Case No: C1/2013/2213

Neutral Citation Number: [2014] EWCA Civ 470

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN BRISTOL
His Honour Judge Denyer QC
[2013] EWHC 1783 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 15th April 2014

Before:

LORD JUSTICE JACKSON
LORD JUSTICE BEATSON
and
LORD JUSTICE CHRISTOPHER CLARKE

- -

Between:

Secretary of State for Communities and Local Government	**Appellant**
- and -	
Hopkins Developments Ltd	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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- -

James Maurici QC (instructed by **The Treasury Solicitor**) for the **Appellant**
Jeremy Cahill QC and Satnam Choongh (instructed by **Ashfords LLP**) for the **Respondent**

Hearing date: 13 March 2014

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Judgment

Lord Justice Jackson:

1. This judgment is in seven parts, namely:

Part 1. Introduction

2. This is an appeal by the Secretary of State against an order of the High Court under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") quashing an Inspector's decision for breach of the rules of natural justice or procedural fairness. The principal issue is whether the Inspector's decision should be quashed because she reached her decision by reference to matters which had been debated in evidence but which the Inspector had not identified as main issues. Counsel on both sides tell us that the resolution of this issue is a matter of importance, which affects the conduct of planning inquiries generally.

3. Hopkins Developments Ltd is the party seeking planning permission. It was applicant in the High Court proceedings and is respondent in the Court of Appeal. I shall refer to it as "Hopkins".

4. The Secretary of State for Communities and Local Government was first defendant in the High Court, and is appellant in the Court of Appeal. I shall refer to him as "the Secretary of State".

5. Somerset District Council is the local planning authority. It was second defendant in the High Court, but is not a party to the present appeal. I shall refer to it as "the District Council" or "the Council".

6. The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 set out the procedures to be followed in planning appeals. I shall refer to these Rules as "the 2000 Rules" or "the Rules". Where I refer to a particular rule, this is always a reference to the 2000 Rules.

7. Rule 7(1) of the 2000 Rules provides:

> "(1) An Inspector may, within 10 weeks of the starting date, send to the appellant, the local planning authority and any statutory party a written statement of the matters about which

he particularly wishes to be informed for the purposes of his consideration of the appeal."

8. Rule 14 provides that parties appearing at an Inquiry under the 1990 Act shall furnish copies of their proofs of evidence to the Secretary of State four weeks before the date fixed for the hearing.

9. Rule 15 provides:

> "(1) The local planning authority and the appellant shall–
>
> > (a) together prepare an agreed statement of common ground; and
> >
> > (b) ensure that the Secretary of State and any statutory party receives a copy of it, within 5 weeks of the starting date.
>
> (2) The local planning authority shall afford to any person, who so requests, a reasonable opportunity to inspect and, where practicable, take copies of the statement of common ground sent to the Secretary of State."

10. Rule 16 provides:

> "(1) Except as otherwise provided in these Rules, the inspector shall determine the procedure at an inquiry.
>
> (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."

11. Rule 18(3) provides:

> "(3) If, after the close of an inquiry, an inspector proposes to take into consideration any new evidence or any new matter of fact (not being a matter of government policy) which was not

raised at the inquiry and which he considers to be material to his decision, he shall not come to a decision without first–

(a) notifying in writing the persons entitled to appear at the inquiry or who appeared at it of the matter in question; and

(b) affording them an opportunity of making written representations to him or of asking for the re-opening of the inquiry,

and they shall ensure that such written representations or request to re-open the inquiry are received by the Secretary of State within 3 weeks of the date of the notification."

12. I shall refer to a written statement sent by an Inspector under rule 7(1) as a "rule 7 statement". I shall refer to a statement made by an Inspector under rule 16(2) as a "rule 16 statement".

13. The Secretary of State issued Procedural Guidance (PINS 01/2009), which came into effect on 6th April 2009. This includes the following provisions:

"6.6.1 A statement of common ground is essential to ensure that the evidence at an inquiry focuses on the material differences between the main parties. Effective use of such statements is expected to lead to more efficient inquiries. The statement should identify the areas of agreement and disagreement. Identification of these two matters will greatly assist the Inspector in preparing for the case, by clarifying the matters remaining in dispute. It will also provide a commonly understood basis for the parties to inform the evidence. This should lead to an improvement in the quality of the evidence and a reduction in the quantity of material which needs to be considered.

…

6.8.2 Proofs of evidence should not include matters which are not in dispute. They should focus on the issues of dispute remaining following the statement of common ground."

14. In most planning appeals, the principal protagonists are the disappointed applicant for planning permission and the local planning authority. I shall refer to these two parties as "the main parties". Nevertheless, many third parties participate in planning appeals. They are usually local residents and others with an interest in the area. Their evidence is, or may be, important.

15. Some of the documents in this case, whether generated by the parties or the Inspector, are undated. This has led to debate and some speculation at the hearing of the appeal as to the sequence of events. This is unfortunate. Even in the specialist field of

planning inquiries, people really should put dates on the documents which they send out. The dates which I give in Part 2 of this judgment are the best which can be deduced from detective work combined with counsel's recollection.

