Michaelmas Term
[2017] UKSC 79
On appeal from: [2016] EWCA Civ 936

JUDGMENT

Dover District Council (Appellant) *v* CPRE Kent (Respondent)
CPRE Kent (Respondent) *v* China Gateway International Limited (Appellant)

before

Lady Hale, President
Lord Wilson
Lord Carnwath
Lady Black
Lord Lloyd-Jones

JUDGMENT GIVEN ON

6 December 2017

Heard on 16 October 2017

Appellant (Dover District Council)
Neil Cameron QC
Zack Simons
(Instructed by Legal Services, Dover District Council)

Respondent

John Howell QC
Ned Westaway
(Instructed by Richard Buxton Environmental and Public Law)

Appellant (China Gateway International Limited)
Matthew Reed QC
Matthew Fraser
(Instructed by Pinsent Masons LLP (London))

LORD CARNWATH: (with whom Lady Hale, Lord Wilson, Lady Black and Lord Lloyd-Jones agree)

1. When a local planning authority against the advice of its own professional advisers grants permission for a controversial development, what legal duty, if any, does it have to state the reasons for its decision, and in how much detail? Is such a duty to be found in statutory sources, European or domestic, or in the common law? And what are the legal consequences of a breach of the duty?

2. Those issues are presented by this appeal in a particularly striking form. The context is a proposal for major development to the west of Dover, on two sites referred to as Western Heights and Farthingloe. The latter is within the Kent Downs Area of Outstanding Natural Beauty. Western Heights is a prominent hilltop overlooking Dover, dominated by a series of fortifications dating from the Napoleonic wars, including the so-called "Drop Redoubt". The site is a scheduled monument. Farthingloe is in a long valley between the A20 and the B2001 to the west of Western Heights, and comprises 155 hectares of agricultural and scrubland.

The application

3. The application for planning permission was submitted by the second appellant ("CGI") to the local planning authority, the Dover District Council ("the Council"), on 13 May 2012. The principal elements were: 521 residential units and a 90 apartment retirement "village" at Farthingloe; 31 residential units and a hotel and conference centre at Western Heights; and conversion of the Drop Redoubt into a visitor centre and museum. A payment of £5m for the improvements to heritage assets, to be funded from the profits of the residential development, was to be secured by a planning agreement. The development was categorised as "EIA development" for the purpose of the relevant regulations (Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824) regulation 2(1)), and was accordingly accompanied by an environmental statement.

4. The proposal attracted strong support and strong opposition. Some saw it as offering a much-needed boost to the local economy. Thus, for example, the South East Local Enterprise Partnership commented:

> "The proposals represent a major opportunity for both Dover and the wider tourism and visitor economy of East Kent at a time of major challenges facing the local economy. In the

> absence of likely public-sector funding to act as a catalyst for change it is essential that the private sector is encouraged to move forward with confidence and business can aid recovery. Approval of the application would be timely in demonstrating that Dover is open for business and investment. Refusal would send out all the wrong messages to investors."

Others (including the present respondents, CPRE Kent) saw it as a serious and unjustified breach of national policy. Thus the AONB Executive said:

> "The Farthingloe valley in the Kent Downs Area of Outstanding Natural Beauty is an enormous asset to Dover. This dry chalk valley provides a memorable approach to the town, with glimpses of Dover castle, as well as a green setting for both the town and the Western Heights available for all to enjoy. The proposed development of over 500 houses in a particularly prominent area of the valley would irreparably damage this nationally protected landscape. It would cause significant harm to the special character and the natural beauty of the AONB. No meaningful mitigation would be possible. The scheme is wholly contrary to national and local policy and is a major challenge to the Government's purposes for AONB designation. We have found no other housing development nationally on a similar scale which has been approved in an AONB …"

The planning officers' report

5. These views along with many others on both sides were faithfully summarised in the officers' report to the Planning Committee, circulated on 7 June 2013. The report, under the name of the Head of Regeneration and Development, is a remarkable document. It runs to some 135 pages with appendices. It contains a comprehensive exposition of the various elements of the proposed development, the responses to consultation public and private, and the applicable national and local policies, followed by a detailed appraisal of the relevant issues, and concluding with a recommendation for the grant of permission but in amended form.

6. The principal change recommended by the officers was the exclusion from the development at Farthingloe of a "safeguarded area" of some 2ha in the south-west (in the more prominent sector known as FL-B), where "officers consider the landscape harm … most acute"; and the consequent reduction of the number of houses at Farthingloe from 521 to 365. The Council's economic advisers, Smiths

Gore, had advised that the reduction would not jeopardise the viability of the scheme or the intended financial contributions (officers' report paras 2.216, 2.443, 2.445). One aspect of Smiths Gore's advice was to suggest a reduction in the Code for Sustainable Homes (CSH) rating from Code 4 to Code 3, which would not only deliver a viable development but would also achieve "a more marketable and higher quality housing scheme … this being important to help diversify and improve the Dover housing offer" (paras 2.217, 2.443). Among other recommended conditions, it was proposed that the provision of the hotel should be secured by requiring it to be commenced before one of the development phases (para 2.131(iii)).

