Neutral Citation Number: [2016] EWCA Civ 1183

Case No: C1/2015/3556

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT, PLANNING COURT
His Honour Mr Justice Holgate
CI/2984/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 November 2016

Before :

LORD JUSTICE LEWISON
LORD JUSTICE HAMBLEN
and
LORD JUSTICE HENDERSON

- -

Between :

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT AND ANR	**Appellant**
- and -	
CLAIRE ENGBERS	**Respondent**

- -
- -

MR RICHARD KIMBLIN QC (instructed by Government Legal Department) for the **Appellant**
MR CHRISTOPHER LOCKHART-MUMMERY QC (instructed by Harvey Jaskel Solictors for the **Respondent**

Hearing date : 24 November 2016

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Judgment Approved

Lord Justice Lewison:

1. Following an eight day public inquiry a planning inspector dismissed Mrs Engbers' application for outline planning permission to erect 110 dwellings at Thames Farm, Harpston near Lower Shiplake in Oxfordshire. The main reason for his conclusion was that the proposed development would have a "severe adverse residual cumulative effect on the safety and convenience of highway users." Mrs Engbers argues that the decision was procedurally unfair because she and her team were not adequately alerted to the fact that highway safety at a proposed pedestrian crossing was in issue; and that the inspector was wrong not to have properly considered whether any concerns could have been met by the imposition of a condition attached to a planning permission prohibiting the development unless and until adequate measures had been agreed to preserve highway safety (a so-called "*Grampian* condition": see *Grampian Regional Council v City of Aberdeen District Council* (1984) 47 P & CR 633).

2. Both these arguments succeeded before Holgate J who quashed the inspector's decision. His decision is at [2015] EWHC 3541 (Admin). With the permission of Gloster LJ the Secretary of State appeals.

3. Leaving aside a determination by written representations, there are two procedures by which a planning inspector may determine an appeal: by hearing or by inquiry. A hearing is the less formal and more inquisitorial of the two. An inquiry is more formal and adversarial. Procedure at a public inquiry is regulated by the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 ("the Rules"). The relevant rules, for present purposes are:

    i) rule 6 (which requires the local planning authority and the appellant to provide a "full statement of case");

    ii) rule 7 (which gives the inspector power in a pre-inquiry document to inform the appellant, the local planning authority and any statutory party of the "matters about which he particularly wishes to be informed for the purposes of his consideration of the appeal");

    iii) rule 14 (which requires parties appearing at an inquiry to furnish their proofs of evidence in advance);

    iv) rule 15 (which requires the local planning authority and the appellant to prepare a statement of common ground). A statement of common ground is a written statement prepared jointly by the local planning authority and the appellant and which contains agreed factual information about the proposal which is the subject of the appeal (rule 2).

4. Rule 16 provides:

> "(1) Except as otherwise provided in these Rules, the inspector shall determine the procedure at an inquiry.
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> (2) At the start of the inquiry the inspector shall identify what are, in his opinion, the main issues to be considered at the

> inquiry and any matters on which he requires further explanation from the persons entitled or permitted to appear.
>
> (3) Nothing in paragraph (2) shall preclude any person entitled or permitted to appear from referring to issues which they consider relevant to the consideration of the appeal but which were not issues identified by the inspector pursuant to that paragraph.
>
> (12) The inspector may take into account any written representation or evidence or any other document received by him from any person before an inquiry opens or during the inquiry provided that he discloses it at the inquiry."

5. However, this is not a complete procedural code because the inspector is also required by the common law to conduct the inquiry in accordance with the principles of procedural fairness. One of the principal purposes of the Rules is to make the inquiry more focussed, so that the main protagonists (i.e. the appellant and the local planning authority) know what is in issue between them. At the same time, however, the ability of the public to participate in environmental decision making is of considerable importance, as recognised for instance by the Aarhus convention.

6. The leading case on procedural fairness in the context of planning inquiries is the decision of this court in *Hopkins Developments Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 470; [2014] PTSR 1145. After a review of some of the case law, Jackson LJ set out the relevant principles at [62]:

> "(1) Any party to a planning inquiry is entitled (i) to know the case which he has to meet and (ii) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case.
>
> (2) If there is procedural unfairness which materially prejudices a party to a planning inquiry that may be a good ground for quashing the inspector's decision.
>
> (3) The 2000 Rules are designed to assist in achieving objective (1)(i), avoiding pitfall (1)(ii) and promoting efficiency. Nevertheless the Rules are not a complete code for achieving procedural fairness.
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> (4) A rule 7 statement or a rule 16 statement identifies what the inspector regards as the main issues at the time of his statement. Such a statement is likely to assist the parties, but it does not bind the inspector to disregard evidence on other issues. Nor does it oblige him to give the parties regular updates about his thinking as the Inquiry proceeds.
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> (5) The inspector will consider any significant issues raised by third parties, even if those issues are not in dispute between the

> main parties. The main parties should therefore deal with any such issues, unless and until the inspector expressly states that they need not do so.
>
> (6) If a main party resiles from a matter agreed in the statement of common ground prepared pursuant to rule 15, the inspector must give the other party a reasonable opportunity to deal with the new issue which has emerged."