16. I must also say a word about skeleton arguments. The rules governing skeleton arguments in the Court of Appeal are set out in Practice Direction 52A paragraph 5 and Practice Direction 52C paragraph 31. The skeleton arguments must be concise and, in any event, not exceed 25 pages. They must not include extensive quotations from documents or authorities. The way to highlight relevant passages in authorities is by sidelining, not by quoting long passages in the skeleton arguments.

17. The skeleton arguments in this case do not comply with the Practice Direction. Accordingly, whichever party wins will not recover the costs of preparing its skeleton argument.

18. After these introductory remarks, I must now turn to the facts.

Part 2. The facts

19. On 14 July 2011, Hopkins applied for outline planning permission to construct 58 dwellings on a field at the edge of Wincanton. The site roughly forms a right-angled triangle, with its hypotenuse on the north side. Wincanton Community Hospital is on the south-west side. Cable Road is on the south-east side, with the back gardens of houses in Cable Road abutting the site boundary. The two main roads closest to the site are Verrington Lane and Dancing Lane. An access road leads from Dancing Lane to the hospital and indeed through the hospital grounds. Hopkins proposed that that same access road should also be used as access for the 58 new dwellings.

20. On 12 October 2011 Somerset District Council refused permission, stating six reasons which I would summarise as follows:

    i) The proposed development was not needed in order to meet the Council's target for five year housing supply.

    ii) The proposal made insufficient provision for public open space.

    iii) The proposed dwellings were so close to the hospital and the Cable Road houses that they would result in "an overbearing impact, loss of outlook and loss of privacy to the detriment of the amenities of existing residents and users of the hospital".

    iv) There was a danger of noise and odours from the proposed pumping station affecting residential amenity.

    v) The proposed access route passing through the hospital grounds "would result in conflicting traffic movements to the detriment of highway safety and residential amenity".

    vi) There was inadequate information as to how the proposed development would impact on local educational and other facilities.

    I shall refer to these six reasons as the "refusal reasons".

21. Hopkins appealed to the Secretary of State against the refusal of planning permission pursuant to section 78 of the 1990 Act. The Secretary of State appointed an Inspector, Ms Janice Trask, to hold an Inquiry. This took place on 3 – 6 July 2012.

22. On 3 or 4 June 2012 Hopkins and the District Council exchanged proofs of evidence. Hopkins served proofs prepared by Matthew Kendrick, a planning consultant, and Paul Greatwood, a transportation planner. The District Council served proofs prepared by two of its planning officers, namely Ms E Arnold and Andrew Collins. The District Council also served a proof prepared by Carl Brinkman. Mr Brinkman was employed by the County Council and he dealt with highway issues.

23. Hopkins and the District Council duly supplied copies of their proofs to the Inspector. In addition Mr Colin Winder, chairman of the Wincanton Town Council, furnished a proof of evidence to the Inspector, setting out his objections to the proposed development. So also did Ms Claire Andrews, matron of Wincanton Community Hospital.

24. A number of local residents sent in letters expressing opposition to the proposed development. The Inspector received copies of all those letters.

25. Later in June 2012, the Inspector sent a document entitled "Inspector's Notes on Inquiry Procedure" to all who were proposing to attend the Inquiry. Also in late June, the parties exchanged rebuttal proofs of evidence and provided copies to the Inspector. It is not known in which order those events happened, or whether the Inspector had the rebuttal proofs when preparing her "Notes on Inquiry Procedure".

26. Paragraph 6 of the Inspector's "Notes on Inquiry Procedure" reads as follows:

> "**6. MATTERS TO BE ADDRESSED AT THE INQUIRY**
>
> Without inhibiting the case of either main party, on the basis of material seen to date, I consider that the Inquiry should focus principally on the following matters:
>
> 1. Whether there is a need for housing in the area;
>
> 2. The effect of the proposal on highway safety;
>
> 3. The effect of the proposal on the safety and convenience of users of the hospital and future residents;
>
> 4. The effect of the proposal on protected trees; and
>
> 5. The effect of the proposal on the provision for affordable housing, education provision and sports, art and leisure facilities."

This paragraph clearly constituted a rule 7 statement, and I shall so refer to it.

27. The next significant event is that, on an unknown date, the main parties produced a statement of common ground pursuant to rule 15. The statement recorded an agreement that refusal reasons 2, 3, 4 and 6 no longer applied.

28. On Tuesday 3 July 2012, the parties gathered at the Council Offices, Churchfields, Wincanton for the commencement of the hearing.

29. There is no formal record of what the Inspector said when she opened the hearing. The Inspector recalls referring to her rule 7 statement and saying that the issues which she had highlighted may well not be the only relevant matters; they were her preliminary views alone.

30. According to Mr Kendrick's handwritten note, the gist of what the Inspector said at the start of the hearing was as follows:

> "Two matters are still at contention:
>
> 1. Whether the release of the appeal site for development would be justified. This requires the consideration of three matters:
>
>   a. whether the Council can demonstrate a 5 year supply for housing such that Development Plan housing policies can be considered out of date;
>
>   b. if so, is there an overriding need to develop and set aside the Local Plan policy of restraint in the countryside;
>
>   c. if not are the proposals in accordance with the NPPF.
>
> 2. The effect of the proposal on the safe running of the hospital."

