Neutral Citation Number: [2013] EWHC 473 (Admin)

Case No: CO/4231/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/03/2013

Before :

THE HONOURABLE MRS JUSTICE LANG DBE

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Between :

(1) EAST NORTHAMPTONSHIRE DISTRICT COUNCIL **(2) ENGLISH HERITAGE** **(3) NATIONAL TRUST**	**Claimants**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT **(2) BARNWELL MANOR WIND ENERGY LIMITED**	**Defendants**

Morag Ellis QC and Robin Green (instructed by **Sharpe Pritchard**) for the **Claimants**
David Hardy (Solicitor Advocate from **Eversheds LLP**) for the **2nd Defendant**
1st Defendant was not in attendance and was unrepresented

Hearing dates: 20th and 21st February 2013

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Approved Judgment

MRS JUSTICE LANG:

1. The Claimants have applied under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") for an order quashing the decision of Mr P. Griffiths, an Inspector appointed by the First Defendant, dated 12th March 2012, who held an Inquiry and allowed an appeal by the developer, the Second Defendant, against the decision of East Northamptonshire District Council and granted planning permission for a wind farm development on farmland in Sudborough, Northamptonshire.

2. Initially the proposed development comprised 5 wind turbine generators, sub-station, access road, 80 metre anemometer, underground cabling and temporary construction facilities. In the course of its appeal, the Inspector permitted the Second Defendant to remove from its proposal the wind turbine which was closest to Lyveden New Bield, arguably the most significant heritage asset affected. He then granted permission for the development with 4 wind turbines.

3. East Northamptonshire District Council refused the application, on 24th January 2011, on the following grounds (among others):

> "1. It is considered that the proposed development site is not suited to accommodating wind energy infrastructure, due to the significant immediate visual and landscape impacts at location of public access and recreation, through the introduction of 'dominant' additional features in the skyline and viewpoints, This is especially pertinent given the presence of cultural heritage features and the relative absence of any other existing modern structures. The proposal is therefore considered contrary to PPS1, objective 5, paragraphs 17, 18, 20, paragraphs 14 and 16 of PPS7, paragraphs 9 and 11 of PPS22, policies 26, 31 and 40 of the Regional Plan, policy 13(o) of the North Northants Core Spatial Strategy and policies EN8, EN9 and EN20 of the saved Local Plan.
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> 2. It is considered that the proposed wind turbines will result in an unacceptable harm to the setting of Lyveden New Bield (Scheduled Monument, Grade 1 Listed Building, Grade 1 Registered Park and Garden) and to St Andrews Church Brigstock (Grade 1 Listed Building), and an insufficient assessment of the effects of the development on the setting of Drayton House (Grade 1 Listed Building) and its Grade 1 Registered Park and Garden. The proposal is therefore considered to conflict with the aims of historic environment planning policy and guidance expressed in PPS5, PPS22 (para 11), East Midlands Regional Plan (policies 26, 27, 31). North Northamptonshire Core Spatial Strategy (policy 13(o))."

4. On appeal, the Inspector identified the main issues, at paragraph 9 of the Appeal Decision, as:

> "whether any benefits of the proposal are sufficient to outweigh any harm caused to the setting of heritage assets, the character

and appearance of the surrounding landscape, the enjoyment of the area and the many rights of way within it, by walkers, cyclists and horse riders, ecology and other matters"

5. He concluded, at paragraphs 84 to 86, Appeal Decision:

   a) There would be no significant adverse impact on users of public rights of way, no appreciable devaluation of the visitor experience to the area and no harm in ecological terms, and some enhancement.

   b) The proposed development would harm the setting of a number of designated heritage assets, however, the harm would in all cases be less than substantial and reduced by the temporary nature of the planning permission (25 years) and its reversibility. The proposal would also cause harm to the landscape.

   c) The benefits that would accrue from the wind farm – a 10 MW contribution to the 2020 regional target for renewable energy – attracted significant weight in favour of the proposal.

   d) The significant benefits of the wind farm outweighed the harm it would cause to the setting of designated heritage assets and the wider landscape.

6. It was not disputed that the three Claimants had standing to bring the claim, as persons aggrieved under section 288(1)(b) TCPA 1990.

7. English Heritage has a statutory obligation under the Heritage Act 1983 to preserve historic buildings and promote public enjoyment and knowledge of them. In the present case it was a statutory consultee, an objector and their representative gave evidence at the Inquiry.

8. The National Trust is a charitable organisation incorporated under the National Trust Acts 1907 to 1971 and administered in accordance with the Charities (National Trust) Order 2005. It was established for the purposes of promoting the permanent preservation of buildings and lands for the benefit of the nation. It objected to the grant of planning permission and its representatives gave evidence at the Inquiry.