7. The main debate in this appeal centres on principles (5) and (6). The mere fact that some aspect of the proposed development is not in issue between the developer and the local planning authority does not preclude the inspector from considering that aspect and to give it decisive weight, if it is raised by a third party. That is illustrated by *R (Tatham Homes Ltd) v First Secretary of State* [2005] EWHC 3538 (Admin). Sevenoaks District Council refused a planning application on the basis that the proposed development would be detrimental to the character and visual amenity of the area. The developer appealed. The statement of common ground between the developer and the council said that "Privacy and overshadowing do not form part of the Council's reason for refusal and are not therefore at issue with the Council." Consistently with that statement, the council did not tender evidence on privacy or overshadowing. The inspector did not identify them as main issues at the opening of the inquiry. However a local resident (Mr Fowler) did identify them both in correspondence before the inquiry and in evidence given to the inspector. The inspector also made his own site inspection. The developer's team were aware that residents had raised these concerns, and consequently their witness did give some evidence on those questions. Sullivan J held that there had been no breach of procedural fairness. He said at [14]:

> "The issue of overlooking in general, and the impact of the proposed development on the privacy and amenity of Number 16 Woodside Road in particular, were squarely raised before the Inspector. They were "fairly and squarely at issue". Although the second issue had not been raised by the [council], the [developer] could reasonably have anticipated that the Inspector might be persuaded by the force of Mr Fowler's objection."

8. He added at [16]:

> "The second main issue had been raised by Mr Fowler and others in correspondence prior to the inquiry. Thus the [developer] had an opportunity to present whatever evidence he wished in response. Having heard Mr Fowler amplify his objection in his oral evidence, the [developer] had a further opportunity to respond."

9. The clear message of that case (reflected in principle (5) in Jackson LJ's summary) is that a developer cannot ignore the views of local residents, even if they are not supported (or are even contradicted) by the council. To hold otherwise would undermine the value of public participation in environmental decision making.

10. The cases principally relied on by Mr Lockhart-Mummery QC, on Mrs Engbers' behalf, were cases in which the local planning authority itself resiled from or called evidence to contradict a statement of common ground. That is not this case. He commended in particular the decision of Mrs Justice Patterson in *R (Gates Hydraulics Ltd) v Secretary of State for Communities and Local Government* [2009] EWHC 2187 (Admin). That was a case in which an issue about noise arising from proposed development was originally in issue between the developer and the local planning authority but became the subject of a statement of common ground after exchange of proofs of evidence. The statement of common ground was given to the inspector at the start of the inquiry. At the inquiry the local planning authority's only witness said that she agreed with the developer's noise consultant, as a result of which the latter was not called. No third party gave evidence before the inspector, and it does not appear that she had written representations on the subject either. Despite the existence of the common ground the inspector decided against the developer on grounds relating to noise. It was in that context that Ms Patterson said that if the inspector still had concerns about noise they should have been raised at the inquiry. That is a far cry from this case, where the local residents were clear in their view that the proposed pedestrian crossing was dangerous.

11. Since any case about procedural fairness is fact-sensitive it is necessary to go into the sequence of events in some detail. I should mention at this point that when the case was before the judge he was provided with a single witness statement from the inspector, which included the written representations made by the local residents and others, but which did not include the inspector's written notes of what happened at the inquiry. Since the judge's decision the inspector has prepared a second witness statement in which he exhibits his hand-written notes and a transcription of them. In giving permission to appeal Gloster LJ gave the Secretary of State permission to rely on this second witness statement. Mr Lockhart-Mummery invited us to review and discharge that part of the order. His argument, in essence, is that the admission of fresh evidence on appeal in public law cases is an exceptional course to be taken only "where it is necessary to put the public interest factors which are needed for the determination of the appeal before the court": *R (Mott) v Environment Agency* [2016] EWCA Civ 564 at [58]. In principle I agree. But where, as here, we need to consider in some detail what actually happened at the inquiry it seems to me that we should not shut our eyes to the best evidence available: namely the inspector's contemporaneous notes. In the end Mr Lockhart-Mummery did not object to our considering the inspector's notes of what actually happened at the inquiry. As a result we have been able to form a much clearer picture about what happened at the inquiry than the judge was able to do.

12. We were hampered to some extent in reconstructing the progress of events by the fact that some of the key documents were undated. I echo Jackson LJ's observations in *Hopkins* at [15] that even in the specialist field of planning inquiries "people really should put dates on the documents which they send out". It would be desirable for the Secretary of State or the Planning Inspectorate to incorporate that in clear written guidance.

