Neutral Citation Number: [2015] EWHC 3437 (Admin)

Case No: CO/2629/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 27/11/2015

Before:

MR JUSTICE HOLGATE

- -

Between:

Government of The Republic of France	**Claimant**
- and -	
Royal Borough of Kensington and Chelsea	**Defendant**
Crown Estate Commissioners	**1st Interested Parties**
Mr. and Mrs. Jonathan Hunt	**2nd Interested Parties**

Robert Griffiths QC and Nicola Strachan (instructed by **Gordon Dadds LLP**) for the **Claimant**
Tom Cosgrove (instructed by **Legal Department Royal Borough of Kensington and Chelsea**) for the **Defendant**
The First Interested Parties did not appear and were not represented
Paul Brown QC (instructed by **Mischon de Reya**) for the **Second Interested Parties**

Hearing dates: 10 and 11 November 2015

- -

Approved Judgment

Mr. Justice Holgate:

Introduction

1. The Claimant seeks permission to apply for judicial review of two certificates issued by the Royal Borough of Kensington and Chelsea ("the Council") in respect of 10 Kensington Palace Gardens, London, W8 4QP. In summary, the effect of those certificates was as follows:-

   (i) A certificate issued on 2 April 2015 to the Second Interested Parties, Mr. and Mrs. Jonathan Hunt, under s.26H of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act 1990") that as at 13 February 2015 the works authorised by the listed building consents granted on 14 August 2008 and 1 November 2010 (for the "renovation, alteration and extension to the existing dwelling, including basement excavation and garden landscaping") may lawfully be carried out under those consents;

   (ii) A certificate issued on 24 April 2015 to the Second Interested Parties under s.192 of the Town and Country Planning Act 1990 ("TCPA 1990") that as at 12 February 2015 the development authorised by the planning permission granted on 14 August 2000 (for the "renovation, alteration and extension to the existing dwelling, including basement excavation and garden landscaping") may lawfully be carried out under that permission.

   The freehold owners are the Crown Estate Commissioners. They are the First Interested Parties but are taking no part in these proceedings. On the other hand Mr and Mrs Hunt have taken an active part in resisting the claim and it is convenient to refer to them instead as "the Interested Parties".

2. 10 Kensington Palace Gardens is a vacant, large, detached four storey building with a basement and undercroft, set in 0.3 hectares of grounds. It became a Grade II listed building in April 1969 because of its architectural merits. The building was designed by Philip Hardwick in 1846. It was originally used as a private residence for almost a century until the Crown Estate granted a lease to the Russian Soviet Mission in 1941. It has been empty for about 15 years since the mission relocated. The Crown lease is now owned by the Interested Parties who, over the last 10 years or so, have applied for and obtained various planning permissions and listed building consents from the Council for the redevelopment and refurbishment of the property.

3. Kensington Palace Gardens runs north south between Bayswater Road and Kensington High Street. The street includes Foreign Embassies and large single family dwellings. 11 Kensington Palace Gardens is occupied by the Ambassador of France as her official residence. It too is subject to a Crown Estate lease held by the Government of the Republic of France ("the Claimant"). The properties lie within a Conservation Area and also an Area of Metropolitan Importance. The street lies adjacent to Kensington Palace Gardens which is designated as an Area of Metropolitan Open Land.

4. The claim form was issued on 5 June 2015. It was therefore issued just within the six week time limit stipulated by CPR 54.5(5) as regards the s.192 certificate, and outside that time limit by 22 days in relation to the s.26H certificate.

5. On 14 July 2015 the application for permission to apply for judicial review was considered on the papers by Patterson J. She ordered the application to be listed in Court as a rolled-up hearing and so the matter came before me. In the order she stated that challenge to the s.26H certificate was out of time, but that other matters in relation to the s.192 certificate might be arguable and that it was sensible for full argument to be heard to enable all issues to be resolved comprehensively.

6. Subsequently, a witness statement by Gareth Hughes dated 18 September 2015 was filed on behalf of the Claimant in order to explain the delay in the challenge to the s.26H certificate. Mr. Hughes is a director and barrister with Jeffrey Green Russell, who has been acting on behalf of the Claimant in respect of the planning issues with which this case is concerned since 2011.

7. The Defendant and the Interested Parties maintain that all of the grounds of challenge are unarguable and that the Claimant had not given a proper justification for the extension of time needed in order to challenge the s.26H certificate. Nevertheless, at the hearing all parties agreed that I should hear the parties' submissions on all grounds of challenge in relation to both certificates followed by submissions on the delay issue.

Planning History

8. In 2005 planning and listed building consents were granted by the Council for alterations and extensions in order to return the property to residential use. These works related to an attic, store extension, two pavilion extensions at the rear, provision of a new subterranean space for leisure facilities to include a swimming pool and conversion of the existing undercroft into a car museum. In 2006 planning and listed building consents were granted for the expansion of the basement below the rear garden to accommodate a car museum and also a new garden layout. That consent also provided for two new pavilion extensions to be added to the garden elevation.

9. In 2008 the Interested Parties decided to seek consents for enlarged schemes. On 14 August 2008 the Council granted planning permission (ref. PP/08/01322) for development described as "renovation, alteration and extension to the existing dwelling, including basement excavation and garden landscaping", subject to the conditions set out in the Schedule attached to the planning permission and in accordance with the plans submitted. The relevant plans were listed in the Schedule to the planning permission. The Schedule also stated "full conditions, reasons for their imposition and informatives attached overleaf". Condition 1 stipulated that the development permitted should be "begun before the expiration of three years from the date of this permission" in accordance with s. 91 of the TCPA 1990. Accordingly unless the planning permission was implemented beforehand, it would expire on 14 August 2011. Conditions 7, 10, 12, 14 and 15 set out matters for which the Council's approval was required to be obtained before the development authorised by that permission could lawfully be commenced so as to implement the permission and satisfy the time limit in condition 1.

10. On 14 August 2008 the Council also granted a listed building consent (ref. LB/08/01323) under s. 16 of the Listed Building Act 1990 on an application made by Mr. and Mrs. Hunt under s. 10. The grant of consent reads as follows:-

> "The Borough 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. …"

In the Schedule the "development" was again described as "renovation, alteration and extension to the existing dwelling, including basement excavation and garden landscaping". The approved drawings were listed in the Schedule. At the foot of the Schedule it was stated that "Full conditions, reasons for their imposition and informatives attached overleaf". Condition 1 of the consent imposed the time limit of three years for the commencement of the works authorised thereby, in accordance with s. 18 of the Listed Building Act 1990. Condition 2 reads:-

> "The demolition hereby permitted shall not be undertaken before a contract for the carrying out of the remainder of the works hereby permitted has been let."

Condition 3 reads:-

> "The works hereby permitted shall be carried out in their entirety exactly and only in accordance with the drawings, and other particulars, forming part of the Consent, …"

The drawings referred to in Condition 3 were those listed in the Schedule to which I have referred.

11. The Grounds of Challenge in this case also rely upon certain other conditions contained in the 2008 listed building consent, namely:-

> "5. Detailed drawings or samples of materials as appropriate, in respect of the following, shall be submitted to and approved in writing by the Local planning authority before the relevant part of the work is begun:
>
> (a) All new architectural elements to main house, to include roof-plan, rooflights, glazed roof areas, bay windows, pavilions, staircases, windows, chimney pieces, decorative plasterwork, and internal joinery. Landscaping designs to rear garden and forecourt.
>
> 6. All original fabric shall be retained unless notated otherwise on the approved drawings, including lath and plaster ceilings.
>
> 7. Before any work is undertaken in pursuance of this consent to demolish any part of the building, such steps shall be taken and such works carried out as shall, during the progress of works permitted by this

consent, secure the safety and stability of that part of the building which is to be retained.

8. Suitable precautions must be taken to secure and protect the interior elements against accidental loss or damage during building work, and no such elements may be disturbed or removed temporarily or permanently except as indicated on the approved drawings or with the prior written approval of the Executive Director, Planning and Borough Department.

10. Excluding only that which is specifically indicated on the approved drawings, no existing joinery, cornices, fireplaces, floorboards, lath and plaster or other architectural fixture or surfaces shall be removed from the building unless details have first been submitted to and approved in writing by the Executive Director, Planning and Borough Department.

12. Notwithstanding that which is specifically indicated on the approved drawings, no recessed lighting and/or speakers, smoke detectors, ventilation, heating or air-conditioning grilles shall be installed unless details have first been submitted to and approved in writing by the Executive Director, Planning and Borough Development.

13. Notwithstanding the approved drawing, there shall be no general renewal of plasterwork. Plaster shall only be replaced where it is unsound, and then it shall be replaced on a 'like for like' basis (i.e. replace laths with laths, lime plaster with lime plaster, and gypsum with gypsum)."

12. Applications for a detailed planning permission and an associated listed building consent were subsequently submitted by the Interested Parties to the Council on 2 April 2009 seeking permission for larger extensions to development at sub-third to sub-fifth levels beneath the already approved subterranean development. On 29 May 2009 these applications were refused on the grounds that the increased floor area beneath the property was excessive. The refusals were not the subject of any appeal.

13. On 8 September 2010 Mr. and Mrs. Hunt applied to the Council for approvals to a revised scheme which would reduce the scope of the development authorised by the 2008 consents In summary, the amendments involved the following:-

(i) The removal of subterranean development at sub-fourth and sub-fifth floors to the rear of the dwelling so as to reduce the depth of the basement from 23.65m to 11m;

(ii) A reduction in the width of the subterranean development by 2m;

(iii) The removal of subterranean development to the front of the property.

The Council's approval to the 2010 scheme was sought in two ways. First, an application was made under s. 96A of the TCPA 1990 for "non-material amendments" to the 2008 planning permission. Second, an application was made (as the Claimant accepted in oral submissions) under s. 10 of the Listed Building Act 1990 for a listed building consent.

14. The Council approved both applications. On 16 November 2010 the Council issued an approval under s. 96A stating that it accepted that the amended set of drawings referred to in the Schedule annexed were non-material and therefore did not require the grant of a fresh planning permission. At the foot of the Schedule the Council stated "I draw your attention to the need to ensure that all conditions attached to the planning permission are complied with…". The planning permission referred to was the permission granted in 2008 with the ref. PP/08/01322. So in accordance with s.96A(1) the non-material amendments accepted by the Council operated as changes to the 2008 planning permission. From that moment the 2008 planning permission was varied by the s.96A amendments. No additional planning permission resulted from that particular decision.

