Neutral Citation Number: [2019] EWHC 2899 (Admin)

Case No: CO/1863/2019

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

Date: 01/11/2019

Before :

HER HONOUR JUDGE BELCHER

- -

Between :

The Queen on the application of James Hall and Company Limited	**Claimant**
- and -	
City of Bradford Metropolitan District Council	**Defendant**
-and-	
Co-Operative Group Limited (1)	
Dalehead Properties Limited (2)	
	Interested Parties

- -
- -

Mr Killian Garvey (instructed by **Shoosmiths**) for the **Claimant**
Mr Philip Robson (instructed by **City Solicitor, City of Bradford Metropolitan Council**) for the **Defendant**

Hearing date: 22 October 2019

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Approved Judgment

Her Honour Judge Belcher :

1. In this matter the Claimant challenges the Defendant Council's (the "Council") decision of 28 March 2019 granting planning permission for the demolition and development of the old Haworth fire station on Station Road in Haworth (the "Site"). The development comprises the construction of an A1 food retail unit with parking and associated works (the "Approved Development"). References in this judgment to the trial bundle will be by Tab number, followed by the page number, for example [15/276].

2. I was provided with two lever arch files containing authorities, including statutory extracts and 28 cases. Prior to the hearing I had read only those parts of the authorities which I was invited to read as part of counsels' lists of essential reading. I was already familiar with some of the other authorities. At the end of counsels' submissions, they agreed that there were a number of the cases which I did not need to read prior to giving my judgment. Those were the cases in the authorities' bundle at Tabs 5, 9, 10, 12, 13, 15, 18, 20, 21, 22, 23, 25, 26, 28, 31 and 32. I was invited to read the relevant paragraphs only of the case at Tab 19, but to otherwise read the authorities in full. I confirm that I have done so. I do not consider it necessary to refer to all of those authorities in the course of my judgment, but a failure by me to mention an authority does not mean I have not read it or considered it for the purposes of this judgment.

3. The Site is adjacent to, but not within, the Haworth Conservation Area ("HCA"), and close to the Grade II listed Bridgehouse Mills. It is otherwise bordered by residential properties and railway sidings. The Claimant challenges the grant of planning permission on three grounds:

    i) that the Council's approach to the Approved Development's impact upon the HCA was flawed

    ii) that the inclusion of the tailpiece "unless otherwise agreed in writing with the local planning authority" contained in the planning conditions 3, 7, 12 and 13 was ultra vires and/or wrong in principle

    iii) that the Council failed to comply with the requirements of Paragraph 189 of the National Planning Policy Framework ("NPPF") in that the relevant Historic Environment Record ("HER") was not consulted in considering heritage impacts.

<u>The Facts</u>

4. In common with many planning authorities, the Defendant offers a pre-application advice service whereby future applicants can seek preliminary views and advice from planning officers. This enables a developer to receive an early indication as to whether a proposal is likely to be acceptable, and to identify any issues that need to be addressed prior to the submission of a planning application. In this case the Second Interested Party ("Second IP") was the applicant for planning permission.

5. The Second IP took advantage of the pre-application advice service. One of the Defendant's planning officers, Laura Eastwood was the officer allocated to deal with the pre-application enquiry [15/275: Witness Statement of Laura Eastwood, paragraph 3]. On 31 January 2018 she wrote a letter responding to the pre-application enquiry.

Under the heading "DESIGN/IMPACT ON CONSERVATION AREA AND HERITAGE ASSETS" that letter includes the following paragraphs:

> "There would be no objections to demolition of the existing fire station building, which is agreed to be of no heritage or architectural merit……
>
> The site is very open on all sides, any new built form will be highly visible. The site is adjacent to the Haworth Conservation Area.
>
> The site and existing buildings are not regarded as affecting the setting of the Grade II listed Haworth station building, but the proposed development would impact on views of the Grade II listed Bridgehouse Mills
>
> Officers consider that in order for any new structure on this site to complement its context, better analysis and subsequent respect for the prevailing character of Haworth is required. We would urge a bespoke design solution which should be harmonious to its context. An approach to design, materials that pays due respect to local context will be essential to satisfy policies DS3 and EN3 of the core strategy" [15/279B]

6. In support of its application for planning permission, the second IP submitted a Planning and Retail Statement ("PRS") dated June 2018, prepared by I D Planning. Section 6 of the PRS contains the Heritage Policy Assessment [5/104-108: paragraphs 6.1- 6.46]. At paragraph 6.5 the PRS states as follows:

> "As referred to above, the application site does not fall within the conservation area but its location adjacent to it suggests that the site forms part of the setting of the asset and therefore it is prudent to assess the proposal in respect of the setting of heritage assets."

7. The PRS refers to and applies the Historic England Guidance on assessing the setting of heritage assets [5/104: paragraph 6.6]. The assessment identifies four significant key views and assesses the impact on each significant key view as "negligible" [5/107: paragraphs 6.33 (which contains a typographical error, but which is clear from its context refers to significant key view 3), 6.36, 6.38 and 6.41]. The conclusions to Section 6 include the following:

> "In summary therefore the degree of harm to the conservation area and heritage assets is considered to be minimal" [5/108: paragraph 6.46]

The Claimant makes no complaint in respect of the methodology applied in the PRS.

