Neutral Citation Number: [2025] EWCA Civ 1566

Case No: CA-2024-002273

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE KING'S BENCH DIVISION
PLANNING COURT SITTING IN MANCHESTER
The Hon. Mr Justice Fordham
AC-2022-MAN-000340

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2025

Before:

LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN
and
LORD JUSTICE COULSON

- -

Between:

THE KING (on the application of HALTON BOROUGH COUNCIL)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Respondent**
(1) HEALTH & SAFETY EXECUTIVE **(2) VIRIDOR ENERGY LIMITED**	**Interested Parties**

- -

John Hunter (instructed by **Halton Borough Council**) for the **Appellant**
Robert Williams (instructed by **Government Legal Department**) for the **Respondent**
The Interested Parties did not appear and were not represented.

Hearing date: 19/11/2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 03/12/2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

1. This appeal from Fordham J is about an award of costs made by the Secretary of State against a local planning authority (the "LPA"), following the conclusion of a called-in planning inquiry. The LPA had originally supported the application for planning permission but withdrew its support after one of its expert witnesses had been cross-examined in closed session. The Secretary of State, acting by Mr Parsons, decided that the LPA's withdrawal of support for the application when it did, amounted to unreasonable conduct, and justified a partial order for costs against the LPA. A challenge to that decision failed before Fordham J. His judgment is at [2024] EWHC 2030 (Admin), [2024] Costs LR 1709.

The facts

2. I can take the facts largely from the judge's judgment. In September 2017, a developer (MJ Gleeson) submitted a planning application to Halton BC ("the Council") as LPA. Planning permission was sought for 139 dwellings, with associated demolition and ancillary development, on land at Runcorn. The site was located within the vicinity of the Runcorn Chemicals Complex. The Health and Safety Executive ("HSE") objected to the application and advised against it on safety grounds. The Council nevertheless resolved to grant the planning application, in line with an Officer Report. The Council considered the HSE's objections but judged the proposals to be in line with its own adopted development plan; and that HSE's objections did not justify a departure from the plan. The Council also stated that it had extensive experience and history with the chemicals industry and had a robust framework for taking into account the risks posed by development. It went on to say that it had for many years taken advice on risk related issues from DNV, who were specialist risk management consultants with extensive experience in that field.

3. The development plan and the adopted policy had been approved by two local plan inspectors, who had not endorsed the HSE's objections at the time.

4. In the light of the HSE's objections the Secretary of State called in the application on 21 May 2021. Mr Brian Simms was appointed as inspector to report to the Secretary of State. Procedure at a called-in inquiry is governed by the Town and Country Planning (Inquiries Procedure) (England) Rules 2000.

5. Rule 5 requires the Secretary of State (in practice the inspector) to hold a pre-inquiry meeting if the inquiry is expected to last for 8 days or more, unless he considers it unnecessary. At such a meeting the inspector could, for example, direct experts to meet or to narrow matters in dispute between them. Rule 6 governs the service of statements of case by the LPA, the applicant and other interested parties. Rule 13 governs the service of proofs of evidence. Rule 15 governs procedure at the inquiry, including cross-examination. Schedule 1 modifies some of these rules in cases where a national security direction has been given under section 321 of the Town and Country Planning Act 1990.

6. The Council and the HSE submitted rule 6 statements of case on 23 June 2021. At the same time, the developer submitted a position statement which said that, although it remained committed to the development, the primary public safety matter was between the HSE and the Council, and it did not intend to provide evidence at the

inquiry. The Council and HSE proceeded to submit their rule 13 proofs of evidence relating to public safety matters (on 4 August 2021) and an HSE rebuttal proof (on 17 December 2021), in readiness for eight days of inquiry hearings (starting on 11 January 2022). The Council's rule 13 proof of evidence on public safety matters was the expert evidence of Mr Hopwood of DNV (the consultants who had been advising the Council). It contained an expert evidence declaration conforming with the Planning Inspectorate guidance. The Council also submitted a proof of evidence from Mr Gibbs, a planning officer with the Council. We have not seen those underlying documents.

7. Viridor operates one of the UK's largest energy-from-waste plants at Runcorn near the proposed development and also objected to the application. It was joined to the inquiry proceedings as a rule 6 party on 2 November 2021.

8. Both before and after exchange of evidence the Council held multiple conferences involving counsel, Mr Hopwood and Mr Gibbs, during which the merits of both parties' positions and their evidence were discussed extensively.

9. As had been requested in the HSE's rule 6 statement of case, on 27 October 2021 the Secretary of State made a direction under s 321(3) of the Town and Country Planning Act 1990, to hold part of the inquiry in private due to national security concerns regarding public safety matters.

10. The public inquiry opened on 11 January 2022 and went into closed session on 13 January in order to consider the public safety issues. In the course of that closed session Mr Hopwood was cross-examined by Mr Kimblin QC on behalf of HSE. As the HSE stated in their application for costs, Mr Hopwood had accepted that the *policy* on which the Council relied failed to follow the principles in the NPPG. When those principles were followed the outcome was to advise strongly against the grant of planning permission. Thus, Mr Hopwood accepted that if he were in the inspector's position he would advise the Secretary of State strongly against the grant of planning permission. These were answers which, according to the Council, were inconsistent with the advice that he had previously given.