This constituted a rule 16 statement.

31. The hearing then proceeded. The Inspector heard evidence from all the witnesses who had furnished proofs, save for Ms Andrews. Since Ms Andrews was unavailable, the Inspector received her evidence in writing. The Inspector also heard evidence from Mr Downton, a local resident who was against the proposed development.

32. On Thursday 5 July the Inspector visited the site. She also walked from the site to the town centre and back, as Mr Downton had suggested that she should do this. The hearing continued and concluded on Friday 6 July.

33. On 29 August 2012 the Inspector delivered her decision letter, in which she dismissed Hopkins' appeal. In paragraph 6 of her decision, the Inspector wrote:

> "6. Having regard to the remaining reasons for refusal, the evidence submitted and the representations made at the inquiry, I now consider the main issues in this appeal are:
>
> i) housing supply;

ii) the effect of the proposal on the character and appearance of the area;

iii) whether the site is in a sustainable location;

iv) the effect on highway safety and the safe running of the hospital."

I shall refer to the second of these four issues as "character/appearance" and to the third as "sustainability".

34. I would summarise the Inspector's conclusions on these four issues as follows:

> i) The District Council cannot demonstrate a five year supply of deliverable housing sites. The shortfall is substantial. Therefore the Council's first refusal reason is unsound.
>
> ii) The construction of a housing estate on the site would unacceptably detract from the tranquil and rural character of the area.
>
> iii) The site is not in a particularly sustainable location. This is because many residents would need to travel by car to the town centre (a) so as to commute to other centres for their work and (b) so as to access shops and services.
>
> iv) The proposed access arrangements would cause undue risk to motorists and pedestrians. Therefore the District Council's fourth refusal reason was valid.

I shall refer to these four conclusions as "conclusion 1", "conclusion 2", "conclusion 3" and "conclusion 4".

35. In the latter part of the decision letter the Inspector weighed up the relevant factors. The substantial shortfall in the five year housing land supply militated in favour of granting planning permission. The Inspector attached significant weight to this factor. On the other hand, conclusions 2, 3 and 4 militated against granting planning permission. The Inspector set out her final assessment as follows at paragraph 72 of the decision letter:

> "72. I have weighed the factors in opposition to the proposal against the contribution the proposal would make towards meeting the substantial shortfall in the five-year housing land supply and other benefits. I find that the adverse impacts of the proposal would significantly and demonstrably outweigh the benefits when assessed against the policies in the Framework taken as a whole and that the appeal proposal would not represent sustainable development."

36. Hopkins was aggrieved by the Inspector's decision. Accordingly, Hopkins applied to the High Court to quash it.

Part 3. The application to the High Court

37. By a claim form issued in the Administrative Court on 9 October 2012, Hopkins applied to the High Court to quash the Inspector's decision pursuant to section 288 of the 1990 Act. The Secretary of State was first defendant. The District Council was second defendant. Hopkins based its application on six grounds, but for present purposes I need only refer to the first ground.

38. Ground 1 was that the Inspector acted in breach of the rules of natural justice. She reached conclusions on character/appearance and sustainability, despite having indicated that these were not main issues. Hopkins did not have a chance to deal with these issues through evidence or submissions. This error by the Inspector vitiated the balancing exercise which she carried out in the latter part of her decision.

39. Both parties filed evidence to establish what had happened during the course of the Inquiry. Hopkins relied upon two witness statements made by Mr Kendrick. The defendants relied upon two witness statements made by the Inspector.

40. The action came on for hearing before His Honour Judge Denyer QC, sitting as a deputy judge of the High Court ("the judge") on 25 April 2013. The one day allowed for the hearing was insufficient to deal with all issues. In those circumstances, and with the agreement of the parties, the judge dealt with Hopkins' first ground of claim as a preliminary issue.

41. The judge handed down his reserved judgment in writing on 25 June 2013. In that judgment, he set out the main issues which had originally been identified by the Inspector. These did not include character/appearance or sustainability. The judge held that the Inspector's subsequent failure to warn the parties that she was minded to rely upon character/appearance and sustainability constituted a breach of natural justice. Hopkins did not have a reasonable opportunity of addressing issues which turned out to be determinative. Accordingly, the judge found in favour of Hopkins and he quashed the Inspector's decision on ground 1: see *Hopkins Developments Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 1783 (Admin).

42. The Secretary of State was aggrieved by the judge's decision. Accordingly, he appealed to the Court of Appeal.

Part 4. The appeal to the Court of Appeal

43. By an appellant's notice issued on 28 August 2013, the Secretary of State appealed against the judge's decision on three grounds. I would summarise those grounds as follows:

> i) The sustainability issue was the subject of extensive evidence and argument during the hearing. Hopkins had the opportunity to deal with the matter, even though the Inspector did not specifically identify it as a main issue.
>
> ii) The issue of character/appearance was the subject of evidence by third parties. Therefore Hopkins had the opportunity to deal with this issue, even though the Inspector did not identify it as a main issue. Furthermore, the issue of character/appearance was a matter of aesthetics rather than a technical

matter. Therefore there was little that Hopkins could achieve by adducing evidence or making submissions about that matter.

iii) Having found two breaches of natural justice, the judge erred in proceeding straight to a decision to quash. The judge ought to have exercised his discretion and considered whether those breaches warranted a quashing order.

