Neutral Citation Number: [2023] EWCA Civ 1495

Case No: CA-2022-001307

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
HHJ Jarman KC (sitting as a Judge of the High Court)
[2022] EWHC 1111 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 December 2023

Before:

SIR KEITH LINDBLOM
(Senior President of Tribunals)
LORD JUSTICE COULSON
and
SIR LAUNCELOT HENDERSON

- -

Between:

THE KING **(on the application of CHALA ALICE FISKE)**	**Claimant/ Appellant**
- and -	
TEST VALLEY BOROUGH COUNCIL	**Defendant/ Respondent**
- and -	
WOODINGTON SOLAR LIMITED	**Interested Party**

- -
- -

James Burton (instructed by **Lewis Silkin LLP**) for the **Appellant**
Robin Green and **Robert Williams** (instructed by **Sharpe Pritchard LLP**) for the **Respondent**
The **Interested Party** did not appear and was not represented

Hearing date: 10 October 2023

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Approved Judgment

This judgment was handed down remotely at 2.00pm on 15 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Keith Lindblom, Senior President of Tribunals:

Introduction

1. Did a local planning authority err in law when granting planning permission for a distribution network operator ("DNO") substation to connect a proposed solar park to the national grid? In particular, did it fail to have regard to an "obviously material" consideration by not taking into account the incompatibility of that planning permission with the permission it had previously granted for the solar park itself? These questions arise in this case. They involve principles of law that are already well established.

2. With permission granted by Nugee L.J. after an oral hearing, the appellant, Chala Fiske, appeals against the order of H.H.J. Jarman K.C., dated 27 May 2022, dismissing her claim for judicial review of the decision of the respondent, Test Valley Borough Council ("the council"), to grant planning permission for development including the construction of a 132kV substation on land at Woodington Farm, East Wellow. The applicant for planning permission was the interested party, Woodington Solar Ltd..

3. The site has an intricate planning history. On 4 July 2017 the council granted planning permission ("the 2017 permission") for the development of a solar park on a larger site at Woodington Farm. That development included a 33 kV substation. On 10 July 2019 the council granted planning permission under section 73 of the Town and Country Planning Act 1990 ("the 1990 Act"), approving a 132kV DNO substation compound. That permission was later quashed by consent. On 24 May 2021 the council granted the planning permission now challenged in these proceedings, for the 132 kV substation and other development, including solar panels, on a much smaller area of land within the site of the 2017 permission ("the 2021 permission"). On 27 April 2022 – the day before the hearing of this claim in the court below – a further planning permission ("the 2022 permission") was granted under section 73 to vary several conditions attached to the 2017 permission, and thus avoid any inconsistency between the development approved under the 2017 permission and that approved under the 2021 permission. The 2022 permission was also the subject of challenge by a claim for judicial review, and was quashed by Morris J. in an order dated 12 September 2023. An application for permission to appeal against the order of Morris J. has been made by the council, and awaits decision.

The main issue in this appeal

4. There are three grounds of appeal. The first contends that the incompatibility between the 2017 permission and the 2021 permission as applied for was a "mandatory material consideration", to which the council was obliged to have regard when considering the application for the 2021 permission. The second ground asserts that the judge framed the issues before him incorrectly, relied on an "ex post facto" justification for the council's approach and misapplied the legal test for "mandatory material considerations". The third asserts that the judge unfairly posed an "ex post facto" question at the conclusion of the hearing, which he then changed after receiving submissions upon it. The parties agree, however, that we are faced with a

single main issue, identified by Nugee L.J. at the permission stage: "[was] the fact that the 2021 permission was incompatible with the 2017 permission (and hence that there was a risk of breach of planning control) something that was so "obviously material" to the 2021 permission as to require consideration?"

The 2017 permission

5. The 2017 permission (ref. 15/0259/FULLS) was a full planning permission for the "[installation] on the land of a ground mounted solar park, to include ancillary equipment, inverters, a substation, cctv cameras, access tracks and associated landscaping" on a site of some 72 hectares. One of the conditions imposed by the council required details of the substation to be submitted to the council and approved before development commenced.

6. On one of the drawings approved under the 2017 permission the substation was shown located to the east of the 132kV overhead electricity lines forming part of the national grid, which run across the site. Another drawing showed the substation as comprising "typical single 33kV GRP housing switchgear" in a rectangular building measuring 5m. by 4.5m. and standing 3m. above ground level.

7. As is explained by Timothy Redpath, a director of Woodington Solar, in his witness statement dated 5 May 2022, a substation serving a solar park typically contains a "customer's part" – which in this case would operate at 33kV – and a DNO's part, which normally operates at 132kV. When the 2017 permission was granted, Woodington Solar did not know what the design requirements for the DNO's part would be, and therefore submitted only details relevant to the customer's part.

8. We were told that works to implement the 2017 permission were carried out in June 2020, and that no other works were carried out under the 2017 permission before the 2021 permission was granted.

The 2021 permission

9. The 2021 permission (ref. 20/00814/FULLS) was a full planning permission for the "[installation] of substation, ground mounted solar panels, ancillary equipment, infrastructure and access associated with Planning Permission reference: 15/0259/FULLS" on a site of 6.78 hectares.

