Neutral Citation Number: [2020] EWHC 2292 (Admin)

Case No: CO/16/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/08/2020

Before :

MR JUSTICE DOVE

- -

Between :

The Queen (on the application of) Kenneth Kay	**Claimant**
- and -	
Secretary of State for Housing Communities and Local Government	**Defendant**
-and-	
Ribble Valley Borough Council	**Interested Party**

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- -

Mr John Hunter (instructed by **Knights PLC**) for the **Claimant**
Mr Killian Garvey (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 21st May 2020

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Approved Judgment

Mr Justice Dove :

Introduction

1. On the 23 May 2018 the claimant submitted applications for planning permission and listed building consent in relation to his property at Great Mitton Hall, Mitton Road, Mitton, Clitherowe. The development proposed in relation to the planning application was described as follows:

> "The development proposed is the erection of a single storey extension to the south of an existing modern extension to Great Mitton Hall, the reconfiguration of the existing patio and railings, the removal of the pointed arch doorway to the southern wall of the modern extension and its replacement with a window, and the repainting of the existing rendered gable wall to the hall."

2. In relation to the application for listed building consent the description of the works which were proposed under the application were as follows:

> "The works proposed are the erection of a single storey extension to the south of an existing modern extension to Great Mitton Hall, the reconfiguration of the existing patio and railings, the removal of the pointed arch doorway to the southern wall of the modern extension and its replacement with a window, and the repainting of the existing rendered existed gable to the Hall."

3. These applications were refused by the interested party on the 22 July 2018. The claimant appealed to the defendant against the refusal of these applications and the appeal was conducted by an Inspector using the written representations procedure. Following a site visit made by the Inspector on the 29 October 2019, the appeals were dismissed on the 25 November 2019. This application is made pursuant to section 288 of the Town and Country Planning Act 1990 and challenges the Inspector's decision. At an earlier stage of the proceedings the defendant took the point that the claimant had not pleaded the claim as a challenge under section 63 of the Planning and Listed Building (Conversation Areas) Act 1990 ("the Listed Building Act 1990), which is the equivalent provision in relation to statutory challenges to decisions on listed building appeals. By the time of the hearing the defendant, in my view pragmatically and sensibly, no longer pursued this point, but for the avoidance of doubt the application before the court relates to both the dismissal of the appeal in relation to planning permission and also that in relation to listed building consent.

The facts

4. Great Mitton Hall was constructed in the 17th century and was built close to the Church of All Hallows. Great Mitton Hall is listed at Grade II, whilst the Church of All Hallows is listed at Grade I. The Planning Statement which accompanied the application made clear that the proposals sought to address the reasons for the dismissal of an earlier appeal in respect of alterations to the building on the 19 August 2016. The Planning Statement noted that part of the proposals included the removal of

a pointed arched opening from the south-west wall of the modern extension to Great Mitton Hall and its replacement with a window to match others, thereby improving the overall character of the hall by removing a feature that was not original or authentic, reducing architectural confusion and providing consistency to the fenestration of the elevation. The simplification of the railings as part of the applications was also identified as an improvement to the appearance of the building. Reliant upon a Heritage Assessment which had been submitted along with the applications, the Planning Statement concluded that the concerns raised by the Inspector who had previously dismissed the appeal were addressed and observed in particular as follows:

> "7.12 In addition, the proposal seeks to soften the stark white tone of the existing render to the gable and also seeks to reconfigure the existing patio and railings to make them less evident in long range views. The proposals therefore address the concerns of the previous Inspector and the associated improvement to the existing hall and modern extension would address the Inspector's conclusions further.
>
> 7.13 As a result, there would be no harm and there would therefore be preservation for the purpose of the decision makers during under the relevant legislation, and paragraphs 133 and 134 [of the National Planning Policy Framework of the Framework] are not engaged."

5. Having analysed the significance of both Great Mitton Hall and also the nearby heritage assets, the Heritage Assessment addressed each of the elements of the proposed development in turn, noting that, in particular, the removal of the pointed arched opening from the south-west wall of the modern extension and its replacement with a window to match others on the same elevation "will improve the overall character of the listed building" in a number of ways that are then described. The Heritage Assessment also noted that the reconfiguration of the railings would make them less evidently a modern feature alongside the older part of the listed building. Re-painting the gable wall of the hall would not affect any historic fabric and would tone down the gable wall to a colour which would be better balanced with the adjacent church. This led, in turn, to the conclusion that the setting of the church would be improved. The Heritage Assessment concluded that there was no reason to believe that either the setting or significance of the listed building would be harmed as a result of any change arising from the proposed development.

6. Following consultation, Historic England offered no views in relation to the applications. The planning officer's assessment of the proposal in a delegated report was as follows:

> "The applicant's re-consideration… of extension eaves and ridge heights and fenestration form is recognised. However in my opinion, the proposed extension and formal railings (atop patio) are harmful to the special architectural and historic interest of Great Mitton Hall and the setting of the listed building ensemble (particularly the church) because the forward projection of the extension and urban style railings

> compound the incongruity and conspicuousness of the 1996 extension at the most important and sensitive alleviation of the listed buildings. The extension will project the 1996 extension forward to the Hall Gable and is a concern from all oblique views including Mitton Bridge. Photographs show that stone walling and hedgerow was the historic boundary treatment of the ensemble – unfortunately, different types of prominent timber fencing has been erected along this boundary in recent years.
>
> …
>
> NPPF paragraph 196 requires that any "public benefits" be considered (highlighting the securing of the optimum viable use in this regard). The applicant does not suggest that works are essential to the maintenance and occupation to the property…
>
> I note that existing Hall Gable render colour follows the resolution of unauthorised works (the Gable had been painted green)- mindful of the comments of LAAS I would not considered the proposed repainting of the C1600 building (Georgian stucco render was imitate local stone colour) to be a public benefit. The provenance of the existing railings is not clear… I do not consider the proposed replacement of the existing extension door with a matching two light window to be beneficial… as the doors vertical emphasis helps provide termination to the elevation."