44. This appeal came on for hearing on 13 March 2014. Mr James Maurici QC appeared for the Secretary of State, as he did in the court below. Mr Jeremy Cahill QC, leading Mr Satnam Choongh, appeared for Hopkins. Mr Cahill appeared for Hopkins in the court below. He also appeared before the Inspector at the hearing in July 2012. Therefore, on occasion, he was able to assist us with his recollection of the course of that hearing.

45. The principal matter debated by counsel during the hearing of this appeal was how the principles of natural justice operate in the context of an Inquiry proceeding under the 2000 Rules. This is an issue of law to which I must now turn.

Part 5. The law

46. Professor Cane has observed that the language of natural justice has given way to that of "procedural fairness": see *Administrative Law*, 5th edition (Oxford University Press, 2011) at page 70. A number of other textbook writers also favour the language of procedural fairness. I readily accept that the principle of natural justice which is in play in this case is an aspect of procedural fairness. Nevertheless, I shall continue to use the time-honoured phrase "natural justice" since that is how counsel have argued the case.

47. I would formulate the principle of natural justice or procedural fairness, which is in play in this appeal, as follows. Any participant in adversarial proceedings is entitled (a) to know the case which he has to meet and (b) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case.

48. The House of Lords' decision in *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 1 WLR 1255 illustrates the operation of this principle. Fairmount owned a number of houses which the London Borough of Southwark proposed to demolish on the grounds that they were unfit for human habitation. The Council made a compulsory purchase order, to which Fairmount objected. The Secretary of State appointed an Inspector to hold an Inquiry. The Inspector visited the houses and formed the view that their foundations were defective. This was not a point which the Council had taken, but the Inspector based his decision in favour of the Council upon it. The Secretary of State confirmed the compulsory purchase order. Fairmount challenged that order in proceedings under Schedule 4 to the Housing Act 1957. The Court of Appeal, reversing the trial judge, quashed the compulsory purchase order. The House of Lords upheld that decision. The Judicial Committee held that the Secretary of State's decision had been made in breach of the rules of natural justice. This was because the inadequacy of the foundations had not been part of the Council's case; Fairmount had had no opportunity to refute the Inspector's opinion concerning the foundations.

49. Lord Russell observed at 1265 – 1266 that Fairmount had not had "a fair crack of the whip". This stark phrase, which now has somewhat strange overtones, appears in a number of authorities both before and after *Fairmount*. With all due respect to those great jurists who use it, this phrase is not helpful, either as elucidation of the principle or as a guide to its application. What, I think, is meant by not having "a fair crack of the whip" is that there has been procedural unfairness which materially prejudiced the applicant. This pedestrian phrase is perhaps more useful as a test.

50. Let me now consider how that principle operates in the context of an Inquiry proceeding under the 2000 Rules. It was common ground between the parties that the Court of Appeal has not previously considered this question, although a number of judges have done so at first instance. It has been suggested that there may be some inconsistency between these first instance decisions. I do not think that there is. The differing outcomes in those cases are the consequences of their individual facts.

51. I shall now review the first instance decisions which are of particular relevance in relation to the present case. In *Castleford Homes Ltd v Secretary of State for Environment, Transport and the Regions* [2001] EWHC Admin 77, one reason why the Inspector dismissed the developer's appeal was because of lack of a local area of play ("LAP") for small children on site. The developer alleged breach of natural justice, asserting that it was effectively common ground between the main parties that no such provision was necessary. The Council argued that there were sufficient indications in its evidence that this matter was in issue. Ouseley J quashed the Inspector's decision.

52. After dutifully quoting *dicta* about "fair crack of the whip" in paragraph 52, the judge set out the core of his reasoning at paragraph 65:

> "Whilst an Inspector can reasonably expect parties at an Inquiry to explore and clarify the position of their opponents, if an Inspector is to take a line which has not been explored, perhaps because a party has been under a misapprehension as to the true position of its opponents, as in my view happened here, fairness means that an Inspector give the party an opportunity to deal with it. He need not do so where the party ought reasonably to have been aware on the material and arguments presented at the Inquiry that a particular point could not be ignored or that a particular aspect needed to be addressed. Here, whilst I am satisfied that the Inspector was unaware that he might be being unfair because he may not have appreciated the misapprehension under which the Claimant was labouring, I am satisfied on balance that the Claimant ought, in fairness, to have been given the opportunity to address the implications of the Inspector concluding in the way he did as to the appropriateness of the site for a LAP. I do not consider that the circumstances were such that the Claimant ought reasonably to have been alerted to the need to address that issue, from what was raised by the Council or the Inspector."

Ouseley J held that, if the developer had been invited to deal with the requirement for an LAP on site, the developer would have done so and this might have led to a different outcome of the planning appeal.

53. It can be seen that *Castleford* was a case in which there was procedural unfairness and this materially prejudiced the developer.