11. The significance of those answers was not lost on the HSE. On the very same day the GLD (who had been representing the HSE) wrote to the Council saying that "in view of the evidence provided by Mr Hopwood, HSE sees no basis on which the Council's objections can be maintained in respect of the public safety matters."

12. In the light of the answers given by Mr Hopwood under cross-examination the Council decided that it could no longer support the proposed development and withdrew its support. In consequence of that, the developer withdrew the application for planning permission, and the inquiry came to an abrupt halt.

13. Both the HSE and Viridor applied for their costs. On 27 July 2022 Mr Parsons determined both applications against the Council and made a partial award of costs.

Costs in planning matters

14. The Secretary of State's power to award costs is found in section 250 (4) of the Local Government Act 1972 as it applies to called-in applications by virtue of section 322 of

the Town and Country Planning Act 1990. Although the statutory power is a broad one, in practice the Secretary of State exercises that power in accordance with published Guidance.

15. Paragraph 28 of the Guidance sets out the overall justification for the power to award costs:

> "**Why do we have an award of costs?**
>
> Parties in planning appeals and other planning proceedings normally meet their own expenses. All parties are expected to behave reasonably to support an efficient and timely process, for example in providing all the required evidence and ensuring that timetables are met. Where a party has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs. The aim of the costs regime is to:
>
> - encourage all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case;
>
> - encourage local planning authorities to properly exercise their development management responsibilities, to rely only on reasons for refusal which stand up to scrutiny on the planning merits of the case, not to add to development costs through avoidable delay;
>
> - discourage unnecessary appeals by encouraging all parties to consider a revised planning application which meets reasonable local objections."

16. Paragraph 31 states that "unreasonable" is used in its ordinary meaning. It goes on to say that unreasonable behaviour can be "procedural" (relating to the process) or "substantive" (relating to the merits of the appeal).

17. The Guidance is different to some extent in relation to called-in applications. Paragraph 34 says:

> "**How does the award of costs apply to called-in planning applications?**
>
> When a planning application is "called-in", it is determined by the Secretary of State rather than by the local planning authority. This places the parties at a called-in proceeding in a different position from that in a planning appeal. The local planning authority is not defending a decision to refuse planning permission, or a failure to determine the application

> within the prescribed period. In these circumstances, it is not envisaged that a party would be at risk of an award of costs for unreasonable behaviour relating to the substance of the case or action taken prior to the call-in decision. However, a party's failure to comply with the normal procedural requirements of inquiries, including aborting the process by withdrawing the application without good reason, risks an award of costs for unreasonable behaviour."

18. As paragraph 34 says, in a called-in application it is not envisaged that a party would be at risk of an award of costs for unreasonable behaviour relating to "the substance of the case". Paragraph 49 of the Guidance gives examples of "substantive" grounds for making an award of costs against an LPA in a planning appeal. They include "failure to produce evidence to substantiate each reason for refusal on appeal" and "not reviewing their case promptly following the lodging of an appeal against refusal of planning permission (or non-determination), or an application to remove or vary one or more conditions, as part of sensible ongoing case management."

19. Finally, since both awards of costs were made in favour of interested parties, it is necessary to refer to paragraph 56:

> "**When might an award of costs be made against an interested party?**
>
> Interested parties who choose to be recognised as Rule 6 parties under the inquiry procedure rules, may be liable to an award of costs if they behave unreasonably. They may also have an award of costs made to them. See the Planning Inspectorate guide on Rule 6 for more detail. It is not anticipated that awards of costs will be made in favour of, or against, other interested parties, other than in exceptional circumstances. An award will not be made in favour of, or against interested parties, where a finding of unreasonable behaviour by one of the principal parties relates to the merits of the appeal. However an award may be made in favour of, or against, an interested party on procedural grounds, for example where an appeal has been withdrawn without good reason or where an unnecessary adjournment of a hearing or inquiry is caused by unreasonable conduct. In cases dealt with by written representations, it is not envisaged that awards of costs involving interested parties will arise."

The case-law on costs in planning cases

20. In *R v The Secretary of State for the Environment ex p North Norfolk DC* [1994] 2 PLR 78 Auld J considered the meaning of the then guidance in saying that "authorities will be expected to produce evidence to substantiate their reasons for refusal." That, of course, was in the context of the LPA defending its own decision to refuse planning permission, rather than participating in a called-in inquiry. He said:

> "It may be a convenient paraphrase of that guidance to say that authorities are expected to produce "substantial evidence", but it depends what "substantial evidence" means in this context. Clearly, the evidence upon which an authority relies to support a ground for refusal of permission must have some substance in the sense of providing some respectable basis for its stance upon a particular issue. But it need not be of such substance as to persuade the inspector to find in the authority's favour on the issue. Otherwise every evidential failure to persuade an inspector on an issue would expose the loser to a finding of unreasonableness on an application for costs in relation to that issue."

