Neutral Citation Number: [2015] EWHC 2245 (Admin)

Case No: CO/1091/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 28th July 2015

Before :

MR JUSTICE OUSELEY

- -

Between :

ALWYN DE SOUZA **Claimant**
- and -
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

Defendants

-and-
TEST VALLEY BOROUGH COUNCIL

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Jonathan Clay (instructed by **DMH Stallard**) for the **Claimant**
Charles Banner (instructed by **The Government Legal Department**) for the **Defendant**

Hearing dates: 16 July 2015
Judgment
As Approved by the Court

MR JUSTICE OUSELEY :

1. These proceedings relate to an enforcement notice issued by Test Valley District Council, the second defendant, in March 2014, and relating to land in the countryside near Romsey, Hampshire. The breach of planning control alleged was that there had been a material change in the use of this land without planning permission to a use "for open storage of builders materials, plant, equipment, vehicles and surplus materials and the siting of three storage containers". The enforcement notice required that all those items should be removed from the land.

2. The applicant appealed against the notice under the Town and Country Planning Act 1990, TCPA, on the grounds in section 174(2)(a) that planning permission should be granted for that use, (c) that the matters alleged did not constitute a breach of planning control, (d) that the time had passed for taking enforcement action and (g) that the period for taking the required steps was too short. This case is concerned with grounds (a) and (c). By section 177(5), the applicant also is deemed to have made an application for planning permission for the matters alleged to constitute the breach of planning control. The precise terms of those statutory provisions are of importance as I shall come to.

3. Following a public inquiry, the Inspector rejected the appeal on all grounds, save for an amendment under grounds (c) and (g) to avoid the enforcement notice affecting permitted development rights and an extension of time for compliance with the notice to 6 months. He refused the deemed planning application. The enforcement notice as upheld with amendments contains the following requirements:

> "1. Other than as permitted under the provisions of Class A Part 4 Schedule 2 to the General Permitted Development Order 1995 (as amended), cease the use of the land for the open storage of builders' materials, plant, equipment, vehicles and surplus materials and the siting three (3) storage containers; and,
>
> 2. Remove from the land all builders' materials, plant, equipment, vehicles and surplus materials and storage containers not required in connection with authorised works being undertaken on adjacent land."

This amendment is made in the requirements and not in the recitation of breach.

4. The applicant appealed under s289 TCPA on a point of law, or several as it happens. By s289(6), the leave of the High Court was required for the bringing of that appeal. The application for leave came before Gilbart J who on 9 December 2014 refused leave to appeal to the High Court in relation to grounds (c), (d) and (g). However, he ordered, after giving his reasons on 18 December, that:

> "The application under ground (a) in respect of the decision to refuse the deemed application for planning permission stands as a ground of application under Section 288 of The Town and Country Planning Act 1990 to be listed accordingly."

5. The reference to ground (a) is a reference to the statutory ground (a) appeal. As he had made clear at the hearing, and contrary to the submissions of Mr Clay for the applicant, Gilbart J had taken the view that ground (a) and indeed the deemed planning application challenge had to be made, not under s289, but under s288. The Defendants were not represented. In paragraph 2 of his judgment Gilbart J said:

> "As this is an application under Section 289 of the 1990 Act, it is not appropriate to include grounds directed towards quashing the decision to refuse the deemed application for planning permission, which was considered under ground (a). However nothing much turns on that since if I were minded to allow this application I could always indicate that this should stand as the grounds for a Section 288 application."

6. The applicant applied for permission to appeal to the Court of Appeal, not against that part of Gilbart J's Order that there should be a s288 hearing of the ground (a) appeal, but against his refusal of leave to appeal to the High Court in relation to ground (c). That application for permission to appeal to the Court of Appeal was refused on paper for want of jurisdiction by Lewison LJ in line with the decision in *Walsall Metropolitan Borough Council v Secretary of State for Communities and Local Government* [2013] EWCA Civ 370, and earlier decisions.

