Neutral Citation Number: [2024] EWHC 770 (Admin)

Case No: AC-2023-LON-001889

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/04/2024

Before :

HIS HONOUR JUDGE JARMAN KC
Sitting as a judge of the High Court
Between :

R (LOW CARBON SOLAR PARK 6 LIMITED)	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR LEVELLING UP HOUSING AND COMMUNITIES **(2) UTTLESFORD DISTRICT COUNCIL**	**Defendants**

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- -

Mr Michael Humphries KC and Mr George Mackenzie (instructed by **Burges Salmon**) for the **claimant**
Ms Sasha Blackmore (instructed by **Government Legal Department**) for the **first defendant**
The second defendant did not appear and was not represented

Hearing dates: 19 March 2024

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JUDGMENT

This judgment is deemed to be handed down remotely at 11.30 am on 5 April 2024 and copies sent to the parties and to National Archives

HHJ JARMAN KC:

Introduction

1. The claimant, with the permission of Lang J, challenges a decision dated 11 May 2023 of an inspector appointed by the first defendant (the Secretary of State) under section 76D of the Town and Country Planning Act 1990 (the 1990 Act), refusing planning permission for the construction and operation of a solar park at Pelham, Manuden. The proposed development comprises ground mounted solar voltaic arrays, battery storage, inverter cabins, DNO substation, customer switchgear, access, fencing, cctv cameras and landscaping. There is only one ground of challenge, and that is that the inspector dealt with the claimant's application for planning permission in a way that was procedurally unfair. That is denied by the Secretary of State. The second defendant, the local planning authority (the authority), has taken no part in these proceedings.

Statutory framework

2. The application was made directly to the Secretary of State under section 62A of the 1990 Act, inserted by section 1 of the Growth and Infrastructure Act 2013 to promote more efficient determination of applications for planning permission. The claimant was able to choose to proceed in this way, rather than by an application to the authority in the normal way, as the Secretary of State had on 8 February 2022 designated the authority as one which was not adequately performing its function of determining applications for the purposes of section 62B of the 1990 Act. Consequently, applications for planning permission for major development within the authority's area could be made directly to the Secretary of State under section 62A of the 1990 Act. The relevant procedure for such an application is set out in Town and Country Planning (Section 62A Applications) (Procedure and Consequential Amendments) Order 2013 (the 2013 Order) and the Town and Country Planning (Section 62A Applications) Written Representations and Miscellaneous Provisions) Regulations 2013 (the 2013 Regulations).

3. The most pertinent articles of the 2013 Order include the following. Articles 17(6) and 18(1) provide that the Secretary of State must, in determining a section 62A application, take into account any representations made to him by a statutory consultee or a local planning authority, and by article 21 must publish all consultation responses on a website. This the claimant submits is to enable applicants to see what is being said about an application and respond if necessary. Article 24(1)(c) requires decision notices to include a statement explaining whether, and if so how, in dealing with the application, the Secretary of State has worked with the applicant in a positive and proactive manner based on seeking solutions to problems arising in relation to dealing with a planning application.

4. Regulation 6 of the 2013 Regulations provides as follows:

> "6.— Determining the application: standard applications

> (1) This regulation applies where a relevant application is a standard application.
>
> (2) When making his determination, the inspector—
>
> (a) must take into account any representations made to the Secretary of State pursuant to any notice of, or information about, or consultation in relation to, the application, under articles 9, 13, 14, 16, 17 or 18 of the Town and Country Planning (Section 62A Applications) (Procedure and Consequential Amendments) Order 2013 which are received within the representation period; and
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> (b) may disregard any representations or information received after the end of the representation period.
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> (3) If, after the end of the representation period, the inspector takes into consideration any new information (not being a matter of government policy), he must not determine the application without first— (a) notifying in writing the applicant and any interested person of the new information; and (b) affording them an opportunity of making written representations to him."

5. There are two other relevant provisions. First, under article 23(2)(c) of the 2013 Order an applicant may agree an extended period for the application to be determined. Second, under section 319A(4) of the 1990 Act the mode of determination may be varied by a subsequent determination at any time before the proceedings are determined. Accordingly a variation from a written representations procedure to a hearing would allow all parties to have their say to ensure that obviously material considerations would be dealt with in a procedurally fair manner.

