Neutral Citation Number: [2022] EWHC 2632 (Admin)

Case No: CO/1548/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 October 2022

Before:

James Strachan KC
(sitting as a Deputy Judge of the High Court)

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Between:

STANDARD LIFE ASSURANCE LIMITED	**Claimant**
- and-	
(1) SECRETARY OF STATE FOR LEVELLING-UP, HOUSING AND COMMUNITIES **(2) BATH AND NORTH EAST SOMERSET COUNCIL** **(3) OAKHILL GROUP LIMITED**	**Defendants**

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Gregory Jones KC and Jonathan Welch (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
Robert Williams (instructed by **Government Legal Department**) for the **First Defendant**
Sasha White KC and Matthew Fraser (instructed by **Eversheds Sutherland (International) LLP**) for the **Third Defendant**

Hearing dates: 11 and 12 May 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10am on 19 October 2022

James Strachan KC (sitting as a Deputy Judge of the High Court):

Introduction

1. By claim form dated 28 April 2021, the Claimant challenges the lawfulness of a decision of a Planning Inspector, Nick Fagan BSc (Hons) DipTP MRTPI, appointed by the First Defendant given by decision letter dated 22nd March 2021 ("the DL"). The decision was made following an inquiry held between 16-26 February 2021. The claim is brought under section 288 of the Town Country Planning Act 1990 ("the 1990 Act").

2. By that decision, the Inspector allowed an appeal (ref: APP/F0114/W/20/3258121) made by the Third Defendant Party, Oakhill Group Ltd, under section 78 of the 1990 Act. The appeal was against a decision of the Council, Bath and North East Somerset Council ("the Council"), to refuse outline planning permission for redevelopment of the Former Hartwells Garage Site, Newbridge Road, Bath BA1 2PP ("the Appeal Site").

3. The Claimant is the owner of the Maltings Industrial Estate in Bath ("the Industrial Estate"). The Appeal Site is immediately adjacent to the Claimant's Industrial Estate. The Third Defendant has a right of way over that Industrial Estate. It proposes to make use of that right of way in its redevelopment of the Appeal Site. The Claimant is concerned that such use and the redevelopment will prejudice its continued use of the Industrial Estate. It objected to the Third Defendant's planning application on that basis. It also subsequently took part as a "Rule 6 Party" at the inquiry held by the Inspector to determine the Third Defendant's appeal: see Rule 6(6) of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 SI 2000/1625 ("the 2000 Rules").

4. The Claimant contends that the Inspector erred in law in allowing the Third Defendant's appeal and in granting conditional outline planning permission for the proposed redevelopment. It advances three grounds of challenge, although the third is subdivided into two. In summary the Claimant contends:

a. The Inspector's decision was irrational. The Claimant submits that the Inspector found that it would be necessary to put in place some changes to infrastructure and access controls over the Industrial Estate for the proposed development to be acceptable in planning terms, but that the Inspector then failed to require that such measures be secured, or to explain why he was content to grant planning permission in their absence (**Ground 1**).
b. The Inspector: (i) misread the deed of grant concerning the right of way so as to discount potential planning harm that would arise from the proposed development; and (ii) unlawfully relied on that private law instrument as a reason to discount or neutralise the planning harm the Claimant had raised (**Ground 2**).
c. The Inspector relied on a planning condition restricting the industrial operations at the Industrial Estate, but failed to take into account, or grapple with, evidence that the units had been in *sui generis* use for the requisite 10 year period of time without enforcement action being taken, such that the condition restricting the operations was no longer enforceable; alternatively the Claimant alleges that the Inspector's reasons were inadequate bearing in mind the discussion about the evidence that took place at the inquiry (**Ground 3A**).
d. The Inspector erred in dealing with the 'agent of change' principle expressed in

paragraph 182 of the National Planning Policy Framework ("the NPPF") and the relevant allocation policy in the development plan relating to the Appeal Site, bearing in mind the Inspector's conclusions elsewhere in his decision (**Ground 3B**).

5. Permission to bring the claim was initially refused on the papers by His Honour Judge Allan Gore QC by Order dated 5 August 2021 on the basis that each of the grounds was unarguable. Permission was subsequently granted for the claim to proceed on all three grounds following a renewal hearing by Mr Tim Smith, sitting as Deputy Judge of the High Court, by Order dated 7th October 2021.

6. Mr Jones QC appeared for the Claimant with Mr Welch at the hearing before me. Mr Williams appeared for the First Defendant. Mr White QC and Mr Fraser for the Third Defendant. I am grateful to them all for the clarity and focus of their written and oral submissions. The Council did not appear and was not represented.

7. By application notice dated 28 April 2022 filed shortly before the substantive hearing was due to take place, the Claimant applied for permission to rely on two further witness statements, one from Ms Emily Williams dated 27 April 2022 and a second witness statement from Ms Bending (the Claimant's planning consultant who appeared at the inquiry) dated 28 April 2022. Both witness statements refer to transcripts of the video recordings of the inquiry, following disclosure of further video recordings by the First Defendant to the Claimant on 25 March 2022.

8. Both the First Defendant and the Third Defendant objected to that application, principally on the basis that the application was made too late given paragraph 2.7 of Practice Direction 23A, and the Defendants considered that no good reason had been provided for filing the statements approximately 1 month after disclosure so close to the substantive hearing.

9. At the start of the hearing all the parties agreed in principle to the Court provisionally considering the witness statements and exhibits and any submissions on their contents, with any decision on the application to admit them deferred until judgment. Having considered the statements and exhibits on that basis, I grant the Claimant's application to rely upon both witness statements and the exhibits. There is some merit in the Defendants' stance that the application to adduce this further evidence could and should have been made more promptly following disclosure on 25 March. Overall, however, I am persuaded by the Claimant that the First Defendant could and should have disclosed the requested video recordings earlier than he did, given the nature of the grounds of challenge relating to what transpired at the inquiry generally, and not simply what occurred during the round table session. This would have given the Claimant more time to have considered the disclosed recordings and to transcribe them in advance of the hearing. For the reasons that will become apparent, I do not consider that the First Defendant is unfairly prejudiced by the timing of the application and the content of the statements and exhibits. I bear in mind that the Inspector himself has not had time to respond to what is in the statements; but the evidence is principally directed to transcribed extracts of what was said at the inquiry and the Claimant, First and Third Defendant have had the opportunity to make submissions about those extracts.

Factual Background

The Appeal Site

10. The Appeal Site consists of land previously used as a car garage, along with associated land on Newbridge Road. It slopes down towards the south where it adjoins the Industrial Estate. The main access route for the Appeal Site is from Newbridge Road to the north. There is also a right of access to the Appeal Site from the south over the Industrial Estate connecting to Brassmill Lane. It is this right of access which is the principal subject of this claim.

11. The access route over the Industrial Estate is currently subject to two gated entrances. There is a gate that separates the Industrial Estate from the Appeal Site itself. Access can be taken through this gate using a key. There is another gated entrance to the Industrial Estate itself where it joins Brassmill Lane. This entrance is used by all of the tenants of the Industrial Estate, as well as anyone using the right of way to the Appeal Site. Each tenant of the Industrial Estate and the owner/occupier of the Appeal Site has a key this gate so that they can obtain access out of hours, when the Brassmill Lane gate is closed and locked. At the hearing, Mr Jones referred the Court to the practical arrangements that apply to that access as had been in evidence at the inquiry in the proof of evidence of Nicola Perry of JLL.

The Right of Access

12. The Appeal Site's right of access over the Industrial Estate is secured in a deed of grant dated 11 May 1994. It is common ground that it binds mutual successors in title.

13. The references in the deed to: the 'First Property' and 'First Owner'; and 'Second Property' and 'Second Owner', therefore refer respectively to: the Appeal Site and its owner; and the Industrial Estate and its owner.

14. By Clause 3.2.1 of that deed of grant, the First Owner is granted "the Second Rights". The "Second Rights" are defined in Clause 2.15 to mean the rights granted by the Second Owner to the First Owner "details of which are set out in the Fourth Schedule".

15. Paragraph 1 of the Fourth Schedule dealing with the "Second Rights" identifies the right of access as follows:

> "*1. The right to go pass and repass at all times with or without vehicles over and along the Access Route for the purpose only of obtaining access to and egress from the First Property.*"

16. By clause 2.1, the term 'Access Route' is defined to mean the following:

> "*such continuous route over the Second Property (terminating (at the one end) at its junction with a highway maintainable at the public expense of sufficient width and classification as to be able to accommodate all classes of Heavy Goods Vehicles and (at the other end) at any point along the boundary between the*

> *Second Property and the First Property which is suitable having regard to any buildings erected on the First Property at the time of any proposed change in the location of such route to be of sufficient width and of such design as to be able to accommodate all classes of Heavy Goods Vehicles passing from the said highway over the Second Property to the First Property and otherwise having characteristics which enable the right of way granted by paragraph 1 of the Fourth Schedule to be exercised over and along it) as the Second Owner shall designate from time to time having first obtained the approval in writing of the First Owner (such approval not to be unreasonably withheld) the location of the route currently and until any further such designation shown coloured blue the Plan*."

17. It is common ground that the designated "Access Route" referred to in that definition remains that shown coloured blue on the plan attached to the deed of grant.

18. It is self-evident from the terms of Clause 2.1 set out above the right of access along the Access Route includes a right to use all classes of Heavy Good Vehicles ("HGVs").

19. By Clause 4.1 of the deed of grant the First Owner covenanted with the Second Owner to observe and perform the First Owner's Obligations. The term "the First Owner's Obligations" is defined in Clause 2.5 to mean "the obligations entered into by the First Owner details of which are set out in the Fifth Schedule". The Fifth Schedule includes obligations on the First Owner:

> "...
>
> *2. To pay the Fixed Proportion of the costs and expenses incurred by the Second Owner in cleansing maintaining repairing renewing and replacing the Access Route (but excluding any costs which are the obligation of the Second Owner under paragraph 2 of the Sixth Schedule)*
>
> *3. Not to permit or suffer any vehicles to park at any time on any part of the Second Property and to ensure that any tenant or occupier from time to time of the First Property complies with this obligation.*
>
> *4. To ensure in the event of the Access Route being used by construction traffic in connection with the development of all or any part of the First Property that there are adequate wheel*

washing facilities on the First Property for use by such traffic at all times during such development.

5. To pay one half of all costs and expenses incurred by the Second Owner in maintaining and keeping in full and substantial repair and condition the boundary structure dividing the First Property and the Second Property (provided that the First Owner's obligation shall be limited to paying one half of the cost of maintaining and repairing a boundary structure of no greater height and specification than the fence dividing the First Property and the Second Property at the date of this deed)."

20. The term "the Fixed Proportion" is defined in Clause 2.8 to mean "twenty five per centum (25%)".

21. By Clause 4.2 of the deed of grant, the Second Owner covenanted with the First Owner to perform the Second Owner's Obligations. Clause 2.13 defines "the Second Owner's Obligations" to mean "the obligations entered into by the Second Owner details of which are set out in the Sixth Schedule". Paragraph 6 of the Sixth Schedule includes an obligation on the Second Owner:

> "3. To keep in good and substantial repair and condition-
>
> (a) the boundary structure from time to time dividing the First Property and the Second Property and
>
> (b) the surface of the Access Route."

22. Again, it is self-evident from these provisions that the parties to the deed of grant contemplated the potential use of the right of access by the owner of the Appeal Site for construction traffic in connection with the development of the Appeal Site. Paragraph 4 of the Fifth Schedule specifically refers to such activity. In anticipation of such activity taking place, it imposes an obligation on the owner of the Appeal Site to provide adequate wheel washing facilities on the Appeal Site. This is no doubt to seek to mitigate the potential for dirt from the wheels of construction traffic coming from the Appeal Site being left on the Industrial Estate.

23. In its grounds, but not at the oral hearing, the Claimant drew particular attention to Clause 5.2 of the deed of grant. This provides that if, within the perpetuity period, the owner of the Appeal Site obtains planning permission for redevelopment of that property "*which includes alternative access to that property from Newbridge Road Bath which is in all respects a satisfactory alternative to the right of way granted by paragraph 1 of the Fourth Schedule it will (if so requested by and at the expense of the Second Owner) release such right to the Second Owner to the intent that it shall from the date of such release cease and be extinguished*". The Claimant, however, has not suggested at any point that the grant of the outline planning permission in

this case meets the requirements in clause 5.2 for the extinguishment of the right of access. It is no part of the Claimant's case to suggest that the Third Defendant is required to release the right of way that it enjoys under this deed of grant in consequence of the outline planning permission that was granted by the Inspector. Indeed, the Claimant's basic concern is predicated on the continued existence and use of that right of access over the Industrial Estate for the development authorised by the outline planning permission.

24. The Claimant notes that (save as summarised above) the deed of grant does not provide any further obligations on, or specify arrangements for, the owners of the Appeal Site in relation to redevelopment of the Appeal Site and the use of the right of access across the Industrial Estate. In particular, the Claimant notes that the deed of grant does not secure provision or delivery of any works, improvements or management arrangements in circumstances where redevelopment results in a change to the nature of the use of the right of way.

25. In that context, the Claimant has identified that the right of way was historically used by the operator of the former Hartwells garage on the Appeal Site principally for larger service vehicle entry. This was because of difficulties accessing the Appeal Site for large vehicles from Newbridge Road because of a ramp. The Claimant notes that the operator of the Appeal Site has held a key to facilitate such access over the Industrial Estate and that it had a single point of contact with the Claimant's estate managers.

The Development Plan Allocation and the Outline Planning Application

26. Both the Appeal Site and a neighbouring site to the west, containing a concrete batching plant, were allocated together for development under Policy SB15 Hartwells Garage in the Council's Core Strategy and Placemaking Plan (part of the Council's statutory development plan) adopted in July 2017 ("the Local Plan").