10. One of the approved drawings, the "Site Block Plan", showed the substation as a compound of buildings and structures in a different location from that approved under the 2017 permission. It was now positioned to the west of the overhead lines in an area where the erection of solar panels had been approved by that permission. Another drawing showed the maximum height of the equipment as 6.8m., with a gantry 10m. in height to connect it to the overhead lines. The proposal included circuit breakers, insulators, 132kV/33kV transformers, above-ground connections and associated infrastructure within the compound, the "SSEN Control Building" and the "CLIENT/SWG Control Building", each measuring 4.7m. in length by 5.6m. in

width, and 3.2m. in height. The compound comprised both the customer's part, designed to operate at 33kV, and the DNO's part, designed to operate at 132kV. A further difference between the 2017 permission and the 2021 permission was that the solar panels permitted under the 2021 permission would be located, in part, within an area described as a "Proposed Conservation Area with New Tree Planting" approved under the 2017 permission.

11. According to Mr Redpath, Woodington Solar changed the proposed siting of the substation because it preferred to avoid an underground pipeline beneath the site of the substation in the 2017 permission. Had this not been possible, a substation comprising both the 33kV part and the 132kV part could be constructed on land to the east of the overhead power lines.

The planning officer's reports to committee

12. When the application for planning permission (ref. 20/00814/FULLS) came before the council's Southern Area Planning Committee at its meeting on 27 April 2021 the planning officer presented a lengthy report.

13. In describing the proposal, the officer referred to the 2017 permission. She said (in paragraph 3.1 of the report):

> "3.1 The proposals are associated with a previous application for a Solar Farm at the site which was granted Planning Permission by Test Valley Borough Council (reference: 15/02591/FULLS) on 4th July 2017. Condition applications have both been made and approved at the time of report writing in respect of the original Planning Permission. An NMA application has also been approved in respect of the 2015 application. This related to changes to the scheme associated with changes to the inverters proposed to be used as part of the development. …
>
> Development of 15/02591/FULLS commenced on Monday 15th June 2020 with construction works taking place from the Tuesday (16th June 2020), the implementation of the development had been substantially completed by 22nd June 2020."

14. Recounting the planning history of the site, the officer referred again to the 2017 permission and the conditions attached to it. She identified the information approved under various conditions, including the condition requiring the approval of details of the substation before development was commenced (paragraph 4.3).

15. In section 5.0, "CONSULTATIONS", she noted the absence of objection from the council's "Design and Conservation" officers (paragraph 5.7):

> "5.7 Conservation – No Objection
>
> Permission for a solar farm in the current location was granted under application 15/02591/FULLS (see previous comments). This application

> relates to a small section of the area considered under that application and is for various amendments, including additional solar panels and a substation.
>
> An amended heritage appraisal has now been provided.
>
> An additional site visit has been undertaken by Design and Conservation to consider the current proposals[.]
>
> It is considered that the area subject to the application in question is sufficiently screened by the landscape, topography and vegetation so as to not be visually prominent in the settings of any of the nearby heritage assets. Any glimpsed views would be exceptionally limited and would be incidental and therefore would not adversely affect the significance of the assets in this instance.
>
> … ."

16. In section 6.0, "REPRESENTATIONS", she referred to an objection – which was, in fact, Mrs Fiske's – alleging a "Procedural Error" (paragraph 6.13):

> "6.13 Following the grant of [the 2017 permission], the applicant found that the DNO substation incorporated into the design of the permitted development would not be able to become operational as the drawings had been based on connection with 33Kv overhead lines. Consequently, a S73 application (Ref 19/00401/VARS) ("the VARS") was submitted to revise the permitted scheme to include a DNO substation that would connect with overhead powerlines for 132Kv. The substation infrastructure for this conversion is significantly larger with more extensive impact. The VARS was granted consent but following a JR challenge by our client the Council agreed to have this quashed.
>
> Instead of submitting a new S73 application, the applicant has chosen to submit a full stand-alone application for the 132Kv DNO complex.
>
> This cannot be granted consent if there is no solar farm for it to connect with. The development permitted by the original Permission remains conditional upon details being submitted for a DNO that connects to a 33Kv grid. No details can be submitted and approved for a [33kV] grid since the grid needs a 132Kv connection. Our letter of 6 February 2020 detailed the legal position in respect of the problem discharging Condition 15 of the Permission.
>
> Accordingly, the applicant should have submitted either a revised new full application for the whole solar farm with a 132 Kv DNO or a new S73 application."

17. In her advice on the planning merits in section 8.0 of the report, "PLANNING CONSIDERATIONS", the officer began with the "Principle of development" (in paragraph 8.6):

> "8.6 The applicant has worked with technical partners and various specialists including Ethical Power Connections Ltd and the DNO Scottish and Southern Energy (SSE) Power Distribution, to finalise the construction detail of the Solar Farm and the means by which the renewable energy generated will be exported to the local electricity network. It is proposed the renewable energy generated by the Solar Farm will connect to the 132kV overhead line which crosses the Woodington site. Given the principle of siting a solar farm in this location have [sic] previously been established by the original grant of planning permission which has been implemented, and the current proposals ensure the site can function, it is considered that it is essential for these proposals to be located within the countryside and as such the development is considered to accord with Policy COM2 of the RLP. "

18. On "Site selection and agricultural land", she said (in paragraph 8.7):

> "8.7 …
>
> The selection of the site and the use of the agricultural land for use as a solar farm has been assessed under the previous application 15/02591/FULLS and this application has since been implemented in June 2020. …".

