Neutral Citation Number: [2015] EWHC 524 (Admin)

Case No: CO/3930/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2015

Before :

MR JUSTICE DOVE

- -

Between :

Daniel Gerber	**Claimant**
- and -	
Wiltshire Council	**Defendant**
Steve Rademaker	**1st Interested Party**
Norrington Solar Farm Limited	**2nd Interested Party**
Terraform Power, Inc	**3rd Interested Party**

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- -

Jenny Wigley (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Jonathan Wills (instructed by **Wiltshire Council**) for the **Defendant and 2nd and 3rd Interested Parties**

Hearing dates: 23rd & 26th January 2015

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Approved Judgment

Mr Justice Dove :

Introduction

1. This claim relates to the installation of photovoltaic arrays mounted on frames covering 22.1ha of land at Broughton Gifford, Wiltshire. The claimant lives at a property known as Gifford Hall which is a Grade II* listed building. Planning permission for the installation was obtained by the first interested party. The first interested party did not appear and was unrepresented in the proceedings. The second and third interested parties are presently involved and interested in the operation of the development.

2. The claimant contends that he first became aware of the development when it was being constructed. He had not objected to it nor had he participated in the decision making process leading to the grant of planning permission by the defendant. Having subsequently investigated the grant of consent he now challenges the legality of the planning permission on a variety of grounds. Issues in this case arise both as to the legitimacy of those grounds and also as to whether in any event, even if they are made out, the decision should be quashed bearing in mind the delays involved in bringing these proceedings and also the fact that the development is now built.

3. I propose to set out the facts leading up to the issuing of these proceedings at the outset. I shall then deal with the various grounds of legal challenge raised, addressing the relevant legal principles in the context of each of those grounds. I shall then finally turn to the question of discretion and whether or not the permission should be quashed. In the course of considering those issues subsequently there are further elements of the factual circumstances which I shall set out at that stage.

The Facts Leading Up To the Inception of Proceedings

4. On 12th September 2012, following a request, the defendant undertook a screening of a proposed solar farm development on what was to become the application site for the purposes of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. The officer conducting the screening opinion concluded that it fell within Schedule 2 of the 2011 regulations as the area of the site exceeded the threshold for industrial installations for the production of electricity. The reasoning of the screening opinion and its conclusion that no environmental impact assessment was required was as follows:

> "Location of development
>
> The site which is agricultural land, is not in an environmentally sensitive geographical area as defined by the Regulations. It is relatively flat agricultural land in open countryside to the north of Broughton Gifford. Even though the solar panels would be situated in an area where there are several settlements and isolated farmhouses, it is not a densely populated area. Although it is noted that the site is partially covered by an archaeological record (SMR), subject to appropriate reports this can be adequately assessed during the course of any planning application. Public Rights of Way run through the application

> site, but subject to appropriate information any impact can be addressed during the course of any planning application.
>
> There are no other known historical, cultural or archaeological designations likely to be harmed by the proposals, although it is noted that the Cotswolds Area of Outstanding Natural Beauty lies 3.7 kilometres to the north-west of the site, to the south-west of the site is the Broughton Gifford Conservation Area and a listed building and to the east is a County Wildlife Site. Again subject to appropriate reports these can be adequately assessed during the course of any planning application.
>
> The Characteristics of the Potential Impact
>
> The potential impact and material environmental issues in the proposal, such as the landscape character, heritage assets, archaeology, ecology and health and safety can be adequately dealt with in the normal processing of a planning application which will need to be accompanied by the usual statements, reports and assessments including in this instance but not limited to ecology, archaeology, flood risk and landscape that would be subject of consultation with the necessary bodies."

5. As a result of this screening opinion no environmental impact assessment was required.

6. On 9th November 2012, following pre-application consultation with officers of the council and pre-application publicity by way of public exhibitions and advertisements in the Wiltshire Times, the first interested party made an application to the defendant for planning permission for:

> "The installation of solar photovoltaic (PV) arrays and frames totalling approximately 22ha including associated cable trenches and electrical connection buildings. There is no change to the agricultural land use."

7. The application, as foreshadowed by the screening opinion, was accompanied by reports on various matters. In particular, so far as relevant to this challenge, there was a Heritage Statement dated November 2012. That statement identified, amongst other heritage assets, the Broughton Gifford Conservation Area and Gifford Hall. The heritage statement set out to assess 'the type, magnitude and significance of any potential direct and indirect changes' to the Conservation Area and listed buildings. In relation to the Broughton Gifford Conservation Area it relied upon photographic plates 8 and 9. Unfortunately originally within the papers there was no photo location plan so as to show from where these views had been obtained, but during the course of the hearing witnesses both for the claimant and for the defendant undertook their own assessment and established, broadly speaking, where these photographs were taken from.

8. The view in plate 8 was taken from the site looking south towards the Conservation Area. Plate 9 was taken again from within the site looking to the south-west. Neither

of these plates, nor indeed any of the other plates within the Heritage Statement were taken from any part of the appeal site looking directly towards Gifford Hall. The plates in the Heritage Statement were relied upon to found the conclusion in relation to listed buildings, including Gifford Halls, and the Conservation Area as follows:

> "Views of the proposed development site from all of these buildings [including Gifford Hall] are obscured by mature trees, which are north of these properties and form the southern border of the proposed site. It is assessed from the in-field views (plates 8 and 9) that the installation of solar PV arrays would cause no change to views from, or the appreciation of the Conservation Area of, these Listed Buildings."

9. Further mention of Gifford Hall was provided in the heritage statement in connection with the Atworth Conservation Area as follows:

> "The public footpath leading to Broughton Gifford from Atworth has views looking south-east c900 meters along the footpath, the private drive to Studley Farm rises above the footpath affording a view of the roof of Gifford Hall, yet none into the proposed solar farm fields as shown in plate 15."

10. Plate 15 is described as a view 'over the proposed site looking south-east from the private drive to Studley Farm above the footpath south-east of Atworth'. This view is in a south-easterly direction from beyond and across the western boundary of the site. Gifford Hall can be seen in the distance. The footpath which is referred to is a footpath which enters into and crosses the site. Having concluded that there would be no physical impact on either the Conservation Area or any listed buildings the heritage statement then concluded as follows:

> "In terms of visual impact:
>
> - Negligible adverse change to the view into the fields from just one non-listed private residential property within the adjacent Broughton Gifford Conservation Area;
>
> - A potential moderately significant change to the view from the public footpath exiting the Broughton Gifford Conservation Area, with any adversity to the perception of a conservation Area to be mitigated through the planting and management of a hedge to screen the solar arrays;
>
> - No changes to views from or of or settings or perceptions of any of the nearby Grade I, Grade II* and Grade II listed buildings in Broughton Gifford, Atworth Conservation Area or the Registered Park and Garden at Chalfield Manor

> Overall it is considered that the national and local heritage assets identified and assessed would not suffer any significant adverse impacts (so long as the highlighted archaeological mitigation is implemented) which would have the potential to affect their protection in the future, nor their function within the landscape as tools to interpret the national and local historic and built environment."

11. The application was also accompanied by a Landscape Visual Impact Assessment (the 'LVIA'). That also examined the question of visual impact. Two viewpoints contained within the analysis of the LVIA are of note in the light of the conclusions of the Heritage Statement. The first of those, Viewpoint 1, is taken from the edge of the Broughton Gifford Conservation Area looking towards the north-east and across open agricultural land, and over the application site. This is the equivalent to plate 12 in the Heritage Statement. The visual impact of the development on that viewpoint which is described in the Visual Impact Table as relevant to the conservation area designation is as follows:

> "the proposed development would be the dominant feature of the open immediate view from users of the footpaths, which merge at this junction. There will be a complete change to the view in to the fields, yet the boundary hedgerows will remain unchanged and, after a couple of years, the impact will become less as shrubs, planted as part of the development, will grow to screen the proposed development around the perimeter fence."

12. The impact was described as being 'moderately significant'. The other viewpoint of relevance in the LVIA was viewpoint 6 which is the same as plate 15 in the Heritage Statement described above. The description of the view is set out as follows:

> "view south-east over Broughton Gifford towards Melksham Town. The roofline of the Grade II* listed building Gifford Hall is just visible nestled in the mature trees, which line the adjacent fields. The views south-east from the adjacent public footpath are restricted to the immediate fields with the mature hedgerows preventing any views of rooflines or the landscape beyond."

13. The description of the change contained in the LVIA is as follows:

> "the proposed development would be totally obscured by the mature hedgerows. There would be no change to the view at this point on either the farm drive or the footpath. There would be a significant visual impact as users reach the point where the footpath enters the development site."

14. The defendant has adopted a Statement of Community Involvement which covers community involvement in planning applications and provides that, where appropriate, neighbours are to be notified by letter that an application has been received. The detail of that is set out in the document as follows:

> "5.6 The council recognises that many people are most interested in applications that directly affect them, such as householder applications, which constitute almost 50% of all planning applications received in Wiltshire. The council endeavours to notify occupiers of premises which adjoin the application site and may be affected by the proposed development individually by letter that an application has been received. They are invited to view the application and make any written observations within 21 days."

15. In relation to notification letters the following is also set out in Appendix 1 of the document which addresses methods of consultation. The council's consultation processes are described as follows:

> "If the council receives a planning application that it feels may affect neighbouring properties then it will notify persons affected by writing to them directly. Recipients of neighbour notification letters have 21 days in which to respond."

16. As a result of the receipt of the application, site notices advertising it in an appropriate form were erected on the footpaths at the boundary to the site and also on Norrington Lane to the west of the site. The site was to be accessed off Norrington Lane. A site notice was also erected at the road junction to the south of the claimant's home.