9. The National Trust owns the site of Lyveden New Bield, arguably the most important heritage asset affected by the proposed development. Lyveden New Bield is said to be the finest surviving example of an Elizabethan garden, and also of significance because it was designed to be a testament to the Catholic faith in an era of religious persecution. It is Grade 1 listed, and the Inspector found "this group of designated heritage assets has archaeological, architectural, artistic and historic significance of the highest magnitude" (paragraph 45, Appeal Decision).

10. The First Defendant conceded that the Inspector's decision should be quashed and took no further part in the proceedings.

Grounds of challenge

11. The issues in dispute on this application were as follows:

a) Did the Inspector give special regard to the desirability of preserving the settings of listed buildings as required by section 66(1) Planning (Listed Buildings and Conservation Areas) Act 1990 ("P(LBCA)A 1990")?

b) Did the Inspector correctly interpret and apply planning policy on the effect of development on the setting of heritage assets?

c) Did the Inspector give adequate reasons for his decision?

12. Mr Hardy complained that there were differences in the formulation of the Claimants' grounds, as between the Claim Form and the Skeleton Argument. I did not consider that these were significant and the Second Defendant was not unfairly prejudiced by them.

Principles of law

13. In considering these issues, I have applied the following principles of law.

14. The exercise of planning judgment and the weighing of the various issues are entirely matters for that decision-maker and not for the Court: *Seddon Properties v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28 and *Tesco v Secretary of State for the Environment* [1995] 1 W1.R 759, at 780. In the latter case Lord Hoffmann said "If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State".

15. In *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74 (a case concerning a challenge to a planning inspector's decision) Sullivan J. said at [6] – [8]:

> "An application under section 288 is not an opportunity for a review of the planning merits of an Inspector's decision. An allegation that an Inspector's conclusion on the planning merits is *Wednesbury* perverse is, in principle, within the scope of a challenge under section 288, but the court must be astute to ensure that such challenges are not used as a cloak for what is, in truth, a rerun of the arguments on the planning merits.
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> In any case, where an expert tribunal is the fact finding body the threshold of *Wednesbury* unreasonableness is a difficult obstacle for an applicant to surmount. That difficulty is greatly increased in most planning cases because the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport? et cetera. Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable.

> Moreover, the Inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received on the site inspection. Against this background an applicant alleging an Inspector has reached a *Wednesbury* unreasonable conclusion on matters of planning judgment, faces a particularly daunting task ..."

16. In *Tesco Stores v. Secretary of State for the Environment & Ors* [1995] 1 WLR 759, Lord Hoffmann said, at 780F-H, that the weight to be given to a material consideration was a question of planning judgment for the planning authority.

17. In *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, Lord Reed (with whose judgment Lord Brown, Lord Hope, Lord Kerr and Lord Dyson agreed) said, at [17]:

> "It has long been established that a planning authority must proceed upon a proper understanding of the development plan: see, for example, *Gransden & Co Ltd v Secretary of State for the Environment* (1985) 54 P & CR 86, 94 per Woolf J, affd (1986) 54 P & CR 361; *Horsham DC v Secretary of State for the Environment* (1991) 63 P & CR 2319, 225-226 per Nolan LJ. The need for a proper understanding follows, in the first place, from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them. It also follows from the legal status given to the development plan by section 25 of the 1997 Act. The effect of the predecessor of section 25, namely section 18Aof the Town and Country (Planning) Scotland Act 1972 (as inserted by section 58 of the Planning and Compensation Act 1991), was considered by the House of Lords in the case of *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447. It is sufficient for present purposes to cite a passage from the speech of Lord Clyde, with whom the other members of the House expressed their agreement. At p.44, 1459, his lordship observed:
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> > "In the practical application of sec. 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it."

18. Lord Reed rejected the proposition that each planning authority was entitled to determine the meaning of development plans from time to time as it pleased, within

the limits of rationality. He said, at [18], that development plans should be "interpreted objectively in accordance with the language used, read in its proper context". They are intended to guide the decisions of planning authorities, who should only depart from them for good reason.

19. Lord Reed re-affirmed well-established principles on the requirement for the planning authority to make an exercise of judgment, particularly where planning policies are in conflict, saying at [19]:

> "That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 WLR 659, 780 per Lord Hoffmann)."

20. An Inspector's decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

21. The Inspector was required to give adequate reasons for his decision: see the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000, rule 19(1). The relevant principles in relation to the adequacy of reasons were summarised by Lord Brown in *South Bucks District Council and another v Porter (No 2)* [2004] 1 WL.R. 1953, at [36]:

> "35 It may perhaps help at this point to attempt some broad summary of the authorities governing the proper approach to a reasons challenge in the planning context. Clearly what follows cannot be regarded as definitive or exhaustive nor, I fear, will it avoid all need for future citation of authority. It should, however, serve to focus the reader's attention on the main considerations to have in mind when contemplating a reasons challenge and if generally its tendency is to discourage such challenges I for one would count that a benefit.

