IN THE COURT OF APPEAL (CIVIL DIVISION) CA-2025-002031
ON APPEAL FROM THE HIGH COURT OF JUSTICE
PLANNING COURT (MR JUSTICE JAY [2025] EWHC 1852 (Admin))

BETWEEN:

GHL (EAGLE WHARF ROAD) LTD

Appellant

-and-

(1) HOLBORN STUDIOS LIMITED
(2) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT
(3) LONDON BOROUGH OF HACKNEY

Respondents

APPEAL REPLACEMENT SKELETON ARGUMENT
On behalf of the Appellant – 19.11.25

References in the form [CB/X/Y] are to Tab X, Page Y of the Core Bundle and references in the form [SB/X/Y] to the Supplementary Bundle.

INTRODUCTION

1. The Appellant appeals against the Order of Mr. Justice Jay which allowed the First Respondent's claim under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") against the decision of an Inspector appointed by the Second Respondent, in a decision letter dated 29th July 2024 ("the DL") **[CB/C21/320-359]**, to grant planning permission ("the Planning Permission") for a mixed-use scheme including 5,591 sqm of commercial floorspace and 50 residential units ("the Development") at 49-50 Holborn Studios, Eagle Wharf Road, Hackney, London, N1 7ED ("the Site").

2. There are three grounds of appeal:

   (1) Ground One: the Judge was wrong to find that the Inspector's reasons were "wholly unclear". Not only was this not a pleaded ground of challenge, but the Judge failed to apply well established principles in assessing the adequacy of the Inspector's reasoning. Applying those principles, the Inspector's reasoning was entirely clear and lawful.

(2) Ground Two: the Judge fell into error in his interpretation of the relevant policies in this case. The Inspector was entitled as a matter of judgment to consider re-provision both in terms of the existing high-end photographic studio (the Judge's 'Approach 2'), and also the various ancillary cultural uses at the Site, which fluctuated in terms of their exact nature (the Judge's 'Approach 3'). In short, contrary to the Judge's analysis, it was not impermissible for the Inspector to adopt a mixture of the two approaches. Indeed, that was the only "approach" that accurately reflected the existing use of the Site.

(3) Ground Three: the Judge made several errors in concluding that the Inspector's conclusions were irrational and failed to apply the high threshold required when considering rationality challenges in the planning context. It was open to the Inspector (as a matter of judgment) to find that the proposed basement alone would comprise acceptable re-provision, in circumstances where she had found that the basement would provide suitable space for a high-end photographic studio (a conclusion that was expressly endorsed by the Judge as not being irrational). Whilst the basement of itself would not provide space for the various ancillary cultural uses at the Site, this did not preclude a judgment being reached that there was acceptable re-provision.

3. The local planning authority ("the LPA") for the Site is the Third Respondent, who has taken no part in the proceedings to date. The current leasehold owner of nearly all of the Site is the First Respondent (the Claimant below) who will be referred to as Holborn Studios Ltd ("HSL"). HSL leases the Site from the Appellant, who is the freeholder of the Site and the applicant for planning permission. Under those leases, HSL operates a photographic studio from the Site, and also licenses other parts of the Site to a variety of other businesses.

BACKGROUND

4. The Development comprises an employment-led, mixed-use redevelopment of previously developed land within the London Borough of Hackney, including replacement floorspace for cultural uses. The full description of development is as follows:

"*partial demolition of existing buildings, retention of 3 storey building and former industrial chimney and redevelopment of the site to provide a mixed use scheme comprising blocks of 2 to 7 storeys and accommodating 5,591 sqm of commercial floorspace (Use Class Eg[i]) at basement, ground, first, second, third, fourth and fifth floor level, 50 residential units at part first, part second, third, fourth, fifth and sixth floor levels (comprising 23 x 1 bed, 17 x 2 bed, 8 x 3 bed, 2 x 4 bed) as well as 127 sqm café floorspace (Use Class E[b]) at ground floor level, landscaped communal gardens, pedestrian link route to the Regents Canal and other associated works'*

5. The Development seeks to re-provide space that would be suitable for HSL's studios (or another high-end photographic studio) within the proposed basement.

6. In order to understand the issues raised by the appeal, it is necessary to understand the existing floorspace at the Site. The Site as a whole comprises a series of 19th and 20th Century brick-built warehouses. J/3[1] **[CB/C9/94]** explains the nature of this existing space as follows:

"The existing Site, measured in terms of the gross internal area, comprises 4,784 sq. m. of employment floorspace and 251 sq. m. for the café. My attention has not been drawn to any reference in the bundles which specifies the surface area of the eight studios currently occupied by Holborn Studios or indeed the surface area in occupation by any other entity."

7. Importantly, this existing "employment floorspace" can be divided into two categories: (i) the existing HSL photographic studios; and (ii) the remaining space.

8. Turning first to the existing HSL studios: whilst there was no evidence at the Inquiry as to the exact floorspace of the studios, the Appellant's architect gave evidence that *"the spaces used by R6P Holborn Studios fit approximately into the appeal scheme basement and provide a comparable studio arrangement."* This evidence was before the Judge but is not referenced in the Judgment.

9. Indeed, the Judge appears to have proceeded on the erroneous assumption that the quantum of floorspace in the proposed basement as part of the Development was

[1] Throughout, references to the Judgment below are in the form J/x.

inadequate to acceptably replicate the HSL studios.[2] There is simply no evidential basis for that assumption, which is contrary to the evidence that was before the Inspector.

10. As for the existing remaining space at the Site, this comprises several businesses. The majority fall within the "cultural" sector, but there are a number which are not in "cultural" use(s). These businesses include some additional individual photographic studios (not operated by HSL), an architect's practice, an environmental consultancy, an osteopath, a modelling agency, fundraising strategists and two creative agencies.