7. As a consequence of this assessment the interested party refused permission for the following reasons, firstly in relation to the application for planning permission:

> "1) The proposal will have a harmful effect upon the special architectural and historic interest in the listed building, the setting of a adjoining listed buildings and the cultural heritage of the area immediately adjoining the Forest of Bowland Area of Outstanding Natural Beauty because the extension, railings and door replacement will compound the existing incongruity and conspicuousness of the modern extension."

And further, in relation to the application for listed building consent as follows:

> "1) The proposal will have a harmful impact upon the special architectural and historic interests of the listed building because the extension, railing and door replacement will compound the existing incongruity and conspicuousness of the modern extension."

8. As set out above, the claimant appealed against both of these decisions and the appeal was heard by means of the written representations procedure. Pursuant to the appropriate rules the claimant and the interested party prepared a Statement of

Common Ground in which they identified the main area of dispute between them for the purposes of the appeal as follows:

> "(a) the level of harm that would be generated by the appeal proposal (less than substantial harm in the opinion of the LPA or no harm in the opinion of the Appellant) and whether the proposed extension would result in Great Mitton Hall becoming less significant if the development were to be permitted."

9. In the claimant's Statement of Case similar points were rehearsed to those which had been set out in the Planning Statement. In particular the claimant relied upon the conclusion that there was no harm to the listed building and its interests would be preserved. In particular, it was pointed out by the claimant that the appeal turned on whether heritage harm would arise, contending that this was not the case on the basis of the material placed before the Inspector. By contrast the interested party contended in its Statement of Case that there was harm to the listed building and that the appeal should, therefore, be dismissed. The author of the claimant's Heritage Assessment produced a response to the interested party's Statement of Case in which, having rehearsed his assessment in relation to each of the elements of the applications, he concluded that the interested party had failed to identify either a category of harm or the extent of any harm which would arise as a consequence of the proposals to the listed building.

10. The Inspector undertook a site visit on the 29 October 2019 leading to his decision letter dated 25 November 2019. The key paragraphs of that decision letter for the purposes of the present case are as follows:

> "6. Great Mitton Hall originated in the early 17th century. It is constructed in rubble stone under a steep slate roof. Original windows are mullioned and the south-east gable is buttressed and rendered. This gable has mullioned windows at all four levels; a four light window at basement level, a 14 light window at ground level, a 7 light window at first floor level, and a 5 light window at attic level. At the east corner of the building, adjoining the south-east gable, is a turret with gable roof. The listed building has many other historic features and, to the owner's credit, is well preserved and maintained.
>
> 7. Attached to the south-west elevation of the listed building, and set back only slightly from the south-east gable, is a modern single storey extension that is about 7 metres wide and 13 metres long. It has a stone gable but is otherwise rendered under a slate roof. To the left of the south-east elevation of the extension is an arched doorway with chamfered surround. Otherwise the windows in the extension have plain casements. Adjoining the extension, on its south-east side, is a paved terrace with curved railings.
>
> 8. The principle elements of the proposed works is the erection of a new extension to the extension. It will be about 4.3 metres wide and 2 metres deep, and will be slightly left of centre of the

south-east elevation of the existing extension. Other works include the replacement of the arched doorway with a window to match others, reconfiguration of the terrace railings, and the re-painting of the south-east rendered gable end of the original building.

9. The existing extension of the listed building has, at the very best, a neutral effect of the architectural and historic interest of the listed building. Despite its position relative to the distinctive south-east gable of the listed building it is a simple, restrained, relatively unadorned, structure that does not compete with the form and historic detailing of the gable. The principle adornment of the extension is the arched doorway, which, alongside plain casement windows, is incongruous and draws attention away from the gable of the listed building. The replacement of the doorway with a matching window, in this regard, would be a positive alteration that would benefit the architectural and historic interest of the listed building.

10. The existing extension has a roof pitch significantly lower than that of the listed building; about 24 degrees compared to about 42 degrees. The proposed new extension would have a lean-to roof that would have an even lower roof pitch of about 14 degrees. It would be, consequently, inappropriate and incongruous in form. Furthermore, the extension would be forward of the gable of the listed building and would draw attention to the existing extension and away from historic gable and its distinguishing fenestration. The new extension would detract from, and would harm, the architectural and historic interest of Great Mitton Hall.

11. The current railings are over-elaborate and replacing them with straight railings would, as is identified in the Heritage Statement that accompanied the applications, simplify this feature of the immediate surroundings at the listed buildings. The Statement with regard to the repainting of the existing rendered gable to the Hall states that "by toning down the stark white gable to a stone colour, the Hall will be tonally balanced with the adjacent Church". But white is the traditional colour for painted render and the gable does not need to be "tonally balanced" with the church. In this regard there is no justification for the repainting of the south-east gable of the Hall.

12. The erection of a single storey extension to the south of the existing modern extension and the re-painting of the existing rendered gable would adversely effect, and would harm, the architectural and historic interest and significance of Great Mitton Hall. These elements of the proposed works conflict with policy DME4 of the Ribble Valley Core Strategy (RVCS). The reconfiguration of the existing patio and railings and the

> removal of the pointed arch doorway to the southern wall of the modern extension would not harm the architectural historic interest and significance of Great Mitton Hall. These elements of the proposal do not conflict with RVCS policy DME4.
>
> 13. Paragraph 196 of the National Planning Policy Framework states that where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset the harm should be weighed against the public benefits of the proposal. The harm that would be caused to the listed building by the new extension and the re-painting of the gable would be less then substantial but there are no public benefits to be weighed against the harm caused."

