Neutral Citation Number: [2016] EWCA Civ 444

Case Nos: C1/2015/3769 and C1/2015/3770

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MRS JUSTICE LANG
[2015] EWHC 2804 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 May 2016

Before:

Lord Justice Simon
Lord Justice Lindblom
and
Lord Justice Hamblen

- -

Between:

Mark Whitby **Appellant**

- and -

(1) Secretary of State for Transport
(2) Secretary of State for Communities and Local Government
(3) Network Rail Infrastructure Limited **Respondents**

Mr Richard Drabble Q.C. and Mr Andrew Parkinson (instructed by **Richard Buxton**) for the **Appellant**
Mr Richard Kimblin Q.C. and Jack Smyth (instructed by **the Government Legal Department**) for the **First and Second Respondents**
Ms Nathalie Lieven Q.C. and Mr Richard Clarke (instructed by **Winckworth Sherwood**) for the **Third Respondent**

Hearing date: 21 March 2016

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Judgment Approved by the court for handing down

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Lord Justice Lindblom:

Introduction

1. We heard these appeals on 21 March 2016. For all four parties the outcome was urgent. Conscious of this, we announced on 23 March 2016 that we had decided to dismiss the appeals and would give our reasons later.

2. The appeals require us to consider the meaning and effect of government policy in paragraphs 132 and 133 of the National Planning Policy Framework ("the NPPF") for decision-making on proposed development that would harm the "significance of a designated heritage asset", and, in the context of a project for the construction of a new railway, the decision-maker's approach to a suggested alternative alignment.

3. With permission granted by Lewison L.J. on 11 January 2016, the appellant, Mr Mark Whitby, appeals against the order of Lang J., dated 14 October 2015, dismissing his challenge to the decisions of the first respondent, the Secretary of State for Transport, on 25 March 2015, to make the Network Rail (Ordsall Chord) Order under sections 1, 3 and 5 of the Transport and Works Act 1992, and to direct that planning permission for the proposed works be deemed to be granted under section 90(2A) of the Town and Country Planning Act 1990 ("the 1990 Act"), and the decision of the second respondent, the Secretary of State for Communities and Local Government, on the same day, to grant ten applications for listed building consent for the demolition, partial demolition or alteration of listed buildings affected by the works. The project was promoted by the third respondent, Network Rail Infrastructure Ltd.. It is for the construction of the Ordsall Chord: an elevated chord railway, 340 metres in length, running from the Castlefield Viaduct on the Bolton line in the city of Manchester to the Middlewood Viaduct on the Chat Moss line in the city of Salford, and linking the three main railway stations in Manchester – Victoria, Oxford Road and Piccadilly.

4. An inquiry into Network Rail's proposals was held by an inspector, Mr Brendan Lyons, over 13 days in April and May 2014. Mr Whitby appeared at the inquiry as an objector and presented the case for an alternative alignment, known as "Option 15". In his report to the two Secretaries of State, dated 6 January 2015, the inspector recommended that the order be made with minor modifications, that the direction under section 90(2A) of the 1990 Act be given, and that the listed building consents be granted. Those recommendations were accepted by the Secretaries of State.

The issues in the appeals

5. The proceedings concern the approach taken by the inspector and the Secretaries of State to the consideration of Option 15. They were brought by way of statutory challenges to the order and the listed buildings consents**,** and a claim for judicial review of the deemed planning permission, all of which were rejected by Lang J..

6. Mr Whitby's grounds of appeal are a somewhat refined version of the argument that failed before the judge. They raise several closely related issues: whether the judge was wrong to find, first, that the inspector and the Secretaries of State correctly understood and lawfully applied government policy in paragraphs 132 and 133 of the NPPF

(ground 1); secondly, that the inspector was right to assess Option 15 on a different basis from the proposed works (ground 2A); thirdly, that he gave clear and adequate reasons for concluding as he did on the balance between potential benefit and harm in his consideration of that alternative (ground 2B); fourthly, that he properly balanced Option 15's advantage in avoiding harm to heritage assets against its disadvantages (ground 3A); and fifthly, that the Secretaries of State complied with the requirements of sections 16, 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act") (ground 3B).

