IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2019] EWHC 978 (Admin)

No. CO/4850/2018

Royal Courts of Justice
Friday, 5 April 2019

Before:

HIS HONOUR JUDGE ALLAN GORE QC
(Sitting as a Judge of the High Court)

B E T W E E N:

THE QUEEN ON THE APPLICATION OF
LAKENHEATH PARISH COUNCIL — Claimant

- and -

SUFFOLK COUNTY COUNCIL — Defendant

MS I. TAFUR (instructed by Richard Buxton) appeared on behalf of the Claimant.

MR R. GROUND QC (instructed by David Hole) appeared on behalf of the Defendant.

J U D G M E N T

THE JUDGE:

1 Lakenheath is the well-known home of a major United States Air Force base operated from premises belonging to the RAF. Local government for the area is provided both by the claimant, the local Parish council, and the defendant, the county council, and, so far as is relevant to this case, the planning authority.

2 Although there remains some dispute as to the stage that proposals have reached, so far as is relevant to this case, planning permission has been granted for about 220 new homes near Lakenheath and several hundred other homes are subject at least to a resolution. Mindful of a perceived substantial increase in demand for school places, the defendant as local authority applied to itself as planning authority for planning permission for a new primary school for up to 420 pupils and a further 60 preschool places in Lakenheath. There is no dispute that during the school day in the outdoor areas around the new school there will be what I neutrally at this stage call "excessive noise levels", although it is controversial as to how excessive those noise levels will be and whether, and if so, in what respects and to what extent they will be injurious.

3 The planning application was made on 2 March 2018, attracted as is the usual case an officer's report, the date of which is not clear but is not material, and came before the defendant planning authority's planning committee for consideration on 16 October 2018. In a decision notice dated 23 October 2018, the planning authority granted planning permission for the new school.

4 By Claim Form filed on 4 December 2018 the claimant applied for permission to apply to quash this decision. As drafted, three grounds were relied upon. Although in the claimant's reply to the summary grounds of resistance adopting the euphemism "limb", it is asserted that ground one comprises two freestanding grounds of challenge.

5 Those grounds are that the decision to grant planning permission, firstly, failed to have proper regard to the best interests of the child under Art.3 of the United Nations Convention on the Rights of the Child, (hereafter UNCRC), or to treat that as a primary consideration. Secondly, it failed to have regard to or interfered disproportionately with the rights of future pupils of the school under Art.8 of the European Convention on Human Rights (hereafter ECHR). Thirdly, it failed to have proper regard to the public sector equality duty under s.149 of the Equalities Act 2010. Fourthly, it breached regulation 3 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 by virtue of the failure to properly assess the environmental impacts of alternatives in breach of Art.5(3)(a) of the Environmental Impact Assessment Directive 201192EU enacted into UK law by sch.4 Part 1 para.2 of the 2013 Regulations (hereafter described as the failure to provide an EIA).

6 As is usual, the application for permission was first considered without a hearing by Mr John Howell QC, sitting as a Deputy High Court Judge, on 28 January 2019 and he refused permission on all but the last ground. By a Notice of Renewal dated 4 February 2019, the claimant applied for the oral reconsideration of all the grounds for which permission had been refused. Mr Neil Cameron QC, sitting as a Deputy High Court Judge, on 11 February 2019 without a hearing directed that the oral renewal hearing be listed to be heard immediately before the substantive hearing, thereby providing for what is colloquially called ‘a rolled-up hearing’. So it is that the matter came before me in the form of the substantive hearing on the ground for which permission was granted and the rolled-up hearing for permission and, if granted, substantive relief in the respect of the other grounds of challenge.

7 Before I turn to consider the detail of the matters before me, there is an unfortunate feature of this litigation that I wish to deprecate. Underlying the dispute in this case are a serious series of factual disputes about a variety of matters including, but not limited to, the extent of the excessive noise, the injurious nature or potential injurious nature of it, the circumstances and performance of the existing school, the assets and resources of the claimant and various other less important matters. This has attracted a deplorable ping pong of supplementary witness statements, attempts to deploy expert evidence without permission and applications for permission to rely on further evidence. Some of this has been, to say the very least, very late.

8 Not only is that, in my judgment, a wholly improper way to conduct litigation of this type, but the truth of the matter is that much of this material, at least as regards the issues concerning noise and schools, could and should have been deployed by all concerned before the planning permission decision was even taken. That way what are in effect objections to the grant of planning permission on the merits and purported rebuttals thereof and answers thereto could and should have been considered by the planning authority before the planning decision was taken in the first place. Review proceedings in the Administrative Court are not the appropriate vehicle by which to seek to resolve such potentially central disputes.

9 Prior to either the preparation of the officer's report or the consideration by the planning committee, the usual lengthy consultation took place. During that process, the claimant made the following contributions.

10 Firstly, on 2 February 2018 by email, pre-application comments were made.

11 Secondly, further representations were made, again by email, on 2 October 2018 in which the claimant recorded:

> "Lakenheath Parish Council strongly believe that this is this is not the best suited site for a school to serve their village. For these main reasons, they object strongly to the proposed school site, especially when there are better sites within the village boundary available."

12 Thirdly, a verbal presentation was made by the chair of the claimant's planning subcommittee to the meeting of the planning committee making the relevant decision.

13 It is material to note and observe that in none of those contributions made by the claimant was any point taken recognisably identifying as issues for consideration the points of criticism now raised as grounds for challenge. Mr Streeten, counsel who appeared for the claimant, in oral submissions said that this was because the Claimant did not have the benefit of legal advice at any of these points in time.

14 Mr Ground QC, leading counsel for the Defendant, both in his skeleton argument and in his oral submissions replies by asking, not rhetorically, why should the planning decision maker have to deal with points that no one has raised during the consultation process? In support of that proposition, he prays in aid the observations of Judge Cooke, sitting as a High Court Judge in *Stroud v North West Leicestershire District Council* [2018] EWHC 2886 who said at para.40:

> "It is important, in my view, that the courts in interpreting and applying this duty should not do so in a way that introduces unnecessary and cumbersome formality and box ticking. A duty to have 'due regard' to matters does not require the decision taker in all cases to go looking for possible implications for any or all of the protected characteristics, but

> only to consider them properly where they are substantively raised on the facts."

