Neutral Citation Number: [2021] EWHC 1368 (Admin)

Case No: CO/4314/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2021

**Before** :

**SIR DUNCAN OUSELEY**
**Sitting as a High Court Judge**
**Between:**

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| **GEOFFREY JUDEN** | **Claimant** |
| **- and -** | |
| **THE LONDON BOROUGH OF TOWER HAMLETS** | **Defendant** |
| **-and-** | |
| **CREST NICHOLSON OPERATIONS LTD** | **Interested Parties** |
| **-and-** | |
| **THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT** | |

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**Richard Harwood QC and Andrew Parkinson** (instructed by **Harrison Grant Solicitors**) for the **Claimant**
**Saira Kabir Sheikh QC and Alexander Greaves** (instructed by the **Solicitor to the London Borough of Tower Hamlets**) for the **Defendant**
**Rupert Warren QC (**instructed b**y Pinsent Mason Solicitors)** for the **First Interested Party**
**Alistair Mills (**instructed by the **GLD)** for the **Second Interested Party** (by written submissions)

Hearing dates: 5 and 6 May 2021
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# Approved Judgment

**SIR DUNCAN OUSELEY:**

1. On 9 October 2020, Tower Hamlets London Borough Council granted planning permission and listed building consent for residential development of the former London Chest Hospital at Bonner Road, both building and grounds, for residential purposes. Its use as a hospital ceased in 2015. It is a Grade 2 listed building, listed in 2016. It also lies within the Victoria Park Conservation Area. Within the grounds is a "veteran" mulberry tree, which was to be moved to another location within the site to enable the development to take place. The permission and consent were granted to Crest Nicholson Operations Ltd, the first interested Party, Crest Nicholson. Mr Juden, the Claimant, is a local resident, opposed to the development, which was locally controversial.

2. This is an application for judicial review to quash those decisions on the grounds that (i): the Heritage Officer of Tower Hamlets LBC produced what the Claimant characterised as an internal consultation response, and which the Claimant contended should have been listed and made publicly available as a background paper under s100D Local Government Act 1972, the LGA; this mattered because her view on the degree of harm which the development would cause to heritage assets had changed by the time the Committee Report was finalised; (ii) the Committee Report had misinterpreted paragraph 196 of the National Planning Policy Framework, NPPF, and had thereby breached the provisions of the Planning (Listed Buildings and Conservation Areas) Act 1990, the LBA; the Report had wrongly taken account of the benefits to heritage assets when judging the degree of harm which those assets would experience, and had double-counted benefits in the overall planning balance in consequence; (iii) part of the Committee Report was irrational in the way public benefits were to be weighed; (iv) the Committee Report equated "substantial harm " within the NPPF to "a total loss of significance", thereby setting the point at which "less than substantial harm" would become "substantial harm" too high; and (v) the Committee Report and the advice at the Committee meeting had misinterpreted paragraph 175c of the NPPF relating to the loss of or deterioration of veteran trees in a number of ways, which had affected its approach to the risk of the tree dying as a result of its proposed relocation.

3. Holgate J, as Planning Liaison Judge, joined the Secretary of State as an Interested Party, so that the Court could have the benefit of written submissions on his behalf on how the NPPF should be interpreted in relation to (i) the stage at which heritage benefits should be weighed: should it be when assessing the degree of harm or should it be when the overall planning balance came to be struck, and (ii) the interpretation of its policy on veteran trees.

4. The applications were made in December 2016, and were significantly amended a year later and again in May 2018. A final change to the affordable housing provision was made in July 2018, but that did not affect the design issues. The Strategic Development Committee, by 4 votes to 3, with 1 abstention, resolved to grant planning permission and listed building consent on 20 September 2018, but these were not issued until two years later, because of the time it took for an agreement to be concluded under s106 Town and Country Planning Act 1990, for the Mayor of London to decide to leave the decision with Tower Hamlets LBC, and then for the proposal to be reassessed against the newly adopted Local Plan. This case does not involve any policy within any version of the Local Plan.

5. The former hospital is an 1850s building, built in a late C17 Wren style, to resemble a country house in a parkland setting, affording healthy surroundings for tubercular patients. The proposal was to provide 291 dwellings, 50 by conversion works to the main building, and the rest in three new buildings in the grounds. 35 percent were to be affordable. This was the maximum reasonable amount of affordable housing deliverable within the scheme. The works to the listed building would involve the demolition of the original south wing off the main building, the main roof, and all rear extensions. Existing chimneys would be rebuilt but in different places from their original locations. There would be a new full-width, full-height extension to a rear elevation which had already been substantially compromised. The fabric of the retained building would be refurbished; the front elevation and key internal spaces internally would be restored.

6. I have taken that description largely from the Executive Summary to the Committee Report. I set out more of it as it is a convenient introduction to the issues. It began with the legal framework, including the correct effect of the duties in the LBA. It then described the development, largely as above. It then said, before dealing with topics which do not concern this case:

> "2.5 The proposed scheme would result in significant, albeit less than substantial, harm to the significance of the Grade II listed hospital building owing to the loss of various historic elements including the south wing, the main roof, and the remaining expanse of the rear elevation. There would be some harmful impacts to the setting of the hospital building arising from the proximity and height of the proposed residential buildings, proposed within its curtilage. The scheme would also result in less than substantial harm to the character and appearance of the Victoria Park Conservation Area as a result of the location, scale and appearance of the new residential buildings.
>
> 2.6 The proposal would result in the loss of 27 trees across the site, including 11 trees subject to the site wide Tree Preservation Order. The proposed replacement planting along with the landscaping works is considered to provide adequate mitigation so as to ensure the green character of the area is preserved.
>
> 2.7 The scheme would provide significant public benefits including securing the listed hospitals future up keep and conservation, additional housing, affordable housing, guaranteed public access to the front lawn of the site and improvements to a number of elements of the heritage importance across the site including sensitive repair, refurbishment and alterations to the front facade of Hospital Building and the Victorian iron railings, that would together better reveal the significance of these elements of the listed building.
>
> 2.8 "Less than substantial harm" to heritage assets is required by policy and statute to be given significant weight against the granting of planning permission, unless the public benefits

> would be such that they would, on balance outweigh the harm. Officers consider that, on balance, the scale of the public benefits which the scheme delivers would outweigh the less than substantial harm to the significance of the Grade II listed Hospital Building along with the adverse impacts upon the character and appearance of the Victoria Park Conservation Area.
>
> 2.9 The proposals would include the relocation of a Black Mulberry Tree to a new position on the site. The scale of the public benefits deliverable through the scheme is considered to outweigh the potential risk of the veteran Black Mulberry Tree not surviving the proposed relocation."

**The Listed Buildings Act**

7. There are particular provisions in the Listed Buildings Act which deal with how development affecting listed buildings and conservation areas is to be considered. I take this from what I said in *R (Safe Rottingdean Ltd.) v Brighton and Hove City Council and Fairfax Acquisitions Ltd.* [2019] EWHC 2632. S66(1) provides:

> "In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of a special architectural or historic interest which it possesses."

8. S72(1) is in broadly similar language, dealing with conservation areas:

> "In the exercise, with respect to any buildings or other land in a conservation area, of any functions under [the planning Acts], special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that conservation area."

9. These provisions have been the subject of considerable judicial analysis, but I need go no further back than *Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council and others* [2014] EWCA Civ 137, a case concerning s66 principally. Sullivan LJ with whom Rafferty and Maurice Kay LJs agreed, accepted that the nature of the duty was the same under both enactments, "preserving" in both meant doing no harm, in the light of *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141, Lord Bridge. However, he had continued, at p146E-G:

> "There is no dispute that the intention of section [72 (1)] is that planning decisions in respect of development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the

> presumption may be overridden in favour of development which is desirable on the ground of some other public interest. But if a development would not conflict with that objective, the special attention required to be paid to that objective will no longer stand in its way and the development will be permitted or refused in the application of ordinary planning criteria."

10. Sullivan LJ, at [23], found Lord Bridge's explanation of the statutory purpose:

> "highly persuasive, and his observation that there will be a "strong presumption" against granting permission for development that would harm the character or appearance of a conservation area is consistent with Glidewell LJ's conclusion in Bath. There is a "strong presumption" against granting planning permission for development which would harm the character or appearance of a conservation area precisely because the desirability of preserving the character or appearance of the area is a consideration of "considerable importance and weight".
>
> 24...[There is no doubt about] the proposition that emerges from the Bath and South Lakeland cases: that Parliament in enacting section 66(1) did intend that the desirability of preserving the settings of listed buildings should not simply be given careful consideration by the decision-maker for the purposes of deciding whether there would be some harm, but should be given "considerable importance and weight" when the decision-maker carries out the balancing exercise."

11. He added, at [28-29] that even if the harm to heritage assets was less than substantial, the strong presumption against the grant of planning permission would not be entirely removed; it would still be a substantial objection.

12. A more recent decision is *R (Palmer) v Herefordshire Council* [2016] EWCA Civ 1061, [2017] 1 WLR 411 concerning development which affected the setting of a listed building. Lewison LJ summarised the position at [5]. "Preserving" the building or setting meant doing no harm to it. The degree of harm was a matter of judgment for the decision-maker, but if there was harm, he was not entitled to give it such weight as he thought fit, but instead had to give it considerable weight. But that weight was not uniform and could vary with the degree of harm to the value of the asset. That was consistent with the policy in the Framework.

13. At [29], Lewison LJ accepted a submission that: "...where proposed development would affect a listed building or its settings in different ways, some positive and some negative, but the decision-maker may legitimately conclude that although each of the effects has an impact, taken together there is no overall adverse effect on the listed building or its setting." If compliance with a policy necessarily involves the conclusion that there is also no adverse effect on the setting of a listed building, compliance with the policy was likewise compliance with the statutory duty.

**The NPPF**

14. The NPPF heritage policies provide, so far as material:

> "193. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.
>
> 194. Any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification. …
>
> 195. Where a proposed development will lead to substantial harm to (or total loss of significance of) a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or total loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply:
>
> a) the nature of the heritage asset prevents all reasonable uses of the site; and
>
> b) no viable use of the heritage asset itself can be found in the medium term through appropriate marketing that will enable its conservation; and
>
> c) conservation by grant-funding or some form of not for profit, charitable or public ownership is demonstrably not possible; and
>
> d) the harm or loss is outweighed by the benefit of bringing the site back into use.
>
> 196. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use."

**The Committee Report**

15. This report described itself as the Report of the "Place Directorate" and stated that the "Case Officer" was Gareth Gwynne. The site location, proposals and planning history were set out. The legal and policy framework referred again to the LBA, with an oversight here, which was of no concern, in relation to the building itself. It then set out the consultation responses in section 7. This began by saying "The views of the Directorate of Development and Renewal are expressed in the MATERIAL PLANNING CONSIDERATIONS section below." The Conservation Team, including the Conservation Officer, Ms Lambert is within that Directorate.

