Neutral Citation Number: [2021] EWCA Civ 2

Case Nos: C1/2019/1873 and C1/2019/1901

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
Mrs Justice Lang
[2019] EWHC 1869 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/01/2021

Before :

LORD JUSTICE SINGH
LADY JUSTICE ANDREWS DBE
and
LORD JUSTICE NUGEE

- -

Between :

KHALID IKRAM	**Respondent**
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**1st Appellant**
-and-	
(1) SAYED VEQAR HUSSAIN **(2) TRUSTEES OF THE CHARITY KNOWN AS ISLAMIC LINK** **(3) BUBAL MURAD CENTRE**	**2nd Appellant/2nd, 3rd and 4th Interested Parties**
-and-	
LONDON BOROUGH OF BRENT	**1st Interested Party**

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Mr Robert Williams (instructed by the **Government Legal Department**) for the **First Appellant**
Ms Saira Kabir Sheikh QC (instructed by **James Smith (Planning Law Services) Ltd**) for the **Second-Fourth Appellants**
Mr Charles Streeten (instructed by **Richard Buxton Solicitors**) for the **Respondent**

Hearing dates: 1 and 2 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10 a.m. on Wednesday, 6 January 2021.

Lord Justice Singh:

Introduction

1. These are appeals against the decision of Lang J dated 17 July 2019, by which she granted (i) a statutory application to quash the grant of planning permission by an Inspector appointed by the Secretary of State, for a change of use of land at 852A-C, Harrow Road, Wembley ("the Appeal Site"), from a mixed use as a builders' yard and residential to a mixed use as a place of worship and residential; and (ii) a claim for judicial review of the decision by the Inspector to quash an enforcement notice which had been issued by the local planning authority, the London Borough of Brent ("the Council").

2. The Council is the First Interested Party in these proceedings but has played no active part in these appeals. The Secretary of State, who was the Defendant below, is the First Appellant. The Second, Third and Fourth Appellants were interested parties below: they were the beneficiaries of the grant of planning permission by the Inspector. Mr Ikram, who was the Claimant below is the Respondent before this Court.

3. The decision by the Inspector to quash the enforcement notice could only be challenged by way of judicial review, whereas his grant of planning permission had to be challenged by way of a statutory application under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act"). That is why there were two sets of proceedings in the High Court but the substantive issues are the same.

4. Permission to appeal to this Court in both sets of proceedings was granted by Lewison LJ in an order sealed on 30 September 2019.

5. At the hearing before us we heard submissions from Mr Robert Williams for the Secretary of State; Ms Saira Kabir Sheikh QC for the other Appellants; and Mr Charles Streeten for the Respondent. I am grateful to them and their teams for the assistance they have given the Court.

Factual background

6. On 19 March 2019, the Council granted retrospective planning permission for Nos 856 and 858, Harrow Road, to be used as a place of worship and community centre. The premises had previously been used for residential purposes and are owned by International Islamic Link ("IIL"). IIL is an unincorporated charity, and the land is registered in the names of four individuals, including the Second Appellant, Mr Hussain, as trustees of the charity. The planning permission was granted subject to conditions to reduce the impact on the surrounding area.

7. On 13 September 2011, the ground floor of the premises was certified as a place of worship under the Places of Worship Registration Act 1855; however, it is primarily used as a community centre.

8. The Respondent lives at 854 Harrow Road, in between the above premises and the Appeal Site.

9. IIL purchased the Appeal Site in 2012. It undertook construction work and changed the use of the property, in breach of planning controls. The ground floor was established as a Mosque. Planning permission for the construction changes and the material change of use was applied for retrospectively on 24 September 2012. Planning permission was refused by the Council on 9 May 2017.

10. On 12 June 2017, an enforcement notice was issued by the Council. It alleged, among other things, a breach of planning controls by a material change of use to a mixed use as residential and a community centre/place of worship.