15 Although those observations were made specifically in the context of the so-called public sector equality duty they have merit generally in supporting Mr Ground's submission. Moreover, in a case not included in the over 50 authorities cited to me in the course of argument, but familiar to junior counsel for the defendant because it was cited against him before me in a case two days earlier, David Elvin QC, as a Deputy High Court Judge, in *Wynn-Williams v Secretary of State for Communities and Local Government* [2014] EWHC 3374 at para.33 said:

> "It is necessary in my view to exercise due caution with new material and new points taken, especially with respect to written representations appeals which are intended to be short and for straightforward cases. It is not to be expected as a general rule that inspectors should seek to find new points though there are bound, from time to time, to be some cases where there may be obvious errors or omissions, for example, the failure to consider a plainly applicable policy."

16 This of course is not a written representations appeal, but the point remains generally a good one.

17 On a similar point, Mr Ground submits that there is no evidence to refute that neither has the claimant identified any person actually or potentially adversely affected either at the existing school or at the proposed school by outdoor levels of noise, nor is there any evidence of specific cases of detriment or harm caused by such noise. He also draws attention to the fact that such expert evidence as the claimant was deploying in the period up to the making of the planning decision did not mention anything to do with the public sector equality duty or the effect of noise or any likely child with a disability who might attend the proposed school.

18 I turn then to the officer's report. The material passages are as follows:

> "47. The do-nothing option is not considered appropriate as the proposal seeks to meet development needs. Lakenheath has been identified to receive a considerable level of housing growth and additional educational infrastructure needed to support this growth.
>
> 48. The applicant has considered the need for a new primary school in Lakenheath since 2013. Several site options have been considered: see table 1 below."

19 Table 1 is entitled "Alternative sites. To be read in conjunction with planned potential sites for new Lakenheath primary school. 8 December 2017." There follows an identification by number of seven sites and reasons for unacceptability are expressed in the following terms. In respect of site 1:

> "Within current planning application F142096HYB considered isolated and accessibility could be improved by relocating further south to site now proposed."

20 Site 2:

"Currently woodland. Partly covered by TPO. Tree loss would have adverse ecological and visual impacts. No additional land available for expansion. Similar noise impacts to site now proposed."

21 Site 3:

"Access constrained as via residential estate roads. Close to existing primary school with potential for local highway congestion. No additional land for expansion. Location would be noisier than the site now proposed. There will be acquisition costs."

22 Site 4:

"Isolated site outside settlement boundary and poorly located with respect to future housing development."

23 Site 5:

"Location not ideal with respect to future housing growth. There would be acquisition costs."

24 Site 6:

"Very noisy location close to end of run way of Lakenheath airbase, detached from Lakenheath village with potential for highway issues."

25 Site 7:

"Location of existing primary school. Insufficient land is available to extend the school to accommodate the required growth."

26 The officer's report continues at para.69 in the following terms:

"69. The noise impact assessment addresses all the relevant issues. The report states that the site is considered acoustically suitable for a primary school. I generally agree with the assessment methodology adopted and the recommendations given in the report. I consider, however, that aircraft noise could prove a significant issue in any external teaching areas. If there are to be any such areas, I recommended you satisfy yourself that the school body are fully aware of it and accept the limitations on the use of any external areas.

70. The survey confirms that aircraft noise is very significant on the site with average noise levels (LAEQ 30 min) generally above 55 DBA over 60 DBA for around half the time and even reaching 70 DBA on a few occasions. The proposed solution to achieve the noise criteria set out in BB 93 inside classrooms is enhanced facade of high performance acoustic glazing and mechanical ventilation. This is considered an acceptable approach."

27 I digress to make the observation, which is not superficially apparent, that the measure of noise levels by reference to the scale DBA is not a linear scale, but a logarithmic scale, with the result that 70 DBA is very significantly indeed noisier than 60 DBA or 55 DBA. Returning to the officer's report:

"71. The measured noise levels far exceed the desirable noise levels in external areas due to aircraft flyovers. AJA, who conducted the noise surveys, point out that the noise climate is relatively quiet for the majority of the time interspersed with high noise levels when teaching outside could be paused. Consider it imperative that the school body are aware of this limitation and are willing to accept it.

72. Agrees with the conclusion of the report that with adequate noise attenuation plant noise from mechanical ventilation is unlikely to be an issue. Background noise levels are proposed as the basis for setting plant noise limits. Recommends 30 DBA LA 90 is used in the evening not 32 DBA. Also recommends that noise limits are based on the rating level of plant not exceeding the measured background noise levels at all times, rather than providing a relaxation during evenings and weekends, as is proposed. Recommends that plant noise emissions are conditioned if the application is approved: see condition 30 above.

73. Agrees the conclusion of the report that the impact on surrounding noise-sensitive properties of noise from sport's activity and from traffic generated by the school is unlikely to be an issue."

28 Some pages further on the officer's report under the heading "Site-specific issues. Conformity with the NPPF and Local Plan Policy and specifically in relation to noise" contains the following paragraphs:

"121. Advice on noise levels in outside areas of schools where the building regulations do not apply is contained in the joint Institute of Acoustics/Association of Noise Consultants publication 'Acoustics of schools. A design guide published in 2015.' It states:

'(a) The following recommendations are considered good practice for providing suitable acoustic conditions outside school buildings. For new schools 60 DBLAEQ 30 minutes should be regarded as an upper limit for external noise at the boundary of external areas used for formal and informal outdoor teaching and rectify.

(b) It may be possible to meet the specified indoor ambient noise levels on sites where external noise levels are as high as 70 DBLAEQ 30 min, but this will require considerable building envelope sound insulation or screening.

(c) Playgrounds, outdoor recreation areas and playing fields are generally considered to be of relatively low sensitivity to noise.'.

Indeed, playing fields may be used as buffer zones to separate school buildings from busy roads where necessary. However, where used for teaching, for example sports lessons, outdoor ambient noise levels have a significant impact on communication in an environment which is already acoustically less favourable than most classrooms. Noise levels in unoccupied playgrounds, playing fields and other outdoor areas should not exceed 55 DBLAEQ 30 min and there should be at least one area suitable for outdoor teaching activities where noise levels are below 50 DBLAEQ 30 min. If this is not possible due to a lack of suitably quiet sites, acoustic screening should be used to reduce noise levels in these

areas as much as practicable and an assessment of the noise levels and options for reducing these should be carried out.

