Neutral Citation Number: [2016] EWHC 421 (Admin)

Case No: CO/4852/2015

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

Bristol Civil and Family Justice Centre,
Redcliff Street, Bristol, BS1 6GR.

Date: 4 March 2016

Before:

THE HON MR JUSTICE COULSON

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Between:

Forest of Dean District Council	**Claimant**
- and -	
Secretary of State for Communities and Local Government	**First Defendant**
- and -	
Gladman Developments Ltd	**Second Defendant**

- -
- -

Mr Peter Wadsley and **Mr Philip Robson** (instructed by **Legal Services, FDDC**) for the **Claimant**
Mr Gwion Lewis (instructed by **Treasury Solicitor**) for the **First Defendant**
Mr David Elvin QC and **Mr Peter Goatley**
(instructed by **Irwin Mitchell LLP**) for the **Second Defendant**

Hearing date: 23 February 2016

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Approved Judgment

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1. On 12 June 2014, the second defendant developer (whom I shall call "Gladman") applied for planning permission to build up to 85 dwellings and associated works on land north of Ross Road in Newent, GL18 1BE. In February 2015, the claimant (whom I shall call "FDDC"), refused that application. Gladman appealed and there was an Inquiry in late June/early July 2015. In a written decision dated 25 August 2015, the inspector allowed Gladman's appeal and granted outline planning permission.

2. By an application made pursuant to section 288 of the Town and Country Planning Act 1990 ("the 1990 Act"), lodged on 5 October 2015, FDDC challenges the decision of the planning inspector. There are four grounds of appeal as follows:

    (1) Failing to consider and give reasons as to whether the site was a 'valued landscape';

    (2) Incorrectly applying the National Planning Policy Framework ("NPPF") at paragraph 134 and the test on harm to heritage assets;

    (3) Failing to consider the interaction between paragraph 134 and paragraph 14 of the NPPF and therefore applying the wrong test;

    (4) Inadequate reasoning.

3. Unusually perhaps, the first defendant (whom I shall call "SSCLG") expressly accepts that Ground 3, the failure to consider and apply the test created by the interaction between paragraphs 134 and 14 of the NPPF, has been made out. In consequence, SSCLG joins with the claimant, FDDC, in asking me to quash the appeal decision. Gladman do not accept Ground 3. In those circumstances, in order to save both time and costs, at the hearing I invited the parties to deal with Ground 3 only, although it was of course also necessary to deal with the issue of discretion and whether, if Ground 3 was made out, the inspector's decision would still have been the same.

4. The argument on these two points alone took almost all of the time allocated for the hearing on 23 February 2016. At the end of that hearing, I gave a short ruling in which I indicated that: a) FDDC's application on Ground 3 had been successful, together with brief reasons; and that b) it could not be said that, if the inspector had applied the right test, he would necessarily have reached the same answer. In those circumstances, I allowed the application to quash. I said that, in view of the importance of the point, not only for the parties, but for what I was told was the planning process generally, I would provide a fuller written judgment explaining the reasons for my decision. This is that Judgment.

2. THE RELEVANT LEGAL PRINCIPLES

2.1 Section 288

5. Section 288 of the 1990 Act provides as follows:

"**288 Proceedings for questioning the validity of other orders, decisions and directions**

(1) If any person—

(a) is aggrieved by any order to which this section applies and wishes to question the validity of that order on the grounds—

(i) that the order is not within the powers of this Act, or

(ii) that any of the relevant requirements have not been complied with in relation to that order; or

(b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds—

(i) that the action is not within the powers of this Act, or

(ii) that any of the relevant requirements have not been complied with in relation to that action,

he may make an application to the High Court under this section.

(2) Without prejudice to subsection (1), if the authority directly concerned with any order to which this section applies, or with any action on the part of the Secretary of State to which this section applies, wish to question the validity of that order or action on any of the grounds mentioned in subsection (1), the authority may make an application to the High Court under this section.

(3) An application under this section must be made within six weeks from the date on which the order is confirmed (or, in the case of an order under section 97 which takes effect under section 99 without confirmation, the date on which it takes effect) or, as the case may be, the date on which the action is taken.

(4) This section applies to any such order as is mentioned in subsection (2) of section 284 and to any such action on the part of the Secretary of State as is mentioned in subsection (3) of that section.

(5) On any application under this section the High Court—

> (a) may, subject to subsection (6), by interim order suspend the operation of the order or action, the validity of which is questioned by the application, until the final determination of the proceedings;
>
> (b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action."

I note that this claim was brought under the unamended provisions of the 1990 Act, pursuant to which permission to make the application is not required. Thus the case proceeded directly to a substantive hearing. The amended s.288 only applies to decisions taken on or after 26 October 2015.

2.2 The Correct Approach to Section 288

6. The correct approach to be adopted to a s.288 claim was set out in paragraph 19 of the judgment of Lindblom J (as he then was) in ***Bloor Homes East Midland Ltd v SSCLG*** [2014] EWHC 754 (Admin) as follows:

> "19. The relevant law is not controversial. It comprises seven familiar principles:
>
> (1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in ***Seddon Properties v Secretary of State for the Environment (1981) 42 P. & C.R. 26*** , at p.28).
>
> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in ***South Bucks District Council and another v Porter (No. 2) [2004] 1 W.L.R. 1953*** , at p.1964B-G).