7. Because those issues are not readily divisible from each other, I think they are best dealt with together – as they were by counsel on either side in their submissions. The single main issue, as I see it, is whether the decisions in this case were unlawful either because they were not taken consistently with the decision-maker's statutory duties relating to listed buildings and conservation areas or because the Secretaries of State misunderstood or misapplied relevant national policy and guidance.

Statute, policy and authority

8. Section 16(2) of the Listed Buildings Act provides:

> "In considering whether to grant listed building consent for any works the local planning authority or the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

Section 12(3A) of the Listed Buildings Act provides that "[an] application for listed building consent shall, without any direction by the Secretary of State, be referred to the Secretary of State instead of being dealt with by the local planning authority in any case where consent is required in consequence of proposals included in an application for an order under section 1 or 3 of the Transport and Works Act 1992". Section 66 of the Listed Buildings Act contains the "[general] duty as respects listed buildings in exercise of planning functions". Section 66(1) provides:

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

Section 72 contains the "[general] duty as respects conservation areas in exercise of planning functions". Section 72(1) provides:

> "In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

9. It is settled law that the duty under section 66(1) is of the same nature as the parallel duty under section 72(1) (see the judgment of Sullivan L.J. in *Barnwell Manor Wind Energy Ltd. v East Northamptonshire District Council* [2014] EWCA Civ 137, at

paragraph 16); that the concept of "preserving" in both of those provisions means "doing no harm" (see the speech of Lord Bridge of Harwich in *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 A.C. 141, at pp.149 and 150); and that "Parliament's intention in enacting section 66(1) was that decision-makers should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise" (see Sullivan L.J.'s judgment in *Barnwell Manor*, at paragraph 29).

10. The NPPF was published as national planning policy for England on 27 March 2012. Paragraphs 132, 133 and 134 state:

> "132. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. Substantial harm to or loss of a grade II listed building, park or garden should be exceptional. Substantial harm to or loss of designated heritage assets of the highest significance, notably scheduled monuments, protected wreck sites, battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional.
>
> 133. Where a proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply:
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> - the nature of the heritage asset prevents all reasonable uses of the site; and
> - no viable use of the heritage asset itself can be found in the medium term through appropriate marketing that will enable its conservation; and
> - conservation by grant-funding or some form of charitable or public ownership is demonstrably not possible; and
> - the harm or loss is outweighed by the benefit of bringing the site back into use.
>
> 134. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."

In the "Glossary" in Annex 2 to the NPPF, "Significance (for heritage policy)" is defined in this way:

> "The value of a heritage asset to this and future generations because of its heritage interest. The interest may be archaeological, architectural, artistic or

> historic. Significance derives not only from a heritage asset's physical presence, but also from its setting."

11. In *Jones v Mordue* [2016] 1 P. & C.R. 12 Sales L.J., with whom Richards and Floyd L.JJ. agreed, referred (in paragraph 28 of his judgment) to paragraph 134 of the NPPF as belonging to "a fasciculus of paragraphs … which lay down an approach which corresponds with the duty in s.66(1)". He went on to say (in the same paragraph) that "[when] an expert planning inspector refers to a paragraph within that grouping of provisions … then – absent some positive contrary indication in other parts of the text of his reasons – the appropriate inference is that he has taken properly into account all those provisions …".

12. At the time of the Secretaries of State's decisions here, although the NPPF had superseded Planning Policy Statement 5 – "Planning for the Historic Environment" ("PPS5"), the PPS5 Practice Guide remained extant (see the judgment of Sales J., as he then was, in *R. (on the application of Lady Hart of Chilton) v Babergh District Council* [2015] J.P.L., at paragraph 16). In June 2012 English Heritage published a "Revision Note" for it, stating that "the policies in the NPPF are very similar and the intent is the same, so the Practice Guide remains almost entirely relevant and useful in the application of the NPPF". Paragraph 91 of the PPS5 Practice Guide states:

> "Where substantial harm to, or total loss of, the asset's significance is proposed a case can be made on the grounds that it is necessary to allow a proposal that offers substantial public benefits. For the loss to be necessary there will be no other reasonable means of delivering similar public benefits, for example through different design or development of an appropriate alternative site."

