Neutral Citation Number: [2016] EWCA Civ 795

Case No: C1/2015/2398

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MRS JUSTICE PATTERSON DBE
[2015] EWHC 1877 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 July 2016

Before:

Lord Justice Laws
Lady Justice King
and
Lord Justice Lindblom

- -

Between:

R. (on the application of Anne-Marie Loader) **Appellant**

- and -

(1) Rother District Council
(2) Churchill Retirement Living Ltd. **Respondents**

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Ms Jenny Wigley (instructed by **Richard Buxton Environmental and Planning Law**) for the **Appellant**
Mr Hugh Flanagan (instructed by **Wealden and Rother Shared Legal Services**) for the **First Respondent**
Mr Neil Cameron Q.C. (instructed by **Shoosmiths LLP**) for the **Second Respondent**

Hearing date: 18 May 2016

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Judgment Approved by the court for handing down

Lord Justice Lindblom:

Introduction

1. This appeal concerns a challenge to a local planning authority's decision to approve development on a site comprising open space, within the setting of a grade II listed building. It goes to the authority's understanding and application of relevant government policy in paragraph 74 of the National Planning Policy Framework ("NPPF"), and to the consequences of its failure to notify English Heritage and the Victorian Society of the proposal before determining the application for planning permission.

2. With permission granted by Lewison L.J. on 9 October 2015, the appellant, Anne-Marie Loader, appeals against the order of Patterson J., dated 30 June 2015, dismissing her claim for judicial review of the planning permission granted on 20 November 2014 by the first respondent, Rother District Council, for a development of 39 sheltered apartments at Gullivers Bowls Club, Knole Road, Bexhill. Ms Loader was an objector to that proposal, as she had been to a previous, similar proposal for development on the site. The applicant for planning permission was the second respondent, Churchill Retirement Living Ltd..

The issues in the appeal

3. Lewison L.J. granted permission on a single ground (ground 3 in the appellant's notice). The issue arising from that ground, and the council's and Churchill's respondent's notices, is whether the judge was right to conclude that the council's decision reflects the true meaning and a lawful application of government policy for development on sites comprising "open space, sports and recreational buildings and land" in paragraph 74 of the NPPF. Permission was refused on the other two grounds, from which two further issues arise: whether the judge was wrong to exercise her discretion against quashing the planning permission for the council's failure to notify English Heritage (ground 1); and whether she ought to have upheld Ms Loader's challenge because the council's Planning Committee was misled about the consultation of the Victorian Society (ground 2). At the hearing of the appeal we granted permission on those two grounds, and they were fully argued before us.

4. I shall refer to English Heritage by that name – not as Historic England, which they became in April 2015. The judge did the same.

The council's decision

5. The site of the proposed development lies to the east of the town centre of Bexhill, a short distance from the seafront. It contains two bowling greens, a pavilion, a clubhouse and an indoor bowling rink. It is surrounded on three sides by the houses in Middlesex Road, Brassey Road and Cantelupe Road. To its south, on the other side of Knole Road, is a terrace of late-Victorian dwellings in De la Warr Parade, listed at grade II. A previous proposal by Churchill for a development of 41 sheltered apartments was granted planning permission on appeal, but that permission was quashed by the court in June

2008. Later proceedings challenging a screening direction made by the Secretary of State for Communities and Local Government failed (see *R. (on the application of Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869). When the appeal against the refusal of planning permission was re-determined, it was dismissed by the inspector, in a decision letter dated 30 January 2013. In her "Conclusion" (in paragraph 48 of her decision letter), the inspector said:

> "Notwithstanding my positive conclusions in respect of the effect of the appeal proposal on the living conditions of neighbouring residents, and on the provision of affordable housing in the district, I find that the detailed design of the proposed sheltered building would cause substantial harm to the setting of De la Warr Parade, a heritage asset of significance in the locality. In addition the proposal would unacceptably harm the character and appearance of the surrounding area. Therefore, the appeal should fail."

6. In April 2013 the site was registered as an asset of community value under section 88(1) of the Localism Act 2011. The registration survived both a review by the council and an appeal against that decision, dismissed by the First-tier Tribunal (General Regulatory Chamber) in April 2014.

7. The revised proposal involved the demolition of the bowls club buildings, the construction of a new clubhouse and an indoor bowls rink, the replacement of the two outdoor bowling greens with one, and the erection of a block of 39 sheltered apartments, partly of four floors and partly of three, which would face the listed terrace on De la Warr Parade. The application for planning permission came before the council's Planning Committee on 19 June 2014. The committee had before it a report prepared by a planning officer, recommending that planning permission be granted, and an update report, which adhered to that recommendation. The committee resolved, by a majority of eight to three, to grant planning permission.

Did the council misinterpret and misapply the policy in paragraph 74 of the NPPF?

8. Paragraph 74 of the NPPF appears in a section headed "Promoting healthy communities". It states:

> "Existing open space, sports and recreational buildings and land, including playing fields, should not be built upon unless:
> - an assessment has been undertaken which has clearly shown the open space, buildings or land to be surplus to requirements; or
> - the loss resulting from the proposed development would be replaced by equivalent or better provision in terms of quantity and quality in a suitable location; or
> - the development is for alternative sports and recreational provision, the needs for which clearly outweigh the loss."