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

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

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

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

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

2.3 The NPPF

7. During the hearing, numerous paragraphs within the NPPF were referred to. It would make this Judgment unnecessarily prolix if I set out all those paragraphs. In my judgment, the important paragraphs were as follows:

(a) Paragraph 14:

"At the heart of the National Planning Policy Framework is a **presumption in favour of sustainable development**, which should be seen as a golden thread running through both plan-making and decision-taking.

For **plan-making** this means that:

- local planning authorities should positively seek opportunities to meet the development needs of their area;
- Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:
  - 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; or
  - specific policies in this Framework indicate development should be restricted.[9]

For **decision-taking** this means:

- approving development proposals that accord with the development plan without delay; and

[9] For example, those policies relating to sites protected under the Birds and Habitats Directives (see paragraph 119) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion.

- where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:

  - 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; or[10]

  - specific policies in this Framework indicate development should be restricted.[9]"

It is this second bullet point under 'decision-taking' that matters for the purposes of this case. Of the two alternatives applicable where the development plan is absent, silent or relevant policies are out-of-date, the first ("any adverse impacts…") was referred to at the hearing as Limb 1. The second, ("Specific policies…") was referred to as Limb 2.

(b) Paragraph 49:

> "Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."

(c) Paragraphs dealing with conserving and enhancing the historic environment, including:

> "126. Local planning authorities should set out in their Local Plan a positive strategy for the conservation and enjoyment of the historic environment, including heritage assets most at risk through neglect, decay or other threats. In doing so, they should recognise that heritage assets are an irreplaceable resource and conserve them in a manner appropriate to their significance. In developing this strategy, local planning authorities should take into account:
>
> - the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation;
> - the wider social, cultural, economic and environmental benefits that conservation of the historic environment can bring;
> - the desirability of new development making a positive contribution to local character and distinctiveness; and

[10] Unless material considerations indicate otherwise.

- opportunities to draw on the contribution made by the historic environment to the character of a place.

…

132. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. Substantial harm to or loss of a grade II listed building, park or garden should be exceptional. Substantial harm to or loss of designated heritage assets of the highest significance, notably scheduled monuments, protected wreck sites, battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional.

133. Where a proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply:

    - the nature of the heritage asset prevents all reasonable uses of the site; and
    - no viable use of the heritage asset itself can be found in the medium term through appropriate marketing that will enable its conservation; and
    - conservation by grant-funding or some form of charitable or public ownership is demonstrably not possible; and
    - the harm or loss is outweighed by the benefit of bringing the site back into use.

134. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."

8. The NPPF itself has to be approached in accordance with the guidance referred to by Lord Reed in ***Tesco Stores v Dundee City Council*** (as set out in paragraph 19(4) of ***Bloor Homes***, above). The NPPF has also been recently considered by the Court of Appeal in ***Europa Oil and Gas Ltd v SSCLG*** [2014] EWCA Civ. 825 in these terms:

> "13. Paragraph 90 of the NPPF is a policy statement which, in accordance with basic principle, "should be interpreted objectively in accordance with the language used, read as always in its proper context" (per Lord Reed JSC in ***Tesco Stores Ltd***.
>
> …
>
> 15. On the face of it, the NPPF is a stand-alone document which should be interpreted within its own terms. It even contains a glossary (Annex 2) which explains familiar planning terms such as "local plan" and "planning condition", cross-referring as appropriate to legislation…"

9. More particularly, paragraphs 132-134 of the NPPF were dealt with by Gilbart J in ***Pugh v SSCLG*** [2015] EWHC 3 (Admin). He noted at paragraph 49 of his judgment that paragraph 134 "can be a trap for the unwary if taken out of context" and he went on to say in paragraph 50:

> "There is a sequential approach in paragraphs 132-4 which addresses the significance in planning terms of the effects of proposals on designated heritage assets. If, having addressed all the relevant considerations about value, significance and the nature of the harm, and one has then reached the point of concluding that the level of harm is less than substantial, then one must use the test in paragraph 134. It is an integral part of the NPPF sequential approach. Following it does not deprive the considerations of the value and significance of the heritage asset of weight: indeed it requires consideration of them at the appropriate stage. But what one is not required to do is to apply some different test at the final stage than that of the balance set out in paragraph 134. How one strikes the balance, or what weight one gives the benefits on the one side and the harm on the other, is a matter for the decision maker. Unless one gives reasons for departing from the policy, one cannot set it aside and prefer using some different test."

