



Neutral Citation Number: [2024] EWHC 1225 (Admin)

Case No: CO/1812/2023

AC-2023-LON-001536

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/05/2024

**Before :**

**Dan Kolinsky KC**  
**(sitting as a Deputy Judge of the High Court)**

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**Between :**

**R (on the application of WELLINGBOROUGH  
WALKS ACTION GROUP LTD) Claimant**

**- and -**

**NORTH NORTHAMPTONSHIRE COUNCIL Defendant**

**- and -**

**STANTON CROSS DEVELOPMENTS LLP Interested Party**

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**William Upton KC (instructed by Goodenough Ring Solicitors) for the Claimant**  
**Gary Grant (instructed by North Northamptonshire Council) for the Defendant**  
**Saira Kabir Sheikh KC (instructed by Sharpe Pritchard) for the Interested Party**

Hearing dates: 30 April 2024 – 1 May 2024

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**Approved Judgment**

This judgment was handed down remotely at 2pm on 21 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

**Dan Kolinsky KC (sitting as a Deputy Judge of the High Court) :**

1. This case concerns the relationship between the protection afforded by a tree preservation order and the rights conferred by planning permission.
2. Planning permission has been granted for (amongst other things) the construction of the southern access route (known as Route 2) to serve a major mixed-use development known as Stanton Cross, Wellingborough.
3. There is a line of mature lime trees known as the Wellingborough Walks, which date from Victorian times. These were planted in a double row along the east side of London Road on either side of a pedestrian walk from near the centre of town down to the river Nene. Substantial sections of this double row of 176-year old trees remain. They are all protected by a tree preservation order. In these proceedings, we are particularly concerned with the trees either side of the existing roundabout running in a north west to south east axis along the side to the north east of the existing London Road. These are trees T81 to T137 in the tree preservation order.
4. The key issue is whether (and to what extent) the cutting down of protected trees is “necessary to implement a planning permission” to be within the exception in Regulation 14 (a) (vii) of the Town and Country Planning (Tree Preservation) (England) Regulations 2012 (“the 2012 Regulations”).
5. Regulation 14 creates exceptions to the general position covered by Regulation 13 of the 2012 Regulations that consent would be required from the local planning authority to cut down (or undertake any of the other prohibited activities to) a protected tree.
6. The Claimant is a local action group. The Defendant is the local planning authority. It is a unitary authority created on 1 April 2021. Prior to this, the local planning authority was the Borough Council of Wellingborough (“BCW”) and the highway authority was Northamptonshire County Council (“NCC”). Both NCC and BCW were dissolved in April 2021 and the Defendant is the successor to their respective planning and highway functions. The Interested Party is the developer of the Stanton Cross development.
7. On 22 and 23 February 2023, contractors for the Interested Party began felling some of the protected trees towards the south end of Wellingborough Walks. As a result of local protests, these works were temporarily halted. The contractors halted felling works after felling 16 protected trees and damaging one other. Fifteen of these trees were to the north of the London Road roundabout, and 1 tree was felled and 1 was partially destroyed to the south of the roundabout (TPO tree references T90, T93-T101, T108, T109, T131-135). The timing of these tree works was related to the fact that the bird nesting season was due to begin at the start of March (as explained in para 3.5 of the witness statement of Christopher Tompkins dated 22 November 2023 on behalf of the Interested Party).
8. These proceedings arise out of the ongoing (and evolving) controversy as to whether the works to these protected trees were permitted (and what further work would be permitted without express consent or further approval under the applicable conditions to the planning permission).

9. The initial focus for the justification for the works included reliance on Regulation 14 (a) (iii) of the 2012 Regulations which applies to work “by or at the request of a statutory undertaker, where the land on which the tree is situated is operational land of the statutory undertaker and the work is necessary [for a reason specified]”. It is now common ground that this exception was not applicable.
10. The key dispute in these proceedings is how Regulation 14 (a) (vii) applies to the work undertaken and any further work.
11. This judgment is structured as follows:-
  - a. The proceedings (para 12)
  - b. The tree preservation order (para 17)
  - c. The planning permission for Route 2 (para 21)
  - d. The relationship between the protected trees and the approved Route 2 (para 29)
  - e. The parties’ positions (para 39)
  - f. The applications to discharge conditions dated 12 April 2024 (para 49)
  - g. The legal framework (para 56)
  - h. The main issue – are the works necessary to implement the planning permission?
    - i. Principles for interpreting planning permission (para 85)
    - ii. Conditions in the 2017 planning permission (para 86)
    - iii. Discussion (para 90)
  - i. Practical implications (para 134)
  - j. Further arguments of the parties (para 140)
  - k. Evaluation of the ground of challenge and relief (para 153)
  - l. Other matters (para 180)
  - m. Conclusions (para 187).

### **Part A: The Proceedings**

12. The claim was lodged in May 2023. It sought to challenge the Defendant’s “failure to take enforcement action to prevent the felling of trees protected under a TPO”. It identified this as a “continuing state of affairs”. The claim also impugned the Defendant’s explanation of its position in a public statement made on 30 March 2023 (see further para 44 below).
13. Since then, no further felling of trees has occurred.
14. The claim form sought the following relief:
  - a. A declaration that the works done in February 2023 were outside the terms of the exception stated for statutory undertakers pursuant to regulation 14 of the 2012 Regulations.
  - b. The quashing of the decision of the Defendant Council that the works to fell the protected trees came within the exception stated for the implementation of this planning permission pursuant to 2012 Regulations, as set out in their statement dated 30 March 2023.

c. A declaration that the pre-commencement planning conditions relating to the construction of the southern access (which is known as Route 2) under planning permissions ref WP/2004/0600 and Variation WP/15/00605/VAR have not yet been satisfied.

15. The case was adjourned twice to allow the parties to engage in alternative dispute resolution. This did not resolve the dispute.
16. Permission to proceed with the judicial review claim was granted by Timothy Corner KC, sitting as a Deputy High Court Judge on 18 October 2023. In granting permission, the Deputy Judge observed that he thought that it was arguable that the planning permission exception in Regulation 14 “cannot be relied upon before the discharge of pre-commencement conditions attached to the planning permission”.

### **Part B: The Tree Preservation Order**

17. The Borough Council of Wellingborough (The Walks, London Road, Wellingborough) Tree Preservation Order 2016 was made by BCW on 1 July 2016 and confirmed on 13 October 2016 (“the TPO”).
18. By article 3 of the TPO, subject to the exceptions in Regulation 14, no person shall “cut down, top, lop, uproot, wilfully damage or wilfully destroy” or “cause or permit the cutting down, topping, lopping, uprooting, wilful damage or wilful destruction of” any tree specified in the Schedule to the TPO except with the written consent of BCW (now the Defendant) or the Secretary of State (pursuant to provisions in Regulations 16, 17 and 23 of the 2012 Regulations) and where such consent is given subject to conditions, in accordance with those conditions.
19. The schedule to the TPO specifies 189 lime trees as protected trees. It identifies them individually. The attached plans to the TPO also identify each of the protected trees individually.
20. It is common ground that the effect of the TPO is to confer protection on each tree and that accordingly consideration of whether the exception in Regulation 14 is satisfied must be undertaken in respect of each protected tree.