17. In relation to neighbour notification there is a dispute between the claimant and defendant as to who was included in those to be provided with a neighbour notification letter. The claimant's contention is that, in effect, the process of identifying recipients of a neighbour notification in response to the application effectively occurred at random and certainly many properties far further afield than the claimant were notified about the proposals. By contrast, the defendant says, that some of the properties which the claimant relies upon in support of this argument were not consulted by a neighbour notification letter but were properties where the residents became aware of the application from other sources and wrote in unprompted.

18. Mr Michael Wilmott is employed by the defendant as an Area Development Manager with responsibility for the area in which the application was made at the time when it occurred. He was not involved directly in the handling of the application. The officer who was directly involved is no longer in the UK. In a witness statement dated 4th November 2014 Mr Wilmott describes the neighbour notification process in the following manner.

> "17. Due to the fact that the site was a rural one, surrounded by fields, neighbour notification was aimed at those dwellings closest to the site, and its access from Norrington Lane (whereby they might expect more traffic as being on the defined construction route). Gifford Hall does not adjoin the application site, as suggested by the council's SCI and nor is the hall close to the site such that it would be affected by the development through construction traffic or noise from the

> invertors or substation. No neighbour notification was therefore undertaken to Gifford Hall.
>
> 18. The main purpose of neighbour notification is to alert the neighbours where there may be impact on their amenity through, for example, increased traffic, noise, loss of light or over bearing impact. It is not, and never has been, a purpose of neighbour notification to notify residents purely because a development may be visible across fields from the upper windows of their property."

19. In relation to the consultation process there are three matters which are beyond argument. Firstly, it is not disputed but that the defendant discharged the requirements of Article 13(4) of the Town and Country Planning (Development Management Procedure) (England) Order 2010. Secondly, it is not disputed that a neighbour notification was not sent to the claimant. Thirdly, English Heritage were not consulted.

20. There is no contemporaneous explanation as to why English Heritage were not consulted, albeit subsequent explanation has been provided to which I shall turn when dealing with the complaint in relation to this below. The conservation officer was consulted and his comments are reflected in the Officer's Report which is set out below. There are, within the papers, notes representing the preparatory thoughts of the officer who was involved in considering the application and making a decision it relation to it. In so far as relevant they provided as follows:

> "Historic Interests
>
> The north exit of the conservation areas experience would be changed - this is felt to be mitigated through planting. Still need to check where listed buildings are and that I am happy that there (sic) settings are not affected. Need views from Russell Brown as to what he thinks on this one. 2 conservation areas within 2 km – Broughton Gifford and Atworth. Existing and proposed screen felt to mitigate any impact on the northern extent of Broughton Gifford CA moderate significant change identified for the footpaths – but expected to be ameliorated by proposed planting and the appreciate (sic) of the receptors of an understanding of environmental benefits that would be gained from the interpretation panels explaining and justifying the site…
>
> Listed Buildings
>
> Discussion with Russell on the 08.01.12 – he identified listed building of Broughton (sic) Hall as key concern… site visit get photos of the stretch of land between to see how much screening and look at the LB near Atworth – walk down the path and see how it affected… after looking at these pictures he will write a written response for me."

21. It is agreed that the reference to Broughton Hall is an error and should be a reference to Gifford Hall.

22. In accordance with the defendant's scheme of delegation the officers were entitled to take the decision themselves, but in accordance with good practice an officer's report was prepared setting out the basis upon which the decision was taken. The contribution from the conservation officer is recorded in the officer's report as follows:

> "I confirm that I have no objections to the above application. I am satisfied that the views from the nearby Conservation Areas will be significantly distant but no intrusive visual impact would occur. The listed buildings within viewing range are similarly distant or, as in the case of Gifford Hall, have a sufficiently dense vegetation screen to block the view of the panels. Consequently there will be no significant adverse impact on the settings of the listed buildings. A condition should be imposed to say that when the apparatus falls out of use it must be removed from the land and the land returned to its former state."

23. The consultation process in relation to the application was recorded as follows:

> "This application was advertised by means of press notice, site notices and neighbour notification letters. Consultation events were also carried out by the applicant in the local community."

24. The officer's report records that two letters of objection had been received from a nearby resident. In the context of the officer's assessment of the visual impact of the proposal the following was recorded in relation to the Broughton Gifford Conservation Area:

> "views into the site from Broughton Gifford Conservation Area are limited. From within the Conservation Area and on the Common the PV arrays would not be visible; any possible views would be limited to long distance first floor oblique angles from a small number of properties at the northern extent of the Conservation Area. As such there would be a negligible impact on views from within the Conservation Area towards the site."

25. The officer went on to consider the impact on the Conservation Area and the listed buildings from a heritage perspective. The Report records as follows:

> "Is the impact on the historic setting of Broughton Gifford Conservation Area and the listed buildings of Gifford Hall and The Hayes acceptable?
>
> A Heritage Statement (HS) has been submitted to support the application. This assessment concluded that ' the national and local heritage assets identified and assessed would not suffer

> any significant nor moderately adverse impacts, which might otherwise have the potential to affect their protection in the future, nor their function within the landscape as tools to interpret the local and national historic and built environment.'
>
> As discussed above, the impact on views from Broughton Gifford Conservation Area would be very limited. This is as a result of distance, typography and woodland. Any views would be restricted to private views. As such the impacts on the Conservation Area are negligible, its character and appearance would be preserved
>
> There are 2 listed buildings within the surrounding intermediate landscape, Gifford Hall and The Hayes. Gifford Hall is visible from the site in long distance views, and long distance oblique views of the PV arrays will be visible from upper floors of the property. However the distance (300 metres) of the property from the site and the intervening landscape would ensure that the setting of the listed building would not be harmed as a result of the landscape. At The Hayes upper floor south facing windows would have views of the development. The distance of the 550 metres (sic) would ensure that any impact on the setting of the building would be so small as to not be significant.
>
> The Senior Conservation Officer has no objection to the scheme.
>
> The natural typography of the site, the existing landscape features (tree and hedgerows) together with the distance of the sensitive receptor from the site would ensure that there would be negligible impact on the identified Conservation Area and listed buildings…
>
> Summary and conclusions
>
> This development has been subject to extensive consultation carried out by the applicants. Furthermore it has been subject to statutory consultations carried out by the Council. The scheme is very large in scale and would impact on the character of the area yet it has resulted in a very minor level of public interest during the application phase. Under the localism agenda it is important to give weight to local opinion on the scheme, and the lack of response is meaningful."

26. The officer recommended, and indeed was then entitled to decide, that conditional planning permission should be granted. On 25th June 2013 planning permission was given subject to a number of conditions. By condition 2 the development had to be discontinued and the land restored to its former condition on or before 31st December 2039. Condition 4 tied the development to a number of approved plans.

27. On 19th March 2014 the claimant heard noises from the application site and observed the development being constructed. As set out above, he had not been consulted and was surprised by the emergence of the installation. On 20th March he contacted the council in an effort to find out what had in fact transpired and raise his concerns in relation to the development. His email identified in particular the effect upon Gifford Hall as a listed building. On 21st March 2014, his email it would seem having been passed to Mr Brown (the council's senior conservation officer referred to above), he received a reply from Mr Brown setting out an explanation in relation to the decision as follows:

> "Thank you for your email and I am sorry that you did not see any of the advertisements for this scheme. Please be assured that the setting of Gifford Hall was taken into account when determining the application. I will elaborate to hopefully give a fuller understanding of our position relating to the setting of the listed building.
>
> I would like to make it clear that the listed building legislation does not relate to the protection of personal views from a listed building. There are no rights to a view in planning or listed building legislation. We are dealing here with what harm is being caused to the setting of the listed building and whether that harm is significant enough to warrant an objection.
>
> I have visited your property, and walked to the end of the garden, in recent years and so I am familiar with the building and the surroundings. My comments relate to the setting of Gifford Hall itself, which is over 270 metres away from the edge of the application site. Granted Gifford Hall has a very long garden, but the protection of the setting of the listed building must relate to the building itself and not to the end of an informally bounded garden some 230 metres in length. In other words, the garden forms the immediate and most significant setting of the house, and the wider surroundings form a less significant part of the setting.
>
> The intervening trees and the 2 rows of mature hedging and trees between the house and the site do give some mitigating protection. However, the fact that you are able to see some of the solar units from the listed building does not in itself cause overriding harm to the setting of the listed building. This is a listed building on the edge of a village in a rural setting, where a variety of activities and structures within its view may come and go over time. I said above that the wider surroundings, which would include the fields over 270 metres away, form a less significant part of the setting of the building and as such development within them would have less of an impact than development closer to the house.
>
> I did say in my original comments that the adverse impact would not be significant. This means that there was not enough

> harm to the setting of the listed building to warrant an objection, due to the distances involved and the intervening vegetation."

28. The claimant instructed solicitors and set about finding out what had happened as well as forging alliances with others to campaign against the development which was in the course of construction.

29. As he was soon to discover on 20th February 2014 the first interested party had applied for further planning permission at the site which was described as follows:

> "Amendments to the approved documents are required due to the addition of a CCTV scheme which is currently not shown on the approved Proposed Site Plan 1295/2579REV1 (DA Appendix 2 REV 4). The Decision Notice for application W/12/02072/FUL also incorrectly lists Location Plan 2575 Rev V3 as the consented Location Plan. 2575 Rev v4 was the final version submitted with application W/12/02072/FUL. However these are both now superseded by 1295/2575 rev v5."

