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Case No: AC-2025-LON-001605

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 March 2026

Before :

MRS JUSTICE LANG DBE

- -

Between :

WILTSHIRE COUNCIL	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Defendants**
(2) OLD SARUM AIRFIELD LIMITED	

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- -

Hashi Mohamed and Edward-Arash Abedian (instructed by **Wiltshire Council**) for the **Claimant**
Jonathan Darby (instructed by the **Government Legal Department**) for the **First Defendant**
Christopher Young KC and Anna Stein (instructed by **Wilsons Solicitors LLP**) for the **Second Defendant**

Hearing date: 10 February 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LANG DBE

Mrs Justice Lang:

1. The Claimant applies for planning statutory review, pursuant to section 288 of the Town and Country Planning Act 1990 ("TCPA 1990"), of the decision of an Inspector, appointed by the First Defendant ("D1"), dated 9 April 2025, to allow the appeal of the Second Defendant ("D2") against the Claimant's refusal of outline planning permission on land at Old Sarum Airfield, Old Sarum, Salisbury SP4 6FW ("the Site").

2. The Claimant's grounds of challenge may be summarised as follows:

   i) Ground 1: the Inspector's decision is unsound, as it is based on a materially incorrect basis of fact, following the change of circumstances brought about by extensive fire damage to Hangar 3 which occurred shortly after the Inspector's decision.

   ii) Ground 2: the Inspector's decision has been vitiated by external injustice as a result of the fire and damage to Hangar 3.

3. Kerr J. granted permission on the papers on 5 October 2025.

Planning history

4. Old Sarum Airfield ("the Airfield") operates as a commercial/civilian airfield. It has been identified by Historic England as one of the best-preserved flying fields of the First World War ("WW1") period with one of the most complete suites of technical and hangar buildings. It is of significant heritage importance. The Airfield was designated a Conservation Area in 2007, and contains three Grade II* listed former WW1 aircraft hangars, as well as further Grade II listed buildings.

5. The easternmost of the listed hangars - Hangar 3 - is within the Site. Its condition has deteriorated considerably over many years such that it is now considered a category 'A' priority building ("Immediate risk of further rapid deterioration or loss of fabric") in "Very bad" condition on Historic England's 'Heritage at Risk' Register.

6. Core Policy 25 ("CP25") of the Wiltshire Core Strategy ("WCS"), adopted in January 2015, allows for sympathetic new development on the Airfield perimeter, where proposals can demonstrate that they will deliver the outcomes identified in the policy.

7. For several years, D2 has sought to bring forward development on the Site. In 2019 an appeal was dismissed by a planning inspector, in large part due to the "inordinate amount of harm to the heritage assets" that would be caused by the proposal and conflict with CP25. In reaching her decision, Inspector Mahoney accorded considerable weight to securing the restoration of Hangar 3. D2 challenged this decision in the High Court without success.

8. D2 made a second application for planning permission in September 2023 (the subject of this claim), which differed from the first application in a number of respects. The application was as follows:

> "Outline application with all matters reserved, except means of access to site, for the demolition, modification & renovation of

> existing buildings, structures & site development. Provision of approx. 315 residential dwellings, mixture of employment, commercial/leisure, & aviation uses, including a 'flying hub' comprising control tower, heritage centre, visitor centre, café/restaurant, parachute centre, aviation archives & aircraft hangars. Provision of new vehicular access to surrounding highways network, car parking, & connections to surrounding footpath/cycle networks. Green infrastructure provision, including open space, play space, foot & cycle paths, & landscape enhancement areas; & sustainable urban drainage system & waste water treatment works. Associated vegetation removal, ground modification & engineering works."

9. In a consultation response to the application, dated 3 November 2023, Historic England expressed its view that the heritage harms identified previously by Inspector Mahoney could be overcome by a restoration of Hangar 3, although there was insufficient evidence as to the viability of such a restoration, and therefore an application for Listed Building Consent with a costed schedule of works was desirable.

10. In January 2024, D2 made a standalone application for Listed Building Consent for repair and refurbishment of Hangar 3. It was accompanied by a design report and cost plan. It had to be updated following storm damage.

11. On 23 February 2024, Historic England provided a response to the Listed Building Consent application, combined with an updated consultation response to the application for planning permission, which stated:

> "... However, the condition of Hangar 3 remains of major concern, and part of the proposal is its repair and reuse. Sufficient evidence has now been supplied to demonstrate that the hangar can be restored/rebuilt. …
>
> The proposed rebuilt/restoration of the hangar is a major heritage benefit. The harm caused by the proposed new development that we have identified above has been minimised as far as possible through good design. We are content that in heritage terms alone, the heritage benefits outweigh the heritage harm. There will, of course, be wider planning issues for your authority to consider upon which Historic England are not qualified to comment.
>
> If you are minded to consider this application favourably, we suggest the imposition of suitably-worded planning conditions or a Section 106 agreement to guarantee the restoration of the listed hangar. We suggest you consider requiring completion of the main structural repair and hangar roof prior to any dwellings being occupied on the development. You could also consider requiring completion of all of the repairs as outlined in the cost plan prior to 50% of the dwellings being occupied. Such conditions would prevent the scenario of new development being built but the hangar remaining unrestored."