### **Part C: The planning permissions for Route 2**

21. I discuss the interpretation of the applicable planning permission in more detail below.
22. To set the scene, the essential facts are these. Stanton Cross is a substantial urban extension. The development was granted planning permission in 2008. It was EIA development. Much of that permission was in outline with reserved matters to be approved. It is common ground that the 2008 permission was a hybrid permission. Route 2 (the relevant southern access road) was approved subject to conditions as shown on the highway plans which formed part of the application. Those plans show the alignment of the road. The application plans in respect of Route 2 (which were permitted by the 2008 planning permission) were detailed plans (and so the permission granted for the

access road is detailed; not outline). However, the approved plans for Route 2 do not show existing trees. The approved plans do not in themselves allow the necessary extent of tree loss required for the construction of the approved Route 2 to be ascertained.

23. The 2008 planning permission pre-dates the TPO.
24. Parts of the 2008 planning permission were implemented but not Route 2.
25. In 2017, an application pursuant to s.73 of the Town and Country Planning Act 1990 (“the 1990 Act”) to vary conditions attached to the 2008 planning permission was approved (“the 2017 planning permission”). It is common ground that this takes effect as a distinct planning permission. It is also common ground that the 2017 planning permission is the relevant planning permission. The plans for Route 2 are the same (or at least not materially different) from those which were approved in the 2008 planning permission. A range of conditions (mostly similar to those attached to the 2008 planning permission were imposed). An update to the environment statement was provided.
26. The 2017 planning permission did not refer to the TPO which had been recently confirmed.
27. The parties disagree on how the conditions of the 2017 planning permission should be interpreted. Key differences include (a) the relevance and effect of conditions relating to the commencement of the Route 2, (b) the relationship between the removal of trees and applicable conditions, (c) the substantive requirements of conditions which relate to the protection of existing landscape features.
28. There is also an issue about the extent to which the environmental statement is relevant as an aid to construction of the 2017 planning permission.

#### **Part D: The Relationship Between the Protected Trees and the Approved Road**

29. The relationship between the protected trees and the approved road is central to this claim.
30. Various plans have been shown to the Court. Each has shortcomings.
31. The approved highway plans show the route of the road but no trees. From these it is obvious that some protected trees will need to be lost to deliver the road (because some trees lie directly in its path). But the plans do not help to identify the necessary extent of that loss.
32. The extent to which other trees will need to be lost or cut back has not been shown on any approved plan.
33. The environmental statement (as originally submitted in 2005 and re-submitted in 2016) at figures 9.33-9.36 gives a broad indication of expected tree loss but does not identify individual trees which will be lost. This is apparent from reading the plans together with the note to figure 9.33 which indicates that “smaller tree references are indicative of tree groups” (not individual trees) (see exhibit JS01 to the witness statement of Jasbir Sandhu

(the Defendant's Interim Planning Management and Enforcement Lead Manager) dated 18 April 2024).

34. Since the controversy arose, there has been a continuing dialogue between the Defendant and the Interested Party as to the extent to which trees will need to be lost to deliver Route 2. Issues which affect this include (a) road safety requirements (which will be known as the detail of the highway scheme is worked up to a greater degree of particularity than the alignment depicted in the approved plans as explained in para 3.1-3.2 of Mr Tompkins' witness statement dated 22 November 2023), (b) the approach to landscaping; (c) the approach to protecting trees in the construction process and once Route 2 is in place; and (d) other design choices which are not determined by the approved plans.
35. Condition 34 to the 2017 planning permission (discussed further in Part H below) requires a plan to be produced to show existing vegetation including trees and the protective measures adopted in respect of those which will be retained. No such plan has yet been approved.
36. Plans were submitted as part of the applications made on 12 April 2024 by the Interested Party to the Defendant for the partial approval of conditions (discussed further in Part F below). These plans were produced as exhibit JS 27-3 to Ms Sandhu's witness statement dated 18 April 2024). Tree retention plan 2049-1-T-14B shows the proposed approach to the north of the existing London Road roundabout and plan 2019-1-T-13B shows the proposed approach to the south of the existing London Road roundabout. These plans have not yet been approved as the applications made on 12 April 2024 have yet to be determined.
37. It is unknown to the Court whether the contractors who started work had a plan which indicated which trees they were instructed to remove or what assumptions informed any such plan or other instruction. This has not been addressed in the evidence produced to respond to the claim.
38. Plans are available which show what was removed (prior to the work being stopped due to the protests and public disquiet). These plans (2049-1-X-01 to 06) were produced – see in particular sheet 01 at B832 and sheet 02 at B833 of the supplementary bundle. The Defendant's position is that it is now satisfied that the trees which were removed needed to be removed to enable the construction of Route 2. It has only been able to ascertain this by looking "backwards" (as Mr Grant put it) after the events of 22-23 February 2023.

### **Part E: The Parties' Positions**

39. The Claimant (and the members of the public who support it) seek to protect the trees but acknowledge that Route 2 has planning permission.
40. The cutting down of the trees caused considerable concern. This concern has not been alleviated by a lack of clarity as to which trees will need to be lost to deliver Route 2, what the legal basis for such loss is and what the process for resolving any uncertainty should be.

41. The Claimant has indicated its purpose in pursuing these proceedings (in the witness statement of Marion Turner-Hawes dated 12 December 2023) as being to “reach a solution whereby Route 2 can be completed without felling the trees or limiting tree loss as much as possible”.
42. There were three stages in evolution of the Defendant’s position as to the lawful basis for the works.
43. First, in February 2023, the Defendant considered that the works to the protected trees were necessary and were being carried out under the statutory undertaker exception on operational land. This is no longer its position (or the position of any party).
44. Second, the Defendant set out its position in a public statement on 30 March 2023 as follows:  
“Given that planning permission was granted by the former Borough Council of Wellingborough for the full detailed design of Route 2, the developer benefits from an exemption to the TPO regulations. The preparatory works to remove the trees from this location are necessary in order to implement their permission and develop Route 2.”
45. The Claimant challenges that decision as unlawful. The Interested Party says that this encapsulation of the position is right. However, the Defendant’s position has evolved. The third stage of the Defendant’s position (as reflected in its response to the claim and oral submissions) is as follows.
46. The Defendant contends that pre-conditions relating to landscaping and protective measures to existing trees need to be met before any further works can be carried out. As reflected in para 15 of the Defendant’s skeleton argument, its position is that “no further felling will take place prior to [the Defendant] being satisfied that, as considered to be relevant by the [local planning authority] the relevant applicable pre-conditions have been discharged” with the aim of limiting tree loss as far as possible.
47. It is the logical consequence of this refinement to Defendant’s position, that the Defendant considers that the works carried out in February 2023 were not authorised under the planning permission (as relevant pre-conditions had not been complied with). Mr Grant candidly accepted this in his oral submissions.
48. The Interested Party’s position is that the works to be carried out were lawful. It contends that the Defendant’s position in these proceedings (to require a package of pre-conditions to be addressed before further works can be undertaken) is erroneous.

