Neutral Citation Number: [2017] EWCA Civ 429

Case No: C1/2015/4066

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION (PLANNING COURT)
THE HON MR JUSTICE HOLGATE
[2015] EWHC 3437 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/06/17

Before :

LORD JUSTICE PATTEN
and
LORD JUSTICE HICKINBOTTOM

- -

Between :

THE GOVERNMENT OF THE REPUBLIC OF FRANCE

Claimant

- and -

THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA

Defendant

- and -

(1) THE CROWN ESTATE COMMISSIONERS
(2) MR AND MRS JONATHAN HUNT

Interested Parties

- -
- -

Paul Stinchcombe QC and **Ned Helme** (instructed by **Edwin Coe LLP**) for the **Claimant**
Tom Cosgrove QC and **Robert Williams** (instructed by **Royal Borough of Kensington and Chelsea Legal Department**) for the **Defendant**
The First Interested Party did not appear and was not represented
Paul Brown QC (instructed by **Berwin Leighton Paisner**) for the **Second Interested Parties**

Hearing date: 16-17 May 2017

- -

Approved Judgment

Lord Justice Hickinbottom:

Introduction

1. This application concerns 10 Kensington Palace Gardens ("10 KPG"), a Grade II listed building, the freehold of which is owned by the First Interested Party ("the Crown Estate") subject to a long lease held by the Second Interested Parties ("the Developers"). The building next door, 11 Kensington Palace Gardens ("11 KPG"), is also owned by the Crown Estate, subject to a long lease held by the Government of the Republic of France ("the Claimant"). It is occupied by the French Ambassador, as her official residence.

2. The Developers wish to redevelop 10 KPG by, amongst other things, excavating several subterranean levels; and, to that end, over the last ten years, they have made a number of applications for planning and listed building consents which have reflected the evolving proposed development. In August 2008, planning permission and a listed building consent were granted to the Developers by the Respondent local planning authority ("the Council"), for change of use to residential and works designed to restore the property to that use, including basement excavation to five storeys. In November 2010, in respect of a revised scheme with fewer subterranean storeys, the Council granted both a non-material planning permission amendment application and another listed building consent.

3. In this claim, the Claimant seeks judicial review of two certificates issued in April 2015 by the Council – under section 192 of the Town and Country Planning Act 1990 ("the TCPA"), and section 26H of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act"), respectively. To an extent, the scope of these certificates is in issue; but it is the Council's case that it certified that, as at February 2015, the balance of the development/works authorised by the 2008 planning permission and the later listed building consent may be lawfully carried out, because the planning permission and that consent have been lawfully implemented.

4. I pause there to note that the Claimant's real complaint is about the merits of the decisions with regard to planning and listed building consents for the proposed project at 10 KPG; and especially the adverse effect that the development/works will have upon its ability to conduct the mission's affairs which are dependent upon the facilities at the Ambassador's residence. It considers that insufficient weight has been given to that effect, particularly in the light of article 22(2) of the Vienna Convention on Diplomatic Relations (to which both the United Kingdom and France are signatories) which imposes a special duty on the receiving state to take all appropriate steps "to prevent any disturbance of the peace of the mission or impairment of its dignity". However, in this application, we are concerned with the lawfulness of the two certificates to which I referred, which is dependent upon, not planning merits, but whether, in all the circumstances, the Council had the power to issue those certificates in the form that it did.

5. On 27 November 2015, Holgate J, with minor exceptions, refused the Claimant's application for permission to proceed with a judicial review of those certificates. On 21 April 2016, upon consideration of an application for permission to appeal, Laws LJ rather granted permission to apply for judicial review under CPR rule 52.8(5), and

retained the claim in this court under CPR rule 52.8(6). Thus, the claim for judicial review is now before us. It is resisted by both the Council and the Developers.

6. Before us, Paul Stinchcombe QC and Ned Helme have appeared for the Claimant, Tom Cosgrove QC and Robert Williams for the Council, and Paul Brown QC for the Developers.

The Law

7. Section 57(1) of the TCPA provides that, generally, planning permission is required for the carrying out of any "development" of land, defined in section 55 to include any building operations "in, on, over or under land", and any material change in use of buildings or land. Where development is carried out without such permission, then there are various enforcement procedures for breach of planning control which may be taken against the developer and/or the owner.

8. Section 91 of the TCPA (as amended by section 51 of the Planning and Compulsory Purchase Act 2004) provides that every planning permission granted shall be subject to a condition that the development to which it relates must be "begun" not later than the expiration of three years beginning with the date on which permission is granted, or such other period as the relevant planning authority may direct. If there is non-compliance with that condition, the benefit of the permission will be lost.

9. For these purposes, section 56 deals with, "Time when development begun". Section 56(1) provides that, where, as in this case, "development of land" consists of both the carrying out of operations and a change of use, it shall be taken as "initiated" at the earlier of the time when the operations are "begun" and the time when the new use is instituted. This application focuses upon the former.

10. Section 56(2) provides that, for the purposes of section 91:

> "… development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out."

"Material operation" is defined in section 56(4) to include any work of construction in the course of erection of a building, any work of demolition of a building and the digging of a trench which is to contain the foundations of a building. Section 56(4) is not exhaustive: development may be begun by material operations not included in that list (see Field v First Secretary of State [2004] EWHC 147 (Admin) at [46] per Sullivan J). However, where material operations contravene planning conditions, they are unlawful and cannot properly be treated as commencing development authorised by the permission (FG Whitley & Sons v Secretary of State for Wales (1992) 64 P&CR 296: the so-called "Whitley principle" and its exceptions were helpfully considered by Richards LJ in Greyfort Properties Limited v Secretary of State for Communities and Local Government [2011] EWCA Civ 908 at [6]-[9]).

11. Section 191 of the TCPA (introduced by section 10 of the Planning and Compensation Act 1991) provides a mechanism by which a person may ascertain whether an existing use or development of buildings and land is lawful. So far as

material to this application, under the heading "Certificate of lawfulness of existing use or development", it provides:

> "(1) If any person wishes to ascertain whether—
>
> (a) any existing use of buildings or other land is lawful;
>
> (b) any operations which have been carried out in, on, over or under land are lawful; or
>
> (c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,
>
> he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.
>
> (2) For the purposes of this Act uses and operations are lawful at any time if—
>
> (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and
>
> (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
>
> (3) …
>
> (4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect [i.e. "a section 191 certificate"]; and in any other case they shall refuse the application.
>
> (5) A certificate under this section shall—
>
> (a) specify the land to which it relates;
>
> (b) describe the use, operations or other matter in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);
>
> (c) give the reasons for determining the use, operations or other matter to be lawful; and

(d) specify the date of the application for the certificate.

(6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed.

(7) …"

In this judgment, references to "section 191" are to that section of the TCPA.

12. Section 192 of the TCPA 1990 (amended in form, but deriving from the established use certification procedure in section 94 of the Town and Country Planning Act 1971) deals with circumstances in which there may be doubt as to whether planning permission is required. It provides, under the heading "Certificate of lawfulness of proposed use or development", as follows:

"(1) If any person wishes to ascertain whether—

(a) any proposed use of buildings or other land; or

(b any operations proposed to be carried out in, on, over or under land,

would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question.

(2) If, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect [i.e. "a section 192 certificate"]; and in any other case they shall refuse the application.

(3) A certificate under this section shall—

(a) specify the land to which it relates;

(b) describe the use or operations in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);

(c) give the reasons for determining the use or operations to be lawful; and

(d) specify the date of the application for the certificate.

(4) The lawfulness of any use or operations for which a certificate is in force under this section shall be conclusively presumed unless there is a material change, before the use is

> instituted or the operations are begun, in any of the matters relevant to determining such lawfulness."

In this judgment, references to "section 192" are to that section of the TCPA.

13. The references to "use" and "operations" in sections 191 and 192 of course chime with the definition of "development" in section 55 of the TCPA, and thus with the general requirement in section 57 to obtain planning permission for "development".

14. The general requirement for planning permission – and the provisions of sections 191 and 192 of the TCPA – equally apply where the building which is the subject of the development or works is listed as a building of special historic or architectural interest.

15. However, in addition, listed buildings are also subject to their own regime, found primarily within the Listed Buildings Act. Chapter 1 of that Act provides for the listing of buildings of special architectural or historic interest. Chapter 2 concerns "Authorisation of works affecting listed buildings". Within that chapter, section 7(1) provides that:

> "Subject to the following provisions of this Act, no person shall execute or cause to be executed works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorised."