11. Beyond the HSL studios (which have remained in the same use for the past 35 years), the exact nature of the other ancillary uses at the Site has fluctuated over time. Further, as the Site does not appear to operate pursuant to any planning permission, there are no planning controls which require these ancillary uses on the wider Site to be retained in a "cultural" use, still less a particular type of cultural use.

12. The proposed re-development of the Site has been recommended for approval by the LPA's officers on three occasions; twice that recommendation was supported by the LPA's Planning Committee and resulted in the grant of planning permission (in 2016 and 2020). On both occasions, HSL successfully challenged the grant of planning permission by way of judicial review due to procedural errors.[3]

13. The planning application was subsequently amended and brought back to the LPA's planning sub-committee on 10th March 2022, again with an officer recommendation for approval. The LPA's committee resolved to refuse planning permission. The first reason for refusal alleged that:

"The proposed development would result in the loss of the existing photographic studio use, which is considered to be a cultural facility in use by creative industries, contrary to the objectives of Policy HC5 (Supporting London's Cultural and Creative industries) of the London Plan 2021, and Policy LP10 (Arts, Culture and Entertainment Facilities) of the Hackney Local Plan 2020. The loss of the existing facility is not outweighed by the

[2] See, for example, J/69(4) – which suggests that there was *"not enough"* reprovision for a photographic studio in the proposed basement of the Development.
[3] R. (Holborn Studios) v London Borough of Hackney [2017] EWHC 2823 (Admin) and R. (Holborn Studios) v London Borough of Hackney [2020] EWHC 1509 (Admin).

potential benefits of the proposed development which is not considered to deliver sufficient wider planning benefits for the community"

14. The Appellant appealed the decision, and the appeal was heard at an Inquiry. HSL appeared at the Inquiry as a Rule 6 Party. The Inquiry was carried out by an experienced Inspector who had sat on the panel of three Inspectors who had examined the London Plan. The Inspector heard evidence from a number of witnesses in respect of the first reason for refusal. This evidence included the following:

(1) <u>On behalf of HSL</u>:

a. Witness evidence from HSL which alleged that the provision of cultural space in the Development would be *"unusable"* **[SB/S27/160]**;

b. Planning evidence which stated that the basement could not be used as a photography studio and that the Development would therefore not comply with Policies HC5 of the London Plan (2021) **[SB/S25/139-144]** and LP10 of the Hackney Local Plan (2020) **[SB/S26/145-157]**; and

c. Evidence from Bill Ling, a fashion photographer, who argued that the proposed plans for the basement did not provide essential requirements for a photographic studio **[SB/S29/202-203]**.

This evidence focussed largely (if not exclusively) on the acceptability of the proposed basement to re-provide a high-end photographic studio. In this respect, as will be apparent from a review of the evidence, the focus was very much on the useability of the space, rather than its quantum.

(2) <u>On behalf of the Appellant</u>:

a. Evidence from the scheme architect, Mr. Stephen Davy. This included a section on how the design of the Development sought to provide for cultural use **[SB/S31/216-230]**; and

b. Evidence from a Chartered Surveyor, John Stephenson. This further explained how the basement had been designed with photographic studios in mind. In particular, Mr. Stephenson explained how the Development would create the necessary 'shell' to meet the requirements of top end photographic studios (paras 4.6.3-4) **[SB/S32/231-247]**.

15. In addition, a statement of common ground was agreed between the Appellant and the Third Respondent. This recorded as follows:

> *"It is agreed that at basement level, the commercial floorspace has been designed to be suitable for occupation as film/photographic studios, as well as other cultural industries. A feature of the design has been to include high ceilings at basement level and a large goods lift, to ensure the floorspace at this level would be attractive to a number of cultural uses"* (para 8.15) **[SB/S21/83]**;
>
> *"It is agreed that the new floorspace would be of a high quality and flexible"* (8.21) **[SB/S21/84]**;
>
> "*Without prejudice to the LPA's reason for refusal, it is agreed that while the particular occupational requirements of Holborn Studios photography studio may not be fully accommodated by the new floorspace, the space is considered to be of a design standard where it could be occupied by other potential occupiers in the E(g)[i] use class, including creative uses such as film and photography studios and more conventional office uses (which are also present upon the site).*" (8.25) **[SB/S21/84]**; and
>
> *"It is agreed that the affordable workspace would be suitable for occupiers within the creative sector and would be provided at a genuine discount against market rates.*" (8.28) **[SB/S21/85]**.

16. After hearing detailed evidence and submissions over 15 sitting days, and carrying out two site visits, the Inspector issued her decision letter on 29th July 2024 ("the DL") **[CB/C21/320-359]**. At this stage, the following can be noted:

(1) The main issues are set out at DL/29 **[CB/C21/324]**. These included: "*The effect of the appeal proposal on the provision of cultural facilities in use by creative industries"*. The Inspector considered this issue at DL/30-47;

(2) In terms of the existing uses at the Site:

a. The HSL photographic studios were *"of more than local renown and possibly of national or international significance"* (DL/31) **[CB/C21/324]**; and

b. The Site also included space licensed by HSL to other users – described by the Inspector as being *"ancillary space"* (DL/32) **[CB/C21/325]**. As she explained at DL/30 **[CB/C21/324]**:

"whilst some space is leased to other non-creative users such as architects, an osteopath, engineering consultants, the majority is in use either in the photographic or film industries or other creative industries"

(3) The Inspector concluded that this existing use *"falls within the definition of a cultural facility within the meaning of London Plan policy HC5"* and could be described as being a *"creative hub" "in as much as the existing use brings together people working in cultural or creative industries"* (DL/32-33) **[CB/C21/325]**;