30. This did not transpire to be a full reflection of what the application sought in respect of the development which had been constructed and in due course the defendant analysed the proposal in the application as follows:

> "This is a minor material amendment application seeking to vary the original planning approval for the installation of solar voltaic (PV) arrays and frames covering 22.1 hectares including associated cable trenches, electrical connection buildings and improvements to existing access to finally include:
>
> - Installation of 72 CCTV cameras;
> - Amendments to access to allow separation from SSE electricity poles;
> - Extension to permanent track way to allow year round maintenance access;
> - Arrays to have 1 leg instead of 2 and 0.73 metres lower in height;
> - Arrays to be 2x landscape rather than 5x portrait and closer together;
> - Alterations to on-site substation detail including reduction in area by circa 22 square metres in height by circa 0.5 metres;
> - Alterations to DNO substation so circa 15 square metres smaller but approximately 0.73 metres higher;

- Reduction in number and height of inverter houses to allow 8 (rather than 13) and circa 0.5 metres lower in height;

- Fencing changed from deer proof fencing to standard metal security fencing with a tighter mesh and 0.4 metres lower in height;

- Revised landscaping detail to reflect alterations above."

31. On 2nd April 2014 the claimant's solicitors wrote a letter objecting to the variation application. They wrote again on 22nd April 2014 this time raising a complaint in relation to the defendant's handling of both the consent now under challenge and also the variation application. The conclusions of that letter record as follows:

> "Conclusion
>
> The council has failed in it duty to protect the setting of Gifford Hall.
>
> There has been maladministration in that the setting has been incorrectly assessed and consequently English Heritage have not been consulted and the owners have not been notified of the applications. Both the clients and English Heritage have been denied the opportunity to make objections to the council in respect of the application for the solar farm at Norrington Common.
>
> As a result of their failure to notify the owner and to consult English Heritage, a solar farm has been granted permission and has been constructed which harms the setting of Gifford Hall. The council has failed in its duty to protect the setting on Gifford Hall under section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990.
>
> My clients have lost their opportunity to object to application ref W/12/02072/FUL and to judicially review the grant of permission.
>
> If English Heritage are not consulted in respect of the current application reference 14/01962/VAR then further maladministration will occur causing injustice and loss.
>
> Loss has been occurred to the residential amenity of my clients, the irretrievable harm to the setting of Gifford Hall and financial loss as their property has been dramatically devalued."

32. The council treated that as a complaint which should be the subject of their formal complaints process.

33. Returning to the consideration by the defendants of the second application this time they chose to consult with English Heritage. On 22nd May 2014 English Heritage provided them with a response to the application as follows:

> "We would expect that the impact of any development on the setting of Gifford Hall and the Broughton Gifford Conservation Area to be assessed by reference to the EH guidance on the *Setting of Heritage Assets*. The list description for Gifford Hall states that it is 'a good, little altered example of an early 18th Century classical house' and whilst it's primary façade faces south towards the Common, its wider setting, and that of the Conservation Area, is one of rural, open character.
>
> This variation will provide 72no. additional poles, each 2 metres in height. The information provided is poor and it is not clear to what extent these poles will be visible beyond the security fences. They may be seen against the backdrop of the existing, consented infrastructure already in situ, although they might be more visually intrusive and seen as an intensification of the amount of industrial paraphernalia within the rural landscape, and potentially harmful to the settings of Gifford Hall and the Conservation Area.
>
> Given the scale of the consented solar array and its impact on the setting of the Grade II* Gifford Hall and Broughton Gifford conservation area, English Heritage would have expected to have been consulted on the original application that has now been implemented. The introduction of the PV panels on aluminium frames up to 3 metres high has introduced a new built form into the agricultural landscape that is visually alien, and would appear to cause harm to the setting of both assets, especially during the winter months.
>
> There is no indication that any investigation into the impact of the significance of Gifford Hall or the impact of views from and into the Conservation Area has been undertaken."

34. On 19th June 2014 a report was written by the responsible officer at the defendants rejecting all of the claimant's complaints. At that time the claimant was heavily involved in campaigning against the variation application, and the development as a whole, as he had been energetically ever since becoming aware of it. In the course of this extensive campaigning he consulted with a firm of property surveyors. He was advised by them to consult his present solicitors and he contacted them on 22nd July 2014. Having assembled the relevant information his new solicitors wrote a pre-action protocol letter on 3rd August 2014 and then issued the present proceedings for Judicial Review on 20th August 2014.

35. On 3rd September 2014 the second application was reported to the responsible Area Planning Committee for decision. The officers had prepared a report on the application which they recommended for approval. In the event members refused the

application for 2 reasons. The second reason for refusal was the detrimental impact upon the setting of Gifford Hall.

36. I turn now to consider the various grounds upon which the application for Judicial Review has been made.

Ground 1

37. The claimant's ground 1 relates to the defendant's failure to consult English Heritage as part of the planning application. The duty to consult English Heritage is contained within the Planning (Listed Buildings and Conservation Areas) Regulations 1990 which at regulation 5A provides as follows:

> "5A Publicity for applications affecting setting of listed buildings
>
> (1) This regulation applies where an application for planning permission for any development of land is made to a local planning authority… and the authority think… that the development would affect the setting of a listed building or the character or appearance of a conservation area."

38. Miss Jenny Wigley, who appears on behalf of the claimant, drew attention to the case of R v South Herefordshire District Council ex parte Felton [1989] 3 PLR 81 as an example of the court striking down a planning permission on the basis of an irrational failure to consult English Heritage when dealing with an application which affected the setting of a listed building. Further guidance in relation to the operation of the 1990 Regulations can be derived from R (the Friends of Hethel Limited) v South Norfolk District Council [2011] 1 WLR 1216. That was a case which involved a challenge to a planning permission granted for wind turbine development which was accompanied by an environmental statement. In dealing with heritage issues the environmental statement concluded that there would be an effect on listed buildings which was either 'moderate to major' in extent or 'minor to moderate'. Against the background of this material, and having set out the requirements of the 1990 Regulations, Sullivan LJ observed as follows:

> "32. Pausing there, while the question whether a proposed development affects, or would affect the setting of a listed building is very much a matter of planning judgment for the local planning authority ('in the opinion of the local planning authority' and 'the authority think'), in view of the conclusions in the ES the local authority had to consider whether this proposed development affected, or would affect the setting of the listed buildings referred to in the ES. Unless the local authority disagreed with the conclusions in the ES it is difficult to see how it could rationally have come to the conclusion that there would be no such effect. Para 5.1 of the report suggest endorsement of, rather than disagreement with, the discretion in the ES of the potential impacts of the development…

> 36. In the event, it [disagreement with the ES] does not matter because, even if the conclusions in the ES are ignored, both the conservation and design officer and head of planning concluded that the proposed development would affect the setting of a Grade I or Grade II* listed building. The former had 'some concern about the proposed view of the Grade I listed church at Wreningham', and the latter considered that while there would be 'some impact on this long distance view… this impact is not so great that it would in itself justify refusing consent'. The question for the purposes of Circular 01/01 and the 1990 Regulations is whether the development would affect the setting of the listed building, not whether it would affect it so seriously as to justify a refusal of planning permission. The extent of the effect, and its significance in terms of the setting of the particular building, are precisely the matters on which English Heritage's expert views should be sought."

39. Against the background of these authorities the case is put by the claimant on three interlinked bases. Firstly, it is contended that upon an analysis of the documentation the council did in fact think that there was an effect on the listed building and the Conservation Area. Secondly, and allied to this submission, it is contended that they misdirected themselves by focusing on the question of harm, and in particular the significance of harm, and not whether there was simply an affect on these heritage assets. Thirdly, it is submitted that the conclusion reached by the council was irrational.

40. Mr Wills, who appears on behalf of the defendant, responds to these submissions by contending that the council were correct to conclude that they did not need to consult English Heritage on the basis that there was no effect on the setting of the listed building or the Conservation Area and that that conclusion was one which was properly open to the defendant. He submits that the court should not have regard to the email written by Mr Brown on 21st March 2014 to gauge these submissions on the basis that it was an email written long after the decision was reached and amounts to the kind of ex post facto justification for a decision which the court should normally ignore or attach no weight to.

41. Dealing with the question of the status of Mr Brown's email first, I am not satisfied that it would be entirely appropriate to set it aside for the purposes of my consideration of this issue. It was not written in the contemplation of proceedings or after proceedings had been commenced. It is sensibly to be viewed as part of the context of the decision, in that Mr Brown was providing the claimant with an explanation of his consultation response which had informed the decision making process. There is a certain irony in Mr Wills' submission because, both in this part of the case and in relation to other grounds, the defendant relies upon the ex post facto explanations from Mr Wilmott. Ultimately these are questions of weight and I have to resolve what weight I can attach to both the email and also Mr Wilmott's evidence. I shall deal with that issue in my observations below.

42. Having scrutinised in particular the documentation which is contemporaneous with the decision I am satisfied that in truth the defendant did think that there was an effect on both listed buildings and the Conservation Area and that therefore, had they

applied the test in the 1990 Regulations, English Heritage should have been consulted. The material which supports this conclusion is as follows.

43. It will be recalled that in Mr Brown's consultation response, as it is reported in the officer's report, he stated that 'there would be no significant adverse impact on the setting of listed buildings'. He did not say that there would be no effect on them or that they would not be affected. In the officer's conclusions whilst at one point it is observed that the setting of Gifford Hall 'would not be harmed', in the same paragraph it is observed that in relation to The Hayes 'any impact on the setting of the building would be so small as not to be significant.' Again, this is not an assessment that there was no effect but rather as to the quality of the effect. A little further on in the conclusions the impact on the Conservation Area and listed buildings is described as being 'negligible'. Again this is a judgment as to the quality of the effect not whether it exists at all. With these views in mind it is important to observe that the language of the Regulations observes studied neutrality as to the nature of how the proposed development would affect the setting of the listed building. It is the conclusion that the proposed development would affect the listed building, and not the quality of how it would do so, which is the key issue triggering the consultation requirements.

