Neutral Citation Number: [2024] EWHC 452 (Admin)

Case No: AC-2023-LON-002520

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2024

Before :

MRS JUSTICE LIEVEN

- -

Between :

MARKS AND SPENCER PLC

Claimant

and

SECRETARY OF STATE FOR LEVELLING UP HOUSING AND COMMUNITIES

First Defendant

and

WESTMINSTER CITY COUNCIL

Second Defendant

and

SAVE BRITAIN'S HERITAGE

Third Defendant

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Mr Russell Harris KC and Ms Heather Sargent (instructed by **Dentons UK and Middle East LLP**) for the **Claimant**
Mr Paul Shadarevian KC, Ms Clare Parry and Mr Jack Barber (instructed by **Government Legal Department**) for the **First Defendant**
The Second Defendant was not represented
Mr Matthew Fraser (instructed by **Gunnercooke LLP**) for the **Third Defendant**

Hearing dates: **13 and 14 February 2024**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 1 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This is a challenge to the decision of the Secretary of State for Levelling Up, Housing and Communities ("SoS") to refuse planning permission for the construction of a nine storey new mixed office and retail store at the western end of Oxford Street, London ("the development"). The challenge is brought by Marks and Spencer Stores Plc ("the Claimant") pursuant to s.288 Town and Country Planning Act 1990 ("TCPA"). The Third Defendant, SAVE Britain's Heritage ("SAVE"), was a Rule 6 party at the public Inquiry and a principal objector to the proposed development.

2. The Claimant was represented by Russell Harris KC and Heather Sargent, the SoS was represented by Paul Shadarevian KC, Clare Parry and Jack Barber, Westminster City Council was not represented and SAVE was represented by Matthew Fraser.

3. The application for planning permission was made to the Local Planning Authority, Westminster City Council ("WCC"). The site is located in the Central Activity Zone ("CAZ"), as defined by the London Plan, which is part of the Development Plan for the purposes of s.38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA").

4. The officers at WCC recommended the grant of permission, and the Planning Committee voted to grant permission on 23 November 2021.

5. The SoS called the application in under s.77 TCPA, which led to an inquiry before a senior planning inspector, Mr David Nicholson (RIBA IHBC) ("the Inspector"). The Inspector produced an Inspector's Report spanning 109 pages ("IR") and recommended the grant of planning permission.

6. The SoS determined to refuse the application on 20 July 2023 by Decision Letter ("DL").

7. The detail of the IR and DL are critical to the determination of the Grounds in this application, and I will refer to the relevant parts under the separate Grounds below. At this stage I will merely set out a broad summary of the conclusions on the key issues in each document.

8. The site is made up of three buildings, Orchard House (the main building on Oxford Street and Orchard Street), Neale House and the extensions to 23 Orchard Street. The Grade II* Selfridges store is on the other side of Orchard Street. The proposal was for one building, with a two floor basement, retail in the lower floors, and office above (the "Scheme").

The Inspector's Report

9. The IR follows the conventional format, and the conclusions are set out at Section 13. At IR13.1 the Inspector sets out the main considerations, which in part draw upon the issues upon which the SoS wished to be informed. I will only summarise those parts that have some relevance to the issues before the Court. The Inspector's main issues are:

    a. Impact on designated heritage assets;

    b. Impact on non-designated heritage assets;

c. Impact on UK's transition to a zero-carbon economy;

d. Weight to be given to public benefits of the proposal;

e. Whether public benefits outweigh harm to heritage issues;

f. Consistency with Government policy on the historic environment;

g. Consistency with the development plan and the overall planning balance with regard to the NPPF and any other material considerations.

10. The effect on the significance of designated heritage assets: The Inspector concludes that Selfridges' setting does provide a generally helpful backdrop to an appreciation of Selfridges and so is of value to its significance (IR 13.3). He concludes that Orchard House contributes little to Selfridges' significance but does not detract from it (IR13.4). He finds less than substantial harm would be caused to the setting (and so to the significance) of Selfridges. He gives that harm moderate weight overall (IR13.11). He finds no harm to the significance of any other designated heritage assets: most of their significance he finds lies within the fabric of the buildings themselves (IR13.12-IR13.13; IR13.17). He gives limited weight to the heritage benefit of avoiding the possibility of a derelict building next to Selfridges (IR13.17).

11. The effect on the significance of non-designated heritage assets ("NDHAs"): The Inspector gives moderate weight to the harm that would be caused by the loss of Orchard House (IR13.25). He finds that the removal of the bridge connecting Hesketh House (also a NDHA) to the development would be an enhancement to Hesketh House, the Portman Estate Conservation Area ("CA") and the setting of Selfridges; he attributes a modest amount of weight to that heritage benefit (IR13.27). He finds no heritage harm to the setting of any other NDHA (IR13.28).

12. The effect on the UK's transition to a zero-carbon economy: The Inspector notes a range of law, policy and guidance that recognise there is a climate emergency and a need to reduce greenhouse gas emission to prevent a rapidly deepening climate catastrophe (IR13.31). He states the *"proposals would demolish and remove relatively recent and structurally sound buildings for a larger new development".* Further, *"the scheme would not achieve net-zero but would rely on a financial contribution to comply with policy",* and that *"[t]he amount of embodied energy, that is the energy that would go into construction, would be substantial".* He finds that *"[t]his would be contrary to the aims of NPPF [the National Planning Policy Framework] [para.] 152";* furthermore, it would not accord with London Plan Policies SI 2 and SI 7. He notes that it was not argued that the embodied carbon would be justified because the buildings were causing significant heritage harm or there was any fundamental structural or safety reason why they should be demolished (IR13.33). The Inspector observes that *"[o]n the face of it, the scheme should be roundly condemned"* (IR13.32) and states that there was no dispute *"that redevelopment would involve much greater embodied carbon than refurbishment"* (IR13.33).

13. The Inspector notes the Claimant's argument that over the life of the building the Scheme would use less carbon than any refurbishment (IR13.38). He said *"it was no surprise that there was disagreement over the lifetime carbon usage for the proposals*

and, more particularly, for a refurbishment", since the understanding of Whole Life Carbon ("WLC") assessments was still developing. The Claimant originally made a comparison against a light-touch refurbishment ("LTR") in this regard (IR13.39). He observes that time did not allow a detailed comparison with the outline scheme submitted by SAVE during the inquiry for a *"more comprehensive refurbishment"* and that *"[g]iven that neither side now advocates for a LTR, the submitted comparisons are of limited help in assessing the relative carbon emissions. Equally, it would be wrong to find a breach of policy for not submitting a WLC Assessment for a scheme which did not exist"* (IR13.39). I note that Mr Fraser was not happy with what SAVE put forward being described as a scheme because it was not for SAVE to put forward worked up schemes.

14. The Inspector then discusses decarbonisation of the electricity grid and concludes that "in theory" this consideration weighs against the Scheme (IR13.40-IR13.41). At IR13.42 he gives modest weight to the potential reduction in carbon emissions that could result from concentrating travel to shops and offices near to Bond Street and other nodes.

15. At IR13.43 the Inspector finds that there would be harm through substantial quantities of embodied energy in the demolition of three sound structures and the construction of a new, larger building with two levels of basements. *"[T]here should generally be a strong presumption in favour of repurposing and reusing buildings"* but *"much must depend on the circumstances of how important it is that the use of the site should be optimised, and what alternatives are realistically available".* The Inspector notes that SAVE's objection on sustainability grounds was reliant on there being a reasonable prospect of an alternative scheme for a more comprehensive refurbishment going ahead and returns to that point later in the IR (below).

16. The weight to be given to the public benefits of the Scheme: At IR13.53 the Inspector finds that the benefits to employment and regeneration through improved retail and office floorspace, concentrating economic activity at a highly accessible location, in a high quality building with urban design benefits to the public realm, and some heritage benefits, should be given substantial weight. He expressly concludes that *"in the absence of alternatives, these benefits would outweigh the harm to the historic environment and to the UK's transition to a zero-carbon economy",* before going on to consider whether there are better ways that those benefits could be achieved.

17. At IR13.46 the Inspector concludes that the balance of evidence was that if Marks & Spencer were to leave the site on Oxford Street, which Marks & Spencer had stated it would do if the Scheme was not approved, it would not be replaced by another department store and its loss would cause serious damage to the vitality and viability of the whole of Oxford Street and to London's West End. The Inspector later finds that the loss of Marks & Spencer would probably result in a significant drop in footfall and a *"severe harmful impact"* on the vitality and viability of the area (IR13.47 and IR13.74).

