AC-2024-LON-[ ]

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

IN THE MATTER OF AN APPLICATION FOR PERMISSION FOR STATUTORY REVIEW UNDER SECTION 288 OF THE TOWN AND COUNTRY PLANNING ACT 1990

BETWEEN:

ECONERGY INTERNATIONAL LTD

Claimant

- and -

(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) SHROPSHIRE COUNCIL
(3) FLOUR NOT POWER

Defendants

STATEMENT OF FACTS AND GROUNDS

References to page references to the Claim Bundle are in square brackets.
*References to paragraphs in decision letters are in the form **(DL§X)**.*

Essential Reading (estimated time for reading 1.5 hours):

i. *Appeal Decision Letter **[35 - 63]***
ii. *First Witness Statement of David Robert Hardy **[33 - 34]***
iii. *List of proposed conditions, condition 28 **[276]***
iv. *Unilateral Undertaking **[277 - 312]***

INTRODUCTION

1. The Claimant seeks permission to apply for statutory review under s.288 of the Town and Country Planning Act 1990 ("**TCPA"**) of the First Defendant's decision dated 26 March 2024 ("**the Decision**") to uphold the Second Defendant ("**the Council**")'s decision to refuse application 22/04355/FUL ("**the Planning Application**"), in respect of the erection of a solar farm on land south of Berrington, Shrewsbury, Shropshire ("**the Site**").

BACKGROUND

2. The Site is an arable field under no obligation in relation to protected habitats or species. On 26 August 2022 the Claimant applied to the Council for planning permission for the following development on the Site **[64]:**

"Erection of an up to 30MW Solar PV Array, comprising ground mounted solar PV panels, vehicular access, internal access tracks, landscaping and associated infrastructure, including security fencing, CCTV, client storage containers and grid connection infrastructure, including substation buildings and off-site cabling."

3. As noted in the officer's report the development would power some 7,000 houses per annum (§1.5 **[66]**) and would deliver biodiversity net gain ("**BNG**") of 123.5% in terms of primary habitat and 76.4% in terms of hedgerow units (§6.2.2 **[74]**).

4. By proposed condition 3 the duration of the development was limited to a time period of 40 years from the date when electricity is first exported from the solar panels to the electricity network.

5. The Claimant designed their proposals in collaboration with the Council. This collaborative process resulted in no technical objection to the development from any consultee, including the Council's Ecologist and the Council's Landscape Officer who both considered the development was acceptable and had no objections **[69, 70** respectively**].**

6. As part of this collaborative process, the Claimant developed a Skylark Mitigation and Management Plan **[290 - 310]** which was agreed with the Council's Ecologist. It was to be secured through the TCPA by way of an agreement under s.106. The Skylark Mitigation Plan included the provision of an area of land to the north of the site for mitigation and compensation land for Skylarks potentially displaced from the site, alongside other works such as management of the Site itself for biodiversity interests, compatibly with the development.

7. The officer's report recommended approval of the Planning Application subject to conditions and a s.106 agreement providing for off-site Skylark mitigation **[64 - 95]**. It said:

"6.1.9 SC Ecology has not objected subject to a number of ecological conditions linked to habitat / biodiversity management / enhancement (included in Appendix 1). They requested further information in relation to mitigation for effects on Skylark habitat. In response the applicant has identified a specific area for Skylark mitigation in fields to the immediate north of the proposed site and has put forward specific management measures for this area to ensure that the habitat remains optimal for Skylark throughout the operational life of the proposed development. These provisions would be secured by means of a s106 Legal Agreement. Subject to this it is concluded that the Proposed Development complies with relevant planning policy regarding ecology / biodiversity…" **[83]**

8. The Planning Application was referred to the Council's Planning Committee for determination due to objections from local residents. On 9 May 2023, the Council's Planning Committee refused the application. It gave three reasons for refusal ("**RfRs**") **[96 - 97]**, with RfR 3 being the adverse ecological impact of the proposed development (emphasis added):

"Skylarks are protected under the EU Birds Directive 79/409/EEC. The application affects land which is used by Skylarks for nesting. The applicant proposes to mitigate for the loss of nesting opportunity by providing protected plots on land to the immediate north of the site. However, this land if [sic.] of a different character and the general

area is also used for seasonal shooting which may coincide with the Skylark nesting season. It is considered that the applicant has not demonstrated sufficiently that the proposed off-site mitigation would provide an appropriate safe and undisturbed environment for successful Skylark nesting. The proposals are therefore contrary to Core Strategy Policy CS17 and SAMDev policy MD12."