The definition of "Open space" in the glossary in Annex 2 to the NPPF is "[all] open space of public value, including not just land, but also areas of water (such as rivers, canals, lakes and reservoirs) which offer important opportunities for sport and recreation and can act as a visual amenity".

9. At the time of the council's decision, saved policy CF2 of the Rother District Local Plan stated:

> "Development which would result in the loss of a recreational facility, playing field, play space, amenity open space or allotments will not be permitted unless: –
> (i) an assessment has been undertaken which has clearly shown the facility or area to be surplus to the requirements of the community which it serves, and;
> (ii) the facility or area is not needed for an alternative form of community facility provision which is in deficit locally and for which the site is suitable; or
> (iii) alternative provision is made elsewhere in the locality that is at least equivalent in terms of size, usefulness, attractiveness and quality or which would result in a net improvement in the quality of the facilities."

10. In the appeal the inspector had concluded (in paragraph 45 of her decision letter):

> "Whilst the number of greens would be reduced on the appeal site the up-grading of facilities, including the indoor bowling rink, would be such as to safeguard the existing bowling club as well as offering improved facilities to the wider bowling community. New indoor facilities would help increase participation in bowls and would be more significant than the evidence of need for alternative outdoor sports which could be reasonably accommodated on this site. In addition, close by there is a large area of open space along the Promenade which offers considerable recreational opportunities. Therefore, the terms of LP Policy CF2 would not be compromised in this instance."

11. With its application for planning permission Churchill submitted a "Leisure Use Assessment" prepared by its consultants, GVA. In section 4 of that document, "Planning Policy", GVA discussed the relevant planning policies, including the policy in paragraph 74 of the NPPF and Policy CF2 of the 2006 local plan. They said that the proposal "fully complies with the NPPF" (paragraph 4.8). In section 6, "The Need for Alternative Community Sports", they concluded that "the only suitable alternative community uses would appear to be for small scale outdoor sports", none of which had been found to be viable (paragraph 6.2). In section 8, "Conclusions", they said (in paragraph 8.4) that "the active bowling green, and inactive bowling green, are both surplus to the local requirement for bowls greens … as there is an overprovision of greens in active use … compared to the national average provision"; that "[the] proposed replacement clubhouse, indoor rinks and outdoor bowling green will provide a better quality and quantity of provision than the existing facilities that are in a poor state of repair"; and that "if there were a need to prove as much, there is no alternative outdoor small sports that would be suitable and viable for the site and for which there is an under-provision in supply in the Bexhill area"; and (in paragraph 8.5) that the proposal "fully complies with planning policy relating to the improvement and re-provision of sporting facilities".

12. In his main report to the committee for its meeting on 19 June 2014 the officer reminded the committee that none of the saved policies of the 2006 local plan, including Policy CF2, had been found not to comply with the NPPF, and said that these policies could therefore be "afforded full weight" (paragraph 1.1.2). The policies in paragraphs 70 to 77

of the NPPF were relevant here (paragraph 1.3). The officer referred to GVA's "Leisure Use Assessment" as one of the application documents (paragraph 4.6). In summarizing the responses to consultation (in section 5.0), he listed an objection to the "[loss] of one of the few open spaces on the east side of the town centre", contending that "a Local Action Plan" – seemingly a reference to the council's "Sport and Recreation Study" – "highlighted need to preserve green open spaces specifically identifying this site as being of exceptional quality".

13. In section 6.0 of the report, "Appraisal", the officer reminded the committee that the council's reasons for refusal of the previous proposal had included a reason contending there was conflict with Policy CF2 (paragraph 6.1.1). But this had been abandoned when the Sports Council accepted that "a satisfactory assessment had been provided concluding that one of the bowling greens was surplus to requirements and could not reasonably be used for other sports" (paragraph 6.1.2). In the appeal on the previous proposal, the inspector had concluded that, as the officer put it, "[the] loss of one outdoor bowls rink, in the circumstances of the proposal as a whole, would not compromise policy CF2" (paragraph 6.2.1). Under the heading "Asset of Community Value" the officer pointed out that the proposed development would "have the effect of ensuring the continuation of a Bowls Club on the site", and that it was "important to acknowledge that the Bowls Club support the redevelopment to deliver new facilities" (paragraph 6.8.3). He referred to the conclusion of the First-tier Tribunal that "the current use of the site as a whole (notwithstanding that there is a disused bowling green) furthered the social wellbeing or social interests of the local community". He acknowledged that the site had been "valued for its visual openness with public views of the greens", and that "visual permeability from Knole Road to the bowls green was a point that the planning appeal Inspector considered desirable …". But he regarded the redesign of the proposal with "areas of glazing" and the removal of fencing as a "balanced approach to maintaining awareness of the open space to the rear" (paragraph 6.8.4).

14. Drawing his conclusions together, the officer said this (in paragraph 6.9.1):

> "Consideration has been given to the loss of the disused bowls green and it is concluded that this should not be a factor that weighs heavily in the determination of the application. [Churchill's] Leisure Assessment concludes that there is already a surplus of bowls greens locally compared to the national average, that the new facilities will be an improvement and that there is no evidence of under provision for any other sport suited to the modest area in question. Sport England has objected on the basis that the needs of other bowls clubs have not been canvassed. However, Sport England did not raise this issue in connection with the earlier appeal, when the Inspector accepted that the site was not well suited to other sports (Paragraphs 43-46). In the consideration of the current application the [council's] Community and Economy (Sport and Recreation) Officer raises no objection to the loss of the disused bowls green and is not aware of any demand from within the town to utilise this green. It is concluded therefore that Local Plan Policy CF2 would not be compromised by acceptance of the scheme."