(4) As the Inspector explained at DL/34 **[CB/C21/325]**, Policy LP10 of the Hackney Local Plan indicates how the protection sought by London Plan Policy HC5 will be achieved in Hackney. It:

"requires that development involving the loss of arts, culture and entertainment facilities will be resisted, unless re-provided in accordance with other policy requirements. Given other policy requirements that will not necessarily require a like for like replacement, and does not extend to a particular specific or bespoke use operated by a specific user. However, reprovision in this case does infer something that would enable the cultural facility/cultural hub to still function as such"

(5) The reprovision of the existing studios and ancillary space would be mainly in the proposed basement (DL/36) **[CB/C21/325]**. Based on the evidence before her, she found at DL/38 **[CB/C21/325]**:

"*the basement internal arrangements necessary to accommodate the appeal site's cultural facility could include adequate floor to ceiling heights, taking account of the need for ventilation, other services, an adequate slab to provide adequate column-less spaces and floor and ceiling finishes*"

(6) Therefore, she found that whilst the basement space may not be appropriate for HSL's particular business, it could be used as a photographic studio by a different operator: see DL/37-41 **[CB/C21/325-326]**;

(7) Further, there was an opportunity for the other existing ancillary cultural/creative occupiers to use the proposed space at ground and first floor – albeit that the use of this space was not formally restricted to such uses: DL/43 **[CB/C21/326]**. In this respect, whilst this floorspace was not designed as a 'cultural facility' there is no reason why an internal fit out could not reflect the bespoke requirements of an end user (DL/44);

(8) Overall, however, the basement accommodation alone could acceptably re-provide for the existing cultural facility/creative hub at the Site (DL/45) **[CB/C21/327]**;

(9) On balance, therefore: "*the proposed development would not adversely affect the provision of cultural facilities in use by creative industries. It would therefore accord with London Plan policy H5 and Local Plan policy LP10"* (DL/47) **[CB/C21/327]**; and

(10) Having considered the other main issues, the Inspector found that the Development was entirely policy compliant in all other respects. This reasoning on the other main issues has either not been challenged by HSL or was upheld in the Judgment. Accordingly, planning permission was granted by the Inspector.

LEGAL AND POLICY CONTEXT

Policy Framework

17. The relevant policies for the purposes of the Inspector's first main issue were as follows:

(1) Policy HC5 of the London Plan (2021) **[SB/S25/139-144]**. This states:

> *"A. The continued growth and evolution of London's diverse cultural facilities and creative industries is supported. Development Plans and development proposals should:*
>
> *1) Protect existing cultural venues, facilities and uses where appropriate"*

(2) Policy LP10 of the Hackney Local Plan (2020) **[SB/S26/145-157]**. This provides as follows:

"Development involving the loss of arts, culture and entertainment facilities will be resisted, unless re-provided in accordance with other policy requirements"

18. In order to understand both the Judgment and the Judge's criticisms of the Inspector, it is necessary to reference here the Judge's three potential approaches to the interpretation and/or application of these policies. As he explained at J/55-58 **[CB/C9/108]**:

"55. ...Logically, there are three possibilities.

56. Approach 1 is that "reprovision" means that the proposal should be suitable for Holborn Studios' specific requirements…

57. Approach 2 is that "reprovision" means any photographic studio that could properly be described as a cultural facility. Some more basic photographic studios could not be…

58. Approach 3 is that "reprovision" means any cultural facility not limited to photographic studios…"

19. The Judge also found (at J/73) **[CB/C9/113]** that:

"…Approach 2 is only the correct approach in the circumstances of this particular case because, in light of the Inspector's findings, it reflects the nature of the cultural activities being conducted at present."

20. For reasons explained further under Ground Two below, this approach over-complicates an essentially straightforward policy question. The policy requires a decision-maker to identify the nature of the existing cultural use/facility, and then to consider whether the proposed development "re-provides" this facility.

21. Where, as here, the existing use comprises a primary use (a high-end photographic studio), together with ancillary space (in a variety of different uses), the existing use cannot be described as falling either into "Approach 2" or "Approach 3".

22. Further, in terms of re-provision, there are no benchmarks or thresholds for what amounts to acceptable "re-provision" in the policies. In particular, the policies do not require reprovision which is at least equivalent to that lost in both quantity and quality. Whether any proposed re-provision would be acceptable is a matter of planning judgment for the decision-maker.

23. Therefore, whilst a decision-maker must almost certainly have regard to both the quantity and quality of re-provision, they are entitled (as a matter of judgment and within the bounds of rationality) to take an overall holistic view and find that there is acceptable re-provision, even in circumstances where there is a reduction in the overall quantum of cultural floorspace that is re-provided.

Legal Framework

24. The principles upon which the Court will act in challenges of this nature are well known, but are worth emphasising in light of the Judgment. Inspector's decisions *"should not be laboriously dissected in an effort to find fault"*: St Modwen Developments Ltd v Secretary of State for Communities and Local Government [2018] P.T.S.R. 746 at [7], per Lindblom LJ. As such:

    (1) The exercise of planning judgment and the weight to be given to a material consideration are matters for the decision-maker and not for the Court: Seddon Properties v Secretary of State for the Environment (1981) 42 P & CR 26, at 28 and Tesco v Secretary of State for the Environment [1995] 1 W.L.R 759, at 780. In the latter case, Lord Hoffmann said, *"If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State";*

    (2) Therefore, the exercise of a planning judgment can only be interfered with by the Court if it is Wednesbury unreasonable. That is, *"if the court considers that no reasonable person in the position of the Secretary of State, properly directing himself on the relevant material, could have reached the conclusion that he did reach…"* see Seddon at p. 26;