9. The Claimant duly appealed to the First Defendant under s.78 TCPA, who held a public inquiry via his appointed inspector.

10. The Council's RfR 3 wrongly focussed on the impact of shooting upon nesting skylark, later accepted to have been wrong by the Council because the two relevant time periods are different.

11. However, not long before the inquiry was due to open (on 5 March 2024), the Council significantly changed its case through a Supplementary Statement of Case (provided to the parties on 30 January 2024) **[145 - 146]**. This raised the adequacy of the Skylark mitigation and compensation land, specifically whether it had the carrying capacity for the number of Skylark that could potentially be displaced from the Site.

12. Because of the very late new allegation, the Claimant proposed a condition and a unilateral undertaking as means to resolve the issue. Condition 28 provided:

"No development shall take place until a Skylark Mitigation Strategy ('the Skylark Mitigation Strategy') has been submitted to and approved by the Local Planning Authority. The Skylark Mitigation Strategy shall follow the principles set out in the Skylark Mitigation and Management Plan produced by ADAS and dated 1st May 2023 and shall include:

(1) Identification of the areas for the implementation of mitigation
(2) Details of how the area will be managed
(3) The provision of evidence of arrangements to secure the delivery of proposed measures, including a timetable of delivery
(4) Long term monitoring for a period not less than 5 years
(5) The inclusion of a feedback mechanism to the Council before the end of the first 5 year period allowing for the alteration of working

methods/management prescriptions, should the monitoring deem it necessary

(6) Identification of persons responsible for implementing the works

Reason: To protect and enhance the site for biodiversity."

13. This type of condition is known as a "*Grampian*" condition, after *Grampian Regional Council and Another v City of Aberdeen District Council* (1984) 47 P. & C.R. 633 in which the House of Lords confirmed *"[i]t would have been not only not unreasonable but highly appropriate to grant planning permission subject to the condition that the development was not to proceed unless and until the [works in question] had been brought about*" (page 637 per Lord Kinkel). In effect, this decision confirmed the legal validity of "*negatively*" worded conditions, i.e. permission is granted but subject to a condition that no development may take place until X happens.

14. The unilateral undertaking applied the principles set out in the Skylark Mitigation and Management Plan produced by ADAS dated 1 May 2023 and agreed by the Council's Ecologist as securing the necessary mitigation and compensation. It committed to setting aside some 25ha north of the Site as compensation land for Skylarks, with two options based on future scenarios: (1) six hectares within the 25ha surrounded by 50m buffers to be transformed into Skylark-specific plots within species-rich grassland (if Natural England permitted the conversion of the compensation land to arable farming from its current use for cattle grazing), or if Natural England refused the land conversion, then: (2) the 25ha would remain as pasture land but would be managed for Skylarks in accordance with a set of agreed principles.

15. The unilateral undertaking, by Schedule 1 **[286]**, went even further than condition 28 and provided that the landowner covenanted with the Council not to commence development unless and until the agreed Skylark Mitigation Strategy had been implemented in full, and written confirmation of such implementation has been issued to the Council. It also committed the Claimant to maintaining the Skylark Mitigation Strategy for the lifetime of the development. This northern parcel of land is currently unfettered in its use in relation to protected species and used in a way detrimental to Skylarks.