19. Under the heading "Other matters", the officer discussed Mrs Fiske's objection alleging a "Procedural Error" (in paragraph 8.60):

> "8.60 …
>
> …
>
> Comments have been received in respect of the 2019 s.73 permission (Ref: 19/00401/VARS) … which was granted consent but following a JR challenge has been quashed. It has been suggested that the current application cannot be granted consent if there is no solar farm for it to connect with. However Planning Application 15/02591/FULLS is an extant permission which provides the solar farm which the substation will connect to. This remains unaffected by the quashing of the 2019 s.73 permission. It is noted that the information submitted and approved under the previous application condition process for the substation is not adequate for the grid connection, however this does not result in application 15/02591/FULLS being unable to provide the solar panel arrays and associated works which this application seeks to link to."

20. In section 9.0, "CONCLUSION AND PLANNING BALANCE", the officer concluded that the proposed development was in accordance with the policies of the development plan, and that "[material] considerations do not indicate that the decision should be otherwise than in accordance with the development plan". She therefore recommended that planning permission be granted.

21. In a supplementary report, entitled "Update Paper", she maintained that recommendation.

The statutory planning code

22. A grant of planning permission authorises the development of land (see sections 55, 57 and 58 in Part III of the 1990 Act). It does not, however, compel the landowner or developer, or the applicant for permission if that is somebody else, to carry out that development (see the judgment of Lord Sales and Lord Leggatt, with whom Lord Reed, Lord Briggs and Lady Rose agreed, in *Hillside Parks Ltd. v Snowdonia National Park Authority* [2022] UKSC 30; [2022] 1 W.L.R. 5077, at paragraph 20). Whatever the intention of the applicant in seeking planning permission – which may simply be to test the market or to establish the principle of a particular use of the land and thus raise its value, or some other motive – the authority's task in determining the application is to judge the acceptability of the proposal on its planning merits.

23. Section 70(1) of the 1990 Act provides that "where an application is made to a local planning authority for planning permission … they may grant planning permission, either unconditionally or with conditions as they think fit". Section 70(2) requires that in dealing with an application for planning permission a local planning authority "shall have regard to", among other specified matters, "the provisions of the development plan, so far as material to the application", and "any other material considerations". Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that "[if] regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise".

24. Section 73 of the 1990 Act applies to applications for planning permission for the development of land "without complying with conditions subject to which a previous planning permission was granted" (subsection (1)). It requires that the local planning authority shall "consider only the question of the conditions subject to which planning permission should be granted" (subsection (2)). Such a permission can be granted for development already carried out (see the judgment of Lord Carnwath in *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33; [2019] 1 W.L.R. 4317, at paragraphs 11 and 12).

25. Section 75(1) provides that "[without] prejudice to the provisions of this Part as to the duration, revocation or modification of planning permission or permission in principle, any grant of planning permission … to develop land shall (except in so far as the permission otherwise provides) enure for the benefit of the land and of all persons for the time being interested in it".

26. Section 96A gives a local planning authority the power to make a change to any planning permission relating to land in its area if satisfied that the change is not material.

27. In the statutory regime for the enforcement of planning control in Part VII of the 1990 Act, section 172(1) provides that a local planning authority may issue an enforcement notice where it appears to it that there has been a "breach of planning control". This

would include, under section 171A(1), "carrying out development without the required planning permission". Section 187B empowers a local planning authority to apply to the court for an injunction where it considers it "necessary or expedient for any actual or apprehended breach of planning control" to be restrained in that way.

"Material considerations"

28. The classic statement of principle on "material considerations" in the making of planning decisions is to be found in the speech of Lord Scarman in *Westminster City Council v Great Portland Estates Plc* [1985] A.C. 661. He said (at p.670C-G) that "[the] test … of what is a material "consideration" … in the control of development … is whether it serves a planning purpose: see *Newbury District Council v Secretary of State for the Environment* [1981] A.C. 578, 599 *per* Viscount Dilhorne …". A "planning purpose", he said, "is one which relates to the character of the use of land" – not , as Lord Parker C.J. put it in *East Barnet Urban District Council v British Transport Commission* [1962] 2 Q.B 484 (at p.491), "the particular purpose of a particular operator". Lord Scarman added (at p.670E-F) the caveat that "[personal] circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control" (see also the judgment of Lord Sales in *R. (on the application of Wright) v Forest of Dean District Council* [2019] UKSC 53; [2019] 1 W.L.R. 6652, at paragraphs 31 to 36).

29. In *R. (on the application of Samuel Smith Old Brewery (Tadcaster) and another) v North Yorkshire County Council* [2020] UKSC 3; [2020] PTSR 221 (at paragraph 30), Lord Carnwath cited his own reasoning, as Carnwath L.J., in *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin); [2010] 1 P. & C.R. 19, where he had emphasised (at paragraph 17) that it was "one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it", but "quite another to say that it is *necessarily* relevant, so that he errs in law if he fails to have regard to it" (emphasis added by Carnwath L.J.). It was, he had said (at paragraph 18), "trite and long-established law that the range of potentially relevant planning issues is very wide (*Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281) …". But "[on] the other hand, to hold that a decision-maker has erred in law by *failing* to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered) him to do so" (emphasis added by Carnwath L.J.).