    (3) The Courts should respect the expertise of the specialist planning inspectors and start at least from the presumption that they will have understood the policy framework correctly: see Suffolk Coastal District Council v Hopkins Homes Ltd [2017] 1 W.L.R. 1865 at [25], per Lord Carnwath;

(4) An Inspector's decision letter must be read: (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; and (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Clarke Homes v Secretary of State for the Environment (1993) 66 P. & C.R. 263 and South Somerset DC v Secretary of State for the Environment (1993) 66 P. & C.R. 83; and

(5) So far as reasons are concerned: *"the reasons need refer only to the main issues in the dispute, not to every material consideration"* (South Bucks v Porter [2004] 1 W.L.R. 1953 at [36]). What is required is *"an adequate explanation of the ultimate decision":* see Dover District Council v CPRE Kent [2018] 1 W.L.R. 108 at [41] and the reasoning need only explain the conclusion reached on each principal important controversial issue (South Bucks at [34]). There is also no duty to provide *"reasons for reasons"*: see Keep Bourne End Green v Buckinghamshire Council [2021] J.P.L. 181 at [168].

THE CLAIM AND THE JUDGMENT BELOW

25. The DL was challenged on five grounds, which are summarised at J/17 **[CB/C9/98-99]**.

26. The claim was ultimately successful on Ground 1(b), namely that: *"given the Inspector's findings and the incontrovertible circumstances, it was not rational to find that the scheme amounted to the "reprovision" of the cultural facility, as required by policy, in particular given the permitted use, design and the lack of control of the use of the building."*

27. Permission to bring this ground had originally been refused on the papers, but was considered with the other grounds at the substantive hearing on a "rolled up" basis. At this stage, it can be noted that none of the grounds (including Ground 1(b)) challenged the adequacy of the Inspector's reasoning or her interpretation of Policy HC5 of the London Plan and Policy LP10 of the Hackney Local Plan.

28. The Judge's conclusions are considered in detail below. However, they are summarised at J/70 **[CB/C9/112]** in the following terms:

"the Inspector's approach cannot be supported, is internally inconsistent, is irrational, and that her reasoning is wholly unclear. At the very least, it was incumbent on the Inspector to explain how and why the basement alone could constitute acceptable "reprovision"."

GROUNDS OF APPEAL

Ground One: Reasons

29. The logical starting point is the Judge's conclusion that the Inspector's reasoning is *"internally inconsistent"* and *"wholly unclear"* (J/70) **[CB/C9/112]**. This conclusion needs to be placed in context. Although unacknowledged in the Judgment, there was in fact no pleaded "reasons" challenge before the Judge. Nor was one even advanced in HSL's skeleton argument (which the Court is invited to read in full and compare with the reasons given by the Judge for finding that the decision was *"wholly unclear"*).

30. Rather, the purported inadequacy in reasoning was raised for the first time by the Judge in argument, and then fleshed out in the Judgment. This has two consequences:

31. First, the Courts have recently emphasised the importance of procedural rigour in judicial review proceedings. This includes the importance of ensuring that grounds do not "evolve" from the pleaded case. The principle, and the relevant case-law, were summarised by the Court of Appeal in R. (Wingfield) v Canterbury City Council [2021] 1 W.L.R. 2863 at [36]-[38] and in R. (on the application of Talpada) v Secretary of State for the Home Department [2018] EWCA (Civ) 84. In that case, Singh LJ said at [69]:

"Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation."

32. These judicial warnings were not heeded by the Judge, who quashed the decision on a ground that not only was not pleaded, but which was introduced by the Judge himself at the hearing. This meant that the Appellant had to decipher the criticism of the decision "on the spot" from the Judge's questions at the hearing itself, rather than in advance through proper written pleadings filed on behalf of HSL. The Judge's conclusion that the Inspector's reasoning was inadequate, and the full explanation of why, was then only revealed for the first time in the draft Judgment.

33. Second, as a consequence of the above, the Judge did not have before him all of the relevant case-law on when a decision may be quashed for failure to give adequate reasons. This has led the Judge to fall into substantive error.

34. In particular, as Lord Brown put it in South Bucks at [36]: *"a reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."*

35. It follows from the fact that a reasons ground was un-pleaded that there was no evidence or submission of prejudice in this case. It is also difficult to see how HSL could be said to be prejudiced by the reasons given in the DL in circumstances where it had not contended that they were inadequate in the first place.

36. In any event, prejudice or not, the Inspector's reasons are more than adequate:

37. First, the relevant policies in this case required "re-provision" of the existing cultural facility at the Site.

38. That requires the existing facility to first be identified. This was described by the Inspector at DL/30-33 **[CB/C21/324-325]**. Notably, these paragraphs are not the subject of any criticism. The facility consisted of a primary use (the HSL photographic studios), together with "ancillary" uses (both cultural and non-cultural; and, amongst the cultural uses, both photographic and non-photographic uses).

39. Second, the proposed re-provision was mainly in the basement of the Development (DL/36) **[CB/C21/325]**. The main concern raised by HSL was that the nature of this space was unsuitable to replicate the existing HSL studios (or an equivalent high-end photographic studios).

40. As such, the Inspector considered this concern in detail at DL/36-41 **[CB/C21/325-326]**. Ultimately, she concluded that the basement provided a suitable space for a high-end photographic studios.

41. The reasons for that conclusion are abundantly clear. In particular, reference is made to: (i) the high floor to ceiling heights; (ii) the ability to accommodate column-less spaces; (iii) the ability to provide infinity coves and appropriate depth of field for photography; (iv) the ability to provide segregated spaces for television filming; and (v) provision for loading and unloading. On that basis, the Inspector found that the basement space was suitable for use by a high-end photographic studios.

