Neutral Citation Number: [2022] EWHC 1547 (Admin)

Case No: CO/612/2020 & CO/1135/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2022

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

PIFFS ELM LIMITED	**Claimant / Interested Party**
- and -	
COMMISSION FOR LOCAL ADMINISTRATION IN ENGLAND	**Defendant**
- and –	
TEWKESBURY BOROUGH COUNCIL	**Claimant / Interested Party**

- -
- -

John Hunter (instructed by **Harrison Clark Rickerbys**) for the Claimant
Jason Coppel QC (instructed by **Bevan Brittan**) for the Defendant
James Pereira QC & Horatio Waller (instructed by **One Legal)** for the Interested Party

Hearing dates: 24 – 25 May 2022

- -

Approved Judgment

Mrs Justice Heather Williams:

Introduction

1. Two applications for judicial review are before me, both arising from decisions made by the Local Government and Social Care Ombudsman ("LGO") in relation to a complaint of maladministration made by Peter Cassidy and Jacqueline Cassidy on behalf of Piffs Elm Limited ("PEL") against Tewkesbury Borough Council ("TBC") acting in its capacity as a local planning authority. The complaint concerned TBC's refusal to refund a planning application fee ("the refund refusal") after deciding not to determine PEL's planning application pursuant to s.70A, Town and Country Planning Act 1990 ("the s.70A decision"). Section 70A empowers a local authority to decline to do so where more than one similar application has already been refused in the relevant period. In a final report issued on 22 August 2019 the LGO found that TBC was at fault because it did not consider exercising its discretion to return the fee and that this had caused injustice ("the August 2019 decision"). On 14 November 2019, the LGO withdrew the August 2019 decision and re-opened his investigation ("the November 2019 decision"). On 2 February 2021, the LGO issued a further final report now finding that TBC was not at fault ("the February 2021 decision").

2. In claim CO/612/2020 PEL challenges all three of the LGO's decisions. In claim CO/1135/2020 TBC challenges the August 2019 decision in so far as it was not lawfully withdrawn and remains the operative decision.

3. At the time when CO/612/2020 was issued, PEL challenged the August 2019 decision and the November 2019 decision. The LGO's re-investigation had not been completed at that stage. On 4 December 2020 Pepperall J granted permission in respect of two of the grounds that PEL relied upon, namely grounds one and four. He also granted TBC permission in proceedings CO/1135/2020 in respect of its three grounds of challenge to the August 2019 decision and an extension of time for bringing the proceedings. Both claims were then stayed pending the LGO's publication of its further final report. The parties were given permission to file amended pleadings after receipt of the report and all parties duly did so.

4. On 9 August 2021 Jacobs J granted PEL permission to challenge the February 2021 decision on two of its additional proposed grounds, namely grounds one and three. He refused permission in respect of additional ground four (which has not been pursued thereafter) and he ordered a 'rolled up' hearing in respect of additional ground two. He lifted the stay and directed that the two cases be heard together. At the outset of the hearing I indicated that I would hear full argument on ground two on a provisional basis, deferring consideration of whether to grant permission in respect of it until my reserved judgment.

5. Accordingly, as formulated in PEL's Amended Statement of Facts and Grounds ("PEL's ASFG") and TBC's Statement of Facts and Grounds ("TBC's SFG") the issues before me are as follows:

<u>August 2019 decision</u>

i) Did the LGO err in law in concluding that TBC had a discretion to refund the planning fee and in consequently finding maladministration (TBC's Ground 1);

ii) Alternatively if the LGO was correct to find there was a discretion to refund the planning fee, was his conclusion that TBC acted maladministratively irrational, flawed by a failure to take into account relevant considerations and/or inadequately reasoned (TBC's Ground 2);

iii) In any event, if there was a discretion to refund the planning fee, would it have been *Wednesbury* unreasonable for TBC to have refunded the fee in the present case (TBC's Ground 3);

iv) Did the LGO err in concluding that he lacked jurisdiction to determine the part of the complaint relating to the s.70A decision (PEL's original Ground 4);

November 2019 decision

v) Did the LGO have the power to withdraw the August 2019 decision, re-open the investigation and issue a new report (PEL's original Ground 1: "the Withdrawal Ground");

February 2021 decision

vi) Did the LGO err in law in refusing to consider TBC's actions "in the context of the judicial review, and any previous planning applications" when determining whether there was any fault resulting in injustice in its refusal to return the third planning application fee; and/or did he fail to give adequate reasons for this conclusion (PEL's additional Ground 1: "the Context Ground"). (The reference to a judicial review is to PEL's challenge to TBC's refusal of its second planning application);

vii) Did the LGO err in concluding that he lacked jurisdiction to determine the part of the complaint relating to the s.70A decision (PEL's additional Ground 2: "the s.70A Ground");

viii) If I accept that the contention is arguable, did the LGO err in law in concluding that there was no fault resulting in injustice in TBC's refusal to return the third application fee because there was a "respectable legal argument" that it had no power to do so; and/or did he fail to give adequate reasons for this conclusion (PEL's additional Ground 2: "the Fault Ground")?

6. When addressing these issues, it is logical to first consider the Withdrawal Ground, since if the LGO lawfully withdrew the August 2019 decision, that decision no longer has any effect and the focus must then be on the grounds of challenge to the February 2021 decision. There is no direct authority on whether, and if so, in what circumstances the LGO has power to re-open an investigation after issuing a final report and this issue loomed large in the submissions made to me. When I address the February 2021 decision, I will first consider the Context Ground and the s.70A Ground, as they both relate to the LGO's decision as to the scope of his investigation; and then I will consider the Fault Ground, which concerns the LGO's substantive conclusion. Before addressing any of the grounds I will explain the relevant legal framework in relation to the LGO and then set out the material facts and circumstances.

The Local Government Ombudsman: the legal framework

The statutory provisions

7. The LGO was created by Part III, Local Government Act 1974 ("LGA 1974"). The LGO's power to investigate is found in s.24A. This section was added by the Local Government and Public Involvement in Health Act 2007, which repealed the previous provision relating to investigations, s.26(10). As relevant, s.24A provides:

> "(1) Under this Part of the Act, a Local Commissioner may investigate a matter-
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> (a) which relates to action taken by or on behalf of the authority to which this Part of this Act applies,
>
> (b) which is subject to investigation under this Part of this Act by virtue of section 26, and
>
> (c) in relation to which subsection (2), (3) or (5) is satisfied.
>
> (2) This subsection is satisfied if, in relation to the matter, a complaint which satisfies sections 26A and 26B has been made to a Local Commissioner.
>
> …..
>
> (6) In determining whether to initiate, continue or discontinue an investigation, a Local Commissioner shall, subject to the provisions of this section and sections 26 to 26D, act in accordance with his own discretion.
>
> (7) Without prejudice to the discretion conferred by subsection (6), a Local Commissioner may in particular decide-
>
> (a) not to investigate a matter, or
>
> (b) to discontinue an investigation of a matter
>
> if he is satisfied with action which the authority concerned have taken or propose to take. "

8. Section 26A is satisfied where (amongst other circumstances) a complaint is made by a member of the public who claims to have sustained injustice in consequence of the matter. A "member of the public" can include an incorporated body: s.27(1). Section 26B requires the complaint to be made in writing within the prescribed period.

9. Section 26 LGA 1974 is headed "Matters subject to investigation". As relevant it provides:

> "(1) For the purposes of section 24A(1)(b), in relation to an authority to which this Part of this Act applies, the following matters are subject to investigation by a Local Commissioner under this Part of this Act-

> (a) alleged or apparent maladministration in connection with the exercise of the authority's administrative functions;
>
> …..
>
> (6) A Local Commissioner shall not conduct an investigation under this Part of this Act in respect of any of the following matters, that is to say-
>
> …..
>
> (c) any action in respect of which the person affected has or had a remedy by way of proceedings in any court of law;
>
> Provided that a Local Commissioner may conduct an investigation notwithstanding the existence of such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect the person affected to resort or have resorted to it."

10. Section 28(2) LGA 1974 provides that save for the fact that it shall be conducted in private, the procedure for conducting an investigation "shall be such as the Local Commissioner considers appropriate in the circumstances of the case". Section 28(4) states that the conduct of an investigation "shall not affect any action taken by the authority concerned or any other person or any power or duty of the authority concerned or any other person to take further action with respect to any matters subject to the investigation".

11. Section 30 addresses the LGO's report. As relevant, it provides:

> "(1) If a Local Commissioner completes an investigation of a matter under this Part of this Act, he shall prepare a report of the results of the investigation and send a copy to each of the persons concerned (subject to subsection (1B)).
>
> (1A) A Local Commissioner may include in a report on a matter under subsection (1) any recommendations that he could include in a further report on the matter by virtue of section 31(2A) or (2BA).
>
> (1B) If, after the investigation of the matter is completed, the Local Commissioner decides-
>
> (a) that he is satisfied with action which the authority concerned have taken or purpose to take, and
>
> (b) that it is not appropriate to prepare and send a copy of a report under subsection (1),
>
> he may instead prepare a statement of his reasons for the decision and send a copy to each of the persons concerned.
>
> (1C) If a Local Commissioner decides-

> (a) not to investigate a matter, or
>
> (b) to discontinue an investigation of a matter,
>
> he shall prepare a statement of his reasons for the decision and send a copy to each of the persons concerned."

12. Pursuant to subsection (1), s.31 LGA 1974 applies where the LGO reports that (amongst other things) there has been maladministration. Subsection (2) states that the report shall be laid before the authority concerned, who must within three months from its receipt (or longer, if agreed) notify the LGO of the action which it has taken or proposes to take. Subsection (3) provides that if such notification is not received or the LGO is not satisfied with the action which the authority has taken or proposes to take, he/she "shall make a further report setting out those facts and making recommendations". Where the report relates to maladministration, those recommendations are in respect of action which the LGO considers the authority should take "to remedy injustice sustained by the person affected in consequence of the maladministration" and to prevent injustice being caused in the future in consequence of similar maladministration by the authority: s.31(2B). The provisions of s.30 and s.31(2) apply, with any necessary modifications to this further report. If the LGO is not satisfied with the action the authority proposes to take in response to the further report or the authority does not respond within the prescribed period, subsection 2D provides that he/she may require the authority to arrange for a statement to be published in accordance with subsections 2E and 2F.

The case law

13. The statutory provisions confer a very wide discretion on the LGO to decide what complaints he/she should or should not investigate and whether or not to continue or discontinue any such investigation, subject, to review by this Court on the usual public law grounds: *R (M) v The Commissioner for Local Administration in England* [2006] EWHC 2847 (Admin) ("*M v LGO*"), para 20 per Collins J.