#### **Part F: The Applications to Discharge of Conditions dated 12 April 2024**

49. The Interested Party has worked with the Defendant to put forward plans which now show landscape proposals and tree retention in respect of Route 2. It has done this without prejudice to its primary position that no such approvals are required before trees can be felled. These applications were submitted on 12 April 2024.

50. The covering letter to the application dated 12 April 2024 for part discharge of condition 34 (landscape feature retention) states as follows:

“I write on behalf of Stanton Cross Developments LLP to seek confirmation of the part-discharge of Condition 34 (Landscape Feature Retention) of WP/15/00605/VAR in relation to Route 2. The submitted material has been prepared by FPCR Environment and Design Ltd in order to satisfy the requirements of the condition.

Please note that this report, and therefore this discharge of condition application, is interim until such a point as Stanton Cross Developments LLP have completed their technical review of the proposed Route 2 works. Should that technical review alter any of the findings of this report, then a subsequent application will be submitted to re-discharge these conditions.

Two separate Discharge of Condition applications have also been submitted today relating to the part-discharge of Condition 32 (Bats) and Conditions 23 and 36 (Landscaping and Landscape Maintenance) of WP/15/00605/VAR in relation to Route 2.

In accordance with Stanton Cross Developments LLP’s undertaking as part of the ongoing High Court case in relation to Route 2, any further applications to discharge the relevant outstanding conditions and Section 106 obligations relating to the delivery of Route 2 will not be submitted until such a time as the High Court judgement has been received”.

51. On 12 April 2024 three “part-discharge” of conditions applications were submitted: (a) in respect of condition 34 (landscape feature retention) (covering letter set out above); (b) in respect of conditions 23 (landscaping) and condition 36 (landscaping maintenance); and (c) in respect of conditions 32 (bats).
52. The plans informing those applications are referred to in exhibits JS27-30 of Jasbir Sandhu’s witness statement dated 18 April 2024. These plans show the proposed landscaping scheme in respect of Route 2 and identify which individual trees will be removed and which can be retained.
53. These applications have not yet been determined. I was informed that that this would not be determined until after this judgment has been handed down.
54. The iterative process of drawing up these more detailed plans (and discussing them with the Defendant as local planning authority) illustrated that the extent of the tree loss depends on matters of judgment and design detail – for instance what precise design approach is taken as the highway plans are worked up, how safety issues are addressed and what approach is taken to protecting existing trees.
55. A key issue in these proceedings is the extent to which the 2017 planning permission has passed those choices to the Interested Party without the need for any further approval from the Defendant in respect of the protected trees. That takes us to the central issue of how Regulation 14 (a) (vii) applies in this case.



## **Part G: The Legal Framework**

56. Section 197 of the 1990 Act provides that:

“It shall be the duty of the local planning authority –

- (a) to ensure, whenever it is appropriate, that in granting planning permission for any development adequate provision is made, by the imposition of conditions, for the preservation or planting of trees; and
- (b) to make such orders under section 198 as appear to the authority to be necessary in connection with the grant of such permission, whether for giving effect to such conditions or otherwise”.

57. Section 198 contains the power to make tree preservation orders if it appears to a local planning authority that it is expedient in the interests of amenity to make provision for the preservation of trees or woodland in their area. It may do so in relation to such trees or groups of trees or woodlands as are specified in the order.

58. Section 202C of the 1990 Act provides that the order may make provision prohibiting all or any of the cutting down trees, topping trees, lopping trees, uprooting trees, wilful damage of trees, wilful destruction of trees and prohibitions on causing or permitting such activities.

59. Section 202D makes provision for regulations governing the giving of consent including conditionally.

60. Section 206 contains a duty to replace trees removed, uprooted or destroyed in contravention of tree preservation regulations. Section 207 empowers the authority to take action in respect of breaches of the replacement duty or conditions requiring replacement.

61. Section 210 creates criminal offences in respect of breaches of tree preservation regulations.

62. The relevant regulations are the 2012 Regulations.

63. Regulation 13 provides for prohibited activities subject to exceptions in Regulation 14.

64. Regulation 14 states so far as material:

“Nothing in regulation 13 shall prevent –

(a) the cutting down, topping, lopping or uprooting of a tree –

(iii) by or at the request of a statutory undertaker, where the land on which the tree is situated is operational land of the statutory undertaker and the work is necessary—

(aa) in the interests of the safe operation of the undertaking;

(bb) in connection with the inspection, repair or renewal of any sewers, mains, pipes, cables or other apparatus of the statutory undertaker;

(cc) to enable the statutory undertaker to carry out development permitted by or under the Town and Country Planning (General Permitted Development) Order 1995

.....

(vii) so far as such work is necessary to implement a planning permission (other than an outline planning permission or, without prejudice to paragraph (iii)(cc), a permission granted by or under the Town and Country Planning (General Permitted Development) Order 1995) granted on an application under Part III of the Town and Country Planning Act 1990 (control over development), or deemed to have been granted (whether for the purposes of that Part or otherwise)”.

65. As identified above, exception (vii) is the central provision at issue in these proceedings. Exception (iii) was identified at an earlier stage of the dispute but is not now said to be relevant for present purposes by any of the parties.
66. The Court of Appeal’s decision in Barney-Smith v Tonbridge and Malling Borough Council [2016] EWCA Civ 583 (CA) contains an encapsulation of the relationship between tree preservation orders and planning permission. This decision was not cited in argument by any of the parties. The Court drew attention to it at the start of the hearing and all parties made submissions as to how it bears on the points at issue in the claim.
67. The factual context of Barney-Smith was a discussion of the effect of a tree preservation order on the grant of planning permission for the continued use of land as a caravan site. In the present case, we are concerned with the grant of planning permission for operational development. Despite the factual difference, the Court of Appeal’s discussion on the relationship between planning permissions and tree preservation orders provides a framework for assessing the key issue in this case.
68. In paras 5-11, Lindblom LJ (with whom Vos and Elias LLJ agreed) reviews the history of tree preservation orders in the planning legislation which dates back to s.46 of the Town and Country Planning Act 1932. Lindblom LJ noted the evolution of the planning permission exception through various iterations of the predecessor regulations to the 2012 Regulations.
- a. In the Town and Country Planning (Tree Preservation Order) Regulations 1969 (“the 1969 Regulations”) the exception from the requirement for consent applied to (3) the cutting down, uprooting or lopping of a tree ..(c) where immediately required for the purpose of carrying out development authorized by the planning permission....”
  - b. The corresponding exception in the schedule to the Town and Country Planning (Trees) Regulations 1999 was “(1)...(d) the cutting down, topping and lopping of a tree where that work is required to enable a person to implement a planning permission”.
69. Lindblom LJ observed (at para 38) that “the legislative regime for tree preservation orders does not stand apart from the comprehensive statutory scheme for land use planning. It is an integral part of that statutory scheme, and an important one”. He noted the complementary nature of the power to impose conditions to protect trees and the power to make tree preservation orders (now reflected in the duties in s.197 of the 1990

Act) and explained that the power to make tree preservation orders “complement” a local planning authority’s “functions in making decisions on proposal for development, including its power to impose conditions on grants of planning permission”.