21. In *R v Secretary of State for the Environment ex p Wakefield MBC* (1998) 75 P & CR 78 Jowitt J approved the observations of Auld J. He went on to say:

> "There is thus an evidential threshold which, if reached, is [likely][1] to put a planning authority beyond the risk of a finding that it has been guilty of unreasonable conduct. I propose to refer to it by use of the phrase "sufficient evidential basis" by which I mean evidence, not lacking real substance, which is capable of belief and which, if accepted, would be capable of making good the plaintiff authority's objection. I would wish to stress, though, there may not be only one test of unreasonable conduct in relation to the raising of a planning objection and the evidential threshold. A planning authority which persists with an objection knowing the appellant is in a position to advance cogent and overwhelming evidence to refute it may, in an appropriate case and despite any evidence the planning authority may have to offer, lay itself open to a finding of unreasonable conduct despite the fact that its own evidence crosses the evidential threshold so that it may be at risk, therefore, of an order that it pay the costs of the attendance of the appellant's relevant witnesses at the inquiry. The guidance provided by the circular does not purport to deal with every permutation of circumstances which may arise. The Inspector asked to find that a party to an inquiry has acted unreasonably has to make a judgment drawing such assistance as is available from the guidance in the circular."

22. He recognised, however, that there may be cases in which issues raised can only be resolved one way or another through hearing the witnesses.

The challenged decisions

23. As I have said, both decisions were made by Mr Parsons on 27 July 2022. It is necessary to set out a substantial part of his reasoning. Like the judge, I will

[1] The report of the judgment uses the word "unlikely" but counsel were agreed that that was a typographical error.

concentrate on his decision relating to the HSE. In paragraph 7 he paraphrased part of the Guidance in the following terms:

> " In these circumstances, as stated in the guidance at paragraph 034 of the PPG, it is not normally envisaged that a party will be at risk of an award of costs relating to the substance of the case or action taken prior to the application being called-in. However, a party's failure to comply with the normal procedural requirements of inquiries, including aborting the process by withdrawing the application without good reasons, may risk an award of costs should that amount to unreasonable behaviour."

24. Having then set out the factual background Mr Parsons said:

> "15. HSE are evidently aggrieved that the Council had resolved to grant planning permission for the proposed development against their advice. However, as the called-in application was never determined because it was withdrawn by the applicant it is considered a matter of conjecture as to what the outcome on the merits of the planning application would have been if it had not been withdrawn and the Inspector had heard the respective parties' evidence, inspected the site and reported to the Secretary of State, resulting in a formal decision on the called-in planning application. While HSE argue that the Council failed to give proper consideration to the strength of their public safety objections and the unique scale of the risks when resolving to approve the application, the Secretary of State has had regard to the fact that this was a called-in planning application and therefore it is not normally envisaged that a party will be at risk of an award of costs relating to the substance of the case or action taken prior to the application being called-in, as already noted in paragraph 7 above. In the absence of a formal decision on this matter therefore the Secretary of State cannot conclude that the Council acted unreasonably by resolving to approve planning permission for the proposed development at the outset.
>
> 16. However, the final sentence of paragraph 034 of the PPG makes it clear that a party's failure to comply with the normal procedural requirements for inquiries, may place them at risk of a partial award of costs for unreasonable behaviour in a call-in case. In this case the work undertaken by parties to comply with the relevant requirements of the call-in were rendered abortive by the Council's decision to no longer support the application made by MJ Gleeson. Careful consideration has therefore been given to the Council's stated reasons for withdrawing their support for the proposals when they did.
>
> 17. It is undisputed that the Council decided that they could no longer support the application in the light of evidence heard in

the closed public safety session held at the inquiry on 13 January 2022. This resulted in the call-in process being aborted as the applicant decided to withdraw their planning application as they had previously stated that they would be relying on the Council to provide evidence in support of their resolution to approve the application. In their defence of the costs application the Council say that Mr Hopwood, their expert witness on public safety matters, gave certain answers in cross-examination by the HSE's representative which were inconsistent with the advice previously received. The Council considered that the responses given by Mr Hopwood harmed their case so significantly that they no longer believed that they had any prospect of success. The Council argued that it was not unreasonable to have withdrawn their support for the application in these circumstances.

18. However, the Council have not explained, in clear and precise terms, the details of the responses given by Mr Hopwood in cross-examination that caused them to change their position on their reasons for supporting the application and why they now considered that their case had been seriously undermined. It appears to the Secretary of State that the responsibility for appointing Mr Hopwood as their expert witness on public safety matters rests with them and they should have been satisfied with the strength of the advice received and crucially that they could rely on it being capable of standing up to scrutiny by any other parties through cross-examination. Having resolved to approve the application the onus was on the Council to ensure that they were in a position to prosecute their case through to a decision.