8. As would be expected, the Council's Conservation Officer, Jonathan Ackroyd, was consulted in respect of the planning application. He has provided a Witness Statement which I shall consider later in this judgment. There is no contemporaneous

documentary record as to any advice which he gave at the time. The officer's report ("OR") to the Area Planning Panel, which was drafted by Laura Eastwood, contains the following in respect of the consultation with conservation:

> "Conservation-the site is adjacent to but not within the Haworth Conservation Area and does not affect the setting of the grade II listed station building but may impact that of Bridgehouse Mills. The existing fire station building is of no merit and though the proposed structure would be of a similar size, scale and form to that presently on the site the cladding has an overtly industrial appearance. A bespoke solution is required which is harmonious to the context" [2/18].

That wording mirrors what is set out in the pre-application response letter of 31 January 2018 (set out in paragraph 4 above). There is no other reference to heritage assets within the OR.

9. At its meeting on 28 March 2019 the Area Planning Panel approved the application and granted planning permission including the following conditions:

> "3. The use of the premises shall be restricted to the hours from 0600 to 2300, 7 days per week including bank or public holidays unless otherwise agreed in writing by the local planning authority.
>
> 7. The servicing of the site shall be carried out in accordance with the Service Management Plan submitted to and approved in writing by the Local Planning Authority and the plan shall be retained whilst ever the use subsists. The size of vehicles servicing the site shall be limited to no larger than 10.35m rigid vehicles unless otherwise agreed in writing with the Local Planning Authority.
>
> 12. Unless otherwise agreed in writing with the Local Planning Authority, prior to construction of the development, a detailed remediation strategy which removes unacceptable risks to all identified receptors from contamination, shall be submitted to and approved in writing by the Local Planning Authority. The remediation strategy must include proposals for verification of remedial works. Where necessary, the strategy shall include proposals for phasing of works and verification. The strategy shall be implemented as approved unless otherwise agreed in writing by the Local Planning Authority.
>
> 13. Unless otherwise agreed in writing with the Local Planning Authority, a remediation verification report, including where necessary quality control of imported soil materials and clean cover systems, prepared in accordance with the approved remediation strategy shall be submitted to and approved in writing by the Local Planning Authority prior to completion of the development. [1/2-4]

10. The Area Planning Panel resolved to approve the planning application pursuant to the following resolution:

> "That the application be approved for the reasons and subject to the conditions set out in the Strategic Director, Place's technical report." [3/81]

Accordingly, the resolution was to grant planning permission in accordance with the conditions found in the OR. None of the conditions in the OR contained the words "unless otherwise agreed in writing by the Local Planning Authority".

Relevant Policies

11. By Section 70(2) Town & Country Planning Act 1990, in dealing with any application for planning permission the planning authority shall have regard to the provisions of the development plan, so far as material to the application and to any other material considerations. There is no dispute that The National Planning Policy Framework ("NPPF") is a material consideration for the purposes of that Section. By Section 38(6) Planning and Compulsory Purchase Act 2004, a planning application must be determined in accordance with the development plan unless material considerations indicate otherwise. There is no dispute that this extends to the Council's Core Strategy Policy EN3, which I consider further below.

12. Part 16 of the NPPF deals with "Conserving and enhancing the historic environment". "Heritage Asset" is defined in the glossary of terms in the NPPF as:

> "A building, monument, site, place, area or landscape identified as having a degree of significance meriting consideration in planning decisions, because of its heritage interest. It includes designated heritage assets and assets identified by the local planning authority (including local listing)." [21/390]

13. Insofar as relevant, Paragraphs 189 and 190 NPPF provide as follows:

> "Proposals affecting heritage assets
>
> "189. In determining applications, local planning authorities should require an applicant to describe the significance of any heritage assets affected, including any contribution made by their setting. The level of detail should be proportionate to the assets' importance and no more than is sufficient to understand the potential impact of the proposal on their significance. As a minimum the relevant historic environment record should have been consulted and the heritage assets assessed using appropriate expertise where necessary……
>
> 190. Local planning authorities should identify and assess the particular significance of any heritage asset that may be affected by a proposal (including by development affecting the setting of a heritage asset) taking account of the available evidence and any necessary expertise. They should take this into account when

> considering the impact of a proposal on a heritage asset, to avoid or minimise any conflict between the heritage asset's conservation and any aspect of the proposal." [21/378]

14. The following further paragraphs of the NPPF, were also cited in argument and are of relevance in this case:

> "Considering potential impacts
>
> "193. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.
>
> 194. Any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification……
>
> 196. Where a development proposal will lead to less than substantial harm to the significance of the designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use" [21/378-379].