7. And so the matter came on before me, seemingly as a s288 application for which no leave to appeal was required, challenging the decision under ground (a) and the refusal of permission on the deemed planning application. I was puzzled by this as Gilbart J had seemingly ruled on ground (a) holding it to be unarguable. In paragraph 15 of his judgment he said this,

> "So far as the Inspector's rejection of the appeal under ground (a) is concerned, he took all relevant matters into account, including the statutory Development Plan and concluded that planning permission should be refused on the basis that the principle of the use of the land for open storage was not acceptable in the open countryside, having regard to the Development Plan for this area and national planning policy. Although an attempt was made to argue that this development was somehow consistent with the Development Plan and national policy, I reject that submission for the reasons given by the Inspector in the Decision Letter, which in my judgment are unassailable."

8. I was also puzzled because the appellant was trying to argue in relation to ground (a) that the Inspector had failed to consider as a material consideration the fact that he had planning permission for the use of part of the enforcement notice land for the open storage of builders' material and the other items. But the existence of this planning permission for open storage was in fact the basis for his ground (c) argument which the Inspector had rejected, which decision Gilbart J had found to contain no arguable error of law and which, as ground (c) could no longer be pursued.

9. I was troubled by the Order which Gilbart J had made and asked for submissions as to the jurisdiction he had to make it in the light of s284, 288 and 289 TCPA. S284(1) is the exclusionary jurisdiction provision; it says:

> "Except in so far as may be provided by this part, the validity of… (f) any such action on the part of the Secretary of State as is mentioned in subsection (3), shall not be questioned in any legal proceedings whatsoever."

10. Section 284(3) lists the actions referred to in s284(1)(f): it is action of any of the following descriptions-

> "… (e) any decision to grant planning permission under paragraph (a) of s177(1)…"

It is to be noted that s284(3)(e) only applies to a decision to *grant* planning permission and not to *any* decision on the deemed application for permission under s177(5) or to *any* decision on an appeal under ground (a).

11. S288 is the provision which deals with applications in relation to actions under s284(3) and so would be relevant had the Inspector granted planning permission but he did not do so. S288(1) provides:

> "If any person-
>
> (a)is aggrieved by any order to which this section applies and wishes to question the validity of that order on the grounds—
> he may make an application to the High Court under this section. "

12. Section 288(4) provides:

> "This section applies to … any such action on the part of the Secretary of State as is mentioned in subsection (3) of [section 284]."

13. Accordingly Section 288 has no application: Section 289 is the only possible avenue for a High Court challenge. S289(1) is broad. An appeal lies to the High Court on a point of law against the decision of the Secretary of State "in proceedings on any appeal under Part VII against an enforcement notice." The appeal right is available to the appellant, a local planning authority or any other person having an interest in the land to which the notice relates. The appellant is the appellant against the enforcement notice.

14. The reason for the distinction between grant and refusal in section 284(3)(e) appears to be that those "aggrieved" by the grant of planning permission on an enforcement notice appeal should have a right of application to the court equivalent to that which they would enjoy under s288, and particularly because the language of standing differs as between an "aggrieved" person for s288 purposes and the more limited range of those who can appeal under s289. But be that as it may, the only jurisdiction of this court in relation to the decisions of the Secretary of State challenged by this

applicant lay under s289. Leave to appeal is required. The hearing could not take place as a s288 hearing as I have no jurisdiction to hear it and Gilbart J had no jurisdiction to order such a hearing.

15. The parties agreed on that point and suggested that the hearing before me should be treated as a substantive hearing following an assumed grant of permission to apply. Neither thought it right to say that as Gilbart J had had jurisdiction under s289 and not otherwise, and had considered the ground (a) appeal and ruled on it adversely to the applicant, there was no further power in the court at all to hear further applications. Indeed Mr Clay had argued much of his case by the time this analysis was agreed on after the short adjournment.