The project

13. Between the parties in these proceedings it is common ground that the Ordsall Chord will bring about considerable transport benefits. As well as providing a new direct rail link between the three stations, it will connect the two main rail corridors in Manchester. It will relieve an existing bottleneck at Piccadilly Station, which has been an intractable problem in the city's rail network. And it is an important component of the "Northern Hub", which involves the investment of £676 million in improvements to the railway network in the north of England. In particular, it will assist the regeneration of Salford.

14. But, as is also agreed, the new railway will cause substantial harm to several listed buildings, to the settings of others, and to the character and appearance of the Castlefield Conservation Area – each a "designated heritage asset" under government policy in the NPPF. Some of these buildings are now occupied by the Museum of Science and Industry ("MOSI"). Within the site of the proposed works are the surviving buildings of the former Liverpool Road Station, constructed for the Liverpool and Manchester Railway, which opened in 1830 as the first passenger carrying railway in the world. The "Station Master's House", the "1830 Warehouse" and "Stephenson's Bridge" are all listed at grade I. The "Water Street Bridge" and the "1830 Viaduct", which linked the station with "Stephenson's Bridge", are grade II listed. So too are the "Girder Bridge" and "Zigzag Viaduct", the "Colonnaded Viaduct", MOSI's main

building and "Power Hall", the buildings at 123 and 125 Liverpool Road, and, to the south, the "Castlefield Viaduct".

Option 15

15. Mr Whitby is a former President of the Institution of Civil Engineers. He has great experience in major engineering projects. He was, at one time, a member of the design panel for the Ordsall Chord. He resigned to pursue an objection to the draft order, because of his concerns about the harm the proposed works would cause to listed buildings at and near the site of the former Liverpool Road Station and to the Castlefield Conservation Area. Others objected on similar grounds, English Heritage among them. The centrepiece of Mr Whitby's objection was Option 15.

16. In Option 15 the new chord would branch off the Bolton line immediately to the west of Stephenson's Bridge. Constructing the railway on this alignment would have the advantage of largely avoiding harm to listed buildings, their settings, and the conservation area. This is not in dispute. But the Option 15 route runs through a large vacant site called "Middlewood Locks", on which Salford City Council seeks a major commercial and residential redevelopment. This site is identified in the Salford Unitary Development Plan as a "key opportunity" for comprehensive redevelopment, which is seen by Salford City Council as vital to the successful regeneration of central Salford.

17. A route for the new railway across Middlewood Locks was at first discounted because the site had been identified as one on which the High Speed 2 ("HS2") station in Manchester might be built. But after it had become clear that the HS2 station would not be built there, this alternative was looked at more closely. Network Rail's "Option 15 Engineering Analysis" of September 2013 concluded that although Option 15 was technically viable there were a number of difficulties and risks associated with it. They rejected it for a number of reasons: the effect of a railway on this alignment on the regeneration potential of the Middlewood Locks site, which it would reduce in size and sever into separate units; its far greater cost than the scheme proposed; disadvantages in performance, including longer journey times; the risk of delay to the economic benefits of the Northern Hub; and the possibility that the Ordsall Chord project would be cancelled if the Government's funding priorities changed while the new alignment was promoted.

18. At the inquiry Mr Whitby urged on the inspector the merits of his "Rationalised Option 15", which he had produced in response to Network Rail's assessment of this alternative route.

The inspector's report

19. The inspector's report runs to 159 pages and 887 paragraphs. It is a conspicuously careful and thorough report.

20. In recording the case for Network Rail (in paragraphs 32 to 188), the inspector summarized their evidence and submissions on the options they had considered, their reasons for rejecting Option 15 (paragraphs 62 to 74) – engineering difficulties (paragraph 66), cost (paragraph 71), its harmful effects on the regeneration potential of

the Middlewood Locks site (paragraph 70), and delays and risk to deliverability (paragraph 73).

