Neutral Citation Number: [2024] EWCA Civ 507

Case No: CA-2023-000388

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
Timothy Mould KC (sitting as a Deputy High Court Judge)
[2023] EWHC 92 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2024

Before :

SIR ANDREW MCFARLANE
PRESIDENT, FAMILY DIVISION
LADY JUSTICE ANDREWS
and
LORD JUSTICE SNOWDEN

- -

Between :

MRS HEINI WATHEN-FAYED	**Claimant/ Appellant**
- and -	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendant/ Respondent**
-and	
(1) HORIZON CREMATION LIMITED **(2) TANDRIDGE DISTRICT COUNCIL**	**Interested Parties**

- -
- -

Patrick Green KC and Kate Gardiner (instructed by **Fladgate LLP**) for the **Appellant**
Jonathan Darby (instructed by **Government Legal Department**) for the **Respondent**
Peter Goatley KC and Sioned Davis (instructed by **Addleshaw Goddard LLP**) for the **First Interested Party**
The **Second Interested Party** did not appear and was not represented at the hearing

Hearing date: 20 March 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 10th May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lady Justice Andrews:

Introduction

1. The granting of planning permission for a development in the Green Belt is almost inevitably going to excite controversy. The decision of a Planning Inspector appointed by the Secretary of State for Levelling Up, Housing and Communities ("the Secretary of State"), following a local Inquiry, to allow an appeal by the First Interested Party ("Horizon") against the refusal by the District Planning Authority, the Second Interested Party ("Tandridge") of its application for planning permission for such a development on land in the parish of Tandridge, near Oxted, Surrey, proved to be no exception.

2. The proposed development comprises a crematorium with a ceremony hall, memorial areas, a garden of remembrance, and associated parking and infrastructure. The development site comprises 4.5 hectares of open fields adjacent to the A25, previously used for grazing horses. Although not itself within an area designated of landscape importance, the Surrey Hills Area Of Outstanding Natural Beauty is to the north, and its elevated chalk escarpment can be seen from the section of the A25 fronting the site. The proposed crematorium would be on the eastern side of the site, served by a new access road, and both the crematorium and its operational areas would be set within the lower part of the site, with woodland planting screening the sides that would otherwise be visible from the surrounding roads. The western third of the site is to be kept free of development, and managed as meadow.

3. The site lies within an area designated as flood risk Zone 1 by the Environment Agency, meaning that annually it has a low (less than 1 in 1,000) probability of flooding from a river. However the flood risk zones are only concerned with the risk of flooding from rivers (or where relevant, the sea), so the fact that land falls within the lowest designated flood risk zone, whilst important, does not address the risk of flooding from other sources. A Level 1 Strategic Flood Risk Assessment ("SFRA") report was prepared for Tandridge in December 2017. This identified a number of areas which were assessed as being at risk of groundwater flooding. The site lies in one such area.

4. In support of its planning application, Horizon submitted a site-specific flood risk assessment prepared on its behalf by a firm of consulting civil and structural engineers ("the Flood Risk Assessment"). They expressed the view that: "based on the review of available information, the site is not at risk of flooding. The proposals to develop the site will not have a significant impact on the current surface water regime".

5. It was common ground before the Inspector that, under the policies in the National Planning Policy Framework, the most recent version of which was published on 20 July 2021, ("the Framework"), the proposed development was inappropriate development in the Green Belt, by definition harmful to it, and thus should not be approved except in very special circumstances. The Inspector found that the overall degree of harm in respect of Green Belt purposes to prevent encroachment and preserve openness would be moderate, and that there was also a moderate degree of further harm to the character and appearance of the area. However, all that harm was outweighed by the benefits that he identified, including the provision of facilities

which would meet an essential, growing, and currently unfulfilled community need. He found that very special circumstances existed justifying the development, and that it satisfied both local Green Belt policy (DP10 in the Detailed Policies of the 2014 Tandridge District Local Plan) and the policy in the Framework.

6. The Inspector stated, in paragraph 8 of the Decision Letter, that "the main crematorium building comprises three pitched-roof sections linked by flat-roofed walkways. Located quite centrally within the site, its siting and design conform with the various laws and regulations governing crematoria". He specifically referred to section 5 of the Cremation Act 1902 ("the 1902 Act") at paragraph 34, when addressing local need for such a facility, commenting that the statutory requirement (in that section) that crematoria normally need to be located at least 200 yards away from the nearest dwelling and 50 yards away from a public highway "make a Green Belt location difficult to avoid in this part of Surrey, given the extent of its coverage outside of built-up areas."

7. Subject to conditions, the Inspector found no substantiated objection to the proposal on grounds of flood risk. He granted planning permission subject to 18 conditions which included a requirement, in condition 6, that the development should not commence until details of the design of a surface water drainage scheme had been submitted to and approved in writing by Tandridge. The development would have to be carried out, and ground infiltration of surface water drainage thereafter would only be permitted, in accordance with the approved drainage scheme.

8. The appellant, Mrs Wathen-Fayed, is a local resident and a member of the Oxted and Limpsfield Residents Group, which had objected to the proposed development. Her claim for statutory review of the Inspector's decision under section 288 of the Town and Country Planning Act 1990 was dismissed by Timothy Mould KC (as he then was), sitting as a Deputy High Court Judge ("the Judge"). She now appeals against his order, dated 3 February 2023, on four grounds.

9. The first two grounds, which are inextricably linked, concern the proper construction, application and effect of the 1902 Act. In essence, it is contended that the proposed development could not be constructed on the site without contravening the restrictions in section 5, and that the Inspector and the Judge were wrong to find the contrary. The infringement of the statutory prohibition and its impact on the deliverability of the proposed development was a material consideration (insofar as it was capable of undermining the case for "very special circumstances") which the Inspector failed to take into account: see *London Historic Parks and Garden Trust v Minister of State for Housing and others* [2022] EWHC 929 (Admin); [2022] JPL 1196, at paragraphs 107 to 111.

10. The third and fourth grounds, also inextricably linked, concern surface water flood risk. The appellant contends that the Inspector misinterpreted or failed to properly understand and apply the relevant policies of the Framework and relevant Planning Practice Guidance ("the PPG"). In the appellant's skeleton argument it is said that the "short point" is that:

> "in the face of evidence of 11 alternative sites with less flood risk and recent information of flood risk on the site, to which the Inspector was bound to have regard, one way or another the Inspector fell into

> error because his decision was not an available option on a correct interpretation of the relevant national policy and guidance, given that evidence".

Despite the reference to 11 alternative sites, the Judge found at [126] that there was no evidence that the objectors ever advanced the candidacy of any potential alternative site other than the one at Farleigh (referred to in paragraph 31 below) and it was not suggested to us that he was wrong about that. It is further contended that the Judge erred in upholding the Inspector's approach and/or in holding that the Inspector had not been "misled" by Horizon's Flood Risk Assessment.

11. This Court recently considered a very similar argument on the correct interpretation of the relevant policies and provisions of the Framework and the PPG relating to flood risk, when dismissing an appeal against the refusal by Lang J of a claim for judicial review of the grant of development consent for proposed onshore development associated with two nationally significant infrastructure projects at Friston in Suffolk: *R (on the application of Substation Action Save East Suffolk Ltd) v Secretary of State for Energy Security and Net Zero* [2024] EWCA Civ 12 ("*Substation Action*").

12. Despite the engaging and articulate way in which Mr Patrick Green KC (who did not appear in the court below) presented the case for the appellant, for the reasons set out in this judgment, I would dismiss this appeal. In summary:

    (1) Although my reasons differ slightly from those of the Judge, I agree with his conclusion that the proposed development on this site would not inevitably contravene the requirements of the 1902 Act. The Inspector properly addressed that objection, and reached a decision that he was entitled to reach.

    (2) So far as the risk of flooding from surface water is concerned, the judge and the Court of Appeal in *Substation Action* interpreted the relevant policy in the same way as the Judge did in the present case. On application of the relevant principles, the Judge was right to find that the Inspector understood the policy, that he made no error in his approach to the issue of flood risk, and that he reached a decision that was open to him on the evidence as a matter of planning judgment.

Grounds 1 and 2: The Cremation Act 1902

The relevant statutory provisions

13. The long title to the 1902 Act states that it is "[a]n Act for the regulation of the burning of Human Remains and to enable Burial Authorities to establish crematoria".

14. "Crematorium" is defined by Section 2 of the Act as follows:

> "2. In this Act –
>
> the expression "crematorium" shall mean any building fitted with appliances for the purpose of burning human remains, and *shall include everything incidental or ancillary thereto."*
>
> [Emphasis added].

15. Section 4 of the Act provides that:

> "4. The powers of a burial authority to provide and maintain burial grounds or cemeteries, or anything essential, ancillary or incidental thereto, shall be deemed to extend to and include the provision and maintenance of crematoria."

16. Section 5 of the Act specifies that:

> "No crematorium shall be constructed nearer to any dwelling-house than two hundred yards, except with the consent in writing of the owner, lessee and occupier of such house, nor within fifty yards of any public highway, nor in the consecrated part of the burial ground of any burial authority."