15. Prior to the decision on the s.96A application, on 1 November 2010 the Council had granted a listed building consent (LB/10/02900) as their determination of the application made on 8 September 2010 under s. 10 of the Listed Building Act 1990. The grant of consent reads:

> "The Borough 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. …" (emphasis added)

16. In the Schedule "development" was described as "Amendments to listed building consent LB/08/01323 (reduction in the scope of the scheme) (Listed Building Consent only)". The Schedule contained a list of the drawings thereby approved. At the foot of the Schedule the Council stated "Full conditions, reasons for their imposition and informatives attached overleaf". The Schedule to the consent contained only two conditions. Condition 1 imposed a time limit for the implementation of the consent in the following terms:-

> "The works hereby permitted shall be begun before the expiration of three years from the date of *this consent*." (emphasis added)

17. Condition 2 stipulated that the work permitted by the listed building consent should only be carried out exactly and in accordance with the details shown on the approved plans listed in the Schedule of the consent. The 2010 Consent did not replicate conditions contained in the 2008 listed building consent.

18. On 10 February 2011 the Interested Parties made an application to the Council for an extension of the time limit in the 2008 planning permission (PP/08/01322). This application relied upon a relatively new extension of time procedure set out in the Town and Country Planning (General Development Procedure) (Amendment no. 3) (England) Order 2009. The accompanying Planning Statement prepared by consultants acting on behalf of Mr. and Mrs. Hunt stated that no elements of the scheme had been implemented by that stage and the 2008 planning permission would otherwise expire on 14 August 2011. It appears that during discussions with the Interested Parties' representatives the Council indicated that the application was likely to be refused and consequently it was withdrawn prior to any determination being made.

19. On 12 February 2015 the Interested Parties made applications to the Council under s.192 of the TCPA 1990 and under s.26H of the Listed Building Act 1990. Each of the application forms relied upon a covering letter of the same date in order to describe the proposals and the grounds upon which the application was based. Each of the applications stated that Mr. and Mrs. Hunt were interested in the premises as lessees and that notice of the applications had been given to the freeholder, namely the Crown Estate.

20. In the covering letter the planning consultant Gerald Eve, acting on behalf of the Interested Parties, stated that the applications sought confirmation that "works had been undertaken sufficient to have implemented planning permission PP/08/01322 and listed building consent LB/10/02900 and the remainder of the works granted by these permissions can be lawfully completed and thereafter that the building can be lawfully occupied as a residential dwelling." Thus it is plain that the application relied upon works which had been undertaken simply as the basis for obtaining a decision that the bulk of the works authorised by the consents could still lawfully be carried out thereunder. Obviously the object of the applications was not to obtain certificates that only the works already carried out were lawful.

21. The covering letter dated 12 February 2015 summarised the planning history. Having referred to the listed building consent granted on 14 August 2008, the letter went on to state that amendments had been made to the scheme permitted in 2008 which had been approved "under a new listed building consent dated 1 November 2010 (ref. LB/10/02900)." The letter accepted that in deciding whether either the planning permission or the listed building consent had been implemented it was necessary "to ensure that any pre-commencement conditions have been discharged" or approved before looking at the physical works which had actually been carried out. It is common ground in these proceedings that the letter correctly identified five pre-conditions for the purposes of lawful implementation of the 2008 planning permission, namely conditions 7, 10, 12, 14 and 15. The letter gave the dates upon which approvals had been granted by the Council under each of these five conditions. It is common ground that the necessary approvals were given by the Council on 15 July 2011 (condition 14), 21 July 2011 (conditions 10 and 15) and 29 July 2011 (conditions 7 and 12).

22. The covering letter then dealt with the listed building consents. It stated that the 2010 listed building consent was a stand-alone consent, separate from the listed building consent granted on 14 August 2008 (relying upon a legal opinion by Mr. Richard Harwood QC). The letter added that the 2010 listed building consent (ref

LB/10/02900) did not incorporate any of the 2008 listed building consent or its conditions. On that basis the letter argued that the 2010 consent contained only 2 conditions, neither of which constituted pre-conditions in the sense of conditions requiring approvals to be obtained before any works qualifying as an implementation of the consent could lawfully be carried out.

23. The letter dated 12 February 2015 clearly stated that:-

> "It is the 2008 Planning permission ref. PP/08/01322 as amended and the 2010 listed building consent ref. LB/10/02900 which have been implemented."

24. Under the heading "physical works" the letter then described the works which had been undertaken within the premises as an implementation of the 2008 planning permission and the 2010 listed building consent. The letter stated:-

> "In July 2011 works were undertaken involving the digging of a void in the basement of the lift shaft and the removal of various parts of internal walls and a staircase. These works are sufficient to constitute development under the Planning permission as they were works of construction in the course of the erection of part of a building. *The excavation of the void was development in its own right and so sufficient to implement the Planning permission*. These works were in accordance with the approved plans and the conditions applying to those consents" (emphasis added)

The letter enclosed an "existing building" plan, which was annotated to identify the location of the hole excavated for the lift shaft. The letter also enclosed the method statement which had been used for carrying out this work, along with a bundle of photographs showing the area in question and demonstrating the extent of the works that had taken place. The letter also enclosed signed statutory declarations from Mr. Daniel Farrand, a solicitor acting on behalf of the Interested Parties, and Mr. Stuart Adolph, employed by Ocubis, the contractors responsible for executing the works described in the letter. It was explained that the works had commenced on 22 July 2011 and that the photographic evidence demonstrated that the works had been performed before 14 August 2011, the date on which the 2008 Planning permission would have expired if not lawfully implemented beforehand.

25. The letter then stated:-

> "All this evidence is sufficient to demonstrate on the balance of probabilities that the 2008 Planning permission (amended in 2010) and the 2010 listed building consent have both been implemented. This position is supported by the legal opinion prepared by Richard Harwood QC."

26. On 2 April 2015 the Council, through an Officer acting under delegated authority, granted a certificate under s.26H of the Listed Building Act 1990. The certificate reads as follows:-

> "**CERTIFICATE OF LAWFULNESS OF PROPOSED WORKS**
>
> The Royal Borough of Kensington and Chelsea 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 s.26H(2) of the Planning (Listed Building and Conservation Areas) Act 1990 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 listed building consent LB/08/01323 and LB/10/02900."

27. The First Schedule to the certificate stated;-

> "Confirmation that Listed building consent LB/08/01323 (renovation, alteration and extension to the existing dwelling, including basement excavation and garden landscaping), and Listed Building Consent LB/10/02900 have been lawfully implemented."

28. It will be noted that this certificate gave confirmation that not only the 2010 but also the 2008 listed building consent had been lawfully implemented, albeit that the application before the Council had only asked for a certificate to be issued as regards the continuing validity of the 2010 listed building consent. When this matter was raised at the hearing by the court, all parties agreed that the s.26H certificate went outside the ambit of the application before the Council as regards the 2008 listed building consent. However, that has never been a matter which the Claimant has sought to raise as a ground of challenge. Even in his oral submissions Mr Griffiths QC did not ask the court to consider quashing the s.26H certificate on this ground. I invited written submissions from the parties on whether this error could be corrected in some way. It is a matter to which I shall have to return at the end of this judgment.

29. On 26 April 2015 the Council, through an Officer acting under delegated authority, issued a certificate under s.192 of the TCPA 1990. The certificate reads as follows:-

> "**CERTIFICATE OF LAWFUL PROPOSED USE OR DEVELOPMENT**
>
> The Royal Borough of Kensington and Chelsea 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 s.192 of Town and Country Planning Act 1990 as amended 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 reads:-

> "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…"

The Grounds of Challenge

30. The grounds set out in the "Detailed Statement of Facts and Grounds on behalf of the Claimant" were refined firstly in the skeleton argument of Mr. Robert Griffiths QC and Nicola Strachan (who appeared on behalf of the Claimant) and then again in oral submissions. I summarise (and arrange in a logical sequence) the grounds which are now pursued by the Claimant as follows:-

(1) The certificates issued under s.192 and s.26H were ultra vires, because they purported to certify the lawfulness of works already carried out. These provisions may only be used to certify the lawfulness of proposed works, that is works that have yet to be carried out;

(2) The Council erred in law in granting the certificates because the works relied upon were referable to the requirements of the lease between the Crown Estate and the Interested Parties and so could not have been referable to the "development" or "works" authorised respectively by the planning permission and the listed building consent;

(3) The Council failed to take reasonable steps to obtain information relevant to questions which had to be answered in order for the Council's decisions on the applications for the certificates to be lawful;

(4) The Council's decision to issue the certificates was reached without any prior consultation with, or notification of the applications to, (a) the Crown Estate and (b) the Claimant, in breach of their legitimate expectations to be consulted upon and/or notified of the applications for the certificates;

(5a) The reports by the Officer delegated to determine the certificate applications proceeded on a fundamental error, namely that there was no evidence to show that the works relied upon were carried out before the discharge of the pre-conditions in the two consents;

(5b) The Council failed to consider the application of the "Whitley Principle" or the first exception to that principle, as stated in Whitley and Sons v Secretary of State for Wales and Clwyd County Council (1992) 64 P&CR 96;

(6) In breach of Article 40(7) and (10) of the Town and Country Planning (Development Management Procedure) (England) Order 1995 (SI 2015 No. 595), the Council failed to enter the s.192 certificate on the Council's Planning Register.

31. As to Ground 6, the Council accepts that it did not comply with its obligation to enter the s.192 certificate on its Planning Register until 24 June 2015. The Council says that this failure to comply with the 2015 Order was an administrative error, but points out that the Officer's Report explaining the delegated decision taken in this regard had been published from around the time of the decision to grant the s.192 certificate. It is common ground between the parties that the requirement to enter the certificate on the register is not a pre-condition for the validity of the certificate and, consequently, the failure to include the certificate on the Register before the 24 June 2015 cannot provide a basis for asking the Court to quash the certificate. The only relief sought by the Claimant in relation to Ground 6 is "a declaration that the Council acted unlawfully in failing to register on the Council's Planning Register and/or make available for inspection by the public the certificate of lawful development under s.192 of TCPA 1990 dated 24 April 2015." The Claimant accepts that its real object in commencing and pursuing these proceedings has been to obtain an order quashing the two certificates issued by the Council rather than to obtain this declaratory relief. It will be necessary to return to this subject when considering the extent to which relief should be granted.

32. Other matters raised in the Detailed Statement of Facts and Grounds and in the Claimant's Skeleton were not pursued in argument.

Statutory framework

33. Section 191 of the TCPA 1990 provides:-

> "**191 Certificate of lawfulness of existing use or development.**
>
> (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; 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) …"

34. Section 192 of the TCPA 1990 provides:-

"**192 Certificate of lawfulness of proposed use or development.**

> (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; 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."

35. The references in s.191 and s.192 to "use" and "operations" aligns with the definition of "development" in s. 55(1) of TCPA 1990 and the general requirement in s.57 to obtain planning permission for "development".