Works to a listed building are consequently "lawful" if, and only if, (i) they would not "affect its character as a building of special architectural or historic interest" or (ii) they are "authorised"; and, generally, "lawfulness" for the purposes of the Act is thus defined. Section 8 provides for authorisation for such works in the form of a written consent for the local planning authority or the Secretary of State, and, in the case of demolition, the added requirement of notification to the Royal Commission on the Historical Monuments of England. Section 9 makes it an offence to contravene section 7.

16. Section 10 provides that application for consent shall be made to the local planning authority, and it provides for the making of regulations with regard to the form of applications etc. Section 17 enables an authority to impose conditions on the grant of a listed building consent: and section 18, reflecting section 91 of the TCPA, provides that every listed building consent must include a condition that the work to which it relates must be begun within three years of the date of grant or such other period as the authority directs.

17. In respect of existing development, there is no equivalent to section 191 of the TCPA. Section 8(3) of the Listed Buildings Act gives a local planning authority power to grant consent for works already done for the demolition of a listed building or for its alteration or extension executed without prospective consent under section 8(1) or (2); but such consent only takes effect from the date of authorisation, and it does not have retrospective effect.

18. Section 26H (inserted by section 61 of the Enterprise and Regulatory Reform Act 2013) to an extent reflects the forward-looking section 192 of the TCPA. Under the heading "Certificate of lawfulness of proposed works", it provides:

> "(1) A person who wishes to ascertain whether proposed works for the alteration or extension of a listed building in England would be lawful may make an application to the local planning authority specifying the building and describing the works.
>
> (2) For the purposes of this section works would be lawful if they would not affect the character of the listed building as a building of special architectural or historic interest.
>
> (3) If on an application under this section the local planning authority are provided with information satisfying them that the works described in the application would be lawful at the time of the application they must issue a certificate to that effect [i.e. "a section 26H certificate"]; and in any other case they must refuse the application.
>
> (4) The certificate under this section must –
>
> (a) Specify the building to which it relates;
>
> (b) Describe the works concerned;
>
> (c) Give the reasons for determining that the works would be lawful; and
>
> (d) Specify the date of issue of the certificate.
>
> (5) Works for which a certificate is issued under this section are to be conclusively presumed to be lawful, provided that –
>
> (a) They are carried out within 10 years beginning with the date of issue of the certificate, and
>
> (b) The certificate is not revoked….".

In this judgment, references to "section 26H" are to that section of the Listed Buildings Act. The relevant parts of the section were effective from 6 April 2014 (see article 3(b) of the Enterprise and Regulatory Reform Act 2013 (Commencement No 6, Transitional Provisions and Savings) Order 2014 (SI 2014 No 416)).

19. Section 26I of the Listed Buildings Act makes provision for regulations to be made prescribing the manner in which an application under section 26H must be made. The current procedure is set out in the Planning (Listed Buildings) (Certificates of Lawfulness of Proposed Works) Regulations 2014 (SI 2014 No 552). Under regulation 2, an application must be made to the relevant local planning authority, and be accompanied by (amongst other things) "a statement explaining why the applicant believes the proposed works would not affect the character of the listed building or

buildings as a building or buildings of special architectural or historic interest…" (regulation 2(1)(d)(iii)).

The Facts

20. The factual background, including the planning history, is fully set out in Holgate J's judgment, particularly at [8]-[29]. For the purposes of the application, I can deal with it more briefly.

21. 10 KPG is a four-storey building with a basement, originally built in the 1840s as a private residence, which it remained until 1941 when the Crown Estate granted a lease to the Russian Soviet Mission. It was Grade II listed in 1969, because of its architectural merit. The mission relocated in the early 2000s, since when the building has been empty.

22. The Crown lease is now held by the Developers, who wish to develop the property and restore it to residential use. To that end, in 2005 and 2006 planning and listed building consents were granted by the Council. The proposed works included the provision of a new subterranean space for leisure facilities including a swimming pool.

23. On 14 August 2008, on the application of the Developers, the Council granted planning permission for development described as "renovation, alteration and extension to the existing dwelling, including basement excavation [to five-storey depth] and garden landscaping", subject to the sixteen conditions set out in a schedule ("the 2008 planning permission"). Several conditions set out matters for which the Council's approval was required before the development could lawfully be commenced. Furthermore, condition 1, made under section 91 of the TCPA, was that the development should be "begun before the expiration of three years from the date of this permission": in other words, the planning permission would expire on 14 August 2011 unless, by that date, it had been implemented.

24. That same day (14 August 2008), the Council also granted a listed building consent reference LB/08/01323 ("Consent LB/08") for works as set out in a schedule, again described in terms of "renovation, alteration and extension to the existing dwelling, including basement excavation and garden landscaping". The consent was subject to thirteen conditions. Condition 1 imposed the section 18 statutory time limit of three years for the commencement of the works authorised.

25. The consent was accompanied by a Summary of Reasons for Decision, which quoted from the observations of the Council's Conservation and Design Officer upon which the decision was based, which said:

> "It is considered that the works proposed will not be detrimental to the special architectural and historic character of the building, and are therefore acceptable."

The Summary of Reasons itself said:

> "You are advised that this application was not considered to harm the special architectural character or historic interest of the listed building…".

26. In September 2010, the Developers made an application under section 96A of the TCPA for non-material amendments to the 2008 permission, and a further application under section 10 of the Listed Buildings Act for listed planning consent, in respect of a revised scheme, with only three below ground storeys and a reduction in extent of the basement levels. On 7 October 2010, solicitors on behalf of the Claimant lodged objections to the listed building application, expressing concern about the way in which the proposed project would adversely impact upon the occupational use, amenity and quiet enjoyment of neighbours (including the Claimant itself), "particularly in the diplomatic environment which has famously existed for several decades in Kensington Palace Gardens". However, in November 2010, the Council approved both applications. As a result, the planning permission was varied; and, on 1 November 2010, a new listed building consent reference LB/10/02900 ("Consent LB/10") was issued.

27. Consent LB/10 was in the following terms:

> "The… Council, hereby consents to the works to the Listed Buildings referred to in the under mentioned Schedule, subject to the conditions set out therein and in accordance with the plans submitted, save insofar as may otherwise be required by the said conditions…".

The "development" was described in a schedule as "Amendments to listed building consent LB/08/01323 (Reduction in scope of the scheme) (Listed Building Consent Only)", those amendments being more particularised in the attached "Summary of Reasons for Decision". That Summary of Reasons included a quotation from the report of the Council's Conservation and Design Officer in the same terms as his observations in respect of the 2008 application; and it again confirmed that, in the Council's view, the 2010 application "was not considered to harm the special architectural or historic interest of the listed building…".

28. The thirteen conditions in Consent LB/08 were not replicated in Consent LB/10. In the latter, there were only two, described in the grant itself as "Full conditions". Condition 1 required the works to be begun "before the expiration of three years from the date of this consent". Condition 2 required the work to be carried out exactly in accordance with the details shown on identified approved plans.

29. On 3 February 2011, solicitors on behalf of the Claimant and the Government of India (which has an adjacent mission) wrote to the Council asking it to revoke the 2008 planning permission under section 97 of the TCPA, because the ambassadors and their advisers had been unaware of the application at the time and the development was unacceptable because of the particular sensitivities of the location. The Council did not accede to that request.

30. On 10 February 2011, the Developers applied to the Council to extend the time limit for commencement of the development under the 2008 planning permission, an application to which the Claimant and the Indian and Lebanese Governments

objected. The application was withdrawn, possibly because the Developers thought that the Council would likely refuse it.

31. In July 2011, the Developers applied for a discharge of the 2008 planning permission pre-commencement conditions, on the basis of compliance; and all were discharged that month.