National policy

6. The National Planning Policy Framework (the Framework) as in force at the relevant time, deals with heritage assets in section 16, entitled "Conserving and enhancing the historic environment. In particular [194] provided:

> "194. In determining applications, local planning authorities should require an applicant to describe the significance of any heritage assets affected, including any contribution made by their setting. The level of detail should be proportionate to the assets' importance and no more than is sufficient to understand the potential impact of the proposal on their significance. As a minimum the relevant historic environment record should have been consulted and the heritage assets assessed using appropriate expertise where necessary. Where a site on which development is proposed includes, or has the potential to include, heritage assets with archaeological interest, local planning authorities should require developers to submit an

> appropriate desk-based assessment and, where necessary, a field evaluation."

7. Footnote 68 provided that non-designated heritage assets of archaeological interest, which are demonstrably of equivalent significance to scheduled monuments, should be considered subject to the policies for designated heritage assets.

8. [200] to [203] of the Framework provided:

> "200. Any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification. Substantial harm to or loss of: a) grade II listed buildings, or grade II registered parks or gardens, should be exceptional; b) assets of the highest significance, notably scheduled monuments, protected wreck sites, registered battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional.
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> 201. Where a proposed development will lead to substantial harm to (or total loss of significance of) a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or total loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply: a) the nature of the heritage asset prevents all reasonable uses of the site; and b) no viable use of the heritage asset itself can be found in the medium term through appropriate marketing that will enable its conservation; and c) conservation by grant-funding or some form of not for profit, charitable or public ownership is demonstrably not possible; and d) the harm or loss is outweighed by the benefit of bringing the site back into use.
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> 202. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.
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> 203. The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that directly or indirectly affect non-designated heritage assets, a balanced judgement will be required having regard to the scale of any harm or loss and the significance of the heritage asset."

Guidance from PINS

9. PINS issues guidance from time to time in relation to section 62A applications, which does not have statutory status. That in force at the material time at section 2

emphasised that pre-application advice can be sought from the local planning authority and/or PINS and that applicants should engage with key stakeholders, such as statutory consultees, and provide responses to PINS early in the process. At section 3 applicants were strongly encouraged to identify what the main issues are likely to be with reference to the development plan, the Framework, supplementary guidance documents and issues raised by pre-application community consultation or advice and to ensure that all the issues identified are adequately and appropriately addressed in the application submission.

Background

10. The claimant made a previous application in 2021 to the authority for similar development before such designation. The application related to a similar site, although that included an area of land to the north and south east which was excluded from the section 62A application. In January 2022 the authority issued a screening opinion that concluded that that scheme would not give rise to significant adverse effects and was not EIA development within the meaning of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (the EIA Regulations). The authority refused that application later that month for several reasons. These included landscape and visual impact, heritage impact on designated assets, and failure to provide sufficient information on the impact on archaeological assets, protected species, electricity lines, drainage and flooding.

11. Consequently, the claimant commissioned a geophysical survey in March 2022, which recorded anomalies indicative of significant and extensive archaeological activity at three locations in the proposed development site. These were interpreted as highly likely to be settlement activity, possibly of different periods. The first comprised a series of fields and smaller enclosures extending for approximately 500m along the western edge of the site. The second was to the north of the site, where a moated feature was confirmed with outlying fields and where there were complex but well defined features in two areas, but it was difficult to be certain where one area finishes and the other starts or indeed whether they overlap. The third was an isolated enclosure complex bordering the north-west corner of Battle's Wood.

12. The survey was considered by the archaeological officer at Essex County Council (ECC) but Historic England (HE) was not at that stage consulted upon it. The ECC archaeologist's initial comments included a recommendation that the first two areas identified by the survey should be removed from the scheme with no groundworks within the area. Alternatively, if a panel design could be achieved using only surface mounting, then this could be considered within this area and potentially on the wider landscape. As for the second area, the recommendation was to undertake a targeted evaluation to define the significance of the area. This should include the potential moat and other features and the other areas identified in the survey. The archaeologist commented that following this appropriate discussion could take place regarding mitigation strategies for either preservation in situ, preservation by record or design solutions which protect the archaeology.

13. The claimant then sought pre-application advice from the authority and met with officers in April 2022, following which revised plans were submitted and formal pre-application advice was issued by the authority in June 2022. The claimant also carried out pre-application consultation with stakeholders and compiled a consultation report

dated August 2022 setting out the scope and results of that consultation. The scheme was amended following those results and in particular an area to the north of the scheme was removed because of its potential to contain archaeological remains.