36. Under the statutory regime for listed building control, there is no parallel provision to s.191 of the TCPA 1990. Section 61 of the Enterprise and Regulatory Reform Act 2013 inserted s.26H to s. 26K into the Listed Building Act 1990. Section 26H enables a landowner to obtain a certificate of lawfulness of *proposed* works, not works already carried out.

37. Section 7 of the Listed Building Act 1990 restricts the "works" which may be carried out to a listed building in the following terms:-

> "**7 Restriction on works affecting listed buildings**.
>
> Subject to the following provisions of this Act, no person shall execute or cause to be executed any 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."

38. Section 8 deals with the authorisation of works controlled by s.7 by means of listed building consent. Section 8(1) provides:-

> "**8 Authorisation of works: listed building consent.**
>
> (1) Works for the alteration or extension of a listed building are authorised if—
>
> (a) written consent for their execution has been granted by the local planning authority or the Secretary of State; and
>
> (b) they are executed in accordance with the terms of the consent and of any conditions attached to it."

39. Section 9(1) of the Act provides that if a person contravenes s.7 he shall be guilty of an offence. Section 9(2) provides that, without prejudice to s.9(1), if a person executes or causes to be executed any works to a listed building under a listed building consent but fails to comply with a condition attached to that consent, he too shall be guilty of an offence.

40. Section 26H of the Listed Building Act 1990 provides as follows:-

> "**Certificate of lawfulness of proposed works**
>
> (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; 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 under s.26I."

41. The Claimant's case before the Court, as confirmed by Mr Griffiths QC, is that s. 26H(2) does not have the effect of restricting the use of s. 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". The Claimant's case was presented on the basis that a landowner is entitled to rely upon s.26H in order to obtain a certificate as to whether works which require listed building consent fall within the ambit of a listed building consent previously granted.

42. However, I note that it could be argued that the language used in s. 26H(2) restricts the ambit of s. 26H, in contrast to the parallel provision in s. 191(2)(a) (see e.g. the words used there "or for any other reason"), with the consequence that other issues as to the lawfulness of proposed works under the Listed Building Act 1990 cannot be tested under s. 26H. I also note that s. 26H(2) cross refers to the second limb of s. 7(1), dealing with alterations of, or extensions to, a listed building, rather than to the first limb of listed building control relating to demolition works (see also the distinction between s. 8(1) and 8(2) and Shimizu (UK) Ltd v Westminster City Council [1981] 1 WLR 168, 181). On the other hand, it could be said that such a restrictive approach to section 26H would render that provision rather less useful than s. 192 of the TCPA 1990 and does not accord with Parliament's intention. These issues have not been explored in argument. Because of the common ground between the parties in this case that s. 26H may be used to test whether proposed works fall within the ambit of a listed building consent already in existence, this judgment proceeds on that basis.

Ground 1

43. In summary, Mr. Griffiths QC submitted as follows:

(i) An application to certify the lawfulness of works which have already been carried out falls outside the ambit of s.192 of the TCPA 1990 or s.26H of the Listed Building Act 1990. In relation to planning control as opposed to listed building control, such an application may only be made under s.191 of the TCPA 1990;

(ii) Similarly, an application cannot be made under s.192 to determine that a planning permission has lawfully been implemented (by the carrying out of works authorised thereby) so that further works may be carried out under that permission;

(iii) An application cannot be made under s.26H to determine that a listed building consent has lawfully been implemented (by the carrying out of works authorised thereby) so that further works may be carried out under that consent, because s. 26H only relates to works which are proposed to be carried out;

(iv) Proposition (iii) is consistent with the policy of the Listed Building Act 1990 to discourage people from carrying out works to listed buildings without obtaining prior authorisation by the grant of listed building consent;

(v) The certificates in the present case were ultra vires because they certified the lawfulness of works which had already been carried out.

44. The Court asked Mr Griffiths QC to explain what course should be followed where a planning permission or listed building consent has already been granted but the date for commencement of the works authorised has passed, and the landowner wishes to obtain a formal decision as to whether works he proposes to carry out would be lawful pursuant to that consent because it was implemented by works lawfully carried out thereunder within the relevant time limit. He replied that the landowner should *first* apply for and obtain a certificate under s.191 as the lawfulness of the works carried out in order to implement the permission, before making a *second* application for a certificate under s.192 to certify the lawfulness of the works which he proposes to carry out under that same permission.

45. Mr. Griffiths QC then accepted that on his argument a landowner who wishes to obtain a decision as to whether he can rely on a listed building consent by virtue of works of implementation which have previously been carried out:-

(i) cannot rely upon any statutory provision similar to s.191 to deal with the implementation of the listed building consent by the commencement of the works authorised thereby;

(ii) would be unable to rely upon s.26H for this purpose in order to obtain a certification of the lawfulness of the works remaining to be carried out pursuant to the listed building consent, even where the local planning authority agrees that that consent has been lawfully implemented;

(iii) would therefore have to apply to the High Court for a declaration because of this lacuna in the Listed Building Act 1990 on his reading of the legislation.

46. Mr. Griffiths' justification for this surprising outcome was simply that the policy of the Listed Building Act 1990 is to discourage landowners and other persons from carrying out works to listed buildings without obtaining beforehand any listed building consent which may be necessary. However, that explanation is untenable. In the situation postulated the landowner's objective is *not* to carry out works without relying upon a listed building consent. Instead he is seeking a formal decision as to whether a listed building consent already obtained remains extant (despite the expiration of the time limit for commencement) so that he may carry out works in the future relying upon that consent.

47. I reject the Claimant's submissions as to the construction of s.192 and s.26H for the following additional reasons:-

(i) There is no doubt that s.192 enables a landowner to apply for a certificate that works he proposes to carry out fall within the ambit of a planning permission where there is no issue as to whether that permission remains extant because the time limit for implementation has not yet expired;

(ii) Section 192 also applies where a landowner wishes to obtain a certificate that works he proposes to carry out fall within the ambit of a planning permission where the date stipulated for the commencement of development authorised by the permission has already passed, and there is simply a factual issue as to (a) whether works were carried out before the expiry of the time limit for commencement or (b) whether those works formed part of the development for which the permission was granted. Where the local planning authority resolves such factual issues in the Applicant's favour, it is simply expressing its reason for deciding why the works proposed to be carried out are lawful. Neither that reasoning nor the legitimacy of the s. 192 certificate depend upon the authority having issued an additional certificate under s.191 that the works carried out in the past to implement the permission were lawful;

(iii) The analysis is no different in a case where, in addition to determining whether as a matter of fact works referable to the permission were carried out before the time limit expired, the local planning authority also has to decide whether those works complied with, or were in breach of, a condition or conditions of that permission (i.e. were lawful or unlawful in accordance with the "Whitley principle" – see para. 78 below). If the authority should decide that those works were carried out lawfully with reference to the permission, with the consequence that the permission was implemented and remains extant, it is simply expressing its reason for deciding to certify that further works proposed to be carried out in the future under that permission are lawful;

(iv) The challenge in this case proceeds on the basis that s.26H may be used in order to obtain a certificate as to whether works proposed to be carried out to a listed building are authorised by a listed building consent previously granted. On that basis points (i), (ii), and (iii) apply equally to the interpretation and application of s.26H.

48. The only remaining legal issue under Ground 1 is whether a challenge can properly be made to the form in which the two certificates were issued by the Council in this case. It can be seen from the wording of the text setting out the certification under s.192

(see para. 29 above), that the Council began by certifying the operations described in the First Schedule as being lawful. It went on to explain why that conclusion had been reached, namely it was satisfied that works described in the submitted evidence had been sufficient to constitute a lawful implementation of the 2008 planning permission. The First Schedule to the Certificate confirms that the 2008 planning permission has lawfully been implemented, so that the remainder of the works authorised by that permission may lawfully be completed and thereafter the building may lawfully be occupied as a residential dwelling. The works previously carried out amounted to no more than excavation for a new lift shaft, and removal of parts of internal walls and a staircase, all within the existing footprint of the building, a relatively small part of the overall scheme. But the focus of the certificate was on the confirmation that works for the "renovation, alteration and extension to the existing dwelling, including basement extension and garden landscaping" may be carried out. In the context of the application under s. 192, and as a matter of common sense, "implementation" of the permission was concerned with establishing what may lawfully be done in the future; not with establishing the legitimacy of the works already carried out as an end in itself. The Council referred to the lawful implementation of the permission because that is obviously integral to certifying the lawfulness of the much more substantial works remaining to be carried out in the future in reliance upon that permission. It is plain from the heading to, and the substance of, the certificate that the Council proceeded on the basis that it was certifying the lawfulness of *future* works.

49. Essentially the same analysis applies to the certificate issued under s.26H (see paragraphs 26-7 above). The document bore the title "Certificate of Lawfulness of *Proposed* Works" (emphasis added). The second paragraph of the certificate, like its counterpart in the s.192 certificate and the First Schedule express the basis upon which the Council decided to grant the certificate under s.26H, namely that the listed building consents referred to had been lawfully implemented, so that the remaining works proposed to be carried out could lawfully be executed in reliance upon those consents.

50. For these reasons I reject Ground 1 of the challenge.

Ground 2

51. Paragraphs 30 and 31 of the Detailed Statement of Facts and Grounds on behalf of the Claimant referred to the covering letter dated 12 February 2015 in support of the applications for the two certificates. The Claimant refers to those passages which described the works physically carried out to the premises, in particular the removal of $8m^3$ of subsoil in connection with the proposal to construct a lift shaft. The claim did not suggest that the works relied upon by the Interested Parties were not authorised by either the 2008 planning permission or the 2010 listed building consent. During the hearing Mr. Griffiths QC stated that his client was not suggesting that in physical terms the works were not referable to either of those two consents. Instead paragraphs 32 and 33 of the Statement of Grounds relied upon only one matter, namely evidence that in any event the Interested Parties were obliged to carry out the works relied upon as having implemented the planning permission and listed building consent in order to comply with their obligations as lessees under the Crown Lease and therefore those works could not, as a matter of law, have been treated as referable to, or an implementation of, either of those consents. By definition, this ground would only arise if ground 1 is incorrect.

52. The sole evidence relied upon by the Claimant is contained in a letter from Cluttons, surveyors acting on behalf of the Crown Estate, dated 15 July 2011. The letter makes it plain that the Crown Estate were intending to conduct a consultation process with neighbours in the vicinity of 10 Kensington Palace Gardens in connection with an application by the Interested Parties to the Crown Estate for the lessor's consent under the Crown Lease to the carrying out of subterranean development work at 10 Kensington Palace Gardens. The letter stated:-

> "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."

The Claimant also relied upon a subsequent passage in the same letter which stated:-

> "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."