11. The Inspector went on to consider whether or not there would be an improvement to the setting of the church of All Hallows. He concluded that there would be no improvement but that the harm that might be caused by the proposals was "negligible". Finally, after these conclusions, the decision of the Inspector was set out as follows:

> "16. The erection of a single storey extension to the south of the existing modern extension and the repainting of the existing rendered gable would adversely affect, and would harm, the architectural and historic interest and significance of Great Mitton Hall. For these works the appeals have been dismissed. The reconfiguration of the existing patio and railings and the removal of the pointed arch doorway to the southern wall of the modern extension would not harm the architectural and historic interest and significance of Great Mitton Hall. For these works the appeals have been allowed."

12. The effect, therefore, of the Inspector's decision was to grant permission for some of the elements of the works proposed and to refuse permission and listed building consent for others.

The grounds

13. It will be worthwhile to set out at this stage the grounds which are pursued in this challenge in brief. The claimant pursues two grounds. The first ground is the Inspector erred in law when he held that there were "no public benefits to be weighed" against such harm as he had identified from the proposals to the special historic interest of Great Mitton Hall. Mr John Hunter, who appears on behalf of the claimant, characterises that error in a number of ways. He submits that this was a failure by the Inspector to properly interpret the relevant paragraphs of the National Planning Policy Framework ("the Framework") related to this. The contention is that the Inspector failed to take account of a material consideration, namely the benefits which he had concluded would arise to the heritage assets from the improvement that would arise from the removal of the arched doorway, together with, potentially, the simplification of the railings which were proposed within the applications. In short, these elements of improvement were matters which the Inspector should have

recognised as public benefits of the proposal and taken into account in striking the overall balance. His failure to do so was an error of law.

14. In response to these submissions Mr Killian Garvey, who appears on behalf of the defendant, contends that the Inspector was perfectly entitled to consider each of the elements of the proposal separately and to treat the application as comprising a number of severable elements. This approach entitled him to reach the conclusion that certain parts of the proposal before him could be granted consent whereas others, giving rise to harm to the listed building, had to be rejected. It was for the Inspector to determine how he approached the applications and there was no requirement that he should consider the whole development first, prior to giving consideration to treating the application as severable and considering its parts in turn. In truth, the application was presented as a suite of individual elements and there was no necessary linkage between them.

15. Ground 2 is the claimant's contention that whilst the Inspector was perfectly entitled to issue a partial permission, or grant parts of the application and refuse other parts, it was necessary for him to have consulted with the parties in relation to whether or not to adopt that course. There was an issue in relation to procedural fairness in respect of the action in which the Inspector took. It ought to have been obvious to him that there was a significant difference between dealing with the application and granting a partial consent, and there was a legal obligation on the Inspector to consult with the parties. In response to this contention the Defendant submits that, as already noted, there was no necessary or suggested linkage between the elements of the application, and the Inspector was perfectly entitled to treat the elements of the applications as severable and to reach separate decisions in relation to those elements of the application.

The law and relevant policy

16. An application for planning permission falls to be determined in accordance with section 70(2) of the 1990 Act, by having regard to the provisions of the development plan so far as material to the application, and any other material considerations. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that if regard is to be had to the development plan for the purpose of any determination then that determination must be made in accordance with the development plan unless material considerations indicate otherwise. It is beyond argument that the Framework is a material consideration for the purposes of this exercise.

17. In relation to an application for planning permission which effects a listed building or its setting there is a general duty under section 66 of the Listed Building Act 1990 for the decision-taker to have "special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses".

18. When planning consent has been refused, section 78 of the 1990 Act provides a right of appeal to the Secretary of State against that decision, and section 79 of the 1990 Act provides the powers of the Secretary of State on an appeal. In effect the power under section 79 allows the Secretary of State to allow or dismiss the appeal or "reverse or vary any part of the decision of the local planning authority (whether the appeal relates to that part of it or not), and may deal with the application as if it had

been made to him in the first instance". Similar rights exist in relation to a refusal of listed building consent, whereby under section 20 of the Listed Building Act 1990 there is a right of appeal to the Secretary of State against the decision refusing listed building consent, and under section 22 of that Act the Secretary of State has similar powers to those granted by section 79 of the 1990 Act in relation to listed building appeals. Further consideration as to how these powers should be exercised is set out below.

19. The question of interpretation of a planning policy, such as the Framework, is a question of law for the court to determine: see *Tesco Stores v Dundee City Council* [2012] PTSR 983. However, questions of application rather than interpretation are matters for the decision-taker and in particular in this context the expert tribunal.

20. Questions of the interpretation of planning policy, when they genuinely arise for the courts determination, require the court to bear in mind that planning policy is neither a statute nor a formal legal instrument, but rather a tool which is intended to be a practical aid to consistent decision-taking. Statements of planning policy should be interpreted with their purpose and intended audience (both professionals but also wider public) clearly in mind. The policy should be read and interpreted in a straightforward manner, taking into account the context in which it arises. The correct approach to the interpretation of planning policy is now well established from cases such as *Canterbury City Council v Secretary of State for Housing Communities and Local Government* [2019] PTSR 81 (see paragraph 23) and *Monkhill Limited v Secretary of State for Housing Communities and Local Government* [2019] EWHC 1993, with both of these authorities and the recent decision of Holgate J in *Gladman v Secretary of State for Housing Communities and Local Government* [2020] EWHC 518 synthesising the earlier authorities that are referred to in these judgments.