The section 62A application

14. The claimant decided to make an application directly to the Secretary of State rather than to the authority, which it did at the beginning of October, but sought no further pre-application advice, including from the Planning Inspectorate (PINS) who dealt with the application on behalf of the Secretary of State. Later that month PINS issued a screening direction under the EIA Regulations, which stated:

> "On the basis of the information provided, the Secretary of State considers that the Proposed Development has the potential to give rise to significant visual effects and significant cumulative effects including those on the local landscape through an increase in the amount of electrical infrastructure within the locality."

15. In February 2023 the claimant submitted an environmental statement (ES) to the Secretary of State and notice of that under regulation 20(2) of the EIA Regulations was given shortly afterwards stating that written representations about the ES and the application could be made to the Secretary of State from 9 February 2023 until 20 March 2023. The 2013 Order and the 2013 Regulations set out what must be taken into account in determining the application, as referred to above. During that period over 150 statutory consultees and interested parties responded and their representations were put on the PINS website and a linked second PINS website on a rolling basis. Many of them only appeared on the websites after 20 March 2023. On that day in correspondence with the claimant's consultants it was noted by PINS from a phone call to one of its officials that the claimant intended to contact statutory consultees. It was indicated that PINS did not wish to be copied into any correspondence, but that if the claimant or any consultee wished to provide information as to the final outcome of any such discussions, any such requests would be considered in accordance with the Rules and Regulations and in line with common practice to ensure fair, open and impartial consideration of the case. The claimant says that was an indication that it was open for it to provide such information.

16. On 20 February 2023 a consultation response from ECC's archaeologist was received. That referred to the geophysical survey undertaken in March 2022 and its recommendations relating to those areas to be removed from the scheme and those which would require a programme of targeted archaeological evaluation to identify the significance of these non-designated heritage assets as defined in paragraph 194 of the Framework. The response noted that no further discussions have been undertaken and stated:

> " The applicant should be required to conduct a field evaluation comprising targeted trial trenching to establish the nature and complexity of the surviving archaeological assets identified in the geophysical survey. The significance of the moated sited identified needs to be established pre-determination therefore

> this should be undertaken prior to a planning decision being made. "

17. On 23 February HE provided its response, in which it noted that of ECC's archaeologist and the concerns about the lack of, and need for, targeted trial-trenching evaluation in advance of the planning decision, in order to assess the nature and complexity of non-designated archaeological remains within the application site. HE continued that they considered it best practice to identify whether any important remains are present that could preclude or modify the proposed development. This approach is proportionate and justified in accordance with Framework paragraphs 194 and 195 and this is consistent with their advice relating to the previous application.

18. Some two weeks later the claimant contacted HE for the first time in the section 62A application, who responded the same day offering dates for a site visit. One of those dates was accepted by the claimant some 11 days later and HE carried out a site visit on that date, 14 April.

19. The representation period ended on 20 March and some four days later PINS confirmed in writing that the claimant's application would be determined on the basis of written representations rather than at a hearing and that the target date for the decision to be made was 1 June 2023. On 28 March the claimant's solicitors responded as follows:

> "We are in receipt of the representations received during the consultation period for the Application and await a complete suite of documents from Protect the Pelhams in respect of its written representation. Once the outstanding documents have been received, the Applicant will respond to the written representations accordingly. The Applicant is also actively engaging with Uttlesford District Council to agree a Schedule of Conditions, which it is anticipated shall be provided together with the Applicant's response to the written representations received."

20. The next day PINS wrote again as follows, referring to the 2013 Order and the 2013 Regulations:

> "There is no requirement or provision within the Regulations/Rules (referred to in our letter of 24 March) for the Applicant to respond to representations made. It is unclear why the Applicant is engaging with the designated authority to agree a schedule of conditions when these have not been sought. It is open to parties to seek to submit further information or representations after the period has closed. However, it is open to the Inspector as the appointed person to determine whether or not they are accepted, and if so due process is followed as per the Rules/Regulations/Order."

21. Almost four weeks later, on 27 April, the claimant's solicitor forwarded what was termed a rebuttal statement under cover of an email as follows:

> "On behalf of Low Carbon Solar Park 6 Limited (the "Applicant") please find attached the Applicant's response to the written representations, which has been prepared in order to assist the Inspector in the determination of the Application by clarifying matters raised in consultation responses. The attached includes a response to the technical and legal submissions and an update following discussions with the Council. It does not include new information not already in the public domain and before the Inspector."