42. Indeed, the Judge recognised as much in dismissing HSL's Ground 1(a). As it is put in the Judgment at J/48 **[CB/C9/106]**:

> *"Holborn Studios' real complaint is that the proposals for the basement did not meet their own high standards as a nationally-renowned photographic studio. Mr Harwood submitted more than once that the concept of "reprovision" requires a qualitative assessment to be made; and that, for example, a building suitable for a school orchestra would probably not be good enough for the Vienna Philharmonic (he did not put the submission quite in those terms). In my judgment, once one accepts that the "reprovision" does not have to be "like for like", as the Inspector found, and that the bespoke requirements of any particular enterprise are not relevant, Mr Harwood's qualitative argument loses much of its traction. The Inspector did find that the proposal could be fitted out to enable infinity coves etc. Accordingly, she clearly did have in mind a high-end and sophisticated studio rather than a more basic, high street operation. Ultimately, it was for the Inspector in the exercise of her planning judgment to assess whether this amounted to adequate and acceptable "reprovision" within the meaning of relevant policies."*

43. The Inspector did not directly compare the quantum of the floorspace in the basement with the floorspace of the existing HSL studios. But nor did she have to. Ultimately, the evidence before the Inspector, from the scheme architect, was that *"the spaces used by R6P Holborn Studios fit approximately into the appeal scheme basement and provide a comparable studio arrangement."* Given this, the focus of HSL's criticism of the basement re-provision was on its useability. In particular, it was not said that the basement was too small to re-provide a high-end photographic studio.[4] As such, the Inspector cannot be criticised for not dealing with this issue in detail in her decision. It simply was not a *"principal controversial issue"* (South Bucks).

[4] What was said was the entirely different point that the basement was too small to accommodate both the primary use (the HSL studios) and the various existing ancillary uses and businesses. A point that was acknowledged by the Inspector in terms – and which is dealt with further below.

44. That addressed the primary use at the Site i.e. the HSL photographic studios.

45. Third, there remained the other ancillary uses on the wider Site. These uses were not a focus of the evidence and submissions made on behalf of HSL at the Inquiry.

46. Nevertheless, the Inspector considered these ancillary uses at DL/42-44 **[CB/C21/326-327]**. She concluded that through use of the ground and first floor accommodation *"all of the existing floorspace in creative use could be provided as part of the appeal development."* The rationality of this conclusion is criticised by the Judge. This is dealt with under Ground Three below.

47. However, so far as the adequacy of the Inspector's reasons is concerned, it is clear that in these paragraphs the Inspector is considering the extent to which the existing ancillary uses at the Site could be re-provided in the above ground floor-space.

48. In doing so, the Inspector considered whether this space could be used by any cultural use (i.e. she was not limiting her consideration to useability by photographic studios).

49. It is readily understandable why she approached the ancillary floorspace in this way - since the existing ancillary uses at the Site included a mixture of uses (creative and non-creative; and, even in the creative sector, included a number of non-photographic creative uses). That was part of the nature of the *"existing use"* at the Site (albeit one which did not fit neatly into the Judge's binary "Approach 2" or "Approach 3" construct).[5]

50. Therefore, by the end of DL/44 **[CB/C21/326-327]**., an informed reader of the DL would readily understand that the Inspector had concluded that the basement could acceptably re-provide the primary use of the Site (i.e. a high-end photographic studios), and there was an opportunity for the existing ancillary uses at the wider Site to be re-provided in the remaining above ground space.

[5] See the implied criticism of these paragraphs at J/68 and the express criticism at J/69(3) that they proceeded on the premise that *"any cultural use will do"* **[CB/C9/111-112]**.

51. Fourth, DL/45 **[CB/C21/327]** brings these conclusions together. It directly addresses the policy question of whether, in these circumstances, the existing cultural facility at the Site would be "re-provided". It states as follows:

"I acknowledge that the basement would not reprovide all of the existing floorspace in creative uses. However, use of part of the proposed office floorspace would be possible and enable all of the cultural facility/creative hub floorspace to be reprovided whilst still ensuring an office led scheme to satisfy the requirements of development within the POA. However, taking all matters into account the basement accommodation could acceptably reprovide for the existing cultural facility/creative hub."

52. In order words: the basement is not large enough to re-provide both the existing primary and ancillary uses at the Site in terms of quantum of floorspace. The ancillary uses could be accommodated in the above ground floorspace. But in any event, the basement alone amounts to acceptable re-provision for the purposes of policy (in circumstances where the Inspector had already found that it could acceptably re-provide the primary existing cultural use at the Site, i.e. a high-end photographic studios).

53. Notwithstanding this straightforward reading, this paragraph is the subject of particularly detailed criticism by the Judge. As he put it at J/69 **[CB/C9/111-112]**:

"I turn now to DL45. In my judgment, it is replete with difficulty. In particular:

(1) the first sentence is obviously correct, but fails to address Mr Harwood's submission that the basement is too small in the context of relevant policy. Contrary to Ms Hutton's submission that the Inspector was not being asked to address quantity as opposed to quality, she clearly was.

(2) it is not clear in relation to this first sentence whether the Inspector has in mind photographic use or any cultural/creative use. Either way, it is difficult to understand how the basement in isolation is adequate (and that is not the finding the Inspector makes in this first sentence), and the Inspector fails to explain how and why it could amount to "reprovision".

(3) the second sentence, which picks up DL42-44, addresses the possibility that the upper floors could enable or facilitate "reprovision". However, these paragraphs do so on the premise that cultural use is no more than possible and that any cultural use will do.