12. The Claimant granted Listed Building Consent on 11 March 2024. It was granted subject to conditions, including approval of details by the local planning authority. Condition 3 provided:

> "3. Prior to commencement of any works deemed necessary by the structural engineer's report …. or for any other reason, that are in addition to those defined in the Cost Plan Rev A, details of those additional works shall be submitted to and approved in writing by the Local Planning Authority. Development shall be carried out in accordance with the approved details.
>
> Reason: To ensure the preservation of as much of the listed building as possible."

13. The informatives stated:

> "8. With regard to works proposed in addition to those described in the Cost Plan, a further application may be required if the additional works are extensive or the condition of the building is significantly different from that at the time of granting this consent.
>
> 9. For the avoidance of doubt, the ability of the applicant to commence the works hereby approved is not constrained by the outcome of any other planning application."

14. The Claimant refused the application for planning permission on 15 August 2024, for five reasons. The second reason was that the scheme would be of a significant height and scale and the open character of the site would be eroded. It would have a significant visual impact, and be likely to cause less than substantial harm, to the character and setting of the surrounding heritage assets, which is not outweighed by significant public benefits.

The Inspector's Decision

15. D2 appealed to D1 against the refusal of the application. Inspector Fagan held a 9 day public inquiry and a site visit. At paragraph 4 of the Decision Letter ("DL/4"), he identified four main issues for determination, namely: (1) whether development could in terms of financial viability deliver 25% affordable housing units; (2) the highways issue; (3) whether the development would result in any heritage harm and, if so, whether this harm would be outweighed by the public benefits; and (4) the planning balance: whether other material considerations would outweigh any conflict with the development plan, either in terms of the standard or tilted balance.

16. During the appeal, the Claimant argued that D2 should not be permitted to take advantage of the need to restore Hangar 3 as a benefit of the scheme, as it had failed to maintain it. The Inspector found as follows:

> "75. The agreed prime benefit is the restoration/rebuilding of Hanger 3, now a category 'A' priority building ('Immediate risk

of further rapid deterioration or loss of fabric') in 'Very bad' condition on HE's 'Heritage at Risk' Register. HE gives this benefit considerable weight. This is a benefit not just for this hanger but also to the adjacent two Grade II* hangers, the Grade II listed buildings and the Airfield CA. Other heritage benefits to all these assets are the demolition of the detracting buildings on the hanger apron (the café, building currently used by the parachute training company and the modern and unattractive airfield control towers). The Grade II camera obscura building would undergo repairs to its fabric and would also be subject to the above benefits. The SM and Stratford-sub-Castle CA would benefit from the improved relationship and visual accessibility of the former Roman Road route as part of the overall design for the Area A development: the linear park.

76. Much of the Council's case in respect of the Hanger 3 prime benefit was pinned on the appellant's alleged deliberate neglect of an obviously very important listed building that should be preserved. I note in this respect that the other two listed hangers, which are not owned by the appellant, are in much better condition, although I do not know why that is. However, I cannot accept that there has been 'deliberate neglect' in terms of NPPF paragraph 209. The appellant has attempted, albeit largely failed, to prop up the roof by the installation of various shipping containers on top of each other in order to support the Belfast trusses and scaffolding has been erected to try and preserve what is left of the roof following the extensive damage to it by Storm Isha in January 2024.

77. No advantage has been gained by the appellant if it has neglected Hanger 3, whether deliberately or not, in view of HE's view that the benefit of restoring it has been weakened because much more rebuilding is now required than in 2019. Its restoration/rebuilding is of significant weight, whether such restoration amounted to essentially repair and refurbishment, as it would have been at the time of the previous appeal, or a substantial part-rebuilding exercise as it would now be. The difference is that it will now cost (the appellant) a lot more, but the weight I attach to its preservation is equally important now as it was in 2019, notwithstanding that the works to restore it need to take place as soon as possible, otherwise there may be no building at all to restore.

78. I acknowledge that there was no impediment to the appellant implementing the listed building consent PL/2024/00102 granted in March 2024 – indeed the consent positively encouraged it – and ideally it should have done so. But the damage from the storm had already occurred by then. The works required are obviously substantial and costly and it is quite conceivable that the appellant did not have a spare £3.31M to

> spend on implementing the necessary works that had been agreed as part and parcel of that application. Indeed, the appellant made clear during the Inquiry that the proposed residential development would be used to cross-subsidise the works to Area B, the new hanger etc buildings and the necessary works to preserve Hanger 3. I do not doubt that is the case."