13. The appeal site is around 5.65 hectares in area. Its eastern boundary fronts on to the A4155 Reading Road. It was proposed that vehicular access to the site would be located at a point lying approximately in the middle of that frontage. The scheme also

proposed two pedestrian routes between the appeal site and Lower Shiplake village centre in order to gain access to the local station, shops and other services. The second of these routes was known as route A. Route A was the main intended pedestrian route between the site and Lower Shiplake. The A4155 follows a straight alignment alongside the eastern boundary of the appeal site and runs for a further 190 metres or thereabouts beyond the southern boundary of the site. It then bends to the west at the Shiplake War Memorial traffic island which is located at the junction with Station Road. Route A involved the creation of a new footway along the western side of the A4155 between the southeastern corner of the site and a new crossing point to the War Memorial traffic island at the junction with Station Road. The relevant lengths of the A4155 and Station Road are subject to a 30 mile per hour speed limit.

14. On 30 October 2013 South Oxfordshire District Council ("the Council") refused the application for outline planning permission on seven grounds. Two of the grounds related to highway issues, but they do not relate to route A.

15. In April 2014 Mrs Engbers commissioned a road safety audit. The safety audit contained the following relevant passages:

> "Although the A4155 is subject to a 30mph speed limit in this location, it is semi-rural and has a straight alignment on the southern approach to the junction with Station Road. If drivers travel at speeds greater than 30mph there may not be sufficient stopping sight distance in the event that a pedestrian steps out to cross the road from the inside of the bend at the proposed pedestrian crossing location. There is a risk, therefore, that pedestrians may be struck by passing vehicles with resultant serious injury.
>
> Recommendation.
>
> Checks should be made to ensure the 43m visibility envelope shown on CEC Plan 3537.202(A) [Proposed Footway Route to Local Services], enclosed within Appendix 1, at the proposed pedestrian crossing point is adequate for the vehicle approach speeds along the A14155.
>
> Safety Concern
>
> The 43m visibility envelope shown on CEC Plan 3537/202(A) [Proposed Footway Route to Local Services], enclosed within Appendix 1, for the proposed pedestrian crossing location will require the trimming and/or removal of the hedgerow/vegetation on the inside of the bend at the junction between A4155 and Station Road. The visibility envelope will not otherwise be achievable with the resultant significant risk that pedestrians may be struck by passing vehicles
>
> Recommendation

> Ensure that the trimming/removal of the hedgerow is deliverable and that there are no other obstructions within the visibility envelope. The visibility envelope should be kept clear thereafter."

16. Mrs Engbers' designers responded to the safety audit in a separate document also produced in April 2004. Paragraph 2.1.2 read as follows:

> "Designers Response
>
> Visibility has been shown for the posted speed limit of the road and the proposed pedestrian crossing is well within the 30mph speed limit zone and at a sharp s-bend in the road alignment, therefore vehicle speeds should be at or below the posted 30mph speed limit. However, should the local highway authority require, further speed tests could be carried out to obtain actual vehicle speeds and the pedestrian visibility splays adjusted accordingly."

17. In other words, the designers did not follow the recommendation to carry out speed checks, but left it to the highway authority to pick up that baton. Paragraph 2.2.2 said:

> "Designers Response.
>
> Extent of Public Highway data has been obtained from Oxfordshire County Council (OCC). This has confirmed that the visibility envelope shown on drawing no. 3537/201 Rev A is achievable within public highway. A copy of this plan is contained in appendix 1."

18. In preparation for the appeal, and in accordance with rule 15, the Council and Mrs Engbers' consultants prepared a statement of common ground in March 2014. Paragraph 8.3 of that statement recorded the agreement between the Council and Mrs Engbers' consultants that "safe access can be provided into Shiplake for pedestrians with a new footpath along Reading Road."

19. In the meantime, between 14 and 23 June 2014, a number of local residents (and the Shiplake Parish Council) sent written representations to the Planning Inspectorate objecting to the development. It is clear from those representations that the local residents and the Parish Council did not agree Route A in principle. On the contrary they opposed it vigorously. I quote some extracts from the residents' written representations:

> "It would cause serious traffic safety issues
>
> - It is near a double bend/chicane at the Shiplake War Memorial crossroads junction, this being the location of many road traffic accidents and a fatal road traffic accident in 2006"

> "The A4155 is already a busy road which is exceptionally difficult to cross safely even by the able bodied, let alone by anyone with a walking disability or visual impairment.
>
> Anyone who attempts to access the 500 bus stop or Woodlands Road on foot by crossing the A4155 near the Shiplake War Memorial will testify to the difficulty and danger, with lack of vision from each direction of approaching traffic at these curves in the road."
>
> "The Reading Henley road is incredibly dangerous with a very tight corner at the Shiplake turning… The crossroads at the Shiplake War Memorial are lethal as school buses and public buses all stop there and hinder visibility on what is already a treacherous corner."
>
> "To allow this development would mean major changes are required to the Reading Road adjacent to the War Memorial where there have been numerous accidents including one fatality in recent years as a result of the sharp bends at that junction with Lower Shiplake."
>
> "I am very concerned about the dangerous road conditions at the Shiplake Memorial road crossing with Reading Road and Station Road. This is already a source of accidents, and is very difficult with bus and coaches waiting at school time."
>
> "I never let any of my children, ages 8, 13 and 15 cross the A4155 as I find it extremely dangerous and during my time living here (I have a friend who lives on the War Memorial corner itself) have known of many accidents over the years – as many motorists DO NOT adhere to the 30mph speed limit and then when they hit the corner have lost control…"

