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

Claim No. CO/3041/2021

IN THE MATTER OF S. 288 OF THE TOWN AND COUNTRY PLANNING ACT1990

BETWEEN:

LONDON HISTORIC PARKS AND GARDENS TRUST

Claimant

-and-

MINISTER OF STATE FOR HOUSING

First Defendant

-and-

WESTMINSTER CITY COUNCIL

Second Defendant

-and-

SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT

Interested Party

CLAIMANT'S REPLY TO SUMMARY GROUNDS OF DEFENCE

Introduction

1. The Claimant makes this Reply to the Minister's and Secretary of State's summary grounds of defence (SGD) and comments briefly on those submitted by Learning for the Righteous. This is in accordance with the application for permission to do so in para. 8 of the Claimant's claim form at CB/6.

2. The Claimant repeats its request for permission to bring its section 288 challenge on the basis that its grounds are demonstrably arguable and neither "unarguable" as contended by the Minister nor "wholly wrong" as asserted at one stage by the Secretary of State.

3. The Claimant notified the Minister and Secretary of State that it proposed to make a claim in a pre-action letter sent by email on 22 August 2021 requesting a reply by 3 September. There was no obligation on the Claimant to do so since this is statutory challenge, but the Claimant also asked for disclosure of certain information (which has still not been provided – see further below).

4. The Secretary of State declined to respond by 3 September and only replied at close of business on 6 September when, because of the rules about deemed service in CPR 8.44, the claim had to be issued the next day rather than on 9 September, the last day to bring a challenge.

5. Although not acknowledged by the Minister, the Claimant's solicitors explained when serving the claim on 7 September that "The response from the Minister has not persuaded [the Claimant] not to pursue a s.288 challenge". But there was not time to say more than that. In any event, the principles referred to in case law such as St Modwen and Bramshill are familiar summaries of principles in previous cases and do not represent a complete answer to the Claimant's challenge.

6. Where the Secretary of State is concerned, he completely failed to serve his SGD on the Claimant until prompted by the Claimant's solicitors and has not acknowledged at all the request for information on alternative sites – see further below.

7. Their responses to the claim should be read in that light.

Ground 1

8. The Minister's SGD emphasise, in relation to Ground 1, the statements of principle by the Court of Appeal in both Bramshill [2021] EWCA Civ 320 and St Modwen [2018] PTSR 746. For the reasons set out below, the Claimant's submissions in support of Ground 1 are consistent with those authorities and the earlier authorities from which those principles are derived. These include Tesco Stores Ltd v. Dundee City Council (SC) [2012] PTSR 983.

9. The analysis that these authorities demand involves establishing, first, the objective meaning of the relevant paragraphs of the NPPF; and second, examining whether the Inspector, or the Minister, has erred in the application of the policy as so construed. The

first stage is for the Court. As it is put in St Modwen, (4) cited at SGD [7], "The proper interpretation of planning policy is ultimately a matter of law for the Court. The application of planning policy is for the decision-maker".

10. The Claimant accepts, of course, the nature of both of these stages as re-iterated by the Court of Appeal. At the first stage, St Modwen (4) itself states that "Planning policies are not statutory or contractual provisions and should not be construed as if they were". Nonetheless, it is important not to lose sight of the fact that the Court in interpreting the policy is looking for a single objective meaning. At the stage of interpretation, the Court is not asking whether the decision-maker has adopted a reading of the policy reasonably open to it; it is establishing the true meaning. This is set out in the judgment of Lord Reid in Tesco v. Dundee at [17] to [22]. Lord Reid explains that the approach approved in those paragraphs means that "planning authorities do not live in the world of Humpty Dumpty. They cannot make the development plan mean whatever they would like it to mean."

11. At the second stage of the exercise, the application of a properly construed policy to the facts of the case involves an exercise of planning judgment which will be accorded a high a degree of respect by the Court, which will only interfere if the judgment is irrational or perverse. In the present context, ascertaining whether the harm to the significance of a particular listed building is or is not "substantial" requires an assessment of a wide range of issues, not spelt out in the paras. of the NPPF and which are indeed a matter of judgment. But the starting place remains the requirement of the policy objectively construed.