27. Paragraph 1 of Policy SB15 identifies in respect of 'development requirements and design principles' for that allocation:

> "1. Residential development of 80-100 dwellings, which could include a variety of specialist older persons housing types but not student accommodation, where this would prejudice the achievement of Policy DW.1 and B1 in respect of boosting the supply of standard market and affordable housing."

28. The Inspector referred to this allocation and the substance of the policy in his decision letter at DL4-7.

29. The Third Defendant sought outline planning permission for development of the Appeal Site for the following ("the Outline Planning Application"):

> "Outline application with all matters reserved except for access and layout comprising the demolition of the existing buildings on the site; construction of replacement buildings ranging in height from 3 to 5 storeys providing a mixed use development comprising up to 104 residential units (Class C3 Use), up to 186 student bedrooms (Sui Generis Use), and a commercial retail unit (flexible A1/A3 Use); formation of new vehicular access from Newbridge Road, construction of new access ramp, and provision of vehicle parking spaces; provision of new shared bicycle and pedestrian sustainable transport route through the site and formation of new access and linkages on the eastern and western boundary; provision of hard and soft landscaping scheme across entire site" ("the Appeal Scheme").

30. The Outline Planning Application therefore sought permission for more residential units than had been identified in Policy SB15, and on a smaller part of the whole allocation, along with purpose-built student accommodation ("PBSA").

31. The Claimant's position is that the inclusion of additional residential units beyond the number identified in the policy triggered a need for 24 hours, 7 days a week, access to be taken over the Industrial Estate, as this is required to enable future residents of those additional units to access an extra 9 additional car parking spaces on what is referred to as proposed Car Park 2 in the proposed development. The Claimant considers this would not have been necessary had a scheme in line with the numbers of residential units referred to in Policy SB15 been pursued.

32. The Claimant therefore considers that the Appeal Scheme proposes a significant change in the way the access route has been used previously. It would become an access route not only for service and delivery vehicles to the new homes, but also to provide access to the 9 residents' parking spaces in Car Park 2.

33. Nothing in the Appeal Scheme itself before the Inspector proposed to secure any change to the existing gate arrangement between the Appeal Site and the Industrial Estate, or to the entrance to the Industrial Estate and Brassmill Lane. The Claimant's basic position, as further explained by Mr Jones during the hearing, is that a reduction of 9 units from the proposed scheme would have removed the need for the 24 hours 7 days a week access across the Industrial Estate.

The Council's Refusal of the Outline Planning Application

34. The Council refused the Outline Planning Application for six reasons set out in a

decision notice dated 16 March 2020. It is not necessary to set out those reasons for refusal here. The Claimant itself notes that those reasons did not directly include any impact of the proposed development on the Industrial Estate. However, the Claimant relies on four points about the Council's assessment of the Outline Planning Application, namely:

a. The Council provided pre-application advice to the Third Defendant on its proposals on 29 October 2018 in which it expressed the view that the proposed use of the Industrial Estate for access was considered to be "fundamentally flawed".

b. On four occasions prior to the determination of the Outline Planning Application the Council's highways officer raised concerns about the use of the access across the Industrial Estate and the need for an appropriate agreement to manage that access. The officer's final consultation response dated November 2019 identified this to be one of "the outstanding highways issues" and expressed the view that an agreement was necessary "given that the access across the Estate is critical to the success of the scheme".

c. The planning officer's committee report dealing with the Outline Planning Application (which had recommended the grant of permission) had referred to access across the Industrial Estate and identified that the anticipated agreement under section 106 of the 1990 Act "will need to secure the submission (and subsequent adherence to) a plan for the management of this off-site arrangement".

d. The Council's second reason for refusal had raised overdevelopment and this was concerned with the need for access to be taken across the Industrial Estate.

The S78 Appeal Inquiry

35. Following the Council's refusal, the Third Defendant lodged its appeal under s.78 of the 1990 Act. The Third Defendant is consequently referred to as the appellant in the Inspector's DL. The appeal was allocated for determination by a public inquiry.

36. The Claimant applied for, and was granted, the status of a Rule 6 Party in respect of the appeal under the 2000 Rules. It submitted representations as part of its case raising (amongst other things) significant concerns about the proposed use of the access route, along with the need for an appropriate management agreement to facilitate such access.

37. In preparation for the inquiry, the Inspector held a pre-inquiry Case Management Conference ("CMC") in December 2020. At that CMC the Inspector identified that the Claimant's objection in respect of the access route was one of the main issues to be considered.

38. The Claimant states that the Third Defendant made an application at the CMC that the

Claimant's objection be dealt with by "round table session", rather than through the more formalised process of the calling of evidence with cross-examination. The Inspector agreed to deal with the issue in this way. At the hearing before me, there was some dispute as to whether the decision to deal with this issue at a round table session was at the request of the Third Defendant, or the result of mutual agreement by the parties. Whatever the position, however, the Claimant submits that the decision to deal with this issue at a round table session at an inquiry does not affect the need to apply relevant principles which would apply to informal hearings. In reliance on *Dyason v Secretary of State for the Environment* [1998] JPL 778, the Claimant submits that "the absence of an accusatorial procedure places an inquisitorial burden upon an Inspector" and at a round table session (by analogy with the requirements for a hearing) "the Inspector has to play an enhanced role in order to resolve conflicts of evidence. In addition, such an Inspector must not arrive at a finding adverse to a party without having put the point to the party in question or his witness" : see *Croydon LBC v SSE* [2000] PLCR 171.

39. The Inspector held the inquiry between 16-26 February 2021 and dealt with the Claimant's main issue at a round table session.

The Inspector's Decision Letter ("the DL")

40. The Inspector sets out his decision to allow the appeal and to grant planning permission subject to specified conditions in DL1. His reasons then follow.

41. Under the heading "Procedural Matters" at DL2, the Inspector refers to the fact that the inquiry had been adjourned until 12 March 2021 and stated this was: "for the execution of the S106 agreement (the S106) and left open the prospect of the appellant and Rule 6 party being able to resolve their differences via a separate private law agreement." The Inspector noted that the completed S106 agreement had been submitted on 4 March 2021, but that no agreement was forthcoming between the appellant and Rule 6 party, and he stated:

> "…Consequently, the Rule 6 issue has been decided based on the two parties' evidence at the Inquiry including their closing submissions."

42. The Inspector set out what he regarded as the "Main Issues" at DL3. The first four of these relate to matters raised by the Council in its reasons for refusal which the Inspector dealt with at DL4-45. It is unnecessary to address those paragraphs here as the Claimant does not take any issue with the Inspector's decision and reasoning on any of those issues.

43. The fifth main issue the Inspector identified was that raised by the Claimant namely:

> "5.Whether the proposed development would lead to a significant intensification of the use of the vehicular access route through The Maltings or any other significant effect resulting from it as an 'agent of change' that would seriously harm the industrial estate's operations (the Rule 6 issue)."

44. The Inspector dealt with this in DL46-58 under the heading 'Access Through the Maltings'.

45. At DL46 the Inspector began by describing the Industrial Estate and the Claimant's acquisition of it in 1994. He noted of the Industrial Estate (amongst other things):

> "46. … Eleven businesses occupy the 15 units; these are a mix of industrial, storage and distribution uses including some with ancillary trade counters (e.g. Toolstation, Euro Car Parts and Topps Tiles) and a brewing company which apparently offers tasting sessions."

46. At DL47 he then referred to the 1994 deed of grant's creation of the right of access across the Industrial Estate as follows:

> "47. The 1994 Deed of Transfer between the appellant associated company and the Rule 6 Party grants a legal right of access (an easement) through the Estate for any pedestrian and vehicular traffic – including HGVs – 24 hours a day via the quickest route from the Brassmill Lane entrance to the access into the site adjacent to Unit 6. This easement applies to any redevelopment of the site including for all construction traffic, not just the original car showroom/garage use. However, Schedule 5 of the Deed does not permit any use of the appeal site to park vehicles on the Estate. None of this is contested between the two parties."

47. At DL48 the Inspector then referred to what was a principal part of the Claimant's objection (where SL is used an abbreviation of the Claimant's name):

> "48. SL argues that the continued use of this access for Heavy Goods Vehicles (HGVs) servicing the site and the 9 cars of residents of the apartments who would be allowed to park in Car Park 2 would intensify the use of the access through the

> Estate such as to prejudice its lawful operation as an established and valued industrial estate."

48. The Inspector then set out his reasons on the issue the Claimant had raised in the subsequent paragraphs. The Claimant's criticisms focus on particular paragraphs or parts of those paragraphs, but it is appropriate to set out the full reasoning as follows:

> "

> "49. However, SL does not dispute the appellant's survey figures of the traffic using the appeal site when it was used as a car dealership nor its predicted traffic levels for the proposed development. The appellant's evidence sets out that the latter would be likely to be less than the former[6]. That is uncontested by SL.
>
> 50. The concerns raised by SL in relation to delivery drivers dropping off goods via the Estate access to the site are in my view exaggerated. The appellant will manage the site. It has said that as part of its management it will request tenants to ask delivery drivers to drop off goods via Car Park 1 accessed from Newbridge Road where at all possible. I see no reason why this would not be likely to occur since this access to the site would be easier and clearer for delivery drivers. The majority of deliveries would therefore be likely to occur from here. Only deliveries of heavy goods, such as furniture, would be likely to occur through the Estate, and such deliveries would be of a far lesser volume than, say, typical deliveries by Amazon and the like.
>
> 51. Where HGVs or even MGVs (Medium Goods Vehicles) do need to drop off goods via the Estate access I see no reason why they would have to generally park up and wait to be let into the site because they could be immediately let in by the site's management staff either by having arranged such delivery in advance or by a quick phone call, as made clear by the appellant at the Inquiry round table session (RTS). There is no reason for individual tenants to have control over the access gate into the site from the Estate, with the exception of those whose car has a permit to park in Car Park 2. There is no reason why such deliveries to the site would be more likely to block access to any of the industrial units compared to the car transporters used by Hartwells when it was operating, including Units 5 and 6 next to the southern site entrance (both which are occupied by Horstman).
>
> 52. I acknowledge that the owners of the 9 vehicles parking in Car Park 2 will need constant 24-hour vehicular access to the site. These vehicles will use the Estate access at

night as well as during the working day as used by the former car showroom/garage. In order for this to work efficiently I appreciate that new electronic gates may well be needed, for instance in order to introduce an Automatic Number Plate Recognition (ANPR) system, and that the appellant will be required to fund or at least part fund and maintain any such new systems, as it mooted in the various versions of the draft Management Plan discussed at the RTS on this issue. There will inevitably need to be agreement between the appellant and SL over such measures and who pays, installs and maintains them.

53. But this is nothing new since as joint users of the Estate access there must inevitably be agreement made about any such changes under the current Deed. The S106 also requires in its Schedule 8 the agreement of a Vehicle Management Plan or VMP (including for vehicles accessing the site through the Estate) with the Council prior to commencement of development and the development's operation in accordance with it thereafter. I would expect the Council to consult SL before agreeing this.

54. The VMP must follow the principles in the Framework Management Plan appended to the S106, which makes clear that most vehicles will access the site from Newbridge Road; specifies the management of the site by on-site staff including control of residential deliveries via the Estate; the fact that the 9 parking spaces in Car Park 2 will be the last to be allocated to residential tenants; and the requirement for tenants to display authorised parking permits. On this basis there is no objection from the Highway Authority, nor from the Council as Local Planning Authority (LPA).

55. I appreciate that construction traffic to the site has the potential to create interference with the operation of the Estate, specifically in terms of temporary blocking of access vehicles to some individual units. But any such potential interference is acknowledged in the existing Deed which allows for such construction access. It is also in the interests of the appellant to minimise any such interference as well as to minimise the construction period, which is by definition temporary.

56. NPPF paragraph 182 states that existing businesses should not have unreasonable restrictions placed on them as a result of development permitted after they were established – the 'agent of change' principle. I appreciate that the industrial units are not restricted to operating only during the working day; they could operate all through the night and may be occupied by a completely different range of tenants.

> 57. However, Condition 6 of the Estate's original planning permission dated 5 July 1983[7] prevents any processes being carried out or machinery being installed that could not be carried on or installed in any residential area by reason of noise, vibration, smell, fumes, dust etc, similar to the definition of the former industrial Use Class B1(c) and now encompassed within new Class E(g). Given this Condition, there can be no possible objection to residential development on the appeal site. In any case, LP Policy SB15 allocates the site for residential development.
>
> 58. For all these reasons I conclude that the proposed development would be unlikely to lead to a significant intensification of the use of the vehicular access through The Maltings or any other significant effect resulting from it as an 'agent of change' that would seriously harm the industrial estate's operations."

49. The Inspector then turned to deal with other issues, including those raised by way of third party objections, in DL 59-66. He included in this section something that he himself had observed at his site inspection as follows:

> "66. At my site visit I noticed the noise of the Hanson's concrete batching plant. Although not a contested issue between the main parties I sought reassurance that this noise would not adversely affect the residents of the proposed development, particularly in the nearest Blocks E and C. I am suitably assured of this by reference to the Summary Note produced by Matrix at the Inquiry as well as by pages 11-13 of its original Noise Assessment (CD23). I am assured that this would not prevent the opening of the habitable room windows in the nearest Blocks facing the batching plant. Condition 17 below will ensure the provision of adequate sound insulation as part of the construction of the development, as detailed in these Matrix reports."

50. The Inspector then turned to deal with "The Planning Balance" at DL 67-69. He concluded as follows:

> "67. The development would comply with the most relevant LP Policies: SB15, CP6, D1, D2, CP10 and LCR6. As such it would comply with the development plan overall.