2.4 Heritage Assets

10. Heritage assets and the correct approach to them was recently dealt with by the Court of Appeal in ***Barnwell Manor Wind Energy Ltd v East Northants DC*** [2014] EWCA Civ. 137, and by Lindblom J in ***R (Forge Field Society) v Sevenoaks DC*** [2014] EWHC 1895 (Admin). At paragraphs 48-51 of his judgment in ***Forge Field***, Lindblom J said:

"48. As the Court of Appeal has made absolutely clear in its recent decision in ***Barnwell***, the duties in sections 66 and 72 of the Listed Buildings Act do not allow a local planning authority to treat the desirability of preserving the settings of listed buildings and the character and appearance of conservation areas as mere material considerations to which it can simply attach such weight as it sees fit. If there was any doubt about this before the decision in ***Barnwell*** it has now been firmly dispelled. When an authority finds that a proposed development would harm the setting of a listed building or the character or appearance of a conservation area, it must give that harm considerable importance and weight.

49. This does not mean that an authority's assessment of likely harm to the setting of a listed building or to a conservation area is other than a matter for its own planning judgment. It does not mean that the weight the authority should give to harm which it considers would be limited or less than substantial must be the same as the weight it might give to harm which would be substantial. But it is to recognize, as the Court of Appeal emphasized in ***Barnwell***, that a finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted. The presumption is a statutory one. It is not irrebuttable. It can be outweighed by material considerations powerful enough to do so. But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering.

50. In paragraph 22 of his judgment in ***Barnwell*** Sullivan L.J. said this:

> "… I accept that … the Inspector's assessment of the degree of harm to the setting of the listed building was a matter for his planning judgment, but I do not accept that he was then free to give that harm such weight as he chose when carrying out the balancing exercise. In my view, Glidewell L.J.'s judgment [in ***The Bath Society***] is authority for the proposition that a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give "considerable importance and weight"".

> 51. That conclusion, in Sullivan L.J.'s view, was reinforced by the observation of Lord Bridge in ***South Lakeland*** (at p.146 E-G) that if a proposed development would conflict with the objective of preserving or enhancing the character or appearance of a conservation area "there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest". Sullivan L.J. said "[there] is a "strong presumption" against granting planning permission for development which would harm the character of appearance of a conservation area precisely because the desirability of preserving the character or appearance of the area is a consideration of "considerable importance and weight"" (paragraph 23). In enacting section 66(1) Parliament intended that the desirability of preserving the settings of listed buildings "should not simply be given careful consideration by the decision-maker for the purpose of deciding whether there would be some harm, but should be given "considerable importance and weight" when the decision-maker carries out the balancing exercise" (paragraph 24). Even if the harm would be "less than substantial", the balancing exercise must not ignore "the overarching statutory duty imposed by section 66(1), which properly understood … requires considerable weight to be given … to the desirability of preserving the setting of all listed buildings, including Grade II listed buildings" (paragraph 28). The error made by the inspector in ***Barnwell*** was that he had not given "considerable importance and weight" to the desirability of preserving the setting of a listed building when carrying out the balancing exercise in his decision. He had treated the less than substantial harm to the setting of the listed building as a less than substantial objection to the grant of planning permission (paragraph 29)."

2.5 Discretion

11. Of course, even if the court concludes that the inspector may have made an error of law, the decision to quash is not automatic; it is a matter of discretion. In the ordinary case, the decision to quash will only be made if the court cannot say that, even allowing for the error, the decision would inevitably have remained the same. This approach was recently followed in ***Europa***. In that case, Ouseley J was not satisfied that, without the error made by the inspector as to the interpretation of 'mineral extraction', the decision would inevitably have been the same. The Court of Appeal agreed. They held that the judge was entitled to find that the decision might have been different but for the inspector's error and thus to exercise his discretion to quash the decision.

3. THE APPEAL DECISION

12. The inspector's appeal decision in the present case was dated 25 August 2015. For present purposes, it is necessary only to set out some of the paragraphs under two of the inspector's own headings: 'The setting of heritage assets' and 'The overall planning balance'.

13. As to the setting of heritage assets, the following paragraphs are relevant:

> "31. In my view the two fields that make up the appeal site contribute to the significance of the listed Mantley House Farm complex. In their current undeveloped state these fields provide an appropriate rural and tranquil setting for the farm house and the associated former farm buildings. In previous times there may well also have been a functional and historical link between the two as it is likely the fields would have been farmed as part of the extensive Mantley Farm estate. Consequently the appeal proposal would damage the rural setting of the Mantley Farm complex and erode the likely functional and historical relationship that existed between the farm and nearby fields. The effect would be particularly evident from Horsefair Lane as the views of the Mantley Farm complex sitting within a rural landscape would be lost.
>
> 32. It is clear from the Illustrative Masterplan for the appeal site that a real effort has been made to reduce the impact of built development and disturbance on the farm complex's immediate setting. To this end the south-western part of the site next to the Mantley House Farm complex would remain undeveloped and be given over to public open space, whilst the main access road off Ross Road would be located away from the western boundary. Furthermore extensive areas of planting are planned along the edge of the proposed private drives nearest to the farm buildings to provide a green edge to the open space and soften the impact of the new dwellings. I consider that the provision of such a sizeable open area on that part of the site next to the Mantley House Farm complex, together with the associated landscaping, would lessen the impact of the development on the immediate setting of this group of listed buildings. However it would not produce a setting of the same quality and characteristics as currently exists.
>
> 33. Having regard to the effects of the appeal scheme, the proposed mitigation and the high threshold required for 'substantial harm' I consider that the proposed development would cause 'less than substantial harm'

> to the Mantley House Farm complex in terms of *the Framework*."