11. There was a successful appeal against the enforcement notice by Mr Hussain, acting on behalf of IIL. The Inspector's decision was dated 1 November 2018. The main ground of appeal against the enforcement notice was under ground (a) in section 174 of the 1990 Act, that planning permission ought to be granted for the development. Under this ground, IIL submitted that planning permission should be granted to use the Mosque for twice daily prayers with a maximum attendance of 30 people. The Inspector referred to this as "the Limited Use of the Mosque", at para. 9 of his decision. Planning permission was granted by the Inspector subject to several conditions, to which I will return.

12. Mr Ikram applied to the High Court to quash the Inspector's decision. Ouseley J granted permission on 31 January 2019 and pointed out what appeared to be a drafting error in condition 1 attached to the planning permission which the Inspector had granted. Condition 1 said: "The Mosque shall only be used as a place of worship." Ouseley J thought that the condition should have read "only the Mosque shall be used as a place of worship".

13. In making his order Ouseley J said:

> "The claims are plainly arguable. It seems to me that the interpretation of condition 1 is at the core of all the points. If the Claimant is wrong and the use of the whole appeal site is restricted to the use of the mosque for 30 people, then many of the other issues may be resolved. However, I feel bound to say that if the Defendant had to show that his interpretation was arguable, I would refuse permission. The 'Appeal Site' is the whole site, the 'mosque' is a building. The whole site seems to have permission, without restriction, save in the mosque, for the mixed use including as a place of worship. Condition 1 on its natural meaning seems to control the mosque only; there would be, contrary to how the case seems to have been presented, no control on what appears to be the admitted and objectionable use of the rest of the appeal site, where planning permission has on the face of it been granted. Thirty people at any one time in the mosque permits a very large turnover of parking on the site, and overspill facilities. What does the Defendant say is permitted or prohibited there and by what wording?"

14. In response to those observations, IIL by its trustees entered into a unilateral undertaking, pursuant to section 106 of the 1990 Act, on 18 April 2019. The undertaking contained planning obligations, including these at clause 3:

> "3.1.1 not to allow any part of the Land other than the Mosque to be used for the purposes of religious worship pursuant to the Planning Permission; and
>
> 3.1.2 not to permit the Mosque to be attended by more than 30 (thirty) people at any one time for the purposes of religious worship in accordance with condition 3 on the Planning Permission".

The Inspector's decision

15. The Inspector, Mr Tim Belcher, gave his decision after a hearing and site visit which took place on 26 September 2018.

16. In his decision dated 1 November 2018, he set out the background, at paras. 1-4, and procedural matters, at paras. 5-13. Of particular importance is the way in which he defined the scope of the planning application deemed to be before him under ground (a), at para. 9:

> "At the Hearing the Appellant [Mr Hussain] confirmed that he was seeking planning permission through the Ground (a) appeal to use the Mosque for twice daily prayers with a maximum attendance of 30 people. I will refer to this as 'the Limited Use of the Mosque'."

17. The Inspector then set out his reasons for allowing the appeal on ground (a) and for granting the deemed planning application, at paras. 22-57. He referred to relevant planning policies, at paras. 22-24. He then considered the parking and highway safety issues, at paras. 25-26; whether sufficient on-site car parking spaces were available for the Limited Use of the Mosque, at paras. 27-33; whether the Limited Use of the Mosque would result in the interference with the free flow of traffic along Harrow Road or other highway safety issues, at paras. 34-36; whether the Limited Use of the Mosque and the operational development carried out at the appeal site materially harmed the character and appearance of the area, at paras. 37-47; whether the Limited Use of the Mosque would harm the living conditions of nearby residential occupiers, having particular regard to noise, disturbance and lighting, at paras. 48-53; and other matters, for example the fact that the appeal site was next to a public open space, at paras. 54-57.

18. His overall conclusions were set out at paras. 58-60. He concluded that the appeal should succeed on ground (b) to the limited extent that the reference in the enforcement notice to use of the appeal site as a community centre had to be deleted because it was incorrect. More importantly, he concluded that the appeal should

succeed on ground (a) and planning permission should be granted. The appeal on ground (g) – that more time should be given to comply with the enforcement notice – therefore did not need to be considered.

19. At para. 61 the Inspector set out his formal decision. In particular he granted planning permission on the deemed application under section 177(5) of the 1990 Act for the development already carried out, namely the material change of use of the Appeal Site to a mixed use as residential and a place of worship.

