Neutral Citation Number: [2019] EWHC 1128 (QB)

Case No: HQ16X02767

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2019

Before:

MR JUSTICE SWIFT

- -

Between

CHALFONT ST PETER PARISH COUNCIL	**Claimant**
- and -	
HOLY CROSS SISTERS TRUSTEES INCORPORATED	**Defendant**

- -
- -

MATT HUTCHINGS QC (instructed by **Simons Muirhead & Burton LLP**)for the **Claimant**
PHILIP COPPEL QC & ASITHA RANATUNGA (instructed by **Farrer & Co**) for the **Defendant**

Hearing dates: 11th - 15th, and 18th - 22nd February 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE SWIFT

Mr Justice Swift:

A. Introduction

1. Until 2006, the Defendant ran a girls' school ("the School") on land in the village of Chalfont St Peter. A convent also stood on the site. The site is referred to as the Grange. The Sisters of the Holy Cross is an international congregation of nuns. The congregation was founded in Switzerland in 1844 with the purpose of providing education to young people, especially women, in rural Switzerland. The congregation first established in England in 1902. The Defendant (a body incorporated under what is now section 251 of the Charites Act 2011) comprises the trustees of a trust made under a Deed dated 20th August 1949, which concerns property held by the English Province of the Sisters of the Holy Cross. I will refer to the Defendant as "the Holy Cross Sisters", and the international congregation as "the Congregation". There are now some 17 nuns in the Congregation's English Province; only a very small part of the 1,500 sisters who are members of the Congregation worldwide. The Holy Cross Sisters ran the School from 1928 until 2006.

2. The claims now made by Chalfont St Peter Parish Council ("the Parish Council") arise out of steps taken by the Holy Cross Sisters, following the School's closure, to obtain planning permission for the Grange site. Chiltern District Council ("the District Council") granted outline planning permission for the Grange site in December 2010. The first part of the Parish Council's case is that to obtain that planning permission and specifically for the purposes of a meeting of the Planning Committee of the District Council that took place on the 5th August 2010, some of the Holy Cross Sisters, together with a former employee at the School, conspired to provide false information to the District Council about the use to which part of the school site was put when the School was in operation. The second part of the Parish Council's case relies on the tort of interference with its interest by unlawful means. For the purposes of this claim too, the Parish Council contends that some of the Holy Cross Sisters provided false information to the District Council. The Parish Council relies on substantially the same events in support of the unlawful means interference tort claim as it does in support of the conspiracy claim, save that for the purposes of the former claim, there is no need to demonstrate the existence of an unlawful combination.

3. The focus for both claims is what happened in the middle part of 2010, and in particular the events leading up to the meeting of the District Council's Planning Committee on the 5th August 2010. However, the evidence I have heard has covered, in some detail, events prior to the closure of the School in 2006 and thereafter between 2006 and 2010. The Parish Council's case is that the conspiracy comprised Sister Imelda Fleming, a nun who as at 2010 was both Leader of the English province of the Congregation, and a trustee of the Holy Cross Sisters; Sister Teresa Mooney, a nun who is a member of the Congregation, and who had both taught music at the School and lived at the convent at the Grange for almost the whole of the period since the 1950s; and Michael Kelly, the caretaker of the School from 1980 until its closure in 2006. When the case was opened the Parish Council also contended that two other members of the Congregation were parties to the conspiracy. The first, was Sister Margaret Donovan. She had been a trustee of the Holy Cross Sisters since 2000. However, when she came to give evidence, she was not cross examined on the basis she was party to any conspiracy. It follows that

the conspiracy case, so far as it involved her, fell away. The second was Sister Mary Christa Stanton, a member of the Congregation, who taught at the School between 1991 and 2006. She lived at the convent on the Grange site during that period, and has continued to live there since. By the time of closing submissions, the Parish Council decided not to pursue its case against her as a conspirator. In a nutshell, the Parish Council's contention is that Sister Fleming agreed with Sister Mooney and Mr. Kelly that Sister Mooney and Mr. Kelly would give false information to Richard Moir, a partner in the firm of Gerald Eve. Gerald Eve was the firm retained by the Holy Cross Sisters to act on its behalf for the purposes of the application for planning permission to develop the Grange site. The conspirators intended that Mr. Moir would pass this false information to the District Council and cause the District Council to grant planning permission. The Parish Council's case on unlawful means interference is factually similar. It is that Sister Mooney and Mr. Kelly made false statements, dishonestly in order to induce the District Council to grant planning permission, and with the intention to harm the Parish Council's interests.

B. Narrative

(1) The decision to close the School

4. The Holy Cross Convent School was established in 1928. The Grange site was home both to the School and the convent where the Sisters lived. The School was a fee-paying Catholic School. Most of the Sisters who lived at the convent from time to time, were involved with the School as teachers or in other roles. Lay people also taught at the School. During the latter part of its existence the majority of the teachers at the School, including the Head Teacher, were lay people.

5. At its peak in the 1980s there were almost 500 pupils at the School, including a sixth form. However, pupil numbers declined from the 1990s onwards. In part it appears this was explained by decisions taken by the Ministry of Defence to cease to pay boarding fees for the children of service personnel posted overseas. Be that as it may, pupil numbers declined such that by November 2005 there were only 235 pupils spanning the years between reception and the sixth form.

6. A convenient starting point in the story is the Provincial Chapter meeting that took place between 25th and 27th October 2002. This meeting took place shortly before Sister Imelda Fleming took up the role of Provincial Leader, the leader of the members of the Congregation in England. At this time there were around 20 nuns within the English Province, about 12 of whom lived at the convent at the Grange site.

7. The minutes of the meeting included consideration of the following proposal.

> "PA and Province to take positive steps to look realistically at all our institutions and communities etc. to act on slimming down our administration reasonabilities with the objective of freeing for new directions that we are able to respond to"

Sister Fleming explained this comprised a root and branch reconsideration of the Congregation's activities in England, including the School at Chalfont St Peter and a further school at Kingston-upon-Thames, the Holy Cross Preparatory School.

8. In June 2005 Gerald Eve, the property consultants and long-standing advisors to the Holy Cross Sisters, provided a letter of advice which considered a number of possible options for the future of each of these sites. By the latter part of 2005 specific consideration was given to the continuation of the School. In a letter dated 15th November 2005, Buzzacott, a firm of chartered accountants, reviewed the financial performance of the School and that of the Holy Cross Preparatory School. The financial position of the Holy Cross Preparatory School was sound. The same could not be said for the School which had showed an operating deficit in five of the previous eight years, and a net operating deficit over that eight year period of over £320,000. Over the same period the Holy Cross Sisters had contributed over £500,000 to the School's running costs and capital expenditure.

9. A Provincial Council meeting took place on 19th November 2005. At that meeting the Provincial Council reviewed the financial position of the School and decided that it should close with effect from the end of the 2005/2006 academic year. This decision took account of the significant operating deficit of the School over an extended period, low pupil numbers which meant the School was not viable either financially or in educational terms, and the likelihood that if the School continued to operate substantial capital investment would be required. The decision to close the School was also taken bearing in mind the ageing profile of the nuns who made up the English Province. All were then either beyond or close to retirement age. This meant that members of the Congregation would cease to be directly involved in teaching at the School, and called into the question the ability of members to continue to participate in the management of the School.

10. The Provincial Council did not have the authority to take a final decision on whether the School should close. That authority rested with the Congregation's Superior General in Switzerland. On 25th November 2005 Sister Fleming wrote to the Superior General explaining the decision to close the School, seeking her ratification of the decision. By letter dated 16th December 2005 Sister Anne Roche, the Superior General, gave permission for the School to close at the end of the 2005/2006 academic year.

11. The decision to close the School was first communicated to staff and parents on 27th January 2006. That announcement started the period of statutory consultation required because closing the School would mean likely redundancy for the teaching and other staff. Strictly speaking, the decision taken at this stage was to withdraw from running the School, however, without continued financial support from the Holy Cross Sisters the School would not be in any position to operate.

12. I heard significant evidence about events starting with the closure announcement starting in January 2006 continuing through to April 2006. During this time a group of parents formulated a proposal to take over the running of the School. The first version of the proposal was put forward in February 2006 and a revised proposal was made in March 2006. Nicholas Cray was one of the group of parents who led the attempt to prevent the closure of the school. He gave evidence as to the terms of the proposals put forward and, as he saw it, the attitude of the Holy Cross Sisters, in particular of Sister Fleming, to those proposals. This evidence was given at length, but the thrust of it was Mr Cray's fervent beliefs that the Holy Cross Sisters did not take his proposals seriously, and that at all times the Holy Cross Sisters were determined to close the School so as to be able to realise the value of the Grange site. Mr Cray's evidence was that the proposals he put forward for the School's future were viable and should have

been accepted. I will not set out those proposals in detail, but in summary they entailed the transfer of the Grange site to new trustees, either leasehold or freehold. The new trustees (who would be parents of pupils at the School) would continue to run the School in its then present form.

13. I do not doubt the sincerity of Mr Cray's beliefs on these matters, but I do not accept his evidence which was to the effect that the Holy Cross Sisters' decision to reject the parent's proposal was disingenuous, and concealed the true motivation which was the desire to realise the commercial value of the Grange site. In fact, the Holy Cross Sisters took advice on the parents' proposals (both original and revised) from its accountants (Buzzacott), and its property consultants (Gerald Eve), and its then legal advisors (Witham Weld). The overall tenor of that advice was that the proposals were not viable. For example, in respect of the first proposal, Mr Moir of Gerald Eve concluded (in a letter dated 28th February 2006) that the proposal would provide the Holy Cross Sisters with an inadequate financial return from the property and would leave the School in a precarious position.

14. I have reached a firm conclusion, based on consideration of the various letters and advice provided to the Holy Cross Sisters at this time, that the decision to reject the parents' proposals, advanced by Mr Cray and others, was not disingenuous at all. Quite to the contrary, it was an entirely reasonable decision in light of the advice provided by the various professional advisers, and in light of the reasons which had motivated the decision to close the School as apparent from the minutes of the Provincial Council meeting on 19th November 2005. Although I accept Mr Cray's evidence was sincere, it was apparent to me he lacked objectivity. The significant practical and emotional investments he made in the plan to keep the School open had the consequence that he became blinkered, to the extent that he could not entertain the possibility that anyone who disagreed with him on his proposals for the School might do so for genuine and sound reasons. One example of this was his clear view that the charitable objects of the Holy Cross Sisters extended no further than the maintenance of the School at Chalfont St Peter. In fact, the charitable objects are much more widely-framed.

15. I had expected that Mr Cray's evidence, and evidence to similar effect from Richard Allen a member of the Parish Council since 2005, its Chairman between 2007 and 2011 and leading proponent of this litigation on its behalf, was led in support of a submission that from at least 2005 when closure of the School came under consideration, the Holy Cross Sisters and in particular Sister Fleming, had formed a fixed view that the full development value of the School site had to be realised in preference to all other options, and that this was the context for what happened in 2010 when the application for outline planning permission was made. In fact, no such submission was made to me. Had the submission been made I would have rejected it. There was nothing remotely colourable about the decision to close the School. The decision rested on an assessment, based on reasonable grounds, that the School would not in future be viable, absent significant financial support from the Holy Cross Sisters.

16. Further, I accept that proper consideration was given to the proposal advanced by Mr Cray and the other parents, and I accept the decision to close the School rather than proceed with the parents' plan was a decision taken because, based on the professional advice received, Sister Fleming honestly believed on reasonable grounds, that the proposal to continue the School would in all likelihood fail. There was no ulterior motive. Any notion that as at August 2006 the objective was to sell the land for its full

development value would also demonstrably be closer to conspiracy theory than any form of conspiracy known to law. As I explain below, as at 2006, the designation of the Grange site on the District Council's Local Plan rendered the prospect of the site's development entirely speculative. The contention, had it been advanced, that the decision to close the School in 2006 was part of a single plan that culminated with the application for planning permission in 2010, would have been entirely implausible.