15. The update report was very short. It recorded comments made by leading counsel for Churchill (Mr Neil Cameron Q.C.) on the main report, including these:

> "3) Para 74 of the NPPF (policy applicable to development of recreational open space). Bearing in mind what is said at paras 6.1.2 and 6.9.1 of the report it can reasonably be concluded that the first bullet point of NPPF para 74 has been satisfied.
>
> 4) Attention is drawn to the attached letter from The Dept. Communities and Local Government; [it] is pointed out the proposal delivers improved facilities for the Bowls Club."

16. In the court below, Patterson J. accepted that the council's committee had understood the policy in paragraph 74 of the NPPF correctly and applied it lawfully. She observed (in paragraph 76 of her judgment) that "whilst an assessment had not been undertaken which clearly showed the open space buildings or lands to be surplus to requirements the loss resulting from the proposed development was one that would be replaced by equivalent or better provision in terms of quantity and quality in a suitable location and thus comply with the second bullet point of paragraph 74". She added (in paragraph 77) that it was "clear from a true reading of the officer report that the issue of visual amenity was very much in the minds of the officers both in the content of the report itself and in the way that it is recorded that they addressed the members". And she concluded (in paragraph 78):

> "Whilst I agree with [Ms Loader], therefore, that in terms of an assessment, on the evidence that I have seen, a comprehensive assessment does not appear to have been undertaken it is of no matter given that the development proposed complied with the second bullet point of paragraph 74 in any event."

17. Ms Jenny Wigley, for Ms Loader, criticized the judge's approach and conclusions. The definition of "Open space" in the NPPF is, she submitted, a broad definition – encompassing all kinds of open space of "public value". Thus, for example, paragraph 77 of the NPPF, which relates to the designation of "Local Green Space", refers to a "green area" that is "demonstrably special to a local community and holds a particular local significance". In this case the "public value" of the open space, as the objections made plain, lay not only in its use for sport or recreation but also in its visual amenity. In registering the site as an asset of community value, the council had formally recognized its value in furthering "the social wellbeing or social interests of the local community" (section 88(1) of the Localism Act 2011). The policy in paragraph 74 of the NPPF had to be understood, and applied, in that light. The judge was right to conclude that the test in the first bullet point in paragraph 74 was not met – because no assessment had been undertaken showing the open space on the application site to be surplus to requirements. But she was wrong to conclude that the council could properly find the test in the second bullet point had been met. It could not. About half of the existing open space on the site was going to be lost, and views of it would largely be blocked by the new buildings.

18. I cannot accept those submissions.

19. As was submitted by Mr Hugh Flanagan for the council and Mr Cameron for Churchill, in performing its statutory obligations under section 38(6) of the Planning and Compulsory Purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990 the council had to consider whether the proposal complied with Policy CF2, as the

policy of the development plan relevant to development on open space. The policy in paragraph 74 of the NPPF was another material consideration.

20. The relevant parts of the policy in paragraph 74 are consistent with Policy CF2. Its first criterion requires an "assessment" to be undertaken to demonstrate that the facility or area is "surplus to … requirements". This corresponds closely to the words of the first bullet point in paragraph 74. Both policies refer to an "assessment". But neither prescribes what form that "assessment" must take. This will depend on the circumstances of the case in hand. Both policies hold the concept of a facility being "surplus to requirements". Whether this is so will call for the exercise of planning judgment, with which the court will interfere only on public law grounds (see Lord Reed's judgment in *Tesco Stores Ltd. v Dundee City Council* [2012] P.T.S.R. 983, at paragraph 17). The crucial question for the decision-maker, under both policies, is not how the "assessment" has been undertaken or in what form it has been presented, but whether it has clearly been shown that the facility is "surplus to the requirements of the community which is serves" (under Policy CF2), and thus "surplus to requirements" (under paragraph 74 of the NPPF). The second criterion in Policy CF2 – not present in paragraph 74 – adds to the first. The third criterion, though expressed differently from the test in the second bullet point in paragraph 74, is also concerned with an equivalent quantity and quality of alternative or replacement provision. Once again, this is classically a matter of planning judgment. The two policies are not, of course, identical. But at least as they fell to be applied in this case, they were, in substance, the same. In short, if the proposal complied with Policy CF2, it could hardly be said to be contrary to the policy in paragraph 74.

21. There is nothing in either of the two officer's reports, or in the Committee Clerk's note of the committee meeting, to suggest any misunderstanding or misapplication of the policy in paragraph 74. The advice the members were given, though explicitly based on Policy CF2, was, I think, impeccable as an exercise in applying the policy in paragraph 74 of the NPPF to the facts and circumstances of this case. And it may safely be assumed that this advice was accepted by the committee. The officer's conclusion, in paragraph 6.9.1 of his report, was unequivocal. Policy CF2 would not be "compromised" by the development. That conclusion is not attacked in these proceedings, nor could it be. It represents an entirely reasonable planning judgment. It flowed from the officer's consideration of the matter in the earlier parts of his report, to which I have referred. It also reflected the conclusions in GVA's "Leisure Use Assessment", on which the officer clearly relied. And it was consistent with the inspector's conclusion to the same effect in her decision letter on the appeal for the previous proposal.