20. There are many others in the same vein. The Shiplake Parish Council's letter included:

> "The A4155 Reading Road has a 30mph speed limit along the site's boundary, yet it exhibits the rural character of a road with a national speed limit of 60mph. Traffic is prone to speeding along its length and the presence of a sudden and sharp bend and hidden dips does nothing to improve its safety. The road is a known accident blackspot, it is difficult to cross due to traffic speed and volume and visibility, and there has been a fatality in recent years…. We are concerned that although an access solution is promoted that meets the technical requirements for a road limited to 30 m.p.h. it does not take into account the true elements of this road…. Given the road's issues in terms of traffic speeds and safety, and the barrier the road creates between the village and the countryside to the west, the site at Thames Farm is wholly unsuitable for development."

21. At some point (but we do not know when) these representations were passed to the developer. This was followed by a further statement of common ground with the highway authority (Oxfordshire County Council) on 30 July 2014. Paragraph 1.3 of that statement recorded that "there are [no] highway related matters which remain unresolved." Route A (referred to in that statement as "Access Point 4") was dealt with in a number of paragraphs. At the end of paragraph 4.1 of the statement it was agreed that:

> "Access point 4 connects to Reading Road (A4155) at the south-eastern corner of the site and it is agreed that it will provide access for pedestrians wishing to walk along the proposed footway (on the west side of Reading Road) towards Lower Shiplake village centre."

22. Paragraph 4.3 stated:

> "Whilst it is agreed that the site access arrangement, above-mentioned access points and proposed footway along Reading Road will all be subject to detailed design, the remainder of this Section outlines the design principles that have been agreed."

23. Paragraph 4.8 of the statement of common ground dealt with access point 4 in the following terms:

> "Access Point 4 will lead from the south eastern corner of the site where it will link with the proposed footway to be constructed in a southerly direction along the western side of Reading Road (A4155) (refer to Section 5.0 of the SoCG). A staggered barrier arrangement is proposed immediately before the footpath reaches the western side of the A4155 carriageway. This detail is agreed, and is shown on CEC Plan 3537/201 Revision H [Proposed Site Access Ghost Island Right Turn Lane] in Appendix 1. This footway will also be 2m wide."

24. Paragraph 5.5 and 5.6 dealt with the proposed new footway alongside Reading Road in the following terms:

> "5.5 With regard to the new footway along the west side of Reading Road (A4155), from the south east corner of the proposed development site to the junction of Reading Road (A4155) with Station Road, it is agreed that this will be implemented by the developer via a Section 278 Legal Agreement ."
>
> 5.6 CEC Plan 3537/202 Revision A [Proposed Footway Route to Local Facilities] in Appendix 1 shows the proposed footway and is agreed. The proposed footway will be subject to detailed design, on a topographical survey base, where that detailed design will need to be submitted to and approved by the local highway authority prior to implementation. Refer to Section 6.0 for further detail.

25. Paragraph 5.8 said:

> "The Stage 1 road Safety Audit is contained in Appendix 3. The findings of the Road Safety Audit are self-explanatory. Also provided within Appendix 3 is the Designer's Response to the Road Safety Audit, where the former document addresses the minor points raised by the auditors."

26. Paragraph 5.9 of the statement reads:

> "Further to OCC's consideration of the two documents described in paragraph 5.7 (via Revision A of this SoCG) it is agreed that:
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> • with regard to Auditors' Safety Concern Reference 3.1, whilst the footway route is agreed in principle, the detailed design process may reveal a more suitable point (with respect to available visibility splays) at which to cross Reading Road (A4155) than that presently shown CEC Plan 3537/2012 Revision A; and
>
> • with regard to Auditors' Safety Concern Reference 4.1, the footway implementation will be subject to detailed design which may include the provision of street lighting.

27. Paragraph 7.6 of the statement dealt with the statement of draft conditions. The highway authority and the developer proposed that a condition should be imposed requiring development to be carried out in accordance with drawings which included the proposed footway route A. Draft condition 5 read as follows:

> "Footway Prior to Occupation.
>
> Prior to the first occupation of the development hereby permitted, the footway alongside the Reading Road (A4155) and crossing point as illustrated in principle on Drawing 3537/202 Revision A, shall be laid out, constructed and completed in accordance with specification to be submitted to and approved in writing by the Local Planning Authority."