17. Inspector Fagan's conclusions on the heritage balance were as follows:

> "*The Heritage Balance*
>
> 95. I agree with HE that the totality of the proposed development (in Area A-C combined) will adversely impact the setting and thus significance of the SM [Scheduled Monument] and the Stratford-sub-Castle CA [Conservation Area] and the open character and thus significance of the Airfield CA [Conservation Area] and the settings of the listed buildings including the Grade II* listed hangars within it. But, like HE, I agree that the overall level of harm is towards the mid-range of less than substantial harm. Crucially, I agree with HE that the heritage benefits alone, including primarily the restoration/rebuild of Hanger 3 and the other benefits listed above, outweigh such harm for all the above reasons."

18. The Inspector undertook the planning balance at DL/96 – 104. He identified the benefits of the scheme at DL/96 – 100, in addition to the heritage benefits already identified. He considered that the scheme would comply with CP25 and other Core Strategy policies listed, and as it would accord with the development plan, there was no reason to withhold planning permission.

19. As part of the grant of permission the Inspector imposed a condition to secure the repair and restoration of Hangar 3. Condition 17 imposes a series of restrictions precluding occupation of residential units on the Site until those restoration works are completed. It provides as follows:

> "**Repair and Restoration of Hangar 3**
>
> 17. No dwellings shall be occupied (with respect to Areas A & C housing only) until completion of the main Hangar 3 structural repairs and Hangar 3 roof as outlined in the cost plan and Listed Building Consent (ref PL/2024/00102). No more than 160 dwellings shall be occupied (with respect to Areas A & C housing only) until completion of all of the Hangar 3 repairs as outlined in the cost plan and Listed Building Consent (PL/2004/00102). For each stage of the repairs an architect's certificate of practical completion of the approved works shall be submitted to the Local Planning Authority. The condition will be discharged by confirmation in writing from the Local Planning Authority that the relevant works have been undertaken to its satisfaction. Such confirmation would include a site visit facilitated by the applicant.

> REASON: To ensure that the repairs to Hangar 3 are undertaken in association the building of the dwellings so that the heritage asset is rebuilt in accordance with the aims of policy CP25 and CP58 of the Wiltshire Core Strategy."

20. The Inspector sent the DL to the parties on 9 April 2025. Costs decisions were sent in a separate decision letter dated 17 April 2025.

The fire

21. On the evening of 17 April 2025, Hangar 3 caught fire, together with the café and another adjacent building. The incident report from Dorset and Wiltshire Fire & Rescue recorded the "Cause/motive" as "Deliberate". Subsequently, Dorset & Wiltshire Fire Service and Dorset & Wiltshire Police conducted a formal investigation into the cause of the fire, and considered whether it was caused deliberately or accidentally. On 23 October 2025, the police officer leading the investigation informed Mr Grenville Hodge, a Director of D2, that the police investigation had been closed down in the light of the fire report which stated:

> "It is the author's opinion, based upon the information and evidence gathered from witnesses, fire-fighters and detailed examination of the scene at the time, that the cause of fire is undetermined.
>
> From the enquiries completed it cannot be determined if this fire was set deliberately or not. There are no further lines of enquiry to pursue and a suspect (if it was set deliberately) cannot be identified.
>
> For closing as undetected at this time."

22. D2 made a claim to its insurers, Aviva, in respect of the fire damage to the buildings other than Hangar 3 (which was uninsured). Aviva commissioned an investigation into the cause of the fire but did not disclose any findings to D2. On 27 June 2025, Aviva notified D2 that the investigation had concluded and loss adjusters had been instructed to assess the loss. D2's claim was subsequently met in full by Aviva. In my view, on the balance of probabilities, Aviva's willingness to pay the claim, without any further questioning of D2, indicates that its investigation did not conclude that D2 was responsible for the fire, whether deliberately or negligently.

23. In the light of the outcome of these investigations, I consider it is not possible to proceed on the basis that the fire was or may have been set deliberately.

Application to discharge condition 3 of the Listed Building Consent

24. On 5 November 2025, D2 submitted an application to discharge condition 3 of the Listed Building Consent. The application was accompanied by a structural survey report for Hangar 3, a design and condition report, and a revised Stage 3 cost plan.

