Green Lane Chertsey (Developments) Limited v Secretary of State Forhousing Communities and Local Government, Runnymede Borough Council

CO/4836/2018

High Court of Justice Queen's Bench Division Administrative Court

29 March 2019

[2019] EWHC 990 (Admin)

2019 WL 01428724

Before: His Honour Judge Allan Gore QC (Sitting as a Judge of the High Court)

Friday, 29 March 2019

Representation

Mr J. Parker (instructed by D & M Planning Ltd Chartered Surveyors) appeared on behalf of the Claimant.

Mr L. Glenister (instructed by The Government Legal Department) appeared on behalf of the First Defendant.

The Second Defendent did not appear and was not represented.

Judgment

The Judge:

1 The claimant challenges three linked decisions, each dated 24 October 2018 by a planning inspector appointed by the first defendant who refused five appeals against the dismissal by the second defendant of applications for planning permission for a housing development in Green Lane, Chertsey, Surrey.

2 These appeals are for planning statutory review, pursuant to s.288 of the Town and Country Planning Act 1980 ("the 1990 Act") as a result of a decision without a hearing of Mr John Howell QC, sitting as a deputy high court judge on 22 January, 2019. Permission to appeal was granted, and so the matter came before me.

3 There are two grounds of appeal relied upon. The first is that the planning inspector erred in law by failing to identify in his decisions or then to apply or have regard to the so-called "tilted balance" in para.11 of the National Planning Policy Framework ("the NPPF") pursuant to which it is submitted that a presumption in favour of sustainable development should have been applied.

4 The second ground complains that the inspector failed to have regard to the substantial need for new dwellings in the area in question, and the contribution the proposed scheme would make to that need.

5 In the statement of grounds, para.27, and again in his skeleton argument at para.26, Mr Parker, who appears for the claimant, set out what he submits to be the seven familiar principles that represent the law applicable to challenges brought under s.288 of the 1990 Act, and I detect no significant disagreement to those principles on the part of Mr Glenister, who appears for the first defendant. Those principles, which I therefore adopt, are summarised as follows:

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

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

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

4. Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant decision is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council [2012] PTSR 983* at paras.17-22).

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

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

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

6 Mr Glenister, in the summary grounds of resistance draws attention to two other statements of legal principle from judges of the planning court with considerably greater experience in planning matters than I. Mr David Elvin QC, sitting as a judge in the high court, in *Wynn Williams v Secretary of State for Communities and Local Government [2014] EWHC 3374* said at para.33 of

his judgment:

> "It is necessary in my view to exercise due caution with new material and new points taken, especially with respect to written representations appeals which are intended to be short and for straightforward cases. It is not to be expected as a general rule that inspectors should seek to find new points though there are bound, from time to time, to be some cases where there may be obvious errors or omissions, for example, the failure to consider a plainly applicable policy."

7 Holgate J in *Distinctive Properties (Ascot) Ltd v Secretary of State for Communities and Local Government [2015] EWHC 729 Admin* at para.49 of his judgment said:

> "I should add that Mr. Boyle has sought in effect to argue a point of law which was not canvassed before the Inspector. Whilst it is not impossible in proceedings under sections 288 or 289 of TCPA 1990 to raise a point of law for the first time, the general principle is that that should not be allowed where the point would have required further fact-finding or investigation by the Inspector."

8 The background to this matter so far as I consider it to be relevant is as follows. Approximately five planning applications were made to the second defendant for housing development in the location in question. They were all refused. The claimant appealed to the inspector. In this case it was a written representations appeal. The appeal was in relation to all applications and refusals. The decisions now challenged relate to appeals bearing reference numbers 3202330, 3199096 and 3192855. The first and second references each distinguished between what was described in each of the appeal decisions as Appeal A and Appeal B. Although both appeals were dismissed in each case, the current challenge is against what in each case was Appeal B.