16. There then followed the views of external consultees, starting with Historic England. In summary, it welcomed proposals that would enable the restoration of the listed building and its long term sustainable use. Despite welcome changes over the previous year, there were still elements which would cause harm to the listed building, particularly the loss of the south wing, which would have to be weighed against the public benefit. It accepted that the proposals "could result in a range of public benefits that could outweigh the harm." A later representation that said that the proposal would cause "some harm to heritage… but this is less than substantial harm and could be outweighed by public benefits. One of the major public benefits would be the restoration of the historic building and providing it with a long term sustainable use. The Council should consider carefully whether the public benefits "decisively outweigh any harm".

17. Next came the views of the Greater London Authority. It "strongly supported" the retention and restoration of the original hospital frontage, front gardens, mature trees, and railings; it supported the revised proposals to replicate and repair the original single storey roof to the main building, which had suffered significant war damage and unsympathetic alterations. The demolition of the unlisted twentieth century buildings raised no strategic issues. It accepted that the retention of the south wing would have reduced the developable area, the quantity of housing and the increase in open space. "While the loss of the substantial part of the South wing is regrettable, given the partial retention [of a bay and replication of the end elevation], the harm caused is considered less than substantial." The changes would not harm the setting of the building. The new build would make a "positive contribution to the wider Victoria Park Conservation Area." The Victorian Society considered the level of harm overall to be high; the public benefits had to be weighed carefully.

18. The section headed "Internal Consultees" reported the views of the Biodiversity Officer, Environmental Health, the Energy and Sustainability Officer, Employment and Enterprise, Transportation, Highways and Parking Services, and Waste Management.

19. Local representations followed. The issues, Environmental Impact Assessment, the principles of the land use and urban design were then identified. Section 11 contained a detailed description of the proposals. Section 12 dealt with "heritage", over 95 paragraphs all but two of which were concerned with listed building and Conservation Area issues. It opened by reminding Members of the two statutory duties in the LBA, setting them out in the updated version of the Report, followed by the relevant policies, quoting those from the NPPF. The Hospital Building, its value and interest were then described. The proposed works were set out and appraised. In the introduction to the proposals at 12.23, the report said:

> "The main alterations to the main range of the hospital itself are for its conversion to residential and involve the removal of all extensions to the rear of the main building, including the demolition of the original south wing, to be replaced with a full height, full width extension, introducing new elevations to the side and rear which are intended to be a "memory" of both the north wing, lost as a result of bombing and the south wing, which is to be removed as part of the current proposals.

> 12.24 In addition to the conversion works on the main floors and the extension to the rear, the works will also involve the demolition of the historic roof to be replaced with a new roof. The scheme would remove and rebuild the existing chimneys and dormers. However, not all those rebuilt would be relocated in their existing location within the roof slope….
>
> 12.25 Whilst the proposals for the refurbishment of the fabric of the retained existing building elements is supported and the sensitive restoration of the front elevation and key spaces internally is to be welcomed, the proposals do also involve some significant harmful impacts."

20. The significance of the proposed rear extension was discussed; the existing historic back had already been "substantially compromised but elements of the original elevation remain between the wings to the rear." The loss of the existing roof would mean the loss of the existing timber trusses, chimneys and dormers, and involve changes to the structure, materials and overall profile of the roof. The new roof would be similar in appearance from some views, but in terms of fabric and form, much of its historic significance would be lost. The chimneys would be repositioned, and the dormers would be new. This was not necessitated by the condition of the roof which was largely sound. The applicant contended that the alternative of leaving the roof entirely as it was, would prevent the accommodation justifying the works being undertaken. "Whether this constitutes justification for the loss of the roof is questionable."

21. The report next said this about the south wing, which was to be entirely lost:

> "12.36 The proposals result in the loss of south wing to enable the development of an entirely new and separate southern block….
>
> 12.38 The south wing emulates the style of the main building, has a plan form reminiscent of it and displays carving of a similar quality. Further to this it physically adjoins the main building forming an intrinsic element of the overall composition, and of the significance of the hospital as a whole. It also forms a key part of the main hospital's setting and contributes positively to the special character and appearance of the broader conservation area. The bulk of the end (east) elevation is readily visible from St James's Avenue. …
>
> 12.40 Although slightly later, the interest of the south wing is clearly set out in the listing description. It is also accepted that it has undergone alteration, however, the impact of this alteration on the significance of the buildings is less clear-cut.
>
> 12.41 Justification for demolition of the south wing seems to rest on the fact that the remaining parts of the main hospital are to be retained and restored, and that the proposed design includes what

> is stated to be an accurate reflection of the appearance of the rear elevation of the original south wing."

22. Internally, the erosion of the end of the wide exercise corridor would harm the building's character and significance.

23. The setting of the hospital building in parkland, its significance for a chest hospital, and the low scale of the other buildings, were noted, making it a "landmark building within the conservation area set within its own landscaped grounds."

24. The smaller buildings in the grounds were described in the list as of no interest, but that did not mean that they did not make a positive contribution to the conservation area. Even though much of the nurses' accommodation block was rebuilt after bomb damage, in a less distinguished manner, it too contributed positively to the setting of the main building and to the special character and appearance of the conservation area.

25. The effect of the new build elements on the hospital building was assessed:

> "12.65…the new development would potentially detract from the landmark character of the hospital building. The new buildings would reduce the prominence of the listed hospital, diluting its contribution to the character of the conservation area as a consequence."

26. Their impact on the historic setting of the hospital was put this way:

> "12.70 The scale and proximity of the new blocks to the main hospital would reduce the apparent openness around the hospital and the architectural vision of the hospital as a substantial country house within a parkland setting would be compromised.
>
> 12.73 The extent and scale of the proposals compete for attention with the hospital itself impacting upon the ability to appreciate the architectural vision for the building, its landmark quality and the parkland setting, all key elements of its significance."

27. In relation to the effect on the conservation area, although the proposals would preserve the historic green space in front of the hospital and much of the planting across the site,

> "the vision of the open space as parkland will to some degree be compromised by the proximity and enclosure, bulk and height of the new blocks. These proposals will result in a substantial change to the character of this block, to the perception of the balance between building and planting, and will diminish the impact and impression of other planting within Approach Road."

28. This was all drawn together in an appraisal section entitled "Categorisation of harm", which featured large in the submissions:

> "12.79 The decision about whether proposals constitute substantial or less than substantial harm to heritage assets as set

out within Chapter 16 of the NPPF is always a matter of fact and degree.

12.80 Whilst there are a number of important and beneficial heritage consequences of the proposals, not least the refurbishment and reuse of the main hospital securing its future for the long term and restoring important architectural elements, the balance of negatives; the loss of the existing roof and its fabric-an intrinsic part of the overall architectural vision, the loss of the south wing-such an important element of the overall heritage asset, and the impact of new development on the setting of the listed building altering the perception of the hospital as a landmark building within a parkland setting, and impacting upon the broader landscaped character of the conservation area, must mean that these proposals cumulatively tip the balance towards the top end of the spectrum of less than substantial harm category to the listed hospital.

12.82 In terms of the degree of harm the proposals would cause to the Victoria Park Conservation area, this would be considerable. Substantial mature planting surrounds the hospital and is key to the site's significance, but it is also a quintessential part of the special character and appearance of the conservation area as a whole which takes its cue from Victoria Park.

12.83 The chest hospital is a landmark institutional building within the conservation area and together with its landscape setting, the character of which is key to its overall significance, occupies a whole urban block. The mature planting which surrounds the site not only contributes to the aesthetic vision of the hospital as a country house but also reflects the character of Victoria Park which is a key focus of the designation, and consolidates and enhances the special character and appearance of the existing terraces within Approach Road, which is a key access to Victoria Park and which is a street which incorporates planting within the gardens and public realm, which references the park beyond.

12.84 Whilst the impact of this scheme upon the special character and appearance of the conservation area would be harmful, it would not result in the total loss of the conservation areas significance. It also needs to be acknowledged the direct visual impacts of the proposal remain confined to a relatively small area of the Victoria Park Conservation Area and the massing and height of the proposed buildings are not such that they are a visible and dominant from a significantly wider geographic area of the conservation area.

12.85 Officers conclude the proposals do cause harm to designated heritage assets, albeit less than substantial. As such

> the scheme must be assessed against paragraph 196 of the NPPF with the necessary public benefit test applied.
>
> 12.85 With regard to consideration and apply a public benefit to the scheme including weighing the heritage benefits of the scheme against the harm to heritage assets as part of a broader undertaking of assessing the overall planning benefits of the proposed scheme officers refer members to Section 17 of this report that deals with this key consideration which … is necessary for the decision-maker to undertake in circumstances where there is identified harm to designated assets." [*Numbering as in original*]

29. Housing, affordable housing and design standards were considered in the next sections of the report. Section 15 dealt with trees, including the black mulberry tree, which I set out when dealing with Ground 4.

30. Section 17 of the Report was entitled "Striking the Planning Balance". It was in these terms, so far as material:

> "17.1 The local planning authority has a statutory obligation under Sections 66 (1) and 72 (1) of the Planning (Listed Building and Conservation) Acts 1990 to the conservation of designated heritage assets. In accordance with the aforementioned Act, paragraph 193 of NPPF sets out that "great weight" should be given to protection of designated assets, "irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance".
>
> 17.2 As set out Section 12 of this report concerning the heritage assessment of the scheme, officers concluded the scheme would result in less than substantial harm to designated heritage assets. Upon that basis it falls upon the Council, as decision-maker to this submitted scheme to apply a public benefit planning balance test, as set out in paragraph 196 of NPPF.
>
> 17.3 Paragraph 196 of NPPF states "Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use."
>
> The key public benefits of the proposed scheme would be:
>
> a. Heritage benefits derived from bringing back the retained listed hospital structures into use, thereby securing the future conservation of the designated asset;
>
> b. Heritage benefits gained from the return and restoration of original built features to the main hospital building including provision of new wooden window casements,

restoration of the Victorian cast iron veranda, a resizing and re-arrangement of the front dormer features -to better match the historic arrangement;

c. Delivery of 291 new homes;

d. Provision of 35% of the residential accommodation as affordable housing …;

e. Provision of … space designed … readily capable of serving as a children's nursery…;

f. Securing … public access to the site open space specifically the front lawn area;

g. Relocation of the Mulberry Tree to the front lawn would serve as a tangible public benefit given the tree is imbued with such cultural and historical significance to the site and the local area and yet is presently not visible from the street or the public realm more generally;

h. Demolition of a set of post war buildings on site that detract from the setting of the listed building and the character of the conservation area to be replaced with new buildings that offer some architectural merit (as set out Section 11 of the report) that would visually benefit the locality.

17.5 [This dealt with the mulberry tree and is set out in Ground 4].