25. The structural survey (September 2025) was limited to a visual structural inspection without "intrusive inspection of the building fabric". The report states that it is possible to reconstruct Hangar 3, and the extent of work required is not significantly different to the situation before the fire. It states at Chapter 6:

> "The main external walls of the hanger have structural defects many of which are likely to have occurred over a significant period of time due to the gradual deterioration of the hanger and poorly detailed and executed structural alterations over the history of the building. Other issues are likely to have occurred more recently due to the collapse of sections of the roof before April 2025. The most recent areas of damage caused by a storm in January 2024 are detailed in the Fielden + Mawson report 9765 / A04.
>
> There is no doubt that the fire in April 2025 has caused further damage, most significant of which is the damage caused by the collapse of the doors and their tracks. This has caused the collapse of the southern support piers on the south eastern elevation and damaged the southern support piers on the north western elevation. Damage has also occurred to the elevations adjacent these towers as they collapsed.
>
> There is no evidence of heat damage to the main structural walls. Significant areas of the roof and the doors at the north eastern end had already collapsed before the fire and the collapse of the remaining roof trusses does not appear to have caused further damage to the masonry walls.
>
> As a result the extent of work required to restore the hanger is not significantly different to the situation before the fire. The Fielden + Mawson report 9765 / A04 concludes that only three of the 34 roof trusses could be repaired. The rest required complete replacement. Therefore compared to the situation before the fire there are an additional three roof trusses to construct from new. There is also one more set of door support pillars to rebuild and some additional cracking to be repaired. All areas of masonry that require reconstruction should be able to reuse their original foundations which are still in place and appear to be undamaged.
>
> In conclusion the majority of the masonry structural walls and piers have not been damaged by the fire and can be reused in their current condition provided historic cracking is addressed. The walls have not been damaged by the heat of the fire and are generally plumb. Timber elements including the roof and timber lintels will required complete replacement as was the case before the fire in April 2025."

26. The updated Design and Condition Report (September 2025) concludes that "the fire has not fundamentally altered the scale or methodology of the restoration". It notes the changes to the previously approved works as follows:

> • "Three no. Trusses S05, N13 and S13 previously identified as potentially repairable now require complete replacement. Methodology for the construction of new Belfast trusses (4.0) will be in accordance with Appendix B."
>
> • "Remaining roof structure collapsed due to fire this however was due for removal."
>
> • "Appendix E Structural Survey concludes although the recent fire has caused some addition damage, including collapse of south eastern door support masonry piers and the upper part of the southern end of the western elevation, the extent of work required is not significantly different to the situation before the fire. Hence brickwork should be repaired in accordance with the Integral structural report and to structural engineers specification and collapsed areas rebuilt like for like."
>
> • "Additional areas of collapse shown on central piers page 27 & plan page 28."
>
> • "Timber Lintels over window and doors to be removed and replaced like for like."
>
> • "South hangar doors and tracks to be replaced like for like as far as possible. Doors to be constructed as 7.3 and 7.5 below with fixed outer door sections."
>
> • The main hangar doors are now to be "Replaced like for like as 7.0 and 7.5."
>
> • "New central door sections to be constructed like for like."

27. The Stage 3 Cost Plan (revised 29 October 2025) estimates the total cost (including construction costs, contingency, design risk and inflation) at £4.43 million. The construction costs alone, prior to the fire, amounted to £2,601,511.81. The additional work required after the fire will cost £688,638.75. The total construction costs are now estimated at £3,290.150.56. Based on these estimates, the costs have risen by approximately a third (£1.1 million) from the £3.31 million figure presented to the Inspector at the Inquiry.

28. Mr Guest, who is the Claimant's Conservation and Design Manager, expressed the view in paragraph 26 of his witness statement dated 19 May 2025, that because of the fire damage to Hangar 3, the Listed Building Consent is no longer fit for purpose. In his view, it followed that condition 17 to the planning permission cannot now be actioned which would render the whole planning permission unimplementable. However, his evidence pre-dated D2's updated reports and costs estimates which were submitted to the Claimant in support of the application to discharge condition 3 of the Listed

Building Consent on 5 November 2025. The Claimant has not filed any evidence in response.

29. The application to discharge condition 3 of the Listed Building Consent has been registered by the Council but has not yet been determined.

Grounds of challenge

Ground 1

Claimant's submissions

30. The Claimant submitted that the authorities were clear that when new evidence comes to light which could not have been made available to the decision-maker, or other exceptional circumstances exist, then the court can take fresh evidence into account when exercising its powers of review. This is not limited to errors of fact or new evidence which existed prior to the decision under challenge.

31. The Claimant relied on the following authorities. *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044, at [66]; *R (Powis) v Secretary of State for the Environment* [1981] 1 WLR 584, at 595-6; *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649; *R (Connolly) v Havering LBC* [2008] EWHC 2873 (Admin), at *R (Albert and Maud Johnson Trust Ltd) v West Sussex Quarter Sessions* [1974] QB 24; *R (Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876; *R (Momin Ali) v Secretary of State for the Home Department* [1984], 1 WLR 663; *R (Launder) v Secretary of State for the Home Department (No. 2)* [1997] 1 WLR 839, at 860H-861A; *R (Fidler) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 1159; and *ATE Farms Limited v Secretary of State for Housing, Communities and Local Government* [2025] EWHC 347 (Admin).