14. Maladministration is not defined in the LGA 1974. The phrase also appears in the legislation creating the Parliamentary Ombudsman, the Parliamentary Commissioner Act 1967 ("PCA 1967"). Its meaning has been considered in a number of cases. In *R (Rapp) v The Parliamentary and Health Service Ombudsman* [2015] EWHC 1344 (Admin) ("*Rapp*") Andrews J (as she then was) summarised the position as follows at para 37:

> "It will cover 'bias, neglect, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on'. The list is open-ended, but the type of behaviour that qualifies concerns the manner in which a decision is reached or a discretion is exercised, rather than the merits of that decision or of the discretion itself: *R v Local Commissioner ex p. Liverpool CC* [2001] 1 All ER 262 per Henry LJ at [3], adopting a passage in the judgment of Lord Denning MR in *R v Local Commissioner for Administration for the North and East Area of England ex p. Bradford Metropolitan CC* [1979] QC 287 at 311-312."

15. Having reviewed a number of cases which considered the nature and ambit of the role of the Ombudsman, Andrews J extracted the following general propositions at para 38 of *Rapp*:

> "i) The Ombudsman has no duty to determine questions of law. He/she is not acting as a surrogate of the court in determining whether there has been unlawful conduct, but rather, investigating a complaint of maladministration under the powers conferred on him/her by statute.
>
> ii) Maladministration is a different concept from unlawfulness; consequently in determining whether the conduct complained of amounted to maladministration, the Ombudsman is not constrained by legal principles which would apply if they were determining whether that conduct was unlawful.
>
> iii) Unlawfulness is neither a precondition of, nor concomitant to a finding of maladministration; there may be maladministration without unlawfulness, and vice versa.
>
> iv) Even if, with the benefit of hindsight, it may seem obvious that the public body got something wrong, the Ombudsman must look at the question of maladministration on the basis of the information that the public body had at the relevant time, and not with the benefit of hindsight.
>
> v) It is for the Ombudsman to decide and explain what standards he or she is going to apply in determining whether there was maladministration, where there was a failure to adhere to that standard, and what the consequences are; that standard will not be interfered with by a court unless it reflects an unreasonable approach.
>
> vi) However the court *will* interfere if the Ombudsman fails to apply the standard that they say they are applying;
>
> vii) The question whether any given set of facts amounts to maladministration or causes injustice to a complainant is a matter for the Ombudsman alone. Whatever it may think about the conclusion reached, and even if it fundamentally disagrees that that conclusion, the Court may not usurp the statutory function of the Ombudsman. It can only interfere if the decision reached was irrational.

> viii) An Ombudsman's report should be read fairly, as a whole, and should not be subject to a hypercritical analysis nor construed as if it were a statute or a contract." (Emphasis in original text.)

16. It is not necessarily maladministration for a decision-maker to take a wrong view of the law. In *Westminster City Council v Haywood* [1996] 3 WLR 563 at 578A & F, Robert Walker J held that the Pensions Ombudsman had erred in assuming that any mistake by a local authority as to the scope of its statutory powers was necessarily maladministration. In *Rapp* at para 39 Andrews J observed that "even if what the relevant public body…did or said turns out in hindsight to have been based on a misunderstanding of the law, it will not necessarily lead to a finding of maladministration…especially if the legal issue is not entirely straightforward and the mistake was an understandable one for a layman to have made".

17. Authorities have also emphasised the informal nature of the process. For example, in *R (Miller) v Health Service Commissioner of England* [2018] EWCA Civ 144; [2018] PTSR 801 ("*Miller*"), Ryder LJ said at para 55:

> "…it is important that this court does not import into the informal, non-judicial process of administrative and complaints adjudicators like the ombudsman the procedures of courts and tribunals. The adjudication process is an informal resolution of a complaint or problem where other remedies are not reasonably available or appropriate. The procedure is a matter entirely within the gift of the ombudsman provided that her decision making process is lawful, rational and reasonable."

18. In *R v Parliamentary Commissioner for Administration ex p. Balchin* [1998] 1 PLR 1 ("*Balchin*") at p.11 Sedley J (as he then was) considered the meaning of "injustice" (which is also not defined in the legislation). He cited a passage from de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed), para 1-102:

> "'Injustice' has been widely interpreted so as to cover not merely injury redressible in a court of law, but also 'the sense of outrage aroused by unfair or incompetent administration, even where the complainant has suffered no actual loss' (citing Mr RHS Crossman, speaking as Leader of the House of Commons)."

He said it followed "that the defence familiar in legal proceedings, that because the outcome would have been same in any event there has been no redressible wrong, does not run in an investigation by the commissioner".

19. I have already set out the material parts of s.26(6) LGA 1974. The operation of this provision was considered by Woolf LJ in *R v Commissioner for Local Administration ex p. Croydon London Borough Council* [1989] 1 All ER 1033 ("*Croydon*"). At that time, the LGO's power to initiate, continue or discontinue an investigation was contained in s.26(10). At 1044f, Woolf LJ explained that the LGO did not have to conclude that legal proceedings would succeed for s.26(6) to apply; he merely had to be satisfied that the Court of law was the appropriate forum for investigating the subject matter of the complaint. From 1044g – 1045c he examined whether s.26(6) was a

threshold requirement or one that could apply at any stage of the investigation and discussed the interface between the Court's role and the LGO's role. He said:

> "Counsel for the commissioner submits that it only applies at the stage when the commissioner is deciding whether or not to conduct an investigation and once he has embarked on an investigation it has no application. On balance I agree that s 26(6) is directed to the threshold requirement. However, I do not regard this as being significant, because the commissioner has a continuing discretion not to continue, and to discontinue an investigation. Therefore, even if s 26(6) does not expressly deal with the subsequent stages after the commencement of an investigation, in exercising his discretion under s 26(10) whether to discontinue an investigation the commissioner should approach the matter very much in the same way as he would if s 26(6) did apply. If it becomes apparent during the course of an investigation that the issues being investigated are appropriate to be resolved in a court of law, then giving effect to the general intent of s 26, the commissioner is required to consider whether, notwithstanding this, it is appropriate to continue with the investigation broadly on the lines indicated in the proviso to s 26(6). When performing this exercise the extent to which the investigation has proceeded is a relevant consideration for the commissioner to take into account in deciding whether or not to discontinue the investigation.
>
> Section 26(6) makes it clear that where there is a remedy in the sense which I have indicated, inter alia, in a court of law, the courts do not have sole jurisdiction and the commissioner may still intervene. On the other hand the general tenor of s 26(6) is that, if there is a tribunal…which is specifically designed to deal with the issue, that is the body to whom the complainant should normally resort.
>
> I suggest this approach is particularly important in the case of issues which are capable of being resolved on judicial review…
>
> …Issues whether an administrative tribunal has properly understood the relevant law and the legal obligations which it is under when conducting an inquiry are more appropriate for resolution by the High Court than by a commissioner, however eminent." (Emphasis added.)

20. Lord Justice Woolf's observations were cited by Beatson J (as he then was) in *R (Umo) v Commissioner for Local Administration in England* [2003] EWHC 3202 (Admin) at paras 10 – 11, where he emphasised that s.26(6) was applicable when there was a *potential* remedy by way of judicial review; it was not necessary that the person in question had actually commenced such proceedings.

21. No other authority was cited to me in relation to the point in time at which s.26(6) can apply. Whilst Counsel were not agreed on this, it appears to me in light of the statutory wording and Woolf LJ's analysis that the relevant position is as follows:

    i) Section 26(6)(c) contains a jurisdictional bar to the LGO conducting an investigation into any action where the person has a remedy by way of legal proceedings, save where he/she is satisfied that it is not reasonable to expect that person to resort to or to have resorted to that remedy (so that the proviso to s.26(6) applies);

    ii) Once an investigation has commenced, s.26(6) does not itself apply, but if it becomes apparent that the issues under investigation could be resolved in a Court of law, the LGO is required to exercise his general discretion to continue or discontinue an investigation (now conferred by s.24A(6)) in a way that reflects the terms and intent of s.26(6);

    iii) Although the existence of a legal remedy is not a complete bar to the LGO investigating a matter, the general thrust of s.26(6) is that questions which can be resolved on an application for judicial review will be more appropriately considered by this Court; and

    iv) Where a LGO conducts an investigation in circumstances where he/she had no jurisdiction to do so because of a statutory prohibition, that investigation would be ultra vires, as discussed by Collins J in *M v LGO*, at paras 35 - 38 (in relation to whether the investigation in that case offended the prohibition in s.26(8) LGA 1974 read with Sch. 5 para 5(2)). However, where the continuation / discontinuation of an investigation is for the LGO's discretion, the Courts will only interfere with that exercise of discretion on conventional public law grounds.

22. The Courts have noted the utility of the practice of the LGO and other Ombudsmen of inviting comments on their draft report from the authority and the aggrieved person before the decision is issued: *Miller* at para 53.

The material facts and circumstances

The applications for planning permission and the refund refusal

23. On 16 February 2016, TBC refused PEL's October 2015 application for planning permission in respect of an industrial development on land at Tewkesbury Road, Elmstone Hardwicke. On 18 May 2016, TBC refused PEL's second, similar planning application. PEL issued judicial review proceedings in respect of the second refusal on the basis that the planning officer who had prepared the report for TBC opposing the application (Joan Desmond) was married to an employee of a rival developer. In due course, the judicial review application was listed for a 'rolled up' hearing on 4 November 2016.

24. In the interim PEL made a third application for planning permission in relation to the same land and requested a waiver of the application fee. By emailed letter sent on 27 May 2016, Paul Skelton, Development Manager at TBC, responded that he did not consider there was any justification for waiving of the fee. He also drew attention to

s.70A Town and Country Planning Act ("TCPA 1990") , saying that it appeared this provision would be engaged if submission of the application was completed by payment of the fee and he suggested that PEL might want to consider its position. PEL proceeded to pay the fee of £41,244. According to a subsequent letter dated 25 June 2019 from TBC to the LGO, a representative of TBC telephoned the planning agent after the fee was received to confirm that if TBC proceeded to validate the application, any decision not to determine it would result in the fee being forfeited.

25. On 14 July 2016 TBC conveyed the s.70A decision to PEL; the Council declined to determine the planning application on the basis that more than one similar application had been refused and there had been no appeal to the Secretary of State against those refusals. As material, s.70A TCPA 1990 provides:

> "(1) A local planning authority may decline to determine a relevant application if-
>
> (a) any of the conditions in subsections (2) to (4) are satisfied, and
>
> (b) the authority think there has been no significant change in the relevant considerations since the relevant event.
>
> …..
>
> (4) The condition is that-
>
> (a) in that period the local planning authority have refused more than one similar application, and
>
> (b) there has been no appeal to the Secretary of State against any such refusal or, if there has been such an appeal, it has been withdrawn."

26. PEL did not apply to judicially review the s.70A decision. On 4 November 2016, the judicial review challenge to the second planning decision was heard and determined by HHJ Jarman QC, sitting as a High Court Judge ("the Jarman Judgment"). He found that the circumstances gave rise to an appearance of bias. Nonetheless, he declined to grant any relief to PEL as there was an available alternative remedy, namely an appeal to the Secretary of State for which the time limit had not expired.

