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Case No: CO/2629/2022 & CO/2629/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Thursday, 2nd February 2023

Before:
MR JUSTICE FORDHAM

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Between:

ELIZABETH SOILLEUX	**Claimant**
- and -	
SECRETARY OF STATE FOR LEVELLING UP HOUSING AND COMMUNITIES	**Defendant**
-and-	
CASTLEFIELD INTERNATIONAL LIMITED SOUTH CAMBRIDGESHIRE DC	**Interested parties**
ELIZABETH SOILLEUX	**Claimant**
-and-	
SOUTH CAMBRIDGESHIRE DC	**Defendant**
-and-	
CASTLEFIELD INTERNATIONAL LIMITED	**Interested party**

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Victoria Hutton (instructed by Pinsent Masons LLP) for the **Claimant**
Leon Glenister (instructed by GLD) for the **Secretary of State**
Wayne Beglan (instructed by South Cambridgeshire District Council) for the **Council**
Richard Turney and **Isabella Buono** (instructed by Town Legal LLP) for **Castlefield**

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Hearing date: 2/2/23
Judgment as delivered in open court at the hearing

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM:

Introduction

1. These linked claims for judicial review and statutory review arise out of an application for outline planning permission S/0202/17/OL (for residential development of up to 110 dwellings with areas of landscaping and public open space and associated infrastructure works) and the associated and subsequent reserved matters approval appeal APP/W0530/W/22/3291523. All of the key documents are available in the public domain by searching using the reference numbers which I have given. Any interested person wishing to know more about the context and detail, and to follow the paragraph numbers I will give, will be able to do so by finding the public domain documents.

Arguability threshold

2. I deal at the outset with a preliminary point. I was invited to adopt a heightened arguability threshold because these cases have occupied a one day hearing. I agree with Ms Hutton for the Claimant that that is not an appropriate course to take. The reason why a hearing of 4 hours was allocated was because these are two linked cases ("significant" planning cases), which are complex and in which a number of grounds for review have been identified. In my judgment, it is appropriate to apply the threshold of arguability with a realistic prospect of success that is entirely conventional in judicial review and statutory review; together with any discretionary bar (there is one in play in the judicial review: the question of delay).

The Claims

3. The claims were commenced on 19 July 2022. The target for the claim for judicial review is the local authority's grant of outline planning permission on 26 October 2017. The grant of outline planning permission followed a detailed Officer Report dated 9 August 2017. The target for the claim for statutory review is the Secretary of State's Inspector's decision of 10 June 2022 approving the reserved matters on appeal, after an inquiry which ran from 24 May 2022 to 1 June 2022. The cast list of representatives on that appeal was set out by the Inspector at the end of the Determination and is at least as impressive (if not identical) to the cast list for these claims in this Court. The Inspector's Determination comprised 185 paragraphs and 33 pages. Permission for judicial review and leave for statutory review were refused on the papers by Thornton J on 12 October 2022.

Length of the Skeleton Argument

4. An Order was subsequently made (27 October 2022) which included a 10-page restriction on the length of any skeleton argument from the Claimant. That was in the context where this Court already had extremely detailed and comprehensive pleadings, and where what the permission Judge at this hearing was really going to need most was to 'cut to the chase' – in writing and orally – to identify the key headline points that really mattered, in order to test the case against the relatively modest permission and leave stage arguability threshold (together with the delay point). In the event, what Ms Hutton offered the Court was a 20 page skeleton argument in the statutory review claim, together with a 10 page skeleton argument in the judicial review claim. She did so

accompanied with an application for permission to vary the Order that the Court had made. Very sensibly, the statutory review skeleton argument was in two parts, the second of which was 10 pages of submissions 'cutting to the chase'. I did not read – and did not need – the first part of that skeleton argument. That was because I was able to inform myself, by reference to other materials, of the relevant background. I formally refuse permission to rely on the first part of the skeleton argument. In my judgment the direction which had been made in this case was an appropriate discipline and it would have been sufficient to follow it.