22. The three tests in paragraph 74 of the NPPF are disjunctive. The policy can be complied with if only one of them is satisfied. In this case, as is clear from the "Leisure Use Assessment", Churchill was inviting the council to accept that the proposal met both the first and the second test. The judge accepted that the council could properly accept, and did, that the second test was satisfied, and the policy in paragraph 74 thus complied with. She was, in my view, undoubtedly right to do so, given the officer's conclusions in paragraphs 6.8.3 and 6.9.1 of the main report, which were amply supported by the "Leisure Use Assessment". The officer's conclusion in paragraph 6.9.1 that "the new facilities will be an improvement" was more than the test in the second bullet point in paragraph 74 requires – the test being "equivalent or better provision in terms of quantity and quality in a suitable location". It was an unimpeachable planning judgment, consistent with the appeal inspector's conclusion in paragraph 45 of her decision letter.

In my view, therefore, the judge was clearly right to reject this ground of Ms Loader's challenge.

23. Unlike the judge, however, I think the council was entitled to conclude, and in fact did, that "the open space, buildings or land" lost through this development was "surplus to requirements" – so that the test in the first bullet point in paragraph 74 was also satisfied. This conclusion too was supported by the "Leisure Use Assessment", as the officer evidently accepted. He did not doubt the adequacy and accuracy of GVA's assessment. He also put before the committee, in the update report, Churchill's contention that, in the light of what had been said in paragraphs 6.1.2 and 6.9.1 of the main report, it could reasonably be concluded that the test in the first bullet point in paragraph 74 of the NPPF was met. Had he disagreed, he surely would have said so. Nor is there any suggestion that the committee took a different view.

24. I see no force in Ms Wigley's submission that the council misunderstood the scope of the policy in paragraph 74, and thus misapplied it, by failing to have regard to the "public value" in the site's "visual amenity" and as an "asset of community value", which furthers the "social well-being or social interests of the local community". This consideration was specifically taken into account in paragraph 6.8.4 of the officer's main report. I do not accept that it impinged significantly, if at all, on the application of the relevant tests in Policy CF2 and paragraph 74 of the NPPF. Tests framed in terms of open space, buildings or land being "surplus to requirements" and alternative or equivalent or better "provision" of such facilities are not, I think, germane to a site's "visual amenity". However, in so far as "visual amenity" and "the social well-being or social interests of the community" contributed to the "public value" of the open space on the site, their protection was, in my view, inherent in the application of the Policy CF2 and paragraph 74 tests, and were dealt with appropriately in this case by the application of those tests. To the extent that these considerations went beyond the ambit of those tests, they were taken into account and given due weight in the council's decision.

25. I would therefore reject this ground of appeal.

Ought the judge to have quashed the planning permission for the council's failure to notify English Heritage of the application for planning permission?

26. The council did not notify English Heritage of the previous proposal before proceeding to its decision. Nor did it on this occasion. Both in the court below and before us it was common ground that the council was under a statutory obligation to do so. For the judge, therefore, the question on this ground of the claim was whether she should exercise the court's discretion to withhold relief. She decided she should. Ms Wigley submitted that she was wrong to do so; Mr Flanagan and Mr Cameron that she was right.

27. The relevant notification arrangements for our purposes are in regulation 5A of the Planning (Listed Buildings and Conservation Areas) Regulations 1990 –"Publicity for applications affecting setting of listed buildings". At the relevant time, and until 15 April 2015, regulation 5A provided:

> "(1) This regulation applies where an application for planning permission for any development of land is made to a local planning authority … and the authority … thinks that the development would affect the setting of a listed building …".

Paragraph (2) required the local planning authority to publish notice of the nature of the development in a local newspaper circulating in the locality and of a place where the application could be inspected by the public for the period of 21 days (sub-paragraph (a)); for not less than 21 days, to display on or near the building in question a notice containing the same particulars as required by sub-paragraph (a) (sub-paragraph (b)); and again for not less than 21 days, to publish specified information about the application on a website, including the date by which representations must be made, which must be not less than 21 days from the date of the publication of the information (sub-paragraph (c)). Paragraph (3) provided:

> "The local planning authority shall send to the Commission [i.e. English Heritage] a copy of each notice, under paragraph (2)."

Paragraph (4) provided that the application was not to be determined by the local planning authority before the specified periods of 21 days had elapsed. As subsequently amended, regulation 5A requires English Heritage to be notified of proposals that the local planning authority think would affect the setting of a grade I or grade II* listed building. This amendment does not apply to any application made before 15 April 2015. The statutory arrangements are reflected in paragraph 057 and Table 1 of the Planning Practice Guidance, first issued by the Government in March 2014 and subsequently revised.