30. Lord Carnwath referred (at paragraph 31) to the passage in his judgment in *Derbyshire Dales District Council* where he had included the discussion of this issue by Cooke J. in the New Zealand Court of Appeal in *CREEDNZ Inc. v Governor General* [1981] 1 NZLR 172, at p.182, adopted by Lord Scarman in *In re Findlay* [1985] A.C. 318, at pp.333 and 334, and, in the sphere of planning, by Glidewell L.J. in *Bolton Metropolitan Borough Council v Secretary of State for the Environment and Greater Manchester Waste Disposal Authority* [2017] PTSR 1063, (at p.1071). In the relevant passage (at paragraphs 26 to 28), Carnwath L.J. had said:

> "26. [Cooke J.] took as a starting point the words of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, 228: 'If, in the statute conferring the discretion there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters.' He continued: 'What has to be emphasised is that it is only when the statute *expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation* that the court holds a decision invalid on the ground now invoked. It is not enough that it is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision …' [emphasis added by Carnwath L.J.].
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> 27. In approving this passage, Lord Scarman noted that [Cooke J.] had also recognised, that: '… in certain circumstances there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers … would not be in accordance with the intention of the Act.' (*In re Findlay* at p 334.)
>
> 28. It seems, therefore, that it is not enough that, in the judge's view, consideration of a particular matter might realistically have made a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because 'obviously material') requires to be taken into account 'as a matter of legal obligation'."

31. As has since been confirmed by the Supreme Court, the test to be applied in determining whether a consideration is "so obviously material" that it must be taken into account is "the familiar *Wednesbury* irrationality test" (see the judgment of Lord Hodge and Lord Sales in *R. (on the application of Friends of the Earth Ltd.) v Heathrow Airport Ltd.* [2020] UKSC 52; [2021] PTSR 190, at paragraphs 116 to 119).

The incompatibility of planning permissions

32. In his judgment in the Divisional Court in *Pilkington v Secretary of State for the Environment* [1973] 1 W.L.R. 1527, Lord Widgery C.J. considered the status of conflicting planning permissions relating to the same land when the development approved in one of those permissions was carried out, and whether in those circumstances the other permission remained capable of lawful implementation. He said (at p.1531E-H):

> "There is, perhaps surprisingly, not very much authority on this point which one would think could often arise in practice, so I venture to start at the beginning with the more elementary principles which arise. In the first place I have no doubt that a landowner is entitled to make any number of

> applications which his fancy dictates, even though the development referred to is quite different when one compares one application to another. It is open to a landowner to test the market by putting in a number of applications and seeing what the attitude of the planning authority is to his proposals.
>
> Equally it seems to me that a planning authority receiving a number of planning applications in respect of the same land is required to deal with them even though they are mutually inconsistent one with the other. Of course, special cases will arise where one application deliberately and expressly refers to or incorporates another, but we are not concerned with that type of application in the present case.
>
> In the absence of any such complication, I would regard it as the duty of the planning authority to regard each application as a proposal in itself, and to apply its mind to each application, asking itself whether the proposal there contained is consistent with good planning in the factual background against which the application is made.
>
> I do not regard it as part of the duty of the local planning authority itself to relate one planning application or one planning permission to another to see if they are contradictory. Indeed I think it would be unnecessary officiousness if a planning authority did such a thing. They should regard each application as a proposal for a separate and independent development, and they should consider the merits of the application upon that basis. … ."

33. Lord Widgery went on to consider the position where one of two planning permissions for different development on the same land has been implemented. On this point he said (at p.1532A-C):

> "For this purpose I think one looks to see what is the development authorised in the permission which has been implemented. One looks first of all to see the full scope of that which has been done or can be done pursuant to the permission which has been implemented. One then looks at the development which was permitted in the second permission, now sought to be implemented, and one asks oneself whether it is possible to carry out the development proposed in that second permission, having regard to that which was done or authorised to be done under the permission which has been implemented."

34. That approach was not doubted by the House of Lords in *Pioneer Aggregates (U.K.) Ltd. v Secretary of State for the Environment* [1985] 1 A.C. 132, where (at p.145A-C) Lord Scarman said:

> "… This was certainly a common sense decision, and, in my judgment, correct in law. The *Pilkington* problem is not dealt with in the planning legislation. It was, therefore, necessary for the courts to formulate a rule which would strengthen and support the planning control imposed by the legislation. And this is exactly what the Divisional Court achieved. There

> is, or need be, no uncertainty arising from the application of the rule. Both planning permissions will be on a public register: examination of their terms combined with an inspection of the land will suffice to reveal whether development has been carried out which renders one or the other of the planning permissions incapable of implementation."

35. In *Hillside Parks* Lord Sales and Lord Leggatt referred with approval (in paragraphs 30 and 31 of their judgment) to the passages I have mentioned in Lord Widgery's judgment in *Pilkington*. They acknowledged without comment (in paragraph 30) that Lord Widgery had "expressly set to one side cases "where one application deliberately and expressly refers to or incorporates another" (p1531)".