22. The rebuttal statement comprised 15 pages and 80 pages of appendices. It contained technical evidence in response to detailed and technical objections by consultees and interested parties, including those objections which had been prepared or informed by professionals or experts. This covered various topics including need and potential benefits, character and appearance of the area, landscape and visual, heritage assets both in terms of setting and archaeology, best and most versatile agricultural land, highway safety, biodiversity, noise, planning obligations, conditions, and planning balance.

23. Of particular relevance in the present challenge are objections in relation to archaeological heritage, which emphasised that without trial trenches it was not possible to know what archaeological assets lay below ground at the application site, a point which as part of its submissions in the present challenge the claimant says had not been raised before.

24. The claimant sought to deal in the rebuttal with the many points raised by consultees and interested parties from ECC, HE and a Dr Hoggett on behalf of interested parties, in particular on the issue of underground archaeological assets. In respect of such assets the rebuttal in appendix 7 stated that the uncertainty as to the significance of these is immaterial because an above-ground foundation design for the relevant parts of the site could ensure that there would be no harm to such assets, and a condition requiring approval of final site layout would mean that areas of potential assets could be avoided. Accordingly the requirement in the Framework as to the identification of the significance of such assets was inapplicable. It was also stated that post-determination trial trenching would inform a detailed mitigation strategy involving above-ground foundations for areas of archaeological significance, or alternatively archaeological recording, or exclusion of panels.

25. On 11 May PINS wrote again, as follows:

> "Thank you for sending email below with attached documents. We note that this was not sought by the [Inspector] and has been submitted after the close of the Representation period on 20 March 2023. The [2013 Regulations] and Article 6(2)(b) states 'When making his determination, the inspector – may disregard any representations or information received after the end of the representation period.' To that end, the Inspector, as the appointed person, has determined to disregard this information."

26. No further reasoning was then provided as to why that determination was made. In the course of these proceedings the Secretary of State has filed evidence, which the claimant makes submissions as to weight rather than admissibility, to the effect that the inspector had already drafted his decision notice, which is borne out by the fact that the notice was also issued 11 May. It was also asserted that the inspector had pre-booked annual leave thereafter.

The decision notice

27. The inspector's decision notice deals with each of the issues, including those summarised in paragraph 9 above. The evidence regarding archaeological assets was dealt with in [37]-[39]:

> "37. Paragraph 194 of the Framework sets out that where there is potential for archaeological interest on sites, an appropriate desk-based assessment and, where necessary, a field evaluation should be undertaken. Footnote 68 of the Framework sets out that 'Non-designated heritage assets of archaeological interest, which are demonstrably of equivalent significance to scheduled monuments, should be considered subject to the policies for designated heritage assets.'
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> 38. Significant archaeological remains from Iron Age to Roman dates and a moated enclosure and ditch-like anomalies from geographical survey are identified on the site. These are located in the northern and western parts of the application site. The applicant's heritage expert indicates that 'The majority of moated sites served as prestigious aristocratic and noble residences with the provision of a moat was intended as a status symbol. They commonly consist of wide ditches which are often water-filled, which partly or completely enclose an 'island' of dry ground.
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> 39. A metal detector survey was undertaken in the mid-2000s, but only on part of the northern end of the site, and there have been finds of coins from the early first millennium. On this basis, the Applicant considers that the potential for significant archaeological remains of Iron Age to Roman date within the site is moderate to high. They go on to consider that there are around 6,000 moated sites known within England, and the two potential enclosures identified within the application site, and contained within areas earmarked for development, are not scheduled like others found nearby with the visible remains are barely perceptible above ground. They should, therefore, be considered as non-designated heritage assets rather than as commensurate with Scheduled Monuments."

28. The inspector then dealt with the consultation responses from ECC and HE in [40] and [41]:

> "40. Place Services, Essex County Council -Specialist Archaeological Advice dated 20 February 2022 set out that significance of the remains of the moated enclosure have not yet been ascertained. They recommend that trial trenching evaluation is undertaken in advance of a planning decisions. Historic England note the above comments and indicate that it is best practice in terms of the assessment of archaeological remains to identify whether any important remains are present that could preclude or modify the proposed development.
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> 41. With a lack of trial trenching at the application site it is not possible to ascertain the significance of buried archaeological remains. In such circumstances, the decision-maker is unable to undertake the balancing exercise set out at Paragraph 202 of the Framework (or Paragraph 201 if substantial harm).