28. Incorporated as an Appendix to the statement was the highway authority's earlier response to consultation which stated that it would be appropriate that, if planning permission were to be granted, "a suitably worded Grampian condition places a requirement on the developer to enable local improvements that benefit pedestrian and/or cyclist movement to and from the village."

29. I agree with the judge at [35] that:

> "it is clear that the highway authority and the local planning authority were content with the principle of the crossing proposed at the War Memorial Island site but wished to control the detailed design or specification of the link having regard to, amongst other things, matters raised in the safety audit."

30. In other words the two authorities had approved Route A in principle, and the details (described as "minor points") would be worked out later, under a condition to be satisfied when seeking approval of reserved matters. It is, however, important to note that the design proceeded on the basis that drivers would comply with the 30 mph speed limit, although it is also true to say that the developer's designers did say that "further speed tests could be carried out to obtain actual vehicle speeds" if required by the highway authority. The highway authority did not so require, so no further speed checks were carried out.

31. The inspector produced a pre-inquiry statement under rule 7. Unfortunately it is undated, but it is common ground that it post-dated both the statements of common ground and also the representations by local residents. The inspector's statement outlined the main issues, based on the written evidence thus far. Those issues included:

> "the safety and convenience of users of the highway and other public rights of way"

32. The inspector also said in paragraph 4.4 of that statement:

> "In considering the appeal the Inspector will take account of all written representations as well as the evidence heard at the Inquiry."

33. Paragraph 6.1.2 recorded that the inspector had received "representations … from a number of interested parties". He also recorded in paragraph 6.2.1 that he had received two statements of common ground, namely one between the council and the developer and the other between the highway authority and the developer.

34. Despite the existence of this common ground, and in particular the statement that "there are [no] highway related matters which remain unresolved", the inspector said that the main issues included "the safety and convenience of users of the highway and other public rights of way". He had also referred to the fact that he had received a very large number of representations from interested parties and repeated that he would take them all into account. Since there was no issue as between the developer and either the Council or the highway authority about highway matters, it seems to me that the only way in which the inspector's statement could reasonably have been understood is that the highway issues were those raised by the local residents and the Parish Council, particularly in the light of the fact that he said in terms that he was going to take into account all the written representations.

35. It was in the light of that statement that proofs of evidence were prepared in accordance with rule 14. Mrs Engbers' highway consultant, Mr Farmery, did not produce a proof of evidence and was not initially tendered as a witness in support of the appeal.

36. When the inquiry opened in accordance with his duty under rule 16 the inspector repeated orally his description of the main issues which, once again, included the safety and convenience of highway users. A number of the written representations had referred to the lack of visibility at the Shiplake War memorial; and the letter from Lower Shiplake Parish Council had specifically flagged up both speeding and also the

combination of "traffic speed and volume and visibility". The chorus of protest from local residents largely focussed on the perceived danger of the pedestrian crossing at the War Memorial. In my judgment it ought to have been clear enough to the developer that these would be among the issues that the inspector would take into account in line with his announcement at the opening of the inquiry.

37. The inspector also said that he had some questions about highway matters and was told to put them to the Council's witness in the first instance.

38. Those questions included questions about the speed check recommended by the road safety audit, in response to which he was told that the design assumed a speed of 30 mph. He also asked about where there might be a more appropriate place for the pedestrian crossing. He also queried the size of the visibility splay at the pedestrian crossing. The Council's witness could give no answer. When Mr Thomas, the representative of the Parish Council, came to give evidence on 11 December he queried the adequacy of the pedestrian crossing for "parents with kids" and he told the inspector that cars did not follow the speed limit. He also said that the pedestrian route to the site "peters out at [the] memorial" and that pedestrians "would find it difficult to cross both carriageways".

39. In the event Mr Farmery was called to give evidence at the inspector's request. That in itself ought to have alerted the developer to the fact that the inspector was taking the residents' concerns seriously. Mr Farmery appeared on the following day. In the course of his evidence in chief he was asked about pedestrian safety and said that the ghost island was there to allow crossing safely in two stages. The point that the road was dangerous was put to him, and he said that he disagreed, giving reasons for his disagreement. He thought that although drivers saw no need to adhere to the speed limit, the development proposals would improve things. In response to the inspector he confirmed that the main intended pedestrian route would be the crossing at the War Memorial. The inspector also asked him about the crossing at the War Memorial and how that would impact. Mr Farmery's response was that every site was looked at on its own merits but that there might be an option to move the crossing to the north. However he said that the bend reduced speed so that it was better to leave it where it was. Mr Thomas asked him about the pedestrian crossing to which Mr Farmery replied that it would not have impact and would be subject to detailed design. Mr Thomas also asked him about the island and Mr Farmery said that it was sized to accommodate a pushchair or cyclist. The inspector asked Mr Farmery why there was no refuge at the memorial crossing point, to which the latter replied that the sinuous alignment of the road meant that vehicle speeds were lower. There was also discussion about the size of the visibility splay. Mr Farmery pointed out that it had been agreed with the council that the visibility splay at the memorial crossing point was "OK", but he added that it would be possible to achieve a visibility splay of up to 53 metres. He also explained that the drawings were outline drawings only. He repeated his points in subsequent answers, concluding that it was safe to cross with appropriate visibility. He also produced a technical note, and came back to the inquiry on 17 December to answer the inspector's questions about it. That second appearance was concerned with the main vehicular access to the site rather than with the pedestrian crossing at the War Memorial.