> 68. It would deliver a substantial amount of Class C3 housing including 13 affordable units as well as PBSA on previously developed land within the built-up area of Bath without any planning harm. The site is accessible via sustainable transport modes, especially taking into account that the development will provide the remaining links of the STR including through the site itself. For the reasons set out above I consider the development would be well suited to its likely occupiers: students, graduates and young professional single peoples and couples. All these are significant benefits of the scheme. Indeed, increasing development densities on such sites where possible, as it is here, is to be encouraged because this lessens the requirements of greenfield sites to provide for such required development.
>
> 69. I also note that a CIL contribution of about £1.4 million will be payable on the development to fund relevant community infrastructure."

51. The Inspector then considered the S106 agreement that had been submitted at DL 70. He considered the obligations imposed met the requirements of Regulation 122 of the Community Infrastructure Levy Regulations 2010, namely that they were necessary to make the development acceptable in planning terms, directly related to the development and fairly and reasonably related in scale and kind to the development.

52. The Inspector then addressed the conditions agreed between the Council and the Third Defendant at DL72. He concluded that they were needed and met the relevant tests required for planning conditions. They included the conditions dealing with the necessary sound insulation for the development to which he had referred, along with the condition requiring the submission to, and agreement from, the Council of a 'Site Management Plan' to prevent students having cars.

53. At DL73 he set out his conclusion that the appeal should be allowed.

The S106 Agreement

54. The submitted signed Section 106 Agreement which the Inspector addressed was made between the Council and London Road Nottingham Ltd. The latter was identified as the owner of the Appeal Site.

55. Clause 3.1 of the S106 Agreement refers to a "Framework Management Plan". This is defined in the S106 Agreement as meaning: "*the framework management plan (as revised January 2021) attached hereto at Appendix 1 which sets out the principles for the management of vehicles at the Development*."

56. Clause 3.1 also refers to a "Vehicle Management Plan" ("VMP"). This is defined in the S106 Agreement to mean "*a document setting out the Owner's detailed proposals for the management of vehicles in the Development and for vehicles having unrestricted access to and from the Development through the Maltings Industrial Estate such Plan to follow the principles set out in the Framework Management Plan.*"

57. Clause 5 sets out the Owner's covenant to the Council that it will observe and perform the covenants contained in Schedules 1-10 of the S106 Agreement.

58. Schedule 8 contains covenants in respect of the VMP. Paragraph 1 of Schedule 8 requires the Owner not to commence the Development unless and until the VMP has been submitted to and approved in writing by the Council. Paragraph 2 of Schedule 8 requires the VMP to follow the principles set out in the Framework Management Plan. Paragraph 3 of Schedule 8 requires the Development to be to be "*occupied and operated in accordance with the approved Vehicle Management Plan subject to any amendments as may be agreed in writing from time to time by the Council*." Paragraph 4 requires the Owner to provide the Council with such evidence as the Council shall reasonably require in order to demonstrate how the Owner has complied with its obligations in Schedule 8.

59. The "Framework Management Plan" was attached as Appendix 1 to the S106 Agreement and contained, amongst other things, the following provisions:

> "Car Parking
>
> …
>
> 3.5 … 9 spaces will also be located at the southern side of the cycleway running through the site accessed of The Maltings
> …
>
> 3.6 The car parking spaces will be allocated by permit to residential tenants only. The 9 car parking spaces accessed off The Maltings will be the last to be allocated.
>
> …
>
> Servicing Arrangements

> 3.11 The access ramp service from Newbridge Road is suitable for cars or vans only. Larger service vehicles, refuse, and emergency vehicles will access the site from The Maltings Industrial Estate to the south of the site. The access will be secured via a gate, and the plans identify a clear delivery/drop off area and refuse pick up point. The site management office has deliberately been located adjoining this area and residential deliveries will be controlled by the Management Team."

60. The Claimant points out that the Third Defendant had refused to allow the Claimant to be a party to the Section 106 Agreement, and Clause 12 of the S106 Agreement excludes the enforcement of its terms by third parties who are not party to it. The Claimant refers to it not securing an agreed management plan in relation to the Industrial Estate in circumstances where (as the Claimant submits) such agreement between the Claimant and the Third Defendant was considered necessary by the Inspector and, as Mr Jones put it at the hearing, where the Claimant's case was that without an adequate access agreement, there would be harm to the Industrial Estate (as dealt with in the evidence that had been provided by Ms Bending).

61. Mr Jones also drew attention to (amongst other things) the written evidence of Mr Krassowski, the planning consultant for the Third Defendant, who had referred to the need for a practical commercial arrangement to be in place that worked for both the Claimant and the Third Defendant to ensure that access was maintained and security was in place to protect both sites. When drawing attention to these references, he also referred to references in the planning evidence of Ms Bending in which she was putting the need for the Third Defendant to demonstrate that non-industrial uses would not have an adverse impact on the sustainability of the provision of services from industrial premises that remained around the site and the need to protect the Industrial Estate given Policy EDA2 of the Local Plan (of relevance to Grounds 3A and 3B). Mr Jones referred to these as issues which need to be grappled with by the Inspector which could not be ignored, but had to be faced up to by the Inspector in his decision.

62. The Claimant further submits that the S106 Agreement does not even contain a requirement for the Claimant to be consulted, despite what the Inspector had stated, and there was no mechanism to secure agreement between the Claimant and the Third Defendant.

Legal Framework

63. The general principles applicable to a legal challenge of this kind are not in dispute. They were summarised by Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746, at [6] – [7]:

> "6. In my judgment at first instance in *Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local*

Government [2014] EWHC 754 (Admin) (at paragraph 19) I set out the "seven familiar principles" that will guide the court in handling a challenge under section 288. This case, like many others now coming before the Planning Court and this court too, calls for those principles to be stated again – and reinforced. They are:

"(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at p.28).

(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another v Porter (No. 2)* [2004] 1 WLR 1953, at p.1964B-G).

(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in *Newsmith v Secretary of State for Environment, Transport and the Regions* [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the

decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] PTSR 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment (1993)* 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. in *Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government* [2013] 1 P. & C.R. 6, [2012] EWCA Civ 1198, at paragraphs 12 to 14, citing the judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P. & C.R. 137, at p.145)."

7. Both the Supreme Court and the Court of Appeal have, in recent cases, emphasised the limits to the court's role in construing planning policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2017] UKSC 37, at paragraphs 22 to 26, and my judgment in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, at paragraph 41). More broadly, though in the same vein, this court has cautioned against the dangers of excessive legalism infecting the planning system – a warning I think we must now repeat in this appeal (see

my judgment in *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893, at paragraph 50). There is no place in challenges to planning decisions for the kind of hypercritical scrutiny that this court has always rejected – whether of decision letters of the Secretary of State and his inspectors or of planning officers' reports to committee. The conclusions in an inspector's report or decision letter, or in an officer's report, should not be laboriously dissected in an effort to find fault (see my judgment in *Mansell*, at paragraphs 41 and 42, and the judgment of the Chancellor of the High Court, at paragraph 63)."

64. As to the second principle derived from *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 195 Lord Brown stated in that case at [36]:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

65. In addition to these general principles and the Claimant's submissions on *Dyason* and *Croydon* (above), the Claimant submits:

    a. The existence of other potential remedies (whether statutory or in private law) does not render harm immaterial to a planning decision: see eg issues of dust and noise in *Hopkins Developments Ltd v First Secretary of State* [2006] EWHC 2823 (Admin), or odours in *Harrison v Secretary of State for Communities and Local Government* [2009] EWHC 3382 (Admin). Such harms were not rendered immaterial just because action could be taken

against them by the affected neighbours (in private or statutory nuisance) or regulators (under environmental permits). The fact that neighbours can recover damages for nuisance does not render the possibility that a development will cause a nuisance irrelevant to the determination of a planning application for that development.

b. A decision will be liable to be quashed where there is a material mistake of fact, leading to unfairness: see the criteria expressed in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 at [66]: "first, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning".

c. A decision-maker must subject relevant material considerations to proper analysis and consideration: see *R v Secretary of State for the Home Department, ex p Iyadurai* [1998] Imm AR 470 at 475, paragraph 25*;* and *R v Birmingham County Council, ex p Killigrew)* (2000) 3 CCLR 109 at 117G-118.

d. A public body has a basic duty to take reasonable steps to acquaint itself with relevant material and to grapple with it, see *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1065B) ("the *Tameside* duty") and the Supreme Court in *R (CPRE Kent) v Dover District Council* [2018] 1 WLR 108 at paragraph 62.

e. A decision may be irrationally unlawful where there is "an error of reasoning which robs the decision of logic" so that the "decision does not add up": see *Canterbury City Council v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1211 (Admin) at para 86.

f. Where mitigation measures are proposed, it will not be a rational approach for a decision maker simply to assume the efficacy of those mitigation measures in ameliorating harm that is likely to arise, without any sufficient assessment of contingencies and uncertainties: see *Gillespie v First Secretary of State* [2002] EWCA Civ 400; [2003] Env LR 663 at [40]-[41]. Rather, a decision maker must have "sufficient information" in order to make an "informed judgment" before concluding on the efficacy of mitigation measures and the overall likely residual effect of a proposal : see *R (Jones) v Mansfield DC* [2003] EWCA Civ 1408; [2004] Env LR 21 at [38]-[39]; and *R(Swire) v SSHCLG* [2020] EWHC 1298 (Admin) at [62]-[89] and [105]-[107].

66. In addition, in respect of Ground 3A and 3B the Claimant and the First Defendant refer to the provisions of s.171B(3) of the 1990 Act which provides that no enforcement action may be taken for a breach of planning condition after the end of ten years beginning with the date of the breach.

67. In that respect, the First Defendant refers to *R(Ocado Retail Ltd) v Islington LBC*

[2021] PTSR 1833 and submits (by reference to paragraphs 51-60, 130, 132 and 159 of Holgate J's judgment) that: (1) in order to show that activities in breach of a condition are lawful upon the expiration of the time limit in section 171B(3), it is necessary to show that the breach had continued for ten years since it began; (2) the rationale for the time limits is that once they have expired the local planning authority has lost the chance to take enforcement action in respect of that breach; (3) time only runs while the breach of condition is liable to enforcement action and time does not run when the breach has ceased – the test is whether the local planning authority would have been entitled to take enforcement action in respect of the non-compliance during the ten year immunity period; (4) a continuous breach of a condition for a ten-year period renders lawful the failure to comply with that condition to the extent of the breach in question; it does not cause the condition to be expunged altogether; and (5) in enforcement notice appeals and applications for certificates of lawfulness the burden lies on the applicant to demonstrate that a breach of planning control has become lawful applying the civil standard.

68. The First Defendant also made the following additional submissions as to the law:

    a. It is incumbent on parties to a planning appeal to *"*put before an inspector the material on which he relies and to make all the representations he wishes, and the inspector is entitled to reach his decision based on the material before him*"*: *Villages Action Group v Secretary of State for Communities and Local Government* [2015] EWHC 2729, per Lang J at [22], and see also *West v First Secretary of State* [2005] EWHC 729 at [42]-[43].

    b. That principle applies both to representations and evidence and nothing should be held back: see *Villages Action Group* (above) and *JBS Park Homes v Secretary of State for Communities and Local Government* [2018] 6 WLUK 349 at [56].

Ground 1

69. Under Ground 1, the Claimant submits that the Inspector's decision was irrational because the Inspector found: on the one hand that it would be necessary for some changes to the access controls and infrastructure to be put in place for the scheme to be acceptable in planning terms (and the Claimant refers to the fact that new gates and Automatic Number Plate Recognition – 'ANPR' - were discussed at the Inquiry); and yet, on the other hand, the Inspector failed to require such measures to be secured. The Claimant submits that if the Inspector was going to determine the case without any such measures being secured, he needed to weigh the planning harm which would result from the access not operating "efficiently" (as he described it in DL52), which critically he failed to do. The Claimant submits that the reasoning given was inadequate.

70. By way of amplification of this ground, the Claimant argued that reading DL52 in its proper context, the Inspector accepted that *some* further access control or infrastructure would be necessary in order to make the access route work suitably post-development. The Claimant submitted that the Inspector accepted that the Third Defendant must pay for those measures, and that there would need to be an agreement between the Claimant and the Third Defendant (in reliance on DL 52-53). Mr Jones put it in his oral submissions that the Inspector was therefore disagreeing

in that sense with the Third Defendant's case on this issue. The Claimant argues that the Inspector, however, wrongly assumed in DL53 that under the section 106 agreement the Council must consult the Claimant before agreeing the VMP. It is also said that the Inspector wrongly assumed that pursuant to the deed, there "must inevitably be agreement made about any such changes" (see DL53). As Mr Jones put it in his submissions at the hearing, there was nothing inevitable about such agreement.

71. The Claimant submits that:

a. There was no agreement between the Claimant and the Third Defendant which secured *any* improvement to the access control or infrastructure in the way envisaged by the Inspector, whether through the use of ANPR or other means. That was made clear to the Inspector at the inquiry and in the Claimant's Closing Submissions (for example at paragraph 62).

b. The Inspector did not determine in DL52-54 that either of the mechanisms that he discussed (the deed or the s.106 agreement) would deliver the elements which he had concluded to be necessary; and neither of those mechanisms do deliver those elements. Furthermore, the Claimant points out that the s.106 agreement does not require consultation with the Claimant, excludes any reliance by third parties on its terms, and it allows the s.106 and Management Plan to be altered in writing by the Council without any consultation.

c. The assumption that the current Deed meant there "must inevitably be agreement" was plainly mistaken and founded upon a misdirection as to law. The deed does not require any such agreement or alteration as a result of the development scheme in question, and there is no basis for the Inspector's assumption that an agreement would be forthcoming – as evidenced by the absence of any agreement to date.

d. In any event, where – as here – mitigation measures were being considered, it is not a rational approach for a decision maker simply to assume the efficacy of those mitigation measures in ameliorating harm likely to arise without any assessment of the likely effectiveness of those measures (see e.g. *Gillespie v First Secretary of State)*, or indeed whether they can be secured. Rather, the Claimant submits, a decision maker must have "sufficient information" in order to make an "informed judgment" before concluding on the efficacy of mitigation measures and the overall likely residual effect of a proposal: see *R (Jones) v Mansfield DC*; and *R (Swire) v SSHCLG*.

e. Any arrangements to be included in an agreement were clearly material to the Inspector's decision. The Claimant points to the fact that the Inspector insisted on leaving the Inquiry open for two weeks after formal Closing Submissions in order (as the Inspector hoped) to facilitate such agreement: see DL2. The Inspector did so notwithstanding that at the end of the inquiry, it was clear from the evidence before him that no agreement had been reached between the Third Defendant and the Claimant on the matter and that the Claimant had rejected the suggestion of an adjournment before making its closing submissions.