32. As well as writing to the Council in respect of the 2008 planning permission and the listed building consents, the Claimant's solicitors were in communication with the Crown Estate which, as the landlord of 10 KPG, also had to give consent under the lease for any works. On 15 July 2011, the Crown Estate's agents, Cluttons, wrote to the Claimant's solicitors saying that discussions with the Developers were still on-going, prior to consultation which they proposed to conduct; and no consent under the lease for those works had as then been given. The letter, which was open copied to the Crown Estate but not the Council, continued:

> "However, as you may be aware, the property at 10 KPG is in need of repair, and whilst the Crown Estate have not consented to the overall scheme of additions at the property, the lease on 10 KPG does require the lessee to undertake a number of internal repair and refurbishment works to protect the fabric of the building. These works are a requirement of the lease and it has been agreed that Mr Hunt will undertake some of these works in August. These works are internal works only and should cause no disturbance to neighbours whatsoever, as they generally involve the removal of some internal partitioning, a staircase, strip out works and some lift investigation works which involved the excavation of a trial pit in the basement for the proposed lift shaft. These internal works have already been approved by the Crown Estate as a condition of the original 2005 lease and also form part of the planning and listed building consent which Mr Hunt separately obtained from [the Council] Planners. The undertaking of these works could possibly have the impact of implementing the planning consent for the scheme. However, the Crown Estate have taken comfort from the knowledge that irrespective of planning consent possibly being implemented with [the Council], Mr Hunt still requires separate Crown Estate consent, such consent would only be forthcoming in the event the Crown Estate are satisfied technically and that the concerns of the neighbours have been reasonably addressed.
>
> I can assure you these internal works are totally separate to the overall development proposals, and as they represent internal repair and investigation works, should cause no disturbance/disruption whatsoever.
>
> In the meantime the Crown Estate would like to arrange a meeting with Mr Hunt's advisers and the neighbouring residencies in order that they can appreciate at first hand the concerns that have been raised previously. Such a meeting will

> help inform the consultation and enable the relevant parties to address the issues highlighted as they prepare details on construction methodology and associated detailing. I will be in contact in this respect if this proposal is of assistance to you. The full consultation process will follow shortly afterwards when all the detailed information and methodology has been received...".

33. In a three-week period from 22 July 2011, the Crown Estate having granted a limited licence under the lease, the Developers carried out certain works at 10 KPG, all internal, comprising an 8m³ excavation in the basement to create a void to accommodate a lift shaft, and removal of various internal walls and a staircase, all in accordance with the plans approved as part of the 2008 planning permission ("the July 2011 works"). On 8 August 2011, consultants employed by the Developers (Gerald Eve LLP ("Gerald Eve")) wrote to the Council confirming that "works on site have now commenced", and saying that, although documentation as to the works that had been performed could be provided, if the Council wished to inspect the works, then a full site inspection could be arranged. The Claimant was unaware that those works had been carried out.

34. On 12 February 2015, the Developers made applications to the Council for certificates under section 192 and section 26H. The applications were made together, and were accompanied by a covering letter from Gerald Eve which explained that the purpose of the application for a certificate of lawful proposed use and development was to:

> "… seek confirmation that works have been undertaken sufficient to have implemented [the 2008 planning permission] and [Consent LB/10] and the remainder of the works granted by these permissions can be lawfully completed and thereafter the building can be lawfully occupied as a residential dwelling…".

After setting out the planning history, under the heading "Physical works", it described the July 2011 works and stated that they were "in accordance with the approved plans and the conditions applying to these consents [i.e. the 2008 planning permission and Consent LB/10]". The letter said that the July 2011 works were considered to be sufficient to have implemented those consents.

35. In addition, the application was accompanied by the following:

i) Copies of the Council's decision notices confirming that the pre-commencement conditions had been discharged.

ii) A statutory declaration by Stuart Adolph, who worked for an agent of the Developers and who confirmed that, in 2011, he was "responsible for overseeing the implementation of the [2008 planning permission] and [Consent LB/10]". Mr Adolph confirmed that he had, on 12 August 2011, taken the photographs of the July 2011 works which were attached to a second statutory declaration of a Daniel Farrand (the Developers' solicitor), which was also sent to the Council with the applications.

iii) A legal opinion from Richard Harwood QC. The opinion is largely consistent with the stance now taken by the Council on the various legal issues – and no doubt it informed that stance – but it cannot, of course, be relevant to the correct construction of the relevant statutory provisions. I do not propose referring to it further.

36. On 2 April 2015, the Council's Director (Planning and Borough Development), under delegated powers and with the benefit of an officers' report, granted a certificate, headed "Certificate of Lawfulness of Proposed Works", in the following terms:

> "The… Council hereby certify that on 13/02/2015, the works described in the First Schedule to this certificate in respect of the Listed Building specified in the Second Schedule to this certificate and edged black on the plan attached to this certificate, are lawful within the meaning of section 26H(2) of [Listed Buildings Act] for the following reason:
>
> The submitted evidence, in the absence of anything contradictory, demonstrates that in all likelihood the works described therein were sufficient in their nature to constitute a lawful implementation of [Consents LB/08 and LB/10]."

The First Schedule stated:

> "Confirmation that [Consent LB/08] (renovation, alteration and extension to the existing dwelling, including basement excavation and garden landscaping), and [Consent LB/10] have been lawfully implemented."

37. It will be noted that this certificate gave confirmation that not only Consent LB/10 but also Consent LB/08 had been lawfully implemented, albeit the application before the Council had only asked for a certificate to be issued as regards the continuing validity of the later in time. When this matter was raised by Holgate J, all parties agreed that the section 26H certificate went outside the ambit of the application before the Council; and the judge ordered the Council to amend the certificate so as to remove references to Consent LB/08 and substitute the amended certificate for the original version on the planning register. That order is not the subject of any appeal.

38. On 24 April 2015, the same Director, again under delegated powers and with the benefit of a report, issued a certificate under section 192, headed, "Certificate of Lawful Proposed Use or Development", in the following terms:

> "The… Council hereby certify that on 12/02/2015 the use/operations/matter described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged black on the plan attached to this certificate, was lawful within the meaning of section 192 of [TCPA] for the following reason:
>
> The submitted evidence, in the absence of anything contradictory, demonstrates that in all likelihood the works

> described therein were sufficient in their nature to constitute a lawful implementation of Planning permission PP/08/01322."

The First Schedule read:

> "Confirmation that Planning permission PP/08/01322 (renovation, alteration and extension to the existing dwelling, including basement excavation and garden landscaping) has been lawfully implemented and the remainder of the works granted by this permission can be lawfully completed thereafter that the building can be lawfully occupied as a residential dwelling as shown on submitted drawing…"

39. It is, of course, those two certificates which the Claimant now challenges.

Grounds of Challenge

40. Before us, Mr Stinchcombe relied upon seven grounds of challenge, namely Grounds 1A, 1B, 2A, 2B, 3, 4 and 5. Grounds 1B and 2B are new, and they require permission to amend and to proceed. Laws LJ gave permission to proceed in relation to the other five grounds.

41. For the sake of completeness, I should refer to other grounds, not now before this court.

    i) As Ground 6, the Claimant submitted that, in breach of Article 40(7) and (10) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015 No 595), the Council failed promptly to enter the section 192 certificate on the Council's Planning Register. Holgate J granted permission in respect of this ground, and upheld the substantive challenge, making a declaration that, between 9 May and 23 June 2015, the Council failed to comply with those regulations by failing to enter and make available for public inspection on its planning register the section 192 certificate. That ground is not the subject of any appeal.

    ii) Before us, Mr Stinchcombe abandoned several strands of Ground 5 as they were pursued before Holgate J, conceding that the pre-commencement conditions attached to the 2008 planning permission were discharged; the discharge of two conditions (conditions 7 and 12) came within the scope of the first exception to the Whitley principle, as identified in Greyfort (see paragraph 10 above); that there was sufficient evidence that those works were more than *de minimis* and performed prior to August 2011; and that the conditions attached to Consents LB/08 and LB/10 were not breached by those works. Of those abandoned sub-grounds, I need say nothing; except that I see the wisdom in not pursuing them. I deal with the remaining sub-grounds below (see paragraphs 42 and 114-119).

42. The extant grounds are as follows.

    Ground 1A: The certificates issued under section 192 and section 26H were *ultra vires*. Under those provisions, the Council only had power to issue certificates of

lawfulness of *proposed* use/development, but the certificates in this case purported to certify the lawfulness of *existing* development. Mr Stinchcombe submitted that the section 192 and section 26H procedures did not allow for an applicant to have certified, or otherwise establish, the lawfulness of existing development.

Ground 1B: In any event, the section 26H certificate was *ultra vires*, because section 26H(2) restricts the ambit of section 26H, such that a certificate can only be issued if the Council is satisfied that the proposed alteration or extension of a listed building would not affect the character of that building as a building of special architectural or historic interest. The Council acted outside its powers by allowing the section to be used to test whether proposed works would be lawful because they fall within a listed building consent that had been implemented.