36. They went on to say (in paragraphs 43 and 45):

> "43 … What mattered, as [Lord Widgery] made clear, was whether it was physically possible to carry out the development authorised by the terms of the unimplemented permission. That depends upon (a) the terms of the unimplemented permission and (b) what works have actually been done. It would not make sense to have regard to the terms of the permission under which development has already taken place, as a central theme of the judgment is that mere inconsistency between the two permissions does not prevent the second permission from being implemented. What must be shown is that development in fact carried out makes it impossible to implement the second permission in accordance with its terms.
>
> …
>
> 45 In essence, the principle illustrated in the *Pilkington* case is that a planning permission does not authorise development if and when, as a result of physical alteration of the land to which the permission relates, it becomes physically impossible to carry out the development for which the permission was granted (without a further grant of planning permission). Unlike a doctrine of abandonment, this principle is consistent with the legislative code. Indeed, as Lord Scarman observed in *Pioneer Aggregates* at p 145C, it serves to "strengthen and support the planning control imposed by the legislation". Where the test of physical impossibility is met, the reason why further development carried out in reliance on the permission is unlawful is simply that the development is not authorised by the terms of the permission, with the result that it does not comply with section 57(1)."

37. After a discussion of relevant case law, Lord Sales and Lord Leggatt said this (in paragraph 68 of their judgment):

> "68 In summary, failure or inability to complete a project for which planning permission has been granted does not make development carried out pursuant to the permission unlawful. But (in the absence of clear express provision making it severable) a planning permission is not to be

> construed as authorising further development if at any stage compliance with the permission becomes physically impossible."

38. They also considered an argument on "variation", including a submission that it would cause serious practical inconvenience if a developer who, when carrying out a large development, encounters a local difficulty or wishes for other reasons to depart from the approved scheme in one particular area of the site cannot obtain permission to do so without losing the benefit of the original permission and having to apply for a fresh planning permission for the remaining development on other parts of the site. On this argument they said (in paragraph 74):

> "74 In our view, that is indeed the legal position where, as here, a developer has been granted a full planning permission for one entire scheme and wishes to depart from it in a material way. It is a consequence of the very limited powers that a local planning authority currently has to make changes to an existing planning permission. But although this feature of the planning legislation means that developers may face practical hurdles, the problems should not be exaggerated. Despite the limited power to amend an existing planning permission, there is no reason why an approved development scheme cannot be modified by an appropriately framed additional planning permission which covers the whole site and includes the necessary modifications. The position then would be that the developer has two permissions in relation to the whole site, with different terms, and is entitled to proceed under the second."

The judgment in the court below

39. The judge referred (in paragraphs 15 to 23 of his judgment) to several "options" for completing the solar park development with a connection to the national grid. He had sought help from the parties on the question of "whether it was viable to [complete the development] without the direct connection to the overhead lines" (paragraph 15). The options included going ahead with the implementation of the 2017 permission and applying either for permission for the "compound element of the substation" under section 73 of the 1990 Act or for a full planning permission. A connection for a private customer could be made by a "private wire network" (paragraph 20), but this "would appear to be an unlikely, if viable, option" (paragraph 21). An application could be made under section 73 to create space for the development under the 2021 permission – an option already attempted (paragraph 22). It would be possible to apply for a "composite planning permission to allow for the solar park with the compound". Or a section 73 application could be made "to vary the 2021 permission" (paragraph 23).

40. The application for the 2021 permission was, said the judge, "associated" with the 2017 permission. It was made to secure a connection to the national grid. This was, therefore, a "special case" of the kind referred to in *Pilkington*. But the incompatibility between the two permissions was a matter for Woodington Solar as

developer and not something the council needed to consider. And it was not surprising that a project of this magnitude should be an "evolving process" (paragraph 28).

41. In the judge's view this "was not a matter which [the council] was compelled to take into account or grapple with". It "[seemed] to be common ground that it would be open to the developer to apply for a composite permission for a solar park with the compound element of the substation". And it was "not difficult to see why a developer, having established the principle of the acceptability in planning terms of the solar park under the 2017 permission, should first wish to test such acceptability of the compound in the countryside, before embarking on a far more extensive application". The judge acknowledged that "the difficulties of incompatibility" may not have been considered by Woodington Solar when submitting the application for the 2021 permission, and were "now having [to] be addressed" (paragraph 29). But he "[could not] see that there [was] a statutory … or policy requirement to have regard to such potential consequences in deciding the application for the compound or that they were so obviously material as relating to the character of the 6.78 hectares of land comprising the site to which the application related". The council had found such use in the countryside "acceptable in planning terms, in the context that such acceptability of a 72 hectare solar park in the countryside had already been established" (paragraph 30). The assumption that Woodington Solar would seek to implement either permission, or both, in breach of planning control was "not justified on the evidence". It was "for the developer to decide how to develop in a way which does not involve such a breach, and … therefore it was not for the [council] to grapple with or speculate upon the potential options" (paragraph 31).

Did the council err in law?

42. For Mrs Fiske, Mr James Burton argued that the incompatibility between the two planning permissions was an "obviously material" consideration in the council's decision. The particular nature of the application for planning permission for the substation and the council's reasons for granting permission made it so. In the first place, Mr Burton submitted, the application was expressly "associated" with the 2017 permission because the proposed development was necessary to complete the development of a solar park approved by that permission, by connecting it to the grid. Secondly, this was the fact on which the council relied in accepting that the development was "essential" in the countryside and complied with relevant planning policy. The judge had neglected this point. He should have seen that the council's failure to have regard to the incompatibility of the two planning permissions was enough to invalidate the 2021 permission. Thirdly, the incompatibility of the two permissions was likely to generate a breach of planning control. This was itself an "obviously material" consideration. Fourthly, the judge wrongly relied on Woodington Solar's options for overcoming the incompatibility as justification for the council's decision. This evidence, Mr Burton argued, was "ex post facto".