(2) *The application for outline planning permission*

17. The next stage in the narrative concerns the application for outline planning permission made in February 2010.

18. In February 2006, in the context of advising on the parents' proposal to take on the running of the School, Gerald Eve had advised that since the Local Plan designation of the Grange site was as *"open amenities space"*, the likelihood of obtaining planning permission for substantial development of the Grange site was low. This remained the position until early 2008.

19. In the meantime, it appears that during 2007 the Holy Cross Sisters decided that the Grange site was surplus to its requirements, and that the preferred course of action was to realise the value of the land. Again, the final decision on this matter was something for the Superior General, Sister Roche. In a letter dated 7th May 2007 she gave permission to put the site on the market, subject to part of the site being used for a new convent building.

20. In the course of 2007 some steps were taken with a view to marketing the land. By January 2008 a draft marketing brochure had been prepared, but marketing itself did not commence. Then, in February 2008, circumstances changed. The District Council had started to formulate a new Local Development Framework. That framework had to accommodate substantial new development because of the housing target set by the government in its Regional Strategy. In early 2008 it came to Gerald Eve's attention that, as part of an initial proposal, the District Council had identified a substantial part of the Grange site as an area for new-build development. Mr Moir wrote to Sister Fleming to this effect on the 20th February 2008. He informed her that because of the possibility that the value of the site could increase significantly if the District Council's proposals became part of the Local Development Framework, any attempt to market the Grange site should be put on hold until at least September 2008, to await the District Council's decision.

21. On 3rd September 2008 Mr Moir wrote to Carol Castle, the District Council's Head of Planning, pointing out that the Holy Cross Sisters wished to dispose of the Grange site, and that the property had potential to accommodate development of a large number of new houses. At this time the District Council was considering which of four options for development to promote as part of its new Local Development Framework Strategy. Mr Moir's letter was consistent with the District Council's Option 3, which proposed development at three areas including Chalfont St Peter. At the end of September 2008, the District Council decided that Option 3 was its preferred option.

22. In early October 2008, Sister Fleming met with Mr Moir. By that time Mr Moir was of the opinion that an application for planning permission should be made as early as possible in 2009. What he envisaged was (as he described it) *"a mixed-use*

development", including using part of the site for new-build housing. At a Provincial Council meeting on 13th December 2008, a decision was taken not to market the site but instead to apply for planning permission with a view to marketing the site once planning permission had been obtained.

23. On 3rd July 2009 Gerald Eve wrote to Mr Turnbull, the Development Control Officer at the District Council, asking for a screening opinion on an application for outline planning permission for development comprising a care home, houses, and flats. That opinion was provided in a letter dated 7th November 2009. Prior to that in October 2009, Gerald Eve had arranged for an exhibition of draft plans for the Grange site at the Chalfont St Peter Library. The Holy Cross Sisters' application for outline planning permission was submitted by Gerald Eve to the District Council on 5th February 2010. It was an application for outline planning permission in respect of

> "mixed use development to provide up to 232 new homes, a residential care home, community facilities, recreation, car and cycle parking and landscaping and associated works".

By this time the new convent accommodation had already been the subject of a separate planning application, granted by the District Council on 4th September 2008. Under that permission, the existing convent premises were to be demolished and new convent premises built.

(3) *The Parish Council's opposition to new development in Chalfont St Peter*

24. Following the District Council's decision in September 2008 that as part of its Local Development Framework Strategy, Chalfont St Peter should be one of the locations for new housing development, the Parish Council had sought to mobilise opposition. Indeed, even before the decision of the District Council the Parish Council had been alive to the possibility that the Grange site could be a focus for possible new development. As early as a meeting on 19th May 2008 the Parish Council recognised that it might need to act quickly to prevent development at the Grange site, and sought to engage the support of the local newspaper – the Bucks Advertiser – in its opposition to development in Chalfont St Peter. At around the same time, the Parish Council began to promote the formulation of a Village Design Statement and Parish Plan as a means of preventing the District Council going ahead with any idea that there should be significant new development in the village. A Village Design Statement is a form of planning guidance. It is a document written and researched by local communities, with only advisory input from the local planning authority. These Statements are intended to represent a community view of how new development should be designed in order to retain a sense of place and is in keeping with existing local character. Once a Village Design Statement has been approved by the relevant planning authority, it becomes a relevant planning document, and as such the planning authority must take account of its contents when it determines any planning application which affects the area covered by the Statement.

25. In July 2008, Mr Allen, who was by this time Chairman of the Parish Council, contacted Mr Underwood, the Headteacher of the Chalfont St Peter Church of England School ("the Church of England school"). Mr Allen suggested that the Church of England school might relocate to the Grange site from its present site in the village, with the consequence that the site of the Church of England school (a much smaller site than the

Grange) could then be available for new-build housing. Mr Underwood was very attracted to this idea, and it became an idea that was to figure in the proposed draft Village Design Statement and Parish Plan.

26. Progress with the proposed Village Design Statement was relatively slow. A draft for consultation was published on 31st January 2010. By the time of the District Council's Planning Committee meeting on 5th August 2010, the Village Design Statement remained in draft before the Parish Council; it had not been adopted by the District Council as a relevant planning document. The suggestion that the Church of England school move to the Grange site remained a matter of discussion between the Church of England school and the Parish Council (primarily between Mr Underwood and Mr Allen). Mr Underwood also sought to engage the support of Buckinghamshire County Council, the relevant educational authority. The proposed relocation of the Church of England school is a matter of importance in this litigation since, for the purposes of the unlawful means interference tort, the Parish Council's case is that its interest in that proposal was the relevant interest that was the subject of interference.

27. On 20th March 2009 Mr Allen, Mr Underwood and others, met to discuss the proposal to relocate the Church of England school. It is fair to say that by then the proposal remained in a very preliminary form. The meeting recorded as follows:

> "The political will of the move needs to be ascertained
>
> A feasibility study needs to be completed
>
> Valuation of the land needs to be established
>
> Basic needs to be established with statistics to back up this position
>
> Review of Chiltern South Bucks children's education provision needs to include Chalfont St Peter currently it does not
>
> Village community opinion needs to express support for this outcome
>
> Sharing information regarding this project to the press and a wider audience is currently on hold"

28. On 23rd March 2009, the Parish Council agreed that in principle it would support the Board of Governors of the Church of England school

> "in the campaign to move the school to the Holy Cross Convent site possibly including Chalfont St Peter First School as well"

29. The relocation of the Church of England school was next discussed at the Annual Parish Meeting on 21st May 2009, in the context of opposition to the District Council's proposal in the draft Local Development Framework Strategy to identify the Grange site as a location for new housing development, and promotion of the idea of a Village Design Statement and Parish Plan. Mr. Allen suggested to the meeting that the Church

of England school should be relocated to the Grange instead. The Parish Meeting then passed a resolution requesting that

> "Chiltern District Council and Bucks County Council work together with the Parish Council and a wider partnership which is to be formed towards resolving the future school and community provision in line with development plans in Chalfont St Peter."

That resolution was considered at the next meeting of the Parish Council on 28th May 2009. It was agreed that the resolution passed at the Parish Meeting should be reformulated as being a request from the Annual Parish Meeting. The Parish Council then agreed

> "… that is was important for this request to be written in a precise and detailed way taking into consideration all the relevant factors such as a Village Design Statement, Chiltern Local Development Framework and the need for utilities and community facilities"

30. As far as I can tell, the 28th May 2009 meeting was the final occasion on which the Parish Council passed any resolution concerning the relocation of the Church of England school to the Grange site. The Parish Council did continue to voice its political opposition to that part of the District Council's Core Strategy Document that proposed identifying the Grange site as a location for housing development (see for example at the meeting on 29th August 2009). The Parish Council also continued work on its it proposed Village Design Statement and Parish Plan, this too being a manifestation of its political opposition to the prospect of significant new housing building in Chalfont St Peter. It is important to recognise that at this time the opposition was primarily directed to the District Council's plans in its proposed Core Strategy Document. That, of course, included the prospect that housing development would be permitted at the Grange site; however, any actions on the part of the Holy Cross Sisters was not the primary focus of the campaign waged by the Parish Council.

31. On 31st January 2010 a first draft of the Village Design Statement was published for consultation. The Grange site was mentioned in Section 5 of the document. Various recommendations were made as to the steps that should be taken before any decision to develop the site was made. There was no recommendation to the effect that the site should not be developed. Section 8 of the Village Design Statement considered educational provision. The recommendation under this section in the draft was as follows

> "the potential of the existing buildings of the Grange should be optimised for use as a larger school facility for the village with additional leisure and community facilities usable by the whole community"

32. Drawing these matters together, by the time of the meeting of the District Council's Planning Committee on 5th August 2010, the proposal that the Church of England school relocate to the Grange site remained no more than a bare proposal. It had the in-principle support of the Parish Council, no doubt because it was an idea that fitted well with the Parish Council's opposition to the District Council's proposal to identify the

Grange site in its Local Development Framework Core Strategy as a location for new-build housing. However, the proposal did not have the support of Buckinghamshire County Council (the Education Authority). Further, the Diocese of Oxford, the organisation responsible for the Church of England school, while having no in-principle objection to the proposal, had made it clear that it had no funds available to commit to any such scheme. The Church of England school site was significantly smaller that the Grange site, so either funds would need to come from somewhere to enable the proposal to move from the realm of theoretical possibility to practical possibility, or some very creative arrangements would have to be devised to permit the Church of England school site to be traded for a suitable part of the Grange site.

33. The Parish Council's pleaded case in respect to the relocation of the Church of England school is at paragraph 21 of the Re-Amended Particulars of Claim. It is as follows

> "In about June 2008 the Claimant and the Church of England School agreed collectively to pursue a land swap proposal where by the Church of England School would be relocated to the site. As part of a mixed-use redevelopment of the site they proposed that the site of the Church of England School would be sold for housing development and the proceeds of sale reinvested in the new site of Church of England School at the site, and that planning permission would be obtained accordingly in respect of both sites."

The references to the site in this part of the Re-Amended Particulars of Claim are references to the Grange site. There is no evidence of any such agreement either in June 2008 or otherwise. The Parish Council's position went no further than the resolution passed at the meeting on 20th March 2009. There is no evidence of an agreement for *"mixed use development"* of the Grange site. In short, the Proposal described at paragraph 21 at the Re-Amended Particulars of Claim was never more than aspirational. So far as concerned the Parish Council, all that existed by the time of the 5th August 2010 Planning Committee Meeting was the Parish Council's resolution of 20th March 2009.

(4) *Events in 2010*

34. I turn now to events leading to the meeting of the District Council's Planning Committee on 5th August 2010. Given the way in which the Parish Council has put its case, the critical issue concerns the objection to the planning application raised by Sport England premised on use of the former school grounds for sport up to 2006 (when the School closed). In what follows, I shall focus on matters material to that objection.

35. The application for outline planning permission was submitted on 5th January 2010. Mr Moir explained that from the point of view from the District Council's planning policy, as at February 2010 the matters of principal concern to the planning experts at Gerald Eve (in particular Mr. Peter Dines, who took the lead on this aspect of the application) were the District Council's Policies R10 and CSF2.

36. Policy CSF2 was (so far as material) as follows:

> "Within the built-up areas excluded from the green belt the Council will not allow any development which results in loss of community service or facility on the site in question unless
>
> i) a replacement building and/or land can provide in an equally convenient location that would comply with policy CSF1, or
>
> ii) it can be demonstrated to the satisfaction of the Council that the facility is no longer required for its existing use or for any other community use in the built-up area in which it is located or in the district as appropriate to the type of use under consideration, and
>
> iii) other policies within this local plan would be complied with"

Policy R10 was as follows:

> "Development will not be permitted if it would
>
> (i) result in the loss as a whole or in part of any area of amenity open space (not open to the general public) as defined on the proposals map or
>
> (ii) be seriously detrimental to the established character of the amenity open space referred to in clause (i).
>
> Where development proposals are acceptable in accordance with this policy this proposal should also comply with other policies in this local plan."