Ground 2A: The Council erred in law in granting the certificates because the works that had been carried out were not referable to the 2008 planning permission, but rather to the Developers' obligations under their lease with the Crown Estate.

Ground 2B: The Council erred in applying the test for implementation applicable for determining a section 192 certificate to the section 26H certificate. The tests are different.

Ground 3: The Council failed to take reasonable steps to obtain information required to give properly informed (and, thus, lawful) decisions on the applications for the certificates.

Ground 4: The Council's decision to issue the certificates was reached without any prior consultation with, or notification of the applications to, the Crown Estate or the Claimant, in breach of their legitimate expectation to be consulted upon and/or notified of the applications for the certificates.

Ground 5: Holgate J was wrong to conclude that Consent LB/10 was freestanding, and that, therefore, the conditions in Consent LB/08 did not apply after Consent LB/10 was issued. Consent LB/10 was not freestanding, but a mere amendment of Consent LB/08. Alternatively, if Consent LB/10 was freestanding, then the conditions in Consent LB/08 were incorporated or implied into it.

Ground 1A: The *Vires* of the Section 192 Certificate

43. I will deal first with the *ultra vires* argument as it applies to the section 192 certificate.

44. Having performed the July 2011 works, the Developers were not concerned with the lawfulness of those works *per se*. No enforcement action had been taken, or even suggested, in respect of those works, which were in any event only a very small proportion of the authorised works as a whole. Rather, the Developers wanted comfort that they could lawfully complete the development as described in the 2008 planning permission.

45. They considered that it would be lawful to complete those works in the future because they were still authorised by that planning permission, which was still extant because the performance of the July 2011 works within three years of the grant had

implemented that permission. Therefore, it was crucial for their application in respect of the lawfulness of the proposed works that the Council was persuaded that the works that comprised the development authorised under the 2008 planning permission had "begun" by 14 August 2011. In other words, they had to show that the July 2011 works were more than *de minimis* and lawful under the 2008 planning permission.

46. Mr Stinchcombe submitted that the Developers could not proceed as they did to achieve the comfort they sought. To obtain a section 192 certificate on this basis required an analysis of the lawfulness of the July 2011 works; and, he submitted, on a section 192 application the Council had no power to certify, or even determine, that existing works were lawful. The Developers ought to have made an application under section 191, for certification that the works they had performed in July 2011 were lawful. For the Developers' purposes, such a certificate would probably have been sufficient, he submitted, because it is likely that the Council's reasons for granting that certificate would have made clear that the 2008 planning permission had been implemented; and, therefore, the Developers could continue with the development in the knowledge that they were entitled to do so under the 2008 planning permission. However, if, after the section 191 application, there was any doubt as to the lawfulness of doing works to complete the balance of the development, then an application under section 192 could be made, on the back of the section 191 certificate that had been obtained.

47. I do not find these submissions compelling, for the following reasons.

48. One focus of the Claimant's submissions before Holgate J was the (uncontroversial) legal proposition that section 192 certificates could not certify the lawfulness of works that had already been carried out, coupled with the (controversial) factual proposition that the certificate in this case was *ultra vires* because it certified the July 2011 works.

49. However:

i) As I have described, the Developers had no discrete concern about the lawfulness of the existing, July 2011 works. Their concern was as to the lawfulness of the proposed, future works that comprised the balance of the development in the 2008 planning permission.

ii) Reflecting their substantive concern, the Developers' application was under, and only under, section 192. As well as the application form itself, Gerald Eve's covering letter made clear that the application was for, and only for, "a certificate of lawful *proposed* use and development" (emphasis added). It is true that Gerald Eve's covering letter said that the Developers sought confirmation that the works that had been undertaken were sufficient to have implemented the 2008 planning permission; but, on a fair reading of that letter, they clearly did not seek *certification* of the lawfulness of existing works, but were only setting out the basis upon which they said that the proposed works would be lawful, i.e. because the existing, July 2011 works implemented the 2008 planning permission of which the proposed works comprised the balance.

iii) The certificate was expressly issued under section 192, and was headed "Certificate of Lawful Proposed Use or Development". It certified that "the use/operations/matter described in the First Schedule hereto… was lawful

within the meaning of section 192…". The First Schedule confirmed that "Planning permission PP/08/01322 (renovation, alteration and extension to the existing dwelling, including basement excavation and garden landscaping) has been lawfully implemented and the remainder of the works granted by this permission can be lawfully completed and thereafter that the building can be lawfully occupied as a residential dwelling as shown on submitted drawing…". It is in my view clear from the face of that document, looked at as a whole, that that is not a certificate for existing works, but only for proposed works, namely the balance of the works required to complete the development authorised by the 2008 planning permission, the reference to the lawful implementation of that planning permission being part of the reasons for that certified conclusion.

iv) However, even if I am wrong in that firm view, and existing works are purportedly included in the certification, that part did not respond to the application which was under section 192 only, and is *ultra vires*; and would be severable, leaving a certificate of only proposed works.

For those reasons, I do not consider that that formulation of this ground has any force.

50. However, by the time of the hearing before this court, the focus had shifted. Mr Stinchcombe submitted that, even if the Council had not certified the lawfulness of existing works, in arriving at the certified conclusion that the proposed works would be lawful, it had unlawfully circumvented section 191. Section 191(1)(b) provides that, if a person wishes to ascertain whether any operations which have been carried out are lawful, then he may apply to the local planning authority for a certificate, which, by section 191(4), the authority must make if satisfied that the existing works are lawful. On the way to certifying the proposed works, the Council purported to make a finding that the existing, July 2011 works were lawful; but that is a finding that it could only make under section 191, and could not make under section 192.

51. This submission, if correct, would mean that lawfulness of existing works could only be proved by the obtaining of a section 191 certificate. But that is clearly not the case.

52. In my view, the submission is based upon a fundamental misunderstanding of section 191. It is section 191(2), and not section 191(1), which defines the scope of "lawful" operations, essentially in terms of operations which, at the relevant time, are not amenable to enforcement action. In particular, the lawfulness of existing works is not dependent upon the existence of a section 191(1) certificate, but only on satisfying the requirements of section 191(2). The section 191 certification process is merely evidential in nature: section 191(1), (4) and (6) taken together provide that, if that person obtains a section 191 certificate in respect of particular operations, then the lawfulness of those operations "shall be conclusively presumed". The advantage of such a provision to a prospective developer is both substantial and obvious; but it is a *non sequitur* to suggest that this is the only way in which a person may prove lawfulness for these purposes. Neither section 191(1) nor (2) expressly restricts how a person might prove lawfulness for these purposes; and no implied restriction is warranted. Indeed, the wording of section 191(1) ("If any person wishes to ascertain… he *may* make an application…) makes clear that the section 191

certification procedure is merely an option, not the mandatory means of proving the lawfulness of existing use or development.

53. Furthermore, for someone in the position of the Developers in this case, a section 191 certificate would or might not be sufficient to show that the proposed works will be lawful: simply because existing works are lawful and certified as such does not necessarily mean that the completion of a development of which those works are said to form a part will be lawful. I accept that, in those circumstances, the existing works may well be found to be lawful because the local planning authority is satisfied that they are referable to a grant of planning permission, which has been lawfully implemented; but the authority may consider those works to be lawful for an unrelated reason, e.g. they are so minor that they neither implement an existing planning permission nor require planning permission, or otherwise fall under permitted development rights. Therefore, even if a section 191 certificate is granted, an applicant developer may still be required to apply – or, at least, reasonably wish to apply – for a section 192 certificate. In the circumstances that the Developers found themselves in this case, proceeding by way of section 191 is a route that would not be optimal or necessarily determinative of the question to which they really want a response, which is in relation to the proposed future works.

54. The construction which I favour, which I consider to be unambiguous on the face of section 191, therefore has significant practical advantages. Indeed, I would have grave doubts as to whether Parliament, having provided the section 192 mechanism, could have intended that a developer, whose ability lawfully to perform future works is dependent upon showing that some works have already been performed in accordance with a grant of planning permission, must use section 191 first; even where it was possible, likely or even certain that the response to such an application would not be helpful in determining the issue of whether further works under an earlier planning permission would be lawful.

55. For those reasons, in respect of the section 192 certificate, the *vires* ground, Ground 1A, fails. Ground 1B does not apply to that certificate.

