Bedford Borough Council v Secretary of State for Communities and Local Government, Nuon UK Ltd

CO/9953/2012

High Court of Justice Queen's Bench Division the Administrative Court

26 July 2013

[2013] EWHC 2847 (Admin)

2012 WL 8203608

Before: Mr Justice Jay

Friday, 26 July 2013

Representation

Mr T Cosgrove (instructed by Bedford Council Legal Department) appeared on behalf of the Claimant.

Mr A Newcombe QC (instructed by Bond Dickinson) appeared on behalf of the Defendant.

Judgment

Mr Justice Jay:

1 This is an application under section 288 of the Town and Country Planning Act 1990 to quash a decision of the first respondent's inspector given on 13 August 2012, granting planning permission with conditions for the erection of three large wind turbines at a site called Airfield Farm, Podington, Bedfordshire.

2 The application is brought by the local planning authority, the Bedfordshire Borough Council. The first respondent, the Secretary of State for Communities and Local Government, does not appear before me today, having indicated an intention at the end of June to submit to judgment on the reasons issue. Accordingly, the second respondent, Nuon UK Limited, the original appellant before the inspector, takes up the cudgels in defence of the decision.

3 The inspector's decision followed a four or five day planning inquiry and a number of site visits by him. The main issue before the inquiry was whether any benefits of the proposal were sufficient to outweigh any harm it might cause to the character and appearance of the surrounding landscape, the setting of heritage assets, the living conditions of nearby residents through visual impact and/or noise, the enjoyment of riders and other users of public rights of way, ecology, and other matters.

4 It is salient background that the local planning authority's position before the inspector, aligned to the position of English Heritage, was not that the proposed development would cause substantial harm to the setting of heritage assets. It was another interested party, Campaign to Limit Onshore Wind Development, who as it were ran with this point. The second respondent submits that the claimant local planning authority, having lost on the main point he took before the inspector, namely the landscape issue, is acting in a somewhat opportunistic way in alighting on the heritage assets issue. I tend to agree, and will need to consider the extent to which this is an aspect of the matter which needs to inform the exercise of my discretion in this appellate jurisdiction.

5 In this context, I also refer to two specific matters which were drawn to my attention through evidence filed by the second respondent. First of all, before the inspector's decision under challenge, a previous inspector had considered these issues, or at least most of them. At page

24 of the supplementary bundle, we see this, and this is paragraph 50 of the relevant decision letter:

> "In terms of heritage matters, references have been made to Hinwick House and its parkland Hinwick Hall, the Podington Conservation Area, and Chellington Church. There would be some views of the turbines over and through trees and woodland from these places. However, I find that the distances would be such that their settings would not be adversely affected. I note that neither English Heritage nor the Council have raised objections on heritage grounds."

6 So the position at the first appeal was not even that some harm would be caused. My interpretation of DL50 is that no significant harm would be caused.

7 As for the current proceedings, as it were, my attention has been drawn to the Statement of Common Ground which starts at page 6 of the supplementary bundle. Paragraphs 5.1.7 and 5.1.9 are of particular relevance. Paragraph 5.1.7, for example, states:

> "Although there will be adverse effects on cultural heritage assets these are not significant and are not sufficient to warrant refusal of planning permission."

8 In a nutshell, and subject to more detailed analysis of what he decided, which I will undertake subsequently, the inspector found that the harm the proposed development would cause to the setting of various heritage assets, and thereby its significance, would be less than substantial. The inspector purported to carry out a balancing exercise and concluded that the upshot was that the proposed development could be permitted with conditions.

9 The claimant seeks to assail the inspector's decision on five grounds. Here I cite from the claimant's skeleton argument, not the second respondent's reformulation of those issues which it contends one needs to undertake in order to make proper sense of them. At this stage it is surely sufficient to record the precise way in which the claimant advances its case on this issue:

> 1. Did the inspector correctly construe and apply planning policy in relation to the impact of development on the setting and significance of heritage assets?
>
> 2. Was the inspector's application of the NPPF and/or his reasoning legally adequate?
>
> 3. Did the inspector undertake a lawful balancing exercise?
>
> 4. Did the inspector give special regard to the desirability of preserving the settings of affected listed builds as required by section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 ?
>
> 5. Was the inspector's reasoning legally adequate?"