15. The Council's development plan includes the Core Strategy (adopted July 2017). Policy EN3 of the Core Strategy relates to the Historic Environment. Insofar as relevant, it provides as follows:

> "The Council, through planning and development decisions, will work with partners to proactively preserve, protect and enhance the character, appearance, archaeological and historic value and significance of the District's designated and undesignated heritage assets and their settings.
>
> This will be achieved through the following mechanisms:
>
> ……
>
> C. Require that all proposals for development conserve and where appropriate, enhance the heritage significance and setting of Bradford's heritage assets, especially those elements which contribute to the distinctive character of the District,..." [6/119]

It then goes on to specify a number of heritage assets contributing to the distinctive character of the District including "The literary and other associations of Haworth and conservation areas of Thornton with the Bronte family." [6/119] In the explanatory

text to the policy, designated heritage assets are defined as including, amongst other things, 59 conservation areas. [6/122].

16. There is no dispute in this case that the Site, being adjacent to the HCA, involves development which may affect the setting of a heritage asset. It is accepted, therefore, that Paragraphs 189-190 NPPF, and Core Strategy Policy EN3 apply in this case. It is also accepted that the NPPF is a material consideration for the purposes of any planning decision. It follows that the Defendant accepts that, in determining the application, the Council was under a duty to assess the impact upon the HCA, including its setting.

17. The Statement of Facts and Grounds in this case refers to Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990. Mr Garvey, for the Claimant, accepts that Section applies only to land in a conservation area and, accordingly, that it has no application in this case.

Ground 1: Unlawful Approach to the Haworth Conservation Area

18. There is no dispute that the decision maker in this case was the Area Planning Panel, and not the Council officers. Further, there is no dispute that there is nothing within the main body of the OR which refers to or gives any consideration to the setting of the HCA. The only mention of the HCA was within the consultation section of the report where it is simply recorded that the site is adjacent to but not within the HCA [2/18; and set out in paragraph 7 above]. Accordingly, nowhere in the advice to members were the Area Planning Panel invited to consider the impact of the development on the HCA or its setting. There is no mention at all about heritage assets, no information about or assessment of the heritage assets and no indication of there being any duty to consider the HCA or its setting.

19. Mr Garvey submitted that there is nothing in the OR to assist the Area Planning Panel members, and, therefore, nothing at all to suggest the relevant duty was complied with. He submitted that any harm from development within the setting of a heritage asset triggers paragraph 194 NPPF. He submitted that there is a duty pursuant to paragraphs 190, 192 and 196 NPPF, firstly, to identify and secondly, to assess the impact of any harm. He relies upon the PRS prepared by the Second IP, and its conclusion that the proposed development was in the setting of the HCA and would cause minimal harm to the HCA. He submitted that evidences the need for the harm to be identified and assessed by the decision maker, namely by the Area Planning Panel. By reason of the absence of any mention of the need to identify any harm, or of the need to assess the impact of the harm and weigh it in the balance before making a decision on the application, Mr Garvey submitted that the result is that there was a complete failure to consider the impact upon the HCA. He submitted the failure to consider that impact was a clear error of law in that:

    i) the duty to consider the HCA and its setting was not discharged

    ii) the Council failed to identify and assess the particular significance of the HCA as required by paragraph 190 NPPF

    iii) there was a failure to have regard to a material consideration, namely the impact upon the HCA

iv) there was a failure properly to consider and apply policy EN3

20. Mr Garvey referred me to case law which he submitted support his submission that the planning committee must consider the issues and must make the decision as to whether there is an impact on the setting of the HCA. The first was the Court of Appeal decision in *R (oao Graham Williams) v Powys County Council* [2017] EWCA Civ 427. That case concerned, amongst other matters, whether the County Council had erred in failing to perform the duty in Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 to have regard to the desirability of preserving the setting of a listed building. Mr Garvey relied in particular on the following passages in the judgment of Lord Justice Lindblom:

> "58. There will, of course, be cases where it is quite obvious that there is no listed building whose setting is going to be affected by the proposed development, others in which it is no less obvious that the setting of a listed building will be affected, and others again where there is doubt or dispute……. Sometimes a consultee or an objector may have raised concern about the effect the development will have on the setting of a listed building but the decision maker can properly take the view that there will be no such effect, or at least no harm. On other occasions, no such concern may have been raised, but the section 66(1) duty will be engaged nevertheless. As the judge in this case recognised, the fact that the possible effect of the proposed development on the setting of a listed building has not been identified as an issue in responses to consultation, or in representations made by third parties, does not of itself relieve a planning authority of the duty. There will also be cases where only the developer himself identifies the possibility of some change to the setting of a listed building but contends either that the change would not be harmful or that the harm would be insignificant or acceptable. Depending on the circumstances, this too may be enough to engage the section 66(1) duty, and, if it does, the decision maker will err in law in failing to perform that duty.
>
> 64. The officer said nothing in her report about the application of the section 66(1) duty to the proposed development. She mentioned policy ENV14 as one of the development plan policies relevant to the proposal, and Welsh Office Circular 61/96 as relevant national policy. But she did not apply those policies to the proposal before the committee, nor explain how they were relevant……"
>
> 65. In short, nowhere in the advice the members were given on this proposal was there any mention of the listed building, or of the effect the development might have on its setting, taking into account views in which both it and the proposed wind turbine would or might be visible…..
>
> 66. In my view the lack of relevant advice from the officer and of any relevant discussion at either committee meeting, was, in

> the particular circumstances of this case, enough to amount to an error of law….
>
> 67. The first question for the county council, inherent in section 61(1), was whether there would be an effect on the setting of the listed building, and, if so, what that effect would be. This, I think, was undoubtedly a case in which that question had to be confronted in the making of the decision, and a distinct conclusion reached……. In any event, it seems to me that in this case, without that exercise having been gone through explicitly in the officer's report so as to show that the section 66(1) duty had been heeded and performed, and also without some trace of it having been undertaken by the members in their consideration of the proposal, the court can only conclude that the county council's decision-making was, in this particular and significant respect, deficient and therefore unlawful. The county council failed to discharge its duty under section 66(1), and failed also to have regard to relevant development plan and national planning policy as material considerations."