16. It may be that Gilbart J ordered a s288 hearing, feeling obliged to do so in view of the conclusion he had reached about jurisdiction, but saying what he did about the ground (a) appeal because he hoped that the s288 hearing would either not take place or if it did that it would be very brief. If that is so, that would mean that this hearing should be a continuation of the leave hearing so that the applicant would have no greater appeal rights than he would have had, had Gilbart J made the order he would have done had he appreciated that he had jurisdiction to do so. I have treated the hearing before me as an adjourned leave hearing considering only ground (a) and the deemed application. If I grant permission to appeal on a properly arguable point, I will treat myself as having heard the substantive appeal as well. I am also not sure how full the argument on ground (a) before Gilbart J was in the light of the stance on it which he announced quite early on in the hearing before him.

The appeal in relation to ground (a): (i) the existence of a planning permission.

17. The first point which Mr Clay argued overlapped with the failed ground (c) point in this way. He had contended before the Inspector that the 2004 grant of planning permission for the building of a dwelling house, on land adjacent to the land subject to the enforcement notice, included an express grant of planning permission for the use of part of the land subject to the enforcement notice for the open storage of builders' materials and equipment, described as a "Contractor's Compound Area for storage of Construction Materials". The Inspector rejected that argument but concluded that there were permitted development rights for such a use and so protected them, such as they were, by his amendment to the enforcement notice. Mr Clay argued before Gilbart J that the Inspector should have found that the applicant had express planning permission for that use and that the temporary permission which the Inspector, he contended, had found to exist was not restricted effectively by any condition. These arguments were rejected by Gilbart J when refusing leave to appeal. Nonetheless, Mr Clay wanted to argue before me that the applicant did have planning permission for that use over part of the enforcement notice land, that this permission should have been recognised by the Inspector and treated as a material consideration in deciding whether he should grant planning permission for the whole of the enforcement notice land to be used for open storage.

18. As Mr Banner for the Secretary of State accepted, there is a more straightforward answer to this point, than his skeleton argument had suggested when contending that the applicant was simply not entitled to make this submission as it had already been ruled on, that it was an abuse of process and I should follow what Gilbart J had held, unless satisfied he was wrong. Mr Clay accepted in the end, I think, that there could

be no difference in approach between what I could find and what Gilbart J could have found if he had dealt with the point. The premise for the argument on ground (a) could not be different between one route and another. The answer is this. The terms of a ground (a) appeal in s174(2)(a) is that planning permission should be granted in respect of "any breach of planning control which may be constituted by the matter stated in the notice". Section 174(2)(c) is that "those matters if they occurred [i.e. those matters stated in the notice as constituting a breach of planning control] do not constitute a breach of planning control". I note also s177(5) deems a planning application to have been made for planning permission "in respect of matters stated in the enforcement notice as constituting a breach of planning control".

19. The matters alleged to constitute the breach of planning control were as I have set out as above from the enforcement notice. The alleged breach covered the whole of the enforcement notice site as edged in red on the accompanying plans. Success on ground (c) would have meant the use of at least part of the site for open storage did not constitute a breach of planning control. Defeat on ground (c) meant that the matters alleged in the enforcement notice, as constituting a breach of planning control, were a breach of planning control throughout the whole of the red line enforcement notice site. Ground (c) had been considered and ruled on and dismissed beyond revival. That breach of planning control, throughout the whole of the red line area, is therefore what the ground (a) and the deemed planning application appeal had to relate to. The breach of planning control alleged was not the use of part of the site for open storage but the use of any part of the site for open storage. The challenge to the lawfulness of the ground (a) decision must therefore start from the premise that the use of any part of the site for open storage was in breach of planning control. It therefore becomes irrelevant as an argument on ground (a) that part of the site, it was alleged, had express planning permission for open storage. It simply did not and that is the straightforward answer to any failure alleged against the Inspector to take into account the asserted express permission as a material consideration to the question of whether the whole site should receive planning permission for open storage.

20. It was agreed that where the matters stated in the enforcement notice as constituting the breach of planning control are amended, that in effect amends the deemed application for planning permission and the basis for the ground (a) appeal. In this case although there was no amendment to the statement of matters said to constitute the breach of planning control, the requirements to remedy the breach of planning control were amended which in substance altered the matters alleged to be in breach of planning control, but it makes no difference to this point here. I do not need to address ground (c) at all.