17.6 The Borough has a five-year supply of deliverable housing land, and a track record of delivering significantly more new homes than any other London borough over the last ten years. Nevertheless the scheme's provision of new housing is recognised to be a public benefit that needs to be given very significant weight given London is considered (as set out in London Plan) to operate as a single housing market with an existing housing supply shortfall.

17.7 With respect to the provision of affordable housing, the public benefits are clear with the scheme set to deliver a quantum of affordable housing consistent with the 35% to 50% target set in the development plan. This level of delivery of affordable housing set within the context of a site with such a degree of heritage constraints/sensitivities is a significant outcome.

17.8 Within Chapter 12 of the NPPF concerned with "achieving well designed places", an obligation is placed upon decision-makers when determining planning decisions to ensure new developments "optimise the potential of the site to

> accommodate and sustain an appropriate amount and mix of development" (Paragraph 127). This requirement on decision makers is echoed again in Chapter 16 (the NPPF chapter dealing expressly with concerning conserving and enhancing the historic environment) in Paragraph 196 of the NPPF when its it sets out that the public benefit associated with "securing optimum viable use" also applies to a scheme that will lead to less than substantial harm to a designated heritage asset.
>
> 17.9 In summary, officers conclude on-balance the scheme would deliver public benefits that outweigh the identified resultant harm arising from the scheme.
>
> 17.10 Officers in arriving at this conclusion on the planning balance do not seek to diminish the degree of harm the proposed development would incur to designated assets, including partial demolition of significant elements of the hospital cited in Historic England's listed description.
>
> 17.11 The proposed scheme would provide an opportunity and a secure mechanism (through planning conditions) to actively manage and maintain the large number of trees on-site that for some time have been not managed. This aspect of the scheme of itself would provide a visual public benefit to the neighbourhood and go towards improving the visual appearance of the conservation area alongside serve as an ecological benefit."

31. The adopted minutes of the Strategic Development Committee meeting of 20 September 2018 record Mr Gwynne, the Case Officer, identifying various aspects of heritage loss, but also stating that:

> "…the proposal would also involve improvements to a number of elements of the heritage importance across the site.
>
> As a result of the changes, Officers considered that the application would result in 'less than substantial harm' to the significance of the Grade II listed Hospital Building and the character and appearance of the Victoria Park Conservation Area. Officers considered that on balance, the scale of the public benefits which the scheme would deliver would outweigh the less than substantial harm to the heritage assets".

32. Ms Lambert responded to a question from Members thus:

> "…that whilst elements of the building would be lost, the special interest and historic significance of the building would be maintained and improved. It was a fine balance, but Officers and Historic England considered that the harm to the heritage assets would be 'less than substantial' as defined in the NPPF given that most of the building would be retained and the measures to

> restore the historic features of the building. Officers also gave some examples of what would constitute substantial harm to a heritage asset."

33. Crest Nicholson's planning consultants made their own record of what was said, and both sides referred to various parts of it in support of their contentions, the Claimant more particularly in relation to the mulberry tree. One Member asked Ms Lambert, the Heritage and Design Officer, why officers had concluded that the scheme would result in less than substantial harm, to which her recorded reply was:

> "…that even though there is the loss of the south wing and roof, special interest is maintained. Explained that there has been thorough consideration and that there is a fine balance. Although at the very top end of less than substantial harm, they believe that the scheme will result in less than substantial harm as does Historic England. … Cllr Tomlinson finds and reads out the exact wording of NPPF para 194 and asks the Council's Heritage officer if the tests are met. The officer confirms that the tests have been met and there is clear and convincing justification, including heritage benefits, to justify the resulting identified harm."

**Ground 1: internal consultation and background papers**

34. The Claimant's solicitor's pre-action researches included a search of Tower Hamlet LBC's website in relation to this application. Relevant documents could be viewed there. This included all the applicant's supporting document and external consultee responses. One section included a list of Council internal consultation responses. One was for the Conservation Officer's response, but no document could be brought up and the Report to Committee contained no reference to such a separate internal consultation response. Although I was told that this is a set of headings which exists whether or not there is a response to be included, Tower Hamlets LBC responded to the solicitor's request to see the response, by providing a document prepared by Ms Lambert.

35. This document is not dated and is not headed "consultation response"; indeed it is not headed at all. What was of interest to the Claimant was that the views of Ms Lambert were different from those in the Report to Committee. Ground 1 initially claimed that the Committee ought to have been alerted to her disagreement with those views. Ms Lambert explained in her first witness statement that she had changed her views over time and in discussion and that she was in agreement with the views expressed in the Report. Ground 1 was then amended to contend, instead, that her response should have been listed and made available publicly as a background paper, so that Members and the public could have the full picture of the evolution of the Officers' thinking. It is not now contended that her previous view was a material consideration which ought to have been drawn to the Committee's attention for its Members to consider. In her first witness statement, she described the document as being finalised on 26 June 2018 when it was provided to the Development Management Officer.

36. The Claimant's solicitors produced a version of what Ms Lambert produced which showed the changes from it which appeared in section 12 of the Committee Report. The document has the structure of section 12 of the Committee Report in it, and much of

the text is identical. Many of the changes are typos or little more, some are clarifications or more matters of drafting taste or style. Some are points of emphasis or shades of views. There are very many changes, large and small. The crucial points of difference are to be found under the heading "Harm/substantial harm" which contains what, in the Committee Report, is to be found under the heading "Categorisation of harm". I set them out:

> "The decision about whether proposals constitute substantial or less than substantial harm is always a matter of fact and degree and whilst individual elements of a proposal might each be considered to be less than substantial harm, cumulatively the impact of these elements may be judged to constitute substantial harm.
>
> Many of the elements of these proposals alone or even in combination might be considered to be less than substantial harm and this is reflected in the protracted negotiations on the site. Whilst there are definitely important beneficial consequences of the proposals, not least the refurbishment and reuse of the main hospital, securing its future for the long term and restoring important architectural elements, the balance of negatives, the loss of the existing roof and its fabric, an intrinsic part of the overall architectural vision, the loss of the south wing, such an important element of the overall heritage asset and the impact of new development on the setting of the listed building and the broader conservation area must mean that these proposals cumulatively tip the balance towards substantial harm.
>
> Officers have worked carefully with developers to try and put together a proposal which whilst potentially harmful in some respects combines sufficient heritage and public benefits to meet the required tests. Concessions have been made in terms of the loss of the nurses accommodation to facilitate more efficient development of the site, the possibility of building a full width, full height extension once again to enable more efficient development of the site and the possibility of accommodating development which is higher than would be desirable on the northern corner facing the park, to ensure that the main buildings can be restored. However, the proposals as they stand are cumulatively harmful, lack adequate justification and offer insufficient public benefits to counteract the negative impacts.
>
> Even if the harm were to be considered to be less than substantial, and it is finely balanced, the justification for the proposals and the public benefits which it offers are not considered sufficient to outweigh the harm. The applicants acknowledge that the proposals result in some harm, and suggest

that this harm can be balanced by the public benefits of the proposals. Included amongst which are:-

• Returning a vacant listed building that is in a dilapidated condition to a viable use and securing its future maintenance,

• Restoration of original iron verandas and the sanitary tower

• Repair and reinstatement of the iron railings and dwarf wall that form the boundary of the project site

• And better revealing the significance of the heritage asset through proposals such as the access to the main lawn, interpretation and signage, and a commemorative plaque

• The enhancement of the landscape setting to the hospital

• Other benefits including the provision of new and affordable homes

• Habitat and ecological enhancements

• Creation of jobs

• Significant investment.

Many of these benefits would, however, be expected to arise from any successful and sympathetic conversion and reuse of the building and cannot therefore be considered specific to allowing these harmful proposals. The remaining benefits seem relatively slim, if the housing provision is set aside, amounting to recording what is to be lost, some signage and interpretation.

As for the dilapidated condition of the Hospital, it was used as a hospital until relatively recently, and its condition reflects this, being relatively wind and weather tight, and potentially capable of mothballing.

**In conclusion**

When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation.

These proposals are detrimental to the special architectural and historic interest, and to the significance of the former London Chest Hospital. The loss of the existing roof structure, considered to be sound within the structural survey, and the loss of the south wing, identified as significant within the recent listing together with the extension along the extent of the rear and the introduction of three new buildings in close proximity to the original hospital building and of a competing height will impact detrimentally on the significance of the listed building and its setting.

There is also a lack of clarity about what the proposals will involve in terms of the extent of works internally, the extent to which the retention of the third floor and the cupola will be possible.

The degree to which the approach taken recognises the constraints placed upon the significance of the building needs to be considered, this scheme although amended considerably builds upon the original scheme which was presented prior to the buildings listing and fails to take into account the constraints imposed by the listing.

In addition to the harmful impact upon the fabric of the listed building itself the legislation requires that proposals must be assessed in terms of their impact upon the setting of the listed building and upon the special character and appearance of the broader conservation area.

The new development proposed across the site impacts harmfully upon the setting of the listed hospital, competing with it in terms of its scale and prominence. Altering the perception of the hospital as a landmark building within a parkland setting, and impacting upon the broader landscaped character of the conservation area.

These detrimental impacts to the listed building itself, are also detrimental to the character and appearance of the wider conservation area and as a consequence the proposals fail to preserve or enhance the character and appearance of the conservation area."

37. Paragraph 12.65 of the Committee Report provides an example of a change in emphasis, and style but not of substance, from Ms Lambert's document, which read:

> "…the new development will dominate the hospital impacting upon its landmark character. The new buildings diminish the prominence of the hospital, making it just one of a number of large buildings on the site, rather than the most significant, and diluting its contribution to the character of the conservation area as a consequence. The new buildings are not deferential in any way."

38. The basis for the contention that this document in law should have been identified as a background paper lies in s100D LGA. This provides:

> "(1) Subject, in the case of section 100C(1), to subsection (2) below, if and so long as copies of the whole or part of a report for a meeting of a principal council are required by section 100B(1) or 100C(1) above to be open to inspection by members of the public–
>
> (a) those copies shall each include a copy of a list, compiled by the proper officer, of the background papers for the report or the part of the report, and
>
> (b) at least one copy of each of the documents included in that list shall also be open to inspection at the offices of the council….
>
> (3) Where a copy of any of the background papers for a report is required by subsection (1) above to be open to inspection by members of the public, the copy shall be taken for the purposes of this Part to be so open if arrangements exist for its production to members of the public as soon as is reasonably practicable after the making of a request to inspect the copy.
>
> (4) Nothing in this section—
>
> (a) requires any document which discloses exempt information to be included in the list referred to in subsection (1) above; or
>
> (b) without prejudice to the generality of subsection (2) of section 100A above, requires or authorises the inclusion in the list of any document which, if open to inspection by the public, would disclose confidential information in breach of the obligation of confidence, within the meaning of that subsection.
>
> (5) For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which—

> (a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and
>
> (b) have, in his opinion, been relied on to a material extent in preparing the report, but do not include any published works."