44. Returning to the council's views, the observations which I have set out above from the officer's report are consistent with the observations made by Mr Brown in his email. For example, he observes in the penultimate paragraph of that email that his views were that 'the adverse impact would not be significant' and that this meant that there was not enough harm to the setting of the listed building to warrant objection. Given the consistency of what Mr Brown was saying in his email with the officer's report I attach some weight to it. By contrast, Mr Wilmott's evidence that the view was that there was no harm to the listed buildings and their setting was not affected is inconsistent and less weight can be attached to it.

45. It follows that from the record of the decision, corroborated by Mr Brown's explanatory email, the listed building and its setting was affected. This needed to be evaluated. The statutory scheme requires English Heritage to have the chance to input into that evaluation. To use the language of Sullivan LJ it is precisely the matter on which English Heritage's expert views should be sought. The failure to do so in this case was in my view a clear legal error.

46. As part of the claimant's case reliance was placed on the English Heritage response to the second application. It will be apparent that I have reached my conclusion in relation to ground 1 without reference to that matter. What English Heritage's response does show, and it is a matter which is relevant to questions of discretion to which I shall turn later, is that they have held a very different view to that of the council and a view to which no doubt significant weight should attach as coming from a body charged with specific responsibility for the nation's heritage.

Ground 2

47. The claimant's ground 2 is that the defendant failed to discharge the duty contained within s66 of the Planning (Listed Buildings and Conservation Areas) Act 1990. This statutory provision provides as follows:

> "66 (1) In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it posses."

48. The role which this statutory duty plays in the decision making process was recently considered by the Court of Appeal in East Northamptonshire District Council v Secretary of State [2014] 1 PNCR 22 357. The nature of the question which the court had to consider and the answer which was provided is set out in the leading judgment of Sullivan LJ as follows:

> "17. Was it Parliament's intention that the decision-maker should consider very carefully whether a proposed development would harm the setting of the listed building (or the character or appearance of the Conservation Area), and if the conclusion was that there would be some harm, then consider whether that harm was outweighed by the advantages of the proposal, giving that harm such weight as the decision maker thought appropriate; or was it Parliament's intention that when deciding whether the harm to the setting of the listed building was outweighed by the advantages of the proposal, the decision-maker should give particular weight to the desirability of avoiding such harm? …
>
> 24. While I would accept Mr Nardell's submission that Hetherington does not take the matter any further, it does not cast any doubt on the proposition that emerges from the Bath and South Lakeland cases: that Parliament in enacting s66(1) did intend that the desirability of preserving the settings of listed buildings should not simply be given careful consideration by the decision-maker for the purpose of deciding whether there would be some harm, but should be given 'considerable importance and weight' when the decision-maker carries out the balancing exercise…
>
> 29. For these reasons, I agree with Lang J's conclusion that Parliament's intention enacting s66(1) was that decision-makers should give 'considerable importance and weight' to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise. I also agree with her conclusion that the inspector did not give considerable importance and weight to this factor when carrying out the balancing exercise in this decision. He appears to have treated the less that substantial harm to the setting of the listed buildings, including Lyveden New Build, as a less than substantial objection to the grant of planning permission. The appellant's skeleton argument effectively conceded as much in contending that the weight be given to this factor was, subject only to a rationality, entirely a matter for the inspector's

> planning judgment. In his oral submissions Mr Nardell contended that the inspector had given considerable weight to this factor, but he was unable to point to any passage in the decision letter which supported this contention, and there is a mark contrast between the 'significant weight' which the inspector expressly gave in paragraph 85 of the decision letter to the renewable energy considerations in favour of the proposal having regard to the policy advice in PPS 22, and the manner in which he approached the S66 (1) duty. It is true that the inspector set out the duty in paragraph 17 of the decision letter, but at no stage in the decision letter did he expressly acknowledge the need, if he found that there would be harm to the setting of the many listed buildings, to give considerable weight to the desirability of preserving the setting of those buildings. This is a fatal flaw in the decision even if grounds 2 and 3 are not made out."

49. In her submissions to me Miss Wigley drew particular attention to paragraph 24 and the s66 duty requiring both that careful consideration should be given for the purpose of deciding whether harm exists and also in being given 'considerable importance and weight' in undertaking the balancing exercise required to make the decision.

50. It should be emphasised at the outset that in assessing the merits of this ground I am not concerned at all with the merits of the substantive issue as to the extent to which there is a harmful impact on historic interests of Gifford Hall. Much material has been submitted by both the claimant and the defendant bearing on this issue, which as I have said does not arise in the proceedings before me, and I was not assisted by it. The true focus of the claimant's submissions on this ground have to be on the procedural questions arising as to the approach taken by the defendant to the question of the interests of the setting of Gifford Hall. Those procedural points were, in essence, that there had been a failure to visit the listed building in order to examine the issue from the perspective of the historic asset itself, and that there had solely been reliance so far as the conservation officer was concerned on a site visit some years before and a summer view photo which was not, in any event, a view towards the Hall.

51. The defendant's response to these matters is, firstly, that in that the defendant formed the conclusion there was no effect on the listed building the ground is misconceived. For the reasons given in relation to ground 1 above that is not an argument open to the defendant. Mr Wills' fallback position was that the officers had clearly had close regard to the questions associated with the listed buildings and had formed a careful and rational evaluation of those matters which could not be impugned.

52. It is important to observe at the outset that the duty under s66(1) arises when a listed building or its setting are affected by a proposed development. In the light of the conclusions which I have reached under ground 1 it is clear that in this case that duty was engaged. The duty is to 'have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.' In order to do so it is necessary in the first instance to properly evaluate the quality of the effect on the listed building and on its setting. In my view to attempt to do this without the input which the statutory regime requires from the relevant

national body with responsibility for these matters, namely English Heritage, is not immediately redolent of the duty being engaged with and properly discharged.

53. Furthermore, it is clear that at no point in the documentary record relating to the decision is there any mention of the s66(1) duty. In my view the absence of any such reference is not in and of itself decisive but it is a matter to be borne in mind when considering whether, overall, the council have demonstrated that the duty has been applied and discharged.

54. Having considered the procedural history of the application in my view there is substance in the criticisms made by the claimant of the defendant's evaluation of the effect on Gifford Hall. The officer's preparatory notes set out above correctly, and consistent with the duty, describe the impact on the listed building's setting as a 'key concern'. That appears to have been an observation taken from Mr Brown. Furthermore, it seems from the officer's preparatory notes that Mr Brown was seeking photographs to be taken from the footpath passing through the site in order to evaluate the impact on the setting of Gifford Hall. There is no evidence before me that that was ever done.

55. In fact what was done is further illuminated from evidence which was assembled by the defendant in the investigation of the claimant's complaint. In the report on the complaint the following is recorded:

> "The Conservation Officer who responded to the consultation has explained to me that he knew the site from the visit he paid to Gifford Hall for another application in 2010, when he had met with the previous owner and viewed the surrounding landscape from the grounds of the Hall.
>
> The officer commented that plate 8 of the heritage statement satisfied him that the intervening vegetation between the Hall and the application site had not become less dense in the meantime and, therefore, the officer was satisfied that he could assess the impact of the proposal upon the Hall without carrying out a further site visit. I am satisfied that that the officer acted reasonably in this regard."

56. There is no doubt that the case officer walked the site including the relevant footpaths in order to form her view of the proposal. However, her view and indeed the discharge of the s66(1) duty was bound to be, and needed to be, informed and reliant upon the views of the relevant heritage experts. In this case, for the reasons I have set out above, the external expert potentially interested in the decision had not been engaged. The internal expert, the conservation officer, relied on a site visit which had occurred several years previously and a photograph which it will be recalled was not a view from the site towards Gifford Hall, and was in any event only one view from what is a very extensive site area. Perhaps more importantly he did not follow his own prescription of requiring photographs from the footpaths through the site in order to establish an informed view. Taking all of these flaws in the process together (the failure to consult English Heritage, the failure to record the engagement of the duty and the procedural failings I have set out above in the investigation on the impact upon the heritage asset by the council's relevant expert) I am unable to conclude that

the defendant has demonstrated that the s66(1) duty was discharged in the present case. The failure to do so was a legal error and the claimant's case in this respect is made out.

Ground 4

57. The argument under ground 4 is that the Statement of Community Involvement created a legitimate expectation that the claimant would be consulted about the application. Alternatively it is contended that the consultation process itself was so muddled in terms of who was consulted that the exercise was in and of itself unlawful. Dealing firstly with the question of legitimate expectation the claimant relies upon the case of R (on the application of Majed) v Camden LBC [2010] JPL 621. This was a case which concerned a failure to notify the claimant of an application relying upon the contention that notification was required pursuant to the defendant council's Statement of Community Involvement. At paragraph 14 Sullivan LJ dealt with the relevant principles as follows:

> "14. On behalf of the respondent and the interested party, Mr Beard and Mr Kolinsky submitted that there was no legitimate expectation. It was submitted that, since there was a specific statutory code – the General Development Procedure Order (GPDO) – which regulates the balance between various interests, applicants and local residents, as to who should and who should not be notified, it would be wrong to impose some rigid requirement to notify in accordance with the terms of Annex 6 [of the Statement of Community Involvement]. It was submitted that this would upset the balance that had be struck by the statutory requirements. It seems to be that reference to the statutory requirements is of no real assistance. Legitimate expectation comes into play when there is no statutory requirement. If there is a breach of a statutory requirement then that breach can be the subject of proceedings. Legitimate expectation comes into play when there is a promise or a practice to do more than that which is required by stature. It seems to be that the Statement is a paradigm example of such a promise and a practice. As I understood it, Mr Beard accepted that this appellant falls within Annex 6. Although he submitted there was an element of discretion, that is not relevant in the circumstances of the present case. No doubt if an officer had given consideration to the matter and had concluded that, for example, this appellant was so far away from the proposed development that he could not fairly be described as an adjoining occupier then, absent Wednesbury unreasonableness the court would not interfere with that exercise of discretion. In the present case no discretion was exercised and an administrative mistake was made. It was submitted by the respondent and the interested party, even though there was a clear statement that a person in the position of the appellant would be sent a letter, there was nevertheless no unequivocal assurance that they would be notified. I am quite unable to

> accept that submission given the clear terms of para 1.3 of the Statement which tells the public that when the Statement is adopted by the council it is 'required to follow what it says'. It would be difficult to imagine a more unequivocal statement as to who would, and who would not, be notified."