7. In a section of the report headed "NPPF (para 116) review", reference was made to that paragraph of the National Planning Policy Framework (NPPF), which indicates that major development in an AONB should be permitted "only in exceptional circumstances and where a public interest can be demonstrated". The officers regarded the level of harm to the AONB as "significant", particularly to the south-west of sector FL-B where "built development on the elevated and exposed terrain would seriously compromise the landscape character". They concluded:

> "2.447 Nevertheless it is your officers' opinion that offsetting the landscape harm by the modifications outlined in this report would shift the planning balance in favour of the economic and other national benefits of the application. The local economic issues and specific circumstances of this case … are considered to provide a finely balanced exceptional justification for this major AONB development, the benefits of which would be in the public interest. Essential to this conclusion would be seeking all the recommended conditions (changes) and ensuring (by condition / section 106 agreement) the deliverability of all the relevant application 'benefits'. The rationale for the application is as a composite package, and any permission should therefore be framed to ensure the emergence of the proposals in a structured and comprehensive fashion."

8. It was noted that the applicant had not yet been given an opportunity to comment on these proposed changes. If they were supported in principle by the Committee, it was suggested that they might delegate to officers to discuss with the applicant "any minor variation of the proposed residential quantum", and the precise boundaries of the safeguarded area, although it was "not envisaged that this should lead to any notable change in the recommended approach" (para 2.448). On balance their conclusion in this case was that the application would, as "a single comprehensive scheme", support rather than work against the overall objectives of sustainable development as defined by the NPPF (para 2.454).

9. In a section headed "Conclusion" it was stated:

> "… the officer position is that the conditions / changes as set out in this report (informed by independent legal and financial viability advice) are well founded and that all are necessary to deliver the right composite package, including the economic benefits, so that an on balance recommendation of approval can reasonably be made." (para 2.457)

The report ended with a recommendation for the grant of conditional planning permission (part outline, part full) for the various elements of the proposal, but with a limit of 365 residential units at Farthingloe, and subject to the completion of a planning agreement (under section 106 of the Town and Country Planning Act 1990) to secure the proposed benefits including the hotel and conference centre.

10. The report was shown to the applicants. Their consultants, BNP Paribas, wrote on 11 September, expressing "fundamental" disagreement with Smiths Gore's appraisal of viability. They commented on the proposed reduction to 365 houses:

> "We have re-run our appraisals to test the impact of the removal of 156 units, as suggested by Smiths Gore. The result is to turn a positive land value of £5.85m to a negative land value of -£3.03m. On the basis of this result, the scheme would not secure funding and could not proceed.
>
> For the avoidance of doubt, we do not agree with the planning officer's assessment that the benefits provided by the Application scheme could also be provided by the sensitivity analysis mooted by Smiths Gore. Indeed, our view is that such a scheme would not be capable of providing the benefits offered and could not proceed as it would be incapable of providing a competitive return to the landowner and developers, as required by the National Planning Policy Framework."

They also disagreed with the suggestion that the proposed changes would make the scheme more marketable. Although the letter was not seen by the members of the committee (other than the chairman), its effect and Smiths Gore's response were summarised at the meeting (see below).

The Committee meeting

11. The application was considered by the Planning Committee on 13 June 2013. The very full minutes record that the meeting started at 6.00 pm and ended at 9.38 pm, with a short break at 9.00 pm following the main vote for the officers to make amendments to their recommendation. (Also on the agenda was one other minor planning application which was dealt with first.) On the Farthingloe application there were contributions by four members of the public (two for and two against). There was a detailed presentation by the officers of the proposals and the issues, during which reference was made to the issue of viability and the BNP Paribas letter, the effect of which was summarised. The minute continued:

> "The Principal Planner advised the Committee that, having considered the further views of BNP Paribas, Smiths Gore stood by their analysis that a lower density scheme would be viable and would deliver the same monetary benefits as currently on offer. Officers therefore recommended that a lower density scheme should be approved as it was viable, not excessive for the site and would be compliant with the Core Strategy."

12. After the officers' presentation, five members were recorded as speaking in favour of the proposal, and one against. Another expressed concern about the security of the proposed payment of £5m. The views of three named supporters were expressed collectively; they saw it as "a rare opportunity for regeneration and investment", and a "courageous step … necessary to give Dover's young people a future"; of the proposed amendments they said:

> "…, it was felt that the application should not be restricted in the way proposed in the recommendation as this could jeopardise the viability of the scheme, deter other developers and be less effective in delivering the economic benefits. The Committee had to assess whether the advantages outweighed the harm that would be caused to the AONB. When seen from the ground and with effective screening, it was believed that this could be minimised. In these exceptional circumstances it was considered that the advantages did outweigh the harmful impact on the AONB."

13. At the end of the discussion a motion was proposed that the officers' recommendation be approved but subject to amendment of the number of houses from 365 to 521 as proposed in the application. The motion was carried (the voting

is not recorded). The meeting was adjourned for 25 minutes to enable the officers to re-word their recommendation with consequential amendments. A vote was then taken on the amended recommendation, which was approved.

14. On 11 July 2013, in response to requests by (among others) CPRE Kent, the Secretary of State declined to call in the application for his own determination.

The section 106 agreement and the grant of permission

15. On 18 December 2014 the application returned to the planning committee with an updated officers' report. The introduction to the report made clear that its purpose was, not to revisit the decision to grant permission in the previous year, but to update the committee on the section 106 agreement, and to provide "an assessment of planning considerations which have emerged since the resolution to grant planning permission" (para 3). The report on the section 106 agreement confirmed that, contrary to the officers' recommendation in June 2013, there was no obligation linking the provision of the hotel to the phasing of the residential development:

> "The section 106 is drafted in accordance with the Committee resolution which places no obligation on the applicant to provide the hotel at any point in time and there is no obligation to provide the hotel at any stage during the build-out of other development proposed in the application. Rather, the objective of the section 106 is to provide the opportunity for a quality hotel to come forward." (para 35)

16. Although Mr Cameron drew our attention to some aspects of this report, it does not seem to have been relied on in the courts below. Mitting J (para 6) merely noted that the revisions were not material to the issues which arose in the case. The December meeting was not mentioned by the Court of Appeal. I can find nothing in the report or minutes to suggest an intention to revisit the substance of the decision of principle made in June 2013, nor which throws further light on the reasons for that decision. The committee resolved to grant permission subject to the completion of the section 106 agreement.