12. This division between interpretation and application is unsurprisingly to be found in the judgment of Lieven J in Solo Retail Ltd v. Torridge DC [2019] EWHC 489 (Admin), cited by the Minister in SGD [11]. Application of the principles set out by Lord Reid to a core concept of the NPPF such as "substantial harm" is consistent with Lieven J's explanation of the relevant principles.

13. In relation to the construction of that core concept, the claimant repeats the submission that the apparent requirement that for harm to be "substantial" or "serious" significance needs to be "very much if not all drained away" is not compatible with a proper construction of the relevant paragraphs of the NPPF. It imposes a higher test or threshold than those paragraphs read alone.

14. It is apparent from IR 15.12 (cited at SGR [15]) that the Inspector's approach involved equating the requirement of a "serious" impact on a key element of special interest with the "Bedford" test. He explained the latter in these terms "Bedford turns on the requirement for the harm to be assessed as serious (with significance needing to be very much, if not all 'drained away') in order that it be deemed substantial". The gloss has no justification in the language of the NPPF; it imposes a requirement over and above that which would be produced by a straightforward application of the NPPF. The central language in NPPF [193] (old) requires an assessment of whether any potential harm "amounts to substantial harm, total loss, or less than substantial harm to its significance."; wording repeated in [195] (old) – "substantial harm to, (or total loss of significance of)" a designated heritage asset. This "test" or "threshold" would as a matter of the ordinary use of language (objectively assessed) be met by harm to the setting of the BM which was of great importance. The requirement allegedly produced by Bedford is repeated by the Inspector in the first sentence of [15.187].

15. The apparent requirement is based on a reading of Jay J's judgment in Bedford. The Claimant submits that considerable care is needed in relation to this judgment; and in particular to both the factual context of, and the arguments advanced, in the case. The Claimant submits that on a true reading of Jay J's judgment it is not authority for the Inspector's reasoning in IR 15.12. However, even if it was, it is in the last analysis a first instance judgment. If it is authority for the proposition that there is a requirement for the significance to be very much if not all drained away for the harm to be deemed substantial, it is wrongly decided.

16. Turning to Bedford, the factual context is important. The case is one in which the issue was the impact of three large wind turbines on the setting of heritage assets. Jay J recorded, and regarded as important, the fact that neither the local planning authority nor English Heritage thought that the turbines would cause substantial harm [4]; set out at [5] the finding of an earlier Inspector that the distances involved were such that the settings were not adversely affected; stated succinctly at [6] "So the position at the first appeal was not even that some harm had been caused."; set out at [7] agreement within the Statement of Common Ground that the effects were not significant; and summarised at [8] the finding of the IR that he was dealing with as being that the harm would be less than substantial.

17. At DL42 the Inspector had said that substantial harm "needs to be something approaching demolition or destruction" – see [11]. The attack on this was that it created a false equiparation between physical and other harm. Jay J rejected this line of argument – see [25]. At [26], Jay J considered an argument not put to him. He said: "I have considered whether the formulation 'something approaching demolition or destruction' is putting the matter too high in any event. 'Substantial' or '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."

18. By parity of reasoning with [26] the issue arises whether the "requirement" of significance being "very much, if not all, drained away" imposes an additional requirement not to be found in the wording of the NPPF. The Claimant submits that it plainly does.

19. On the facts that he was dealing with, the finding by Jay J that there was no material error was unsurprising. However, the present facts are very different. The approach in IR 15.12 is central to the whole structure of the IR. It enabled the Inspector to hold (in [15.188]) that the harm to the setting of the BM was moderate (because below the threshold created by the approach in [15.12] and [15.187]) but that, outside the NPPF policies construed in the light of Bedford, "the measure of harm to the setting of the BM should be assessed as being of great importance, and the weight to that harm characterised as considerable."

20. The requirement or gloss is expressed in a single sentence at the end of [25]. Examination of [20] to [25] show that this was a paraphrase of the submissions made by counsel for the developers explaining why it could be seen that the Inspector had not falsely equiparated physical and non-physical harm. There was no argument about the threshold to be applied in the case of non-physical harm; it is not possible to find any reasoning within Bedford in support of the derivation of the gloss from the wording of the NPPF (neither the Claimant nor the developer was advancing such an argument; and the Secretary of State did not participate (see [47])). The Claimant accordingly submits that the formulation in Bedford should simply be put to one side.