> 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."

Planning Policies

22. The national planning policies relevant to this application were 'Planning Policy Statement 5: Planning for the Historic Environment' ("PPS5") and 'Planning Policy Statement 22: Renewable Energy' (PPS22). PPS5 has to be read together with the Government practice guidelines: 'PPS5 Planning for the Historic Environment: Historic Environment Planning Practice Guide' ("the Practice Guide").

23. These policy documents establish the following (among other) principles:

    a) The "significance" of a heritage asset is the "value of that asset to this and future generations because of its heritage interest. That interest may be archaeological, architectural, artistic or historic. The accompanying Practice Guide expands on how one can analyse the public's interest in heritage assets by sub-dividing it into aesthetic, evidential, historic and communal values. This is not policy, but a tool to aid analysis" (PPS5, Annex 2, Terminology & footnote 18).

    b) The "setting" of a heritage asset comprises the "surroundings in which the asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance, or may be neutral." (PPS5, Annex 2, Terminology).

c) The contribution that setting makes to the significance of a heritage asset does not depend on there being an ability to access or experience the setting (PPS5 Practice Guide, para 117).

d) A proper assessment of the impact on setting will take into account, and be proportionate to, the significance of the asset and the degree to which proposed changes enhance or detract from that significance and the ability to appreciate the asset (PPS5 Practice Guide, para 122).

e) There is a presumption in favour of the conservation of designated heritage assets and the more significant the designated heritage asset, the greater the presumption in favour of its conservation should be (PPS5, Policy HE9.1).

f) Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting (PPS5, Policy HE9.1).

g) Loss affecting any designated heritage asset requires clear and convincing justification (PPS5, Policy HE9.1).

h) Substantial harm to designated heritage assets of the highest significance should be wholly exceptional (PPS5, Policy HE9.1).

i) Where the application will lead to substantial harm to or total loss of significance local planning authorities should refuse consent unless it can be demonstrated (inter alia) that the substantial harm to or loss of significance is necessary in order to deliver the substantial public benefits that outweigh that harm or loss (PPS5, Policy HE9.2).

j) Where a proposal has a harmful impact on the significance of a designated heritage asset which is less than substantial harm, in all cases local planning authorities should (i) weigh the public benefit of the proposal and (ii) recognise that the greater the harm to the significance of the heritage asset the greater the justification will be needed for any loss (PPS5 Policy HE9.3).

k) When considering planning applications that do not preserve those elements of the setting that contribute to the significance of a heritage asset, any such harm should be weighed against the wider benefits of the application (PPS5, Policy HE10.1).

l) The Government has set a target to generate 10% of UK electricity from renewable energy sources by 2010 and to double that figure by 2020. This can contribute to meeting energy needs, protecting the environment, reducing reliance on fossil fuels and economic growth and employment (PPS22 "The Government's Objectives").

m) Renewable energy developments should be capable of being accommodated throughout England in locations where the technology is viable and environmental, economic, and social impacts can be addressed satisfactorily (PPS22, Key Principle 1(i)).

n) The wider environmental and economic benefits of proposals for renewable energy projects are material considerations that should be given significant weight in determining whether proposals should be granted planning permission (PPS22, Key Principle 1(iv)).

o) Planning permission for renewable energy projects affecting sites with nationally recognised designations should only be granted where it can be demonstrated that the objectives of designation will not be compromised by the development, and any significant adverse effects on the qualities for which the site has been designated are clearly outweighed by the environmental, social and economic benefits (PPS22, para 11).

24. Other relevant policies to be taken into account were English Heritage Guidance: 'The Setting of Heritage Assets'; 'Wind Energy and the Historic Environment'; 'Conservation Principles Policies and Guidance for the Sustainable Management of the Historic Environment'.

The statutory duty under section 66(1) Planning (Listed Buildings and Conservation Areas) Act 1990

25. Section 66(1) P(LBCA)A 1990 provides:

> "In considering whether to grant planning permission for development which affects a listed building or its setting, the Local Planning Authority, or as the case may be, the Secretary of State, shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

26. The Claimants submitted that the Inspector failed to discharge his duty under section 66(1). The Second Defendant's response was that the Inspector had discharged the section 66(1) duty by paying special regard to the desirability of preserving the setting of the listed buildings.

27. In my judgment, it is necessary to consider the way in which the section 66(1) duty fits into the overall consideraton of a planning applicaton.

28. The determination of an application for planning permission, and any appeal, is to be made in accordance with the development plan**,** unless material considerations indicate otherwise: section 38(6) Planning and Compulsory Purchase Act 2004, read together with sections 70(2), 77, 78 TCPA 1990.