17. The agreement was executed on 1 April 2015, and planning permission was granted on the same day. The notification of grant is a substantial document, running to more than 50 pages, including a long list of approved documents supporting the application, and detailing 183 conditions. It concludes with a note ("for the avoidance of doubt") that the Environmental Statement accompanying the

application has been taken into account. But it contains no reference to any obligation to give reasons under the EIA regulations (see below), nor any formal statement of the reasons for the grant.

The proceedings

18. The present proceedings for judicial review, on a number of grounds including lack of reasons, were heard by Mitting J at a rolled-up hearing in December 2015, and were dismissed by him on 16 December: [2015] EWHC 3808 (Admin). Permission to appeal was granted solely on the issue of reasons. On 16 September 2016 the Court of Appeal (Laws and Simon LJJ) allowed the appeal and quashed the permission: [2016] EWCA Civ 936.

19. Laws LJ noted the controversy at the Bar as to the standard of reasons required (para 18). He pointed to three particular factors as calling for clear reasons in this case: the "pressing nature" of the AONB policy as expressed in the NPPF para 115-6 ("the highest status of protection"); the departure from the officers' recommendation; and the specific duty imposed by the EIA regulations (paras 21-23). Although he noted the relative "thinness" of the material available to the committee on the viability issue, he relied principally on the failure of the committee to assess and explain the degree of harm to the AONB, having regard to the strictness of the policy and the strong view of harm taken by the officers (paras 29-30). The only reference to this issue in the minutes spoke of the need to assess whether the advantages "outweighed" the harm to the AONB, wrongly implying that it was simply a question of "striking a balance". Further the reference to "minimising the harm" by "effective screening" took no account of the officers' view that the change of levels to the east would mean that "over time, screening would be largely ineffective".

20. In granting permission to appeal (on 2 March 2017), this court indicated that it would wish to consider generally the sources, nature and extent of a local planning authority's duty to give reasons for the grant of planning permission.

Duties to give reasons - statutory sources

21. The Town and Country Planning Act 1990 itself says nothing about the giving of reasons for planning decisions. The 1990 Act requires the decision (inter alia) to be made having regard to the development plan and other material considerations (section 70(2)). The Planning and Compulsory Purchase Act 2004 is more specific in requiring the decision to be made in accordance with the development plan "unless material considerations indicate otherwise" (section

38(6); see *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865, para 7). But it does not in terms require the decision-maker to spell out the material circumstances which justify such a departure.

22. The non-statutory National Planning Policy Framework ("NPPF") (itself treated as a "material consideration" for these purposes: *ibid* paras 10-21) provides comprehensive guidance to local planning authorities on the handling of individual planning applications. Paragraph 14 with footnote 9 notes, as an exception to the general presumption in favour of permission, "specific policies" by which "development is restricted"; including those relating to protected sites under the Birds and Habitats Directives, Green Belts, Areas of Outstanding Natural Beauty, and National Parks. In practice such policy designations are likely to be reflected also in the statutory development plan, so that section 38(6) will come into play.

23. The statutory rules relating to the giving of reasons are all to be found in subordinate legislation. It is hard to detect a coherent approach in their development. The main categories are:

i) Secretary of State decisions (including those delegated to inspectors) -

a) following an inquiry or hearing;

b) on written representations.

ii) Decisions by local planning authorities -

a) Refusing planning permission or imposing conditions;

b) Granting permission;

c) Officer decisions under delegated powers.

iii) Decisions (at any level) on applications for EIA development.

Secretary of State and inspector decisions

24. Local objectors have no right to call for a public inquiry into a planning appeal. Section 79(2) provides that before determining an appeal the Secretary of State shall "if either the appellant or the local planning authority so wish" give them an opportunity of appearing before a person appointed by the Secretary of State. If an inquiry is held the right of other parties to appear is determined by the inquiries procedure rules (see, in respect of Secretary of State decisions, the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624) rule 11). Following an inquiry, the Secretary of State must "notify his decision on an application or an appeal and his reasons for it in writing" to "all persons entitled to appear at the inquiry who did appear, ... and any other person who, having appeared at the inquiry, has asked to be notified of the decision" (ibid rule 18(1)). Equivalent duties are applied under the separate rules dealing with decisions by inspectors and decisions following hearings.

25. In *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153, Lord Bridge said of the duty imposed by statute on the Secretary of State:

> "That they should be required to state their reasons is a salutary safeguard to enable interested parties to know that the decision has been taken on relevant and rational grounds and that any applicable statutory criteria have been observed. It is the analogue in administrative law of the common law's requirement that justice should not only be done, but also be seen to be done." (p 170)

26. There is no corresponding statutory rule applying to decisions following a written representations appeal. However, it is the practice for a fully reasoned decision to be given. It has been accepted (on behalf of the Secretary of State, and by the Administrative Court) that there is an enforceable duty, said to arise "… either from the principles of procedural fairness … or from the legitimate expectation generated by the Secretary of State's long-established practice …" (*Martin v Secretary of State for Communities and Local Government* [2015] EWHC 3435 (Admin) para 51 per Lindblom LJ).