21. Mr Garvey submitted that the situation in this case is exactly the same. There is nothing in the OR to direct the Area Planning Panel to the issue of the possible impact on the heritage asset, namely the setting of the HCA. He further submitted that there is nothing from which the court could conclude that the Area Planning Panel had assessed what, if any impact, the development might have on the setting of the HCA. Further he submitted there was no evidence that any such impact had been weighed in the balance when reaching a decision on whether or not to approve the planning application.

22. Mr Garvey also referred me to the decision of Stewart J in *Obar Camden Ltd v Camden LBC* [2015] EWHC 2475 (Admin). That case involved a challenge to planning permission based, amongst other grounds, on a failure to assess heritage impact of the proposed development, both by reference to the statutory duties under the Planning (Listed Buildings and Conservation Areas) Act 1990, and by reason of failing to comply with national policy and the relevant local development plan policy, referred to in that case as CLARPA. At paragraph 14 of his judgment Stewart J dealt with the statutory duties and concluded that there was a failure to comply with the statutory duty. He then went on to deal with the NPPF and CLARPA. At paragraph 15 he stated as follows:

> "15. As to the four other points made by C, the NPPF para 128 and CLARPA both required the applicant to describe the significance of any heritage assets affected including any contribution made by their setting. Nowhere in the OR is there an assessment of the significance of the heritage assets. It is submitted by C that it is not possible to come to a conclusion about harm until an assessment has been made of the significance of the asset affected. Nor were members told that the NPPF s.12 (particularly at para. 128) required the applicant to describe the significance of heritage assets affected. D accepted that the process had become "truncated" but again emphasised that officers had come to the conclusion that there was no harm and that the committee were experienced. One

> wonders in those circumstances why there is the requirement in CLARPA and the NPPF para. 128 as stated above. The reality is, in my judgment, that these were material considerations which were not considered and therefore the decision is flawed (cf. TCPA 1990 section 70(2); Planning and Compulsory Purchase Act 2004 section 38 (6)).”

23. Counsel are agreed that Paragraph 189 of the current version of the NPPF is in the same terms as Paragraph 128 in the earlier version of the NPPF being considered by Stewart J in that judgment. Accordingly, his references to Paragraph 128 can be read as if they were references to the current Paragraph 189. Mr Garvey submitted that the same points in paragraph 15 of Stewart J’s judgment apply in this case. He asked the rhetorical question: “Why have a duty but allow the Council not to do anything to discharge it?”

24. The Council has filed Witness Statements from two of its officers, Jonathan Mark Ackroyd, Senior Conservation and Design Officer[14/270-273] , and Laura Joanne Eastwood a Planning Officer [15/274-278]. In general terms the evidence from the two officers asserts that Mr Ackroyd assessed the significance of the HCA and its setting in accordance with NPPF Paragraph 190, and concluded that there was no harm to the significance of the HCA through the impact on its setting [14/271: Witness Statement of Jonathan Ackroyd, paragraph 2; 15/277: Witness Statement of Laura Eastwood, paragraph 5]. In relation to this evidence, Mr Garvey urged caution and submitted that I should disregard it as ex-post facto rationalisation. Further, in any event, he submitted that the witness evidence is irrelevant because the officers are not the decision maker, and their conclusions on these issues are irrelevant. Mr Garvey further pointed to the fact that there is nothing before the court predating the grant of planning permission which shows that any consideration was given by the Area Planning Panel, as decision-maker, to the setting of the conservation area.

25. I do not understand Mr Robson for the Defendant to dissent from the proposition that the decision maker in this instance is the Area Planning Panel and not the officers. He submitted that experienced officers can use their professional judgement to reach the conclusion that negligible or minimal harm to the HCA does not engage the policy, and, therefore, that it does not need to be included in the OR. In those circumstances, he submitted that it was sufficient for an experienced Area Planning Panel to be directed to the NPPF and policy EN3, and to be told that the Site was adjacent to but not within a conservation area. He submitted that if the Area Planning Panel felt that was not sufficient information, they could ask for more information. He submitted that this Area Planning Panel obviously felt this was not necessary.

26. The thrust of Mr Robson’s submissions was that because the council officers formed the view that there was no harm to the setting of the conservation area, that did not need to go into the OR, and the Area Planning Panel was not materially misled in any way. He sought to draw a distinction between compliance with a statutory duty and the application of policy, and he submitted that because this case concerns the application of policy, that affects the level of detail required in an officer report.