21. When providing a decision on an appeal under section 78 of the 1990 Act an Inspector is under a duty to provide reasons. In accordance with the well-established principles from the speech of Lord Brown of Eaton-Under-Heywood in *South Bucks District Council v Porter (no. 2)* [2004] 1 WLR 1953 (at page 1964 B-G) the reasons must not give rise to doubt as to whether the Inspector went wrong in law, for example by misunderstanding a relevant policy. It is not, however, necessary for the Inspector to engage with every issue or material consideration raised in the appeal, but rather to focus upon the principle important controversial issues. When dealing with a challenge to an appeal decision under section 78 the decision letter is to be read in a purposeful way, bearing in mind that the letter is addressed to the principal participants in the decision-taking process who will be familiar with the issues at stake in the appeal as well as the evidence and arguments deployed by the relevant parties.

22. The courts have given consideration to the duty under section 66(1) of the Listed Building Act 1990 and how the duty it creates should be taken into account by decision-takers addressing proposals which affect listed buildings. In the case of *Barnwell Manor Wind Energy Limited v East Northamptonshire District Council* [2014] EWCA Civ 137 the Court of Appeal considered the impact of section 66 of the Listed Buildings Act 1990 on a decision in relation to a wind turbine proposal which impacted upon the setting of heritage assets. Giving the leading judgment in the Court of Appeal, Sullivan LJ provided the following analysis supporting the conclusion at first instance that the Inspector had erred in law in relation to his duty:

> "29. For these reasons I agree with Laing J's conclusion that Parliament's intention in enacting section 66(1) was that decision-makers should give "considerable importance and weight to the desirability of preserving the setting of listed buildings" when carrying out the balancing exercise. I also agree with her conclusion that the Inspector did not give considerable importance and weight to this factor when carrying out the balancing exercise in this decision. He appears to have treated the less then substantial harm to the setting of the listed buildings, including Lyveden New Bield as a less then substantial objection to the grant of planning permission. The appellant's skeleton argument effectively conceded as much as contending that the weight to be given to this factor was, subject only to irrationality, entirely a matter for the Inspector's planning judgment. In his oral submissions Mr Nardell contended that the Inspector had given considerable weight to this factor, that he was unable to point to any particular passage in the decision letter which supported this contention, and there is a marked contrast between the "significant weight" which the Inspector expressly gave in paragraph 85 of the decision letter to the renewable energy considerations in favour of the proposal having regard to the policy advice in PPS 22, and the manner in which he approached the section 66(1) duty. It is true that the Inspector set out the duty in paragraph 17 of the decision letter, but at no stage in the decision letter did he expressly acknowledge the need, if he found there would be harm to the setting of the many listed buildings, to give considerable weight to the desirability of preserving the setting of those buildings. This is a fatal flaw in the decision even if grounds 2 and 3 are not made out."

23. This approach was reinforced by the Court of Appeal in the case of *Mordue v Secretary of State for Communities and Local Government* [2015] EWCA Civ 1243 where, in paragraph 28 of the judgment, Sales LJ concluded that the relevant legal duty was, in effect, encapsulated in the paragraphs of the 2012 Framework, starting at paragraph 131 and proceeding through paragraph 134. Sales LJ concluded that working through these paragraphs in the 2012 Framework (which reflect the paragraph set out below from the 2018 Framework) would enable a decision-taker to properly direct themselves in relation to the discharge of duty under section 66.

24. The relevant paragraphs of the Framework operative at the time of the decision addressing the issues in relation to designated heritage assets are as follows:

> "193 When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to

> substantial harm, total loss or less than substantial harm to its significance.
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> 194 Any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification. Substantial harm to or loss of:
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> a) grade II listed buildings, or grade II registered parks or gardens, should be exceptional;
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> b) assets of the highest significance, notably scheduled monuments, protected wreck sites, registered battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional
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> 195. Where a proposed development will lead to substantial harm to (or total loss of significance of) a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or total loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply:
> a) the nature of the heritage asset prevents all reasonable uses of the site; and
> b) no viable use of the heritage asset itself can be found in the medium term through appropriate marketing that will enable its conservation; and
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> c) conservation by grant-funding or some form of not for profit, charitable or public
> ownership is demonstrably not possible; and
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> d) the harm or loss is outweighed by the benefit of bringing the site back into use.
>
> 196. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use."

25. Further assistance in relation to understanding the provisions of the Framework is provided in the National Planning Practice Guidance ("the PPG"). The PPG provides particular assistance in relation to the term public benefits as follows:

> "What is meant by the term public benefits?
>
> The National Planning Policy Framework requires any harm to designated heritage assets to be weighed against the public benefits of the proposal. Public benefits may follow from many developments and could be anything that delivers economic, social or environmental objectives as described in the National Planning Policy Framework (paragraph 8).

> Public benefits should flow from the proposed development. They should be of a nature or scale to be of benefit to the public at large and not just be a private benefit. However, benefits do not always have to be visible or accessible to the public in order to be genuine public benefits, for example, works to a listed private dwelling which secure its future as a designated heritage asset could be a public benefit.
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> Examples of heritage benefits may include:
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> - sustaining or enhancing the significance of a heritage asset and the contribution of its setting
> - reducing or removing risks to a heritage asset
> - securing the optimum viable use of a heritage asset in support of its long-term conservation."