70. Lindblom LJ construed the effect of the planning permission according to its terms and in the context of the complementary nature of the controls (see paras 40-42).

71. The decision in Barney-Smith was concerned with the provision in the 1969 Regulations for the exception (i.e. whether the work to protected trees is immediately required for the purpose of carrying out development authorised by the planning permission” (para 43). The wording of that exception, Lindblom LJ explained: “connote[s] nothing more or less than the concept of it being necessary, as an immediate requirement, to undertake work to protected trees to make it possible to carry out development for which planning permission has been granted or deemed to be granted” (para 43).

72. Applying that legal approach he stated (at para 44):

“Leaving aside the other exemptions, with which we are not concerned, if the felling of a protected tree – or something less than that, such as topping or lopping – was “immediately required” because otherwise the landowner would be unable to carry out the development in question, he would not need the council's consent for the work. But if it were possible for the planning permission to be implemented without such work being undertaken, the work would, self-evidently, not be “immediately required for the purpose of carrying out [the] development ...”, and it would not be lawful to do it without the necessary consent. In those circumstances the development could still be carried out under the planning permission or deemed planning permission, but it could not lawfully be carried out in such a way as to negate the protection afforded to the trees by the TPO. The fact that otherwise, had the TPO not been made, the development could have been lawfully carried out in some other way, without the council's consent having to be sought for work to the protected trees, is immaterial. **So too is the fact that a particular developer or landowner might prefer, in carrying out the development, to make way for it by undertaking work to protected trees, even though that work was not immediately required, or required at all, to enable the planning permission to be implemented. The critical question is whether the development was capable of being carried out without destroying or injuring trees protected by the TPO. That is not a question of a developer's preference. It is a question of fact**”.

(emphasis added)

73. At para 45, Lindblom LJ, observed that this approach was unsurprising and remained apt under the later iterations of the TPO Regulations (including the 2012 Regulations) with which we are concerned for present purposes. He observed:

“This, in my view, is an entirely natural and entirely unsurprising interpretation of the relevant exemption in the TPO. It is not only true to the language of the TPO, which itself is true to the provisions of the legislative regime for tree preservation orders under the 1971 Act and the 1969 regulations. It also respects the relationship within the comprehensive statutory scheme between grants or deemed grants of planning permission for development and tree preservation orders, whose purpose is to protect trees from development. It maintains the requisite balance in that relationship, which Parliament clearly intended. And in my view this may also be

said of the legislative regime as modified by subsequent amendments, including the amendments introduced in the 1999 regulations and under the 2008 Act and the 2012 regulations. To be clear, the same understanding of the exemption for development for which planning permission or deemed planning permission has been granted would also apply, in principle, to the concept of work to trees being “required to enable a person to implement a planning permission ...”, under the 1999 regulations, and to the concept of such work being “necessary to implement a planning permission ...”, under the 2012 regulations”.

74. The application of this approach in any given case will be fact specific. In paragraph 46, Lindblom LJ observed that:

“Sometimes of course – indeed, often – development for which planning permission has been granted can only be carried out if work is undertaken to trees protected under that order. The obvious example – the one given in paragraph 36-083–20150415 of the PPG – would be operational development such as the construction of a house or a factory, for which full planning permission has been granted, fixing the siting and design of the building so that it must be erected on a part of the site where there are trees protected under a tree preservation order. In such a case there will be only one way in which the planning permission can be implemented, and it will be obvious, as a matter of fact, that the development cannot be carried out unless protected trees are removed within the area where the building will stand. The protection of the trees under the tree preservation order would then yield to the implementation of the planning permission, because otherwise the planning permission could not be implemented”.

75. Vos LJ and Elias LJ agreed with Lindblom LJ. At para 69, Vos LJ observed:

“As the judge and Lindblom LJ have pointed out, if the felling was specifically required in order to carry out a particular operational development, such as the building of a house in a specified location where protected trees were standing, the planning permission would certainly take precedence so that felling would be “immediately required” to carry out the authorised development. But that is not this situation. Here, the authorised development is only the continuation of use of the Caravan Park as a caravan site, and that can objectively be carried out without bringing any more caravans on to the site, and certainly without felling trees so as to do so. The TPO would not be working together with the Planning Permission if the Appellants could simply override it (the TPO) so as to fell protected trees in order to site more and more caravans on the land”.

76. The relevant guidance in the Planning Practice Guidance (which was referred to in the Court of Appeal’s decision in Barney-Smith) states as follows:

**Is there an exception for tree work relating to planning permission and permitted development?**

The authority’s consent is not required for carrying out work on trees subject to an Order so far as such work is necessary to implement a full planning permission. For example, the Order is overridden if a tree has to be removed to make way for a new building for which full planning permission has been granted. Conditions or information attached to the permission may clarify what work is exempt.

However, the authority's consent is required for work on trees subject to an Order if:

- development under a planning permission has not been commenced within the relevant time limit (ie the permission has 'expired');
- only outline planning permission has been granted; and
- it is not necessary to carry out works on protected trees in order to implement a full planning permission.

The authority's consent is also required, for example, for work on trees protected by an Order that is necessary to implement permitted development rights under the Town and Country Planning (General Permitted Development) Order 2015.

Paragraph: 083 Reference ID: 36-083-20150415

77. The Barney-Smith case confirms that:

- a. The overall statutory scheme is one where tree preservation orders are complementary to planning control.
- b. A key task when considering how Regulation 14(a)(vii) applies is to understand what is permitted by the planning permission.
- c. To the extent that what is permitted necessarily involves the loss of trees, then the exception will be applicable.
- d. To the extent that the planning permission can be carried out in a way which does not necessitate the loss of trees, then the exception will not be available.

78. It is a key step in the analysis to construe properly the grant of planning permission. In the present case, this will involve understanding the extent to which tree loss is required to give effect to the plans which have been approved.

79. Barney-Smith does not deal with the questions of conditions in the planning permission (because there were none in that case). However, I consider that it is part of the essential task of understanding what is permitted under the planning permission to address the extent to which conditions bear on what can be done under the planning permission so far as it relates to works to trees. If, and to the extent that, conditions are relevant to the exercise of understanding whether trees will necessarily be lost to give effect to the development for which planning permission has been granted, their effect needs to be properly understood.

80. Although the precise wording of the exception has changed from the 1969 Regulations, Lindblom LJ did not consider that the change of wording affected the essential nature of the factual inquiry. The essential task is to identify the extent to which trees will necessarily be lost. To that extent (but only to that extent), the exception applies. If it is possible to implement the consent without loss of trees then the exception does not permit the loss of trees that could be saved (without the grant of express consent).

81. In the present case, there will be some trees which will plainly be lost to deliver the scheme. Barney-Smith confirms that the complementary nature of the legislative schemes is that the tree preservation order yields to the necessary effect of implementing the planning permission.