39. There was no list of background documents. The evidence from Mr Gwynne and Ms Lambert about the role of her paper was this. Ms Lambert, who had a number of relevant planning and historic building qualifications, worked in the Place Directorate as a Heritage and Design Officer and had done so since 1989. Her duties included providing guidance on planning and listed building consent applications; she had been involved in some large projects in the Borough. On this application, she had been involved in the pre-application meetings and thereafter. As the appointed conservation officer, she "liaised continuously with the… Development Management Case Officers…through the lifetime of the application proposals." Mr Gwynne had been the Case Officer at the relevant times. She described the origin and use of the paper thus:

> "5. As the proposals neared the determination stage, I compiled a response to Development Management Officers which set out my professional opinion on the proposals at that time. This document finalised on the 26th June 2018 was provided to the DM officer. It was intended to help with the formulation of the report. With heritage sensitive applications such as this, it is rare that I would report separate comments to committee and in providing this document it was intended that the content would be used by the DM case officer for the heritage section of the report.
>
> 6. In between writing this response and the date of the committee, the extent of the harm that these proposals would cause was the subject of much discussion with colleagues in both Development Management and my own Placeshaping Team. I ultimately came to the conclusion, based upon these discussions, that the proposals would constitute less than substantial harm. Whilst the harm identified was at the high end of less than substantial, it did not result in the complete loss of the significance of the hospital and to this end I was in agreement with colleagues and the final draft of the committee report, which I had reviewed.
>
> 7. I attended the Council's Strategic Development Committee on 20th September 2018 in order to respond to any questions members had about the impact of the proposals in heritage terms. My responses to questions from the committee are recorded in the minutes of the meeting and reflect my concluded professional opinion on the effect of the proposal."

40. Ms Lambert elaborated in her second witness statement of 26 April 2021. She had been involved with the case since before the building was listed. Historic England had advised in 2016 that the harm would be less than substantial, but would still need to be

justified by public benefits. There had been subsequent changes which had reduced the harm which the proposals would do to the listed building. She commented: "With these improvements in mind, it would be difficult to disagree with Historic England, the body tasked with protecting the nation's heritage, regarding the likely degree of harm." The role of her comments had been misunderstood. They were not a formal consultation response. Ms Lambert had provided her comments after considering the application documents, third party representations and undertaking a site visit. She said at paragraph 9:

> "The comments were provided in a Word document so that they could be incorporated within the committee report. However, it was recognised that there would still need to be further discussion between officers regarding these comments and the final form that the heritage section of the committee report would take as part of our joint working on this issue. In my first witness statement, I explained that these comments were finalised on the 26 June 2018. However, in doing so, I was seeking to clarify when these comments were produced, since I understood a query had been raised about this. I was not suggesting that my comments represented a formal standalone document, as is sometimes the case.
>
> 10. In terms of the approach I took, I appreciate (and always have done) that substantial harm does not have to result in total or complete loss of significance. I think this is clear from my written comments to the development management officers, where I suggested that the proposals "may" be cumulatively tipping the balance towards substantial harm. This indicates that I understand the nuances of substantial and less than substantial harm and that there is a sliding scale between those proposals which cause less harm and those that cause substantial harm. Where a particular impact lies is ultimately a matter of planning judgement.
>
> 11. In the present case, I always recognised that the position was finely balanced. After providing my initial comments, officers working on the application collectively reviewed the position, taking into account the guidance in the PPG and the advice that had been provided from Historic England. Overall, we decided that the proposal would result in less than substantial harm, although at the very upper end of the scale and it was this opinion which was included in the final committee report and expressed to Councillors at the Committee Meeting. This conclusion that the harm was at the upper end of the scale of less than substantial harm and therefore finely balanced (between the two categories of harm) was reached despite it always being clear that a large part of the significance of the listed building would be retained."

41. Mr Gwynne's first witness statement focused on issues concerning the mulberry tree, but affirmed his qualifications, experience and his various roles at Tower Hamlets LBC since 2014, becoming a Team Leader in 2017. He was the case officer from November 2016 until spring 2017 when he became West Area Team Leader, overseeing the new case officer, becoming case officer for this application again, in July 2018, while remaining Team Leader in view of his knowledge of the application. He prepared the Committee Report and presented it to Committee, under the name of the Corporate Director of Development and Renewal, though he was identified as the case officer on the front page of the Report. Ms Lambert was in the Place-Shaping Team which, with the Development Management Team, was part of this Directorate. Mr Gwynne drew attention to the words at the start of section 7 of the Report, which stated that the views of the Directorate of Development and Renewal, which included those of Ms Lambert, were expressed later within the Report. The internal consultees', whose views were set out in section 7 of the Report, were not within that Directorate.

42. In his second witness statement of 26 April 2021, Mr Gwynne described how the Report had evolved:

> "8. The content of this planning committee report, and others I have prepared, is in practical terms the work of many officers, which is pulled together by the Development Management Team led by the case officer overseen by others, including the DM Team Leader and DM Area Manager and, on occasion, with input from others including the Service Level Development Management Manager. Couched differently, these reports are very much collaborative exercises. In place of the frequently used term "officer report" more accurate to my mind would be to describe it in the plural "officers' report". This 'correction' for want of a better term I consider is an important point in the case of this report, and far from a matter of trivial pedantry.
>
> 9. For this committee report (like all other planning committee reports I have led in preparing) internal consultee reports would have been received by myself from specialist internal teams (and other external consultees) and these would then be included in full within the report, or précised in the Consultation Responses section of the report…These formal comments received from consultees frequently inform/help populate the drafting of the assessment section of the relevant planning consideration in the committee report…
>
> 10. In the drafting of other reports, there is often minimal need for on-going discussion with the specialist consultees…
>
> 11. However, in the case of this application, the preparation and completion of both the Urban Design and Heritage sections (11 and 12) of the report was very much an on-going collaborative exercise between officers working in Development Management Team and colleagues in the Place Shaping Team. Specifically, two assigned lead officers for this application from Heritage and Urban Design sections of that Place-Shaping Team. The

> Heritage (Conservation) Officer in question being Ms Vicki Lambert, who was involved in all meetings with the applicant team and all internal discussions regarding the application when conservation and urban design matters were discussed. Since, in this case, Ms Lambert was involved in drafting the heritage section of the report, no separate comments are reported separately from the Heritage and Urban Design Officers of the Council….
>
> 13. In June 2018, when the comments for the heritage section of the report were received from Ms Lambert, neither the then DM case officer to the application (Mr Simon Westmorland) or I (then acting in an Area Manager capacity) viewed the comments from Ms Lambert as some form of conclusive or final set of consultee comments from the Conservation Officer Ms Lambert. Rather, I viewed the document from Ms Lambert as setting out the form/structure/assessment of heritage matters that would be subject to further refinement through the collaborative drafting of the Heritage section of the report discussed above. This is a process which is undertaken with constant reference back to submission documents and first hand discussions between officers informed by previous site visits and written comments received from 3rd parties, including statutory consultee comments (including, but not exclusively, those from Historic England and Victorian Society)…
>
> 15. From the multiple discussions both myself (and the previous case officer) had with Ms Lambert, I was left in no doubt that Ms Lambert had not reached a categorical/settled position on the level of harm, less still stated it was substantial harm…."

43. Mr Gwynne, in support of his view that Ms Lambert had not reached a settled view on the level of harm quoted from her original comments, emphasising the last six words, that "the balance of negatives….must mean that these proposals cumulatively tip the balance towards substantial harm." He referred to others in which Ms Lambert had referred to the question of whether the harm was substantial or less than substantial as "finely balanced." He referred to discussions with the applicant about design, which were continuing at the time, although none of any significance were said to have emerged between her June 2013 comments and the finalised Committee Report. Mr Gwynne also said that he "did not consider" Ms Lambert's "comments" to be a background document because they did not fulfil the criteria in s100D(5).

44. Mr Harwood QC for the Claimant focused his argument on the language of subsection (5): the document met the statutory language; it was not an exempt document, and so it should have been available for inspection. It did not matter that Ms Lambert had changed her view as her evidence explained, and that her view was now contained within the Committee Report itself. He accepted that a draft of the Committee Report would fall outside its intended scope. But, he submitted, that that only applied to a draft of the Report made by the Officer author. Draft contributions to that Report, if

that is what Ms Lambert's paper was, would not fall outside its scope, if they fitted the statutory language. This omission could have affected the outcome of the Committee's decision, which was reached by a narrow margin, by showing that the view of those opposed to the development had respectable support, and alerting them to the scope for testing the quality of thinking behind the change.

45. Ms Sheikh QC for Tower Hamlets LBC primarily submitted that the evidence of Mr Gwynne and Ms Lambert, in two witness statements each, showed that her paper was in reality the draft Heritage section of the Committee Report which was subject to internal discussion and debate with Mr Gwynne, and her final views were part of the Report itself. It did not therefore fall into the intended scope of "background papers" which required final, stand-alone papers to be made available, not drafts or part of drafts of what were to become Reports. She also submitted that Mr Gwynne's opinion, that there were no background papers, had been reasonable. Final internal consultation responses were reported fully; Ms Lambert's was part of the Report. She also submitted that Ms Lambert's paper did not meet the other requirements in s100D(5), to be a background paper. Mr Warren supported these submissions.

**Conclusions on Ground 1**

46. This ground is not that the views of Ms Lambert as expressed in her original paper were of themselves a material consideration, or that the document itself was a material consideration. There was no suggestion that the fact that an Officer changed her views, during the course of the consideration of the application by officers, was of itself a material consideration. There was no issue but that the views held by Ms Lambert at the time when the Report to Committee was finalised were her views. It may be a very different case, as this was initially thought to be, where the current, dissenting, views of the officer dealing with a specific and large part of the case, were not disclosed or, worse, were misrepresented.

47. There was no issue over the factual description given by Mr Gwynne and Ms Lambert in their witness statements, of the way in which the paper and Report evolved. There was no issue either but that the fact that a paper was an internal paper, or was produced as an internal response to consultation, did not of itself preclude the application of s100D(5) to it; see *R (Holborn Studios v London Borough of Hackney (No.2)* [2020]EWHC 1509 (Admin), at [61], Dove J. It was not an exempt paper.

48. Mr Harwood accepted that a draft of the Committee Report itself did not fall within the scope of s100D(5), although, at first blush, a draft of a report, could come within the statutory wording as disclosing facts or matters on which an important part of the final report is based and has been relied on to a material extent. Mr Harwood was right to accept that the provision should not be construed in that way. The drafts of the Report itself are not what the subsection is aimed at. The subsection is aimed at the separate papers on which the authors of the Committee Report have drawn to a significant extent or in a significant way, and not those which become part, varied or not, of the Report itself.

49. It is not what the section expressly provides for, and it would be contrary to the sensible operation of the decision-making processes in local authorities if draft reports at whatever stage were to be made publicly available. If that really were the intention of Parliament, I would have expected so startling a result to be provided for expressly.