32. In *E,* which is the leading authority on mistakes of fact in a public law context, Carnwath LJ, giving the judgment of the court, stated:

> "66. In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

33. The Claimant submitted that the criteria in *E* were met, for the following reasons:

    i) There is a mistake of fact because the Inspector's decision was predicated on the condition of Hangar 3 as it existed at the time of the inquiry, which is now materially incorrect because of the damage caused by the fire.

    ii) The fact that there has been a fire which has damaged Hangar 3 is uncontentious.

    iii) The Claimant is not responsible for the mistake of fact.

    iv) The mistake of fact was material to the Inspector's reasoning; he considered that the restoration of Hangar 3 was of central importance to the decision to grant planning permission.

34. The Claimant emphasised that the Inspector's decision to grant planning permission in this case was made at a specific point in time and on the basis of a clearly defined understanding of the factual context. Those facts, which the Inspector understood to be the reality, were superseded (or at very least were materially impacted) by an intervening act which occurred only 8 days after he made his decision, and within the 6 week period to bring a statutory challenge. This case therefore falls within the situation described by Lord Hope in *Launder* as justifying the court's intervention, and one of exceptional circumstances in line with *Momin Ali* and *E*.

35. The Claimant also submitted that the fact of the fire, its cause and the prospects of restoring Hangar 3 were material considerations which ought to be re-considered by the Inspector, given the importance of the Site. Furthermore, if the Inspector were to re-consider his decision, in the light of the fire damage and the new evidence from D2 on repair and reconstruction, the heritage balance and the planning balance might well be different.

Conclusions

36. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with, and in consequence, the interests of the applicant have been substantially prejudiced.

37. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish a public law error on the part of the D1 when making the challenged decision.

38. I accept the submissions of D1 and D2 that this ground has no merit. The Inspector's decision does not disclose any error of law or mistake of fact. It was taken on a correct application of the law to the facts as they existed at the time, as the Claimant concedes. A subsequent event, such as the fire, cannot retrospectively render a lawful decision unlawful.

39. In my view, it is irrelevant that the subsequent event occurred within the 6 week period to bring a statutory challenge. That was merely a matter of chance. If, contrary to my view, the court had jurisdiction to quash a prior decision in circumstances such as these, it is hard to see how a fair distinction could be made between a fire which occurred

before or after the expiry of the 6 week period. Such a fundamental change to existing legal principles would inevitably undermine the certainty of planning decision-making, which developers rely upon.

40. In *Powis*, at 595G, Dunn LJ set out the accepted principles (as at that time) upon which fresh evidence should be admitted on judicial review, namely, (1) to show the nature of the material before the decision-maker; (2) to determine a fact on which jurisdiction depended or whether essential procedural requirements were observed; and (3) to prove alleged misconduct by one of the parties or the tribunal. In the *Law Society* case, the Divisional Court held:

> "38 Although these categories are a useful and well-established list, it would be wrong to treat them as if they were embodied in statute or as necessarily exhaustive. That is particularly so as public law has developed in ways which were not in contemplation when *Ex p Powis* was decided. In *R (Lynch) v General Dental Council* [2004] 1 All ER 1159, Collins J was prepared to allow some extension of the possibility of admitting expert evidence beyond the *Ex p Powis* categories in a case where a decision is challenged on the ground of irrationality. The judge accepted that, where an understanding of technical matters is needed to enable the court to understand the reasons relied on in making the decision in the context of a challenge to its rationality, expert evidence may be required to explain such technical matters.
>
> 39 We would extend this principle to a situation where, - as in the present case - it is alleged that the decision under challenge was reached by a process of reasoning which involved a serious technical error….."

41. The case of *E* was solely concerned with a mistake of fact which had occurred and was discoverable before the challenged decision was taken. The issue was whether "new evidence" could be relied upon to demonstrate the mistake of fact. The Court said, at [91]:

> "91. In summary, we have concluded in relation to the powers of this Court:
>
> i) An appeal to this Court on a question of law is confined to reviewing a particular decision of the Tribunal, and does not encompass a wider power to review the subsequent conduct of the Secretary of State;
>
> ii) Such an appeal may be made on the basis of unfairness resulting from "misunderstanding or ignorance of an established and relevant fact" (as explained by Lord Slynn in *CICB* and *Alconbury*);

> iii) The admission of new evidence on such an appeal is subject to *Ladd v Marshall* principles, which may be departed from in exceptional circumstances where the interests of justice require."

42. Here, there is no "new evidence" which demonstrates a mistake of fact by the Inspector at the time when he made his decision because the fire damage did not exist at the date of the decision. The fire was a subsequent event. There was no unfairness in the Inspector's decision arising from a misunderstanding of "an established and relevant fact". This is a distinction of fundamental importance.