9 There is no dispute between the parties that para.11 of the NPPF requires planning authorities to apply a presumption in favour of development so far as is relevant to this appeal unless:

> "i. the application of policies in this Framework that protect areas or assets of particular importance provides a strong reason for restricting the overall scale, type or distribution of development in the plan area; or
>
> ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

10 This it is that provides the so-called "tilted balance" in favour of the grant of planning permission. Relevant to that tilted balance is the undisputed background fact that the second defendant was not at the time of its planning decisions nor at the time of the inspector's decisions able to demonstrate a five-year supply of deliverable housing sites for the purpose of meeting housing need. It is also not disputed that the proposed development will add an undisputed number of units to the supply of available housing in the relevant area, although there is a dispute as to how significant the addition is or what weight should be attached to it.

11 There is no dispute that the inspector's decision neither referred to the tilted balance presumption in favour of development, nor to the second defendant's failure to demonstrate a five-year supply of deliverable housing sites, nor to the fact that the proposals would add to the supply of available housing. The relevant parts of the Appeal B decision under reference 3202330 read as follows:

> "21. The appeal site forms the rear garden of areas of 307, 309 and 311 Green Lane. The area is predominantly residential in character and contains a variety of style and size of properties, although bungalows are prevalent in the immediate vicinity. The properties along this side of Green Lane benefit from gardens that are of a substantial depth and contain a mixture of mature trees and shrubs which contribute to the area's spacious and pleasant suburban character that is reinforced by the uniform arrangement dwellings face-on to the road.

22. The proposed dwellings would be sited in close proximity to each other with little space about the buildings. Notwithstanding that the rear garden depth meets the expected standard as detailed in policy H091C of the local plan, as a result of the width of each site, the proposal attempts to erect three buildings within the garden areas of two dwellings, resulting in a cramped form of development. Moreover, the close relationship of each dwelling to one another creates a mess of development, reduces the openness of the land to the rear of the frontage of the dwellings. The harm to the character and appearance of the area would be clearly visible as a result of the overall height of the development and through the new axis that will be created onto the site. The development as proposed would not reflect or respect the grain of development and appear as a form of backland development wholly out of keeping with the established character.

23. Thus, I therefore conclude that the development would result in material harm to the character and appearance of the area. It would be in conflict with policy H09 of the local plan which seeks, amongst other things, to ensure that development proposals are sensitively designed so that they do not damage the character of established areas."

12 The relevant substantive parts of the Appeal B decision under reference 3199096 read as follows:

"7. The area is predominantly residential in character and contains a variety of style and size properties, though bungalow are prevalent in the immediate vicinity. The properties along this side of Green Lane benefit from gardens that are of a substantial depth and contain a mixture of mature trees and shrubs which contribute to the area's spacious and suburban character that is reinforced by the uniform arrangement dwellings with principle elevations face-on to the road.

8. The development of the land to rear of the frontage dwellings would be significantly at odds with the characteristic form of frontage development, and I saw no other developments in the immediate vicinity that had a lack of street frontage. The proposed development would fail to reflect or respect the grain of the area and would appear as a backland form of development quite out of keeping with its established character. The proposal would also result in a tight and cramped form of development that would erode the spacious and open character of the area. The harm that I have identified above would be visible through the proposed access into the site from Green Lane and to those properties that surround it.

9. Thus, I therefore conclude that the development would result in material harm to the character and appearance of the area. It would be in conflict with policies BE2 and HO9 of the Runnymede Borough Council Local Plan Second Alteration 2001 ("the local plan") which seeks, amongst other things, to ensure that development proposals respect townscape character and are sensitively designed so that they do not damage the character of established residential areas".

13 The relevant substantive parts of Appeal B decision under reference 3192855 reads as follows:

"6. The proposal seeks to demolish the existing bungalow and replace it with a further bungalow that would be sited closer to the shared boundary with 309 Green Lane. The width of the proposed bungalow would be reduced to allow parking and turning areas to be provided within the site. The hardstanding would be to the front and side of the bungalow and would not appear to be out of character with other areas of outstanding in the vicinity.

7. Although the size of the site remains unaltered, the proposed bungalow would appear as though it had been squeezed into one side of the site. Furthermore, the design of the bungalow would result in a conspicuously narrow building that would appear as a discordant and incongruous development and would interrupt the regular pattern of development along this part of Green Lane, resulting in material harm to the established

character and appearance of the area."

14 There is no dispute, as a matter of history, that the planning officer's report and recommendations, which were put to the planning committee before the committee made its decisions upon the applications, formed part of the second defendant's case. It is right to observe in this regard that in respect of the matter proceeding under reference 3202330, the officer recommended grant of planning permission and that the committee refused permission, contrary to that advice.