53. Mr. Cosgrove on behalf of the Council and Mr. Brown QC on behalf of the Interested Parties, both pointed out that the Claimant's reliance on these passages was somewhat selective. The author of the letter also stated:-

> "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 RBK&C 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 RBK&C, 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."

Of course the letter from the surveyor was offering no more than his own opinion as to whether the works could qualify as a commencement of development for the

purposes of the 2008 planning permission and the 2010 listed building consent. This was a matter ultimately to be determined by the Council.

54. In any event, in my judgment, the complaint raised by the Claimant under ground 2 is flawed for two freestanding reasons.

55. First, in Staffordshire County Council v Riley [2001] EWCA Civ 257 at paragraphs 26 to 28 the Court of Appeal held that the issue as to whether works of implementation are referable to a planning consent is a purely objective question of law. It is therefore irrelevant to consider the purposes of a developer in carrying out works of implementation. Equally, it is irrelevant that a developer has or may have mixed motives or purposes when carrying out such works. Therefore, the Claimant's argument that the works relied upon by the Council when granting the two certificates were works which in any event the Interested Parties had to undertake in order to comply with obligations under their Crown lease is nothing to the point.

56. Second and in any event, even on the basis that the works relied upon by the Council needed to be carried out in order to comply with the lease, it does not follow that they could not also qualify as works for the implementation of a planning permission or a listed building consent. In some cases works which fall within the ambit of a planning consent may be necessary because of a separate public law obligation (e.g. to satisfy requirements of health and safety or environmental legislation) or a private law obligation (e.g. a contractual requirement). But Mr. Griffiths QC was unable to identify any principle of law, let alone an authority, to justify treating works falling within the scope of a planning permission (or listed building consent) as not satisfying a time limit for commencement of works, simply because those works need to be carried out in order to fulfil some public or private law obligation. The fulfilment of such obligations may involve the carrying out of works which happen to require planning permission and/or listed building consent, but that has nothing to do with whether a time limit for the commencement of works authorised by any such permission or consent is satisfied. The Claimant's Counsel did not put forward any justification for the proposition they asserted and I am wholly unable to see any.

57. For these reasons I reject ground 2 of the challenge.

Ground 3

58. At paragraph 52(ix) of the Claimant's detailed statement of grounds the Council is criticised for failing to request further information from the Crown Estate. In his oral submissions Mr. Griffiths QC confirmed that the sole effect of this ground of complaint is that through failing to seek information from the Crown Estate the Council did not obtain or receive the information contained in the letter from Cluttons 15 July 2011 to which I have already referred at paragraph 52 above. There is therefore no merit whatsoever in this ground of challenge because even if there had been some legal obligation on the part of the Council to seek information from the Crown Estate, on the Claimant's own case this would only have resulted in the Council obtaining information which would have been an irrelevant consideration for the purposes of determining the applications under s.192 of TCPA 1990 and s. 26H of the Listed Building Act 1990, for the reasons I have already explained under ground 2.

59. I should add that the legal basis for the assertion that the Council had been obliged to obtain information from the Crown Estate was not made clear in the Claimant's detailed statement of grounds or skeleton argument. It would appear that in part the argument was based on an alleged duty on the part of the Council to consult based upon a legitimate expectation argument. I deal with that subject under ground 4 below.

60. However, it also appeared that the Claimant had in mind the dictum of Lord Diplock in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1997] AC 1014 to the effect that an obligation to address questions relevant to the making of a decision is accompanied by an obligation to take all reasonable steps to obtain information relevant to those questions in order to be able to arrive at a lawful decision. But it is plain from the judgement of Laws LJ in R (Khatun) v London Borough of Newham [2005] QB 37 at paragraph 35 and of Lang J in R (on the application of Hayes) v Wychavon District Council [2014] EWHC 1987 (Admin) at paragraphs 29 to 31, that an alleged failure to take reasonable steps to obtain information is in essence a challenge based on irrationality. Consequently where it is alleged that the planning authority has failed in a duty to make sufficient enquiries, the question to be asked is whether the enquiry made by the planning authority was so inadequate that no reasonable planning authority could suppose that it had sufficient material available on which to make its decision. The Claimant in this case did not begin to explain why the Council acted irrationally in considering that the material before it was sufficient to enable it to determine the two applications. Moreover, Mr. Griffiths QC failed to point to any material before the Council which ought rationally to have suggested to them that they were obliged to seek information from the Crown Estate or from the Interested Parties concerning obligations owed by the lessee under the Crown lease. The only matter to which Mr. Griffiths QC pointed was the statement in the application forms that a notice of the making of the applications had been given to the Crown Estate as the freeholder of the property. Plainly, that information contained nothing to indicate to the Council that it was under a legal obligation to make enquiries regarding any obligations that the Interested Parties might have as lessees under the Crown lease.

61. In any event there is no merit in Ground 3 of this challenge for the reasons explained previously, namely that taking the Claimant's case at its highest, the process which it is said the Council ought to have followed would only have led to information which, as a matter of law, the Council would not have been entitled to take into account.

62. For these reasons I reject ground 3 of the challenge.

Ground 4

63. It was submitted firstly that the Council's decisions were unlawful because the Crown Estate was not notified of the applications for the certificates, or was not consulted upon these applications. This was a wholly unmeritorious point to raise. The application forms submitted to the Council on 12 February 2015 plainly state that the Interested Parties gave the appropriate notices to the Crown Estate as the freeholder of 10 Kensington Palace Gardens of their intention to apply for the certificates. Accordingly, the Crown Estate was able to make such representations, if any, as it saw fit and the Council would have been obliged to take into account any relevant representations made. The Claimant has not said whether any such representations

were or were not made. Certainly, the Crown Estate has not indicated that it objected to the grant of the certificates, or more pertinently, has not challenged the certificates because of a legal error by the Council in the handling of any representations made. Indeed, the Crown Estate was notified of the claim for judicial review. On 26 June 2015 Hogan Lovells, Solicitors for the Crown Estate Commissioners, wrote to the Claimant's Solicitors stating that they are not directly affected by the claim and have nothing to add in these proceedings, which concern planning decisions made by the Council. The Commissioners do not consider themselves to be Interested Parties. They have decided not to participate in the claim.

64. The Claimant accepts that there was no statutory obligation upon either the Interested Parties or the Council to notify the Claimant of the making of the applications for the certificates, or to give it an opportunity to make representations on the applications or to consult the Claimant on the applications. However, it is said that the Claimant had a legitimate expectation that it would be notified of the applications so that representations could be made and/or that it would be consulted upon the applications. In paragraph 22 of his first witness statement Mr. Damian Manhertz, a senior planning officer with the Council, stated that in practice the Council does not consult on certificate applications and, in this case no representations were made by the Council that it would do so.

65. In his oral submissions Mr. Griffiths QC accepted that ordinarily he would have to demonstrate that the alleged legitimate expectation arose from a clear and unambiguous representation (or conduct) that the Claimant would be consulted upon any application to certify that the Interested Parties could undertake subterranean development pursuant to consents previously granted (see e.g. R v Inland Revenue Commissioners ex parte MFK Underwriting Ltd [1990] 1 WLR 1545, 1569). He also stated that the claim to rely upon a legitimate expectation in the present case was novel and unsupported by any authority on the point.

66. Nonetheless he argued that a legitimate expectation arose in this case because:-

(i) The Claimant had been told *by the Crown Estate* that it would be consulted upon proposals by the Interested Parties before any approval would be granted by the Crown Estate for works to be carried out under the Crown lease of 10 Kensington Palace Gardens (see e.g. letter from Cluttons dated 10 September 2010); and/or

(ii) An established practice of consultation had been created by the Council in relation to planning applications made by the Interested Parties in respect of underground development at 10 Kensington Palace Gardens.

67. In relation to proposition (i) Mr. Griffiths QC submitted that not only was the Council aware of the Claimant's profound concerns about proposals for underground development by its neighbour, but also the Council was "privy" to the promise of consultation which had been made to the Claimant by the Crown Estate. I have carefully reviewed again all the correspondence upon which Mr. Griffiths QC relied. True enough, a clear promise was made by the Crown Estate to consult the Claimant and other neighbours affected before granting any consents for underground works required to be obtained by the Interested Parties as leaseholders under the Crown Lease. The Claimant does not suggest that the Crown Estate had the legal ability by

itself to make a promise of consultation which would be binding upon the Council in any way, let alone one binding upon the Council in the discharge of its statutory functions as the local planning authority. In any event, the promises made by the Crown Estate, not surprisingly, did not purport to go any further than deal with the process of granting lessor's approvals under the Crown Lease.

68. As to the somewhat vague suggestion that the Council became "privy" to the promises of consultation made by the Crown Estate, so as to become bound by those promises itself, Mr. Griffiths QC did not draw attention to any specific evidence in support. For my part I note that in a letter dated 3 February 2011 Jeffrey Green Russell, acting for the Claimant, informed the Council that the Crown Estate would consult neighbours "with a view to considering whether they should grant or not the permission *under the lease*" (emphasis added). There was nothing in that or subsequent letters to suggest that the Council agreed, or was ever being asked to agree, to consult with the Claimant upon any subsequent application under the *planning* regime in relation to the underground works at 10 Kensington Palace Gardens.

69. Indeed the letter from Cluttons, the agent for the Crown Estate, to the Claimant dated 4 February 2011 stated, in the context of a fresh planning application being made by the Interested Parties, that "it is important to confirm that the planning process is outside the remit of the Crown Estate, as the Crown Estate is considering the scheme under the terms of the individual lease". The Crown Estate organised a meeting on 23 March 2011 with representatives from the Claimant's Embassy, the High Commission of India and a number of other Embassies, but the Council did not attend and was not involved in that process.

70. Although Mr. Griffiths QC did not seek to rely upon it, I have also noted paragraph 3 of the witness statement of Mr. Hughes in which he states that on 8 March 2011 he lodged an objection to the application made by the Interested Parties on 10 February 2011 to extend time for the implementation of the 2008 planning permission (see paragraph 18 above). He states that he was subsequently informed by the planning officer that as the Council has been minded to refuse the application the Interested Parties had withdrawn it, and continues:-

> "I asked to be kept informed of any subsequent application which may be made prior to the expiry of the planning permission on the 14th August 2011."

Paragraph 4 of the witness statement then says:-

> "I heard nothing about this matter from the planning authority until I received an email from Mr. William Minting…." [dated 14 May 2015]

71. In my judgment this part of the witness statement of Mr. Hughes cannot assist the Claimant's reliance upon the doctrine of legitimate expectation. He does not identify how the request was made or to whom, so that the Council could have an opportunity to deal with it. More importantly, he does not suggest that the Council acceded to his

request. Moreover the terms of the request related only to applications *before* 14 August 2011. A decision on whether the 2008 planning permission had been lawfully implemented could potentially have been made at any time *after* that date.