21. English Heritage's case (summarized in paragraphs 200 to 276 of the inspector's report) was that the proposed works would cause substantial harm to heritage assets of exceptional importance (paragraph 200). The collection of listed buildings on the route of the Ordsall Chord was "of the highest heritage significance, of not just national but international value" (paragraph 201). It comprised "one of the most significant railway sites in the world" (paragraph 202). Under sections 16(2), 66(1) and 72(1) of the Listed Buildings Act, and the policies in paragraphs 132 and 133 of the NPPF, Network Rail had to "demonstrate to an extremely high standard that there is no other reasonable option open to the Secretaries of State[, the] case for rejecting any alternative must be overwhelmingly convincing[, and] the evidence of Network Rail has neither recognised nor lived up to this expectation" (paragraphs 204 to 207). English Heritage were "not in a position to comment on all aspects of the judgment … required in relation to the necessity test" (paragraph 259). They "[did] not comment on the overall impacts of the regeneration of [the Middlewood Locks site] …", but Network Rail appeared to "overstate the position" (paragraph 267). There was merit in the masterplan presented by Mr Whitby (paragraph 270). And "when the effect of Option 15 on the regeneration of this site is placed in the balance, it will have to be assessed against these considerations, as well [as] the harm to heritage assets" (paragraph 271).

22. The inspector recorded Mr Whitby's objection very fully (in paragraphs 277 to 349). Network Rail had failed to show that the harm the proposed works would cause to heritage assets was "necessary to achieve the substantial public benefits it would bring", as the policy in paragraph 133 of the NPPF requires (paragraph 279). Option 15 was technically feasible. The harm to the regeneration of Middlewood Locks had been overstated, and should be weighed against the enormous benefits of the Ordsall Chord and the substantial harm the proposed works would cause to heritage assets (paragraphs 280 and 310 to 336). Under the policy in paragraph 133 of the NPPF, "the Secretary of State must be satisfied of two matters: (i) that the substantial harm caused by the Order Scheme is necessary to deliver substantial public benefits and (ii) those substantial public benefits outweigh that harm or loss" (paragraph 282). Mr Whitby's case was "focused on the first issue; the question of whether the public benefits of the harm outweigh the heritage loss is a matter of judgment for the Secretaries of State" (paragraph 283). The meaning of the word "necessity" had to be considered in the light of the guidance in paragraph 91 of the PPS5 Practice Guide (paragraph 284). Thus the "key question" was "whether Option 15 provides another reasonable means of delivering the Ordsall Chord's substantial public benefits". Under the policy in paragraph 132, it was for Network Rail "to demonstrate that the heritage harm is necessary, and therefore that Option 15 is not a reasonable alternative", and they had failed to do this (paragraph 285). In the circumstances, to require Mr Whitby to show that planning permission should now be granted for the Option 15 alignment would be "an excessive burden" (paragraph 310).

23. Salford City Council had submitted written representations, strongly supporting the Ordsall Chord "as part of the wider Northern Hub proposals that will deliver substantial, vital economic benefits to Salford, the Regional Centre, Greater Manchester and the North of England" (paragraph 433), and asserted that Option 15 "would have a significant detrimental effect on regeneration in Salford" (paragraph 448).

24. The inspector summarized Network Rail's response to the objections of English Heritage and Mr Whitby (in paragraphs 479 to 518 and paragraphs 519 to 579 respectively), culminating with the submission that the disadvantages of Option 15 "would be enormous: impact on Middlewood Locks site; cost; passenger disbenefits in terms of operation, construction, delay and risk of cancellation" (paragraph 579).

25. In his conclusions the inspector accepted that there was a "pressing need" for the rail improvements proposed, which had "not been challenged by any party to the Inquiry or other objector …" (paragraph 596). He also accepted that "implementation of the Order scheme would result in very substantial public benefits, at both the local and regional scale, that provide very strong justification for the Order" (paragraph 599). He identified the effect of the proposed works on the historic environment as the "outstanding issue" (paragraph 602). He referred to the statutory duties in sections 16, 66 and 72 of the Listed Buildings Act (paragraphs 603 and 604), the policies in paragraphs 132 and 133 of the NPPF (paragraph 605 and 607), and paragraph 91 of the PPS5 Practice Guide (paragraph 608). He acknowledged that Network Rail had conceded there would be **"**substantial harm to listed buildings and their settings, including some at Grade I and to the character of the Castlefield [Conservation Area]" (paragraph 609).