27. As set out in paragraph 7 above, the PRS reached the conclusion that the degree of harm to the conservation area and heritage assets is considered to be minimal [5/108: paragraph 6.46]. In the Detailed Grounds this is described as a finding of no material

harm [17/301: heading to paragraph 39]. It is asserted in Paragraph 40 of the Detailed Grounds that had Mr Ackroyd disagreed with the conclusions of the PRS on heritage, he is perfectly capable of disagreeing with them but that instead he *"acknowledged"* the conclusions in the PRS. Mr Garvey submitted that the Detailed Grounds were trying to suggest that this conclusion in the PRS had been adopted by, and should be considered to be, the decision of the Area Planning Panel. Having taken instructions in response to a question from me, Mr Robson conceded that the PRS was not before the Area Planning Panel. Very sensibly, he did not seek to persuade me that the Area Planning Panel could be considered to have adopted the conclusion in the PRS as their own.

28. In my judgment, the evidence of Mr Ackroyd does not suggest that he *"acknowledged"* the conclusions in the PRS. At paragraph 2 of his Witness Statement, Mr Ackroyd states that he concluded at the pre-application stage that there was no harm to the significance of the conservation area through the impact on its setting. At that stage the Council was not in possession of the PRS which was produced by the Second IP having received the pre-application response letter from Laura Eastwood. In her evidence Laura Eastwood also asserts that she and her colleague (which I was told is a reference to Mr Ackroyd) concluded at the pre-application stage that the impact on the conservation area was not material [15/277: paragraph 5].

29. Mr Ackroyd goes on in his Witness Statement to say that having received the PRS, its conclusions were regarded as being comprehensive and agreeable. Based upon the submitted information and his own personal expertise, the Historic England guidance, adopted local policies and having regard for adopted character appraisals, he concluded that the principle of development would not harm the setting of the conservation area or the setting of the Grade II listed Bridgehouse Mills [14/272: paragraphs 4 and 6].

30. I have to say I have some concerns about the evidence of these officers in this respect. The conservation summary in the OR refers to the possible impact on Bridgehouse Mills but also asserts that the Grade II listed station building will not be affected. It seems surprising that the OR should address both things that will be affected in heritage terms and things that will not, but is silent as to the alleged conclusion reached by the officers that the HCA would not be affected. I regret that I am forced to the conclusion that there is some ex post facto rationalisation in this evidence. My view on this matter is reinforced by the approach of the Defendant's Detailed Grounds which suggest that Mr Ackroyd *"acknowledged"* the PRS findings as opposed to disagreeing with them. That is carried through from the Summary Grounds of Resistance [11/168; Paragraph 30] which were of course lodged prior to the Witness Statements being made. At that stage it was the express position that Mr Ackroyd was perfectly capable of disagreeing with the conclusions had he wanted to but **instead** (my emphasis) he "acknowledged" them. The evidence of the witnesses is at odds with the instructions which were provided for the purposes of the Summary Grounds, and that gives me cause for concern. As I have also noted at paragraph 8 above, the Conservation entry in the OR is in identical terms to the pre-application response letter, which, in the absence of any documentary evidence to the contrary, suggests that no further consideration had been given to these matters.

31. Mr Garvey attacks the Defendant's case as being confused in this respect. He submitted that in the Detailed Grounds, the Defendant was saying that it agreed with the finding of minimal harm. However, they now seek to say that their officers made a positive

finding that there was no material harm. He suggests the two things are different and irreconcilable. He submitted that the words "minimal harm" do not necessarily mean "no material harm" and that it would be wrong, indeed dangerous, for the court to say that any minimal harm can be discounted. He pointed to Paragraph 193 NPPF [21/378] which acknowledges three brackets of harm to heritage assets, substantial harm which is addressed in Paragraph 195 [21/379]; less than substantial harm which is addressed in Paragraph 196 [21/379], and no harm. Mr Garvey submitted that the Defendant is trying to say that minimal harm equates to no harm and does not need to be given any weight. Mr Garvey submitted that minimal harm (which by definition must be something more than no harm) falls to be considered within Paragraph 196 NPPF as less than substantial harm. In those circumstances, he submitted that Paragraph 193 NPPF required the Area Planning Panel to give great weight to that impact, whereas it failed to assess it, and therefore failed to give it any weight at all.

32. In response to this, Mr Robson relied upon the conclusions in the PRS which were that the impact in respect of each of the four key views was negligible [5/107: paragraphs 6.33, 6.36, 6.38, and 6.41]. Whilst acknowledging that the degree of harm in the conclusions section is considered to be minimal [5/108: paragraph 6.46], Mr Robson submitted that where the conclusions in respect of each of the key views is that the impact will be negligible, the harm can be nothing but also negligible. He submitted that the word "minimal" is interchangeable with "negligible" which is used throughout the PRS.

33. In response to that Mr Garvey submitted that the conclusion is one of minimal harm. There is nothing from the author of this document as to whether he uses the terms interchangeably. Mr Garvey made the point that whilst negligible might be less than minimal, the author's conclusion, having identified four instances of negligible impact, is that the impact overall is minimal. Mr Garvey submitted that whilst they might be one and the same, there is no evidence from which this court could properly conclude that is the case. He submitted that the category of less than substantial harm in Paragraph 196 NPPF is a broad spectrum and there is no reason why even a negligible harm should not fall within that bracket.