43. For the council, Mr Robin Green supported the judge's reasoning. He also submitted that in the light of the Supreme Court's reasoning in *Hillside Parks* this must be seen as a case of "mere inconsistency". When the 2021 permission was granted the development already carried out under the 2017 permission did not make it physically impossible to carry out the development authorised by the 2021 permission. "If and

when" any development carried out under the 2021 permission made it physically impossible to undertake the development authorised by the 2017 permission, it would then, but only then, make any additional development under the 2017 permission unlawful. But until then Woodington Solar could lawfully continue with, and complete, the development approved by the 2017 permission.

44. Mr Burton contested that understanding of the principles expressed in *Hillside Parks* when applied to the facts of this case. He submitted that, as was readily apparent from a comparison of the relevant drawings, the two developments could not both be completed. As soon as the implementation of the 2021 permission was begun it would be physically impossible to build out the development approved by the 2017 permission, and this would be enough to engage the principle stated by Lord Sales and Lord Leggatt in *Hillside Parks* (at paragraph 68), that "… a planning permission is not to be construed as authorising further development if at any stage compliance with the permission becomes physically impossible".

45. I cannot accept Mr Burton's argument asserting that the council's decision to grant the 2021 permission was unlawful. I think that the council's approach in determining the application was entirely lawful, and that the grant of the 2021 permission is valid in law. I agree with the judge's conclusions to this effect.

46. Mr Burton cannot argue that either the incompatibility of planning permissions or the prospect of some future breach of planning control was a material consideration to which the council was required to have regard under any provision of the statutory planning code. Neither of those two things was identified in legislation, or in policy, as a matter the council must take into account. Nor is there any basis for submitting that the council was obliged in law to have regard either to the incompatibility of the two permissions in question or the possibility of Woodington Solar, or any subsequent landowner or developer of the site, carrying out development under either permission in breach of planning control as an "obviously material" consideration. I cannot accept that it was irrational for the council not to take these matters into account.

47. These conclusions emerge from a straightforward analysis, applying well-established legal principles to the circumstances in which the 2021 permission was granted.

48. The essential facts are simple and uncontroversial. There is no dispute that the 2017 permission and the 2021 permission were inconsistent with each other. The 2021 permission was only applied for because the development proposed was different from the corresponding element in the 2017 permission. If the solar park was to be connected to the national grid a substation suitable for that connection had to be put in place, and this would not have been so if the development permitted by the 2017 permission was fully built out in accordance with the terms of that permission. A different specification and design for the substation were necessary, and that different design required changes to be made to the layout of the surrounding parts of the solar park. None of this is contentious.

49. I do not think we have to resolve the parties' dispute over the application of the principles relevant to the incompatibility of planning permissions. The starting point here is the parties' agreement that there is some inconsistency between the development permitted by the 2017 permission and that permitted by the 2021 permission. The two planning permissions are incompatible, and obviously so. It is

inherent in the differences between them that one or the other of them could one day be incapable of implementation in full if nothing had been done by then to overcome the incompatibility.

50. But the argument we have to consider on the main issue in the appeal does not turn on the exact nature and extent of the differences, or on their potential significance. The central question for us is whether the incompatibility of the two proposals was a matter the council was bound in law to take into account when considering the application for planning permission in May 2021. It is enough, but it is also necessary, for Mr Burton to persuade us that this was an obviously material consideration. The asserted obvious materiality here lies in the fact that such incompatibility exists. We do not need to explore the detail and degree of that incompatibility, or the precise legal implications of it.

51. The fact that the differences between the two proposals were obvious when the challenged decision was taken does not mean that their incompatibility was an "obviously material" and thus mandatory material consideration in the council's decision. That would be a misconception. The planning system does not preclude the possibility of a number of applications for planning permission being made and granted for different developments on the same site. It accepts the granting and co-existence of mutually incompatible permissions, one or more of which may prove incapable of lawful implementation, whether in whole or in part, unless the incompatibility can be defeated by a further grant of permission under section 70 of the 1990 Act, or section 73. This was a point strongly emphasised in *Pilkington*.

52. There is nothing in the judgment of Lord Sales and Lord Leggatt in *Hillside Parks*, nor in Lord Widgery's in *Pilkington*, or elsewhere in the cases to which counsel referred, to support the proposition that the incompatibility between a previously granted planning permission and an application seeking permission for a different scheme is a mandatory material consideration in the decision being taken, either as a general rule or in the "special cases" to which Lord Widgery referred.

53. What Lord Widgery said, obiter, in *Pilkington* should not be misunderstood. He emphasised, as "elementary principles", a landowner's entitlement to make as many applications for planning permission for as many different proposals as he might wish, and the obligation of the local planning authority to determine those applications even if they are inconsistent with each other. He recognised those "special cases" where "one application deliberately and expressly refers to or incorporates another". But he did not say that even in those "special cases" the incompatibility of two or more applications would be an "obviously material" consideration. He said what he thought the authority's duty would be if there were no such "complication", which was to consider each application on its own planning merits. He did not state, however, that in a "special" case the authority would be obliged to have regard to the differences between proposals. Nor did he qualify his remark that he did "not regard it as part of the duty of the local planning authority itself to relate one planning application or one planning permission to another to see if they are contradictory".