17. Section 7 of the Act provides, among other matters that:

> "The Secretary of State shall make regulations as to the maintenance and inspection of crematoria, and prescribing in what cases and under what conditions the burning of any human remains may take place, and directing the disposition or interment of the ashes…"

18. The regulations made pursuant to Section 7 which are currently in force are the Cremation (England and Wales) Regulations 2008, (SI 2008 No. 2841) which came into force on 1 January 2009. The 2008 Regulations superseded the Cremation Regulations 1930. We were not shown those earlier regulations, though in an earlier case it was said that there was little difference between them and the 2008 Regulations (see *R(Ghai) v Newcastle City Council* [2010] EWCA Civ 59; [2011] QB 591, ("*Ghai*") at paragraph 9 of the judgment of Lord Neuberger MR).

19. Regulation 13 of the 2008 Regulations provides that:

> "No cremation may take place except in a crematorium the opening of which has been notified to the Secretary of State."

20. Regulation 30 of the 2008 Regulations provides that:

> "**Disposal of Ashes**
>
> 30 (1) Subject to paragraph (2) … after a cremation the cremation authority –
>
> > (a) must dispose of the ashes in accordance with the applicant's instructions for ashes; or
> >
> > (b) in any case where the applicant does not give instructions for ashes, or where the ashes are not collected in accordance with those instructions, may dispose of the ashes in accordance with paragraph (3)

> where "instructions for ashes" means the instructions given on the application form completed by the applicant, or any subsequent written instructions given by the applicant to the cremation authority.
>
> (2) In exceptional circumstances the cremation authority may at their discretion release the ashes to someone other than the applicant or the applicant's nominee.
>
> (3) Where paragraph 1(b) applies, any ashes held by a cremation authority must be decently interred in a burial ground or part of a crematorium reserved for the burial of ashes, or scattered there.
>
> (4) In relation to ashes left temporarily in the care of a cremation authority, the authority may not inter or scatter the ashes unless the cremation authority has made reasonable attempts to give the applicant 14 days' notice of their intention to do so."

21. Section 8 of the 1902 Act sets out the penalties for breaches of the regulations as well as creating certain statutory offences. Section 8(1) provides that:

> "Every person who shall contravene any such regulation as aforesaid, or shall knowingly carry out or procure or take part in the burning of any human remains except in accordance with such regulations and the provisions of this Act, shall … be liable on summary conviction, to a penalty not exceeding level 3 on the standard scale."

22. Two subsequent statutes have expressly modified the restrictions on the location of crematoria in section 5 of the 1902 Act, as they apply to land in Central London and in Greater London respectively. The first in time was the Central London County Council (General Powers) Act 1935, ("the 1935 Act") section 64 of which provides as follows:

> "(1) In the application of section 5 of the Cremation Act 1902 to a borough council, the restriction imposed by that section upon the construction of a crematorium near to a dwelling-house shall not apply with reference to any dwelling-house situate at a greater distance than one hundred yards from the site of a proposed crematorium nor to any new dwelling-house.
>
> (2) For the purposes of this section –
>
> the expression "new dwelling house" means any dwelling-house the erection or placing in position of which is commenced on or after the date on which public notice of the application to the Minister for his approval of the plans and site of a proposed crematorium is first given by the borough council concerned;
>
> the expression "public notice" means a notice which is advertised in a newspaper circulating in the locality of the site in question and is displayed upon a conspicuous part of that site; and

> the expression "site of a proposed crematorium" means the land which is proposed to be covered with a building intended to be used for the purpose of burning human remains."

23. The second statute is the Greater London Council (General Powers) Act 1971 ("the 1971 Act"). Recital (2) states that:

> "It is expedient to extend to the councils of outer London boroughs and to certain other authorities the provisions of section 64 (Consents under section 5 of Cremation Act, 1902) of the London County Council (General Powers) Act 1935, and otherwise to amend the law relating to the provision of crematoria in Greater London".

24. Section 7 provides, so far as is material, that:

> "(1) In its application to a crematorium constructed or proposed to be constructed on land in Greater London by a Greater London burial authority, section 5 of the Cremation Act 1902 shall have effect and be deemed always to have had effect as if for the word "crematorium" there were substituted the words "building fitted with appliances for the purpose of burning human remains".
>
> (2) Section 64 (Consents under section 5 of Cremation Act, 1902) of the London County Council (General Powers) Act 1935, shall have effect and be deemed always to have had effect as if:
>
> > (a) in subsection (1) thereof, for the word "crematorium" in the first place where that word occurs, there were substituted the words "building fitted with appliances for the purpose of burning human remains" and for the words "a proposed crematorium" there were substituted the words "any such building";
> >
> > (b) in subsection (2) thereof, in the definition of the expression "site of a proposed crematorium" there were substituted the words "fitted with appliances".
>
> (3) Subject to the provisions of the next following subsection, the said section 64 as amended by the last foregoing subsection shall extend and apply and be deemed always to have extended and applied in relation to the construction or proposed construction of a crematorium on land in Greater London by a Greater London burial authority and references in that section to a borough council shall be construed accordingly;
>
> Provided that development consisting of or including the construction by a Greater London burial authority on land in an outer London borough of a building fitted with appliances for the purpose of burning human remains shall, if the building is to be situated within 200 yards of any dwelling-house (not being a new dwelling-house within the meaning of the said section 64) be deemed to be

> development of a class to which section 15 of the Town and Country Planning Act, 1962, applies and which has been designated under subsection (3) of that last-mentioned section."

(This last proviso ensures that an application for planning permission for such a development is sufficiently publicised locally).

The Department of the Environment Guidance

25. In April 1978 the Department of the Environment issued a non-statutory memorandum entitled "The Siting and Planning of Crematoria" (1978 LG1/232/36), whose stated purpose was "to assist local authorities and others contemplating the construction of crematoria" ("the Crematoria Guidance") .

26. Paragraphs 5 to 16 concern the site. Paragraph 5 states that:

> "Sufficient land is required to provide an appropriate setting for the crematorium, adequate internal access roads, car-parking space and space for the disposal of ashes…"

Paragraph 7 provides that:

> "Efficiently operated modern cremators should not cause any nuisance or inconvenience to houses in the vicinity. But to allow for any possible emission of fumes, the direction of the prevailing wind should be taken into account in the selection of a site."

27. Paragraphs 17 to 53 fall under the general heading "the building". Within that section there are various paragraphs relating to features such as the porte cochère (a covered setting-down space for the reception of the coffin at the entrance to the chapel), the entrance hall, the waiting room, the vestry, the chapel, the crematory, ancillary spaces, the chapel of rest (if there is one) and the service yard. Paragraph 18 states that:

> "By section 2 of the Act "crematorium" means "any building fitted with appliances for the purpose of burning human remains, and shall include everything incidental or ancillary thereto". The Department is advised that the crematorium buildings, chapels, and parts of the grounds used for the disposal of ashes come within this definition, but not ornamental gardens, carriageways or houses for staff."

28. An Explanatory Note at the end of the Crematoria Guidance explains that a previous requirement that the sites and plans of proposed crematoria must be approved by the Secretary of State for the Environment was rescinded by provisions of the Local Government, Planning and Land Act 1980, and that in consequence paragraph 3 of the guidance (which referred to that requirement) was no longer relevant. It added "[w]e feel we must stress that the above Memorandum was only issued for guidance and certain aspects may well be out of date. However, prospective cremation authorities may find it informative, which is why it has been decided to continue to publish it …"

The appellant's case in the Planning Court

29. As a general rule, statutory restrictions outside the planning regime which might impede the implementation of a planning permission are treated as immaterial to the determination of a planning application. However, in a case where the ability to deliver the proposed development in a timely way (to meet a pressing community need) is relied on as a key factor weighing in its favour, and/or as constituting the "very special circumstances" outweighing harm to the Green Belt, legal impediments to the ability of the applicant to deliver the proposed development may be material considerations.

30. As the Judge records at [79], it was common ground before the Inspector that the ability of Horizon to deliver the proposed development at the site without contravening the restrictions imposed by section 5 of the 1902 Act was a material consideration to the determination of the planning application on appeal. However, compliance with the 1902 Act was not raised by any party at the Inquiry (including the Residents' Group to which the appellant belongs) as a principal controversial issue. Tandridge and its planning officer were of the view that the proposed development *would* comply with the provisions of the 1902 Act.

31. It is fair to say that the case developed before us by Mr Green was very different from the case that was argued before the Judge. This in turn differed to some extent from the way in which an objection based on the 1902 Act was originally articulated by a third party ("Mercia") who wished to obtain planning permission for the development of a crematorium at a different site in Surrey, also within the Green Belt, at Farleigh.

32. Mercia wrote a letter to Tandridge opposing Horizon's planning application on 24 June 2020 in which they alleged, among other matters, that by virtue of section 5 of the 1902 Act "incidental or ancillary spaces/features *around the crematorium building*" had to be located outside the statutory minimum spacings to dwellings and public highways, and that on this site the service yard, pedestrian access and the memorial gardens "where ashes might be scattered" were all located "well within 200 yards of an existing dwelling".