82. But it is also necessary to consider whether (and to what extent) the tree loss is authorised by the planning permission without further approval. This depends on the effect of the conditions attached to the planning permission.
83. In the present case, there are trees that might need to be lost but whether they are to be lost depends upon decisions made as to how the planning permission is implemented. I will refer to this as the grey area (i.e. it is not yet known whether the trees will need to be lost on the basis of the plans approved). Barney-Smith indicates that such trees cannot simply be removed relying on the exception (if it is possible to implement the planning permission without such loss).
84. Here, there is a set of conditions which may inform (and regulate) whether ‘grey area’ trees become trees whose removal is known to be necessary. It is a question of fact which trees are required to be removed. However, the conditions may have a role to play in defining which trees are known to be required to be removed. How they work under the 2017 planning permission is controversial and this is the issue to which I turn next.

**Part H: The main issue – are the works necessary to implement the 2017 planning permission?**

Interpretation of Planning Permission

85. The essential principles to be applied in the interpretation of planning permissions are now well settled. In R (Dennis) v Southwark LBC [2024] EWHC 57 (Admin), Holgate J summarised the relevant law as follows.

“56. The principles for the interpretation of planning permissions are well-established (see e.g. *R v Ashford Borough Council ex parte Shepway District Council* [1999] *PLCR* 12 ; *UBB Waste Essex Limited v Essex County Council* [2019] *EWHC* 1924 (Admin) ; *Trump International Golf Club Scotland Limited v Scottish Ministers* [2016] *1 WLR* 85 ; *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] *1 WLR* 4317 and *Barton Park* ). They do not need to be repeated in detail here.

57. The interpretation of a planning permission is an objective question of law for the court to determine. A permission must be interpreted as a whole, comprising not only the grant but also the conditions imposed and the reasons stated for imposing those conditions. The court asks itself what a reasonable reader would understand the language of the permission to mean. The court will have regard to the ordinary and natural meaning of the words used, the purposes of the permission, the statutory context and common sense”.

Conditions under the 2017 planning permission

86. It is also common ground that the operative planning permission is now the 2017 planning permission. It was granted pursuant to s.73 of the Town and Country Planning Act 1990. It takes effect as a separate planning permission.
87. On 6 February 2017, BCW granted planning permission under s.73 of the 1990 Act for a “variation” of the 2008 Planning Permission in the following terms: “variation/removal of conditions (reserved matters link to masterplan), 7 (development in accordance with stated plans), 8 (development in accordance with ES), 9 (max development parameters), 10 (phasing), 15 (highway works and phasing), 16 (travel plan phasing), 25, 26, 28, 31, 32 and 34 (ecology mitigation), 27 (compensation areas), 35 (structural landscape strategy). 38 (landscape mitigation), 42 and 44 (noise mitigation), 45 (kennels) and 49 (construction management plan) of planning permission ref: WP/2004/0600- Mixed use development including 87ha of residential development; B1, B2 and B8 development, new public transport links (buses), new and enhanced walking and cycling routes and facilities, Country Park Neighbourhood Centre, 2 Secondary local centres, construction of access roads, bridges and highway structures, footways, footpaths, bridgeways; and associated works and facilities” (“the 2017 planning permission”).
88. The 2017 planning permission contains a number of conditions which are potentially relevant for present purposes.

Condition 14 states:

“The following highway works shall be implemented in accordance with the approved details prior to the identified triggers that relate to the approved development individually or in combination with the additional residential development subject to WP/15/00481/OUT.....

The Embankment/Access Road 2 6117071/R2/J3 J Prior to 724 occupations

London Road/A509/Turnells Mill Road/The  
Embankment 6117071/R2/J2 M

Prior to 724 occupations”

Condition 8 states:

“The development hereby permitted shall be carried out in substantial compliance with the plans contained in the Planning Application and save as is necessary to secure compliance with the conditions on this permission no variation shall be made without the prior written approval of the local planning authority.”

89. There are several pre-conditions which apply to Route 2 (which remained to be discharged at the time of the February 2023 works and to date). These include conditions which relate to soft landscaping (including trees). The key conditions are as follows (headings added for ease of reference).

Condition 23 (Landscape Areas) states:

“Soft landscape areas shall be provided in accordance with the mitigation strategy set out in the ecology statement within the Environmental Statement August 2004/05 and the 2015 Environmental Statement Supplement in accordance with a timetable to be

agreed with the local planning authority”.

“Reason: To ensure that the development achieves the objectives set out in the environmental statement”.

Condition 34 (Landscape Feature Retention) states:

“Prior to the commencement of development of any sub-area or infrastructure element, a detailed plan shall be submitted to and approved in writing by the local planning authority indicating the position of existing landscape features including trees, large shrubs and hedges both within the site and overhanging the site boundary. The extent of the canopy must be plotted accurately and the plan must specify protective measures to existing trees and hedges to be retained on that part of the site in accordance with British Standard 5837. The plan must also indicate the proposed route of all underground services and measures to be taken to ensure that root damage is avoided. The approved measures shall be implemented prior to development of the sub area or infrastructure element to which it relates and retained until the completion of the development. Any land so enclosed shall be kept clear of all materials, machinery and temporary buildings at all times”.

“Reason: To protect existing landscape features”

Condition 36 (Landscape Maintenance) states:

“Before work commences on any development sub area or infrastructure element, a detailed scheme for the future maintenance and management of the proposed amenity and landscape area(s) shown on the approved plan in accordance with the Environmental Statement dated August 2004/05 shall be submitted to an approved in writing to the local authority. The details shall thereafter be implemented in accordance with the approved scheme. The scheme should include a plan indicating any amenity area(s) or landscape works that are proposed for adoption by the Local Authority or other agency”.

“Reason: To ensure the proper future maintenance of the open spaces”.

Condition 32 (Bats) states:

“No trees which have the potential to accommodate bat roosts will be removed until a detailed method statement according with the Environment Statement dated August 2004/2005 and the 2015 Environment Statement Supplement has been submitted to and approved in writing by the local planning authority”.

“Reason: to protect wildlife”.

In addition, condition 31 provides:

“Existing vegetation with the potential to accommodate birds will only be removed outside of the bird breeding season (March to August), unless otherwise agreed in writing by the local planning authority. Where such agreement is made, an ecologist nominated by the local planning authority will first check that no nests are present. Where they are present the vegetation will be retained with a 5m buffer until all birds are fledged and the nest is no longer in use”



“Reason: to protect wildlife”