14. As to the overall planning balance, the relevant paragraphs are set out below. I have put the critical parts in bold:

> "42. The Council cannot demonstrate a 5-year supply of deliverable housing sites and it would appear that the shortfall may be significant. Consequently all relevant policies for the supply of housing have to be regarded as out of date and accorded very limited weight. ***Paragraph 14*** **of the *Framework* makes it clear that in such cases planning permission should be granted, where relevant policies in the development plan are out-of-date, unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in *the Framework* taken as a whole.**
>
> 43. I have identified adverse impacts of the appeal scheme. In particular I have concluded that the proposal would detract from the rural character and appearance of Horsefair Lane. I have also found that by causing 'less than substantial harm' the development would fail to preserve the special architectural and historic interest of the Grade II listed Mantley Farm complex and would harm the significance of Picklenash Court, a non-designated heritage asset. These findings bring the scheme into conflict with elements of local and national planning policy.
>
> 44. I now turn to the weight that should be attached to these adverse impacts in the overall planning balance. As regards the adverse impact on the character and appearance of Horsefair Lane I believe that the visual harm would be fairly localised and confined to a particular part of Horsefair Lane. Consequently I attach only moderate weight to this consideration.
>
> 45. Given the statutory duty as regards listed buildings I am obliged to give considerable weight to the desirability of preserving the setting of the Mantley House farm complex in carrying out the balancing exercise, even though I have found that the harm would be 'less than substantial.' In my view, however, it is also necessary to take account of the fact that the appeal scheme provides for a substantial area of open space on the part of the appeal site next to the Mantley House farm complex. Although this would not replicate the current rural setting of this former farm it would ensure that the listed buildings continue to sit within an undeveloped area and

away from other built development. Consequently whilst attaching considerable weight to the failure of the scheme to preserve the special architectural and historic interest of the Grade II listed Mantley House farm I believe that this needs to be tempered with my finding that the new setting created would allow the continued appreciation of these heritage assets within an undeveloped area.

46. Similarly the public open space to be created north of Ross Road would ensure that the non-designated heritage asset, Picklenash Court, retains an open setting to the front albeit of a different nature and extent than currently exists. As a result, taking account of the scale of this harm and the nature of the asset and its surroundings, only limited weight should be attached to the harm to the significance of Picklenash Court.

47. There are considerable public benefits associated with the appeal scheme and these need to be given substantial weight. *Paragraph 14* of the *Framework* makes it clear that sustainable development has three dimensions: economic, social and environmental. In my judgement the proposal would fulfil the economic role of sustainable development and would contribute to building a strong, responsive and competitive economy, by helping to ensure that sufficient land is available to support growth. There would also be associated economic benefits in terms of construction jobs, increased spending in the area, additional Council tax revenues, and the New Homes bonus. With reference to the social dimension the scheme would contribute to boosting housing supply, by providing a range of sizes and types of housing for the community, including a sizeable number of acutely-needed affordable housing units.

48. As regards environmental considerations Newent is recognised as a sustainable settlement and considered to be an acceptable location for accommodating new development. The appeal site is well located in terms of accessibility to the various facilities and services in the town and the development would help to support them. For longer trips alternatives to the private car are available with bus services available in the town. The proposed land to be given over to public open space would be of recreational benefit and footpath/cycleway links would be created across the site. There would be increased opportunities for ecological enhancement and habitat creation that would not arise if the land were to

> continue in its existing use. In due course a softer edge to the town would be created than currently exists. The site is available and it is likely that it could be developed within the next five years.
>
> 49. It is evident that I have identified adverse environmental impacts of the appeal scheme. **The essential test in cases such as this is not confined to the assessment of harm in isolation but rather whether the adverse impacts identified would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.** In this regard I have also identified a considerable number of economic, social and environmental benefits that would arise as a result of the appeal that need to be given substantial weight. In my judgement the limited number of adverse impacts identified in this case, and their localised nature, even when added together, would not significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole. I therefore find that there are insufficient grounds for finding against the development and that when taken as a whole the appeal scheme would constitute sustainable development. Consequently the *Framework's* presumption in favour of sustainable development applies."

4. GROUND 3: DID THE INSPECTOR APPLY THE WRONG TEST?

4.1 The Principal Issues

15. The principal issues between the parties must be considered against the background of the matters that are not in dispute. It is agreed that the last bullet point in paragraph 14 of the NPPF (paragraph 7a) above) applies to this case, because the inspector found that FDDC's policy was out of date due to their inability to show a 5 year housing supply. Paragraph 49 of the NPPF was therefore engaged. It is also agreed that the inspector's findings in respect of the Mantley House Farm complex, a Grade II listed group of buildings, related to a designated heritage asset. Finally, it is agreed that the inspector found that the development proposal would lead to "less than substantial harm" to the significance of the Mantley House Farm complex. Accordingly, paragraph 134 of the NPPF, set out at paragraph 7c) above, is, on any view, directly applicable to this application.