54. In this case we are not concerned with a situation in which one application incorporates another. We are concerned with an application in which the description

of development referred to a previously granted planning permission, with which it was said to be "associated" – as it was.

55. In the light of the relevant reasoning in *Pilkington*, recently confirmed in *Hillside Parks*, and the cases on mandatory material considerations, I do not accept that the fact of the 2017 permission being expressly "associated" with the application for the 2021 permission made the incompatibility between the two permissions an "obviously material" consideration. Such incompatibility did not nullify or prevent the implementation of either the 2017 permission or the 2021 permission. It did not negate the principle of a solar park development on the site, which the 2017 permission had established. Nor did it go to the intrinsic planning merits of the substation proposal that the committee was now considering.

56. As is clear from the planning officer's report, the committee understood how the application it was determining related to the 2017 permission. It knew the two proposals were "associated". It was aware that the proposal it was now considering had been submitted to enable the solar park to function effectively with a connection to the national grid. All this was made perfectly clear to the members. And in my view they unquestionably assessed the planning merits of the proposal without failing to have regard to any mandatory material consideration arising from the relationship between it and the development for which planning permission had already been granted.

57. A planning officer's report to committee must be read fairly and as a whole (see the leading judgment in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314; [2019] PTSR 1452, at paragraphs 41 and 42). When that is done here, one can see that the officer took care to draw the members' attention to the relationship between the two proposals and did so appropriately.

58. There can be no suggestion that she materially misled the committee. She told it that the application was "associated" with the 2017 permission, that submissions for approval of details had been made and granted, and that the "implementation" of the development under the 2017 permission had been "substantially completed" (paragraph 3.1 of her report). She drew attention to the "Design and Conservation" officers' observation that the proposal related only to a small section of the area to which the 2017 permission related, and was for various amendments, including additional solar panels and a substation (paragraph 5.7).

59. She spelt out Mrs Fiske's objection alleging a "Procedural Error", which contended that planning permission could not be granted for this proposal "if there is no solar farm for it to connect with", that under the relevant condition attached to the 2017 permission "no details [could] be … approved for a [33kV] grid since the grid needs a 132Kv connection", and that Woodington Solar "should have submitted either a revised new full application for the whole solar farm with a 132Kv DNO or a new S73 application" (paragraph 6.13).

60. In her discussion of the planning merits the officer referred to the work being done to "finalise the construction detail" of the solar park and "the means by which the renewable energy generated will be exported to the local electricity network" through a proposed connection to the 132kV overhead lines crossing the site. She reminded the committee that "the principle of siting a solar farm in this location [had]

previously been established by [the 2017 permission], which [had] been implemented". She confirmed that "the current proposals [would] ensure the site can function". She therefore concluded that it was "essential for these proposals to be located in the countryside", and that this was in accordance with development plan policy (paragraph 8.6), adding that the development of this agricultural land as a solar park had already been assessed in the granting of the 2017 permission, which had been implemented in June 2020 (paragraph 8.7).

61. When she came to address the objection alleging a "Procedural Error" she emphasised that the 2017 permission was "an extant permission which provides the solar farm which the substation will connect to", and that this remained so despite the quashing of the section 73 permission granted in 2019. As for the complaint that the information approved under the relevant condition on the 2017 permission was not adequate for the grid connection, she told the committee that this did not result in the 2017 planning permission being incapable of providing the arrays of solar panels and associated works to which the works now proposed would be linked (paragraph 8.60). This was consistent with her advice in paragraphs 8.6 and 8.7 about the "principle" of the solar park being established by the 2017 permission. Implicit in what she said about the section 73 permission in paragraph 8.60 was that Woodington Solar had seen the need to modify the solar park proposal approved by the 2017 permission if a substation of suitable specification and design were to be integrated with it. And in any event the fact that the section 73 permission had been quashed in a claim for judicial review did not affect the status and effect of the 2017 permission itself, which remained extant and valid. It did not undo the principle of solar park development on the site, or undermine the justification for the proposed substation being built in the countryside.

62. Taken together, these passages in the officer's report provided a legally adequate explanation of the relationship between the 2017 permission and the application before the committee. There was nothing else that the committee ought to have been told about this. The officer was not obliged to explain the incompatibility between the two proposals as a mandatory material consideration. Her planning assessment, accepted by the committee, was not legally flawed by a failure to identify the inconsistencies, or to say how they might be tackled. It was not incumbent on her to do either.

63. The advice given to the committee reflected the reality that if a suitable connection to the national grid was to be achieved the construction of a substation of appropriate specification and design would be needed. Without that substation the solar park could not operate as Woodington Solar intended. There would have been no point in pursuing this proposal unless the substation was going to function with the solar park itself. It is not surprising then that the officer's assessment of the proposed development on its planning merits was based squarely on the "principle" of a solar park being constructed in this location having been established by the 2017 permission, which had already been implemented. The assessment itself was wholly logical. It did not rely, nor did it need to, on the concept that the two permissions would be fully compatible. It did not attempt to predict what steps would be taken by Woodington Solar after the 2021 permission had been granted to ensure that the development of the solar park could lawfully go ahead with the requisite substation in place. That was also unnecessary.