20. That planning permission was made subject to conditions. Of particular relevance are conditions (1), (2) and (3). Condition (1) was that "the Mosque shall only be used as a place of worship." Condition (2) was that "the use referred to in Condition (1) above shall only take place between 12.00 hours and 22.30 hours." Condition (3) was that "the Mosque shall not be occupied by more than 30 people at any one time."

The judgment of the High Court

21. Before Lang J there were six grounds of challenge, which she set out at para. 31 of her judgment. Ground 6, which alleged breach of the Human Rights Act 1998, was not pursued at the substantive hearing. Of the other five grounds, the Judge rejected grounds 2-5 and the first part of ground 1. She accepted the second part of ground 1, which gives rise to the only issue on this appeal.

22. At paras. 32-35 the Judge considered the admissibility of the witness statement of the Inspector. This was opposed in part by Mr Ikram.

23. At paras. 33 and 34 the Judge said:

> "33. In *R (Lanner Parish Council) v Cornwall Council & Anor* [2013] EWCA Civ 1290, the Court of Appeal applied to the planning field some well-established principles restricting the admission of post-decision evidence. Jackson LJ said:
>
> > '59. In support of this argument Mr Coppel relies upon the Court of Appeal's decision in *R v Westminster City Council, ex parte Ermakov* [1996] 2 All ER 302 …
> >
> > 60. The Court of Appeal held that since the respondent was required to give reasons at the time of its decision and those reasons were deficient, the decision should be quashed. Hutchison LJ gave the leading judgment, with which Nourse and Thorpe LJJ agreed. At 315 h-j Hutchison LJ stated:
> >
> > > "The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in *Ex p Graham*, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking

> clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence – as in this case – which indicates that the real reasons were wholly different from the stated reasons."
>
> 61. In my view that principle is applicable to the present case. The Council was required by article 31 of the 2010 Order to give reasons for its decision. The planning permission with the reasons attached is a public document, which anyone is entitled to inspect. The first paragraph of those reasons states that the proposed development accords with policy H20. That paragraph reveals a misunderstanding of policy H20. The Council should not have been permitted to adduce evidence contradicting its own stated reasons.

34. In *Secretary of State for Communities and Local Government v Ioannou* [2014] EWCA Civ 1432; [2015] 1 P. & C.R. 10, Sullivan LJ said obiter:

> 'I would merely endorse Ouseley J's observation at [51] of the judgment:
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> "I would strongly discourage the use of witness statements from Inspectors in the way deployed here. The statutory obligation to give a decision with reasons must be fulfilled by the decision letter, which then becomes the basis of challenge. There is no provision for a second letter or for a challenge to it. A witness statement should not be a backdoor second decision letter. It may reveal further errors of law …."."'

24. In the present case the Judge then went on to apply those principles to this case. She accepted the submission made on behalf of Mr Ikram that the Inspector's evidence should only be admitted in so far as it set out his recollection of what did, or did not, occur at the hearing, in response to the criticisms made against him. She excluded those parts of the witness statement in which he sought to explain or justify his conclusions: namely, the whole of para. 19; the last sentence of para. 20 and the last sentence of para. 21. She considered that those passages were an impermissible attempt to supplement the decision in the light of the challenge in the High Court.

25. Turning to the substantive challenge before her, the Judge addressed ground 1 at paras. 47-76 of her judgment. Ground 1 was formulated before the Judge in the alternative. First, it was submitted that the Inspector erred in limiting his consideration to the use of the Mosque, and in failing to consider the use of the other

parts of the Appeal Site, even though they were also the subject of the enforcement notice. In the alternative, it was submitted that, even if it was open to the Inspector to limit his consideration to the use of the Mosque, he should have imposed conditions to ensure that the Appeal Site could not be used beyond the Limited Use of the Mosque which he had considered.

26. At para. 49, the Judge noted that the ground (a) appeal was an application for planning permission for a material change of use of the entire Appeal Site. However, she went on to note that, following discussion at the hearing, Mr Hussain had reduced the scope of his appeal to the Mosque alone, as recorded by the Inspector at para. 9 of his decision.