19. The view is taken that the Council would, or should, have known of the full extent of HSE's public safety objections to the proposed development when they submitted their Rule (6) pre-inquiry statement of case and that they would be required to address those concerns at the forthcoming call-in inquiry. No evidence is seen to suggest that HSE changed their position regarding the public safety aspect of the proposed scheme during the call-in process and it appears to the Secretary of State that the public safety issues to be considered at the inquiry remained the same.

20. It was incumbent upon the Council, as the call-in inquiry process progressed, to continue to appraise their position ensuring that their original grounds for resolving to approve the planning application remained. Instead, the Council changed their previous stance at the inquiry, but it is evident that there had been no material change in the planning circumstances or evidence sufficient to justify such a volte face. In the circumstances, it is difficult not to conclude that the situation

> that the Council found themselves in at the inquiry was of their own making. The practical consequences of the Council's decision to no longer support the application caused the inquiry to collapse and the call-in proceedings were subsequently aborted following the applicant's decision to withdraw the planning application. The conclusion therefore reached is that the Council's decision to withdraw their support for the application when they did was unreasonable, with the result that HSE, as a Rule 6 party in the call-in proceedings, incurred unnecessary wasted expense in preparing to resist the application. An award of costs will therefore be made."

25. Mr Parsons therefore decided that a costs award should be made, although limited in time from the date on which the HSE submitted its rule 6 statement. He applied the same reasoning in relation to the application by Viridor.

The grounds of appeal

26. There are two broad grounds of appeal against the challenged decisions:

    i) Mr Parsons' reasons for finding that the Council were responsible for the situation it found itself in after Mr Hopwood gave evidence were demonstrably flawed and unsound;

    ii) Mr Parsons gave inadequate reasons to explain why he concluded that the Council were responsible for that situation.

General principles

27. In *R (Finch) v Surrey CC* [2024] UKSC 20, [2024] PTSR 988 the challenge was to the grant of planning permission permitting the extraction of oil without taking into account the greenhouse gas that would subsequently be produced when the extracted oil was actually used by consumers. Lord Leggatt, giving the majority judgment, said that there were cases in which the criteria to be applied to the making of a particular decision were such that different decision-makers could rationally reach different answers in such a case, he said at [56]:

> "… the court will not interfere with the decision taken unless it is "irrational" in the sense either that it is outside the range of reasonable decisions open to the decision-maker or that there is a demonstrable flaw in the reasoning which led to the decision. Examples of such a flaw would be that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error…"

28. In *R (KP) v Secretary of State for Foreign Commonwealth and Development Affairs* [2025] EWHC 370 (Admin) Chamberlain J distinguished between "process rationality" and "outcome rationality". At [56] he said of the former:

> "Process rationality includes the requirement that the decision maker must have regard to all mandatorily relevant considerations and no irrelevant ones, but is not limited to that. In addition, the process of reasoning should contain no logical error or critical gap. This is the type of irrationality Sedley J was describing when he spoke of a decision that "does not add up – in which, in other words, there is an error of reasoning which robs the decision of logic": *R v Parliamentary Commissioner for Administration ex p. Balchin* [1998] 1 PLR 1, [13]. In similar vein, Saini J said that the court should ask, "does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion?": *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin), at [33] ."

29. In the present case the criteria to be applied are those in the Secretary of State's Guidance. Although it is only guidance, not law, a decision-maker who departs from the Guidance must give reasons for doing so.

30. The reasons for a decision must be intelligible, and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration: *South Bucks DC v Porter* [2004] UKHL 33, [2004] 1 WLR 1953.

31. At [16] the judge considered a number of cases dealing with applications for costs in planning appeals (not called-in inquiries). At [17] he extracted a number of principles from those cases. I did not understand Mr Hunter to challenge that summary of principle which I reproduce (although omitting citations):

> "The following key points which are relevant to the present case can all be derived from the line of cases to which I have referred:
>
> i) The judicial review court can intervene in the exercise of its supervisory jurisdiction where: (a) the costs decision-maker has materially misdirected themselves; or (b) the decision is unreasonable in a public law sense. A material misdirection can include deciding the case other than in accordance with the Guidance.
>
> ii) Clear and intelligible reasons must be given for the decision, so that the reasons do not raise a substantial doubt as to whether the decision was lawful including as a proper exercise of discretion having regard to the Guidance.

> iii) The decision letter must be read straightforwardly and as a whole.
>
> iv) The decision as to costs involves a wide statutory power vested in the costs decision-maker. Costs are pre-eminently a matter for the decision-maker; a decision is not unreasonable because a different decision-maker might have taken a different view, or because there is room for significant disagreement."

The criterion applied

32. In paragraph 16 of the decision Mr Parsons said:

> "However, the final sentence of paragraph 034 of the PPG makes it clear that a party's failure to comply with the normal procedural requirements for inquiries, may place them at risk of a partial award of costs for unreasonable behaviour in a call-in case."