18. Whether the public benefits would outweigh any harm identified in the heritage balances, and whether the same benefits could be achieved with less harm: On the latter point (alternatives to demolition), the Inspector observes that *"there must be a reasonable likelihood that [the specific drawings showing refurbishment options] were produced after the event, they nevertheless illustrate alternative proposals".* He notes

that it is unlikely that refurbishment was not given careful consideration (IR13.54). He also notes that, on the evidence, there was little record of wholly dissenting voices at any stage in the process or to suggest that parties had gone back to first principles before confirming that they had not changed their minds and accepted that contemporaneous evidence to refute this says little about the consideration of refurbishment and mostly refers to Marks & Spencer specifications and standards (IR13.55). He goes on to explain that *"[w]hile it would be unkind to impose climate change requirements on the Applicant which did not apply at the time of the Application, that is nevertheless what I have done"* (IR13.56). At IR13.57 he notes that SAVE has (like the Claimant) ruled out both LTR or façade retention options, such that SAVE's case on alternatives rests on *"an outline option for a comprehensive refurbishment".*

19. At IR13.58 the Inspector notes that the merits of any refurbishment option would be academic if such a scheme was not viable or deliverable. At IR13.59 he summarises the Claimant's adviser's views that in relation to the office development the constraints were such that no investor would be interested. At IR13.60 he says that given the locational advantages of Oxford Street he found it difficult to judge the viability evidence on office refurbishment without evidence of land values and anticipated rental levels. He also notes that it would be surprising if the Claimant's experts were not partially influenced by the chance to advise their client to look at the prize of letting a brand new state of the art office development, but noted they had enormous expertise in their fields and had signed statements of truth and their evidence should be given weight.

20. At IR13.61 the Inspector reasons as follows:

> *"To accord with relevant development plan policies, the onus for considering a refurbishment option and demonstrating that refurbishment would not be deliverable or appropriate, as part of considering the CE and WLC or otherwise, lies with the Applicant. The GLA and WCC also have a role in checking compliance. To show that this has not been done properly, SAVE has only to demonstrate that, on the balance of probabilities, there might be another route. It would be unreasonable to expect SAVE to present a fully worked alternative. It has not, and has not claimed to have done. Nonetheless, any alternative must have some chance of proceeding, that is, it must be potentially viable and deliverable such that developers and investors would be interested..."*.

21. At IR13.64, the Inspector notes that *"there was no dispute that retaining the overall structure and external envelope would save significant amounts of embodied carbon, only whether or not such an option was deliverable".* At IR13.65 the Inspector reasons that it is not for SAVE to present a fully resolved scheme in order to demonstrate that refurbishment could be an alternative option; rather, *"to comply [with] recently adopted policy and guidance on carbon emissions, the Applicant should show that it had considered all reasonable alternatives".*

22. At IR13.66, the Inspector notes that the Claimant's advisors had looked rapidly at the SAVE suggestion, which was submitted at a very late stage in the inquiry, before confirming their previous opinion that it would be unviable and undeliverable. He notes it would be unreasonable to expect the Claimant's advisors to make any detailed

comments on a draft scheme as it was submitted so late in the day. At IR13.67 the Inspector identified a series of criticisms of the SAVE scheme. At IR13.68 he said:

> *"I saw from my visits that, as SAVE argued, such problems are not uncommon in office developments and are to be expected in refurbishments. I accept that competent architects such as those presenting the scheme are used to facing and overcoming such difficulties through skilled design. They have demonstrated this elsewhere. However I was not directed to any development which suffered from ALL these shortcomings."*
>
> The Inspector then commented on a number of other schemes.

23. The Inspector states at IR13.70:

> *"While many interested parties, including some of the most renowned and capable UK architects, gave evidence on the benefits of their experience of retrofitting existing buildings for new uses, and of the substantial savings in embodied carbon, only SAVE put forward a considered example. On the evidence before the Inquiry, I consider that the only remaining refurbishment scheme for the site is so deeply problematic, even for Oxford Street, that no-one would be likely to pursue it or fund it. Even disregarding the difficult question of theoretical viability without detailed land/lease values, in my view the likelihood is that the inescapable structural issues and the awkward combination of the three buildings would deter investment in any meaningful refurbishment for office use, if not result in a negative residual valuation for the premises, as the expert advisers contend".*

24. Reaching his conclusions on the alternatives point, the Inspector reiterates that avoiding the harm that he has identified to heritage and to moving to a zero-carbon economy depends on there being a viable and deliverable alternative (IR13.73). He concludes that there is no such alternative (IR13.74). Refusing the application would probably lead to the closure of the store, the loss of Marks & Spencer from the Marble Arch end of Oxford Street and substantial harm to the vitality and viability of the area. That is a material consideration of substantial weight.

25. Consistency with Chapter 16 of the NPPF (heritage): The Inspector finds that the public benefits of the Scheme would outweigh the less than substantial harm to designated heritage assets (IR13.78) and would be consistent with the heritage balance in para. 202 of the NPPF. He also finds that the public benefits of the Scheme would outweigh the harm to Orchard House as a NDHA (IR13.80). He finds on balance that the harm to all the affected heritage assets individually and collectively would be outweighed by the public benefits, and having considered whether an alternative scheme could provide many of the benefits without the same level of harm he found that no such scheme was likely to be deliverable so his conclusions on the NPPF balance remain as above (IR13.81).

26. Consistency with the statutory development plan; and the overall planning balance: On heritage, the Inspector reasons that the heritage policies in the development plan are consistent with the NPPF such that *"the scheme would not only accord with the relevant*

development plan policies but had it not, the NPPF heritage policies would amount to a sufficient material consideration as to outweigh any conflict with the development plan".

27. On zero-carbon, the Inspector considers London Plan Policies D3, SI 2 and SI 7 and Westminster City Plan Policies 36 and 38. He notes that none of those policies prohibits demolition and redevelopment in appropriate circumstances (IR13.86). However, on the face of it the Scheme would generally impede the UK's transition to a zero-carbon economy and *"in theory this should weigh heavily against the scheme".*

28. The Inspector discusses the Scheme's benefits in relation to London Plan Policies D2 and D3 and Westminster City Plan Policies 13 and 15 at IR13.88-IR13.89. He addresses "other matters" at IR13.90-IR13.95 – those include emerging development plan policies, which attract limited weight (IR13.93). At IR13.96 ("Conclusion on the development plan") the Inspector concludes that *"[o]ther than policy support for saving Orchard House, [the Scheme's] embodied energy and the current setting to Selfridges and surrounding CAs, refusal would be against a raft of recently adopted development plan policies aimed at improving Oxford Street, the International Centre, the CAZ and the SPA".* He gives considerable weight to the benefits of the scheme.

29. Overall conclusions: These are set out at IR13.97-IR13.100. The Inspector finds that the benefits of the Scheme would outweigh the harm that he has found. He considers that of the material considerations to take into account, *"the extent of embodied energy that would be required weighs most heavily against the scheme"* (IR13.99). His ultimate conclusion is that material considerations do not alter his finding that the proposals should be determined in accordance with the development plan and that permission should be granted (IR13.100).

30. The Inspector's formal recommendation is stated in Section 14: that the application should be approved and planning permission granted (subject to planning conditions and the s.106 obligation).

The Decision Letter

31. I set out much of the decision letter below, so only provide a brief summary here. At DL12-20 the SoS deals with the heritage impacts. He agrees that there would be no direct effects. In respect of setting, he finds at DL13 that there would be a *"significantly detrimental impact on the setting of Selfridges".* He gives the harm to designated heritage assets very great weight, see DL15. He gives substantial weight to the loss of Orchard House, DL17. He gives the heritage benefits moderate weight.

32. At DL21-24 he deals with the transition to a zero carbon economy. Much of these paragraphs are set out below. He says at DL21 that *"there was no dispute that the proposals would demolish and remove structurally sound buildings for a new development or that redevelopment would involve much greater embodied carbon than refurbishment".* At DL23 he gives substantial weight to the advantage of concentrating development in such an accessible location. At DL24 he finds that a strong reason would be needed to justify redevelopment.

33. At DL25-26 he considers the public benefits of the scheme and gives these benefits significant weight.

34. At DL27-33 he considers whether the benefits outweighed the harm, and whether the benefits could be delivered in another way. These paragraphs are all referred to below. At DL34-39 he considers heritage policies and found partial accordance and partial conflict.

35. At DL40-46 he considers the policy framework on greenhouse gas emissions and related matters. Again, the critical parts of these paragraphs are referred to below.