Discussion

90. A key controversial issue was the effect of condition 34 (read together with condition 23, 32 and 36).
91. As explained above, it was common ground that:-
- a. The 2017 planning permission is the operative planning permission.
  - b. It is a hybrid permission which grants approval for Route 2 as shown in detailed plans.
  - c. The approved plans do not show the extent of tree loss.
  - d. It is necessary to construe the permission as a whole together with its conditions to understand the extent of what is permitted.
92. Route 2 was granted planning permission in accordance with the plans (see condition 6). The key plan is titled “Access route 2- Detailed Plan layout – sheet 1 “which sits within the Route 2 plan with the following details added “Junction RB2/B -removal of existing roundabout, construction of new signalised roundabout junction, pedestrian & cyclist crossing points provided at suitable locations, 3 m wide shared surface cycle/footways provided as necessary, 1.8 wide verges/footways provided to all other edges of carriage way.”
93. The implementation of Route 2 is to be managed under the conditions.
94. In respect of condition 34, there are two basic perspectives.
95. The perspective of the Claimant and the Defendant is that this is a measure which secures (together in particular with condition 23 which relates to landscaping), the need for further approval in respect of the approach to the retention of trees as part of the development of Route 2.
96. The applications submitted on 12 April 2024 (see Part F above) reflect this view of the scope of condition 34 (read together with condition 23).
97. The Interested Party’s primary case does not accept that condition 34 restricts its ability to undertake works to the trees to deliver Route 2. Its submissions focused on two points: (a) the relevant trigger for the requirements of condition 34 and (b) the substantive content of condition 34.
98. Before addressing these points, it is instructive to establish some common ground in terms of the potential relationship of conditions to Regulation 14(a) (vii).
99. Condition 31 applies to the removal of any vegetation. This can only be done outside the bird nesting season.

100. So, a question of approach which arises is whether the removal of a protected tree which obviously needs to be removed (because say it is in the direct line of the road) that is within the bird breeding season (and so in breach of condition 31) would be within the exception.
101. It would be necessary to remove that tree to implement Route 2 (on any view) but it would be removed in breach of a planning condition attached to the planning permission.
102. In my judgment such a removal would not come within Regulation 14(a)(vii). I consider that, consistent with the approach in Barney-Smith, to fall within exception in Regulation 14 (a)(vii), the tree removal must be consistent with what is required by (and therefore necessarily authorised by) the planning permission. Actions which are inconsistent with an express requirement of planning permission would not come within the exception in Regulation 14 (a) (vii).
103. Ms Sheikh KC accepted this. Thus, if a protected tree (which would undoubtedly have to be lost) was removed in the bird breeding season, that work would not be within the exception in Regulation 14 (a)(vii) because it would not be authorised by the planning permission.
104. The same logic would also apply in respect of condition 32 (bats). This attaches restrictions to the removal of any tree. If a tree is removed (even one that is undoubtedly destined to be removed) without complying with the scheme to protect bat roosts, then it is not authorised by the planning permission and its removal is not authorised by Regulation 14(a)(vii).
105. With this insight in mind, I consider the position in respect of condition 34 (read together with condition 23).
106. I address Ms Sheikh KC's two points (see para 97 above) in reverse order.
107. As to the substance of condition 34. It is necessary to read the requirements of this condition in the context of the permission as a whole (and applying the principles summarised by Holgate J in para 57 of Dennis).
108. The condition applies to a range of scenarios. It applies to parts of the development for which outline consent has been granted. It also applies to the infrastructure elements (including Route 2) where the alignment of proposed road is established (albeit that the extent of necessary tree loss is not clearly defined on the approved plans and has not yet been fully worked out and reflected on a plan).
109. Condition 34 requires before any work on Route 2 is commenced (because Route 2 is an infrastructure element of the scheme), that a plan should be submitted to the local planning authority identifying all existing trees and what measures will be employed to protect those which will be retained.
110. That plan is not submitted for informational purposes, it is submitted for approval.

111. It is a necessary part of the preparation of that plan to identify which trees will be retained (and which trees will be lost; because if existing trees are not retained then by definition they will be lost).
112. If one reflects on how a local planning authority would deal with a plan submitted to them under this condition which was prepared (by way of an example) on the basis that all the trees will be lost because the developer has decided to remove them rather than take any steps to retain them (say on grounds of cost or speed of construction); it cannot be right that the local authority would have no role under condition 34 (read together with condition 23) to question such an approach.
113. Rather, it must be intrinsic to the exercise required by the condition (and plainly consistent with its stated purpose) for the local authority to have a function under this condition to assess whether the choice of which trees are retained (and which are to be lost) is acceptable or not. In so assessing, the local planning authority cannot of course go behind the substance of what has already been permitted in the approved plans. But it can and indeed should exercise its power to ensure that existing trees (as a form of soft landscape) are appropriately retained where this is reasonably possible (taking account of the material considerations which inform this planning judgment). To read the condition in this way is consistent with the statutory scheme given the local planning authority's duties in respect of trees under s.197 of the 1990 Act. It is consistent with the fact that the approved plans are silent on the extent of the tree loss. It is consistent with the fact that the precise details of the landscaping arrangements applicable to Route 2 remain to be determined.
114. The contrary approach urged by Ms Sheikh KC was that condition 34 was not concerned with approving which trees are to be retained. She argued that it was the Interested Party's election as to which trees to retain. All it was required to do was show its choices on the plan. All that the local authority could do was to check the accuracy of how this had been plotted and assess the protected measures for those trees which the Interested Party had elected to retain.
115. I disagree that this is the effect of condition 34 (read properly in context). As I have indicated, such an approach would be inconsistent with a practical approach to its wording. It would be contrary to the local planning authority's function under s.197 of the 1990 Act. It would defeat the stated purpose of the condition. If the words of the condition could only be read that way, then I would be required to hold this was their effect. But I do not consider that this is the effect of condition 34 when the condition is interpreted applying the approach summarised by Holgate J in para 57 of Dennis.
116. Ms Sheikh KC also contends (her first point – see para 97 above) that the trigger for the requirements of condition 34 (prior to the commencement of Route 2) would not be met by cutting down trees to clear space for Route 2.
117. This contention sparked a legal debate as to whether the act of cutting down trees could be the commencement of development for the purpose of s.56 of the 1990 Act.
118. On the one hand, Mr Upton KC contended that the situation was closely analogous to

position in Thayer v Secretary of State [1992] JPL 264 where the creation of a 12-foot hole in the hedge and limited ground preparation was the commencement of development for the purpose of s.56 of the 1990 Act. Similarly, in Malvern Hills DC v Secretary of State for the Environment [1982] JPL 439, the Court of Appeal held by a majority that marking out a line and width of a road with pegs amounted to an operation in the course of laying a road (see s.56(4)(d) – for the purpose of s.56(2) a material operation comprised in the development includes “any operation in the course of laying out or constructing a road or part of a development”).