33. Mercia also took the point that the doors to the main crematorium building opened out into the restricted zone, and suggested that the constraints imposed by the legislation may prevent "such basic actions *incidental/ancillary to the operation of the crematorium* as access by staff through the service yard, the lawful scattering of ashes on site, arrival of the deceased through the porte cochère or opening windows in the building outwards for ventilation". [Emphasis added]. Mercia repeated these points in paragraph 4 of a letter of objection to the Inspector dated 18 June 2021, which appended a copy of their earlier letter.

34. Mercia's expressed concern about the site of the memorial gardens related specifically to the prospect of ashes being scattered there. In answer to that point, Horizon's planning agent had explained in email correspondence with the planning officer in July 2020 that Horizon does not dispose of ashes in its memorial gardens, and that the scattering of ashes would not be allowed on this site. Instead, mourners would be able to store ashes in the memorial gardens either temporarily, or in the long term, in suitably designed sealed receptacles that hold urns above the ground.

35. Ultimately, the planning officer was satisfied that implementation of the planning permission would not be impeded by the restrictions on the siting of crematoria imposed by section 5 of the 1902 Act: see the judgment at [76], in which the Judge described the planning officer's analysis as "legally impeccable".

36. At the time of the Inquiry, nobody, including the appellant and the Residents' Group to which she belonged, suggested to the Inspector that the use of the memorial gardens for *storing* the ashes in the manner described by Horizon would bring about an infringement of the restrictions imposed by section 5 of the 1902 Act. The Inspector cannot be criticised for considering the objections that were actually articulated, and deciding that they did not arise in practice on the evidence before him.

37. In the court below, the appellant complained that "*the objections raised by Mercia* concerning the question whether the application complied with section 5 *were not referred to or dealt with anywhere in the Decision Letter*". [Emphasis added]. It was submitted that the short reference in paragraph 8 to the siting and design of the proposed crematorium conforming with the various laws and regulations governing crematoria was not good enough, and in any event the Inspector's conclusion was insufficiently reasoned. Those challenges largely fell away, though Mr Green tried to resurrect a complaint about the reasoning of the Inspector's decision in his oral submissions in reply, when he submitted that even on a generous reading of the Decision Letter it was impossible to tell whether the Inspector thought the service yard or memorial gardens were inside or outside the restricted area. Like the Judge, I disagree. An informed reader of the Decision Letter would be aware of the plans and what parts of the complex were more than 200 yards away from dwelling houses. That person would also know Horizon's position regarding the memorial gardens, roads, parking lots, and the service yard, and would readily infer that the Inspector accepted it. It is obvious that the Inspector had concluded that any areas within the 200 yard zone were not caught by the restrictions in section 5 of the 1902 Act.

38. So far as the interpretation of the relevant provisions of the 1902 Act was concerned, the appellant's case before the Judge was that the words "incidental or ancillary thereto" in section 2 necessarily encompassed "*aspects of the facility which go beyond the envelope of the crematorium building",* because it was said that those words would otherwise be otiose. As the Judge recorded at [92] to [94] it was her case that the memorial gardens, car parking areas and access roads were all "incidental or ancillary" elements falling within the definition of "crematorium" in section 2, and that their proposed location would contravene section 5. The appellant contended that it was immaterial whether ashes were scattered or placed in urns in the gardens, because that had no bearing on whether "*the area or structures provided for this"* are "incidental or ancillary *to the crematorium*" [Emphasis added].

39. The interpretation of section 2 advocated by the appellant at that time was said to have the impact that there was only a very small area on the site which did not fall within the prohibition in section 5. The main crematorium building itself would only fit in that area if the doors and windows remained shut; and *none* of the rest of the proposed development, including the memorial gardens, internal access roads and car parking area, could be lawfully constructed.

40. The Secretary of State and Horizon both made the point, in response to the case that they then had to meet, that reading section 5 of the 1902 Act in the manner suggested

would lead to the absurd result that access roads and their associated infrastructure would need to be sited away from a public highway. They contended that the purpose of section 5 of the 1902 Act was to protect public health. The phrase "everything incidental or ancillary thereto" related to a building or buildings fitted with appliances for the purpose of burning human remains, and could not sensibly be read to extend to ornamental or memorial gardens or car parking. The point of section 5 was to ensure that the burning of human remains was sited away from dwelling-houses and public highways, and there was no justification for extending the restriction to "other structures on the site with wholly different functions".

The Planning Court Judgment

41. The Judge's analysis began, at [98] with the long title and the stated purpose of the Act as being to regulate "the burning of human remains". This set the context for and explained why Parliament enacted the locational restrictions imposed by section 5 of the 1902 Act. He said that "they were intended to apply to any part of the process of burning human remains at a crematorium, irrespective of whether that operative element of the process was carried out within the main crematorium building itself." Therefore, he held at [99], the phrase "everything incidental or ancillary thereto" in the statutory definition of "crematorium" referred to anything incidental or ancillary to the burning of human remains. The focus of the inquiry was on anything that was incidental or ancillary to that process, rather than on elements of the crematorium facility which played no operative part in the burning of human remains.

42. However, the Judge then went on at [100] to say that he regarded that approach as properly reflected in the Crematoria Guidance. He expressly endorsed the distinction drawn in the guidance between the crematorium buildings, chapels and parts of the gardens that were used for the disposal of ashes (by strewing them on open ground), and ornamental gardens, carriageways and staff housing. He said:

> "I have no difficulty in understanding why, in the interests of public health and for the protection of neighbouring residential occupiers, it was considered advisable to treat the strewing or burial of ashes on or in the open ground as forming an incidental or ancillary part of the actual process of burning human remains".

43. He then explained at [101] to [102] that in his view the restrictions in section 5 were imposed with a view to protecting the health of the occupants of the dwelling house from the process of burning human remains carried on at the crematorium. In any given case, the question whether any building, structure or open area of the crematorium facility is to be treated as part of the crematorium within the meaning of section 2 of the 1902 Act, and so subject to the 200 yard separation distance, falls to be answered by determining whether on the evidence that building, structure or open area is actually used in the process of burning human remains at that crematorium facility. Applying that test to the facts of the present case, he found that the access roads and parking areas fell outside the definition.

44. Given that it was and remained Horizon's position that there would be no scattering of ashes in the memorial gardens, the Judge held there was no factual basis for Mercia's assertion that the memorial gardens fell within the extended definition of "crematorium" in section 2 of the 1902 Act. It was lawful to conclude that Horizon's

proposed use of the memorial gardens as a location for the storage of ashes above ground in sealed containers pending their removal from the site would not form part of the process of burning human remains. At [110] the Judge dismissed the argument that the opening of doors and windows in the crematorium building would contravene section 5 of the 1902 Act, on the basis that those parts of the building had nothing to do with the process of burning human remains.

The appellant's case on appeal

45. The appellant did not challenge the Judge's findings that the Inspector had given consideration to the potential impact of the restrictions imposed by the 1902 Act on the proposed development, that he took Mercia's articulated concerns into account, and (subject to the vestiges of the "reasons" challenge to which I have already referred) that he was under no duty to say any more than he did on that point. That was understandable; the Judge's analysis at [85] to [91] of the judgment is impeccable.

46. Instead, Mr Green contended that the Judge misconstrued sections 2 and 5 of the 1902 Act, and thereby erred in upholding the Inspector's decision – but for substantially different reasons from those used to challenge that decision in the lower court. The major sea-change in the appellant's case was that it was no longer submitted that the phrase "everything ancillary or incidental thereto" related to the crematorium *building*. Before us, Mr Green not only accepted, but adopted with enthusiasm the Judge's view that it meant everything incidental or ancillary to burning human remains.

47. However, Mr Green submitted that the Judge's construction of the statute was too narrow in scope, because it selected only one statutory purpose (the protection of public health) to the exclusion of others (such as the protection of religious and other sensibilities). It was Parliament's role to strike the balance between those sensibilities and the facilitation of the establishment of crematoria, as it did from time to time, but that was not the role of the Court. On the Judge's approach, he submitted that there would have been no need for the amendment made by section 7 of the 1971 Act.

48. Mr Green abandoned the argument that the access roads or car parking areas were covered by the statutory definition of "crematorium". He focused upon the service yard (or at least those parts of the service yard which might be used by vehicles transporting equipment used to service the machinery within the crematorium, or to store gas canisters), and any areas inside or outside the building used for the storage of ashes, whether temporary or permanent, (including the memorial gardens) because he submitted that that function was incidental or ancillary to the burning of human remains.

49. Mr Green also sought to maintain the point about the doors and windows of the crematorium building, pointing out that they were an integral part of the building itself and therefore did not need to fall within the phrase "everything incidental or ancillary thereto". On that point, I agree with him that the Judge's reasoning at [110] cannot be supported. However, when pressed, Mr Green very fairly accepted that the windows were not marked on the plan, and that any problem about outward opening doors or windows encroaching into the 200-yard zone, even if not regarded as *de minimis*, could be solved by design, e.g. by incorporating sliding doors. Given that

the appellant must establish that the crematorium could not possibly be constructed on the site without infringing the statute, the outcome of this appeal is not going to turn on whether the doors open outwards, inwards or sideways.