29. In *Edinburgh City Council* v *Secretary of State for Scotland [1997] 1* W1.R. 1447, the House of Lords held that the effect of the Scottish equivalent of this provision was that the development plan has "priority" in the determination of planning applications (per Lord Clyde at l458B), but if there are considerations indicating the plan should not be followed, a decision contrary to its provisions can properly be made (per Lord Clyde at 1458F). The decision maker has to assess the facts and weigh the material considerations and decide "whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it" (per Lord Clyde1459D-H).

30. In this application, the development plan comprised the East Midlands Regional Plan (EMRP), the North Northants Core Spatial Strategy (CSS) and the Local Plan. The Council found that the proposed development was contrary to the EMRP and the CSS, as set out in paragraph 3 above. The Inspector concluded, in paragraph 85, that the proposed development failed to accord with policies in the EMRP and CSS.

31. The statutory term 'material considerations' has been broadly construed to include any consideration relevant in the circumstances which bears on the use or development of land: *Cala Homes (South) Ltd v Secretary of State for Communities and Local Government & Anor* [2011] EWHC 97 (Admin); [2011] 1 P. & C.R. 22, per Lindblom J. at [31].

32. The 'material considerations' in this application included the Government planning policies and the English Heritage policies, listed above.

33. As the proposed development affected the setting of listed buildings, consideration of the grant of planning permission had to be made in accordance with the statutory duty under section 66(1) P(LBCA)A 1990.

34. In a case where the preservation of a listed building or its setting might conflict with the development plan, which has been given statutory priority, the duty under section 66(1) has been characterised "at its lowest" as a 'material consideration' "to which considerable weight should be attached" (per Deputy Judge Keene in *Heatherington (UK) Ltd v Secretary of State for the Environment & Anor* 69 P. & C.R. 374, at 383). He distinguished, to some extent, the earlier case law which pre-dated the change in the law in 1991 which gave prority to the development plan over other material considerations.

35. However in this application, the preservation of the setting of a listed building was not in conflict with the development plan. It was potentially in conflict with other 'material considerations', such as national planning policies, which are not given the same statutory priority as the development plan.

36. It is therefore relevant to consider the two cases cited in *Heatherington* about the similar statutory duty in what is now section 72 P(LBCA)A 1990 in respect of planning decisions within Conservation Areas which provides:

> "Special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

37. In *South Lakeland District Council v Secretary of State for the Environment & Anor* [1992] 2 AC 141 the House of Lords held that the intention of the equivalent provision in the Town and Country Planning Act 1971 was to "give a high priority" to the statutory objective (per Lord Bridge at 146F-G).

38. In *Bath Society v Secretary of State for the Environment* [1991] 1 WLR 1303, Glidewell LJ held that the desirability of preserving or enhancing the conservation area was, in formal terms, a material consideration but added at 1318F; "[s]ince .. it is a consideration to which special attention is to be paid as a matter of statutory duty, it must be regarded as having considerable importance and weight".

39. In my judgment, in order to give effect to the statutory duty under section 66(1), a decision-maker should accord considerable importance and weight to the "desirability of preserving … the setting" of listed buildings when weighing this factor in the balance with other 'material considerations' which have not been given this special statutory status. Thus, where the section 66(1) duty is in play, it is necessary to qualify Lord Hoffmann's statement in *Tesco Stores v. Secretary of State for the Environment & Ors* [1995] 1 WLR 759, at 780F-H, that the weight to be given to a material consideration was a question of planning judgment for the planning authority.

40. Turning then to the Appeal Decision in this case, under the heading "The Impact on the setting of Heritage Assets", at paragraph 17, the Inspector stated that the assessment of the impact of the proposal on the heritage assets had to be made "against the background of a series of statutory and policy documents". The first of those listed was section 66(1).

41. In paragraph 22, he found that the wind farm would affect the setting of the heritage assets, which had wide implications for section 66(1). The Inspector concluded his section on the impact on the setting of heritage assets at paragraph 57, saying:

> "To summarise, the proposal would cause harm to the setting of a range of designated heritage assets. At its worst, that harm would not reach the level of substantial. Nevertheless, that there would be some harm means that the proposal does not accord with EMRP Policies 26 and 27 or CSS Policy 13 criterion (o). It is relevant to note that, subject to suitable conditions, the harm would disappear once the 25 year period of the planning permission expires. Moreover, the LIDAR survey would provide a small benefit in terms of recording. All that needs to be fed into the balancing exercise implicit in Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 and explicit in PPS5 Policies HE9.4 and HE10.1. I return to that below."