28. Regulation 5A is not, I think, very well drafted. Paragraph (3) does not require the local planning authority to send English Heritage the notices specified in paragraph (2) within any defined period. Nor does paragraph (4) state that the authority is not to determine the application for planning permission until 21 days, or any other defined period, has elapsed after the date on which it has done what paragraph (3) requires. But it is, I believe, clearly implicit in these provisions that English Heritage is to be given the opportunity of making known to the local planning authority its views, if any, on the proposed development before the authority's decision is made. This was accepted by all parties in the appeal.

29. On 12 February 2015, about six weeks after the claim for judicial review was issued, the council's Conservation and Design Officer, Ms Diane Russell, sent an e-mail to English Heritage's Assistant Inspector of Historic Buildings and Areas, Sussex and Surrey, Ms Alma Howell, asking her "if, separately from formal consultations you receive as required by Circular 01/2001, you at the EH south-east office receive copies of adverts under Reg 5A(3) from other local authorities, or if [it is] not established practice for such notifications to be sent, i.e. if local authorities do not send EH copies of such notices in Grade II (unstarred) cases". Ms Howell's response, in an e-mail of the same date, was that English Heritage "do not generally receive copies of adverts under Reg 5A(3) from other local authorities". The reference to "Circular 01/2001" in Ms Russell's e-mail was to Circular 01/01 – "Arrangements for handling heritage applications – notification and directions by the Secretary of State". In paragraph 8 of that circular, under his power in section 67 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act"), the Secretary of State notified local planning authorities that they

were not required to send English Heritage notice of any application that was not a "notifiable application". Under paragraph 8(2)(a) "development which in the opinion of the local planning authority affects the setting of a grade I or II* listed building" was a "notifiable application".

30. Also on 12 February 2015 the council's Planning Solicitor, Ms Kathleen Barnes, sent an e-mail to English Heritage, attaching copies of the regulation 5A(2) notices for the proposed development. Having pointed out that the council had granted planning permission on 20 November 2014, Ms Barnes said:

> "We are sending a copy of the notices now, because no notice was sent at the time and it is alleged in current legal proceedings that such notices were required to be sent under Regulation 5A(3). No notice was sent at the time because we followed the requirements of Circular 01/2001, and as such, did not consult English Heritage on the application as it did not affect the setting of a grade I or II* listed building, and therefore was not a 'notifiable application'."

A link was provided for the application documents, the officer's report to the Planning Committee and the decision notice. The e-mail concluded by asking English Heritage whether they "would have wanted to make a representation in respect of the application on receipt of such notices". Ms Barnes pointed out that her request was "urgent in light of the ongoing legal proceedings".

31. In a letter dated 16 February 2015, English Heritage's Business Officer in their South East Office, Ms Amanda Kearsey, wrote to Ms Barnes, pointing out that the proposed development, which would affect the setting of a grade II listed building and would be outside the conservation area, did not fall within English Heritage's "criteria for consultation". But it was open to any local planning authority to "make a special request if they particularly need our advice and the application does not strictly meet the reasons for consultation".

32. On 10 March 2015 Ms Barnes sent an e-mail to Ms Kearsey, making this request:

> "Please can you confirm that you do not wish to make any comment on this application, or if you do wish to comment, please can you do so. I attach a completed English Heritage Notification Form.
>
> Legal proceedings are ongoing in relation to this case and I would be very grateful if you could reply as soon as you are able, and in any event within three working days to enable the Council to comply with court deadlines which are coming up."

Attached to Ms Barnes' e-mail was a notification form, in which a "special request" was made in the box provided for such requests:

> "Reason for special request: Notification under Reg 5A and in connection with court proceedings."

On 13 March 2015 Ms Howell sent an e-mail to Ms Barnes, in which she said this:

> "Thank you for sending us a copy of the notices publishing the above application in accordance with Regulation 5A(3) of the Planning (Listed Buildings and Conservation Areas) Regulations 1990. We note that the proposal does not fall within the criteria for statutory notification under Circular 01/01 and that the application has been decided but is now subject to legal proceedings. I confirm that we do not wish to make any comment on this application."

33. By the time of the hearing before Patterson J., the council had conceded that the requirement in regulation 5A(3) had not been met in this case, because it had notified English Heritage of the proposal only after determining the application for planning permission. It also acknowledged that the notification arrangements provided in the direction in Circular 01/01 were superseded by regulation 5A. In view of the council's admitted failure to comply with regulation 5A, the judge was left only to decide whether, despite this clear legal error in the council's decision-making, she should in her discretion refrain from quashing the planning permission.

34. Ms Wigley submitted – as she did to the judge – that this was not one of those rare cases in which the court can properly withhold relief once a distinct error of law has been admitted or established. It was only after planning permission had been granted that English Heritage had been notified of the proposal, and they were then told that the decision had been made and that legal proceedings had been begun. They had themselves misunderstood the statutory notification requirements. Had they known what those requirements were, they might have chosen to express a view on the proposal, and this might have made a difference to the council's decision. If the application were sent back to the council for re-determination, the council would then have to notify English Heritage of the proposal in accordance with regulation 5A(3).

35. Mr Flanagan and Mr Cameron submitted that Ms Howell's e-mail of 13 March 2015 showed that English Heritage, asked formally for their view, had nothing to say about the proposal. Inevitably, therefore, the outcome for Churchill's application would have been no different if the council had been aware of this when the decision was made.