21. There is the further consideration that the current guidance on the application of the concept of substantial harm is not the same as it was at the time of Bedford (see IR [8.18]). The Claimant notes that the Secretary of State's SGD are heavily dependent on Bedford.

Ground 2

22. This Ground is fully pleaded. It is not an allegation of irrationality. Rather it asserts that it was incumbent on the Inspector to clearly identify the special historic interest of the RPG that justified its registration under s8C of the Historic Buildings and Ancient Monuments Act 1953 and consider whether that interest was harmed. The assessment of the changes that would be made by the proposals could only go to whether a justification for the harm to the interest that underlay the registration.

Ground 3

23. The 1900 Act is addressed in the Minister's SGD in a passage at [32] to [35]. This makes two points. First, that the submission made in the SFG was not made on behalf of the Claimant at Inquiry and, second, that in any event on the construction advanced by the Minister there would be no breach of the Act.

24. Neither point is a bar to success on this ground. As a matter of construction, the use of the "New Garden Land" which is the subject of the obligations created most relevantly by ss. 8(1), (6) and (8) of the Act, see at CB/944-946, would be a breach of those obligations. It is this land which is the site of the proposed Memorial. As to the second, the Act creates an insurmountable obstacle for the proposals, which on the Claimant's case simply cannot be carried out on the basis of existing primary legislation. A critical issue, with which much of the argument is concerned, is that of alternatives. It is not sensible to have a decision which accepts the approach of the promoter of the project to alternatives which leaves out of account a straightforward statutory bar to the carrying out of the project that is being put forward.

25. Further, cases such as R (Kides) v. South Cambridgeshire DC [2002] EWCA (Civ) 1370 demonstrate that a claimant can rely on issues not raised by her at Inquiry. A person with standing is entitled to a lawful decision.

26. This perspective is not avoided by the Secretary of State's suggestion that the Act could be repealed. There are no proposals for repeal and no consideration of the timetable and procedures that would be involved and whether, for example, it would involve hybrid legislation.

27. The construction of s. 8 of the Act is addressed at SFG [24] and [65] to [70] – see especially the first sentence of [67]. The relevant obligations are most clearly seen in the terms of s. 8(6) and 8(8). S. 8(6) created an obligation on the Commissioners to "lay out as a garden the new garden land….and may also make such alterations to the paths bedding and turfing of the existing Victoria Garden….as they think necessary to secure uniformity of design in the Victoria Gardens extended under the provisions of this section." S. 8(8) created the obligation to "maintain the garden so laid out." This is not a simple obligation to maintain any garden; it has to be the garden "as so laid out" in accordance with a detailed prescription of uniformity of design across the whole of the enlarged Victoria Garden. The Minister's SGD at [34] seek to rebut this argument by relying on changes to the Gardens since their original creation. However, these changes are completely different as a matter of scale from the now proposed use of the new garden land for the different purpose of the Memorial. It is not necessary to explore whether the changes referred to in [34] were strictly compatible with the obligations in s. 8; the present proposals clearly are not.

Ground 4

28. The Claimant maintains that the Minister erred in his approach to alternative sites as a material consideration (and that this ground is reinforced by Ground 1 above).

29. In agreeing with the Inspector, the Minister did not conclude that a prominent and striking memorial could not be provided at the IWM with less harm than it would cause at Victoria Tower Gardens given the constraints on development within them. They merely concluded that there were factors which might hamper its provision and that it had not been demonstrated that an IWM alternative could be provided.

30. But such a test is incorrect in law since it puts a burden of proof on an objector such as the Claimant (or indeed Westminster City Council) that would be impracticable to discharge without providing a feasible scheme showing how a prominent and striking memorial can be provided with less harm than at Victoria Tower Gardens. This places a burden on an

objector or opponent of the scheme which is unjustifiable given the relevance of alternative sites as a material consideration in cases involving inevitable environmental harm. It is yet more unjustifiable given the burden on an applicant in a case involving harm to designated heritage assets to provide a "clear and convincing justification" for any harm to the asset's fabric or setting as required by para. 200 of the NPPF.