54. In *R (Tatham Homes Ltd) v First Secretary of State* [2005] EWHC 3538 (Admin); [2008] JPL 185, 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 Inspector identified what he regarded as the main issues at the outset of the Inquiry. These did not include overlooking and loss of privacy for nearby residents. It was common ground between the main parties that overlooking and loss of privacy did not form part of the Council's reasons for refusal. Nor did the Council rely upon overlooking and loss of privacy as a ground for resisting the appeal. The local residents, however, took a less sanguine view of the matter. They expressed objections to being overlooked and the consequent loss of privacy.

55. In his decision, the Inspector rejected the Council's original reason for refusing planning permission. He concluded that the development would not be harmful to the character and visual amenities of the area. Nevertheless, the Inspector dismissed the appeal because the development would cause overlooking and loss of privacy for nearby residents. The developer applied pursuant to section 288 of the 1990 Act to quash the Inspector's decision on the grounds of breach of natural justice.

56. Sullivan J dismissed the developer's application. He loyally referred to the "fair crack of the whip" test, and observed that this was fact-sensitive. He set out the core of his reasoning at paragraph 18 as follows:

> "I can well understand that the claimant is greatly disappointed by the Inspector's conclusions, but from the outset of the inquiry it should have been foreseeable that the Inspector might be persuaded by the views expressed by local residents on this, and indeed on the other issues they raised. Equally, it would have been appreciated that the Inspector would conduct a site visit and that whatever impression he gained would be gained at a site inspection in December. In all the circumstances, I do not accept that there was any unfairness on the Inspector's part. This was a matter which was fairly and squarely at issue during the inquiry. The fact that in the event the Inspector accepted Mr Fowler's evidence rather than Miss Dixon's evidence on this point does not mean that there has been any unfairness."

57. In *R (Poole) v Secretary of State for Communities and Local Government* [2008] EWHC 676 (Admin); [2008] JPL 1774, the main parties to a planning appeal prepared a statement of common ground pursuant to rule 15 of the 2000 Rules, which included the following at paragraph 23:

> "The majority of the trees covered by the Tree Preservation Orders can be maintained and protected. The loss of any

> protected tree can be mitigated against through the planting of replacement trees that can be secured by conditions."

The Council subsequently called evidence which contradicted that paragraph. The Inspector refused the developer's application for an adjournment. The Inspector ultimately dismissed the developer's appeal because of the unacceptable effect of the proposed development on one of the protected trees. Sullivan J quashed the Inspector's decision because there had been procedural unfairness.

58. In the discussion section of his judgment, Sullivan J gave valuable guidance on the interaction between the common law rules of procedural fairness and the procedural rules governing the conduct of planning inquiries. At paragraph 40 he said:

> "However, it is most important when deciding whether the parties at an inquiry have had a fair opportunity to comment on an issue raised by an Inspector of his or her own motion, and whether they could reasonably have anticipated that an issue had to be addressed because it might be raised by an Inspector, to bear in mind the highly focused nature of the modern public inquiry where the whole emphasis of the Rules and procedural guidance contained in Circulars is to encourage the parties to focus their evidence and submissions on those matters that are in dispute."

Sullivan J added that in deciding whether there had been unfairness the court should take into account the importance of the issue in respect of which the Inspector was differing from the position agreed in the statement of common ground.

59. Counsel have cited a number of other first instance decisions, all made by deputy judges, which are to similar effect. I hope I shall be forgiven for not rehearsing those judgments.

60. There is a suggestion in the authorities that where the new issue raised is one of aesthetic judgment, rather than technical analysis, the prejudice suffered by the losing party may possibly be diminished. This is because aesthetic judgment is often a matter of impression. Eloquent submissions and factual or expert evidence may, at least in some cases, be less likely to change the Inspector's opinion on aesthetic matters. See *Poole* at [47]; *R (Gates Hydraulics Ltd) v Secretary of State for Communities and Local Government* [2009] EWHC 2187 (Admin) at the seventh paragraph within that part of the judgment which is denominated paragraph 30; *R (Garlick) v Secretary for Communities and Local Government* [2013] EWHC 1126 (Admin) at [47]. Whether there is any force in this point depends upon the facts of the particular case. It is not a principle of law for which the above cases stand as authority.

61. Let me now stand back and review the terrain. The 2000 Rules enable the Inspector to focus the hearing without confining its scope at the outset. The Rules provide a framework, within which both the Inspector and the parties operate. It remains the duty of the Inspector to conduct the proceedings so that each party has a reasonable opportunity to adduce evidence and make submissions on the material issues, whether identified at the outset or emerging during the course of the hearing.

62. From reviewing the authorities I derive the following principles:

> i) Any party to a planning inquiry is entitled (a) to know the case which he has to meet and (b) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case.
>
> ii) 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.
>
> iii) The 2000 Rules are designed to assist in achieving objective (i), avoiding pitfall (ii) and promoting efficiency. Nevertheless the Rules are not a complete code for achieving procedural fairness.
>
> iv) 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.
>
> v) 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.
>
> vi) 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.

63. In my view the "crack of the whip" metaphor, which possibly derives from horse racing, is now of little assistance in resolving challenges under section 288 of the 1990 Act.