26. The correct approach to the interpretation of paragraph 196 of the Framework was recently considered by Sir Duncan Ousley in the case of *Safe Rottingdean Limited v Brighton and Hove City Council* [2019] EWHC 2632. In that case a challenge was brought to the grant of planning permission for a package of residential development and the restoration and reuse of listed buildings. The first ground of the application for judicial review related to the question of whether or not the committee report had fallen into error in the way in which it dealt with the application of development plan policy in relation to listed building and conservation areas. The argument in relation to these policies also engaged consideration by the court of the correct interpretation of paragraph 196 of the Framework. In that regard Sir Duncan Ousley observed as follows:

> "68…Paragraph 196 contemplates the position where there is some but less then substantial harm to a heritage asset, whether listed building or conservation area. It does not look at the overall balance of advantage or disadvantage to the heritage asset at that stage. The weighing exercise then includes the advantage of "securing its optimum viable use" as a factor against which the less then substantial harm has to be weighed. That is a clear reference to the public policy advantage of bringing a listed building or part of conservation area into a viable long term use. Such public heritage benefits are clearly among those to be weighed against the less than substantial harm. So the Framework adopts its own approach but emphatically is not dependant on a view that the less than substantial harm is a net overall less than substantial harm."

27. As set out above there was no dispute between the parties to the proposition that by virtue of section 79 of the 1990 Act and the equivalent provisions in the Listed Buildings Act 1990 the Inspector had power to issue a split decision in relation to some of the elements of the development proposed. The relevant legal powers were analysed by Mr John Howell QC sitting as a Deputy Judge of the High Court in the case of *R v Holborn Studios Limited v Hackney London Borough Council* [2017] EWHC 2823 (Admin); [2018] PTSR 997 his analysis is set out as follows:

> "63. In my judgment it is necessary to distinguish the substantive and the procedural constraints on the power of the local planning authority to grant planning permission for a development other that for which an application was originally made.
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> 64. There are three ways in which a planning permission may be granted for such a development: the initial application may itself be amended; permission may be granted only for part of the development applied for; and permission may be granted subject to a condition that modifies the development applied for. Quite apart from any requirements for notification and consultation there are substantive limitations on the changes that can be effected by such methods. These limitations have been variously described but they are all concerned with whether the result is the grant of permission for development that is in substance something different from that for which the application was initially made. That is because the legislation only gives power to local planning authorities to determine the application describing the development for which permission is sought which is made to them in the prescribed form and manner.
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> …
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> 66. The planning authority also has power to grant planning permission for part of the development applied for under section 70(1)(a) of the 1990 Act and to refuse permission for another part under section 70(1)(b) where such parts are separate and divisible: see section 70(1)…;and *Kent County Council v Secretary of State for the Environment* [1976] 75 LGR 452, 455. In such a case the development for which permission is granted is the same as that in part of the application but there remains a question (apart from one about consultation about such a partial grant) whether the permission would be for a development that would be substantially or significantly different in its context from that which the application envisaged: see *Bernard Weatcroft Limited v Secretary of State for the Environment* 43 PNCR 233, 240; and *Johnson v Secretary of State for Communities and Local Government* [2007] EWHC 1839 (Admin) at [25].

28. These paragraphs make clear the evident power of the decision-taker in relation to a planning application to grant permission for a severable part of that application. This is an issue to which I shall return below. As the judgment of Sir Douglas Frank QC sitting as a Deputy Judge of the High Court makes clear, where an application is comprised of separate parts, it is open to a decision taker to grant permission for such of those parts as it is thought should be permitted. Sir Douglas Frank QC observed in the course of his judgment as follows:

> "In my judgment the correct approach to this matter is to ascertain the powers under section 29 of the Act by reference to the purposes of Part III , in which it appears. It seems to me that everything in Part III flows from and is consequential on the provision in section 23 that planning permission is required for the carrying out of any development of land; hence, when the matters come before the determining authority, in this case the first respondent, what that authority has to do is to decide whether, having regard to the provisions of the development plan and to any other material considerations—that is, planning considerations—permission ought to be granted, and, if so, what, if any, conditions should be imposed. It further seems to me that, as a matter of common sense, the determining authority can grant as much of the development applied for as they think should be permitted."

29. The requirements in relation to the issuing of a split or part permission were further considered by Ousley J in the case of *Johnson v Secretary of State for Communities and Local Government* [2007] EWHC 1839 (Admin). In that case the claimant had applied for planning permission in respect of two elements of development. The first was the erection of a new dwelling as an extension to a detached double garage, and the second was the conversion of a larger building into a single dwelling together with a garage from what was currently two dwellings. The local planning authority had no objection to the conversion of the two dwellings into a single dwelling but did object to the proposed dwelling as an extension to a detached double garage. Permission was refused and was appealed. The Inspector agreed with the local planning authority and dismissed the appeal in relation to the creation of the new detached dwelling, but allowed the appeal granting permission for the conversion of the existing dwelling houses into a single dwelling house. As a result of practical problems with implementing the permission which had been granted, the claimant made an application to this court for the quashing of the Inspector's decision, including within his grounds a complaint that he ought to have been given the opportunity at the hearing of the appeal to explain what the problems would be were a split decision to be issued. The question of whether or not a split decision ought to be made had not been aired at the hearing of the appeal. Having rehearsed the authorities such as *Kent County Council* and *Bernard Wheatcroft Limited,* Ouseley J expressed his conclusions on the question of whether or not an opportunity to make representations on the implications of a split decision should have been granted in the following terms:

> "21. The first issue is whether the Inspector here entirely inadvertently, and with the most benign and efficient of intentions, failed to afford to Mr Johnson the procedural fairness to which he was entitled. I have come to the conclusion that the Inspector did act fairly. There was no material at all to alert the Inspector to any problem in the way of the grant of permission for the works to the existing dwelling. The levels issue was not raised; the degree of dependence between the two parts of the scheme was not raised; no party referred to it; there was nothing in the representations or the nature of the sight to lead an Inspector to suppose that there might be any basis for any objection at all to such a decision.