27. The Mosque had been defined by the Inspector, at para. 1, as the "ground floor of the main building to the rear of No. 852". The Inspector decided, at para. 12, that his consideration of the appeal would be restricted to the Limited Use of the Mosque. The Council and Mr Hussain agreed to that course. Further, the Inspector accepted the proposal of both parties that he should not consider or decide the planning issues which arose during the "Festival use" of the Appeal Site. This was because that use required a marquee and that would need planning permission, so the planning issues arising from that could be considered at a later date.

28. At para. 53 the Judge set out in outline the various parts of the Inspector's decision, by reference to the different issues which arose before him.

29. At para. 54, the Judge rejected the first part of the Claimant's ground 1. She said that, once Mr Hussain had limited the scope of his ground (a) appeal to the Limited Use of the Mosque, it followed that the Inspector was entitled to limit his consideration of the grant of planning permission to that limited use.

30. However, at para. 55 of her judgment, the Judge said that the Inspector's formal decision at para. 61 "extended far beyond granting planning permission for the Limited Use of the Mosque." The Inspector granted planning permission for a material change of use to a mixed use as residential and as a place of worship for the *entire* Appeal Site, not just the Mosque. Thus, the outside space and the outbuildings could all be used as a place of worship. However, the Inspector had not properly considered or determined the highly contentious planning issues which arose in respect of the entire Appeal Site. He had limited his consideration to the use of the Mosque. The Judge concluded on this point:

> "In my view, this was a fundamental defect in the Decision."

31. At para. 56, the Judge observed that initially the Secretary of State and IIL sought to rely upon the restriction imposed by condition 1. However, in the light of the observations made by Ouseley J when he granted permission, and the Judge's own scepticism, they rightly conceded that the wording of condition 1 did not restrict the use of the remainder of the Appeal Site. In an attempt to rectify the position, on 18 April 2019, the Trustees of IIL had made a unilateral undertaking under section 106 of the 1990 Act.

32. At paras. 58-61 of her judgment, the Judge accepted the submissions made by Mr Williams on behalf of the Secretary of State that, in practice, there was only a limited difference between the procedural safeguards afforded to third parties in relation to the variation of a planning condition as opposed to the variation of a planning obligation.

33. However, at para. 62, she said that Mr Streeten was correct to submit on behalf of Mr Ikram that the covenants in the section 106 agreement, read with the conditions imposed by the Inspector, did not cure the defects in the Inspector's decision.

34. The Judge considered that the defects in the Inspector's decision-making were particularly significant because of the planning history. She said, at para. 64, that this history implied a lack of respect for the purposes of planning control. She considered, at para. 66, that in the light of that history, the Inspector should have given careful consideration to the need to impose appropriate conditions to control use. The Inspector had recognised the need for such conditions but had

> "regrettably erred in the manner in which he approached his task. This appeal was an opportunity to establish a workable scheme which would be clear and enforceable, but unfortunately this Decision failed to achieve that objective."

35. The Judge then turned to consider what she regarded as the defects in the Inspector's decision. There were two matters in particular: use of the Mosque, which she considered at paras. 68-69; and use of the Appeal Site outside the Mosque, which she considered at paras. 70-74.

36. She accordingly concluded, at para. 74, that those defects were not sufficiently overcome by the unilateral undertaking. For those reasons, as the Judge said at paras. 75-76, and to that extent ground 1 succeeded.

The Secretary of State's grounds of appeal

37. On behalf of the Secretary of State Mr Williams advances three grounds of appeal.

Ground 1: Use of the Mosque

38. Mr Williams submits that the Judge erred by straying into the territory of planning judgement, which was a matter for the Inspector and not for the court. He submits that Lang J's approach was based on what she perceived to be defects in the Inspector's decision which could only be identified by taking a hypercritical approach, which this Court has discouraged on many occasions: see e.g. *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, at para. 41 (Lindblom LJ); and *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, at para. 7, where

Lindblom LJ said that an Inspector's decision "should not be laboriously dissected in an effort to find fault".