64. Having identified the relevant principles, I must now apply them to the present appeal.

Part 6. Application of the legal principles to the present appeal

65. In relation to the issue of sustainability, there was extensive evidence adduced by both parties. Mr Kendrick and Mr Greatwood dealt with this issue in both their first and second proofs. One of the Council's witnesses, Mr Brinkman, dealt with this issue, asserting that planning permission should be refused because the development would not be sustainably located.

66. The issue of sustainability was not included in the statement of common ground. The Council in its opening statement at the Inquiry made clear that although the lack of sustainability had not been one of its original reasons for refusing planning permission, the Council did now rely upon this as one reason for resisting the appeal.

67. Mr Winder and Mr Downton supported the Council's position on sustainability in their evidence to the Inquiry. Moreover, in its closing submissions the Council emphasised lack of sustainability as its first reason for resisting the appeal.

68. In those circumstances, the question of sustainability was clearly a live issue in the Inquiry. The fact that the Inspector had not identified this issue in her written rule 7 statement or her oral rule 16 statement was no more than an indication of her preliminary views. It did not remove the issue of sustainability from the arena.

69. Hopkins was or ought to have been aware that lack of sustainability was part of the case which it had to meet. Hopkins had a reasonable opportunity to adduce evidence and make submissions on that topic. There was no procedural unfairness in this respect.

70. I turn now to the issue of character/appearance. The Inspector did not identify this as a main issue in his rule 7 statement or his rule 16 statement. On the other hand, a number of third parties raised this issue.

71. Ms Claire Andrews, matron of Wincanton Community Hospital, in her proof said that the proposed development would "urbanise and detract from the quiet rural atmosphere which the hospital currently enjoys as the end point of a cul-de-sac". Ms Andrews expressed concern about the impact of the proposed development on the outlook from the hospital. She opined that the effect would be "spoiling ethos of the hospital as a place of healing for patients aids rehabilitation".

72. A number of local residents sent in letters referring to the pleasant character and appearance of the area. They asserted that the proposed development would damage this.

73. Thus character/appearance was clearly an issue in the Inquiry, even though the Inspector's preliminary opinion was that this was not a main issue. It remained a matter which the Inspector could consider, especially when she made her site visit.

74. The main parties did not deal with the impact of the proposed development on the character and appearance of the area in their statement of common ground. The agreement which they reached in relation to refusal reason 2 was directed to a different matter, namely policy CR2 of the adopted local plan. This case is different from *Castleford*, where it was common ground between the main parties that the particular matter (lack of a local area of play) was not a concern.

75. In those circumstances, I conclude that there was no procedural unfairness in relation to character/appearance. Hopkins was aware that this was a significant issue raised by third parties. Self-evidently, the Inspector would consider it when she made her site visit. Therefore Hopkins had an opportunity to make any submissions which it wished about the matter.

76. As a separate point, the character and appearance of the area is a matter of aesthetics and subjective impression. Hopkins may not have achieved much by making submissions about the matter. I do accept, however, that Hopkins might have slightly improved its position by demonstrating (if it were the case) that all possible sites in the area were of similar beauty and tranquility.

77. Let me now draw the threads together. For the reasons set out above, I have reached a different conclusion from the judge in this case. I would allow the Secretary of State's

appeal on the first two grounds of appeal. Accordingly, the third ground does not arise.

Part 7. Executive summary and conclusion

78. Hopkins applied for planning permission to construct 58 dwellings on a site at Wincanton. The District Council refused planning permission on six grounds, four of which subsequently became inapplicable. Hopkins appealed under section 78 of the 1990 Act, but the Inspector dismissed the appeal. Hopkins was aggrieved because the Inspector relied on two matters (sustainability and character/appearance) which she had not initially identified as main issues.

79. The High Court quashed the Inspector's decision on the ground that the Inspector had acted in breach of the rules of natural justice. This court reverses that decision, because both sustainability and character/appearance were live issues on the evidence. The Inspector was not confined by her original stated opinion as to what were the main issues.

80. In the result, the Secretary of State's appeal is allowed. The order made by His Honour Judge Denyer QC in relation to Hopkins' ground 1 is set aside. We remit this case to the judge, so that he can deal with the other grounds of challenge raised by Hopkins.

Lord Justice Beatson:

81. I am grateful to my Lord, Lord Justice Jackson, for his comprehensive description and analysis of the facts and legal issues in this appeal. I agree with his conclusion that the Secretary of State's appeal on the first two grounds succeeds and that the third ground does not therefore arise. I add a judgment of my own because we are differing from the judge, and express my own reasons as follows.

82. At the inquiry those representing Hopkins did not question the witnesses who gave evidence that the site was in an unsustainable location or respond to the local planning authority's closing submissions on this question. Hopkins' approach to the evidence on character and appearance was similar. Its position was that because these matters were not identified as "main issues" in the Inspector's Rule 7 and 16 statements, absent an indication from the Inspector that they were at least "in play", it was not obliged to challenge the evidence and the submissions on these matters, and should not be prejudiced as a result of not doing so.