27. On 24 November 2016 TBC conveyed the refund refusal.

The complaint to TBC

28. In December 2016 PEL formally complained to TBC about the refund refusal, utilising Stage 1 of the Council's complaint scheme. The complaint was rejected in an emailed letter from Mr Skelton dated 11 January 2017. It is necessary for me to set out a part of this letter:

> "The complaint refers to the outcome of the Judicial Review proceedings in respect of the second application which were

> opposed by the Council as it did not consider the allocation of the application to Ms Desmond gave rise to any actual or perceived bias. The Council's procedures were followed in that it was not an application in which it was considered that Ms Desmond had any conflict of interest. Judge Jarman did consider that the decision was tainted by apparent bias. The Council does not agree with the Judge's analysis of the facts. Nevertheless, he found that there had been no abuse of power and refused to grant the relief sought. Further, the Judge identified that there was a suitable alternative remedy. Despite being professionally represented, no planning appeal was submitted.
>
> The Council did comply with its procedures in that the application was not one in which the Case Officers was considered to have any conflict of interest; the decision was taken by the Planning Committee. The procedure followed and the decision of the Council were both capable of challenge within the statutory time limit. The fee was payable in order to be validated and you were advised of the risks in respect of both the decision and the fee, before the application was validated by the Council. In conclusion, the position is that the fee will not be repaid."

29. Counsel were not agreed as to the way this should be interpreted, in terms of the reason/s given for refusing to repay the fee. It appears to me that a number of reasons were given. In particular, it was noted that HHJ Jarman had declined the relief sought by PEL as an alternative remedy was available, which in the event had not been pursued; that the s.70A decision had not been the subject of a legal challenge; and PEL had been warned before the application was validated of the likely position regarding the fee. Whilst reference was made to TBC not agreeing with HHJ Jarman's analysis of the facts, this appears to me to have been included more by way of narrative comment, than as an assertion that the fee would not be returned because TBC thought the Judge's conclusion was wrong.

30. PEL escalated the matter to Stage 2 of the complaints process by a letter dated 12 January 2017. The complaint was rejected by TBC in a letter emailed on 17 March 2017, which said that there was no justification for the reimbursement of the submitted fee. The letter noted that PEL had not appealed to the Secretary of State in respect of the rejection of the first and second planning applications; had not applied to judicially review the s.70A decision; and had chosen to pursue the third planning application after being advised by TBC of the possibility of a s.70A determination and retention of the fee. Thus the reasons given at this stage were consistent with my interpretation of the reasons given in the Stage 1 response. The letter advised that this was the last stage of the complaints process, but that PEL could contact the LGO.

The complaint to the LGO

31. On 2 June 2017 PEL's complaint of maladministration was submitted to the LGO by its solicitors. The document said that there was no alternative remedy in respect of the s.70A decision or the refusal to refund the planning fee other than judicial review and such an application had not been made (para 1.4). The decision to retain the £41,244

sum was described as "Wednesbury unreasonable in itself" and the form continued that it was "made even more objectionable by reference to the individual circumstances of this case" (para 1.5). The decisions on the three planning applications were referred to, including that the High Court had ruled that TBC's determination of the second planning application was unlawful. The document continued in para 1.9 that:

> "The reason the Court judgment in relation to the Second Application is relevant to this complaint is that the decision to decline to determine the Planning Application and the decision to refuse to return the Planning Application Fee are based on planning permission having 'been refused for more than one similar application in the last two years', whereas in fact, one of those refusals has been held to be unlawful."

32. The complaint continued that "the Council's decision to decline to determine the Planning Application was Wednesbury unreasonable" as PEL had drawn TBC's attention to the concerns that were subsequently upheld by the High Court (para 1.10). Reference was then made to TBC's continuing refusal to refund the fee and to the contents of its Stage 1 response which was said to contain "a clear misinterpretation" of the Jarman judgment so that the refund refusal was "fundamentally flawed" (paras 1.12 – 1.13) and that TBC's refusal to accept the Judge's criticisms was itself indicative of serious maladministration (para 1.15).

33. At this stage, it was clear that the complaint related to *both* the s.70A decision and the refund refusal; this was said in terms at para 1.16 of the document.

34. In the section of the complaint form headed "How has this affected you?" reference was made to the financial loss of the planning application fee and to related consultants' fees and legal fees. An additional award was requested to compensate PEL for "the time, trouble and costs incurred, and also distress".

35. The LGO was furnished with a response to the complaint from TBC dated 6 November 2017. It was pointed out that the complainant had an alternative remedy by way of judicial review and the letter also disputed that the Council had any discretion to refund the fee.

The first – fifth draft reports

36. Before issuing the first of the final reports in August 2019 the LGO issued five draft reports upon which PEL and TBC were given an opportunity to comment. I was told by Counsel that it was very unusual for so many draft reports to be issued. Each draft report triggered a critical response from one or both of the recipients' legal teams and, on occasions, threats to apply for judicial review. In light of the grounds of challenge raised in these proceedings it is necessary to trace the development of certain strands in the LGO's thinking and also of the clarification that PEL's solicitors provided as to the scope of the complaint.

37. The first draft decision was issued on 26 January 2018. This and subsequent reports described the complainants as "Mr and Mrs Y". This was a reference to Mr and Mrs Cassidy; although it appears that both the planning applications and the complaint were made in the name of their company, PEL (and these proceedings have been brought in

PEL's name). The LGO indicated that he proposed to discontinue his investigation "as Mr and Mrs Y had alternative remedies through the Planning Inspectorate and the Courts which were reasonable for them to pursue due to the issues of law involved". It is apparent from para 24 of the document that the LGO regarded this as an exercise of his powers under s.24A(6), LGA 1974. The draft report characterised the complaint as relating to both the s.70A decision and the refund refusal (para 1). The "key question" was said to be whether the first and second planning application refusals were null and void following the Jarman Judgment and that it was "outside of the Ombudsman's remit to make a finding on this point. This case involves difficult and contentious legal issues" (paras 21 and 24). The LGO went on to say that he considered it appropriate and reasonable for Mr and Mrs Y to have these matters resolved by the courts.

38. Importantly after receiving this draft, PEL's solicitors wrote to the LGO narrowing the basis of the complaint from the way it had been described in the complaint form. Their emailed letter of 2 May 2018 said that the LGO did not need to consider whether the first and second planning refusals were null and void. It continued:

> "The complaint simply relates to whether it was unreasonable of the Council to refuse to refund our client's planning application fee following the Court judgment. The complaint therefore relates to the Council's actions after the Court judgment was issued – i.e. in refusing to refund the planning application fee despite the Council knowing at that stage that a High Court Judge considered their errors during the previous application process to be unlawful.
>
> Whether the Court judgment that the Council acted unlawfully in the way it determined the previous planning applications means the planning refusals are 'null and void' is not actually relevant. It would be relevant if our clients were claiming that the Council acted unlawfully in declining to determine the third planning application. This is not, however, the basis of our client's complaint – the complaint relates to the refusal to return the planning application fee." (Emphasis in original.)

39. Accordingly, at this stage, PEL's solicitors indicated without qualification that the complaint did not include the s.70A decision and that it was not being suggested that the s.70A decision was unlawful in light of the Jarman Judgment. However, the outcome of the judicial review was said to be relevant in that TBC was at fault in refusing the refund after receiving that judgment.

40. This communication was plainly the trigger for the LGO's change of position in the second draft report issued on 9 May 2018. The LGO now said that he would investigate the refund refusal because it was "not inextricably linked to its refusal to determine the planning application. The two alleged failures are not intertwined: the Council's decision to keep the fee is independent, rather than a result of, its refusal to determine the planning application" (para 21). The LGO said he had determined that it would not be reasonable for Mr and Mrs Y to pursue an alternative legal remedy for this part of their complaint because the failure to return the planning fee was a question of compliance with planning guidance, rather than a strict question of law (para 22). The LGO said that TBC was at fault in retaining the fee and that this was contrary to the

implicit requirements of the statutory government guidance (para 29). He considered that the fee should be refunded with an apology (para 30).

41. In this and subsequent iterations of the draft report the LGO maintained his decision not to investigate the s.70A decision. In this draft report (only) he said he was exercising his powers under s.26(6)(c) to discontinue that aspect of his investigation (para 33). He said this was because "to determine this issue, there would need to be a judicial decision on the legality of the Council's previous planning decisions" and that this could not be provided by the Ombudsman.

42. By the next iteration of his report, the third draft report issued on 5 September 2018, the LGO was persuaded by further representations from TBC that he could not disentangle matters in the way he had indicated in his second draft report and accordingly he proposed to discontinue the entire investigation. He said this was because in considering its discretion to refund the fee, TBC would need to consider the significance of the two previous planning decisions and Mr and Mrs Y's challenge to the reasonableness of TBC's decision was largely based on the findings made in the judicial review. Accordingly, the LGO would need to decide upon the status of the earlier planning decisions and "we cannot determine the legal status of the planning decisions" (paras 24 and 25). The LGO concluded that he intended to exercise his general discretion under s.24A(6) LGA 1974 to discontinue the investigation.

43. With a view to persuading the LGO that the matters were not inextricably linked and that he should proceed with the investigation into the refund refusal, PEL's solicitors gave further clarification as to the way the complaint was put in letters to the LGO dated 28 September and 3 December 2018. The first of these letters emphasised that the complaint was about the refund refusal and not any of the decisions made on the three planning applications. It said that the grounds of complaint did not depend upon any finding that TBC had acted unlawfully or unreasonably in making the s.70A decision, but "it was nevertheless unreasonable for it subsequently to decline to return the fee after the High Court judgment" when it had thereby been made aware that at least one of the previous planning applications "had not been fairly dealt with". The second letter summarised the scope of the complaint as follows:

> "The complaint is about the decision to refuse to return the planning application fee, not the decisions made on any of the three planning applications.
>
> The sole question for consideration by the Ombudsman is whether it was reasonable for the Council to refuse to refund the planning application fees, given the Court's findings."

44. In the fourth draft report issued on 14 February 2019, the LGO drew a distinction which he was to maintain into the August 2019 decision between what he characterised as TBC's failure to consider exercising its discretion to refund the fee, which he did investigate, and the other matters that had been raised. He drew this distinction on the basis that following the third draft report "the complainants have since re-confirmed the scope of their complaint…The Ombudsman is now only investigating the administrative actions of the Council in relation to the retention of the third planning application fee. We have not investigated the Council's actions in the context of the first and second planning applications" (para 22). This position was reaffirmed in para

31 where the LGO said that the refund refusal had been considered "as a standalone administrative action. We have not reached a view on the reasonableness of the Council's actions in the context of the first two planning applications because our jurisdiction prevents us from determining the legal status of those applications". This draft report did not make explicit reference to either s.24A(6) or s.26(6)(c). The LGO indicated that his provisional view was that TBC had a discretion to refund the planning application fee which they had not considered exercising in this case (paras 23 – 26).