10 The legal principles governing an application under section 288 are generally speaking common ground, subject to minor differences in emphasis, which I shall address when I come to examine the issues. There is, however, a potentially important issue between the parties as to the right approach to issue 4, and the correct application of the test, if it be a test, in section 66(1) of the 1990 Act. I shall now examine, analyse and set out my conclusions on the five issues in turn.

11 By its first ground, the claimant contends that the inspector misconstrued and/or misapplied the concept of "substantial harm". At DL42, the final sentence, the inspector said that substantial harm needs to be something approaching demolition or destruction. Mr Cosgrove for the local planning authority submits that here the bar is being placed too high, and in a manner which

enables the court to intervene, because this issue is logically prior to any question of planning judgment. Not merely does the terminology “something approaching demolition or destruction” suggest an overly formidable hurdle, it creates a false equiparation between physical harm on the one hand and non-physical or indirect harm on the other. Mr Cosgrove goes so far as to submit that it is far from clear that the inspector had other than physical harm in mind at all.

12 Further, the extent that what the inspector described as the still extant practice guide that accompanied the now defunct PPS5 was at all relevant, the inspector clearly misapplied it. Paragraph 91 of the practice guide does not circumscribe substantial harm as the inspector suggested. Paragraphs 99 to 95 are concerned with varying degrees of physical harm.

13 Finally, Mr Cosgrove drew my attention to paragraph 132 of the National Planning Policy Framework, the NPPF, which came into effect on 27 March 2012, and after the inspector's inquiry. The inspector gave the parties the opportunity to advance written submissions on the NPPF as a whole. The NPPF is important because it went slightly further than the antecedent PPS5.

14 I start with the relevant part of the glossary at page 94 of the bundle. “Setting of a heritage asset” means:

> “The surroundings in which a heritage asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or may be neutral.”

Then “significance (for heritage policy)” means:

> “The value of a heritage asset to this and future generations because of its heritage interest. That interest may archaeological, architectural, artistic or historic. Significance derives not only from a heritage asset's physical presence, but also from its setting.”

15 Surroundings are not limited to the curtilage of the asset. The “setting” is of course distinct from the physical structure of the asset itself, as must have been obvious to the inspector. Mr Cosgrove submitted in relation to the definition of “significance” that the final sentence is new. I will need to consider that submission in the context of PPS5, to the extent that it is material to my decision on the first ground.

16 Paragraphs 131 to 134 of the NPPF provide, and this is page 69 of the bundle:

> “In determining planning applications, local planning authorities should take account of: the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation; the positive contribution that conservation of heritage assets can make to sustainable communities including their economic vitality; and the desirability of new development making a positive contribution to local character and distinctiveness.
>
> “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. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. Substantial harm to or loss of a grade II listed building, park or garden should be exceptional. Substantial harm to or loss of designated heritage assets of the highest significance, notably scheduled monuments, protected wreck sites, battlefields, grade I and II listed buildings, grade I and II registered parks and gardens, and World Heritage Sites, should be wholly exceptional.
>
> “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 loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following

> apply: the nature of the heritage asset prevents all reasonable uses of the site; and no viable use of the heritage asset itself can be found in the medium term through appropriate marketing that will enable its conservation; and conservation by grant-funding or some form of charitable or public ownership is demonstrably not possible; and the harm or loss is outweighed by the benefit of bringing the site back into use.
>
> "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 securing its optimum viable use."

17 Two principal points arise here. First, it is clear that the test for the grant of planning consent varies according to the quantum of harm to significance. There is a presumption against granting consent if the harm to significance is substantial, or there is a total loss to significance; see paragraph 133. But if the harm is less than substantial, it is simply a question of weighing that harm against the public benefits of the proposal; see paragraph 134. I say that without prejudice to other issues which might arise under different statutes, for example section 66(1) of the 1990 Act.

18 Secondly, and perhaps less straightforwardly, I turn to address the third sentence of paragraph 133. I agree with Mr Cosgrove that this is examining the different ways in which significance may be damaged, to use a neutral term not in fact deployed in this paragraph. Significance may be harmed through alteration of the asset, ie physical harm, or development within its setting, ie non-physical or indirect harm. Significance may be lost through destruction of the asset, or, in a very extreme case, development within its setting.

19 Mr Cosgrove's submission is that paragraph 132 is looking at both types of harm, physical and non-physical, and substantial as well as less than substantial harm. I agree with Mr Cosgrove's analysis of paragraph 132 to that extent, but do not accept that it significantly enhances his argument on ground 1. It is common ground that the instant case is only about non-physical harm. It is also plain in my judgment that paragraphs 131 to 134 are not purporting to quantify harm or explain what is meant by the adjective "substantial".