43. The other authorities cited by the Claimant do not support its submissions either.

44. *Albert and Maud Johnson Trust* concerned new evidence discovered post-trial on public use of a footpath which undermined the finding of fact made at Quarter Sessions. The Court of Appeal refused to quash the decision. Lord Denning said, in a dissenting judgment, that hitherto the cases had only allowed certiorari where the decision of the inferior court was vitiated by fraud or perjury, but the remedy should not be confined to those two grounds. It should also be allowed where the decision of the inferior court was vitiated by mistake of fact if fresh evidence was discovered which could not have been found with due diligence before the trial, where it is apparently credible and would have an important influence on the result. However, Lord Denning found that those criteria were not met in that case and declined to admit the new evidence. The passage in Lord Denning's judgment relied upon by the Claimant was an *obiter dicta* in a dissenting judgment, and clearly distinguishable from this case since the complaint was that the Quarter Sessions had made its findings on a mistaken basis, not that the original decision was correct, but that there had been a change of circumstances. Although the case is of historical interest, it has been superseded by *E*. The fact that Lord Denning's view was referred to (but not endorsed) by Lord Bridge in *Al-Mehdawi* does not alter that analysis.

45. *Momin Ali* concerned a challenge to the accuracy of an Adjudicator's finding, in favour of the claimant, that he was the sponsor's son, and therefore was eligible for leave to remain in the UK, in the light of post-decision fresh evidence that the claimant was actually the sponsor's nephew. Sir John Donaldson MR held, at 670D-F:

> "This fresh evidence was clearly available and should have been placed before Webster J. It is not the function of this court, as an appellate court, to retry an originating application on different and better evidence. We are concerned to decide whether the trial judge's decision was right on the materials available to him, unless the new evidence could not have been made available to him by the exercise of reasonable diligence or there is some other exceptional circumstance which justifies its admission and consideration by this court. That is not this case."

Thus, it was a challenge based upon the validity of the Adjudicator's original findings, not on the basis of a supervening event.

46. In *Launder*, the Secretary of State for the Home Department authorised the applicant's extradition to Hong Kong under sections 6(4) and 12 of the Extradition Act 1989. The House of Lords held that the Secretary of State had applied the correct test, namely,

whether in all the circumstances it was unjust, oppressive or wrong to return the applicant; that his decision was not irrational; and that, in the circumstances, it could not be said that the Secretary of State had not taken fully into consideration whether to return the applicant would constitute a breach of the ECHR. The Secretary of State took into account new evidence as to events arising after the date of his initial decision

47. *Launder* has to be read in the context of the statutory scheme for extradition which conferred a "continuing duty" on the Secretary of State to keep the extradition under review and to withdraw the warrant should circumstances change. Obviously it may well be necessary to consider new evidence and to revise the original decision, in order to discharge this continuing duty.

48. The statutory scheme was summarised by Lord Hope at 852C-H:

> "Section 12, which appears in Part III of the Act, provides that the decision to return a person into the custody of the requesting state is at the discretion of the Secretary of State. Subsection (2) sets out various circumstances in which it is provided (a) that the Secretary of State shall not make an order under that section and (b) that he may decline to make an order. The relevant subsection in this case is subsection (1), which confers a general discretion on the Secretary of State in these terms:
>
> > "Where a person is committed under section 9 above and is not discharged by order of the High Court or the High Court of Justiciary, the Secretary of State may by warrant order him to be returned unless his return is prohibited, or prohibited for the time being, by this Act, or the Secretary of State decides under this section to make no such order in his case."
>
> The power which is given to the Secretary of State by section 12(1) to make no order in his case is an important part of the protections which the law provides to persons who are the subject of an extradition request. A provisional warrant for his arrest must first be issued under section 8 of the Act. Section 9 provides that, once arrested, he must be brought as soon as practicable before a court for committal to await the decision of the Secretary of State as to his return to the foreign state, Commonwealth country or colony which made the request. His committal is subject to review under the procedures set out in section 11, by which he has the right to make an application for habeas corpus in the High Court. Then there is the Secretary of State's discretion under section 12(1) not to order his return which, as these proceedings have demonstrated, is subject to judicial review by the court in the exercise of its supervisory power. Even after he has issued the surrender warrant the protections are not at an end. <u>The Secretary of State has a continuing duty to keep the matter under review until the person is removed from this country for return to the place which made the request. This is because he has the power, should</u>

> circumstances change, to withdraw the warrant before it has been implemented. It was in recognition of this duty that, although not obliged to do so by the statute, the Secretary of State agreed to consider the representations made in the light of his original decision letter before issuing his decision of 21 December 1995 not to reverse his earlier decision and withdraw the surrender warrant." *(emphasis added)*