Grounds 1A and 1B: The *Vires* of the Section 26H Certificate

56. In relation to the section 26H certificate, within Ground 1A, Mr Stinchcombe made a parallel submission; but it would be convenient to deal, first, with Ground 1B, a new submission as to why the Council acted *ultra vires* in making that certificate. The ground has arisen as follows.

57. As I have described, under section 26H, a person who wishes to ascertain whether proposed works for the alteration or extension of a listed building would be "lawful" may make an application for a certificate to that effect. Section 26H(2) provides:

> "For the purposes of this section works would be lawful if they would not affect the character of the listed building as a building of special architectural or historic interest."

58. Before Holgate J, it was common ground that a person could rely on section 26H to obtain a certificate as to whether works which require listed building consent fall within the ambit of a consent previously granted because it had been implemented.

The Claimant expressly declined to argue that section 26H(2) has the effect of restricting the use of section 26H to cases where the only issue to be determined is whether works would affect the character of the listed building as a building of special architectural or historic interest (see judgment of Holgate J at [41]-[42] and [47(iv)]). However, in his judgment (at [42]), Holgate J noted that it might be argued that section 26H(2) did have this restrictive effect; although he considered that that might render the provision "rather less useful than section 192 of the TCPA", as, presumably, it would mean that a person in the position of the Developers in this case would only be able to obtain comfort that their listed building consent was still effective – because it had been implemented – in some less convenient way, e.g. by obtaining a High Court declaration to that effect.

59. Although this was not a point taken by the Claimant in its original grounds of challenge, or in its application for permission to appeal, it is a point taken before us. Mr Stinchcombe submits that the ambit of section 26H is restricted in the manner mooted by Holgate J; and, in proceeding on the basis that it did, the Council strayed outside its statutory powers. That new ground requires permission to amend and permission to proceed.

60. The ground turns on the true construction of section 26H(1) and (2). Mr Cosgrove for the Council submitted that, like section 192, section 26H(1) enables a person to ascertain whether proposed works for the alteration or extension of a listed building would be "lawful". As reflected in section 7 (see paragraph 15 above), under the scheme of the Listed Buildings Act, works for the alteration or extension of a listed building are lawful in two circumstances, namely (i) where the works would not affect its character as a building of special architectural or historic interest, and (ii) where the works are "authorised" as a result of written consent by the relevant local planning authority, and the works have been subsequently implemented in accordance with such consent and any conditions attached to it. There is nothing in section 26H(1) to restrict the scope of "lawfulness"; nor, he submitted, does section 26H(2), properly construed, restrict that scope. It merely confirms that works executed in certain circumstances would be "lawful" for these purposes; but the language is not restrictive, and it does not exclude the possibility that works may be lawful in other circumstances. It provides a mere example that falls within the scope of lawfulness, provided for the avoidance of doubt.

61. In support of that construction, Mr Cosgrove relied upon the following:

i) He submitted that Field (cited in paragraph 10 above) provides support by way of analogy. In that case, at [41] and following, Sullivan J held that the list of "specified operations" in section 43(2) of the Town and Country Planning Act 1971 (now section 56(4) of the TCPA) were not exhaustive of the "specified operations" which might be carried out to "begin" development for the purposes of section 43(1) of the 1971 Act (now section 56(2) of the TCPA).

ii) The Claimant's restrictive interpretation would lead to the "absurd result" that an applicant proposing works for the alteration or extension of a listed building which had been authorised pursuant to a written consent – and which could, consequently, be undertaken without committing an offence – would be denied the ability to obtain a "Certificate of lawfulness of proposed works" under the Listed Buildings Act despite the proposed works being entirely lawful. At the

very least, he submitted, as Holgate J noted at [42], the restrictive interpretation would severely restrict the usefulness of the section 26H procedure.

62. Mr Stinchcombe, praying in aid the maxim "*expressio unius est exclusio alterius*" ("to express one thing is to exclude another"), submitted that, looking at section 26H in the context of the Listed Buildings Act regime as a whole, the definition of "lawful" in section 26H(2) is exhaustive.

63. To clear the decks, I should say at the outset that, on this issue of construction, I did not find the two authorities to which we were referred helpful.

i) By reference to Shimizu (UK) Limited v Westminster City Council [1997] 1 WLR 168, Holgate J (at [42]) suggested that the absence of any reference in section 26H(2) to works of demolition might be relevant, because, under section 8 of the Listed Buildings Act, the authorisation of such works involves not only the written consent of the local planning authority or Secretary of State, but also the notification of the Royal Commission (see paragraph 15 above). However, I am unconvinced that there is any independent significance in that point. Demolition of a listed building is bound to affect its character as a building of special architectural or historic interest for which it was listed, whilst works of alteration or extension may or may not have that effect; hence the qualification which applies to those words for the purposes of section 7 (see Shimizu at page 181B per Lord Hope of Craighead). Section 26H(2), whether exhaustively or not, simply includes works that are "lawful" because they do not affect the relevant character of the listed building and excludes those that do.

ii) As I have mentioned, Mr Cosgrove referred to Field as a case which, he submitted, supported his case by way of analogy. However, I do not consider it is of any assistance in the proper construction of section 26H(2). It concerned the construction of a different part of the statutory scheme – and, if the list of specified operations had been construed as exhaustive, that would have meant that some operations (e.g. those involving engineering works) would not have "begun" for the purposes of time limits even when completed. Unsurprisingly, Sullivan J concluded that Parliament could not have intended that the carrying out of a listed specified operation could be the only way in which development could be begun for time limit purposes (see [43]). The statutory provisions with which we are concerned are so different that, in my view, that analysis and conclusion is of no assistance, even by way of analogy.

64. Nor do I consider that the *expressio unius* maxim is of any substantial assistance. I agree with the learned authors of Cross on Statutory Interpretation (3rd edition (1995), Butterworths) at page 140 (quoted in Bennion on Statutory Interpretation (6th edition (2013), LexisNexis UK) at section 390):

> "… it is doubtful whether the maxim does more than draw attention to a fairly obvious linguistic point, *viz* that in many contexts the mention of some matters warrants an inference that other cognate matters were intentionally excluded."

65. In respect of the substantive arguments, for the following reasons, I prefer the submissions of Mr Stinchcombe.

66. Mr Cosgrove submitted that, in effect, section 26H mirrored section 192. I accept that section 192 and section 26H have some similarities, in that they both allow individuals to apply to a local planning authority for confirmation, by way of certification, that something they wish to do will be "lawful". However, there are differences.

67. Although it has been the subject to amendment, the process for certifying the lawfulness of existing use and development has been part of the Town and Country Planning Acts since 1971 (see paragraph 12 above). The certification process found in section 26H of the Listed Buildings Act was not originally part of that Act, but was introduced in 2014 (see paragraph 18 above). What is now section 192 was not simply, in fact, transposed into the Listed Buildings Act.

68. Furthermore, there are substantial textual differences. For example, the focus of section 192 is on the question of whether the proposed works would be lawful "if instituted or begun at the time of the [section 192] application" (section 192(2)). A section 192 certificate is not time limited; although by section 192(4), the conclusive presumption of lawfulness accompanying the certificate ceases if there is a material change in any matter relevant to determining lawfulness before the relevant use is instituted or operations are begun. However, under section 26H, unless revoked, a certificate is conclusive proof of "lawfulness" provided the works are carried out within ten years of the date of issue of the certificate (section 26H(5)). There is no reference to change in material circumstances.

69. Most importantly for the purposes of this claim, as Holgate J remarked (see [42]), the definition of "lawful" in section 192 (set out in section 191(2), quoted in paragraph 11 above) is significantly different from that in section 26H (set out in paragraph 26H(2), quoted in paragraph 18 above). First, it is noteworthy that the definition in section 191(2) expressly applies throughout the TCPA, and is not expressed as a definition "for the purposes of [a particular section]". In my view, the opening words of section 26H(2) ("For the purposes of this section…") are telling. Second, whilst on its face section 26H(2) is restricted to one category of lawfulness within section 7 of the Listed Buildings Act, section 191(2) defines "lawful" in terms of an inability to take enforcement action in respect of the relevant use or operation "whether because they did not involve development or require planning permission or because the time for enforcement action has expired *or for any other reason*".

70. It is difficult to consider that this difference in terminology, and approach, is anything but deliberate. In enacting section 26H, it would have been easy for Parliament to have indicated that a regime parallel to section 192 was intended – and, in my view, it is telling that it did not. It is clear that section 26H is not intended to replicate section 192.