Local authority decisions

27. *Refusals and conditions* It has long been the case that local planning authorities must give reasons for refusing permission or imposing conditions. Historically this appears to have been the corollary of the fact that in those cases

there is a statutory right of appeal against the refusal or the conditions. The current order (Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595) article 35(1)) provides that the authority in their decision notice must state "clearly and precisely their full reasons".

28. *Grant of permission* Until 2003 there was no statutory duty on local planning authorities to give reasons for the grant of permission as such. There was then a change of thinking, as Sullivan J explained (*R (Wall) v Brighton and Hove City Council* [2004] EWHC 2582 (Admin), para 52):

> "Over the years the public was first enabled and then encouraged to participate in the decision-making process. The fact that, having participated, the public was not entitled to be told what the local planning authority's reasons were, if planning permission was granted, was increasingly perceived as a justifiable source of grievance, which undermined confidence in the planning system …"

Accordingly, between 2003 and 2013, local planning authorities were required to include in the notice of the decision "a summary of their reasons for the grant of permission" and "a summary of the policies and proposals in the development plan which are relevant to the decision" (see Town and Country Planning (General Development Procedure) (England) (Amendment) Order 2003 (SI 2003/2047) article 5; Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184) article 31).

29. This duty was repealed as from 25 June 2013 (Town and Country Planning (Development Management Procedure) (England) (Amendment) Order 2013 (SI 2013/1238) article 7). The Explanatory Memorandum (paras 7.17-20) indicated that this was a response to suggestions that the duty had become "burdensome and unnecessary", and having regard to the fact that officer reports "typically provide far more detail on the logic and reasoning behind a particular decision than a decision notice", so that the requirement to provide a summary "adds little to the transparency or the quality of the decision-taking process"; and also having regard to the "greater level of transparency in the decision-taking process", resulting from increased ease of access to information, both on-line and through the Freedom of Information Act 2000.

30. *Officer decisions* Since 2014 there has been a duty on a local authority officer making any decision involving the "grant [of] a permission or licence" to produce a written record of the decision "along with the reasons for the decision", and "details of alternative options, if any, considered and rejected" (Openness of Local

Government Bodies Regulations 2014 (SI 2014/2095) regulation 7(2)-(3)). This covers, although it is not limited to, the grant of planning permission.

EIA development

31. Special duties arise where an application (as in this case) involves EIA development, at whatever level the decision is taken. EIA development is defined as development listed in Schedule 1 or 2 to the Regulations, in the latter case if the development is "likely to have significant effects on the environment by virtue of factors such as its nature, size or location." Decision-makers must not grant planning permission "unless they have first taken the environmental information into consideration", and "they shall state in their decision that they have done so" (EIA regulations regulation 3(4)). "Environmental information" is defined as:

> "the environmental statement, including any further information and any other information, any representations made by anybody required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development." (regulation 2(1))

32. Where an EIA application is determined by a local planning authority, the authority must inform the public of the decision and make available for public inspection a statement, containing -

> "(i) the content of the decision and any conditions attached to it;
>
> (ii) the main reasons and considerations on which the decision is based including, if relevant, information about the participation of the public;
>
> (iii) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the development; and
>
> (iv) information regarding the right to challenge the validity of the decision and the procedures for doing so." (regulation 24(1)(c))

This regulation is derived from article 9 of the EU Directive on environmental assessment (2011/92/EU) ("the EA Directive"), which expresses the duty in similar terms.

33. Also relevant by way of background is the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters) to which this country is a party. The preamble to the Convention recognises the right of all people to live in a healthy environment and their duty "both individually and in association with others" to protect it for the benefit of present and future generations; and the consequent need for effective public participation, access to information, transparency in decision-making and access to justice in environmental matters.

34. Article 6, which is mentioned in the preamble to the EA Directive, is headed "Public Participation in Decisions on Specific Activities". In addition to certain listed activities and others which "may have a significant effect on the environment", it extends to any activities where public participation is provided for under national procedures for environmental impact assessment (article 6(1), annex I para 20). Article 6.9 provides:

> "Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based."

Standard of reasons

35. A "broad summary" of the relevant authorities governing reasons challenges was given by Lord Brown in *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, para 36:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial

> doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

36. In the course of his review of the authorities he had referred with approval to the "felicitous" observation of Sir Thomas Bingham MR in *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & CR 263, 271-272, identifying the central issue in the case as:

> "… whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

37. There has been some debate about whether Lord Brown's words are applicable to a decision by a local planning authority, rather than the Secretary of State or an inspector. It is true that the case concerned a statutory challenge to the decision of the Secretary of State on a planning appeal. However, the authorities reviewed by Lord Brown were not confined to such cases. They included, for example, the decision of the House of Lords upholding the short reasons given by Westminster City Council explaining the office policies in its development plan (*Westminster City Council v Great Portland Estates plc* [1985] AC 661, 671-673). Lord Scarman adopted the guidance of earlier cases at first instance, not limited to planning cases (eg *In re Poyser and Mills' Arbitration* [1964] 2 QB 467, 478), that the reasons must be "proper, adequate and intelligible" and can be "briefly stated" (p 673E-G). Similarly local planning authorities are able to give relatively short reasons for refusals of planning permission without any suggestion that they are inadequate.