72. The Claimant summarises the position as being one where: (1) the Inspector found improvement measures to be necessary in planning terms (i.e. so that the access could operate "efficiently", as the Inspector put it), and/or assessed the application on that basis; and (2) the Inspector has relied on those measures being delivered; but (3) the Inspector failed to identify where those measures were secured or provided for; and consequently (4) the conclusion that there would be no harm resulting is not a rational one.

73. Put another way, the Claimant submits that in failing to secure the requirements relied on by way of a binding mechanism, the Inspector took into account an immaterial consideration and reached a conclusion that does not "add up", or else the Inspector failed to take into account the harm which would be created with no agreement being in place. If the Inspector was going to determine the case without relying on any such measures being secured, he needed to weigh the planning harm which would result from the access not operating "efficiently", and to explain why such harm was permissible, although the Claimant submits that that any such explanation would certainly have been irrational. The Claimant submits that the Inspector failed to give such an explanation and that is significant because the effect of the scheme on the Industrial Estate was identified by the Inspector as a main issue.

74. It is in this context that, drawing upon the transcript extracts that the Claimant has put in evidence, the Claimant makes a number of criticisms about the way in which the Inspector conducted the inquiry and, specifically the round table session. These criticisms inform both Ground 1, but also the other Grounds. The Claimant submits (amongst other things):

a. At the start of the inquiry the Inspector stated that he was reading into the case late and that he had not read all the documentation, and the Inspector still had not done so by the end of the first week (as addressed in more detail by Ms Bending in her second witness statement).

b. At the inquiry the Inspector expressed a reluctance to deal with the Claimant's issue concerning access. The round table session had been programmed for the first day of the inquiry. Yet on the opening day, the Inspector deferred that session to the second day expressing a hope that the issues would "go away" and be settled between the Claimant and the Third Defendant. This was a sentiment he repeated again on the second day. The Inspector was reminded that he had expressed that sentiment by the Third Defendant's advocate on the seventh day of the inquiry.

c. At the close of the inquiry the Inspector directed that he would give a further two weeks for the parties to seek to resolve the issue relating to the access across the Industrial Estate (and the Claimant refers to the Inspector's DL2 in this respect).

d. Whilst the First Defendant had disputed the Claimant's account of what the Inspector had said at the inquiry, the transcripts of the inquiry from the video recordings subsequently disclosed confirmed the Claimant's account to be an accurate recollection of what the Inspector said.

75. In response to Ground 1, both the First and Third Defendants submit that there was no error in the Inspector's decision. They submit this ground is based upon a false premise, namely that the Inspector found that the measures to which he made

reference were necessary to make the development acceptable in planning terms. They submit that the Inspector made no such finding, but simply recorded an expectation that for the right of access to work efficiently, electronic gates may well be needed, but this was not a finding that such gates and ANPR were necessary for the right of access to be effective, let alone to make the development acceptable in planning terms. In addition, they submit that it was open to the Inspector (and not irrational in any event) to express the view that if electronic gates were needed to operate the access efficiently, there would inevitably need to be agreement between the Claimant and the Third Defendant over such measures including who pays, installs and maintains them in light of the terms of the 1994 deed of grant. On this basis, they submit that the Claimant's further arguments as to the alleged failure on the part of the Inspector fall away. The First Defendant also rejects the criticisms that were made of the Inspector's conduct of the inquiry.

76. I agree with the First and Third Defendants that this ground of challenge is not well-founded essentially for the reasons they articulate and for the reasons summarised below.

77. In the first place, I consider that the ground of challenge is predicated upon a misreading of the Inspector's decision and what he found. This becomes evident when one reads the Inspector's reasoning fairly and as a whole, as the well-established legal principles require.

78. The Claimant focuses on the Inspector's reasoning in paragraph DL52; but this reasoning follows on from his earlier conclusions in DL48-51 which set the context for his conclusions at DL52 and what follows thereafter. In DL48 the Inspector first noted that in respect of traffic generation overall, the Claimant had not in fact disputed the Third Defendant's analysis that traffic levels associated with the proposed development would be likely to be less overall than when the appeal site had been used as a car dealership. This provides some important context to his subsequent analysis.

79. The Inspector then turned to address the concerns that had been expressed by the Claimant about delivery drivers dropping off goods via the Industrial Estate. The Inspector came to the view (as he was lawfully entitled to do on the evidence before him) that the concerns the Claimant had identified were in fact exaggerated for the reasons the Inspector had identified in DL50. In short, the Inspector considered the levels of use of the access road across the Industrial Estate for deliveries would in fact be significantly lower than the Claimant had been contending. The Inspector concluded that the majority of deliveries would take place from Newbridge Road, with only larger deliveries (which would be of a far lesser volume) being likely to occur through the Industrial Estate: see DL50.

80. In respect of such deliveries that would occur across the Industrial Estate, the Inspector did not see any reason why the vehicles would in fact have to park up and wait because he took the view that such vehicles could be let in by the site's management staff immediately, either because of prior arrangement or simply by making a quick telephone call. The Inspector essentially accepted the evidence that the Third Defendant had given at the round table session on that subject, as the Inspector was entitled to do: see DL51.

81. The Inspector took the view (again as I consider he was entitled to do) that there was no reason for individual tenants of the Appeal Site to have control over the access gate between the Industrial Estate and the Appeal Site, except for those whose car had a permit to park in Car Park 2. That was then something to which he returned in DL52. He also saw no reason why deliveries to the Appeal Site would be more likely to block access to any of the industrial units on the Industrial Estate than the car transporters which had previously accessed the garage dealership had done previously, including specifically Units 5 and 6 about which specific concerns had been raised. Again, I consider that was a matter for the Inspector's judgment, based on the evidence. His conclusion cannot be characterised as irrational, or based upon a failure to take into account relevant considerations or taking into account irrelevant ones.

82. Accordingly, by the time the Inspector returned to deal with the question of access for the tenants using Car Park 2, he had already dealt with, but rejected, many of the access concerns raised by the Claimant which he found to be exaggerated or unjustified for the reasons he had given. This is therefore the context in which he then turned to deal with the question of access for users of the 9 car parking spaces in Car Park 2 at DL 52.

83. In that paragraph, he began first by acknowledging that the owners of the 9 vehicles parking in Car Par 2 would need constant 24 hour vehicular access to the site, and so recognising that such vehicles would need to obtain access across the Industrial Estate at night, as well as during the working day (in contrast to the former use). This was therefore acceptance, and so recognition, of a point that had been made by the Claimant that access taken across the Industrial Estate would involve a change, albeit the Inspector did not agree with the full extent of change that the Claimant had been suggesting (for example in relation to deliveries) for the reasons he had already given.

84. It was in this context that the Inspector set out his view that in order for this access for the residents to work "efficiently" he thought that "new electronic gates may well be needed, for instance in order to introduce an … ANPR system". Similarly he set out his understanding that the Third Defendant "will be required to fund or at least part fund and maintain any such new systems, as it mooted in the various versions of the draft Management Plan discussed at the RTS on this issue". It was in that context that he stated that there will "inevitably need to be agreement between the appellant and SL over such measures and who pays installs and maintains them."

85. In my judgment, the Claimant is simply wrong to suggest that the Inspector was identifying that new electronic gates and measures were necessary for the development to proceed. "Necessary" is not the word the Inspector used. Nor, in my judgment, is it the natural meaning of what the Inspector was identifying in the

context that I have summarised above. The Claimant's ground of challenge is therefore based upon a misreading of the Inspector's decision.

86. Simply looking at the words the Inspector used, he was in fact only identifying what "may well be needed" in order for the access for the 9 vehicles to work "efficiently." He was not saying that such gates and arrangements were necessary for the Appeal Site development to proceed. If the Inspector had been of that view, I would have expected him to use language to that effect. I consider the natural and ordinary meaning of his choice of words to be sufficiently clear, where the operative words just mean what they say. The Inspector was only identifying what may well be needed for access to work efficiently for the residents, not what was necessary or required for the access to work at all. This is also consistent with the remainder of the language he used. Thus, for example, he suggest that electronic gates may well be needed "for instance" in order to introduce an ANPR system of the type that had been "mooted" by the Third Defendant in the various versions of the draft Management Plan that had been discussed at the round table session.

87. It follows that I consider the Claimant is misinterpreting the reasoning of the Inspector in claiming that the Inspector found any of these contemplated systems to be necessary for the development to be acceptable.

88. My conclusion is reinforced by what then follows in the Inspector's reasoning. In the remainder of DL52 the Inspector was pointing out that for "any such new systems", the Third Defendant would be required to fund or at least part fund and maintain them, as the Third Defendant had contemplated in the various versions of the draft Management Plan that had been discussed at the round table session. Again, it was only in this context that the Inspector identified that there "will inevitably need to be agreement between the appellant and SL over such measures and who pays, installs and maintains them." The Claimant seeks to suggest that this is recognition on the part of the Inspector that such systems would be required and need agreement to be reached; however, I consider that ignores the proper context of those observations. The Inspector was simply identifying the inevitable need for agreement if such measures were introduced, not that such measures would have to be introduced.

89. Under the 1994 deed of grant the basic position is that the Claimant is obliged to provide a right of access to the Third Defendant for the residents of Car Park 2. It is not entitled to refuse such access, or to inhibit it. In practice, there is bound to be a mutuality of interest in the Claimant and Third Defendant agreeing specific access arrangements to give effect to that right in a way which gives the Claimant the ability to continue to control security for its own site, whilst permitting the Third Defendant (and in this instance residents of Car Park 2) to pass or repass over that land. To date that mutuality of interest has been reflected in the gated access arrangements that are in place with the provision of a key. That reflects a pragmatic solution. With the proposed development, there will continue to be a mutuality of interest in both parties reaching agreement on the practical arrangements to ensure efficient arrangements are in place. An electronic gated system with ANPR has obvious merit as a potential pragmatic and up-to-date solution, as the Claimant appeared to recognise during the course of the hearing.

90. On a fair reading of the Inspector's decision, I consider that is all the Inspector was

articulating in substance. I also consider it reasonable and lawful in principle for him to reflect an expectation that such pragmatic agreement would be reached. In doing so, I do not consider that the Inspector was finding that the measures themselves that had been discussed were necessary, or that he was assuming that pragmatic agreement would inevitably be reached (as distinct from correctly recognising that if the measures contemplated were put in place that would inevitably require agreement).

91. It is inherent in the Inspector's reasoning, and correct as a matter of principle, that if such practical agreement were not to be reached, the basic duty would remain on the Claimant to provide unimpeded access across its site to allow the residents to reach Car Park 2. That reflects the rights the Third Party enjoys under the 1994 deed of access. Accordingly, I do not consider that the Inspector has erred in law in identifying (as he did) that arrangements of the type that had been discussed may well be needed to make the arrangements work efficiently, and to recognise that such arrangements would inevitably be predicated on an agreement.

92. Moreover, the Inspector's observations were unsurprising in light of the materials before him, including the terms of the 1994 deed of grant and the conclusions he had already lawfully reached about the exaggerated concerns of the Claimant.

93. The natural meaning of the Inspector's reasoning described above is further reinforced by what then follows in DL53. The Inspector identifies that a need for agreement for "any such new systems" is "nothing new" given that the Claimant and Third Defendant, as joint users of the Industrial Estate, would inevitably have to reach agreement about changes to the access arrangements given the deed of grant. Again, this generally reflects and is consistent with the other parts of the deed of grant. Thus, for example, whilst the Claimant is required to provide access to the Third Defendant, the Third Defendant is required to pay the identified share of the costs and expenses incurred by the Claimant in maintaining and keeping in full and substantial repair and condition the boundary structure diving the two properties, but limited to paying one half of the cost of a boundary structure of no greater height and specification than the fence that divided the property at the date of the Deed.

94. Moreover, in the same paragraph, the Inspector also went on to note that the Section 106 agreement imposed obligations on the Third Defendant to produce a VMP. This would cover, amongst other things vehicles accessing the Appeal Site through the Industrial Estate. The Inspector correctly identified that this obligation to agree a VMP was one with the Council (rather than the Claimant). However, the Inspector was entitled to express an expectation that the Council would consult the Claimant before agreeing the VMP. The Inspector did not say, and was not suggesting, that the Council was required to consult the Claimant. That does not reflect the words he used. To the contrary, he was only expressing what I consider to be a reasonable and lawful expectation that such consultation would occur. That was reasonable and lawful because the Council, in its capacity as a local authority, might well be anticipated to be interested in the Claimant's views on any draft VMP before reaching a view on its acceptability to the Council. Such views might prove helpful for the Council in deciding whether or not to agree the VMP. But expressing such an expectation does not disclose any misunderstanding by the Inspector that such consultation was somehow required, nor does it mean that the Inspector was somehow bound to seek to secure such consultation.

95. The Inspector was entitled to articulate an expectation rather than seeking to impose it as a requirement, given that it would be open to the local authority to consult in that way at its own discretion in dealing with the discharge of the obligation imposed on the Third Defendant by the local authority through the section 106 agreement.