26. He went on to consider Option 15 (in paragraphs 628 to 697). Under the heading "Heritage impacts", he said it was "not disputed that the Option 15 alignment would have a less harmful effect on heritage assets and their setting than the Order proposal" (paragraph 631), and went on to say (in paragraphs 633 to 635):

> "633. It is argued on behalf of Mark Whitby that the Order scheme's harm to heritage assets would not be necessary because the Option 15 alignment would be technically feasible and the harm to the development potential of the Middlewood Locks site has not been made out. But the judgment to be made is not a straightforward balance of harm to Middlewood Locks against the substantial benefits of an Ordsall Chord, which might be the case if Option 15 were before the Secretaries of State. Option 15 is not before the Secretaries of State because the promoters have rejected it. The issue is whether it would provide a "reasonable" alternative to the Order scheme and would be on an "appropriate alternative site". [280, 281, 284, 285, 482]
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> 634. In reaching a judgment, the matter is not merely a comparison of the heritage impacts of the two alternatives. In my view it does not follow that substantial harm to the heritage assets on an application site should necessarily justify substantial harm to other interests on an alternative site. The test is one of reasonableness. The relevant PPS5 guidance relates specifically to cases of substantial harm or total loss of significance. Clearly, as substantial harm to heritage assets of the highest significance should be "wholly exceptional", the necessity for such harm must be rigorously tested. Paragraph 132 of the NPPF advises that the more important the asset, the greater the weight should be given to its conservation. This is consistent with the judgment in [*Barnwell Manor*], where the Court of Appeal held that the "… general duty (imposed by s.66 of the Act) applies with particular force if harm would be caused to the setting of a Grade I listed building, a designated heritage asset of the highest significance". However, the need for "an exceptional degree of

justification" of the case for necessity does not appear in national guidance. [207, 285, 482-485]

635. In order to assess whether Option 15 should be seen as a reasonable alternative, of sufficient merit to justify rejection of the Order, it is necessary to consider in turn the issues raised by Network Rail to justify its dismissal. These are: impact on the Middlewood Locks site; engineering; cost; passenger and economic disbenefits."

27. The inspector then turned (in paragraphs 636 to 697) to his assessment of the case for Option 15 as "a reasonable alternative" to the order scheme. Of the issues relevant to this assessment he found the impact on the regeneration of the Middlewood Locks site "by some way the most compelling" (paragraph 636). This was, he said, "a critical juncture in the regeneration process" for central Salford. He gave "substantial weight" to "the grave concerns raised by [Salford City Council] about the effect of delay in implementing the Order …" (paragraph 640). These concerns were "particularly relevant to the Middlewood Locks site, … a key component of the Central Salford regeneration strategy". The evidence suggested that "the comprehensive redevelopment of the site will be essential to the success of the overall strategy for the wider area" (paragraph 641). The "redevelopment of Middlewood Locks also stands at a critical juncture" (paragraph 642).

28. The developers had made clear that they would not be willing to proceed if the order scheme were rejected and work begun on the design of an alternative based on Option 15. Thus "in the immediate term, there would be a significant setback to the ongoing regeneration of the Salford Central area" (paragraph 644). In "the longer term", the issue would be whether these or other developers "would be willing to invest in the site's potential" (paragraph 645). The masterplan put forward on behalf of Mr Whitby, "should not be assessed as if it were being put forward now for planning permission and that the detail of the form, scale and content of each individual plots and blocks could be subject to considerable evolution" (paragraph 646). But it was "not disputed that the developable area of the site would be reduced by the addition of the new infrastructure, even allowing for the area potentially released by the removal of the Middlewood Viaduct". And "[the] division of the site would militate against successful comprehensive redevelopment" (paragraph 652). The "new elevated structures would also impose both a physical and a perceptual barrier to the connectivity of movement across the site" (paragraph 653). There was "very substantial doubt over the provision of satisfactory access to the major part of the site …" (paragraph 662). And, "as well as the risk of delay and uncertainty in the short term following any rejection of the current Order, there would be a significant risk that the development of the site could be jeopardised for some considerable time … with a consequent serious impact on the achievement of the regeneration of Central Salford" (paragraph 663).