45. In its response dated 6 March 2019, TBC continued to maintain that it had no discretion to refund the fee, referring to an advice from Mr Pereira QC dated 30 May 2018 which TBC had earlier submitted. As regards the proposition that it had not considered refunding the fee, the letter said that this had been considered prior to its receipt:

> "Whilst the Ombudsman is right to say that the Council did not consider exercising its discretion to refund the fee after the application was submitted, it was requested to consider waiving those fees before the application was submitted and it did consider whether there was a justification to do so…
>
> Without prejudice to whether, on analysis, there was such a power to waive fees…this discretion was exercised against the complainants, who were told there was no justification to waive fees. In these circumstances (a) it would have been entirely lawful and not maladministrative not to consider refunding fees after the submission of the application, and (b) there is no conceivable basis on which the Council, having decided not to waive the fees pre-application, should nevertheless decide to refund the fees post-application."

46. The fifth draft report was issued on 5 June 2019. It was in materially the same terms as the fourth draft report.

The August 2019 decision

47. The August 2019 final report, dated 22 August 2019, found that TBC was at fault because it did not consider exercising a discretion to refund the planning application fee and that this had caused injustice. The core reasoning on this point was between paras 31 – 40. The LGO found that there was a discretion open to the Council to consider making a refund and TBC was at fault in failing to consider exercising that discretion in this case, as the Council had confirmed that it did not give any thought to doing so (and the 6 March 2019 letter which I have just quoted was cited in this regard). The LGO said he disagreed with TBC's position that it had no discretion. If that were the position, he would have expected to see it made clear in the legislation and he was aware of two cases where councils had made refunds: *R (Harrison) v Richmond upon Thames* [2013] EWHC 1677 ("*Harrison*") and *R (O'Brien) v South Cambridgeshire District Council* [2016] EWHC 36 ("*O'Brien*").

48. The LGO found that the fault had caused injustice because there was uncertainty as to whether Mr and Mrs Y would have received a refund if TBC had considered its discretion. In the "Recommendations" section, the LGO said that within four weeks TBC should review the case, consider whether it intended to exercise its discretion to

refund the planning application fee and confirm within three months the action that it had taken or proposed to take.

49. The complaint, as described in para 1 of the report, was that the refund refusal was unreasonable given the Court's findings about the previous planning applications. In para 2, the LGO said that the reasonableness of the Council's actions had not been investigated in the context of the judicial review or the previous planning applications. He explained that he had previously proposed not to investigate because he considered the complaint about the refusal to refund the fee was "inextricably linked" to the status of the two previous planning decisions "a matter which we cannot determine", but that the complainants had re-confirmed the scope of the complainant and "[w]e are now only investigating the administrative actions of the Council in relation to the retention of the third planning application fee. We have not investigated the Council's actions in the context of the first and second planning applications" (paras 29 and 30). Under the heading "Parts of the complaint that we did not investigate" para 45 was in the same terms as para 31 in the fourth draft report (para 44 above). These passages did not identify the statutory provision that the LGO considered he was applying in determining the scope of his investigation. In an earlier part of the report summarising "The Ombudsman's role and powers" reference was made to s.24A(6) LGA 1974 when explaining that the LGO "may decide not to start or continue with an investigation if we think the issues could reasonably be, or have been, raised with a court of law" (para 5). No specific reference was made to s.26(6).

50. Whilst this position was not made as clear as it could have been by the LGO, it appears to me that the LGO's reasoning as to the scope of his investigation was based on a perceived exercise of his s.24A(6) discretion, rather than an application of s.26(6)(c). The only iteration that referred to s.26(6) was the second draft report; and the August 2019 decision referred to the s.24A(6) power in terms that were consistent with the decision as to scope that the document went on to explain. The LGO appears to have concluded that part of the complaint could be investigated as a standalone complaint about administrative action, whereas part of it should not be investigated because it entailed resolution of legal issues that should be addressed by the Courts.

The November 2019 decision

51. TBC sent a pre-action protocol letter dated 28 October 2019 threatening judicial review of the LGO's August 2019 decision. It was said that his decision was legally flawed as TBC had no power to refund the planning application fee, or, if there was such a power, the position was sufficiently uncertain that the refusal to do so was incapable of amounting to maladministration.

52. After taking legal advice, the LGO considered that the August 2019 decision was legally flawed. In letters dated 14 November 2019 to PEL and to TBC respectively, the LGO indicated that he intended to re-open the investigation, withdraw the final report and issue a further report. By letter dated 19 December 2019 PEL disputed that the LGO had the power to do so. In a reply dated 16 January 2020, the LGO said that he had made this decision in view of the matters raised in TBC's letter before claim and after taking legal advice. The letter said that as the LGO considered that a public law error had been made in the August 2019 decision, the correct course was for him to revisit his decision and that this approach was rooted in public law principles as a matter of good administration and fairness.

The sixth draft report and the commencement of proceedings

53. On 17 January 2020, the LGO issued a further draft report ("the sixth draft report") indicating a provisional finding that TBC had not acted with fault. The document said that the LGO considered he could not make a finding of fault as independent legal advice supported TBC's view that there were respectable arguments for saying it did not have a discretion to refund the planning application fee (paras 36 -39). The LGO also said that he "could not determine legal matters and there is no good reason why the complainants cannot take the matter to court for a definitive determination" (para 39). As regards the scope of the complaint, the stated position was as set out in the August 2019 decision.

54. By letter dated 20 February 2020, the LGO responded to a pre-action protocol letter from PEL dated 6 February 2020. The LGO maintained that he had power to withdraw the August 2019 decision and re-investigate. The claim in CO/612/2020 was filed by PEL on 14 February 2020. It was contested by the LGO in his Summary Grounds of Resistance. The claim in CO/1135/2020 was filed by TBC on 13 March 2020. The LGO did not contest TBC's challenge to the August 2019 decision; and his position is that he consents to judgment on that claim if the August 2019 decision remains the operative decision. However, the LGO did not suggest that there were *additional* reasons why the August 2019 decision was legally flawed. As an Interested Party in CO/1135/2020, PEL did dispute TBC's challenge to the August 2019 decision, contending that it was lawful as far as it went, but (as per its Ground 4), the scope of the investigation should have been wider.

The February 2021 decision

55. The second final report was issued on 2 February 2021. The LGO found that there was no fault on the part of TBC. The complaint was described in para 1 in the same terms as in the fourth draft report (para 44 above). The section on "The Ombudsman's role and powers" referred to both s.24A(6) ("We may decide not to start or continue with an investigation if we think the issues could reasonably be, or have been, raised within a court law") and s.26(6) ("The law says we cannot normally investigate a complaint when someone could take the matter to court. However, we may decide to investigate if we consider it would be unreasonable to expect the person to go to court").

56. The LGO said that he had investigated whether there was fault by TBC "when it retained the fee after declining to determine the third planning application", but had not investigated "the reasonableness of the Council's actions in the context of the judicial review, and any previous planning decisions for the reasons explained at the end of this report" (para 2). The explanation was provided in paras 31 – 32 and paras 46 – 48. These passages accorded with paras 29 – 30 and 44 – 45 of the August 2019 decision (para 49 above), save that para 47 was added, which quoted the scope of the complaint as confirmed in the 3 December 2018 letter (para 43 above).

57. The report discussed whether TBC had a power to refund the planning application fee. Reference was made to *Harrison* and to *O'Brien*, noting that whilst they showed other local authorities had refunded application fees, it was "important to note that these cases did not involve a judicial determination as to whether the fee ought to be, or could be, refunded" (para 36). The same paragraph also mentioned *Provectus Remediation Ltd v Derbyshire CC* [2018] EWHC 1412 (Admin), [2018] PTSR 2115 ("*Provectus*") as a

case where the Court had "seemingly decided that the planning authority had no discretion to refund an application fee", albeit in different circumstances. The LGO noted that the complainants argued that s.111 Local Government Act 1972 ("LGA 1972"), s.92 Local Government Act 2000 ("LGA 2000") and/or s.1 Localism Act 2011 ("LA 2011") empowered the return of the fee. He said that he did not regard these provisions as "absolutely determinative" of the issue (para 38). He concluded that there were "respectable legal arguments" as to whether TBC did have a power to refund the planning application fee and that the dispute arose from "a question of law, which is not the role of the Ombudsman to determine. There is a difference between fault and conduct which may be wrong in law. It is not fault for the Council to have got the law wrong providing there are reasonable arguments for it having adopted the position that it did, which in our view there are" (para 39). The LGO also referred to the fee being submitted despite the forewarning that the third planning application could amount to a duplicate application that would not be determined; and to the fact that no appeal was instituted against the rejection of the second planning application (para 40).

58. Immediately prior to addressing whether there was power to refund the fee, the LGO noted that Mr and Mrs Y relied on the fact that the contention that it did not have power to do so had not been part of TBC's reasoning at the time of the refund refusal. The LGO did not consider that this precluded him from considering the point, as: "Our view is that no un-remedied injustice has been suffered as a result of that limited allegation" (para 35). Although this was rather clumsily phrased, I understand this to mean that if a failure to refund the planning application fee could not amount to maladministration for the reasons the LGO went on to identify (para 36 onwards), then no injustice could have resulted from the failure to repay it.

59. The LGO expressed his conclusions as follows:

> "41. Having considered the representations made by both parties the Ombudsman has reached the view that it cannot make a finding of fault because independent legal advice supports the Council's view that there are respectable legal arguments for saying that the Council does not have discretion in the circumstances of this case.
>
> 42. The Ombudsman finds that the uncertainty relating to the legal position as to whether there is discretion to refund the fee or not means:
>
> a) It would not be appropriate for him to make a definitive finding as to whether there is discretion to refund the fee or not. The Ombudsman considers that making a finding in this regard would place him at risk of making a legal determination or treading into the jurisdiction of the Courts. This is because the meaning of the planning guidance, relevant statutory provisions and case law is a matter of law given the uncertainty that arises.
>
> b) Even if it were open to the Ombudsman to consider whether or not to make a finding of maladministration, then given the Council's position is supported by respectable legal arguments and with the benefit of legal advice, the Ombudsman

> does not consider that fault has occurred. Other parties may take a different view to the Council, but that does not mean the Council has acted with fault. It is important to note that the question of whether any particular set of facts amounts to maladministration is for the Ombudsman alone.
>
> c) Even if there was a discretion to refund the fee, it would be very difficult for the Ombudsman to reach a determination as to the reasonableness of the Council's retention of the fee without forming an opinion as to the status of the prior planning applications. The Ombudsman has already decided that he cannot look at the validity of the previous planning applications.
>
> 43. Neither statute, associated guidance, nor case law provides clear and unambiguous authority that a discretion to refund the application fee exists. Given the ambiguity, the Ombudsman cannot say that the Council's position that it has no discretion to refund the fee, having considered the question of whether such discretion exists, amounts to fault. Furthermore, the Ombudsman cannot determine legal matters and there is no good reason why the complainants cannot take the matter to court for a definitive determination."

60. It is therefore apparent that the LGO gave three reasons for rejecting the complaint in respect of the refund refusal. Firstly, that given the uncertainty over the legal position, it would not be appropriate for him to determine whether there was a legal power to refund the fee; this was a matter of law for the Courts to decide. Secondly, that in any event, as the existence of a power to refund the fee was uncertain, TBC was not at fault in not making a refund. Thirdly, that even if there was power to refund the planning application fee, he could not reach a conclusion on whether there was fault without forming an opinion as to the status of the first two planning applications, a topic which he had already decided he could not investigate.