(4) the third sentence is completely unclear. The Inspector appears to be saying that the basement alone could acceptably "reprovide" cultural facilities, but her reasoning comes nowhere near addressing Mr Harwood's submission on quantity, and is also inconsistent with the penultimate sentence of DL42 which suggests that the basement alone would not be sufficient. Further, the Inspector's reasoning is altogether opaque: is she addressing use

as a photographic studio (in which event, there would at least be relevant "reprovision", albeit not enough of it), or is she bringing into consideration other cultural uses altogether, as she started to do in the final sentence of DL 41 (in which event she would clearly be erring, but for a different reason)?"

54. These criticisms fail to read the DL fairly and as a whole.

55. The overall meaning of DL/45 **[CB/C21/327]** is more than adequately clear and is addressed above. However, responding to the detailed line-by-line criticisms made by the Judge:

56. The first sentence means what it says: the Inspector is saying that, in terms of the quantum of floorspace, the basement would not provide enough to re-provide the existing "cultural facility" at the Site, i.e. the HSL photographic studio together with space for the other ancillary businesses that are in cultural use.

57. Far from *"failing to address the submission that the basement is too small"* (J/69(1)) **[CB/C9/111-112]**, the Inspector has in fact directly acknowledged this and dealt with this criticism head-on.

58. It is also clear that in this sentence the Inspector is considering whether, quantitatively, the basement would re-provide the existing use at the Site comprising a primary use (a high-end photographic studios), together with various ancillary uses. That is clear from the language used (see the reference to the *"existing floorspace in creative uses"*). The Inspector had described the primary/ancillary nature of this existing floorspace earlier at DL/30-33 **[CB/C21/324-325]**.

59. In the second sentence, the Judge notes that the quantitative shortfall in floorspace could be made up through use of the above ground floorspace to accommodate the existing ancillary uses at the Site. Whilst the Judge criticises the substance of this conclusion (relevant to rationality – and considered under Ground Three below), in no sense is her reasoning or approach unclear.

60. In the final sentence, the Inspector concludes that *"taking all matters into account the basement accommodation could acceptably re-provide for the existing cultural facility/creative hub."*

61. Again, the reasoning is clear. The Inspector is saying that (taking all matters into account) the basement alone could re-provide the existing facility at the Site in an acceptable manner as required by policy.

62. The Judge says that this reasoning *"comes nowhere near addressing Mr. Harwood's submission on quantity…"* **[CB/C9/112]**. However:

(1) The concern about quantity had already been expressly taken into account in the first sentence of DL/45 **[CB/C21/327]**. It did not need to be re-stated again two lines later in the DL.

(2) In any event, the *"submission on quantity"* needs to be placed in context. This submission was contained in one paragraph out of the 60 paragraphs in HSL's closing submissions which dealt with the cultural facilities main issue (at paragraph 43) **[SB/S36/309]**. This stated as follows:

"The Appellant's belated attempt to rely on the above ground offices is important because the basement is much smaller than the current cultural facility. The proposed basement is 1,263 m2 GIA (955 m2 NIA)29 whilst the existing site is 4,784 m2 GIA (3,387 m2 NIA). The great majority of the present floorspace constitutes the cultural facility, all can realistically be occupied as such, and all of the cultural facility is protected."

Notably, when it came to considering policy compliance (see HSL's closing submissions at 61-67 **[SB/S36/312-313]**), it was not said that the size of the basement alone prevented adequate re-provision.

(3) In any event, the Inspector was entitled to find that in circumstances where (for the reasons she had explained earlier) the basement acceptably re-provided the primary existing use at the Site, the existing facility was "re-provided" – notwithstanding the fact that, as she acknowledged, the quantum of floorspace in the basement was insufficient to also accommodate the other ancillary uses at the Site.

As the Judge correctly noted at J/65 **[CB/C9/111]**: *"Although there were other cultural uses going on, the premise of the Inspector's analysis was that Holborn Studios as a photographic studio was the most important and significant cultural use taking place. The other uses were very much subordinate or, possibly, ancillary."*

In those circumstances, it was not only open to the Inspector to find that the basement alone (which re-provided the most important and significant use) acceptably re-provided the existing facility, but her reasons for doing so are clear and intelligible when the DL is read fairly and as a whole.

63. Nor is this conclusion *"…inconsistent with the penultimate sentence of DL42 which suggests that the basement alone would not be sufficient"* (J/69(3)) **[CB/C9/111-112]**. The penultimate sentence of DL/42 **[CB/C21/326]** merely notes that the basement could not re-provide *"all of the existing floorspace in creative use"* **[CB/C21/327]**. It is addressing the quantum of floorspace to accommodate both the primary and the ancillary uses (in similar terms to the first sentence of DL/45 **[CB/C21/327]**).

64. For the reasons just set out, this finding does not preclude an overall conclusion (as part of the Inspector exercising her planning judgment in assessing compliance with policy) that the re-provision is acceptable, especially in circumstances where the basement adequately re-provided the primary use existing at the Site.

65. Finally, it is said by the Judge to be unclear whether the Inspector's overall conclusion is addressing *"use as a photographic studio"* or use by *"other cultural uses"*. However:

(1) This binary way of assessing re-provision (between the Judge's so-called "Approach 2" and "Approach 3") was not one which was adopted by the parties at the Inquiry (and is in any event flawed – see Ground Two). Therefore, it is not surprising that she did not express herself in those terms; and

(2) The Inspector was simply asking the question posed by policy – would the existing cultural facility be re-provided. Read fairly and as a whole, the Inspector is concluding in the last sentence of DL/45 **[CB/C21/327]** that there would be adequate re-provision

of the existing facility in circumstances where (for reasons she had already explained in detail) the basement acceptably re-provided the primary existing cultural use.