Nor could it add to the achievement of the purpose of the section, which is to enable Members and the public to see what material the report is based on and on which the officers have relied, rather than how their thinking evolved, and did so collaboratively. Indeed it could have a damaging effect on what officers were prepared to commit to paper when jointly preparing draft parts of a Report for later discussion. The language of s100D(5) does not fit the inclusion of a draft of a report as the source of facts or matters upon which the report is based or relied on in preparing the report. Nor does the purpose of the section, in terms of public and member knowledge of the basis for recommendations and decisions, mean that it falls within the subsection. The possible Member interest in or use of a draft document to test the evolution of views does not bring it within the purpose of the subsection.

50. Mr Harwood sought to distinguish a draft of a part of the Report prepared by the nominal author or presenter, from a draft of a part prepared by another officer, whether or not one with separate expertise. I can see no principled or textual basis for that distinction. The description of a paper as "stand alone" rather than "final" gets closer to what the officer ought to be looking for in reaching his opinion under s100D(5).

51. I am satisfied, from the unchallenged description given by Mr Gwynne and Ms Lambert of how the Report evolved, that her paper is a draft of the heritage part of the Report, which was a collaborative effort by her and Mr Gwynne. I note, for these purposes, the absence of any description of its status in heading, and that it was in a format which meant that others could work on it and that it could readily be altered, with changes tracked. I note the nature and extent of the changes in the Claimant's solicitor's helpful comparison document. I have described them above. They cover the full gamut of potential changes, from minor corrections, to omissions and additions of no great significance but which are improvement, stylistic changes, changes of emphasis, and changes to the conclusions, and there, not just in clarity, but in substance as to the level of harm. Ms Lambert agreed the Committee Report with its multitude of changes, which emphasises rather than contradicts the draft and contributory nature of the paper at issue. A Case Officer could not, properly, alter internal consultation responses, which are *the* views of the officers consulted. The fact that the draft was "finalised" does not detract from its draft status: it simply means that it was ready for handing over for discussion, as with collaborative judgment writing.

52. I also note that Ms Lambert's paper did not confine itself to an assessment of the harm or the level of harm, but ranged more widely, in its conclusions, than her specialist remit, to provide an overall assessment of where the planning balance lay. This suggests strongly that it was not an internal consultation response, but rather a draft of a significant part of the Report. This is evident from her assessment of the insufficiency of the public benefits, including the housing and affordable housing provision: "However, the proposals as they stand are cumulatively harmful, lack adequate justification and offer insufficient public benefits to counteract the negative impacts."

53. I was not persuaded however by Mr Gwynne's references to Ms Lambert describing "the balance being tipped towards substantial harm" as showing that the conclusions were draft or tentative in view of the language of the Report itself. The fineness of the judgment on the level of harm does not make it more likely to be a draft. What I am clear about is that there was nothing odd about a change of view, after discussion, to harmonise with that of Historic England. Nor was I persuaded that Mr Gwynne's opinion on what constituted a background paper was of much relevance. If I am wrong

in my approach here, the paper was a background paper. If I am right, it could not have been a background paper. But in my judgment, this paper is to be seen as a draft part of the Report, and not as Ms Lambert's final consultation response. That would not be consistent with the evidence.

54. I was not persuaded either by any part of Ms Sheikh's submission that the document was properly thought not to be a background paper because it was based on the applicant's Heritage Statement, and which was said to be a published work. I did not find value in the fact that, in response to the Claimant's solicitors' request for the "internal conservation officer response", Tower Hamlets LBC adopted that language in emailing the document to them. Nor did I find value in the description of the document as the "original consultation response" in the Summary Grounds of Defence. I am more concerned with the substance at the time.

55. I do not accept her submission that, if my analysis is wrong, the document did not otherwise satisfy the requirements of s100D(5) as containing facts and matters on which an important part of the report was based, or being relied on to a material extent in preparing the Report. It does so in my view but only in the way that could be true of any draft part of a report.

56. If I am wrong, and the paper should have been a background paper, I am not prepared to hold that it is highly likely that the outcome would have been the same in view of the narrowness of the voting margin, the interest of Members in this crucial topic, and the way in which Ms Lambert's original views could have been used to challenge the weight to be given to her changed views, though they now agreed with Historic England. That latter aspect does not mean that it became a background paper when it otherwise was not, however.

57. Accordingly Ground 1 is dismissed.

58. After this judgment was sent to the parties for corrections before hand down, Mr Harwood, quite properly, drew my attention to the judgment of Lang J in *R (Kinsey) v London Borough of Lewisham and Another* [2021] EWHC 1286 (Admin), dated 18 May 2021. He made no submissions on it; Ms Sheikh, who had appeared against Mr Harwood in that case as well, made short written submissions distinguishing it on its facts. It concerned a Committee Report which dealt with the conservation aspects of a planning application, but did not describe accurately the views of the Conservation Officer, as give in an internal consultation response. They raised a stronger objection than the Report had conveyed. The consultation response was not a background paper either. It appears that the issue was argued as a background paper point but was dealt with as a material consideration or as a point about a materially misleading Committee Report. Those are not the facts here; there was no issue here but that an internal consultation response can be a background paper. Ms Lambert's final views were accurately conveyed in the Report. It was not suggested that her original views, once changed as her witness statements showed, were a material consideration. She had produced what was a draft of part of the Report, and it was that which was not a background paper.

**Ground 3: the inclusion of heritage benefits when assessing the level of heritage harm**

59. There is now no Ground 2. The major part of Ground 3, (a), concerns the stage at which heritage benefits are brought into the planning balance: is it when assessing whether harm is substantial or less than substantial? Or is it after that when assessing the whether the harm is outweighed by the public benefits? Or is either permissible, of course so long as whichever way it is done the same benefit is not double counted? This raises an issue about the interpretation of the NPPF of relevance beyond the facts of this case. Ground 3(b) is of no consequence beyond this case: it raises a point about paragraph 2.8 of the Committee Report, which is said to misapply the NPPF.

60. Mr Harwood submitted that the correct approach was that heritage benefits should be ignored when assessing whether the level of harm was substantial or less than substantial, and that the Report had not observed that distinction. The risk of not observing it was that heritage benefits could be double counted, first when assessing the level of harm, and again when assessing the public benefits. That problem had come to pass, as the Report showed.

61. Ms Sheikh and Mr Warren submitted that, on a proper reading of the Report, it had adopted the "correct" approach as contended for by Mr Harwood, but that, if it had not, it made no difference; a different approach it would not necessarily have been an unlawful approach and there had been no double counting of heritage benefits.

62. Mr Mills, in written representations for the Secretary of State, submitted that there was no one right way to bring the heritage benefits into account. But where there was a balance of heritage harm, after considering both the heritage harm and heritage benefits, considerable importance and weight had to be given to that "net" heritage harm, when weighing it up with the other, non-heritage, public benefits. Both the LBA, and the NPPF in consequence, required that degree of importance and weight to be given to the heritage harm. A legalistic interpretation was to eschewed.

63. I need to refer to three authorities. First, *R (Safe Rottingdean Ltd) v Brighton and Hove City Council, and Fairfax Acquisitions Ltd* [2019] EWHC 2632 (Admin), a decision of mine. The issue in that case concerned the interpretation of policies in the Local Plan which dealt with listed buildings and Conservation Areas. It was argued that they required heritage benefits to be ignored when the judging whether there was harm to either. This mattered for the purpose of the judgment as to whether the proposals accorded generally with the development plan. I rejected that argument. The language of the policies was contrasted with the language of the NPPF and paragraph 196 in particular. At [68] I said this:

> " …Paragraph 196 contemplates the position where there is some but less than substantial harm to a heritage asset, whether listed building or conservation area. It does not look at the overall balance of advantage or disadvantage to the heritage asset at that stage. The weighing exercise then includes the advantage of "securing its optimum viable use" as a factor against which the less than substantial harm has to be weighed. That is a clear reference to the public policy advantage of bringing a listed building or part of a conservation area into a viable long-term use. Such public heritage benefits are clearly among those to be weighed against the less than substantial harm. So the Framework adopts its own approach but emphatically is not

> dependant on a view that the less than substantial harm is a net overall less than substantial harm. That necessarily means that it had to be approached differently from the way in which the HE policies were approached."

64. In *R (Kay) v Secretary of State for Housing communities and Local Government* [2020] EWHC 2292 (Admin), Dove J applied those words at [34], saying:

> "The clear focus of paragraphs 193-196, and the fulcrum or essential finding necessary to apply the policy contained in those paragraphs correctly, is an initial establishment of the extent and nature of the harm to the significance of a designated heritage asset as a consequence of what is proposed. At the stage of establishing the nature and extent of the harm to significance, any beneficial impact on the significance of the heritage asset is left out of account. It is only after that level of harm has been fixed that any beneficial effect upon the building which, in accordance with the PPG would properly be considered to be a public benefit, is to be taken into account in assessing whether or not the overall balance to be struck in applying the policy, including any other public benefits, enables the conclusion to be reached that the proposals do not conflict with the policy."

65. The third decision came after both of those decisions. In *R (City & Country Bramshill Ltd) v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 320, the Court of Appeal had to consider an appeal related to an application for the conversion of the listed mansion of the former police training college, and residential development in the grounds. The Appellant's argument was that the NPPF required the decision-maker to net off the heritage benefits against the heritage harm, and that, only then, would paragraph 196 of the NPPF come in to play in respect of the net, less than substantial harm. *Palmer*, referred to in paragraph 12 above, was said to have been wrongly distinguished below, as applying only to mitigation measures and not to separate heritage benefits.

66. Sir Keith Lindblom SPT, with whom Phillips and Arnold LJJ agreed, said this:

> "71. Like the judge, I cannot accept those submissions. It is not stipulated, or implied, in section 66(1), or suggested in the relevant case law, that a decision-maker must undertake a "net" or "internal" balance of heritage-related benefits and harm as a self-contained exercise preceding a wider assessment of the kind envisaged in paragraph 196 of the NPPF. Nor is there any justification for reading such a requirement into NPPF policy. The separate balancing exercise for which Mr Strachan contended may have been an exercise the inspector could have chosen to undertake when performing the section 66(1) duty and complying with the corresponding policies of the NPPF, but it was not required as a matter of law. And I cannot see how this approach could ever make a difference to the ultimate outcome of an application or appeal.
>
> 72. Section 66 does not state how the decision-maker must go about discharging the duty to "have special regard to the desirability of preserving the building or its setting …". The courts have considered the nature of that duty and the parallel duty for conservation areas in section 72 of the Listed Buildings Act, and the concept of giving "considerable

importance and weight" to any finding of likely harm to a listed building and its setting. They have not prescribed any single, correct approach to the balancing of such harm against any likely benefits – or other material considerations weighing in favour of a proposal. But in *Jones v Mordue* this court accepted that if the approach in paragraphs 193 to 196 of the NPPF (as published in 2018 and 2019) is followed, the section 66(1) duty is likely to be properly performed….