58. It is contended on behalf of the claimant that albeit he is not an occupier of an adjoining premises nevertheless as an 'affected' neighbour he ought to have been consulted. That created a legitimate expectation and the defendant is in breach of that legitimate expectation by failing to notify the claimant of the application. In response the defendant submits that what is contained within the statement of community involvement is not an explicit promise. It is only stated that the council will 'endeavour' to notify. Furthermore it is submitted that para 5.6 is limited to the notification of those adjoining the application site and does not include any requirement to consult those who might not adjoin the site but who might be affected by the proposed development.

59. I am unable to accept the defendant's construction of the Statement of Community Involvement. In my view, read sensibly and as a public document, the use of the word 'endeavour' does not mean that the council might or might not comply with the commitment which follows it. It expresses in my view the council's earnest intention to do that which they state within para 5.6. That then raises the question as to what it is they are stating they will do. Again, I am unable to accept that para 5.6 suggests that only adjoining occupiers will be notified. My reasons for rejecting the defendant's submission is this respect are as follows.

60. Firstly, Appendix 1 quoted above is in my view entirely clear when it says that where the council feels that a planning application may affect a neighbouring property then it will notify the persons affected. That is not confined to only those adjoining. Furthermore, Mr Wilmott's evidence set out above describing what was done does not support the defendant's construction either. In undertaking neighbour notification in this case the council did not limit themselves to only those who were adjoining but also consulted those who were affected. For these reasons I am satisfied that the failure to consult in accordance with the promise made in the Statement of Community Involvement in this case was a breach of the claimant's legitimate expectation that he would be notified.

61. In so far as reliance might be placed on the question of whether or not the council may have felt that the claimant's property was affected in my view it would not have been open to the defendant to submit that they could properly or rationally have concluded in the circumstances that the claimant's property was not potentially affected. The reasons for that are already set out in relation to Ground 1. In addition to those matters, as is pointed out in the documentation, there were in the material accompanying the planning application numerous references to Gifford Hall all of which should have alerted the defendants, acting reasonably, to the fact that it was necessary to consult the occupier of that property. Views as to the effect upon it were being reached throughout both the LVIA and more particularly the Heritage Statement. This is further evidence to support the claimant's contentions.

62. The approach taken as to who was or was not consulted on the application remains in my view somewhat opaque. Whilst I note Mr Wilmott's recent explanation that the

claimant is mistaken in relying on all of the addresses which have been derived from the website on the basis that some individuals responded without having been consulted, the number of those consultations which he has referenced do not tie back to the observations in the officer's report that there were two consultation responses from a single local resident. Whether or not there is legitimacy in the claimant's concerns in relation to the consultation process taken as a whole in my view it is sufficient and determinative of this ground that the claimant was not consulted and, for the reasons I have set out above, should have been and that was a breach of his legitimate expectation pursuant to the Statement of Community Involvement. The claimant succeeds under this ground.

Ground 5

63. This ground relates to concerns in relation to the screening opinion. The legal background to the provision of screening opinions is derived from the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. Regulation 2 of the Regulations defines 'EIA development' as including development as defined within Schedule 2 of the Regulations 'likely to have significant effects on the environment by virtue of factors such as its nature, size or location.' Regulation 2 also defines 'screening opinion' as 'a written statement of the opinion of the relevant planning authority as to whether development is EIA development.' Thus it can be seen that the screening opinion is the means whereby consideration is given to whether or not a development which is of a kind identified in Schedule 2 (both as to its nature and also as to its site or development size) will be likely to have significant effects on the environment and therefore needs to be accompanied by relevant environmental information contained in an Environmental Statement.

64. Regulation 4(6) of the 2011 Regulations states that in undertaking the screening exercise and deciding whether or not development within Schedule 2 is EIA development regard has to be had to the range of matters set out in schedule 3 of the Regulations. These include both environmental aspects of the characteristics of the development together with potential sensitivity of its location and the potential scale of its impact. Regulation 4 (7) provides as follows:

> "4 (7) where a local planning authority adopts a screening opinion under Regulation 5 (5), or the Secretary of State makes a screening direction under paragraph (3) –
>
> (a) that opinion or direction shall be accompanied by a written statement giving clearly and precisely the full reasons for that conclusion."

65. Regulation 3 of the 2011 regulations, and in particular regulation 3(4) prevents the grant of planning permission to EIA development unless environmental information has been taken into account.

66. There is no dispute but that this development is of a kind and at a scale which brings it within Schedule 2 of the Regulations. The questions relate to the legality of the screening opinion set out above concluding that environmental impact assessment was not required. In the case of R (Lebus) v South Cambridgeshire District Council [2002] EWHC 2009 Sullivan J (as he then was) concluded that a screening opinion was

legally flawed where it relied upon the impermissible premise that it was unnecessary to obtain a formal environmental statement if the information was to be received in sufficient detail as part and parcel of material to be expected with an application. That approach to giving consideration to whether or not EIA was required was further considered in the case of R (on the application of Bateman) v South Cambridgeshire District Council. It is worthwhile setting out the pertinent part of the screening opinion which was in dispute in that case. It is set out in para 6 of the judgment of Moore – Bick LJ:

> "4. The main impacts of the development are likely to be: increase in traffic movements, landscape impact and noise disturbance to nearby residents. Transport landscape and noise assessments are to be provided with the application.
>
> 5. Having regard to the selection criteria in Schedule 3 to the regulations, particularly noting the size of the development, culmination with the existing development of potential impact, it is considered that this major development will not have more than local importance, will not be proposed for a particularly environmental sensitive or vulnerable location, and will not have unusually complex and potentially hazardous environmental effects."

67. Moore-Bick LJ's conclusions (with which Jackson LJ agreed, Mummery LJ delivering a dissenting judgment) were as follows:

> "27. Nothing has been put before us to suggest that the planning officer's decision in this case was not carefully and conscientiously considered, nor do I think it can be said that it was not in fact based on information that was both sufficient and accurate. However, I have, somewhat reluctantly, come to the conclusion that the reasons given for her decision do not make it sufficiently clear why she reached the conclusion that an EIA was not required in this case. That is not to suggest that she may not have had perfectly good reasons for reaching that conclusion, just that it is not clear what they were. Although the matters referred to in paragraph 3, which refers to the risks of flooding, public rights of way, tree preservation orders, ancient monuments and environmentally sensitive areas, are of importance in themselves, they were not aspects of the environment that were potentially at risk and so did not require detailed consideration. Paragraph 5 contains the whole of her reasoning in relation to the effects that were of potential significance.
>
> 28. It is perhaps unfortunate that the planning officer chose to express her decision in the language used in paragraph 33 of circular 02/99, because the 3 criteria to which it refers are couched in terms so broad that they offer only general guidance in relation to the kind of projects that are likely to require an EIA. However, the same criticism could have been made had

> she expressed her reasons in terms of what is described in paragraph 34 as the 'basic test' namely that she has not made in clear *why* she did not consider the test to be satisfied. One can, I think, infer that the planning officer had considered the 3 matters to which she referred to in paragraph 4 and that she may have accepted Savills' arguments in relation to them. She may have thought that conditions could be imposed on any grant of permission to ensure that the effects would not be significant. The difficulty is that one does not know and cannot safely infer what her reasons were. In my judgment, therefore, the opinion does not comply with the requirements laid down in Mellor."

68. The recent decision of R (on the application of Hughes) v South Lakeland District Council [2014] EWHC 3979 at paras 32-33 is a further illustration of the principles in play.

69. Against the background of those authorities Miss Wigley submits on behalf of the claimant that the screening opinion's author simply does not engage with the relevant test under the regulations as to whether or not this development would give rise to significant environmental effects. She contends that simply relying upon subsequent reports is not a proper substitute for the application of that test and furthermore, the reasons why the test has not been passed are not clear in the present case.

70. In response Mr Wills on behalf of the defendant submits that the relevant statutory framework has been fully set out in the screening opinion and that it is inconceivable that the author did not have clearly in mind the relevant test when undertaking the examination of the development. All of the matters alluded to in the screening opinion were relevant to the exercise and it was appropriate to rely upon the provision of future reports in relation to those relevant issues. In so far as the claimant relied upon the reasons in the screening opinion he submitted that that was a point which was not pleaded and therefore the claimant ought not to be allowed to rely upon it.

71. Dealing firstly with the pleading point taken by Mr Wills, as Miss Wigley pointed out in her reply, at paragraph 20 of the claimant's reply to the defendant's Summary Grounds for Contesting the Claim reliance is placed upon the absence of reasoning. In any event I am not satisfied that any prejudice has occurred to the defendant or the interested parties as the points raised are matters of legal argument which they were well equipped to deal with, and did indeed grapple with, at the hearing.

72. At the point at which I granted permission on the papers for this judicial review to proceed it is right to recall that I was far from convinced in relation to this ground of challenge. However, it was a ground which benefitted considerably from oral presentation and the exploration of its merits in the course of argument. Having reflected on the submissions made by the claimant I am satisfied that there is substance in them, notwithstanding the defendant's contentions.