The Parameters Plan

5. I will start with the sixth of six grounds for statutory review. This raises a discrete issue about compatibility with a Parameters Plan. Castlefield (the developer) had made the reserved matters application on 13 September 2019, within the two-year timeframe permitted by the outline planning permission conditions. One of the issues raised before the Inspector (Determination §11) was that the reserved matters application was not "valid" and within the scope of the outline planning permission. The Inspector addressed that issue (Determination §§11-20 and 184). He concluded that appropriate and "acceptable" changes had been made which remained in "broad conformity and harmony with the outline planning permission including the Parameters Plan" (§12). The Inspector made reference to the relevant "case law" which had been cited on the appeal (§15).

6. Ms Hutton's argument, in its essence, came to this. It is right that the test identified by Lord Denning MR in Heron Corporation v Manchester City Council [1978] 1 WLR 937 at 944C-D applies, asking whether there was departure in any "significant respect" from the outline permission or conditions. However, the approach of the High Court in R (Swire) v Canterbury City Council [2022] EWHC 390 (Admin) at §43, to the phrase "in accordance with" in the planning condition in that case (Swire §36), is an approach applicable on the facts and in the circumstances of that case but inapplicable in the present case. What matters in the present case is to identify the objectively correct interpretation (Swire §30) of the planning conditions and the Parameters Plan. On the legally correct interpretation of Planning Condition 4 in this case, when read alongside Planning Conditions 6 and 28, what was needed was a 'strict accordance' with the Parameters Plan, subject only to any 'de minimis' departure. That is correct bearing in mind the later planning conditions which speak of "general accordance" (Condition 6) and a specific reserved matter arising out of the Parameters Plan (Condition 28). The Inspector went wrong in law, as a matter of interpretation of those Planning Conditions, in not accepting the "strictly accordance" approach (Determination §12) and, rather, adopting as permissible "broad conformity and harmony". The Inspector also went wrong in law in the objective interpretation of the Parameters Plan itself in identifying (§15) ancillary infrastructure as permissible. These were material errors in the present case, where a pumping station and electricity substation had been included in what the Parameters Plan identified as "open space". That constituted a material departure from the Parameters Plan which should have timed-out the reserved matters application.

7. I cannot accept that this ground is arguable with any realistic prospect of success. The Inspector identified the wording of Condition 4 (§13) and considered it in its context. His approach of looking for "broad conformity and harmony" was the approach directly arising from the case law, including Heron, which had been cited to him. It gave the phrase "in accordance with" its ordinary and natural meaning. That ordinary and natural

meaning of "in accordance with" is what Swire identifies at §43. In Swire, moreover, there were very similar arguments about a "tighter" approach viewed alongside another condition (Swire §38), as well as arguments about the interpretation of a parameter plan (Swire §48). The Inspector's conclusions (Determination §§12-13) were plainly an exercise of "planning judgment and degree" (Swire §44). This was squarely the realms of "application" rather than "interpretation". It is clear, moreover, that the points being considered at Determination §12 included the pumping station and electrical substation because those had been raised in the very "outline submissions on validity" to which the Inspector referred. That, in my judgment, is fatal to this ground.

8. But the Inspector went on, for good measure, to pick up the stick from the other end (Determination §§14-15) and consider whether, within the Parameters Plan itself, there was room for latitude. To the extent that there was, that would itself raise a question of broad conformity and harmony. Viewed independently and in that way the Inspector, in my judgment unimpeachably, also concluded that the inclusive wording of the Parameters Plan was not prohibitory of ancillary infrastructure in open spaces (§15). But even if this second aspect were arguably erroneous in public law terms the earlier passage (§§12-13) is fatal for the reasons I have identified.

The Flooding Concerns

9. The other grounds for statutory review and judicial review all relate to increased risk of off-site flooding. There are relevant planning policies concerning flood risk. These were identified at the outline planning permission stage in the Officer Report of August 2017 (Report §§9-13), where flood risk was identified as one of the key material considerations (Report p.1) and where it was addressed in the passage at §§116-117. There was a Flood Risk Assessment dated September 2014 and a January 2017 Update, appending an August 2016 Report. The lead local flood authority had responded on 15 February 2017. Castlefield's position in the application form for outline planning permission (§12) was that the proposal would not "increase the flood risk elsewhere". That remained its position in the application for reserved matters approval.