83. At the hearing before this court, Mr Cahill QC relied in particular on the paragraphs of PINS 01/2009 set out at [13] above and the judgment of Sullivan J (as he then was) in *R (Poole) v Secretary of State for Communities and Local Government and Cannock Chase DC* [2008] EWHC 676 (Admin), reported at [2008] JPL 1774. Sullivan J stated (at [43]) that the parties at an inquiry conducted under the modern inquiry procedural rules are "not expected to cover every conceivable eventuality in their proofs of evidence" because (see [44]) of "the imperative in the Rules requiring the principal parties to focus their attention on the issues that are in dispute". Mr Cahill submitted that since the Inspector had not identified sustainability and character/appearance as a main issue in either her Rule 7 or Rule 16 statements, there

was no reason why the developer should. The developer was entitled to be put on notice of what Mr Cahill described as the Inspector's "fundamental change of heart".

84. Mr Cahill's submission was essentially that, no matter what transpires at the inquiry, absent a formal statement or other indication by the Inspector, it is procedurally unfair for the Inspector to rely on issues which have not been identified as main issues in dispute in the Rule 7 and 16 statements. The starting point of my explanation of why I reject this submissions is a general proposition about the nature of the "right to be heard" limb of the common law principles of natural justice or procedural fairness.

85. Provided that certain factors are borne in mind, it does not generally matter whether what is at issue is characterised as "natural justice" or "procedural fairness". The first of those factors is that it is a commonplace that in the context of administrative decision-making the ascertainment of what procedures are required is acutely sensitive to context and the particular factual situation. Fairness is thus a flexible concept, as well as, of course, being subject to any particular requirements in primary and secondary legislation: see *R (L) v West London Mental Health NHS Trust* [2014] EWCA 47 at [67], citing *inter alia R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, at 560 (*per* Lord Mustill). Here the relevant legislative and policy framework is contained in the 2000 Regulations and PINS 01/2009.

86. Secondly, the term "fairness", when first used, was a signal that, although the reach of the "right to be heard" limb of the principle of natural justice had been expanded to new situations, the procedures required in those situations might be less onerous and less formal because of the nature of the decision that is to be made. But, although the precise content of the procedure required will depend on the particular context and circumstances, the underlying principle is of general applicability: *Bushell v Secretary of State for the Environment* [1981] AC 75 at 95B – C *per* Lord Diplock; *Lloyd v McMahon* [1987] AC 625 at 702 *per* Lord Bridge; and Craig, *Administrative Law* 6th ed., (2008) at 12-009 – 12-010.

87. Thirdly, it is important to identify what the "right to be heard" limb of the common law principle gives the individual affected. In *R (Gul) v Secretary of State for Justice* [2014] EWHC 373 (Admin) at [34], I stated that:

> "it is clear from decisions in the last 60 years that what is required is an opportunity to be heard, an opportunity to participate in the procedure by which the decision is made."

I gave as examples the classic statement by Denning LJ in *Abbott v Sullivan* [1952] 1 KB 189 at 198 and the recent statement by Lord Reed in *Osborne v Parole Board* [2013] UKSC 61 at [68]. The decisions to which my Lord has referred and which I discuss briefly at [89] – [92] show that this is also the broad position in the context of planning inquiries.

88. The question is thus whether Hopkins had a reasonable opportunity to put its case on sustainability and character and development at the inquiry. As my Lord has explained, extensive evidence was adduced by the main parties and others in the inquiry on the issue of the sustainability of the development in the sense that term is

used in the National Planning Policy Framework ("NPPF").[1] The NPPF regards sustainable development as "a golden thread running through both plan-making and decision-taking" and states (paragraph 14) that "a presumption in favour of sustainable development lies at its heart". At the outset of the appeal the Council made it clear that it relied on lack of sustainability as a reason for resisting the appeal although this was not one of the reasons it had given for refusing the application for planning permission. As to character and appearance, a number of third party objectors raised this issue before the Inspector.

89. It is clear that, although neither sustainability nor character and appearance had been identified by the Inspector as a "main issue" in her statements pursuant to Rule 7(1) of the 2000 Rules before the inquiry and pursuant to Rule 16 at the start of the inquiry, they were live issues at the inquiry. There was, moreover, no agreement between the main parties, Hopkins and the planning authority, that sustainability and character and appearance were not problematic in the context of Hopkins' application. Their statement of common ground prepared pursuant to Rule 15 of the 2000 Rules, referred by my Lord, did not record agreement as to the sustainability of the proposed development. That is significant in view of the importance accorded to sustainability by the NPPF and the fact that it is very commonly an issue in inquiries. As to character and appearance, while it stated that there was no objection to the site in landscaping terms, the statement of common ground said nothing about the impact of the development on the character and appearance of the area.

90. The authorities on planning inquiries considered by my Lord show that in this context what is needed is knowledge of the issues in fact before the decision-maker, the Inspector, and an opportunity to adduce evidence and make submissions on those issues: see *Castleford Homes Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC 77 (Admin) at [65] and *R (Tatham Homes Ltd) v First Secretary of State of State* [2005] EWHC 3538 (Admin), reported at [2008] JPL 185.