(ii) The scope of the enforcement notice

21. Mr Clay next argued that the Inspector had failed to consider the effect of the limited scope of the enforcement notice which did not require the removal of the boundary, fencing and gates around the contractor's compound or hard standing within it. It had been a significant part of the applicant's case before the Inspector that the use caused little harm to the character and appearance of the surrounding area. Upholding the enforcement notice would make no visible difference to any public viewpoints, and conditions could cover the height of storage, hours of operation and so on. In my judgment, it simply cannot be said that the Inspector ignored that point. He dealt with it expressly in paragraph 49 of his decision letter. The District Council, he considered,

might have made a mistake, which it could rectify, in not enforcing against the boundary fences. But even if the boundary fences remained, that was not a good reason for allowing development which conflicted with the policies in the Development Plan:

> "49. …In this case, the relative inconspicuousness of the appeal site, and its convenience for the appellant, do not, in my view, amount to the material considerations necessary to outweigh the primacy of the Development Plan, which is concerned with directing development to the most appropriate sites in the area for their intended usage, having regard to a wide number of factors. In this context, the Council has also produced evidence to show that land is available on authorised sites for the open storage use, and that evidence has not been contradicted by the appellant.
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> 50. I am also mindful of the fact that there are likely to be many well-screened plots of land throughout the countryside in this area which could similarly be used for a use of this type without causing significant visual harm. It is a poor argument to say that such sites should be developed as that would lead to uncontrolled and unsustainable development contrary to the aims of The Framework in seeking to recognise the intrinsic beauty of the countryside, and thereby protecting it from unsuitable development.
>
> 51. My conclusion on this issue, therefore, is that the principle of the use of the land for open storage is not acceptable in the open countryside having regard to the Development Plan for this area, and national planning policy, and would thereby conflict and undermine such policy."

22. There was no arguable error of law in that approach, the Inspector considered conditions when he dealt with residential amenity later.

(iii) Inconsistency between the National Planning Policy Framework and the Development Plan

23. Mr Clay argued that the relevant Development Plan Policy, SET 03 of the Test Valley Local Plan 2006, should have been given less weight than it was by the Inspector because it was inconsistent with the NPPF. Paragraph 215 of the NPPF required that "due weight should be given to relevant policies in existing plans according to their degree of inconsistency with this framework (the closer the policies and the plan to the policies in the Framework, the greater the weight may be given)." Policy SET 03 permitted development in the countryside, that is on land outside the boundary of settlements as the enforcement notice land was, only if there were an overriding need for it to be located in the countryside, or if it were a type appropriate in the countryside as set out in a list of other policies.

24. The relevant policies would be out of date in the sense used by the NPPF because of inconsistency with the NPPF, rather than simply because of age. If policies were outdated in that sense, paragraph 14 of the NPPF would require planning permission to be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the NPPF policies as a whole.

25. As the Inspector said, and it was not at issue, "there is clearly, therefore a fundamental conflict between the use of the site for open storage and policy SET 03". It was not at issue that the development was in conflict with the Development Plan. Section 38(6) of the Planning and Compulsory Purchase Act 2004 required the decision to be made in accordance with the Development Plan. It required permission to be refused, unless material considerations indicated otherwise. The outdatedness of a policy, that is here measured by the degree of inconsistency with the NPPF, is thus a material consideration which can indicate a decision otherwise than in accordance with the Development Plan.

26. Mr Clay pointed to the fact that policy SET 03 was based on policies in PPG 7 of 1997 and not even on the later PPG which in its turn had been superseded. Paragraph 3.3.1 of the Local Plan spoke of land being safeguarded as undeveloped rural land and of the principle that the countryside "should be safeguarded for its own sake". Development should "both benefit economic activity and maintain and enhance the environment." Building in the open countryside away from settlements should be strictly controlled. The supporting text to SET 03 said that the general approach of PPG 7 was reflected in the local plan policies which indicated that development was broadly appropriate within settlements but should be strictly controlled in the countryside. Later supporting text referred to a general policy of restraint in the countryside unless development there was essential, or if it was acceptable in helping to meet social or economic objectives: for example by supporting the rural economy through small scale redevelopment of established employment sites or by the provision of services and facilities such as doctor's surgeries which could not be met within settlements. Other examples were given.