16. Ground 3 of the s.288 application is in these terms:

> "Failure to consider the interaction between NPPF 134 and NPPF 14, Footnote 9, and applying the wrong test when balancing the harm and benefits of the development."

Essentially, Mr Wadsley (strongly supported by Mr Lewis for SSCLG) contends that, because the development plan is out-of-date, the presumption in favour of granting planning permission is disapplied in either of the two separate circumstances identified in the last bullet point of paragraph 14 of the NPPF (Limb 1 or Limb 2, set out at paragraph 7(a) above). FDDC and SSCLG submit that Limbs 1 and 2 cover different possibilities. They argue that, in circumstances where there is a finding of less than substantial harm to the significance of a designated heritage asset, the harm has to be weighed against the public benefits of the proposal. Crucially, they say that this balancing exercise must be carried out in the ordinary (or unweighted) way. They say that this is the test required by paragraph 134, and that it is the same test required by Limb 2 of paragraph 14, because paragraph 134 is a policy indicating that development should be restricted.

17. Mr Elvin, on the other hand, maintains that paragraph 134 is not a policy indicating that planning should be restricted, so that Limb 2 does not apply in this case. Further or in the alternative, he argues that the weighted balancing exercise required by Limb 1 of paragraph 14 should be 'read across' to the exercise set out in paragraph 134. He says that is what the inspector did, and therefore no criticism can attach to his decision.

4.2 Limb 2 and Footnote 9

18. Limb 2 of the last bullet point of paragraph 14 of the NPPF disapplies the presumption in favour of granting planning permission in circumstances where "specific policies in this Framework indicate development should be restricted." Footnote 9 gives examples of those policies. One of those policies is identified as relating to "designated heritage assets".

19. As I have said, the parties disagreed about whether Limb 1 or Limb 2 applied in this case. In consequence, there was a good deal of argument about whether footnote 9 was intended to be an exclusive list of the policies relevant to the test in Limb 2. There was also a debate about whether or not each of the paragraphs within the NPPF which set out the various policies referred to in footnote 9 had to be regarded as a policy indicating that development "should be restricted". Mr Elvin went so far as to say that, unless FDDC/SSCLG could show that each paragraph in the NPPF setting out every one of the policies noted in footnote 9 amounted to a planning restriction of some sort, they were bound to lose.

20. I am not sure that I derived very much assistance from either of these arguments. On the face of it, footnote 9 cannot be regarded as exhaustive, since it is plain that the policies which it set out were merely provided by way of example. But that does not affect the outcome of this case in any event, since "designated heritage assets" is one of those examples. And as to the second issue, it does not seem to me that either side's arguments necessarily stand or fall on showing, either that every paragraph of the NPPF dealing with the policies in footnote 9 could be said to restrict planning in one way or another, or that only certain paragraphs within the relevant sections of the NPPF needed to be restrictive in order for Limb 2 to apply. The first substantive issue for me is whether paragraph 134, dealing as it does with what happens if there is finding of a less than significant harm to a designated heritage asset, is a "specific policy [which] indicates development should be restricted", an issue I address in **Section 4.3** below.

21. However, before coming to that, I think it is worth giving one example of a policy which is expressly referred to in footnote 9, and which may therefore be regarded as a policy restricting development within the definition of Limb 2. That concerns the Heritage Coast. Although this is a policy referred to in footnote 9, the only express reference to the Heritage Coast in the body of the NPPF comes in the second bullet point of paragraph 114. This provides that:

> "Local planning authority should…maintain the character of the undeveloped coast, protecting and enhancing its distinctive landscapes, particularly in areas defined as Heritage Coast, and improve public access to an enjoyment of the coast."

22. I accept Mr Wadsley's submission that this is a very general statement of policy. But its inclusion in footnote 9 indicates that the policy is considered to be, even in those general terms, restrictive. In my view, it can be regarded as a policy indicating that "development should be restricted" only because the general presumption in favour of development may not apply in areas defined as Heritage Coast, in consequence of the operation of paragraph 114. I note, as Mr Wadsley did, that Mr Elvin did not address this point, although it was expressly raised in Mr Wadsley's opening submissions.

4.3 Is Section 134 A Policy Indicating That Development Should Be Restricted?

23. Mr Elvin argued that paragraph 134 was not a restriction on development. Instead, he said, a restriction within the NPPF was something like paragraph 87, dealing with the Green Belt, which stipulates that "inappropriate development is…harmful to the Green Belt and should not be approved except in very special circumstances." His argument was that, because there was not such a clear prohibition in paragraph 134, paragraph 134 should not be regarded as a restriction on development.