50. Mr Green submitted that the Judge's analysis was illogical and internally inconsistent. Disposal of the ashes, by whatever means, was inherently "incidental" to the burning of human remains; the ashes were the inevitable by-product of the process and had to be dealt with in some manner afterwards. The word "disposal" should be interpreted as including interment in an urn or other container. Otherwise, the cremation authority would not be obliged under regulation 30(1)(a) of the 2008 Regulations to comply with an instruction by an applicant to store the ashes in the kind of repository that Horizon had in mind. Parliament cannot have intended that the identification of a "crematorium" would depend on whether the ashes were disposed of above or below ground.

51. Alternatively, even if the distinction between storage and disposal were validly drawn, Mr Green contended that the Judge was still wrong to treat any area on the site used for storage of ashes as falling outside the statutory restrictions. If parts of the grounds used for the disposal of ashes were accepted to be sufficiently connected with the burning of human remains to be "incidental or ancillary" to that process, he submitted that there was no cogent explanation as to why storage of the ashes pending such disposal was not. In this context, the distinction between storage of ashes above ground and their strewing on or burial in the ground was illusory, and could not be justified on public health or any other grounds. On that basis it did not matter whether any parts of the grounds were to be used for the interment or strewing of ashes; the extended definition encompassed any parts where the ashes might be stored.

52. Both respondents sought to support the Judge's decision, quintessentially for the reasons that he gave. On behalf of the Secretary of State, Mr Jonathan Darby submitted that the Inspector's conclusion as to compliance with the 1902 Act was rational, and that the Judge was right to find that the Inspector was not required to say any more on this topic than he did in the Decision Letter. The Judge was also correct in his construction of the 1902 Act.

53. Mr Darby made much of the fundamental change between the appellant's case as argued before the Judge and the case presented on appeal. In particular, the appellant's reliance on other purposes of the 1902 Act, such as the reflection of religious or other sensibilities, was an entirely new point, never put to or considered by the Inspector, nor argued before the Judge. In any event, he submitted that there was no inconsistency between what the Judge found to be the primary purpose of the Act and the possible existence of other subsidiary purposes or objectives.

54. When asked whether he took issue with any part of the Judge's analysis at [100], Mr Darby said no. He was content with the distinction drawn between burial/scattering of ashes on the one hand, and their storage in an above-ground container which was not degradable and would not contaminate the ground or groundwater, on the other. When asked by the President of the Family Division whether the definition of what constitutes a "crematorium" should depend on how someone intends to deal with the ashes after the cremation, Mr Darby's response was that the Act itself is not concerned with disposal; that was something covered by the regulations. The 2008 Regulations did not require ashes to be disposed of in any way on site. There is a valid

distinction between "disposal" (which is permanent) and storage above ground, whether temporary or long-term. Regulation 30(1)(a) is not concerned with instructions for storage; "instructions for ashes" can cover matters other than disposal, including leaving ashes temporarily in the care of a cremation authority as envisaged by Regulation 30(4). In any event, the way in which regulations made pursuant to section 7, many years after its enactment, dealt with disposal should not drive the interpretation of the 1902 Act.

55. Mr Peter Goatley KC, on behalf of Horizon, agreed with the approach taken by the Secretary of State. He reminded the Court that in order to succeed, the appellant would have to show that the proposed development was flawed from the start and could not possibly be constructed in a manner which was compatible with the 1902 Act. He submitted that the material before the Inspector did not demonstrate that, or that at least the Inspector was entitled to reach that conclusion, and that was enough to answer these grounds of appeal. As a matter of fact, the service yard was not going to be used to store gas canisters, as the crematory would be fuelled from the mains. The dimensions of such part of the yard as would be used by service vehicles fell within the permitted zone; the remainder was purely access.

56. Horizon was not concerned with any wider issues of interpretation of the statute, nor with the question whether the distinction drawn in paragraph 18 of the Crematoria Guidance between memorial gardens and ornamental gardens was right or wrong. Mr Goatley described Horizon as "agnostic" on that matter. Horizon had dealt with Mercia's objection on the *assumption* that the distinction in the Guidance between places where ashes were scattered or buried, and ornamental gardens – where the ashes might be stored above ground until such time as they were collected for scattering or interment elsewhere – was validly drawn, because in practical terms this made no difference to the fate of Horizon's planning application.

57. The appellant's case, as now articulated, was predicated to some extent on the Judge's acceptance that some open areas of the complex would fall within the extended definition of "crematorium" if they were used for the disposal of ashes. However, despite the way in which they had argued the matter before the Judge (see paragraph 40 above), no doubt for their own reasons, neither respondent took issue with his views on that matter, as expressed at [100] and [102], and underlying his approach to the position of the memorial gardens at [104] and [105], and there was no respondent's notice.

58. In the light of the way in which matters developed at the hearing, and in particular certain questions that were directed by the Court to Mr Green with a view to exploring those aspects of the Judge's reasoning, and whether they affected the correctness of his interpretation of sections 2 and 5 of the 1902 Act, we decided that the parties should have the opportunity to make further written submissions after the hearing. Those submissions were to be directed to the specific question whether, and if so why (given the express prohibition in section 5 on "construction" of a crematorium within the specified distances from a dwelling or road) a memorial garden or other open space in which ashes are interred or scattered within the grounds falls within the definition of "crematorium" in section 2. We specifically permitted these submissions to include any submissions which the parties were minded to make about whether paragraph 18 of the Crematoria Guidance is or is not correct.

59. The Court subsequently received written submissions from all the parties, which we have read and considered, and for which we are very grateful. However, they did not appear to me to take matters much further.

Discussion

60. In the process of statutory interpretation the Court is "seeking the meaning of the words which Parliament used" by making an objective assessment. This involves considering the words of the statutory provision in context, having regard to the purpose(s) underlying the statute. A word or a phrase must be read in the context of the section as a whole, and may need to be read in the context of a wider group of sections, as that may provide the relevant context for ascertaining, objectively, what meaning the legislature was seeking to convey in using those words. The Court will take into account any legitimate aids to statutory interpretation, such as explanatory notices prepared under the authority of Parliament, or sources such as Law Commission reports, which may assist in ascertaining the background to and purpose of the statute. (Unfortunately, there were no such aids available in this case). See generally *R (on the application of O (A Child)) and R (on the application of Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, per Lord Hodge DPSC at paragraphs 29 to 31. See also the judgment of Lord Sales JSC in *R (on the application of PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] 1 WLR 2594 at paragraphs 40 to 44. In both cases, the other members of the constitution agreed with those judgments.

61. In the latter case, Lord Sales confirmed that whilst subordinate legislation made pursuant to powers in a statute can be an aid to its interpretation, there are limits to how far that principle extends. As a general rule, it is only if the subordinate legislation was promulgated more or less contemporaneously with the Act itself that it will be admissible as an aid to interpretation: see *Deposit Protection Board v Barclay's Bank Plc* [1994] 2 AC 367 per Lord Browne-Wilkinson (with whom Lord Keith, Lord Goff, Lord Mustill and Lord Lloyd agreed) at page 397E-F. In the present case, even the previous version of the regulations was made 28 years after the 1902 Act came into force. We were not told if there were any regulations made before that, but I have ascertained that the 1930 regulations were the first to be made pursuant to section 7 of the 1902 Act. The current regulations were enacted over 100 years after the primary statute. As a matter of principle, they cannot be used as an aid to its construction.

62. There is little previous authority on the 1902 Act. In *Ghai* (above) this Court was concerned with the question whether the 1902 Act and regulation 13 of the 2008 Regulations prohibited a Hindu cremation from taking place within a structure with substantial apertures allowing the sunlight to fall on the body whilst it was being consumed by fire. There was no issue about the location of the structure, which could be situated the requisite distances from houses and roads. Lord Neuberger MR (with whom Moore-Bick and Etherton LJJ agreed) held (at paragraph 10) that the Act and regulation 13 of the 2008 Regulations together provided that a cremation can only lawfully take place in a structure which is a "building" within the meaning of section 2, which has been constructed in a location which satisfies section 5, which has been "fitted with appliances for the purpose of burning human remains" pursuant to section 2, and in respect of which the (then) requirements of notification to the relevant

Secretary of State had been met. The issue was whether a proposed structure fitted with such appliances, which was acceptable to the appellant, but which had no roof, was a "building". The Court decided that it was.

63. The Master of the Rolls considered the meaning of the word "building" in section 2 in paragraphs 21 and following, concluding at paragraphs 34 and 35 that :

> "At least for present purposes, the relevant aims of the Act, which can be gathered from its provisions, were to ensure that cremations were subject to uniform rules throughout the country, to enable the Secretary of State to regulate the manner and places in which cremations were carried out, to require a crematorium to be a building which was appropriately equipped, and to ensure that a crematorium was not located near homes or roads. The Act also envisaged that crematoria would be "constructed". These facets of the Act suggest to me that, provided it is relatively permanent and substantial, so that it can properly be said to have been "constructed", and provided it could normally be so described, a structure will be a "building" within the Act.
>
> There is no reason not to give the word "building" its natural and relatively wide meaning in section 2 of the Act, as discussed in paras 21-26 above."