10. The point that emerges in this case and emerged before the Inspector and has been at the heart of the flood risk concern is, as I see it, as follows. Figure 4.7, when compared with Figure 4.3, in the August 2016 report appended to the January 2017 Update showed an increase in the extent and/or depth of potential flooding to the south of the site into the Cow Lane gardens when the position with, and without, the development was compared. That picture arose using a "1 in 100 year" modelling method with a "climate change" adjustment. This came to be recorded in the submissions before the Inspector on behalf of the Save Fulbourn Fields and Fulbourn Forum as properly considered by all parties as "the appropriate measure of probability". There were equivalent Figures 4.7 and 4.3 in later reports: in particular an August 2020 Report and a subsequent April 2022 Report. Mr Turney emphasises from Castlefield's perspective that further materials were deployed to show, at a glance, what the ultimate Figure 4.7/4.3 comparison picture showed. Ms Hutton submits that the point ultimately came into clear focus and – she says – finally accepted on behalf of Castlefield through cross-examination to which she showed me a reference in written submissions before the Inspector. The concern at the heart of this case, as I see it, arises out of what those various pictures show so far as concerns increase in extent and/or depth of water inundating parts of Cow Lane gardens. The Figure 4.7/4.3 comparison, of the picture

with and without the development, allows a focus on the implications for flooding of the development.

11. In the Inspector's Determination the issue of "flood risk" was recorded as one of the "main issues" which had been raised (§32). The Inspector heard a lot of evidence about it, as well as submissions, and gave detailed reasons.

Scope of Reserved Matters Approval

12. One line of reasoning in the Inspector's Determination was that "flood risk management" was not a "reserved matter" but one which went to the "principle of development", for consideration at the earlier outline planning permission stage, where indeed it had expressly been considered; and that reserved matters approval was concerned with "appearance, landscaping, layout and scale" (Determination §§83, 86, 88, 106 and 182). The first ground for statutory review is that the Inspector made an error of law as to whether the increased risk of off-site flooding fell within the scope of reserved matters approval. Ms Hutton submits that the increased risk of off-site flooding and flood risk management were within the reserved matters. She says in the present case they were intimately linked to both landscape and layout. She says that everybody approached the issue of flooding and flood risk management as being relevant (as she submits, rightly); and that the development proposals were designed and revised at the Reserved Matters Approval stage, to attenuate floodwater. She accepts that the Inspector went on in the Determination to deal with the topic of increased risk of off-site flooding. But she submits that there was nevertheless a "material" error by the Inspector in relation to the scope of the reserved matters. When pressed, her submission was that the 'materiality' was 'because of the modelling'. She went on to emphasise, on this and other parts of the case, that the Inspector did not require, through Conditions, the replication in delivery of the same "landform" as had been the subject of the modelling. As she put it, if the Inspector was going to go on and find the flood risk position to be "acceptable" he needed to secure the "landform" by reference to which that view had been arrived at.

13. In my judgment, it is not arguable with any realistic prospect of success that there was any error of law, still less material error of law, on the part of the Inspector so far as the scope of the reserved matters is concerned. In my judgment, in the passages in which the Inspector recorded (eg. §86) that "the potential for flood risk" was "not a reserved matter" but had "already been considered, in principle, as part of the outline planning permission", the Inspector was adopting a position which was, "in principle", correct in law. Flood risk, "in principle", had been settled at the outline planning permission stage, in the context of the principle of development, except insofar as flood risk related to landscaping and layout. Put another way, the starting point was that "in principle" the development was acceptable in flood risk terms.

14. But, in any event, the point can – in my judgment – go nowhere in the circumstances of the present case. The Inspector did not exclude increased risk of off-site flooding and flood risk management from consideration. Rather, he addressed it in a lengthy and sustained passage within the Determination. Indeed, the Inspector – in my judgment and beyond argument – went as far as dealing, on its planning merits, with the increased risk of off-site flooding concerns that had been raised with him. He emphasised (§86) that he was being invited to consider that aspect of the development proposals. In my judgment, beyond argument, that is plainly what he went on to do. That is why for

example passages that come later are linked with a phrase like "notwithstanding the above" (§89). In my judgment, there are passages (eg §§90-93) where the Inspector is grappling, head-on, with the picture from the modelling (§90), with the concerns about "depth and extent of water during a period of flood" (§92) that were being raised with him, on the materials as they were before him, and that he was doing so on the 'planning merits'. Ultimately, he arrived at this conclusion (at §97):

> ***I am also satisfied that the proposal would not result in a flood risk to neighbouring land or properties.***