Each of these policies was addressed in the planning application document.

37. The planning application document also addressed Policy R2. Policy R2 was as follows:

> "Development which would result in loss of any existing sports facility to a non-sports use will be refused unless either of the circumstances set out below applies and exception to this policy may be permitted in the following circumstances
>
> (i) the applicant demonstrates to the satisfaction of the Council that there is no continuing community need for the facility and it is not possible use the facility for other sports or
>
> (ii) alternative provision of at least an equivalent size suitably and convenience as defined in Policy R1(i) and (ii) is made,
>
> and
>
> (iii) Other Policies in this Local Plan are complied with"

In respect of this the planning application submitted on behalf of the Holy Cross Sisters stated as follows (at paragraphs 5.129 and 5.139 of the planning statement which was part of the application):

> "Policy R2 seeks to retain sports pitches, a sports pitch on the site has remained unused since the closure of the school recent evidence in the form of the councils Open Spaces and Recreational Facilities Audit and Needs Assessment, identifies that Chalfont St Peter is already well served by sports pitches, it is also relevant the proposals put forward play areas which were in any event be available for the community. In these circumstances the loss of the existing sports pitch will fully accord with the plan and would accord with Sport England policy"

38. On 6th April 2010 Sport England wrote objecting to the application for planning permission, stating as follows:

> "the application does not propose to retain any of the existing playing field land and no proposals have been put forward to provide replacement playing field in another off-site location"

This, considered Sport England, ran contrary to its own policy document *"A sporting future for the playing fields of England"*. Under that policy Sport England had committed itself to oppose applications to develop playing fields unless a replacement playing field was provided, or on proper assessment it had been demonstrated to the satisfaction of Sport England that there was an excess of playing field provision in the area. It is important to note that for the purposes of Sport England policy *"playing field"* was a defined term meaning the *"whole of a site that encompasses at least one playing pitch"*. In turn, a pitch was defined as a delineated area of 0.4 hectares or more used for one or other for a list of sports. The list included hockey, but did not include athletics. For the purposes of the application for outline planning permission made by the Holy Cross Sisters, Sport England was not satisfied that there was an excess of playing field provision, and for that reason it objected to the application.

39. In May 2010 Cerda Planning, acting on behalf of the Parish Council, submitted a detailed set of objections to the planning application. The objections ran to some 40 pages. A wide range of points were made in this document; one of the points raised was that there was a *"significant issue with regard to the loss of open space and playing pitches, which has not been assessed by the applicants."*

40. In early June 2010, Mr Dines of Gerald Eve, provided a draft revised plan to the District Council. Production of this revised plan had followed a "without prejudice" meeting between Mr Dines and Mr Turnbull of the District Council. Mr Turnbull sent an email to Mr Dines on 9th June 2010 addressing various matters arising from the draft revised plan. In respect of the playing field issues raised by Sport England he said as follows

> "I note the proposed retention and relocation of the playing field which is welcomed. We discussed the objection raised by Sport England at our meeting and this centred on the loss of the playing field, should you amend the layout as the above then it seems likely this would overcome Sport England's concerns, however in this context it would be helpful if you would provide an accurate plan of the existing playing field including details of its size and location together with any additional information about

> the previous use of the previous playing field which would be of assistance when reconsulting Sporting England".

I note, that unlike Sport England, it is clear that Mr. Turnbull did not adopt any rigid approach to the meaning of "playing field". In context he used the words to refer to something Sport England would probably have considered a "playing pitch".

41. The Holy Cross Sisters presented a revised planning application on 28th June 2010. The description of the proposed development was now in the following terms

> "Outline planning application with matters of access only to be considered in detail at this stage. The redevelopment of the site to provide a mixed use comprising up to 198 dwellings (use class C3) including the retention of the existing bungalow adjacent to the graveyard, and the provision of 35% of affordable housing, a residential care home for up to 74 bedrooms and up to 3,370 square meters (use class C2). Retention of existing Chapel, retention and relocation of existing playing field together with provision of both open space and permissive footpath through the existing woodland for use for the public. The whole development is to be served from new and altered vehicle accesses from Goldhill East and Grange Road and a new pedestrian access off Market Place with associated car parking and off-site highway works."

42. I need now to say something about the layout of the Grange site so far as it became an issue for the purposes of the planning application. On the Grange site roughly to the east of the original school and convent buildings was an area of open land used as recreational space for the children at the School. In these proceedings, the upper part of that area has been labelled "Area B". In 1973 this area was levelled, and after that was used as a hockey pitch. The remaining larger area of open space has, again for the purposes of these proceedings, been labelled "Area A". The reference in the revised planning documentation to the "existing playing field" was a reference to Area B, the levelled hockey pitch. The plan that accompanied the revised planning application also identified Area B as "existing playing field".

43. The revised planning application was accompanied by an amended planning statement. In these proceedings the Parish Council places some reliance on the fact that in the amended statement reference is made to a *"replacement sports pitch"*. At paragraph 1.44 to 1.45 of the amended statement the following is stated:

> "1.44 In response to objections raised to the original proposals by Sport England the revised scheme now seeks to provide a new public sports pitch on the site to replace the disused private pitch. Although seeking to retain the sports pitch on the site Sport England has made it clear in their letter of 15th December 2009 that they have "no objection to the principle of residential development on the former school site".
>
> 1.45 Accordingly, it is considered that the provision of this new sports pitch accords with policy R2 of the Chiltern District

> Local Plan, and PPG17 which seek to prevent the loss of existing sports facilities, and overcomes concerns raised to the original scheme by Sport England, the District Council and the Parish Council."

44. Sport England wrote again on 22nd July 2010. That letter included the following

> "The current application has been amended such that an area of playing field land has been retained within the scheme. It is not clear how large this playing field area is clarity should be provided in this regard … The proposals still result in the loss of playing field land in the order of approximately 1.2 hectares. The applicant has made no attempt to demonstrate that the proposals accord with Sport England's adopted playing fields policy or the provisions of PPG17, and it is clear that the loss of playing field does not meet any of the above exception policies.
>
> As stated in our previous objection, the proposals are not considered to accord with exception policy E1 in the absence of an up to date and credible evidence base.
>
> As such Sport England continues to object to this application."

In summary, Sport England maintained its objection, this time on the basis that the whole of Area A and Area B constituted *"playing field land"*. Therefore, according to Sport England, notwithstanding the proposal to retain the hockey pitch in Area B, the planning application still entailed a loss of playing fields, and there was no assessment that satisfied Sport England that there was an excess of playing field land in the area. I note that the Sport England objection was entirely independent of what sporting use had been made of Area A prior to 2006. Area A was "playing field land" simply because of the prior use of Area B as a hockey pitch, and for no other reason.

45. In late July 2010, Mr Turnbull prepared his report for the Planning Committee meeting scheduled for the 5th August 2010. That report was circulated to councillors on the Committee, and posted on the District Council's website. A significant part of the report addressed the application for planning permission made by the Holy Cross Sisters. In respect of the objectives arising from the proposal to develop the former playing fields (i.e. Areas A and B) the report stated as follows at paragraphs 10 – 14

> "<u>Retention of and relocation of the existing playing field associated with the school</u>.
>
> 10. Policy R2 concerns the loss of existing sports facilities within the district and states that development that results in the loss of such facilities will not be permitted, unless there is no continuing community need for the facility or alternative provision is made. The policy confirms that it also applies to land last used as school playing fields. The applicant has confirmed that the site, when operated as a private school, contained a playing field and has submitted plans to show its extent and location to the north west of the application site. The original

schemed submitted under this planning application did not include the retention of the playing field. As such it would have been for the applicant to show that there was no continuing community need for the facility. Furthermore, Sport England raised objection to the loss of the playing field. Subsequently as stated previously the application has been amended and a revised scheme has been submitted which now retains the playing field. Whilst the lay out only remains indicative at this stage, it does show the retained playing field, which is of the same size and shape as the existed playing field, to be relocated within the site. Notwithstanding this, Sport England is maintaining its objection to the proposal. The reason for this appears to be that Sport England has assumed that the playing field associated with the school incorporated all the open grass land to the north and east of the school buildings, and if this were the case then approximately 1.2 hectares of playing field land would be lost. Sport England does not therefore consider the relocated and retained playing field meets criterion E4 of Sport England's adopted playing field policy, which refers to the minimum excepted requirement that "… the proposed development would be replaced by a playing field or playing fields of an equivalent or better quality …". However, the applicant who has extensive first-hand knowledge of the site and have owned it and operated the school from it for many years, has stated that the extent of the playing field was not as indicated by Sport England but was as shown on their submitted plans. The applicant states that the proposed playing field is the same size and shape as the existing playing field and that no loss of playing field will in fact occur as a result of his proposed scheme.

11. Bearing in mind the first-hand nature of the landowner's extensive knowledge of this site spanning decades, the comments of Sport England are noted, but there is no evidence to indicate that the extent of the playing field went beyond that shown by the applicant on the submitted location plan.

12. Notwithstanding the above, if the landowner's assertions were not correct then it should be noted that Chiltern District undertook its Open Space Sport and Recreational Facilities Audit and Needs Assessment in 2005 (Planning Policy Guidance 17. Open Space Sports and Recreation PPG17 Study). This assessed the provision of open space and playing pitches based on a standard established by the consultants on a settlement by settlement basis. In respect of playing pitches the 2005 study on assessed those pitches which were publicly available that is public pitches or those school pitches both private and public which were let out to outside groups to use in evenings and weekends. The study did not include the Holy Cross Convent site and it had no public access or use. However, the PPG17 study concluded that there was effectively an

oversupply of playing pitches in Chalfont St Peter if all the available accessed pitches were included. (Paragraph 8.678 PPG17 Study).

13. Further to the PPG17 Study the Council commissioned the same consultants to undertake, a sports pitch strategy for Chiltern District Council. This was conducted in consultation with Sport England and assessed the playing pitch capacity on a settlement by settlement basis and sport by sport basis. In respect of football, there was a theoretical shortfall of football pitches available for teams on Saturdays, and a surplus of available pitches on a Sunday. However, the consultants qualified this by stating this shortfall was based on assumptions they had made rather than on empirical evidence. They did not recommend the need for more football pitches in Chalfont St Peter. Recommendations for future needs in the settlements related to improvements and/or provision of changing facilities at existing pitches rather than demand for new pitches. In relation to cricket pitches provision within the settlement was acceptable. There was a suggestion that the local club would "like" an additional cricket pitch for one of its teams and that this was something the Council should support, however there was no stated need for additional pitches within the settlement. The only other main sport played in the district was rugby where facilities were adequate with the exception of some improvements required in relation to the Chesham Rugby Club.

14. Concern has also been expressed by local residents and the Parish Council about the loss of other sporting facilities that were associated with the former school use of the site, including the tennis courts. It should be noted that the school tennis courts do not fall under either the Government definition of a playing field or indeed the definition of an outdoor sports facility as defined in the adopted local plan. Loss of the tennis courts is not contrary to planning policy. In respect of outdoor recreation generally the proposed development provides an increase in opportunity for the public to use some of this land. In this context it should be noted the development includes the creation of a permissive network of footpaths through the woodland area identified on the "indicative master plan", thereby providing an opportunity for outdoor recreation as part of the development. This has been welcomed by Natural England, who also the encourages the provision of open natural green spaces as detailed in the applicant's design and access statement. To this end the revised "indicative master plan" shows the area immediately adjacent to the woodland to remain as an open natural green space. The permissive network of footpaths through the woodland and the adjacent open space can be secured by way of a condition if planning permission is forthcoming."

46. It is clear that for the purposes of writing this report Mr. Turnbull had not adopted Sport England's distinction between *"playing fields"* and *"playing pitches"*. On this point it can be noted that the District Council's Policy R2 was not formulated in terms of playing fields and playing pitches. Rather it was drafted in terms of "sports facilities" with that term then defined to include "school playing fields". It is then likely that Mr. Turnbull's references to playing fields are to areas used for outdoor sport facilities. At paragraph 10 of the report, Mr. Turnbull's approach was to accept the Holy Cross Sister's position that the relevant playing field was Area B, and on that basis, he reached the conclusion that the application for planning permission entailed *"no loss of playing field"*.