33. I deduce from this first that Mr Parsons was not intending to depart from the Secretary of State's guidance; and second that what he was looking for was a failure to comply with normal procedural requirements for inquiries in a call-in case. Such a failure includes withdrawing an application without good reason.

Change in evidence during cross-examination

34. In the case of a planning inquiry (as in civil proceedings) the function of an expert witness is to assist the inspector. The role of an expert in a planning inquiry is made clear by the Planning Inspectorate's Procedural Guide paragraph 15.2:

> "It is the duty of an expert to help the Inspector. This duty overrides any duty the expert may have to the party that involved them in the appeal or that is paying them."

35. In paragraph 17 of his decision Mr Parsons correctly said that the Council decided that they could no longer support the application in *the light of evidence* heard in the closed public safety session. Clearly that was new evidence that had not been contained in Mr Hopwood's proof but was elicited by Mr Kimblin in the course of cross-examination. As I observed in *Guntrip v Cheney Coaches Ltd* [2012] EWCA Civ 392, if at any time the expert can no longer support the case of the person who instructed him, it is his duty to say so. But in paragraph 20 Mr Parsons said that that there had been no material change in the evidence sufficient to justify such a volte face. Since the Council's position was that the change in Mr Hopwood's evidence under cross-examination was the very reason that it withdrew its support for the application, those two statements are impossible to reconcile. There was a change in the evidence and its materiality was such that it caused the Council to withdraw its support; as the letter from the GLD had correctly foreshadowed. Put shortly, just as Mr Parsons said they should, the Council continued to appraise their position as the inquiry progressed; and once it became apparent that they could no longer support the proposal they withdrew support. The leap from paragraph 17 to paragraph 20 is, to my

mind, a leap in reasoning which fails to justify the conclusion. It is a demonstrable flaw in the reasoning.

36. It is also worthy of note that in relation to Viridor's application for costs against MJ Gleeson, the developer, Mr Parsons decided that the Council's change of stance *did* amount to a material change in the planning circumstances; and that the developer therefore did have a good reason for withdrawing the application. But the cause of the Council's change of stance was attributable to the change in Mr Hopwood's evidence. If the change in Mr Hopwood's evidence was a material change of circumstances as regards the developer, why was it not as regards the Council?

37. In paragraph 18 Mr Parsons said:

> "…the Council have not explained, in clear and precise terms, the details of the responses given by Mr Hopwood in cross-examination that caused them to change their position on their reasons for supporting the application and why they now considered that their case had been seriously undermined."

38. It is true that the Council did not particularise the answers that Mr Hopwood gave. It is, however, common ground that the particularly damaging answer he gave was in accepting the proposition put to him that if he were the inspector he would advise the Secretary of State to refuse planning permission. In paragraph 7 of their application for costs, the HSE said in terms that "Mr Hopwood's evidence was that he would have advised strongly against the grant of planning permission." Mr Parsons also had before him a note of Mr Hopwood's cross-examination. That was the very basis of the HSE's application for costs. I do not see why Mr Parsons needed any further details.

39. It is, with respect, difficult to conceive of a better reason for withdrawing support for the proposed development than the principal expert witness being no longer able to support the case advanced. That was, I think, common ground before us. If and in so far as Mr Parsons meant to suggest otherwise, in my judgment that would have been irrational. But the precise terms in which Mr Parsons put the point in paragraph 20 were:

> "The conclusion therefore reached is that the Council's decision to withdraw their support for the application *when they did* was unreasonable… " (Emphasis added)

40. The judge glossed this at [16] as follows:

> "This calls for some elaboration. Where it is realised by a party that they are no longer able to maintain an application, appeal, enforcement notice or reason for refusal there should be prompt withdrawal. Withdrawal may be for good reason; or there may be no good reason. An example of a good reason is a material change in another party's case or material change in circumstances relevant to the planning issues (see para 054). Withdrawal will always have the virtue of avoiding ongoing and future costs and expenses. In that sense, it will always be reasonable – and there will always be good reason – for

> withdrawal as distinct from failure to withdraw. But withdrawal raises an important temporal question. Should it have been earlier? Suppose, much earlier, the party knew perfectly well – or should have appreciated – that they were no longer able to maintain an application, appeal, enforcement notice or reason for refusal. The late withdrawal may be unreasonable behaviour. This temporal perspective is strongly reinforced by what is said at para 054, amplifying withdrawal without good reason by emphasising the importance of withdrawal "at the earliest opportunity". The idea of withdrawal "without good reason" must therefore include withdrawal "whose belated timing was" without good reason."

41. Mr Parsons did not make the point with the clarity which the judge did, but I will assume that that is what he meant. So the question, then, is whether the Council were unreasonable in relying on Mr Hopwood's evidence until the moment of his cross-examination? That requires a consideration of Mr Parsons' conclusions on earlier stages of the process.