74. The same can be said of the policies in paragraphs 195 and 196 of the NPPF, which refer to the concepts of "substantial harm" and "less than substantial harm" to a "designated heritage asset". What amounts to "substantial harm" or "less than substantial harm" in a particular case will always depend on the circumstances. … But the decision-maker is not told how to assess what the "harm" to the heritage asset will be, or what should be taken into account in that exercise or excluded. The policy is in general terms. There is no one approach, suitable for every proposal affecting a "designated heritage asset" or its setting.

75. This understanding of the policies in paragraphs 193, 195 and 196 reflects what Lewison L.J. said in *Palmer* (at paragraph 5) – that the imperative of giving "considerable weight" to harm to the setting of a listed building does not mean that the weight to be given to the desirability of preserving it or its setting is "uniform". That will depend on the "extent of the assessed harm and the heritage value of the asset in question". These are questions for the decision-maker, heeding the basic principles in the case law.

76. Identifying and assessing any "benefits" to weigh against harm to a heritage asset are also matters for the decision-maker. Paragraph 195 refers to the concept of "substantial public benefits" outweighing "substantial harm" or "total loss of significance"; paragraph 196 to "less than substantial harm" being weighed against "the public benefits of the proposal". What amounts to a relevant "public benefit" in a particular case is, again, a matter for the decision-maker. So is the weight to be given to such benefits as material considerations. The Government did not enlarge on this concept in the NPPF, though in paragraph 196 it gave the example of a proposal "securing [the heritage asset's] optimum viable use".

77. Plainly, however, a potentially relevant "public benefit", which either on its own or with others might be decisive in the balance, can include a heritage-related benefit as well as one that has nothing to do with heritage. As the inspector said (in paragraph 127 of the decision letter), the relevant guidance in the PPG applies a broad meaning to the concept of "public benefits". While these "may include heritage benefits", the guidance confirms that "all types of public benefits can be taken together and weighed against harm".

78. Cases will vary. There might, for example, be benefits to the heritage asset itself exceeding any adverse effects to it, so that there would be no "harm" of the kind envisaged in paragraph 196. There might be benefits to other heritage assets that would not prevent "harm" being sustained by the heritage asset in question but are enough to outweigh that "harm" when the balance is struck. And there might be planning benefits of a quite different kind, which have no implications for any heritage asset but are weighty enough to outbalance the harm to the heritage asset the decision-maker is dealing with.

79. One must not forget that the balancing exercise under the policies in paragraphs 195 and 196 of the NPPF is not the whole decision-making process on an application for planning permission, only part of it. The whole process must be carried out within the parameters set by the statutory scheme, including those under section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") and section 70(2) of the 1990 Act, as well as the duty under section 66(1) of the Listed Buildings Act. …

80. Within that statutory process, and under NPPF policy, the decision-maker must adopt a sensible approach to assessing likely harm to a listed building and weighing that harm against benefits. Lewison L.J. was not suggesting anything else in *Palmer*. He was not seeking to establish any principle. He was saying that, in circumstances such as he was considering, a decision-maker, having considered both "positive" and "negative" effects on a listed building and its setting, "may legitimately" find there would actually be no harm. He was not saying that a decision-maker must go about the balancing of harm, if harm is found, against benefits in any particular way. There is no "*Palmer* principle" of the kind suggested by Mr Strachan. The court was simply endorsing the pragmatic and lawful approach taken by the local planning authority in the circumstances of that case. An "internal" balancing exercise was appropriate because the apprehended "harm" could be avoided through the mitigation measures proposed, and there would be "no overall adverse effect on the listed building or its setting" (paragraph 29 of Lewison L.J.'s judgment).

81. But as Waksman J. recognised here (at paragraph 111 of his judgment), "[this] is quite different from balancing an admitted or found adverse impact . . . against separate beneficial effects …".

67. I start by considering the approach adopted in the Committee Report. I am satisfied that it adopted the approach which Ms Sheikh contended it had adopted, and which Mr Harwood submitted was the correct approach. It did not set the heritage benefits against the heritage harm before concluding that the harm was less than substantial. I recognise that the language could give the contrary impression in places, but I am satisfied that that is not its approach when paragraphs 12.79-12.85 and section 17 are read together and as a whole.

68. Mr Harwood's chief point was the language of 12.80:

> "Whilst there are a number of important and beneficial heritage consequences of the proposals, not least the refurbishment and reuse of the main hospital securing its future for the long term and restoring important architectural elements, the balance of negatives; the loss of the existing roof…[and other harm] must mean that these proposals cumulatively tip the balance towards the top end of the spectrum of less than substantial harm category to the listed hospital."

69. He pointed to the introductory clauses, recounting benefits, the reference to "the balance of negatives" and tipping the "balance towards the top end of the spectrum."

70. I regard this as clumsy in structure, grammar and concept. But it is clear enough in the end, taking this paragraph on its own, that the "balance" and the point on the "spectrum" are the same points. It is the identified harm alone, and not the net harm, which puts the harm at the top end of the spectrum of "less than substantial harm." The "balance" is really the content of one of the pans of the scales, the pan of harm, or, as the Report put it, "the balance of negatives". The introductory clauses acknowledge the heritage benefits, but the paragraph then puts them aside, summarising the various harmful elements and judging them to be at the top end of the spectrum. The paragraph cannot mean that the harm outweighs all of the heritage benefits, including that important benefit of the refurbishment and reuse of the listed building, securing its future. That would be significantly out of kilter with the rest of the Report.

71. The same approach can be seen in paragraphs 12.82-12.84 dealing with the Conservation Area: it deals with the adverse effects. The correct analysis of the approach, if not already clear, is made clear by both paragraphs 12.85. The conclusion is that the proposals cause harm to heritage assets, but that that harm is less than substantial. Then, the scheme has to be assessed against paragraph 196 NPPF "with the necessary public benefit test applied." The one public benefit specifically identified in paragraph 196 is securing the "optimum viable use" of the listed building. This is one of the benefits referred to in the introductory clauses of 12.80. Reading the two paragraphs together shows that the benefits were referred to in 12.80, not as part of a balance but merely as a recognition that they existed, before the paragraph set them aside to deal with the degree of harm or "balance of negatives", as the Report put it. The second paragraph 12.85 then makes that clear, despite some garbling: the public benefits to be weighed against the heritage harm include the heritage benefits, as part of the broader assessment of the overall planning benefits. For that purpose Members were referred on to section 17.

72. There, in paragraph 17.2, the harm to heritage, albeit less than substantial, requires the application of "a public benefit planning balance test as set out in paragraph 196 of NPPF." This is set out in 17.3. The key benefits listed start with the reuse of the hospital building securing its future, then the other heritage benefits from the works of restoration, followed by homes and affordable homes, and so on. So, the heritage benefits are weighed at this stage. The heritage harm is the only significant harm against which the benefits are to be set. And the Report, in 17.10 again refers to the heritage harm.

73. Mr Harwood submitted that the Report had double-counted the benefits, once when harm was assessed and again in the planning balance. But that only arises if his analysis of the Report's approach to the assessment of harm and the overall planning balance is correct. I have held that it is not. But the fact that his interpretation also involves attributing so basic and obvious an error to the Report, to my mind rather supports the alternative reading.

74. The Minutes of the meeting, and indeed Crest Nicholson's notes both support my assessment of the Report. The Minutes in particular show that the point at which the heritage benefits were put into the balance was after the assessment that the harm was less than substantial had been reached.

75. Second, I see nothing unlawful in that approach. Whether or not what I said about paragraph 196 in *Safe Rottingdean* was correct, and whether or not Dove J was wise or

unwise to follow it in *Kay*, as to which no particular view is expressed in or deducible from *Bramshill*, the Report did not adopt an unlawful approach either under the LBA or as a matter of the interpretation of paragraph 196 NPPF, with or without the light of *Bramshill*.

76. The LBA requires special regard and attention to be paid to the protection and preservation of the heritage interests of listed buildings and conservation areas. It was.

77. Judicial exegesis has treated the practical application of those duties as requiring significant weight and importance to be given to harm to those heritage assets, creating in effect a presumption against such harm, to justify which required strong countervailing public benefits. It was so adjudged. The thrust of *Bramshill* is that the Courts should not set out rigid frameworks for decision-makers to follow, so long as the statutory duties are observed, and policies, interpreted with planning sense and flexibility, are applied rationally. The variety of types of case in which the LBA, NPPF and local plan policies have to be applied may make one approach more convenient or sensible than another, varying with the circumstances of the case. The differing structures within which the duties and policies may be considered ought not to lead to different overall results.

78. Accordingly, where a proposal includes both positive and negative heritage elements, as part of the works to a listed building, or its setting or to a conservation area, it is open to a decision-maker under the LBA, either to treat them together as reducing or eliminating the heritage harm against which other benefits have to be set, or to add those heritage benefits in later as part of an overall planning balance. In each instance, the heritage harm, netted off or not, would have to be given significant weight. Of course, if the structure for the decision-making is itself not to be of importance to the outcome, the decision-maker will need to be careful that the weight given to the negative and positive heritage aspects did not vary with the stage at which they were considered.

79. Under the LBA, when deciding whether or not the LBA, and the approach to it established by the courts over the years, has been met, and that significant weight has been given to the desirability of preserving it, there is nothing to suggest that the heritage benefit of restoring a redundant listed building, and bringing it back into a long term viable use, cannot be set against the harmful works which may be required to achieve what may be seen as a greater good. *Palmer* explains how sensible it is to set them off, an approach which *Bramshill* could not reject, and merely said was not a mandatory approach, so long as the benefits were taken into account in the overall planning balance. There was nothing unlawful in the approach to the LBA in the Report.

80. So far as the application of paragraph 196 NPPF is concerned, the same applies, except that it is clear, and nothing in *Bramshill* suggests otherwise, that the benefit of securing the long term future of a listed building, cannot affect the degree of heritage harm but must go into the public benefits side. Of course, this is a very common source of works, some of which restore and others which harm a building in preparing it for a different but viable use. The stage at which the decision-maker considers other heritage benefits, such as those in paragraph 17.3(b) of the Report, whether when considering overall heritage harm or when considering whether the public benefits outweigh heritage harm taken on its own, is a matter for the convenience of the decision-maker. *Bramshill* does not explicitly deal with the stage at which heritage benefits other than the optimal viable

reuse of the building, should be allowed for. This could matter because the consequences of a finding that the harm is "substantial" are markedly different from those where the harm is "less than substantial."

81. There was, however, nothing unlawful in the Report or meeting in the approach to or interpretation of paragraph 196 NPPF.