31. For the avoidance of doubt, it is not accepted that Pugh, referred to respectively by the Minister and Secretary of State at [43] and [47] of their SGDs, bears on the issue which arises here of the significance of alternative sites. It is similarly not relevant that the Claimant does not allege a breach of the EIA Regulations, although it is to be noted that the adequacy of the treatment of alternative sites in the Secretary of State's ES was substantially challenged by the Claimant at CB/756 (and by Westminster):

> "Consideration of other sites
> 32. Proper consideration of alternative sites is yet another issue which received scant consideration in the choice of Victoria Tower Gardens as the location for the application proposals. In fact, Victoria Tower Gardens was only settled on as a location for the proposals in what Mr Balls described as the "moment of genius" in a meeting in January 2016. It will be recalled that Lord Pickles was asked whether there were any professional reports considered at that meeting to inform that choice. He said they would be produced to the inquiry if there were. Since no reports have been produced, it can be inferred that no such reports exist or were considered to inform that so-described "genius" decision to locate the development somewhere as inherently unsuitable as Victoria Tower Gardens.
> …
> 35. Likewise, the exercise of consideration of alternatives in the Environmental Statement (CD 6.11 page 12 and updated in CD 6.49) was a mere perfunctory exercise carried out long after Victoria Tower Gardens had been settled on irrevocably in that highly questionable "moment of genius" in January 2016. Where IWM was concerned it was also based on an incorrect factual summary of the Sir Norman Foster designed bid*, dismissing the Memorial element as being "attached to a back wall with no prominence and a below-ground learning centre adjacent to it", CD 6.11 para. 4.1.3, when what was proposed was a three storey high wall of remembrance alongside the building and a sculpted memorial located beside that (with the learning centre provision below ground, ie the same as what is proposed for Victoria Tower Gardens).
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> 36. These important matters have been effectively excluded from the justification of the proposals before the inquiry. As Mr Goddard said in his evidence in chief "VTG represents the end not the beginning of the search", Day 17 am. That is, the attitude of the Secretary of State is that the choice has been made; location

of the proposals in Victoria Tower Gardens is in effect a fait accompli; the site search process was not a matter for scrutiny in the public inquiry".

***see at CB/875 and following and plan at CB/533 (nowhere mentioned in the SGDs)**

32. Moreover, the opacity of the Secretary of State's site selection process was a significant controversial issue in the Inquiry, and this reinforces the importance of evaluation of alternatives in a transparent manner. The Claimant repeats that its requests for information about the process by which Victoria Tower Gardens ("this most obvious of sites" as so described in the Secretary of State's SGD [43]) was alighted upon as an appropriate location have still not been addressed by the Secretary of State.

33. It is submitted generally that in a case involving proposals promoted by and decided on by Government, that a higher standard of scrutiny and openness should be applicable, especially in a case such as this involving such sensitive and controversial issues. In this regard it is to be noted that the Secretary of State's SGD [45] omits reference to the demonstrable error in the ES referred to above.

34. The Claimant has no further comment to make on the SGD submitted by Learning for the Righteous save to point out that the numerous references to IWM ignore the fact that the Holocaust Commission's report devoted a number of pages to explaining why IWM was a suitable site and one which met the Commission's objectives, see eg CB/507:

"Imperial War Museum

The Holocaust Exhibition at IWM London is very highly regarded, as was demonstrated throughout the evidence received. There is therefore an obvious advantage in locating the Learning Centre alongside IWM London in Geraldine Mary Harmsworth Park near Lambeth.

The site is within easy reach of Westminster and accessible via several routes by public transport. It offers existing high footfall with approximately 1.5 million visits to IWM in 2014.

IWM has proposed the building of a new wing to house a memorial and a learning centre and to link to newly expanded and upgraded Holocaust galleries in the main building. This would also benefit from being able to use the existing visitor facilities and essential infrastructure of the IWM building.

It is the view of the Commission that this is a viable option, provided a way can be found to meet the Commission's vision for a prominent and striking memorial".

Ground 5

35. Under Ground 5, the Claimant maintains that the Minister's failure to express a conclusion on the question whether, if "possible/potential" tree loss did occur as a result of severance of their root systems in the course of excavations to accommodate the Learning Centre, that consequence would be acceptable.