20 The inspector drew some assistance from the practice guide, and in my judgment he was right to do so. The real question is whether he misunderstood it. The heading before paragraph 91, this is page 126 of the bundle, is "Substantial harm, demolition or destruction". Paragraph 91 provides:

> "Where substantial harm to, or total loss of, the asset's significance is proposed a case can be made on the grounds that it is necessary to allow a proposal that offers substantial public benefits. For the loss to be necessary there will be no other reasonable means of delivering similar public benefits, for example through different design or development of an appropriate alternative site."

Then paragraph 92:

> "Alternatively a case can be made for such serious harm or loss on the grounds that the designated heritage asset is generally redundant itself and it is preventing all reasonable uses of the site in which it sits … "

21 It is clear in my view that the epithets "substantial" and "serious" are to be read as synonymous. It could not sensibly have been otherwise. Further, it is also plain in my judgment that paragraphs 91 to 95 are not, pace Mr Cosgrove's submissions, limited to physical harm. Express reference is made to the asset's significance. Paragraph 14 of the practice guide addresses this; see page 105 of the bundle. These interests include "historic, architectural, artistic, traditional or archaeological."

22 It is not arguable in my view that the practice guide excludes non-physical or indirect harm. But it is against this background that DL42 needs to be understood. I set it out in full, at page 8 of the bundle:

> "As a precursor to the assessment of impacts on the setting of individual heritage assets, it is necessary to address the concept of significance. This is defined in the framework as the value of a heritage asset to this and future generations because of its heritage interest. That interest may be archaeological, architectural, artistic or historic. Significance derives not only from a heritage asset's physical presence, but also from its setting. Furthermore, it is necessary to assess the calibration of substantial and less than substantial harm. This is dealt with in paragraphs 91 to 95 of the still extant practice guide that accompanied PPS5. There is no specific guidance as to the level at which harm might become substantial but on a fair reading, it is clear that the author(s) must have regarded substantial harm as something approaching demolition or destruction."

23 Mr Newcombe QC accepted that the meaning would have been even clearer had the words "to significance" been interpolated after "substantial harm" in that final sentence, but I agree with him that their absence does not alter the sense. The inspector clearly had in mind substantial harm to the setting. Not merely does he say that expressly, the whole appeal before him was not about physical harm.

24 At one stage I was attracted by Mr Cosgrove's submission that the inspector was falsely comparing the physical with the non-physical, and by using the formulation "something approaching demolition or destruction", he was applying a concept which was solely apt to the case of physical harm. However, this is an incorrect reading of the inspector's decision. On further analysis, I agree with Mr Newcombe that the inspector was not setting up a dichotomy. He was applying a unitary approach to a unified concept of significance. What the inspector was saying was that for harm to be substantial, the impact on significance was required to be serious such that very much, if not all, of the significance was drained away.

25 Plainly in the context of physical harm, this would apply in the case of demolition or destruction, being a case of total loss. It would also apply to a case of serious damage to the structure of the building. In the context of non-physical or indirect harm, the yardstick was effectively the same. One was looking for an impact which would have such a serious impact on the significance of the asset that its significance was either vitiated altogether or very much reduced.

26 Although Mr Cosgrove did not put his argument quite in this way, I have considered whether the formulation "something approaching demolition or destruction" is putting the matter too high in any event. "Substantial" and "serious" may be regarded as interchangeable adjectives in this context, but does the phrase "something approaching demolition or destruction" add a further layer of seriousness as it were? The answer in my judgment is that it may do, but it does not necessarily. All would depend on how the inspector interpreted and applied the adjectival phrase "something approaching". It is somewhat flexible in its import. I am not persuaded that the inspector erred in this respect.

27 Further, I consider that there is merit in Mr Newcombe's subsidiary point that Mr Cosgrove has abstained from saying what the correct test is.

28 Mr Newcombe's fallback submission was that even if the inspector erred, I should confidently conclude that the result was the same. The outcome was congruent with the statement of common ground and naturally flowed from all the evidence in the case, including, he submitted, CLOWD's less than persuasive expert evidence primarily dedicated to landscaping issues. However, if I had been against the second respondent on ground 1, I would not have concluded that the case falls within the exceptional category of case where the court could be satisfied that no reasonable inspector could have reached a different conclusion. So the first ground fails on the law rather than on discretion.