72. In fact the written representations on the extension application included in the Court bundle were sent on behalf of the Claimant by Mr. Hughes to the Council by email dated 11 March 2011. The basic thrust of the representations was that if the 2008 planning permission were to be extended, its conditions would not provide an adequate opportunity to neighbouring embassies to submit representations, particularly technical material, on issues which ought to be covered and so the extension should be refused and the Interested Parties should apply for a fresh planning permission. The email concluded by requesting "an extension of time in which to submit any expert reports in support of the contentions in this submission if the Council is not minded to reject the application". There was nothing in the email requesting the Council to make a commitment to consulting with the Claimant on any future applications in relation to proposals for underground development, or more particularly an application to certify that consents already granted remained extant.

73. I do not accept that the alleged legitimate expectation can be founded on Mr Griffith's proposition (ii), namely that the Council had established a practice of consulting with the Claimant on *any* applications under planning legislation relating to proposals for underground development at 10 Kensington Palace Gardens. No attempt was made by the Claimant to adduce evidence specifically directed to this point. From the documents before the Court the only inference that can be drawn is that, in accordance with usual practice, the occupiers of properties in the vicinity of 10 Kensington Palace Gardens would have been notified of applications that had been made for *planning permission* or *listed building consent*. In fact the Claimant states that it did not make any representations on the applications which resulted in the 2008 planning permission and 2008 listed building consent. The letter from Jeffrey Green Russell dated 3 February 2011 suggests that that was because the Claimant had been unaware of the 2008 applications. However, no proceedings for judicial review have ever been brought in relation to the Council's decisions in 2008. On the other hand representations were made on behalf of the Claimant in relation to the applications made by the Interested Parties in September 2010 and February 2011 (see paragraphs 13 and 18 above).

74. The only practice disclosed by the evidence before the Court is the standard practice of notification to neighbours of applications for planning permission and listed building consent. No evidence has been produced to show that the Council had a practice, whether in relation to 10 Kensington Palace Gardens or more generally, of notifying or consulting with neighbours on *any* application made under planning legislation (including applications for approval or discharge of details under conditions attached to a planning permission) or simply applications for certification that proposed works would be lawful (whether relying upon permissions previously granted or for any other reason).

75. The reasons given above are sufficient to dispose of the second proposition advanced by Mr. Griffiths QC, but I also accept a submission made both by the Council and the Interested Parties. A decision on whether or not to grant a planning permission or a listed building consent requires consideration to be given to the merits of the proposal and its effect upon the locality, including neighbouring properties. By definition an

application for a certificate as to whether proposed works may lawfully be carried out in reliance upon a planning permission and listed building consent, does not involve any consideration of those same issues, which were previously determined when the consents were granted. In the present case the issues for the Council were very different from those which fell to be decided when the consents were granted in 2008 and 2010. They were simply whether the works carried out were in physical terms referable to the consents and if so, whether those works involved a breach of any condition attached to those consents so as not to constitute a lawful implementation thereof under the Whitley principle. A practice of notifying to neighbours applications for listed building consent and planning permission, does not establish a practice of notifying or consulting upon applications of such a different nature. That view is reinforced by the stance maintained by the legislature that no such notification or consultation is required in relation to applications under s.191 or s.192 of TCPA 1990 or s.26H of the Listed Building Act 1990, notwithstanding the concerns raised in this regard in Sumption v Greenwich LBC [2008] 1 P&CR 20 at paragraph 8.

76. Even if, contrary to the firm conclusions I have reached, the Claimant had been able to establish the legitimate expectation contended for, a failure to notify the Claimant of the applications for the certificates would not automatically result in the certificates being quashed. As Mr. Griffiths QC correctly submitted, the doctrine of legitimate expectation, at least in the context of an obligation to consult, is rooted in the principles of procedural fairness (see e.g. MFK at pages 1569 to 1570). But in a complaint of procedural unfairness it is generally necessary for the Claimant to show that the procedural defect has caused him to suffer "material prejudice" (see e.g. Hopkins Developments Ltd v Secretary of State for Communities and Local Government [2014] PTSR 1145 at paragraphs 49 and 62). This echoes a well-known dictum of Lord Denning MR in George v Secretary of State (1979) 77 LGR 689, 695:-

> "There is no such thing as a technical breach of natural justice. You should not find a breach of natural justice unless there has been substantial prejudice to the applicant as a result of the mistake or error which has been made."

(see also paragraphs 115 to 116 of the judgment of Ouseley J in R (Midcounties Co-operative Ltd) v Wyre Forest D.C. [2009] EWHC 964 (Admin)).

77. In the present case no evidence was presented by the Claimant to indicate what it would have said to the Council about the applications for the two certificates if it had had the opportunity to do so. When the question was put by the court to Mr. Griffiths QC, he replied that the only matter upon which the Claimant would have wished to rely is the argument that the works carried out by the Interested Parties before 14 August 2011 were referable to obligations they owed to the Crown Estate under the Crown lease and not to the commencement of development under the 2008 planning permission or the 2010 listed building consent (based upon the letter from Cluttons dated 15 July 2011). For the reasons already given under grounds 2 and 3 that contention is wholly misconceived. It follows that in any event the Claimant has not suffered any prejudice through being unable to rely upon an argument which was legally irrelevant.

78. For all these reasons I reject ground 4 of the challenge.

Ground 5

79. This ground is concerned with the application of the "Whitley principle". That principle and the exceptions to it were summarised by Richards LJ in Greyfort Properties Limited v Secretary of State for Communities and Local Government [2011] EWCA Civ 908 at paragraphs 6 to 19. The issue is whether the operations or works said to have satisfied a time limit in a planning permission (or listed building consent) for commencement of the development were authorised by that permission read together with its conditions. Thus it is necessary to consider not only (i) whether the works carried out fell within the scope of the works authorised by the relevant consent but also (ii) whether those works were unauthorised because they were carried out in breach of a condition of the consent.

80. As to point (i) the Claimant has not argued that in *physical terms* the works carried out before 24 August 2011 did not fall within the ambit of the schemes approved by the consents granted in 2008 and 2011. The issue concerns point (ii). It is said that works relied upon in order to justify the decision to grant the two certificates were carried out before "pre-conditions" attached to the 2008 planning permission and 2010 listed building consent were satisfied. Pre-conditions refer to a condition which require specified details to be submitted by the developer to the local planning authority and the latter's approval obtained before any part of the development or works authorised may lawfully be commenced (and thus before it can be said that the time limit for commencement was satisfied and the consent was lawfully implemented).

81. The first exception to the Whitley principle is that where a condition requires an approval to be obtained before a given date, the developer has applied within that time limit for the approval and that approval is subsequently given so that no enforcement action could be taken, then work done before the deadline and in accordance with the scheme approved can amount to a lawful commencement of the development for the purposes of implementing the relevant consent (Greyfort paragraph 8).

The section 192 certificate in relation to the 2008 planning permission

82. Conditions 7, 10, 12, 14 and 15 of the 2008 planning permission set out matters for which the Council's approval had to be obtained before the development authorised could lawfully be commenced (see paragraph 9 above). As I have already recorded, it is common ground that the Council issued notices discharging those conditions. Condition 14 was discharged on 15 July 2011, conditions 10 and 15 on 21 July and conditions 7 and 12 on 29 July (see paragraph 21 above). Thus, conditions 10, 14 and 15 were discharged before any of the works relied upon as a commencement of the development began on 22 July 2011 (see paragraph 24). The potential breach of the "Whitley principle" related to any works carried out before, rather than after, the discharge of conditions 7 and 12, that is to say works carried out between 22 and 29 July 2011, as opposed to works carried out between 30 July and 13 August 2011. The "Whitley principle" would only be breached, and exceptions to that principle would only need to be addressed, if no material works to implement the permission were carried out in the period between 30 July and 13 August 2011, but were instead confined to the earlier period pre-dating 30 July 2011.

83. At all events, it is also common ground that conditions 7 and 12 were discharged on 29 July 2015, even before the expiry of the time limit for the commencement of development authorised by the 2008 planning permission. Therefore, these circumstances fell full square within the first exception to the "Whitley principle". In paragraph 6 of the skeleton for the Claimant it was submitted at that stage that the first exception applies to the subsequent *approval* of details under a condition but not where a pre-condition is said to have been *discharged*. Any legal distinction between the two was not explained. I am bound to say that this contention was hopeless and, not surprisingly, it was abandoned at the hearing. Referring to a pre-condition as having been "discharged" is simply another way of saying that the requirement to obtain approval of details specified in the condition has been satisfied.

84. Paragraph 11 of the skeleton for the Claimant also criticised the Council for issuing the certificates without taking into account the fact that no further work has been carried out pursuant to the consents between August 2011 and February 2015. No authority was cited to support this ground of attack. Indeed it is, so far as I am aware, an entirely novel point. It is misconceived. If the works carried out in 2011 were sufficient to constitute a lawful implementation of the 2008 planning permission then that is the end of the matter in relation to the application of the "Whitley principle". The fact that no further works were subsequently carried out by the time the certificates were issued does not affect the legality of those certificates as challenged in these proceedings. This point too was not pursued at the hearing.

85. The abandonment of these two points ought to have resulted in the Claimant's legal team acknowledging in the case of the 2008 planning permission that this was a classic example of the first exception to the "Whitley principle" applying. I am reinforced in that view by the nature of the two residual points on the s. 192 certificate which were persisted in at the hearing, namely:-

    (i) Paragraph 4.6 of the report by the officer exercising delegated authority to determine the application for the s.192 certificate proceeded on the basis of a fundamental factual error, namely that there was no evidence to indicate that the works relied upon occurred before the discharge of conditions 7 and 12 on 29 July 2011; and

    (ii) The Council failed to consider the application of the "Whitley principle", in particular the nature and significance of the works carried out before 29 July 2011 in terms of the conditions discharged on that date.

    In my judgment there is no legal merit in either of these points.

86. The general principles on how the Court should approach the criticism of an officer's report to a planning committee were summarised in R (Luton B.C.) v Central Bedfordshire Council [2014] EWHC 4325 (Admin) at paragraphs 90 to 95. The parties in this case did not refer me to any authorities dealing with reports prepared for decisions delegated to officers. Certainly it was not submitted that any more exacting standards should be imposed by the Court. Applying these established principles to the present case, I should be wary of undue judicial intervention in the making of judgments by officers operating within their areas of special competence and expertise. It is reasonable to assume that planning officers entrusted to take certain types of planning decision are aware of the general legal principles relevant to

that area (in this case the "Whitley principle", a long established and widely known principle) and that their decisions need not rehearse concepts which are well-understood by practitioners in the area. The officer, no more than a Planning Inspector, is not being marked on an examination paper (Hoffman LJ in South Somerset D.C. v Secretary of State [1993] 1 PLR 80, 83).