40. On the final day of the inquiry the inspector made a site inspection, and the proceedings then resumed for final statements.

41. As foreshadowed the inspector did indeed take into account the views of local residents and the Parish Council, even though there were no highway issues as between the developer and the authorities. In paragraph 26 of his decision letter he said:

> "Neither the Council nor the Highway Authority object to the scheme on the basis of its effect on the safety and convenience of highway users. Nonetheless, I have had regard to the concerns raised by other interested parties, including Shiplake Parish Council."

42. Having identified route A he explained his conclusions on highway safety as follows:

> "29. At the request of the Highway Authority, route A has been the subject of a Stage 1 Road Safety Audit (RSA). The RSA identifies that 'although the A4155 is subject to a 30 mph speed limit in this location, it is semi-rural and has a straight alignment on the southern approach to the junction with Station Road. If drivers travel at speeds greater than 30 mph, there may be insufficient stopping sight distance (SSD) in the event that a pedestrian steps out to cross the road from the inside of the bend at the proposed pedestrian crossing. There is a risk, therefore, that pedestrians may be struck by passing vehicles with resultant serious injury. Checks should be made to ensure the 43 metre visibility envelope shown on the application plans is adequate for vehicle approach speeds.'
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> 30. The Designer's Response to Stage 1 Road Safety Audit suggests that the proposed visibility envelope 'has been shown for the posted speed limit of the road and the proposed pedestrian crossing is well within the 30 mph speed limit zone and at a sharp-bend in the road alignment, therefore vehicle speeds should be at or below the posted 30 mph speed limit.' However, based on what I have read, heard and seen, I consider that little reliance can be placed on this view. Records of speed surveys undertaken along the 30 mph section of Reading Road in the vicinity of the appeal site show 85th percentile speeds significantly in excess of the 30 mph speed limit. Whilst the appellant has indicated that the proposed highway works in the vicinity of the appeal site entrance would be likely to have a traffic calming effect, there is no evidence before me to show that this would be likely to significantly depress traffic speeds approaching the proposed crossing point at the war memorial island, which is some distance away. I have had regard to the guidance set out in Manual for Streets to the effect that reduced forward visibility tends to reduce average speeds. Nonetheless, based on my own observations, both as a driver and pedestrian travelling along Reading Road, I saw little evidence that the bends in the road in the vicinity of the proposed crossing point caused traffic to slow to any significant degree.

> 31. With reference to the speed survey results, the appellant indicated at the Inquiry that vehicles may require SSDs of up to around 63 metres northbound and 87 metres southbound. I have not been provided with any compelling evidence to show that this could be achieved in the vicinity of the proposed crossing at the war memorial and consider it unlikely on the basis of my own observations.
>
> 32. Whilst the Highways and Transport Statement of Common Ground (SoCGH) indicates that the detailed design process may reveal a more suitable point at which to cross Reading Road, no details of likely alternatives have been provided to me. Given the winding nature of the highway hereabouts, which restricts intervisibility between drivers and pedestrians crossing the road, I am not convinced that a suitable alternative could be found. I give the unsupported assertion contained within the SoCGH little weight.
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> 33. The TA indicates that over 50 pedestrians are likely to travel to, and a similar number away from, the site each day. I saw that in the morning and early evening, when pedestrians would be most likely in my view to want to travel between the appeal site and facilities within Lower Shiplake, such as the train station and school bus pick-up points, traffic conditions along the A4155 were busy. I have no reason to believe that these conditions were unusual. Due to the limited intervisibility between pedestrians starting to cross the highway in the vicinity of the war memorial and drivers approaching along the A4155, I consider that there would be a significant risk of pedestrians crossing when approaching drivers have insufficient time to react to avoid a collision. Furthermore, drivers who are able to stop in time to avoid a pedestrian part way across the highway would themselves potentially interrupt the free flow of traffic. In my judgement, the use of the proposed crossing would be likely to pose a serious threat to the safety and convenience of highway users.
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> 34. I conclude that the proposal would be likely to have a severe adverse residual cumulative effect on the safety and convenience of highway users. In this respect it would conflict with the aims of Policy T1 of the South Oxfordshire Local Plan 2011 (LP), which are consistent with the Framework insofar as it seeks to ensure that safe and suitable access to the site is provided and that conflicts between traffic and pedestrians are minimised. This harm weighs heavily against the grant of planning permission in this case."