> 22. It is my judgment that if it is to be said that there was some unfairness in the Inspector not raising the question of a split decision, there had to be something, whether in representations or on the ground, to alert him to the fact that what might otherwise be a perfectly sensible, unobjectionable course could give rise to difficulties, and indeed give rise to difficulties who, on the face of it, was being benefited. There was nothing before him which would have had that effect. I do not think that it can in those circumstances be said, after the event, that it was unfair for the Inspector not to give Mr Johnson the opportunity of saying that he did not want the uncontentious part of the permission to be granted.
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> 23. Mr Johnson is a planning professional, in addition, and would have been (and indeed was) aware that sometimes such split decisions are granted. Bearing in mind the attitude which the local authority had expressed towards the larger building and maintained at the hearing, it must have been on the cards that a split decision would be made. It was in my judgment incumbent on Mr Johnson to raise in some form or other something which would have alerted the Inspector to the fact that such a decision could be a problem, e.g. saying that the scheme was an integrate whole for certain reasons."

Submissions and conclusions

30. On behalf of the claimant, Mr Hunter's submissions in relation to ground 1 are in essence as follows. Firstly, and applying the interpretation of paragraph 196 of the Framework from *Safe Rottingdean*, it was incumbent upon the Inspector to solely examine the harmful effects of the proposals before him upon the heritage assets involved in the decision at the first stage of the analysis. Any beneficial effect in relation to the heritage assets came into the balance at a later stage. Mr Hunter submits that it is clear from the Inspector's report that he found that one element of the proposal, namely the removal of the arched doorway and its replacement with a matching window, would be a positive alteration of benefit to the listed building: see paragraph 9 of the decision letter. Furthermore, he submits that the conclusion in paragraph 11 which the Inspector reached in relation to the replacement of the railings was, in effect, recognised as another improvement. Certainly, when read with paragraph 12 of the decision letter, he submits that no harm arises from the replacement of the railings, and this issue is at least neutral. He submits that the less than substantial harm that the Inspector found at paragraph 13 of the decision letter reflects an overall assessment based upon his conclusions in relation to the proposal before him in paragraph 12 of the decision letter. Where the Inspector then fell into error was in concluding that "there are no public benefits to be weighed against the harm caused". The Inspector had clearly found that one of the works included in the proposal would benefit the architectural and historic interest of the listed building, and therefore amounted to a public benefit which the Inspector failed to take into account. Thus, Mr Hunter submits that the Inspector failed to correctly interpret paragraph 196 of the Framework, and failed to have regard to a material consideration namely the public benefit that he had found from one of the works included in the proposal in

paragraph 9 of the decision. Alternatively, there was a failure on the part of the Inspector to explain the conclusions which he had reached in paragraph 13 of the decision letter.

31. In relation to ground 2 Mr Hunter submits that whilst the Inspector was entitled in principle to issue a partial permission in respect of the application before him, he should have been aware that there was a very significant difference between permitting the proposals as a whole and permitting individual works within the proposal. Mr Hunter submitted that there was a clear linkage between the elements of the proposal namely that they were all proposals in respect of the same listed building and that fairness required that the Inspector should consult with the parties prior to issuing a split or partial permission.

32. In response to these submissions Mr Garvey on behalf of the Defendant contends that, firstly, the application comprised a number of individual elements none of which were linked. They were presented and considered separately in the application material. Secondly, he submits that it is clear from the material accompanying the appeal that the issue before the Inspector was stark: the claimant submitted that there was no harm arising from the proposals to the heritage assets concerned, whereas the interested party submitted that harm arose. Thus, the decision turned on a finding as to whether or not harm would arise. Thirdly, and in the light of the first submission, it was open to the Inspector to decide for himself as to how to go about considering the proposal and, in particular, open to him to conclude that he should examine and determine each of the elements individually and decide in relation to each of those elements whether or not they should be permitted. Thus, in paragraphs 12 and 13 of the decision letter the Inspector was entitled to review each of the elements of the proposal individually and to reach the conclusion that those which were harmful had no public benefit to be weighed against them on the basis of their own individual merits. In so far as the claimant's case is that it was mandatory for the Inspector to consider the proposal as a whole first before he went on to examine the individual elements of the applications to see whether any of them could be granted on their own merits, there was no authority supporting this proposition and no warrant for the court mandating such an approach. Finally, Mr Garvey submitted that whereas here there were individual elements, some of which were beneficial and some harmful, it would create absurd results if one part of the proposal were said to support a different part of the proposal, since the developer could choose which parts of the proposal to implement.

33. In respect of ground 2 Mr Garvey submitted that, in truth, there was no suggested linkage between the different elements of the appeal proposals and no basis upon which the Inspector, consistent with the principles set out in *Johnson*, should have been required to consult with the parties before issuing a split decision.

34. The starting point for the consideration of ground 1 is the question of what is required by paragraph 196 of the Framework and its correct interpretation. I have no doubt that the interpretation of paragraph 196 provided by Sir Duncan Ousley in *Safe Rottingdean* is correct. The clear focus of paragraphs 193-196, and the fulcrum or essential finding necessary to apply the policy contained in those paragraphs correctly, is an initial establishment of the extent and nature of the harm to the significance of a designated heritage asset as a consequence of what is proposed. At the stage of establishing the nature and extent of the harm to significance any

beneficial impact on the significance of the heritage asset is left out of account. It is only after that level of harm has been fixed that any beneficial effect upon the building which, in accordance with the PPG would properly be considered to be a public benefit, is to be taken into account in assessing whether or not the overall balance to be struck in applying the policy, including any other public benefits, enables the conclusion to be reached that the proposals do not conflict with the policy.

