IN THE COURT OF APPEAL (CIVIL DIVISION) **CA-2024-002003**

ON APPEAL FROM THE HIGH COURT OF JUSTICE (PLANNING COURT)
(HIS HONOUR JUDGE JARMAN KC SITTING AS A JUDGE OF THE HIGH COURT)
[2024] EWHC 2017 (ADMIN)

BETWEEN:

GREENFIELDS (IOW) LIMITED

Appellant

- and -

(1) ISLE OF WIGHT COUNCIL
(2) WESTRIDGE VILLAGE LIMITED

Respondents

SUPPLEMENTARY/ REPLACEMENT SKELETON ARGUMENT ON BEHALF OF THE APPELLANT

References to the Judgment Below take the format J/paragraph. *Other references are to the agreed Court of Appeal Core Bundle in the form* CB/Tab/Page *and Supplementary Bundle in form* SB/Tab/Page.

A. Summary

1. The Appellant appeals with permission of Lewison LJ against the decision of HHJ Jarman KC (sitting as a judge of the High Court) to dismiss a claim for judicial review challenging the grant of planning permission for development of 473 dwellings, a café, doctors' surgery and associated infrastructure at Westridge Acre Park, near Ryde on the Isle of Wight.

2. In this case, as the judge at first instance appears to have accepted:

   (a) Cllr Geoff Brodie (not Ian Brodie as suggested at J2),[1] the leader and acting chair of the Isle of Wight Council's Planning Committee, improperly excluded a member of the planning committee from voting at a meeting of the Council's planning committee (J65), in circumstances where that councillor subsequently stated at a later committee meeting that having watched the debate, "the outcome would have been entirely different if I'd have been on that Committee, and I'd been participating" [SB/327 §119 see also SB/274].

   (b) Cllr Brodie also refused to permit another councillor to attend that same committee meeting unless she was willing to speak in favour of the application (J16);

   (c) Cllr Brodie sought to dissuade from attending, and/or played a part in the exclusion of, other

[1] The judgment was handed down (and circulated in draft) during the vacation when the Appellant's primary counsel was abroad without meaningful access to internet, such that he was unable to consider the draft judgment or suggest corrections.

Councillors who he believed would speak or vote in favour of the grant of planning permission (J15, J17, and J66); and

(d) A political whip was applied to a subsequent motion seeking a full reconsideration of the application, contrary to the authority's constitution, and resulting in the failure of that motion (J39).

3. It is also a case in which the puisne judge accepted that the R1 had acted in breach of its duty pursuant to Article 40(3)(b) of the Town and Country Planning (Development Management Procedure) Order 2015 ("the **DMPO**") (J73) by failing to publicise the terms of the draft or final section 106 planning obligation, and that the Appellant wished to comment on the detail of that planning obligation in terms of highway impact mitigation (J78). That was in circumstances where the Council's Cabinet Member for Highways, PFI, Transport, and Infrastructure himself gave evidence that he too was not consulted on the terms of the section 106 planning obligation, and would have wished to comment upon it [SB/31-32], and the Highways Authority itself had raised concerns regarding the deliverability of the mitigation purportedly secured by that obligation in its statutory consultation response [SB/83].

4. Nevertheless, HHJ Jarman KC (having considered the matter at a rolled up hearing) dismissed the claim on all grounds, including Grounds 1 & 2 (procedural impropriety and appearance of bias) and refused permission on Grounds 3, 4, and 5 (breach of Article 40(3)(b) DMPO and failure to have regard to obviously material considerations in relation to highways mitigation) as well as one aspect of Ground 1 (the extension of the length of the 2021 meeting).[2]

5. Lewison LJ granted permission to appeal on all grounds on 25 November 2024. On 9 December 2024 the First Respondent ("**R1")** filed a Respondent's Notice raising four additional reasons why the learned judge's decision should be upheld other than or in addition to those contained in his judgment, which was followed by a skeleton argument dated 23 December 2024 ("**R1Sk**"). The Appellant has sought permission to rely on this skeleton argument to reply to these arguments by application dated 17 January 2024.

6. The Appellant's case in summary is as follows:

(a) None of the grounds raised below or in this Court are "out of time" as alleged by R1 or at all. R1 fails to understand the principles of law in *R (Burkett) v Hammersmith LBC* [2002]1 WLR 1593, which were properly applied by the learned judge below.

[2] The judge's refusal of permission on Ground 1 is limited only to one aspect of that ground being "in relation to the length of the 21 July 2021 meeting".

(b) R1 had failed to publish the section 106 planning obligation, in draft or final form, contrary to Article 40(3)(b) of the DMPO. The breach of statutory duty was admitted and there was clear prejudice to the Appellant. The judge's conclusion to the contrary, resulting in his refusal of permission under section 31(3C-3D) of the Senior Courts Act 1981, was not open to him on the evidence. In particular, given the correspondence in evidence before the judge sent on the Appellant's behalf (including by its solicitors), it was not open to the judge to conclude that "Greenfields has not shown that a copy of the section 106 agreement was requested on its behalf" (J78). Further, and in any event, he failed to apply the correct test when considering the materiality of consultation responses (Ground of Appeal 1);

(c) The judge was wrong to find that the R1 did not err in its approach to highways mitigation. It failed to have regard to obviously material considerations. This included the expiry of the planning permission for development at Pennyfeathers, which the judge (in error of fact) held was not obviously material because the Pennyfeathers site remained allocated (when it did not) (Ground of Appeal 2);

(d) The judge was wrong to hold that the conduct of Cllr Brodie did not create an appearance of bias (Ground of Appeal 3); and/or

(e) The procedural impropriety found by the judge at J65 in relation to the resolution to grant permission passed in July 2021 vitiated R1's later resolution to grant permission in April 2023, because members were advised that the resolution passed in July 2021 was a material consideration (Ground of Appeal 4).

B. Timing

7. R1's submission at R1Sk paras. 4 – 11 is contrary to binding authority and fundamentally misconceived.

8. In *Burkett* the House of Lords stated unequivocally that "time runs from the date of the grant and not from the date of the resolution" (per Lord Slynn of Hadley at para. 5). As their Lordships explained, "for the grant not to be capable of challenge, because the resolution has not been challenged in time, seems to me wrongly to restrict the right of the citizen to protect his interests" (see para. 5). At paras. 45 – 51 Lord Steyn identified three principled policy reasons for supporting this position: (1) to avoid entrusting judges with the broad discretionary task of deciding when the complaint could first reasonably be made in circumstances where community interests are engaged (see para. 45); (2) to produce simplicity and certainty (and avoid complexity and uncertainty) since "if time only runs under Ord 53 r 4(1) [as it then was] from the grant of permission the procedural regime will be certain

and everybody will know where they stand (see paras. 46 and 49); (3) to avoid abortive cost and expense in challenging a decision which may ultimately be of no effect (see para. 50). That decision, and the policy reasons for it, remains good law, as it has for more than 20 years. It is binding and determinative of this issue.