43. At [25] the judge referred to what he called:

> "the well-known principle that, although an Inspector is not bound by an agreement reached by an appellant and the local

> planning authority in a statement of common ground, if the Inspector is going to depart from that agreement in the reasons given for deciding the appeal, then in general the Inspector should give the participants at the inquiry an opportunity to deal with the issue he or she has in mind in order for the procedure to be fair."

44. Put in these stark terms I do not agree. Whether the inspector must give the participants an opportunity to deal with the issue depends on *why* the inspector departs from the statement of common ground. I think that the judge recognised this in the next part of the same paragraph in which he said:

> "It follows that in a case where the local planning authority does not resile from the statement of common ground agreed with the appellant and the Inspector does not reveal at the inquiry his or her disagreement with a matter contained in that statement and that disagreement influences the outcome of the appeal, the court may be unable to uphold the decision *unless it can be shown that the appellant ought reasonably to have been aware of that issue and its potential significance for the decision from another source, for example third party representations*." (Emphasis added)

45. If a third party raises an issue which is at variance with the agreed stance of the appellant and the local planning authority, the inspector is in my judgment duty bound to consider it. Fairness to third parties demands no less. Thus the only question, as I see it, is whether on the facts of this case the third parties' representations and evidence, coupled with the inspector's own conduct and questions, meant that Mrs Engbers or her team ought reasonably to have been aware of the significance of the question of road safety and in particular the safety of the pedestrian crossing at route A.

46. It must be borne in mind that in reaching his conclusion the judge did not have the benefit of the inspector's contemporaneous notes of the inquiry.

47. The judge was dismissive of the inspector's rule 7 statement which said that "safety and convenience of highway users" was a main issue. He said at [62]:

> "That was a merely generalised statement capable of covering any highway issue. It could not be taken by itself as indicating the possibility that the Inspector would contradict the position agreed between the claimant and the two local authorities on the pedestrian crossing."

48. I respectfully disagree. Given that the developer and the highway authority had agreed that there was no problem about safety, the flagging of road safety as a main issue must have meant that there was every possibility that the inspector would depart from the statement of common ground in some respect. Against the background of the representations of local residents which, for the most part, emphasised the difficulty for pedestrians in crossing the road at the War Memorial, pedestrian safety in crossing the road ought to have been seen as a significant possibility. That this was an issue

cannot be said to have come as a bolt from the blue. Moreover the specific points that concerned the inspector were put to the Council's witness (and hence into the public arena) on the first day of the inquiry. That in itself ought to have alerted the developer to the questions that the inspector needed answered; and if there had been any doubt about that the fact that the inspector asked for Mr Farmery to attend the inquiry would have dispelled it.

49. The judge considered the representations made by local residents but said at [68]:

> "I have reread all of the passages identified. In my judgment, whether taken individually or collectively, or even with the other matters relied upon by the Defendant, they did not represent a proper or sufficient indication to the claimant of "significant issues" being raised, let alone issues which could become determinative in the appeal. Many of the representations were of a very general nature as might often be encountered in a planning appeal."

50. I think, with respect, that this overlooks the consensus among the local residents of the danger of the road, and the difficulties that pedestrians would have in crossing it at the War Memorial. It is unrealistic to expect local residents who may be keenly interested in a development to deal with technical detail such as the size of visibility splays. The judge commented:

> "… it would hardly accord with the highly focussed nature of modern public inquiries to expect the appellant to deal with each and every representation of that kind, particularly if the matter had been resolved in a statement of common ground agreed with the authority. That focussed approach acknowledges a need to apply finite public resources for planning inquires not only fairly but also efficiently and to avoid the appeal process becoming too protracted."

51. As I have said I do not consider that the fact that a particular matter is common ground between the developer and the local planning or highway authority debars the public from disagreeing. It may not be incumbent on an appellant to deal with *every* representation, but in the face of a clear consensus of opinion from local residents a developer takes a risk by failing to do so, especially where, as here, the inspector has said (twice) that road safety was a main issue. I have set out a number of passages from the evidence to show that the question of the safety of pedestrians especially at the proposed crossing at the War Memorial was raised during the inquiry, and that the developer's assumptions about road speeds were also challenged. It is also clear from the inspector's notes of the inquiry that he also followed up the concerns of the local residents, in particular on the subject of traffic speeds and visibility at the War Memorial crossing point. I have no doubt that Mr Lockhart-Mummery is correct in saying that local residents take a number of points, good, bad and indifferent, but the bad or indifferent points will have been filtered out by the inspector's own description of what he or she perceives to be the main issues. That just leaves the points that are potentially good ones.

52. Mr Farmery said in his evidence before the court that the inspector had not asked whether further speed checks could be carried out; and that if he had then they could have been done. However, I do not consider that it was the inspector's duty, in the context of the more formal and adversarial context of an inquiry, to assist one party to repair holes in his case. The road safety audit had recommended carrying out speed checks, but that recommendation had not been followed. The residents had themselves raised the question of traffic speeds, and it would have been open to Mr Farmery to have carried out further speed checks before the inquiry took place. Alternatively, knowing that during the inquiry itself the inspector was concerned about the assumptions of speed underlying the design, Mr Farmery could himself have offered to carry out further speed checks. Moreover, if further speed checks had been carried out after the conclusion of the inquiry it might have led to an application to reopen the inquiry.