119. On the other hand, Ms Sheikh KC submitted that the statutory scheme draws a distinction between works to trees and development. She submits that cutting down trees is not development for the purpose of s.55 of the 1990 Act.
120. These competing submissions touch on a point of legal controversy as to the possible range of circumstances in which the cutting down of trees might be development.
121. There is a helpful discussion of the relationship of works to trees with the concept of development in Mynors, Hall and Nichols: *The Law of Trees, Forests and Hedges* (3<sup>rd</sup> edition) (2023) at paras 10-43 and 13-39. This was also discussed by Gilbert J in R (Dillner) v Sheffield City Council [2016] EWHC 945 (Admin) at paras 148-170 (in the context of a case about the legality of works to trees undertaken by Sheffield City Council acting as highway authority). The orthodox position is that tree work (including cutting down trees) is not generally development.
122. The application of s.56(4) of the 1990 Act is fact specific. I consider that by analogy with the cases cited in para 118 above, it may be that certain works to trees (for example where they are extensive, involve the use of substantial equipment) could amount to a sufficient act of clearing the way for a road that they come within s.56(4)(d).
123. But I do not consider that it is necessary for me to decide this point. The relevant issue in this case is to determine at what point in time the protective provisions of condition 34 apply in respect of the protection of trees. That does not require reaching any more general conclusion about the commencement of development for other purposes.
124. In considering the specific issue of when the provisions of condition 34 take effect, it is relevant (consistent with the approach to construction summarised in para 57 of Dennis) to consider the requirements of condition 34 and the purpose for which they have been imposed.
125. Their very purpose is to protect existing vegetation (which includes trees).
126. There are two possibilities. First, the condition is toothless as far as the protection of trees is concerned because it does not bite on the removal of trees as a preliminary step in the commencement of Route 2.
127. Alternatively, the condition works because the removal of trees specifically to clear space for Route 2 to be constructed is an act which triggers the protective provisions of condition 34.

128. I prefer the second approach. It fits with the purpose of the condition and represents the more sensible and practical approach to interpretation of the planning permission.
129. Thus, whilst I see force in Ms Sheikh KC's general observation that the cutting down of trees is not normally development for the purpose of s.55 of the 1990 Act, I approach the construction of condition 34 on the 2017 planning permission that its requirements need to be met before trees can be cut down to make way for Route 2.
130. In my assessment the 2017 planning permission requires the developer to submit a plan for approval identifying which trees will be retained before it removes trees to facilitate the construction of Route 2.
131. It is common ground that no such plan was submitted and approved before trees were removed in February 2023.
132. The process of formulating such a plan and seeking approval is now underway and the application was submitted on 12 April 2024. This plan (yet to be approved) indicates the extent to which tree loss will be required to implement route 2 (albeit with the caveats referred to in the covering letter).
133. I therefore consider that both Mr Upton KC and Mr Grant are correct to say that necessary conditions under the 2017 planning permission had not been satisfied before works were carried out in February 2023. It is necessary for the retention plan (in respect of Route 2) under condition 34 to be approved before trees are felled under the 2017 planning permission as part of the process of delivering Route 2. On this interpretation of the 2017 planning permission, the works carried out before such a plan is approved are not authorised by the permission and therefore do not fall within Regulation 14 (a)(vii).

### **Part I: The Practical Implications of this Interpretation**

134. As indicated above, the Defendant is now on the correct legal path.
135. The application which has been submitted on 12 April 2024 will facilitate the Defendant assessing what level of tree loss is necessary to build out Route 2.
136. The relationship of the TPO and the 2017 planning permission is such that it will be necessary for some protected trees to be lost to deliver Route 2. As explained in Barney-Smith, the TPO does not prevent the loss of trees that are necessary to implement the planning permission in accordance with its terms.
137. There will be some trees that will plainly be lost because they are located in an area where development is required.
138. There will be other trees where the exercise of planning judgment is needed as to whether their loss is necessary or can be avoided. I consider that the landscape focused conditions to the 2017 planning permission namely conditions 23, 32, 34 and 36 provide a framework for determining which trees will fall into the category of unavoidable loss (when the relevant planning balance is struck) and which can be retained (with or

without protective measures).

139. I do not consider that Regulation 14 (a)(vii) can be relied upon until the necessary approval for the plan identifying which trees will be retained has been approved.

**Part J: The Further Arguments of the Parties**

140. Mr Upton KC advanced two additional points on the interpretation of the 2017 planning permission which were not supported by Mr Grant.
141. First, he contended that a wider suite of pre-conditions attached to the 2017 planning permission needed to be satisfied before any trees could be removed.
142. As might be expected for a complex scheme, there are many elements of planning control which were secured by conditions attached to the 2017 planning permission.
143. I agree with Mr Grant's contention that the controls applied in this wider suite of conditions are remote from the central issue for present purposes of defining the extent of the tree loss which is required under the 2017 Planning Permission.
144. The pre-conditions relied upon by Mr Upton KC in this wider suite of conditions have little to do with trees and relate to other aspects of the Route 2. For instance, the archeological condition and the lighting condition do not seem to me to relate plausibly to the need for tree removal or the required extent of it.
145. They do not meaningfully assist in answering the factual question which arises under Regulation 14 (a)(vii) of whether the works (to trees) are necessary to implement the planning permission. Neither, on a realistic approach, do they contain controls which are sufficiently related to the retention of trees to be treated as pre-requisites which would need to be satisfied before reliance can be placed on the exception contained in Regulation 14 (a)(vii).
146. I do not consider that the need to approve these preconditions would be required before works can be undertaken to protected trees once it has been established to the satisfaction of the Defendant as local planning authority what the extent of trees that will need to be removed are to deliver Route 2. Even if they were relevant in some way to the issue of which trees could be retained, in those circumstances this link would be material to the Defendant's exercise of planning judgment as to whether it has sufficient information to approve the plan submitted under condition 34. But to take the approach urged by Mr Upton KC (in this wider argument) would be to conflate the broader functions of planning control with the factual question of what tree loss is authorised under the permission (for the purpose of applying Regulation 14(a)(vii)). In my judgment it is only the conditions which bear directly on the defining which trees need to be removed (or otherwise directly control the removal of trees) which affect the question of whether the Regulations 14(a)(viii) exception is available in this case.
147. Mr Upton KC also argued that the environmental statement was incorporated into the 2017 Planning Permission.

148. He advanced this argument to contend that the plan referred to at figure 9.34 of the environmental statement (which he contended showed the extent of proposed tree loss) was incorporated by reference into the permission.
149. This argument has two fundamental difficulties.
150. First, as Mr Grant correctly submitted, the plan in question did not in fact contain any specific assumptions about which individual trees would be retained. Its key explained that it showed areas where trees could be retained (see the key to figure 9.33 referred to in para 33 above). Mr Upton KC's argument therefore relied upon an incorrect assumption as to what the plan at figure 9.34 of the environmental statement in fact shows.
151. Second, the 2017 planning permission makes specific references to specific parts of the environmental statement in certain conditions. However, it did not refer to the environmental statement in respect of the protection of existing trees in condition 34 (or otherwise).
152. I therefore reject the proposition that the environmental statement is incorporated into the 2017 planning permission beyond the extent to which specific parts of it are explicitly referred to the conditions.

**Part K: Evaluation of the Grounds of Challenge and Relief Sought**

153. I have so far addressed the key disputes between the parties without explicit reference to the grounds of claim. I now relate my conclusions to the grounds of challenge.
154. The first ground focuses on the level of detail available to determine whether Regulation 14 was satisfied.
155. As I have decided above, at the date of the works (February 2023), no plan had been approved under condition 34. No plan was available showing the extent of tree loss proposed. It follows from the analysis above that I agree with the Claimant that this was legally insufficient to enable the Interested Party to rely on the exemption in Regulation 14(a)(vii).
156. As I have recorded above, Mr Grant (for the Defendant) conceded that this was so.
157. The pathway now being followed, namely the submission of an application for the approval under condition 23 and 34 (as well as conditions 32 and 36) dated 12 April 2024 seeks to remedy this deficiency and define the extent to which tree loss will be necessary taking account of landscaping and the more detailed working up of the highway proposal (beyond that which is settled by the approved plans to the 2017 Planning Permission).
158. To this extent therefore, ground 1 succeeds.
159. In respect of ground 2, the challenge is to the carrying out of works to the protected trees in advance of the approval of pre-conditions.