42. The Inspector returned to the "balancing exercise", at paragraphs 84 to 86. In paragraph 85, he re-stated that the proposal would not accord with the development plan. In paragraph 86 he referred again to PPS5 Policies HE9.4 and HE10.1 saying that they required him to balance the identified harm to the heritage assets against the benefits the proposal would provide. He concluded that the benefits, in terms of renewable energy, outweighed the harm which would be caused to the setting of designated heritage assets.

43. However, he did not refer again to section 66(1). In my view, given that he had previously referred to section 66(1), and clearly had it in mind, his failure to refer to it again did not of itself indicate an error of law, provided he applied it properly, and did not merely pay lip-service to it. However, in my judgment, he did fail to give proper effect to section 66(1) in the balancing exercise.

44. Under PPS5 HE9.4 he was required to "weigh the public benefit of the proposal against the harm". Under PPS5 HE.10, he was required to "weigh any such harm against the wider benefits of the application". This is what he did in these paragraphs.

45. Although "harm" is not the test in s.66(1), one of the meanings of "preservation" is to keep safe from harm and so the concepts are closely linked (see *South Lakeland District Council v Secretary of State for the Environment & Anor* [1992] 2 AC 141, per Lord Bridge at 150). However, in my view, the addition of the word "desirability" in section 66(1) signals that "preservation" of setting is to be treated as a desired or sought-after objective, to which the Inspector ought to accord "special regard". This goes beyond mere assessment of harm.

46. In my judgment, the Inspector did not at any stage in the balancing exercise accord "special weight", or considerable importance to "the desirability of preserving the setting". He treated the "harm" to the setting and the wider benefit of the wind farm proposal as if those two factors were of equal importance. Indeed, he downplayed "the desirability of preserving the setting" by adopting key principle (i) of PPS22, as a "clear indication that the threshold of acceptability for a proposal like the one at issue in this appeal is not such that all harm must be avoided" (paragraph 86). In so doing, he applied the policy without giving effect to the section 66(1) duty, which applies to all listed buildings, whether the "harm" has been assessed as substantial or less than substantial.

47. For the reasons set out above, I have concluded that the Inspector erred in law by not giving effect to the duty under section 66(1) P(LBCA)A 1990 when carrying out the balancing exercise.

Planning policies on the effect of development on the setting of heritage assets

48. The Claimants submitted that the Inspector failed correctly to interpret and apply planning policy on the effect of development on the setting of heritage assets. He assessed the potential harm to the setting solely or principally by reference to the extent to which the proposed development might affect an observer's understanding of what the heritage asset was. That was an inadequate basis for an assessment of the effect of the proposed development on heritage assets. The Inspector had to assess:

    a) the significance of the heritage asset;

    b) the contribution made to that significance by its setting;

    c) the effect of the proposed development on the setting; and

    d) the effect of the proposed development on the significance of the heritage asset and on the appreciation of that significance.

49. Consequently, the Claimants contended that the inspector erred in law in misconstruing relevant policy.

50. The Second Defendant's response was that the Inspector had correctly applied the relevant policy tests (including English Heritage guidance on setting) in that he:

    a) identified each heritage asset;

b) assessed the significance of each asset including any contribution made to significance by elements of setting;

c) assessed the degree of impact that the turbines would have on those elements of setting that contributed to significance;

d) assessed the degree of impact that the turbines would have on the ability of receptors to experience each heritage asset;

e) formed a view on whether any harm to significance was substantial or less than substantial.

51. The Claimants focused their criticisms on the Inspector's assessment of the heritage assets listed below:

Titchmarsh; Church of All Saints, Aldwincle; Church of St Peter, Aldwincle; Church of St Michael and All Angels, Wadenhoe; Wadenhoe House; Wadenhoe Conservation Area; Church of St Mary, Lower Benefield; Lower Benefield Conservation Area.

52. The Inspector said, at paragraphs 28 to 31, Appeal Decision:

> "28. Starting with the more distant heritage assets identified, Titchmarsh lies approximately 7 kilometres south-east of the appeal site. From the road that heads north-west towards the A605, there are panoramic views over the Nene valley, towards the appeal site, that take in the Church of All Saints and the Church of St Peter, in Aldwincle (both Grade I listed buildings) and the Church of St Michael and All Angels in Wadenhoe (Grade II*).
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> 29. Along with Wadenhoe House (Grade II*) and the Wadenhoe Conservation Area, the Church of St Michael and All Angels (Grade II*) would also be visible with the proposed wind turbines in the background from points to the east-south-east of Wadenhoe, particularly when emerging from the churchyard at Achurch and the Nene Way public footpath. These listed buildings and the conservation area are designated heritage assets of national significance, clearly.
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> 30. The wind turbines proposed would be an obvious and, at times, moving presence alongside the designated heritage assets in the views highlighted. However, any reasonable observer would understand the differing functions of a wind turbine and a church or a country house or a settlement and that the latter have a much greater archaeological, architectural, artistic or historic significance in themselves and as landmarks.
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> 31. Coupled with the relatively significant degree of separation involved, this means that the presence of the wind turbines in these views would not erode from an understanding or appreciation of the significance of the designated heritage

assets at all. As such the proposed wind turbines would have no harmful impact on their settings. For the same reasons, I reach a similar conclusion in respect of the effect on the settings of the Church of St Mary in Lower Benefield (Grade II) and the Lower Benefield Conservation Area."