38. In the context of the EIA regulations, Mr Reed QC (for CGI) relied on the fact that under Regulation 24(1)(c)(ii) the duty is limited to the "main" reasons. He drew an analogy with the former duty of local planning authorities to provide "summary" reasons for the grant of permission, which was treated as imposing a less onerous standard than that considered in *Porter*. Thus in *R (Siraj) v Kirklees Metropolitan Council* [2010] EWCA Civ 1286, Sullivan LJ said "summary reasons" in that context could not be equated with reasons in a Secretary of State's decision-letter:

> "… a decision letter is intended to be a 'stand-alone' document which contains a full explanation of the Secretary of State's reasons for allowing or dismissing an appeal. By their very nature a local planning authority's summary reasons for granting planning permission do not present a full account of the local planning authority's decision making process." (para 14)

39. Mr Reed sought to apply this thinking to the duty to give the "main reasons" under the EIA regulations. He referred to *R (Cherkley Campaign Ltd) v Mole Valley District Council* [2014] EWCA Civ 567, para 70, where counsel was recorded as conceding (apparently without demur from the court) that the duty under the EIA was no higher than the duty to give "summary" reasons under domestic planning legislation. I am unable to accept the analogy. I do not read the reference in the EIA regulations to the "main" reasons as materially limiting the ordinary duty in such cases. It is no different in substance from Lord Brown's reference in *Porter* to the need to refer only to "the main issues in the dispute". To my mind the guidance in *Porter* is equally relevant in the EIA context.

40. Lang J in *R (Hawksworth Securities plc v Peterborough City Council* [2016] EWHC 1870 (Admin) made a more general point about what she saw as the difference between a planning inspector conducting an "adversarial procedure, akin to court or tribunal proceedings", contrasted with a local planning authority as an administrative body, determining an individual application:

> "Its reasons ought to state why planning permission was granted, usually by reference to the relevant planning policies. But it is not conducting a formal adjudication in a dispute between the applicant for planning permission and objectors, and so it is not required to give reasons for rejecting the representations made by those who object to the grant of planning permission." (para 87)

41. I am not persuaded that the difference between the two processes bears such significance. In both the decision-maker may have to take into account and deal fairly with a wide range of differing views and interests, and reach a reasoned conclusion on them. Where there is a legal requirement to give reasons, what is needed is an adequate explanation of the ultimate decision. The content of that duty should not in principle turn on differences in the procedures by which it is arrived at. Local planning authorities are under an unqualified statutory duty to give reasons for refusing permission. There is no reason in principle why the duty to give reasons for grant of permission should become any more onerous.

42. There is of course the important difference that, as Sullivan J pointed out in *Siraj*, the decision-letter of the Secretary of State or a planning inspector is designed as a stand-alone document setting out all the relevant background material and policies, before reaching a reasoned conclusion. In the case of a decision of the local planning authority that function will normally be performed by the planning officers' report. If their recommendation is accepted by the members, no further reasons may be needed. Even if it is not accepted, it may normally be enough for the committee's statement of reasons to be limited to the points of difference. However the essence of the duty remains the same, as does the issue for the court: that is, in the words of Sir Thomas Bingham MR, whether the information so provided by the authority leaves room for "genuine doubt … as to what (it) has decided and why".

Legal remedies

43. In the case of a decision by the Secretary of State or a planning inspector, the 1990 Act provides for a statutory challenge under section 288, on the grounds that the decision was not within the powers of the Act, or that a "relevant requirement" (which includes a requirement under the inquiries procedure rules to give notice of the decision and the reasons for it) had not been complied with. In the latter case the court must be satisfied also that "the interests of the applicant have been substantially prejudiced" by the failure (section 288(5)(b)).

44. I note that in the *Save* case, Lord Bridge identified a single question:

> "There are in truth not two separate questions: (1) were the reasons adequate? (2) if not, were the interests of the applicant substantially prejudiced thereby? The single indivisible question, in my opinion, which the court must ask itself whenever a planning decision is challenged on the ground of a failure to give reasons is whether the interests of the applicant have been substantially prejudiced by the deficiency of the reasons given." (p 167D-E)

I am not convinced with respect that it is helpful so to conflate the two parts of the statutory formula. Until one has decided on the nature of the breach of the statutory requirements, it is difficult to determine the nature and extent of any prejudice. However, that passage needs to be read in the context of what follows (p 168), which makes clear that Lord Bridge's principal concern was to emphasise, contrary to the apparent implication of the judgment of Woolf LJ in the Court of Appeal, that the burden lay on the applicant to establish both parts of the statutory test.

45. In *Save* itself, the decision of the House ultimately turned on the adequacy of the reasons for departing from the policy, rather than lack of prejudice. Lord Bridge accepted that -

> "… an opponent of development, whether the local planning authority or some unofficial body like Save, may be substantially prejudiced by a decision to grant permission in which the planning considerations on which the decision is based, particularly if they relate to planning policy, are not explained sufficiently clearly to indicate what, if any, impact they may have in relation to the decision of future applications." (p 167H)

The same point is picked up in Lord Brown's summary. Lord Bridge did not, as I understand him, dissent from the view of the Court of Appeal that, had Save been able to establish a material defect of reasoning, the appropriate remedy was to quash the permission.

46. Mr Cameron QC (for the Council) argued that a different approach should apply to a breach of the EIA duty taken on its own. Relying on the decision of the Court of Appeal in *R (Richardson) v North Yorkshire County Council* [2004] 1 WLR 1920, he argued that in that context a mere declaration of the breach was sufficient. Indeed before Mitting J (para 22) this point was conceded by Mr Westaway for CPRE Kent. Although the point was raised in argument in the Court of Appeal, Laws LJ apparently found it unnecessary to address the issue, perhaps because he saw the EIA duty, not as a free-standing duty, but as no more than one of the factors relevant to the obligation to give reasons in this case.