91. In the *Tatham Homes* case Sullivan J (at [16] – [18]) referred to the fact that the claimant in that case "had an opportunity to present whatever evidence he wished" (emphasis added) including photographic evidence in response to the objectors' evidence on privacy, and stated that "from the outset of the inquiry it should have been foreseeable that the Inspector might be persuaded by the views expressed by local residents" on the privacy issue.

92. In *R (Poole) v Secretary of State for Communities and Local Government* [2008] EWHC 676 (Admin), reported at [2008] JPL 1774, on which the respondent relied heavily, Sullivan J stated that, in determining whether a developer had a reasonable opportunity to deal with the retention of a particular tree, this was in contention only for a brief period and had been overtaken by the statement of common ground that the loss of the tree could be mitigated by planting a replacement. He considered that, in those circumstances, the developer could not reasonably have anticipated that the retention of the tree would be an issue at all, let alone the determining issue. *Poole*'s

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[1] The NPPF refers (at 254) to the definition of sustainable development in UN General Assembly Resolution 42/187: "meeting the needs of the present without compromising the ability of future generations to meet their own needs." It includes (NPPF at 262) land uses that minimise the need to travel (and journey lengths for employment, shopping and other activities) and maximise the use of sustainable transport modes.

case is very different from the *Tatham Homes* case because, in that case, the application by the appellant developer was for an adjournment to enable it to deal with evidence adduced by the local planning authority at the inquiry itself which contradicted what had previously been said in the Rule 15 statement of common ground.

93. The circumstances of the present case are very different to those in *Poole's* case. There was no explicit contradiction and no application for an adjournment or to adduce additional evidence. Indeed, a positive decision was made not to cross-examine witnesses who stated the site was not sustainable and criticised the impact of the development on the character and appearance of the area. It is to be recalled (see [85] above]) that what fairness requires is acutely fact-sensitive, and that, in determining what it requires in a particular case, all the circumstances of the case need to be considered. In my judgment, Hopkins' decision not to challenge the evidence and submissions on what were live issues at the inquiry is of particular significance in concluding that there was no procedural unfairness in this case.

94. The reason given by Mr Maurici for his submission that there was no unfairness in this case in relation to the question of character and appearance was that it involves aesthetic rather than technical questions. I consider that the decision not to challenge the evidence or the submissions made on that question is more important. The determination of aesthetic questions is, as Mr Maurici contended, likely to turn on subjective impression and a site visit, so that deprivation of the opportunity to make submissions may be less prejudicial. But it is important not to forget that many questions described as questions of "planning judgment" involving an aesthetic element are regularly dealt with by evidence and submissions at inquiries. Advocacy, after all, can be as effective when addressed to a matter of judgment as to a matter on which there is a technically correct answer.

95. It is of course important that inquiries focus on the main issues in dispute. But it is also important to remember that the main parties are not the only parties and it is not only the issues identified by the Inspector before or at the commencement of the inquiry which are relevant. This is clearly seen from Rules 16(3) and 16(12) of the 2000 Rules. Rule 16(3) explicitly permits any party at the inquiry to refer to issues which that party considers relevant to the appeal but which are not issues identified by the Inspector as main issues. Rule 16(12) permits the Inspector to take into account any written representation or evidence received before or during the inquiry provided that it is disclosed at the inquiry.

96. Although Rule 16 of the 2000 Rules is concerned with procedure at the inquiry whereas Rule 18 is concerned with procedure after the inquiry, the difference in the provision made in the two rules is also of assistance in this context. Rule 18 deals, *inter alia,* with the position, after the close of the inquiry, of new evidence and new matters of fact not raised at the inquiry which the Inspector considers to be material to his decision. It requires the Inspector to notify those who appeared at the inquiry of the matter and to afford them an opportunity of making written representations to him or asking for the re-opening of the inquiry. Had the rule-maker wished to require the Inspector to make some formal statement about an issue not identified as a main issue in the Rule 7 and Rule 16 statements before taking it into account, it could have done so in that Rule by making it a requirement in a similar way to the way Rule 18 requires the Inspector to notify and to afford an opportunity to those who appeared at

the inquiry to make representations. The submissions on behalf of Hopkins, if accepted, would in effect reduce the distinction between the procedure in relation to issues that are not identified as main issues but emerge during the inquiry and the procedure after the inquiry for evidence not raised at it very significantly, and indeed almost to vanishing point.

97. In this case two issues not identified in the Rule 7 and 16 statements as a main issue clearly emerged as significant issues as a result of the evidence of the third parties at the inquiry. I have concluded that a developer who does not avail himself of the opportunity to test evidence adduced about such an issue (if necessary by seeking an adjournment to adduce further evidence) or to make submissions about it may not complain of procedural unfairness if the Inspector's decision is based in whole or in part on that issue. This conclusion follows from the fundamental nature of "natural justice"/"procedural fairness", the structure of the 2000 Regulations, and the approach of the authorities on planning inquiries.

98. Accordingly, in my judgment the Inspector did not err and it follows that the judge's order should be set aside. For the reasons given by my Lord, because the judge did not consider the other grounds of challenge raised by Hopkins, this case must be remitted so that they can be dealt with.

Lord Justice Christopher Clarke:

99. I agree with both judgments.