9. R1's attempts to distinguish *Burkett* are hopeless. They ignore the *ratio* of the House of Lords, and the policy reasons for the decision it reached. Where the target of a claim for judicial review is a planning permission, time runs from the date of grant. That avoids uncertainty and wasted expense. In this regard, it should be noted that the words "contingent upon" although apparently quoted (from where is unclear) at R1Sk para. 8 do not appear in *Burkett*.

10. Further, and in any event, on the facts of this case the decision in question *was* contingent upon the earlier resolution. The earlier resolution was not revisited and was taken into account in deciding to grant permission.

11. For these reasons, the High Court was right to reject R1's submissions on timing.

C. Ground of Appeal 1 (Ground 3 below): Article 40(3)(b) DMPO

12. The judge was wrong to refuse permission for judicial review on the basis that the Appellant "has not shown that a copy of the section 106 agreement was requested on its behalf prior to the grant of planning permission" and/or that its detailed comments in terms of highway impact mitigation could be addressed through Ground 5.

The Judge's Analysis

13. The judge's analysis on this issue is at J73-78.

14. There was no dispute at first instance, and the judge accepted at J73, that "the authority was in breach of the statutory duty in article 40(3)(b) DMPO by not publishing the section 106 agreement, in draft or final form, until August 2023 after Greenfields referred to the breach in its pre-action letter".

15. At J74 the judge cited the decision of Ouseley J in *Midcounties Cooperative v Wyre Forest DC* [2009] EWHC 964 (Admin), in which the High Court held that publication of the heads of terms of a proposed section 106 agreement is not sufficient to comply with that duty. Stating "What is needed is at least one draft, as well as the final version, on the public register to enable meaningful public consultation" and referring to the need to identify prejudice.

16. At J75-J76 the judge sought to distinguish *Midcounties* by saying, "In that case a request was made for a copy of the agreement, but in the present case, Greenfields did not make such request until its pre-

action letter" i.e. until August 2023 (J75). As explained below, that contention was wrong in fact. It was clearly a finding upon which the judge relied, since in the subsequent paragraph, J76 the judge went on to cite Holgate J in *R (Worcestershire Acute Hospitals 4 NHS Trust) v Malvern Hills District Council[2023] EWHC 1995 (Admin)*at para. 145 where he said, "when it comes to material prejudice, a person who was aware of a reference in a committee report to a background paper but who has never shown or had any interest in inspecting the document is unlikely to get very far in a claim for judicial review".

17. Indeed, at J78, the substantive basis for refusing to grant permission for judicial review on this ground was that "Greenfields has not shown that a copy of the section 106 agreement was requested on its behalf prior to the grant of planning permission or that it would have said anything on the detail of the section 106 agreement other than in terms of highway impact mitigation. I deal with this point [highway impact mitigation] under Ground 5."

18. There are thus two findings critical to the judge's conclusion on this ground:

    (1) That the Appellant did not request to see a copy of the section 106 agreement prior to the grant of planning permission;

    (2) That the detailed comments that the Appellant would have made on the section 106 agreement in terms of highway impact mitigation may be addressed through the judge's conclusions on what was ground 5 below.

19. An error in relation to either of those findings would, independently, be sufficient to undermine the judge's conclusions on this ground. In fact, however, he was wrong in both respects.

Greenfields Request for the Draft Section 106 Agreement

20. The judge was wrong to find that "Greenfields has not shown that a copy of the section 106 agreement was requested on its behalf prior to the grant of planning permission". That conclusion was not open to him on the evidence before him. He reached a conclusion which was rationally unsupportable on the evidence before him, failed to provide rational reasons for his conclusion, and/or erred in fact in relation to the evidence on this issue.

21. Before the judge was the following evidence:

    (a) The letter sent by Richard Buxton Solicitors on behalf of the Appellant on 24 March 2022 in which they stated expressly "the final draft (ready to be signed) section 106 agreement… should be disclosed and circulated for consideration" [SB/31/295] §22.

(b) The First Witness Statement of Imran Rahman (Director of the Appellant) exhibiting the minutes of a meeting of the Appellant's Board on 27 April 2023 (i.e. several months before the permission was granted) [SB/36/337]. Those minutes state at 5.1.3 that "email requests from residents on the issues set out in this clause have not been responded to" and note that "certain documents have not been published on the Council's portal". The issues and documents in question include the details of the section 106 planning obligation and identify specific issues which the Appellant wished to address including: "if one or more related developments do not proceed, how that will affect a single specific s106 agreement/ developer contribution given that all the improvements to the relevant junctions need to be made notwithstanding this eventuality". Mr Rahman's witness statement also confirms that the Appellant's shareholders were regularly checking the Council's planning portal with the intention of reviewing and commenting upon the section 106 planning obligation.

(c) The Third Witness Statement of Naushad Rahman [SB/10/46] which exhibited:

i. An email from Ms Rahman (a member of resident's association which is the sole shareholder of the Appellant as explained in her witness statement) to R1 dated 7 July 2023 (approximately one month before the grant of planning permission) stating: "can you also send me a copy of the developer's road contribution agreement as approved by Island Roads". Safe receipt of this email was expressly acknowledged on 7 July 2023 and it was stated that a response would be sent shortly, but in the event none was received [SB/10/52-54].

ii. Email correspondence between Christina Nicholson (for and on behalf of Ryde Residents) and the R1 dating from 10 September – 1 October 2021 (before the Appellant was incorporated but noting that Ms Nicholson became a shareholder of the Appellant following its incorporation), in which she requested information from the R1 regarding how the section 106 agreement would secure payment for highways works [SB/10/49-51].

22. It is important to note here the context in which Mrs Rahman' witness statement was produced, especially in the light R1Sk para. 16(c). The learned judge gave permission, with the agreement of all parties including R1, for the submission of this witness statement to address a new and unmeritorious submission made by the R1 during the hearing that not a single email requesting sight of the draft section 106 agreement existed or had been received by the R1.

23. None of these emails were disclosed by the R1 pursuant either to its duty of candour, or the order for specific disclosure of documents relating to the involvement of named individuals in the determination of the application, notwithstanding that those named individuals included recipients of the email in question) [CB/10/134] §2. The R1 has never accepted these serious breaches of its

disclosure obligations; nor that its submission was factually untrue.

24. The judge made no reference to any of this evidence in his judgment. Rather, he concluded that the Appellant has not "shown that a copy of the section 106 agreement was requested on its behalf prior to the grant of planning permission".