15 In respect of the matters proceeding under the other references, committee decisions accorded with planning officer recommendations. What is material about the planning officer's report under reference 3202330 is that, firstly, paragraph 6.1 specifically identifies the NPPF as relevant to consideration of the applications. Secondly, paragraph 6.7 conceded and accepted that the inability to demonstrate a five-year land supply weighed in favour of the grant of planning permission. Thirdly, paragraphs 6.8 and 6.13 similarly refer to and promote the application of the NPPF to the matter to be decided.

16 It is, in my judgment, also relevant, however, to make the following observations which cannot factually be disputed. Firstly, in none of the appeal statements filed by the claimant against the second defendant's planning decisions did the claimant cite or refer to or pray in aid any of the tilted balance provisions of the NPPF.

17 Secondly, in so far as the claimant then and now seeks to rely upon an argument based upon the tilted balance provisions of the NPPF, it ought to have been foreshadowed in the appeal statements according to para.2.5 and Annexe J of the Planning Inspectorate Procedural Guide.

18 Thirdly, the potential relevance of the NPPF was appreciated by the inspector because, in the context that it was revised, between the date when the planning applications were submitted and the date of his appeal decisions, he invited written views of the parties in relation to the revised framework published on 24 July 2018. (See paras. 5, 5 and 2 of the decision reference numbers 3202330, 3199096 and 3192855 respectively). The response of the claimant to those invitations was silence.

19 Fourthly, in the appeal statements submitted on behalf of the claimant, the previous iteration of the tilted balance provisions of the framework was neither identified as among "the most relevant sections" (see para.6.11) nor as included among "all relevant planning issues" under consideration (see para.6.12).

20 In response to the appeal statements of the claimant, the second defendant conceded and acknowledged the existence of a presumption in favour of development at para.4.4 of its submission. That is to be found at trial bundle p.151. In so far as the proposals add to the supply of housing in the relevant area, the increment was never asserted by the claimant to be more than "modest" (see appeal statement para.6.13).

21 Certain conclusions appear to me to flow.

22 Firstly, if the correspondence and documentation passing between all concerned, did not identify the tilted balance provisions of the framework that constituted a significant issue between the parties, it is arguable that the inspector did not need to rehearse such arguments in his decisions.

23 Secondly, if, and to the extent that the application of the NPPF is more than merely a consideration and the weight to be given to it is a matter of the planning judgment of the inspector (see generally per Lindblom LJ in *BDW Trading Ltd v Secretary of State for Communities and Local Government [2016] EWCA Civ 493* at para.21 and in *East Staffordshire Borough Council v Secretary of State for communities and Local Government [2017] EWHC 983* at para.14 and that the "tilted balance" provisions represent a fundamental requirement of planning policy (see generally per Lindblom LJ in *St Modwen Ltd v Secretary of State for Communities and Local Government [2017] EWCA Civ 1643* at para.10, citing and relying on the decision of the Supreme Court in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] UKSC 37* per Lord Carnwath at para.9 and Lord Gill at paras.808), on any view, it is surprising that the inspector neither mentioned these considerations nor expressly analysed or explained the conclusions that he came to upon, even if, as here, the arguments had

not been raised prior to his decision.

24 Thirdly, in that the inspector expressed his decision by reference to what he found to be harm or material harm or to conclude that the proposed development was out of keeping, he exercised planning judgment, which it was for him and him alone to exercise, and it is not for this court to substitute its own view for that of the inspector.

25 However, Mr Parker submits that in doing so, he simply but wrongly applied the conventional planning balance as opposed to the tilted balance presumption. Mr Glenister responds by submitting for several reasons that it was unnecessary for the inspector to do or say more than he did. His submission, which I found to be superficially attractive, was that the inspector was entitled to assume the housing policy was up to date, and implicitly, therefore, that there existed or was demonstrable an adequate fiveyear housing land supply, thereby rendering the tilted balance provision of para.11 of the NPPF inapplicable because that tilted balance in favour of granting permission only applied:

> "(d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date."