36. At DL51-55 he sets out the planning balance and overall conclusions:

> *"51. For the reasons given above, the Secretary of State considers that there is overall conflict with development plan policies D3 and 38 which deal with design, and partial conflict with heritage policies HC1 and 39. Given the centrality of these policies to the determination of this case, he considers that the proposal is in conflict with the development plan overall. He has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in line with the development plan.*
>
> *52. Weighing in favour of the proposal are the advantages of concentrating development in such a highly accessible location, which attracts substantial weight; and the potential harm to the vitality and viability of the area which could follow from a refusal of permission, which attracts limited weight. The heritage benefits carry moderate weight, and the possibility of demolition attracts limited weight. The benefits to employment and regeneration through improved retail and office floorspace, and the benefits in terms of permeability and connectivity, safety and shopping experience and the public realm collectively carry significant weight.*
>
> *53. Weighing against the proposal is the Secretary of State's finding that in terms of paragraph 152 of the Framework, the proposal would in part fail to support the transition to a low carbon future, and would overall fail to encourage the reuse of existing resources, including the conversion of existing buildings, which carries moderate weight. He has also found that harm arising from the embodied carbon carries moderate weight; and the future decarbonisation of the grid carries limited weight.*
>
> *54. When assessing the heritage impacts of the proposal, the Secretary of State has taken into account the requirements of s.66 of the LBCA Act and the provisions of the Framework. He has found that in terms of paragraph 202 of the Framework, the harm to the settings, and so the significance, of the designated heritage assets would fall into the 'less than substantial' category. In respect of Selfridges and the Stratford Place CA, he has found the harm would be at the upper end of that category; in respect of the Mayfair CA it would be in the middle of that category; and in respect of the Portman Estate CA it would be at the lower end of the category. Overall he has found that the harm to the settings of, and significance of the designated heritage assets carries very great weight. He has further considered paragraph 202 of the Framework and has found that the public benefits of the proposal do not outweigh the harm to the significance of*

> *the designated heritage assets. The Secretary of State considers that harm from the loss of the non-designated heritage asset of Orchard House attracts substantial weight and has considered paragraph 203 of the Framework in coming to this decision. In respect of paragraph 189 of the Framework, the Secretary of State considers that the proposal would overall fail to conserve the heritage assets in a manner appropriate to their significance, so that they can be enjoyed for their contribution to the quality of life of existing and future generations. He considers that the possibility of an Oxford Street CA attracts limited weight.*
>
> *55. In the particular circumstances of this case, when reaching his conclusion on section 38(6), overall the Secretary of State considers that the conflict with the development plan and the material considerations in this case indicate that permission should not be granted."*

Grounds of Challenge

37. There are six Grounds of challenge:

    a. Ground One – the SoS erred in respect of paragraph 152 of the National Planning Policy Framework ("NPPF") when he said in DL 24 that there is a "strong presumption in favour of repurposing and reusing buildings";

    b. Ground Two – the SoS erred in respect of the consideration of alternatives;

    c. Ground Three – the SoS erred in the balance of public benefits as against the heritage impacts;

    d. Ground Four – the SoS's conclusion on the harm to the vitality and viability of Oxford Street, had no evidential basis;

    e. Ground Five – the SoS made an error of fact in respect of the embodied carbon, and misapplied policy in respect of embodied carbon;

    f. Ground Six – the SoS erred in his approach to analysing the impact of the proposals on the setting of Selfridges and the Stratford Place CA.

Ground One

38. The Claimant submits that the SoS erred in law in DL24 when saying that there was a *"strong presumption in favour of repurposing buildings".* He then wrongly applied this alleged presumption in later paragraphs of the DL. DL24 says:

> *"The Secretary of State agrees with the Inspector at IR13.43 that there should generally be a strong presumption in favour of repurposing and reusing buildings, as reflected in paragraph 152 of the Framework. In the circumstances of the present case, where the buildings in question are structurally sound and are in a location with the highest accessibility*

> *levels, he considers that a strong reason would be needed to justify demolition and rebuilding. However, he agrees that much must depend on the circumstances of the case, including how important it is that the use of the site should be optimised, and what alternatives are realistically available. Like the Inspector, the Secretary of State has gone on to consider whether there is a reasonable prospect of an alternative scheme going ahead. He has returned to the question of whether there is accordance or conflict with relevant local and national policies at paragraphs 40-42 below, and has addressed the question of the harm arising from embodied energy at paragraph 46 below."*

39. Paragraph 152 of the NPPF states:

> *"The planning system should support the transition to a low carbon future in a changing climate, taking full account of flood risk and coastal change. It should help to: shape places in ways that contribute to radical reductions in greenhouse gas emissions, minimise vulnerability and improve resilience; encourage the reuse of existing resources, including the conversion of existing buildings; and support renewable and low carbon energy and associated infrastructure."*

40. The SoS went on to consider whether the alternatives to demolition had been properly considered, and whether the benefits could be delivered with less harm by a different scheme. At DL27 he says that the *"onus lies on the applicant to demonstrate that refurbishment would not be deliverable or appropriate …."* At DL28 he refers to the difficulty the Inspector had found in assessing refurbishment options and the viability of such options (DL29).

41. At DL31-32 he states:

> *"31. The Secretary of State considers that given the Inspector could not draw clear conclusions on this matter, and its importance in the determination of this application, a degree of caution ought to be exercised in drawing overall conclusions from the evidence, and considering the weight to be given to this issue. He finds the applicant's evidence much less persuasive than the Inspector appears to have done in light of the gaps and limitations identified by the Inspector. He does not consider it appropriate to draw such firm and robust conclusions about this issue as the Inspector does (IR13.70-13.75 and IR13.97). The Secretary of State is not persuaded that it is safe to draw the same conclusion reached by the Inspector, namely that 'there is no viable and deliverable alternative' (IR13.74), which leads to the Inspector's overall conclusion that 'there is unlikely to be a meaningful refurbishment of the buildings' (IR13.97).*
>
> *32. Overall, the Secretary of State concludes that the evidence before him is not sufficient to allow a conclusion as to whether there is or is not a viable and deliverable alternative, as there is not sufficient evidence to judge which is more likely. The Secretary of State also does not consider that there has been an appropriately thorough exploration of alternatives to demolition. He does not consider that the applicant has demonstrated*

> *that refurbishment would not be deliverable or viable and nor has the applicant satisfied the Secretary of State that options for retaining the buildings have been fully explored, or that there is compelling justification for demolition and rebuilding."* [emphasis added]

42. The Claimant submits it is apparent that the SoS considered it necessary for the Claimant to show there was a "compelling justification" for demolition and rebuilding due to the "strong presumption" that he has wrongly relied upon in DL24. As a result, the SoS is in effect seeking to introduce a new approach to sustainable development and the preservation of existing buildings, without such a policy currently existing in the NPPF, or indeed the Development Plan.

43. The misidentification of the "strong presumption" impacts upon the balance and structure of the DL as a whole. At DL32 the SoS applies this "strong presumption" to the consideration of alternatives, and the option of retaining the existing building. At DL45 he refers back to DL32 and states:

> *"In respect of paragraph 152 of the Framework, the Secretary of State agrees that a substantial amount of carbon would go into construction (IR13.32), and that this would impede the UK's transition to a zero-carbon economy (IR13.87). He has found that there has not been an appropriately thorough exploration of alternatives to demolition (paragraph 32 above). He has also taken into account that the carbon impacts would be to an extent mitigated by the carbon offset payments secured via the s.106 Agreement, which would be used to deliver carbon reductions (albeit it has not been demonstrated that the carbon reductions would fully offset the embodied carbon arising from this proposal). He has also taken into account the sustainability credentials of the new building (paragraph 21 above)."* [emphasis added]

44. Mr Harris submits that the use of the words "strong presumption" in DL24 are clear and are plainly intended to import a high test to be applied by the SoS. There are places in the NPPF where a "presumption" is expressly applied, see NPPF paragraph 11. Therefore, if the intention of the draughtsman of the NPPF is to create a presumption, then it is stated as such. Similarly, in DL15 there is reference to the statutory presumption in the Listed Building Act. Therefore, the word "presumption" has a specific meaning and effect in planning decisions. The consequence of this is that misuse of a presumption, where one does not actually exist in policy or law, is a highly material error.

45. Mr Shadarevian submits that the stated intention of paragraph 152 of the NPPF is to create a *"radical reductions in greenhouse gas emissions".* As such the message is clear, and it is open to the SoS, as a matter of planning judgement and weight, to apply a policy presumption in order to achieve the radical reduction sought by policy. The policy itself does not need to use the words "presumption" because the objective of the policy is to create a transition to low carbon development, and the SoS is simply applying that policy.