47. In *Richardson*, notwithstanding a clear failure to provide a statement of reasons as required by regulation 21 of the EIA regulations then in force (Town and Country Planning (Environmental Impact Assessment) (England & Wales) Regulations 1999), the Court of Appeal held that the appropriate remedy was, not to quash the decision itself, but to make a mandatory order for the required statement

to be provided. In the leading judgment, Simon Brown LJ (para 33) adopted the reasoning of Richards J (at first instance), who had said:

> "49. … the first and most important point in the present case is that regulation 21(1) looks to the position *after* the grant of planning permission. It is concerned with making information available to the public as to what has been decided and why it has been decided, rather than laying down requirements for the decision-making process itself. It implements the obligation in article 9(1) of the directive to make information available to the public 'when a decision to grant … development consent *has been taken*' (emphasis added). That is to be contrasted with article 2(1) of the Directive, which lays down requirements as to what must be done *before* the grant of planning permission (which may be granted only after a prior assessment of significant environmental effects).
>
> 50. The fact that the requirement focuses on the availability of information for public inspection after the decision has been made, rather than on the decision-making process, leads me to the view that a breach of regulation 21(1) ought not to lead necessarily to the quashing of the decision itself. A breach should be capable in principle of being remedied, and the legislative purpose achieved, by a mandatory order requiring the authority to make available a statement at the place, and containing the information, specified in the regulation."

48. With respect to the judges concerned, I would decline to follow that reasoning. I find the distinction drawn between notification of the decision, and of the reasons on which it is based, artificial and unconvincing. In the regulations (as in the Aarhus Convention, which is now expressly referred to in the Directive) the provision of reasons is an intrinsic part of the procedure, essential to ensure effective public participation. I would not necessarily disagree with the court's disposal of the appeal in *Richardson*. Although the committee had not given its own reasons, it had granted permission in accordance with the recommendation in the officer's report, and could be taken to have adopted its reasoning. Simon Brown LJ (para 35) referred with approval to the comment of Sullivan J (*R v Mendip District Council, Ex p Fabre* (2000) 80 P & CR 500, 511) that in such a case -

> "… the reasonable inference is that the members did so for the reasons advanced by the officer, unless of course there is some indication to the contrary."

49. It is perhaps also relevant that the court was faced with a somewhat extreme submission (based on observations of Lord Hoffmann in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, 616-617), that in respect of a breach of an EU directive the court had no choice in the matter; it was -

> "… simply not permitted to regard a breach of the implementing regulations as curable other than by the outright quashing of the development permission granted." (para 38)

Not surprisingly the court found that an unattractive proposition. However, it is now clear, following recent judgments of this court, that even in respect of a breach of an EU directive the powers of the court are not so restricted:

> "… the court retains a discretion to refuse relief if the applicant has been able in practice to enjoy the rights conferred by European legislation, and there has been no substantial prejudice (per Lord Carnwath, (*R (Champion) v North Norfolk District Council & Anor* [2015] UKSC 52; [2015] 1 WLR 3710, para 54, following *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51, paras 139, 155)."

In *Champion* itself it was held that this test was met: given that the environmental issues were of no particular complexity or novelty; there was only one issue of substance on which each of the statutory agencies had satisfied itself of the effectiveness of the proposed measures; the public had been fully involved; and Mr Champion himself having been given the opportunity to raise any specific points of concern but having been unable to do so (para 60).

Duty to give reasons - Common law

50. Given the existence of a specific duty under the EIA regulations, and the views I have expressed on its effect, it is strictly unnecessary in the present appeal to decide what common law duty there may be on a local planning authority to give reasons for grant of a planning permission. However, since it has been a matter of some controversy in planning circles, and since we have heard full argument, it is right that we should consider it.

51. Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed (see *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531; *R v*

Higher Education Funding Council, Ex p Institute of Dental Surgery [1994] 1 WLR 242, 263A-D; *De Smith's Judicial Review* 7th ed, para 7-099). *Doody* concerned the power of the Home Secretary (under the Criminal Justice Act 1967 section 61(1)), in relation to a prisoner under a mandatory life sentence for murder, to fix the minimum period before consideration by the Parole Board for licence, taking account of the "penal" element as recommended by the trial judge. It was held that such a decision was subject to judicial review, and that the prisoner was entitled to be informed of the judge's recommendation and of the reasons for the Home Secretary's decision:

> "To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed. If there is any difference between the penal element recommended by the judges and actually imposed by the Home Secretary, this reasoning is bound to include, either explicitly or implicitly, a reason why the Home Secretary has taken a different view …" (p 565G-H per Lord Mustill)

It is to be noted that a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so make effective the right to challenge the decision by judicial review.

52. Similarly, in the planning context, the Court of Appeal has held that a local planning authority generally is under no common law duty to give reasons for the grant of planning permission (*R v Aylesbury Vale District Council, Ex p Chaplin* (1998) 76 P & CR 207, 211-212 per Pill LJ). Although this general principle was reaffirmed recently in *Oakley v South Cambridgeshire District Council* [2017] 2 P & CR 4, the court held that a duty did arise in the particular circumstances of that case: where the development would have a "significant and lasting impact on the local community", and involved a substantial departure from Green Belt and development plan policies, and where the committee had disagreed with its officers' recommendations. Of the last point, Elias LJ (giving the leading judgment, with which Patten LJ agreed) said:

> "The significance of that fact is not simply that it will often leave the reasoning obscure. In addition, the fact that the

> committee is disagreeing with a careful and clear recommendation from a highly experienced officer on a matter of such potential significance to very many people suggests that some explanation is required … the dictates of good administration and the need for transparency are particularly strong here, and they reinforce the justification for imposing the common law duty." (para 61)

His conclusion was reinforced by reference to the United Kingdom's obligations under the Aarhus Convention (para 62; see to similar effect my own comments on the relevance of the Convention, in *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51, para 100). Sales LJ agreed with the result, but expressed concern that the imposition of such duties "might deter otherwise public-spirited volunteers" from council duties, and might also introduce "an unwelcome element of delay into the planning system" (para 76).