25. In the face of the evidence set out above:

(a) It was not rationally open to the judge to reach the conclusion that he did on the evidence before him, in the sense that his conclusion was rationally insupportable (see *Henderson v Foxworth Investments Ltd* [2014] UKSC 41 at para. and 57). In circumstances where the Appellant's solicitors had written to the R1 on their behalf, specifically requesting that the draft section 106 planning obligation be circulated, where email requests had been made directly for the planning obligation to R1, and where the Appellant's Board minutes referred to requests for the section 106 agreement going unanswered, it simply cannot reasonably be said that the Appellant "had not shown that a copy of the section 106 agreement was requested"; and/or

(b) The judge failed to provide any reasons sufficient to show the parties, and if need be the Court of Appeal, the reasons which led to his conclusion on this issue (see *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 at para. 115). Whilst the judge's reasons need not be elaborate, in the circumstances of this case, where no reference is made anywhere in the judgement to any of the evidence above, and a conclusion which is *prima facie* wholly inconsistent with it is reached, some reasoning for the finding that the Appellant had not "shown that a copy of the section 106 agreement was requested on its behalf prior to the grant of planning permission" was required.

26. This is enough on its own for this appeal to be allowed: the judge ought to have allowed the Appellant's claim on Ground 3.

Prejudice to the Appellant

27. The judge's second error in relation to this ground was to conflate the test for whether or not a party has been prejudiced by a failure to consult them on a particular issue (Ground 3 below), with the question of whether or not it was unreasonable (in the *Wednesbury* sense) for a decision maker to fail to take into account a particular issue (Ground 5 below).

28. The two are entirely different. Where a party has been deprived of the opportunity to make representations, the burden is on the defendant to demonstrate that that party's representations were incapable of resulting in a materially different outcome. That is a conclusion the authorities make clear the court will be very slow to reach, (see *R (Brent LBC) v Secretary of state for Environment* [1982] QB

593 at 646). By contrast, where the challenge is to a failure to have regard to a particular issue, the challenge is one of rationality – the burden is on the claimant to no reasonable decision-maker properly directed would have failed to take that issue into account (see *R (Friends of the Earth) v Heathrow Airport Limited* [2020] UKSC 52 at paras. 116 – 119).

29. In dealing with the points that the Appellant wished to make in relation to the highway impact mitigation under Ground 5, the judge erred in principle. He applied the wrong legal test.

30. In considering an admitted breach of a statutory procedural duty to consult, the following principles apply:

    (a) The court will refuse relief if the claimant was not materially prejudiced by that breach (see *Mid-Counties Co-op* at para. 116).

    (b) Where a claimant identifies representations that it would have wished to make, however, and in circumstances where the decision-maker is under a duty conscientiously to take any representations made into account and to consider them with an open mind, it is wrong for the court to speculate as to how the decision-maker would have acted (see *Brent* at 656 and *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 per Leggatt LJ and Carr J (as they then were) at para. 142).

    (c) That approach continues to apply following the introduction of section 31(2A-3D) of the Senior Courts Act 1981. As the Divisional Court made clear in *Law Society* at para. 142, "it would be wrong in principle for the court in a case where the hypothetical decision would have been made on the basis of materially different information…to make a judgment expressed as a high likelihood about what the [decision maker] would have decided. To do so would involve trespassing into the domain of the decision-maker".

    (d) That approach applies with particular force in the context of planning decision making. In *R (Holborn Studios ltd) v Hackney LBC* [2018] PTSR 997, having cited *Brent*, the High Court said at para. 122 that the "caution is reinforced by the fact that matters of planning judgment are essentially ones for the democratically-elected planning authority. <u>It is not for the court generally speaking to anticipate what the outcome would be if a planning authority had regard to representations that is has not considered</u>" (emphasis added).

31. Those principles are consistent with the well-established approach to the consequences of procedural non-compliance in accordance with the decision in *R v Soneji* [2006] 1 AC 340. Taking that approach the court should consider the legislative purpose underlying the procedural requirement, and the

consequences of the failure to comply with it, having regard to that purpose, including in particular any prejudice to the party in question (see *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Company Ltd* [2024] UKSC 27 per Lord Briggs and Lord Sales at para. 61). The above authorities represent a paradigmatic application of those principles in the context of the statutory duty under Article 40(3)(b) DMPO to publish a proposed planning obligation in a draft form prior to the grant of planning permission "to enable meaningful public consultation" (*Midcounties*).

32. The heads of terms included in the Council's officers report referred only to "a financial contribution" being secured towards highways mitigation [SB/18/167-168] §8.1. Nothing was said as to the extent of or basis for that contribution.

33. As the judge recognised at J78, the Appellant wished to make detailed representations regarding the approach to securing highways impact mitigation under the section 106 agreement.

34. Indeed, that is recorded expressly in the minutes of the Appellant's Board meeting on 27 April 2023. In particular, the representations the Appellant wished to make included those set out in detail in the Witness Statement in support of the Claimant's claim given by Philip Jordan, then the Council's own Cabinet Member for Highways, PFI, Transport and Infrastructure (and now the Leader of the Isle of Wight Council) [SB/7/31ff], to which HHJ Jarman KC makes no reference. Cllr Jordan himself says in that statement at §16, "On the 1st September 2023 the s106 Agreement was forwarded to me for the first time via the Claimant's solicitors and not through the Council. I am appalled to see the Highways Issues and costs contributions as outlined in this statement have not been adequately dealt with. As I am equally appalled that no consultation was afforded to me or the wider public before this date". He identifies a number of issues in relation to the planning obligation, including that: (1) the contribution secured (being the sum of £406,359) is insufficient to secure the delivery of the highways mitigation works required to make the development acceptable even on the Council's costings (§§8-9); (2) the approach to those costings relied upon were premised upon a further contribution from a 900 home development at Pennyfeathers coming forward simultaneously, in circumstances where the outline Pennyfeathers permission had expired having failed to secure reserved matters approvals before its expiry, such that there was no planning permission for that development in existence (§9), (3) the objections from the owner of land required to deliver the highways works proposed such that they could not in practice be delivered (§10 cf [SB/15/97]); (4) the failure to account for inflation and the increase of cost over time, in circumstances where the costings dated from February 2022 and the works were not proposed for delivery until 10 years after development had begun (§§11–12); (5) the highways mitigation proposals put forward had not been developed with proper engagement from the Council's Highways team/ services to establish the scope and cost of the necessary infrastructure (§13).

35. Those objections fall to be viewed in circumstances where Island Roads (being the Highway Authority and relevant statutory consultee, whose advice should be followed, absent compelling reasons for disagreeing with it - see *Visao v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 276 (Admin) at paras. 65-68) had formally stated that "While it is accepted that there may be scope for improvement works being implemented at each of these junctions, this relied on third party land and so this office could not see how its delivery could be guaranteed" and on that basis reiterated that "concerns are once again highlighted by this office in relation to this application" [SB/13/93].