Lowick Conservation Area, Church of St Peter, Lowick

53. The Inspector said, at paragraphs 35 to 36, Appeal Decision:

> "35. A significant part of Lowick, a village to the north-east of Drayton House, makes up the Lowick Conservation Area. Within the conservation area is the Church of St Peter, a Grade I listed building. The church has a distinctive tower crowned with tall pinnacles and an octagonal lantern and is of the highest order of significance, nationally. From the southern end of the village and further south, there are places where the conservation area, with the church within it will form the foreground with the proposed wind turbines, sometimes turning, visible beyond. There are locations where the wind turbines proposed would be directly behind and rising above the church tower.
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> 36. Again though, any reasonable observer would not be confused by the juxtaposition and would recognise the settlement and the church as features of historic, architectural and cultural significance, and the wind turbines as modern, large-scale, functional impositions designed to capture energy from the wind. There would be no confusion about the origins, or purpose of either, or both. The presence of the wind turbines would be something of a distraction but would not detract to any great extent from an understanding or appreciation of the significance of these heritage assets. As such, the harmful impact on the setting of the Lowick Conservation Area, and the Church of St Peter within it, would be much less than substantial."

Lyveden New Bield

54. The Inspector said, at paragraphs 44 to 51, Appeal Decision:

> "44. The site of Lyveden New Bield is owned and managed by the National Trust(NT) and is made up of the remains of a relatively large, formal landscape, with various earthworks and moats, and a roofless garden lodge known as the New Bield, all dating from towards the end of the 16th Century. There is also a later cottage on the site. The site is covered by a range of heritage designations. Lyveden New Bield (the garden lodge) is a Grade I listed building. Lyveden New Bield (the remains of the formal landscape) is included on the English Heritage Register of Parks and Gardens of Special Historic Interest at

Grade I. Lyveden New Bield (the garden lodge and part of the remains of the formal landscape) is a SAM. Lyveden Cottage is a Grade II listed building. Adjacent to the site of Lyveden New Bield, and outside the ownership of the National Trust, is Lyveden Old Bield and its attached outbuildings (formerly known as Lyveden Manor) a Grade I listed building. Along with its grounds, this formed part of the original formal landscape.

45. The intentions of Sir Thomas Tresham that lay behind the design of the formal landscape, and the processional route through it, are well documented, especially in the NT's Conservation Management Plan. It is not necessary to repeat all that. Suffice to say that the appellant's cultural heritage witness was content to acknowledge the group as probably the finest surviving example of an Elizabethan Garden, and that as a group, the heritage asset at Lyveden New Bield has a cultural value of national, if not international significance. I agree; this group of designated heritage assets has archaeological, architectural, artistic and historic significance of the highest magnitude.

46. There was much discussion at the Inquiry about the setting of the group as heritage assets. References to the concept of 'immediate setting' are not helpful because advice in PPS5 and from EH is clear. The wind turbines proposed would be visible from all around the site, to varying degrees, because of the presence of trees. Their visible presence would have a clear influence on the surroundings in which the heritage assets are experienced and as such they would fall within, and affect, the setting of the group. Bearing in mind PPS5 Policy HE7, the central question is the extent to which that visible presence would affect the significance of the heritage assets concerned.

47. While records of Sir Thomas Tresham's intentions for the site are relatively, and unusually, copious, it is not altogether clear to what extent the gardens and the garden lodge were completed and whether the designer considered views out of the garden to be of any particular significance. As a consequence, notwithstanding planting programmes that the National Trust have undertaken in recent times, the experience of Lyveden New Bield as a place, and as a planned landscape, with earthworks, moats and buildings within it, today, requires imagination and interpretation.