The Withdrawal Ground

The parties' submissions

61. It is common ground that the LGA 1974 contains no express power permitting an investigation to be re-opened and a s.30(1) report to be withdrawn after it has been issued. Mr Hunter submitted that no such power could be implied in circumstances where the LGA 1974 contained a complete statutory code. He said that to imply such a power would undermine finality and create unfairness for persons in his client's position. He relies in particular upon the Divisional Court's decision in *R v Parliamentary Commissioner for Administration ex p. Dyer* [1994] 1 WLR 621 ("*Dyer*") that the Parliamentary Ombudsman was *functus officio* after issuing his report.

62. Mr Coppel QC, on the other hand, submitted that the provisions of the LGA 1974 did point to the LGO having the power to withdraw a report and re-open an investigation, at least where there is a compelling reason to do so, including where he/she reasonably forms the view that the conclusion reached was legally flawed. Furthermore, s.12(1) Interpretation Act 1978 ("IA 1978"), applied as there was nothing to indicate a contrary

intention. He said that it would be artificial and unduly time-consuming and expensive to require an application for judicial review to be made before a legally flawed report could be withdrawn and there would be no consequential injustice as the fresh decision could be challenged if appropriate. He contended that *Dyer* was distinguishable. Mr Pereira QC adopted Mr Coppel's submissions on this issue.

Functus officio: the legal principles

63. The term *functus officio* has been explained as applying where "a judicial, ministerial or administrative actor has performed a function in circumstances where there is no power to revoke or modify it": *R (Commissioner of Police of the Metropolis) v Independent Police Complaints Commission* [2015] EWCA Civ 1248, [2016] PTSR 891 ("*IPCC*"), per Vos LJ (as he then was) at para 42. Accordingly, this involves considering, firstly, whether the body in question has "performed" the relevant function and, if that is the case, whether they are entitled to modify or revoke it: *R (Dickins) v Parole Board* [2021] EWHC 1166 (Admin), [2021] 1 WLR 4126 ("*Dickins*"), per Stacey J at paras 53 and 63. The *IPCC* case at para 42 provides an example of the Court holding that the function in question had not yet been performed.

64. There are exceptions to the *functus* principle, in the interests of justice and good administration, where the decision has been obtained by fraud or it is based on a fundamental mistake of fact: *R (Sambotin) v Brent London Borough Council* [2018] EWCA Civ 1826, [2019] PTSR 371 ("*Sambotin*") per Peter Jackson LJ at para 3.

65. The LGO is created by statute and as there is no express power to revoke a s.30(1) report, determining this issue will depend upon the extent to which a statutory power can be implied. The nature of the decision and the decision-making process will be relevant: *Sambotin* at para 29.

66. The principles I have summarised so far were common ground between Counsel. Section 12(1) IA 1978, which Mr Coppel relies upon, provides:

> "Where an Act confers a power or imposes a duty it is implied , unless the contrary intention appears, that the power may be exercised, or the duty is be performed, from time to time as occasion requires…"

67. *R (Johnson) v Parole Board for England and Wales* [2022] EWHC 1026 (Admin) ("*Johnson*") is a recent instance where s.12 IA 1978 was considered in the context of a *functus* issue. Mr Justice Fordham held that the Parole Board's power to determine a prisoner's release date pursuant to s.256(1)(a) Criminal Justice Act 2003 was a statutory function within the ambit of s.12(1) but a "contrary intention" was apparent from the statutory provisions and circumstances, so that the Parole Board had no power to re-open and re-fix the date (paras 1 and 35). As I address below, Mr Hunter disputes that s.12(1) can apply to the withdrawal of an LGO's report issued under s.30(1) LGA 1974, and, alternatively, if it can, he submits that a contrary intention within the meaning of the section can be discerned from the legislative provisions. He draws attention to the following passage from Wade & Forsyth, *Administrative Law*, which says of s.12(1):

> "this gives a highly misleading view of the law where the power is a power to decide questions affecting legal rights. In those

> cases the courts are strongly inclined to hold that the decision, once validly made, is an irrevocable legal act and cannot be recalled or revised. The same arguments which require finality for the decisions of courts of law apply to the decisions of statutory tribunals, ministers and other authorities."

This passage was referred to at para 36 in *Johnson*, where Fordham J explained that his conclusion as to the existence of a contrary intention was based on the special features of the statutory context he was concerned with. Furthermore, I note that the authors' comment is focused upon the exercise of a power which decides questions affecting legal rights.

68. Counsel cited examples of cases from other contexts where the *functus officio* principle had been considered. In each instance the decision was heavily dependent upon the particular statutory context and the nature of the function in question and thus these authorities are of limited utility in resolving the withdrawal issue. Consequently, I do not propose to refer to all of them, in particular, it is unnecessary to refer to decisions that simply illustrate the exceptions I have referred to in para 64 above. There is, however, some assistance to be had in noting the factors that proved to be influential.

69. In *R (Persimmon Homes (Thames Valley) Ltd v North Hertfordshire District Council* [2001] EWHC Admin 565, [2001] 1 WLR 2393 Collins J held that the TCPA 1990 impliedly conferred a power on a local planning authority to withdraw a local plan, or a proposal to amend or replace such a plan, at any time after it had been placed on deposit and before it was adopted. The Judge said that such a power was necessary to avoid the absurdity of a local plan having to be put through the costly statutory procedure including a public inquiry when the local planning authority knew in advance that it would not be adopted; and he noted that there was no apparent reason for the absence of an express power in the legislation (paras 16 and 23).

70. In *R v Bristol City Council ex p. Everett* [1999] 1 WLR 1170 the Court of Appeal agreed with Richard J's decision at [1999] 1 WLR 92 that the defendant council had an implied power to withdraw an abatement notice issued under the Environmental Protection Act 1990 when it was no longer of the view that a statutory nuisance existed. Mr Justice Richards had decided that the absence of such an implied power would involve undue rigidity, particularly when a failure to comply with an abatement notice can give rise to criminal penalties. He said that a power of withdrawal was "consistent with, and serves to promote rather than undermine, the legislative scheme" (106D – E).

71. A third example of a power to re-exercise the relevant function being implied is *R (Trustees of the Friends of the Lake District) v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 281; [2002] P & C R 22 ("*Friends of the Lake District*") where it was held that it was implicit in s.77 TCPA 1990 that the Secretary of State could withdraw or revoke a call-in direction made under that section. In support of his conclusion, Harrison J referred to the procedural nature of the decision to call-in a planning application, rather than it determining any substantive rights; the wide measure of discretion involved in the exercise of the power; and the existence of sound practical reasons why the Secretary of State should have such a power (paras 34 – 38).

72. However, *Friends of the Lake District* was distinguished in *R (Gleeson Developments Ltd) v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1118, [2014] PTSR 1226 ("*Gleeson*"), where the Court of Appeal held that a grant of outline planning permission could only be revoked under the procedure contained in ss.97 – 100 TCPA 1990. Giving the leading judgment, Sullivan LJ noted (at paras 22 – 25) that the planning Acts comprised a very detailed and highly prescriptive legislative code; that to imply the power sought would give rise to uncertainty; and that, unlike *Friends of the Lake District*, a grant of planning permission conferred a substantive right and therefore was by its very nature irrevocable. In *Sambotin* the Court of Appeal held that a decision that the claimant was eligible for housing assistance under Part VII of the Housing Act 1996 could not be withdrawn or reviewed. The statutory provisions only provided for review of decisions that were unfavourable to the applicant and real practical difficulties would result from the housing authority's suggested approach (para 29).

73. In *Dickins* Stacey J held that the only powers the Parole Board had to revoke or modify a decision made under rule 25 of the Parole Board Rules 2019 directing the Secretary of State to release a prisoner on specified conditions, were those expressly provided for in rules 28 and 30 (which did not apply in that case) and that any broader power of reconsideration that had previously existed did not survive the implementation of the 2019 Rules (paras 63 – 67). I have already referred to *Johnson* where Fordham J concluded that there was no implied power to re-fix the date for a prisoner's release on licence (outside of the limited circumstances expressly covered by the Rules). His decision was based on the statutory language, the nature of the decision and the fact that there was no sensible reason why the Parole Board would be *functus officio* if it directed a prisoner's immediate release (*Dickins*) or if it declined to release the prisoner, but would be able to revoke and remake a decision if it dealt with them by fixing a future release date (paras 29 – 33).

74. I will not attempt to identify an exhaustive list of relevant matters, and the particular statutory provisions and context will always be of central importance. However, these authorities do indicate certain factors that are likely to assist in determining whether a public authority has an implied power to re-take a particular action or decision or it is *functus officio* once it has exercised the relevant function, in particular:

    i) Whether the statutory provisions create a comprehensive and detailed code in respect of that function;

    ii) Whether the statutory scheme is consistent with re-taking the particular action or decision;

    iii) Whether a power of withdrawal would promote or undermine the legislative scheme;

    iv) Whether the function in question determines or impacts upon substantive rights;

    v) Whether a measure of discretion and/or informality is involved;

    vi) Whether express provision is made for more limited circumstances in which an action or decision may be withdrawn and re-taken;

vii) Whether there is an apparent reason for the absence of an express power;

viii) Whether the existence or absence of an implied power would result in practical difficulties and/or undue complexity, delay or expense; and

ix) The extent to which attaining finality is of particular importance in that context.

Conclusions

Legal error in the August 2019 decision

75. As I have indicated, Mr Coppel's submits that, whether or not a wider power of review exists, the LGO was justified in re-making his decision as he reasonably considered that he had erred in law in his August 2019 decision. It is therefore necessary for me to consider the bases upon which Mr Coppel says that the August 2019 decision was legally flawed. He submitted that the LGO's errors were threefold: (1) the s.26(6)(c) jurisdictional bar applied to the entirety of the issues raised by the complaint, so that he should not have conducted an investigation and proceeded to make a decision; (2) his approach did not take into account the well-established principle that adopting an incorrect view of the law was not of itself maladministration; and/or (3) he wrongly treated *Harrison* and *O'Brien* as authority for the proposition that TBC did have a power to refund the application fee.

76. In summary, I do not consider that the first of these propositions assists Mr Coppel, but I accept that the LGO reasonably believed his August 2019 decision to be flawed for the second and third of these reasons.

77. Taking these reasons in reverse order, the LGO acknowledged in his February 2021 decision that neither *Harrison* nor *O'Brien* in fact involved any judicial decision as to whether there was power to refund the planning application fee (para 57 above). I have read both judgments and that acknowledgement is plainly correct. In his oral submissions, Mr Hunter fairly acknowledged that the LGO was "wrong" to treat these cases as supportive authority for the proposition that there was a discretion to refund the application fee paid by PEL in his August 2019 decision (para 47 above). Accordingly, the LGO reasonably believed that he was in error in this respect in his August 2019 decision and this error plainly played an important part in his then conclusion that TBC had failed to consider exercising a discretion that existed.