36. It is not suggested that Patterson J. misdirected herself as to the test she had to apply in exercising her discretion – this not being a case to which the provisions of the new section 31(2A)(a) of the Senior Courts Act 1981 applied. As she said (in paragraph 101 of her judgment) "[the] test is whether the Court is satisfied that the decision maker would have reached the same decision". That is always a question to be considered on the particular facts of the case, viewed as a whole.

37. The judge founded her conclusions on discretion upon the officer's advice to the members. The officer reminded the committee of the council's duty, under section 66(1) of the Listed Buildings Act, to have special regard to the desirability of preserving the setting of the listed building (paragraph 1.4 of the officer's main report). After the rejection of the previous scheme on appeal Churchill had changed the design, and it had done so again in the light of comments made by the design panel and the council's conservation and design officer (paragraph 6.4.1). In the officer's view the proposal "now succeeds in delivering a robust design solution of far higher architectural integrity than previous schemes, responding well … to the rhythm and streetscene characteristics of the surrounding late Victorian villas". He did not consider that "the design of this

building now adversely affects the character of the area or the setting of the listed terrace to the south" (paragraph 6.4.4).

38. The judge's view was that, in these circumstances, it was "difficult to see what a consultation response from English Heritage would have added to the overall appraisal considered within the officer report". She attached "no weight" to the correspondence between the council and English Heritage after planning permission had been granted, for two reasons: first, because it was "after the decision making process was complete", and secondly, because it "contains views expressed in the knowledge of ongoing legal proceedings" (paragraph 107 of the judgment). And she went on to say (in paragraph 108):

> "The key point is that, even taking the position at the most favourable to [Ms Loader], which is that English Heritage would have responded and responded in an adverse way on the submitted design, the degree of scrutiny and care with which [the council] considered the revised application would not have been any different. [The council] was aware throughout of the importance of the revised design on the setting of the Grade II listed building opposite the development site. It regarded that factor as a highly material consideration and took it very much into account as part of its decision making process."

Patterson J. therefore had "no doubt that the decision would have been the same had English Heritage responded on the application as a result of notification" (paragraph 109).

39. In two recent appeals this court has had to consider the exercise of judicial discretion in the context of planning decision-making (*Smech Properties Ltd. v Runnymede Borough Council* [2016] EWCA Civ 42, and *Secretary of State for Communities and Local Government and South Gloucestershire Council* [2016] EWCA Civ 74). Both of those cases demonstrate the general reluctance of this court to overturn the exercise of discretion by a judge at first instance. In *Smech Properties Ltd.* Sales L.J. observed (in paragraph 30 of his judgment, with which Tomlinson and Briggs L.JJ. agreed) that "[the] weight to be accorded to the considered view of a judge at first instance may also be enhanced where the judge has a particular expertise in the area in question or where the judge has had a fuller opportunity at the hearing before her to go into the case and understand it in the round than this court might be able to achieve at the hearing of an appeal".

40. With those observations of Sales L.J. in mind, whilst I would not question what the judge said about the cogency of the officer's advice on the effect the development would have upon the setting of the listed building, I think the approach she took to the exercise of her discretion was incomplete – in two respects. The first is that she did not, it seems, allow for the significance of English Heritage's role as a statutory consultee on proposed developments likely to affect heritage assets; I agree with Ms Wigley that she ought to have done so (see the judgment of Beatson J., as he then was, in *Shadwell Estates Ltd. v Breckland District Council* [2013] EWHC 12 (Admin), at paragraph 72). As English Heritage say in their charter ("A Charter for Historic England Advisory Services"), they are "the government's expert advisor on England's heritage and … have a statutory role in the planning system", and "[central] to [their] role is the advice [they] give to local planning authorities, government departments, developers and owners on development

proposals affecting the historic environment". Secondly, the judge did not take into account the correspondence in which English Heritage's position became clear. As I shall explain, however, I do not think the conclusion she reached in the exercise of her discretion can be said to be wrong.

41. As Ms Wigley emphasized, the design of the proposed development was controversial at the committee meeting on 19 June 2014. The council's Service Manager – Strategy and Planning, Mr Hickling, told the members that the council did "not have any expertise to support … a refusal" on design grounds, and the Major Applications and Appeals Manager, Mr Rowland, said that Ms Russell "could not do this". In these circumstances it seems clear that if English Heritage had been unhappy with the design and had opposed the scheme because they thought the development would harm the setting of the listed building, the outcome of the committee's deliberations might have been different (see paragraphs 36 and 41 of Sullivan L.J.'s judgment in *R. (on the application of Friends of Hethel Ltd.) v South Norfolk District Council* [2011] 1 W.L.R. 1216, where the local planning authority had failed to notify English Heritage of a proposal for development that would affect the settings of a number of grade I and grade II* listed buildings).

42. In this case, however, I do not see any real doubt about the stance English Heritage would have taken if they had been consulted on the proposal, as they should have been under regulation 5A. Unlike the judge, I do not think it is necessary, or appropriate, to ignore the council's correspondence with English Heritage after planning permission was granted. English Heritage were at that stage given the opportunity to express their view on the proposed development. They were under no pressure to offer a neutral or supportive view. They were free to say what they thought. They were not a party to these proceedings. The risk of their putting forward a self-serving view, or a view intended to bolster a challenged decision, does not arise. They could reasonably be expected to say what they would have done if notified of the proposal under regulation 5A, as they should have been, before the council's decision was made. So I think the council's correspondence with them was relevant in the court's exercise of discretion, and should have been given due weight.