34. In my judgment the three categories of harm recognised in the NPPF are clear. There is substantial harm, less than substantial harm and no harm. There are no other grades or categories of harm, and it is inevitable that each of the categories of substantial harm, and less than substantial harm will cover a broad range of harm. It will be a matter of planning judgement as to the point at which a particular degree of harm moves from substantial to less than substantial, but it is equally the case that there will be a number of types of harm that will fall into less than substantial, including harm which might otherwise be described as very much less than substantial. There is no intermediate bracket at the bottom end of the less than substantial category of harm for something which is limited, or even negligible, but nevertheless has a harmful impact. The fact that the harm may be limited or negligible will plainly go to the weight to be given to it as recognised in Paragraph 193 NPPF. However, in my judgment, minimal harm must fall to be considered within the category of less than substantial harm.

35. Mr Robson sought to persuade me that in his judgment in *Blackpool Borough Council v The Secretary of State for Communities and Local Government and Thomson Property Investments Ltd* [2016] EWHC 1059 (Admin), Kerr J recognised that it was

only above de minimis harm that falls into the category of less than substantial. He based this on the following single sentence at Paragraph 48 of Kerr J's judgement:

> "This case was, moreover, one in which the parties appeared to be in agreement that this was a case where the harm to the heritage asset was less than substantial, but more than de minimis."

I do not accept that in acknowledging the parties agreement on that matter, Kerr J was intimating that in order to be less than substantial, harm to the heritage asset had to be more than de minimis. It simply amounts to an acknowledgement that the harm in that case was more than de minimis. I further note that in Paragraph 51 of that judgment Kerr J referred to the Inspector's finding that the proposals in question would "do little harm", adding that the inspector did not say they would do no harm. I do not consider this case assists Mr Robson's submission.

36. Mr Robson's alternative submission was that even if "minimal" in the PRS meant something material, Mr Ackroyd's evidence is that he disagreed with that and he formed the conclusion that the principle of development would not harm the setting of the HCA [14/272: paragraph 6]. I have already indicated that I have concerns about that evidence, but for the purposes of dealing with Mr Robson's submissions, I shall approach the matter as if the evidence was properly elucidatory only (untrammelled by any ex post facto justification) and, therefore, properly admissible.

37. Mr Robson submitted that this case does not involve statutory duty but rather policy as to how to assess the potential impact to the heritage assets. This he submitted affects the level of detail required in an OR. He submitted that having used their professional judgement that there was no harm to the HRA, the officers were entitled to reach the further judgement that the policies were not engaged. In those circumstances, he submitted, it was not necessary for there to be anything more in the OR than a reference to the policy because this is an informed committee.

38. In support of these submissions Mr Robson took me to a number of authorities. He first of all referred me to judgment of Lindblom LJ in *Michael Mansell v Tonbridge and Malling BC and Others* [2017] EWCA Civ. 1314. At paragraph 42 Lindblom LJ said this:

> "The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled……. The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge…….. The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice and the officer's report is such as to misdirect the members in a material way - so that, but for the flawed advice it was given, the committee's decision would or might have been different - that

> the court will be able to conclude that the decision itself was rendered unlawful by that advice."

39. Mr Robson submitted that the Area Planning Panel in this case can be expected to understand national and local policies. He pointed to list of designated heritage assets contained in the explanatory text to Policy EN3 which lists the Saltaire World Heritage site, over 2289 listed building entries on the National Heritage List for England, 59 conservation areas, 14 historic parks and gardens, 194 scheduled ancient monuments and one historic battlefield site at Adwalton Moor, Tong. Mr Robson submitted this is a Council with significant heritage assets and that the Area Planning Panel would be well used to dealing with policies covering this area of planning law. He further submitted that given Policy EN3 is referenced in the OR, it can be expected that the Area Planning Panel was well aware of its contents and how it operated.

40. Mr Robson referred me to the judgment of Sullivan J in *R v Mendip District Council, ex parte Philippe Cyprian Fabre* [2000] 80 P & CR 500, at paragraph 102 where he stated as follows:

> "It is for the committee to decide, in the first instance, whether it has sufficient information to enable it to reach a decision one way or the other. The court can review the committee's decision on Wednesbury grounds, if it considers that no reasonable committee could have reached a decision to grant planning permission without having a particular piece of information."

Mr Robson submitted that this is an experience Area Planning Panel which was directed by the OR to the NPPF and to Policy EN3, that the OR set out that the Site was adjacent to but not within a conservation area, and that if this Area Planning Panel had felt they did not have sufficient information, they could have asked for it. He submitted they obviously felt that was not necessary.

41. Mr Robson placed particular reliance on the decision of Andrews J in *Pagham Parish Council v Arun District Council and Others* [2019] EWHC 1721 (Admin). ("*Pagham*"). Mr Robson urged me that this was a case which I should read carefully on the basis that it has close parallels to the case I have to decide. Mr Robson particularly relied on Paragraphs 60 to 65 in the judgment, and he relied on these to support his submission that it was not necessary for the OR to say that the PRS thought there would be some harm to the HCA, but that the planning officers did not agree.