26 I disagree with this submission and reject it. Based on authorities that I have already drawn attention to, it is to be assumed that the inspector was aware of the tilted balance presumption and the need to have it in mind and that adherence to it could be a fundamental requirement. In order to justify what would amount to a disapplication of the tilted balance, I would have expected the inspector in his decision so to declare, and to explain his reasons for so declaring. So far as is relevant to this application, his reason could only have been the absence of any evidence that a fiveyear housing land supply could not be demonstrated. The fallacy of such a finding, if made, would have been that it was directly contrary to and in conflict with the officer's report which, in relation to the application being dealt with under reference 3022330 specifically drew attention, at para.6.7, to the fact that:

> "In more recent years the Council has not been able to demonstrate a five-year housing supply, and the evidence base through the SLA and SHMAA demonstrates that there is a substantial need for new dwellings. This is a substantial change in circumstances since the previous applications were determined and weigh[s] in favour of the application."

27 Moreover, at para.6.13 in the same document, the officer acknowledged his word was "given" that:

> "The Borough cannot demonstrate a five-year supply of housing land." And that this, coupled with another stated factor "is considered to weigh in favour of the application". In those circumstances, the inspector would have had no alternative but to reject the contention that the tilted balance provisions were inapplicable.

28 Fourthly, in expressing himself in the way that he did, it is not evidence that the inspector plainly appreciated, consistently with the tilted balance provisions that something had to enter the balance which balance was already tilted, to justify refusal of permission by the defendant or dismissal of the appeal by the inspector. Whatever entered the "tilted balance" needed to do so to the extent that it "significantly and demonstrably" outweighed the benefits of the proposed development. Merely to find "harm" or "material harm" or, for that matter, that the development would be out of keeping with the established character would be to apply the wrong test, or at least is not demonstrably consistent with the application of the correct test.

29 Fifthly, in my judgment, it is no answer to this direction of travel to submit, as Mr Glenister did, that the inspector was entitled to adopt to course that he did because of the claimant's breach of its duty to identify relevant issues in the case, as required by The Planning Inspectorate Procedural Guide, para.2.5 and Annexe J. The importance of pleadings is not to be belittled. There is a strong imperative to deploy all relevant documents and raise all relevant issues at the

relevant time. That was not done in this case. While that state of affairs may have beguiled the inspector, it does not and cannot justify in a tribunal discharging a specialist function either a failure to identify and apply the correct test or the application of the incorrect test. Those go to the legality of the decision making, whereas the "pleading point" may be capable of being addressed at the appeal level in another way.

30 Sixthly, simply because the inspector did not mention explicitly the tilted balance does not conclusively demonstrate that he did not have it in mind or alternatively that he ignored it. The second defendant had specifically drawn it to his attention in its response to the claimant's appeal statement. However, the inspector neither referred to it nor used language consistent with its application.

31 Seventhly, if it might have been incumbent on the inspector to explicitly mention the tilted balance in his decisions in the way now contended for by the claimant, to do so would have been to take new points in respect of something that never plainly had been put in issue by the claimant in its planning applications or its appeal to the inspector. Against this, however, is the judicial reminder to which I have already referred, that the tilted balance provisions represent a fundamental requirement of planning policy.

32 Eighthly, although the inspector clearly explained himself and expressly found that there were several reasons for refusing permission for the proposed development or alternatively that the benefits of development were outweighed by what he saw to be the detriments, neither did he express himself to the effect, nor did he characterise them either, as constituting a "clear reason" for displacing the effect of the tilted balance under para.11(d)(i) of the Framework, nor did he express himself to the effect or characterise those reasons as "significantly and demonstrably" outweighing the benefits under para.11(d)(ii) of the Framework. To uphold the decision of the inspector, I would have to be justified in inferring such findings. The language of the decision and the reasons given does not, in my judgment, justify such inferences.

33 Ninthly, he clearly balanced the modest increase in the number of dwellings against his planning judgment appreciation of the harm the proposed development would do to the character and appearance of the area (see para.22 of his decision under reference 3202330). He was entitled to do that. But that is not a sufficient basis, in my judgment, for finding by inference that he decided that appropriate reasons existed for disapplication of the effect of the tilted balance.