122. An onsite noise survey was conducted for one week during March 2018. This indicated that external noise levels average 66. DBLAEQ 30 min and typically peaked at between 80 and 85 DB. This would considerably exceed the above guideline. It is unlikely a teacher would be able to address a group of children for the duration of an aircraft overflight and teaching would have to be paused for short periods during overflights. Five covered shelters would be provided around the school sites to provide some mitigation of direct noises for pupils' comfort during external play and teaching in small groups. These shelters are expected to provide around 5 DBA reduction in noise levels. The precise degree of mitigation would be determined by their detailed construction and siting to be agreed by condition on any grant of planning permission.

123. Between overflights the primary source of noise in outdoor areas of the school would be traffic on Station Road. The school building would provide some acoustic screening of traffic noise to the outdoor dining area and nearby grassed areas. As a result, noise level in these areas is expected to be below 50 DBALAEQT between overflights.

124. Planning guidance accompanying the NPPF [that is the National Planning Policy Framework] states that the impact of noise levels will depend on how various factors combine in any given situation, including the source and absolute level of noise. For non-continuous sources of noise the number of noise events and the frequency and pattern of occurrence of the noise, the spectral content and general character of the noise. It also states that noise impacts should not be considered in isolation separately from economic, social and other dimensions of the project.

125. On the proposed site average daytime noise levels during school hours are mainly influenced by relatively short periods of high noise levels due to overflying aircraft with relatively low and constant residual noise levels at other times. Analysis of the four 30 minute periods during school hours with the highest measured short-term noise levels shows that aircraft noise typically peaked at 80 to 58 DBA, but that these averaged less than seven minutes in duration.

126. The applicant has confirmed acceptance that overflying would impose some limitation on the use of external areas for teaching due to short periods of loud noise. It considers the sound-limiting pods could be used as teaching or play spaces for younger pupils and for formal sports tuition instruction, if it is taking place outside when overflying is in progress.

127. Aircraft noise around Lakenheath will vary according to daily operational requirements of the base, as well as factors such as weather and flight paths. Its nature is quite different to the more constant noise from a busy road or civil airport. The level of activity during the survey period is considered to be representative of the daily activity at the base, which averages 80 to 90 aircraft movements, including landings:

> information from RAF Lakenheath commander's office. The survey is also broadly consistent with the latest published noise contours for the Lakenheath Airbase which place the application site halfway between the 66 DBLAEQ 16-hour and the 72 DBLAEQ 16-hour contour. I therefore consider sufficient information is available to properly assess the noise environment at the application site."

29 The final extract I draw attention to starts at para.162 in the following terms:

> "162. The main policy breach relates to impact of aircraft noise on external areas of the school which cannot be fully mitigated. Although noise levels from passing aircraft may interrupt teaching in outside areas, this would be for relatively short periods and, given its sporadic nature, not all external lessons would be affected. The applicant has confirmed that this limitation on the use of outside areas for teaching is accepted.
>
> 163. Aircraft noise is endemic to the Lakenheath area. Published noise contours for RAF Lakenheath show that the application site is in a relatively favourable noise environment, as noise levels increase in a southerly direction towards the village centre. By comparison, the existing Lakenheath Primary School is on the 72 DB contour in a noisier environment than the application site. Its school buildings were not constructed to defend against aircraft noise, but, despite this, it has a good Ofsted rating and Ofsted reports do not mention military aircraft noise as an issue.
>
> 164. While noise nuisance is clearly a dis-benefit in the planning balance, the weight to be attributed to it is reduced by its sporadic nature and because it cannot be avoided if a new school is to be built to serve the new housing planned on the north side of Lakenheath. Government planning guidance makes it clear that in the planning balance noise should not be considered in isolation.
>
> 165. On site specific issues there is a large degree of conformity with the NPPF and Local Plan Policies. Taken as a whole, the proposals are considered to constitute sustainable development where any adverse impacts are decisively outweighed by the benefits of a new village school and preschool. I therefore recommended that planning permission is granted with the conditions set out in para.13 above."

30 It is right to note and observe, as is the principal thrust of Mr Streeten's submissions, that there is not a single reference in the 30 pages and 165-paragraphs of the officer's report to the UNCRC Art.3, the ECHR Art.8, the Equality Act 2010 or any EIA. Mr Streeten submits of the officer's report that provided the evidential basis upon which the planning committee came to its decision, that the failure to mention or evaluate the potential harm of excessive noise to the physical or psychological wellbeing of children generally or to their education and educational attainment, constitutes actionable interference with their ECHR Art.8 and UNCRC Art.3 rights generally.

31 In addition, he submits that failure to mention or evaluate the potential harm of excessive noise to the physical or psychological wellbeing of children with protected characteristics or to their education and educational attainment constitutes breach of the public sector equality duty. Specifically, he submits that nowhere does the officer's report state that children with

protected characteristics will not be able to attend the new school or may suffer impacts on their health or development, as is now conceded by the Defendant, as Mr Ground agreed when that submission was made. So it is that Mr Streeten submits that both limbs of ground 1 and ground 2 of the challenge are made out and the decision of the planning authority was unlawful and should be quashed. He makes a similar criticism under ground 3 in relation to the absence of any specific EIA.

32 Mr Ground, on the other hand, submits, firstly, that there is and can be no breach of the UNCRC Art.3 rights. In so far as this right requires the best interests of the child to be treated as a primary consideration, that was the central consideration of the entire process which was concerned with the provision to children of access to education. Secondly, as regards ECHR Art.8, he submits in the alternative either that the siting of the school in the location for which planning permission was granted did not constitute an interference or an actionable interference with those rights or, alternatively, that, if it did, it was proportionate and therefore legitimate.

33 As regards the allegation of breach of the public sector equality duty, he submits that on the evidence steps were taken to minimise disadvantages or meet the needs of or to encourage participation of persons with protected characteristics, each within the meaning of s.149(3) of the 2010 Act, even if the Act was not specifically mentioned in the officer's report. Finally, he submits that there was consideration of environmental impact at the site and its alternatives and that assessment was sufficient.