64. The Court of Appeal was not persuaded by a submission made by counsel for the Secretary of State for Justice (an interested party) that the purpose of the Act was to prevent the public seeing the cremation. The Master of the Rolls considered something of the history of the 1902 Act, and accepted that its enactment may have been prompted by a direction given to a jury by Stephen J in *R v Price* (1884)12 QBD 247. In that case, the defendant had been accused of burning the body of his son (who had died of natural causes) in a field. The jury was directed to acquit him on the basis that burning a body did not constitute an offence unless it amounted to a public nuisance at common law. Stephen J observed, at 255, that:

> "not every practice which startles and jars upon the religious sentiments of the majority of the population is for that reason a misdemeanour at common law".

65. Despite this graphic illustration of the Victorian distaste for the practice of cremation, Lord Neuberger MR observed at paragraph 29 that if prohibiting publicly visible cremations was intended by the legislature, one would have expected that to have been stated somewhere in the Act itself, or in the long title. He added that:

> "Section 5 directly addresses the issue of the proximity of cremations to dwellings and highways, and if it was intended to address the issue of cremation (rather than public health or privacy of residents and risk of congestion), it represents the limit of the protection the legislature thought it right to provide."

66. Turning first to the purposes of the statute, whilst I agree with what Lord Neuberger MR said in paragraph 34 of *Ghai*, the 1902 Act was not just concerned with the regulation of the burning of human remains. It also expressly empowered burial authorities to establish crematoria. Earlier attempts to enact legislation for that purpose had been unsuccessful. So Parliament's intention was not to impede the establishment of crematoria, but to facilitate it. A wide construction of the restrictions in section 5 of the statute which would create impediments to the establishment of new crematoria exceeding the objectives underlying those restrictions, would be contrary to that intention. The original objection by Mercia, as adopted by the appellant, was fundamentally flawed because there was no good reason why the internal access roads or car parking areas should be situated at least 200 yards from a dwelling house, and such a requirement would create an unjustifiable impediment to the establishment of a crematorium.

67. In interpreting the extended definition in section 2, it must be borne in mind that the words "crematorium" or "crematoria" do not just appear in section 5. The definition applies to these words wherever they appear, including section 4, which I briefly consider below, section 6, which empowers a local authority to accept a donation of land for the purpose of a crematorium, and a donation of money or other property for enabling them to acquire, construct or maintain a crematorium; section 7, which mandates the Secretary of State to make regulations, among other matters, as to the maintenance and inspection of crematoria; and section 9, which entitles the burial authority to demand fees for the burning of human remains "in any crematorium provided by them". Notwithstanding the extended definition of "crematorium", in the context of section 9 that expression self-evidently cannot apply to anything other than the building where the cremation takes place.

68. The words "incidental" and "ancillary" which appear in section 2 are also used in section 4, albeit in the reverse order. Section 4 refers to the powers of a burial authority to provide and maintain burial grounds or cemeteries "or anything essential, ancillary or incidental thereto" and extends those powers to crematoria (as defined by section 2). Unless the context obviously requires otherwise, it is to be assumed that Parliament intended identical words and phrases used in different sections of the same Act to be interpreted consistently. I therefore considered whether any assistance could be derived from that section, and in particular whether it would shed any light on the intention underlying the extended definition of "crematorium".

69. Section 4 is designed to ensure that all the powers of burial authorities mentioned in it will extend to, and apply equally to, crematoria. That gives effect to the second purpose of the Act stated in the long title, "an Act… to enable Burial Authorities to establish Crematoria". It could be said that by including in the definition of "crematorium" the words "everything incidental or ancillary thereto", Parliament avoided repeating those words after "crematoria" in section 4. However, I was unable to place much weight on that, as it is possible to read the phrase "essential, ancillary or incidental thereto" in section 4 as relating not to the cemeteries and burial grounds themselves, but to the powers of the authorities to provide and maintain such facilities. That interpretation makes sense, as activities such as trimming hedges and mowing the grass can be described without artifice as incidental to the maintenance of a cemetery or burial ground.

70. Ultimately it seems to me that the most one can derive from the use of the words "crematorium" and "crematoria" in section 4 and all the other sections of the statute apart from section 5, is that Parliament did not intend the powers of local authorities or burial authorities conferred by the 1902 Act to be restricted to the specific building housing the cremation equipment. In the light of those sections, particularly section 4, it could not be argued, for example, that it would be *ultra vires* a relevant authority to construct a crematorium complex in which the waiting area, chapel and ceremony hall were in one building, and the crematory itself was located in another.

71. If the primary purpose of section 5 was the protection of public health, as the Judge held, and both respondents contended, it might seem odd that the owner and other inhabitants of the dwelling-house could *consent* to the crematorium being built nearer to the house; that the prescribed minimum distance to a public highway (where pedestrians might walk up and down on the pavement and, in 1902, open carriages might pass, as well as cyclists) is far shorter; and that the only buildings which must be at least 200 yards away from the site of a crematorium are houses - not other buildings whose inhabitants' health might be affected by emissions from the crematory, such as, for example, a school, or a public house with a beer garden. If public health was the major concern it might appear even stranger that, by 1935, in the more densely populated areas of Central London, when smog was still a well-documented feature of inner city life, the prescribed minimum distance from a dwelling-house should be halved to 100 yards.

72. As Mr Green pointed out, section 5 also contains an absolute prohibition on the construction of a crematorium within the consecrated part of a burial ground, and that plainly has nothing to do with public health, and everything to do with religious sensibilities. However, that prohibition is independent of the prescribed distances from dwelling houses or public highways, and it concerns areas within the site, not outside it. For that reason, I do not consider that any assistance in ascertaining the purpose(s) of setting those other distances is to be derived from it. Nor is there anything useful to be gleaned from section 11 of the 1902 Act, which enables the incumbent of an ecclesiastical parish to refuse to carry out a funeral service within the ground of a burial authority before, at or after a cremation of one of their parishioners.

73. Nevertheless, Mr Green's submission that the prescribed distances from dwelling houses and public highways were more likely (or at least as likely) to have been driven by the protection of public and religious sensibilities than by concerns about public health, initially appeared to me to be quite attractive. The sensibilities of a local inhabitant might well be engaged if they were forced to live in close proximity to a crematorium and frequently exposed to the sight of smoke coming from the chimneys. On the face of it, this explanation for the prescribed distances also fitted quite well with the idea that, as the public became more accepting of the concept of cremation, the distances were shortened, first in Central London, where the pressing needs of the expanding urban population for more crematoria had to be accommodated, and then in Greater London.

74. However, a closer examination of the historical context of the 1902 Act, and the desire of Parliament to give burial authorities the same powers in respect of the establishment of crematoria as they already had in respect of cemeteries and burial grounds, puts a different perspective on the matter, and demonstrates that the Judge

was right to regard public health as the primary purpose behind the logistical restrictions on the siting of a crematorium.

75. The provisions of earlier statutes governing the distance of burial grounds and cemeteries from dwelling houses were plainly driven by public health considerations, but despite this, and contrary to what one might expect, the owners and occupiers of those houses could consent to a truncation of the distances. Moreover, those statutes were only concerned with distances from dwelling houses and not from other buildings.

76. Section 10 of the Cemeteries Clauses Act 1847, which is described in the long title as "an Act for consolidating in one Act certain Provisions usually contained in Acts authorising the Making of Cemeteries" provided that:

> "No part of the cemetery shall be constructed nearer to any dwellinghouse than the prescribed distance, or if no distance be prescribed, two hundred yards, except with the consent in writing of the owner, lessee, and occupier of such house."

That section was incorporated into the Public Health (Interments) Act 1879 and subsequently modified by section 2 of the Burial Act 1906, which reduced the distance to 100 yards. Of course, that change occurred after the 1902 Act was passed. At the time of its enactment, the prescribed distance from a dwelling house to a (new) cemetery was still 200 yards.

77. So far as burial grounds were concerned, the very first of the 14 Burial Acts which preceded the enactment of the 1902 Act (the Burial Act 1852, which was primarily concerned with a power to order the discontinuance of burials in any part of the Metropolis) provided by section 25 that:

> "No ground not already used as or appropriated for a cemetery shall be appropriated as a burial ground, or as an addition to a burial ground, under this Act, nearer than two hundred yards to any dwelling-house, without the consent in writing of the owner, lessee and occupier of such dwelling-house."

78. However, that distance was truncated long before the 1902 Act was passed. Section 9 of the Burial Act 1855, in its original form, provided that

> "*So much of [the Burial Act 1852] as enacts that "no ground not already used as or appropriated for a cemetery shall be appropriated as a burial ground, or as an addition to a burial ground, under this Act, nearer than two hundred yards to any dwelling-house, without the consent in writing of the owner, lessee and occupier of such dwelling-house" shall be repealed,* but no ground not already used or appropriated for a cemetery shall be used for burials under the said Act or this Act or either of them, within the distance of one hundred yards from any dwelling-house, without such consent as aforesaid."