78. As regards the second reason, I conclude when I come on to the Fault Ground that there are respectable legal arguments in favour of the proposition that TBC had no power to refund the planning application fee. It is also clear from the case law that I have cited earlier that taking a view in an uncertain area of law is not in itself maladministration. In the August 2019 decision the LGO appeared to equate the failure to consider exercising a discretion which, as a matter of law, may or may not have existed, as itself amounting to fault. Whereas in the February 2021 decision he (rightly) recognised the existence of respectable legal arguments in both directions in terms of whether the power to refund existed and he was careful not to equate getting the law wrong with fault (para 57 above). Accordingly, the LGO reasonably believed that he was in error in this respect too in his August 2019 decision and it was plainly a central component of the chain of reasoning in that decision.

79. Mr Coppel does not need to succeed on his first reason as well, in order to establish the foundation for his submission on the withdrawal issue, but I will address it because he placed some emphasis on it during his oral submissions.

80. I have concluded that the LGO considered he was exercising his s.24A(6) discretion in terms of the matters that he did and did not investigate and determine in the August 2019 decision, rather than applying s.26(6)(c) LGA 1974 (para 50 above). This was in keeping with the need he perceived to clarify the scope and nature of the complaint before the limits of the investigation could be finalised. As I have described in setting out the material facts and circumstances, it was only after a considerable amount of back and forth and towards the end of events that culminated in the August 2019 decision, that the LGO considered he had sufficient clarification to enable him to disentangle the elements of the complaint into those that it would and would not be appropriate for him to investigate. In these circumstances and consistent with Woolf LJ's analysis in *Croydon* (paras 19 and 21 above) at this stage the decision as to scope was made as an exercise of the s.24A(6) discretion and this did not entail an apparent error of law. Furthermore, given that the LGO's conclusions on the scope of the complaint were expressed in materially the same terms in the February 2021 decision as in the August 2019 decision, I do not consider that the LGO believed at the time he had made an error in not applying s.26(6)(c) or that he sought to withdraw his earlier decision on that basis.

81. I also note for completeness, that as Mr Hunter pointed out, this s.26(6)(c) point was not pleaded. In CO/1135/2020 the LGO agreed with TBC's grounds of challenge to the February 2019 decision and did not file Detailed Grounds supporting the challenge on additional grounds, as would be required by CPR 54.14(1) if he relied upon further reasons for quashing that decision. The Summary Grounds of Defence filed in CO/612/2020 (subsequently confirmed as the Detailed Grounds) referred to the second and third of the legal errors that Mr Coppel relied upon, at para 10, but not to the first.

Power to withdraw the August 2019 decision

82. I accept that s.12(1) IA 1978 can apply to the circumstances under consideration, subject to the existence of a contrary intention, and I reject PEL's contention to the contrary. Mr Hunter submitted that s.12 had no application, as the LGA 1974 did not confer a relevant power or impose a relevant duty, as there was no express reference to a power of withdrawal in either s.24A(6) or s.30(1) LGA 1974. However, if there was an express power to revoke in either of these provisions, there would be no need to imply a power to do so or to rely on the IA 1978 at all. Sections 24A(6) and 30(1) expressly confer the power to investigate and the power to issue a report (once an investigation is completed); if there is no contrary intention, the effect of s.12(1) is that these powers may be exercised on more than one occasion ("from time to time as occasion requires"). Revocation of an earlier decision is simply a concomitant of a power to re-take it. More broadly, Mr Hunter suggested that s.12(1) was simply not capable of being used to imply a power to revoke and retake a decision. However, I can see no basis for that proposition; the statutory wording is wide enough to embrace such situations and Mr Hunter cited no supporting authority. In *Johnson* Fordham J accepted that s.12(1) applied and that the *functus* question depended upon whether or not there was a contrary intention.

83. I therefore turn to whether a contrary intention is indicated in the present circumstances. For the avoidance of doubt, I am solely concerned with whether the LGO had the power to withdraw a decision that he reasonably believes to be legally flawed; I do not propose to decide whether the LGO has a wider power to withdraw s.30(1) decisions, whether on his own initiative or consequent upon representations made to him, as it is unnecessary for me to do so in order to resolve the present case. I record for completeness, that Mr Coppel suggested that the power to withdraw a report would (at least) apply where there was a "compelling reason for doing so".

84. Mr Hunter submitted that the LGA 1974 lays down a complete, prescriptive statutory code, which does not admit of the implication of additional powers. I do not accept that proposition. As I have already noted, the LGA 1974 provides for the LGO to have a large measure of discretion in relation to what is investigated, the process that is adopted and the conclusions that are reached; and the process is relatively informal (paras 13, 15 and 17 above). The LGO publishes a leaflet that is provided with the report, indicating that a decision may be reviewed on application made within a month where it was made on the basis of inaccurate facts or where there is new and relevant information that was not previously available. The LGA 1974 makes no provision for this, but it appears to be a sensible instance of the degree of flexibility contemplated by the process. I was told this review process, or something analogous to it, has operated for 20 years. If Mr Hunter were correct in his submission of a complete statutory code, then it would be ultra vires the LGO's powers to do this; a proposition that appears less than desirable.

85. Having considered all the circumstances, I conclude that there is an implied power to withdraw a final report and remake the decision (with such further investigation as is necessary) where the LGO reasonably considers that the decision is flawed by legal error; and that such a power is consistent with, rather than contrary, to the LGA 1974 provisions. In particular I note that:

    i) The statute confers on the LGO: a broad power to investigate (s.24A(6)); a broad power to decide on the appropriate procedure (s.28(2)); and a broad power to determine what standards to apply and what does or does not amount to maladministration (para 15 above);

    ii) The LGA 1974 does not expressly confer a more limited power of review, it is simply silent on the point;

    iii) The LGO does not determine legal rights (s.28(4)) and as set out in s.31, the LGO makes *recommendations* as to actions the authority should take, he/she does not issue directions requiring, for example, an amount of compensation to be paid or other steps to be taken (paras 10 and 12 above). Further, the legislation contemplates that where legal action is available, questions of law will usually be determined by the Courts rather than by the LGO (paras 19 and 21 above); and

    iv) The issuing of a report under s.30(1) does not conclude the LGO's role in relation to the complaint. In para 12 I have described the process that follows including (potentially), two stages of the LGO making recommendations as to the steps the authority should take consequent upon the report. In addition, to the general point that the LGO's role is not at an end, I accept that it would be

undesirable if the LGO had to embark on this process in respect of a report that he / she believed to be flawed in its reasoning until it was quashed by the Court.

86. I do not accept Mr Hunter's submission that, on analysis, the terms of LGA 1974 point in the opposite direction. In particular:

i) I do not consider it significant that s.24A(6) makes no express reference to withdrawing a report or re-opening an investigation. This does not in itself indicate that Parliament did not intend such a power to exist. As I have indicated, if s.12 IA 1978 applies, a power of withdrawal is simply ancillary to a power to make the decision on more than one occasion; and in terms of the statutory language, if the LGO considers the report that has been issued is flawed so that further work is necessary, then it can be said that their investigation "continues";

ii) I do not attach significance to the word "completes" in s.30(1); it simply indicates when a report should be prepared and provided; its terms do not preclude a decision to re-open the investigation and provide a further report;

iii) I do not agree that the terms of s.31 are inconsistent with a power to withdraw a s.30(1) decision. Mr Hunter emphasised that the stages identified in s.31 are detailed and prescriptive. Even if that is correct, s.31 is concerned with action to be taken consequent upon a report, not with whether the report itself can be withdrawn after it has been issued.

87. Furthermore, I do not consider that an implied power to withdraw a decision that the LGO reasonably considers to be flawed by legal error would undermine the statutory scheme. To the contrary, this would be consistent with and promote good administration. A limited power of this nature would not encourage a lack of finality; the alternative would be likely to take longer. If a report is legally flawed but the LGO has no power to withdraw it, a judicial review application would have to be brought and a quashing order, or equivalent relief, obtained before further investigation could be undertaken. The LGO could not apply to judicially review his /her own report, so presumably either the complainant or the authority would need to be prepared to do so. Inevitably, additional costs, as well as delay, would be involved. Furthermore, withdrawing a report because its reasoning is flawed by legal error, is closely analogous to the exceptions to the *functus officio* principle that have already been recognised to exist (para 64 above).

88. On the other hand I do not see that any particular unfairness would result from the existence of such a power. A party who preferred the original decision will still have the opportunity to challenge the new report and/or the withdrawal decision if they considered that it is flawed by public law error.

89. For all these reasons I would be strongly inclined to conclude that the LGO does have the power to withdraw a report that he / she considers to be flawed by legal error and to re-open the investigation and issue a new report. However, I have anxiously considered whether this conclusion is precluded by *Dyer*, as Mr Hunter submits (bearing in mind the precedent status of an earlier Divisional Court's decision: *R v Greater Manchester Coroner ex p. Tal* [1985] 1 QB 67)).

90. *Dyer* concerned an unsuccessful judicial review of a decision made by the Parliamentary Ombudsman under the PCA 1967. The Claimant in that case acted in person. The Ombudsman had upheld some of her complaints regarding the handling of her claims for Social Security benefits and he concluded that payment of an *ex gratia* sum by the department in question was a satisfactory remedy. The claimant raised a number of concerns, including that only some of her complaints had been investigated. She asked the Ombudsman to re-open his investigation, which he declined to do. The Divisional Court found that the decision as to the scope of the investigation was well within the Ombudsman's broad discretion (628F). Giving the leading judgment, Simon Brown LJ (as he then was) addressed the further submission that the Defendant had erred in declining to re-open his investigation in a short passage at 629F-H. He said:

> "I come finally to Miss Dyer's complaint about the Commissioner's refusal to re-open the investigation. This I can deal with altogether more shortly. It seems to me that the Commissioner is clearly correct in his view that, once his report had been sent to Mr Hattersley and the department (as required by section 10(1) and (2)) he was functus officio and unable to re-open the investigation without a further referral under section 5(1). Section 5(5), as already indicated, confers a wide discretion indeed; it does not, however, purport to empower the Commissioner to re-open an investigation once his report is submitted. It would seem to me unfair to the department and outside the scheme of this legislation to support that the Commissioner could do as Miss Dyer wished.
>
> That apart, however, it is plain that even if the Commissioner had had the power to re-open his investigation he would inevitably have refused to do so: he had long since decided not to investigate Miss Dyer's further complaints and I have already held that he was entitled to limit his investigations in that way."

91. Whilst there are some similarities between the Parliamentary Ombudsman and the LGO, most notably in the broad discretion that both enjoy to initiate, continue or discontinue an investigation and in the procedure that is adopted (ss. 5(2), 5(5) and 7 PCA 1967) there are also differences. Pursuant to s.5(1) PCA 1967, a complaint from a member of the public is referred to the Ombudsman by a member of the House of Commons. Section 10(1) PCA provides that where the Ombudsman conducts an investigation under the Act he /she shall send a report of the results to the member of the House of Commons who referred the complaint. Section 10(2) requires that the report is also sent to the principal officer of the department or authority concerned. Subsection (3) provides that if it appears to the Ombudsman that injustice has been caused to the person aggrieved in consequence of maladministration, he / she may if they think fit "lay before each House of Parliament a special report upon the case".