24. I do not accept that submission for four reasons.

25. First, based on the words used in paragraph 134 in the context of the NFFP as a whole, I consider that paragraph 134 is a policy indicating that development should be restricted. Throughout the NPPF, there is a presumption in favour of sustainable development, and therefore in favour of granting permission. That is the default setting. However, certain specific policies within the NPPF indicate situations where this presumption does not apply and where, instead, development should be restricted. Paragraph 134 is, I think, one such policy.

26. Paragraph 134 provides for a balancing exercise to be undertaken, between the "less than substantial harm" to the designated heritage asset, on the one hand, and the public benefits of the proposal, on the other. The presumption in favour of development is not referred to and does not apply. Paragraph 134 is thus a particular policy restricting development. Limb 2 of paragraph 14 applies.

27. I should add that, although Mr Lewis submitted that it was always SSCLG's intention to create this route by which the presumption in favour of development will not apply, I have had no regard to that submission. It is irrelevant to the true meaning of paragraph 134 and Limb 2 of the last bullet point of paragraph 14. The policy is a function of the NPPF itself; not what counsel tell me that the SSCLG intended it to

say. But in my view, the words used in paragraph 134 plainly constitute a restriction of development within the normal meaning of the words used.

28. Secondly, I think that it is appropriate to give the word "restricted" in Limb 2 of paragraph 14 a relatively wide meaning, to cover any situation where the NPPF indicates a policy that cuts across the underlying presumption in favour of development. The alternative is impractical. It is not a sensible approach to the NPPF for everyone involved in a planning application to comb through each of the policies referred to in footnote 9, to try and work out which paragraphs under each policy heading could be said to be unarguably restrictive of development, as opposed to those which, as a function of their wording, might be regarded as more nuanced. That is the sort of exercise which Mr Elvin attempts at paragraph 33 of his written submissions. In my view, it is an approach which runs the risk of construing the NPPF in an overly-prescriptive way, contrary to the principles set out in ***Tesco Stores*** and ***Bloor***.

29. At times, such as his submissions on paragraph 133 of the NPPF, Mr Elvin came close to urging that 'restricted' in paragraph 14 should be given the same meaning as the word 'refused'. I consider that this would be an incorrect interpretation of Limb 2; I agree with Mr Wadsley that it is significant that the policy could have said 'refused', but instead deliberately used the much wider word 'restricted'.

30. Thirdly, I consider that Mr Elvin's approach is not in accordance with the footnote itself. I have, at paragraphs 21 and 22 above, given the example of the Heritage Coast within the NFFP. The only reference to that policy in the whole of the NPPF is at paragraph 114, so the footnote must therefore assume that paragraph 114 is restrictive of development. In my view it is, but only in the same way as paragraph 134 is restrictive, in that it is identifying a situation in which the presumption in favour of development does not apply. To that extent, the wording in paragraph 114 is even more general than in paragraph 134. But since the NPPF assumes that paragraph 114 is restrictive; *a fortiori*, so too is paragraph 134.

31. Fourthly, I have set out at paragraph 7c) above paragraphs 132 – 134 of the NPPF. They contain different tests: for example, paragraph 133 states that planning permission for a development which creates significant harm to a designated heritage asset should be refused, whereas paragraph 134 says that, if the harm is less than significant, it has to be balanced against the benefits. Yet there is nothing in footnote 9 which seeks to differentiate between those paragraphs or those tests. The footnote encompasses the entirety of the policy in relation to designated heritage assets, and therefore includes both paragraphs. Furthermore, as Gilbart J noted in ***Pugh*** (paragraph 9 above), those paragraphs have to be read together. This approach again supports the proposition that, albeit in their different ways, both paragraph 133 and paragraph 134 'indicate that development should be restricted'.

32. Accordingly, on a proper interpretation of the NPPF, I consider that the exercise at paragraph 134/Limb 2 needs to be undertaken when there is less than substantial harm to the significance to a designated heritage asset. I consider that this conclusion is in accordance with the principles noted in **Sections 2.2 and 2.3** above. Furthermore, on the face of it, this exercise would seem to involve an ordinary (or unweighted) balancing of harm and benefits. However, that point too is disputed by Gladman, and is therefore the second substantive issue which I have to decide.

4.4 Does Paragraph 134 Import Limb 1?

33. Further or in the alternative to his submission that paragraph 134 was not a policy indicating that development should be restricted, Mr Elvin argued that the balancing exercise in paragraph 134 was not an ordinary one. Instead, he said, the weighted balancing exercise envisaged in Limb 1 (that is to say, that the adverse effects of permission would "significantly and demonstrably outweigh the benefits") should be imported - or as he put it, 'read across' - into paragraph 134. He submitted that there was no difficulty with interpreting paragraph 134 as importing that weighted test: indeed, he said, that was in accordance with the NPPF and the presumption in favour of development and the granting of planning permission.

34. I do not accept that submission. It seems to me that it is wholly inconsistent with the words of paragraph 134 itself, which make plain that the balancing exercise is of a standard type, without any weighting. There is no reason to import the weighted test from Limb 1 of the last bullet point of paragraph 14 into paragraph 134, when the words of paragraph 134 can be read entirely satisfactorily without them. Reading across in this way would be unnecessary and over-complicated. Moreover, without any signpost of any sort, it would be unwarranted. It would be contrary to the natural meaning of the words used.