71. It would have been equally simple for Parliament to have indicated that section 26H(2) provided only an example of lawfulness – particularly as the only other way in which works to a listed building could be "lawful" is if they are authorised under the Listed Buildings Act – and, again, in my view it is telling that it did not. Indeed, having effectively defined "lawfulness" of works for the purposes of the Listed

Buildings Act in section 7 to include both works that would not affect the listed building's character as a building of special architectural or historic interest" and works that are authorised under section 8 (see paragraph 15 above), it would be particularly strange not to have given an exhaustive definition of "lawfulness" in section 26H in those terms if that is what had been intended. To give a non-exhaustive example would not only be otiose, but positively misleading.

72. However, I am quite satisfied that this strained construction pressed by Mr Cosgrove is not the true interpretation of section 26H(2). In my view, in the context of proposed works, section 26H(2) exhaustively defines "lawful" for the purposes of section 26H, i.e. it can only be used to apply for a certificate that proposed works to a listed building would not affect its character as a building of special architectural or historic interest. That is the natural reading of the words used; and, in my view, there is nothing to suggest that the words used do not have their ordinary meaning.

73. I accept, as did Holgate J, that the restrictive construction which I favour may not be optimal for those who wish to have confirmation that a listed building consent that they have obtained has been implemented, such that they have continuing authorisation to perform the works covered by that consent. But any apparent "inconvenience" has to be seen in its proper historical context.

74. Until April 2014, where an individual proposed to perform works of demolition, alteration or extension on a listed building, he had no option but to obtain a listed building consent. There was no scheme for prospective certification of any sort. Notably in the context of this application, where that individual had had the benefit of a listed building consent, and wished to have comfort that that consent had been implemented, there was no specific provision to enable him to do so. Of course, where the works the subject of the listed building consent were the same or substantially similar to works comprised within a parallel grant of planning permission, a section 192 certificate might in practice have given sufficient comfort. The local planning authority might also have been prepared to confirm that it was satisfied that works had been performed such as to implement the consent. That would not have the attraction of the conclusive presumption now in section 26H(5), but it may have been sufficient for the developer's purposes.

75. On the basis of the construction I favour, the position of such individuals has not changed greatly. However, in a case in which the local planning authority takes the view that listed building consent should be given because the proposed works have no material effect upon the character of the listed building as a building of special architectural or historic interest, it is now open to the individual to apply for a section 26H certificate on the basis that that has not changed.

76. The scope of the listed building provisions is very wide, and cover any alteration in a listed building, no matter how small (*cf* the position with regard to planning permission). It seems to me that the section 26H certification procedure is primarily aimed at the many cases where alterations are so small that they could not arguably affect the character of the building as one of special architectural or historic interest. It offers a procedure whereby those who wish to make relatively minor alterations to, say, their kitchen, can avoid the need to make a full application for listed building consent. Hence the (exclusive) focus of section 26H upon whether the proposed works affect that character.

77. Mr Stinchcombe relied upon regulation 2(1)(d)(iii) of the Planning (Listed Buildings) (Certificates of Lawfulness of Proposed Works) Regulations 2014, under which an application for a section 26H certificate must be accompanied by "a statement explaining why the applicant believes the proposed works would not affect the character of the listed building or buildings as a building or buildings of special architectural or historic interest…" (see paragraph 19 above). In construing section 26H, it is unnecessary to rely upon that subordinate legislation, as I consider the primary legislation sufficiently clear. However, that focus upon the effect that the proposed works would have upon the character of the listed building is certainly consistent with the interpretation of section 26H which I favour.

78. The Developers' application under section 26H was made on the basis that that section can be used to test whether proposed works would be lawful because they fall within a listed building consent that had been implemented. The Council determined it on that basis. For the reasons I have given, the Council exceeded its powers in doing so. Thus, Ground 1B is made good.

79. Turning to Ground 1A, the issue with regard to the section 26H certificate is narrow. Insofar as the Council made an intermediary finding that Consent LB/10 had been implemented – because the works comprised within it had been commenced within three years of its grant – the Council did not act unlawfully. However, in my view, Mr Stinchcombe's submission that the certificate on its face did not certify any future, proposed works has more force than its parallel argument made in respect of the section 192 certificate.

80. It is true that Consent LB/10 was headed "Certificate of Lawfulness of Proposed Works", and it purported to be a certificate that "the works described in the First Schedule to this certificate… are lawful within the meaning of section 26H(2) of [Listed Buildings Act]", that section of course being concerned with certifying proposed, future works. However, the First Schedule described the works thus:

> "Confirmation that [Consent LB/08] (renovation, alteration and extension to the existing dwelling, including basement excavation and garden landscaping), and [Consent LB/10] have been lawfully implemented."

Thus, in contradistinction to the section 192 certificate, the works were described only in terms of the lawful implementation of the consent, i.e. only in terms of past works. There is no reference to the future, proposed works, namely the balance of the works within the scope of the consent.

81. Mr Cosgrove submitted that these were essentially the reasons for the (implicit) certification of those future works; but, despite the heading of the document and its reference to section 26H, in the absence of reference to proposed works, I find it impossible properly to construe this as a certificate for any proposed works. On its face, the certificate referred to only past works.

82. Therefore, if it had not been *ultra vires* the Council on the basis of Ground 1B, I would have found it *ultra vires* on this ground in any event.

83. Mr Cosgrove and, particularly, Mr Brown submitted that, if we were to find the section 26H certificate *ultra vires*, we should in any event refuse permission to amend to include Ground 1B or proceed on that ground, and/or refuse any relief on either ground, because any error of law by the Council was immaterial. The Council found that there had been lawful commencement of work pursuant to Consent LB/10; and, unless the court were to find any error of law in that conclusion, the Developers will be able to rely upon that finding to proceed to complete the remainder of the works authorised by that consent.

84. Those submissions have considerable force; but, in my view, having found that the Council erred in these respects, it would be wrong to deny the Claimant relief. It would not be appropriate for this court to uphold a decision which the Council had no power to make. Whether the Developers have sufficient comfort from the finding of the Council, incorporated into the section 26H notice that was invalidly issued, that Consent LB/10 has been implemented is, in my view, a matter for them and the Council.

85. Consequently, I would grant the Claimant permission to amend its grounds to include Ground 1B; grant permission to proceed on that ground; allow the substantive judicial review in respect of the section 26H certificate; and quash that certificate.

Ground 2B: Test for Implementation

86. The decisions to issue the certificates under section 192 and section 26H were each based upon a delegated report, written in similar terms. In particular, having described the July 2011 works, each report set out the relevant test for implementation in identical terms, as follows:

> "The works only need to be sufficient to have constituted a material start to the works approved under the [planning permission/listed building consent]."

87. Mr Stinchcombe submitted that that was a material error of law, because the test for implementation was not the same in the TCPA and Listed Buildings Act, the test under the latter having a higher threshold requiring works that go beyond "a purely token commencement" that might suffice for commencement and thus implementation under the TCPA. He cited no authority for that proposition, but relied upon the Encyclopaedia of Planning Law and Practice, paragraph L18.05, which, in relation to "What constitutes the 'beginning' of works" for the purposes of Listed Buildings Act, says:

> "The Act offers no guidance on this point, unlike the corresponding provisions of the principal Act dealing with planning permission. It may, therefore, require something more than purely token commencement (which is all that section 56(2) of the principal Act requires for planning permission); but to require any substantial implementation of the consent would go beyond the requirements of the section."

Had the Council focused upon the more rigorous test under the Listed Buildings Act, Mr Stinchcombe submitted, it would have concluded that the July 2011 works were

no more than a token in an attempt to keep the consent alive and could not therefore amount to an implementation of either listed building consent. The section 26H certificate should thus be quashed.

88. This issue has not been taken before, and thus the Claimant needs permission both to amend and to proceed. This ground is now academic, in the sense that, for the reasons I have given, in my view the section 26H certificate should be quashed on different grounds. Nevertheless, the issue raised in the new ground is a matter of law requiring no new evidence, was fully argued before us, and in my view warrants a response. I would grant permission.

89. However, having done so, I would refuse the substantive challenge on this ground which, in my view, fails on both the law and the facts of this case. My brief reasons for doing so are as follows.