I interpose, in the same vein, that the Inspector recorded (at §92) "I do not agree with [the Forum] that the reserved matters application form is incorrect from the point of view of saying that the proposal would not increase 'flood risk' elsewhere"; and (at §111) that "the available evidence before me does not indicate that this proposal would result in a flood risk elsewhere". In light of that structure, and reasoning, in my judgment it is impossible with a realistic prospect of success to argue that a 'material' error was present in the approach to the scope of the reserved matters, whatever the position on that topic. So far as concerns the 'materiality' arising 'because of the modelling' I confess I am unable to see how points relating to modelling render this aspect of the case arguably 'material', given the approach which the Inspector took and to which I have just referred. As to requiring replication of the landform through Conditions, since this point arose in relation to various grounds for statutory review, I will deal with it at this stage.

<u>Conditions Replicating the Modelled Landform</u>

15. As I indicated, Ms Hutton submitted that the Inspector went wrong in public law terms in not requiring the delivery of the landform which was the basis of the modelling on which he was persuaded of flood risk acceptability. Ms Hutton submits that, although the Forum did ask for a planning condition to be imposed relating to flood risk and did not ask for this landform-replication condition, nevertheless it could not be expected to do so and in any event it was a matter for the Inspector. She also says the Inspector would have needed more information. In my judgment, it is highly material – to what must be an unreasonableness challenge – that, in all the detailed submissions to the Inspector as to what course needed to be taken, including submissions relating to a planning condition said to be needed to be imposed (with which he dealt at Determination §182) – that there was no request along the lines of what Ms Hutton now repeatedly submits was obvious and required by public law reasonableness. Even leaving that aspect to one side, Mr Glenister for the Secretary of State has shown me what – on the face of it – are a series of new Conditions imposed by the Inspector (Determination §185) which touch on this aspect of the case: New Conditions 1, 16, 17 and 19. He submits that this demonstrates the Inspector conscientiously addressing aspects of securing delivery in the context of the findings he had made. In my judgment, save for a general submission that there should have been a single Condition to replicate "the landform", there was in the response on the behalf of the Claimant nothing by way of illustration of how it is that those Conditions leave outstanding some important "landform" aspect. Ultimately, it is – in my judgment – impossible to say that the course taken by the Inspector, in relation to what further Conditions were and were not imposed, arguably crosses the threshold of unreasonableness in the context of the planning judgment and evaluation entrusted to him.

Judicial Review

16. As I have explained, the Inspector's Determination specifically recorded that the flood risk issue had been raised by the local authority and third parties and the Inspector considered it appropriate to address the issue (Determination §§82, 86 and 89). The Inspector also addressed what the position had been before the local authority at the outline planning permission stage. He explained that he was satisfied that the issue of flood risk had expressly been considered (§§83, 86, 182). He explained (at §83) that the "information submitted by [Castlefield] and considered by the local planning authority and the [lead local flood authority], did show an increased extent/depth of flood to the south of the site into gardens on Cow Lane" (where the Claimant lives). He also explained that the position taken by the local authority (and the lead local flood authority) was that it "agreed that the proposal would not increase 'flood risk' elsewhere" (§§83, 182). All of this takes me next into the realms of the claim for judicial review.

17. The ground for judicial review, in a claim for which a four-year extension of time would be necessary, addresses that topic. The argument advanced is this. The information did indeed "show an increased extent/depth of flood to the south of the site into gardens on Cow Lane". It was indeed the position taken by Castlefield and the local authority that "the proposal would not increase 'flood risk' elsewhere". But this amounted to a misappreciation on the part of the local authority and planning officer, and a misstatement on the part of Castlefield. A relevant consideration was overlooked or alternatively a material error of fact made. That misappreciation and misstatement have emerged in this case. The modelling information available at the time of the Officer Report did show (the Figure 4.7/4.3 comparison) the increased incidence in extent and/or depth, with the development compared to without. But that position was materially misstated by Castlefield. Not only did it describe the avoidance of increasing off-site "flood risk" but it also referred to the development as one with a layout plan which served "to avoid diverting the floodwater elsewhere", a layout "based around the need to provide space for surface water runoff shed from the surrounding development (run-on) and for runoff generated by the proposed development itself (run-off)", so that "by making space for water the proposals avoid the potential displacement of run-on to the surrounding development". The Officer Report was itself materially misleading and left uncorrected because it made no mention of the picture which Figure 4.7 of the modelling work evidenced. That was an undoubtedly material, as it went to the fact of flooding. The absence of any mention deprived the local authority of the opportunity to reach a planning judgment on that aspect. Whether viewed as a relevant consideration or materially misleading Officer Report, or for that matter a material error of fact, the outline planning permission grant in October 2017 is vitiated as a matter of public law. All that is needed for today is that this is arguable.