46. He also points to the fact that DL24 says that the strong presumption is *"as reflected in paragraph 152 NPPF",* and the SoS is therefore not saying the words are contained in

the policy, they are merely reflective of it. He submits that when the SoS returns to the point at DL45 he says:

> *"In respect of paragraph 152 of the Framework, the Secretary of State agrees that a substantial amount of carbon would go into construction (IR13.32), and that this would impede the UK's transition to a zero-carbon economy (IR13.87). He has found that there has not been an appropriately thorough exploration of alternatives to demolition (paragraph 32 above). He has also taken into account that the carbon impacts would be to an extent mitigated by the carbon offset payments secured via the s.106 Agreement, which would be used to deliver carbon reductions (albeit it has not been demonstrated that the carbon reductions would fully offset the embodied carbon arising from this proposal). He has also taken into account the sustainability credentials of the new building (paragraph 21 above). …"*

47. That is a perfectly legitimate approach to the words of the NPPF.

48. Mr Fraser takes a slightly different approach and refers back to the Inspector's approach at IR13.43, which says:

> *"For the above reasons, I find that there would be harm through substantial quantities of embodied energy in the demolition of three sound structures and the construction of a new, larger building with two levels of basements. While there should generally be a strong presumption in favour of repurposing and reusing buildings, much must depend on the circumstances of how important it is that the use of the site should be optimised, and what alternatives are realistically available. In proposing a more comprehensive refurbishment, SAVE's objection on sustainability grounds was reliant on there being a reasonable prospect of an alternative scheme going ahead. I therefore consider, below, whether any such scheme could be delivered."*

49. The Inspector found his presumption from London Plan Guidance documents, including *CE Statements*, which include a "Decision Tree", intended to assist in the decision as to whether a building should or should not be retained. The Inspector said at IR13.36:

> *"The approach in the GLA's LPG: CE Statements includes a Decision Tree to demonstrate if an existing building could and should be retained. There was no dispute that it would be technically feasible to retain the existing buildings, albeit that the Applicant claimed that the resulting spaces would be severely compromised. The Tree then moves on to whether the building is suited to the requirements for the site and expects that applicants should robustly explore the options for retaining existing buildings. M&S has stated that the present structures cannot be made to satisfy the aims of its brief, but my interpretation of the Guidance is that this is not the test. Rather, it is a matter of assessing options against the requirements of the development plan, taken as a whole, which I deal with below."*

50. I note at this point that the Guidance documents are not part of the statutory Development Plan, but rather are Supplementary Planning Documents ("SPDs"). I also note that even the Guidance documents do not say that there is a "strong presumption" in favour of the retention of buildings.

51. SAVE placed considerable reliance on these SPDs in their Closing in the inquiry. Mr Fraser submits that the Inspector's "strong presumption" was his summary of the London Plan Guidance documents. He supports Mr Shadarevian in relying on the words "reflected in" the NPPF, rather than the DL stating that the strong presumption was actually written in the NPPF.

52. He also relies on the decision of the Court of Appeal in *R (Asda Stores) v Leeds City Council* [2021] EWCA Civ 32, where the Court was dealing with whether or not paragraph 90 of the NPPF contained a "presumption". The Court said at [41]-[42]:

> *"41. It is not necessary, in my view, to apply to the policy in paragraph 90 the label of "presumption". The meaning and effect of the policy are entirely clear without it. What paragraph 90 does is to establish, in national planning policy, a proposition that will indicate a refusal of planning permission if it is not overbalanced by other considerations. It does not matter, I think, whether one calls this a "presumption" or an "effective presumption" or an "expectation", or something else of that kind. The effect of the policy is the same. Whenever a decision-maker finds there is likely to be a "significant adverse impact" on the "vitality and viability" of the town centre, this will count as a negative factor with the force of government policy behind it. It will go against the proposal as a material consideration. Other policies in the NPPF may support the proposal. These too will be "material considerations" to which appropriate weight must be given. As Mr Warren submitted, the policy in paragraph 90 does not have some special status, enabling it to prevail over any other policy in the NPPF. Nor does it automatically trump any other material consideration or combination of material considerations bearing on the decision.*
>
> *42. The crucial point, therefore, is this. Even if the policy in paragraph 90 is rightly regarded as containing a "presumption", the "presumption" is one that can be overcome by countervailing factors, which are not specified or limited by the policy itself – but might include, for example, planning benefits such as the creation of jobs in an area where unemployment is high and an uplift to the local economy by the development proposed. Inevitably, this will be more difficult or less according to the nature and degree of the "significant adverse impact" the development is likely to have. The potential harm will vary from one proposal to another. Giving appropriate weight to it is a matter of planning judgment for the decision-maker. In some cases, the development may be judged likely to cause numerous shop closures and vacancies in the town centre, serious and lasting effects on trade to the detriment of the centre as a whole, and a long-term lack of investment. In others, the effects may still be "significant" but much less damaging, and the town centre may be expected to recover in a relatively short time. A "significant adverse impact" is not a uniform concept.""*

53. Mr Fraser submits that the word "presumption" therefore contains no particular legal effect.

54. In my view it is plain that the SoS misinterpreted the NPPF, and therefore erred in law. This is a clear case of interpretation not application of policy, and therefore the Court is entitled to intervene, see *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13 and *St Modwen Development Limited v Secretary of State for Communities and Local Government and Others* [2017] EWCA Civ 1643.

55. In DL24 the SoS relied on a meaning of the NPPF which is simply not open to him. There is in paragraph 152 some encouragement for the reuse of buildings, but nothing that comes close to a presumption. Mr Shadarevian's argument that paragraph 152 is seeking to achieve a radical reduction in carbon, and thus a presumption of retailing buildings can be inferred, ignores the rest of the paragraph which refers to a number of other very general policy aspirations. There is nothing in the paragraph that supports the application of a policy presumption for one part of the paragraph alone.

56. The SoS has not applied the policy, he has rewritten it. This then leads to him applying a test, or policy hurdle, through the rest of the DL which is based on his misinterpretation of the policy.

57. The Inspector found his "strong presumption" in IR13.43 in the Guidance documents. It may be questioned whether those documents could give rise to a "strong presumption", but that was not in any event the approach of the SoS. The SoS said he was relying on policy from the NPPF, where the words and the test do not appear. I agree with Mr Harris that it is important to note that where the NPPF wishes to create a presumption, or suggest or direct refusal if certain conditions are not met, this is made clear on the face of the NPPF: see paragraph 11 for the presumption and paragraph 90, as considered in *Asda Stores*, for a policy direction to refuse. The words of paragraph 152 do not rationally support any such approach.

58. Therefore, the Claimant succeeds on Ground One.

Ground Two

59. The Claimant submits that the SoS has failed to have regard to the true basis of the Inspector's findings on alternatives, or has failed to provide adequate reasons for his rejection of the Inspector's conclusions that there was no viable and deliverable alternative to the Scheme.

60. The Inspector reached a clear conclusion at IR13.74:

> *"For the reasons given above, even allowing for the necessarily draft nature of SAVE's thoughts and that the onus lies with the Applicant, I find that there is no viable and deliverable alternative and that refusing the application would probably lead to the closure of the store, the loss of M&S from the Marble Arch end of Oxford Street and substantial harm to the vitality and viability of the area. This is a material consideration of substantial weight."*

61. At IR13.88 he referred to the strong development plan support which sets "*an imperative to support and maximise office floorspace….*"

62. However, at DL27-32 the SoS states:

> *"27. The Secretary of State has gone on to consider the extent to which alternatives to demolition have been properly considered, and whether the benefits could be achieved with less harm. He agrees with the Inspector that the onus lies on the applicant to demonstrate that refurbishment would not be deliverable or appropriate (IR13.61). He also agrees with the Inspector that it is for the applicant to show that it had considered all reasonable alternatives (IR13.65).*
>
> *28. The Secretary of State notes that the applicant argued that no refurbishment option was fully deliverable (IR13.58). However, he has had regard to the Inspector's identification of gaps and limitations in the evidence before the inquiry (IR13.54-13.56 and IR13.66), for example that contemporaneous evidence said little about the consideration of refurbishment and referred mostly to M&S's specification and standards and that there was little conclusive evidence that the principle of refurbishment had been discussed between the applicant, WCC and the GLA.*
>
> *29. He also notes that the Inspector found it difficult to reach a judgement on some of the issues in dispute in the inquiry, for example in respect of the viability evidence put forward by the applicant in relation to office refurbishment (IR13.60). With regard to the evidence put forward by other parties, including a number of architects, the Secretary of State notes that the Inspector did not analyse or assess their evidence in relation to retrofitting existing buildings for new uses but instead focussed on the SAVE alternative (IR13.70).*
>
> *30. The Secretary of State notes that the Inspector reviewed the challenges to the delivery of SAVE's proposal identified by the applicant and, whilst noting that SAVE had not provided evidence of a single development where all the challenges had been present, considered that such problems are not uncommon and that architects are used to facing and overcoming such difficulties through skilled design (IR13.68).*
>
> *…*
>
> *31. The Secretary of State considers that given the Inspector could not draw clear conclusions on this matter, and its importance in the determination of this application, a degree of caution ought to be exercised in drawing overall conclusions from the evidence, and considering the weight to be given to this issue. He finds the applicant's evidence much less persuasive than the Inspector appears to have done in light of the gaps and limitations identified by the Inspector. He does not consider it appropriate to draw such firm and robust conclusions about this issue as the Inspector does (IR13.70-13.75 and IR13.97). The Secretary of State is not persuaded that it is safe to draw the same*