29 The claimant's second ground is substantially parasitic on ground 1, save that Mr Cosgrove submits that the inspector failed to have regard to the fourth sentence of paragraph 132 of the NPPF, which as it happens he did not set out in DL40. This states, and I reiterate:

> "As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification."

However, in my judgment, the fourth sentence does not create a freestanding test. To the extent that there is a test, it is to be found in paragraph 134, and there is no evidence that the inspector failed to apply that. I therefore reject ground 2.

30 Ground 3 is in my judgment wholly without merit, and I did not invite Mr Newcombe to address me on it. The submission is that the inspector made no attempt to differentiate the degrees of harm, he simply indicated that it was less than substantial. Paragraph 34 of Mr Cosgrove's skeleton argument reads:

> "Plainly, he did not weigh with any degree of nicety the harms which would be sustained."

But as soon as the point is put in those terms, the flaw becomes obvious. Matters of fact and degree are matters of planning judgment for the inspector.

31 Ground 4 is more substantial. It alleges that the inspector failed to give special regard to the desirability of preserving the settings of affected listed buildings as required by section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 , which provides:

> "In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority, or, as the case may be, the Secretary of State, shall 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."

32 Mr Cosgrove's submission is that I cannot be satisfied on the balance of probabilities that the inspector had "special regard" to these matters. Instead, so his submission runs, the inspector regarded setting et cetera as a material consideration simpliciter, not a consideration to which special regard needed to be paid. Mr Cosgrove accepted that "special" in this context did not mean that special or heightened weight needed to be given to setting et cetera, but there had to be evidence that the inspector's regard to it was special.

33 Although the inspector mentions section 66 at DL38, 53 and 86, he merely stated that he bore it in mind. Either he failed to engage properly with it, or it is unclear whether he did so or not. Mr Cosgrove placed particular reliance on the decision of Lang J in East Northamptonshire District Council & Others v Secretary of State for Communities and Local Government & Another [2013] EWHC 473 (Admin). As it happens, that case involved the same inspector. DL57 in the case under consideration provided as follows, and here I am reading from paragraph 41 of the judgment of Lang J:

> "To summarise, the proposal would cause harm to the setting of a range of designated heritage assets. At its worst, that harm would not reach the level of substantial. Nevertheless, that there would be some harm means that the proposal does not accord with EMRP policies 26 and 27 or CSS policy 13 criterion (o). It is relevant to note that, subject to suitable conditions, the harm would disappear once the 25 year period of the planning permission expires. Moreover, the LIDAR survey would provide a small benefit in terms of recording. All that needs to be fed into the balancing exercise implicit in section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 , and explicit in PPS5 policies HE9.4 and HE10.1. I return to that below."

34 The following passages in the judgment of Lang J are relevant. First of all, paragraph 43:

> "However, he [that is to say the inspector] did not refer again to section 66(1) . In my view, given that he had previously referred to section 66(1) , and clearly had it in mind, his failure to refer to it again did not of itself indicate an error of law, provided he applied it properly, and did not merely pay lip service to it. However, in my judgment, he did fail to give proper effect to section 66(1) in the balance exercise."

Then paragraph 45:

> "Although 'harm' is not the test in section 66(1) , one of the meanings of 'preservation' is to keep safe from harm and so the concepts are closely linked (see South Lakeland District Council v Secretary of State for the Environment & Another [1992] 2 Appeal Cases 141 , per Lord Bridge at page 150). However, in my view, the addition of the word 'desirability' in section 66(1) signals that 'preservation' of setting is to be treated as a desired or sought after objective, to which the inspector ought to accord 'special regard'. That goes beyond mere assessment of harm."

Paragraph 46:

> "In my judgment, the inspector did not at any stage in the balancing exercise accord 'special weight', or considerable importance to 'the desirability of preserving the setting'. He treated the 'harm' to the setting and the wider benefit of the wind farm proposal as if those two factors were of equal importance. Indeed, he downplayed 'the desirability of preserving the setting' by adopting key principle (i) of PPS22, as a 'clear indication that the threshold of acceptability for a proposal like the one at issue in this appeal is not such that all harm must be avoided' (paragraph 86). In so doing, he applied the policy without giving effect to the section 61 duty, which applies to all listed buildings, whether the 'harm' has been assessed as substantial or less than substantial."

35 The first two sentences of paragraph 46 were subjected to careful analysis in submission by counsel before me. They were the main plank for Mr Cosgrove's submission that the same inspector in our case had failed to have special regard to the section 66(1) considerations. I should draw the inference, he submitted, that the inspector excluded it from account.