18. So far as delay is concerned Ms Hutton submits in essence as follows. The Claimant could not, or not realistically, bring her judicial review claim earlier than she did. She did not, on the evidence, appreciate the implications of the Figure 4.7 modelling data until October 2019, at which point the concerns "crystallised". By that time, there was the extant application made the previous month for reserved matters approval. The Claimant took the position that this point could be addressed through the reserved matters application process. Everything that subsequently happened reinforced that point of view. For that reason, instead of attempting a belated judicial review claim, she

sensibly and understandably put her 'eggs in the basket' of arguing the point on the reserved matters application and appeal. Although the Inspector did deal in the Determination with the point that had been raised, he did not do so properly. The Inspector's view – as Ms Hutton put it in her reply – was in any event a 'new' development and could not be a basis for refusing a remedy in judicial review. And there are a number of flaws in the way in which the Inspector dealt with the issue.

19. I am going to refuse permission for judicial review. The starting point is the discretionary bar. This is a plain and obvious case of extreme delay. The delay of now nearly five years, more than four years at the time when judicial review proceedings were commenced, is to be viewed against the six week timeframe identified in the Civil Procedure Rules 54.5(5). I do not accept the submission that the Claimant "could not" have brought a claim on this point promptly. I pressed Ms Hutton on whether she was submitting that this was a "concealment" case. She does not submit that there was a concealment; nor could she in light of the fact that the modelling documents were produced and in the public domain. She does submit that the position was materially misstated, both by the developer and in the Officer Report. But it would have been possible to make that very point in a judicial review challenge, promptly, to the grant of outline planning permission. I cannot accept, at least in the absence of concealment, that ignorance can be an excuse in those circumstances. There is, moreover, a clear detriment to good administration and plainly a clear prejudice to the interests of Castlefield who, on the evidence, has spent more than £1m on this project subsequent to that unchallenged grant of outline planning permission.

20. Delay, in my judgment, has a second dimension which is also, and independently, fatal. The Claimant's explanation for why she took the course that she did, and excusing the delay, is that she put her eggs in the basket of the Inspector dealing with this point through the reserved matters application and appeal. I understand that entirely. But that is precisely what the Inspector did in passages in the Determination to which I have already referred. In my judgment, beyond argument, the Inspector did consider – on the 'planning merits' – the 'increased risk of off-site flooding' issues. The Inspector concluded that the policy position, so far as that aspect of the application was concerned, is that the consequences were acceptable, and in terms concluded that there is no policy "conflict" (Determination §111). What I cannot accept is that the Claimant was entitled to pursue this course: not to bring judicial review, deciding instead to raise points at the reserved matters stage asking the Inspector to deal with them; then, when the Inspector does so adversely, on the 'planning merits', to seek then to bring a judicial review to reopen the decision on outline planning permission reached by the local authority more than four years earlier. That, in my judgment, is itself a fatal aspect of the delay objection to this claim for permission for judicial review. To the extent that there is anything in the criticisms that the Inspector did not look at issues 'properly' but made a public law error in the Determination, those can of course be raised – and are being raised – in the application for statutory review of the Inspector's Determination.

21. Finally, on this delay aspect of the case, it is relevant to remember – as I have explained – that the Inspector also evaluated the position as it stood at the time of outline planning permission. Having heard detailed evidence and submissions, the Inspector concluded that this issue was expressly considered by the local authority (Determination §§83, 86, 182), that the information from Castlefield did show increased potential for flooding to the Cow Lane Gardens (§83) at the time of outline planning permission, that the local

authority (and the lead local flood authority) had agreed that there was no increased flood risk elsewhere (§§83, 182).