47. Paragraph 12 of the report is also important. Here Mr. Turnbull assumed the conclusion he had stated at paragraph 10 was wrong. On that premise he went on to conclude that in any event, and notwithstanding any loss of playing field at the Grange site, there was an oversupply of playing pitches.

48. Thus, on any analysis, concluded Mr Turnbull, the application was consistent with Policy R2. Mr Turnbull's overall recommendation was that the Committee should decide that it was

> "… minded to grant conditional permission subject to the conditions set out below, with the decision deferred for referral of the application to the Secretary of State and for the prior completion of the section 106 planning obligation. The final decision delegated to Head of Planning Services."

(5) *Sport England's letter dated 3rd August 2010*

49. On 3rd August 2010 Sport England wrote to the District Council again, having taken the opportunity to read Mr. Turnbull's report. In this letter Sport England repeated its definition of *"playing field land"*. The point made by Sport England was that the whole of the land (i.e. Area A and B) compromised playing field land because Area A and Area B were part of a single site. In support of the contention that there was a single site, Sport England relied on aerial photographs which it said showed that there was a pitch and/or a running track on Area A as well as the pitch on Area B.

50. As I understand it, the Sport England 3rd August 2010 letter was directed to the point at paragraph 10 of Mr. Turnbull's report. The point of significance for Sport England was that Area A was part of the same site as Area B; it was not a matter of significance *per se* whether there was a pitch on Area A. The Sport England letter did not address the point at paragraph 12 of Mr. Turnbull's report.

(6) *Events of 4th August 2010*

51. The Sport England letter of 3rd August 2010 was provided to Mr Moir of Gerald Eve just before 9am on 4th August 2010. That was the day before the meeting of the Planning Committee. He decided he needed to get instructions on the matters in the letter and write further to the District Council before the meeting of the Planning Committee scheduled for the next day. In the evidence before me there has been a significant focus on what happened in the course of 4th August 2010. I heard evidence

on this from Mr Moir, Sister Fleming, and Sister Stanton, and I have seen witness statements dealing with the events of that day from both Sister Mooney and Mr. Kelly.

52. Civil Evidence Act notices were served in respect of Sister Mooney and Mr. Kelly. The notice for Sister Mooney was served in accordance with the Rules, and was served on the basis that Sister Mooney was too unwell to attend court as a witness. I have been provided with evidence of Sister Mooney's health and I am entirely satisfied that the Notice was served on proper grounds. Mr. Hutchings QC, for the Parish Council, made no specific submission as to the weight I should attach to Sister Mooney's evidence. The Civil Evidence Act notice for Mr Kelly was served during the trial. Mr. Hutchings QC objects to the admission of Mr. Kelly's statement on the basis that the Notice was not served in accordance with the Rules. That submission runs counter to section 2(4) of the Civil Evidence Act 1995, and for that reason I reject it. Section 2(4) of the 1995 states in terms that a failure to comply with the rules does not affect the admissibility of the evidence. Rather, failure to comply with the rules is relevant to the weight to be attached to the evidence. Section 4 of the 1995 Act makes provision in respect of the weight to be attached to hearsay evidence. The general position is that a court may weigh the evidence taking account of any circumstances from which *"any inference can reasonably be drawn as to the reliability or otherwise of the evidence"* (see section 4(1)). Section 4(2) then identifies, non-exhaustively, matters which may weigh in the balance. In the present case I do not attach specific significance to the fact that the Civil Evidence Act notice was served late. The thrust of the medical evidence provided (some during the trial, the rest with permission, after the end of the hearing) is that Mr Kelly suffers from symptoms of *"significant anxiety depression"* brought on by the prospect of attending court to give evidence. Since the prospect of giving evidence is the apparent cause of his symptoms, that also explains the reason why it did not become apparent until the trial was in progress, that Mr. Kelly would not be able to attend. However, the fact that Mr. Kelly was not able to attend to give evidence and be questioned is a matter which does affect the weight I am prepared to attach to the evidence in his witness statement. I shall return to this below.

53. As to what happened on 4th August 2010, Mr Moir's evidence is that once he saw the Sport England letter of 3rd August he realised he needed to get instructions on what he saw as a new factual contention – namely that there were two sports pitches, one in each of Area A and Area B. As I have explained above this was not the primary point made by Sport England in its letter. The primary point was that Area A and Area B were part of a single site that for the purposes of Sport England's Policy was "a playing field area". Be that as it may, I appreciate that the Sport England letter was thrust upon Mr. Moir at the last minute and he did not have the luxury of reflecting on its contents or considering what was now said in the context of what Sport England had said in its previous correspondence. Mr Moir had to deal with the point at speed and in the moment. His decision was to obtain instructions on whether Area A had previously been used as a playing pitch.

54. It also appears that on the morning of 4th August 2010, Carol Castle the District Council's Head of Planning spoke to someone at Gerald Eve, and in that conversation said that the 0.8 hectares of land allocated as a sports pitch in the revised planning application (i.e. Area B), might not be enough. Whether or not that conversation was reported to Mr Moir was not clear, but he certainly had a copy of the Sport England letter.

55. Mr Moir's recollection of what happened on 4th August 2010 is that he spoke first to Sister Mooney, and then to Mr. Kelly. He does not remember whether he spoke to Sister Stanton. Mr Moir's evidence was that he did not think he spoke to Sister Fleming. His evidence was that when, on previous occasions, any practical matter had arisen – for example about access to the site – he had gone either to Sister Mooney or Mr. Kelly as both lived on or near the Grange site. His evidence is that on 4th August 2010, he followed the same course of action. He spoke directly to Sister Mooney and Mr. Kelly and did not speak first to Sister Fleming, because he thought Sister Mooney and Mr. Kelly were likely to be best placed to give him the information he needed – that is to say, information as to the use to which Area A was put prior to 2006 when the School was in operation.

56. Sister Fleming's evidence was to different effect. It was that she saw Mr. Moir on 4th August 2010, that he showed her the letter from Sport England, and that she suggested he should speak to Sister Mooney, Sister Stanton or Mr. Kelly. The existence of this difference of recollection did not become apparent until I put questions to Mr Moir. By that time Sister Fleming had given her evidence. Neither party applied to recall Sister Fleming to explore the point further. In my view Mr Moir's evidence on this point is the more plausible and I accept it. The 3rd August letter from Sport England arrived out of the blue on the 4th August; Sister Fleming was not based at the Grange, and for that reason there is every chance that she was not there on that day. The fact that Mr Moir spoke to Sister Mooney and Mr. Kelly is evidenced by notes he made at the time. He spoke to them by phone. He did not visit the Grange that day. He has no note of any conversation with Sister Fleming that day.

57. My conclusion therefore is that the basic sequence of events on 4th August 2010 was that Mr Moir spoke first to Sister Mooney, and asked various questions about the use of Area A and Area B up to 2006. He then sent her an email which set out, as he saw it, the questions that needed to be addressed arising from the Sport England letter. He then spoke to Sister Mooney again. They discussed matters by reference to the points listed in his email. Next Mr Moir spoke to Mr Kelly. At 4pm Mr. Moir sent a further email to Sister Mooney which reduced the content of his discussion with Sister Mooney and Mr. Kelly into a series of numbered points. He asked her to confirm his summary was accurate and asked if she could show the same document to Mr Kelly.

(7) *5th August 2010*

58. On the morning of 5th August 2010 Mr Moir spoke to Sister Mooney again. She confirmed the contents of the summary Mr Moir had sent the previous day. The note of that call made by Mr Moir suggests that Mr Kelly had seen the document too. Mr Moir then finalised the text of a letter to the District Council dated 5th August, which he sent later on that morning. There was some dispute before me as to whether in addition to that letter, Mr Moir sent to the District Council a further document which contained the same summary confirmed by Sister Mooney. The emails between Mr Moir and the District Council suggests only one attachment was sent with the letter. Mr. Turnbull, however, recalled seeing the second document also. I accept Mr. Turnbull's evidence that the second summary document was also sent to him.

59. The Planning Committee met later in the day on 5th August 2010. Mr. Turnbull addressed the meeting. Mr. Moir addressed the meeting. Others did too. So far as

concerns the playing pitch issue, Mr. Moir's speaking note for the meeting read as follows

> "We have enhanced sport facilities in the revised application. There are currently no public facilities on this site and we propose a playing pitch for public use, three play areas and the use of the woodland area for less formal recreation. Sport England has not acknowledged this clear increase in publicly available facilities, on a site which the Council has identified as being suitable for housing. We see this as a flawed approach which does not address local need.
>
> The previous playing pitch has not been available for use by the public and has not been used by anybody for over four years. These proposals give access for the public to a playing pitch which would not otherwise become available. However, Sport England are objecting to the proposals based on a historic photograph which indicate there may have been another playing pitch on the property. In contrast we are advised by the Members of the Religious Order and the caretaker who have been onsite for over thirty years that the area of land adjoining the former playing pitch has not been marked up nor used as a playing pitch within the last nine years and by recollection longer. A running tract used to be marked up, principally for use at the school sports day, all be it the caretaker again does not recall marking out a tract for at least about nine years."

60. I note that since the time Mr. Turnbull had written his Committee report, nothing had happened which had caused him to revisit the recommendation he had set out in that report. That recommendation was ultimately accepted by the Committee which decided accordingly. The decision was 8 to 2 in favour. When he gave evidence, I asked Mr. Turnbull whether, had the Sport England letter on 3rd August 2010 gone unanswered, his recommendation to the Committee would have been any different. He said that it would not. I took this to mean that regardless of the point at paragraph 10 of his report, the further point at paragraph 12 of the report was, so far as he saw it, determinative.

C. Decision

(1) *Causes of Action*

61. The Parish Council alleges an unlawful means conspiracy, and further that there was interference with its interests by unlawful means that caused it loss.

62. The elements of the unlawful means conspiracy are as follows. (1) An agreement between one or more people to act unlawfully or to use unlawful means. (2) That those who have so agreed, act with the intention of causing damage to the claimant. (3) The claimant must suffer damage. There is no requirement that the defendants' predominant or main intention must be to inflict damage on the claimant, but the defendants must have some intention to harm the claimant.

63. In the present case, by the time of closing submissions, the unlawful means relied on was deceit. In its pleaded case the Parish Council also relied on the offence under section 2 of the Fraud Act 2006. The elements of deceit – one of the forms of unlawful means relied on by the Parish Council are (1) that representations have been made that were wrong; (2) that they were made knowing them to be wrong or the person making them was reckless as to whether the representation was true or false; (3) that the representation was made to the claimant intending that the claimant should act on it; and (4) that the claimant did in fact act upon the representation and did suffer damage in consequence.

64. The unlawful means tort, recognised in the judgment at the House of Lords in *OBG Limited v Allan* [2008] 1 AC 1, is somewhat more protean, or at least less set in its form. It is a tort based on a deliberate use of unlawful means. In its barest form the tort is committed when one person uses unlawful means with the object and effect of causing damage to another.

65. In the present case the unlawful means relied on are, again, deceit. It is accepted in case law that the unlawful means tort can be committed where A commits deceit upon B intending to damage C, and causes damage to C notwithstanding that B suffers no harm: see *Lonhro v Fayed* [1990] 2 QB 479 per Ralph Gibson LJ at 491 F – H. The tort is one of intention; however, it is not necessary to prove that the defendants' predominant purpose was to injure the claimant. It is sufficient that the unlawful act was in some way directed against the claimant or intended to harm him: see again *Lonhro* (above) per Dillon LJ at 488G – 489A and 489D – E.

66. Drawing these matters together, it seems to me that the issues arising collectively from these claims in this case are as follows.

(1) Was there a relevant combination, that is to say an agreement to use unlawful means?

(2) Were representations made that were false?

(3) Were representations made dishonestly in that they were made knowing them to be false, or made without caring whether they were true or false?