82. There are no local plan policies here, but how a local plan is to be interpreted and the stage at which the issues of heritage harm and heritage benefit are considered, may arise. This was the issue in *Safe Rottingdean*. The question may be whether a development accords with the development plan. This may depend on whether there is overall no or a reduced heritage harm once the heritage benefits are allowed for, or whether there is harm or greater harm because those heritage benefits are to be disregarded until a later stage. The former may mean no conflict with development plan and the latter may mean conflict. In the latter, the heritage benefits would be brought in as other material considerations to support a decision in conflict with the development plan. Avoiding a difference in outcome from the structure for decision-making would need careful consideration.

83. However, as I say, the approach adopted here gives rise to no unlawfulness. If Mr Harwood had been right, it is difficult to see how the benefits would not have been double-counted in the Report, and the outcome could well have been different.

84. The second part of Ground 3, (b), concerned the first sentence of paragraph 2.8 of the Report, part of the "Executive Summary". I set it out again for convenience:

> "2.8 "Less than substantial harm" to heritage assets is required by policy and statute to be given significant weight against the granting of planning permission, unless the public benefits would be such that they would, on balance outweigh the harm. Officers consider that, on balance, the scale of the public benefits which the scheme delivers would outweigh the less than substantial harm to the significance of the Grade II listed Hospital Building along with the adverse impacts upon the character and appearance of the Victoria Park Conservation Area."

85. Mr Harwood submitted that the first sentence meant that significant weight only had to be given to the less than substantial harm, where the public benefits outweighed this less than substantial harm. This was not what was required at all. Significant weight had to be given to the harm when weighing in the public benefits, and not after doing so. Poor drafting, agreed Ms Sheikh, but this was not how Members would have read it.

86. I agree with Ms Sheikh. I read it first without seeing anything wrong with it, as my mind turned it into what I am satisfied the author meant. Mr Harwood is right on the literal interpretation of the sentence. But that reading is such a nonsense that anyone inclined to it would have realised what it really meant. Mr Harwood's reading requires an obvious circularity of reasoning: the harm is outweighed by the planning benefits; nonetheless it then comes to be weighed; there is nothing to outweigh it, yet it has already been outweighed. The words "leading to a refusal" are obviously implied

between "permission" and "unless". This circularity is not repeated later in the Report or in the Minutes. No one could have been misled. Ground 3(b) is without merit.

87. Ground 3 is dismissed.

**Ground 5: the meaning of "substantial harm" in the NPPF**

88. It is convenient to take this Ground next. Mr Harwood submitted that in the Report, and elsewhere, the authors had misinterpreted what the NPPF meant by "substantial harm" and, in doing so, had placed the tipping point between "less than substantial harm" and "substantial" higher than it should have been. As the development was already at the tipping point between the two, the correct interpretation would or could well have meant that the harm would have been assessed as "substantial" with the tougher tests in paragraphs 194-5 NPPF applying to the nature and degree of public benefits required to overcome it, instead of the test in paragraph 196. Ms Sheikh and Mr Warren submitted that this was another misinterpretation of the documents relied on.

89. This Ground was added by amendment, as a result of Ms Lambert's first witness statement. This statement was addressing the challenges relating to the evolution of her views and of the Report, and not the issue which it was said to give rise to. She said, and I set out the relevant passage again:

> "6… I ultimately came to the conclusion, based upon these discussions, that the proposals would constitute less than substantial harm. Whilst the harm identified was at the high end of less than substantial, it did not result in the complete loss of the significance of the hospital and to this end I was in agreement with colleagues and the final draft of the committee report, which I had reviewed."

90. Mr Harwood submitted that this showed that Ms Lambert was taking the tipping point as being where a proposal resulted in "the complete loss of significance" of the heritage asset. This was wrong. Whilst a "complete loss of significance" would be "substantial harm", "substantial harm" could occur without a "complete loss of significance". There is no dispute about that on the correct interpretation of paragraph 195 NPPF, set out above in [14].

91. Ms Lambert responded in her second witness statement:

> "10. In terms of the approach I took, I appreciate (and always have done) that substantial harm does not have to result in total or complete loss of significance…
>
> 12. For the avoidance of doubt, I should say that my First witness statement was provided to address the original ground advanced by the Claimant and which was subsequently refused permission by the Court. The sentence in paragraph 6 was not conveying that I thought the harm was less than substantial because it did not result in a total loss of significance. I was merely commenting that the harm was at the high end of less than substantial and stating as a fact that it did not result in a complete

> loss of significance of the hospital. As I have explained, I am fully aware that substantial harm does not have to necessarily result in total loss and this is clear from my earlier comments as set out above."

92. Mr Harwood reinforced his submission with 12.84 of the Report, which did not trigger the ground, which I set out again for convenience:

> "12.84 Whilst the impact of this scheme upon the special character and appearance of the conservation area would be harmful, it would not result in the total loss of the conservation areas significance. It also needs to be acknowledged the direct visual impacts of the proposal remain confined to a relatively small area of the Victoria Park Conservation Area and the massing and height of the proposed buildings are not such that they are a visible and dominant from a significantly wider geographic area of the conservation area."

93. I take the Report first, as this is what Members had before them. I do not read the Report in the way which Mr Harwood says supports his claim but was not enough to trigger it. I do not consider that, in context, the Report was suggesting that total loss of significance was the tipping point or the true equivalent or meaning of substantial harm. The author was pointing out that the significance was not totally lost; indeed far from it. Nothing else in the Report suggests a misinterpretation of the NPPF in the way put forward by Mr Harwood. There is no support for this ground in the Minutes or in Crest Nicholson's notes.

94. The evidence of Ms Lambert, in both witness statements, shows that she did understand the relationship between "substantial harm" and "total loss of significance." So, there is no basis for any contention that her judgment or that in the Report was distorted by a concealed error which her first witness statement brought to light. Rather this is an adventitious seizing on a phrase in a statement addressed to a different point, to make a bad one. Thornton J, permitting the amendment, described it as "barely arguable". Having recorded that kindness, I dismiss the ground.

**Ground 4: The Mulberry Tree**

95. This Ground raises an issue about how paragraph 175c NPPF had been interpreted or applied in the appraisal of the relocation of the Mulberry Tree. It reads:

> "Development resulting in the loss or deterioration of irreplaceable habitats (such as ancient woodland and ancient or veteran trees) should be refused, unless there are wholly exceptional reasons and a suitable compensation strategy exists."

96. The Report to Committee dealt with this in section 15. The Mulberry Tree was classified as a "Veteran Tree" on the basis of joint Standing Advice published by Natural England and the Forestry Commission in October 2014. It had historical

associations, some proven and some not, and had survived significant bomb damage during the Blitz. The Report continued:

> "15.13 The tree officer considers the Mulberry Tree has significant local and national importance. This is evidenced by the overwhelming number of objections to this tree's transplantation from local residents, professionals and by the Woodland Trust who have placed this tree on their Ancient Tree Inventory…
>
> 15.14 This tree can be considered both an 'aged' and 'veteran' tree."
>
> 15.15 The National Planning Policy Framework (NPPF) defines aged or veteran trees as those which, because of its age, size or condition is of exceptional value for wildlife, in the landscape, or culturally. The Tree Officer considers the following are applicable to the Mulberry Tree:
>
> •*Importance as a repository of genetic information from many centuries past*
>
> •*Its role in providing local distinctiveness, structure and interest to landscapes*
>
> •*The historical and cultural link it provides to past generations and communities.*
>
> 15.16 Paragraph 175 of NPPF, sub-section (c) deals with aged and veteran trees [and it was set out].
>
> 15.17 The proposals for the site include the relocation of the Mulberry Tree from its current location to the north of the site, to a position located centrally within the front lawn. The relocation strategy has been detailed in a Technical Note …and involves the translocation of the tree and root system, without a requirement to prune any of the root system…
>
> 15.18 The Technical note and proposals to relocate the tree have been assessed by the Council's tree officer who has concluded the applicant has provided a robust methodology for transplanting the Mulberry Tree and it is considered the methodological approach proposed by the applicant could not be readily improved over that which is set out in the applicant's submitted Technical note.
>
> 15.19 The applicant has provided several case studies of… the appointed specialist contractor … successfully transplanting other mulberry trees.

15.20 The Technical note also express a professional opinion that the Mulberry Tree in the existing setting which includes a current absence of good husbandry "it would be reasonable to expect the tree to fail of its own accord within a decade"; consistent with BS5837 (2012) Table 1 timeframes for trees "that demonstrate, serious irredeemable defect, such that their early loss is expected due to collapse....." The Mulberry Tree presently depends on a prop to remain upright.

15.21 The applicant as a precautionary measure, should the Mulberry Tree not survive relocation, has already undertaken nine successful cuttings of this tree (one planted directly into compost, the other eight grafted to White Mulberry root stock). These cuttings would maintain the Mulberry Tree's genetic continuity on site, by future replanting of one or more of the cuttings back on site when they have grown bigger and return from their nursery environment.

15.22 The Borough tree officer does consider that transplanting the Mulberry Tree presents a risk of fatality, due to the structural condition of this tree and that distinguishes this tree from the case studies referenced by the tree contractor that are understood to be related to trees in better health –hold greater vigour. The tree officer concludes on the balance of probabilities there is a greater likelihood the Mulberry Tree would survive than not, yet there remains a fair chance the tree might not survive. This probability of loss needs to be measured against the NPPF's test for veteran trees to determine whether or not the Mulberry tree should be transplanted….

15.24 Notwithstanding the above detailed implications of the proposed relocation, it is accepted by officers, including that of the tree officer, that the tree is currently located in a somewhat marginalised part of the site, surrounded as it is by piecemeal post-war development without the opportunity to gain sight of the tree from the street or the general public realm. The proposed location would be preferential in terms of giving the tree a fitting location on the site with an ability for public to readily see and appreciate it set within the main front lawn to the site, which will be secured by section 106 legal agreement, as public realm open space should the scheme gain consent.

15.25 Nevertheless, as outlined in the tree officer's assessment above, there is a possibility that the tree would not survive the relocation process. It is important to note that this conclusion is not reflective of any methodological deficiencies identified in the proposed strategy, but instead is reflective of the unavoidable risks associated with seeking to relocate this tree. …

15.27 Whilst the public benefits deliverable through the scheme are not wholly exceptional, the survival of the tree and its

> relocation to an area of improved public access would be a positive outcome of the planning application. Consequently, the high threshold of the test in paragraph 175 of the NPPF is not considered directly applicable in this instance. In addition, *with regard to the applicants "compensation strategy",* the public benefits arising from the scheme, in particular the significant addition of housing and affordable housing to the stock of housing within the borough, are considered, on balance, to outweigh the potential loss of the Veteran Mulberry Tree. Maintaining the Mulberry Tree in its existing location would severely curb the opportunity to gain residential development in this northern corner of the site with likely significant implications on the viability of any prospective alternative residential redevelopment scheme for the site." [*Italicised part was an amendment shortly before the meeting*]

97. The Committee Report in section 17 "Striking the Planning Balance" said this:

> "Members should also take into consideration when striking the planning balance the test set out at paragraph 175(c) of the NPPF which sets out that when determining planning applications, local planning authorities should apply the principle that development resulting in the loss or deterioration of irreplaceable habitats (such as ancient woodland and ancient or veteran trees) should be refused, unless there are wholly exceptional reasons and a suitable compensation strategy exists. As discussed above, the retention of the tree, its relocation to a position of improved public access and a commitment to a veteran tree management plan, which will be tailored to assist with the Mulberry Tree's long-term contribution to the site, provide a suitable mitigation and compensation strategy. This, alongside the suite of public benefits the scheme brings, would amount to wholly exceptional reasons in this case. [*replacing original shortly before meeting, and further clarified at the meeting, the terms of which appear in paragraph 98 below; see Gwynne first witness statement at 9-14*].