22. Leaving aside the issue of delay, I cannot in any event see an arguable basis for the claim that this feature of the information and material from the developer was overlooked by planning officers or needed to be spelled out in the Officer Report. That point links to the ground to which I will come next in the context of the statutory review claim, about what is meant by "flood risk". It is also relevant that the local authority appears in these proceedings, with a duty of candour, and if there were material in the possession of the local authority to support the conclusion that it had been "materially misled" by what Castlefield said, I would expect it to be brought to the Court's attention. Mr Beglan, for the local authority, has very properly confirmed that – from his client's perspective – the duty of candour is regarded as being applicable at this permission stage.

23. In light of all of that there, is in my judgment, no need to invoke either common law 'inevitability' or the statutory HL:NSD (highly likely: not substantially different) tests. However, the point is compellingly made by Mr Beglan that, in the light of the planning Inspector's clear evaluation as a matter of planning merits of the acceptability of the development in terms of flood risk, there would need to be some very good reason why the local authority – even were this matter reopened and remitted – would take a different 'planning merits' review. None has been identified.

"Flood Risk"

24. The third ground for statutory review, and the one to which I have just alluded, involves an alleged error of law. Ms Hutton, in essence, submits that a "flood risk" is the same as 'land being covered by water' and that the Inspector made a material error of law in his approach to "flood risk". The relevant "flood risk" policies are CC9 (of the South Cambridgeshire Local Plan) and NPPF (National Planning Policy Framework) §167. The relevant definitional description, replicated in the PPG (National Planning Policy Guidance) was set out by the Inspector in the Determination (at §91):

> ***for the purposes of applying the National Planning Policy Framework, flood risk is a combination of the probability and the potential consequences of flooding from all sources – including from rivers and the sea, directly from rainfall on the ground surface and rising groundwater, overwhelmed sewers and drainage systems, and from reservoirs, canals and lakes and other artificial sources.***

There is no dispute that this was a legally correct starting point, so far as the meaning of "flood risk" is concerned.

25. Ms Hutton submits that an 'increased probability of flooding' is itself a sufficient "consequence" as to satisfy the meaning of "flood risk" as correctly interpreted. She accepts there may be other "consequences" but the existence and presence of an increased body of water, or water over a greater geographical area, or at a greater depth, or for a longer period of time, would all – of themselves – fall within "flood risk" as correctly interpreted. She submits that "probability" gives you the 'how often' but the "consequence" is met by 'how much' water is present. She also emphasises that, under the relevant policies, what matters is to ensure no increase to flood risk "elsewhere", which means "anywhere". In support of her interpretation of "flood risk" she referred me to R (Menston Action Group) v City of Bradford Metropolitan District Council

[2016] EWHC 127 (QB) [2016] PTSR 466 §§2-16 but she acknowledged that that is no more than "consistent" with her approach and doesn't grapple with the issue with which I am concerned. She submitted that it would "make a mockery" of the planning application if a developer could tick the box to say "no flood risk" notwithstanding there would be a known greater incidence of volume of water. She emphasised that no policy guidance calibrates the way in which one looks at the other "consequences". She submits that, at least arguably, the Inspector therefore went wrong in law in those passages where he said (Determination §83)

> ***Land being covered by water is not, itself, an occurrence of 'flood risk'.***

And (Determination §92):

> ***I acknowledge that gardens would be covered by the identified depth and extent of water during the period of flood, but this would be a temporary inconvenience. I do not find that the extent and depth of such water would amount to a 'flood risk' …***

She also submits that, even if that is wrong, there is an arguable unreasonableness in the Inspector's approach in regarding as a "temporary inconvenience" the nature of the increased incidence of water inundating gardens in Cow Lane, in light of all the evidence and in light of concerns including as to personal safety and children.

26. In my judgment, there is no arguable error of law or arguable unreasonableness in the approach or analysis of the Inspector in the Determination. The correct definition, as I have said, was identified and set out (§91). The nature of that definition shows, beyond argument, that when the word "risk" is used, in the context of "flood risk", the word "risk" does not mean simply the probability of a flood or of flooding. It is plain that flood "risk" brings into play harmful "consequences". In my judgment, it is not arguable that the mere presence of water or an increased amount of water, in and of itself, must constitute a "flood risk" for the purposes of the policies, correctly interpreted. The presence of water constitutes the "flood" and the "risk" arises as a function of "consequence" in light of the "probability". That separate element – "consequences" – is clearly present and necessary, for good reason, and in my judgment the Inspector did not – even arguably – misunderstand its significance as a matter of interpretation. I do not accept, even arguably, that this makes a "mockery" of the planning application or that there is anything in the point about policy guidance. The planning applicant can be expected to indicate in relation to this matter, as with any other relevant matter, the position that is taken in relation to the application. But that position can then be scrutinised, to see whether the application falls foul of relevant parameters in relevant policies. There is no question of the planning applicant being able, through the ticking of a box, to be able to avoid scrutiny by reference to any relevant policy standard. The policy guidance point in my judgment goes nowhere. On any view, it must be relevant to be able to consider adverse consequences and a number of them are identified in the PPG description. If Ms Hutton is right that no policy guidance assistance addresses the way in which that exercise undertaken then that point, as it seems to me, is at best neutral. It cannot answer the question of interpretation.