(4) Were representations made to the Parish Council, and did the Parish Council act on them thereby suffering loss?

(5) Did the use of unlawful means result in any relevant interference with the Parish Council's interests?

(6) Did either the conspiracy or the use of unlawful means cause loss to the Parish Council?

(7) Did the conspirators or the persons using unlawful means intend to damage the Parish Council in a sense having some intention to cause harm to it?

I am conscious the above list is much shorter than the list of issues prepared by the parties. That list was somewhat over-elaborate, hence my considerably simplified formulation.

(2) Was there a combination to use unlawful means?

67. The Parish Council's pleaded case on the agreement was set out in general terms see the Re-Amended Particulars of Claim at paragraph 54

> "On precise dates unknown to the Claimant but between about April 2010 and August 2010 and at places unknown to the Claimant two or more Sisters of the Defendant (including the Sisters referred to in the Letter and item 7 of Mr. Turnbull's speaking notes) and/or together with others ("the Conspirators") conspired and combined together in order to cause Gerald Eve to make Representations to [the District Council], and persuaded or encouraged the Defendant's caretaker to participate in causing Gerald Eve to make representations to [the District Council], by themselves making and persuading or encouraging Michael Kelly to make false statements to Gerald Eve concerning the School's former use of Area A and Area B for sports, in particular the false statements contained in or relayed by the Representations."

This part of the Parish Council's case was not explained further in its written opening statement. In his oral opening Mr Hutchings QC identified the conspirators as Sister Mooney, Sister Stanton, Mr Kelly, Sister Donovan and Sister Fleming.

68. As I have already mentioned, it was not put to Sister Donovan in cross-examination that she was party to any agreement to practise deceit. Her evidence was that she spent very little if any time at the Grange between 31st March 2010 (the commencement of the School's Easter holiday that year) and the end of August 2010. In particular, her evidence was that from 28th July 2010 to 11th August 2010 she was working in India and out of email and phone communication. I accept that evidence; and in any event, as the conspiracy case was not put to her in evidence, she falls out of the picture so far as concerns conspiracy to use any unlawful means.

69. Turning to Sister Stanton, her evidence in her witness statement was to the effect that she had no particular recollection of speaking to Mr Moir on 4th August 2010. She went on to say in her statement that she would have remembered if anyone had tried to tell her what to say to Mr Moir. She was certain that no one had tried to do this. Mr Hutchings QC expressed surprise at Sister Stanton's oral evidence that she had no recollection whether or not she spoke to Mr Moir on 4th August 2010. He submitted that this was inconsistent with her witness statement. I disagree. Sister Stanton's oral evidence on this point was entirely consistent with paragraph 32 of her witness statement. In any event, by the time of closing submissions Mr Hutchings QC no longer pursued the case that Sister Stanton was party to the conspiracy.

70. That leaves Sister Mooney Mr Kelly and Sister Fleming. In his closing submissions Mr. Hutchings QC fairly and in my view correctly, accepted that in order to fix the Holy Cross Sisters with liability for the conspiracy, he needed to demonstrate that Sister Fleming was party to the conspiracy. As at 2010 she was the Provincial Leader and a Trustee of the Holy Cross Sisters. In cross-examination it was put to Sister Fleming

that in early August 2010, after receipt of the 3rd August 2010 Sport England letter, she spoke to Sister Mooney and/or Mr Kelly and made it clear to them, that when they were asked by Mr Moir about playing pitches at the School it would be in the best interests of the Holy Cross Sisters if they said that there was only one playing pitch (namely the one in Area B). Sister Fleming denied giving any such instruction, and I infer from this that she also denied being party to any agreement with Sister Mooney and/or Mr Kelly to the same end. In closing submissions Mr. Hutchings QC submitted that the agreement between Sister Fleming and Sister Mooney and Mr. Kelly was made in or about June 2010 at the time the revised planning application was submitted.

71. I accept Sister Fleming's evidence that she gave no instruction in August 2010 following receipt of the 3rd August 2010 Sport England letter. Based on the findings I have already made, Mr Moir did not speak to her when he received the Sport England letter. Rather he went directly to Sister Mooney and Mr Kelly. On this analysis Sister Fleming would not have had the opportunity to prime Sister Mooney or Mr Kelly as to the answers they should to give to Mr Moir, or to establish any agreement with them as to the information they should provide him.

72. In any event I accept Sister Fleming's evidence to the general effect that although she was interested in the progress of the planning application, she had no specific interest in whether permission was granted for any particular number of houses to be built on the Grange site. She understood that the likely value of the Grange site would increase if permission was granted to build more rather than fewer homes. But having listened to her evidence I do not consider that she was motivated to the exclusion of other matters by the amount of money the Holy Cross Sisters might receive. That being so, even if she had been made aware by Mr Moir of the 3rd August 2010 Sport England letter, I do not, on a balance of probabilities, consider it likely that she then sought out Sister Mooney or Mr Kelly to instruct them or agree with them what information they should give to Mr Moir.

73. I also reject the alternative scenario put forward in the Parish Council's closing submissions, namely that the agreement was reached or the instruction given in or about June 2010. This seems to me to be inherently implausible (quite apart from the fact that it was not put to Sister Fleming in cross-examination, in terms). As of June 2010, the issue about the use of Area A and Area B prior to the School's closure in 2006 had not come into the sharp focus that it did immediately before the Planning Committee meeting on 5th August 2010. The only letter of objection from Sport England, as at June 2010, was the letter dated 6th April 2010. In that letter Sport England objected to the planning application because it did not *"propose to retain any of the existing playing field land"*. No particular point was made at that time by reference Area A and Area B. That point did not arise in any form until the Sport England letter dated 22nd July 2010, which followed consideration of the revised planning application which had been submitted on the 28th June 2010. The Parish Council's submission was to the effect that by 28th June 2010 the Holy Cross Sisters, and specifically Sister Fleming, had decided to present the planning application on a specific basis by reference to incorporating Area B as a playing field, and was fixed on that come what may and regardless of the prior use of Area A. I reject that submission. Set against the circumstances as at June 2010 it is entirely implausible. The June 2010 revised planning application had been formulated, so far as it concerned playing pitches, to meet the Sport England objection in its April 2010 letter. On its face, the June 2010 application

did appear to meet what appeared at that time to be Sport England's concern. I can see no objective basis for inferring that as at June 2010 Sister Fleming had formed a fixed view that come what may, the planning application had to remain in the form it was by the time of the June 2010 revised planning application. Nor do I consider there is any basis for a conclusion that she had decided that she would lie and recruit others to lie as to the use of Area A prior to the School's closure at the end of 2005/06 academic year. My conclusion, therefore, is that Sister Fleming was not part of any conspiracy as alleged by the Parish Council, or for that matter, at all.

74. Mr. Hutchings QC accepted that in the event that was the conclusion I reached, then it would be very difficult if not impossible for the Parish Council to succeed as against the Holy Cross Sisters on a contention that the conspiracy comprised only Sister Mooney and Mr Kelly. However, for the sake of completeness I must now consider whether Sister Mooney and Mr. Kelly were parties to an agreement to make false statements to Mr Moir in order to ensure that the application for planning permission overcame the objection raised by Sport England in its 3rd August 2010 letter.

75. This is a difficult matter to decide. Neither Sister Mooney nor Mr Kelly was able to attend to give evidence. I have a signed witness statement from each but neither was tested in cross-examination. In his statement Mr Kelly denies that anyone either told him what to say to Mr Moir, or told him to lie to him. Likewise, it is clear from Sister Mooney's statement that her evidence is that no one either told her or suggested to her what she should say to Mr Moir. Reading their statements together I consider that each is denying any form of agreement to tell any particular story as to the prior use of Area A. On this point I have also taken account of Mr Moir's evidence as to the sequence of events on 4th August and first thing on the 5th August 2010. On that evidence there would have been no chance for Sister Mooney and Mr Kelly to reach any form of agreement prior to Mr Moir's first conversation to Sister Mooney, since neither Sister Mooney nor Mr Kelly would have known he was going to call. It is possible that Sister Mooney and Mr. Kelly might have colluded in the course of 4th August 2010 but it seems inherently unlikely they would have done this. I can see no reason obviously or otherwise why they would have done so or how either would have known what answers to Mr. Moir's questions would for the purposes the conspiracy alleged be the "right" answers.

76. It seems to me likely that Mr Kelly as well as Sister Mooney considered the summary list of points sent through by Mr. Moir to Sister Mooney at about 4pm. But my conclusion is that each considered this only for the purpose of checking whether it accurately reflected the points each had made when speaking to Mr Moir earlier that day. This inference is the much more natural one. I do not consider it likely that they considered the document for the purposes of forming any agreement to make dishonest statements or any agreement to that effect which they had already made. As I have already said I have not had the benefit of either giving evidence. Be that as it may, I cannot see that either had any particular reason or motive to be party to the conspiracy that the Parish Council alleges.

77. Drawing these points together my conclusion is that there was no agreement as alleged by the Parish Council to use unlawful means that is to say to make false statements to Mr Moir dishonestly.

(3) *Were representations made that were false?*

78. For this purpose, I will focus on three documents: first, the letter sent by Gerald Eve dated 5th August 2010 which responded to the Sport England 3rd August 2010 letter; second, the summary document comprising numbered paragraphs dated 4th August at the bottom of the page and 5th August at the top of the page prepared by Mr. Moir which I have concluded was sent to the Parish Council; and third, the speaking note used by Mr. Moir at the meeting of the planning committee on the 5th August 2010. The first two of these documents were sent to and received by the District Council. I accept that the third document is a sufficient record of what was said on behalf of the Holy Cross Sisters on the playing field issue to the District Councillors at the 5th August 2010 Planning Committee meeting.

79. I have seen various manuscript notes made by Mr Moir in the course of 4th August 2010, in the course of phone conversations he had with Sister Mooney, and with Mr Kelly. However, I do not consider much is to be gained by detailed forensic examination of these documents. Mr Moir ultimately summarised matters in the document sent to Sister Mooney at around 4pm on 4th August. She confirmed the contents of that document the following morning. That document was then provided to the District Council and was the premise for the letter sent by Gerald Eve to the District Council on 5th August 2010.

80. Taking the three documents together, the following statements were made regarding the use of Area A prior to the closure of the School.

(1) The only *"marked"* playing pitch was Area B. This was the only *"formal"* pitch.

(2) Mr. Kelly was responsible for marking out pitches after the groundsman left, but did not recall marking any playing pitch on Area A.

(3) Any goals on Area A were movable such that Area A was used for informal recreational purposes.

(4) If there had been a pitch on Area A it would have been only for occasional use. It was a temporary pitch, not a *"formal"* pitch.

(5) A running track was marked on Area A in the summer for the School sports day and practice, but not for matches against other schools.

(6) Area A was not marked-up as a planning pitch or track *"within the last nine years"*, which I take to be the nine years up to August 2010.

Representations (1) to (3) and (5) – (6) come from both the 5th August 2010 letter and Mr. Moir's summary note. Representation (4) is from Mr Moir's speaking note for the 5th August 2010 meeting.

81. The Parish Council has deployed significant evidence to demonstrate a more persistent and formal use of Area A for hockey in the winter and spring terms, and for athletics in the summer. I have heard evidence from Angela Woods who was head of PE at the School between 1995 and 2006 and Monica Bartlett a part-time maths teacher between

1995 and 2006. I will focus on the evidence of Miss Woods. In summary she made the following points: (a) during the autumn and spring terms a hockey pitch was marked on Area A and on Area B; (b) the pitch on Area A was used for some school matches, as was the pitch on Area B; (c) the Area A pitch was also used for some games lessons; and (d) in the summer term an athletics track was marked on Area A, and Area A was also used for rounders. In the summer term games lessons took place both on Area A and Area B.