96. The Inspector also went on to note the requirements of any VMP in DL54. This included the fact that the 9 parking spaces in Car Park 2 would be the last to be allocated to residential tenants, with the tenants being required to display authorised parking permits. All of these measures of the VMP would no doubt assist in the efficient provision of access arrangements, secured by the requirement for the VMP to be agreed by the Council. This ought to add a further layer of reassurance to the Claimant, because the Council as a local planning authority has retained control over the final form the VMP by virtue of this obligation. The Inspector was entitled to proceed on the basis that the Council would exercise that control responsibly and consistently with its local planning authority functions. It would be reasonable to expect that in so doing, the Council will take account of the effect of the VMP proposed on the continued use of the Industrial Estate. None of this supports an argument that the Inspector acted irrationally, or otherwise erred in law, in his conclusions and reasoning. Nor does it support the Claimant's erroneous reading of the Inspector's decision to the effect that he was concluding that it was necessary to secure any particular access arrangements between the Claimant and the Third Defendant in order to grant planning permission for the development to proceed. He did not reach any such conclusion.

97. The Inspector then also turned at DL55 to deal with the issue of the potential for construction traffic crossing the Industrial Estate to create interference with the operation of the Industrial Estate through the temporary blocking of access to some individual units. In that respect, the Inspector noted that the deed of grant specifically contemplated that construction traffic would cross the Industrial Estate (hence the requirement for wheel-washing facilities on the Appeal Site). The Inspector was entitled to draw attention to this in his reasoning. It reflects the reality of the deed of grant and the rights it creates. He went on to express the view that it was also in the interests of the Third Defendant to minimise any such interference as well as to minimise the construction period, which is by definition temporary. Again, I cannot discern any legal error of approach in such reasoning. In effect, the Inspector was explaining why he did not consider construction traffic to be a problem given a variety of factors: (1) both parties to the deed of grant, when granting the right of access, had contemplated construction traffic would cross the Industrial Estate; (2) he considered it would be in the interests of the Third Defendant to minimise any such disruption – there is no obvious reason why the Third Defendant would want to delay its own traffic accessing the Appeal Site, let alone to do so in a way which would potentially conflict with the obligations under the deed of grant and the Inspector was entitled to reach such a judgment in his role as a decision maker; and (3) construction would, by definition, be temporary.

98. The Inspector then turned to deal expressly with the Claimant's reliance upon the 'agent of change' principle reflected in the NPPF at paragraph 182. I will consider further below under Ground 2. At DL58 the Inspector then set out his overall judgment that the development would be unlikely to lead to a significant intensification of the use of the vehicular access over the Industrial Estate. In my

judgment, this was a conclusion that was lawfully open to the Inspector on all of the evidence before him. His reasoning for reaching that conclusion is clear from a fair reading of the DL as a whole.

99. I therefore reject the Claimant's further arguments that seek to amplify Ground 1 as described above. The Inspector did not find the improvement measures to which the Claimant refers to be necessary in planning terms for permission to be granted. So he did not assess the application on that basis. He was not relying upon those measures being delivered, or their efficacy, in deciding to grant planning permission, but he was entitled to express expectations as to what might occur. His conclusions do "add up" for the reasons I have summarised.

100. As to the Claimant's reliance upon the way the Inspector conducted the inquiry, including those points made based on the transcript extracts and Ms Bending's second witness statement summarised above, I do not consider there is any real merit in any of the criticisms. They do not assist the Claimant's case on ground 1. In particular:

a. Although it was unfortunate the Inspector had been preparing for the inquiry "quite late" (as he described it to the parties on the opening day), the reason that he gave of a bereavement in the family explained why that was so. Indeed, by being so candid with the parties at the outset about that should have assisted by giving parties insight as to the state of his knowledge. Accordingly when, for example, the Inspector explained on the first day that he had not read the statement of common ground, or on the fourth day he welcomed an early adjournment because he had still not read parts of Mr Krassowski's proof of evidence, such transparency seems commendable and helpful in the circumstances. Unfortunate events may have limited his ability to prepare for the inquiry in advance, but telling the parties of this would help inform on how to present their cases at the inquiry itself and in not assuming that the Inspector had read everything.

b. I do not see any basis for criticism of the Inspector in referring to the potential for the Claimant's objection to "go away", or for deferring consideration of the Claimant's objection to the second day, or for subsequently allowing more time at the conclusion of the inquiry for the parties to try and resolve the Claimant's main issue of concern. Having read the relevant extracts of the transcripts where this sentiment was expressed, along with the DL itself, it is clear that the Inspector was doing no more than reflecting a prospect that had been held out of the Claimant's principal objection being resolved by agreement. In any event, I cannot see any reason why it is an objectionable for an Inspector to welcome the prospect of resolution of points of disagreement in this way.

c. What ultimately matters, both in terms of any impediment to preparation he experienced or in dealing with an issue that did not "go away", is whether the Inspector did deal with the contentious issues properly and lawfully in reaching his decision. For the reasons I have already summarised, I am satisfied that the Inspector did. As the Inspector recorded at DL2, no agreement was reached between the Claimant and the Third Defendant following the close of the inquiry. The Inspector therefore identified the need

> to decide the issue raised by the Claimant based on the evidence at the inquiry and the closing submissions. That is what he did. The relevant parts of the evidence that I have been shown as to what was presented both in writing and orally at the round table session, taken with the DL, demonstrate that the Inspector did conscientiously get to grips with the Claimant's evidence and the case it was presenting. A fair reading of the Inspector's reasoning (as summarised above) shows the Inspector tackling the substance of the concerns. In the end, the Inspector did not agree with the Claimant's position that its concerns relating to Ground 1 were a basis for refusing planning permission. He explained why. That reasoning does not reveal any failure to understand the evidence or case that had been presented at the inquiry, nor any failure to fulfil any inquisitorial burden, nor of failing to resolve conflicts of evidence, nor making an adverse finding against the Claimant without the points having been put to the Claimant or its witnesses.

101. For these reasons, I reject the Claimant's first ground of challenge to the Inspector's decision.

Ground 2

102. Under Ground 2 the Claimant argues that the Inspector: (1) misread the deed of grant and misdirected himself on the lawful position concerning the right of access, so as to lead him to discount potential planning harm; and (2) the Inspector unlawfully relied on this private law instrument as a reason to discount/neutralise/assume the acceptability of the planning harm.

103. By way of amplification of these criticisms, the Claimant relies in particular on DL55. The Claimant argues that this paragraph contains an assumption by the Inspector that because the deed envisaged the potential for construction traffic, any interference with the Industrial Estate arising from construction traffic was necessarily acceptable such there could be no harm from construction traffic, or else the harm that would arise (which the Claimant submits the Inspector accepted was likely) did not fall to be considered in the planning balance.

104. The Claimant submits that whilst the deed of grant refers to the possibility of construction traffic in principle, it does not accept, acknowledge or acquiesce to interference which might result from construction traffic, still less authorise it. At the hearing, Mr Jones also referred me to what Ms Bending had stated in paragraph 4.31 of her proof of evidence as to a lack of assessment of the intensification of the use of the access during the construction period. The Claimant argues that as a result of a misreading of the effect of the deed of grant, the Inspector has dismissed planning harm which was otherwise relevant, in circumstances where he accepted as a matter of fact that construction traffic from the proposed development had the potential to create interference.

105. Without prejudice to that submission, the Claimant submits that the Inspector's approach was legally flawed because he regarded any planning harm to be

acceptable because he thought that the deed of grant permitted it and provided potential remedies, whereas the fact that something may be permitted under private law does not impact upon its acceptability or otherwise in planning terms. The Claimant in this respect also relied on *RMC Management Services Ltd v SSE* (1972) 222 EG 1593.

106. The Claimant argued that, if anything, a private law right is a greater reason for harm to be addressed through the planning process. The Claimant submits that insofar as the Inspector also relied upon any potential private law remedy under the deed of grant, he also erred in law because the existence of other potential remedies does not render the harm immaterial to a planning decision and the planning system should be avoiding building in such future legal conflicts. It was submitted that the reason why planning law does not simply bow to private law remedies is sound and, despite not being addressed by the First Defendant and Third Defendant to date, remains good law. The existence of any civil law right – for example a potential cause of action in nuisance – does not mean that less weight is given in a decision maker's planning judgement to potential disturbance caused to amenity by a proposed development e.g. by way of noise, smell etc. because the victim of it might have sufficient funds be able to litigate in the courts. Equally, disturbances caused by the use of a right of way are not given less weight because the Claimant might be able to pursue e.g. civil injunction proceedings. This is quite apart from the difficulties (e.g. delay, different legal thresholds, discretionary judgements) and costs in pursuing such actions in private law. The Claimant submits that these points were made to the Inspector in the Claimant's closing submissions. The Claimant argues that there has accordingly been a failure to have regard to the material consideration of the harm likely to be caused to the Industrial Estate by construction traffic, on the basis of the Inspector's erroneous approach to the deed and failure to give proper reasons. At the hearing, Mr Jones also submitted that it was no answer for the Defendants rely on the proposed vehicle management plan as a mitigation measure.

107. The First Defendant and Third Defendant submit that the ground of challenge is flawed because the Inspector did not make the assumption that is attributed to him by the Claimant. They submit that, to the contrary, in DL55 the Inspector reasoned as follows:

    a. The Inspector recognised that construction traffic associated with the Appeal Site had the "potential" to cause "temporary blocking of access vehicles to some individual units" on the Industrial Estate. This was a judgment open to the Inspector, not least because the issue of construction traffic was only mentioned in passing in the Claimant's evidence and closing submissions. The Inspector did <u>not</u> find that the temporary interference, even if it did occur, would cause material harm to the operation of the Industrial Estate, still less that it would "seriously harm the industrial estate's operations" which was the issue with which he was concerned.

    b. The Inspector made reference to the fact that the potential for such interference was acknowledged in the 1994 deed of grant as it allowed for such construction traffic access. It was plainly open to the Inspector to treat as relevant considerations the facts that: (i) the deed of grant permitted the use of the right of access for construction traffic in connection with the

redevelopment of the appeal site, which it does and the Claimant does not deny; and (ii) it must therefore have been implicitly acknowledged that the use of the right of access for construction traffic had the potential to cause interference.

c. The Inspector treated these matters as relevant considerations, but he did not, as the Claimant alleges, conclude that it followed from the 1994 deed of grant that any interference with the operation of the Industrial Estate from construction traffic was necessarily acceptable in planning terms, or that any harm from construction traffic should be "discounted" or "neutralised"; such a conclusion is not expressed in the decision letter nor can be inferred from it.

d. The Inspector highlighted that "it is in the interest of the appellant to minimise any such interference as well as to minimise the construction period, which is by definition temporary." These further considerations demonstrate that the Claimant is wrong in its contention that the Inspector assumed that, in light of the 1994 deed of grant, any interference from construction traffic was necessarily acceptable. Had the Inspector adopted such an approach (which he did not) these further considerations would have been irrelevant to his assessment.

108. They submit that when the DL is read as a whole, and particularly when DL55 is read with DL58, it is clear that the Inspector came to the legitimate judgment that the potential impact from the construction traffic would not "lead to a significant intensification of the use of the vehicle access route through The Maltings….that would seriously harm the industrial estate's operations" (see DL58). They submit that this was an unimpeachable exercise of planning judgement, which is not vitiated by any error of law.

109. Further, the First Defendant submits that if the Inspector arguably erred as the Claimant alleged, given that (a) the issue of the impact of construction traffic was, at its highest, peripheral to the Claimant's case; and (b) the Inspector imposed a condition requiring an agreed Construction Management Plan to regulate *(amongst other things)* deliveries, contractor parking and traffic management during construction, it is inevitable that the decision would have been the same in any event. Accordingly, the decision should not be quashed (*Simplex G.E. (Holdings) and Another v Secretary of State for the Environment (1989) 57 P. & C.R. 306., 325-329*).

110. Save in respect of this last submission as to the application of *Simplex,* I agree with the submissions made by the First and Third Defendant. In my judgment, the straightforward and conclusive answer to the Claimant's challenge is that the Inspector did not make the assumption alleged. Again, I consider that the Claimant's interpretation of the Inspector's reasoning is incorrect and artificial. It suffers from the vice of failing to read the decision as a whole and failing to acknowledge that the decision letter was addressed to the parties in light of the evidence that had been presented.

111. Having dealt with, and concluded that, traffic arising from the operation of the proposed scheme using the right of access was acceptable, the Inspector then turned to deal with the issue of construction traffic in DL55. In the first sentence of that

paragraph he explained that he appreciated that construction traffic to the site had the "potential" to create interference with the operation of the Industrial Estate, not that it would. This was a fair and pragmatic appreciation by the Inspector that construction traffic accessing the Appeal Site across the Industrial Estate could potentially interfere with the use of the Industrial Estate if those construction vehicles using the Industrial Estate were to block access to any of the individual units on the Industrial Estate. That pragmatic appreciation of what could potentially happen was not a finding that it would happen, nor is there any obvious evidential basis for suggesting it would necessarily happen. The Inspector then went on to refer to three considerations, each of which he was entitled to treat as material.

112. The first was that the "potential" for interference was implicitly acknowledged in the existing deed of grant which allowed for such construction access. The Claimant treats this as an assumption by the Inspector that because the deed of grant referred to a right of access for construction traffic, such interference from construction traffic was necessarily acceptable, or the harm arising from such interference was inappropriately deemed to be acceptable. I do not regard that as a fair or correct interpretation of what the Inspector said. The Inspector has merely taken account of the fact that the right of access granted by the deed of grant does specifically contemplate and provide for that access to be used by construction traffic, notwithstanding that such construction traffic might have the "potential" to cause the interference to which he had referred in the first sentence of DL55. The Inspector was not concluding that construction traffic would cause that interference, still less concluding that the deed of grant permitted such interference (if it were to occur), or that the deed of grant overrode any planning objection to the proposal. Rather, the Inspector was only pointing out what is clearly correct on the face of the deed, namely that the right of access that had been granted permitted construction traffic to use it in contemplation of the redevelopment of the Appeal Site, even though construction traffic might have the <u>potential</u> to cause interference.