34 Those reasons, as now stated extensively, are not an end of the matter. Mr Glenister submits that, on the facts of this case, there was a clear reason under para.11(d)(i) of the Framework, and therefore that any error on the part of the inspector made no difference to the outcome. The short point in this regard is that the reason for the dismissal of what was described as Appeal A in each case was that at the time of the relevant decision, which he submits to be the moment at which this should be tested, the proposals offended planning policies in relation to perceived flood risk. This is because the sequential risk based approach to assessing flood risk required by paras.157, 158 and 163 of the Framework, were irremediably failed for reasons conceded at para.6.13 of the officer's report in relation to the appeal proceeding under reference 3202330, in turn relied upon by the inspector at paras.713 of his decision, and leading to the conclusion that he expressed on this issue at para.15. Thus, Mr Glenister submits that the tilted balance would not have been applicable.

35 In my judgment, however, even if correct, which factually it is, that provides an artificial basis for upholding the decision in this case because there is no dispute that by agreement between the parties, all flood risk concerns relating to this site subsequently were addressed successfully and are no longer an issue, which is why no application for permission to appeal has been made in respect of the adverse Appeal A decisions. In my judgment, it would be wrong in principle to permit the first defendant to rely upon what is now a bad reason simply because at the time of the relevant decision it may have been a good reason.

36 As regards issues under para.11(d)(ii) of the Framework, there is no dispute between Mr Parker and Mr Glenister that in so far as I have discretion as to whether or not to grant relief, it is sufficient for the claimant to establish that identification that application of the correct test " might have made a difference" to the outcome, or, to put it another way, that to justify refusal to exercise discretion the first defendant must satisfy me that the identification and application of the correct test "necessarily" would have resulted in the same outcome.

37 For the reasons that I have now explained in detail, there being a significant difference between a tilted balance and a simple conventional planning balance, I have to conclude that identification and application of the correct test might have made a difference, and I cannot be satisfied that it would necessarily have resulted in the same outcome.

38 For all of those reasons, despite the deference that the inspector is entitled, to this court, according to his decision, I am satisfied that both grounds of challenge are established; that the inspector's decision was unlawful, and that as a matter of discretion I ought to quash it. It is not for me to substitute my decision for that of the inspector, and therefore this matter must be remitted for reconsideration.

MR PARKER: My Lord, I am grateful. I understand that in light of my Lord's judgment there may need to be an application, but equally, it may be possible for us to agree some consequential matters. In the circumstances, my Lord, I would beg my Lord's indulgence for 5 minutes for us to be able to discuss those matters, and in the long run it may save my Lord—

THE JUDGE: You didn't discuss them before?

MR PARKER: Well, we tried to but it was not entirely sure.

THE JUDGE: Well, there were only going to be two options: either the challenge was going to succeed or it was going to fail. So there were not many alternatives that needed consideration. What are the outstanding matters that need?

MR PARKER: My Lord, in terms of the consequences in terms of the quashing of and (inaudible) of the decisions, there will be no disagreement between us. The only issue is one of costs, and I suspect that we may be able to agree that and it may be worth just spending 5 minutes. Otherwise we will have to hear submissions for both of us and give another judgment. I suspect it would be rather quicker to proceed—

THE JUDGE: And there has been no discussion about that?

MR PARKER: There has been some but not finally concluded. That is why I think it will only take—

MR GLENISTER: There was almost an agreement this morning between those instructing me because – those instructing me were not around today.

THE JUDGE: But you think another 5 minutes might?

MR GLENISTER: Well, Mr Parker and myself were discussing about 1.50 pm/1.55 pm and then it got interrupted.

THE JUDGE: It is 3.40 pm now, and though I am not leaving this city, the court staff are entitled to recognition that it is Friday afternoon. I am not going to give you very long.

MR GLENISTER: That is—

THE JUDGE: Because if you do not reach agreement, I am going to have to hear argument and deal with the consequential matters.

MR GLENISTER: Yes, my Lord.

THE JUDGE: How long do you think you need: 3.45pm?

MR GLENISTER: That clock is saying it is 3.42 pm so I would ask for 8 minutes to 50. 3.45 pm is three minutes, so it may be counter-productive.

THE JUDGE: Well, I think that clock is slightly fast. I am not going to bind you to anything, and I expect you not to bind me to anything. I will hover in the vicinity. There is no point in me trudging back to my room in this building. Do it as fast as you can. Call be back as soon as you are ready.