39. Mr Williams also reminded this Court of certain principles which apply to the construction of planning conditions, which were summarised by Beatson LJ in *Telford and Wrekin Council v Secretary of State for Communities and Local Government* [2013] EWHC 79 (Admin):

    i) Conditions should not be interpreted too narrowly or strictly (*Carter Commercial Development Ltd v Secretary of State for the Environment* [2002] EWHC 1200 (Admin)); and should be given a common sense meaning (*Northampton BC v First Secretary of State* [2005] EWHC 168 (Admin)).

    ii) Any ambiguity has to be resolved in a common sense way. Regard should be had to the underlying planning purpose for it (*Sevenoaks DC v First Secretary of State* [2004] EWHC 771 (Admin)).

    iii) Where a planning permission containing conditions has been granted in a decision by an Inspector allowing an appeal, and a condition is ambiguous, it should be construed in the context of the decision letter as a whole (*Hulme v Secretary of State for Communities and Local Government* [2011] EWCA Civ 638).

40. It is submitted that that approach to the construction of planning conditions also applies to planning obligations, as in the unilateral undertaking in the present case.

41. Mr Williams submits that the first defect identified by the Judge was a suggested disconnect between the assessed use of the Mosque and the permitted use of the Mosque. There was in fact no disconnect; rather the Inspector was exercising his planning judgement to impose the conditions he considered necessary to permit the use of the Mosque as a place of worship.

Ground 2: Use of the Appeal Site outside the Mosque

42. The second defect identified by the Judge was the suggested uncertainty around what is permitted in the areas of the Appeal Site which are outside the Mosque.

43. Mr Williams submits that this raises two issues:

    i) first, does the decision-maker or the court decide whether conditions and planning obligations are sufficiently precise and unambiguous? and, in any event

    ii) secondly, was there in reality an "unacceptable degree of uncertainty", as Lang J put it, to what was permitted on the Appeal Site outside the Mosque?

44. Mr Williams submits that it is for the Inspector to determine this. The court may only interfere with his expert judgement on *Wednesbury* or other public law grounds. He submits that in the present case the Inspector plainly determined that the restrictions

placed on the Mosque were clear and unambiguous and that no specific restrictions were required for the areas of the Appeal Site outside the Mosque.

45. Mr Williams submits that the Judge erred in her approach by asking herself whether the restrictions imposed by the Inspector were "clear and enforceable". This took on the form of a planning judgement rather than considering whether the decision reached by the Inspector was *Wednesbury* unreasonable.

46. Finally in this context, he submits that there was no uncertainty as to what was authorised in the areas of the Appeal Site outside the Mosque. The Inspector's decision letter and the unilateral undertaking can be read together to make it clear that any activity which is, or is ancillary to, religious worship would not be permitted on any part of the Appeal Site which is not the Mosque.

Ground 3: Admissibility of post-decision evidence

47. The Judge only admitted the Inspector's witness statement "in so far as it set out his reflection of what did, or did not occur at the hearing". Mr Williams submits that this was an incorrect and unduly restrictive test; and, in any event, the Judge excluded parts of the Inspector's evidence in which he did set out his recollection of what did, or did not occur at the hearing.

The other Appellants' grounds of appeal

48. On behalf of the other Appellants Ms Sheikh QC advances five grounds of appeal.

Ground 1: The Judge erred in her interpretation of the scope of the grant of planning permission

49. Ms Sheikh submits that the Judge was wrong to require the inspector to incorporate the term "use for twice daily prayers with a maximum attendance of 30 people" in the conditions. Her conclusion that, because this term was not expressly included, the planning permission could allow for more than two prayers a day to take place was not correct. Prayers are held at specified times and it would not be possible for more prayers to take place in the time periods specified in condition 2. The Judge's conclusion disregarded the evidence placed before the Inspector on this issue.

50. Ms Sheikh, like Mr Williams, submits that other activities, which the Judge concluded could be permitted by the terms of the planning permission but which were not intended by the Inspector, were prevented by the unilateral undertaking.

Ground 2: Misinterpretation of the decision letter as being the "formal decision"

51. Ms Sheikh submits that the Judge was wrong to restrict herself to only the "Formal Decision" part of the Inspector's decision letter.