87. The relevant passages of the report read as follows:-

> "4.3 The planning permission was granted subject to conditions, including 5 pre-commencement conditions. The relevant pre-commencement conditions were:
>
> - Condition 7 (demolition and construction method statement) – details agreed 29 July 2011
> - Condition 10 (landscaping and planting scheme/sample of infinity pool glazing) – details agreed 21 July 2011
> - Condition 12 (method statement for retention and protection of trees during construction) – details agreed 29 July 2011
> - Condition 14 (CTMP) details agreed 15 July 2011
> - Condition 15 (Confirmation of appointment of a suitably qualified engineer) – details agreed 21 July 2011
>
> 4.4 In July 2011 works were carried out at the property involving the digging of a hole in the basement level to accommodate a lift shaft in the position approved in the 2008 listed building consent. The cubic content of this is 8m3. Various internal walls were also removed, along with a basement staircase. In addition to the description of the works, the photographs and statutory declarations verify that the works did take place, indicating that the works took place on or before 11th August 2011. The plans included with Daniel Farrand's declaration show the position of the works.
>
> 4.5 The works are not extensive, but they do not have to be. The lift pit is unlikely to be the whole of the excavation necessary to install the lift, but it does not need to be. The works only need to be sufficient to have constituted a material start to the works approved under the planning permission. The commencement of works to provide the lift shaft is a part of an addition which would be within a side extension granted to the northern side elevation. This excavation was development in its own right and forms a key element of the permitted extension, therefore constituting a commencement of the planning permission.

> 4.6 There is no contradictory evidence. Nothing exists to indicate that either the works as described did not occur, or, if they did, they occurred either before discharge of conditional requirements or after the date of 14th August.
>
> 4.7 The submitted documentation does not establish exactly when the works were carried out. Daniel Ferrand writes that "I have no reason to doubt that the photographs show works performed prior to 14th August 2011" which is less than confirmation of a date. However, given the amount of information and the absence of anything contradictory, it can be reasonably concluded that the works were carried out prior to 14th August, and that is all that needs to be concluded as it is not necessary to know the exact time and date to establish that the works were, in all likelihood, carried out in time to have lawfully implemented the listed building consent."

88. The only purpose of the officer setting out in paragraph 4.3 of his report the relevant pre-commencement conditions of the 2008 planning permissions and the dates upon which they were discharged was to apply the "Whitley principle" and the first exception to that principle. The text of paragraph 4.7 also demonstrates the same point when the officer considered the carrying out of the works in relation to 14 August 2011 (the expiry of the three year time limit) and the discharge of pre-commencement conditions. The contention that the officer did not have regard to the "Whitley principle" is unarguable. Moreover, the officer was reacting to the application made on behalf of the Interested Parties. It is obvious that page 2 of the covering letter dated 12 February 2015 (and also paragraphs 6, 12 and 25-26 of the accompanying legal advice) were applying the "Whitley principle". Quite apart from the context, the "Whitley principle" is so well-known in this area that there was no need for the officer to refer to case law by name in order to apply it.

89. As to the Claimant's point (i), when paragraph 4.6 of the report of the delegated decision is read fairly, together with the other passages I have quoted, and in the context of the representations in support of the application, it is clear that the officer accepted that the "Whitley principle" had not been breached, taking into account the first exception to that principle and the simple point that all pre-commencement conditions had been discharged. In paragraph 4.7 the officer stated that he could reasonably conclude that the works had been carried out prior to 14 August 2011 and that it was unnecessary to establish the precise stage before that date at which these works had been carried out. That could only have been because the pre-commencement conditions had been discharged and so the "Whitley principle" was not breached.

90. Indeed, it is impossible to see how, on the material presented to the Council (and bearing in mind the points which are *not* disputed by the Claimant in this challenge), the officer could have come to any other conclusion. For these reasons, there was no conceivable error of law in the officer's observations in paragraph 4.6. He was simply making a further point, namely that there was no contrary evidence to indicate that *all*

of the works sufficient to implement the consents had been carried out *before* the discharge of pre-conditions. In other words he was satisfied on the evidence that at least some works of significance for the implementation of the consents had been carried out after the various discharges, including the discharge of conditions 7 and 12 on 29 July 2015. There is no basis in public law for challenging the officer's view of the evidence and in any event, for the reasons I have already given, the officer's observation about the timing of the works in relation to the discharge of the pre-conditions was not essential to his decision to grant the certificate. All pre-conditions were discharged and the first exception to Whitley applied.

91. Mr. Griffiths Q.C. did not indicate any authority upon which his point (ii) was based. At the hearing the Defendant and the Interested Parties along with the Court, proceeded on the basis that point (ii) related to the exceptions to the "Whitley principle" considered in R (Hammerton) v London Underground Limited [2002] EWHC 2307 (Admin) and R (Hart Aggregates Ltd) v Hartlepool B.C. [2005] EWHC 840 (Admin) (discussed in Greyfort (supra) at paragraphs 11 to 19). The Claimant did not contradict that understanding. The short answer to this criticism by Mr Griffiths QC, is that there was no need for the officer to address any other exception to the "Whitley principle" given that the first exception did apply because all of the pre-conditions had been discharged. One exception was enough.

92. For all these reasons ground 5 must be rejected in relation to the s.192 certificate.

The section 26H certificate in relation to the 2010 listed building consent

93. The Claimant's challenge to the s.26H certificate under ground 5 also relates to the application of the "Whitley principle".

94. The decision notice for the 2010 listed building consent set out only two conditions (see paragraphs 16 and 17 above). Only condition 1 was relevant to the application of the "Whitley principle", namely the three year time limit for the commencement of the works authorised. It is not suggested by the Claimant that the Council erred in law in its reasoning that the works were begun before 14 August 2011.

95. Although the Council was only ever asked by the Interested Parties to certify the lawfulness of works to be carried out under the 2010 listed building consent, the Claimant's contention that the "Whitley principle" was breached is dependent upon their assertion that conditions 2, 3, 6, 7, 8, 10, 12 and 13 of the 2008 listed building consent govern not only that consent but also the 2010 consent. This argument is put in two alternative ways:-

    (i) The 2010 consent was not a freestanding listed building consent separate from the 2008 consent;

    (ii) If the 2010 consent was a separate consent then the conditions of the 2008 listed building consent were incorporated into the 2010 consent.

96. In my judgment it is clear that the 2010 consent was a freestanding consent. The contrary view is unarguable. It is accepted on behalf of the Claimant that the listed building application made on 8 September 2010 was not made under s.19 of the Listed Building Act 1990 to vary or discharge conditions imposed on the 2008

consent, but was instead an application under s.10 of the 1990 Act. It is plain beyond argument that a s.10 application, if granted, results in a freestanding listed building consent under s. 16.

97. Mr Griffiths QC argued that nevertheless the 2010 consent was not a freestanding consent because the application gave a "description of proposed work" as "amendment to listed building consent reference LB/08/01323" and the consent itself refers to the authorised works in similar terms. For my part I have great difficulty in seeing how mere wording used in the decision notice to describe the works being authorised could alter the statutory effect of sections 10 and 16 of the Listed Buildings Act 1990 so that the 2010 consent was no more than a variation of the 2008 consent. In any event, the wording upon which Mr Griffiths QC relied did not in fact define the so-called "amendment". Instead, a new set of application drawings depicting a new scheme defined entirely by those new drawings, was approved by the 2010 listed building consent, as an alternative scheme to that which had been defined by the earlier set of drawings approved by the 2008 listed building consent.

98. It is also important to bear in mind that the s.16 consent granted approval for *works* requiring authorisation under s.7 and s.8. The operative words of the grant in the decision notice dated 1 November 2010 stated that the Council "hereby consents to the works to the Listed Buildings referred to in the under-mentioned schedule…in accordance with the plans submitted." Thus the grant of consent made it plain that the works it was authorising were defined by the plans listed in the schedule, not by the terms of the 2008 consent on the entirely separate set of plans referred to in the earlier consent. The description in the schedule of the "development" referred to the amendments of the 2008 consent as a "reduction in the scope of the scheme". That is entirely consistent with the way in which the 2008 and 2010 consents operated. Each consent authorised the carrying out of a scheme of works defined by the separate sets of drawings. The 2010 scheme was reduced in scale as compared with the 2008 consent. In that loose sense the earlier *scheme of works* was amended, but that is not the same thing as saying that the 2010 consent purported to *amend the 2008 consent*.

99. Finally, I refer to condition 1 of the 2010 consent which, in accordance with s.18 of the Listed Building Act 1990 required the works thereby permitted to be begun "before the expiration of three years from the date of *this* consent" (emphasis added). Thus, although Mr. Griffiths QC attempted to argue otherwise, condition 1 set 31 October 2013 as the time limit for the implementation of the 2010 consent, whereas the 2008 consent was set to expire at the end of 13 August 2011 unless implemented before that date. The two documents created two freestanding listed building consents.

100. Mr. Griffiths QC then submitted that if the 2010 listed building consent was a freestanding consent, it incorporated the conditions of the 2008 listed building consent, relying upon the decision of Sullivan J (as he then was) in R (Reid) v Secretary of State for Transport, Local Government and the Regions [2002] EWHC 2174 (Admin). In that case a planning permission had been granted in 1992 for a transport depot subject to a number of conditions. Subsequently an application was made under s. 73 of the TCPA 1990 for the retention of that use "without compliance with condition 2". The application was granted in those same terms, but under the heading "conditions" the decision notice stated "none". The Court held that because the decision notice had granted permission "for the application" it was necessary to

refer to that document, from which it was plain that the Council was being asked to grant a permission for the same use and subject to the same conditions as had been imposed in 1992 save for the omission of condition 2. The subsequent planning permission had in effect incorporated the terms of the earlier permission (paragraph 56).

101. In the present case, the Claimant's argument eventually came to rely upon an incorporation by reference of the terms of the 2008 consent by the description of the "development" in the schedule to the grant of listed building consent (see paragraphs 15 and 16 above). In particular, the argument relied upon the words "amendments to the listed building consent LB/08/01323….".