27. But, even if I put that to one side and assume that there was some arguable misinterpretation, the fundamental problem in this case which remains is this. The Inspector addressed his mind to questions of acceptability in light of the evidence about the gardens risking being covered with the identified depth and extent of water during a period of flood. That is inevitably where the 'planning merits' would have led and

that is where he went. His conclusion was that that position was not unacceptable in planning terms. His assessment is that it would constitute a "temporary inconvenience" (Determination §92). He went on to emphasise that the gardens were not "sensitive receptors" (§92) and he emphasised that there was no evidence of any risk to the "dwellings" (§§92-93). As I have already explained, he went on to conclude that there was no incompatibility or conflict with policy. In light of all of that, this – in my judgment – is a misinterpretation ground which cannot fly, even if it can get out of the starting blocks. I was shown various materials as to the positions taken on the appeal before the Inspector but the important point about those, in my judgment, was that there was a debate about whether a threshold of harm was applicable to "consequences". That was in circumstances where one suggestion was a test of 'intolerability'. The local authority took the position, in its submissions to the Inspector, that this was not the appropriate approach. Nor did the Inspector adopt that approach.

Betterment

28. That leaves three remaining grounds for statutory review, with which I still need to deal. Ground two is a point about "betterment". This arises out of a comparison, but not between the picture with the development being undertaken and in its absence. Rather, it is a comparison between the picture as it stood at the time of outline planning permission and the (improved) picture as it stood at the time of the Inspector's reserved matters decision. The Claimant's argument, in its essence, is that the Inspector could not –compatibly with public law duties – base his decision on that comparison with the position as at outline planning permission stage. That is, in particular, because of the features relating to the Officer Report having not recorded for the Planning Committee the modelling picture from Figure 4.7. Absent an analysis of that position, says Ms Hutton, the Inspector could not lawfully or rationally base his decision on the "betterment" comparison. The first answer to that point is that, in principle, it is relevant and logical at the reserved matters stage to pose a comparison question by reference to the outline planning permission stage. Particularly in circumstances where the Inspector did undertake an enquiry into what had happened at that earlier stage. I have already explained that the Inspector specifically reasoned (Determination §83) that the issue had been expressly considered, that the "information … did show an increased extent/depth of flood to the couth of the site into gardens on Cow Lane", and that the local authority and lead local flood authority "agreed that the proposal would not increase 'flood risk' elsewhere". But, as with the other points, this one falls away in any event. That is because the comparison which is criticised in relation to "betterment" – that is to say an improved position, in the Inspector's assessment, compared to the outline planning permission stage – was not the "basis" (still less the sole basis) of the Inspector's Determination. Rather, it was one distinct strand of the reasoning (Determination §§85, 90, 94, 111). In the passages to which I have already referred, the Inspector specifically addressed whether the proposal would result in flood risk to neighbouring land or properties and whether that risk and that flooding profile would be unacceptable in terms of planning merits. In those circumstances, even if there were anything otherwise in the "betterment" points, it could not be a vitiating flaw when this decision is properly understood.

'Unaddressed Issues'

29. Ground four identified nine issues set out in the Claimant's skeleton argument relating to the modelling, six of nine of which are said to have been 'unaddressed' by the

Inspector in the Determination. There was also a criticism of one passage (Determination §98) in which, having identified those three of those nine aspects, the Inspector relied on Planning Condition 8 relating to surface water drainage. Finally, on this part of the case, it was argued that the Inspector had misappreciated that the lead local flood authority had expressed its view on information which was later replaced with other information. All of this is said, either individually or cumulatively, to give rise to an arguable legal inadequacy in the Inspector's reasoning.