27. This was contrasted by Mr Clay with the NPPF. Paragraph 17 of the NPPF in its third bullet point refers to supporting sustainable economic development and in its fifth bullet point, the principle focus of Mr Clay's submission, it said that planning decisions should "take account of the different roles and character of different areas… recognising the intrinsic character and beauty of the countryside and supporting thriving rural communities within it."

28. Paragraph 28 of the NPPF entitled "Supporting a Prosperous Rural Economy" says that planning policies should support economic growth in rural areas in order to create jobs and prosperity by taking a positive approach to sustainable new development. Mr Clay relied strongly on that sentence and contrasted it with the approach in SET 03. Paragraph 28 then says that, in order to promote a strong rural economy, local plans should address four identified areas of policy, none of which Mr Clay relied on initially, before then suggesting that the promotion of the "development and diversification of agricultural and other land/based rural businesses" was an approach which showed inconsistency between the NPPF and the Development Plan.

29. These arguments were before the Inspector who rejected them. He accepted the thrust of the District Council's argument which he summarised in paragraph 45 of the decision letter before setting out his own conclusions in paragraph 46.

> "45. The Council, however, contend that the appellant is misguided in his interpretation of paragraph 28 of The Framework and its applicability to the appeal development. It is clear that, whilst economic growth in rural areas is encouraged, with the proviso that new development is sustainable, it is through local and neighbour plans that a strong rural economy should be promoted. This has also to take account of one of the core planning principles, set out in paragraph 17 of The Framework, which includes recognition of the intrinsic character and beauty of the countryside. They also draw attention to support given in various recent appeal decisions for Policy SET 03, and the conclusion, in each case, that the policy remained up-to-date.
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> 46. Having regard to the submissions made, I do not consider that Policy SET 03 should be afforded decreased weight because of its date, or that it is inconsistent with The Framework when read in its fullest context. Whilst it is a restrictive policy, in seeking to protect the countryside from unnecessary development, this accords with the core principles of paragraph 17 of The Framework. Moreover, it does not prevent a development at all, as it permits appropriate development as an exception to the general policy restraint, as illustrated in Figure 3.1 of the LP. This includes the sensitive small-scale redevelopments or expansion of existing employment sites under the terms of those policies as it involved a new use in the countryside rather than an existing employment use. It follows that significant weight should be attached to Policy SET03, and that the current use of the appeal site needs to be assessed against the terms of that policy in determination of this issue."

30. Mr Clay contended that, as the interpretation of policy was a matter for the court, I should interpret SET 03 and its supporting text as being different from and inconsistent with the NPPF paragraphs to which I have made reference. The former, he said, was more restrictive in safeguarding all countryside, regardless of its intrinsic character and beauty and more restrictive in what it allowed by way of development in rural areas. In particular the reference in paragraph 17 of the NPPF to "recognising inherent character and beauty" was different from "safeguarding" the countryside, and "intrinsic character and beauty" required an appraisal of the qualities of the enforcement notice site because countryside which lacked any such qualities, of which there would be some, could be developed all the more readily.

31. I make two observations. First, although the interpretation of policy is a matter for the court, the question of whether there is a degree of inconsistency between policies may involve an evaluation which goes beyond simple interpretation. It does so here. The question of interpretation for the court shades off into a question of evaluation and

judgment which is for the planning decision maker. The second observation is that inconsistency has to be judged in relation to the Development Plan policies as they are applied to a particular development rather than in the abstract. There may or may not be inconsistency between the NPPF and policy SET 03 in relation to another development about which neither the Inspector nor this court need be concerned. The question is whether there is inconsistency in a way which affects the weight to be given to the Development Plan policies pursuant to s 38(6) of the 2004 Act. That involves the question of whether there is inconsistency in relation to the development at issue between the policies in the NPPF and the policies in the Development Plan.