66. For all of these reasons, the Inspector's reasons are perfectly adequate.

67. In short, the Judge has over-complicated what was in essence a straightforward exercise of planning judgment. That error stems in large part from the Judge seeking to superimpose on the Inspector's reasoning his own approach to the interpretation of the relevant policies. However, that approach is not only flawed (see below), but it is not at all surprising that the Inspector did not express herself in those terms, since that was not how the parties to the appeal had approached the application of the policy in either their evidence or submissions.

Ground Two: Policies HC5 of the London Plan and LP10 of the Hackney Local Plan

68. The starting point is the correct approach to the interpretation of planning policies The relevant principles are well known and were summarised by Mr. Justice Dove in Canterbury City Council v SSCLG [2019] P.T.S.R. 81 (at [23]).

69. Applied here, Policies HC5 of the London Plan **[SB/S25/139-144]** and LP10 of the Hackney Local Plan **[SB/S26/145-157]** are classic examples of policies that call for a fact-sensitive judgment to the circumstances of a particular case. That evaluative exercise involves a straightforward exercise of identifying both the nature of the existing cultural facility, and then considering whether it would be re-provided. As Sir Keith Lindblom SPT put it in Mansell (at [41]):

"Planning officers and inspectors are entitled to expect that both national and local planning policy is as simply and clearly stated as it can be, and also – however well or badly a policy is expressed – that the court's interpretation of it will be straightforward, without undue or elaborate exposition."

70. The Judge recognised that there was no *"hard-and-fast principle as to the interpretation of these cultural policies"* as it depends on the nature of the existing use (see J/73 **[CB/C9/113]**). However, on the facts of this case, he found that *"Approach 2 is only the correct approach"* (J/73).

71. However, this blends the concepts of the interpretation of policy (a matter of law for the Court) and its application (a matter of judgment for the decision-maker). As Holgate J (as he then was) explained in Trustees of the Barker Mill Estates v Test Valley Borough Council [2017] P.T.S.R. 408 at [22] and [84]:

"22. in a case where the decision-maker has had regard to a policy which he was required to take into account, it is essential for practitioners to keep in mind the distinction between interpretation and application of policy and the very different functions of the court in each area…

84. Normally a claimant fails to raise a genuine case of misinterpretation of policy unless he identifies (i) the policy wording said to have been misinterpreted, (ii) the interpretation of that language adopted by the decision-maker and (iii) how that interpretation departs from the correct interpretation of the policy wording in question. A failure by the claimant to address these points is likely to indicate that the complaint is really concerned with application, rather than misinterpretation."

72. The Judge's criticism of the Inspector is firmly one of "application", rather than misinterpretation. There can be no suggestion that the Inspector failed to have regard to the policies. There is no criticism of the approach she took to the language of the policies. In any event, "re-provision" is a word that is not capable of being subjected to detailed and forensic analysis (see Hopkins Homes at [24]).

73. Therefore, in finding that "Approach 2" was the "only" correct approach, the Judge was essentially concluding that it was irrational for the Inspector to adopt anything other than "Approach 2" on the facts of this case; and that any consideration of non-photographic re-provision was irrelevant and legally immaterial. That is then reflected in the Judge's criticisms of the occasions where the ability of the Development to accommodate other cultural uses is considered by the Inspector: see, for example, J/66, J/68 and J/69(3) **[CB/C9/111-112]**.

74. However, this binary approach to the application of the policies is flawed on the facts of this case. As the Inspector found, the existing use comprised both a main use (the HSL studios) and various subordinate uses including some other cultural uses. In those circumstances, analysing the facility in terms of either "Approach 2" or "Approach 3" would not fully capture the existing use of the Site.

75. In other words, this was not a question of either re-providing a *"photographic use or any cultural/creative use"* (J/69(2)) **[CB/C9/111]** - since the existing use at the Site comprised both a primary photographic studio use together with ancillary uses, some of which were used for other non-photographic but creative/cultural uses.

76. Instead, the Inspector was entitled as a matter of judgment to consider re-provision both in terms of the existing high-end photographic studio (Approach 2), and also the various ancillary cultural uses, which fluctuated in terms of their exact nature (Approach 3). In short, it was permissible and not irrational to adopt a mixture of the two approaches. Indeed, that was the only "approach" that accurately reflected the existing use of the Site.

77. Indeed, applying "only" Approach 2 in this case leads to nonsensical outcomes. The existing floorspace at the Site is 4,784 sq. m. Under "Approach 2", that would require the Development to re-provide all of this floorspace as a photographic studio – even though this is not in fact the existing use of the Site. That is wholly artificial and cannot be the intention of the policies.

78. Having considered the potential for the Development to re-provide both photographic studios ('Approach 2'), and other cultural uses (through 'Approach 3') there was no misinterpretation or irrationality by the Inspector in concluding that there would be re-provision even though the ancillary uses at the Site may not be re-provided in the basement. There is no policy basis for requiring the exact use on the Site to be replicated in the Development. Therefore, subject to irrationality (see Ground Three), it is open to a decision-maker to conclude (as a matter of planning judgment) that there is re-provision in circumstances where the primary existing cultural use is re-provided.

79. Further, the Inspector did not misinterpret the policies in concluding that there would be acceptable re-provision in this case in the basement – notwithstanding the fact that the basement could not accommodate the overall quantum of all cultural floorspace at the Site. As set out above, the policies do not require equivalent re-provision in terms of both quantum and quality. Provided that regard has been had to both quantitative and qualitative considerations, the overall conclusion under the policies is a matter of judgment for the decision-maker – subject only to irrationality (addressed under Ground Three).