49. Furthermore, Lord Hope went on to say, at 861A-B:

> "The situation has changed since 1995 when the decisions were taken. So it is necessary first to mention the situation at that time and then to examine the situation at the present stage. Although we are concerned primarily with the reasonableness of the decisions at the time when they were taken we cannot ignore these developments. We are dealing in this case with concerns which have been expressed about human rights and the risks to the applicant's life and liberty. If the expectations which the Secretary of State had when he took his decisions have not been borne out by events or are at risk of not being satisfied by the date of the applicant's proposed return to Hong Kong, it would be your Lordships' duty to set aside the decisions so that the matter may be reconsidered in "the light of the changed circumstances."

50. *Launder* pre-dated the Human Rights Act 1998. Following the enactment of section 6 of the Human Rights Act 1998, the court is a public authority which must act compatibly with Convention rights. The doctrine of proportionality requires the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational responses (*R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532). In doing so, the court is not limited to the evidence which was before the decision-maker (see cases cited at '*Judicial Review Handbook*', Fordham (8th ed.) at 17.12.16).

51. Convention rights are not engaged in this claim. The planning statutory scheme does not include a continuing duty comparable to that under the Extradition Act 1989. D1 was *functus officio* once the appeal decision was made. Therefore *Launder* is clearly distinguishable from this claim and does not lend support to the Claimant's submissions.

52. *ATE Farms Ltd* does not assist the Claimant either. The facts of that case and the chronology of events were materially different. The planning inspector made a preliminary ruling that an enforcement appeal could proceed, in part, despite an ongoing police investigation into the cause of the fire. In doing so, the planning inspector had considered that he would not need to hear evidence about or make a finding as to the cause of that fire in order to make his decision on the ground (a) appeal (i.e. deemed application for planning permission). A challenge was brought in relation to that preliminary ruling. However, Mould J. considered that, "on the face of the cases that the parties wish to advance at the appeal inquiry in relation to ground (a), no such possibility exist[ed]" (at [28]). He concluded:

> "37. The inspector's note indicates that if he is required, as I say he must, to determine the question of causation and the appellant's responsibility for the fire, if any, then real prejudice may arise to the appellant and, indeed, to the second defendant if he does so whilst the criminal proceedings remain in contemplation. As I have indicated, in their letter to him the Crown Prosecution Service invited him to postpone making any such findings; a position that they have reiterated, as I understand it, in recent email correspondence. Those matters show that it is, in fact, indisputably necessary to delay the proceedings on the ground (a) appeal in order to fulfil the objective of avoiding prejudice to the parties."

53. It is clear from my judgment above, under the sub-heading "The fire", that such circumstances do not arise in this claim.

54. For these reasons, Ground 1 does not succeed.

Ground 2

Claimant's submissions

55. The Claimant submitted that the consequences of the fire were an example of external injustice or unfairness. Acts which post-date the decision under challenge are, in principle, capable of vitiating that decision. The examples in the case law are not a closed list and there is no established test to apply. The Claimant referred to the 7th edition of '*Judicial Review Handbook*', Fordham (now superseded by the 8th ed.), at paragraph 65.1:

> "65.1 **External injustice/vitating third party act.** In a conventional judicial review case, the claimant relies on a 'public law wrong' for which the public authority defendant is some way responsible. However, in some special cases the Court will intervene, in the exercise of its supervisory jurisdiction, because of a bigger picture: something has gone wrong which is external and not attributable to the public authority defendant. Recognised examples include: injustice or abuse of process caused by an anterior abuse of power; a defendant court's decisions or proceedings made legally unsound because of third-party conduct; or public authority decision-making vitiated by reason of misleading information, misdirection or unfairness from an adviser or other relevant third party."

56. The Claimant submitted that this principle was wide enough to encompass this situation, where it is not known whether the fire was deliberate or not. Damage to Hangar 3 has stripped the Inspector's decision of its logic and rendered the decision meaningless. The Site can now be developed without providing any of the heritage benefits that were promised. D2 now has an opportunity to avoid restoration of Hangar 3 in its entirety, or find a new argument to avoid providing the affordable housing previously agreed, because of the increased cost of restoration and repair following the

fire. The Claimant does not accept D2's evidence that condition 3 of the Listed Building Consent and condition 17 of the planning permission can be discharged.

57. The analogy with the common law doctrine of frustration of a contract (mentioned by Kerr J.) was not pursued by the Claimant at the hearing, and therefore I have not addressed it.