16. In their appeal the Claimant also relied on the "*overwhelming policy support for renewable energy*" (Statement of Case at §3.1.1 **[113]**), specifically:

- *Climate Change Act 2008*
- *Climate Change Act (2050 target amendment) Order 2019*
- *Clean Growth Strategy published by the Department for Business, Energy and Industrial Strategy (BEIS) in October 2017*
- *UK Parliament's declaration of an Environmental and Climate Change Emergency in May 2019*
- *Energy White Paper: Powering our Net Zero Future published in December 2020*
- *UK Government's press release of acceleration of carbon reduction to 2035, dated April 2021*
- *'Net Zero Strategy: Build Back Greener' published by the UK Government in October 2021*
- *British Energy Security Strategy, published in April 2022 by the UK Government*
- *Government Food Strategy, published in June 2022 by the UK Government*
- *Overarching National Policy Statement for Energy (EN-1) (July 2011)*
- *Draft Overarching National Policy Statement for Energy (EN-1) published in September 2021*
- *National Policy Statement for Renewable Energy Infrastructure (EN-3) (July 2011)*
- *Draft National Policy Statement for Renewable Energy Infrastructure (EN-3) published in September 2021*
- *UK Government Solar Strategy 2014*
- *Written Ministerial Statement on Solar Energy: protecting the local and global environment made on 25 March 2015*

17. In his Decision the Inspector rejected condition 28 and the unilateral undertaking as a solution, despite the total prohibition on any development taking place unless and until the Council was satisfied. His reasoning was as follows:

"[183]…The claim is, if the details were found to be unacceptable, the Council would simply refuse to endorse them with a resultant embargo on the ability to implement the planning permission. However, in my opinion and in the alternative, if the compensation scheme was found to be unacceptable, and it was the only impedance to

the development and all its benefits, the Council would be faced with a balance between the two single opposing interests, out-with the balancing exercise of this decision." **[60]**

GENERAL LEGAL FRAMEWORK

Approach to Section 288 Applications

18. Lindblom J (as he then was) summarised the principles relevant to s.288 TCPA reviews in *Bloor Homes Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) at [19], including the following (emphasis added):

"(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues…

(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration…

…

(4) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question…"

GROUNDS OF REVIEW

Ground 1: Application of the Wrong Legal Test re. Skylarks

19. Which legal framework was engaged, and which was not, are of critical importance, as the Decision is of widespread consequence for all development which may affect priority species/species of principal importance. There are some 900 such species.

20. Skylarks are not protected under the Habitats Directive. Thus, the Inspector's decision did not engage the Habitats Directive regime, meaning there is no obligation to carry out an appropriate assessment of the implications of the development on the conservation objectives of the protected site/species, there is no obligation to provide suitable alternative natural greenspace to the Site, and there is no legal requirement the Inspector had to be certain (or in his words, "*convinced*") there would be no adverse effects on Skylarks as at the date of the Decision.

21. Instead, the Decision sat squarely within the framework established by the Natural Environment and Rural Communities Act 2006 ("**NERC**") and the Wildlife and Countryside Act 1981 ("**the WCA**").

22. NERC designates Skylark as a species of principal importance for the purpose of conserving or enhancing biodiversity in England under s.41. Skylark is also a species on the Red List (i.e. the most at threat) in 'Birds of Conservation Concern in the UK'. Under s.41(3) **[407]** the Secretary of State must–

"(a) take such steps as appear to the Secretary of State to be reasonably practicable to further the conservation of the living organisms and types of habitat included in any list published under this section, or
(b) promote the taking by others of such steps."

23. NERC also provides for a general biodiversity objective under s.40 as follows (and so far as relevant) **[404]:**

> *"**40 Duty to conserve and enhance biodiversity***
> *(A1) For the purposes of this section 'the general biodiversity objective' is the conservation and enhancement of biodiversity in England through the exercise of functions in relation to England.*
> *(1) A public authority which has any functions exercisable in relation to England must from time to time consider what action the authority can properly take, consistently with the proper exercise of its functions, to further the general biodiversity objective."*

24. Specific protection for Skylarks is only found under the WCA, which protects them from deliberate disturbance and their nests and eggs from destruction in precisely the same way as all wild birds under s.1 **[360]**. To breach this section is a criminal offence.