Although the title to that section referred to the repeal of part of section 24 of the 1852 Act, this was plainly a mistaken reference to section 25. In *Lord Cowley v Byas*

(1877) 5 Ch D 944, it was held that because the statutory prohibition was concerned with use of the land for burials, land within the statutory distance might be appropriated to a burial ground, provided that no burials took place within the prescribed distance. The italicised part of that section was itself repealed by the Statute Law Revision Act 1892, but at the time of the enactment of the 1902 Act, the prescribed distance between a dwelling house and any land on which burials were to take place, remained 100 yards.

79. After the 1902 Act came into force, those provisions were then further modified by section 1 of the Burial Act 1906 (the fifteenth and final Burial Act) as follows:

> "The consent of the owner, lessee and occupier of a dwelling house in the use for burials of any ground used or appropriated for a burial ground or cemetery mentioned in section nine of the Burial Act 1855, shall not be, and shall be deemed never to have been, required in any case where the dwelling-house is or was begun to be erected, or is or was erected or completed, after any part of that ground has or had been so used or appropriated."

That section was passed to expressly override the decision in *Godden v Hythe Burial Board* [1906] 2 Ch 270, which in effect would have required a burial board or local authority to buy land for one hundred yards' distance around the land required for burial. There are echoes of that modification in the provisions of the 1935 Act, set out in paragraph 21 above, relating to "new dwelling houses" which are erected after notice has been given of the proposal for construction of a crematorium.

80. In *Wright v Wallasey Local Board* (1887) 18 QBD 783, in the course of an *ex tempore* judgment which decided that the prescribed distance of 100 yards from a burial site should be measured from the walls of the dwelling house and not from its curtilage, A.L. Smith J said (at page 785) that the reason why the 100 yards limit in section 9 of the 1852 Act was enacted, was clearly "with a view to the health of the public". He referred to a dictum of Sir George Jessel, MR, in *Lord Cowley v Byas* (above) to the same effect.

81. A memorandum issued by the Ministry of Health in May 1926, and replicated in Fellows, the Law of Burial (2nd edition, 1952), which referred to the 100 yards limitations in section 9 of the 1855 Act and section 10 of the 1847 Act (as amended in 1906), said this:

> "It may be taken that the above distance is amply sufficient to prevent any injury arising to the health of occupants of dwelling houses from a well-kept burial ground, so far as regards noxious matters transmitted through the air, but burial grounds will not in all cases, and at all times, be distant 100 yards from the nearest human habitation. With the consent of the owners, lessees, and occupiers of existing houses, a burial ground may be established within the prescribed limits; and it is, of course, competent to anyone afterwards to erect a new house as close to a burial ground as he pleases. It does not appear, however, that any serious amount of danger to health is to be feared from proximity to a well-kept burial ground. In former times when burials took place in over-crowded churchyards in the

> midst of towns, and in vaults under the churches themselves, grave nuisances and injurious effects on health did no doubt occur; but since intramural interment has practically ceased, well founded allegations of injury to health, or even of nuisance arising from graveyard emanations, whether conveyed by air or water, are extremely rare."

That memorandum cannot be used as an aid to statutory construction, and I have not done so; but it does confirm what one would otherwise naturally infer to have been the nature of the public health concerns underlying the prescribed distances from cemeteries and burial grounds, and it provides a cogent explanation for the truncation of those distances over time.

82. At the time when the 1902 Act was enacted, Parliament must be taken to have been aware of the prescribed distances between dwelling houses and burial grounds or cemeteries and of the reasons for them. Of course, there are obvious differences between cremations and burials from a public health perspective. It is therefore understandable that, despite the general intention of Parliament to confer on burial authorities the same powers in respect of the provision and maintenance of crematoria as they already had in respect of cemeteries and burial grounds (as reflected in section 4), the provisions of section 5 of the 1902 Act do not entirely mirror the provisions of the earlier statutes.

83. Save in those geographical areas where the distances have been modified by the 1935 and 1971 Acts, the prescribed distance between a crematorium and a dwelling house is 200 yards, not 100 yards; in addition there is a (shorter) prescribed distance of 50 yards between a crematorium and a public highway, which does not apply to cemeteries or burial grounds. Yet those differences could be said to underline the public health purpose, because self-evidently graveyard emanations via the air are likely to carry a shorter distance and cover a smaller area than smoke, fumes and ashes or other debris blown through a chimney. The Crematoria Guidance specifically refers to the fact that modern cremators have evolved to become more effective than their predecessors in minimising smoke and fumes. In 1902 they would have been more rudimentary.

84. Bearing that in mind, it can be inferred that at the time when the 1902 Act was enacted, the prescribed distance of the crematorium from a dwelling house, being twice the distance between a house and a burial site, must have been considered far enough away to prevent the occupants from suffering any ill-effects from the smoke or other emissions from the chimneys of the crematory. It would also have reduced their exposure to any other nuisance caused by those emissions (such as the soiling of washing on a clothes line, for example). Unlike passers-by, the occupants of a house would be exposed to the emissions whenever a cremation took place, and that can happen several times a day, virtually all year round.

85. Public health concerns regarding emissions from the chimneys also provides a good explanation of why Parliament included provisions relating to the distance from a public highway. Someone walking, riding or driving past a cemetery, even in an open carriage, is unlikely to be exposed to noxious substances travelling through the air, and even if they were, it would not be for long enough to be likely to have an adverse impact on their health. Someone passing by a crematorium in 1902 would be in a different position, but they would not be exposed to by-products from the cremation

process for as long or as often as the occupants of local houses, hence the shorter distance between the road and the crematorium.

86. As the Court of Appeal recognised in *Ghai*, section 5 sets the ambit of protection of local residents by reference to the location of the building in which the bodies are to be burned. Bearing in mind the primary purpose of protecting public health, the Judge rightly found at [98] that the separation distances imposed by section 5 were fundamentally concerned with the location of the burning of the human remains, irrespective of whether that took place in the main building or in a separate building. That view is supported by the modifications to section 5 in the two subsequent statutes in 1935 and 1971, which concentrated expressly on the distances from the building in which cremations were intended to take place. If the protection of public or religious sensibilities was a further purpose underlying the setting of those distances, it was secondary. In any event, it was the process of cremation which was likely to upset those sensibilities, so I do not accept that Mr Green's submission about the purpose of section 5, even if correct, would have advanced the appellant's case.

87. The Court of Appeal in *Ghai* was not concerned with the meaning of the phrase "everything incidental or ancillary thereto" which appears in section 2. However, it did interpret section 5 and the distances prescribed in that section as being concerned with the site of something *which was capable of being constructed* and of falling within the expression "building" in section 2. I agree with that interpretation. The crematorium must be something which can be "constructed," for the simple reason that section 5 specifies where the crematorium (as so defined) is (and is not) to be constructed. If it had been intended to extend the definition of "crematorium" to something which is not a building or part of a building, one would expect Parliament to have said so, and section 5 seems to me to expressly contradict that intention. This is a point which the Judge appears to have overlooked when he came to make his comments about open areas within the site.

88. In my judgment, bearing in mind the underlying purposes of the statute, section 5 of the 1902 Act is not concerned with the distance of houses from open areas within the site of a crematorium, even if those areas are landscaped, planted or surrounded by walls (as gardens of remembrance or memorial gardens often are) or contain structures of the type proposed by Horizon for storage of the ashes. I agree with the Judge that its underlying concern is the distance of houses and roads from the location of the burning process and anything directly connected with that.

89. The definition of "crematorium" in section 2 must be interpreted with that concern in mind. One needs to identify the purpose that Parliament intended to achieve by extending the definition to include something other than the building containing the cremation equipment, because on the face of it, an extension of the definition to other parts of the complex in which unrelated activities take place would not serve the purpose of protecting the public from the effects of the cremation process.

90. It is clear from the opening words of section 2 that the expression "crematorium" in the Act *shall mean* a building. Moreover, the section stipulates that the building must be fitted with appliances for the purpose of burning human remains. As the Judge recognised, the area containing that equipment (i.e. the crematory) may be and often is part of a larger building, but it could be a separate building on the same site. The section then goes on to provide that the expression "*includes* everything that is

incidental or ancillary thereto". That does not mean that the words "includes" and "everything" have the effect of extending the definition of a crematorium to something which is not a building (or part of a building), even if in the absence of section 5, and without considering the statutory context, they might have been understood as doing so.

91. As a matter of ordinary English, "incidental" means something connected with something more important, and "ancillary" means subordinate, subservient to, or serving something else. There is therefore a degree of overlap between those words, and they are sometimes treated as synonyms. However, it is to be presumed that in using both words here, as they also did in section 4, the drafter did not intend to be tautologous. When used as an everyday figure of speech "incidental" will often denote that something is a natural concomitant of or subordinate feature of something else, whereas something which is "ancillary" need not be connected in that way.