Ground 3: Entering the planning judgment arena – impermissible interference with the planning merits of the Inspector's decision

52. Ms Sheikh submits that the Judge was wrong to attempt to substitute her own judgement that more control was required for the decision of the Inspector using his own planning judgement. She should only have considered whether it was unreasonable for the Inspector to reach that judgement.

Ground 4: Misguided approach to the imposition of conditions

53. Ms Sheikh submits that the Judge was wrong to find that any stricter condition should have been imposed because of the history of the planning control breaches at the Appeal Site and the related premises. It was not appropriate to give weight to the planning history, as the Inspector was aware of this and had taken it into consideration.

Ground 5: Failure to address the Interested Parties' submissions in respect of intensification and the need for planning permission for the Festival Use

54. The Inspector found as a matter of fact that the Festival Use only occurred when a marquee was erected. This would require planning permission itself. The Festival Use could therefore not occur under the permission granted. The Interested Parties provided detailed submissions on this point. They also provided submissions that the permission as granted could not permit any greater intensity of use than that the subject of the deemed grant of permission. Ms Sheikh reminds this Court that, as a matter of law, intensification of a use of land can amount to a material change of use. Ms Sheikh complains that the Judge did not engage with any of those submissions.

Analysis

55. I intend no disrespect to the breadth of the submissions made before this Court on behalf of the Appellants but will focus on what appear to me to be the essential issues in this case rather than addressing each ground of appeal separately.

Admissibility of the Inspector's witness statement

56. The issue of the admissibility of post-decision evidence can be addressed briefly. The Judge was prepared to admit the witness statement of the Inspector, Mr Belcher, in large part. She declined to permit certain passages in paras. 19-21 of his witness statement. It seems to me that, apart from one sentence, these passages have no material bearing on the only issue which is now before this Court. The other passages were relevant to grounds of challenge which in fact the Judge rejected. Those grounds are not the subject of any cross-appeal before this Court.

57. So far as the one sentence which could have a material bearing on the issues in this appeal is concerned, I am satisfied that the Judge was entitled to exclude that evidence. That sentence was the last sentence of para. 20 of the witness statement, where the Inspector said that, after giving the matter some consideration, he had agreed with something that had been said at the hearing before him by the Council, to the effect that it would be too restrictive, and therefore unreasonable, to restrict the hours of use of the Mosque to the periods when the twice daily worship occurred, i.e. 12.00 to 14.00 and 19.10 to 22.00.

58. The starting point is that, as the authorities cited by the Judge make clear, there is an express statutory duty in this context for a planning inspector to give reasons for his decision.

59. Secondly, the Judge was well aware of the relevant authorities, in particular the decision of this Court in *Ermakov*. She expressly referred to the principles established by those authorities, at paras. 33-34 of her judgment, which I have set out above. I do not accept the submission made by Mr Williams on behalf of the Secretary of State (ground 3 of his appeal) that the Judge applied different principles.

60. Furthermore, the conclusion reached by the Judge was one which was well within the ambit afforded to her. There is no basis on which this Court could or should interfere with that conclusion.

The main issues

61. In addressing the main issues, it is important to recall that this case was unusual in that the unilateral undertaking was given not only after the decision by the Inspector but also after the High Court had granted permission to bring these applications: see the Order of Ouseley J dated 31 January 2019. Furthermore, Ouseley J set out in some detail what his reasons were for granting that permission.

62. Moreover, as appears to have been conceded at first instance, at least on the part of the Secretary of State, there was an error of law in the Inspector's decision which required to be corrected by way of the unilateral undertaking: see the Secretary of State's Detailed Grounds of Defence, at paras. 11(ii) and 15(ii). In that document the Secretary of State said that he "will accept that Ground 1 – and specifically Ground 1(b) – is made out" (para. 11(ii)); but that, if a unilateral undertaking were forthcoming, he would "contend that this error is rendered academic" (para. 15(ii)).

63. It follows therefore that the terms of the undertaking were never considered by the Inspector for the obvious reason that he did not have that undertaking before him at the time. It seems to me that many of the submissions which have been made on behalf of the Secretary of State and the other Appellants, which have focussed upon the need to respect the planning judgement of the Inspector unless that judgment is *Wednesbury* unreasonable, are therefore not to the point. There was no planning judgement formed by the Inspector on the relevant issue.