34 An issue that arose for the first time in Mr Streeten's reply is whether the officer's report fairly reflected the evidence submitted during the consultation process or, alternatively, as he submits to be the case, in not doing so it caused the planning committee to be misled materially as regards application of the public sector equality duty or as to the other aspects of objection generally now pursued. This arises because both the acoustic report commissioned from experts and relied upon in the preparation of the officer's report, undated, but the final approval signatory approved it on 9 February 2018, and the environmental statement, simply dated February 2018, each specifically addressed the impact of noise in schools on pupils with special needs (see section 3.4 on internal p.8 to 9 of the former document to be found at trial bundle p.392 to 393 and section 7.5 between internal p.46 to 48 of the latter document to be found at trial bundle p.356 to 358). However, conspicuous by its complete absence from the officer's report is either reference to each or both of these documents or sections as regards their treatment of the issues raised.

35 Accordingly, Mr Streeten submits that this material, relevant to discharge of the public sector equality duty, resulted in the decision maker being materially misled in the decision making process. He draws attention to the fact that both of these documents, not referred to specifically in the officer's report, specifically draw attention to the Equality Act 2010 obligations. Relevant to that submission are points based upon the evidence previously made by Mr Streeten in the course of oral argument before me as follows.

36 Firstly, the relevant and applicable performance standard issued by the Department of Education relating to school design prevailing at the time relevant to this case is the Acoustic Design of Schools Performance Standards Bulletin 93, dated February 2015. In the summary at section 0.4 under the heading "Provision for children having special hearing or communication needs", it is specifically provided that various groups of children, having needs including those arising from communication difficulties, hearing loss, attention deficit hyperactive disorders, auditory processing disorder or difficulty or being on the autistic spectrum, benefit from duties owed under the Equality Act 2010, which require the preparation and implementation of accessibility strategies and plans to increase

accessibility of schools for disabled pupils so as to increase the extent to which they can participate in a school's curriculum or so as to enable them to take advantage of education and benefits, facilities and services provided. Accordingly, it is specifically provided that:

> "In order to fulfil their duties under the Equality Act 2010, school client bodies should anticipate the needs of deaf and other disabled children as current and potential future users of the school.'"

37 The document continues a little later:

> "Pupils with special educational needs are generally even more sensitive to the acoustic environment than others."

38 A little later still it continues:

> "Pupils with hearing impairment, autism and other special needs are often very sensitive to specific types of noise, particularly those with strong tonal impulsive or intermittent characteristics. This should be taken into account in the design of areas which may be used by such children."

39 Secondly, Mr Streeten relies upon the second witness statement of Mr Adrian James filed on behalf of the defendant dated 21 March 2019, para.34 of which contains the assertions that:

> "Our noise assessment is for a mainstream school and, indeed, in our BB 93 assessment we have confirmed that this school was neither intended nor designed to be suitable for children with special hearing or communication needs, as defined in BB 93. This definition includes children with hearing impairment, ASD and ADHD, as discussed by Mr Clarke."

40 Mr Clarke is the expert from whom the claimant sought advice for the purpose of this litigation. The point which Mr Streeten makes is that in this passage the defendant admits that the new school for which planning permission was being considered:

> "Was neither intended nor designed to be suitable for children with special hearing or communication needs [including children with hearing impairment, ASD and ADHD]."

41 This is an admission that the needs of persons who possess protected characteristics within the meaning of the 2010 Act have not been considered, which by definition, he submits, constitutes a breach of the public sector employment duty. He seeks to make good that submission by relying upon the equally lately produced Accessibility Strategy of the Children and Young People's Services Department of the defendant which acknowledges that:

> "It is the county's policy to integrate students with disabilities in mainstream settings where this is appropriate for their learning. However, some young people have needs that are so significant and complex that they require specialist facilities and resources."

42 That is at internal p.4. Note that it follows from this statement that students with disabilities falling short of requiring specialist facilities and resources are to be integrated in mainstream

schools. The same document at internal p.6 announces that "our strategy places equality principles at the heart of service delivery". At internal p.7 it announces that:

> "Our strategy is to support the majority of children in their local mainstream schools."

43 In doing so, the declared strategy is to provide in mainstream schools outreach support and training for categories of children that possess precisely the sort of characteristics and needs referred to by Mr James in his second statement. Accordingly, Mr Streeten submits that insofar as the decision of the planning authority was made with an officer's report that simply did not address the needs of this cohort of children at all, not only was the decision maker seriously misled, but also it failed to have regard to a relevant and important consideration that, on either ground, the decision is liable to be quashed pursuant to public law principles.

44 Mr Ground's submissions in response are multi-layered. A central thread is that a public authority decision maker does not need to go looking for and then to address potential grounds that might be deployed in response to the application under consideration. Instead, he submits that, in the aftermath of lengthy and detailed evidence gathering, consultation and reporting, the authority is entitled to expect, particularly of another body exercising public law functions like the claimant Parish council, that all significant or major issues be identified before the relevant decision is made. It cannot simply or credibly, after the event of the decision, challenge its legality by reference to grounds of challenge or complaints that it has never had drawn to its attention before the event.

45 At the meeting of the relevant planning committee on 16 October the defendant granted planning permission to the proposal, subject to 39 conditions, and it is material to note and observe two of the conditions which imposed the following requirements:

> "21. Prior to their construction, details of the noise attenuation shelters shall be submitted to and approved in writing by the county planning authority. Such details shall include constructional details, facing materials, overall dimensions and orientation of openings. The shelters shall be provided in the approved form and, thereafter, be retained.
>
> 27. Following completion of construction and prior to occupation, a copy of the test report carried out in accordance with the recommendation of BB 93 Acoustic Design for Schools shall be submitted to and approved in writing by the county planning authority."

46 With due respect to the industry of counsel on both sides, the extensive written and oral advocacy and the citation of two lever-arch file volumes of authorities, in my judgment, the issue for the court to decide is whether, as Mr Streeten submits, the absence of specific reference to the four considerations now relied upon by the claimant, or each or any of them, fatally undermines the legality of the planning authority's decision making or whether, as Mr Ground submits, despite the absence of specific reference to those consideration, the substance of them was fully or sufficiently dealt with in the officer's report and, therefore, by the planning authority so as to justify its decision being sustained.