113. The Inspector was entitled to take account of that as a consideration in his reasoning. It was not a conclusion or assumption by the Inspector that if the construction traffic were in fact to cause interference (ie that potential were to be realised), such interference was permitted by the deed of grant, or should otherwise assumed to be acceptable. Again, that is not what the Inspector said, nor a fair reading of his reasoning. The Inspector's observation here is merely one of the factors that he took into account. The deed of grant might have precluded the use of the Industrial Estate for construction access altogether given the "potential" for interference, but it did not do so. But this was obviously not the end point of his analysis. He then turned to consider that "potential" and the nature of any interference were it to occur. The Claimant's mistaken analysis that the Inspector treated the right of access for construction traffic as determinative is irreconcilable with this continuation of the reasoning.

114. In that respect, the Inspector next referred to the fact that was it was also in the interests of the Third Defendant to minimise any such interference as well as the construction period. In my judgment, such a conclusion was open to the Inspector on the facts presented to him. The Inspector was self-evidently of the view that the Third Defendant would have no particular interest or reason to block access to the individual units on the Industrial Estate when accessing the Appeal Site for

construction of the Appeal Scheme and no reason to prolong the potential for interference to arise. The deed of grant gives a right of access for construction traffic (and making specific provision to minimise the effects of that access, such as in the requirement to provide wheel-washing facilities to prevent construction traffic leaving mud across the Industrial Estate), but it would not permit such traffic to block access to the individual units. It is a right to go, pass and repass, not to remain and parking on the Industrial Estate is specifically prohibited. It would therefore be in the Third Defendant's interests to minimise any interference with the Industrial Estate from its construction traffic in light of complying with the right of access that had been granted. The view that the developer would have an interest in minimising the construction period was an opinion the Inspector was obviously entitled to hold and rational given the obvious commercial interests that it reflects.

115. At the hearing before me, the Claimant criticised the notion of any mutuality of interest, on the basis that the interests of the operator of the Industrial Estate and the interests of a developer constructing development on the Appeal Site might not always align. An example might be if the developer were seeking to accelerate development, so maximising the number of construction vehicles accessing the Appeal Site at any one time, or by contrast, in circumstances where it was in the interests of the developer to have a prolonged construction programme.

116. In my judgment, such sort of criticisms of the Inspector's view are unwarranted and just reflect a disagreement with the Inspector's legitimate judgment. First, it is not at all clear that these sorts of point were in fact made to the Inspector. Second, even if they had been, the Inspector was not required as a matter of law to deal with each and every point of objection in his decision. Third and in any event, I consider it was lawful in this context for the Inspector to reach an overall judgment as to the prevailing mutuality of interest that one would ordinarily expect to exist (as he did), without having to cater forensically for every possible (but less likely) scenario, for which obvious counterpoints would arise anyway – if the developer accelerates the construction programme, the duration of the period when there is "potential" for interference will shorten; if the construction period is elongated, then the potential for actual interference to occur from construction vehicles of less regularity is more likely to be reduced.

117. In addition, the Claimant's forensic criticisms also ignore the other obvious context for the Inspector's decision. As might be expected for development of this kind, the Inspector imposed a condition requiring a Construction Management Plan ("CMP") to be put in place with the agreement of the Council. Such a CMP would have the ability to regulate construction traffic in any event. This sort of CMP would therefore enable the Council to address to a significant degree the sorts of detailed issues of concern now being expressed, by regulating the construction traffic across the Industrial Estate in a reasonable manner. The Claimant does not explain why it would not be capable of doing so.

118. Finally in DL55 the Inspector also took into account the fact that any "potential interference" from construction traffic would by definition be temporary. Again, in my judgment there is no realistic basis for seeking to criticise the lawfulness of taking this into account. Construction activity is inherently temporary in nature. The Inspector was entitled to weigh this in the balance in considering the overall effect of any potential for interference with the activities of the Industrial Estate.

119. As I have already noted, the Inspector then turned to acknowledge the agent of change principle in DL 56 and sought to deal with the question of the lawful activities on the Industrial Estate in DL57. I will return to this when addressing Ground 3. But again it is also important to recognise the Inspector's overall conclusion expressed in DL58. In that paragraph he identified that for all the reasons he had given (ie in the preceding paragraphs) he concluded that the proposed development would be unlikely to lead to a significant intensification of the use of the vehicular access through the Industrial Estate, or any other significant effect resulting from it as an "agent of change" that would seriously harm the industrial estate's operations. This was a conclusion that also covered his analysis of the construction traffic effects. That was a judgment which was lawfully open to the Inspector on all of the evidence.

120. I do not consider there has been any misreading of the deed of grant by the Inspector in relation to construction traffic activity when reaching that overall judgment, when his reasons are read fairly and as a whole. I reject the basic premise of Ground 2 that the Inspector somehow did misread it, or that he made some sort of erroneous assumption as to its effect, or that he concluded that there was any material harm arising from the use of the right of access by construction traffic, or that he then discounted such harm because of an erroneous assumption that it was bound to be acceptable because of the deed of grant.

121. For the reasons already given under Ground 1, I similarly do not consider there is any substance to the Claimant's criticisms of the way the Inspector dealt with the inquiry, or in the way the Inspector dealt with the prospect of potential agreement of the Claimant's concern (which agreement did not ultimately materialise), so far as relevant to Ground 2.

122. I therefore also reject the challenge under Ground 2.

Ground 3(a)

123. Under Ground 3(a), the Claimant alleges that the Inspector erred in relying on a planning condition restricting the industrial operations of the Industrial Estate by failing to take into account, or grapple with, the evidence that the units had been used for *sui generis* purposes for more than 10 years with no enforcement action having been taken (with an acceptance by the Third Defendant that "some" had been so used in that way), such that the condition in question was no longer enforceable. Alternatively it is said that the Inspector's reasons were inadequate on this issue bearing mind the discussion that had taken place during the inquiry.

124. This ground of challenge concerns the planning permission that was granted on 5 July 1983 in respect of the Industrial Estate ("the 1983 Permission") itself. It granted permission for the "Erection of 15 light industrial units and provision of car parking after demolition of existing building". A number of conditions were attached to the 1983 Permission, including Conditions 5 and 6 which provided:

> "5. No work of any kind being undertaken or deliveries taking place at any time

> on Christmas Day, Good Friday and Bank Holidays, Sundays or outside the hours of 8.00am to 6.00pm on Mondays to Fridays and 8.00am to 1.00pm on Saturdays.
>
> 6. no processes being carried on or machinery installed which are not such as could be carried on or installed in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit"

125. There was a Statement of Common Ground ("SoCG") provided to the Inspector dated February 2021 that was signed by the Claimant and the Second and Third Defendant. It identifies the 1983 Permission in relation to the Industrial Estate in a way which clearly indicates that the signatories considered it to be relevant to the appeal. Paragraph 2.4 of that SoCG referred to Condition 5 of the 1983 Permission, but identified that a subsequent appeal that had been allowed in 1984 which had amended the 1983 Permission to as to remove Condition 5. This was said to be the result of access having been provided to the Industrial Estate. The SoCG set out the common position that Condition 5 no longer applied.

126. The SoCG refers to there being limited planning history in relation to the units that were subsequently constructed on or around 1984. It identifies that planning permission was granted in 1991 for the change of use of Unit 1 from a warehouse to a car rental facility and in 2005 for the change of use of Unit 15 from light industrial to a storage and distribution use with ancillary trade counter. It identified that all 15 units were occupied and set out a table identifying tenants and floor areas. There is no suggestion in the record of the matters agreed, or later on in relation to matters in dispute, that Condition 6 of the 1983 permission was no longer applicable because of a continuous ten year breach, or a suggestion that the lawful use of the Industrial Estate was *sui generis*.

127. In my judgment, a natural reading of the SoCG suggests that the parties were accepting that the remainder of the 1983 Permission was applicable, or at least certainly not expressly raising any issue with the applicability of other conditions that may have been attached to the 1983 Permission such as Condition 6.

128. As I will return to shortly, I have some conceptual difficulty with the Claimant's repeated reference in its written and oral submissions to the lawful use of the Industrial Estate as being *sui generis*. On its own, this expression does not in fact mean very much. The Latin term *sui generis*, meaning of its own kind, is generally used to as a way of identifying a use that falls outside one of the specified use classes set out in the Town and Country Planning (Use Classes Order) 1987 (as amended) ("the UCO"). Indeed the UCO itself specified uses for which no use class existed, such as a use of land for the sale or display of motor vehicles (which might otherwise have been treated as a type of retail use). Using the term on its own, but without providing any description of the use itself, provides little assistance or clarity as to what is meant. Thus, to assert that the use of the Industrial Estate is *sui generis* does not provide much clarity as to what that *sui generis* use is, other than telling one that it is not a use that falls within a use class within the UCO.

129. The position can lack even greater clarity when it is applied to a site where there are number of different units on it. A site of that nature could potentially have a single

overall primary use as defined in a planning permission (for example, light industrial as previously categorised under the UCO), but with the potential for some ancillary uses to occur that would not necessarily affect or change the primary permitted use of the site. Alternatively such a site might be in mixed use, where each of the units has its own primary use and the mixed use of the site comprises that mix of uses, where changes in that mix could potentially itself involve a material change in the mixed use. Simply claiming that a site of this sort is in *sui generis* use would not tell one very much as to what use is in fact being claimed to be the lawful use of the site.

130. Returning to the Claimant's ground of challenge, the Claimant places particular reliance upon the principles it derives from *Dyason* and *Croydon* (summarised above). The Claimant submits that the Inspector clearly failed to discharge his obligations in this respect. Reference is made to what the Claimant suggests is an increased emphasis in recent years of determining planning appeals via hearings rather than inquiries, and during inquiries, a drive towards dealing with matters via round table session rather than formal testing evidence through cross-examination. The Claimant says this forms a relevant backdrop as to why the requirements articulated in *Dyason* are of particular importance in this case, ensuring that the quality of fairness and rigour is not diminished (with the Claimant also making reference to recommendation 9 of the Rosewell Review in this regard).

131. In light of these submissions, the Claimant criticises the Inspector's reliance on condition 6 of the 1983 Permission in the DL. It is said that in relying on that condition as restricting operations of the tenants of the Industrial Estate, the Inspector ignored evidence that the units on the Industrial Estate had been used in breach of that condition continuously for more than 10 years, so that the condition could no longer be enforced, such that the lawful use of the Industrial Estate was "sui generis" and the Inspector failed to grapple with the "agent of change" issue properly.

132. It was in this context that particular reliance was placed on the evidence of Ms Bending as to how the issue of the use of the Industrial Estate became relevant and what happened at the round table session. She considers that the relevance of condition 6 only became apparent on reading a rebuttal proof of evidence on behalf of the Third Defendant submitted a matter of days before the inquiry began. She says that it was only at this late stage that the Third Defendant sought to rely upon condition 6 of the planning permission in order to "downplay" the agent of change issue that the Claimant had raised. The Claimant seeks to rely on the fact that condition 6 had not formed any part of the SocG setting out matters agreed and matters in issue and it had formed no part of the Third Defendant's previous case to the inquiry.

133. In my judgment, this rather inverts what one might otherwise expect from the Claimant as a Rule 6 party, and its role as a signatory to the SoCG itself.

134. In circumstances where the Claimant was pursuing an objection to the proposed development because of potential prejudice to the Industrial Estate, one would have expected it to have raised any question over the continued validity of Condition 6 affecting the Industrial Estate (which it owned) in the SoCG. This could have been either in terms of a matter for agreement or a matter for dispute. It was the Claimant

who was raising an objection to the development based on the 'agent of change' principle and what it considered to be the lawful use of the Industrial Estate. The SoCG identified the 1983 Permission in the way I have identified above. It dealt with things like the removal of Condition 5, from which one would reasonably infer the other conditions continued to apply. The SoCG was (unsurprisingly) seeking to cover relevant planning history. One would therefore expect any contention by the Claimant that Condition 6 was no longer enforceable in consequence of a continuous breach for more than 10 years to have been clearly referenced as part of that planning history (whether as a matter agreed or as a matter in dispute).

135. In that respect, given the point that I have already raised as to the potential ambiguity of claiming that a site is in *sui generis* use without specifying what that means, one would also expect some sort of identification of what the parties considered to be the lawful use of the Industrial Estate (or units within it) if it differed from what was set out in the 1983 Permission. Such an issue would have been relevant to the Claimant if it was in fact seeking to show how the proposed adjoining residential use might give rise to conflict under the agent of change principle. The absence of any contentions about the validity of Condition 6 in the SoCG contrast with the way Condition 5 was treated.

136. By the same token, even if there were some good reason for not dealing with this issue in the SoCG, I would have expected it to feature clearly in the Claimant's own evidence in advance of the inquiry starting. The Claimant submits that it came about because of the Third Defendant's reliance upon Condition 6 in its rebuttal evidence. I find that difficult to understand. It does not explain why the issue was not raised proactively in the Claimant's own evidence in the first place, given its relevance to the Claimant's objection.

137. Be that as it may, the Claimant identified to the Inspector at the opening of the inquiry that it would respond to what it described as a new point raised by the rebuttal evidence of the Third Defendant's witness during the inquiry sessions through evidence and submissions. It says that the Inspector acknowledged and accepted this approach. I will return to what happened at the inquiry below.