29. The inspector found that "[the] higher cost adds to the weight against Option 15", but that "if cost were the only factor, given the anticipated exceptional benefits and the quality of the heritage risks at risk of harm, the additional costs could be seen as reasonable" (paragraph 691). If the order scheme were rejected and a new scheme prepared, "[there] would be a considerable delay that would cause postponement of the anticipated economic benefits to be triggered by the Northern Hub". It was necessary to give "[significant] weight" to Network Rail's contention that "the economic implications of delayed delivery of the programme would be considerable" (paragraph

693). Rejection of the order scheme "would not automatically ensure that a scheme based on Option 15 would quickly be brought forward …" (paragraph 694). Whether "any protracted delay or increased costs" could lead to the project being cancelled would be "a matter for the Secretary of State in the light of then current needs and priorities and all other circumstances". The "current funding climate is clearly favourable, while the risk of competing priorities in the future is unknown" (paragraph 695).

30. In his "Conclusion on Option 15" the inspector said:

> "696. … [On] the balance of the evidence that Option 15 would be capable of delivering the outputs required for the Ordsall Chord, subject to the resolution of some outstanding engineering issues, none of which appears likely to be insurmountable, and subject to considerably higher costs and disruption to rail travel. If these were the only issues weighing against this alternative, it would be difficult to conclude that the harmful heritage impacts of the Order proposal were absolutely necessary. However, when these aspects are taken together with the likely adverse impacts on the prospects of successful comprehensive development of the Middlewood Locks site, which would have serious consequences for the regeneration of Central Salford, both in the immediate and longer term, the balance is clearly against Middlewood Locks being seen as an appropriate alternative site. The issue is broader than whether the substantial public benefits of the Ordsall Chord could be secured with acknowledged lesser harm to heritage significance.
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> 697. Option 15 provides an elegant and quite persuasive diagram, but examination of the real implications of trying to deliver the proposed route shows that it would be likely to have significant adverse effects, for which no satisfactory resolution was before the Inquiry. Therefore it would not in my judgment provide a reasonable alternative to the Order scheme."

31. In considering the impacts on heritage assets (in paragraphs 709 to 738 of his report), the inspector referred again to the relevant statutory duties (in paragraphs 709, 724 and 738) and the relevant NPPF policies (paragraphs 709, 717, 724 and 738). He described the significance of the heritage assets affected (paragraphs 711 to 713), and assessed the physical impacts on listed buildings, the impacts on their settings, and the impacts on the conservation area (paragraphs 715 to 731). He concluded that "[the] proposal would not align with the statutory duties set by s.66 and s.72 of [the Listed Buildings Act] and the guidance of the NPPF on the desirability of conserving heritage assets …" (paragraph 738).

32. In his "Overall Conclusions" (in paragraphs 872 to 885) the inspector said that "[the] case turns on the issue of heritage, and the two strands of the test set by the guidance of paragraph 133 of the NPPF". He endorsed Network Rail's concession that the proposed works "would result in substantial harm to the significance of heritage assets" (paragraph 873). In this case, he said, the harm "would be very great, and a matter of considerable regret". Nevertheless, "the primary assets would remain intact, and could continue to be appreciated at an individual level, even though the relationship between them would be heavily disrupted" (paragraph 874). The inspector then proceeded to apply the two-stranded test:

"875. With regard to the first strand of the test, I have concluded that Option 15, as the most persuasive other possible solution put forward, would not amount to a reasonable means of achieving the public benefits, primarily because the harm to the redevelopment of Middlewood Locks would have serious consequences for the regeneration of Central Salford. Therefore it could not be regarded as an appropriate alternative site. Higher costs and disruption to passengers add some additional weight against this option, together with lesser weight due to some unresolved engineering issues.

876. Given the decision that a new chord at Ordsall offered the optimum transport solution, the range of potential options was always going to be limited. The chord must connect between two converging rail lines within a relatively confined distance, subject to the constraints of track engineering. It seems unlikely that there are other more successful options waiting to be revealed. Therefore, if Option 15 does not provide a reasonable alternative, the Order scheme may well provide the only viable option.