35. Accordingly, I do not accept that the balancing exercise envisaged in paragraph 134 is anything other than the ordinary (unweighted) test described by its wording. I do not consider that the test in Limb 1 can or should be read across in the way submitted.

36. There is a further point. I accept Mr Lewis' submissions that, in respect of Limb 1, the weighted balancing exercise is of broader scope because it involves an assessment "against the policies in this framework taken as a whole". Accordingly, the exercise in Limb 1 is designed to take into account everything, not just the specific policies of restriction referred to in Limb 2. Again that suggests that Limbs 1 and 2 are different and separate exercises and there would be no need to read across the test in Limb 1 to any of the specific policies which restrict planning, referred to in footnote 9.

37. The two alternative Limbs also make sense as a matter of policy. It means that Limb 2 encompasses the standard balancing exercise in circumstances where there is a policy of restriction on development. But if the result of that standard balancing exercise comes down in favour of development, notwithstanding the restriction, then it is rational that the broader review under Limb 1, where the whole of the NPPF is considered, should be a weighted exercise, so as to give impetus to the presumption in favour of development.

4.5 The Presumption in Favour of Preserving Listed Buildings

38. I have set out in **Section 2.4** above the law relating to heritage assets, including the extract from the judgment in ***Forge Field***. This makes plain, amongst other things, that, when a development will harm a listed building or its setting, the decision-maker must give that harm considerable importance and weight. That harm alone gives rise to a strong presumption against the grant of planning permission. This is of course linked to the SSCLG's duty under s.66 of the *Planning (Listed Buildings and Conservation Areas) Act* 1990 identifying the requirement on the part of the local planning authority or the SSCLG "shall have special regard to the desirability of

preserving the building or its setting or any features of special architectural or historic interest which it possesses."

39. It is plain that the inspector in this case was aware of the considerable weight and importance to be given to the desirability of preserving the setting of the Mantley House Farm complex: see paragraph 45 of his decision. But I consider that the appropriate place for that considerable weight to be applied was as part of the ordinary balancing exercise under paragraph 134 of the NPPF. Because the inspector did not undertake the ordinary balancing exercise required by paragraph 134, it follows that the considerable weight to be given to the preservation of listed buildings, let alone the presumption against granting permission in such situations, has been at best diluted, and at worst, lost altogether.

40. I note that the inspector himself says that considerable weight has to be given to this issue "in carrying out the balancing exercise". But since the balancing exercise that he undertook was only the weighted balancing exercise under Limb 1, and not the ordinary balancing exercise under Limb 2/paragraph 134, there is a very real risk that the important guidance in ***Forge Field*** was not fully followed.

41. For these reasons, I can see why (albeit very late) Mr Lewis prayed in aid the submission that the SSCLG's obligation in respect of listed buildings could only properly be discharged if paragraph 134 and the Limb 2 exercise was undertaken in the way I have indicated. Whilst Mr Elwin was entitled to complain that this point had not been in Mr Lewis' skeleton argument, it did seem to me to be a matter which was of some importance and therefore fell to be considered by the court. In any event, I consider that it was foreshadowed at paragraphs 54-57 of Mr Wadsley's skeleton argument. Having considered the issue, I agree with Mr Lewis and Mr Wadsley that it does provide further support for FDDC/SSCLG's case on Ground 3.

4.6 Other Decisions

42. Both sides endeavoured to support their respective positions by reference to other appeal decisions, whether they were decisions by planning inspectors or decisions by the SSCLG expressly agreeing or confirming the approach of the planning inspector. We looked principally at three of these, concerning proposed developments at:

    (a) Highfield Farm, Tetbury, Gloucestershire (APP/F1610/A/11/2165778);

    (b) New Haine Road, Ramsgate, Kent (APP/Z2260/A/14/2213265);

    (c) The Hawthorns and Keele University Campus, Keele, Newcastle-Under-Lyme (APP/P3420/A/14/2219380; APP/P3420/E/14/2219712).

    In each of these cases, the SSCLG had written agreeing with the conclusions of the relevant inspector.

43. I was not persuaded that the decision in relation to Highfield Farm was of any particular relevance because there the restriction on development applied under Limb 2 of paragraph 14 was in respect of Areas of Outstanding Natural Beauty. I accept that the restrictions on development set out in the NPPF relating to such Areas are, on any view, clear-cut.

44. As to the decision in relation to Ramsgate, it seems to me that that is of some assistance because, at paragraph 118 of his decision, the inspector concluded that the harm was outweighed by the significant benefit of the development. That was undertaken as an ordinary Limb 2 balancing exercise, even if it is not recorded in those terms. Having found that the presumption in favour of development was not switched off as a result of the Limb 2 exercise, the inspector properly applied the weighted test in Limb 1, and concluded that there were no adverse impacts that significantly and demonstrably outweighed of the benefits of the development.