58. The Claimant submitted that there are limited circumstances in which it will be appropriate to develop the limits of planning law, on public policy grounds. It cited *Pioneer Aggregates (UK) Limited v Secretary of State for the Environment* [1985] AC 132, per Lord Scarman at [140]:

> "Planning control is the creature of statute. It is an imposition in the public interest of restrictions upon private rights of ownership of land. The public character of the law relating to planning control has been recognised by the House in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578. It is a field of law in which the courts should not introduce principles or rules derived from private law unless it be expressly authorised by Parliament or necessary in order to give effect to the purpose of the legislation. The planning law, though a comprehensive code imposed in the public interest, is, of course, based on the land law. Where the code is silent or ambiguous, resort to the principles of the private law (especially property and contract law) may be necessary so that the courts may resolve difficulties by application of common law or equitable principles. But such cases will be exceptional. And, if the statute law covers the situation, it will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely because they may appear to achieve a fairer solution to the problem being considered. As ever in the field of statute law it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute, or statutory code, considered as a whole."

Conclusions

59. I accept the submissions made by the Defendants.

60. The proposed development is governed by the terms of the Listed Building Consent and the planning permission. D2 can only implement the permission and the consent in accordance with the conditions attached. Condition 17 is designed to prevent the housing development being occupied until the repair and restoration work to Hangar 3 is completed. If D2 wants to vary the development, it will have to seek permission to do so from the Claimant, either by seeking to vary or discharge the existing conditions under section 73 TCPA 1990, or by making a fresh application for planning permission in different terms.

61. However, the Claimant's fear that D2 does not intend to repair and restore Hangar 3 is unsupported by any evidence. On the contrary, D2 has confirmed that it does intend to

repair and restore Hangar 3. To that end, D2 has applied to discharge condition 3 of the Listed Building Consent, and it has submitted detailed surveys, reports and costings. These include a detailed breakdown of the additional works and expenditure required as a result of the fire. On the face of it, these documents amount to clear evidence that the Listed Building Consent and the planning permission can be implemented. The Claimant has not identified flaws in the evidence, nor filed any evidence to contradict it.

62. The next step is for the Claimant to consider and approve the proposed works under condition 3. If and insofar as it does not approve them, then planning officers should negotiate with D2 on suitable amendments, in accordance with standard practice. Informative 8 also raised the possibility of a further application if there were extensive additional works required, which is a fallback.

63. The planning officer's report for the grant of Listed Building Consent, in January 2024, identified the damage done by the January 2024 storm; warned that more works would be required if work was not commenced promptly; and advised that works to historic buildings in poor repair were usually impossible to define precisely in advance of commencement, and so a degree of flexibility of the consent granted was necessary. The Listed Building Consent was granted on that basis, and the Claimant ought not to resile from it. The unnecessary delay caused by this claim is regrettable.

64. If D2 has under-estimated the extent of the works and the costs, then it will have to consider its position, as owner of the Site and successful applicant for planning permission. Viability may be negatively impacted, but that would not necessarily render the permission unimplementable. It is premature to reach any conclusions.

65. In my view, there is no external injustice or unfairness which vitiates the Inspector's decision. The Inspector's decision is valid and is unaffected by the fire and its consequences. There is a satisfactory way forward, namely, by utilising statutory planning procedures to develop the Site, as outlined above.

66. For these reasons, Ground 2 does not succeed.

Final conclusion

67. The application for planning statutory review is dismissed.

68. The Claimant has agreed to pay the First Defendant's costs in the sum of £18,512.80, but resists any costs order in favour of the Second Defendant, applying the general principle in *Bolton MDC v Secretary of State for the Environment* [1995] 1 WLR 1176, per Lord Lloyd, at 1178G – 1179A, that an unsuccessful claimant should not have to pay a second set of costs incurred by the developer. In my view, this case falls within the exceptions identified in *Bolton*, because there were issues which were not adequately covered by the First Defendant, and the Second Defendant had interests which required separate representation. The Claimant made a thinly-veiled attack on the *bona fides* of the Second Defendant, suggesting that it might decide not to restore the hangar (despite its stated intention to do so), and hinting that it may have been responsible for the fire. That clearly influenced Kerr J.'s decision to grant permission and the Second Defendant was entitled to respond to it. Furthermore, a significant part

of the claim turned on events which arose after the Inspector's inquiry and decision, and so were not addressed by the Inspector. The Second Defendant adduced evidence, in November 2025, relating to the cause of the fire, and also expert evidence assessing the extent to which the fire damage added to the work required on Hangar 3, and the likely cost of the additional works. This was the only evidence on these issues, as the Claimant did not produce any evidence. It was essential to my understanding of the claim and my conclusions. Therefore, the Second Defendant is entitled to a costs order in its favour.

69. I agree with the Claimant that the costs claimed by the Second Defendant, in the sum of £59,104.00, appears excessive. Given the complexity of the claim, and the sums involved, I do not consider that the costs are suitable for summary assessment. Therefore I have ordered that there shall be a detailed assessment, if the costs cannot be agreed.