160. As I have indicated, I consider that it is necessary for approvals to be in place under condition 34 (read together with condition 23). The need for approvals under conditions 36 and 32 is also accepted implicitly through the submission of such details for approval.
161. To this extent, I consider that ground 2 succeeds.
162. I have rejected above, Mr Upton KC's wider argument based on the whole suite of pre-conditions.
163. Ground 3 is primarily the argument that the environmental statement has been expressly incorporated in the 2017 Planning Permission and that tree loss beyond what is shown there cannot be permitted.
164. I have explained above that I reject Mr Upton KC's contention as to the effect of the environmental statement plans (see paras 150-1 above).
165. It will be for the Defendant as local planning authority to assess in approving condition 34 how what is now proposed relates to what has been assessed and whether any further environmental information is required.
166. I therefore reject ground 3.
167. Ground 4 concerns the fact that the work to the trees cannot be justified under Regulation 14 (a)(iii) – the statutory undertakers exception. This was part of the justification advanced in February 2023 for the works.
168. At the hearing nobody suggested that this was relevant. Ground 4 is correct (albeit the debate has moved on from the point which it raises).
169. In so far as the challenge is to the Defendant's failure to take enforcement action, the Court must approach this on the basis that the Defendant has discretion as to how to judge expediency.
170. There was evidence consisting of various internal notes (produced in Ms Sandhu's witness statement dated 18 April 2024) as to the way this has been approached at various stages. Whilst these were criticised in submissions, the reality is that the Defendant's position has evolved.
171. My conclusion is that the Defendant did not assess whether the work to trees was authorised correctly in its initial position in February 2023 or in its decision dated 30 March 2023. Mr Grant accepts this.
172. However, the Defendant's position in these proceedings acknowledges the role of the preconditions relating to trees and landscape. It is now in receipt of an application to partially discharge these conditions which seeks to discharge these conditions.
173. It is a matter for the Defendant as local planning authority to consider what trees need



to be lost and whether the details submitted should be approved.

174. This involves matters of planning judgment for the Defendant. Moreover, it is for the Defendant to consider whether it is expedient to take any enforcement action in respect of the breaches which have occurred (see by analogy the discussion of the breath of discretion which the local planning authority has in respect of its consideration of expediency by Lindblom J (as he then was) in Gazelle Properties Limited v Bath and North East Somerset Council [2010] EWHC 3127 (Admin) at paras 63-68).
175. As to the specific relief sought by the Claimant, the position is as follows.
176. I have indicated that when works started there was insufficient clarity as to what trees would be removed and the necessary approval under condition 34 had not been obtained. On that basis, Regulation 14(a)(viii) was not satisfied.
177. I have also found that Regulation 14(a) (iii) did not apply (as everyone now accepts).
178. I have indicated that the Defendant's decision dated 30 March 2023 was incomplete (as the Council itself has now conceded). It does not need to be quashed because it was part of a continuing process which is now better aligned with what I have found to be the correct approach.
179. As to the declaration that the pre-conditions have not been satisfied, the position is as follows. The wider pre-conditions relied on by Mr Upton KC do not all need to be satisfied. Condition 34 (and its allied conditions 23, 32 and 36) do need to be satisfied and there is now a process in place to enable the Defendant, as local planning authority, to make a decision in respect of those. In this context, no declaration is necessary beyond the conclusions set out in this judgment.

### **Part L: Other Matters**

180. Next, I address briefly various other matters which had been raised by the parties in these proceedings.
181. Ground 5 as pleaded related to a draft s.278 agreement. The Deputy Judge (Mr Corner KC) refused permission for it and this matter was not pursued at the oral hearing.
182. The Defendant and Interested Party advanced arguments in writing on delay. At the permission stage, Mr Corner KC granted an extension of time if one was necessary as he viewed the matter as a continuing process. That decision should not be revisited at the substantive stage but in any event, I agree with his conclusion.
183. In oral argument, it was confirmed that no point on timing was now being taken in respect of relief.
184. Mr Upton KC in his skeleton argument tried to recast the terms of the declaration he sought to refer to the need to conform with the environmental statement. I have addressed the argument which underpins this putative amendment and found it to be without merit (see paras 150-1). There is an additional difficulty. The Claimant did not

apply to amend its pleading to re-formulate the declaration sought. It is necessary that the terms of any declaration sought are identified in the pleadings to avoid potential prejudice to the other parties in the case (see paras 27-29 of R (ZLL) v Secretary of State for Levelling Up, Housing and Communities and Shelter [2022] EWCA Civ 1059).

185. The Defendant applied for permission to rely on the witness statement of Jasbir Sandhu dated 18 April 2024. This witness statement was produced (a) to update the Court on recent developments and (b) to produce certain documents which had been omitted from the claim bundle and (c) to produce relevant documents to comply with the Defendant's duty of candour. After hearing submissions, I admitted this document in evidence (and a short and helpful response to it in a witness statement from Alice Goodenough on behalf of the Claimant dated 29 April 2024).
186. The timing of Ms Sandhu's updating statement and the extent of material produced were unfortunate. It came after skeleton arguments had been prepared and produced a great deal of material with insufficient referencing and unnecessary duplication. I admitted it subject to the proviso that party could make submissions if they found that they were prejudiced by reference to it during the hearing. In the event, no one contended that any prejudice arose. The material produced included documents which assisted in giving clarity as to the progress of discussions between the Defendant and the Interested Parties on formulating landscaping and tree retention plans for Route 2 and their submission for approval under conditions 23 and 34.

### **Part M: Conclusions**

187. I have found that grounds 1, 2 and 4 succeed to the extent indicated above. Ground 3 and the Claimant's wider arguments about the extent of approval required under pre-conditions have not succeeded.
188. The Defendant's initial approach in February 2023 to whether the works were authorised under the statutory undertaker exception in Regulation 14 was incorrect. On 30 March 2023, its legal analysis remained incomplete. In its written and oral submissions at the hearing, Mr Grant's approach aligned with the conclusions now reflected in this judgment.
189. I have rejected the Interested Party's contentions that no further approval was needed for the felling of protected trees (having regard to the conditions attached to the 2017 planning permission and the extent to which the necessary tree loss is defined in the approved plans).
190. It is now the Defendant's role as local planning authority to determine whether the details submitted under condition 34 (together with condition 23) should be approved. The practical implications of this judgment are summarised in Part I (paras 134-139) above.
191. I invite the parties to agree an order to reflect the terms of this judgment or make submissions in respect of any ancillary matters which cannot be agreed.

192. I thank Counsel for their helpful written and oral submissions.