The resolution to grant

42. In paragraph 15 of his decision letter Mr Parsons rejected HSE's contention that the Council had acted unreasonably in resolving to approve the planning application. That resolution was made despite the objections of the HSE. So, this is not a case in which the fact that the Council acted contrary to the objections of the HSE was itself unreasonable. In paragraph 24 of the decision letter relating to Viridor he similarly rejected the contention that "HSE's public safety concerns were overwhelming". The judge took the view that these points related only to conduct which preceded the call-in (and were rejected for that reason) but in my judgment, reading paragraphs 15 and 24 of the letters as a whole, they go further. Mr Parsons could have said (but did not) that although the Council acted unreasonably in resolving to grant the application, he was precluded from basing an award of costs on that conduct because it was pre-inquiry conduct. That is also inferentially supported by his decision to award costs only from the date of the HSE's rule 6 statement. It is also worth noting that in paragraph 15 of his decision letter Mr Parsons said that since the called-in application was never determined "it is considered a matter of conjecture as to what the outcome on the merits of the planning application would have been if it had not been withdrawn and the Inspector had heard the respective parties' evidence, inspected the site and reported to the Secretary of State, resulting in a formal decision on the called-in planning application." This was not, then, an application that was doomed to fail.

43. So, at some unspecified point in the process, before the cross-examination, Mr Parsons must have concluded that it was no longer reasonable for the Council to continue to reply on Mr Hopwood's expert advice. Mr Parsons did not himself identify that point, or any event which would have led to that conclusion.

The course of the inquiry

44. In considering the question whether it was unreasonable for the Council to continue to rely on Mr Hopwood's evidence it is, in my view, important to consider the position

as it appeared to the Council from time to time. It would be wrong in principle to approach the question in reliance on hindsight.

45. The mere fact that the evidence of an expert witness is demolished in cross-examination does not of itself lead to the conclusion that the party calling that expert has been guilty of unreasonable behaviour. Indeed, it may be said that where an expert witness accepts points put to him in cross-examination which are adverse to the case of the party calling him, he is performing his duty to the tribunal in question.

46. Mr Hunter relied, by analogy, on two cases concerning the recovery of costs in criminal proceedings where a prosecution collapsed due to shortcomings in the expert evidence relied upon by the prosecution.

47. In *R v Cornish* [2016] EWHC 779 (QB) Dr Cornish and an NHS Trust were prosecuted for manslaughter after a patient had died. At the close of the prosecution's case Coulson J ruled that there was no case to answer. The Trust thereafter applied for its costs. The threshold for the making of a costs order against one party in a criminal case was "an unnecessary or improper act or omission by, or on behalf of, another party." That is a higher threshold than unreasonableness. Coulson J said that his ruling that there was no case to answer was "based foursquare" on the cross-examination of Professor Hopkins, the prosecution's expert witness. At [32] Coulson J said:

> "The Trust suggest that Professor Hopkins was obviously unreliable, either because his advice and reports were (and/or should have been seen to have been) erroneous, and/or that he was too close to the case. Whilst I accept the criticism that, certainly with hindsight, Professor Hopkins was much too quick to make up his mind, and much too trenchant in his views, I do not think it could be said that what he was saying was plainly wrong, or that the Crown should have known that what he was saying was plainly wrong."

48. Having referred to certain aspects of Professor Hopkins' evidence Coulson J concluded at [35]:

> "… I do not accept the criticism that Professor Hopkins was expressing views which the Crown should and could have concluded were wholly untenable. On the contrary, even the email from the RCoA provided some support for what Professor Hopkins was saying."

49. Coulson J then posed the question: what went wrong? His answer at [44] was:

> " In my view, it would be unfair to say that anything went 'wrong': in some ways, what happened was a good example of the adversarial trial process in action."

50. In *R (DPP) v Aylesbury Crown Court* [2017] EWHC 2987 (Admin), [2018] 4 WLR 30 the Crown instructed an expert to examine AB's computer with a view to a prosecution of AB for possession of indecent images of children. The expert concluded that there were 122 such images accessible to AB. AB appeared before the

magistrates and was charged on indictment with one offence of possessing an indecent image of a child. AB then instructed his own expert who concluded that no indecent images of children were found to have been saved anywhere on the computer's hard disk drive, and that the only pictures that were identified were either deleted or in system-created areas to which the user had no access. When the Crown's expert was asked to comment, he agreed with AB's expert. In consequence the Crown offered no evidence on the charge. The Crown Court judge made an order for costs against the CPS. The DPP then applied for judicial review of that order. Sharp LJ began by considering the position of an expert witness. She said at [20]:

> " An expert may be instructed by the CPS and indeed, it is common to say that an expert called at trial, is called *by* the Crown or the defence as the case may be or gives evidence *on their behalf*. The relationship with an expert is however a contractual one, not one of agency; and the mere fact of the contractual relationship does not make the CPS responsible for the expert's acts or omissions for the purposes of regulation 3, any more than the CPS would be responsible for the conduct of a witness of fact who, for example, having given a witness statement supporting the Crown's case, refuses to co-operate or answer questions, or recants his or her evidence, so that a trial has to be aborted. In short, expert witnesses in a criminal trial do not give their evidence or act, "on behalf of" the CPS. Nor are they to be regarded as "part of the Crown". Indeed it would be antithetical to the duty of an expert if that were to be the case. As the relevant provisions of the Criminal Procedure Rules make clear, an expert is an independent witness, or third party for this purpose, whose principal duty is owed to the court, not to those instructing him…" (Original emphasis)