877. The second strand of the test requires a judgment on whether the substantial public benefits would outweigh the harm. Reference has been made to the judgment of the Court of Appeal in [*Barnwell Manor*] but I have not found anything in that judgment to cast a different light on the balance required by the NPPF in cases of substantial heritage harm. The judgment has reaffirmed earlier judgments on the application of the duties of the decision maker under s.66 and s.72 of [the Listed Buildings Act]. It confirms that "considerable importance and weight" must be given to the desirability of, respectively, preserving a listed building or its setting and preserving or enhancing the character or appearance of a CA. Harm to the special interest of a listed building or the character of a CA is not a matter to be weighed equally with other material considerations, as the priority given by parliament effectively amounts to a "strong presumption" against approval of development that would cause such harm.

878. Whilst the [*Barnwell Manor*] case was specifically concerned with setting, the duty imposed by s.66 applies equally to development of listed buildings themselves as well as to development within their setting.

879. It is clear from the judgment that the application of "considerable importance and weight" does not amount to a prohibition of harmful development. Both of the two main previous judgments referred to by the Court deal explicitly with the likelihood of development being approved despite the weight to be given to preservation and/or enhancement, because of greater weight being given to other benefits [The judgment of Glidewell L.J. in *The Bath Society v Secretary of State for the Environment* [1991] 1 W.L.R. 1303 and the speech of Lord Bridge in *South Lakeland District Council v Secretary of State for the Environment*].

880. Because of the scale of the benefits that would be released across Greater Manchester and the North of England by the Ordsall Chord, I consider that this is an instance where the harm would be outweighed by the public

> benefits, and that clear and convincing justification for the Order has been provided."

33. The inspector's recommendations were that the order be made, and the deemed planning permission and listed building consents granted (paragraphs 886 and 887).

The decision letters

34. In his decision letter of 25 March 2015 the Secretary of State for Transport agreed with the inspector "that there is a pressing need (which was undisputed at the inquiry) for a new route connecting the Piccadilly and Victoria rail corridors to expand rail routing options, to ease congestion at Piccadilly and to allow Manchester Victoria to assume an enhanced role (IR 595-596)" (paragraph 7). He also agreed with the inspector "that implementation of the scheme would result in very substantial public benefits at both the local and regional level, and that this provides very strong justification for the scheme (IR 597-599)" (paragraph 8).

35. He accepted the inspector's conclusions that the proposed works would cause "substantial harm" to listed buildings, their settings and to the character and appearance of the conservation area (paragraphs 9 and 15 of his decision letter of 25 March 2015). He said he had "given considerable weight to these matters, having regard to the duties under sections 66 and 72 of [the Listed Buildings Act], which, while not directly applicable to a TWA Order determination or the giving of directions as to deemed planning permission, are reflected in the NPPF and development plan policies aimed at protecting the historic environment" (paragraph 9). He agreed with the inspector that "the key issue in deciding whether the scheme satisfies the tests in paragraphs 132 and 133 of the NPPF is whether the substantial harm or loss to heritage assets that would result from the scheme is necessary to achieve substantial benefits which outweigh that harm or loss", and also "that, in assessing whether such harm or loss is necessary, the particular issue in this case is whether Option 15 would provide a reasonable alternative to NR's proposals, on an appropriate alternative site (IR 633-634)" (paragraph 11). He agreed with the inspector's conclusions on Option 15 (paragraphs 12, 13 and 14 of the decision letter). He concluded that Option 15 "is not a reasonable alternative to NR's proposals and that Middlewood Locks is not an appropriate alternative site for the new chord railway (IR 696-697)" (paragraph 14). In paragraph 16 he said:

> "The Secretary of State agrees with the Inspector that the cumulative substantial harm to heritage assets which the scheme would cause does not align with the statutory duties and the national and local policies referred to at paragraph 9 above (IR 738). He has, therefore, considered whether the presumption against approving development that would cause such harm as expressed in those duties and policies should be set aside in the circumstances of this case. With regard specifically to the test in paragraph 133 of the NPPF, the Secretary of State agrees with the Inspector that taking into account the conclusions on Option 15 at paragraphs 11 to 14 above and the limited scope for alternative options at Ordsall, the scheme as proposed by NR may well provide the only viable option (IR 875-876). He agrees further that because of the scale of the benefits that would be realised across Greater Manchester and the North of England by the scheme, the harm to heritage assets in the vicinity would in this instance be outweighed by those public benefits (IR 877-882). The Secretary of State is for

these reasons satisfied that clear and convincing justification for the scheme has been provided so as to satisfy the requirements of paragraph 133 of the NPPF."