47 Moreover, with due respect to the industry and effort of counsel on both sides, the legal principles to apply to make that determination do not require the citation of over 50 authorities and can be stated quite shortly. As Lindblom LJ said in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1317:

"41. The Planning Court – and this court too – must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court [and he cites an authority]. The courts must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but – at local level – to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and – on appeal – to the Secretary of State and his inspectors."

48 I omit an irrelevant passage and continue from his judgment:

"Planning officers and inspectors are entitled to expect that both national and local planning policy is as simply and clearly stated as it can be, and also – however well or badly a policy is expressed – that the court's interpretation of it will be straightforward, without undue or elaborate exposition. Equally, they are entitled to expect – in every case – good sense and fairness in the court's review of a planning decision, not the hypercritical approach the court is often urged to adopt.

42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarize the law as it stands:

(1) The essential principles are as stated by the Court of Appeal in R. v Selby District Council, ex parte Oxton Farms [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in R. (on the application of Siraj) v Kirklees Metropolitan Borough Council [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council [2012] EWHC 3708 (Admin), at paragraph 15).

(2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Howell of Richmond in R. (on the application of Morge) v Hampshire County Council [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in R. v Mendip District Council, ex parte Fabre (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in Palmer v Herefordshire Council [2016] EWCA Civ 1061, at paragraph 7)."

49 I emphasise this next passage in his judgment:

"The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be

> excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice."

50 (3) within that citation continues and, again, I emphasise this passage from his judgment:

> "Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases [he continued] in which a planning officer has inadvertently led a committee astray by making some significant error of fact [and he cites an example] or has plainly misdirected the members as to the meaning of a relevant policy [again, he cites an example]. There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law [and he cites another example]. But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

51 And so he asked at para.43, as indeed it seems to me that I must ask in this case: Was the officer's advice to the members in this case flawed in that way?

52 Context for this purpose is both legal and factual. Both require consideration and evaluation.

53 In my judgment, deciding that the needs of children to have access to an education in a new school when the facts are that the provision of new homes will increase demand for places significantly, and the existing school is nearly full, and has no space or resources to meet this increased demand, on any view, amounts to treating the interests of the child as a primary consideration under Art.3 of the UNCRC. I do not understand how it can possibly be said to be arguable that the failure to mention this important requirement constituted misleading the members on a matter bearing upon their decision, either materially or otherwise.

54 Reviewing the question in relation to Art.8 of the ECHR is not so straightforward. Mr Ground is correct in identifying that under Art.8, two questions arise. The first is to consider whether the grant of planning permission constituted, or arguably constituted, an interference with Art.8 rights within the meaning of Art.8(1). If it did not or could not, that is an end of the matter. If, however, it is arguable that it did, the second question is to consider whether the silence of the officer's report on Art.8 rights materially misled the planning committee or whether, given the evidence, facts and matters evaluated in the report, the officer has advised and the planning authority decided in accordance with the proportionate needs in a democratic society, thereby, producing a balanced judgment under Art.8(2).

55 Both Mr Streeten and Mr Ground in this regard took me to the legal principles summarised by Higginbottom J (as he then was) in *Stevens v Secretary of State for Communities and Local Government* [2013] EWHC 792 at para.69.

56 Applying that guidance to the facts in this case, drives me to the following conclusions. Whether or not to grant planning permission in this case did engage Art.8. However, in my judgment, both the reporting officer and the planning authority had and kept at the forefront of their minds the best interests of children. Indeed, the decision making in this case concerned, and only concerned, the best interests of children and I cannot see any evidence of any countervailing or conflicting interest playing any part in the decision making process.

57 I entirely accept the proposition that what is protected by Art.8 is not merely the physical and psychological integrity and wellbeing of citizens, but extends to the physical and psychological space necessary for personal development and the development of social relationships, social identity and the development of "the self". Educational space and its appropriateness are important to this. However, to constitute breach of Art.8(1) the interference must be sufficiently adverse to constitute interference and must not be based on hypothetical factors which are not substantiated. Frankly, I do not need the citation of authority to support these generally propositions, but, for the record, citations to this effect before me included Baroness Howell in *R (On the application of the Countryside Alliance) v Attorney General* [2007] UKHL 52 at para.116; MacDonald J in *London Borough of Sutton v MH* [2016] EWHC 1371 para.93, and the decisions in *Hatton v United Kingdom* [2003] Volume 37 EHRR 28 at para.93, and *Bensaid v United Kingdom* [2001] volume 33 EHRR 25 at para.46.

58 I confess to having been concerned about the lack of reference in the officer's report to the environmental statement section 5. I was also concerned about the lack of any reference in this regard to the needs, within the cohort of children generally, of those with relevant protected characteristics. It is also troubling to read what Mr James set out in para.34 of his witness statement, because I ask, not rhetorically, how will the needs of children with hearing impairment, ASD and ADHD, who live in the new homes which the new school is to serve and who otherwise would be educated in mainstream schools pursuant to the accessibility strategy, be catered for if it is conceded and accepted that, for reasons related to noise, the new school will not be suitable for them, unless all of their schooling is undertaken inside and within the confines of noise protected new school building?

59 However, a proper evaluation, not only of all of the evidence available to the reporting officer and the planning authority, but also of the further evidence emerging since that time, does not establish either the fact or the risk of either physical or psychological harm or educational impairment attributable to excessive noise in this location. The evidence in this regard, at its highest, establishes only hypothetical risk. It is material in this regard that no other objections have been raised during the planning process in relation to this issue. Accordingly, in my judgment, it is not reasonably arguable that Art.8(1) interference is established in this case.

60 Further, in my judgment, even accepting that no explicit mention was made of Art.8(2) in the officer's report, I am satisfied that it is not reasonably arguable that the planning authority were materially mislead by this omission. They undertook precisely the balancing exercise required to consider whether potential infringement was proportionate when they took into account that the decision which would provide a new school, meeting what would otherwise be unmet need, in close proximity to new housing, thereby avoiding imposing on those children longer journeys to other alternatives and all of that in the context where the existing alternative school was filled close to capacity, suffered an indoor environment that was noisier than will be the case in the new school, when the creation of the new school created the availability of a choice of school for parents and satisfied both national policy in the NPPF (see para.92 to which the planning authority were required to give substantial weight), and also local planning policies. The only potential relevant factor ignored in that

balance is the need of those with protected characteristics, but that in my judgment is not sufficient to make ground 1 arguable, bearing in mind the freestanding terms of ground 2. It follows that in my judgment, the modest, but nonetheless minimum, threshold to attract the grant of permission is not satisfied. I main the refusal of permission of Mr Howell QC underground one.