25. The NPPF provides at §186 **[347]:**

> *"a) if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused."*

26. Natural England has provided standing advice for decisions concerning development which may impact protected species. This provides, so far as relevant **[340]:**

> *"If avoidance or mitigation measures are not possible, as a last resort you should agree compensation measures with the developer and put these in place as part of the planning permission. These should:*
> - *make sure that no more habitat is lost than is replaced ('no net loss') and aim to provide a better alternative in terms of quality or area compared to the habitat that would be lost*
> - *provide like-for-like habitat replacements next to or near existing species populations and in a safe position to provide a long-term habitat*

- *provide alternative habitats further away from the impacted population if the natural range of the species is not going to be adversely affected."*

27. It can be seen the concept of "no net loss" / "like-for-like" does not refer to individual members of a species. It refers to the habitat of that species. It is important to note that even where the highest possible level of legal protection is awarded to a species (under the Habitats Directive for a European Protected Species), the test applied is to maintain the 'Favourable Conservation Status' of that species. It is never to provide mitigation based on a set number of animals.

28. Local existing and emerging policy also covered environmental protection and protected species. The key local policies are CS6 **[315]**, CS17 **[316]**, and MD12 **[317]**:

[Core Strategy Policy CS6 'Sustainable Design and Development Principles']:

"To create sustainable places, development will be designed to a high quality using sustainable design principles, to achieve an inclusive and accessible environment which respects and enhances local distinctiveness, and which mitigates and adapts to climate change. This will be achieved by: ...
Ensuring that all development: ...
• Protects, restores, conserves and enhances the natural, built and historic environment and is appropriate in scale, density, pattern and design taking into account the local context and character, and those features which contribute to local character, having regard to national and local design guidance, landscape character assessments and ecological strategies where appropriate;
• Contributes to the health and wellbeing of communities, including safeguarding residential and local amenity and the achievement of local standards for the provision and quality of open space, sport and recreational facilities.
• Is designed to a high quality, consistent with national good practice standards, including appropriate landscaping and car parking provision and taking account of site characteristics such as land stability and ground contamination;
• Makes the most effective use of land and safeguards natural resources including high quality agricultural land, geology, minerals, air, soil and water;"

[Core Strategy Policy CS17]:

"Development will identify, protect, enhance, expand and connect Shropshire's environmental assets, to create a multifunctional network of natural and historic resources. This will be achieved by ensuring that all development:

- *Protects and enhances the diversity, high quality and local character of Shropshire's natural, built and historic environment, and does not adversely affect the visual, ecological, geological, heritage or recreational values and functions of these assets, their immediate surroundings or their connecting corridors;*
- *Contributes to local distinctiveness, having regard to the quality of Shropshire's environment, including landscape, biodiversity and heritage assets..."*

[SAMDev Policy MD12 'The Natural Environment']:

"In accordance with Policies CS6, CS17 and through applying the guidance in the Natural Environment SPD, the avoidance of harm to Shropshire's natural assets and their conservation, enhancement and restoration will be achieved by:
Ensuring that proposals which are likely to have a significant adverse effect, directly, indirectly or cumulatively, on any of the following:

i. *the special qualities of the Shropshire Hills AONB;*
ii. *locally designated biodiversity and geological sites;*
iii. *priority species;*
iv. *iv. priority habitats;*
v. *important woodlands, trees and hedges;*
vi. *ecological networks*
vii. *geological assets;*
viii. *visual amenity;*
ix. *landscape character and local distinctiveness.*

will only be permitted if it can be clearly demonstrated that:

a) there is no satisfactory alternative means of avoiding such impacts through re-design or by re-locating on an alternative site and;

b) the social or economic benefits of the proposal outweigh the harm to the asset.

In all cases, a hierarchy of mitigation then compensation measures will be sought."

29. As can be seen, nowhere in the legislative or policy framework is a pair-for-pair/like-for-like replacement of individual members of a sub-species population required. The Inspector's conclusion on the "*extent that [Skylarks] may be affected*", based on the individual number of Skylarks potentially displaced and potentially 'rehomed', is, therefore, an approach devoid of foundation in law, policy or guidance.