43. Taking Ms Howell's e-mail of 13 March 2015 literally, and in the light of what had gone before, I do not read it as meaning that English Heritage might have wanted to object to the proposal if they had had the chance to do so before planning permission was granted. The e-mail does not say that, or imply it. Nor does it suggest that if the proposal had not fallen outside the "criteria for statutory notification under Circular 01/01", or if the planning permission were not "now subject to legal proceedings", English Heritage might have had something to say. Ms Howell was, I think, simply acknowledging the reasons the council had given for making its "special request". She was not explaining why English Heritage had no comment to make on the proposal in response to that "special request". When she said "I confirm that we do not wish to make any comment on this application", she meant just that. English Heritage simply had nothing to say, favourable or unfavourable, about the proposal. And I think one can safely assume that their position would have the same had they been notified when they should have been under regulation 5A.

44. It follows that the conclusion the judge reached on this issue was right. Had there been no other error of law in the council's decision, its failure to notify English Heritage under

regulation 5A would not have compelled, or justified, an order to quash the planning permission. This is not because English Heritage's view on the proposal, if they had one, would have made no difference to the council's decision – as the judge concluded – but because they did not have a view that could have made a difference.

45. I would therefore reject this ground too.

Was the council's committee seriously misled as to the position of the Victorian Society?

46. The Victorian Society had objected to Churchill's previous proposal in a letter to the council dated 19 September 2006 from their Senior Architectural Adviser, Dr Kathryn Ferry. That letter stated:

> "We have been alerted to this application by local residents and wish to object to the proposed erection of 41 sheltered apartments on this site.
>
> The open space of the current bowling green (formerly croquet lawns) was enclosed as part of the late Victorian and Edwardian planned development of Bexhill-on-Sea. The street pattern demonstrates how housing was designed around this central green space. Most significantly, on the seaward side, is the imposing Grade II listed terrace with entrance fronts onto Knole Road and equally impressive elevations to De la Warr Parade. The bowling green has always formed an important part of the setting of this Queen Anne style terrace. According to paragraph 2.17 of PPG15 'The setting of individual listed buildings very often owes its character to the harmony produced by a particular grouping of individual buildings (not necessarily all of great individual merit) *and to the quality of the spaces created between them*'.
>
> The design of the four-storey blocks proposed in this application shows little regard for the late Victorian character of the area and, in the Society's view, would have a detrimental impact upon the setting of the Grade II listed terrace. For this reason we would urge your Council to refuse planning permission.
>
> We hope you will find these comments useful. Please contact the Society if we can give any further help over these or amended proposals. We would be grateful to be informed of your authority's determination in the case."

47. The council attempted to consult the Victorian Society on the revised proposal, but the attempt failed. On 20 February 2014 a Business Support Assistant in the council's Planning Department, Mr Ali Jassim, sent an e-mail to the e-mail addresses the council had for several intended consultees. One of these was the e-mail address of Ms Heloise Brown, who had once worked for the Victorian Society as a Conservation Adviser, but, as it later emerged, no longer did. Mr Jassim's e-mail invited comments on the proposal by 14 March 2014. It was met with an automatic reply from the e-mail address that had once been Ms Brown's, in which the message was this:

> "I have now left the Society, please contact James Hughes:
>
> james@victoriansociety.org.uk".

Having received that message, the council did not use Mr Hughes' e-mail address, or any other, to consult the Victorian Society. In the officer's main report, in section 5.0, "Consultations", paragraph 5.8 states simply:

> "Victorian Society: No comments received."

48. In e-mail correspondence with Ms Loader after the council had granted planning permission, the Victorian Society confirmed that it had not been consulted. In an e-mail to Ms Loader dated 12 January 2015 Ms Sarah Caradec, a Conservation Adviser, said:

> "I have checked our records and I am afraid that we were not consulted on this application … by Rother District Council. I can, however, see that they approved the application on 20 November 2014. Unfortunately, local councils are only obligated to consult the Victorian Society when an element of demolition to a listed building is proposed. As this was not the case here, they were therefore not obligated to consult with us."

In an e-mail to Ms Loader dated 1 April 2015 Ms Caradec said this:

> "… [If] we had objected to an application we would expect to be re-consulted by the Council if the application was re-submitted by the developer.
> Heloise Brown left the Victorian Society some years ago and I do not think that her email address is still active. Normally councils contact us through our main email which is notifications@victoriansociety.org.uk."

49. Ms Wigley submitted to the judge, and again to us, that this was seriously misleading. The committee was given the impression, wrongly, that the Victorian Society had been consulted and had made no comment on the application, whereas, in truth, the council's attempt to consult them had been abortive. In effect, they had not been consulted. The committee may well have been left with the impression that the Victorian Society were now satisfied with the revised design. That was not so. Given the council's duty under section 66(1) of the Listed Buildings Act, the importance of the effect the development would have on the setting of the listed building, and the fact that the Victorian Society had objected to the previous proposal, this error was enough to vitiate the council's decision to grant planning permission.