61 I turn then to ground 2 invoking the public sector equality duty. True it is that guidance in binding authority (McCombe LJ in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at para.26) establishes that it is an important evidential element in the demonstration of discharge of this duty to record the steps taken by the decision maker in seeking to meet the statutory requirements and that the relevant duty is on the decision maker, personally, as distinct, for example, from those giving evidence to the decision maker. Moreover, what needs to be demonstrated is that proper appreciation was given to the potential impact of the decision on equality objectives, properly and conscientiously focusing on statutory criteria.

62 Both parties also drew my attention to the decision in *Buckley v Bath and North-East Somerset Council* [2018] EWHC 1551 per Lewis J at para.36 to the effect that the duty is one of substance not form, but, in my judgment, it is telling and relevant to draw attention to his observation that the duty is "to have due regard" as opposed to "a duty to achieve a specific result." Can it be said that these requirements are satisfied when the officer's report makes no mention of this duty and there is no extraneous evidence demonstrate that the decision maker had it in mind? Mr Streeten's submission is straightforward no.

63 Mr Ground in para.44 to 57 of his skeleton argument, amplified in oral submissions, seeks to explain why that submission is wrong. In the alternative, in para.58 to 61 of his skeleton argument, amplified by oral submissions, he seeks to submit that even if there was a failure to have regard to the public sector equality duty, it made no difference to the outcome in this case. With respect to Mr Ground, I have come to the conclusion that the approach adopted in this case as a matter of form was not on its face adequate. Not to mention the existence or applicability of the duty makes it difficult to say that the evidential element of demonstration of regard to it has been discharged. If the officer's report had properly and carefully set out and analysed the relevant evidence and made recommendation which the planning authority then accepted and acted upon, the Defendant's position would be unassailable.

64 The question for me to ask in assessing whether the planning authority were materially misled by the failure to do so, is whether due regard was had the duty. In answering that question, I attach particular weight to s.149(3) of the 2010 Act. This provision requires "due regard" for the benefit of persons who shared protected characteristics (that is the group of children who collectively have special needs to be met in their educational provision within mainstream schools) to mean "to remove or minimise disadvantages" (s.149(3)(a)), and "take steps to meet needs" (s.149(3)(b)) and "encourage persons to participate in activity", (which I take for present purposes to mean mainstream education - s.149(3)(c)).

65 In my judgment, the officer's report and, therefore, the planning authority's decision in reliance upon it, can be demonstrated evidentially to have satisfied this requirement, despite the absence of explicit reference to it in literal terms. All concerned identified and reflected upon the excessive levels of noise that would exist in the outdoor areas surrounding the new school. Steps were taken either to remove the disadvantages for those with protected characteristics, in the conditions attached to the planning permission, by the requirements that would achieve quieter indoor sound levels in the new school than would be provided to those groups in the existing school or to minimise them by the provision in the outdoor areas

of noise attenuation shelters designed and constructed to achieve an approved standard. By providing that removal or minimisation of the disadvantages, while also providing new school places, shows that regard was had to meeting the needs of children with relevant protected characteristics to be placed in mainstream education who would live in the new housing. The effect would be to encourage their participation in the activity of education to which, therefore, due regard was had.

66 Therefore, it seems to me, and I find, that due regard within the meaning of s.149(3) was had in this occasion. Accordingly, I have come delusion that the modest, but nonetheless minimum, threshold to attract the grant of permission is not satisfied and I maintain the refusal of Mr Howell QC under ground 2.

67 Permission was given by Mr Howell QC for ground 3. It is for me to decide on the evidence, and in all of the circumstances, whether what is agreed to have been the absence of a formal and compliant EIA undermined the legality of the defendant's decision. Mr Streeten relies upon the judgment of the Court of Justice of the European Union in *Hollohan v Ad Bord Pleanala* [2018] 7 November not formally reported as yet, but a full transcript of which was made available to me. Paragraph 69 is cited by him as support for the submission that what is required by the prospective developer is a study of all the main alternatives, taking into account the environmental effects of each of them.

68 Mr Ground disputes that proposition and in my judgment the language of para.69 is plain and unequivocal. The question which he poses, in the alternative, is whether that was done adequately in this case on the evidence. In this regard, he relies on the specific guidance about environmental statements given by Sullivan J (as he then was) in *R (On the application of Blewitt v Derbyshire County Council* [2003] EWHC 2775 para.40 to 42 which I can summarise by posing as the relevant question whether this environmental statement "is so deficient that it could not reasonably be described as an environmental statement as defined by the regulations?"

69 Table 1 in para.48 of the officer's report identifies that seven alternatives were considered. It is correct that environmental effects were only considered specifically in relation to three of them; namely, sites two and three, and six. As regards site two, attention was drawn to the adverse ecological and visual impacts effects of tree loss and identified the noise impact would be similar to the proposed site. Site three was identified as being noisier than the site proposed. Site six was described as a very noisy location.

70 In my judgment, bearing in mind, to remind myself, that "the function of planning decision making has been assigned by Parliament not to judges but at local level to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners" and that that planning decision making is undertaken by "councillors with local knowledge" (all per Lindblom LJ in *Mansell* cited earlier), the only proper inference to draw from the silence in all other environmental respects is that no adverse environmental impacts existed in relation to any of the alternatives than those specifically identified in respect of the three I have referred to.

71 The question for the planning authority, therefore, was to decide whether the adverse environmental impact of excessive noise at the proposed site weighed in the scale of planning decision making so heavily as to require refusal of permission. That is to conduct an EIA, at least in substance, which is what the authorities require this court to evaluate. Moreover, it is material that at no stage has the claimant, or anyone else, identified yet further alternatives to be considered. The planning decision in this case proceeded upon the conclusion that even the adverse impact of excessive outdoor noise at the proposed site,

balanced against the needs and benefits identified, justified the grant of planning permission, even though the environmental impact at alternatives sites considered was either no worse or in many, if not most cases, less severe or even absent. That is a matter for the planning judgement of the officers and the authority. I do not consider that the officer's report materially misled the planning authority in this respect. Accordingly, ground 3 of the challenge fails.