29. The inspector's conclusion on the responses is at [42] to [44]:

> "42. Clearly there is an incomplete picture in the evidence before me. The geophysical survey has found evidence of Romano-British enclosed structures; yet it is unclear whether there is any discernible evidence as to what these are and what other archaeology remains. Whilst there has been some metal detector surveying these were limited to the northern part of the site and took place some time ago. My role is to consider what is reasonable and proportionate based upon the available evidence before me. Despite evaluation carried out to date, I cannot be assured of the specific nature or significance of the potential buried archaeological remains.
>
> 43. An understanding of the significance of any heritage asset is the starting point for determining any mitigation, and therefore I am unable to assess whether the mitigation proposed would be appropriate. Similarly, I cannot be certain of the potential harm that may result to the archaeological interest from the proposal, for example through the siting of solar arrays and the groundworks required.
>
> 44. The heritage asset might have archaeological interest which could be unlocked through further field evaluation which would enable a greater understanding of any remains and their wider context. On this basis, and given that the significance of the potential remains could be of local and potentially regional importance (or greater if associated with the nearby Scheduled Monuments), I find that the approach suggested by Place Services and endorsed by Historic England is proportionate to the potential asset's importance and no more than is sufficient to understand the potential impact of the proposal. This approach is consistent with Paragraph 194 of the Framework.

30. At [45] the inspector said that he did not consider that the imposition of a planning condition would provide adequate mitigation for the safeguarding of what amounts to a non-designated heritage asset, and observed that what he termed the affected land is in close proximity to land that has known above ground archaeological remains which are afforded the highest levels of protection as scheduled monuments.

31. His conclusions were set out in the three paragraphs following:

> "46. After careful consideration of the archaeological matters arising in this instance the evidence remains incomplete. I therefore conclude that the application fails to provide sufficient evidence regarding potential archaeological remains or features of interest, such that I cannot be assured that material harm to archaeological remains would not result.
>
> 47. Accordingly, the application would fail to accord with Policy ENV4 of the LP, which, amongst other aims, seeks to ensure that in situations where there are grounds for believing that sites, monuments or their settings would be affected developers will be required to arrange for an archaeological field assessment to be carried out before the planning application can be determined thus enabling an informed and reasonable planning decision to be made. In circumstances where preservation is not possible or feasible, then development will not be permitted until satisfactory provision has been made for a programme of archaeological investigation and recording prior to commencement of the development. This policy requires an approach to the conservation of archaeological remains that is consistent with the Overarching National Policy Statement for Energy (EN-1) July 2011.
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> 48. The proposal would also conflict with Section 16: Conserving and enhancing the historic environment of the Framework and in particular Paragraphs 194 and 200 (and footnote 68) which, amongst other aims, set out that any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification. Substantial harm to assets of the highest significance, notably scheduled monuments should be wholly exceptional."

32. He drew together his conclusion in respect of each of the issues under a heading "Planning balance and Conclusions" in [76]-[78]:

> "76. The proposal would clearly result in wider benefits including the moderate contribution to the local and national aspirations to transition to a low carbon future, the significant benefit arising from the renewable energy creation and future energy mix, the modest weight to socio-economic benefits and the modest benefits to ecology and biodiversity.

> 77. However, these fail to negate the harms identified to character and appearance, landscape and visual matters, the settings of designated heritage assets, archaeological remains, loss of BMVAL, highway safety, biodiversity and noise. The benefits in this case are clearly outweighed by the harms identified.
>
> 78. Accordingly, the proposed development would not accord with the adopted development plan when considered as a whole and there are no material considerations which indicate a decision otherwise than in accordance with it. It would also conflict with significant parts of national planning policy identified, including those principally contained within the Framework.

33. Accordingly, planning permission was refused.

Case law

34. *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 was a case involving the right of a prisoner to make written representations as to the period that a prisoner should serve. At 560D, Lord Mustill said this:

> “What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

35. The principle has been applied in a variety of different fields and it has been emphasised that fairness is a question for the court, see *R (Medway Council) v Secretary of State for Transport, Environment and the Regions* [2002] EWHC 2516 (Admin) per Maurice Kay J (as he then was) at [27], [28] and [32].