73. Firstly, the problem with reliance upon future reports being provided in respect of environmental issues is that as the cases of Lebus and Bateman show that does not amount to the application of the correct legal test. The screening opinion in this case focuses on the provision of those reports as enabling those relevant issues to be fully

assessed. That, however, is not the point. The provision of an environmental statement would also facilitate that full assessment. The question which needs to be answered, and which is not directly addressed anywhere in the screening opinion, is whether or not this development would be likely to have significant environmental effects such that instead of environmental information being provided on an adhoc basis it should be provided through the legally structured process required by the 2011 Regulations.

74. I am unprepared to accept in the absence of any supporting evidence within the contemporaneous documentation that the author of the document must have had the relevant test in mind when he undertook the exercise of screening the development. In my view, similar to the concerns expressed by the court of appeal in Bateman, the screening opinion is flawed both as to its substance and its reasoning. In substance dependence on the provision of further report is not a substitute for the application of the correct test. In terms of the reasoning the screening opinion simply does not explain why the development does not pass the test. In those circumstances there has been an error of law.

75. In the course of submissions Mr Wills contended that I should conclude that the screening opinion would in any event be negative even if it were done again. That is a submission I am unable to accept since it is simply not possible for me to say on the basis of the papers that the answer would be the same. To do so would require a comprehensive re-examination of the environmental effects of the proposal which is well beyond the scope of the court's role. It is important to observe in my view therefore this is not a case where there has been a simple technical procedural failure which is without content, but is rather a substantive failure to properly apply the regulations which has the potential to lead to an alternative outcome in terms of the substance.

Delay and Discretion

76. Having found a number of legal errors in the council's decision making process it is now necessary to consider both the question of delay in bringing the proceedings and then, if there is reasonable excuse for the delay, whether as an act of discretion the permission should be quashed or, alternatively, a declaration granted.

77. As CPR r54.5(1) stood at the date of decision a claim in a planning case for judicial review had to be brought promptly and in any event within 3 months. Since 1st July 2013 a claim form has to be filed not later than 6 weeks after the grounds for the claim arose. As Mr Wills rightly points out this emphasises the importance of promptness in bringing claims for planning cases. Section 31 (6) and (7) of the Senior Courts Act 1981 provide as follows:

> "31 (6) where the High Court considers that there has been undue delay in making an application for Judicial Review, the court may refuse to grant – (a) leave for the making of the application; or (b) any relief sought on the application,
>
> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

> (7) subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for Judicial Review may be made."

78. In this case the claimant accepts that there has been delay in making the application but the question is how long the relevant delay has been and whether or not the claimant has a reasonable explanation for why it occurred. The background to the consideration of this issue is provided firstly by the case of Finn-Kelcey v Milton Keynes BC [2009] Env LR 17 299 in which Keene LJ observed as follows:

> "22. The importance of acting promptly applies with particular force in cases where it is sought to challenge the grant of planning permission. In R v Exeter City Council ex parte JL Thomas & Co LTD [1991] 1 QB 471 at 484G, Simon Brown J (as he then was) emphasised the need to proceed with 'greatest possible celerity', as he did also in R v Swale BC ex parte Royal Society for the Protection of Birds [1991] 1 PLR 6. Once a planning permission has been granted, a developer is entitled to proceed to carry out the developments and since there are time limits of the validity on a permission will normally wish to proceed to implement it without delay. In the Exeter case, Simon Brown J referred to the fact that a statutory challenge as to what is now Section 288 of the Town and Country Planning Act 1990 to a ministerial decision must be brought within 6 weeks of the decision. Thus if a planning permission is granted by the Secretary of State on an appeal or a called-in application, the objector seeking to question the validity of that decision must act within 6 weeks, without there being any power in the court to extend that period of time…
>
> 24. I would respectfully agree that, where the CPR has expressly provided for a 3-month time limit, the courts cannot adopt a policy that in Judicial Review challenges to the grant of a planning permission a time limit of 6 weeks will in practice apply. However, that does not seem to me to rob the point made by Simon Brown J and others of all of its force. It may often be of *some* relevance, when a court is applying the separate test of promptness, that Parliament has prescribed a 6 weeks time limit in cases where the permission is granted by the Secretary of State rather than by a local planning authority, if only because it indicates a recognition by Parliament of the necessity of brining challenges to planning permissions quickly. There are differences between the 2 situations: for example, where a Secretary of State grants a permission, an objector is entitled to be notified of the decision, which is not the case where a local planning authority grants permission. Thus where in the latter case an objector is for sometime unaware of the local authority decision, the analogy is less applicable. That was not the situation in the present case, where BLEW and its supporters, including the appellant were very well aware of the decisions

> by the respondent's committee and then by the full council. My point is simply that, while there is no 'six weeks rule' in Judicial Review challenges to planning permissions the existence of that statutory limit is not to be seen as necessarily wholly irrelevant to the decision as to what is 'prompt' in an individual case. It emphasises the need for swiftness of action."

79. The defendant and the interested parties also placed reliance on the decision of Stadlen J in Melton v Uttlesford District Council [2009] EWHC 2845. In that case Stadlen J observed as follows:

> "50. In short in my view there is no reason for the delay in this case. There is a particular importance in the need for promptness in the bringing of claims for Judicial Review as is reflected in CPR r54.5(1). Where, as here, the delay is nearly 2 and a half years after the decision complained of and 2 and a quarter years after the 3 month deadline laid down by CPR r54.5 (1) (b), the court is likely to scrutinise with particular care any submission that there is a good reason for the delay. A change of legal representation and or a change of opinion on law and or tactics is unlikely to pass the test. It is not the function of the remedy of Judicial Review to serve as a tactical means of plugging an actual or perceived gap in the legal argument of a claimant on an appeal on a case stated where the result to that remedy involved a failure to comply with the prescribed time limits, still less a failure on such a large scale as in this case."

80. Mr Wills on behalf of the defendant and the interested parties submits that on the basis of the narrative of events which has been set out above there has been clear and unexplained delay on the part of the claimant. He draws attention to in excess of a year passing before the proceedings in this case were commenced. He places particular reliance on the observation in the claimant's solicitor's letter of 22nd April 2014 that the claimant had lost his opportunity to pursue a judicial review as being an express recognition that judicial review could not and would not be pursued as a significant factor in the assessment. Furthermore he contends on the basis of Melton that a change of legal advice or tactics does not amount to a good reason to explain the claimant's delay in bringing the proceedings well after either the 6 week or the 3 month time period even if, and Mr Wills did not accept this, one made allowance for the fact that the claimant contended he was unaware of the development until March 2014.

81. In response to these submissions Miss Wigley relies upon the claimant's evidence that he was unaware of the development at all until it commenced in a manner which brought it to his knowledge on 19th March 2014. That then drew to his attention the amendment application to which he objected and having been advised that he had little prospect of pursuing a Judicial Review it was then reasonable of the claimant to have pursued his complaint which it took the council 2 months to resolve. Throughout this time and afterwards he was fighting tirelessly the amendment application and also, as he describes in his witness statement, vigorously pursuing a wide variety of experts and opinion formers in order to resist the development as a whole. She

submitted that as soon as the claimant was referred to his present solicitors they acted with all due expedition to both notify the council of the claim and having addressed difficulties in assembling all of the relevant documentation pursuing a pre-action protocol letter and these proceedings.

82. In my view the starting point for the assessment of this issue has to be that the claimant was wholly unaware of the grant of the planning permission which is impugned until 19th March 2014, and that in accordance with the council's promises in the Statement of Community Involvement he should have been notified. In those circumstances he cannot sensibly be criticised for not having brought the claim before that date and his ignorance of the development proposed as a result of what I have concluded was the council's legal error provides in my view a reasonable explanation for why matters were not progressed prior to him becoming aware of the development. Although the defendant continued to submit that the claimant should have been aware of the development as a result of the publicity which did occur I have no reason to go behind the clear and unequivocal evidence of the claimant that he did not know of the development until construction commenced.

83. Once he became aware of the development allowance needs to be made for the fact that, unlike for instance the claimants in Finn-Kelcey, he had not up to that point been involved at all in the decision making process. The claimant therefore had to assimilate all of the issues surrounding the grant of planning permission as well as the issues relating to the amendment application from a standing start. That in my view provides a reasonable explanation certainly up to the point in time when his complaint was formulated and submitted to the council. It is material to note that even at that stage and having received the advice of solicitors not all of the potential legal errors in the council's approach had been identified. For instance, it was not until later and the involvement of his present solicitors that the problems in relation to the 2011 Regulations were identified and put to the council (albeit I did not receive any submissions in relation to questions of delay and the provision of an effective remedy under EU law and have sought to resolve the question of delay on the basis of domestic law principles.)

84. There is some force in Mr Wills' submissions in relation to what was said in the letter of 22nd April 2014 disavowing any intention of pursuing judicial review and also, potentially, the weight that can be attached to changes in legal advice or tactics following the case of Melton. It is, however, clear in my view that Stadlen J was not seeking to lay down any definitive rule in relation to questions of changed legal advice. He identified the matter as relevant and a factor to be assessed, but was careful not to suggest that this issue would be determinative. It should also be noted that Melton was a very different case on its facts from the present. In that case tactical choices had been made years prior to the commencement of judicial review proceedings in which a particular procedure was selected to be pursued by the claimant only then for the judicial review remedy to be relied upon many years later.

85. In the present case it is clear to me that the advice which the claimant received, and which he acted upon, was to say the least incomplete. He did not act unreasonably in relying upon it since he is not a lawyer. It is clear that once the possibility of there being a second or alternative opinion available he availed himself of it. Whilst, therefore, this is a matter to be taken into account in the defendant's favour on this

issue I am unable to afford it the weight which Mr Wills would encourage me to in resolving this aspect of the case.