72 So, in conclusion, the application for permission on rounds 1 and 2 of the original grounds refused by Mr Howell is maintained and the challenge under ground 3, for which he gave permission, is dismissed.

MR GROUND: My Lord, I am most grateful. In those circumstances, I, on behalf of Suffolk, apply for our costs. We do not seek to go behind the cost capping order and I have had discussions with my learned friend, Isabella Tafur and I do not think there is any point.

THE JUDGE: Remind me what was the sum of the cap?

MR GROUND: The sum of the cap we could only benefit to the extent of X£15,000 and I can take you to the order if you just----

THE JUDGE: I am content to accept your statement in that regard. That is the decision of Mr Cameron?

MR GROUND: No, it was the earlier one. I am so sorry. I think it is on p.115 and following. It is the order of Mr John Howell QC, sitting as a Deputy.

THE JUDGE: He dealt with that. You are quite right.

MR GROUND: He did deal with it and he had dealt with an earlier case on cost capping and so on, but you will see at p.117 he imposed a limit of £15,000 and the costs schedule that we have passed up is largely academic, because it considerably exceeds the £15,000 recovering everything.

THE JUDGE: I see. It is the last line of (5) of his reasons.

MR GROUND: You are exactly right, my Lord.

THE JUDGE: And Mr Tafur, I suspect you cannot resist that.

MS TAFUR: My Lord, no. I do not resist the principle of the costs.

I do have an application to make in respect of permission to appeal. Firstly, my Lord, the absence of Mr Streeten today is intended as no it disrespect. He is tied up on an inquiry in South Oxfordshire this week, which is why I am attending on his behalf. I am in a slightly difficult position in terms of permission to appeal.

THE JUDGE: Ms Tafur, you are in a very difficult position.

MS TAFUR: Yes, my Lord.

THE JUDGE: I had this debate in another case in which I handed-down judgment last week. Let me summarise my perception of the position and then you can tell me what it is that you want to do.

MS TAFUR: Yes.

THE JUDGE: In dicta that are obiter not binding upon me, but I accept highly persuasive, Jackson LJ has indicated that the usual course is to seek in the first instance permission to appeal if sought from the local court. With the greatest of respect to the learned Lord Justice, the difficulty with that proposition is that particularly someone in your position, who did not act in the hearing and did not know what I was going to decide or what the reasons for my decision were going to be, cannot answer any of the four questions that, if you persist in your application, I will ask you to address, because if you do not address them, the answer has to be a resounding and immediate refusal.

Those questions are. What error of law do you submit I have been guilty of? Secondly, what relevant fact have I failed to take into account? Thirdly, what irrelevant fact have I based my decision upon? Fourthly, what is it about my decision that is perverse in the sense that no reasonable judge could have come to the decision? Unless you establish arguability to the relevant threshold of one of those four propositions, you cannot get off the starting line.

Contrary to the exhortation of Jackson LJ, it is not unfair in those circumstances, despite his preference from the elevated position of the appellate court, not to have to deal with permission applications. It is not unfair, because the losing party always has the opportunity to reflect on the judgment and consider its position and then formulate in a proper fashion what are the bases upon which permission to appeal is sought and put them in a N161 applying to the Appeal Court for permission. Therefore, whatever may be the pragmatic exhortations of Jackson LJ, there is in fact nothing procedurally or substantively prejudicing you in keeping your powder dry, letting Mr Streeten reflect on the judgment that I have given and for him to consider whether any grounds of appeal are sufficient for him to advise his clients to make an application by filing and serving form N161 in the Appeal Court.

MS TAFUR: My Lord, yes. I wonder if there is, potentially, a practical step that we could take to enable the Parish Council, if they are so advised, to have the opportunity to make the application to you and, if unsuccessful, then to the Court of Appeal, which would be to allow a short period of time, say until Monday, for the Parish counsel to submit in writing its application for permission to appeal to be considered by you, my Lord.

THE JUDGE: No, I cannot do it in writing, because they are entitled to be heard. On Monday I start sitting again in my home court in Exeter. Would Mr Streeten and Mr Ground like to attend me in Exeter on Monday or some other suitable time?

MS TAFUR: Certainly, my Lord, I cannot speak for Mr Ground's arguments.

MR GROUND: It would be a pleasure and delight, my Lord, but, unfortunately, I am on away and it has been booked for some time. I cannot. My family would be very disappointed.

THE JUDGE: But guidance is that the question should be made to the lower court and decided on the occasion at which the lower court makes its decision.

MS TAFUR: My Lord, yes.

THE JUDGE: The guidance in fact does not prevent, but it discourages the adjournment of applications for permission to appeal to yet further hearings. If you need time to reflect and consider, well, then reflect and consider before the appeal court when you make your application. How are you worse off by being made to do that?

MS TAFUR: My Lord, well, I understand that, generally speaking, the application is certainly made at the hand-down of judgment. Difficulties inevitably arise when there has not been an opportunity to consider the reasoning in advance. In circumstances, which you have indicated, that the Parish Council will have the opportunity to consider and reflect upon the judgment, I wonder then if I may crave your indulgence that the Parish Council should have 14 days from receipt of the transcript of your judgment within which to lodge an appeal to the Court of Appeal.

Plainly, I have done my best in taking a note of what you have said, as those behind me will have done, but it was at quite a pace and to allow for the Parish Council to properly reflect and formulate, as you said, their grounds, I wonder if that may be acceptable.

THE JUDGE: Mr Ground?

MR GROUND: My Lord, we do not want to stand in the way of being helpful to the claimant. The only difficult is that if you make it conditional on the transcript we do not know exactly when the transcript is available and we obviously have duties, or the applicant for planning permission has duties, in terms of the providing the school and do not want to see this delayed, it being a planning matter in which the courts have----

THE JUDGE: You are not likely to be breaking ground next week are you?

MR GROUND: No, my Lord. That is absolutely right.