36. When the legal principles set out at para. 30 above are applied, the only rational conclusion is that the failure to consult the Appellant and others on the section 106 agreement, contrary to the statutory duty imposed by Article 40(3)(b) of the DMPO, resulted in material prejudice.

37. The judge erred, however, in failing to apply those principles to the facts.

38. His approach was expressly to consider the issues the Appellant stated it would wish to raise in relation to highway impact through his decision on Ground 5 stating at J78, "I deal with this point under ground 5". Under Ground 5, however, the judge did not apply the authorities on whether or not there had been material prejudice to the Appellant because it has been unable to make representations pursuant to a statutory consultation, rather he considered whether the approach taken was rational (see J79-87). His analysis is at J85-57. At J85 he states, "officers were given delegated authority to carry forward schemes for highway impact mitigation. A formal review is not the only way that this could be done but in any event the approach which the officers took in calculating the amount of highway contribution was based upon costings of schemes of potential highway improvements". On this basis at J87 he states, "I am not satisfied that in these respects members were misled or took into account immaterial considerations or acted irrationally". He does not address the critical issue for the purposes of ground 3, or apply the approach set out in the authorities above. In this regard, the judge erred in law. This again is independently sufficient to allow the appeal on this ground.

Relief

39. For the avoidance of doubt, the judge's conclusion at J93 in relation to relief concerns only conduct pre-dating the resolution in April 2023 and cannot, therefore, be relevant to this ground, which concerns the failure to publish the section 106 planning obligation following that resolution and prior to the grant of planning permission.

40. The alternative conclusion at J94-95 that permission should be refused pursuant to section 31(3C)-(3D) of the Senior Courts Act 1981 is predicated on the judge's findings and approach at J78 which

were wrong for the reasons already given.

41. Ground 1 is made out.

D. Ground of Appeal 2 (Ground 5 below): Highways Mitigation

42. The judge was wrong to dismiss Ground 5 below. The matters to which the Appellant argued the R1 had failed to have regard were obviously material, and the judge was wrong to find otherwise. In doing so, he made material errors of fact and wrongly relied upon the Council's *ex post facto* evidence.

Facts

43. The relevant facts in relation to this ground are not set out in any detail in the judgment below.

44. The Second Respondent's ("**R2**") Transport Assessment submitted in support of the application [SB/12/57] identified that two junctions being Junction 4 (Westridge Cross) and Junction 5 (Smallbrook Lane/ Great Preston Street) would be adversely impacted by traffic from the development.

45. Contrary to J6, nowhere does the Transport Assessment conclude that, unmitigated, the proposed development would not have any severe traffic impacts on the surrounding road network. On the contrary, at para. 5.23 it concluded that Junction 5 was already operating close to capacity, such that if the development were implemented it would be overcapacity [SB/12/60].

46. In light of that issue the Transport Assessment considered three scenarios involving potential highways improvements works, being (i) works to be undertaken as part of the Pennyfeathers development (see §5.44-5.46 [SB/12/61-2)); (ii) an alternative solution from WYG regarding junction 4 (§7.7-7.8 [SB/12/63-4]), and (iii) an alternative solution involving road widening (§7.8-7.13 [SB/12/64-5]).

47. Island Roads, the local highways authority and relevant statutory consultee, considered this assessment and initially sought further information from R2 [SB/13/66]. This was provided but ultimately Island Roads' final consultation response "raise[d] concerns" about the deliverability of the mitigation proposed [SB/13/93].

48. Concerns were also raised in relation to highways mitigation by the Ward Councillor [SB/14/94] and the owner of some of the land required to deliver the highways improvements being proposed who instructed their consultants, Hepburns, to write to the R1 objecting and stating "my clients have given no consent for their land to be used" [SB/15/97].

49. The approach to the consideration of this issue in the original officer's report was set out at §§ 6.148-6.152 [SB/18/152-3]. This suggested that "there are a number of other housing developments either consented or proposed in close proximity to the application site" and that mitigation works "would be funded by s.106 monies that have already been collected and future contributions/ direct works from nearby proposed developments" [SB/18/152 §6.150-6.151].

50. In particular, the report suggested that the R1 "has recently commissioned consultants to undertake a review of junction improvement options for junctions within the Ryde East area, in order to bring about a coherent range of highways improvement schemes" and stating that "the Highway Authority has confirmed that the review is scheduled to be completed in Autumn 2021" [SB/18/152 §6.150-6.151]. On this basis the report concluded that the scheme "would provide or contribute towards enhancements to the local highway infrastructure to ensure that the additional traffic resulting from the development would not have an impact on highway safety" [SB/18/167] §76.

51. In the updated officer's report, the advice from officers included that "the highway works have been approved as part of an alternative development and further permission has been approved for improvements to Westridge Cross in isolation" such that it could not be said that there was no prospect of them being achieved [SB/19/184-5]. The reference to "an alternative development" was a reference to the Pennyfeathers permission.

52. At the meeting of the Council's planning committee on 27 July 2021, one of the members of the committee (Cllr Drew) specifically raised as a reason why he would wish to refuse the application the potential "load on the [highway] network" [SB/20/195] §88. Officers responded by stating, "not only do you have a submission from Island Roads that it's satisfied with it – subject to the conditions and the 106 agreement, it won't have an impact on the network in relation to traffic generation" [SB/20/195-6] §90. That statement was materially misleading given that Island Roads had in fact "raised concerns" regarding the impact of the development in highways terms, notwithstanding the proposed mitigation [SB/13/93].

53. As explained in relation to Ground 1 above, the officer's report did not identify what contribution would be secured to pay for highways mitigation as part of the heads of terms for the section 106 planning obligation it set out [SB/18/167-168] §8.1. Rather, it simply referred generically to "a financial contribution". In breach of Article 40(3)(b) of the DMPO the section 106 was not published other otherwise consulted upon prior to the grant of permission. Rather, it was obtained by the Appellant's solicitors following pre-action correspondence relating to this litigation.

54. The section 106 planning obligation secures a highways contribution from the developer of £406,259. No contemporaneous explanation was provided for how that figure was reached.

55. An *ex post facto* witness statement (said by the judge at J84 to be "clarification and not a fundamental alteration or contradiction with contemporaneous evidence") was relied upon by the Council [SB/9/41].

56. This witness statement suggested that the officer had considered a number of matters not referred to in any of the primary documentation [SB/9/43-5]§§6-8 and §§10-12. It also referred to the works and costings being considered by the Ryde Transport Projects Board, which the Appellant contended does not exist [CB/1/8] §18; [SB/37/340], noting that a Freedom of Information Act request made by the Appellant to the R1 for any information relating to the Ryde Transport Projects Board resulted in a response that "there is no specific Ryde Transport Projects Board" and that the R1 did not hold any information in relation to the request [SB/38/357].