138. In that context, the Claimant submits that the criticisms now made of the Claimant by the Defendants for dealing with the issue in this manner are disingenuous and contrary to the Inspector's own statements during the inquiry itself and the Claimant seeks to rely upon the transcripts of the inquiry session. Turning then to the substance of the criticisms, the Claimant submits that the Inspector wrongly dismissed the Claimant's concerns about the compatibility of adjacent uses (ie industrial uses next to residential uses) in reliance on Condition 6 on the 1983 permission for the Industrial Estate, and its purported limits to use of the Industrial Estate for uses falling within Use Class B1(c) (light industrial acceptable in a residential area without detriment to amenity). The Claimant criticises the Inspector's conclusion on the basis that it ignored what the Claimant says was evidence on both sides (from the Claimant and Third Defendant) that the units had been in "*sui generis* use" for more than 10 years, such that the condition would no longer be capable of enforcement and therefore no longer applied. The Claimant submits that its case at the inquiry was that all of the units were now "*sui generis"*, whilst the Third Defendant accepted that some of them were and the Third Defendant's planning witness nowhere took issue that the others had not been so

used. The Claimant also seeks to rely on the fact that the Council, with statutory responsibility for taking enforcement action for breaches was present at the round table session and did not challenge the Claimant's evidence. The Claimant submits that the Inspector did not challenge the Claimant on this point, nor did he query it with the Council and he was therefore wrong to dismiss the agent of change point on the basis he did.

139. The Claimant also submits that to the extent there was a real dispute as to unenforceability of Condition 6 (which it says there was not), the Inspector failed to acknowledge that dispute in his decision, still less give any reasoning as to how he determined that dispute or what evidence he had relied upon. It argues that it was left out of account and the Inspector made no findings at all in this respect. It submits that there was no rational factual finding which the Inspector identified to gainsay Ms Bending's evidence on the topic and the Inspector did not put the point, which he used in his DL, to the Claimant in the evidence session, contrary to the legitimate expectation for informal hearing sessions.

140. In short, the Claimant submits that either it was common ground that (at least) some of the units were *sui generis,* in which case the Inspector needed to explain why he was departing from the evidence and then give the parties an opportunity to comment upon it; or there was a dispute in which case, the Inspector needed to grapple with it before simply relying on the condition to dismiss the Claimant's objection. The Claimant submits that it appears the Inspector simply forgot the evidence before him.

141. During the course of the hearing, in addition to considering the witness statement from the Inspector and those from Mrs Bending, I was taken through: (1) the various references in the written evidence that had been presented to the Inspector; and (2) the relevant transcript extracts of the discussion that was had about this topic during the round table session. I therefore now have a good understanding of how the issue was dealt with at the inquiry. I was also taken to relevant parts of the Closing Submissions from both the Claimant and the Third Defendant. Mr Jones also provided to the Court a copy of his opening submissions and referred me to paragraphs 28 and 29 in which the issue of the potential for a significant adverse impact to occur in relation to noise was raised. Mr Jones also referred me to *Cemex (UK) Operations Ltd v Richmondshire District Council* [2018] EWHC 3526 (Admin) and took me to the noise report which was in evidence. I have considered all of this evidence and the submissions in the round.

142. The First and Third Defendant submit that there was no error in the Inspector's approach. They submit that, once again, the ground of challenge is based on a false premise, namely that there was evidence on both sides that the units had been in *sui generis* use for more than 10 years, such that the condition would no longer be capable of enforcement and would therefore no longer apply. They submit that there was no such agreed position and the evidence demonstrates that: (1) the Claimant did not advance a case before the Inspector, or not in any particularised or clearly articulated matter, that condition 6 was unenforceable; (2) even if that case had been advanced there was no evidence tendered to support such a proposition.

143. The First Defendant relies upon a witness statement submitted from the Inspector who states that the contention that condition 6 was unenforceable "was not clearly

articulated at any stage during the inquiry" and submits this is true of the Claimant's written evidence, its oral evidence and its closing submissions.

144. As to the Claimant's written evidence, the First Defendant refers to the Claimant's statement of case and proofs of evidence and submits that the Claimant did not advance a case that condition 6 was unenforceable. Mr Williams submitted that Ms Bending in fact drew attention to the 1983 Planning Permission and noted that the Industrial Estate had been constructed in accordance with it and referred to Condition 5 having been removed as a result of an appeal. The First Defendant submits that having referred to the 1983 Permission in this way, if it had been the Claimant's case that condition 6 was unenforceable, that should have been articulated and supported by relevant evidence, and that it is no answer to say that the Third Defendant did not rely upon Condition 6 until submission of rebuttal evidence. The First Defendant also relies on the fact that the SoCG was completed on 15 February 2021, one day before the inquiry opened and after the Third Defendant's rebuttal evidence had been served and there was still no mention of the Claimant's case regarding the enforceability of condition 6.

145. As to the inquiry discussions, the First Defendant refers to the relevant transcript extracts relating to the roundtable session on 17 February 2021 noting that it lasted a day covering a wide variety of points, but that the discussions regarding condition 6 lasted just over quarter of an hour. The First and Third Defendants submit that the transcript demonstrates that:

(1) the original contention in Ms Bending's first witness statement that she gave clear oral evidence that the Industrial Estate had been used for more than 10 years for noise producing activities in breach of Condition 6 of the 1983 permission without enforcement action having been taken is not correct, as Ms Bending did not allege at any point that the units on the Industrial Estate had been used for noise-producing activities, or that such noise producing activities were in breach of condition 6, or that such breach had been ongoing for more than 10 years.

(2) the contention made in Ms Bending's second witness statement that she stated that condition 6 was unenforceable is also not accurate, as that was not what she stated and it was incumbent on her to have made such an allegation, given that the Inspector had proceeded on the basis that condition 6 continued to be enforceable, having asked Ms Bending: "what do you understand by condition 6 of the planning permission, which is an extant condition" and Mr Krassowski (the planning witness for the Claimant) had stated: "I don't see much point in trying to get wound up about what the lawful use of the buildings are. The point is condition 6 is there and it applies to those buildings. And it seeks to protect the amenity of the area."

(3) the highpoint of the Ms Bending's oral evidence during the round table session was her contention that " … if there have been breaches they've never been enforced against, and therefore it's the lawful use. And that's why we say it's sui generis." The First Defendant submits that the statement made was a qualified one and that this was not a slip, but consistent with the way Ms Bending had earlier expressed herself in that roundtable session. Mr Williams submits that the alleged breach was not particularised, in the sense that no information was provided as to what activity was said to have been in breach of condition 6, such as which processes had been carried on, or machinery installed, which are said to have caused a detriment to the

amenity of the area and there was no reference to the requisite 10 year time period or a claim that the breaches had been continuous for that period.

(4) Ms Bending did not, in fact, go so far as to contend that condition 6 was in fact unenforceable, and the contention that the use was *sui generis* cannot be equated with a contention that condition 6 was unenforceable, as condition 6 was capable of applying regardless of whether the Industrial Estate's lawful use was light industrial or something else.

(5) A contention that condition 6 is unenforceable was not supported by evidence, let alone evidence that would be sufficient to demonstrate that the Industrial Estate had been used in breach for a continuous period and no such evidence has been produced in these proceedings either.

146. Finally, the First and Third Defendants rely on the Claimant's closing submissions and submit that it is striking that the Claimant made no mention of condition 6 in those submissions, and did not contend that condition 6 could no longer be enforced. They refer to paragraph 45 of the Claimant's Closing Submissions to the effect that: "Malting tenants have unrestricted 24/7 use of their units which are sui generis", but they argue that this submission was made in the context of a criticism of the noise assessment being flawed because it was assumed that activities on the appeal site were time restricted, when the agreed position was that the time restriction in condition 5 was unenforceable and it had nothing to do with condition 6.

147. By way of contrast, the First and Third Defendant refer to the Closing Submissions of the Third Defendant which did rely upon condition 6 in response to the agent of change issue. They submit that it was clear that the Third Defendant had not accepted that condition 6 was unenforceable. They argue that the Claimant's reliance on paragraph 8.15 of the Third Defendant's closing submissions is misplaced and involves mischaracterising the Third Defendant's submissions and there was no agreement by the Third Defendant that condition 6 was no longer enforceable.

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148. The First Defendant also notes that the Claimant has made reference to the legal test for a mistake of fact to arise (see *E v SSHD* above). Mr Williams submits that this is because the Claimant's allegation, properly characterised, is an allegation that the Inspector made a mistake of fact by proceeding on the mistaken belief that condition 6 of the 1983 Permission remained enforceable when the agreed position that it was not. The First Defendant submits therefore that the Claimant must demonstrate: (1) the fact or evidence has been 'established' in the sense that it is uncontentious and objectively verifiable; and (2) that the appellant (or his advisors) must not have been responsible for the mistake. The Third Defendant submits that it can do neither, as the unenforceability of condition 6 was not established, and any mistake of fact about its enforceability was the responsibility of the Claimant's representatives on the basis that they did not clearly articulate their case or advance any evidence on that issue.

149. As to the Claimant's criticism that the Inspector failed to grapple with the dispute between the parties about the enforceability of the condition and failed to give proper

reasons for this conclusions, the First Defendant submits that: (1) the Claimant failed to put the case that condition 6 was unenforceable in any particularised or clearly articulated manner; and (2) a decision letter is only required to address and give reasons in respect of the main principal controversial issues in dispute and to the extent that the dispute was raised at all, it was not a main principal controversial issue such that a failure to address it vitiated the Inspector's decision. In this context, the First Defendant seeks to rely on the Claimant's Leading Counsel stating during the round table session that the issue of the lawful use of the Industrial Estate was not a "main matter".

150. The First Defendant submits that even if his submissions as regard reasons are wrong, then it is inevitable that the decision would have been the same in any event Relying upon the decision in *Ocado Retail* per Holgate J at [61]-68], the First Defendant submits that there is no reason why a different standard or evidence requirement would apply in this context, and there is no evidence to support the assertion that activities had taken place on the Industrial Estate in breach of condition 6 for a continuous period of 10 years, such that enforcement action could not be taken against such breach and so there was no reasonable basis upon which the Inspector could have concluded that condition 6 was unenforceable. Accordingly, the First Defendant submits that either because the Claimant has not suffered "substantial prejudice" from a failure to give proper reasons, or because the outcome would inevitably have been the same, the decision should not be quashed.

151. I can see considerable force in the submissions made by the Claimant as to the application of the requirements articulated in *Dyason* to round table sessions which deal with main issues on an appeal under section 78 of the 1990 Act. Taking those requirements as if they do apply in the way that the Claimant submits (without needing to decide that point), I am satisfied that the Inspector did discharge those requirements in the way that he dealt with the issues raised before him in the particular circumstances of this case for Ground 3, as with Grounds 1 and 2. Moreover, I do not consider the criticisms under Ground 3A to be well-founded for the following reasons. In so doing, I have considered carefully all of the evidence provided by the parties as to how this issue arose and how it was dealt with at the inquiry.

152. First, I agree with the thrust of the submissions from the First and Third Defendant and the position of the Inspector expressed in his witness statement, that the contention that condition 6 of the 1983 Permission was unenforceable was not clearly articulated by the Claimant at any stage during the inquiry, nor do I consider that to have been done before the inquiry started.

153. In the circumstances of this case where: (1) it was the Claimant who was advancing a case of objection to the proposed development based on potential effects on the Industrial Estate; (2) the Claimant was participating as a Rule 6 party to pursue that objection; (3) the Claimant produced proofs of evidence dealing with that objection; and (4) the Claimant was a party to the SoCG, it is very surprising that a contention

that Condition 6 of the 1983 Permission was no longer enforceable was not articulated clearly in any of the written material put forward by the Claimant in support of its objection in advance of the inquiry. The Claimant's position that it was only after reliance was placed on condition 6 by the Third Defendant in its rebuttal evidence that it sought to deal with this issue at the inquiry does not explain this very surprising omission. Given the obvious relevance of the 1983 Permission to any objection of the kind the Claimant was pursuing, I consider it was incumbent on the Claimant at the outset to have put forward proactively any case (if it was going to make such a case) that condition 6 had become unenforceable by reason of a 10 year continuous breach and to have provided evidence to support that contention.

154. Second, although the Claimant did seek to raise issues over what should have been an unsurprising reliance by the Third Defendant on the terms of Condition 6 at the inquiry, and there was then the discussion about the industrial estate being in *sui generis* use with Ms Bending with the Inspector in the extracts I have read, I remain unconvinced by the way in which it was raised as giving rise to any resulting error of law in the way that the Inspector dealt with in his decision.

155. The Claimant is right that the Inspector did rely upon Condition 6 of the 1983 Permission in his decision (see DL57), when dealing with the question of whether there would be any objection to the proposed development in light of paragraph 182 of the NPPF to the effect that existing business should not have unreasonable restrictions placed on them as a result of development permitted after they have been established. It is therefore a fair reading of the DL that the Inspector considered Condition 6 to remain valid and enforceable. Accordingly, to the extent that the Claimant had contended to the contrary, the Inspector was rejecting that contention. But it does not follow that the Inspector erred in law in reaching that conclusion without setting out further reasons. In light of the well-established legal principles summarised above, the lawfulness of that decision and the absence of further reasoning is necessarily informed by a fair understanding of the extent to which any dispute over the continued validity of Condition 6 formed a principal, important and controversial issue and, if so, whether any lack of reasoning about how that issue was resolved has caused the Claimant the requisite prejudice.

156. Having considered all the material, on the facts of this case I do not consider that the validity of condition 6 was properly articulated by the Claimant in a way which made it an issue of importance for resolution by the Inspector in a way which required reasoning in the DL. I have already identified the surprising lack of any clear articulation in the Claimant's case prior to the inquiry starting, including in the SoCG to which the Claimant was signatory. In my judgment, that necessarily affects the way in which the Inspector was entitled to treat matters in dispute at the inquiry itself. Whilst it is clearly possible in principle for a party to identify to an Inspector that there is a significant issue in dispute which may have not been clearly or properly articulated in the written case of a party beforehand, or raised in the SoCG (particularly where it created the impression that it was only condition 5 that was no longer valid), the need for clarity in such circumstances is obvious. I do not

consider that this was in fact done with any real clarity at all in the round table session itself, or in the subsequent closing submissions of the Claimant; and I remain unconvinced that the Claimant was in fact articulating a case that Condition 6 was generally unenforceable anyway.