86. In my view of greater significance on the facts of this particular case are the efforts which were being made by the claimant personally from the time when he became aware of the development. It is clear that he was consistently and energetically pursuing all avenues which he could to dispute the development (including the second application). There is no basis for any sensible suggestion of neglect, lassitude or inactivity on his behalf throughout the time from when he became aware of the development until these proceedings were issued. There was delay in issuing the proceedings caused by the receipt of incomplete advice from his former solicitors which led him, over the course of several weeks and ultimately fruitlessly, to pursue the defendant's formal complaints procedure rather than legal proceedings. I do not consider that this amounts to unreasonable or unexplained delay. From the time when he became aware of the development until his present solicitors were instructed the claimant's evidence makes clear that not only was he contacting and pursuing the council in relation to seeking further explanation from Mr Brown, raising a detailed complaint and engaging local council members but he was also engaging the Parish Council, his MP, national Government ministries, English Heritage and the media. This is not a case where there are significant periods of inactivity or unexplained delay.

87. I am satisfied on the evidence that at all times and via a wide variety of different routes, including the second application and his objections to it, the claimant was challenging the development in question. When he received advice that it was susceptible to judicial review he and those who had provided that advice acted promptly to bring the claim. I am satisfied that there is in this case a reasonable explanation for why the proceedings were issued when they were, after a period of undue delay, and that time should be extended for the reasons set out above and in the claimant's evidence for the purpose of these proceedings.

88. In the light of that conclusion it is then necessary to consider the question of whether or not discretion should be exercised so as to quash the decision or alternatively to grant declaratory relief. In order to examine that question it is necessary to set out further elements of the factual background.

89. Following commencement of the development in March 2014 the construction of the installation was completed and the plant was producing electricity by June 2014. The evidence makes clear that the physical plant which has been installed is owned by the second interested party who entered into a lease of the land on 3rd February 2014. The second interested party is related to the third interested party by the group of companies in which they are all linked.

90. In a witness statement on behalf of both interested parties Mr Deschler contends that the installation of the development cost £10.5 million and that the restoration of the site would cost £1.5 million. He explains that there is an uncertain second hand market for the panels in the event that they needed to be removed and that any suggestions that they might have any significant value is seriously undermined by the fact that their warranty would be voided by the fact that they had been uninstalled. Re-deployment of them would therefore be, if it occurred at all, without the benefit of the manufacturer's warranty which in turn would have the effect of precluding the

ability to raise finance in order to facilitate their re-installation. Mr Deschler advises that the installation was designed to be bespoke for the site. Further, he explains that as a result of this there would be a serious financial impact on the interested parties were the planning permission to be quashed, together with an associated impact upon investor confidence in any future developments of this nature.

91. In response to these contentions the claimant draws attention to a declaration made by the third interested party to the United States Securities and Exchange Commission in which under the heading 'Legal Proceedings' the third interested party has declared as follows:

> "We are not a party to any legal proceeding other than legal proceedings arising in the ordinary course of our business. We are also a party to various administrative and regulatory proceedings that have risen in the ordinary course of our business. Although it is not possible to predict the outcome of any of these matters, we believe the ultimate outcome of these matters, individually and in the aggregate, will not have a material adverse effect on our business, financial condition or results of operations."

92. It is said by the claimant that this declaration, on the assumption it must be accurate given the regulatory organisation with which it was lodged on 9th December 2014, seriously undermines the credibility of the suggestions made by Mr Deschler that an adverse outcome of these proceedings would have a significant impact upon the second and third interested parties. In a further witness statement in response to this contention Mr Deschler states that the basis of the statement and in particular the observation about the third interested party's belief in 'the ultimate outcome of these matters' was grounded in the advice which they had received that the prospect of the proceedings succeeding was 'low'.

93. Having had regard to this late exchange of evidence, the contentions in relation to which do not have to be conclusively resolved, in my view it is safe to conclude that the interested parties would suffer serious financial prejudice if the planning permission were quashed and the development required to be moved from the land completely. That is a factor which I have taken into account as set out below.

94. There is an unresolved factual dispute as to the extent to which the development which has been built on the site is in fact in accordance with the plans which were permitted. Some elements of the development which are not in accordance with the plans and therefore in breach of development control are undisputed. That there are such elements is clearly evidenced by the retrospective nature of the second application. It is not possible for me to completely resolve the differences between the parties nor, in my view is it necessary to do so. I propose instead to focus on those elements which it is agreed are of significance and retrospective in assessing these matters. They are as follows.

95. The fencing surrounding the development does not accord with that which was permitted and it is in my view important to note that the design of the fence was an important issue in the assessment of the application. The nature of that concern and its

importance can be adequately explained by the following quotation from the officer's report:

> "In the immediate landscape the fencing is a very key feature, particularly to the uses of the footpaths. Concern was raised by the Landscape Officer in respect of the originally proposed fencing. The style, materials and form of the proposed fencing was very industrial security (sic) and considered overbearing and obtrusive in this landscape. Following discussions with the application (sic) the fencing has now been amended to show a more agricultural style deer fencing. The form is much simplified; the materials are more agricultural in character using canalised timber and steel wire. Given the extensive length of proposed fencing, this change will help ensure the openness of [the] site and allow more inviting views across into the site rather than making it feel like it is enclosed and something that is not to be viewed."

96. In addition to this the access way as constructed is not in accordance with the plans and various details in relation to the arrays, substations and inverter houses required amendment. The claimant contends that this is not a comprehensive list of the differences and has produced evidence to support its contention that in fact the differences between that which was described in the approved plans and that which has been constructed is far more extensive. For my purposes it suffices to note the extent of the agreed differences between that which was consented and that which has been built together with the fact that there is presently an enforcement file open in relation to the development, no doubt with a view to investigating these breaches of development control.

97. The claimant relies in support of the contention that permission should be quashed upon the case of Tata Steel UK ltd v Newport City Council [2010] EWCA Civ 1626. That was a case which concerned the grant of a temporary planning permission for a site for a gypsy family who needed to be relocated in order for development to occur on the site which they occupied. They were moved onto the site for which temporary planning permission was granted. That temporary consent was the subject of an application for judicial review by the claimant. The judge at first instance, having identified elements of illegality in the decision to grant temporary planning permission, nevertheless exercised his discretion not to quash the consent on the basis of prejudice to the family who had moved onto the site. Giving the leading judgment of the Court of Appeal Carnwath LJ considered that the exercise of the discretion had been inappropriate. He gave the following reasons:

> "13. I have not been in detail into his [the judge's] reasoning because it seems to me, with respect, that at this point in his judgment he went wrong in principle. He seems to have come down to treating this as though it was some sort of private law dispute between Corus and the Hendry family and to be resolved by balancing the prejudice of the one against the other. Even on that analysis, I find his approach somewhat difficult to understand. From Corus's point of view quashing the permission had the – one would have thought important –

> advantage that the council would be forced to reconsider the matter in order to decide how to regularise it and although it is possible that they would reach the same planning conclusion, at least that would be on a proper basis. Alternatively, they might have to find some other solution.
>
> 14. Conversely, from the point of the view of the Hendry family, there was no evidence at all that they regarded themselves as prejudiced by what was going on. Whenever a planning permission is quashed, inevitably, if people have acted upon it, it affects their interests and uncertainty is created, but I am not aware that this has ever been regarded in itself as a reason for refusing to quash. The Hendry family had the considerable advantage over most people in that position that they were on the site. There was no immediate likelihood of them being disturbed and even if and when they were to be disturbed the council had clearly had their interests well in mind and no doubt would be aware of its responsibilities and Article 8 of the Human Rights Act. The idea that the Hendry family's hopes would have been dashed by the actions taken by Corus, with respect, seems to be unsupported by any evidence.
>
> 15. So even if one looks at it on the way the judge did as a sort of balancing of prejudice, I find the approach, with respect, difficult to support. In my view, it ignores the very important consideration, which is that a planning permission is a public act and if it is found to be unlawful the normal result is it should be quashed and the matter should be regularised. That is not simply a matter of concern to Hendry's or Corus. It is a matter of public concern. That is why there are plenty of authorities which say that a normal rule is that unlawful permission should be quashed."

98. Mr Wills on behalf of the defendant and interested parties draws attention to the earlier case of R (on the application of Gavin) v Haringey LBC [2004] 2 P&CR 13 209. That case involved a judicial review of a planning permission in which it was conceded that the council had failed to properly consult the claimant in accordance with the legal requirements in relation to publicity and further that the council had failed to undertake an EIA screening. In that case, as in the present, there was significant potential financial prejudice to the interested party who had the benefit of the planning permission arising from the risk that the consent would be quashed. The claimant sought to meet that concern by relying upon the possibility that the interested party might be granted planning permission in a fresh application and, secondly, that any enforcement action might result in steps other than the complete demolition or removal of the development. Richards J (as he then was) concluded as follows in relation to those arguments:

> "63. In my view the fresh application for planning permission cannot assist the claimant. The claimant is one of a substantial number of objectors who opposed the grant of planning permission. There is opposition to the development as a whole,

> not just to limited aspects of it. I cannot assess whether permission is likely to be granted, whether by the council or by the Secretary of State on appeal. In any event, if permission were likely to be granted, then that might be thought to weaken rather than strengthen the case for quashing the existing permission. I must also take account of the evidence that Wolseley [the interested party] would have to incur substantial (though un-quantified), re-tendering costs if it were required to stop the works now, on the quashing of the existing permission, but were then able to proceed with the balance of the works with the grant of permission on the fresh application.
>
> 64. Nor does the point on enforcement action avail the claimant. It would be a matter of judgment for the council on how to proceed with regard to enforcement. The powers conferred by section 173 of the Town and Country Planning Act 1990 would give it considerable flexibility. It is possible that something less, even far less than, than demolition and removal of the entire development would be required. But all this is speculative and it is not possible to form any measured assessment of the actual outcome. The fact is that if the planning permission were quashed and no new permission were forthcoming, the entire development would be unlawful and Wolseley would be at risk of being required to demolish and remove it all. It is a risk which cannot be dismissed as insignificant."