50. Mr Flanagan and Mr Cameron countered this argument with the simple submission that what the officer said was right; no comment had been received from the Victorian Society. Even if the statement "No comments received" – though true as a matter of fact – was misleading, it was not seriously so. And it would have to be "significantly" misleading to enable the court to conclude that the committee's decision was legally flawed by it (see the judgment of Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Council* [2010] EWCA Civ 1286, at paragraph 19, citing the familiar passage in the judgment of Judge L.J., as he then was, in *R. v Selby District Council, ex p. Oxton Farms* [1997] E.G.C.S. 60).

51. I think Ms Wigley's argument on this issue is right.

52. As Patterson J. said, the Victorian Society has been "recognised as a heritage consultee in certain circumstances" (paragraph 48 of her judgment). In the statutory scheme, including now paragraph 4 of the Arrangements for Handling Heritage Applications – Notification to Historic England and National Amenity Societies and the Secretary of State (England) Direction 2015, they are one of the "National Amenity Societies". As the judge also said, there was no statutory duty on the council to consult them on this proposal (paragraphs 48, 52 and 55). And as she added, having been consulted on the previous proposal, they "may have preferred to have been re-consulted on any resubmission", and "it would have been good practice on the part of [the council] to do so but it cannot be said that [the council] fell into legal error by failing to consult them effectively on the instant application" (paragraph 55). All of this was common ground. But the judge was unimpressed by Ms Wigley's contention that the officer had mis-stated the Victorian Society's position and that in the circumstances this was a material error in his report (paragraph 56).

53. I cannot agree with that conclusion of the judge. As she accepted, the question here is whether the members were significantly misled by what they were told about the Victorian Society's position. In my view they were.

54. In the first place, regardless of the statutory requirements for consultation, the council plainly thought it necessary to obtain the Victorian Society's views on this proposed development. One can understand why. The Victorian Society had objected to the previous proposal. They had criticized the design of the development, and expressed concern about its likely effect on "the Victorian character of the area" and its "detrimental impact upon the setting of the Grade II listed terrace". These concerns were reflected in the inspector's decision dismissing the appeal. Had the defects in the design now been overcome by the changes made to the design in this proposal? This was an important question for the council in the decision it now had to make. Not surprisingly, it saw the need to seek the Victorian Society's view, even though it was not statutorily obliged to do so. Their view, whatever it might be, would assist the Planning Committee in the exercise of its own planning and aesthetic judgment.

55. Secondly, by the time the Planning Committee met to make its decision on this application for planning permission, the council had failed to consult the Victorian Society, and at least one of its officers knew it had failed. The officer given the task of consulting the Victorian Society had sent the consultation letter to a disused e-mail address, had got an automatic response telling him so, and then not sent the consultation letter to the e-mail address given in the automatic response. So, in fact, there had been no consultation of the Victorian Society on this proposal, and the officer responsible for undertaking that consultation knew that.

56. Thirdly therefore, in its context, which was the section of the officer's report devoted specifically to "Consultations", the note "Victorian Society: No comments received", though factually correct, was nonetheless misleading. No one has suggested, or could, that it was intentionally so. Bad faith is not alleged. The officer responsible for preparing the report could not simply have said "No comments received" if he was aware that the Victorian Society had had no opportunity to comment. Obviously, however, the absence of any comment from the Victorian Society – positive, negative, or neutral – was seen by the officer as significant enough to mention in his report, instead of simply saying nothing. It was, he thought, something the members should have in their minds. It was, in

his view, significant. This much seems plain. But anyway, there can be no doubt that, left uncorrected, the implication of the words "No comments received" could only be that the Victorian Society had been consulted on this proposal, had considered it, and had concluded they did not wish to object to it. This was the impression the committee was given. It was false.

57. And fourthly, Mr Flanagan and Mr Cameron, having rightly conceded that the officer's report was in this respect misleading, urged us to act on the distinction between an officer's advice that is "significantly" – or, as Mr Cameron put it, "seriously" – misleading and advice that is misleading but not "significantly" so. That there is such a line to be drawn is clear from the authorities. Where it is drawn in any particular case will always depend on the context and circumstances in which the misleading advice was given and the possible consequence of it. In this case, in my view, there can be no question but that the mistake made by the officer in his report was, in its context and circumstances and in its possible consequence, sufficiently misleading to invalidate the committee's decision. It was "significantly" – or "seriously" – misleading on a material matter, and it was left uncorrected before the decision was taken. In the context of the duty in section 66(1) of the Listed Buildings Act, the committee was misinformed on the consultation of a national amenity society, which had been an objector to a similar proposal, and whose views on this application the council had chosen to seek and might have made a difference to its decision. In taking this misinformation into account, it could be said to have proceeded on the basis of an error of fact. But I think the unlawfulness here is better described as the taking into account of an immaterial consideration.

58. What the Victorian Society would have said if they had been consulted by the council we do not know. It is impossible to say that their view on the revised proposal would have made no difference to the council's decision. There is therefore no scope here for withholding relief in the exercise of the court's discretion.

59. I would allow the appeal on this ground.

Conclusion

60. For the reasons I have given I would allow the appeal, but only on the ground relating to the council's failed consultation of the Victorian Society and the officer's misleading advice to the members on that matter.

Lady Justice King

61. I agree.

Lord Justice Laws

62. I also agree.