36. In the planning field the Court of Appeal in *R (Ashley) v SSCLG* [2012] EWCA Civ 559 dealt with the Secretary of State's adopted procedural guidance for planning appeals. Pill LJ at [31] said this:

> "There are circumstances in which, to avoid unfairness, representations by interested parties outside the six-week period will be appropriate. The view I have formed that in the circumstances the procedure followed was unfair is given further weight, in my view, by reference to the Guidance which has a potential for unfairness. The contents of the Guidance may have influenced the Inspectorate when failing to take action in a situation where written expert evidence had for the first time been submitted by the appellant on the last day of the six week period. No action was taken."

37. In *Hopkins Developments Ltd v SSCLG* [2014] EWCA Civ 470 the Court of Appeal considered fairness in the context of planning inquiries. The following principles were summarised: (a) a party to such an inquiry was entitled to know the case he had to meet, and had to have a reasonable opportunity to adduce evidence and make submissions about it; (b) procedural unfairness materially prejudicing a party might justify quashing the inspector's decision; (c) the rules applicable to such inquiries were designed to assist in promoting efficiency and ensuring that there was no procedural unfairness; (d) statements given under the rules identified what the inspector regarded as the main issues at that time but not oblige her to disregard evidence on other issues or give the parties regular updates about her thinking; (e) the inspector would consider any significant issues raised by third parties, even if they were not in dispute between the main parties. The main parties had to deal with any such issues unless expressly told that they need not do so; (f) if a main party resiled from a matter agreed in a statement of common ground, the other party had to be given a reasonable opportunity to deal with that matter.

38. The court found in that case that there was no procedural unfairness in relation to either issues of sustainability or of character/appearance which the parties were, or ought to have, been aware were part of the case which had to be met and had a reasonable opportunity to address them. Jackson LJ at [62] made the point that the relevant procedural codes are designed to assist in achieving the relevant objective, but were not a complete code for achieving procedural fairness. Accordingly, if a significant issue emerges during the determination of an application or appeal, the inspector must give the other party a reasonable opportunity to deal with the new issue which has emerged.

39. The claimant also submits that its rebuttal was obviously a material consideration which the inspector ought of taken into account because there is a real possibility that he would reach a different conclusion if he did so or would have tipped the balance to some extent, one way or the other, see *R (Watson) v Richmond Upon Thames LBC* [2013] EWCA Civ 513 per Richards LJ at [28].

40. It is for the party seeking to uphold a decision to establish that a decision maker would have been bound to come to precisely the same conclusion on valid grounds; see *Simplex (GE) Holdings Ltd v Environment Secretary* [2017] PTSR 1041, see Purchas LJ at page 1059E. The test is a stringent one; see *SSCLG v South Gloucestershire Council* [2016] EWCA Civ 74 per Lindblom LJ at [25]

The claimant's submissions

41. The challenge in the present case is put on the basis that the inspector refused to take into account the rebuttal and thus substantially prejudiced the claimant by acting procedurally unfairly and failing to have regard to an obviously material consideration. Consultees and interested parties had 38 days to review the application documents and formulate detailed and technical objections to the scheme. However, the claimant was deprived of the opportunity to reply and rebut those representations and evidence, which also had to be technical and detailed, and accordingly did not have a reasonable opportunity to deal with new issues which had emerged.

42. Mr Humphries KC, for the claimant, accepts that the 2013 Order and the 2013 Regulations prescribes the procedure to be followed on a section 62A application, but emphasises that there are in-built discretionary safeguards designed to provide decision-makers with sufficient discretion to ensure that the procedure is operated fairly.

43. Under regulation 6(2)(b) of the 2013 Regulations the decision-maker has a discretion to admit further evidence and/or representations after the end of the representation period so as to take into account all obviously material considerations, and to ensure procedural fairness.

44. The argument continues that there may well be situations in which it would be necessary out of fairness for a decision-maker to receive material not submitted within the relatively short representation period of up to 30 days. The requirement under article 21 of the 2013 Order that all representations should be published on a website, which is not normally a common law requirement, clearly shows that fairness may require a response. Such a right of reply would follow on an appeal from a refusal by a local planning authority to grant permission. There is no right of appeal from the decision of an inspector under section 62A.

45. Mr Humphries made clear that the claimant's entitlement, as a matter of procedural fairness, to rebut the consultation objections arose not because those materials raised entirely new and unforeseeable points (though he submits some were novel, such as the trial trenching), but because of the detailed and technical nature of those objections which the claimant could not have rebutted before they were made.