35. The second issue is whether, in the light of this understanding of the requirements of paragraph 196 of the Framework, the Inspector interpreted the policy correctly in considering the appeal which was before him. In my view the starting point for considering this issue must be an understanding of what the Inspector did in forging his decision. It is clear to me that in paragraph 9 of the decision letter he made a clear finding that the removal of the arched doorway and its replacement with a window matching the other fenestration in this element of the building "would be a positive alteration that would benefit the architectural and historic interest of the listed building". In paragraph 10 of the decision letter he found that the proposals in relation to the new extension would detract from and harm the historical and architectural interests of the listed building. In paragraph 11 of the decision letter he concluded that the railings would simplify the surroundings of the listed building and therefore it appears to me when read together with paragraph 12 that this element would be at least neutral or not harmful to the interests of the listed building. Finally, he concluded that there was no justification for the re-painting of the south-east gable end of the hall. At paragraph 12 he draws these conclusions together in relation to those works included in the proposal which would be harmful and those which would not. Thereafter in paragraph 13 having referred to the contents of paragraph 196 of the Framework he concludes "the harm that would be caused to the listed building by the new extension and the re-painting of the gable would be less then substantial but there are no public benefits to be weighed against the harm caused".

36. When reading paragraphs 9 to 13 together in my view it appears the Inspector is forming a judgment in relation to the proposed development as a whole, aggregating his analysis of the elements of which it was comprised and forming an overall judgment about the totality of the development. In paragraphs 12 and 13 he draws together an assessment of the impact of the proposals on the listed building as a whole and then applies the relevant policy in paragraph 196 of the Framework to the proposals as a whole. He does not suggest that he is applying paragraph 196 of the Framework to each of the works included in the proposal individually, or suggest or explain that this is the exercise he is performing. Indeed, in the last sentence of paragraph 13 he treats two elements of the development proposals together and in aggregate in assessing that harm will be less than substantial. The Inspector then asserts in the same paragraph that there are no public benefits to be weighed against this collective harm. All this reinforces my view of the exercise that the Inspector was performing, which was to look at the development proposal as a whole at the outset of his decision determining the appeal. Thus, I accept Mr Hunter's submission that within paragraph 13 the Inspector is addressing the overall effect of all of the elements of the proposals taken together. After all, that was the way in which the application had been considered by the interested party when permission was refused.

37. The fact that he reached a conclusion that he should give a partial permission and listed building consent after he reached the conclusion that the proposals taken as a

whole should be dismissed does not mean that he was not in these paragraphs addressing the proposal taken as a whole. It appears that what occurs in the decision letter is that in paragraphs 9 to 13 (and in particular 12 and 13) the Inspector concludes that the proposals as a whole should be dismissed, and he then decides to give a partial permission and listed building consent to the parts of the proposal which he had concluded were not harmful and indeed in one case beneficial. It is not without significance that he does not suggest at this later stage that he has treated the application as, in effect, four separate applications and decisions.

38. I am unable to accept, therefore, the submission made on behalf of Mr Garvey that in truth the Inspector separately considered each of the individual elements of the proposals and did not consider them together. However, for reasons which I shall explain shortly, even were I to accept that the Inspector considered the works comprised in the proposals separately my overall conclusion would be the same for reasons which are set out below. Where the Inspector fell into error, in my judgment, is that having concluded that the proposals gave rise to less than substantial harm as a result of his findings in respect of two of the proposed works, he went on to contend that there were no public benefits to be weighed against any of the harm caused. This was inconsistent with the earlier finding in paragraph 9 that there would be improvements to the architectural and historic interest of the building as a result of one of the elements of the proposal, and which gave rise to public benefits which ought to have been taken into account. This error can be characterised as either a failure to properly interpret the policy in paragraph 196 of the Framework as to how to go about striking the balance in relation to heritage assets, failing to properly interpret what might amount to a public benefit or, alternatively, the leaving out of account of a material consideration which was required by the policy to be taken into account, namely the improvements to the architectural and historic interest of the building as a consequence of one of the elements of the proposal which was by definition a public benefit.

39. I have no difficultly in accepting the proposition that it was open to the Inspector to grant a partial permission: indeed, such was not controversial between the parties in this case. Further, I accept the proposition that it is for the Inspector to determine how he might go about his task of dealing with the decision on the appeal before him. The Inspector will need to form a view as to how to address the application bearing in mind the circumstances of the case and, in some instances, how it has been presented by the applicant. However it is done, it should be clear from the reasoning of the decision how it has been undertaken, so that the recipient of the decision can understand the structure of the decision-taking process. Depending on the facts of any particular case, it may be more convenient to first tackle an assessment of the individual works or parts comprised in an application, or alternatively it may make more sense to deal with the application as a whole. If, for instance, having concluded that taking the works together as a whole the merits of the application justify the grant of permission it may be a pointless exercise to go back and consider the works comprised in the application individually, and vice versa. There is no mandated approach and it is a matter for the Inspector to resolve on the facts of the individual case. It may not, however, be open to an Inspector when considering elements of an application individually to leave out of account aspects of the works or parts comprising the application which may be a material consideration relevant to the merits of others, where they are inter-related. Of course, that inter-relationship can

arise in a variety of different ways: they may be connected as a result of the application of policy, or because on the facts of the case the merits of one work comprised in the application is obviously material to another so as to require them to be taken into account when considering the latter (see paragraphs 29 to 32 of in the judgment of Lord Carnwath in *R (on the application of Samuel Smith Old Brewery (Tadcaster) and others) v North Yorkshire County Council* [2020] UKSC 3), or as a result of some proposed condition or obligation. This is not an exhaustive list. The point is, it may well be on the given facts of a particular case that the benefits arising from one part of a proposal needs to be taken into account in support of another, as offsetting the harm arising from it; indeed, it may be that the purpose of putting the individual elements into a single application is so as to enable the decision-taker to balance the benefits and harm arising from different parts of a proposal containing multiple individual items of development.