30. This matters because consistency in public decision-making matters, and as noted, there are some 900 species potentially subject to what is now a highly variable spectrum of approaches, including this disproportionately demanding approach. Other decisions take the entirely opposite approach: see §37 and condition 8 of the Washdyke appeal decision APP/E2530/W/24/3337544 **[558 - 571]**, which confirms a condition requiring a Skylark Mitigation Strategy would render the development acceptable. Developers cannot possibly prepare proposals for development affecting one of the 900 priority species / species of principal importance with any certainty when there is zero confidence which way an inspector would determine the acceptability of the exact same type of condition. As noted below under ground 3, the correct, predictable and principled basis is to consider whether a condition could make the development acceptable (i.e. the Inspector's approach in the Washdyke decision), and if so, grant permission subject to that condition.

31. Here the Inspector wrongly applied an approach akin to a requirement for certainty under the Habitats Directive and pair-for-pair/like-for-like replacement, an approach not found in the legal, policy or guidance framework under which he was operating.

32. The Inspector's approach is also devoid of logic. The population of Skylarks (and any mobile animal species) on any site will vary from season to season, and from day to day. Counting individual numbers of animals for the purposes of calculating and assessing the effectiveness of mitigation is pointless; the number could be different the next day. What the law requires is an overall assessment of all relevant factors in the round, and judgment. It does not require conviction there will be a like-for-like replacement of a specific number of individual animals and rejection of schemes falling short.

33. The wider consequences are worth reiterating as the public importance of this issue alone warrants permission being granted. As noted, there are over 900 species to which the Inspector's approach applies in principle. If the Inspector's approach was taken in relation to all relevant development across the country then a great volume of development would grind to a halt. It is simply impossible to apply the Inspector's approach on any scale. This impossibility is yet further proof that the Inspector's approach in the Decision is fundamentally wrong.

Ground 2: Failure to Take Account of Material Consideration (Certainty of Benefits to Skylarks)

34. Correlated with the above error of law, nowhere does the Inspector consider the benefits to Skylarks set out in Mr Fearn's evidence **[175 - 177]** and expressly relied on by the Claimant in Closing **[215 - 216]**.

35. The certain benefits to Skylarks were material considerations. The Claimant's evidence **[175 - 176]** was that the implementation of a Skylark Mitigation Strategy based on the ADAS Skylark Mitigation and Management Plan would improve breeding productivity due to increased invertebrate availability on a qualitative basis. Moreover, currently there is no Skylark-specific land management on the Site or the northern compensation site. Both parcels of land are perfectly capable of being (and in the case of the northern compensation site, in fact are) put to use in ways that are directly harmful to Skylark breeding and foraging interests. The imposition of an enforceable Skylark Mitigation Strategy would remove the present ongoing active harm to Skylark requirements in the area and provide certainty of beneficial measures for this priority species over a 40-year period. Failure to consider the obviously material consideration of benefits to Skylarks was an error of law.

Ground 3: Unreasonable Decision on Pre-Commencement Condition / Failure to Take Account of Material Policy on Conditions

36. The PPG on Conditions at §009 **[318]** states that *Grampian* conditions should not be used where there is no prospect of the action being performed within the time limit

imposed by the planning permission. The Inspector considered this advice and held at §129 that *"[i]t is not suggested that there are 'no prospects' and I agree*" **[53].**

37. The case law goes further. In *British Railways Board v Secretary of State for the Environment* [1993] 1993 WL 963747 **[372]** Lord Keith of Kinkel held that: "*the mere fact that a desirable condition appeared to have no reasonable prospects of fulfilment did not mean that planning permission must necessarily be refused*." Similarly, in *Merritt v Secretary of Statement for the Environment, Transport and the Regions* [2000] JPL 371, in relation to circular 11/95 on the point about there being 'no prospects' of a condition being fulfilled (now superseded by the PPG), the court recognised that:

"It is perhaps unfortunate that the first respondent should have adopted a policy that is couched in absolute terms; in other words, that it is his policy that a Grampian condition that might otherwise be wholly desirable, as in British Railways Board, should not be imposed because there is, as judged at the date of the decision, not a reasonable prospect of fulfilment within the permission time-limit.