32. Here, in my judgment, looked at as a matter of interpretation there is no inconsistency. Differences in wording do not of themselves show an inconsistency in this context. The basic thrust of the NPPF and SET 03, read with the other SET policies to which the Inspector refers, is to encourage development to the location most appropriate for it. The open storage of builders' material and equipment is not encouraged in the countryside either specifically or because of any other particular feature of rural support set out in the NPPF. It does not fit into any of the developments set out in paragraph 28 of the NPPF, which policies should support. The SET policies, as the Inspector found, respect at least some of those aspects, and other Development Plan policies, as the notes to SET 03 show, cover other aspects of paragraph 28. In my view, those policies covering rural businesses and services are not inconsistent, at least in relation to this type of activity. The difference between "safeguarding the countryside" and "recognising its intrinsic character and beauty" is very unclear. "Recognising intrinsic character" must involve some response to that recognition which is inherently a protective or safeguarding one. The inherent beauty or character of the countryside does not presuppose some areas of the countryside have intrinsic beauty but other areas have none. The very concept of intrinsic character and beauty recognises that all countryside will have some such qualities. The contrast propounded by Mr Clay is not there.

33. However, this analysis points to the limitation of treating consistency of policies as a simple issue of interpretation for the court. It illustrates how consistency of policies for the purposes of the NPPF does not simply turn on the meaning of words and phrases but can turn on the evaluation of different policies and their objectives, as consistent or inconsistent with each other, especially in the context of their application to a particular development. The evaluation of consistency became here a matter for the Inspector's reasonable planning judgment. There was nothing in his evaluation creating an error of law to my mind.

34. As Mr Banner submitted, and Mr Clay did not dispute, the refusal of permission was based on two issues: the conflict with the Development Plan and flooding risk. As there is no arguable error in relation to the Development Plan ground, planning permission would have been lawfully refused and the ground (a) appeal dismissed anyway. In that sense the flood risk ground is irrelevant but I shall deal with it briefly.

(iv) Flood risk

35. Mr Clay pointed out that the refusal of the ground (a) appeal and of permission on the deemed application on the basis of an unresolved flood risk had not been foreshadowed in the reasons for service of the enforcement notice. That is correct. But the appeal under ground (a) and the deemed application meant that a flood risk

objection could lawfully be raised by the Environment Agency, EA, and that objection became a material consideration for the Inspector.

36. The site lay in Flood Zone 3 as defined by the EA. Policy HAZ 02 of the Local Plan and footnote 20 to paragraph 103 of the NPPF both in effect require a site specific Flood Risk Assessment, FRA, covering the risk to development on site and the effect of the development on flood risks elsewhere. No FRA had been undertaken in relation to this development and an adjournment to the inquiry gave the applicant the opportunity to undertake one. He submitted this to the EA in May 2014 but the EA emailed him to say that the FRA needed to be more specific, and that there was no evidence to back up the statements written in it. The Inspector concluded:

> "58. In the light of this view from the expert statutory authority concerned with the question of flood risk, there can be no certainty that the use of the land for open storage would meet all of the terms of either Policy HAZ 02 or paragraph 103 of The Framework, thus it would be inappropriate to assume that conditions on any grant of planning permission, requiring the submission of a FRA, and subsequent implementation of schemes recommended, would ensure that flood risk would be abated.
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> 59. My conclusion on this issue is that it has not been shown that the use would not adversely affect the surrounding area through an increase in the risk of flooding. The use therefore does not meet the terms of Policy HAZ 02 of the LP, or relevant policy in the Framework."

37. Mr Clay contended that the Inspector had been unfair in this decision because the flood risk issue was capable of resolution via a condition requiring the submission of a satisfactory FRA, failing which there could be an obligation for the use to cease. Mr Clay's submissions to the Inspector on this issue had been very short, pointing out that the flood risk issue had not been raised before the issue of the enforcement notice and it was to be "assumed" that the District Council was satisfied on it. In his statement of facts and grounds for this application and in his skeleton argument, Mr Clay said that the planning officer for the District Council had agreed in cross examination during the inquiry, that the issue was capable of resolution by argument and that the Inspector had given no indication that he had any unresolved doubts about it. The applicant produced no evidence however to support the written and oral submissions to me about that answer or indeed about the question or any evidence in re-examination or about any reaction from the Inspector, or about the conditions proposed by each side, although each had produced lists to the Inspector of such conditions. I am not prepared to make any findings of unfairness if there is no evidence to support the allegation before me and there is none.