48. At the times of my visits, there were limited numbers of visitors and few vehicles entering and leaving the site. I can imagine that at busy times, the situation might be somewhat different but the relative absence of man-made features in views across and out of the gardens compartments, from the prospect mounds especially, and from within the garden lodge,

> give the place a sense of isolation that makes the use of one's imagination to interpret Sir Thomas Tresham's design intentions somewhat easier.
>
> 49. The visible, and sometimes moving, presence of the proposed wind turbine array would introduce a man-made feature, of significant scale, into the experience of the place. The array would act as a distraction that would make it more difficult to understand the place, and the intentions underpinning its design. That would cause harm to the setting of the group of designated heritage assets within it.
>
> 50. However, while the array would be readily visible as a backdrop to the garden lodge in some directional views, from the garden lodge itself in views towards it, and from the prospect mounds, from within the moated orchard, and various other places around the site, at a separation distance of between 1 and 2 kilometres, the turbines would not be so close, or fill the field of view to the extent, that they would dominate the outlook from the site. Moreover, the turbine array would not intrude on any obviously intended, planned view out of the garden, or from the garden lodge (which has windows all around its cruciform perimeter). Any reasonable observer would know that the turbine array was a modern addition to the landscape, separate from the planned historic landscape, or building they were within, or considering, or interpreting.
>
> 51. On that basis, the presence of the wind turbine array would not be so distracting that it would prevent or make unduly difficult, an understanding, appreciation or interpretation of the significance of the elements that make up Lyveden New Bield and Lyveden Old Bield, or their relationship to each other. As a consequence, the effect on the setting of these designated heritage assets, while clearly detrimental, would not reach the level of substantial harm."

55. In my judgment, the Inspector did not adequately summarise the intrinsic significance of the first group of heritage assets at Titchmarsh, Aldwincle, Wadenhoe and Benefield. He merely identified them, described their listing and concluded that they were clearly heritage assets of national significance, listing the four categories (archaeological, architectural, artistic, historic significance) without deciding which applied and why. Nor did he identify the contribution made to the significance of the assets by their setting.

56. In my judgment, the Inspector's assessment of the significance of Lyveden New Bield, and its setting, was unsatisfactory. There was conflicting evidence before the Inspector as to whether the owner and designer of the site intended the views from the lodge and garden to be of significance. In paragraph 47, the Inspector found it was not "altogether clear" whether "the designer considered views out of the garden to be of any particular significance". However, in paragraph 50, he concluded that the

"turbine array would not intrude on any obviously intended, planned view out of the garden, or from the garden lodge". The Second Defendant submitted that, in paragraph 50, the Inspector found that there were no planned views. I am not sure whether or not that is a correct interpretation of the decision, in the light of his apparently contradictory statement at paragraph 47 that it was not "altogether clear" whether there were planned views. The Claimants submitted that the Inspector's conclusion on planned views was perverse or unsupported by evidence. However, I am not satisfied that the Claimants have made out their case in this respect, in view of the possible alternative interpretation proffered by the Second Defendant. I have concluded that the Inspector failed to give adequate reasons for his conclusion on this important issue, and I deal with this further below.

57. In respect of each of the assets listed above, the Inspector's assessment of the effect of the proposal on its setting and in turn, on its significance was, in my view, too limited. Although he correctly considered the separation distance between the assets and the turbines, he went on to emphasise one factor above all else, namely the ability of members of the public to understand and distinguish the assets from the wind turbines. He said:

> "(a) any reasonable observer would understand the differing functions of a wind turbine and a church or a country house or a settlement and that the latter have a much greater … significance" (assets at Titchmarsh, Aldwincle, Wadenhoe, Benefield, paragraph 30);
>
> (b) any reasonable observer would not be confused by the juxtaposition and would recognise the settlement and the church as features of historic, architectural and cultural significance, and the wind turbines as modern, large-scale, functional impositions designed to capture energy from the wind. There would be no confusion about the origins or purpose of either, or both." (Lowick, paragraph 36);
>
> (c) Any reasonable observer would know that the turbine array was a modern addition to the landscape, separate from the planned historic landscape, or building they were within, or considering or interpreting." (Lyveden New Bield, paragraph 50)

58. In respect of Lyveden New Bield, the Inspector had already found:

a) that the wind turbine array would act as a distraction that would make it more difficult to understand the place and cause harm to the setting (paragraph 49); and

b) the array would be readily visible from the heritage asset site, at a separation distance of 1 to 2 kilometres, although it would not dominate the outlook (paragraph 50).

59. It appears, therefore, that the ability of the "reasonable observer" to distinguish "the modern array" from the "historic landscape or building" was the decisive factor for

the Inspector in reaching his conclusion in paragraph 51 that the effect on the setting would not reach the level of substantial harm.

60. I accept the Claimants' submission that the Inspector failed to have proper regard to the relevant planning policies, in particular that he limited his assessment to the ability of the public to understand the asset, and thus failed also to consider the contribution made by the setting to the significance of the asset.

61. In my judgment, the policies require a wider assessment to be taken, as indicated by the extracts set out below.

62. PPS 5, Annex 2 defines the "setting" of a heritage asset as:

> "The surroundings in which the asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance, or may be neutral." (emphasis added).