51. She then turned to the question whether the party instructing the expert had an individual responsibility. Having referred to *Cornish* she said at [23] that Coulson J had held that the evidence of the expert was not plainly wrong in a way that should have been obvious to the Crown; and that that was "an appropriate test to apply". At [24] she considered the respective roles of the CPS and the expert. She said:

> "As Mr Treverton-Jones points out, an expert has an expertise which the prosecuting authorities do not have; hence the need to instruct him. Once the expert in this case had given his opinion that the image in question was accessible, there was nothing to suggest a need to interrogate the expert; or that he was plainly wrong in a way that should have been obvious to the Crown: see further paras 25 to 29 below. In the event, once the error was acknowledged by the expert the prosecution was, quite properly, brought to an end."

52. The judge in our case considered that the cases on costs in the criminal jurisdiction were unhelpful because the test that the courts applied was the higher threshold of impropriety rather than unreasonableness. But in terms of what is expected of a party as regards expert evidence, I cannot see a significant difference.

53. It is also worthy of note that, contrary to a suggestion made by Mr Williams in oral submissions, the Divisional Court in *Aylesbury* were exercising a supervisory jurisdiction rather than exercising an original discretion.

54. Put shortly, in order to castigate a party's reliance on expert evidence as unreasonable, there must be some form of trigger which causes a party to doubt the reliability of that evidence. There may be cases in which it is clear (even to a lay person) that the evidence is flawed in some way. Or the trigger may come when an opposing party sets out its case (either in some formal document or in their own expert evidence) in such a way it becomes clear that the case is flawed. But even if there is a difference in expert opinion, it does not follow that it is unreasonable for a party to continue to rely on their own expert.

55. In paragraph 16 Mr Parsons said that a party's failure to comply with the normal procedural requirements for inquiries might place them at risk of a partial award of costs for unreasonable behaviour in a call-in case. That is true, but it begs the question: with which "normal procedural requirement" did the Council fail to comply? There is no suggestion that they failed to comply with any specific rule in the 2000 Rules. Nor is there any suggestion that they ignored or failed to comply with any request or direction made by the inspector. So the "normal procedural requirement" must be something else.

56. Mr Parsons went on to say in paragraph 18 that the responsibility for appointing Mr Hopwood as their expert witness on public safety matters rested with the Council and they should have been satisfied with the strength of the advice received and crucially that they could rely on it being capable of standing up to scrutiny by any other parties through cross-examination. He further said in paragraph 20 that it was incumbent upon the Council, as the call-in inquiry process progressed, to continue to appraise their position ensuring that their original grounds for resolving to approve the planning application remained. This must be the "normal procedural requirement" which Mr Parsons had in mind.

57. This reasoning needs a little unpacking. In the case of a called-in inquiry where public safety was in issue, one would expect the parties to adduce expert evidence, especially in view of the HSE's objections. That would fall within a normal procedural requirement. But Mr Parsons does not suggest that it was unreasonable for the Council to select Mr Hopwood in the first place as their expert witness on public safety. In paragraph 19 he said that Council would, or should, have known of the full extent of HSE's public safety objections to the proposed development when they submitted their Rule 6 pre-inquiry statement of case and that they would be required to address those concerns at the forthcoming call-in inquiry. The HSE had, of course, already objected to the grant of planning permission on public safety grounds before the Council resolved to grant planning permission; and Mr Parsons had rejected the argument that the resolution to grant permission was in itself unreasonable. The HSE's rule 6 statement was submitted on 23 June 2021. Mr Parsons did not identify any objection in HSE's rule 6 statement which differed from the objections it had ventilated before the resolution to grant. On the contrary, in their application for costs the HSE said that the points of objection had been made over "a period measured in decades;" and that the key elements which underlay the HSE's objections had been "fully explained for years and years". Mr Hopwood's proof of evidence was submitted on 4 August. Both the rule 6 statements, and the submission of proofs in

compliance with rule 13 are normal procedural requirements. But again, Mr Parsons does not suggest that Mr Hopwood's proof of evidence ignored the HSE's concerns on technical public safety matters as set out in the rule 6 statement. Nor does he say that Mr Hopwood's proof of evidence was obviously wrong; or that it failed to meet the evidential threshold of "providing some respectable basis" for the Council's position on public safety; or that it lacked real substance or was incapable of belief.

58. His reasoning, then, appears to be that the Council should have tested Mr Hopwood's evidence and satisfied themselves that it could withstand cross-examination. The carrying out such an exercise was a normal procedural requirement and a failure to do so was unreasonable.