57. The Claimant therefore applied to cross-examine Ms Wilkinson on this evidence [SB/2/9ff], but permission to do so was refused on the grounds that cross-examination was not necessary to determine the grounds of claim fairly and justly [SB/3/23].

58. In any event, Ms Wilkinson's said in her witness statement that she had "established a per unit cost associated with the likely traffic generation from each development and split this between the schemes, based on the indicative cost of the works" [SB/9/44] §12.

59. The only document produced by Ms Wilkinson in support of her approach was a document which recorded that the local authority is "Minded to instruct the detailed design and implementation of a package of junction improvements in Ryde over the next three years" dated 26 February 2020 [SB/11/54]. This concluded "to facilitate detailed design and agreement of s106 contribution rates with developers feasibility options and budget construction estimates including statutory utility diversions and traffic management arrangements are required by the end of July 2020" [SB/11/546]. For the avoidance of doubt, the entirety of three year period referred to in that document had elapsed before the planning permission was granted.

60. Despite requests by the Appellant for any subsequent documentation relevant to this issue, none was provided by the Council. R2, through the witness statement of Mr Long, exhibited an email from the R1 dating from February 2022 suggesting the basis upon which the contribution of 406,359 had been calculated [SB/29/282]. It is apparent from that document that (even working simply from the figures presented) the Pennyfeathers development was intended to provide 42.95% of the funding required to deliver the highways mitigation works. As stated above, the Pennyfeathers permission had lapsed following refusal for the approval of reserved matters on 21 April 2023 (i.e. before the Committee meeting on 25 April 2023 and the grant of planning permission). No reference was ever made in any of the relevant R1 documents to the lapse of the Pennyfeathers permission, however.

The Judgment Below

61. In light of the above, the Appellant submitted to the judge below that there were obviously material considerations to which the Committee's attention should have been drawn at the meeting on 25 April 2023 and/or to which officers should have had regard when determining the highways mitigation contribution secured through the section 106 planning obligation:

    (a) The expiry of the Pennyfeathers permission, and its impact upon both the timing and the delivery of the highways mitigation works proposed, in circumstances where those costings were directly predicated upon the development permitted by the Pennyfeathers permission coming forward in accordance with that consent; and/or

    (b) The absence of progress since 2020 in relation to the review of highways improvement works, which Members were informed was anticipated to complete in Autumn 2021 (and which the LTP Works Notification said would be implemented by April 2023).

62. The judgment below considers this issue at J85-87. The judge simply does not engage with the legal errors identified:

    (a) J85 suggests that "a formal review is not the only way that [schemes for highway impact mitigation] could be done" and that "the approach which the officers took in calculating the amount of highway contribution was based upon costings of schemes of potential highways improvements".

    (b) J86 notes that in relation to Junction 4 in some modelled scenarios, it could operate with spare capacity absent highways mitigation works. That may be so, but it ignores the position in relation to Junction 5, where R2's development alone would result in the junction being over capacity, i.e. a severe highways impact.

    (c) J87 then simply asserts, "I am not satisfied that in these respects members were misled or took into account immaterial considerations or acted irrationally".

Submissions

63. The test for whether a decision maker has failed to have regard to a relevant material consideration or had regard to an immaterial consideration is one of rationality. The test is whether a matter which was obviously relevant was ignored or obviously irrelevant was taken into account (*FoTE* 116-119).

64. That test was met on the facts of this case, and that the judge was wrong to conclude otherwise. In particular:

(a) The judge was wrong to conclude that the expiry of the Pennyfeathers permission was not an obviously material consideration. His reasoning at J83 appears to be that "although the permission for the Pennyfeathers site has lapsed, it remains an allocated site". That was not a lawful approach:

i. The Pennyfeathers site is not an allocated site in the adopted development plan. The conclusion to the contrary is an objectively verifiable and 'established' factual error, which was not the fault of the Appellant, which was material to the Judge's conclusions, and which therefore satisfied the test in *E v SSHD* [2004] QB 1044 per Carnwath LJ (as he then was) at para. 66). The Pennyfeathers site is not, was not at the time of the hearing or judgment, and has never been, an allocated site in the adopted development plan (being the Island Plan Core Strategy). It is entirely unclear on what basis the judge concluded to the contrary. Whilst it is true that the Pennyfeathers land falls within the Ryde Key Regeneration Area – Area Action Plan (a very large area including all of Ryde and extending as far as Fishbourne, which is 3 miles to the west) it is not allocated for residential development.[3]

ii. In any event, Members were expressly being advised that the Pennyfeathers site was consented, and that that consent included consent for relevant junction improvement works. The calculation of the contribution was also based on the specific number of dwellings and other office, industrial and educational development proposed at Pennyfeathers [SB/29/282]. Even in her *ex post facto* evidence, Ms Wilkinson does not suggest she had regard to the fact that the Pennyfeathers permission had expired, the delay this would cause to delivery of the highways mitigation works, or the potential for less or different development to be brought forward on that site. This was, on any rational view, obviously material to the task of calculating the sum for the highways mitigation contribution to be included in the section 106 planning obligation.

(b) The absence of progress since 2020 was obviously material, not least given that the officers' reports presented to the committee both in July 2021 and March/ April 2023 specifically stated that the review was anticipated to complete in Autumn 2021, and did not suggest this deadline

[3] The site is proposed for allocation under policy HA119 of the draft Island Planning Strategy, which at the time of the hearing was subject to consultation pursuant to Regulation 19 of the Town and Country Planning (Local Planning) (England) Regulations 2012, and which had not (at the time of the judge's decision) been submitted to the Secretary of State for examination. There are numerous outstanding objections to the allocation, and applying para. 48 of the NPPF, the emerging allocation could attract only very limited weight.

has passed without action [SB/18/152] §6.150-6.151. Whilst it may be right that a review was not the only way to determine the appropriate highways mitigation contribution (J84), that is what Members were told had happened. The advice to them was incorrect in this regard. It was materially misleading.

(c) The judge was wrong to admit the evidence of Ms Wilkinson, and to rely on it as being clarification, without permitting the Appellant to cross-examine her on that assertion. As the Court of Appeal made clear in *R (Jedwell) v Denbighshire CC* [2016] PTSR 715 at paras. 54-55 (which the Appellant cited in support of its application to cross-examine) whether or not evidence is an account of the actual reasoning process at the time or a subsequent rationalisation is not a question for the local authority, but for the Court, upon which cross-examination is justified. As in *Jedwell*, the Appellant would have wished to ask Ms Wilkinson why there were no contemporaneous documents to support her assertions as to what she considered, why the only document she was able to provided dated from 2020 (more than a year before the first committee meeting considering the application), what progress had been made since then and why there was no evidence of this, why she made no reference in her evidence to the expiry of the Pennyfeathers permission, and critically how she was able to rely on presenting the works and costings to the Ryde Transport Projects Board when the R1 denied the existence of such a body and said it held no documents relevant to a request for any information about that Board. In those circumstances, no reasonable judge could rely upon Ms Wilkinson's evidence as providing a justification for the Council's approach without permitting her to be cross-examined on her evidence.