> *conclusion reached by the Inspector, namely that 'there is no viable and deliverable alternative' (IR13.74), which leads to the Inspector's overall conclusion that 'there is unlikely to be a meaningful refurbishment of the buildings' (IR13.97).*
>
> *32. Overall, the Secretary of State concludes that the evidence before him is not sufficient to allow a conclusion as to whether there is or is not a viable and deliverable alternative, as there is not sufficient evidence to judge which is more likely. The Secretary of State also does not consider that there has been an appropriately thorough exploration of alternatives to demolition. He does not consider that the applicant has demonstrated that refurbishment would not be deliverable or viable and nor has the applicant satisfied the Secretary of State that options for retaining the buildings have been fully explored, or that there is compelling justification for demolition and rebuilding."*

63. Mr Harris therefore submits that there was a clear disagreement between the SoS and the Inspector on the issue of alternatives to the Scheme. The SoS has failed to provide sufficient reasons to explain his grounds for departing from the Inspector. Mr Harris says that the SoS either misunderstood the Inspector's reasoning, or failed to properly deal with it.

64. At the heart of this Ground lies the judgments of the Court of Appeal concerning the situation where the SoS departs from a recommendation of a planning inspector. In *Horada v Secretary of State for Communities and Local Government* [2016] PTSR 1271 at [40]:

> *"He also contrasted the standard of reasoning to be expected from a local planning authority's summary of reasons for the grant of planning permission and the (higher) standard to be expected from a decision letter of the Secretary of State. It is of course the case that a duty to give reasons does not entail a duty to give reasons for reasons; but nevertheless if disagreeing with an inspector's recommendation the Secretary of State is, in my judgment, required to explain why he rejects the inspector's view. Thus in R (Cumbria CC) v Secretary of State for Transport [1983] RTR 129 , 135 Lord Lane CJ (with whom Ackner and Oliver LJJ agreed) said:*
>
> *"The material part of the decision letter was composed mainly, if not entirely, of bald assertions that the Secretary of State was not satisfied upon fact (a) or fact (b) or fact (c), without giving any reason upon which the lack of satisfaction was based. Such decision letters are unfair to the parties. The parties are unable to challenge the reasoning or the reasons, if any, which lay behind the decision. They are particularly reprehensible where the Secretary of State is differing from the commissioners and from the inspector who heard the appeal on matters of fact, as was the case here.""*

65. And in *SSCLG v Allen* [2016] EWCA Civ 767 at [19]:

> *"Where the Secretary of State disagrees with an inspector, as he did in this case, it will of course be necessary for him to explain why he*

> *disagrees, and to do so in sufficiently clear terms. He must explain why he rejects the inspector's view. He must do so fully, and clearly. But there is no heightened standard for "proper, adequate and intelligible" reasons in such a case. Whether the reasons given are "proper, adequate and intelligible" will always depend on the circumstances of the case, and in a case where the Secretary of State differs from his inspector this will depend on the particular circumstances in which he does so (see, for example, the decision of this court in Horada and others v Secretary of State for Communities and Local Government [2016] EWCA Civ 169 , in particular the judgment of Lord Thomas of Cwmgiedd C.J., at paragraphs 57 to 59, and the judgment of Lewison L.J. at paragraphs 34 to 40). It is a truism that the Secretary of State does not have to give reasons for his reasons. What he has to do is to make sure that his decision letter shows why the outcome of the appeal was as it was, bearing in mind that the parties to the appeal know well what the issues were. In this case he did that."*

66. Mr Harris submits that the SoS has failed to meet these standards in the present case. Firstly, the SoS appears not to have appreciated that the Inspector did draw a clear conclusion. Secondly, the SoS has failed to explain why he has departed from the Inspector, and instead has just set out bald assertions of disagreement.

67. Mr Shadarevian submits that when the DL says: *"The Secretary of State considers that given the Inspector could not draw clear conclusions on this matter, and its importance to the application…."* [my emphasis], that means the Inspector was not capable of, rather than did not actually, reach a conclusion. He submits it is because of the *"gaps and limitations"* that are referred to in DL31, which itself has a reference back to DL28, that the Inspector could not reach a conclusion. In the light of the fact the Inspector identified various gaps in the evidence, the SoS was entitled as a matter of weight to reach a different conclusion on alternatives. Therefore he gave sufficient reasons for his disagreement with the Inspector.

68. However, Mr Harris, in my view correctly, submits that this is a misunderstanding of the Inspector's reasons for rejecting an alternative scheme.

69. It is important to understand how the issue of an alternative fitted into the overall analysis. There was strong Development Plan support for investment in retail and commercial in the CAZ. All principal parties accepted that the current layout of the buildings did not meet the Development Plan policies for the site, so something needed to be done to the site if the Development Plan policies were to be met. There was therefore no "do nothing" option being advanced at the Inquiry (certainly not by the principal parties). The question then became whether the same or similar public benefits could be achieved by a scheme that caused less heritage harm (issue v at IR13.54).

70. The Claimant's experts said that no refurbishment scheme was viable, see IR13.59, but the Inspector expressed some scepticism about their evidence, see IR13.60. However, the Inspector accepted that unless a scheme was viable and deliverable it would not be material, see IR13.61.

71. The Inspector's conclusions are at IR13.70-IR13.74:

"13.70 While many interested parties, including some of the most renowned and capable UK architects, gave evidence on the benefits of their experience of retrofitting existing buildings for new uses, and of the substantial savings in embodied carbon, only SAVE put forward a considered example. On the evidence before the Inquiry, I consider that the only remaining refurbishment scheme for the site is so deeply problematic, even for Oxford Street, that no-one would be likely to pursue it or fund it. Even disregarding the difficult question of theoretical viability without detailed land/lease values, in my view the likelihood is that the inescapable structural issues and the awkward combination of the three buildings would deter investment in any meaningful refurbishment for office use, if not result in a negative residual valuation for the premises, as the expert advisers contend.

13.71 If the office redevelopment cannot be delivered then it is doubtful that there would be any substantial new investment in retail floorspace either, and certainly not enough to fund a major refurbishment of the lower floors. Even if a reduced site value, and low rental levels, allowed some viable overhaul for office use, any refurbished retail element would be unlikely to provide anything significantly better than the current store. M&S considers, with evidence of trading and footfall, that this is failing and asserts that it will not continue to occupy it indefinitely. It follows that without a deliverable office refurbishment there would be no department store either.

13.72 On the balance of probability, a refurbishment will not take place under the current M&S lease, or at all. There is no other major retailer that is likely to take on the existing building, let alone retain and refurbish it as a department store. It is unlikely that anyone would finance the cost of refurbishing the upper floors as offices without a more attractive ground floor. While the site has so much potential value that it is unlikely to be left completely vacant, and I give little weight to the fallback position of demolition, I find that even smaller, high quality stores are unlikely to move in without improving the building overall (noting that only low quality stores moved into Neale House and there are plenty of other competing locations on Oxford Street).

13.73 To conclude, SAVE acknowledged that the buildings do not adequately serve their intended purpose. It accepted the public benefit of keeping the site in active use rather than risk long-term vacancy, that the status quo was not an option, and that there is a City Plan imperative to enhance Oxford Street, on which this M&S store is a key site. It further accepted that there is no potential for LTR, a sustainable upgrade of just Orchard House or a façade retention, and instead, put forward an alternative scheme. It follows that avoiding the harm I have identified above to heritage and to moving to a zero-carbon economy, would depend on there being a viable and deliverable alternative.

13.74 For the reasons given above, even allowing for the necessarily draft nature of SAVE's thoughts and that the onus lies with the Applicant, I find that there is no viable and deliverable alternative and that refusing the

> *application would probably lead to the closure of the store, the loss of M&S from the Marble Arch end of Oxford Street and substantial harm to the vitality and viability of the area. This is a material consideration of substantial weight."*
>
> [emphasis added]

72. The Inspector therefore concludes, on the basis of his own judgement, critically at IR13.70, that no meaningful refurbishment could be delivered that would achieve the public benefits sought by the policies and provided for by the application scheme.