38. Mr Clay said correctly that he had raised the issue in the statement of facts and grounds and indeed in his skeleton argument. The issue is raised very briefly, very much as I have set it out. In paragraph 3 of his skeleton argument of 25 June 2015, he said that in the absence of any indication as to the basis of the defendant's defence the applicant had not filed any of the extensive evidence arising at the inquiry and did not propose to do so unless the factual basis of the application were contested. Were that

to happen a further bundle would be prepared. Neither defendant had taken up that challenge so there was no evidence.

39. I cannot accept that approach as meaning that I should accept the assertions in the statement of facts and grounds and skeleton argument as evidence as to what was said, and to treat that as an adequate basis for findings of fact in relation to unfairness. Where a claimant needs to establish a fact, the claimant should produce the evidence relevant to it; if the issue of fact is agreed then the evidence need not be considered. But it is for the claimant to produce the evidence necessary to sustain the assertions made. The evidence in relation to this issue would not have been long: a witness statement recounting the events, who said what but covering evidence in chief, re-examination, Inspector's questions and reactions, closing submissions so far as relevant and both sets of draft conditions. What is produced here is not evidence and is plainly incomplete. It does not deal with the question that was asked, surrounding questions and answers, or produce the relevant documents or show how the issue was raised and responded to. The costs decision letter does not advance matters much but it does suggest in paragraph 12 that the District Council had a different view of where matters were left. I reject therefore the contention that there was unfairness in the Inspector not alerting the appellant to his conclusion that the issue could not be dealt with by condition. Of course subject to any issue of fairness, the Inspector would have been entitled to reject what the District Council witness was said to have accepted anyway.

40. The Inspector was entitled to approach the question of flood risk on the basis that the EA was not satisfied with the FRA, and to conclude that there could be no certainty that the use of the land for open storage would satisfy policies in the local plan and NPPF. In the absence of an FRA satisfying the EA that is the obvious conclusion. The Inspector, accepting the EA's email, clearly concluded that the FRA did not show what the EA required it to show to its satisfaction. There was no basis for supposing that an FRA would succeed in satisfying the EA as it required. The Inspector does then go on to consider conditions. The Inspector was right to say that it could not be assumed that a condition could work, because it could not overcome the possibility that no FRA showing the risk could be abated could be produced and implemented.

41. Mr Clay submitted that the Inspector had failed to consider what he described as a "Grampian" condition: a grant of planning permission for the continued use of land for open storage, subject to a condition either that it cease in the event that within a stated period no satisfactory FRA had been produced, or that in the event that a satisfactory FRA were produced, the required measures should be implemented. There is no evidence as to what condition was actually proposed to the Inspector by Mr Clay. The condition as suggested to me is not a Grampian condition and no Grampian condition in the proper sense of that concept was proposed or could have been proposed. The purpose of a Grampian condition is to prevent the development commencing until an obligation has been fulfilled. Here, by contrast, on Mr Clay's case, the development would be granted permission to continue notwithstanding the continuing breach of flood risk policy and the possible risk of flood. There would then be a subsequent need to take enforcement measures against any failure to cease the use in the absence of a satisfactory FRA, or to implement the required measures, if they were devised at all. That is a very different position. This reinforces my view that the Inspector was entitled to conclude that conditions has not been shown to be an

answer. I also point out that the Inspector's rejection of conditions as an answer is wholly consistent with his considering a condition of the sort Mr Clay says he proposed.

Residential amenity

42. In the light of my conclusions it is unnecessary to say more about residential amenity than that there is no error in the Inspector's approach and even if there had been, it would have had no relevance to my decision since it only added to the strength of the Inspector's reasons for refusal of planning permission but was not crucial to them. His decision would have been the same without any residential amenity issue at all.

Conclusion

43. Having considered with care Mr Clay's arguments, I am satisfied that none of them are arguable. I refuse permission to appeal.