157. The first contributions from Mr Krassowski at the round table session in answering questions from the Inspector make it clear that the Third Defendant considered condition 6 to remain valid and enforceable. In answer to a specific question from the Inspector (at 00:12:24) of the transcript, he identified that it was the Third Defendant's position that condition 6 did basically restrict the use of the units on the Industrial Estate to what would have been the equivalent of a B1 type use, save in respect of one unit which had permission for a B8 use. Mr Krassowski went on to express his view that some of the uses that had been identified in the Statement of Common Ground might have "morphed" over time from a B1 use to something which is "probably more sui generis" which he said was "quite common". This was then clarified as a reference to the fact that some of the uses had some other activities associated with them, such as the tap room and trade counters. But Mr Krassowski affirmed the Inspector's summary of his position that condition 6 "essentially sets that the units can only be occupied by basically B1 uses, so that the appellant is saying is that yes, it's basically B1 plus any subsequent permissions that have allowed trade counters in the tap room and stuff". There was no acceptance by Mr Krassowski, or the Third Defendant, that condition 6 had become invalid by reason of some 10 year continuous breach of it. To the extent that the Claimant's ground of challenge is based on the assumption that it was common ground that condition 6 was unenforceable, it is misplaced as the assumption is wrong.

158. By contrast, Ms Bending in her subsequent responses to the Inspector on condition 6 did say (00:29:02 in the transcript): "Well, we could consider that to be sui generis use as Mr Krassowski said, and if there has been any breach of any use that's never been enforced. There's never been any enforcement action taken by the Council". This was then followed by a further question about condition 6 and the Inspector's summary of the Third Defendant's position that "condition 6 meant effectively that the units in the Maltings are restricted to B1. You know, you can't have units that disturb residential amenity. Apart, you know apart from the fact there's been some subsequent changes like to the trade count, for the trade counter and the Taproom, etc .. you know and basically he said, well, yes, essentially the units are lawful for B1 and subject to these other changes. And do you have any comments on that?" Ms Bending then replied "We don't agree that it's B1" and "We would say its lawful use is sui generis. Light industry. And that's never been enforced on by the Council."

159. The Inspector then followed up with a specific question as to whether it was an extant condition, to which Ms Bending replied:

> "Well, if you take the wording of its, umm, it only refers to actually the processes or the machinery being installed, so that clearly that doesn't cover everything that happens at the site. And if there have been breaches, they've never been enforced against, and therefore it's the lawful use. And that's why we say it's sui generis."

160. Mr Krassowski then intervened indicating that he did not accept that. Ms Bending's

next contribution was to refer to the SoCG with the uses set out there which she said was not questioned. The inquiry then looked at that. Mr Krassowski then made a contribution which ended with him stating "The point is condition 6 is there and it applies to those buildings. And it seeks to protect the amenity of the residential area." The Inspector stated that he understood Ms Bending's point. Mr Jones and then Mr White both made contributions to the discussion with further discussions with the Inspector which I have taken into account.

161. From all of these exchanges, taken with the closing submissions from the parties, it is clear to me that it was the Third Defendant's case that condition 6 remained valid. Mr Krassowski's references to some morphing of the uses was a reference to the fact that some of the units now had some non-B1 type elements to them which were probably more sui generis; but I do not consider that comment, when read with all the other comments and the Third Defendant's Closing Submissions, to be an acceptance that condition 6 was no longer valid. Far from it. Mr Krassowski and the Third Defendant were clearly proceeding on the basis that condition 6 did remain valid and continued to regulate the use of the Industrial Estate. Given this, I would have expected the Claimant's Closing Submissions to have dealt with any contrary position assumed by the Claimant to the effect that Condition 6 was now unenforceable in its entirety to be have been dealt with explicitly and in more detail, but I agree with the First and Third Defendant that there is a conspicuous lack of reliance on what is now claimed to be the Claimant's position that condition 6 was invalid.

162. As to the position expressed by Ms Bending, whilst it is clear that she was expressing the existence of a "sui generis" use, there is no clear articulation of exactly what that meant, nor was there any express assertion that condition 6 was generally invalid or no longer applicable to the Industrial Estate. I agree with the Defendants that her references to lack of enforcement by the Council were generally qualified by the conditional, i.e. "if" there have been breaches; and the general impression she appears to have been conveying is that she considered the uses to be present on the site to involve uses which were not all within Class B1 and so sui generis, and <u>if</u> that involved any breach of Condition 6, no enforcement action had been taken, but not a positive case that there had been breaches of Condition 6 and that Condition 6 was no longer enforceable. More importantly, I consider that the Inspector was entitled to interpret the Claimant's position in the way he did and not one in which any important contentious issue was being raised as to the continued validity of Condition 6.

163. In my judgment, Ms Bending's actual comments at the round table session (in contradistinction to her interpretation of them in her witness statements for these proceedings) are somewhat different to an assertion that Condition 6 was no longer valid at all because it had been breached for a continuous 10 year period. Even if that had been what she was asserting, it was an assertion which lacked clarity and was inherently vague. She does not actually explain what is meant by a "sui generis" use in this context, nor positively assert that Condition 6 was no longer valid.

164. When taken with the way in which the Claimant and Third Defendant then put their respective cases in the closing submissions, my very firm conclusion is that the Claimant did not clearly articulate a case that Condition 6 was invalid, such that it no longer had any application to the Industrial Estate, and the Inspector was entitled to

assume that this was not a contention being made, or if it was being made, entitled to deal with it in the way he did by concluding that Condition 6 did remain in place and did remain a relevant reason for rejecting the Claimant's concern on this topic.

165. Put simply, the validity of Condition 6 was not articulated to be in dispute in a sufficiently clear way to require the Inspector to treat it as such; but even if that is wrong, I consider that the Inspector was entitled to conclude that it remained valid without needing to give any further reasons, on the basis that this was not a principal important controversial issue in itself.

166. I am reinforced in that view by the principles considered in *Ocado* as to what would ordinarily be necessary to demonstrate a condition was no longer enforceable. There was no real evidence presented to the Inspector as to the continuity of a breach for more than 10 years in order for him treat the continued validity of Condition 6 as being something that he needed to address with further reasoning. That is consistent with my overall impression that the Claimant and its witness were not in fact going so far as to claim that Condition 6 had become invalid for all purposes for the Industrial Estate, as opposed to making a far less specific point that <u>if and insofar</u> as changes in the type of uses in units on the Industrial Estate had involved breaches, those breaches had not been enforced against. The conditionality in the way the point was expressed by Ms Bending indicates that she herself was not in fact positively contending that breaches of Condition 6 had necessarily occurred.

167. Moreover, even now, at the time of this judgment, I remain entirely unclear as to what the Claimant is really contending to be a full and proper description of the lawful use of the Industrial Estate, in light of the principles discussed in *Ocado* beyond describing it as *sui generis*. Even if some units of the Industrial Estate had operated in breach of condition 6, this would not necessarily mean that the Industrial Estate is now free from Condition 6 altogether; nor would it necessarily mean that a lawful "sui generis" use of those units (or the Industrial Estate as a whole) would permit the Industrial Estate to be used in the future for uses which exceeded their effects on residential amenity beyond the limits of what occurs on the site now (which the Inspector would have been able to see on his site site).

168. For these reasons, and in agreement with thrust of the Defendants' submissions summarised above, I reject the Claimant's challenge under Ground 3A. I do not consider the Inspector to have acted unlawfully in the way that he dealt with this part of the Claimant's objection given the way in which the case was presented to him at the inquiry. The Inspector was entitled to rely upon the continued validity of condition 6 in the way that he did.

Ground 3B

169. Lastly, the Claimant alleges that the Inspector erred in law in relying upon the fact that the appeal site was part of a site allocated for housing and in taking that as meaning that there could be no "agent of change" issue with what was proposed.

170. The Claimant submits that the allocation for housing did not mean that the agent of change issue could be discounted and emphasises that a larger site than just the appeal site had been allocated for housing for "circa 80- 100" dwellings under Policy

SB15 of the Local Plan, whereas the planning application was made only in respect of part of the allocated site, and was itself for 104 dwellings and 186 student bedrooms, with a consequential impact upon the design and configuration of the scheme. The Claimant relies on the fact that protective noise measures were required for some of the dwellings because of the potential adverse effect from the operation of the concrete batching plant on the western part of the allocated site adjacent to the proposed development (see Condition 17 and DL 66) and submits that this illustrates the point that the allocation did not, of itself, result in elimination of "the agent of change" principle, contrary to what was erroneously assumed by the Inspector. The Claimant submits it was irrational for the Inspector on the one hand to dismiss entirely the Claimant's objection relating to agent of change principles because of the allocation policy, but on the other hand to require a condition ensuring adequate sound insulation for another part of the appeal site in light of the agent of change principle.

171. It is said that as a result of this mistaken approach, the Inspector failed to grapple at all with the issues raised by the Claimant concerning noise, and did not even begin to address these concerns, despite them being raised in the Claimant's opening and closing submissions. It is said that this resulted in a failure to address the substance of one of the Main Issues at the Inquiry, in breach of the *Tameside* duty of sufficient enquiry, and a consequent failure to give reasons at all in respect of this part of the Claimant's case at the Inquiry. The Claimant argues that the First and Third Defendants have not properly addressed this criticism, and their responses involve a misreading of the DL because the Inspector did treat the allocation as dispositive of the agent of change issue, with particular reliance placed on the last sentence of DL57 "in any case, LP Policy SB15 allocates the site for residential development". The Claimant submits that the Inspector was wrong to hold that the allocation excluded the possibility of conflict, not least because the allocation envisaged 80-100 dwellings, whereas the proposal was for 290 units and did not involve all of the allocation site anyway; and it left in place the cement works in respect of which conflict with sensitive residential development proposed by the Third Defendant in terms of noise and dust was accepted, hence the imposition of protective conditions.

172. The First and Third Defendant submit that there was no such error. They argue that the fact that the appeal site formed part of the allocation in the Local Plan for residential development was a consideration which the Inspector was entitled to take into account when considering the agent of change issue. They submit that the allocation was included in the knowledge that the appeal site was located adjacent to an existing light industrial site and this therefore established an acceptability of residential development on the appeal as a matter of principle, such that the Inspector's reference to the allocation in DL57 was unsurprising; but this reference does not give rise to any error of law. They argue that the Inspector was aware of the fact that the proposal for the Appeal Site exceeded what was envisaged in the allocation, as the Inspector had dealt with whether or not the number of dwellings proposed was in conflict with the development plan policies for the supply of housing, or otherwise in conflict with the spatial strategy, as part of dealing with what had been identified as the first main issue. They say that contrary to the Claimant's case, the Inspector did not treat the allocation as meaning that there could

be no agent of change issue, but rather treated it as a material consideration which was not dispositive of the matter. They submit that if the Inspector had treated the allocation as a dispositive, there would have been no need for him to refer to condition 6; and the imposition of condition 17, far from supporting the Claimant's case, in fact underscores the fact that the Inspector did not treat the development plan allocation as dispositive of any agent of change issue. Had the Inspector in fact regarded the allocation as dispositive in the way the Claimant is suggesting, then there would have been no need to have imposed such a condition, whether in respect of the noise emanating from the concrete batching plant or the Industrial Estate. The First and Third Defendant also rely upon the imposition of condition 17 as being designed to protect future residents from unreasonable adverse impacts from existing noise and it applies equally to noise emanating from the Industrial Estate as it does from the concrete batching plant.

173. Once again, having listened carefully to Mr Jones' submissions on this point, I find myself in agreement with the First and Third Defendant's submissions. Read fairly, the Inspector was not treating the allocation as dispositive of the concern raised by the Claimant regarding the "agent of change" principle and the Claimant's analysis of the Inspector's decision is artificial. In DL57 the Inspector had first referred to the effect of Condition 6 (discussed under Ground 3A). It was this which formed the central part of his reasoning for rejecting the Claimant's concern. The wording that then follows is an additional point that is expressed ("in any case"), and correctly notes that the Local Plan did allocate the site for residential development.

174. Like the Defendants, I do not read this as the Inspector treating such allocation as dispositive, but rather the Inspector taking account of the allocation as a relevant factor in his overall assessment. It simply recognises that part of the context for consideration of the Claimant's concern was that the principle of residential development on the allocation site had been accepted in the Local Plan. That does not mean the fact of such allocation was dispositive and it was not treated as such. That is also evident from the earlier reference to Condition 6, which would have been unnecessary if the allocation were being treated as dispositive.

175. In the same way, I agree with the First and Third Defendant that the other parts of the Inspector's reasoning are also inconsistent with the Claimant's interpretation, such as the imposition of condition 17 and the way the Inspector dealt with the issue of noise from the concrete batching plant. As with Grounds 1, 2 and 3A, I do not consider the Inspector's conduct of the inquiry to have affected his proper and lawful determination of the issue that had been raised.

176. Accordingly, I also reject Ground 3B of the Claimant's grounds.

Conclusions

177. Having had very careful regard to all of the many submissions made and the detailed references to the underlying evidence, I am satisfied that the Inspector's decision was not subject to any of the errors alleged. Standing back and reading the DL as a whole, I consider that the Inspector dealt properly and fairly with all of the Claimant's main objections to the proposed development. The reality of the situation is that he did not agree with the Claimant's points of objection and considered that the concerns were not a proper basis for refusing planning

permission. Notwithstanding the comprehensive and eloquent submissions made by Mr Jones, there was nothing irrational in that judgment, nor was any error of law made in reaching that conclusion. I therefore dismiss this claim.