92. Whilst, on the face of it, the language of section 2 is wide, the words "includes" and "everything" are subsidiary to the primary definition of "crematorium" and must be conditioned by it. Without doing violence to the language of the section, it could simply be read as meaning that the expression "crematorium" encompasses (i) everything that would be considered as part and parcel of, or physically connected to (and in that sense incidental to) the building containing the equipment for burning human remains; and (ii) any subordinate building or structure, such as the porte cochère, or possibly a covered walkway between buildings. On that interpretation, the change first brought about by the 1935 Act would be that, for the purposes of section 5, the distances would only be measured from the envelope of the crematory building itself, ignoring any ancillary buildings or structures.

93. That interpretation would have the advantage of simplicity, and would be in keeping with the underlying purpose of the restrictions in section 5. But then the point was made in the course of argument by Snowden LJ, and adopted by Mr Green, that whilst something, including another building or structure, can be described without artifice as "ancillary" to a building, one would not generally refer to something as being "incidental" to a building (as opposed to being an incidental feature *of* it). The expression "incidental to" is more commonly used in connection with something abstract, such as an activity, a purpose, or a power, than in connection with something tangible. That would lend support to the Judge's interpretation of "incidental and ancillary to" in section 2 as relating to the purpose for which the building was used, rather than the building itself. I see the force of that point.

94. However, in considering the meaning of "incidental" one must not lose sight of the fact that Parliament has stipulated that the expression "crematorium" in the Act means a building, and that meaning is reflected in section 5. A building is self-evidently not the same thing as an activity or a purpose for which the building is used and equipped; and it makes no sense to read the definition of something which means a building as also meaning an activity or purpose, rather than a place which serves that activity or purpose or in which that activity or purpose is carried out. It follows that, if an expression which is primarily used to denote a building equipped to carry out a certain activity is stipulated to include everything ancillary or incidental to *that activity*, it could either be interpreted as covering any other parts of *that building* in which those incidental or ancillary functions are carried out, or as extending the expression to

include another location on site which serves a purpose which is ancillary or incidental to the primary activity carried on in the first building.

95. The former interpretation would add little or nothing of substance to the primary definition, although it would make it clear that "crematorium" means the whole building and not just the part of it in which the crematory is located, and that a structure like the porte cochère would be included in the definition even if it is not physically attached to the crematory building. That would closely accord with the public health purpose underlying section 5, and it would mean that the changes brought about by the 1935 and (in particular) the 1971 Acts were simply made by way of clarification, in order to reflect what Parliament had always intended section 5 to achieve. On that view, Parliament was using these statutes as a means of clarification whilst at the same time achieving the primary objective of truncating the prescribed distances in the geographical areas covered by those statutes.

96. The latter interpretation, however, which the Judge adopted, would accord with what the public would understand by the expression "crematorium", since the separate location of the crematory from other buildings or structures such as the chapel of rest and the ceremonial hall in which cremation services took place would not prevent someone from referring to the collection of buildings as "a crematorium". By section 6(c) of the Interpretation Act 1978, unless the contrary intention appears, words in the singular include the plural, so there is no reason why "crematorium" could not mean more than one building.

97. That interpretation would also preclude the authority from limiting the impact of the restrictions in section 5 by housing the crematory in a separate building, and then claiming that the 200 yards were not to be measured from the walls of the main building containing the ceremony hall, waiting area, etc. which would be constructed much nearer to the dwelling house. The changes brought about in 1935 and 1971 would then have served the specific purpose of removing that inhibition, as those statutes require the truncated measurements to be taken from the crematory itself (or any larger building housing the crematory), and not some other building, consistent with the specific public health considerations underlying the locational restrictions.

98. Once sections 2 and 5 are read together, it seems clear to me that the definition of "crematorium" includes all those other buildings/structures on site in which functions that can properly be described as incidental or ancillary to the cremation process are carried out, such as the ceremony hall, the porte cochère, and any part of the building in which the cremated remains are pulverised, and the ashes are collected (though for practical reasons that is likely to be part of the crematory itself).

99. Therefore, whilst I agree with the Judge's view (at [95]) that the phrase "*everything incidental or ancillary thereto*" indicates a legislative intention that the locational restrictions imposed by section 5 should not *necessarily* be limited to the crematory itself, whether they are or are not so limited in practice will depend on whether the incidental or ancillary functions are served by a different part of that building or a separate building or structure on site.

100. There is nothing in the subsequent statutes which undermines that interpretation; quite the contrary. It is telling, in my view, that neither the 1935 Act nor the 1971 Act sought to modify the definition of "crematorium" in section 2. This is quite

understandable, since doing so might have had an unintentionally adverse impact on the ambit of the extended powers conferred by section 4 and reflected in other provisions of the 1902 Act. The definition of the expression "site of a proposed crematorium" in section 64(2) of the 1935 Act made it clear that for the purposes of section 5 of the 1902 Act, in locations to which the 1935 Act applies, the truncated distance of 100 yards from a dwelling house was to be measured only from the land which was to be covered by the building intended to be used for the purpose of burning human remains (and not land covered by any other building on the site which served an incidental or ancillary function). It also precluded any argument about whether the curtilage of the crematory building was included or excluded from the measurements, and if included, how far it extended.

101. That is not inconsistent with the interpretation of section 2 as defining "crematorium" as including any buildings on site which serve incidental or ancillary functions. It simply removes from the equation any possible debate about the ambit of section 2 which might otherwise have had the potential to thwart Parliament's intention at that time to cut down the distances mandated by section 5. As stated above, it also means that in a location to which the 1935 Act applies, if the crematory is housed in a separate building, the distances would have to be measured from the land occupied by that building and not from the site of the other buildings.

102. The 1971 Act was designed to do no more than to grant burial authorities in Greater London the same powers as were conferred by section 64 of the 1935 Act on their counterparts in Central London (see recital 2). Again it did not seek to modify the definition of "crematorium" in section 2 of the 1902 Act. Instead, it substituted for the word "crematorium" in section 5, the expression "a building fitted with appliances for the burning of human remains" and similarly modified all the references to "crematorium" in section 64 of the 1935 Act. There is nothing in the recitals to specifically explain that change, but it was obviously intended to make it even plainer than the 1935 Act did, that in the areas of Greater London to which the 1971 Act applies, the truncated distances from dwelling houses in section 5 as varied by section 64(1) of the 1935 Act relate solely to the land covered by the building containing the crematory, whatever its size.

103. Ultimately, therefore, I agree with the Judge's conclusions at [99], quoted at paragraph 41 above. However, because he failed to take into account the opening words of section 5, the Judge did not confine the place where the ancillary or incidental activities are carried out to a building or structure. That is where I part company with the Judge's otherwise persuasive analysis.

104. Irrespective of whether on the facts of a particular case it extends to buildings other than the one housing the crematory, in my judgment the statutory definition in section 2 of the 1902 Act does not extend to anything which is not a building or part of a building (including, for the avoidance of doubt, any ancillary structures serving the purposes of the crematory) and thus it does not cover outdoor areas such as the gardens, whether they are described as memorial gardens or ornamental gardens. The use of the word "constructed" in section 5 makes it clear to me that Parliament cannot have intended in 1902 that distances from local houses should be measured from open areas within the crematorium grounds. Nor do I consider that building a wall around a garden space would make all the difference. Therefore I would agree with everything

the Judge says at [102], other than with his references to "open areas" of the crematorium facility.

105. I cannot accept that it was ever the intention of Parliament that what constitutes a "crematorium" should depend upon what happens to the ashes after a cremation has taken place, or whether (or where) the ashes happen to be strewn, stored or interred. There is no rational basis for requiring that it should. There is therefore no need to consider whether there is a distinction to be drawn between storage and disposal of the ashes, or whether Horizon's proposals amount to a form of "disposal" even if the storage is intended to be temporary. That debate only arose because Mercia, who were presumably aware of the Crematoria Guidance, espoused the view that memorial gardens where ashes are strewed would be treated as falling within the statutory definition. I accept Mr Green's proposition that Parliament cannot have intended that the identification of a "crematorium" would depend on whether the ashes were disposed of above or below ground, but I take a different view of the consequences for the appellant's case.

106. I agree with the Judge that it makes no difference to the interpretation of sections 2 and 5 of the 1902 Act whether it is proposed that the memorial gardens will contain some kind of structure which acts as a repository for urns which contain the ashes. But I can see no reason why the statutory definition of "crematorium" should be interpreted as including an open area where ashes are strewn, especially since that is not something which is "constructed". There is no reason to suppose that public health considerations pertaining to the potential disposal of ashes in or on the ground after cremation had any bearing on the distances stipulated in section 5 of the 1902 Act.

107. That conclusion is supported by the two main purposes of the statute stated in the long title. As the Judge said, the Act is concerned with the regulation of the *burning* of human remains; and although it makes provision for regulations to be promulgated by the Secretary of State which extend to the disposal of the ashes, the statute itself contains no provisions about what happens to the ashes after the cremation. Although the ashes are a by-product of the cremation process, and after the cremation they must be processed, gathered up and dealt with in some way, the strewing of ashes (or their interment) thereafter is not something that is incidental or ancillary to the process of cremation within the meaning of section 2. Those matters occur after the cremation process has finished, sometimes years later, and not necessarily on the same site.