102. The principles upon which a Court should construe a planning permission were summarised by Keene J (as he then was) in R v Ashford BC ex parte Shepway DC [1999] PLCR 12 principally at page 19 and also by Beatson LJ in Telford and Wrekin Council v Secretary of State for Communities and Local Government [2013] EWHC 79 (Admin) at paragraph 33. The fundamental considerations are that a planning permission (or for that matter a listed building consent) is a public document which runs with the land and which also affects the position of third parties and the wider public. Consequently a local planning authority is statutorily obliged to make planning permissions and other consents accessible to the public by means of its planning register. For these reasons the general rule is that subsequent landowners and the public should be able to understand the ambit and meaning of a planning permission from within the four corners of the document itself, without recourse to extrinsic evidence. Thus, where a planning permission or listed building consent is clear and unambiguous on its face then it must be construed without regard to other documentation unless the permission incorporates by reference some other specific document.

103. In the present case Mr Griffiths QC made it plain that the Claimant does not suggest that there is any ambiguity in the 2010 listed building consent so as to justify the use of extrinsic material under principle (4) in Ashford. On the contrary he contends that the 2010 consent is unambiguous. He says that the 2010 consent incorporates by reference the terms of the 2008 listed building consent, applying principles (2) and (3) in Ashford. However, under principle (3) more is required to achieve incorporation than a mere cross-reference to another document. Although there is no need to comply with some magic formula, nevertheless words sufficient to inform a reasonable reader that the document forms part of the consent are needed, such as "in accordance with the consent dated …" or "in accordance with the terms of the consent …", *and* in either case those words must appear in the *operative part of the consent* dealing with *the works authorised* and the *terms in which the consent is being granted*.

104. The Claimant does not suggest, rightly in my view, that the 2010 listed building consent incorporated the application for that consent made on 8 September 2010. Instead the Claimant relies solely upon wording in the schedule to the 2010 consent which described the "development" as "Amendments to listed building consent LB/08/01323 (reduction in the scope of the scheme) (listed building consent only)" in order to treat the terms of the 2008 listed building consent as forming part of the 2010 consent. In my judgment there are a number of reasons as to why this wording is wholly inadequate for this purpose. First, neither the Schedule to the 2010 consent nor

the description of the "development" constitute by themselves a grant of consent. They depend for their legal effect upon the preceding words of grant.

105. Second, the grant of consent correctly authorises "works" to the listed building referred to in the Schedule. A listed building consent is necessary for the authorisation of "works" not "development" (the latter term belonging to control through the separate requirement to obtain planning permission).

106. Third, as I have already explained in paragraphs 97 and 98 above, the "works" referred to in the grant of consent and identified in the Schedule are not in fact defined by the words "amendments to listed building consent LB/08/01323" or "reduction in the scope of the scheme". Those words do not give any clue as to the content of the 2010 scheme or the differences between the 2008 and 2010 schemes (see e.g. paragraph 13 above). Instead the works authorised by the 2010 consent are defined solely by the freestanding collection of approved drawings listed in the Schedule to that consent. It is not suggested, for example, that those 2010 drawings amended the set of drawings approved by the 2008 consent (e.g. by showing alterations to the details shown on the earlier drawings). Instead the 2010 drawings were a fresh set of drawings which completely replaced the 2008 drawings. The language of the 2010 consent used to authorise the works shown on the 2010 drawings did not rely upon any part of the 2008 listed building consent. The words relied upon by Mr Griffiths QC gave no more than the broadest of indications as to what the consent related to. Those words were at most only *broadly indicative* and were certainly not *operative*.

107. Fourth, and in any event, the suggested incorporation of the 2008 consent would be incompatible with the terms of the 2010 consent. The Claimant merely seeks to incorporate certain conditions from the 2008 consent into the 2010 consent. In this respect I have already referred to the incompatibility between the two listed building consents as regards the time limits for commencement of the two different schemes of authorised works (see paragraph 99 above). But there is a more fundamental obstacle. The Claimant does not suggest that the drawings approved by the 2008 consent and defining the works authorised thereby, are compatible with the works authorised by the 2010 consent. Likewise, condition 3 of the 2008 consent, which requires the works thereby authorised to be carried out in their entirety exactly and solely in accordance with the 2008 drawings, is incompatible with condition 2 of the 2010 consent which requires the works thereby authorised to be carried out in their entirety exactly and solely in accordance with the 2010 drawings. Mr Griffiths QC was unable to point to any wording in the 2010 consent which could justify incorporating only part of the terms of the 2008 consent.

108. Fifth, the grant of the 2010 consent expressly stated that that consent was given "subject to the conditions set out therein", i.e. the conditions set out in the Schedule to the 2010 consent. At the foot of that Schedule the Council stated "Full conditions, reasons for their imposition and informatives attached overleaf." The only conditions set out in the 2010 decision notice were the two to which I have referred in paragraphs 16 and 17 above. The suggestion that the conditions of the 2008 consent, or rather *some* of those conditions, were incorporated into the 2010 consent is inconsistent with the express language used in the latter consent.

109. For completeness I should add that it is now well-established that conditions cannot be implied into a planning permission or a listed building consent (see e.g. paragraph 33 of Telford and Wrekin (supra)).

110. Accordingly, the Claimant's contention that the s. 26H certificate was granted in breach of the "Whitley principle", simply because of non-compliance with pre-conditions contained in the 2008 listed building consent, is unarguable.

111. For the above reasons it is unnecessary to go further into the Claimant's arguments under ground 5 in relation to the s. 26H certificate. But for completeness I note that the Statement of Facts and Grounds and the Claimant's skeleton argument sought to rely upon conditions 5, 6, 7, 8, 10, 12 and 13 of the 2008 listed building consent. But these conditions do not require approvals to be obtained before *any* works can lawfully be commenced. Conditions 6, 7, 8 and 13 simply impose restrictions upon the manner in which the authorised works may be carried out. Condition 5 requires approvals to be obtained before certain later stages of the 2010 scheme may be commenced, but not the initial works which the Council accepted had been carried out. Condition 10 requires prior approval for the removal of any architectural fixture or surface which is not shown to be removed in the drawings approved by the 2010 consent. The Claimant did not suggest that that condition had been engaged or breached by the works carried out in 2011. Condition 12 prohibits the installation of lighting and certain plant without prior approval and plainly has nothing to do with the initial works of implementation carried out in this case. The Claimant did not attempt to show that the works relied upon by the Council as a lawful commencement of the 2010 listed building consent involved a breach of any of the conditions 5, 6, 7, 8, 10, 12 or 13.

112. It follows that even if the Claimant had succeeded in its argument that the 2010 listed building consent was also subject to conditions contained in the 2008 listed building consent, ground 5 would have failed in any event in relation to the conditions upon which the Statement of Facts and Grounds and the Claimant's skeleton had relied.

113. However, at the hearing Mr Griffiths QC, undaunted, sought to rely in addition upon condition 2 of the 2008 listed building consent (see paragraph 10 above). This argument was not developed to any extent in oral argument and so I will deal with the Claimant's asserted breach of condition 2 of the 2008 consent briefly. I accept the submissions of the Defendant and the Interested Parties that the application for (and also the drawings approved by) the 2010 listed building consent defined the proposed works of "demolition" and that the works of commencement carried out did not fall within the scope of those works of "demolition" referred to in condition 2. In my judgment it was sufficient for the implementation of the 2010 consent that the Interested Parties carried out works of excavation in connection with the proposed new lift shaft (see paragraph 24 above).

114. For all these reasons I reject ground 5 of the challenge.

Delay

115. It is common ground that:-

(i) No issue of delay arises in relation to the challenge to the s.192 certificate dated 24 April 2015. The proceedings were brought in time;

(ii) The s.26H certificate was issued on 2 April 2015 and in order to comply with the 6 week time limit in CPR 54.5 (5), the claim ought to have been issued by 14 May 2015. It was not issued until 5 June 2015 and so an extension of time of 22 days is sought;

(iii) In considering whether it is appropriate to extend time it is relevant to consider when the Claimant first knew of the existence of the s.26H certificate and how quickly the Claimant issued proceedings once that knowledge was obtained (see e.g. R v Secretary of State for Transport ex parte Presvac Engineering Ltd [1991] 4 Admin L.R. 121 133-4);

(iv) The Claimant first knew of the granting of the s.26H certificate on 14 May 2015, the day when the relevant 6 week time limit expired. It was not suggested that the Claimant or its advisers ought reasonably to have acquired that knowledge at an earlier stage.

The Claim Form did not include an application for an extension of time because apparently the view was taken, wrongly in my judgment, that time began to run in relation to the s.26H certificate from the date when the s.192 certificate was subsequently granted. That view was completely untenable and no weight can be given to it at all.

116. In his witness statement Mr. Hughes explains on behalf of the Claimant what happened after 14 May 2015. Given the importance of the matter and sensitivity of the issues, including any decision to bring a claim for judicial review, it was necessary for senior officers at the Embassy to be consulted, including the Ambassador. Understandably their schedules were already heavily committed and so a meeting could not be arranged until 22 May 2015, a Friday. Instructions were forwarded to leading Counsel on 27 May 2015 and he gave preliminary advice over the telephone that day. A consultation was organised for 1 June 2015 and the decision taken to bring a challenge by judicial review. The claim was then issued at the end of that week on 5 June 2015.

117. In these particular circumstances, and given the matters that had to be investigated, I am persuaded, but only just, that the delay has been justified in this case, taking into account not only the time which has elapsed (a) since the grant of the s. 26H certificate and (b) since the expiry of the 6 week time limit (R v Cotswold DC ex parte Barrington PC (1998) 75 P & CR 515), but also the absence of any procedures for publicity or for notifying neighbours that the section 26H application had been made (Sumption v Greenwich LBC (2008) 1 P & CR 20). However, in reaching that conclusion I am not to be taken as suggesting that a delay of about 3 weeks beyond the 6 week time limit should normally be treated as justifiable, whether dealing with challenges to certificates of this kind or to planning decisions more generally. The issue whether an extension to the time limit can be justified by a Claimant must depend upon the circumstances of the case in question.

118. I also bear in mind the further consideration that the Defendant and the Interested Parties do not suggest that any prejudice or detriment to good administration has been

caused by the delay of 22 days. The fact that the Claimant is entitled to challenge the s.192 certificate in any event is important when dealing with this additional factor.

119. For these reasons I grant the extension of time needed for the Claimant to challenge the s.26H certificate.

Conclusions on the Claim

120. For all these reasons, grounds 1 to 5 of the claim for judicial review fail and the application to quash the certificates issued under s. 192 of the TCPA 1990 and s. 26H of the Listed Buildings Act 1990 must be dismissed in any event. However, the claim came before me as a rolled-up hearing and I must also deal with the application for permission to apply for judicial review. I make allowance for the fact that the matter was fully argued. But I also bear in mind that the application for permission could otherwise have come before the Court as an oral hearing, in which it is likely that the Court would have applied the threshold in Mass Energy Ltd v Birmingham City Council [1994] Env LR 298. In my judgment, whether applying the standard or the *Mass Energy* threshold for arguability, I consider each of grounds 1 to 5 to be unarguable. I therefore refuse permission to apply for judicial review in relation to those grounds.