36. It may be that such an outcome was not a certainty but that does not mean that the Minister could lawfully avoid grappling with it to discharge the obligation on him to give adequate reasons for his decision. If he had addressed that question and therefore decided that such a consequence would have been unacceptable the balance of considerations would have been altered so that he might well have reached a different decision.

37. This submission is entirely consistent with the speech of Lord Bridge of Harwich in Save Britain's Heritage v. Number 1 Poultry Ltd [1991] 1 WLR 153 at 168 which is the origin of St Modwen (2), that is, the Claimant is prejudiced by the inadequacy of the reasons given because the Minister failed to state his conclusions on one of the "principal important controversial issues" in the Inquiry and because his reasons "raise a substantial doubt whether the decision was taken within the powers of the Act". The Claimant has not "ignored" the St Modwen principle as contended by the Minister in SGD [46]. It is the foundation of this ground of complaint.

Learning from the Righteous

38. The Claimant has no objection to Learning from the Righteous being added as an additional interested party, assuming of course that their involvement will not lead to additional cost or delay in determining the claim.

Expedition

39. The Secretary of State asks for the claim to be expedited, SGD [54]. This is a matter for the Court (but should be considered subject to the Claimant's request for disclosure below and the availability of instructed counsel, having regard to the detailed background to and complexity of the case).

Disclosure

40. The Claimant repeats its request that the Secretary of State be required to supply the documents listed in the Claimant's pre-action letter, see CB/976, namely, all documents, correspondence etc. (including minutes of meetings between ministers, officials, external funders and other proponents of the project) relevant to the issue of the choice of Victoria Tower Gardens and the suitability of other locations for the HMLC including but not limited to:

    a. The passages in the minutes of the UK Holocaust Memorial Foundation from 23 July 2015 to 13 July 2016 inclusive which relate to the choice of location for the UK Holocaust Memorial and the associated Learning Centre. We believe the following may be particularly relevant:
        i. section 4 of the Minutes dated 23 July 2015 ('4. Property Sites: Progress to Date');
        ii. a section on pages 1 – 2 of the Minutes dated 10 November 2015 ('Memorial and Learning Centre site search');
        iii. section 1 of the Minutes dated 13 January 2016 ('1. National Memorial and Learning Centre site search');
        iv. a section on pages 1 – 2 of the Minutes dated 13 April 2016 ('Learning Centre Site Selection'); and
        v. a section on pages 1 – 2 of the Minutes dated 13 July 2016 ('UPDATE ON VICTORIA TOWER GARDENS');

    together with any other relevant passages.

    b. The passages in the minutes of the UK Holocaust Memorial Foundation from 23 July 2015 to 13 July 2016 inclusive which relate to changes in the specification of the features and facilities of the Learning Centre between the publication of the document entitled 'National Memorial and Learning Centre: Search for a central London site' in September 2015 and the launch of the design competition in September 2016; and

    c. The papers circulated to the board of the UK Holocaust Memorial Foundation for the agenda items which gave rise to the items in the board's minutes as above.

    d. A list of all meetings concerned with the location of the HMLC and the consideration of alternative sites between (i) any individual members of the UKHMF board (or that board as a whole) and (ii) David Cameron and/or Cabinet Office officials, relating to the location of the HMLC, between 1 November 2015 and 13 July 2016 inclusive, together with the records of those meetings.

    e. A list of the government sites considered by the UKHMF board or any sub-committee such as a property sub-committee between November 2015 and January 2016 inclusive.

f. A copy of all estimates made by UKHMF or MHCLG up to and including 31 January 2016 of the costs of (i) obtaining the site and (ii) constructing the HMLC, at (a) VTG, (b) the IWM and (c) the three sites shortlisted by CBRE in January 2016.

g. A record of all communications between the IWM and either the MHCLG or the UKHMF or its offshoots executing HMLC relating to the potential location of the HMLC at the IWM between 1 October 2015 and the present.

41. In the PAP response for the Minister (CB/984) it was simply said that he did not hold the information; he did not contest its relevance. As above, the Secretary of State did not respond at all to the PAP letter and made no mention of the request in his Summary Grounds. It is clearly important, in particular for Ground 4, that this material is provided.

Conclusion

42. The Claimant respectfully requests permission to bring its section 288 challenge on the basis that the above grounds are demonstrably arguable.

RICHARD DRABBLE QC

MEYRIC LEWIS

5 October 2021