80. Overall, therefore, the approach adopted by the Inspector faithfully applied the policies to the facts before her and demonstrates no error of law.

Ground Three: Irrationality

81. The Judge concluded that it was irrational for the Inspector to find that there was re-provision of the existing cultural facility in the basement.

82. However, this finding by the Inspector (who was exercising her planning judgment) was entirely rational in circumstances where the Inspector concluded that the basement could re-provide a high-end photographic studio in terms of the useability of the space (a finding upheld by the Judge under Ground 1(a) – see J/48 **[CB/C9/106]**) and where no substantive concern had been raised by any party about the basement providing enough floorspace for a high-end photographic studio to function.[6]

83. Therefore, the only remaining issue was the fact that the basement itself did not allow for the other cultural uses at the Site to be re-provided (i.e. the space not used as the HSL studios). However, these other uses were recognised by the Inspector (and the Judge) as being ancillary or subordinate. They were clearly of lesser importance than the main photographic studios. This was implicitly recognised by all parties. The LPA's original reason for refusal focussed on the loss of the main photographic studio,[7] and this was also the focus of HSL's case before the Inspector.

84. In those circumstances, recognising the high threshold for irrationality, the Inspector's judgment that the basement alone amounted to re-provision (within the meaning of the relevant policy framework, as above) was clearly within the bounds of reasonableness. In finding otherwise, the Judge not only erred in his conclusions on both the Inspector's reasoning (Ground One) and policy interpretation (Ground Two), but in any event he failed to apply the high threshold necessary to demonstrate irrationality in the planning context.

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[6] The Judge appears to have wrongly assumed that the basement did not provide enough floorspace to provide for a high-end photographic studio – see the reference at J/69(4) **[CB/C9/112]** to there being *"relevant 'reprovision', albeit not enough of it"* in the basement. This was wrong, for the reasons set out above at [10] – [11].

[7] "*The proposed development would result in the loss of the existing photographic studio use".*

85. There are three further issues under this ground.

86. First, the Inspector considered the ability of the Development to re-provide the ancillary space outside of the basement (notably at DL/42-44 and in the second sentence of DL/45 **[CB/C21/326-327]**). The conclusions reached here are also the subject of criticism by the Judge. These criticisms are not accepted. However, in circumstances where the Inspector expressly did not in fact rely on the above ground floorspace for re-provision (see last sentence of DL/45), these criticisms go nowhere in terms of the overall outcome: see Simplex GE Holdings Ltd v Secretary of State for the Environment Secretary [2017] PTSR 1041.

87. Second, the last part of DL/41 **[CB/C21/326]** is criticised by the Judge on the basis that the Inspector notes the ability of the basement to accommodate other non-photographic uses (see J/69(4) **[CB/C9/112]**). Again, however, this finding is irrelevant to the outcome in circumstances where the Inspector expressly found that the basement space was acceptable for a high-end photographic studio (also in DL/41).

88. Third, the Judge notes a *"further difficulty"* with the Inspector's conclusions, namely that there was no planning obligation requiring the basement to be used as a photographic studio (see J/71-72 **[CB/C9/112]**).

89. However, as the Judge accepts (at J/71), at no point did either HSL or the LPA contend that additional controls (either by planning condition or obligation under section 106 of the 1990 Act) were required to ensure that the basement could not be occupied for an alternative use. In addition, neither of the two previous (quashed) permissions formally secured the use of the basement space by condition or section 106 obligation; neither permission was challenged on the basis that betrayed an error of law. Ultimately, if HSL truly considered that it was irrational to grant permission without such an obligation, it should have made this argument at the Inquiry when it could have been considered and addressed.

90. Given this context, it was not irrational for the Inspector to proceed on the basis that the basement could only be occupied by a photographic studios – especially in circumstances where the nature of the basement (including a lack of natural light) would make it unattractive to other potential occupiers. Indeed, as Holgate J (as he then was) noted in

Mead Realisations Ltd v Secretary of State for Housing, Communities and Local Government [2024] EWHC 279 at [179] – with emphasis added:

"179. The problem faced by Redrow is that, as Mr. Simons accepted, this argument was not put before the Inspector. Redrow did not consider it to be material, let alone obviously material. It was not raised as a substantial issue between the parties. The Inspector cannot be criticised for acting irrationally, or for failing to give reasons, in relation to an argument of this kind which the claimant did not see fit to rely upon at any stage in its appeal…

91. In any event, once the point was raised through this claim, the Appellant entered into a deed of Unilateral Undertaking ("the UU") **[SB/S23/123-136]** formally securing that the basement can only be used for a cultural/creative use falling within Use Class E(g). Permission to bring Ground 1(b) was originally refused in light of the UU.

92. The UU responded to HSL's pleaded concern that the *"planning permission and obligation did not require any space to be occupied by creative industries"*. It was no part of HSL's claim that there should have been an obligation which required the basement to only be used as a photographic studios – and accordingly the UU was drafted on this basis. Nor was this criticism made of the UU even in HSL's skeleton argument. The first time that it was said that not only should an obligation be provided but that obligation should limit the use of the basement to only one type of cultural use (a photographic studios) was in the Judgment (J/72) [**CB/C9/112**].

93. Overall, the Appellant has done its best to keep up with the changing case on the need for a basement obligation – a case which, in truth, should have been made at the Inquiry when it could have been addressed properly. Standing back from the detail, it was plainly not irrational for the Inspector not to seek an obligation which was not asked for (and which, even now, is constantly evolving in terms of what is required in order to avoid "irrationality").

CONCLUSION

94. For all of the above reasons, it is respectfully submitted that the appeal should be allowed.

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