82. In cross-examination Miss Woods accepted that the hockey pitch on Area A had different dimensions to the pitch on Area B, and also itself had different dimensions from time to time. But, she said that would not have prevented the pitch from being used as a pitch. She also accepted that there was a slope on Area A so that any pitch on Area A was on sloping ground. The tenor of her evidence was that while that was not ideal, it did not render the pitch unplayable. She also said that after the school groundsman retired, Mr. Kelly may have been asked to mark out pitches on one occasion, but after that the marking out was done by a contractor, Sodexho.

83. I have also been shown aerial photographs of Area A and Area B taken between August 1996 and June 2005. Some were taken during term time, some were taken during vacation. Four photographs show a hockey pitch marking on Area A across the period 2000-2005. The photographs before 2000 show no hockey pitch markings. The photographs between 2001 and 2003 show that the size of the hockey pitch on Area A was not consistent. As to photographs taken during the summer term, two show athletics markings, and three show no markings although that may be explained because the photographs were most likely taken during the summer vacation. The summer photographs that show markings (June 2000 and June 2005) show inconsistent markings. The photographs on their own are inconclusive as they do not demonstrate any constant or fixed approach to the markings on Area A either in the autumn/spring terms or in the summer term.

84. Overall, my conclusion is that Area A was used for playing hockey in the autumn and spring terms, and was marked as a hockey pitch. It is clear however, that the pitch marked was not always the same dimensions. I also conclude that the Area A pitch was of significantly lower quality than Area B pitch. Generally, the appearance of Area B is that of a levelled playing field maintained to a high standard. Area A seems to me to have been much more rough-and-ready. I accept Miss Woods' evidence that Area A was used for PE and games lessons including hockey lessons. I see no reason to disbelieve her evidence that school hockey games were also played on Area A. However, it is clear to me from the photographs and from the descriptions in evidence of Area B being created as a levelled pitch in 1973, that Area B was the primary playing pitch. The pitch on Area A was the secondary or back-up playing area. The land sloped making the playing surface of a lower quality, and the dimensions of the pitch seem to vary from year to year. As to the position in the summer, my conclusion was that a running track of some description was marked out on Area A and that the track was used for the School sports day and for athletic practice in lessons before the sports day.

85. Returning to the representations I have set out at paragraph 80 above, my conclusions are as follows (using the same numbering).

> (1) Area B was not the only marked hockey pitch. There was a marked pitch of inconsistent dimensions on Area A during the autumn and spring terms.

I struggle with what is meant by the notion of a *"formal pitch"* (given that pitches were marked in both Areas). Sister Mooney in her statement does not directly explain what the word formal adds in this context. The best I can make of this word in this context, is that it refers to the quality of the playing surface in that it was flat, well maintained, and consistently marked out.

(2) I do not accept that Mr Kelly was responsible for marking out the pitches after the groundsman left. In his evidence Mr Kelly does not say that he had this responsibility. His evidence is that he marked out a running track on Area A on one occasion, and that he had not marked out any sports pitch, which I take to mean hockey pitches.

(3) The hockey goals on Area A were movable. The various aerial photographs do show them in different positions from time to time. As to *"informal recreational purposes"*, if this is meant to exclude the use of Area A for PE and games lessons I disagree. Moreover, I see no reasons to doubt Miss Woods' evidence that from time to time school matches were played on Area A.

(4) My conclusion is that the word *"occasional"* understates the use of the pitch on Area A. As to the distinction between the *"temporary"* and *"formal"* I repeat my conclusions as (1) above.

(5) I accept that this statement was true as to the use of Area A in the summer term.

(6) My conclusion is that this statement was incorrect. On a balance of probabilities, Area A was marked-up as a running track in the summer between 2001 – 2006, and as a hockey pitch in the autumn and spring terms during the same period.

86. Thus, although representation (5) was accurate (as to the use of Area A in the summer term), it was incorrect to say that Area A was the only playing pitch marked for hockey; it was an understatement to say the pitch on Area A was only used occasionally; and it was wrong to say it was used for *"informal recreational purposes"* because Area A was used for games lessons and occasional school matches. It was incorrect to say that Area A had not been marked-up for sports use in the period between 2001 – 2006.

(4) *Were representations made dishonestly?*

87. On this issue the focus now turns to the state of knowledge and the state of mind of Sister Mooney and Mr Kelly, respectively. This is a matter of some difficulty since the information they gave was given in the course of conversation with Mr Moir almost nine years ago, and neither was able to come to court to be questioned on their witness statement.

88. As for Sister Mooney, Mr Moir's note of her first conversation with him on the 4th August 2010 records *"Sister Teresa Mooney's memory - no marked up sports pitch … definitely not since 1991 - no goals"*. The gist of their second conversation was that the hockey pitch was the pitch on Area B. As for the position in the summer, the note concludes that the running track was used for sports day but not for matches against

other schools and that the last sports day was in 2005. As I have already concluded, it was incorrect to say that there had been no marked-up hockey pitch on Area A. However, I am not prepared on the basis of the evidence I have, to conclude that Sister Mooney spoke dishonestly. Although she had lived at the convent on the Grange site since the 1950's and had taught at the school for over an extended period, she was a music teacher and was not involved in sports teaching or school sports. On 4th August 2010 she was called by Mr Moir without warning, and asked about the use of the School playing fields. The School had not been open since 2006. She was asked about matters outside her daily activities at the School. I accept that when she spoke to Mr Moir she spoke on her recollection of matters, and that Mr Moir understood that was so. Although I consider she was wrong to say there was no marked-up pitch on Area A, given the clear practical distinction that must have existed between Area B and Area A in terms of the quality of the playing surface and the consistency with which Area B as opposed to Area A was marked out, I am not prepared to find that she spoke dishonestly. As I have said, she was doing the best she could as a matter of recollection and Mr Moir understood that.

89. Next, Mr Kelly's position. Mr Moir made notes when he spoke to Mr Kelly on the phone. The notes were rough since they were taken in the course of the conversation, but I have no reason to doubt the accuracy of those notes. The most significant parts of them are the passages to the effect that Mr Kelly had not marked-up Area A for sports use for up to 10 years. But this was only true up to a point. The point left out of the account is that it had not been Mr Kelly's responsibility to mark-up the pitches. That responsibility had fallen to the school groundsman while he remained in post, and after he left contractors took over the work, save for perhaps for one occasion when Mr Kelly may have marked out an athletics track. Mr Moir was asked about this in cross-examination. His answers were to the effect that the impression he had from Mr Kelly was both that Mr Kelly did not mark-up the pitches, and that no one else did either. That was a matter that figured squarely in the information Mr Moir passed on to the District Council.

90. Mr Kelly's witness statement is ambiguous on this point. It is to the effect that his answer that he had not marked-up pitches was literally true. But he does not say one way or the other whether he told Mr Moir that as caretaker, marking-up pitches was not part of his job. I also have in mind the likelihood that either on 4th August 2010 or 5th August 2010 Mr Kelly saw the summary document in numbered paragraphs prepared by Mr Moir and sent by him to Sister Mooney. If Mr Kelly did see that document and, taking account of Mr. Moir's brief note of the phone call with Sister Mooney on 5th August 2010, I find that it is more likely than not that he did see it, I find it difficult to understand how Mr Kelly could not have realised that what he had said although literally true was being presented in a way that was misleading.

91. Did Mr. Kelly act dishonestly? I am very reluctant to make such a finding given that Mr. Kelly was not able to attend as a witness at the hearing. What Mr. Kelly said to Mr. Moir about marking-up Area A for sports use was, if not pregnant, certainly ambiguous. It was true if understood in the context of Mr. Kelly's responsibilities as caretaker; but if not understood in that context it was untrue, in that it gave the impression that no one had marked-up Area A for sports purposes. Did Mr Kelly intend that what he said should be understood in this later sense? The way in which point is addressed, or rather not addressed by Mr Kelly in his witness statement (see, at

paragraph 19.3) does not do him much credit. That statement was made sometime after the events of August 2010 and it is difficult to accept that by that time (15th November 2018) the significance of the ambiguity had not either been realised by Mr Kelly or explained to him. Even though Mr Kelly may well have been caught on the hop when Mr Moir questioned him on 4th August 2010, I can see no plausible explanation why, having told Mr Moir that he had not marked-up Area A for sporting purposes for nine years, he did not also say that marking-up the sports ground was not part of his job, either when speaking to Mr. Moir on 4th August 2010 or later that day, or the next morning having seen the note that Mr Moir prepared. At this point, the fact that Mr Kelly has not attended to be questioned on his statement becomes material. This is not because I draw any inference against him by reason of his non-attendance; rather, it is because that in the absence of any further explanation by him of the anomalies I have set out above, there is nothing to weigh in the balance to explain any of those matters. On the evidence before me, my conclusion is that Mr. Kelly represented that nobody had marked-up Area A for sporting purposes in the nine years prior to 2010, and that he made that representation dishonestly.

(5) *Were there representations made to the Parish Council; did the Parish Council act on them; was the Parish Council thereby caused loss?*

92. So far, the conclusions I have reached are that there was no conspiracy as alleged by the Parish Council, but that Mr Kelly dishonestly made a representation to Mr Moir realising that Mr Moir would pass that information on to the District Council. Given that my findings to date are sufficient to dispose of the conspiracy claim, and that no separate cause of action in the deceit is pleaded against the Holy Cross Sisters, there is, strictly, no need for me to consider the remaining elements of the unlawful means relied on for the purposes of the unlawful means conspiracy. However, for the sake of completeness I will do so.

93. The remaining elements of the tort of deceit are that the defendant must intend that the representation be acted on by the claimant, the claimant must have relied on the misrepresentation in the sense of being influenced by it, and as a result of that reliance the claimant must have suffered loss. On each of these matters on the facts of this case, the Parish Council's case breaks down. No representations were made to the Parish Council. The only representations made were made to the District Council for the purposes of the 5th August 2010 meeting of its Planning Committee. The Parish Council took no action in reliance on the representations. If anyone relied on or acted on the representations, it was the District Council. Since there was no reliance by the Parish Council it follows that the Parish Council suffered no loss by reason of any reliance. Put shortly, and in so far as it was the Parish Council's case that the deceit comprised the unlawful means for the purposes of its pleaded unlawful means conspiracy, there is a complete mismatch between the ingredients of the unlawful means relied on and the basic factual matrix within which the claim is pleaded.

94. The Re-Amended Particulars of Claim also pleaded as unlawful means, the criminal offence at section 2 of the Fraud Act 2006, that a false statement was made dishonestly with the intention that either the maker of the statement or another should make a gain. At paragraph 56 of the pleading this case was put on the basis that the relevant intention was that the Holy Cross Sisters should gain from the increased value of the Grange site by reason of the planning permission applied for. This case did not figure in the Parish Council's closing submissions. Had it done so I do not consider it would have assisted

the Parish Council. For Mr Kelly to have had the intent necessary for commission of the offence under section 2 of the Fraud Act 2006, he would have had to have had a detailed or at least some knowledge of the history of the planning application such that he realised the possible significance of what he said to Mr Moir. In my view there is no basis on which it can be inferred that Mr Kelly had any such knowledge. The evidence is all to the effect that prior to speaking to Mr Moir on 4th August 2010, Mr Kelly had had no involvement in the planning application at all, save perhaps for arranging access to the Grange site for Mr Moir and others from Gerald Eve as and when such access may have been required.

(6) *Did the use of unlawful means result in any relevant interference with the Parish Council's interests?*

95. This issue arises in the context of the Parish Council's case on the unlawful means tort. As explained above, the judgment in *Lonrho v Fayed* is authority for the proposition that this tort can be committed when A commits deceit on B intending to damage C. For present purposes B is the District Council, and C is the Parish Council. However, even if the Parish Council succeeded in demonstrating all other elements of the unlawful means tort, can it make good its contention that there was interference with any relevant interest? Mr. Hutchings QC relies on the judgment in the House of Lords in *OBG Limited v Allan* (above).

96. In his speech in that case Lord Hoffmann stated at paragraph 8

> "… it is sufficient that the intended consequence of the wrongful act is damage in any form; for example, to the claimant's economic expectations."