30. In my judgment, this too raises no viable ground of challenge with a realistic prospect of success. It is a classic example of the need to read the Determination fairly and as a whole, and in circumstances where the public law reasons duty requires the Inspector to grapple with the principal controversial issues. There is, in my judgment, nothing in the criticism of the point made about Condition 8 at the end of Determination §98. Having listed three matters relating to the model, the Inspectors words were carefully chosen. What he said was:

> ***Nevertheless, some of these matters, so far as they are relevant to surface water drainage, will need to be fully checked and verified by the [lead local flood authority] as part of the consideration of an application to discharge Condition 8 of the outline planning permission.***

Moreover, I cannot accept that there was no prospect at all of any potential overlap between the points which he had just listed (at §98) and the question of "surface water drainage". So far as concerns the sequence of events and the lead local flood authority, there are two passages in which the Inspector expressly mentioned that sequence (§§100 and 106). He plainly had that well in mind, in noting the position of the lead local flood authority and attributing to it the weight that he considered appropriate. I can see no arguable public law flaw on this ground of the case.

Surface Water Drainage: Planning Condition 8

31. Finally, the same position arises in relation to the final ground: statutory review ground five. This too was a point about reasoning, said to be legally inadequate, or alternatively to involve a material error of fact. Here, the argument certainly circles around Planning Condition 8, to which I have just referred. That was the Planning Condition concerned with the aspect of surface water drainage. Ms Hutton submits that there is a clear and important distinction: between flooding impact and flood risk management on the one hand; and surface water drainage on the other. She submits that, at least so far as the modelling was concerned, these were entirely distinct with no overlap, because of the way in which the modelling had been approached. She criticises the various passages in which the Inspector referred to Planning Condition 8. Foremost among them was Determination §93, in discussing the prospect of flooding to the gardens in Cow Lane where the Inspector was addressing "post-traumatic stress disorder potential should properties be flooded". At that point he said:

> ***condition 8 of the outline planning permission provides a mechanism by which development cannot commence until any surface water drainage issues have been acceptably eradicated.***

He went on to repeat a point about no risk to flooding on the evidence to dwellings. Elsewhere in the Determination he addresses the surface water drainage aspect, observing that that strategy provides an alternative mechanism (§84) and sufficient control (§86).

32. I cannot accept, even arguably, that the Inspector made a public law error in the way in which he discussed the issues of "surface water drainage" and "flood risk". He recognised that these are two distinct aspects. He referred (§82) to the question whether "the reserved matters proposal can provide a satisfactory scheme of surface water drainage and prevent the increased risk of flooding". He said (§89): "In this case, a compelling case has not been made that, in principle, a satisfactory surface water drainage scheme could not be submitted for the site and that the development would not be capable of being made safe for its lifetime without increasing flood 'risk' elsewhere". He discussed the two things alongside each other for the very sensible reason that there is clearly scope for an interrelationship between the two. I was shown by Mr Turney the passage in the Forum's own submissions where that point was strongly emphasised. I cannot accept, even arguably, that the Inspector in the decision was basing his decision on the fact that Condition 8 was available and operative and would need to be addressed. His reasons would have been very differently expressed, and much shorter, had that been his analysis. Rather this was one of the strands in a multi-faceted reasoned analysis in the exercise of evaluative judgment. Finally, I record that I was shown by Mr Turney that the model involves a catchment which does not exclude rainfall on the site (as at one point was being suggested by Ms Hutton).

Conclusion

33. Notwithstanding that the threshold for today is arguability, notwithstanding that this is a case involving a host of detailed points that have been advanced, and notwithstanding – given the complexity and in light of the sustained and comprehensive written and oral submissions that have been put forward – this ex tempore Judgment is a lengthy one for the permission stage, my clear conclusion is that there is no realistic prospect of success in either the statutory review or the judicial review claims; and the judicial review claim fails for the additional delay reason. In agreement with Thornton J, who dealt with these applications on the papers, I will refuse leave for statutory review and permission for judicial review. The only consequential matter was that it was common ground that it is appropriate that I confirm the provisional Aarhus costs orders made by Thornton J: £5,000 in favour of the local authority (judicial review) and £5,000 in favour of the Secretary of State (statutory review).

2.2.23