45. However, by far the clearest application of Limbs 1 and 2 of paragraph 14 of the NPPF can be found in the decision relating to the University of Keele. In that case the SSCLG expressly agreed with the inspector's conclusions at paragraphs 265-276. At paragraphs 266-268, the inspector said as follows:

> "266. The Framework establishes that sustainable development should be seen as a golden thread running through both plan-making and decision-taking. Paragraph 49 advises that housing applications should be considered in the context of the presumption in favour or sustainable development. However it goes on to say that relevant policies for the supply of housing should not be considered up-to-date if the Council cannot demonstrate a 5 year supply of deliverable housing sites. That is the case here and in such circumstances the housing supply policies in the LP are not up-to-date, including those relating to the location of housing. The weight to be given to the policy conflict is therefore reduced. In such circumstances the relevant policy comes from Paragraph 14 of the Framework. Paragraph 14 contains two limbs and it is clear from the word "or" that they are alternatives.
>
> 267. The first limb requires a balance to be undertaken whereby permission should be granted unless the adverse impacts significantly and demonstrably outweigh the benefits, when assessed against policies in the Framework as a whole. The second limb indicates that the presumption should not be applied if specific policies indicate development should be restricted. If the Secretary of State does not agree with my GB conclusion, the second limb would apply. Footnote 9 however gives other examples, including those policies relating to designated heritage assets. I have concluded under Consideration Three that the proposal would be harmful in these terms. There was some debate about whether the restriction applies only to cases of substantial harm under Paragraph 133.
>
> 268. However the Council makes a persuasive point that Footnote 9 refers to policies in the plural, which would mean the inclusion of circumstances where there is less

> that substantial harm as well. It seems to me that if the second limb was only expected to apply to heritage assets where there was substantial harm it would have said so. Whilst Paragraph 133, albeit that this is more stringent as one would expect. In the circumstances the presumption doe not apply in this case and it is necessary to balance benefits and harms in accordance with Paragraph 134 of the Framework..."

46. In my judgment, this decision applies Limbs 1 and 2 in the last bullet point of paragraph 14 in precisely the way I would have expected. I accept that the SSCLG's endorsement of this decision is consistent with the approach that he now takes in agreeing with FDDC that, in this case, in respect of Ground 3, the inspector erred in law. Beyond that, it does not seem necessary for me to go.

4.7 Conclusions

47. For these reasons, I am satisfied that the inspector erred in law in not adopting the same approach as the inspector in the Keele University case. The last bullet point in paragraph 14 meant that the presumption in favour of planning permission was to be dis-applied in two separate situations. Both Limbs had to be considered. In this case, because of the harm to the designated heritage assets, Limb 2 fell to be considered first. The appropriate test was the ordinary (unweighted) balancing exercise envisaged by the words in paragraph 134. Nowhere did the inspector carry out that exercise. He only undertook the weighted exercise in Limb 1. He therefore erred in law.

5. DISCRETION

48. Of course, I would not quash the inspector's decision, despite the fact that both FDDC and the SSCLG wish me to do just that, if I considered that, allowing for the correction of the error, the inspector would have come to the same conclusion (**Section 2.5** above). However, I cannot be satisfied that the inspector would have reached the same conclusion. There are three reasons for that: one general and two particular.

49. In general, it is always difficult to say that a decision-maker who applied the wrong test in law would inevitably have reached the same conclusion even if he had applied the right test. That is particularly so where, as here, the test in Limb 1 is weighted very firmly in favour of the benefits of development, whilst the ordinary test in paragraph 134 is not. It is a bit like comparing the test to be applied in a criminal case and the test to be applied in a civil case. The results may be the same; but it is difficult to be sure that they would inevitably be the same.

50. The first particular reason why I cannot be sure that the same result would eventuate is set out in paragraphs 38-41 above, in connection with listed buildings. The considerable weight to be given to the harm done to the Mantley House Farm complex in an ordinary planning balancing exercise may make a critical difference.

51. The second arises from paragraphs 41-49 of the decision, where the inspector makes a number of findings of harm to which he attaches weight of various kinds. Thus he

attaches *moderate* weight to the adverse impact on character and appearance of Horsefair Lane (paragraph 44 of the decision); *considerable* weight to the desirability of preserving the setting of the Mantley House Farm complex (paragraph 45); and *limited* weight to the harm to the non-designated heritage asset, Picklenash Court (paragraph 46). Against those matters, the inspector identifies a number of considerable public benefits in paragraphs 47 and 48. It is not difficult to see why he concluded that the adverse impacts would not significantly and demonstrably outweigh the benefits. But it is impossible to be sure that, as part of an ordinary balancing exercise, the harm he identified would not outweigh the benefits.

52. Accordingly, like the court in ***Europa***, I cannot be sure that this error of law made no difference to the outcome. It may have made no difference; equally, it may have made a significant difference. For those reasons therefore, in the exercise of my discretion, it is proper to quash the decision on Ground 3. I reiterate that, for the reasons noted above, I have not considered Grounds 1, 2 and 4 of the application to quash the appeal decision.