IN THE HIGH COURT OF JUSTICE **CO/2122/2016**
QUEEN'S BENCH DIVISION
PLANNING COURT
MR JUSTICE CRANSTON

B E T W E E N

THE QUEEN
on the application of
(GORING ON THAMES PARISH COUNCIL)

Claimant

-and-

(1) SOUTH OXFORDSHIRE DISTRICT COUNCIL

(2) THE ENVIRONMENT AGENCY

Defendants

-and-

GORING AND STREATLEY COMMUNITY ENGERY LTD

Interested Party

APPLICATION FOR PERMISSION TO APPEAL

---

1. The Claimant seeks permission to appeal on the following three grounds, the first of which raises an arguable point of law of general public importance. All three grounds have a real prospect of success.

Ground 1: Section 31(2A) Senior Courts Act 1981 and Section 72 of the Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990

2. This ground raises a legal point of general public importance; namely the proper interpretation of s 31(2A) of the Senior Courts Act 1981. In this case, the issue arises in the context of a finding by the Court that a decision maker has failed to apply the statutory presumption under section 72 of the Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990 ('the **1990 Act**') and to give considerable importance and weight to harm to a conservation area.

3. Your Lordship finds at paragraph 68 of the judgment that

> "*If there was any harm to heritage assets the response of both conservation officers, from the Council and East Berkshire Council (sic), was that it was, at most, minor harm. That approach then became part of the Officer's report. More importantly, the factors weighing in favour of the grant of planning permission were weighty, the opportunity of generating renewal (sic) energy from an existing water source. In my*

view there is simply no prospect that this issue would make any difference to the overall planning balance if the decision had been taken in accordance with section 72"

4. In Bokrosova v London Borough of Lambeth [2015] EWHC 3386 (Admin) Elizabeth Laing J explained at [90] the purpose of section 31(2A) stating,

   "*What section 31(2A) seems to be asking, albeit not clearly, is whether, if the defendant's unlawful conduct is taken out of the equation, that would make any difference to the outcome for the claimant."*

   Your Lordship agreed with that approach at paragraph 67 stating, "*this, on the authorities, is a backward-looking provision*".

5. The issue is the extent to which the court may enter into the realm of planning judgment when determining this issue. Your Lordship finds that "*the considerations weighing in favour of granting planning permission were weighty*" and that harm to both conservation areas was, at most, "*minor harm*".

6. Both of these conclusions involve planning judgment. In relation to the former, none of the Council's witness statements, nor the Officer's Report, suggest that any special weight was given to the generation of renewable energy. In relation to the latter, your Lordship has held at paragraphs 65-66 that the Council failed to give "*considerable importance and weight*" to the harm to the conservation area.

7. The relevant finding by the Council is that "*the impact on the historic merits of the Conservation Area... constitutes less than substantial harm, which is outweighed by the public benefit of the renewable energy generation and through the use of the existing water source*".

8. Your Lordship finds that adding the particular importance and weight attributed to harm to the conservation area would not have affected the ultimate planning balance.

9. There is a real prospect that the Court of Appeal would not take this approach. Lord Keith of Kinkel stated in Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 at 764G that, *"it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit"* whilst Lord Hoffman held at 780H that "*matters of planning judgment are within the sole competence of the primary decision maker"*. The extent to which the Court may entertain these matters under section 31(2A) requires clarification. There is a real prospect that section 31(2A) should not be construed so as to permit the court to exercise

a planning judgment in this way, especially in circumstances where the decision maker has failed to give harm, albeit less than substantial, to a conservation area the considerable importance and weight required by statute.

10. The construction and application of section 31(2A) is an important point of law. The authorities on the point do not present a consistent picture. Consideration of this matter by the Court of Appeal would bring much needed clarity to the issue. This, in and of itself, is a compelling reason for granting permission.

Ground 2

11. Your Lordship accepts at paragraph 60 that s 66 of the 1990 Act imposed a duty to investigate. However, your Lordship suggests that that duty "*must be triggered by at least someone either in the council or outside raising it as a potential issue*." There is a real prospect of showing that this is not the correct approach.

12. The statuary duty imposed by section 66 rests expressly with the local planning authority. In Barnwell Manor Sullivan LJ found at [17] that the duty under s 66 manifests "*Parliament's intention was that the decision-maker should consider very carefully whether a proposed development would harm the setting of the listed building*". This is affirmed in Mordue at [22] where Sales LJ stated that the duty involves "*not merely careful consideration for the purpose of deciding whether there would be some harm*". There is therefore a statutory duty upon the local planning authority to consider (of its own accord) whether a proposed development would harm the setting of a listed building.

13. This is also supported by NPPF paragraph 129 which states,

> "*Local planning authorities should identify and assess the particular significance of any heritage asset that may be affected by a proposal (including by development affecting the setting of a heritage asset) taking account of the available evidence and any necessary expertise*"

14. There is a real prospect that the Court of Appeal would prefer this approach.

Ground 3: Harm to the AONB

15. Your Lordship agrees at paragraph 50 that "*heritage enters a planning assessment with an AONB*". It is also agreed at paragraph 53 that the principle of "*death by a thousand cuts*" applies to cultural heritage within AONBs in the same way as to harm to the Green Belt.

16. In light of these findings there is a real prospect that the Court of Appeal would hold either that the Council took an erroneous approach to the applicable law/ policy (which constitutes *Wednesbury* unreasonableness in accordance with the dicta of Lord Diplock in *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768) or find that harm to a conservation area falling within the AONB and contributing to its special qualities must involve harm to the AONB itself.

17. On this ground too there is a real prospect of success and permission to appeal should be granted.

Conclusion

18. For the reasons set out above all three grounds have a real prospect of success and meet the test for permission to appeal pursuant to CPR 52.6(1)(a). Moreover, ground 1 raises an arguable point of law of general public importance. This, in and of itself, is a compelling reason for the appeal to be heard in accordance with CPR 52.6(1)(b). The Court is therefore respectfully requested to grant permission to appeal on these three grounds.

CHARLES STREETEN
FRANCIS TAYLOR BUILDING
TEMPLE, EC4Y 7BY

16 November 2016