108. In any event, section 5 is only concerned with the distance between roads, houses and a building (or buildings) and not with the location of the memorial gardens or any other open space. On the face of it, the distances prescribed by section 5 are purely concerned with the location of the cremation; they have nothing to do with where the ashes might be interred or scattered afterwards, even though these activities could give rise to some prospect of contamination of groundwater, and to that extent could affect the occupants of local properties (though probably to no greater extent than burials, which can take place only 100 yards away). Although the pH balance of the soil may also be affected by the scattering of ashes over a concentrated area, that is not a problem which would be likely to affect neighbouring land, as opposed to the ground on which the ashes are distributed. Indeed. the ashes could well be interred or scattered somewhere else – as Horizon's plans contemplated that they would.

109. For those reasons, although his analysis of the statute was broadly correct, I disagree with the Judge that an open area of the grounds where ashes are to be strewn is encompassed within the statutory definition of a "crematorium". The Crematoria Guidance is right to draw the distinction between certain features of the crematorium building(s) and others, such as staff housing, but in my judgment it is wrong to make the distinction between areas designated for the strewing or interment of ashes and other parts of the landscaping. Those areas could well be subject to the different, and shorter, locational restrictions pertaining to burial grounds, but it is unnecessary to consider that possibility for the purposes of this appeal, as there is no such area designated in the proposed development. That is enough to answer Mr Green's alternative argument if a distinction is to be drawn between storage and disposal.

110. It is clear from the plans that on the correct interpretation of the statute all the potentially relevant parts of the proposed crematorium building in this case fall within the permitted zone, or at least that the Inspector was entitled so to conclude on the evidence before him. The Judge was therefore right to find that the Inspector did not err in finding that the 1902 Act would not be infringed if the crematorium were constructed on this site in line with Horizon's plans.

111. For those reasons, I would dismiss this appeal on Grounds 1 and 2.

Grounds 3 and 4

Policy considerations

112. The Judge set out the relevant provisions of the Framework and the PPG at [21] to [25] of his judgment. There is no need to repeat them all here, save to note that the overarching policy, in paragraph 159 of the Framework, is that:

> "Inappropriate development in areas at risk from flooding should be avoided by directing development away from areas at highest risk (whether existing or future). Where development is necessary in such areas, the development should be made safe for its lifetime without increasing flood risk elsewhere."

113. Although the sequential test is mainly aimed at steering new development into Flood Zone 1, the PPG makes it plain that the fact that a proposed development is within that zone is not the end of the inquiry. For example:

> "018 …
>
> Within each flood zone, surface water and other sources of flooding also need to be taken into account in applying the sequential approach to the location of development.
>
> 033 …
>
> Any development proposal should take into account the likelihood of flooding from other sources, as well as from rivers and the sea. The sequential approach to locating development in areas at lower flood risk should be applied to all sources of flooding, including development in an area which has critical drainage problems, as

> notified to the local planning authority by the Environment Agency, and where the proposed location of the development would increase flood risk elsewhere."

114. In *Substation Action*, which also related to a site in Flood Zone 1, the appellant contended that the provisions of the relevant policies in the Framework and PPG required the decision maker to be satisfied that the sequential test had been applied by the applicant (developer) when selecting the site for the proposed development. That test, it was submitted, required the applicant to locate the development in an area which was not at medium or high risk of surface water flooding unless there were no other sites reasonably available.

115. The lead judgment was delivered by Lewis LJ, with whom Coulson and William Davis LJJ agreed. Although an additional policy, the Overarching National Policy Statement for Energy, ("EN-1") was also engaged in that case, that does not affect the material aspects of the Court's reasoning. Nor does the fact that consent for that development had to be sought and obtained from the relevant Secretary of State under s.104 of the Planning Act 1980, rather than from the local planning authority under Part III of the Town and Country Planning Act 1990. The appellant's arguments were comprehensively rejected.

116. Lewis LJ summarised the Court's relevant conclusions at [60]:

> "The relevant provisions of EN-1, the Framework and [the PPG] do not require an applicant for development consent to demonstrate that whenever there is a risk of flooding from surface water there are no other sites reasonably available where the proposed development could be located in an area of lower surface water flood risk. The risks of flooding from surface water are to be taken into account when deciding whether to grant development consent under section 104 of the 2008 Act. The way in which account is taken of that risk raises issues of planning judgment in the application of the relevant provisions of the policies. The judge was correct in her interpretation of the policy and in finding that there was no irrationality or other public law error in the way in which the first respondent dealt with this issue when granting development consent."

117. Although Mr Green sought to do so, there is no reason to distinguish that case on the basis that this proposed development was within the Green Belt. Its reasoning applies to all developments, regardless of their location.

The Inspector's decision

118. In the present case, the Flood Risk Assessment stated, at paragraph 3.3, that "As this site is entirely within Zone 1, the sequential test is not relevant". It was accepted by the respondents that this statement was incorrect. However, the engineers went on to specifically address the question of the risk of flooding from groundwater. Paragraph 3.6 stated:

> "A review of the SFRA shows the site has potential for groundwater flooding at the surface. Site investigation will be carried out to

> establish the groundwater levels on the site. The proposed development will be designed to take cognisance of these recorded levels."

119. The SFRA itself, in para 5.4, had concluded that the sequential test was not needed for sites in Flood Zone 1 which were at low risk from flooding from other sources.

120. The issue of flood risk was considered in the planning officer's report, in which it was noted that neither the Environment Agency nor the Lead Local Flood Authority objected to Horizon's proposal, subject to appropriate conditions, and it was concluded that "the proposed development is thus considered to accord with planning policies in relation to flood risk and drainage matters".

121. The Inspector considered flood risk and associated objections in paragraphs 32 and 33 of the Decision Letter, which are set out in the judgment at [54]. He noted that the objectors complained that Horizon had failed to adopt a sequential approach to flood risk. He stated that, as set out in paragraph 162 of the Framework, the sequential test was "to steer new development to areas with the lowest risk of flooding from any source", and for such development not to be permitted "if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding." Therefore the Inspector correctly understood the policy, and he was not misled by paragraph 3.3 of the Flood Risk Assessment into believing that the fact the site was in Zone 1 was the beginning and end of that issue.

122. The Inspector acknowledged the potential for groundwater flooding identified in the SFRA. He took into account the specific objections from interested parties, and the position of the Lead Local Flood Authority. He then said: "were I to conclude the sequential test was necessary due to a medium degree of flood risk from ground water sources, the PPG advises a pragmatic approach on the availability of alternatives". Thus he recognised that the question whether to apply the sequential test was a matter of planning judgment for him. Although he ultimately concluded that he was satisfied with the conclusions of the proposal's Flood Risk Assessment that there was no requirement in this case for a sequential test to be undertaken, it is clear to me, as it was to the Judge, that he made up his own mind about that.

123. Moreover, despite the fact that there was no necessity for him to do so, the Inspector also specifically considered alternative sites, concluding that (even if the sequential test were to be undertaken) there were no other reasonably available sites at a lower risk of flooding. As I have already explained, the only alternative site that was being actively proposed by the objectors was the rival site at Farleigh. At the time of the decision, planning permission for that site had been refused. Although an appeal was pending, the Inspector was rationally entitled to consider the situation as at the time of his decision; he was not required to assume that the appeal would or might succeed (and in the event, it failed).

124. I agree with Mr Darby's description of the Inspector's approach in his skeleton argument as "the epitome of the pragmatic approach urged upon decision-makers by the PPG." The Inspector clearly recognised that the location of the site within Flood Zone 1 was not sufficient in itself to avoid the need to consider the risk of flooding from water sources other than rivers, how this might be mitigated, and whether there were alternative sites which might be less susceptible to groundwater flooding. He

rationally took into account the ability effectively to manage the risk of flooding at the site through conditional controls. As the Judge said at [124], he was entitled to take the controls imposed by condition 6 into account in reaching a conclusion, in the exercise of his planning judgment, that a sequential test need not be applied in this case. Even if he had reached the contrary conclusion, it is clear from his consideration and rejection of the Farleigh site an available and better-situated alternative, that the application of such a test would not have led to any different result. There was no irrationality nor any other public law error in that approach. Accordingly, there is no substance in the appellant's complaints concerning the Inspector's treatment of the flooding issue.

125. For those reasons I would dismiss the appeal on Grounds 3 and 4 also.

Conclusion

126. In summary, for the reasons I have adumbrated, the Judge and the Inspector were both right to find that the proposed development could be constructed on the site without contravening the restrictions in section 5 of the 1902 Act. The Judge was also correct to conclude that the Inspector's decision not to carry out the sequential test in respect of the risk of groundwater flooding, and to address that risk by imposing conditions, was unimpeachable. Therefore, this appeal should be dismissed.

Lord Justice Snowden:

127. I agree.

Sir Andrew McFarlane, President, Family Division:

128. I also agree.