...

The danger of promulgating the policy in an absolute form, such as para 40 of the annex, is that a decision maker may regard himself as bound to follow that policy. The challenge in the present case is not, of course, to the policy. It is to the decision. Thus, I must consider whether this inspector did properly exercise his discretion or whether he made his decision not to accept a Grampian condition simply on the basis of the first respondent's policy dicta without regard to other material considerations.

...

As I have indicated, the inspector's conclusion on the Grampian condition was crucial to the conclusion that he reached on the acceptability of the proposal and the application of development plan policy. If he had properly considered the factors to which I have referred, and which were material to the exercise of his discretion, he may well, in my judgment, have come to a different decision. Thus, I conclude that the inspector erred in law, and the decision should be quashed on this ground." **[383 - 384]**

38. Further, §158 of the then-NPPF confirms:

"when determining planning applications for renewable and low carbon development, local planning authorities should:
a) …recognise that even small-scale projects provide a valuable contribution to cutting greenhouse gas emissions; and
b) approve the application if its impacts are (or can be made) acceptable."

39. As the officer's report made clear (at §8.1.1) "*This is a clear instruction in national policy that renewable energy development should be approved where impacts can be made acceptable.*"

40. The *Grampian* condition and unilateral undertaking both confirmed the application and its impact can be made acceptable. It should, therefore, have been approved, in line with the express wording of national policy. Indeed, the Inspector accepts the condition would not fall to be rejected based on the guidance (and as above, the law goes even further in allowing for *Grampian* conditions).

41. Yet he still goes on to reject the condition because it should not be deferred, giving reasoning entirely at odds with the aforementioned law and guidance, essentially arguing the Council cannot be trusted to make the right decision under condition 28 (why else would he have refused the condition for the reasons he gave?). To reject a *Grampian* condition outright in principle because it would do exactly what a pre-commencement condition is designed to do was irrational.

42. In *Gladman Developments v SS Communities and Local Government* [2019] EWCA Civ 1543 Lindblom J (as he then was) recognised **[462]**:

"69. Sometimes, I would accept, it might be unreasonable, in the Wednesbury sense…for an inspector not to impose a condition even though none of the parties has suggested it, because the need for that condition and the appropriateness of imposing it are perfectly obvious. Such a possibility was recognised, for example, by Collins J in National Anti-Vivisection Society v First Secretary of State [2004] EWHC 2074 (Admin) at [32]–[35]—though in the particular circumstances of that case the judge was "wholly satisfied" that the condition in question, which would have limited the use

of the proposed medical research building to animal research, "could not conceivably be regarded as a condition which was obviously needed" (para 35)."

43. This was a case concerning an Inspector who had refused to impose a condition even though none was suggested. However, the reasoning applies with even more force here: it was *Wednesbury* unreasonable to refuse to grant planning permission where a condition was suggested and that condition made it possible to grant planning permission to the proposed development.

44. Further, a decision may be challenged on the basis that it has no sufficient evidence basis (*R (Association of Independent Meat Suppliers and another) v Food Standards Agency* [2022] 3 All ER 965 at §11) **[556]**, or that the reasoning involved a serious logical or methodological error: *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 at §98, per Leggatt LJ (as he then was) **[488]**. The question is whether the decision-maker's conclusion can be justified on the basis of the evidence before it: *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin) at §§32-34 **[510]**, per Saini J. Absence of logic or justification equates to irrationality.

45. Here, the Inspector's conclusion could not be justified on the basis of any evidence before him. The Council accepted the principle of a *Grampian* condition was lawful in the circumstances. Even if they did not, there was still no evidence before the Inspector the condition had no prospect of being fulfilled. Indeed, the Inspector accepted the evidence was that it would. The Decision was, accordingly, both unreasonable and failed to properly take account of policy relating to the imposition of conditions. The NPPF is clear: where development can be made acceptable (i.e. through conditions) conditions ought to be imposed rather than rejecting the development outright.

Ground 4: Unlawfully Inadequate Reasoning (Skylark)

46. The Inspector, in rejecting the imposition of condition 28, said (at DL§183) **[60]**:

"the Council would be faced with a balance between the two single opposing interests, out-with the balancing exercise of this decision.