36 Mr Newcombe's forceful submission was that special regard and special weight are incongruent concepts, and I agree. The focus is on the regard, not on the according of weight pursuant to that regard. Special regard may lead to the giving of special weight, but it does not necessarily do so. The treating of factors as being of equal importance may be evidence that an inspector has not had special regard, but this does not inevitably follow.

37 Mr Newcombe submits that the correct formulation of the law is to be found in the judgment of Mr David Keene QC, as he then was, in *Heatherington UK Ltd v Secretary of State for the Environment & Another [1994] 2 PLR 9* , and Kenneth Parker J in Colman v Secretary of State for Communities and Local Government & Others [2013] EWHC 1138 (Admin). In Heatherington , the relevant passage appears at page 174 of the authorities bundle before me, which is page 19 of the PLR report:

> "It seems to me that, as a matter of interpretation, the inspector may well not have been performing the statutory duty under section 66(1) in relation to residential use, as well as observing section 54A . Both provisions must be observed. Certainly it is a long way from clear from the decision that he was applying section 66(1) to the residential alternative. That being so, I take the view that, on the balance of probabilities, there was a breach of statutory duty in the approach there adopted … "

38 In Colman , the relevant paragraph is paragraph 68 of the judgment of Kenneth Parker J, which reads:

> "That conclusion has, of course, to be read against the detailed findings that, apart from All Angels, insofar as there was any harm at all, it was 'minimal' or 'minor'. It is also notable that the inspector concluded that the overall harm that would arise from the development was 'limited' (paragraph 234). In my view, the inspector did give in this case 'special regard' to the consideration referred to in section 66(1) of the PLBCA . He did so by carrying out a careful and detailed assessment of the impact on the setting of the listed buildings in question. In all instances but one there was no such impact or the impact was such that it could in effect be discounted in the decision making. The inspector did have real concern about one listed building and found that the impact was significant. However, he was then required, first, to evaluate the extent of that impact

> and to weigh the negative impact against the substantial benefits of the development in accordance with NPPF. The impact on the one building was less than substantial, and even if special weight were attached to that impact, the overall negative effects were limited and could not outweigh the benefits of the development."

39 It is true that the decision of Kenneth Parker J, which postdated the decision given by Lang J, did not comment adversely on the latter, but in my judgment, his approach and that of Mr David Keene QC, as he then was, in Heatherington is slightly different and to be preferred.

40 Insofar as is necessary to my decision, I decline to follow paragraphs 45 to 46 of Lang J in the East Northamptonshire District Council case. That is not to say that her decision read as a whole was other than correct.

41 To my mind, the issue is whether I can safely infer on the balance of probabilities that this inspector did have special regard to the section 66(1) factors. Here, the relevant portions of the decision letter are as follows. First of all DL38, where the inspector said this:

> "An assessment of the impact of the proposal on the setting of these heritage assets must be made against the background of a series of statutory and policy documents. First, section 66(1) of the 1990 Act sets out that in considering whether to grant planning permission for development which affects a listed building, or its setting, the decision maker shall 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."

The last sentence of DL86 states:

> "Moreover, the statutory test imposed by section 66 of the 1990 Act must be borne in mind."

Then paragraph 87 of the decision letter:

> "Against that, as reflected in the framework, and wider government energy strategy, the proposal would bring significant benefits through the generation of energy from a renewable source, securing reductions in greenhouse gas emissions, adding to energy security, providing resilience to the impacts of climate change, and fostering economic growth. In my view, notwithstanding the overall failure to accord with the development plan, these positive aspects of the proposal clearly outweigh the negative aspects. On that basis, I intend to allow the appeal, subject to conditions."

42 My mind has wavered on this point, because DL86 and 87 are as much consistent with the proposition that special regard was had to the section 66(1) factors as the proposition exactly to the contrary, but here the burden of persuasion is on the claimant, and, adopting the approach of Kenneth Parker J in paragraph 68 of his decision, it is also clear that this inspector did identify and examine all the relevant factors with care. Furthermore, he concluded, as I have pointed out, that the positive aspects as he identified them clearly outweighed the negative aspects.

43 I do not conclude that this inspector failed to have special regard to the section 66(1) factors. I do not draw the necessary inference that he did not. Even if I had concluded to the contrary, I would not have granted the claimant relief, which is discretionary. A contrary decision would only have been on the basis that it is unclear from the inspector's reasons whether he had special regard or not. The local planning authority has to show substantial prejudice, and in my view it has failed to do that.