65. Without prejudice to the Appellant's position that R1 should not be permitted to advance the argument relied upon at para. 5 of Section 6 of its Respondent's Notice, that submission (developed at R1Sk para. 35) is without foundation:

(a) First, there is no evidential basis for R1's submission. There is no evidence that Members (or indeed officers) reached a judgment prior to the grant of permission that there was a realistic prospect of the Pennyfeathers development coming forward, notwithstanding the expiry of the planning permission for that development, let alone that in doing so they took into account the matters at R1Sk para. 35. The advice they received, and the evidence of Ms Wilkinson is, for the reasons already given directly to the contrary. R1's submission flies in the face of the contemporaneous evidence.

(b) Second, applying (by analogy and *mutatis mutandis)* the principles set out in *UTAG v Mayor of London* [2021] EWCA Civ 1197 at para. 125, it is obviously inappropriate for R1 to seek to

rewrite history, and in essence to advance a submission by reference to matters that were not drawn to the attention of members and which it would appear are in truth an attempt to rectify deficiencies in the advice given at the time in legal submissions (raised for the first time on appeal). This is a case where the attempt to rely upon matters not explained to members serves only to underline the legal deficiencies in the advice given at the time (see *UTAG* at para. 125(5) and *R (Watermead PC v Aylesbury Vale DC* [2018] PTSR 43 at paras. 35 and 36).

(c) Third, the points raised at R1Sk para. 35 are in any event unsustainable:

i. The reference to Table 5.38 and the fact that in the base + committed + proposed development + Pennyfeathers scenario there was no capacity issue misses the point. What matters is that *with* R2's development and *without* Pennyfeathers, there would be adverse (indeed severe adverse) impacts which otherwise would not arise. Put another way, if Pennyfeathers does not come forward, the proposed development would have a severe and unmitigated adverse impact on the highways network. It is, in part, for that reason that the expiry of the Pennyfeathers permission was obviously material.

ii. R1 fails to draw to the Court's attention that the composition of the planning committee which refused reserved matters for the Pennyfeathers site was materially different from the committee which resolved to grant planning permission for R2's development. This is a matter upon which the Appellant would have wished to adduce evidence if it had been raised below. In any event, there is a distinction (which R1 ignores) between refusing an application for reserved matters and appreciating that the effect of that is that the permission has expired, and the relevance of that in determining R2's application for planning permission. None of that was addressed, as it should have been, in the advice given to members.

iii. At the time the decision was taken the Plan had not been submitted for examination. No advice was given to members on the emerging allocation, its relevance, or the very limited weight that such an emerging allocation can be given (applying NPPF para. 48). It is obviously inappropriate to seek to draw the court into the forbidden territory of reaching planning judgments on these matters in circumstances where no advice was given to members on them, and there is no evidence that anyone at R1 has ever formed a judgment in relation to them prior to the production of the Respondent's Notice. Had the matter been raised below, the Appellant would have presented evidence in relation to it (for example with reference to the outstanding objections to the allocation).

iv. The Appellant accepts that planning permission was granted for junction improvement

works at Westridge Cross, but no advice was given as to how those works would be funded, or the likelihood of that permission being implemented, in the absence of the Pennyfeathers development, and in circumstances where the application for those works was made on the basis of supporting the Pennyfeathers development by the developer for Pennyfeathers. These (again) are matters upon which further evidence would have been required.

v. R1Sk para. 35(e) is misleading. The Island Roads representation did not accept that highways mitigation was not required until occupation of the 100th dwelling (for J4) and 400th dwelling (for J5). On the contrary it questioned that assumption and sought "further information as to how this figure has been concluded"[SB/13/82]. In any event, there is (again) no evidence that an assessment was made as to how quickly those 100/400 units would come forward, and the prospect (in the absence of an extant planning permission) of the Pennyfeathers development coming forward in advance of those impacts.

Relief

66. As with Ground 1, the judge's conclusions at J93 on relief do not apply to this ground, since the criticisms made relate to the advice and actions of officers at and after the committee meeting in April 2023. The Judge's application of sections 31(3C-3D) of the Senior Courts Act 1981 at J94-95 was premised upon the above errors and is similarly vitiated by them.

67. Moreover, notwithstanding that at J62 the judge expressly states that he is satisfied his conclusion were based on points properly pleaded, neither of the respondents had in fact pleaded that relief should be refused under section 31 of the Senior Courts Act 1981 in relation to this ground (noting it *had* been pleaded in relation to other grounds).[4] The first time the point was raised was in the Council's skeleton argument, to which the Appellant responded by applying to exclude the argument. The judge did not permit the Appellant to develop its submissions pursuant to that application on the basis unpleaded points could not be pursued and the only issue was what had been pleaded, and yet purported in his judgment expressly to accept the submissions of the Respondents on this point (see J95). That simply was not a procedurally fair approach.

68. Ground 2 is made out.

E. <u>Ground of Appeal 3 (Ground 2 below): Apparent Bias</u>

69. The judge erred in law in holding that the actions of Cllr Brodie did not create an appearance of bias.

[4] See R1 SGR §40–46 [CB/11/155-6] and R2 SGR §31-34 [CB/12/187-8]

Law

70. The test for apparent bias is well-established; namely whether the relevant circumstances "would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased" (*R (United Cabbies Group (London) Ltd) v Westminster Magistrates' Court* [2019] EWHC 409 (Admin) per Lord Burnett CJ at para. 36 with reference to the well-known judgment of Lord Hope in *Porter v Magill* [2001] UKHL 68, [2002] 2 AC 357, at para. 103).

71. Answering this question involves a two-stage process (*Bubbles & Wine v Lusha* [2018] EWCA Civ 468 at para. 17 per Legatt LJ (as he then was)): (1) Ascertaining all the relevant circumstances; and (2) Asking whether those circumstances would lead a fair-minded and informed observer to conclude there was a real possibility of bias. The relevant facts fall to be determined on the balance of probability at the first stage, before then asking whether on the basis of those fact the fair minded and informed observer would conclude there was a real possibility of bias (see *Porter v Magill* at paras. 102-3).

72. A fair minded and informed observer is presumed to have "full knowledge of the material facts", such facts as are found by the Court on the evidence which are not limited to those in the public domain (see *Virdi v Law Society* [2010] 1 WLR 2840 at paras. 37 – 44).