Later in the same paragraph he referred to *"damage to economic expectations"* as being sufficient to found a claim, as a means of distinguishing the unlawful means tort, from the tort in *Lumley v Gye* of inducing breach of contract. At paragraph 47 of his speech Lord Hoffmann described the *"essence of the tort"* as being

> "a) a wrongful interference into the actions of a third party in which the claimant has an economic interest and b) an intention thereby to cause the claimant loss."

Further at paragraph 51 Lord Hoffmann stated as follows

> "… unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant."

At this point in his speech Lord Hoffmann is focusing on the nature of the relevant unlawful means rather than the nature of the claimant's interest. However, the references to *"loss"* only make sense if they are understood as references to financial loss. In the same context, and in my view significantly, at paragraph 56 of his speech Lord Hoffmann sounded a note of caution as to the reach of the unlawful means tort

> "In my opinion the courts should be similarly cautious in extending a tort which was designed only to enforce basic standards of civilised behaviour in economic competition between traders or between employers and labour. Otherwise there is a danger that it will provide a cause of action based on acts which are not wrongful only in the irrelevant sense that a third party has a right to complain if he chooses to do."

97. All this clearly indicates to me that for all purposes, the unlawful means tort is to be kept within careful and in conservative bounds. In his speech, Lord Nicholls labelled the tort *"interference with a business by unlawful means"*. In the same way there was no suggestion in Lord Hoffmann's speech that interference with non-economic interests was sufficient to found the tort. Lord Nicholls said nothing to suggest that possibility either. Lords Walker and Brown and Baroness Hale all gave reasoned judgments. None contained any suggestion that the unlawful means tort extends to the protection of non-economic interests.

98. In his closing submissions, Mr. Hutchings QC accepted that the Parish Council had no relevant economic interest affected by the District Council's decision to grant planning permission. So far as concerns the proposal that the Church of England school should relocate to the Grange site, the Parish Council was not the owner of either site, it was not the manager of the Church of England school it was not the relevant Education Authority. Mr Hutchings QC's submission was that the relevant interest was the "Proposal" as explained by paragraph 21 of the Re-Amended Particulars of Claim (which I have set out above) which amounted to *"the exercise by a public authority of functions to promote the wellbeing … the social economic or environmental wellbeing of its area"*. In other words, that a relevant interest for the purpose of the unlawful means tort included (on the facts of this case) the Parish Council's exercise of its public functions.

99. I reject this submission for two reasons. The first is that there is no authority for the proposition that a claimant's interests protected by the unlawful means tort extend beyond economic interests, and I can see no reason in principle which would justify such conclusion. The Parish Council has no economic interest in the "Proposal" described at paragraph 21 of the Re-Amended Particulars of Claim. At best it had some sort of political or aspirational interest in that Proposal, arising from its general opposition to the District Council's decision in its Local Development Framework Strategy Plan to identify the Grange site in Chalfont St Peter as a location for new-build housing. Extending the unlawful interference tort to such a situation would be unprincipled. It would of necessity recognise a new situation where a non-economic interest was protected, and logically, damages for non-financial loss would be recoverable. Certainly in the circumstances of this case, I see no reason why private law should protect the political aspirations of the Parish Council in this way. As I have already sought to explain, the clear inference in the speeches in *OBG v Allan* is that the tort is aimed only at the protection of forms of economic interest.

100. Mr. Hutchings QC referred to two authorities which he said supported the contention that the tort could be founded on the basis of interference with a non-economic interest. The first case he relies on is *British Motor Trade Association v Salvadori* [1949] Ch 556. The claimant ("the BTMA") was a trade association of all British car manufacturers and their authorised dealers. It enforced a system of covenants made

between purchasers of new cars, the car dealer who sold the car and the BMTA, under which the purchaser agreed not to resell the car for 12 months. At the time, new cars were in very short supply; without the covenant, new cars would sell for prices significantly in excess of list price. The aim of the covenant was to maintain list prices (making sure they were neither exceeded nor cut). The BMTA's members considered that it was in their commercial interests to maintain list prices. Roxburgh J accepted that the BMTA was a proper claimant for claims of procuring breach of contract and conspiracy to procure breaches of contract (on the basis that the BMTA was a registered trade union under the then in force trades union legislation). Roxburgh J further concluded, first that the BMTA had *"trade interests"* which it was entitled to protect against unlawful interference in the form of *"... the maintenance of fixed prices and the covenant system ..."*; and second that in principle, expenses incurred by the BMTA in detection of the defendant's torts would comprise damage sufficient to found a claim in conspiracy. I do not consider that either the reasoning or the outcome in the BMTA case assists the Parish Council on this aspect of its unlawful interference claim. As I see it, Roxburgh J's judgment is not authority for the proposition that the BMTA could maintain its claim in the absence of a commercial interest; rather the premises of his conclusion in favour of the BMTA were (a) that the purpose of the covenants were to protect the trade interests of the BMTA's members; and (b) that the BMTA was an appropriate claimant in proceedings to protect the commercial interests of its members. I see no parallel between the circumstances of that case and submission in this case that the Parish Council's political interest in the Proposal is one that ought to be protected by this tort.

101. The other authority relied on is *Cheltenham Borough Council v Laird* [2009] EWHC 1253 (QB). In that case an employer sued a former employee for deceit, based on statements she made to obtain her employment; the loss claimed by the council was the cost of addressing various internal disputes that had arisen because of the employee's actions as an employee. The council's claim ultimately failed (as did the employee's counterclaim). However, in the course of his judgment, Hamblen J accepted that it would be sufficient to make good the cause of action *"... if the claimant proves significant disruption to the employer's business or activities and there is evidence of the activities undertaken by employees in the course of that disruption"* (at §533). Yet that statement says nothing that is material to the issue in the present case – namely, whether the Parish Council's interest in the Proposal, which was not an economic interest, is capable of founding the unlawful means cause of action. In *Laird*, the council's economic interests had plainly been affected by the matters it complained of – its day to day activities had been disrupted. In the present case, the Parish Council's problem does not stem from the fact that it is a public authority; rather it stems from the nature of the interests it seeks to protect – the purely political interests I have described at paragraphs 98 – 99.

102. My second reason is that even if the Parish Council's asserted interest is considered on its own terms, on the facts of this case it simply did not exist. The exercise of functions by the Parish Council went no further than the resolutions passed in March and May 2009 see above at paragraphs 24 – 32. Even by the standards of local politics these resolutions were somewhat inchoate. There was no policy decision by the Parish Council in respect to what was necessary *"to promote the social economic or environmental wellbeing of its area"*. It follows for this reason alone, I would dismiss the Parish Council's claim based on the unlawful means tort.

7. Did the use of unlawful means (or for that matter also the conspiracy) cause loss to the Parish Council?

103. There are two aspects to the causation issue in this case: first, were any misrepresentations made to the District Council that caused it to grant the outline planning permission to the Holy Cross Sisters; second, on the assumption that the answer to the first answer is "yes", did that result in loss to the Parish Council?

104. On the first of these matters my conclusion is that the representations made to the District Council in respect to the use of Area A prior to 2006 did not cause the decision to grant the outline planning permission (which was subject to the provisos set out in the Planning Committee decision). I have set out above the material parts of Mr. Turnbull's report to the Planning Committee. I have also referred to his evidence that even if the 3rd August 2010 Sport England letter had gone unanswered his recommendation to the Planning Committee would not have changed. As I see it, that reflected the point made at paragraph 12 of his report to the Committee. It goes without saying that the recommendation of the Planning Officer is not to be equated with the decision of the Planning Committee. Committees can and sometimes do depart from recommendations, and in any event the members of a Planning Committee will conscientiously and carefully consider the merits of an application before them rather than slavishly follow the advice of officers.

105. In the present case it appears that at the end of the Planning Committee meeting each Councillor gave brief reasons for voting either for or against the application. A note of what was said was prepared by Cerda, the Parish Council's planning consultants. Looking at that note, and focusing in particular on the eight councillors who voted in favour of the application, there is nothing to suggest that any regarded the information about Area A as either critical or central to their decision. One councillor, who voted in favour, expressly accepted that there had been two hockey pitches prior to 2006. Another attached *"only limited weight to the loss of open space when not in public use"*. Other councillors relied on the fact that under the proposal a sports area not previously available to the public would be publicly available. Each described that as *"a planning gain"*. One councillor described the loss of open space as a *"grey area"* but went on to conclude that the need for new housing outweighed any loss of open space. Other councillors also recognise the District Council's *"duty"* to house people. Overall, even the chance that the Committee would have reached a different conclusion is too small to be of any legal significance.

106. Taking these matters together I am entirely satisfied that the misrepresentations made in respect in the use of Area A prior 2006 were not a cause of the Planning Committee's decision. My conclusion is that even if the Sport England letter of 3rd August 2010 had gone unanswered the decision of the Planning Committee would have been the same.

107. The second matter, if I am wrong about the decision the Planning Committee would have taken, is whether that decision caused the Parish Council loss. The Parish Council's pleaded case is that its losses comprise *"wasted expenditure in pursuing the Proposal"*, and the cost to the Parish Council of its judicial review proceedings to challenge the District Council's decision. The Parish Council pursued those proceedings unsuccessfully both in the Administrative Court and the Court of Appeal. I assume that the damages now claimed comprise the Parish Council's own costs of those proceedings and the value of adverse costs orders made against it in those

proceedings. In my view neither of these matters is a loss caused by the unlawful interference with the Parish Council's interests.

108. The *"wasted expenditure in pursuing the "Proposal ..."* has been particularised as including the following all of which was work undertaken by consultants retained by the Parish Council.

(1) Work on the village design scheme.

(2) Work on the response to the planning application.

(3) Work in connection with the Parish Council's challenge to the District Council's Core Strategy Framework Document.

(4) Work on the judicial review claim brought by the Parish Council against the District Council.

109. I start from the premise that damages for expenses rendered futile by a tort do not have the same importance in tort claims as they do in contract claims because in tort the claimant makes no bargain, and takes no action in reliance on a defendant's promise. That is so on the facts of this case notwithstanding that in part, the Parish Council relies on the tort of deceit. As I have already explained, on the facts of this case the Parish Council placed no reliance on any statement made on behalf of the Holy Cross Sisters. In a tort claim the focus of an award of damages must be on restoring the claimant to the position it would have been in had the tort had never occurred. As regards the four categories of wasted expenditure loss my conclusion is that none is recoverable. Using the numbering as above, my conclusions are as follows.

(1) The Village Design Statement and the Parish Plan was the Parish Council's response to the District Council's proposals for house building in Chalfont St Peter under its proposed Local Development Framework Strategy Plan. It was work undertaken well before the events of August 2010; it is work that would have been commissioned by the Parish Council regardless of the events of August 2010; it was not work directed to the issue of the former use at Area A prior to 2006. This work was not in any realistic sense work "wasted" by any action taken by the Holy Cross Sisters or for which the Holy Cross Sisters are in law responsible. I cannot see any plausible basis on which compensation for this expenditure could be said to be necessary to put the Parish Council in the position it would have been had the torts alleged not occurred. The Parish Council relies (again) on the judgment of Roxburgh J in *British Motor Trade Association v Salvadori* [1949] Ch 556. However, that case is not on point. In that case the claimant recovered damages being the costs of its investigation into the defendant's attempt to circumvent covenants made between the claimant and third parties. The expenses claimed by the Parish Council in this case do not fall into the same category. Rather they represent expenditure entirely independent of the wrongdoing alleged by the Parish Council on the part of the Holy Cross Sisters.

(2) The same general points apply here too. The responses to the successive versions of the application for planning permission (February 2010, and June 2010, respectively) covered a wide range of points going well beyond the objection raised by Sport England. Moreover, it was only with the Sport England letter dated 3rd

August 2010 that the specific point as to the use of Area A prior to 2006 arose in the form it came to exist as at the time of the Planning Committee meeting. The expenses claimed under this head are not rationally connected to that matter.