MR PARKER: Thank you.

(Short adjournment)

THE JUDGE: Yes.

MR PARKER: My Lord, you will be pleased to hear that as far as costs are concerned, that matter has been settled with the Secretary of State making a contribution towards the claimant's costs. A figure is agreed and we will file an agreed order for your approval. There is an issue of permission to appeal. I will sit down and let my learned friend address you.

MR GLENISTER: Just for your information, the figure that the Secretary of State has agreed is £6,000 which is a significant reduction on what was claimed.

In terms of permission to appeal—

THE JUDGE: So it will be by consent that D pay C's costs in the agreed sum of £6,000.

MR GLENISTER: Correct.

MR PARKER: Yes, my Lord.

THE JUDGE: Yes.

MR GLENISTER: In terms of permission to appeal, I am instructed because it is essentially only me here today and there are various people covering, to ask my Lord for 7 days.

THE JUDGE: Be very careful, Mr Glenister. I am mindful of your instructions, and that is fair enough, and you must act as you are instructed or as you deem appropriate. I am also mindful of the fact that what I am about to say has not in fact met with universal appellate approval, in the sense that Jackson LJ has said, but obiter, so not authority that is binding on me, that applications for permission to appeal should, in the first instance, be made to the lower court. And, of course, I recognise that the making of that application must be today unless I grant an adjournment for that purpose, which I would not normally be minded to do.

On the other hand, consistently with the rules, and therefore not out of step with the guidance given by Jackson LJ is the fact that you are entitled to apply for permission to appeal either to the lower court or to the appeal court. And without wishing to embarrass you, were you not to take the reflective opportunity and therefore if, upon reflection, you then pursue an application for permission before the appeal court, you will have to persuade me firstly: what is the error of law that you submit I am guilty of in this judgment; or alternatively, what is, to the extent to which I had any factfinding to do or discretion to exercise, the relevant matter that I failed to take account of, or the irrelevant that I took account of, or why you will submit that my decision is perverse.

MR GLENISTER: My Lord, the terms of the procedure the standard way would be for me to ask permission, and then to put it generally, one usually does not get permission from the first instance judge, and then one then has 21 days to go to the Court of Appeal. If I were to make the permission application today, I could make it essentially to tick the box, but it would not be with the reflection that you say, and actually—

THE JUDGE: Quite.

MR GLENISTER: – I, I.

THE JUDGE: That is why, with the greatest of respect to Jackson LJ, I do not think he is right. In a simple straightforward matter, it may be entirely appropriate for the application in the first instance to be made to the lower court. It may be that there was not a lot of law in it, and that there was a single simple proposition in law in respect of which it is submitted that the lower court erred. But in the rarefied atmosphere of the planning court within the administrative court of the Queen's Bench Division, we are not in that kind of territory, are we?

MR GLENISTER: Well, my Lord, shall I say what I was going to ask to do, and then—

THE JUDGE: It is a matter for you. If you want to press it, you will have to wait for the form that I have to complete.

MR GLENISTER: Well, there is a chance, and I do not think it is a small chance, that there will be no further applications, but if I were to make an application today it would be just to hold the ring. What I was going to ask for was 7 days to make an application in writing, no more than two sides, to yourself, to make an application, with the reflection you—

THE JUDGE: So, you are inviting me to adjourn an application or adjourn the matter for

consideration of an application for permission to appeal?

MR GLENISTER: Yes, but, and within—

THE JUDGE: I think on the decided cases, I am discouraged from taking that course. Either you make an application now, in which case I will listen to it. I will deal with it. I will fill in the form, and you will wait for the form. Or, reflecting the fact that you have in any event, whatever course you adopt today, and whatever I decide or do not decide, the right to apply by form N161 to the appeal court, you do it another day. And if you are asking for 7 days, that appears to me, in effect, to be saying I will reflect on it and take my chance within 21, or is it 28 days; I cannot remember which, before the appeal court.

MR GLENISTER: Well, it is 21, my Lord. And this goes to the timing generally, which is that, as I mentioned last time, I think we were trying to organise a date, I am away from essentially this weekend for 3 weeks. So I was asking for long-stop date for if I was going to push my luck, 35 days, but if I was going to be more reasonable, perhaps 28, in which case I am back from holiday and could do it, but it would be a bit of a stretch.