90. So far as the law is concerned:

i) Under the TCPA, section 91 provides that every planning permission granted shall be subject to a condition that the development to which it relates must be "begun" not later than the expiration of three years beginning with the date on which permission is granted, or such other period as the relevant planning authority may direct (see paragraph 8 above). In this case, the 2008 planning permission had an express condition replicating the wording of section 91 and fixing the period at three years. Section 56(2) provides that development is taken to be begun on the earliest date on which any material operation comprised in the development "begins to be carried out" (see paragraph 10 above).

ii) Under the Listed Buildings Act, section 18 provides that every listed building consent must include a condition that the works to which it relates must be "begun" within three years of the date of grant or such other period as the authority directs (see paragraph 16 above).

91. Therefore, under the TCPA, implementation of planning permission depends upon when the development (in terms of a material operation) is "begun". Under the Listed Buildings Act, implementation of a listed building consent depends upon when the works to which it relates are "begun". I find it difficult to see how there can be any difference between material operations within the scope of planning permission and works within the scope of a listed building consent under the Listed Buildings Act, particularly in the light of section 32 of the Planning Act 2008 – which, for the purposes of development consent for a nationally significant infrastructure project, uses the TCPA definition of "development", which expressly includes (for the purposes of that Act) works as defined in section 7 of the Listed Buildings Act. However, even if there is, at least conceptually, such a difference, I cannot see any reason why "beginning" should be the subject of any different threshold. Indeed, as Mr Brown submitted, as works that may require listed building consent would not require planning permission, having a higher threshold for beginning works with a listed building consent may pose practical difficulties in respect of minor works to a listed building.

92. But, in any event, on the facts of this case, the ground has no sound basis; because, as I have indicated (see paragraph 86 above), the test adopted for both section 192 and section 26H certification was whether, by the relevant time, there had been works performed "sufficient to have constituted a *material* start to the works approved under the [planning permission/listed building consent]" (emphasis added). On any view, that was a test that at least satisfied the threshold of the Listed Buildings Act. There was, of course, as Mr Stinchcombe now concedes, sufficient evidence of such a material start.

93. For those reasons, Ground 2B fails.

Grounds 2A, 3 and 4: Referability to the 2008 Planning Permission, and the associated duties of seeking information, consultation etc

94. Grounds 2A, 3 and 4 can conveniently be taken together.

95. As I have recorded (see paragraph 34 above), the 12 February 2015 letter which covered the applications for the section 192 and section 26H certificates described the July 2011 works, and said that those works were considered to be sufficient to have implemented the 2008 planning permission and the Consent LB/10. However, Mr Stinchcombe submitted that the 15 July 2011 letter from Cluttons (the surveyors acting on behalf of the Crown Estate) to the Claimant's solicitors ("the Cluttons letter", quoted at paragraph 32 above) was evidence of those works being referable, not to those consents, but to the requirements of the lease under which the Developers held the property. That letter ought to have been considered by the Council, which may have concluded from it that the works were not referable to the consents (Ground 2A).

96. However, he accepts that the evidence is that that letter was not before the Council when it decided to issue the section 192 and section 26H certificates (paragraph 20 of the statement of Damian Manhertz dated 14 August 2015: Mr Manhertz is one of the Council's Senior Planning Officers). It is trite law that an authority cannot err in law in not taking into account something that was not before it at the relevant time. But Mr Stinchcombe submits that that letter *ought* to have been before the Council, because:

    i) the Council had a duty to take reasonable steps to obtain information to make a reasonably informed decision, with which it failed to comply: had it properly complied with that duty it would have obtained the Cluttons letter (Ground 3); and

    ii) the Council had a duty to inform and consult the Crown Estate and the Claimant on the applications for the certificates: again, had it properly complied with that duty it would have obtained the Cluttons letter (Ground 4).

97. The numbers identifying the grounds have changed over time; but, if my cross-referencing is correct, Holgate J was quite dismissive of these grounds, and Laws LJ evinced no enthusiasm for them. In my judgment, they have no force.

98. Insofar as there is any submission that the Council breached its duty to notify and consult the Crown Estate, the developers were required to notify the Crown Estate as

landlord of the applications for section 192 and section 26H certificates; they certified that they had done so; and there is no evidence suggesting that they failed to do so. The Crown Estate made no objections to either application. The case that the Council breached some duty owed to the Crown Estate was not actively pursued by Mr Stinchcombe before us; and, in my view, rightly so.

99. Turning to the Claimant, as Mr Stinchcombe frankly accepted, there is no statutory requirement for a Council to notify or consult on applications for certificates under section 192 or section 26H. Furthermore, the Supreme Court in R (Moseley) v Haringey London Borough Council [2014] UKSC 56 emphasised that which was made clear by Sedley LJ in R (BAPIO Action Limited) v Secretary of State for the Home Department [2007] EWCA Civ 1139 at [43]-[47], namely that there is no general common law duty to consult persons who may be affected by a measure before it is adopted (see [23] and following per Lord Wilson JSC and, especially, the judgment of Lord Reed JSC at [34]-[41] with which Baroness Hale DPSC and Lord Clarke JSC expressly agreed at [44]). However, an obligation to consult may arise because of the common law duty of fairness, e.g. where someone has given a legitimate expectation that he would be consulted.

100. Mr Stinchcombe submitted that an obligation to notify and/or consult the Claimant on the applications for certificates arose in this case because a legitimate expectation that it would be notified and/or consulted arose from the last substantive paragraph of Cluttons letter and/or an established practice of notifying and consulting the Claimant that had arisen in relation to planning applications involving 10 KPC. He specifically focused on the reference to "full consultation" in that paragraph.

101. This submission fails – and, in my view, fails by some distance – for the reasons set out by Holgate J in his judgment at [63]-[78], which I need not repeat *in extenso* here. Suffice it to say:

i) Cluttons wrote their letter on behalf of the Crown Estate, specifically with regard to permission it was required to give under the lease. It was not legally able to make any promise to the Claimant on behalf of the Council. In any event, on a fair reading of the letter as a whole, "consultation" appears to be a reference to a procedure as part of the landlord's consideration of the works, rather than any promise that the Claimant would be consulted with regard to any application that might be made for section 192 and section 26H certificates. Certainly, in my view, there is nothing in the letter that could amount to a sufficiently clear and unambiguous representation for the proposes of founding a legitimate expectation.

ii) There is no evidence to support an established practice of notification or consultation with regard to planning applications involving 10 KPG, over and above the statutory obligation on the Council to notify neighbours of any application made for planning consent or listed building consent.

iii) Even if there had been a legitimate expectation as claimed, it was not material, as the Claimant suffered no prejudice by not being notified and consulted on the applications for section 192 and section 26H certificates. The only information that it is said would have been forthcoming would have been the Cluttons letter. For the reasons given below, if that letter had been available to

the Council, I am quite satisfied that the decision to grant the certificates would not have been different.

102. Nor, in my view, did the Council breach any obligation to obtain further information to enable it to give a properly informed, and hence lawful, decision on the application for the certificates, for the reasons given by Holgate J in his judgment at [58]-[62].

103. As Holgate J explained, although a decision-maker has an obligation to take reasonable steps to obtain information relevant to any decision he is required to make (Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 at page 1065B per Lord Diplock), a challenge to a decision on the basis that such steps were not taken has to be based on public law grounds (R (Khatun) v London Borough of Newham [2005] QB 37 at [35] per Laws LJ). Holgate J concluded that the Claimant in this case had not begun to explain why the Council acted irrationally in considering that the material before it was sufficient to enable it to determine the two applications before it. I agree.

104. Intention is irrelevant in assessing whether there has been commencement for the purposes of sections 192 and section 26H (East Dunbartonshire Council v Secretary of State for Scotland [1999] 1 PLR 53 at 64G per Lord Coulsfield; and Staffordshire County Council v Riley [2001] EWCA Civ 257; [2002] PLCR 5 at [27]-[28] per Pill LJ). Insofar as Mr Stinchcombe submitted that Pill LJ at [30(5)] of Riley suggested otherwise, I do not agree: Pill LJ was there considering, not intention, but whether removal of top soil (which has a special status in the mineral planning regime) was sufficient to comprise any part of "winning and working" of minerals. Nor do I consider that Commercial Land Limited v Secretary of State for Transport, Local Government and the Regions [2003] JPL 358 at [35], also relied upon by Mr Stinchcombe, materially assists his case. That case too was concerned with a different issue, namely whether a material operation was comprised in particular development.