92. Accordingly, under the PCA 1967, the Parliamentary Ombudsman only acts upon a referral from a Member of Parliament. Furthermore, their role comes to an end when they submit their report to the relevant Member of Parliament; and a formal procedure involving laying a report before both Houses of Parliament applies where maladministration and injustice is found.

93. Mr Coppel accepted that the first paragraph I have cited from Simon Brown LJ's judgment was part of the *ratio decidendi* of the case. Nonetheless, in my judgment *Dyer* does not preclude the provisional conclusion that I have expressed in para 89 above, given:

    i) The Divisional Court was not concerned with whether the Parliamentary Ombudsman had the power to withdraw a report where he/she reasonably believed the conclusions to be flawed by legal error and did not consider this particular situation. Whilst parts of the reasoning were expressed in broader terms, it is plain from the passage that I have cited that the focus was upon the circumstances of the case (one where the complainant argued that the investigation should be re-opened to embrace complaints that the Ombudsman had lawfully decided not to investigate in the exercise of his discretion);

    ii) There are material differences between the PCA 1967 and the LGA 1974 regimes. For present purposes, the most noteworthy distinctions are those that I have highlighted in para 91 above; and/or

    iii) It is doubtful that the first paragraph I have cited was intended to be a comprehensive statement of the legal position. The Claimant represented herself and it does not appear that s.12 IA 1978 or authorities concerning the *functus officio* principle were before the Court. The passage does not refer to the established exceptions to the rule (para 64 above); and whilst it was unnecessary to do so to resolve the issue before the Court, it does suggest that Simon Brown LJ was not intending to set out a definitive account of if and when the *functus* principle could apply. The reasoning is focused upon the absence of any express power to re-open the investigation in the PCA 1967.

94. I therefore conclude that the LGO was entitled to withdraw the August 2019 decision and that PEL's challenge to the November 2019 decision must fail. In light of this it is unnecessary for Mr Coppel to succeed in his alternative submission that the legal errors in the August 2019 decision in any event rendered it null and void, meaning that there was no s.30(1) decision in existence when the February 2021 decision was made. In the circumstances I will simply indicate that I did not find this argument persuasive. An unlawful administrative act or decision cannot be described as void, independently of a Court's determination to that effect: *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46, [2022] AC 461, para 29, per L. Reed PSC.

95. In the circumstances it is also unnecessary for me to determine TBC's challenge to the August 2019 decision and PEL's original Ground 4.

Conclusions on the February 2021 decision grounds

The s.70A Ground

96. This ground complains that the LGO erred in concluding that he lacked the necessary jurisdiction to determine the part of the complaint relating to the s.70A decision. In PEL's ASFG, the contentions are set out in paras 78 – 80 in respect of the August 2019 decision and applied to the February 2021 decision at para 89. (The reasoning on this aspect was the same in both of the reports, as I explained earlier.) The ASFG contends that the LGO was wrong to consider that his jurisdiction prevented him from

determining the legal status of the first two planning applications as there is no bar on the LGO considering legal issues; and in any event the complaint did not require him to decide any legal issue that had not already been determined by HHJ Jarman, rather he had to consider "whether it was maladministration for the Council to have relied on the second [planning] decision when exercising its power under section 70A".

97. However, this ground entirely fails to recognise that PEL informed the LGO in unequivocal terms that it was not complaining about the s70A decision. This was said in the letter of 2 May 2018 in the passages I quoted earlier, after the first draft report proposed to discontinue the entire investigation and was then repeated in both the 28 September and 3 December 2018 communications after the third report proposed to take that course (paras 37 – 39 and 41 - 42 above). Accordingly, the LGO did not make a public law error in failing to determine a matter that PEL had repeatedly said it was not pursuing. Having persuaded the LGO not to decline to investigate by disavowing this aspect, there is no basis for PEL to subsequently complain that the LGO failed to investigate and determine the abandoned part of the complaint. Accordingly, this ground must fail.

98. When I raised this point with Mr Hunter during his oral submissions, he suggested that this ground was not a challenge to the determination not to investigate the s.70A decision, but a contention that the LGO erred in not considering the refund refusal *in the context* of the s.70A decision and the Jarman Judgment. However, not only is that not what the ASFG says (and there was no application made to amend it), as re-formulated in that way, the submission is merely a restatement of the Context Ground and does not amount to a free-standing ground of challenge.

99. That is sufficient to dispose of this ground, but as I also consider that the contention also fails on its merits I will briefly address this.

100. As I set out when summarising the facts and circumstances, from the second draft report through to the February 2021 decision, the LGO's position was that he would not investigate the s70A decision because he considered that to determine whether it entailed maladministration involved a decision on the legality of TBC's refusals of the first two planning applications in the light of the Jarman Judgment and the impact on whether the s.70A criteria relied upon by TBC was satisfied.

101. In my judgment this was an assessment that the LGO was entitled to make. It was the original complaint form that articulated the complaint about the s.70A decision and so it must be assessed in those terms. The passage at para 1.9 asserted that the s.70A criteria were not met in light of the Jarman Judgment; and para 1.10 said that the s.70A decision was "Wednesbury unreasonable" in light of the appearance of bias concerns (paras 31 – 32 above).

102. As I have indicated earlier, the LGO has a very wide discretion in determining what to investigate and what not to investigate. Whilst Mr Hunter is right to say that the LGO is not prohibited from deciding legal issues altogether, the extent to which a complaint involves legal questions that would be better determined by the Courts is a highly relevant consideration to the exercise of the s.24A(6) discretion, as I have explained at paras 19 and 21 above. It is readily apparent that the complaint about the s70A decision as formulated was a complaint about the substantive decision taken by TBC, expressed in a way that did indeed raise legal issues as to the impact of the Jarman Judgment on

the satisfaction of the s.70A criteria and the reasonableness (in a Wednesbury sense) of TBC's decision-making. Whilst the ASFG says that all the LGO had to decide was whether it was maladministration for TBC to have relied on the second planning refusal when exercising its power under s.70A, it is apparent from the complaint that the *reason why* PEL suggested this was maladministration was because the s.70A criteria should not have been treated as satisfied in light of the Jarman Judgment – a legal question. In any event, I do not need to be satisfied that legal issues were involved (although I am); in light of this Court's supervisory role, it is sufficient if the LGO reasonably considered, as he did, that the complaint about the s.70A decision raised legal issues that could be and were better determined by the Courts. PEL has not challenged the proposition that it could have brought judicial review proceedings in respect of the s.70A decision.

The Context Ground

103. In paras 83 – 84 of PEL's ASFG it is argued that it was an error of law for the LGO to disregard the Jarman Judgment and the two earlier planning applications when determining whether there was any fault resulting in injustice in respect of the refund refusal. Specifically it is said that he was wrong to decide that his jurisdiction precluded him from considering these matters, as: (i) the judicial review proceedings were "obviously material", given the main point made by PEL was that TBC was at fault in refusing to return the fee "on the basis that it did 'not agree with the Judge's analysis of the facts'"; and (ii) as it was only because the first two planning applications had been refused that TBC believed it had the power to decline to determine the third.

104. I accept that PEL indicated in its correspondence with the LGO that it relied upon the first of these matters, the Jarman Judgment, by way of context. The second aspect is more problematic, since it reads as an indirect attack on the s.70A decision, which was explicitly disavowed as a part of the complaint, as I have already discussed. In any event, for the reasons I will go on to explain, I consider that the ground is not well-founded on its merits.

105. As the sequence of events from the third draft report onwards shows, the LGO was only prepared to address the complaint about the refund refusal in so far as it could be considered as a standalone issue. He concluded that taking a broader approach would involve considering the legal significance of the two earlier planning rejections and the reasonableness of the refund refusal in light of the Jarman Judgment, which were legal issues for the Courts. I do not consider that this approach involved any public law error.

106. As PEL's own formulation in the ASFG makes clear, and as I have discussed in relation to the s70A Ground, the two earlier planning permission rejections were relied upon because the appropriateness of treating them as satisfying the s.70A criteria was disputed by PEL in light of the Jarman Judgment. This was a legal issue capable of determination on a judicial review and one that the LGO was reasonably entitled to regard as appropriate for resolution by the Courts, in the exercise of his s.24A(6) discretion.

107. Similarly, the Jarman Judgment was relied upon by PEL for the impact it was said to have, or should have been treated as having, on the rejection of the earlier planning applications and whether it was appropriate for TBC to rely on those rejections to refuse the refund. For the same reasons, the LGO was entitled to regard this as a legal matter

for the Courts, or, at the least, "inextricably linked" to the legal matters raised. In so far it is suggested that there was a discrete reason for PEL's reliance on the Jarman Judgment, namely that TBC was at fault in refusing the refund because it did not agree with the Judge's conclusions, I do not understand this to have been the basis of TBC's reasoning (paras 29 - 30 above) and in any event the LGO acted reasonably in assessing that this point was also bound up with the legal issues that he reasonably considered should be determined by Court proceedings.

108. Having arrived at the conclusion that the LGO was lawfully entitled to distinguish between the standalone investigation that he would conduct into the refund refusal and the matters that he would not take into consideration, it is readily apparent that the "context" matters relied on by PEL were far from "obviously material"; indeed they were simply not relevant to the narrowed investigation, which was focused upon whether TBC was at fault in not considering to exercise a discretion to refund the fee.

109. Furthermore, the LGO was only prepared to continue his investigation at all because he was persuaded by PEL's 28 September and 3 December 2018 communications that the complaints could be "disentangled". It is quite clear that if the LGO had concluded that it was necessary for him to consider the Jarman Judgment and the two earlier refusals of planning permission in order to decide the complaint, he would have (permissibly) reverted to the outcome he had earlier proposed, namely discontinuation of the whole investigation.

110. In so far as this ground also contains a reasons challenge, I reject that too. The February 2021 decision adequately explained the LGO's reasoning on these matters. Accordingly, the Context Ground fails.

The Fault Ground

111. PEL's ASFG advances three reasons why the LGO erred in law in concluding that there was no fault resulting in injustice as a result of TBC's refund refusal because there was a "respectable legal argument" that it had no power to do so (paras 85 – 88). Firstly, that the existence of a respectable legal argument as to whether a discretion existed was irrelevant to the question of fault as it was not the reason given at the time and the existence or otherwise of fault should have been assessed solely by reference to the reasons that were given contemporaneously. Secondly, this was also irrelevant to the question of whether any injustice was caused and/or the LGO failed to explain how, if there was fault, there was no "un-remedied injustice". Thirdly, in any event, the LGO was wrong in deciding that a respectable legal argument existed, as TBC plainly had the legal power to refund the fee.

112. I will address the first and second of these contentions together and then the third point. However, before I do so it is convenient to consider an over-arching submission made by Mr Coppel that PEL's grounds do not challenge the alternative reason given by the LGO for his conclusion, namely that he found no fault as the question of whether there was a legal power to refund the fee was a matter of law for the Courts to determine.