THE JUDGE: What you want is finality.

MR GROUND: But the transcript can sometimes take several months to produce and then the normal time limits for appeal, I think, are three weeks in the case of ground three and I think they are shorter so far as permission is concerned, because I do not think you actually had, according to the JR guide, in terms of grounds one and two that had to go to the Court of Appeal any, I think, and you could not have dealt with any permission on it having been refused permission twice by the High Court. I think that is 25.3.1.

My Lord, all I seek is that the normal rules so far as time limits are concerned it being a planning.

THE JUDGE: You say I have no jurisdiction in relation to my decision under -- one.

MR GROUND: One and two.

THE JUDGE: To refuse permission. That has to go to the Appeal Court in any event.

MR GROUND: I think that is right.

THE JUDGE: So the application can only be in relation to ground three.

MR GROUND: Yes, my Lord. I think that is right. I do not know whether you have jurisdiction on time limits so far as the----

THE JUDGE: It is 52, is it not?

MR GROUND: Yes, it is 52. It is 52.8.1 so far as the permission hearing is concerned can, once permission has been refused, and 52.8.1 says "where permission to apply to JR has been refused at a hearing in the High Court..."

THE JUDGE: That is what excludes grounds one and two.

MR GROUND: Yes, my Lord.

THE JUDGE: Then so far as ground three is concerned, the application is for me to extend the time for appealing. Where is that provided for? 12, I think.

MR GROUND: My Lord, the normal rule is three weeks, 21 days.

MS TAFUR: 21 days from the decision.

THE JUDGE: Actually, there is a simpler and neater way through this. For the reason that Mr Ground correctly identifies, if and in so far as you wish to challenge my decision in relation to ground one and ground two, you are obliged to go to the Court of Appeal anyway and you have to do so within the relevant time. I have no jurisdiction whatsoever and, if that is true in relation to those two grounds, you are not suffering any prejudice by me not acceding to your application in relation to ground three. You take your chance in respect of the lot in front of the Court of Appeal judge.

MS TAFUR: No construction to hear the application for permission to appeal on grounds one and two.

THE JUDGE: No, not even to entertain the application.

MS TAFUR: No, to consider an application, any application for permission to appeal on grounds one and two has to go to the Court of Appeal.

THE JUDGE: And, by definition, any application for an extension of time within which to appeal must go to them as well. It cannot be for me, because, as the lower court, I have no power.

MS TAFUR: The difficulty that we find ourselves in, my Lord, is the absence of a transcript or a draft judgment.

THE JUDGE: Well, you will have to order one and pay for it promptly. You can make the relevant application to the transcribers today.

MS TAFUR: We can.

THE JUDGE: And you can ask for it to be expedited.

MS TAFUR: Yes.

THE JUDGE: It just costs money.

MS TAFUR: Yes. It is not an issue of money. It is the delay that it causes. My instructing solicitor was waiting, as I understand, over eight weeks for a copy of the transcript for a February hearing.

THE JUDGE: Well, I do not know what the circumstances of that were or who the judge was, but you will not wait eight weeks for me to approve a transcript of any judgment that is sent to me. It is rare in the extreme, unless I am actually away and, sadly, I have, but two days in May, no booked time away between now and the long vacation, rare in the extreme for me to take more than 24 hours to turn around a transcript for approval.

MS TAFUR: Well, my Lord----

THE JUDGE: Indeed, all judges should do that.

MS TAFUR: I am grateful for that indication, my Lord, and I know you will have in mind the interests of the Parish Council in properly considering and reflecting on the reasons that you expressed in your judgment in order to enable----

THE JUDGE: I think you have to put in your notice of appeal. You can reserve your position as to perfecting the grounds. You have a note of my reasons.

MS TAFUR: Yes.

THE JUDGE: Mr Streeten will be able to consider whether they appear to give rise to any basis for alleging complaint and, if he does so and can formulate them, he can apply on the N161 for time to perfect his grounds until after the provision of the approved judgment and there is a reasonable chance, I am not going to bind the Court of Appeal, but there is a reasonable chance that they will give him that time.

MS TAFUR: I am grateful, my Lord.

THE JUDGE: So I am not actually going to decide it unless you press me to and, as I say, can you tell me what my error of law is?

MS TAFUR: No, my Lord. I am not pressing you in the circumstances.

THE JUDGE: I think that is a wise decision, if I may say so, Ms Tafur. Have I pronounced your name correctly?

MS TAFUR: You have.

THE JUDGE: If I had not, no offence was intended. So, nothing further required. For the benefit of the associate, will you prepare a minute of order and submit it as a Word document? It should be a simple and short order, Mr Ground.

MR GROUND: Yes. My Lord, there is a standard amount of days for the costs provision. Is that 14 days? I will speak to the associate.

THE JUDGE: I would be happier if you were to do so. I think the order can simply recite that the sum is limited to the sum of the cap.

MR GROUND: It was just the time for payment. Is that 14 days?

THE JUDGE: It is normally 14, but if they want to apply for further time they can.

MR GROUND: My Lord, shall we just resolve that.

MS TAFUR: Could we discuss it between ourselves perhaps and include it in the order.

MR GROUND: Yes. We can but, my Lord, while you are here, can we just have an one minute discussion?

THE JUDGE: How long do you want?

MR GROUND: One minute maybe. (Pause)

My Lord, I do not think -- it might go to and fro. I just wondered if you would be able to order costs within 14 days. My learned friend is not able to take lay client instructions now.

THE JUDGE: Would you be prepared, voluntarily, in the absence of instructions from her, to grant the claimant a degree of further latitude?

MR GROUND: Yes, my Lord. 21 days? Very well.

THE JUDGE: If you need any more, talk to them.

MR GROUND: Good.

THE JUDGE: Not to me.

MR GROUND: Thank you, my Lord.

THE JUDGE: Thank you very much indeed.

I ought to say before I rise to you, Mr Ground, and also please send the message back to Mr Streeten, I did not do so formally in my judgment and I ought to have, thanked both of them for the quality of the oral and written submissions made in this case. Despite my observation about the volume of authority, which I think could have been more sparingly deployed, the principles that were being applied were analysed effectively in written and oral advocacy, which I found helpful and I am grateful to counsel for their efforts in this case.

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