105. As Mr Stinchcombe all but accepted, whether operations are referable to a planning consent is a purely objective question of law: the Council in this case was not required to have "interrogated the [Developers'] subjective motives and intentions" (paragraph 49 of his skeleton). However, he submitted that, without considering the Developers' intention, the Council were required to "look at matters in the round", and decide whether the July 2011 works were referable to the 2008 planning permission, or to something else, in this case their obligations under the lease. I found Mr Stinchcombe's explanation of precisely what this entailed to be less than clear; but, whatever its precise scope, I am quite satisfied that, on the facts of this case, the Council did not err in concluding that the July 2011 works were referable to the 2008 planning permission.

106. The Council had before it substantial evidence that the July 2011 works were referable to the 2008 planning permission and Consent LB/10. The covering letter of Gerald Eve of 12 February 2015 stated that the works were in accordance with the approved plans and the conditions applying to the consents (see paragraph 34 above); and the statutory declarations of both Mr Adolph and Mr Farrand said that the works were intended to act as implementation of the consents (see paragraph 35(ii) above). Furthermore, in 2011, the Council was invited to inspect the works (see paragraph 32 above), which is only explicable on the basis that the works were referable to the

planning permission and listed building consent, the Council having no interest in the requirements of the lease. The delegated reports on each application indicated that the July 2011 works were assessed on the basis of the two consents, paragraph 4.5 of the report on the application for the section 192 certificate indicating that the excavation that formed part of those works "forms a key element of the permitted extension…".

107. On the other hand, the Council had no evidence before it to suggest that the works were referable to anything but the 2008 planning permission and Consent LB/10. Mr Stinchcombe submits that the Council ought to have made enquiries as to whether there might be any such evidence. However, in my view, the Council did not arguably act unreasonably in proceeding on the basis that it was very unlikely indeed that anyone would have any relevant evidence.

108. The July 2011 works were all internal. The Council had been invited to inspect them on site; but no one else had access to the property. It was Mr Manhertz's evidence that he saw "no basis upon which the Council should have requested additional information" (paragraph 23 of his statement dated 14 August 2015). I agree. There was no basis upon which the Council should reasonably have considered that the Claimant, or any other neighbour, or indeed any other person, could have had evidence relevant to the issue it had to determine, i.e. whether the development/works had begun, as a result of the performance of the July 2011 works.

109. In any event, if enquiries had been made (or consultation conducted), the evidence that it is suggested might have been forthcoming would not have been material.

110. Other than the Cluttons letter, Mr Stinchcombe suggested that enquiries of (including consultation with) neighbours may have resulted in "potentially relevant security footage, witness testimony and documentary materials" coming forward. However, none has come forward since this issue arose; no neighbour (including the Claimant) has come forward to say that relevant evidence that existed once has in the meantime been destroyed; and Mr Stinchcombe was unable to suggest what evidence there might sensibly have been. This evidence is, at its best, highly speculative; and the Council cannot be criticised for proceeding on the entirely reasonable basis that no contrary evidence would likely be available.

111. With regard to the Cluttons letter, even if it had been available, it is the evidence of Mr Manhertz (paragraph 20 of his statement) that it would have made no material difference. I accept that. Mr Stinchcombe concentrated upon the passage, towards the end of the main paragraph in that letter, which stated "these internal works are totally separate to the overall development proposals", as indicating that they were referable to the requirements of the lease. However, earlier, the letter specifically says:

> "These internal works… also form part of the planning and listed building consent which Mr Hunt separately obtained from [the Council] Planners. The undertaking of these works could possibly have the impact of implementing the planning consent for the scheme."

112. Mr Stinchcombe accepts that the Cluttons letter "was not totally unambiguous" (paragraph 48 of his skeleton argument), i.e. it was from the Claimant's point of view,

at best, ambiguous. However, I do not consider it was ambiguous. I agree with Mr Brown's submission: if the letter is read as whole, it is clear that the passages relied upon by the Claimant were dealing with the extent of consent given by Cluttons on behalf of the Crown Estate under the lease (which was the Crown Estate's concern) and not the planning permission or listed building consent (which was not). In respect of the latter, in my view, the Cluttons letter was irrelevant; although, of course, it accepted that the works to which they were proposing to consent under the lease might, if performed, have the effect of implementing the 2008 planning permission. In any event, I am quite satisfied that, had it been available to the Council at the time decisions were made on the applications, the outcome of those applications would have been the same.

113. For all those reasons, none of Grounds 2A, 3 or 4 is made good.

Ground 5: The Relationship between the 2008 and the 2010 Listed Building Consents

114. Ground 5, as pursued by Mr Stinchcombe before us, was restricted to the submission that Holgate J was wrong to reject the Claimant's case that Consent LB/10 was not freestanding from Consent LB/08, but rather an amendment to that earlier consent so that the conditions attached to Consent LB/08 continue to apply. Alternatively, he submits that the conditions in Consent LB/08 were incorporated or necessarily implied into Consent LB/10.

115. Mr Stinchcombe accepts that the ground, even if made good, could not affect the validity of the certificates: he seeks only declaratory relief. Given that – and given that I have already concluded that the section 26H certificate must be quashed on other grounds – I can deal with this ground shortly. Had it been necessary I would not have found this ground made good, for the reasons set out in Holgate J's judgment at [93]-[113].

116. Briefly, I agree with Holgate J that Consent LB/10 is freestanding, and not merely an amendment of Consent LB/08. It is noteworthy that the Developers applied for listed building consent under section 10 of the Listed Buildings Act, not for merely a variation of conditions of an earlier consent under section 19 (cf the application for non-material amendment of the 2008 planning permission under section 96A of the TCPA, which requires no further grant of planning permission). Mr Stinchcombe submits that the application used is a matter of form, and what matters is the substance of the document issued by the Council. But, on its face, Consent LB/10 was a new, substantive listed building consent, and not an amendment to Consent LB/08. It is true that the 2010 application for listed building consent described "the proposals to alter, extend, or demolish listed building(s)" as "Amendment to Listed Building Consent Reference LB/08/01323"; and that the proposed work schedule in Consent LB/10 defines "Development" as "Amendments to listed building consent LB/08/01323 (Reduction in the scope of the scheme) (Listed Building Consent Only)", which are further described in the Summary of Reasons for Decision. However, seen in their proper context, these are clearly not applying for and granting an amended consent; but rather simply references to a change in the works covered by the consent compared with Consent LB/08. Of particular importance, the document says that "Full Condition(s)... attached overleaf" (where Conditions 1 and 2 as described in paragraph 28 above are set out): which is inconsistent with the sixteen conditions in Consent LB/08 being still extant.

117. In my view, Consent LB/10 is clear and unambiguous on its face, particularly in respect of the conditions that were applied. The mere fact that the consent referred to "Amendments to [Consent LB/08]" is clearly insufficient to incorporate the conditions (but, on the basis of Mr Stinchcombe's submissions, only the conditions) from that consent, particularly as that would directly conflict with the face of Consent LB/10 which states that the "Full conditions" are Conditions 1 and 2 as set out on the face of that consent.

118. With regard to the submission that the Consent LB/08 conditions were necessarily implied into the later consent, Holgate J did not have the advantage of Supreme Court judgments in Trump International Golf Club Scotland Limited v Scottish Ministers [2015] UKSC 74, which were handed down three weeks after he handed down his own judgment in this case; and I accept that, following Trump, it is clear that he went too far in saying (at [109]) that conditions cannot be implied into a planning permission or listed building consent. However, the Supreme Court judges made clear that the court should exercise "great restraint" in implying conditions into public planning documents (Lord Hodge JSC at [35]), and there "are good reasons for a relatively cautious approach" in doing so (Lord Carnwath of Notting Hill JSC at [66]). In this case, there is no basis for the contention that the conditions from Consent LB/08 were necessarily implied into Consent LB/10; especially as such implication would be inconsistent with the face of the latter, which indicated that the two conditions there set out were "full".

119. For those reasons, Ground 5 also fails.

Conclusion

120. For those reasons, subject to any further submissions on relief, I would:

i) grant permission to amend the grounds of challenge to include Grounds 1B and 2B, and grant permission to proceed on those grounds;

ii) allow the substantive judicial review in relation to the section 26H certificate on Grounds 1A and 1B;

iii) quash the section 26H certificate; and

iv) refuse the substantive judicial review on all other grounds.

Lord Justice Patten:

121. I agree.