73. The SoS's error in DL31 is that he fails to deal with the Inspector's reasoning at IR13.70. The SoS alights on the gaps in the evidence that the Inspector highlighted earlier in his report, but does not appear to appreciate that those gaps were not in the end material to the Inspector's conclusions.

74. Mr Shadarevian submits that the SoS reached a different planning judgement on the likelihood of an alternative, namely that there was insufficient evidence to make a finding either way. He was entitled to do this, and the Court should not interfere with such a judgement.

75. Mr Fraser adopts the same arguments as Mr Shadarevian, relying on the Inspector's comments about the difficulties with the Claimant's evidence in IR13.54-IR13.56, IR13.60 and IR13.70.

76. I fully accept that the SoS was entitled to reach a different conclusion on alternatives and that would be a matter of planning judgement, not amenable to review by the Court. However, that is not the basis of this ground of challenge. Ground Two is a failure by the SoS to explain, within the requirements of ***Horada*** and ***Allen***, why he disagrees with the Inspector. In my view the SoS has failed to do so. The key paragraph in the Inspector's reasoning is IR13.70 and the structural issues and layout of the site, which he finds would deter any meaningful refurbishment. Nowhere in the DL does the SoS grapple with that issue. The "gaps and limitations" in the Claimant's evidence do not undermine the Inspector's reasoning. That is clear from the IR itself. DL32 is merely an assertion by the SoS that he does not agree with the Inspector, and DL31 does no more than say he places less weight on the Claimant's evidence, but the SoS does not explain on what basis he disagrees with IR13.70. Mr Nicholson is a highly experienced planning inspector, who is a qualified architect. If the SoS is going to disagree with his conclusion at IR13.70, then the developer is entitled to understand in clear terms what the basis for that disagreement is. Otherwise, it is not possible to tell whether or not the SoS is acting in a rational and lawful manner.

77. For those reasons I allow Ground Two.

Ground Three

78. Ground Three also focuses on the question of whether there was a viable and deliverable alternative to the Scheme. The SoS at DL32 said that he could not reach a conclusion as to whether there was a viable and deliverable alternative.

79. The SoS, in his overall conclusions in the DL, accepted the public benefits of the proposal. At DL52 he accepted the public benefits of the proposal, but found that they are outweighed by the heritage harm.

80. Mr Harris submits that the SoS has failed to properly deal with the "harm", both to the Development Plan and the West End, if the Scheme and its accompanying benefits are not delivered. I would phrase this as harm from the "loss of opportunity" which would flow from refusal of the application.

81. The simple way to analyse this Ground is that in the fourth line of DL52 the SoS says that the harm to the vitality and viability of the area from the refusal of planning permission has *"limited weight",* but at the end of the paragraph he says that the benefits to employment and regeneration of the Scheme carry *"significant weight".* This appears to be contradictory, unless the SoS grapples with what is likely to happen if the permission is refused, and the impact that would have on the area.

82. Mr Shadarevian and Mr Fraser refer to the fact that at DL31-32 the SoS says that he could not reach a conclusion on whether or not there is a viable and deliverable alternative. However, at DL33 he says: *"taking into account the locational advantages of the site, the Secretary of State does not agree with the Inspector at IR13.75 that redevelopment is the only realistic option to avoid a vacant and/or underused site…."*.

83. The SoS says at DL19 that there were heritage benefits to the application, which carried "moderate weight". At DL23 he gives substantial weight to the advantages of concentrating development in a highly accessible location. At DL25 he gives significant weight to the employment and regeneration benefits and at DL26 he finds that there was support from some policies in the Development Plan. Therefore, Mr Shadarevian and Mr Fraser submit that the SoS did take into account the benefits of the application.

84. In my view this Ground ties closely into Ground Four, and the importance given in the Development Plan to supporting Oxford Street and the West End as a retail and commercial development. I will refer to those policies below.

85. Given that the SoS had given significant weight to the benefits of the scheme, as set out above, his failure to adequately explain his approach to the loss of those benefits on refusal of the application is palpable. There is an obvious inconsistency in DL52 by giving limited weight to the potential harm to vitality and viability from a refusal, but giving significant weight to the benefits, which would be lost if no scheme proceeded.

86. The suggestion that the SoS was relying on DL33 and the finding that the site might not become vacant and underused does not begin to explain the inconsistency. DL33 refers back to IR13.46-IR13.47 where the Inspector raises the possibility that if there is no significant change to the store it might be occupied by multiple traders, including American candy and luggage type stores. It hardly needs stating that such uses would not accord with the Development Plan policies, or the wider vision for the retail heart of London. Therefore the reader is left in the position of understanding that the loss of the benefits would be highly material, but not understanding what the SoS's reasons are for giving that loss so little weight.

87. On a principal important controversial issue, the SoS fails to grapple with the implications of refusal and the loss of the benefits and thus departure from important Development Plan policies. I therefore find for the Claimant on Ground Three.

Ground Four

88. This Ground relates to the alleged harm to the vitality and viability of Oxford Street if the Scheme, or an alternative, is not delivered. At IR13.46 the Inspector said:

> *"M&S has stated that it will not continue to occupy and trade from the store for very much longer if permission is refused. The balance of evidence was that if M&S were to leave, it would not be replaced by another department store and that its loss would cause serious damage to the vitality and viability of the whole of Oxford Street and to London's West End."*

89. And at end of IR13.47 he found *"the loss of M&S would probably result in a significant drop in footfall and a severe harmful impact on the vitality and viability of the area…"*

90. At IR13.53 he concludes on this issue:

> *"Overall, for the above reasons, I find that the benefits to employment and regeneration through improved retail and office floorspace, concentrating economic activity at a highly accessible location, in a high quality building with urban design benefits to the public realm, and some heritage benefits, should be given substantial weight. Indeed, in the absence of alternatives, these benefits would outweigh the harm to the historic environment and to the UK's transition to a zero-carbon economy. I have therefore considered whether there are better ways that these benefits could be achieved."*

91. The SoS appears to disagree with the Inspector on this issue, see DL33 set out above. He refers to there being potential for some harm to the vitality and viability of Oxford Street, but does not agree there would be harm to the wider West End.

92. To understand how inadequate the SoS's reasons are, it is important to go back to the Development Plan and understand how important retail vitality and viability in Oxford Street is, both in terms of Plan policies, but also wider interests of acknowledged importance.

93. The adopted Westminster City Plan dealing with support for "town centres" at Policy 14 and Policy 14C(1) states:

> *"The International Centres of the West End and Knightsbridge will provide a focal point for large format comparison retail, supported by complementary town centre uses that increase customer dwell time, and new office floor space."*

94. The International Centre of the West End extends down Oxford Street, Bond Street and Regent Street, and is tightly drawn.

95. The Claimant had set out the problems at the western end of Oxford Street in its evidence, as recorded by the Inspector at IR6.27-IR6.40. IR6.31 states:

> *"The Council describes the need for change at this part of the iconic shopping street as "both urgent and compelling": WCC Place and Delivery Strategy."*

96. And at IR6.33 the Claimant said it would leave if the application was refused and *"the decline of this area of the Centre will decline yet more dramatically".*

97. This retail and wider commercial viability issue was either the most important issue in the application or one of the two most important, with the climate change arguments. Yet the SoS reasons for disagreeing with the Inspector on the impact of refusal is limited to the second half of DL33:

> *"He considers that there is potential for some harm to the vitality and viability of Oxford Street as suggested by the Inspector at IR13.46-47 and IR13.74. However, he does not agree with the Inspector that harm would be caused to the wider West End beyond Oxford Street (IR13.46) as he considers that this overstates the scale of the impact. He also does not agree with the Inspector's conclusion that the harm would be substantial. The Secretary of State considers that potential harm to the vitality and viability of Oxford Street could arise from a refusal of permission but, unlike the Inspector, he considers that the extent of any such harm would be limited. He attributes limited weight to this possibility."*

98. Ms Parry, who led on the SoS's case on this Ground, submitted that the SoS did deal with the difference with the Inspector because he made clear he did not accept the harm, as found by the Inspector, to the "wider" West End in DL33. She argues that the Inspector himself does not explain why he considered the harm would extend beyond Oxford Street.

99. However, even if one limits consideration to that geographic point, it is apparent why the Inspector took a broad view of harm. Firstly, the Plan policies define one "town centre" or in this case International Centre, which covers Oxford Street, Regent Street and Bond Street. It is obvious to any informed reader of the IR that significant harm to vitality and viability at the western end of Oxford Street will have implications across the centre because of the loss of footfall and investment across the designated town centre. If the SoS was going to disagree on such a basic point arising from the policy background and the Inspector's conclusions, then he had to explain that clearly. That is the principle that arises from both ***Horada*** and ***Allen***. DL33, and the rest of the DL, wholly failed to meet that requirement.