[184] On this basis, I am not satisfied that this issue should be deferred to another day and I attach significant weight to the impact of the proposal on Skylarks, a priority species in decline."

47. There are no reasons explaining why a balancing exercise out-with the Inspector's decision was unacceptable in respect of all of the other pre-commencement conditions (6, 10, 12, 13, 14(a), 15, 17, 18, 19, 20, 21, 22, and 25) **[269 - 276]**. The substance of the condition in question cannot be the answer, as some of these conditions also concern matters in fundamental dispute between the parties, and the condition – just as condition 28 – would resolve the dispute by giving the Council full control over future details. Why was that mechanism unacceptable in relation to condition 28 but not in relation to any of the other 13 pre-commencement conditions? There is no explanation.

48. Further, the Inspector's reasons give no assistance to the Claimant in terms of understanding what else it could have done. The reason details had to be dealt with by way of pre-commencement condition was because of the very late introduction of the Skylark issue by the Council in its supplementary Statement of Case; timing was not within the Claimant's control. The Claimant nonetheless ensured that Skylark mitigation was legally secured by way of condition and formal legal undertaking which, combined, ensured that no development would take place, and thus no harm would be caused, until a strategy was approved by the Council and that strategy had been implemented (thus, development would only take place when the mitigation and compensation measures were already in place). Doing nothing at all to implement the development until the Skylark Strategy was in place (and so, its effectiveness would be known even before the prospect of harm arose) goes well beyond any legal, policy or guidance requirement in relation to Skylarks. It also provided absolute control to the Council concerning the impact to Skylarks as a result of the development.

49. In those circumstances, the Decision does not give the Claimant any explanation of how the dispute was resolved due to a failure on the Claimant's part, and what else it could have done in the circumstances (contrary to (*South Bucks District Council and another v Porter (No. 2)* [2004] 1 WLR 1953, at p.1964B-G). This is likely because there is in fact nothing more the Claimant could have done to protect Skylarks; at the very least a

lawful decision would have acknowledged this and given reasons informing the Claimant why permission had to be refused all the same.

Ground 5: Failure to Take Account of a Material Consideration (Temporary and Reversible Landscape Impact)

50. The solar farm is not permanent: it is a temporary project (condition 3). The landscape would remain exactly the same as before when the development is removed. The impact is temporary, and reversible. This is a material consideration that was not taken into account by the Inspector when considering the visual and landscape impacts.

51. The Inspector's decision here can be contrasted to his decision in the context of the loss of best and most versatile agricultural land; at §83 the Inspector states: "*solar farms are normally temporary structures and planning conditions can be used to ensure the land is restored to its previous use*" **[46]**. This is a quote from §013 of the Renewable and Low Carbon Energy PPG. In full §013 reads (emphasis added) **[319]**:

"The deployment of large-scale solar farms can have a negative impact on the rural environment, particularly in undulating landscapes. However, the visual impact of a well-planned and well-screened solar farm can be properly addressed within the landscape if planned sensitively. Particular factors a local planning authority will need to consider include:

….

- *that solar farms are normally temporary structures and planning conditions can be used to ensure that the installations are removed when no longer in use and the land is restored to its previous use;"*

52. The PPG confirms the temporary nature of the solar farm is a material consideration when considering landscape impacts. However, the Inspector fails to take account of this material consideration when considering landscape and visual impacts.