THE JUDGE: I think there is a decided case recently that suggests that that should not be done. I cannot remember the name of it; I have not brought it with me. I do not know whether it has crept into the latest supplement of the White Book. I know from colleagues in this building that the new edition of the **White Book** is in fact surfacing today, but I have not seen it yet, and I certainly have not found—

MR GLENISTER: It is in pigeon holes today; I have seen it.

THE JUDGE: I certainly have not found whether the decision which I think is reported in Civil Procedure News, my copies of which are in my retiring rooms in my home court in Exeter, suggest that that course should not be adopted. You either make the application today or you make it to the appeal court.

MR GLENISTER: So, my Lord, what I would then ask is that I would make an application to you today just to cover that off, and then—

THE JUDGE: Right then, make your application and wait for the form.

MR GLENISTER: Then, my Lord, and then it is 21 days, but I would ask for the discretion for it to be extended to 28, which is within – because it is 21 days unless the lower court orders otherwise.

THE JUDGE: If you feel you are able to formulate the grounds, I am not going to give you 28 days.

MR GLENISTER: It is 28 days to the appeal court, sorry. So I would make the application to you today but I would ask for 28 days to go to the appeal court. I am not saying that it will be done; I am just asking to hold the ring because people are away today and – if you understand. So the only ground I would cite today in terms of the form that you need to fill out, I would site one ground, which is on the materiality point in relation to the flooding. I think, and I will be corrected if I am wrong, that the court took the view it was artificial because there was a change in position from the date of the planning appeal decisions by the inspector and today's date, which factually is wrong, before the inspector, the Council's position before the inspector, the sequential test was not met, in relation to the location. But the Council had found in Appeal A, the Council had found that there were access routes and escape routes sufficient to satisfy the NPPF.

THE JUDGE: So I might have got the reason wrong, but the effect is the same.

MR PARKER: Well, I am not sure it is because there is a difference between – at the time of the decision, and it has not changed since the decision—

THE JUDGE: Look, the point is this. Leaving aside, for a moment, the question of the reason that I stated, if the fact of the matter is that the Appeal A issue has gone away, then my reasoning stands.

MR GLENISTER: That is correct, but it has not gone away. At all material times—

THE JUDGE: I thought it had gone away, number one. Number two: if it, in truth, has not gone

away and bearing in mind that no-one has ever appealed against the Appeal A determinations, why weren't you challenging this appeal simply and exclusively on the ground that it is academic because of the position in relation to the Appeal A issue?

MR GLENISTER: My Lord, it is not for me; it is obviously for the appellant, or the claimant in this case, to make the appeal. I simply respond. They appealed Appeal B. Flooding was not an issue because the Council had relied on flooding, but it would have—

THE JUDGE: No, I am sorry, Mr Glenister; you missed the point. They have appealed against B. I am not saying it was your job to Appeal against A; quite the opposite.

MR GLENISTER: Yes.

THE JUDGE: Your job, if the flood risk issue is still a live issue—

MR GLENISTER: Mm.

THE JUDGE: – should have been to say: well, whether the decision making was right or wrong on the Appeal B issues is completely academic because on appeal A grounds, which have not been appealed, this project is never going ahead.

MR GLENISTER: That is exactly what was the submission, but it was through the – because if the tilted balance, there needed to be a clear reason. The sequential test was wrongly applied by the Council and has always been wrongly applied. It has been the Secretary of State's case throughout. The Council has said there were escape routes, therefore we are happy to approve Appeal A. The Secretary of State found specifically the sequential test was not met, which was the crucial test for the NPPF.

THE JUDGE: And I have accepted that.

MR GLENISTER: So that would then provide the clear reason as to why the tilted balance is disapplied.

THE JUDGE: But, as a ground of objection under 11(d)(i)—

MR GLENISTER: Mm.

THE JUDGE: – I have rejected that as artificial because the flood risk issue, as I understand it, is no longer an issue.