100. Further, beyond the limited geographic extent of the harm, the Inspector was finding significant harm from the loss of investment, and effectively the loss of a strong retail attraction at the western end of Oxford Street, beyond Selfridges. The SoS disagrees and simply says he thinks the harm *"would be limited".* But he fails to explain why he reaches this conclusion. Given the evidence about the type of uses that might fill the existing building if Marks & Spencer left; the SoS's inability to conclude about the likelihood of an alternative scheme and the role of the store, the SoS had to explain fully why he thought the harm would be limited.

101. The SoS failed to provide adequate reasons, therefore Ground Four succeeds.

Ground Five

102. This Ground relates to the SoS's approach to "embodied carbon" utilised in the proposal. The Ground has two limbs, (a) that the SoS made a clear error of fact; and (b) that he made an even clearer error in the interpretation of the policy on carbon.

103. As explained above, all the principal parties ruled out a "do-nothing" option for the site. SAVE accepted that a LTR would not deliver the benefits, because of the shortcomings of the existing buildings. Therefore, only a comprehensive or deep refurbishment would meet the accepted need, see IR13.57:

> *"The refurbishment alternatives put forward by the architect considered, and ruled out, all options including either light-touch refurbishment (LTR) or façade retention. SAVE also ruled these out, accepting that a LTR would not overcome the shortcomings of the buildings. With an upgrade of just Orchard House, or a façade retention, it accepted that the embodied carbon savings would be immaterial compared with redevelopment, while it would have lower operational energy performance. Acknowledging that none of the possibilities shown in the DAS was feasible, SAVE put forward an outline option for a comprehensive refurbishment which it argued ought to be a sound alternative to complete demolition."*

104. The issue then became the carbon consequences of the proposal as against a deep refurbishment. Mr Harris' error of fact submission turns on DL21:

> *"The Secretary of State has very carefully considered the Inspector's analysis at IR13.31-13.43, the Sustainability Strategy, CE Statement, Energy Statement and WLC Assessment put forward by the applicant (IR13.34), and the parties' cases on this matter. He notes that there was no dispute that the proposals would demolish and remove structurally sound buildings for a new larger development (IR13.32), or that redevelopment would involve much greater embodied carbon than refurbishment (IR13.33). Equally there was no dispute that the proposals would use the latest techniques for energy efficiency or that the building could achieve a rating of BREEAM Outstanding (IR13.38), and the Secretary of State has also taken into account the applicant's argument that over the life of the building it would use less carbon than any refurbishment, which would have to rely on an inefficient building envelope (IR13.38). He agrees with the Inspector, for the reasons given in IR13.37 and IR13.39, that the understanding of WLC Assessments and the tools available for calculations are still developing, and therefore it is no surprise that there was disagreement over the lifetime carbon usage for the proposals and, more particularly, for a refurbishment."*
>
> [emphasis added]

105. Mr Harris' submits the SoS and the Inspector were plainly wrong to say that there was no dispute that redevelopment would involve much greater embodied carbon than refurbishment. At IR13.33 the Inspector said:

> *"Furthermore, it was not argued that the embodied energy (carbon) would be justified because the buildings are causing significant heritage harm (other than disputes over the merits of Neale House and the Orchard Street extensions) or that there was any fundamental structural or safety reason why they should be demolished. Nor was there any dispute that redevelopment would involve much greater embodied carbon than refurbishment."*

106. Mr Harris submits that there was strong disagreement at the Inquiry over whether the SAVE proposal, which was presented very late in the day in evidence in chief, would produce less embodied carbon.

107. On the basis of the SoS's case, it is not necessary for me to go back through what happened at the Inquiry because Mr Shadarevian accepts in his Skeleton Argument that *"There was a dispute at the inquiry over whether SAVE's proposal would necessarily lead to lower embodied carbon that the proposed demotion and rebuilding".* However, he argues that there was no mistake by the SoS and the Inspector because they were only saying that "in general" it is accepted that redevelopment would cause greater embodied carbon than refurbishment. Therefore the second part of the key sentence in DL21 is making a general point and not one about the actual proposal.

108. Interestingly, and rather oddly, Mr Fraser takes a somewhat different stance. He agrees with Ms Parry that the reference to there being no dispute was an "in general point". He says that there was a dispute at the Inquiry as to whether SAVE had shown that an alternative might have significantly less embodied carbon. Mr Fraser pointed to IR8.49 where the Inspector sets out Mr Frasers' closing:

> *"Although a comprehensive retrofit would inevitably have a higher embodied carbon cost than a LTR, that cost would be very significantly below that of a new build. FP and SS agree that a scheme like this would involve the rationalisation of roughly a quarter of the floorplate of the existing building (mainly by core reconfiguration), but that is still a significantly different embodied carbon impact compared with losing the whole fabric of the buildings and starting again (especially with carbon intensive multi-level basement excavation as proposed."*

109. Mr Fraser submits that even if there was a dispute the architects had actually agreed the issue, as explained by the Inspector in IR8.49, and therefore there was no material error of fact. Mr Harris strongly refutes this point and refers to a further document that was before the Inquiry where the Claimant had made clear that there continued to be a dispute.

110. In my view the suggestion that DL21 is only concerned with there being no "in general dispute" about less carbon from refurbishment is an obvious misreading of the DL and the IR. Firstly, it involves mangling the language of DL21. The key sentence says *"He notes that ....."*. Mr Shadarevian's submission involves the first part of that sentence relating to the specific proposal and the second part being a general comment, which

seems more than odd. Secondly, it is not clear why the SoS or Inspector would be interested in the generality of the proposition rather than focusing on the evidence relating to the application itself. As a very general proposition it is obvious that a refurbishment may well involve less carbon than a redevelopment, but that tells one nothing about the facts of this case, and the carbon impacts of a deep refurbishment.

111. Mr Fraser's argument, that the SoS knew there was a dispute in relation to the specific scheme and alternatives, both flies in the face of the language, but also involves reading the DL in a way different from that put forward by the author, i.e. the SoS. It is apparent from the document that Mr Harris submitted that there did continue to be a disagreement, and all the Inspector is recording at IR8.49 is Mr Fraser's closing submissions.

112. The error in DL21 was important to the decision overall, because at DL53 the SoS says that the *"harm arising from the embodied carbon carries moderate weight…."* without having made findings as to whether that harm would have flowed from either scheme, and was therefore an inevitable consequence of achieving the aspirations of the Development Plan, there was a clear gap in the DL.

113. The policy limb (b) appears to be an equally obvious error. In policy terms, carbon consequences are divided into those emanating from the construction phase, and those from the operation of the development. Embodied carbon is generally referred to as that from the construction phase, including demolition. These analyses are necessarily complex and can go into ever greater levels of detail, but in broad terms construction impacts can go back to the construction of the materials, the transportation emissions, and the construction of the building itself. Operational impacts cover matters such as the heating and cooling of the building.

114. The London Plan includes policy SI 2 "Minimising greenhouse gas emissions".

> *"Policy SI 2 Minimising greenhouse gas emissions*
>
> *A. Major development should be net zero-carbon. This means reducing greenhouse gas emissions in operation and minimising both annual and peak energy demand in accordance with the following energy hierarchy:*
>
> *1) be lean: use less energy and manage demand during operation*
>
> *2) be clean: exploit local energy resources (such as secondary heat) and supply energy efficiently and cleanly*
>
> *3) be green: maximise opportunities for renewable energy by producing, storing and using renewable energy on-site*
>
> *4) be seen: monitor, verify and report on energy performance.*
>
> *B. Major development proposals should include a detailed energy strategy to demonstrate how the zero-carbon target will be met within the framework of the energy hierarchy.*
>
> *C. A minimum on-site reduction of at least 35 per cent beyond Building Regulations is required for major development. Residential development*

> *should achieve 10 per cent, and non-residential development should achieve 15 per cent through energy efficiency measures. Where it is clearly demonstrated that the zero-carbon target cannot be fully achieved on-site, any shortfall should be provided, in agreement with the borough, either:*
>
> *1) through a cash in lieu contribution to the borough's carbon offset fund, or*
>
> *2) off-site provided that an alternative proposal is identified and delivery is certain.*
>
> *D. Boroughs must establish and administer a carbon offset fund. Offset fund payments must be ring-fenced to implement projects that deliver carbon reductions. The operation of offset funds should be monitored and reported on annually.*
>
> *E. Major development proposals should calculate and minimise carbon emissions from any other part of the development, including plant or equipment, that are not covered by Building Regulations, i.e. unregulated emissions.*
>
> *F. Development proposals referable to the Mayor should calculate whole life-cycle carbon emissions through a nationally recognised Whole Life-Cycle Carbon Assessment and demonstrate actions taken to reduce life-cycle carbon emissions."*

115. It is clear beyond any rational doubt, and accepted by all parties before me, that the offsetting requirements in SI 2C are in relation to operational carbon, and not embodied carbon. This is because the reference to the Building Regulations necessarily includes a calculation based on the energy efficiency of the building in its operational phase, not the construction carbon impacts.