53. Mr Lockhart-Mummery submitted that since Mr Farmery's second appearance at the inquiry was concerned only with the main access to the site, the developer could reasonably have thought that although the inspector might once have had concerns about the pedestrian crossing, those concerns had been satisfied and, if they had not, the inspector was duty bound to make that clear. I disagree. As Jackson LJ said in *Hopkins*, the inspector is not required to give the parties regular updates about his thinking. Indeed he may not have reached any conclusion at all on a particular issue before the end of the inquiry. Nor is the inspector required to give advance notice that he proposes to reject one party's evidence in favour of another party. The decision letter is the appropriate place for the inspector to explain why he has reached the factual conclusions that he has.

54. Finally Mr Farmery made some points about what happened at the site inspection. He said that he had identified an alternative crossing point to the inspector; and that he offered to measure the extent of the visibility splays. I do not consider that there is anything in this point. It is not the purpose of the site visit following an inquiry to receive any further evidence. Its purpose is to inform the inspector's appreciation of the evidence given at the inquiry.

55. I therefore agree with Mr Kimblin QC that on the particular facts of this case the question of highway safety and in particular the safety of the pedestrian crossing at the War Memorial was sufficiently raised both before and at the inquiry both by local residents and by the inspector himself as to acquit the inspector of any procedural unfairness.

56. However, there was a second ground of challenge, namely that the inspector did not consider whether the problems could be overcome by the use of a *Grampian* condition. The way that it was put in the grounds of challenge was:

> "In any event any such concern [i.e. concern about safety at the crossing point] could readily have been met by the imposition of a condition in "Grampian" form, preventing development taking place in the absence of an agreed solution. Further, the Inspector gave no adequate reason for failing to deal with the matter in this way."

57. What the inspector said on the topic of conditions was this:

> "Whilst the Highways and Transport Statement of Common Ground (SoCGH) indicates that the detailed design process may reveal a more suitable point at which to cross Reading Road, no details of likely alternatives have been provided to me. Given the winding nature of the highway hereabouts, which restricts intervisibility between drivers and pedestrians crossing the road, I am not convinced that a suitable alternative could be found. I give the unsupported assertion contained within the SoCGH little weight."

58. The judge dealt with this ground of challenge separately but treated it as part of the overall complaint about procedural fairness. What he said was this:

> "[78] Going back to the representations made by third parties it is plain to me that they did not seek to question the agreement of the planning authorities with the Claimant that the location and design of the crossing could adequately and properly be controlled as a detailed matter pursuant to a condition on the permission by adjusting the crossing point and/or the visibility splays within the land available.
>
> [79] Applying the principles in *Hopkins* and the other authorities to which I have referred, I am satisfied that in this respect the Inspector failed to comply with the appropriate standards of procedural fairness. For these reasons ground 2 also succeeds and the decision must be quashed in any event on this ground."

59. He did not in terms deal with the alleged inadequacy of reasoning.

60. Mr Lockhart-Mummery submitted that the Secretary of State had not appealed against this ground for quashing the decision. Certainly, in my judgment, a reading of the grounds of appeal, which do not mention the question of conditions, does not suggest that he did. Those grounds are all concerned with the judge's discounting of the views of local residents, but as the judge pointed out none of them raised the question of conditions. The imposition of conditions was inherent in the statement of common ground between the developer and the highway authority, and a *Grampian* condition was specifically mentioned in the highway authority's consultation response. Mr Kimblin submitted that success or failure on ground 1 carried with it success or failure on ground 2. I do not agree. The ground of challenge based on the lack of consideration of a *Grampian* condition was not only based on procedural fairness. It was also based on inadequacy of reasons. Had the Secretary of State made it clear that he was appealing against the judge's order on this ground too, the developer would no doubt have served a Respondent's Notice seeking to uphold the judgment on that point on the alternative pleaded grounds of challenge. I do not consider that it is now open to the Secretary of State to appeal against the judge's conclusion on that question.

61. That being so, it seems to me that although the Secretary of State succeeds on the first ground which was argued, the judge's order must stand, with the result that the appeal must be dismissed. It was common ground that under rule 20 of the Rules it

was a matter for the Secretary of State to decide how the appeal should be dealt with going forward.

Lord Justice Hamblen:

62. I agree.

Lord Justice Henderson:

63. I also agree.

Postscript

64. After these judgments were circulated in draft Mr Kimblin applied to re-open our decision on Ground 2. We decline to do so. It was clear from the skeleton argument served on Mrs Engbers' behalf that her team took the view that ground 2 formed no part of the appeal; and Mr Kimblin did not contradict that until the point was put to him by the court. It is too late to raise it now.