73. The facts and context are critical, with each case turning on "an intense focus on the essential facts of the case" (*Bubbles & Wine Ltd* at para. 18). It is necessary to look beyond pecuniary or personal interests, to consider whether the fair-minded and informed observer would conclude that there was a real possibility of bias in the sense that the decision was approached without impartial consideration of all relevant issues (*Georgiou v London Borough of Enfield* [2004] EWHC 779 (Admin) at para. 31). Public perception of the possibility of bias is the key (*Lawal v Northern Spirit* [2004] 1 All ER 187 at 193F-H, 196C-D).

Facts

74. In support of its submission that Cllr Brodie's actions created an appearance of bias, the Appellant relied in particular upon the facts that:

    (a) Cllr Brodie had refused to permit Cllr Churchman to speak at the committee meeting considering the application unless she could speak in support of this [SB/25/265]; [SB/4/24], which the judge appears to accept is what occurred (J16 and J72).

    (b) Evidence that Cllr Brodie had sought to manipulate other councillors who he believed would vote in support of the application into not attending the committee meeting, including:

i. Cllr Adams, whose evidence was that Cllr Brodie had "coerced" him and repeatedly told him "very forcefully" that he believed Cllr Adams was predetermined [SB/5/25]; [SB/26/267]. Indeed, Cllr Brodie even provided Cllr Adams with a specific form of words he suggested he should use to recuse himself [SB/28/277]; [SB/27/271]. When Cllr Adams sought to raise Cllr Brodie's conduct at a subsequent committee meeting, Cllr Brodie sought to have Cllr Adams excluded from that meeting, including by seeking to raise a motion to that effect [SB/5/25]; [SB/24/273]; [SB/27/268-9];[SB/8/38] §16. Again this appears to have been accepted by the judge (J15 and J72).

ii. Cllrs Medland and Jarman, who both say Cllr Brodie approached them, sought on more than one occasion to discourage them from attending the meeting because he believed they would vote in favour of the motion, and in doing so 'ran through' how he believed each member would vote [SB/6/26].[5] Again, this appears to have been accepted by the judge (J17).

(c) The fact that Cllr Brodie improperly excluded Cllr Price from attending the committee meeting in July 2021. The judge accepts both that this happened, as a matter of fact, and that it was procedurally improper as a matter of law (J65).

(d) The fact that Cllr Brodie was involved with the exclusion of Cllr Lilley, and that the evidence of his witness statement was that he was not, but that this was wholly irreconcilable with the contemporaneous documents disclosed by the R1 following the Court's order for specific disclosure.[6] Again, the judge appears to accept this occurred as a matter of fact, or at least to proceed on that basis (see J66 "even if…it is likely that he had some hand in the advice").

(e) Cllr Brodie's approach at the committee meeting, which was to resist any proposed reasons for granting permission, to use a manner an tone described variously as "dismissive" and "belittling" (J21), to seek initially to propose a second vote on a motion which had failed (contrary to the Council's constitution) and upon realising this was impossible simply to amend the motion by increasing the level of affordable housing from 70% to 71%), and by securing a passing of that motion by exercising his casting vote as acting chair [SB/21/204-5].

(f) Cllr Brodie's subsequent behaviour, including his bullying correspondence to the Ward Councillor, Cllr Lilley, in which he described Cllr Lilley as "cowardly" and "pathetic" (accepted by the judge at J33).

[5] Cf the witness statement of Cllr Medland below High Court supplementary bundle p.82.
[6] See his witness statement at SB/8/35 §4' cf SB/16/100 and SB/28/280

(g) Cllr Brodie's concern to avoid a claim for judicial review when the propriety of his actions was challenged, but his vote against reconsideration of the matter when he believed a claim for judicial review to be out of time [SB/28/280] and [SB/30/287] §47.

(h) The obvious lack of credibility in relation to the witness evidence of Cllr Brodie, which was false and inconsistent with the contemporaneous documents subsequently disclosed, suggesting for example:

i. That "the first [he] knew about [the allegation of predetermination against Cllr Lilley] was when Cllr Lilley rang [him] up on a Thursday or Friday before the Planning Committee of 27 July 2021" [SB/8/35] §5, when the contemporaneous documents demonstrate he was informed of this by officers before that, as appears to be accepted by the judge at J66 [SB/16/100] [SB/28/280]; and

ii. That "[he] did not exclude Cllr Price from the meeting" [SB/8/37] §11 when the contemporaneous email showed him saying, "After discussion with staff I have decided that I cannot permit you to participate in the Westacre Park application's consideration by Committee tomorrow"[SB/17/101]. The disclosure of this email caused the R1 to abandon its pleaded case on this point, and meant the judge accepted impropriety in this regard (J65) (R1 SGR §11 [CB/11/150] and R1 skeleton §13(a) [CB/8/99]).

(i) The failure by Cllr Brodie to disclose relevant documents, which obviously existed given they were referred to in other contemporaneous evidence (e.g. the email containing the form of words sent to Cllr Jarman) [SB/28/276] The judge refers to this at J72. The issue arose in circumstances where an order for specific disclosure had been made requiring the disclosure of all documents "relating to the involvement in the application of Councillors Lilley, Price, Brodey [sic], and Mr Chris Potter"[CB/10/134] and where (notwithstanding the Appellant's complaints and contrary to the authority in *Square Global Limited v Julien Leonard* [2020] EWHC 1008 (QB) at paras. 195 – 200) Cllr Brodie had been permitted himself to search his emails and identify relevant documents [CB/3/22-23].

Submissions

75. The judge did not permit the Appellant to cross-examine Cllr Brodie, despite its application to do so in light of the inconsistencies and lacuna identified above [CB/3/22-23]. Rather, the approach the judge appears to have taken was to dismiss this ground on the basis that, even taking the Appellant's case on the facts at its highest, there was no appearance of bias. That is clear from J72 where he said: "whatever view is taken of this conduct, in my judgment it does not support a finding of apparent bias".

76. That was wrong. If the correct test is applied, the facts advanced by the Appellant necessitated a finding of apparent bias.

77. At J69 the judge said, "The classic basis for a finding of apparent bias is where there is a personal or pecuniary interest in the outcome. That is not suggested here. Instead what is relied upon is what occurred in the run up and during the July 2021 meeting".

78. It is well established, however, that the test for an appearance of bias requires the court "to look beyond pecuniary or personal interests and to consider in addition whether, from the point of view of the fair-minded and informed observer, there was a real possibility that the planning committee or some of its members were biased in the sense of approaching the decision… without impartial consideration of all relevant planning issues" (see *Georgiou* at para. 31).