63. PPS 5 Annex 2 defines the 'significance' of a heritage asset as:

> "The value of that asset to this and future generations because of its heritage interest. That interest may be archaeological, architectural, artistic or historic."

64. PPS5 Practice Guide states:

"115. Setting will, therefore, generally be more extensive than curtilage and its perceived extent may change as an asset and its surroundings evolve or as understanding of the asset improves."

"116. The setting of a heritage asset can enhance its significance whether or not it was designed to do so. The formal parkland around a country house and the fortuitously developed multi-period townscape around a medieval church may both contribute to the significance."

"117. The contribution that setting makes to the significance of a heritage asset does not depend on there being public rights or an ability to access or experience the setting. This will vary over time and according to circumstance."

"119. Understanding the significance of a heritage asset will enable the contribution made by its setting to be understood. This will be the starting point for any proper evaluation of the implications of development affecting setting."

"121 The design of a development affecting the setting of a heritage asset may play an important part in determining its impact. The contribution of setting to the historic significance of an asset can

be sustained or enhanced if new buildings are carefully designed to respect their setting by virtue of their scale, proportion, height, massing, alignment and use of materials. This does not mean that new buildings have to copy their older neighbours in details, but rather that they should together form a harmonious group."

"122 A proper assessment of the impact on setting will take into account, and be proportionate to, the significance of the asset and the degree to which proposed changes enhance or detract from that significance **and** the ability to appreciate the asset." (emphasis added)

65. In my judgment, the Inspector failed properly to interpret and apply the relevant planning policies on the effect of development on the setting of heritage assets. I accept the Claimants' submission that this error would probably have affected the balancing exercise which he was required to carry out. By failing properly to assess the contribution made by setting to the significance of the heritage assets, he may have failed properly to assess the overall magnitude of harm. On the balance of probabilities, it is likely therefore that the balancing exercise was flawed.

Reasons

66. The Claimants submitted that the Inspector failed to give adequate reasons for his decision in two respects:

a) if in fact the Inspector properly considered the effect of the proposed development on the contribution made to the significance of heritage assets by their settings and discharged the duty under section 66, it is wholly unclear how he did so; and

b) in the case of Lyveden New Bield, the Inspector failed to give adequate reasons in relation to the issue of planned views from the lodge and garden.

67. In the light of my earlier finding that the Inspector failed to give proper effect to section 66 P(LBCA)A 1990, it is not appropriate for me to address the reasons challenge under that head.

68. As I have already indicated, there was conflicting evidence before the Inspector as to whether the owner and designer of the site intended the views from the lodge and garden to be of significance. This was a controversial and important issue at the Inquiry. In paragraph 47, the Inspector found it was not "altogether clear" whether "the designer considered views out of the garden to be of any particular significance". However, in paragraph 50, he concluded that the "turbine array would not intrude on any obviously intended, planned view out of the garden, or from the garden lodge".

69. Applying the test set out by Lord Brown in *South Bucks District Council and another v Porter (No 2)* [2004] 1 WL.R. 1953, at [36], I consider that the Inspector should have given a clear conclusion, with reasons, on the important controversial issue as to whether or not there were planned views, before proceeding to assess the level of harm.

70. The Claimants contended that the contradiction between paragraphs 47 and 50 demonstrated that the Inspector erred in law, either by reaching a perverse conclusion in paragraph 50, or one which was not supported by the evidence. The Second Defendant submitted that, in paragraph 50, the Inspector found that there were no planned views. I am left with a substantial doubt as to the Inspector's reasoning and whether or not the Inspector did make an error of law.

71. I find that the failure to give adequate reasons contravenes rule 19(1) of the Rules, and prejudices the Claimants as they are not able to ascertain the Inspector's conclusions in relation to an important controversial issue, nor whether he has made an error of law.

Conclusions

72. The Claimants' application under section 288 TCPA 1990 succeeds for the following reasons. The Inspector:

a) failed to give proper effect to the duty under section 66(1) Planning (Listed Buildings and Conservation Areas) Act 1990 when carrying out the balancing exercise;

b) failed properly to interpret and apply the relevant planning policies on the effect of development on the setting of heritage assets, which meant that the balancing exercise was flawed;

c) failed to give adequate reasons for his decision.

Remedy

73. Mr Hardy submitted that, even if the Claimants succeeded in establishing that the Inspector had erred in law, relief should be refused on the ground that the outcome would have been the same in any event, relying upon *Simplex Holdings v Secretary of State for the Environment* (1989) 57 P. & C.R. 306, where a factual error had been made.

74. In my judgment, it is not possible to predict what conclusion the Inspector would have come to if he had correctly applied section 66(1) P(LBCA)A 1990 and the relevant planning policies.

75. Therefore the decision ought to be quashed and the appeal re-considered, in the light of my judgment.