98. The Minutes record this:

> "There would be a loss of trees, but there would also be a tree planting and landscaping strategy to provide new trees and other benefits. On balance, Officers considered that the merits of the proposals in this respect would offset the loss of the trees.
>
> Regarding the Mulberry Tree, it was noted that it's proposed relocation had attracted a great deal of public interest. The tree was of precarious health and there was uncertainty about its age. However given its cultural and historic significance, Officers considered that it merited "veteran tree" status. On balance, Officers considered that the proposals with regard to the Mulberry Tree met the relevant tests in policy. Many of the

> public benefits of the scheme would not be realised if the tree was not re-located. The detailed tree management plan would support its relocation. Public access to the Mulberry tree would be enhanced."

99. The Arboriculture Officer was asked questions, and he answered, minuted as follows:

> "[He] provided assurances about the proposed relocation of the Mulberry Tree in view of the tree relocation strategy. Officers were of the view that if relocated, the historic value of the tree would be maintained and that there would be not a significant loss of habitat. It was also noted that whilst there was a possibility that the tree would not survive the move, there was a much higher chance that it would survive.
>
> It was also clarified that the new policies in paragraph 175 of the NPPF relating to the loss of veteran trees would not wholly apply to this application, given the tree would not be lost as a result of the proposed development, but would be re-located under a very detailed and carefully considered technical re-location strategy. Officers also considered that the public benefits of the application would warrant the relocation. Therefore, Officers considered that the proposals complied with the requirements in the NPPF with regard to the protection of trees. It was also pointed out that retaining the tree in its current location would require substantial changes to the application and would impact on the viability of the scheme.
>
> It was also explained that there were special circumstances to allow the consideration of the re-location of the mulberry tree, because if left in its current location, that would have a fundamental impact on the redevelopment of the northern part of the site." [*This was regarded as a clarification of paragraph 17.5 of the Report; see Gwynne First witness statement at 9-14*].

100. Crest Nicholson's planning consultants produced their own note of the meeting. Its Arboriculture Consultant responded to a Member's question that he believed that the mulberry tree had a 100% chance of survival of its relocation, as the tree would not be shocked, and he would not support sending £250,000 on it if he did not believe that it would survive. The Tree Officer responded, to a later question, that there was a "good chance" that it would survive the relocation, but that relocation could result in it dying; the Planning Officers however had confirmed that "there are wholly exceptional circumstances in response to both loss and deterioration." He also responded to a question about paragraph 175c NPPF as follows:

> "It had been acknowledged that there was of course a degree of risk, albeit limited, that the development would result in the loss or deterioration of the Mulberry Tree but as officers had advised in the update report and in the slide presentation, in the event of a loss or deterioration (even though considered unlikely), there would be considered to be wholly exceptional circumstances,

> which include substantial public benefits, and a suitable compensation strategy (involving the cuttings taken from the Black Mulberry Tree and replacement tree planting on the site) to justify the development proposals in relation to NPPF paragraph 175(c). Overall, it was considered that NPPF paragraph 175(c) does not squarely apply to this scheme given it is not considered likely that there will be a loss or deterioration of the Mulberry Tree as a result of its relocation, but the proposals would still meet the requirements of the NPPF paragraph 175(c) test in any event if there was a loss or deterioration. It was explained that footnote 58 of the NPPF had been considered in relation to the above."

101. The issue is this: there is no dispute but that the judgment that the tree was more likely to survive than to die on relocation was reached and was lawful. There is no dispute that paragraph 175c does not apply to the relocation of the tree. There is no dispute either but that Tower Hamlets LBC, Officers and Members were concerned to deal with the risk, or "good" or "fair chance", that the tree would not in fact survive relocation. Risk was therefore to them a material consideration. Indeed, had it not been considered, they might well have omitted a material consideration.

102. Mr Parkinson, who made the submissions for the Claimant on this topic, submitted that Members were advised to treat paragraph 175c as a material consideration, and that, even if the tree were lost in relocation, there would still be no breach of paragraph 175c. It must be taken that they followed that advice. It was on that basis that they were prepared to take the risk with the tree's relocation. Of course, it was not necessary for them to approach the risk to the tree in that way or to use paragraph 175c in that way. But having been advised in that way, they were obliged to interpret paragraph 175c correctly. They were not advised correctly because they misinterpreted or were incorrectly advised as to the existence of "wholly exceptional circumstances" and the existence of a "suitable compensation strategy". These were separate and cumulative requirements of 175c.

103. Instead, the advice had been, in paragraph 15.27 of the Report that the public benefits "are not wholly exceptional." In 17.5, as amended, they had been advised that they were "wholly exceptional", but 15.27 had not been amended in that respect. In the Minutes, the Tree Officer stated that the public benefits warranted the relocation, that the proposals complied with the NPPF with regard to the protection of trees, and that there were special circumstances which allowed consideration of the relocation of the tree. In the Crest Nicholson note, the Tree Officer is recorded as saying that there were wholly exceptional circumstances.

104. However, submitted Mr Parkinson, references to the existence of wholly exceptional circumstances, included the compensation strategy within those wholly exceptional circumstances. That strategy should have been a separate point, and the existence of wholly exceptional circumstances found to exist before consideration of the compensation strategy. In 17.5 of the Report, the retention of the tree, its relocation and its management plan were said to provide a suitable mitigation and compensation strategy. There could be no objection to that, but the paragraph concluded: "This, alongside the suite of public benefits the scheme brings, would amount to wholly exceptional reasons in this case." Thus the strategy was brought into the wholly

exceptional circumstances. The Minutes record no repetition of that error in the discussion about the tree. The Crest Nicholson notes however do record a repetition of it. The Tree Officer stated that, in the unlikely event of its loss, the wholly exceptional circumstances, "which include substantial public benefits, and a suitable compensation strategy (involving the cuttings taken from the Black Mulberry Tree and replacement tree planning on the site) to justify the development proposals in relation to NPPF paragraph 175c." Although that paragraph did not "apply squarely", the proposals "would still meet the requirements of the …test in any event if there was a loss or deterioration."

105. Ms Sheikh emphasised that the proposal for the relocation did not call for consideration of 175c as, on the balance of probabilities, the tree would neither be lost or deteriorate. She submitted that the consideration of 175c was never undertaken on the basis that it did apply or could apply directly or on its terms. It was being considered in a more general way to show that there were strong circumstances in the public benefits of the scheme and that a compensation strategy had been prepared, so that the risk of the tree dying or deteriorating was justifiable and conformable with the general thrust of 175c. The full strength of 175c was not applicable as the tree would probably survive without deterioration. The Crest Nicholson notes were not the official record and should not be given weight where they conflicted. Mr Warren supported her submissions.

106. Mr Mills submitted that 175c did not apply unless the tree would be lost or would deteriorate. It did not set a risk threshold. Relocation was not a compensatory measure, within that paragraph. The fact that the policy might not be complied with and that "permission should be refused" could not be taken as a rule that permission "must be refused." It did not and could not dictate a refusal of permission.

107. I accept Mr Parkinson's submissions. Of course, Ms Sheikh is right that paragraph 175c is not "directly" applicable; indeed it is not applicable at all on its terms. But it was brought in, albeit not being applied directly, to fulfill a purpose in relation to the risk of the tree not surviving relocation. The Report, and what Officers said, could have been couched rather as Ms Sheikh's submissions were: to identify important factors, and to explain that the position in the event of death or deterioration had been covered so far as it could be, and Members had to weigh those points, but without giving them the weight of paragraph 175c. The effect of 175c, and a shortfall in the way in which the proposals met it, could have been explained and justified because it was a less than probable risk that was being examined and not a probable loss or deterioration.

108. It would not have been unlawful either for Members to have been advised that, although 175c did not apply directly, they could be assured that, even if the tree did die, the strict requirements of 175c had in fact been met. They could have been advised that there were "wholly exceptional circumstances" in the public benefits of the development, and in the effect which retention of the tree in situ would have had on the developability of the site, such as to warrant taking the risk of relocation leading to the death or deterioration of the tree. Members could have been advised that the compensation strategy was a suitable compensation strategy which would meet 175c if the tree actually were lost or deteriorated. But the two aspects, wholly exceptional circumstances and compensation for loss or deterioration, had to be kept separate.

109. However, it is clear to me that Members were being advised that they could take the risk that the tree would die or deteriorate, because the tests in 175c were met in the

unlikely event that that happened. They then had to be advised correctly about the tests. There was an internal contradiction in the original Report about the existence of "wholly exceptional circumstances, " which was never wholly resolved. The specific *amended* paragraph in the conclusion, 17.5, was clarified orally, but the terms of that clarification by the Tree Officer are only those summarised in the Minutes in the Committee meeting. However, with the Crest Nicholson notes, I might have concluded that the essential point had been made.

110. But the Members were also advised, up to the oral clarification, that the compensation strategy was part of those circumstances. That is simply wrong, on the true interpretation of 175c. The Crest Nicholson notes are quite clear in showing that Members were given a misinterpretation of 175c, on the role of the compensation strategy in "wholly exceptional circumstances". The Minutes do not expressly contain the error, nor do they expressly disavow the error. Ms Sheikh urged me to disregard the Crest Nicholson notes in favour of the approved Minutes. However, the Notes are fuller, and they are not inconsistent with the Minutes. There was no challenge by the Council to the accuracy of the Crest Nicholson notes. There could easily have been contradicting evidence, to the effect that the point of the clarification was to set this position out accurately, if that were true. Crest Nicholson could have explained that the notes were compiled using the written text, without appreciating the significance of what was being said orally, if that were true. There was no such evidence. Their value was urged upon the Council by Crest Nicholson. I cannot simply ignore the notes on the basis that they differ in this way from, but are not inconsistent with, the approved Minutes.

111. I have therefore concluded that the Members have not taken into account the policy which they were advised they were taking into account, and which they were advised had been met. They took into account something else, not very different but sufficiently different to create a legal error. A policy was misinterpreted; a material consideration was ignored.

112. I do not consider that I can hold that it was highly likely that the outcome would have been the same if that error had not been made. It might very well have been, but the issue was of importance to members, and to the public; the vote was a narrow one. Accordingly Ground 4 succeeds.

**Overall conclusion**

113. The decision is quashed on Ground 4.