64. I see no force in the submission that the possibility of Woodington Solar acting in breach of planning control was itself an "obviously material" consideration. If the incompatibility of the two planning permissions was not an "obviously material" consideration, the future actions of a developer with the benefit of those two permissions cannot be seen as a matter on which the council needed to speculate. This was a question for Woodington Solar as developer. It did not bear on the planning merits of the proposal in hand.

65. If Woodington Solar did act in breach of planning control it would be open to the council to use its powers of enforcement in Part VII of the 1990 Act – including the power to issue an enforcement notice under section 172 and the power to apply for an injunction under section 187B. In my view, however, the general presumption should be that the planning system will function lawfully, not that it will fail to do so.

66. For a large development such as this to require changes to be made to it in the course of design and construction is not unusual. It often happens. When it does, the developer may be expected to make such changes through the normal planning process. If he has the benefit of two or more planning permissions incompatible with each other, or potentially so, there may be lawful steps he can take to overcome that incompatibility and proceed with the development he wants to build. Sometimes this will not be so. In that case the incompatibility will remain, and the lawful implementation of one permission or the other, or both of them, will not be possible. But the local planning authority is not legally compelled to anticipate how the developer might later choose to deal with such inconsistency, or to assume that he will resort to unlawful means of doing so. That is not the authority's job.

67. In this case there seems to have been no indication that Woodington Solar would choose to act unlawfully if planning permission were granted for the proposed development. Nothing in the site's planning history suggests that. To argue, in these circumstances, that there was a significant risk of a breach of planning control seems unrealistic. In any event it was certainly not irrational for the council to disregard such a risk in determining the application for planning permission. This was not an "obviously material" consideration.

68. But I also accept Mr Green's submission that the incompatibility of the two planning permissions was not, in fact, an insuperable obstacle to progress with a development in which the proposal for the solar park, suitably modified, and the preferred proposal for the substation could lawfully go forward as a single integrated scheme. How this could best be achieved was up to Woodington Solar as developer. It was not a matter the council had to consider in determining the application for planning permission.

69. To criticise the council's submissions on the available options, and the judge's acceptance of those submissions, as an "ex post facto" justification of the decision under challenge is mistaken. Those submissions were not made on that basis. Their true relevance in these proceedings, I think, is that they lend additional force to the council's contention, which in my view is clearly right, that it was not irrational for the committee to proceed as it did.

70. On the main issue, therefore, I conclude that Mrs Fiske's appeal must fail.

Section 31(2A) of the Senior Courts Act 1981

71. We heard submissions from both sides on the duty in section 31(2A) of the Senior Courts Act 1981, which requires the court to refuse relief in a claim for judicial review where it appears "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". But if we agree, as I have concluded, that the grounds of the claim lack any legal merit, and that the appeal must therefore fail, it follows that there is no need to decide whether a remedy should have been granted had the claim succeeded. I would add only this. The claim in these proceedings is an excessively technical challenge. It has a distinct air of unreality. This, certainly, is one of those cases in which the court might well have been entitled to withhold relief.

Unfairness or procedural irregularity

72. On the third ground of appeal Mr Burton argued that the judge conducted himself unfairly at the hearing of the claim and in his judgment. At the end of the hearing he invited the parties to make written submissions on this question: "[whether] the original permission scheme could be connected to the national grid or to other options". Having received those submissions, and without having invited further argument, he reformulated the question in his judgment. He now asked himself whether it was "viable [to] complete the development under the 2017 permission … without the direct connection to the overhead lines".

73. This argument can be answered shortly. The council has consistently maintained in these proceedings that the options available to Woodington Solar to overcome the incompatibility between the two planning permissions was a factor relevant to the main issue in the case. It did so in its detailed grounds of resistance (at paragraphs 50 and 55), and in its skeleton argument in the court below (at paragraphs 19 to 21 and 25). The point was not an invention of the judge. Mrs Fiske's legal representatives were aware of it from an early stage. At the hearing the judge sought further information on one of the options, namely the completion of the development authorised under the 2017 permission, to explain whether that development could be connected to the national grid. Evidence on that question was given by Mr Redpath in his witness statement, which the judge admitted without objection on behalf of Mrs Fiske. Submissions were made by the parties, and the judge drew his own conclusions in the light of that evidence and those submissions.

74. No unfairness arose, nor any "serious procedural … irregularity" under CPR r.52.21(3). Three points may be made about this. First, the judge did not change the substance of the question he had raised. As he said (in paragraph 15 of his judgment), the issue on which he had asked for clarification was "whether it was viable to [complete the development under the 2017 permission] without the direct connection to the overhead lines". I think his reference to "viable" options (in paragraphs 15 and 21), read in context, went to practicability, not financial feasibility. Mrs Fiske was not unfairly prevented from putting forward evidence on that issue. Secondly, there was nothing unfair, or wrong in principle, in the judge looking as he did at the other options available to Woodington Solar. This was a matter on which the council had relied throughout. It was not excluded from the judge's consideration by his own

question on the option of completing the development approved by the 2017 permission. And thirdly, the judge was entitled to say (in paragraph 21) that the private connection "would appear to be an unlikely, if viable, option", though this was clearly not critical to his conclusion (in paragraph 29) that the incompatibility of the two permissions "was not a matter which [the council] was compelled to take into account or grapple with".

Conclusion

75. For the reasons I have given I would dismiss the appeal.

Lord Justice Coulson:

76. I agree.

Sir Launcelot Henderson:

77. I too agree.