42. The difficulty for Mr Robson is that he has taken those paragraphs in isolation and not in the full context of the judgment in the case. The factual position in that case is completely different. In that case the applicant produced an impact assessment which identified very slight harm in heritage terms. As is clear from paragraphs 3,5 and 6 of the judgement in *Pagham*, a 52 page OR cited the relevant passages from the NPPF and expressly considered the impact that the proposed development would have on each of a number of listed buildings situated within close proximity to the application site. The OR also summarised the views of Historic England, the statutory consultee, and correctly informed the committee that the LPA's conservation officer had raised no objection. The OR then set out the planning officer's conclusions in the following terms:

> "Therefore, it is considered that the proposed development will preserve the setting of the listed buildings surrounding the site and as such would accord with policies HER SP1, HER DM1, and HER DM4 of the Arun local plan. "

The officer added

> "It should also be considered that the proposed development makes a significant contribution to the local planning authority's housing land supply and is an allocated site within the Arun local plan. Therefore, it is considered that the public benefits of the development would outweigh any harm to the setting or significance of heritage assets in accordance with paragraphs 196 and 197 of the NPPF."

43. It is quite clear from the judgment that in *Pagham* the OR expressly addressed these issues, concluded explicitly that there was no heritage harm, and undertook the assessment looking at the benefits of development weighed against any harm to the setting or significance of the heritage assets. The criticism in the judicial review in that case was that the planning officer had materially misled the committee by not adequately summarising the views of the heritage impact assessment submitted in support of the application in which the consultant had expressed the view that there would be slight harm to the setting of a listed building which could be considered less than substantial in the context of the NPPF.

44. At paragraphs 40 and 41 of her judgment, Andrews J makes the following points

> "40. The assessment of whether any harm would be caused by the impact of the development on the heritage asset or its setting is likewise **a matter for the decision maker**, not the author of the HIA……
>
> 41. The evaluation of harm was ultimately a matter for the committee, having been furnished with the necessary information by the planning officer. Thus if the planning officer, having taken all relevant factors into account, was entitled to take the view that there was no harm, and therefore that the setting would be preserved, and **so advise the committee, who accepted that advice,** on the face of it the decision is unimpeachable. It cannot be said there was a failure to comply with the duty under section 66(1) or para 193 of the NPPF because there was no harm to weigh in the balance." (my emphasis added in each case)

45. The paragraphs in the judgment which Mr Robson seeks to rely on, have to be read against that factual background and in the context of those observations made by Andrews J. The relevant parts are as follows:

> "60. Thus once it is accepted (as it was, and had to be) that it was rationally open to decide that there was no harm to the wider setting of the Church, which was the conclusion of this planning

> officer, **and implicitly endorsed by the committee when they accepted his recommendations,** there was no legal duty on anyone within the LPA to explain why they disagreed with the contrary view that had been expressed by the consultant engaged by the applicant for planning permission.
>
> 63. The planning officer did not mislead the committee, let alone mislead it in any material respect…… He was under no obligation to say that the consultant had identified something which could be regarded as minor harm to the vistas from a different perspective but that he, the officer, disagreed with that assessment.
>
> 64. The officer then said that he considered the development would preserve the setting of all the listed buildings in the vicinity. **He furnished the committee with all they information he rationally considered would help them to decide whether they agreed or disagreed with that assessment.**
>
> 65. On the basis of the material before him, having taken all relevant information into account, the planning officer was entitled to **so advise the committee**." (my emphasis added in each case)

46. In my judgment the passages I have emphasised in the judgment of Andrews J underline the very real difficulty that Mr Robson has in this case. Mr Garvey does not dispute that a planning officer is entitled to form a view on matters relevant to the decision to be made by the decision maker, and to tell the decision maker what his or her opinion on that matter is. That does not take the decision making process away from the decision maker. The decision maker is at liberty to adopt the planning officer's opinion or to reject it. The whole of Andrews J's judgment is predicated on advice being given to the committee and, by implication, being accepted by the committee. In my judgment that is entirely different from the situation here.

47. In his closing submissions in reply, Mr Garvey accepted that there is no obligation in an OR to address everything said by an applicant which the officer may disagree with. He said that if the OR before this court had done a proper assessment of heritage impact, and had concluded there was no harm, he would not be here. That would be on all fours with the case that Andrews J was considering in *Pagham.* In my judgment what has happened here, is that the officers have made the decision and, in effect, withdrawn it from the Area Planning Panel. By failing to make any mention of it in the OR, it cannot be said that the Area Planning Panel has, by implication, agreed with the conclusions of the officers. As is made clear in the judgment of Andrews J, the evaluation of harm was ultimately a matter for the Area Planning Panel, having been furnished with the necessary information by the planning officer. In this case the Area Planning Panel was furnished with no necessary information and was in no position to assess whether there was any harm, or to carry out the balancing exercise of any harm found against the public benefits of the development. In those circumstances, I am entirely satisfied that Ground 1 is made out.

48. By Section 31(2A) Senior Courts Act 1981, the High Court must refuse to grant relief on an application for judicial review if it appears to the Court to be highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred. Mr Robson relied on Section 31(2A) both in the detailed grounds and in his skeleton argument.