The Secretary of State's submissions

46. In response, Ms Blackmore for the Secretary of State emphasises that the procedure under section 62A is designed to promote transparent and faster determination of planning applications where a local planning authority has been designated as not performing its functions in that regard. That is why applications and responses are required to be published, time scales are set, and no right of reply is given but only a discretion to allow reply. To this end, applicants are strongly encouraged, by the

guidance, to front load applications. Section 62A gives a right to apply for faster decision-making by an inspector where an authority has been designated, but also a burden on applicants to find out what factors may weigh against their interests. If an applicant does not do so, or chooses not to do so effectively (for example as in this case, by not properly consulting with statutory consultees), that applicant takes the risk that rebuttal evidence outside the representation period will not be considered. Anyone may apply to make a late representation, not just applicants. It does not need to be connected to consultation responses.

47. She also submits that the claimant was aware of the gist of opposition by the objections received in respect of the previous application and the refusal of that application. The requirement in the Framework to identify and describe the significance of affected assets is well established policy. Appendix 7 of the claimant's rebuttal does not put forward new evidence for its assertion that there would be no harm to below ground heritage assets by development taking place. The claimant ignores the burden on consultees or interested persons of being reconsulted where the rebuttal is admitted, and ignores the impact on other work.

48. Further, it is submitted, the email of 24 March from PINS did not suggest that the door was open to the claimant to make further representation of whatever length about whatever point at whatever stage, but related only to an update as to the final outcome of any further discussions. There was no assessment, for example, of the extent of the non-designated heritage area, the landscape impacts of an above-ground scheme or altered layout, or the impacts on the setting of known heritage assets including scheduled monuments.

Discussion and conclusions

49. In my judgment, other inspectors may well have admitted the claimant's rebuttal, but that is not the test. The question is whether the inspector's refusal to do so in the particular circumstances of this case gave rise to procedural unfairness. In my judgment a key factor in determining that question is the requirement in the Framework for the significance of assets to be identified. As the inspector noted at [43], an understanding of the significance of heritage assets is the starting point for determining any mitigation, and it is not appropriate to assess mitigation without that understanding. To approach the matter from the direction which the claimant does, by saying that the requirement to understand such significance is inapplicable because mitigation means that there is no harm, is, in my judgment, to approach the matter the wrong way round. There needs to be an understanding of significance in order to assess whether any mitigation appropriately addresses any harm. It is clear that the claimant did not undertake any evaluations to identify the significance of the historical assets revealed in the March 2022 geophysical survey, seemingly because it took the view that such a requirement was inapplicable where mitigation could avoid harm. In my judgment, the view was in error.

50. I am satisfied that the claimant understood the gist of the objections of ECC and HE before making the section 62A application, from the previous application. Although ECC's raised the possibility of surface mounting, nevertheless the recommendation was to undertake a targeted evaluation to define the significance of the potential moat and other features and the other areas identified in the survey. The scheme was amended to exclude some areas of the site, but no targeted evaluation had been made

in respect of the remaining areas. ECC's objection then made clear that it was following such evaluation that appropriate discussion could take place regarding mitigation.

51. ECC's objection to the present application, emphasised that there had been no further discussions since its previous objection and that a field evaluation was needed, including of the moated site, before the application was determined. That was made a month before the end of the representation period. That issue was not particularly technical or detailed. It was a matter of policy as to whether such evaluation should be carried out pre-determination as ECC recommended, or, as the claimant submits, after determination. In my judgment the claimant had an adequate opportunity to respond before the end of that period, and certainly before another month elapsed.

52. In my judgment the PINS correspondence properly dealt initially with an update on the claimant's proposed consultations and thereafter made clear that any representations received after the end of the representation period would be the subject of the inspector's discretion whether or not to admit them.

53. Accordingly, it has not been shown that there was the claimed procedural unfairness and the claim fails. Were it necessary to apply *Simplex*, in my judgment the inspector would have come to the same conclusion had he taken account of the rebuttal statement. As I have already indicated, that approached matters the wrong way round, and does not meet the point that the significance of the assets had not been identified, without which, as the inspector concluded, it was not possible for him to carry out the balancing exercise which the Framework requires.

54. I am grateful to counsel for their submissions. They helpfully indicated that any consequential matters which cannot be agreed can be determined on the basis of written submissions. Any such submissions, together with a draft order agreed as far as possible, should be filed within 14 days of hand down of this judgment.