53. Mr Cameron QC (for the Council) submitted that this decision should be "treated with care", against the background of the government's decision in 2013 to abrogate the statutory duty to give reasons for grant of permission, planning law being a creature of statute (see *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865, para 20). The factors identified by Elias LJ could arise in many cases, and lead to the common law duty becoming a general rule. He asked us to prefer the view of Lang J (*R (Hawksworth Securities plc) v Peterborough City Council* [2016] EWHC 1870 (Admin), para 81) that a common law duty to give reasons would arise only "exceptionally" and that "generally, the requirements of fairness will be met by public access to the material available to the decision-maker". The present case, he submitted, was not exceptional in that sense, either in principle or on its own facts.

54. In my view *Oakley* was rightly decided, and consistent with the general law as established by the House of Lords in *Doody*. Although planning law is a creature of statute, the proper interpretation of the statute is underpinned by general principles, properly referred to as derived from the common law. *Doody* itself involved such an application of the common law principle of "fairness" in a statutory context, in which the giving of reasons was seen as essential to allow effective supervision by the courts. Fairness provided the link between the common law duty to give reasons for an administrative decision, and the right of the individual affected to bring proceedings to challenge the legality of that decision.

55. *Doody* concerned fairness as between the state and an individual citizen. The same principle is relevant also to planning decisions, the legality of which may be of legitimate interest to a much wider range of parties, private and public (see *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51, paras 152-153 per Lord

Hope). Here a further common law principle is in play. Lord Bridge saw the statutory duty to give reasons as the analogue of the common law principle that "justice should not only be done, but also be seen to be done" (see para 25 above). That principle of open justice or transparency extends as much to statutory inquiries and procedures as it does to the courts (see *Kennedy v The Charity Commission* [2014] UKSC 20; [2015] AC 455, para 47 per Lord Mance, para 127 per Lord Toulson). As applied to the environment it also underpins the Aarhus Convention, and the relevant parts of the EA Directive. In this respect the common law, and European law and practice, march together (compare *Kennedy* para 46 per Lord Mance). In the application of the principle to planning decisions, I see no reason to distinguish between a Ministerial inquiry, and the less formal, but equally public, decision-making process of a local planning authority such as in this case.

56. The existence of a common law duty to disclose the reasons for a decision, supplementing the statutory rules, is not inconsistent with the abrogation in 2013 of the specific duty imposed by the former rules to give reasons for the grant of permission. As the explanatory memorandum made clear, that was not intended to detract from the general principle of transparency (which was affirmed), but was a practical acknowledgement of the different ways in which that objective could normally be attained without adding unnecessarily to the administrative burden. In circumstances where the objective is not achieved by other means, there should be no objection to the common law filling the gap.

57. Thus in *Oakley* the Court of Appeal were entitled in my view to hold that, in the special circumstances of that case, openness and fairness to objectors required the members' reasons to be stated. Such circumstances were found in the widespread public controversy surrounding the proposal, and the departure from development plan and Green Belt policies; combined with the members' disagreement with the officers' recommendation, which made it impossible to infer the reasons from their report or other material available to the public. The same combination is found in the present case, and, in my view, would if necessary have justified the imposition of a common law duty to provide reasons for the decision.

58. This endorsement of the Court of Appeal's approach may be open to the criticism that it leaves some uncertainty about what particular factors are sufficient to trigger the common law duty, and indeed as to the justification for limiting the duty at all (see the perceptive analysis by Dr Joanna Bell: *Kent and Oakley: A Re-examination of the Common Law Duty to Give Reasons for Grants of Planning Permission and Beyond* (2017) 22 Judicial Review 105-113). The answer to the latter must lie in the relationship of the common law and the statutory framework. The court should respect the exercise of Ministerial discretion, in designating certain categories of decision for a formal statement of reasons. But it may also take account of the fact that the present system of rules has developed piecemeal and without any apparent pretence of overall coherence. It is appropriate for the common law to fill

the gaps, but to limit that intervention to circumstances where the legal policy reasons are particularly strong.

59. As to the charge of uncertainty, it would be wrong to be over-prescriptive, in a judgment on a single case and a single set of policies. However it should not be difficult for councils and their officers to identify cases which call for a formulated statement of reasons, beyond the statutory requirements. Typically they will be cases where, as in *Oakley* and the present case, permission has been granted in the face of substantial public opposition and against the advice of officers, for projects which involve major departures from the development plan, or from other policies of recognised importance (such as the "specific policies" identified in the NPPF - para 22 above). Such decisions call for public explanation, not just because of their immediate impact; but also because, as Lord Bridge pointed out (para 45 above), they are likely to have lasting relevance for the application of policy in future cases.