59. In my judgment this sets the bar too high. In any case in which there is a difference of expert opinion, the decision-maker is likely to resolve the difference in favour of one expert rather than another, especially where the experts have been cross-examined. In that sense the expert evidence called on behalf of the losing party will not have stood up to scrutiny following cross-examination. But that of itself cannot rationally be regarded as unreasonable behaviour.

60. As I have said, Mr Parsons did not suggest that the Council had initially fallen below the required evidential threshold. But he went on to say that the Council should have satisfied themselves that Mr Hopwood's evidence would stand up to "scrutiny by any other parties through cross-examination". That seems to me to be the nub of his reasoning. The question, then, is what must a party do, having instructed an apparently competent expert, to test the reliability of their expert evidence? And if they fail to do so, is that unreasonable conduct by that party?

61. There is no suggestion in the cases that we have seen that the LPA (or, indeed any other party) should, as a generality, test the evidence of its own expert to see if it would withstand cross-examination. In other words, testing the evidence of an expert to see whether it would stand up to cross-examination cannot be described as a "normal procedural *requirement*" even if it is permissible procedural *option*. Nor am I aware of any procedural requirement to that effect in civil proceedings. As Sharp LJ said in *Aylesbury*, the reason why a party instructs an expert is that the expert has expertise that the party instructing them does not have. Why, then, should the instructing party be expected to second guess the expert as a matter of routine? The position may be different where the party calling the expert knew, or should have known in the light of subsequent events, that the expert's views were untenable; or where there is some obvious flaw in the expert's reasoning. But Mr Parsons did not identify any time or event which would have led the Council to that conclusion.

62. In short, the Council cannot tell from Mr Parsons' decisions what it did wrong or when its case changed from being "respectable" to "unreasonable". When Mr Williams was asked to identify when and why the change took place, he was unable to do so. Moreover, if it was unreasonable conduct on the part of the Council to continue to rely on Mr Hopwood's expert evidence, it would not have mattered whether the Council withdrew its support for the development or soldiered on to the bitter end. So the link between the withdrawal of the Council's support and the finding of unreasonable conduct is tenuous, to say the least.

63. There are a number of professional codes of conduct that recognise that it is permissible for an expert witness to discuss the case with the relevant legal team. To take one example, the Royal Town Planning Institute Guidance for Expert Witnesses says this:

> "The role of advocate is often carried out by a barrister. In order to perform effectively as an expert witness you will need to be well prepared. By re-reading your proof of evidence with you, your barrister (or other person carrying out the advocacy role) should be able to identify any areas that are likely to come under scrutiny in cross-examination. Annotating your proof and identifying useful cross references will mean that you will be able to respond under pressure."
>
> "To write a good proof of evidence takes time. Reading and discussing the statements of case and statements of common ground with your advocate or barrister will mean that you have all the facts at the start, and it should prevent you from changing your mind during the inquiry."
>
> "When preparing for cross-examination it is important to understand the weakest aspects of your case and prepare to answer questions on these points. Your barrister or advocate will be able to help you to draw out these aspects of the case but they will not tell you what answer to give."

64. Any discussion with witnesses must, of course, steer clear of coaching the witness: see *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [22] to [30]. But rule C9 of the BSB Handbook goes further. It states unequivocally: "you must not *rehearse, practise with* or coach a witness in respect of their evidence." PEBA's Good Practice Guidance for barristers dealing with experts at planning inquiries repeats that admonition. Where discussion ends and practising begins is clearly a matter of judgment.

65. In their representations to Mr Parsons the Council said that multiple conferences were held involving counsel, Mr Hopwood and Mr Gibbs, both before and after the exchange of evidence, at which the merits of both parties' positions and their evidence were discussed extensively. Mr Parsons did not reject that statement; and, on the basis that it is true, it goes a long way towards complying with the practice recommended by the RTPI. But even if the Council *could* have done more without professional impropriety, it does not follow that they were unreasonable or in breach of any "normal procedural requirement" in not having done so. Here, too, there is, in my view a gap in the logic of the decision.

66. Quite apart from all that, it is clear from the HSE's application for costs that the matters on which Mr Hopwood made the crucial concession were not in themselves matters of public safety (which was the topic on which he was put forward as the expert); but on the validity of the local *policy* on which the Council relied. I cannot see how it could reasonably have been anticipated that questions about the validity of the policy were to be put to the expert on public safety.

Conclusions

67. If Mr Parsons regarded the Council's withdrawal of support for the proposed development following the change in Mr Hopwood's evidence as being "without good reason" I consider that his conclusion in that regard is untenable. If he meant to suggest that it is a "normal procedural requirement" to go beyond the Council's extensive discussion of the parties' positions before Mr Hopwood's cross-examination, I can see no rational basis for that conclusion. If, on the other hand, he meant to identify some other "normal procedural requirement" with which the Council did not comply, I do not understand what it was.

Result

68. I would allow the appeal.

Lady Justice Asplin:

69. I agree.

Lord Justice Coulson:

70. I also agree.