40. The significance of this in relation to the current decision is this. If the Inspector in paragraph 13 was, as I consider he was, assessing the works comprised in the proposal collectively, then he left out of account the public benefit from at least one of the works comprised in the proposal as set out above. If, on the other hand, he was considering the new extension and the re-painting of the gable separately, then he left out of account in considering each of those works separately the public benefit which would arise to the architectural and historic interest of the building as a consequence of the removal of the pointed arch doorway and its replacement with a window, which was a work he approved of and which gave rise to an improvement to the significance of the heritage asset. There is certainly no reasoning or explanation setting out why it was that the public benefit he had identified as arising from this improvement to the listed building was not relevant or should not be taken into account when appraising the other works which he was assessing as part of the application.

41. Although Mr Garvey contends that each of these individual elements were not linked, and their merits were isolated from each other, in my view that is an approach based upon an overly forensic review of the application documentation and without properly taking account of the realities of the situation. Whilst as a matter of judgment the heritage merits of the individual works might legitimately have their impact assessed separately, they are inevitably connected and inter-related on the facts of this case by reason not only of them being proposals in relation to the same listed building, but moreover on the basis that they were closely physically related to a particular aspect of the listed building. An alternative way of examining the connection or relationship is the simple point that it was the same particular aspect or elevation of the heritage asset which was being benefitted by the replacement of the pointed arch doorway that was being affected by the two proposals that the Inspector found less than substantially harmful. Different listed building applications comprising multiple works will give rise to different considerations which have to be considered on a case by case basis, but here whichever of the individual works were granted in combination would have an overall effect on the significance of the same part of the listed building, whether positive or negative. Whilst in some cases it may be necessary for an applicant to point out any potential linkage or inter-relationship between parts comprised in a proposal, in the present case the relationship between the parts of the proposal, which all related to a particular part of the listed building, was clear and obvious. For instance, the pointed arch window and its proposed beneficial replacement is in the same elevation of the same extension, and

immediately adjacent to, the proposed further extension to that extension which the Inspector concluded was harmful. Thus, even if the Inspector had been considering the works comprised in the proposal separately, that did not permit him to leave out of account in considering the merits of a work comprised in the proposal which he considered gave rise to less than substantial harm to the heritage asset, the public benefits from a work comprised in the proposal which he considered was an enhancement of the heritage asset given, and this must be emphasised, the particular circumstances of the present case. The public benefit was material in terms of the policy which was being applied and was, in any event, obviously material to the decision being taken for the reasons set out above.

42. I do not consider that there is any substance in the concern of Mr Garvey that such an approach might lead to the grant of a planning permission for both beneficial and harmful elements, which could lead to only the harmful elements being developed. Situations of this kind are commonly encountered within the development control system whereby, as alluded to above, harmful elements of a development proposal are justified on the basis of other parts of the scheme which are beneficial. In those instances, by means of conditions or the entering into of an obligation under section 106 of the 1990 Act the planning system ensures the delivery of the beneficial aspects of the scheme as part and parcel of the proposals overall. In the present instance these solutions would have been equally available.

43. It follows that in my judgment the claimant is entitled to contend that the Inspector fell into error in relation to his assessment in the decision letter. It would have been open to the Inspector to conclude, and express in his reasons, that, for instance, the public benefit from the replacement of the arched window was insufficient to justify the harm arising from the small extension to the extension adjacent to the new window being installed, but he did not. It is not possible, nor was it contended on behalf of the defendant, to suggest that the decision would inevitably have been the same had the Inspector taken account of the public benefits which he had found in paragraph 9 of the decision letter and therefore the decision must be quashed.

44. In the light of the conclusions which I have reached in relation to ground 1 I propose to deal with ground 2 briefly. In my view there is no justification for the claimant's complaint that the Inspector behaved unfairly in reaching a split decision, or issuing a partial permission, without first consulting with the parties. There are several reasons for reaching that conclusion. Firstly, there was nothing in the material before the Inspector to give cause for concern that there would be any prejudice or difficulty arising from a split decision. Whilst issues have been raised in the evidence in this statutory challenge none of them were articulated in the material before the Inspector. Secondly, it is obvious in my view that in submitting an application which is comprised of a number of works in relation to the same building the possibility of a split decision will almost always exist, as it did in the present case. If there were particular difficulties in relation to a split decision the Inspector is entitled to assume that those would be raised as part of the parties' submissions, and in the absence of concern being raised conclude that there would be no difficulty in the split decision being issued. Allied to these points, and given the breadth of the powers under section 79 of the 1990 Act which are engaged by the appellant in appealing under section 78 of the 1990 Act, it appears to me to be appropriate to expect that if there is any particular reason why the full breadth of those powers ought not to be wielded in any

particular case that an appellant might make that clear to a decision taker along with the reasons for their concerns. This is the consequence of the approach taken by Ouseley J in *Johnson*, which is an approach which I would endorse and apply in the present case. It follows that I would not have been minded to allow this application under ground 2 in the absence of the claimant succeeding under ground 1.

45. It follows that for the reasons set out above claimant succeeds under ground 1, but that ground 2 must be dismissed. For that reason the decision in the present case must be quashed.