64. It seems to me to be clear that, if the undertaking had not been volunteered, the High Court would have been entitled, and probably bound, to quash the Inspector's decision because there was an obvious error of law which remained uncorrected.

65. The question then becomes whether the Judge was required to accept that the undertaking did indeed correct the error in the decision. It seems to me that she was not.

66. First, it is common ground (inevitably) that the interpretation of the undertaking is a question of law and is therefore a question for the court.

67. Secondly, it must be common ground that the interpretation of a planning permission is also a question of law. This is important not least because the rights of third parties may be affected, and not only the rights of the persons directly concerned. For example, neighbours need to know with reasonable certainty what is or is not permitted on adjoining land. Furthermore, potential purchasers of land need to know what they will be permitted to do if they invest in the purchase of property. It is important to recall that a planning permission creates proprietary rights and is not personal to a particular occupier or developer. It runs with the land.

68. It is important in this context to bear in mind the following passage in the judgment of Sullivan LJ in *R (Thomas Brown) v Carlisle City Council* [2010] EWCA Civ 523; [2010] JPL 1571:

> "42. [Counsel] told us that if we concluded, contrary to his submissions, that the grant of permission was unlawful, the Interested Party was prepared to give an undertaking to the Court, to be incorporated into a section 106 planning obligation so as to bind the land, that it would not commence development of the Freight Distribution Centre until screening of both it and the airport works had been undertaken by the Defendant under the EIA Regulations. It is difficult to see what purpose would be served by the court's acceptance of such an undertaking that would not equally well be served by the quashing of the permission. A planning permission is a public document. Third party rights, e.g. the rights of agricultural tenants on the land, may be affected by the existence, or otherwise of a planning permission. There would have to be some very good reason to persuade the court that acceptance of an undertaking that an unlawful permission would not be implemented, or would be implemented only on certain terms, would be a more appropriate course than a decision to quash an unlawful permission. No such reason has been identified in this case. It

> follows that the EIA challenge to the permission succeeds and the permission must be quashed."

69. Both Mr Williams and Ms Sheikh relied on what was said by Lindblom J in the case of *R (TWS) v Manchester City Council and FC United Limited* [2013] EWHC 55 (Admin); [2013] JPL 972, at para. 86, and in particular on the passage which I have emphasised below:

> "I come finally on this issue to the relevant provisions in the s.106 obligations. If I were wrong to hold, as I have, that there was no legal onus on the City Council to limit by condition the annual number and daily duration of events in the stadium, I would nevertheless regard the commitments made by FC United in the agreement of October 19, 2012 and the deed of variation of December 19, 2012 as conclusive. A similar view was reached in *Midcounties Co-Operative Ltd* [2010] EWCA Civ 841. *It is not – and cannot be – in dispute that a planning obligation in suitable terms is capable of putting right a defect in the conditions originally imposed on a grant of planning permission*. Here the agreement of October 19, 2012 provides enforceable limitation on the hours of use of the stadium pitch and the other public pitches and facilities in the development. …" (Emphasis added)

70. As is apparent from that passage, it was *obiter*. The principal basis on which Lindblom J reached his decision was that there was no legal onus on the planning authority in that case to limit by condition the annual number and daily duration of events at the football stadium concerned.

71. Secondly, I would observe that the principle as stated by Lindblom J, that a planning obligation "in suitable terms" is *capable* of putting right a defect in the conditions originally imposed on the grant of planning permission, is not in dispute in the present case either. The crucial questions, it seems to me, are (i) whether the planning obligation is indeed "in suitable terms"; and (ii) whether an undertaking in a given case does indeed put right a defect in the conditions originally imposed.

72. Thirdly, as I read that passage, Lindblom J was not suggesting that the test to be applied by the reviewing court is simply one of irrationality. To the contrary, he considered for himself whether the section 106 obligation was sufficient to overcome what would otherwise have been a legal error.