121. I return to ground 6 (see paragraph 31 above). I grant permission to apply for judicial review on ground 6 and I uphold that ground. The Claimant accepted that ground 6 could not found an application to quash the s. 192 certificate and so only declaratory relief is sought in respect of that matter. I invited written submissions as to whether a declaration should be granted, in the light of Hunt v North Somerset Council [2015] 1 WLR 3575.

122. The Claimant says that the failure to enter the s. 192 certificate on the planning register until 24 June 2015 was pursued as a ground of challenge, declaratory relief was and is sought, the breach is admitted and that no valid reason has been put forward to justify refusal of that relief in accordance with Hunt. I agree. The fact that a declaration to confirm the correctness of ground 6 would do nothing to vindicate the Claimant on the challenge to the certificates under grounds 1 to 5 is neither here nor there.

123. Likewise the fact that the breach was cured subsequently is not a sufficient reason to justify refusal of an appropriately worded declaration. The certificate was only entered on the register on 24 June 2015 after (a) the email dated 1 June 2015 from the Claimant's junior Counsel to the Defendant (pointing out that the document was not available on the Council's website or planning register and that the Council's only reason for this had been an entirely spurious claim that the document was "sensitive") and (b) the issuing of the Claim for judicial review on 5 June 2015. Given the absence of any obligation to publicise, or notify third parties of, the making of an application for a s. 192 certificate, it is important that the statutory duty to enter the certificate on the register is complied with. If that is not done then very real difficulties may be created for a member of the public or a body wishing to ascertain whether a certificate has been granted and if so in what terms, so that they may consider whether to make an application for judicial review. The Court may have to consider an application to extend time for making the application under CPR Part 54 which might otherwise have been unnecessary (see also Sumption v Greenwich LBC (supra)). If anything,

the response by the Defendant and the Interested Parties on this point reinforces the need for a declaration to be made.

The ambit of the s.26H Certificate

124. I have concluded that none of the substantive grounds for judicial review can be sustained as a legal basis for quashing either of the two certificates. I return to the issue raised by the court, and not by the Claimant, as to how the court should react to the fact that the s.26H certificate confirmed the continuing validity of the 2008 listed building consent, although that matter did not form part of the application made to the Council by the Interested Party (see paragraph 28 above).

125. Mr. Brown QC confirmed straight away that the Interested Parties do not wish to rely upon that part of the s.26H certificate which confirms the validity of the 2008 listed building consent. He stated that if the matter could not be corrected by the court in these proceedings then his client would be willing to enter into an obligation under s.106 of TCPA 1990, which would bind successors in title (s.104(3)), so as to preclude reliance upon the 2008 consent. For that purpose he would ask the court to allow a period between the draft judgment being made available to the parties and the making of a final order to enable any necessary s.106 obligation to be executed. That course was adopted in not dissimilar circumstances in R (Nicholson) v Allerdale Borough Council [2015] EWHC 2510 (Admin) at paragraphs 83 to 102. The principle of relying upon s.106 obligations, or non-material alterations under s.96A of TCPA 1990, as a basis for the court to refuse a quashing order in the exercise of its discretion has been recognised in R (Midcounties Co-operative Ltd) v Wyre Forest D.C. [2011] JPL 173 and R (Barr) v North Somerset Council [2015] EWHC 1735 (Admin) (at paragraphs 21 to 24 and 26 to 34).

126. I note that in their written submissions dated 13 November 2015 Counsel for the Claimant do not raise any objection to, or even address, the possible use of a s.106 obligation to overcome the issue raised by the court. It follows that if no other option was available to the court, then it would be appropriate to allow such an obligation to be prepared and put before the court before a final order in these proceedings is made. I now consider whether it is in fact necessary to invite the Interested Parties to consider entering into a s.106 obligation, or whether another course may be taken instead.

127. Counsel for the Defendant and Interested Parties have provided jointly agreed written submissions. In summary, they submit that the tests for severability of a legislative instrument which is partially invalid may also be applied to the s.26H consent. The tests relate to textual or linguistic severability and substantial severability. In DPP v Hutchinson [1990] 2 AC 783 the House of Lords held (pp 804 - 811) that while the test of textual severability does not always need to be satisfied in order to justify severing a partially invalid document, the test of substantial severability must always be satisfied.

128. The principles are as follows:-

(i) Textual severability is satisfied where the omission from the text of so much as exceeded the decision-maker's power leaves in place a text which is grammatical and coherent;

(ii) Where textual severance is possible, the test of substantial severability is also satisfied if the valid part is unaffected by, and independent of, the invalid part;

(iii) Where textual severance is not possible, so that severance cannot be achieved without a modification of the text, the test of substantial severability requires the court to be satisfied that it is effecting no change in the substantial purpose and effect of the impugned provision.

129. Similar principles have been applied to the severance of an invalid condition, or an invalid part of a condition, from a planning permission or licence (see e.g. R v North Hertfordshire D.C. ex parte Cobbold [1985] 3 All ER 486, 490-492; R (Midcounties co-operative Ltd) v Wyre Forest D.C. [2009] EWHC 964 (Admin) para 72).

130. In the present case the test of textual severability is satisfied. It is possible to delete from the second paragraph of the grant in the certificate and from the first schedule to that grant the references to LB/08/01323 so as to leave behind text which is grammatical and coherent. In addition, the deletion of the references to LB/08/01323 so that the certificate refers only to LB/10/02900 satisfies the requirement for substantial severability. The remaining text is independent of and unaffected by the references to LB/08/01323. The two consents were free-standing consents. The Council was asked to certify the continuing validity of the 2010 listed building consent and it decided that the 2010 consent remains valid on grounds which support that decision and which the Court has held to be unimpeachable. Accordingly, the test of substantial severability is also satisfied. It is therefore unnecessary to consider how that second test would apply if the first had not been met and textual modification had been necessary.

131. The Claimant has submitted written representations dated 13 November 2015 arguing that severance would be impermissible for the following reasons:-

(i) If the s.26H certificate related to work which had already been carried out and not to proposed works, then it is ultra vires and severance would not save the decision (paragraphs 1 to 2 and 10);

(ii) The Court cannot do that which the Council had no power to do in relation to the application for s.26H certificate. Thus, the Council could only grant or refuse the application made to it and could not modify *that application* (paragraphs 3 to 6);

(iii) Severance would be improper because it would involve rewriting the certificate; the deletion would go to the heart of the certificate (paragraph 7);

(iv) Without any reference to the 2008 listed building consent the s.26H certificate would not have been granted (paragraphs 8 to 9);

132. These submissions are misconceived. Submission (i) relies upon the correctness of the challenge under ground 1, which I have rejected. On that basis the issue now is simply whether the reference to the 2008 listed building consent can properly be severed from the certificate. Submission (ii) does not arise. The proposed deletion does not involve any modification of the *application* made to the Council. Instead, it would simply bring the certificate into line with that application under the Court's

powers of judicial review (which of course the Council does not possess). I have already explained why I do not accept submissions (iii) and (iv) when applying the test of substantial severability above. At this juncture the Claimant's submissions do not raise any additional points for determination.

133. Given that the Claimant never sought to have the s.26H certificate quashed on the ground that it certified the validity of the 2008 consent as something falling outside the ambit of the application, not even at the oral hearing, I regret to have to say that the written representations submitted on 13 October 2015 were simply opportunistic as well as misconceived.

134. For these reasons I conclude that the references to the 2008 listed building consent can be severed from the s.26H certificate. The Court's order reflects the wording agreed between the parties for this purpose.

Costs

135. I have received written submissions from the parties on costs. The Defendant submits that the Claimant should be ordered to pay the whole of its costs. The Claimant's Counsel accept that whilst the Defendant is "entitled to a substantial proportion of its costs, there should be a percentage reduction in the amount awarded" to reflect the fact that (a) the Claimant succeeded under ground 6 and in obtaining declaratory relief in that respect and (b) the Court had to sever parts of the s. 26H certificate. Unhelpfully, however, the submissions do not indicate the reduction sought, whether as a percentage, a proportion or a sum of money. Bearing in mind the "overriding objective" it is regrettable that these relatively small issues have not been resolved by agreement as ought to have been possible.

136. I agree with the Claimant that the award of costs to the Defendant should not include any work on "the severance of the s. 26H certificate". It was a point raised by the Court and not by the Claimant. The costs incurred by the Defendant were not incurred in resisting the claim, but were incurred in correcting an error in the drafting of the certificate. Equally there is no justification for awarding the Claimant any costs for dealing with this subject; indeed the Claimant's submissions on severability were rejected.

137. The Claimant was successful, but only just, in obtaining an extension of time for challenging the s.192 certificate. But that application was not made in the Claim Form as it should have been, nor in any subsequent formal application, because the Claimant incorrectly maintained that no extension was needed. So the Defendant was entirely correct to raise the issue of delay and incurred costs in so doing. The Claimant belatedly changed tack in one short paragraph of its skeleton and reliance was placed upon the very brief witness statement of Mr Hughes. The Defendant unsuccessfully opposed this late and informal request to extend time, but I note that the Claimant does not ask the award of costs to the Defendant to be adjusted for this reason. The application to extend time was one which the Claimant needed to make in any event in order to mount a challenge to the s. 192 certificate and that challenge has failed. Taking into account also the Claimant's conduct on this issue, I see no reason to disallow any part of the Defendant's costs of dealing with the delay issue.

138. The last issue is the Claimant's success on ground 6 and the grant of a declaration. The main object of the claim was to seek the quashing of the two certificates and, indeed to ask the Court to declare that the relevant consents had expired through effluxion of time. There is no reason to think that ground 6 would have been raised if the challenge to the certificates had not been pursued. When the claim was issued on 5 June 2015 the s.192 certificate had not been entered on the planning register, but the breach of the 2015 Order was corrected on 24 June 2015. No significant time at all was spent on this matter in the preparation of the Claimant's skeleton or at the hearing. Only a tiny part of the Statement of Facts and Grounds was devoted to this ground. The grant of the declaration marks a point that needed to be made but has no continuing practical significance. The breach was remedied well over a year ago. Most of the effort spent on this subject was confined to the written submissions by the parties after this judgment was supplied to them in draft form. This issue need to be dealt with in a fair and proportionate way. First I will direct that the Defendant's award of costs should not include any work on ground 6. Second, the Claimant is entitled to costs for only the limited amount of additional work which ground 6 made necessary, bearing in mind the relationship of that ground to the true rationale of the claim. Given the nature of the work involved assess those costs summarily at £1500 plus any VAT payable. A detailed assessment of costs in relation to ground 6 is not justified.