116. However, in the DL the SoS appears to have become thoroughly confused on this point and has assumed that the requirement for carbon offsetting applied to embodied carbon and not just operational carbon. At DL40 he says:

> *"Policy SI 2 of the London Plan deals with minimising greenhouse gases. The Secretary of State agrees at IR13.32 that a substantial amount of embodied carbon would go into construction, and this development is clearly not net-zero carbon. He considers therefore that Policy SI 2(A) is not met; however, the policy makes provision for this scenario at SI 2(C). The Secretary of State notes that an appropriate contribution has been secured via the s.106 Agreement (IR12.1). Policy SI 2(D) requires boroughs to establish and administer a carbon offset fund, and states that offset fund payments must be ring-fenced to implement projects that deliver carbon reductions. A carbon offset fund has been established by WCC and is in operation. The carbon offset payments secured via the s.106 Agreement will therefore be used to deliver carbon reductions. The Secretary of State further notes that an Energy Strategy has been provided, and that in line with SI 2(F) a WLC Assessment has been*

> *provided. Notwithstanding that it has not been demonstrated that the reductions arising from the carbon offset fund would fully offset the embodied carbon arising from the proposal, the Secretary of State considers that the requirements of SI 2(C) have been met, and there is overall compliance with policy SI 2."*

117. Ms Parry argues that SI 2A when saying *"Major development should be net zero. This means…."* is placing a requirement for net-zero development as part of the policy. And *"this means…"* is not intended as a definition of what the policy covers. Therefore the requirement for *"net zero"* can include the construction effects, despite the subsequent words of the policy. This is an impossible submission. The words *"this means…"* are obviously intended to define and limit what comes before. Any other interpretation of the policy would be both nonsensical, and contrary to the obvious words.

118. Ms Parry then argues that SI 2C is referring back to the net zero-carbon reference in paragraph A, which she says includes embodied carbon. This is again a transparently wrong interpretation of the policy, which she fails to read as a whole and in a way that makes sense. The reference to the Building Regulations makes it clear beyond any doubt that the policy is concerned with operational carbon impacts, and not construction impacts.

119. I note that when pressed, both Mr Shadarevian and Mr Fraser accepted that they could point to no other instance, whether by the SoS, the London Mayor or a London Planning Authority where the policy had been interpreted to require offsetting from construction impacts, or that the development as a whole, including construction impacts, had to be net-zero. They also accepted the policy was not advanced in that way at the Inquiry.

120. It would be astonishing if one of the key policies in the London Plan on carbon emissions could have suddenly expanded the scope of the off-setting requirements in such a significant way without anyone applying it in this way before. The approach of the SoS appears to believe that there is a "net zero" requirement of, or at least aspiration for, construction impacts, in a key Development Plan policy which has never previously been applied.

121. It is important to make clear that this case is not about whether or not it would be appropriate or justified to have such a policy in the light of the climate emergency. Such a judgement is not the function of the court. The issue for the court is whether the SoS erred in law by misinterpreting the adopted London Plan policy.

122. Both Mr Shadarevian and Mr Fraser submit that even if the SoS did err in DL40, it made no difference to the outcome of the decision. That is because at the end of DL40 the SoS found compliance with SI 2 in any event. Mr Fraser suggests that shows that the SoS did understand that embodied carbon did not go into the off setting equation.

123. Given that carbon impacts were one of the most important issues in the case, and the SoS relied on embodied carbon at DL53 in his overall conclusions, I do not think this is a case where it would be safe to find the decision would have been the same in any event. The scale of the SoS's error, and the importance of the issue in the overall balance, means this is a case where it is more than possible that if the SoS had properly understood the policy he might have come to a different conclusion.

124. However, ultimately the ***Simplex*** point does not matter because I will quash the decision on the first four Grounds in any event.

Ground Six – Heritage Impacts

125. It was common ground that there would be no direct impact on designated heritage assets. The focus was therefore on whether there was any harm to the significance of listed buildings or CAs by reason of impact on setting of heritage assets. This was a matter of primary importance because of the weight that was attached to such harm by the SoS in the DL.

126. As is set out above, in DL54 within the overall conclusions section, the SoS found that *"Overall he has found that the harm to the settings of, and significance of the designated heritage assets carries very great weight."* As I read the DL as a whole, that was the factor together with the carbon issues in DL53, which led to refusal.

127. Mr Harris' submits that in reaching that conclusion the SoS failed to explain *"the extent to which each relevant asset's significance depended on or derived from its setting".* The principal asset in question was Selfridges, which is a Grade II* building. The Inspector identified it as a *"very fine building in its own right with considerable significance inherent in its fabric and history meriting its Grade II* status".* He said *"Although its setting does provide a generally helpful backdrop to an appreciation of the Selfridges department store, and so is of value to its significance, it is also useful to remember the Inspector's approach in Summerskill House (endorsed by the SoS and unchallenged)...."*

128. The Inspector then went on to consider the contribution of the Site to the significance of Selfridges at IR13.4. In summary he found: *"Even if (see below) Orchard House contributes little to Selfridge's significance, it certainly doesn't detract from it".* He continued by considering the other buildings on the Site and concluded that *"in heritage terms they are quite out of place on this stretch of Oxford Street and within the setting of Selfridges."*

129. Mr Harris submits that the SoS, in contrast to the Inspector, gives no assessment of the contribution of the existing buildings to the relevant settings.

130. Mr Shadarevian points to DL16 which says:

> *"The Secretary of State has carefully considered the Inspector's analysis of the non-designated heritage asset of Orchard House at IR13.19-13.26. While Orchard House was rejected for listing, this does not mean that it is without significance or merit, both on its own terms as a non-designated heritage asset and in terms of its contribution to the streetscape and the setting of Selfridges. The Secretary of State has had regard to the evidence put forward by Historic England (HE) in its consultation response of 26 October 2021 (CD4.04). HE stated that 'Orchard House is a prominent non-designated heritage asset which contributes positively to the settings of Selfridges and the historic retail character of Oxford Street', and that it 'possesses architectural and historic interest'. HE went on to state that 'Orchard House contributes positively to the setting of Selfridges, with which it has strong group value, owing to their stylistic similarities' and*

> *that 'Orchard House is understood as a near contemporary building of lesser status, promoting Selfridges' landmark quality and enabling an appreciation of its influence on later design. They share a similar structural and façade design (incorporating classical detailing, stone cladding and metal spandrel panels), in addition to a consistent roofline'. HE further stated that 'Historic England considers the proposed development to be a missed opportunity to retain, reuse and adapt the good quality elements of the site'. The Secretary of State agrees with this assessment. He notes that HE did not formally object to the proposal, and further notes HE's later decision of 10 November 2021 that Orchard House does not meet the criteria for listing. However he does not consider that those considerations undermine HE's assessment of the value and importance of Orchard House as a non-designated heritage asset. The Secretary of State further notes that Westminster City Council (WCC) share HE's view in respect of the merits of Orchard House in the context of Selfridges, finding that the height, massing and detailed design of Orchard House contributes positively to the setting of Selfridges and for the same reasons to the setting of the Stratford Place CA (IR8.6). He agrees with these assessments."*

131. Mr Shadarevian submits that this is sufficient reasoning to support the SoS's conclusion at DL54.

132. I agree with Mr Shadarevian that the SoS has provided adequate reasoning on this issue. He has addressed the question of the role that Orchard House plays in the setting of Selfridges by accepting the Heritage England comments at DL16. Although there is undoubtedly more that could have been said, and in particular further detail, that does not amount to unlawful reasons.

133. I note the reference to the Minister in the Summerskill House appeal decision saying that unless the asset derives a major proportion of its significance from setting then it is difficult to see that impact on setting alone would give rise to substantial harm to significance. However, this is not a legal test. It is in my view very important that the tests for impact on heritage assets do not become even more complicated, and subject to an even more complex legal reasoning process, than is presently the case. Although the SoS's ascription of weight to impact on setting is somewhat surprising in this case, the Claimant is not advancing a ***Wednesbury*** argument, and it would be very difficult to do so on an issue so fraught with value judgements.

134. For these reasons I dismiss this Ground.