73. Furthermore, it is important to note that, at para. 85, Lindblom J said, by reference to authority, that it was as a matter of law elementary that a local planning authority has no power on a planning application to grant permission for more than has been applied for. By way of example, he mentioned an application for a supermarket, where the area to be the subject of a planning permission (measured in square metres)

is set out in the application. That area then sets the maximum for which planning permission can be granted.

74. The difficulty in the present context may flow from the fact that there was no actual application for planning permission. There was only a deemed application. Since this case arose from enforcement action, the scope of any deemed application for planning permission, under section 177(5) of the 1990 Act, is "the matters stated in the enforcement notice as constituting a breach of planning control."

75. However, as Mr Streeten submitted before us and does not appear to be disputed as a matter of principle, it is open to the parties to agree before the Inspector that the terms of the deemed application for planning permission are to be narrower than the description of the breach of planning control set out in the enforcement notice. On the facts of the present case, that is exactly what happened at the hearing before the Inspector, as noted by him at para. 9 of his decision. It followed that the only matter for which permission was sought on the deemed application before the Inspector was in respect of what he called "the Limited Use of the Mosque". That phrase had a specific meaning which the Inspector himself gave it, which included prayers at the mosque which would take place only twice a day.

76. The consequence was that the undertaking did not and could not overcome that difficulty. At most what the undertaking could do was to correct what the Secretary of State and the other Appellants submit was merely a drafting error in the drafting of condition 1.

77. In my view, the error into which the Inspector fell went well beyond that drafting error. In my view, in agreement with Lang J, the Inspector fell into a fundamental error of approach because, having considered the planning impacts which flowed from the Limited Use of the Mosque only, he went on to grant planning permission for something which was much broader.

78. It follows therefore, as Mr Streeten submits, that the Inspector failed to take into account all material considerations.

79. This is reinforced by the consideration that a planning permission is not personal to this particular occupier. Even if it may be difficult to envisage in practice at the moment, as a matter of law the land could be sold to others. The permission is not limited to any particular denomination. The Judge was therefore entitled to test what could occur compatibly with the planning permission granted on hypothetical facts. She was not bound to consider only what had occurred or would occur on the evidence relating to this particular occupier.

80. By way of example, the planning permission granted by the Inspector, even with the conditions attached to it and read with the unilateral undertaking, would, on its true construction, permit not only prayers but other services, such as weddings and funerals. These could in principle take place "back to back", so that no more than 30 people would be in the Mosque at any one time but there could be other people congregating at the Appeal Site but outside the Mosque, waiting for their event to take place inside it. The fundamental problem is that the planning merits of permitting development which may have such consequences were not assessed by the Inspector. The Inspector erred in his approach as a matter of law. The High Court did not

impermissibly intrude into the sphere of the planning merits or expert judgement. It did what it is there to do: correct errors of law.

81. Furthermore, I accept the submission by Mr Streeten on behalf of the Respondent that the judgement about whether the undertaking was sufficient to cure the problems which had led to the grant of permission to bring these proceedings in the High Court was essentially one for the Judge at first instance. This Court does not sit to re-hear the case. Rather its function is to conduct an appeal by way of review pursuant to CPR 52.11(1). The question for this Court is whether the Judge was "wrong", by asking whether the Judge had legitimate and proper grounds for reaching the decision she did: see *Smech Properties Limited v Crest Nicholson Operations Limited and Others* [2016] EWCA Civ 42, at para. 27 (Sales LJ). Furthermore, as Sales LJ went on to state at para. 28, an appellate court will only find a decision to be "wrong" if the judge at first instance has misdirected herself or has reached a conclusion which is manifestly incorrect or unjust. Furthermore, as he said at paras. 29-30, the weight to be accorded to the view of the first instance judge may also be affected by their expertise (Lang J is an experienced judge of the Planning Court); and the fact that the first instance judge had the opportunity to consider the facts in the round, whereas this Court only has a limited opportunity to see part of the whole picture.

82. In any event, having considered the matter for myself, I am not only of the view that the Judge was not wrong; in my view, she was plainly right.

Conclusion

83. For the reasons I have given I would dismiss this appeal.

Lady Justice Andrews:

84. I agree.

Lord Justice Nugee:

85. I also agree.