60. Finally, with regard to Sales LJ's concerns about the burden on members, it is important to recognise that the debate is not about the necessity for a planning authority to make its decision on rational grounds, but about when it is required to disclose the reasons for those decisions, going beyond the documentation that already exists as part of the decision-making process. Members are of course entitled to depart from their officers' recommendation for good reasons, but their reasons for doing so need to be capable of articulation, and open to public scrutiny. There is nothing novel or unduly burdensome about this. The Lawyers in Local Government Model Council Planning Code and Protocol (2013 update) gives the following useful advice, under the heading "Decision-making":

> "Do make sure that if you are proposing, seconding or supporting a decision contrary to officer recommendations or the development plan that you clearly identify and understand the planning reasons leading to this conclusion / decision. These reasons must be given prior to the vote and be recorded. Be aware that you may have to justify the resulting decision by giving evidence in the event of any challenge." (their emphasis)

The decision in this case

61. The members of the Dover planning committee on 13 June 2013 had an unenviable task. The meeting started at six in the evening, probably for most of them at the end of a hard-working day. They were faced with probably the most significant planning application for their area for many years. It was no doubt seen as the culmination of an extended process of formal and informal consultation, triggered by the submission of the application over a year before, and they may have felt under

some pressure to reach a conclusion. The officers' report, admirable though it was, had arrived on their desks only a few days before the meeting. Not only was it long and detailed in itself, but it introduced into the debate a new element of potentially critical significance (the proposed reduction in the number of houses), on which there was a sharp difference of view between the expert advisers.

62. The Model Council Planning Code and Protocol, already referred to (para 60 above) contains under the same heading the following advice:

> "Do come to your decision only after due consideration of all of the information reasonably required upon which to base a decision. If you feel there is insufficient time to digest new information or that there is simply insufficient information before you, request that further information. If necessary, defer or refuse."

This passage not only offers sound practical advice. It also reflects the important legal principle that a decision-maker must not only ask himself the right question, but "take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly" (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B). That obligation, which applies to a planning committee as much as to the Secretary of State, includes the need to allow the time reasonably necessary, not only to obtain the relevant information, but also to understand and take it properly into account.

63. Even if there was pressure for a decision on the principle of the development, it seems unfortunate that the members did not apparently consider deferring detailed discussion of the officer's proposed modifications, including the contentious issue of viability. It is difficult to see how the members could have expected to reach a properly considered decision on the material then before them. With hindsight at least, given that the application did not come back to the committee for more than a year, nothing would have been lost.

64. The issue of timing is not directly relevant to the reasons challenge before us, but it is an important part of the background. It is not in dispute that the Council was in breach of a specific requirement under the EIA regulations to make available a statement of "the main reasons and considerations" on which the decision was based. The only issue is the nature of the remedy. Mr Cameron submits that a declaration is sufficient and that the reasons can be supplied retrospectively. In so far as this submission is specific to the EIA duty, following the decision of the Court of Appeal in *Richardson*, I cannot accept it for the reasons already given. The report of *Oakley* does not indicate what order resulted in that case. In the present case, however, I am

satisfied that that is not an appropriate or sufficient remedy. Indeed it is notable that in the three years since the permission was issued, no attempt has been made to formulate the reasons so as to make good the admitted breach. This perhaps underlines the difficulty of reconstructing the operative reasons of the committee on the basis simply of what is in the minutes.

65. Mr Cameron relies on the views attributed to the three members who were recorded as supporting the proposal. That was against the background that the officers had recommended approval for a departure from the AONB policies, for reasons they had explained, and which the committee can be taken to have accepted. The only substantial difference was as to whether a reduced dwelling limit should be imposed. That was seen by the committee as turning on whether the risk to the viability of the scheme outweighed the harm to the AONB. That issue, he submits, was fully debated and the majority's conclusion and reasoning were clearly reflected in the minutes. The restrictions proposed by the officers were not accepted because (in the words there recorded) -

> "… this could jeopardise the viability of the scheme, deter other developments and be less effective in delivering the economic benefits."

66. This submission rests on the uncertain assumption that the views of the three members quoted were shared by the majority. The required statement under the regulations is of the reasoning of the committee as a whole. Even making that assumption, there are serious gaps. There is no indication of how or why the members felt able, without further investigation, to reject the view of their own advisers that the viability of the scheme need not be threatened, and indeed could be enhanced. It was not enough to rely on the possibility of the scheme being jeopardised, simply on the say-so of the applicant's advisers without any reference to the expert view to the contrary. Another important issue was the officers' insistence on the need for implementation as "a single comprehensive scheme" to secure the economic benefits, including in particular the hotel and conference centre, and for conditions or planning obligations to achieve that. Given that the members apparently shared their officers' view of the importance of those benefits, their omission of any legal mechanism to secure it needed explanation.

67. Furthermore, as Laws LJ pointed out, the economic argument was only one side of the picture. The other was the members' view of the harm to the AONB. Assuming that they accepted their officers' view as to the seriousness of the potential damage to the AONB, it became critical to understand the basis of their belief that it could be "minimised" by "effective screening". This was of particular significance in the context of the EIA regulations which require the statement to include a description of "the main measures to avoid, reduce and, if possible, offset the major

adverse effects of the development". If the committee had reason to think that landscaping measures could reduce or offset the harm, they needed to be described. At the very least there needed to be an explanation of how the members reconciled this assertion with the view of their officers that landscaping would be "largely ineffective". This point was left without any explanation.

68. These points were not merely incidental, but were fundamental to the officers' support for the amended scheme. The committee's failure to address such points raises a "substantial doubt" (in Lord Brown's words) as to whether they had properly understood the key issues or reached "a rational conclusion on them on relevant grounds". This is a case where the defect in reasons goes to the heart of the justification for the permission, and undermines its validity. The only appropriate remedy is to quash the permission.

Conclusion

69. For the reasons indicated above, I would dismiss the appeal and affirm the order of the Court of Appeal.