(3) Again, the general points at (1) apply. The Core Strategy was the District Council's responsibility. The Strategy or at least the draft of it was a premise for the Holy Cross Sisters' application for planning permission, since absent the proposal set out in the strategy for Chalfont St Peter to be a location for new-build housing any such application for the Grange site would as likely as not have been a non-starter. The Parish Council's opposition to the District Council's proposed Core Strategy was a matter distinct from and prior to even the Parish Council's opposition to the application for planning permission. I can see no basis on which it is appropriate to compensate the Parish Council for its costs for opposition to the Core Strategy in order to put it in the position it would have been but for the tort it alleges.

(4) This work seems to correspond in part if not in whole, to the Parish Council's claim to recover the costs of its judicial review proceedings against the District Council. As described I can see no distinction between the two. I address the claim for those costs next.

110. I can see no principled basis for the Parish Council's claim to be able to recover in these proceedings, damages equivalent to the costs it incurred in the judicial review proceedings. The judicial review claim was in no relevant sense directed to the wrong which the Parish Council has alleged and pursued in these proceedings. The objective of the judicial review claim was to quash the District Council's decision taken on the 5th August 2010. The Grounds of Claim in the judicial review claim did not allege either the fraud alleged in these proceedings, or any other fraud claim. In fact, so far as in the judicial review proceedings anything at all was said about the former use of Area A, the contention was not that the District Council had been misled as to the use of Area A but rather that it had taken its decision based on a false understanding of agreed evidence as to the use to which Area A had been put when the School operated on the Grange site – a contention entirely at odds with the basis on which the Parish Council has conducted this litigation.

111. The Parish Council's submission on this point comes to the contention that the costs of the judicial review proceedings are recoverable because those proceedings were some form of attempt to reverse a decision on planning permission which would not have been granted but for the torts alleged in these proceedings. I do not accept that submission. The judicial review proceedings were in no true sense directed to undoing the wrong perpetrated by the Holy Cross Sisters as alleged by the Parish Council in these proceedings. The judicial review proceedings sought to overturn the District Council's decision to grant planning permission. They sought to do so on grounds entirely independent of any wrongdoing on part of the Holy Cross Sisters.

112. I accept that there have been some instances where in tort proceedings a claimant has been permitted to recover from a defendant the legal costs of earlier proceedings pursued by the claimant against a third party. But in those instances, the earlier proceedings have served some specific purpose relevant to the wrong ultimately alleged by the claimant against the defendant. For example, the scenario in *Morton Norwich Products Inc. v Intercen Limited (No. 2)* [1981] FSR 337 where the earlier proceeding

had been proceedings for discovery against a third party which were part of the claimant's attempts to investigate the fraud committed by the defendant. This too is the point that emerges from the judgment in *British Motor Trade Association v Salvadori* (above, per Roxburgh J at page 569), which the Parish Council relied on in support of the first part of its damages claim in these proceedings.

113. In the present case there is no such connection. The Parish Council's case comes to little more than that the judicial review proceedings amounted to some form of attempt to mitigate the effects of the wrong perpetrated as contended by the Parish Council by the Holy Cross Sisters. I do not agree. The judicial review grounds were entirely free-standing from any matter complained of in these proceedings. The decision to issue the judicial review proceedings was undoubtedly a tactical decision taken by the Parish Council on the basis that it considered that course of action, and cause of action, the most likely means available to it of overturning the District Council's decision to grant planning permission. From the outset it had been the Parish Council's objective to prevent the new development in Chalfont St Peter envisaged by the District Council's Local Development Framework Strategy Plan. Looked at realistically the judicial review proceedings were not an attempt at mitigation; rather they were the next step in the Parish Council's opposition to development in Chalfont St Peter.

114. In any event, even if the judicial review proceedings could be characterised as an act in mitigation, taking those proceedings and pursuing them (let alone pursing them to the Court of Appeal) was not reasonable mitigation. As I have already explained, the premises of the judicial review proceedings were matters apart from any cause of action since pursued in these proceedings by the Parish Council against the Holy Cross Sisters. In his submissions, Mr. Hutchings QC relies on the decision of the Supreme Court in *Willers v Joyce* [2018] AC 779. In that case the Supreme Court accepted the existence of a tort of malicious prosecution. The claimant had been sued by the defendant who, shortly before trial, had discontinued its claim. The defendant had been ordered to pay the claimant's costs on the standard basis, but that order left the claimant out of pocket for his legal expenses to the extent of £2,000,000. The claimant issued proceedings against the defendant for malicious prosecution claiming as damages, the difference between the costs recovered in the earlier proceedings on the standard basis, and his actual legal costs of those proceedings. As to this Lord Toulson said the following at paragraph 58 of his judgment

> "*Excess cost*.
>
> 58. Newey J's decision to award costs to Mr Willers on a standard basis is readily understandable. The action had been discontinued and the Judge would not have been able to determine whether Mr. Willers should recover indemnity costs without conducting what would have amounted to a trial of the present action. On the other hand, the notion that the costs order made has necessarily made the good the injury caused by Mr. Gubay's prosecution of the claim is almost certainly a fiction, and the court should try if possible to avoid fictions, especially where they result in substantial injustice. A trial of Mr. Willers' claim will of course take up further court time, but that is not a good reason for him to have to accept a loss which he puts at over £2,000,000 in legal expenses. Expenditure of court time is

> sometimes the public price of justice. If Langstone's action against Mr. Willers had gone to a full trial, and if at the end the Judge had refused an application for indemnity costs because he judged that the claim had not be conducted improperly, then to attempt to secure a more favourable costs outcome by bringing an action for malicious prosecution would itself have been objectionable as an abuse of the process of the court, because it would have amounted to a collateral attack on the Judge's decision. But those are not the circumstances I do not regard Mr. Willers' claim to recover his excess costs as an abuse of process."

115. The circumstances investigated by Lord Toulson are far removed from the circumstances of the present case. Lord Toulson's observations say nothing that assists the Parish Council in this case in its contention that the costs in the judicial review proceedings are recoverable by it in these proceedings. Mr. Hutchings QC contends that the present case is *a fortiori* the situation in *Willers*, because it was not open in the judicial review proceedings to allege the fraud now alleged against the Holy Cross Sisters. It is true that that fraud could not be alleged in those proceedings. But that does not render this case an *a fortiori* situation. Rather, it only underscores that the Parish Council's decision to pursue the judicial review claim was simply part of its strategy of opposition to new-build housing in Chalfont St Peter; it was not any form of mitigation of the wrong that the Parish Council now pursues against the Holy Cross Sisters in these proceedings. For all these reasons, my conclusion is that the matters of which the Parish Council complains in these proceedings did not cause it to suffer any loss.

(8) *Did the conspirators or those who use unlawful means intend to damage the Parish Council?*

116. The Parish Council does not need to demonstrate that the Holy Cross Sisters (or specifically in this case, the conspirators or those that made false representations) acted with a predominant purpose to harm the Parish Council. It is sufficient that it is shown that the unlawful acts were *"in some sense directed against … or intended to harm"* the Parish Council: cp. *Lonhro v Fayed* (above), per Dillon LJ at pages 488 to 489. I must consider the position of Mr Kelly for the purposes of the unlawful means tort, and the positions of each of Mr Kelly, Sister Mooney and Sister Fleming for the purposes of the alleged conspiracy.

117. Mr. Hutchings QC accepted in his closing submissions, that if there was no case against Sister Fleming, the Parish Council had a very difficult task showing the necessary intent on the part of either Mr. Kelly or Sister Mooney. The Parish Council's case is put in the following way. The application for planning permission and the Parish Council's desire that the Church of England school relocate to the Grange site were competing schemes. The Holy Cross Sisters (specifically Sister Fleming) must have realised that by promoting the application for planning permission that entailed the intention "to knock out" the plan to relocate the Church of England school. Hence, says the Parish Council, when Sister Fleming acted in support of the application to obtain planning permission those actions were necessarily directed against the Parish Council.

118. I do not accept that analysis. The two schemes were not in opposition in the way the Parish Council contends. The proposal to relocate the Church of England school existed (as at August 2010) only in the barest of outline forms. For the purposes of the hearing before me, the Parish Council relied on expert evidence to the effect that from the point of view of planning policy there was no in-principle, overriding objection to the suggestion to relocate the Church of England school to the Grange site. Even if that is accepted as correct, it was not information available to Sister Fleming in 2010; and even if that is disregarded, the expert evidence now available on the point remains a long way from a conclusion that as at August 2010, an application for planning permission to relocate the Church of England school could have been made, and if made would have succeeded. As at August 2010 there was only one scheme for the Grange site – in the form of the application for planning permission proposed by the Holy Cross Sisters. Given the lack of any worked-through proposal to relocate the Church of England school, and given that even if such a scheme had existed the Parish Council's only interest in it was the bare political interest I have described above, the notion that any step taken in pursuit of the application for planning permission was at one and the same time an act directed at the Parish Council is a false notion.

119. This point apart, I do not consider that it has been demonstrated that any of Sister Fleming's, Sister Mooney's or Mr Kelly's actions were in any sense *"directed against the Parish Council"*. Mr. Hutchings QC accepted that neither Sister Mooney nor Mr Kelly had sufficient knowledge of the planning application or the objections to it (in particular the premise for the Sport England objection), with the consequence that no such intention could be inputed to either of them. As to Sister Fleming, and on the assumption that the conclusion I have stated above that she was not party to a conspiracy is wrong, I do not consider her actions were in any way directed towards the Parish Council. She was aware of the Parish Council's objection to the application for planning permission. It is also fair to say that Mr Allen, the Chairman of the Parish Council, had been a little ham-fisted in his attempts to convey to Sister Fleming what he considered to be the strength of local feeling against the application for planning permission. Sister Fleming had felt that some of Mr. Allen's communications were threatening. But even if those matters are taken at their highest I do not see any sufficient basis for inferring that Sister Fleming's actions were directed to the Parish Council rather than simply being steps taken in furtherance in the application for planning permission. The latter is the much more natural conclusion available on the evidence of the events in the year or so leading to the decision of the District Council's Planning Committee on 5th August 2010.

120. For these reasons my conclusion is that, even if I am wrong on my conclusions above, the intent required to found each of the causes of action advanced by the Parish Council was not present.

(9) *Are the Holy Cross Sisters vicariously liable?*

121. Given the conclusions I have already reached it is not necessary for me to address this issue. It is then sufficient for me to note that even if the Parish Council's causes of action had not failed for the reasons I have already set out, insofar as the Parish Council relied on acts by either or both of Sister Mooney and Mr Kelly, the argument that those acts would be sufficient to fix the Holy Cross Sisters with vicarious liability faced significant difficulties. Neither Sister Mooney nor Mr Kelly was an employee of the Holy Cross Sisters. Given the findings of fact I have made as to the sequence of events

on 4th August 2010 it would have been difficult to make good any submission that either had been authorised to speak for the Holy Cross Sisters in respect of the prior use of Area A. On 4th August it was Mr Moir's decision to speak to each of them; neither was put forward by the Holy Cross Sisters as a source of information on that occasion; in the course of the planning application neither had been a source of instructions on behalf of the Holy Cross Sisters.

D. Conclusions

122. For the reasons set out above, (1) there was no conspiracy to use unlawful means alleged. (2) Even if a conspiracy as alleged had existed the Parish Council has failed to establish unlawful means either in the form of the tort of deceit or in the form of the offence under section 2 of the Fraud Act 2006. (3) The intent necessary for an unlawful means conspiracy has not been established. (4) For the purposes of the unlawful interference tort I accept that Mr Kelly had made a false statement dishonestly – as to whether Area A had been marked up for sporting purposes in the period 2001 to 2006. However, (a) that statement did not cause the District Council to grant the application for a planning permission; and (b) the grant of planning permission did not amount to interference with any relevant economic interest of the Parish Council. (5) Mr Kelly did not act with the necessary intent to complete the unlawful means tort. (6) The Parish Council suffered no loss by reason of the District Council's decision to grant planning permission.

123. Each of the claims in tort pursued by Parish Council fails, and is dismissed.