79. The conduct identified above, and apparently accepted by the judge, creates a clear picture of partiality by Cllr Brodie. To take just the most egregious example, Cllr Brodie excluded another councillor from speaking at the meeting unless she agreed to speak in favour of the grant of planning permission (J16) and then secured the grant of planning permission at that meeting by seeking to reposit a motion which had been dismissed, and using his casting vote in favour of the application (J31). Little if any circumspection on the part of the fair-minded and informed observer is required. The conduct identified would create in the mind of any reasonable and fair-minded observer the impression at least that there was a real possibility that Cllr Brodie was biased.

Relief

80. For the avoidance of doubt, and contrary to J69, the conduct relied upon by the Appellant as establishing the appearance of Cllr Brodie's bias extended well beyond the July 2021 meeting (as is apparent from J72 in which the judge specifically refers to subsequent conduct being relied upon by the Appellant). Cllr Brodie continued to be involved with the consideration of the application throughout, and voted in favour of the grant of permission at the final committee meeting in April 2023, where the vote passed by one (see J44). The finding at J93 is simply inapplicable to this ground.

81. Ground 3 is made out.

F. <u>Ground of Appeal 4 (Ground 1 Below): Relief in Relation to Procedural Impropriety</u>

82. Whilst the judge was correct to find at J65 that there was procedural impropriety in the exclusion by Cllr Lilley of Cllr Price from the meeting in July 2021, the judge's approach to the grant of relief on that ground was wrong in law.

Procedural impropriety

83. R1 argues that the judge's finding that Cllr Price had been unlawfully excluded from the July 2021 meeting was wrong. This submission should be rejected, and the judge's finding on that point upheld.

84. The Appellant's submissions below in respect of Cllr Price are at paragraphs 8-16 of its skeleton below [CB/7/72-74]. The material facts in relation to Cllr Price are that:

(a) He was a member of the composition of the committee which was due to determine the Application at the July 2021 meeting;

(b) He attended the lengthy site visit prior to that meeting, but had to leave before it was formally concluded, missing approximately 20 minutes of the visit [CB/13/210] §14(3);

(c) He subsequently requested whether or not he could carry out a further site visit, but was told he could not;

(d) Subsequently, on 26 July 2021, Cllr Brodie wrote to Cllr Price, stating "I have decided that I cannot permit you to participate in the Westacre Park applications consideration by Committee" [SB/17/101];

(e) Had he attended the July 2021 meeting, Cllr Price would have voted against the application [SB/34/327] §119;

(f) Cllr Brodie accepted in contemporaneous documentation that he had been wrong to exclude Cllr Price and that had he been in attendance at the July 2021 the outcome could have been different [SB/28/280];

(g) Nevertheless in these proceedings, R1 and Cllr Brodie (in witness evidence endorsed with a statement of truth) denied until the substantive hearing that Cllr Brodie had made any such decision, before conceding that he had.

85. R1's submissions at R1Sk §§49–54 do not establish that the judge was wrong find that exclusion unlawful. Whilst there is a dispute about when R1 adopted a new constitution (cf SFG §10 [CB/72]), it is not disputed that at all material times the words quoted at R1Sk para. 50 appeared in its constitution. R1 is wrong to argue, however, that the effect of that provision was to entitle Cllr Brodie to exclude Cllr Price from the meeting. Having attended the site visit (but left early) it was for Cllr Price to determine whether or not to participate in the Committee meeting, not for Cllr Brodie to decide for him. The question is not one of *Wednesbury* reasonableness, but one of *vires* and the judge below was right that Cllr Brodie's decision was not within his powers.

Relief

86. At J93 the judge accepted that members were advised that the July 2021 resolution was a material consideration. He accepted, in those circumstances, that it was a matter for them individually as to the breadth of the debate, and that some of those who had previously voted in favour of the application were content to confine their contribution to the 'new' issue of curlew habitat mitigation (J93).

87. He, rightly, did not find that it was highly likely the outcome would not have been substantially different as a result of the error identified at J65, or refuse permission on this aspect of Ground 1, confining his findings and refusal of permission on this issue to "the length of the 21 July 2021 meeting" (i.e. the third issue under ground 1 below, addressed at J67, upon which there is no appeal). That conclusion was unavoidable given that: (1) The test under section 31(2A-3D) of the Senior Courts Act 1981 is inherently backward looking, requiring "an evaluation of the counter-factual world in which the identified unlawful conduct by the public authority is assumed not to have occurred" (see *R (Public and Commercial Services Union v Minister for Cabinet Office* [2017] EWHC 1787 (Admin) per Sales LJ (as he then was) at para. 89); (2) Cllr Price had openly stated on more than one occasion that having sat through the committee debate he would have voted against the grant of planning permission, such that the outcome of a counter-factual situation in which Cllr Price was permitted to vote on the application was known [SB/274]; [SB/327] §119.

88. The only basis upon which the judge refused relief, therefore, was that in April 2023 "the officer's report was presented in detail, with a recommendation that the application should be granted" and that this "was a proper process, with which [the] court should not interfere".

89. In taking that approach, the judge erred in law. Specifically, he failed to recognise that by taking into account the previous resolution as a material consideration (as the judge recognised members did, having been advised to do so by officers (see J40 and J93)) without being advised that the resolution was vitiated by procedural impropriety, members erred in law. The illegality which infected the July 2021 resolution also infected the April 2023 resolution since:

    (a) Having found that the July 2021 resolution was the result of procedural impropriety, the judge should have recognised that it was of no legal effect and incapable of being a relevant material consideration (see *Hoffman-La Roche v Secretary of State for Trade and Industry* [1975] AC 295 at 365), such that in being advised to take it into account members were advised to have regard to immaterial considerations; and/or

    (b) Members were not advised that the July 2021 resolution was the result of any procedural

impropriety. On the contrary, they were advised that that resolution had been made entirely lawfully with Cllr Brodie referring to the Chief Executive having "sought legal advice from a QC… all of which has been shared with every Member of this Committee and has been disclosed" concluding "that this was a safe decision that was entirely defendable at JR" and that "any procedural concerns… would be defendable" [SB/34/286] §47; [SB/28/277]. Had they been aware that the previous resolution was not, in fact, taken on a proper procedural basis, but rather was made unlawfully, that at least might have been capable of reducing the weight given to that previous resolution, or expanding the issues which members wished to debate. That alone is sufficient to vitiate the conclusion reached in April 2023, given that members were expressly advised the previous resolution was a material consideration.

90. Ground 4 is made out.

G. Conclusion

91. For all these reasons, the Appellant respectfully requests that the Appeal be allowed and seeks its costs of this appeal and in the High Court below.

CHARLES STREETEN
BRENDAN BRETT
F.T.B.

16 January2025
[Bundle references updated 17 March 2025]