Ground 6: Unlawfully Inadequate Reasoning (Landscape Impact)

53. At various points in the Decision, the Inspector recognises that the solar panel installation is not permanent, but gives no consideration (ground 5 above) to those implications in terms of landscape impact. The reasoning where he does imply non-permanence, is also, accordingly, so inadequate as to be unlawful (*South Bucks*). See, for example:

a. Within the landscape section, at DL:
   - §33 (emphasis added): in the context of discussing the landscape impacts on PROW 0407/16/1 "*the adverse intrusive impacts of the development would remain apparent for the duration of the project*" **[40];**
   - §42 (emphasis added): "*Continuing with Cliff Hollow Road, between Berrington and the lane to Cantlop Mill (viewpoint 7), impacts would be contained to a small part of the eastern parcel and a minor part of the western field. These are likely to remain for the former during the operation of the installation*." **[41]**
   - §49 (emphasis added): "*In terms of visual effects, there would be some marked adverse effects arising from the construction phase but, more typically, the long-term operational phase*" **[42].**

b. Within the section considering the loss of best and most versatile agricultural land, at DL:
   - §80 (emphasis added) "*The primary comprehensive Statement of Common Ground between the Appellant and the Council accepts that the proposal is temporary; it will not result in permanent loss of agricultural land…*" **[46]**
   - §95 recognises that there would be "*a forty year temporary permission*" **[47]**
   - §107: "*the site would still be capable of restoration to at least its current quality at the end of the forty year period*" **[49].**

c. In the section considering the general planning balance

- §185 recognises that the solar farm would be "*for a period of up to forty years*" **[60]**

54. The reasons are also internally inconsistent: the Inspector recognises the temporary nature of the solar farm in, and yet says that the visual impacts would be "*permanent*" (giving no indication of what he means by that), and nowhere gives reasons on why, despite the temporary nature of the development, the landscape effects were nonetheless unacceptable. This does not allow a reasonable person to determine how a key issue was resolved (*South Bucks*).

Ground 7: Procedural Unfairness (Visual Impacts on the Hamlet of Cantlop)

55. At §39 of the Decision the Inspector concludes on a point that was not argued by any party (emphasis added) **[41]:**

"39. More significantly, from the unnamed road in Cantlop (Viewpoint 14), sizeable portions of the installation in the eastern sector of the western field and across the eastern parcel would be an inevitable large scale blemish on the landscape for the duration of the development. Whilst there is no alleged impact on the amenity of residential properties in this part of the hamlet, local residents would experience the transformation to the rural landscape on a daily basis."

56. Procedural fairness requires parties to have had a fair opportunity to make submissions on issues that the Inspector considers to be material. In *R (Poole) v Secretary of State for Communities and Local Government* [2008] EWHC 676 (Admin), Sullivan J held at §40 **[418]:**

"[I]t is most important when deciding whether the parties at an inquiry have had a fair opportunity to comment on an issue raised by an Inspector of his or her own motion, and whether they could reasonably have anticipated that an issue had to be addressed because it might be raised by an Inspector, to bear in mind the highly focused nature of the modern public inquiry where the whole emphasis of the Rules and procedural guidance contained in Circulars is to encourage the parties to focus their evidence and submissions on those matters that are in dispute."

57. In *Mayor of London v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 1176 (Admin), Holgate J held at §79 **[532]**:

"A key consideration is whether the party could reasonably have anticipated that the Inspector might deal with the issue in his decision…So, for example, if the matter is raised in third party representations, the main parties are expected to deal with it (notwithstanding the contents of an SOCG or a concession from a main party) unless the Inspector should say otherwise."

58. For a decision to be so unfair as to be unlawful substantial prejudice must be caused to the Claimant as a result of the unfairness (*Fairmount Investments Limited v Secretary of State for the Environment* [1976] 1 WLR 1255 at page 1263) **[356]**. That is the case here: there was no indication this issue would be an adverse conclusion found against the Claimant. If the Inspector had provided such an indication, the Claimant could have provided evidence to answer the issue. While the inspector is not required to give the parties regular updates about his thinking (*Engbers v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1183, [2017] JPL 489) **[425 - 443]**, where there has been no notice at all that a matter may be in issue, the parties are at least expected to be notified of that issue prior to a decision being made so that they can fairly answer the point. Here that did not happen and therefore the decision is unlawful due to procedural unfairness.

CONCLUSION

59. The Claimant respectfully asks the Court to grant permission and will seek the following relief in due course:

a. an order quashing the Decision;
b. further or other relief; and
c. an order that the First Defendant pays the Claimant's costs of the claim.

NINA PINDHAM
CORNERSTONE BARRISTERS
30 April 2024