MR GLENISTER: That is not right. So if this goes back to the inspector now, (1) it may be a very possible course, the inspector may now obviously he will be considering para.11. He will reconsider para.11. He will say that there is a clear reason for the presumption to be disapplied because the sequential test is not met. And therefore, there is a clear reason. The factual issue on the ground; nothing has changed since the decision.

THE JUDGE: I am sorry; we are going round in circles, Mr Glenister. If that is right—

MR GLENISTER: Mm.

THE JUDGE: – why have you not, in answer to the appeal that has been raised against the Appeal decisions—

MR GLENISTER: Mm.

THE JUDGE: – said: permission to appeal should be refused because the entire appeal on Appeal B issues is academic because of the unappealed position in relation to Appeal A?

MR GLENISTER: It is not that – it is not that it is rendered academic; it is just simply—

THE JUDGE: Precisely. And therein lies the reasoning that I have given in my judgment.

MR GLENISTER: My Lord, that may be the decision you have come to; I do not challenge that. But that is the ground of appeal I will be putting forward.

THE JUDGE: Well, I do not detect in that a clearly formulated submission of an error in law that passes even the modest threshold for the grant of permission to appeal, and therefore

permission to appeal is refused.

MR GLENISTER: Thank you.

THE JUDGE: But, as I say, you will have to wait for the form.

MR GLENISTER: Thank you, my Lord. May you then indulge me with the 28 days to file any appeal with the Court of Appeal, simply because of my own person—

THE JUDGE: I am not sure that I have the jurisdiction to do that.

MR GLENISTER: I do not have the **White Book** , but it is in 52. It is the paragraph which requires 21 days, and part (b) is unless the lower court orders otherwise.

MR PARKER: My Lord, you do have the power to extend time. As a matter of jurisdiction, that is right. We say – briefly, my Lord – you should not do that because it is in my client's interest for this matter to be remitted to the Secretary of State as soon as possible, and any delay is detrimental. No doubt—

THE JUDGE: Poor Mr Glenister will have to suffer, just as I used to have to suffer at the bar, that his laptop may be engaged for a short period during the time that he enjoys being away.

MR GLENISTER: My Lord, there are two things I would say. Firstly, obviously the judgment has been given fairly swiftly. Had you done a written judgment, my Lord, it would have been longer anyway, so I say 7 days is not a huge amount of time, particularly in that context. And, secondly, I would say that, when you are appealing—

THE JUDGE: Actually, I think you are wrong.

MR GLENISTER: Let's get it out.

THE JUDGE: The appellant must file the appellant's notice at the appeal court within such period as may be directed by the lower court. That applies in circumstances where permission to appeal is granted. Permission to appeal does not absolve you of the obligation of filing and serving a notice of appeal.

MR GLENISTER: My Lord, it is Practice Direction 52B(3.1) .

THE JUDGE: Well, I am sorry, Mr Glenister. It may sound unsympathetic but I am not satisfied that your leave arrangements constitute a good reason why the time limit cannot be adhered to, and so I am not prepared to extend time.

MR GLENISTER: Thank you.

THE JUDGE: We obviously have to retain the hearing bundle, but I think I can unburden the court of the authorities bundle. I do not know who prepared it but that can go back to one of you. It would be wrong of me not to acknowledge both the written and oral submissions that you have both made, and the quality of them, to the assistance of the court. And I so thank you.

MR PARKER: Thank you, my Lord.

MR GLENISTER: Can I just ask one question. I do not know whether you know. My client is keen to obtain a written transcript of the judgment. As I understand it, the transcript goes back to you for approval before it is then disseminated to the parties.

THE JUDGE: I almost invariably approve them within 24 hours. I certainly have never been in breach of the requirement to approve them within 7 Days.

MR GLENISTER: And so that just happens automatically then; that the transcripts—

THE JUDGE: Well, you have to request it and pay for it. How fast the transcribers can do it; I know not. That is out of my hands.

MR GLENISTER: I am grateful, my Lord.

THE JUDGE: I do not have any leave arrangements that will inhibit my ability to abide by those guidelines. Have a good weekend both of you when it eventually arrives.

MR GLENISTER: Thank you, my Lord.

THE JUDGE: I am sorry. I've got to now do the form. Can you come to my room and bring it back to Mr Glenister. We will need one copy on the court file and one copy of the original goes to him. Thank you very much.