113. I have already accepted that the LGO's conclusion was based on these distinct strands of reasoning (paras 59 and 60 above). I also agree that PEL's ASFG does not challenge the conclusion expressed in para 42(a) of the February 2021 decision. Mr Hunter

queried whether this point had been pleaded by the LGO. I am satisfied that the point was raised in the LGO's Grounds of Resistance at para 34.

114. Accordingly, I conclude that Mr Coppel's point is well-founded. It therefore follows that the LGO's conclusion that he could not make a finding of fault would stand in any event, even if I were persuaded by the contentions deployed in the Fault Ground. For this reason and in light of my assessment of the merits of those contentions (as set out below) I do not propose to grant permission to apply for judicial review in respect of this ground. However, if I am wrong in that decision, in any event and for the same reasons, I would dismiss the Fault Ground if permission were granted.

Para 35 of the February 2021 decision

115. The key to the first and second contentions is the legitimacy or otherwise of the reasoning in para 35 of the February 2021 decision (para 58 above). I remind myself that, subject to public law error, it is for the LGO to determine not only the scope of the investigation but the standard he/she will apply in deciding if there is maladministration or injustice and whether any given set of facts constitutes maladministration or constitutes injustice to the aggrieved party. As I have already indicated, TBC gave a number of reasons for the refund refusal (paras 29 - 30 above); the assertion that it had no power to do so was raised in response to PEL's complaint to the LGO (para 35 above) and consistently in its representations to the LGO thereafter. The LGO concluded that in circumstances where a reason for the refund refusal existed that would not amount to fault, then no injustice had been suffered by the fact that this reason was advanced after, rather than at the time of the initial refusal.

116. I accept that this was a permissible line of reasoning for the LGO to adopt and that it does not entail any legal error. The LGO was not exercising a judicial review jurisdiction, in which the decision-maker may be held to reasons given at the time of the decision; but exercising a broad discretion in determining whether injustice had been caused. Furthermore, the absence of a power to refund the application fee was a central plank of TBC's responses to the LGO and was plainly the position it would take in response to any recommendation that the LGO made. It was legitimate for the LGO to consider whether that position involved fault.

117. The nature of the complaint is also significant. The heart of PEL's complaint was the failure to refund the fee and a refund was the primary remedy sought, with other remedies that were referred to on the complaint form being parasitic upon or ancillary to the proposition that the fee should have been refunded (para 34 above). If the application fee could and would be retained without the alleged maladministration, then there was no financial loss or ancillary losses that flowed from the refund refusal. In his oral reply Mr Hunter suggested that injustice, in terms of distress, was nonetheless caused by the reasons that were given by TBC at the time. However, crucially, there was no finding that the contemporaneous reasons for the refusal entailed any fault on the part of TBC. It must be remembered that, permissibly as I have found, the LGO had decided only to investigate the failure to consider exercising a discretion to make the refund; everything else – including any alleged consequences said to flow from allegations of fault that the LGO was not looking into - was outside the scope of the investigation. This is illustrated by the way the LGO identified injustice in the August 2019 decision; it was simply the uncertainty as to whether a financial refund would

have been made or not (if TBC had considered exercising the discretion that the LGO then believed existed) that was said to constitute the injustice.

118. Mr Hunter relied upon two cases in support of his position. He cited the passage in Sedley J's judgment in *Balchin* which I set out at para 18 above. I do not consider that this assists him. Firstly, the point being made there was when *there has been fault* on the part of the authority, it would not be an answer for that authority to say that the outcome would have been the same in any event. That is not the present situation. As I have noted, the LGO did not find there was fault in the reasons given contemporaneously and his investigation was only focused upon the discrete and limited question of whether the failure to consider exercising the discretion itself amounted to maladministration. Secondly, Sedley J was contemplating a situation where outrage or distress flowed from incompetent administration; that had not been established in this instance.

119. Mr Hunter also relied upon the proposition identified by Andrews J in *Rapp* at para 38(iv) (para 15 above). I do not consider that this assists him either. The proposition she explained was that if the public body does something which later turns out to be wrong then, without more, that will not amount to maladministration, because it is necessary to consider the circumstances as they were at the time of the relevant act or decision. Mrs Justice Andrews was not suggesting that in assessing whether injustice has been suffered it is necessary to confine the consideration to what was known and done at the time of the alleged fault. Furthermore, there is no warrant for confining the broad concept of injustice in that way; most obviously (albeit not this case) losses might be either made good or cease to be relevant in the intervening period.

Power to refund the planning application fee

120. Lastly, I turn to the question of whether the LGO erred in law in failing to conclude that TBC *did* have power to refund the planning application fee and in deciding that there was a respectable legal argument in support of the proposition that it did not. For reasons that I will explain, I do not consider that he was in error, or arguably so, in this respect. I stress that I am *not determining* as a matter of law that a *power to refund* a planning application fee in the circumstances of this case *does not exist*; I am simply addressing PEL's contention that it was a legal error to find that there was a respectable legal argument in support of such a position. As that is the question for me to address, my analysis of the competing legal contentions is not intended to be comprehensive and inevitably it is more (although not exclusively) focused upon what can be said, legally, in support of the proposition that there is no such power. I need not refer to the various Government Circulars that were cited to me, as it was accepted that this material was not decisive and that the texts in question pointed in conflicting directions.

121. As a starting point, it is noteworthy that Counsel were agreed that there is no relevant express power in the planning legislation and that there is no caselaw that directly considers whether or not such a power exists.

122. The Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012 ("the Fees Regulations") provide for a duty to refund a planning application fee in two specific circumstances. Regulation 3(1) provides that where an application for planning permission is made to a local planning authority a fee is payable. Regulation 3(5) provides that the fee shall be

refunded if the application is rejected as invalid. Secondly, reg. 9A(1) provides that a fee shall be refunded in the event that it is not determined within 26 weeks of the date when a valid application was received. There is an exception in reg. 9A(2), where the parties have agreed that the application is to be determined within an extended period. In *Provectus* at paras 16 - 18, Sir Wyn Williams sitting as a High Court Judge, held that a fee did not fall to be refunded in circumstances where an extended period had been agreed, but the local planning authority did not determine the application within that period. He concluded that Parliament had chosen quite deliberately to limit the circumstances in which a fee was to be refunded to those expressly mentioned in the Fees Regulations.

123. Mr Hunter does not submit that the power to make a refund is to be implied into the Fees Regulations and he emphasises that regs. 3(5) and 9A(1) are concerned with situations where the authority *must* return the application fee, as opposed to circumstances where it has a discretion to do so. Nonetheless, the limited and very specific references to refunds in the Fees Regulations and the interpretation in *Provectus,* affords some support for Mr Pereira's submission that Parliament must be taken to have intended that there would be no wider power to refund an application fee, particularly as it is well recognised that the planning legislation forms a comprehensive statutory code, see for example *Gleeson* at para 22. This is of particular significance in respect of the power conferred by s.111 LGA 1972 which I consider below.

124. Mr Hunter identified three candidates as the source of a power to refund a planning application fee in circumstances outside of the Fees Regulations. For completeness, I indicate that I was not addressed on the question of whether TBC would have had the power to refund the fee pursuant to s.31(3)(b) LGA 1974, had the LGO found that there was maladministration.

125. Mr Hunter said that his strongest candidate was s.92(1) LGA 2000, which provides:

> "(1) Where a relevant authority consider-
>
> (a) that action taken by or on behalf of the authority in the exercise of their functions amounts to, or may amount to, maladministration, and
>
> (b) that a person has been, or may have been, adversely affected by that action,
>
> the authority may, if they think appropriate, make a payment to, or provide some other benefit for, that person."

126. However, this power only arises where the authority considers that action taken by or on its behalf amounts to or may amount to maladministration. It is clear that TBC did not have either of those states of mind in this instance; the Council firmly considered that it was fully entitled to retain the payment.

127. Mr Hunter also relied upon s.1(1) LA 2011. This provides that a local authority "has power to do anything that individuals generally may do". Section 2 creates a number of barriers to the use of this power, including that a local authority cannot do anything which it was unable to do by way of a precommencement limitation: s.2(2)(a). A

precommencement limitation is defined by s.2(4) as "a prohibition, restriction or other limitation expressly imposed by a statutory provision that is contained in an Act passed no later than the end of the Session in which the LA 2011 was passed or in an instrument that comes into force before the commencement date" of s.1.

128. The difficulties in identifying what an individual "generally may do" was discussed by Green J (as he then was) in *R (Hussain) v Sandwell Metropolitan Borough Council* [2017] EWHC 1641 (Admin), [2018] PTSR 173 at para 125. In a situation such as the present it will depend upon whether the function in question is viewed very broadly (to receive and repay monies), in which case an individual plainly can do it; or it is viewed more narrowly (to receive and refund payment for the exercise of planning functions), in a way that an individual has no power to do. The position is uncertain and there are arguments both ways. That is so even without Mr Pereira's second argument, namely that there was a precommencement limitation in existence because s.303(2) TCPA 1990 confers a power for the Secretary of State through regulations to "prescribe circumstances in which a fee or other charge payable under the regulations is to be remitted or refunded" and that power had only been exercised in respect of the circumstances identified in the Fees Regulations.

129. Mr Hunter's final candidate was s.111(1) LGA 1972, which provides:

> "(1) Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions."

130. This provision gives statutory recognition to the common law rule that a local authority could do anything which was reasonably incidental to its functions: *R v Richmond London Borough Council ex p. McCarthy & Stone (Developments) Ltd* [1992] 2 AC 48 HL per Lord Lowry at 68D-E, who went on to cite from the judgment of Woolf LJ in the Divisional Court in *Hazell v Hammersmith and Fulham London Borough Council* [1990] 2 QB 697. Lord Justice Woolf emphasised that the critical part of the subsection was the words "calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions", so that before this provision could authorise an activity that was not otherwise authorised, an underlying function to which it is incidental had to be identified. As s.111(1) confers a subsidiary power to take action in support of one of the authority's functions, it cannot confer a power to do something where there is a specific code already governing the function/s in question, but that code does not expressly authorise this action: *Kalonga v The London Borough of Camden* [2022] EWCA Civ 670, per Elisabeth Laing LJ at paras 73 and 76.

131. In the present circumstances Mr Pereira submits that TBC was under a duty to charge a fee for the planning application and s.111(1) cannot be used to confer a wider power to refund that payment than exists in the express statutory code concerning application fee refunds, namely s.303 TCPA 1990 and the Fees Regulations. Again, this position is at least a respectable argument.

132. In so far as this ground also contains a reasons challenge the same is unarguable and I reject it. As I have summarised earlier when setting out the facts and circumstances, the LGO explained in some detail in the February 2021 decision why he had concluded that there were respectable legal arguments in both directions in terms of whether there was a power to refund the application fee.

Disposal

133. It therefore follows that I will dismiss PEL's Withdrawal Ground, decline to grant permission in respect of PEL's Fault Ground and dismiss PEL's other grounds of challenge to the February 2021 decision. As the August 2019 decision was lawfully withdrawn there is no need for me to determine the grounds of challenge raised by PEL and by TBC in relation to it.

134. I thank all Counsel for the assistance that they gave to me in their written submissions and during the hearing.