44 On this matter, paragraph 30 of Lord Brown's opinion in Porter is of particular relevance; see *South Bucks District Council & Another v Porter [2004] UKHL 33* . Paragraph 30 cites from Lord Bridge's decision in *Save Britain's Heritage [1991] 1 WLR 153* :

> "… I should expect that normally such prejudice will arise from one of three causes. First, there would be substantial prejudice to a developer whose application for

> permission has been refused or to an opponent of development when permission has been granted where the reasons for the decision are so inadequately or obscurely expressed as to raise a substantial doubt whether the decision was taken within the powers of the Act. Secondly, a developer whose application for permission is refused may be substantially prejudiced where the planning considerations on which the decision is based are not explained sufficiently clearly to enable him reasonably to assess the prospects of succeeding in an application for some alternative form of development. Thirdly, an opponent of development, whether the local planning authority or some unofficial body like [Save], may be substantially prejudiced by a decision to grant permission in which the planning considerations on which the decision is based, particularly if they relate to planning policy, are not explained sufficiently clearly to indicate what, if any, impact they may have in relation to the decision of future applications."

45 In my judgment, the first and second grounds identified by Lord Bridge do not apply to the present case. The issue is whether the third ground applies, particularly in the light of impact on future applications. Notwithstanding paragraph 46 of the claimant's skeleton argument, I am not persuaded that this inspector's decision should or would have any impact on this local planning authority's future approach to section 66(1) . So to the extent necessary, I would have refused relief on the grounds of discretion, even had I been in Mr Cosgrove's favour on ground 4.

46 Ground 5 is entirely without merit. The inspector was entitled to have regard to the 25 year period the proposal was intended to operate. At the end of DL52, he said this:

> "Less than substantial harm would be caused to the setting of a number of heritage assets but that harm would be reduced yet further by the transient and reversible nature of the proposals."

To my mind, the inspector at that point was not possibly perpetrating any legal error.

47 I deal finally with the point that the Treasury Solicitor was prepared to consent to judgment on the basis that the inspector's decision letter provided inadequate reasoning for his decision. That throws little or no light on the Secretary of State's real concern, and I agree with Mr Cosgrove that it is somewhat formulaic. In any event, although I have been troubled by the reasons ground in relation to section 66(1) , I have come to a different conclusion to those advising the Secretary of State, that in reality, those advising the Secretary of State and the Secretary of State himself are in no better position than this court to assess the merits of that ground. It is not as if the Secretary of State had any special knowledge which he has not shared with the parties.

This application under section 288 is therefore refused.

48 MR NEWCOMBE: My Lord, in those circumstances I would seek an order in those terms. So far as costs are concerned, if I might invite your Lordship's attention to the first witness statement of Mr Tilney at pages 3 and 4, which is the TSol letter.

49 MR JUSTICE JAY: Yes.

50 MR NEWCOMBE: Your Lordship will recall that at the bottom of the page, and over, the TSol there sets out three positions on cost dependent upon the outcome. One goes to paragraph 3 at the top of page 2.

51 MR JUSTICE JAY: "In the event that you successfully defend, the offer to pay the claimant's costs is withdrawn," yes, that must be right, "and the claimant and the first defendant will pay their own costs of proceedings in any event".

52 MR NEWCOMBE: My primary submission, my Lord, in these circumstances, would be that since the Borough Council as claimant have lost on this, they ought to pay my costs, but I reserve my position if and insofar as Mr Cosgrove puts a variation on that as to those costs which arose before and after the 26th, for obvious reasons.

53 So far as the quantum is concerned, there is a statement of costs, and I understand from Mr Cosgrove that subject to any apportionment between the Secretary of State and the Borough

Council, the quantum is agreed.

54 MR JUSTICE JAY: Right. That is very helpful. Mr Cosgrove, do we need to apportion, or should you not pay them all?

55 MR COSGROVE: My Lord, I should pay them all, I think. I think in principle my learned friend has succeeded, I think that actually was a rather formulaic letter from the Secretary of State as to costs as well as everything else, but my Lord, I do not object to the principle of the Council paying the costs of my learned friend, nor do I object to the amount. I have seen the costs schedule served in advance.

56 MR JUSTICE JAY: Thank you. I will order that the claimant pay the second respondent's costs in the sum of £27,452.

57 Thank you.