49. In the course of argument, I indicated that it seemed to me inevitable that if I were to find Ground 1 proved, I would inevitably have concluded that a matter calling for a planning judgement by the Area Planning Panel had been withdrawn from them. Matters of planning judgement are matters for the decision makers and not for this court. The decision to assess whether there is any harm in heritage terms to the setting of the HCA inevitably involves a planning judgement, as does the balancing exercise to be carried out if it is found that there is some harm to place into the balance. In my judgment, I cannot properly conclude that the outcome for the Claimant in this case would not have been substantially different if the conduct complained of had not occurred. After I had given that indication, Mr Robson withdrew his reliance on Section 31(2A).

Ground 2: The Conditions Relied Upon Were Unlawful.

50. This challenge relates to the addition of the words "unless otherwise agreed in writing" (the tailpieces) in each of conditions 3,7, 12 and 13 of the conditions attached to the planning permission [1/2-4]. Mr Garvey submitted firstly, that the addition of these words was ultra vires, and secondly, that they are wrong in principle.

51. The Summary Grounds in this case were accompanied by a Witness Statement from Mark Julian Hutchinson, Area Planning Manager for the Defendant. In that Witness Statement he confirms that the OR to the Area Planning Panel did not include the tailpieces, that no further material came to the attention of the LPA between the Area Planning Panel's resolution and the issuing of the decision notice. He states that it was a simple administrative oversight that resulted in the tailpieces being added to conditions 3, 7, 12 and 13. [11/183, paragraph 7]. In those circumstances, it is clear that the tailpieces are ultra vires having been added without any decision from the Area Planning Panel to support their inclusion.

52. Mr Robson accepted the unlawfulness of these conditions, and addressed me only on the issue of the appropriate form of relief. He referred me to the decision of Ousley J in *R (oao Midcounties Co-operative Ltd) v Wyre Forest District Council* [2009] EWHC 964 (Admin), at paragraph 74, where he rejected a submission that the tailpieces in that case should lead to the quashing of the whole planning permission. He found that severance of the offending tailpieces was sufficient.

53. Given my conclusions on Ground 1 which will lead to the quashing of this planning permission, I do not consider it necessary to go into any detail on the issue of relief the Ground 2. In any event, Mr Garvey reserved his submissions on relief pending my decision on the other Grounds. Whilst I have not heard those submissions, it would appear that if only the tail conditions were in issue, then excision would seem to be the appropriate remedy.

54. Given the Defendant's concession that the conditions are unlawfully included, I do not consider it necessary to explore the alternative challenge as to whether they are wrong in principle.

Ground 3: Failure To Have Regard To The Relevant Historic Environment Record

55. Given my conclusion in relation to Ground 1, I can deal with Ground 3 shortly. Paragraph 189 NPPF [21/378; and set out at paragraph 13 above] provides that in undertaking the heritage asset assessment, as a minimum the relevant HER should have been consulted and the heritage assets assessed using appropriate expertise where necessary. There is no dispute that the HER was not consulted in this case.

56. Mr Robson submitted that the fact that the HER has not been consulted is of no substantive consequence in this case. He relies upon Mr Ackroyd's evidence:

> "It was not felt necessary to refer to the Historic Environment Record as the applicant's statement was assessed as having properly identified and considered the heritage impacts in more detail than is included in the Historic Environment Record." [14/272: paragraph 5]

I have already indicated that I have concerns that the officers' evidence in this case does amount to ex-post facto rationalisation. There is nothing in the paperwork to suggest that this was even considered by Mr Ackroyd prior to the grant of the planning permission in this case.

57. That would not necessarily be the end of Ground 3 as Mr Robson submitted that there is no evidence that any failure to consult the HER was of any consequence to the final decision. Mr Robson told me that the HER is simply a database. When I pointed out that there was no evidence to that effect, Mr Robson submitted that the HER is a public document which the Claimant could have put before the court. That may be right, but equally the Defendant could put this document before the court, and it is the Defendant who is seeking to argue that the failure to consult the HER is of no consequence. The Claimant's case clearly raises an issue which needs to be answered. It has not been, save by the evidence of Mr Ackroyd which, for reasons I have already given, I do not regard as sufficient.

58. In the absence of the HER having been produced in evidence, or even any evidence from an officer as to what the HER comprises, I am left with Mr Robson telling me, on instructions, that the HER is simply a database. I have no information as to what is in that database and nothing from which I could properly make any judgment as to whether the failure to consult the HTR is of no consequence to the final decision. It follows that I could not properly conclude that it is highly likely that the outcome for the Claimant would not have been substantially different if the HER had been consulted. Accordingly, Section 31(2A) Senior Courts Act 1981 has no application to this Ground of challenge. Accordingly, I find Ground 3 is also proved.

59. To summarise my conclusions, I find all three Grounds proved. I think it likely that had Ground 2 been the only successful ground, the appropriate relief would have been excision of the tailpieces, although I would have heard further submissions from Mr

Garvey as to relief in those circumstances. However, given that Grounds 1 and 3 are proved, it follows that the planning permission in this case must be quashed.