99. In that case the claimant also relied upon the interested party's conduct and in particular that it had failed to comply with conditions on the planning permission which needed to be complied with prior to the commencement of works. The claimant's contention was that the interested party had not come to court with 'clean hands' and that the failure to comply with the pre-commencement conditions should weigh heavily against the exercise of discretion in its favour. The conclusions ultimately drawn by Richards J in response to these submissions was set out as follows:

> "76. I have not found it easy to decide, in the light of those rival submissions, what importance to attach to the fact that works were undertaken here in breach of the conditions of the planning permission and therefore unlawfully. It undermines Wolseley's argument that it acted lawfully throughout, in implementation of an apparently lawful planning permission, and it puts Wolseley in a generally less attractive position when seeking an exercise of discretion in its favour. On the other hand, I think it right to take account of the fact that what has happened is not exceptional in practice and that the enforcement authority, council, has not seen fit to intervene. Moreover the indications are that the required approvals, if not already now given, will be forthcoming before long end, as a result of continuing discussion over the details. So the breaches

> of condition relate potentially to timing rather than to substance.
>
> 77. In all of the circumstances I have concluded that the point should count against Wolseley when deciding whether to withhold relief on the ground of detriment or prejudice to Wolseley, but that it should not be given the degree of weight that Mr McCracken seeks to attribute to it. I do not regard it as negativing my finding that it was reasonable for Wolseley to continue with the works after the claimant questioned the validity of the planning permission or after he had threatened and then commenced proceedings for Judicial Review."

100. Having considered those matters Richards J then went on to assess the arguments presented to him in respect of prejudice to good administration. His conclusions on the facts of the case before him in respect of prejudice to good administration were set out as follows:

> "83. I do not doubt the importance of certainty in the context of planning decisions, for reasons of the kind mentioned in Chieveley. Third parties are entitled to rely, and do in practice rely, on the information contained in the planning register, and to quash a planning decision long after it was made will undermine the basis upon which people have acted in the meantime. The developer who undertakes work in reliance on the permission is likely to be the person principally affected, though is also likely to be the person best placed to establish substantial hardship or prejudice. But it would be wrong to focus on the developer alone. Others may also have relied on the planning permission and have ordered their affairs accordingly, e.g. in negotiating the price of property near the development. It is very unlikely that all those affected could be identified or that specific hardship or prejudice could be proved in relation to each. Nevertheless it is contrary to the interests of good administration to undermine the basis of which they have acted (and at the same time to create uncertainty as to the reliance that can safely be placed on apparently valid planning permissions in the future). I therefore consider that detriment to good administration ought to be taken into account as a separate and additional factor relevant to the exercise of discretion to quash. But it is of only secondary significance as compared with the hardship or prejudice to the developer.
>
> 84. In reaching that conclusion I have borne in mind that the interests of good administration cut both ways, in that they are also served by correcting legal errors where they have occurred. But in my view there would still be a detriment to good administration if the planning permission were quashed so long after it had been granted."

101. Finally in respect of these issues, both parties drew my attention and relied upon the case of R v Secretary of State for health and another ex parte Furneaux [1994] 2 All ER 652. In that case Mann LJ giving the leading judgment of the Court of Appeal addressed arguments which had been raised in relation to the question of whether or not it was necessary for there to be any causal connection between undue delay which may have been found and prejudice in order for an argument in relation to the discretion to quash to be legitimate. He set out his conclusions as follows at p657e of his judgment:

> "In my judgment on the language of S31(6) there is no requirement for a causal connection between prejudice and undue delay. What is required is a connection between prejudice and the grant of the relief sought. Accordingly I find here a misdirection and I endorse what Simon Brown J said in R v Swale BC & Medway Port's Authority RSPB [1990] 2 Admin LR 790 at 815 where he remarked that the statute clearly invites an approach based on the relationship between prejudice and relief sought."

102. Having set out the guidance which can be obtained from the authorities set out relied upon by the parties I now propose to set out the matters which weigh in my view on each side of the balance before forming a conclusion as to whether or not the decision should be quashed.

103. The following matters in my view support a decision to quash the planning permission. Firstly, there is the question of the illegality which I have identified bearing upon the national interest represented by the listed building occupied by the claimant. As I have, I hope, made clear above, I am not in any position to form any view about the extent of any harm to the setting of the listed building or the planning merits of this issue. That is not the point. The point is that, for the reasons I have set out above, the interests of that nationally important heritage asset (and indeed other heritage assets such as The Hayes and the Conservation Area) have not been the subject of a properly informed assessment, assisted by the potential input from English Heritage, which the statutory regime requires. At this stage in the consideration of the case, as I observed above, reference must be made to the views given by English Heritage in the context of the second application and the concerns which they expressed about the impact of the development on the setting of Gifford Hall and the Conservation Area. As I stated above, their views as a consultee with specific responsibility for heritage assets would undoubtedly carry significant weight in any assessment of the planning merits. The defendant's decision to refuse the second application for reasons including, specifically, the adverse impact on the setting of Gifford Hall further reinforces matters. Thus whilst, as I have stated, I am not in a position to gauge the extent of any impact on heritage assets and the listed building and it is not my task to make an assessment of the planning merits in that respect, the question of the exercise of discretion has to be informed by the fact that since the decision both English Heritage and the defendant itself have expressed significant concern about the impact of the development on these interests.

104. For the reasons which have been set out above, the issues in relation to Gifford Hall have not been considered properly taking account of the s66(1) duty. The status of Gifford Hall as a Grade II* listed building and the failure to give its interests a proper

and lawful consideration attracts in my view very significant weight in the overall balance of considerations.

105. Secondly, failure to comply with EU Law in the form of the EIA Directive (as given effect in the 2011 Regulations) by failing to undertake a proper screening opinion is another matter to which significant weight, in my view, should attach. The 2011 Regulations contain important safeguards in relation to the proper provision of environmental information and this is not a case in which the failure to comply with them is purely formal such that the outcome of any reconsideration of the screening opinion would inevitably be the same. The point raised by the claimant is substantive not aridly technical.

106. A further factor weighing in favour of the grant of relief is the reliance which was placed by the officer upon the absence of local objection in this case when in the light of the conclusions I have set out above in respect of, in particular, the claimant, the point was misconceived.

107. Finally, I attach some weight, but not as much as to the first two points set out above, to the fact that the second interested party has not constructed that for which permission was granted at least to the extent to which those matters are agreed as set out above. It could be argued that the facts of this case are stronger in this respect than the facts in Gavin. There the concern was a failure to discharge pre-commencement conditions which were in the course of being resolved such that, as Richards J pointed out, the question was essentially one of timing. Here, in particular in relation to the fencing around the site which was regarded as a key issue in the officer's report, the second interested party has constructed precisely the type of fencing which the officer's report was concerned to avoid because of its adverse impact on the rural area. Thus in this case it is not simply a question of timing but rather the construction of an element of the development in a form which was specifically excluded from the grant of permission in the first place.

108. Telling against the decision to quash the planning permission is, of course, the substantial financial prejudice which would occur to the interested parties in the event of such an order being made. I attach significant weight to this undoubted and very serious financial prejudice which is not in my view ameliorated to any significant extent by the fact that the installation is temporarily consented and must therefore be designed ultimately for removal. Nor do I attach any material weight to the suggestion that it could be reassembled elsewhere or recycled into other installations. Those suggestions are speculative. In reaching the conclusion that significant weight should attach to this consideration I have also taken into account the loss of Government subsidy in the event that the development were removed.

109. Additionally in support of refusing a quashing order is the national policy support in a variety of publications, which do not need to be set out for the purposes of my judgment, for the provision of renewable energy. It has been suggested by the claimant that the targets in relation to renewable energy in Wiltshire have been met and exceeded. However, I do not attach any material weight to that contention in the light of the general support for the provision of renewable energy which is not limited to any particular ceiling level of provision. The weight to be attached to this issue has to be moderated in the exercise of discretion in the particular circumstance of this case on the basis that the support for the generation of renewable energy is not locationally

specific. By contrast the historic assets are fixed. That said, in my view, it is undeniable that weight in the overall balancing exercise must be afforded to the need to provide for renewable energy in the national interest.

110. The final ingredient is the question of prejudice to good administration. As Richards J observed in Gavin it is perhaps of secondary significance to the issues, for instance, of hardship or prejudice to the interested parties. He also, correctly, observed that the interests of good administration cut both ways. In this case, on the one hand, there is the obvious need for certainty and reliability in decision making. Equally, for the reasons which I have set out above, this is a decision which is the subject of a number of serious flaws and does not represent an example of good administration. It is, of course, of concern that a decision which has stood for many months and upon which the parties have relied might be quashed. On the other hand, the legal errors which have occurred in this case are serious. On balance prejudice to good administration provides some, but no more than a little, support on the particular facts of this case for not quashing the decision.

111. The exercise of the discretion as to whether or not to quash a decision of this kind is obviously highly fact sensitive. Standing back from the detailed examination of each of those considerations and weighing them in the round in my view on balance, and it is a fine balance, the factors which weigh in support of what Carnwath LJ described as the normal approach namely quashing the decision outweigh those which oppose that approach. The proper consideration of the interests of a nationally protected heritage asset and observing the requirements of EU environmental law are, in my view, or particular importance to the question of discretion in this case. In the circumstances I am satisfied that it is appropriate for the planning permission to be quashed, rather than declaratory relief granted.