In his "overall conclusions and decision" he said that, for the reasons he had given in paragraph 16, he agreed with the inspector "that the balance lies in favour of approving the scheme as proposed by NR, in spite of the substantial harm to heritage assets that would result" (paragraph 37).

36. In his two decision letters of the same date the Secretary of State for Communities and Local Government said he concurred with the inspector's conclusion that the listed building consents should be granted (paragraph 5 of each letter).

Were the decisions taken consistently with the decision-maker's statutory duties in the Listed Buildings Act, and on a correct understanding and lawful application of relevant national policy and guidance for heritage assets?

37. For Mr Whitby, Mr Richard Drabble Q.C. submitted that the Secretaries of State failed to take their decisions in accordance with the duties in sections 16(2), 66(1) and 72(1) of the Listed Buildings Act and with the relevant principles in NPPF policy for heritage assets and the guidance in the PPS5 Practice Guide. It was common ground that the proposed works would cause "substantial harm" to heritage assets, including harm to grade I listed buildings, which, under the policy in paragraph 132 of the NPPF, are "designated heritage assets of the highest significance". There were two questions for the inspector and the Secretaries of State to address: first, whether the rejection of the Ordsall Chord now would lead to a project based on Option 15 coming forward, and secondly, if so, whether the disadvantages of this being done, including delay, were such as to make it necessary to proceed with the order scheme. Those questions were not properly faced. Contrary to the approach required by paragraph 132 of the NPPF, which is to regard "substantial harm" to a grade I listed building as "wholly exceptional", the inspector simply applied a broad balance (see paragraph 696 of his report). And contrary to the policy in paragraph 133, and the guidance in paragraph 91 of the PPS5 Practice Guide, he did not require Network Rail to demonstrate that the harm was truly "necessary" (see paragraphs 633 to 635 of his report). In setting himself the task of considering whether Option 15 "should be seen as a reasonable alternative" to the order scheme, he fell in the error of seeing this as a simple comparison between competing alternatives. He shifted the burden on to Mr Whitby, requiring him to demonstrate that Option 15 was superior to the order scheme. The fact that an alternative scheme based on Option 15 was not before the Secretaries of State for decision was irrelevant. And in any event the inspector did not explain with clear and adequate reasons his conclusion that more weight should be given to the potential harm he saw in Option 15 – including delay and its effect on regeneration – than the harm the proposed works would undoubtedly cause to heritage assets.

38. I cannot accept that argument. As was submitted by Mr Richard Kimblin Q.C. for the Secretaries of State and Ms Nathalie Lieven Q.C. for Network Rail, it does not truly reflect the approach adopted by the inspector and the Secretaries of State.

39. One must start with matters that are both uncontroversial and important. Mr Drabble did not attack the conclusion of the inspector in paragraph 596 of his report that there was a "pressing need" for the proposed works, or his conclusion in paragraph 599 that the

Ordsall Chord would result in "very substantial public benefits" providing "very strong justification for the Order", or the firm endorsement of those conclusions by the Secretary of State for Transport in paragraphs 7 and 8 of his decision letter. The need for the project, the urgency of that need, and the significance of the public benefits associated with it are entirely uncontroversial in these proceedings, as they were before the inspector and the Secretaries of State. This is the context in which Mr Drabble's submissions criticizing the inspector's approach to Option 15 as a suggested alternative must be viewed.

40. With those uncontentious matters in mind, I would make three general observations on the disputed parts of the inspector's report and the decision letters of the Secretaries of State.

41. First, I am entirely unpersuaded by Mr Drabble's submission that the Secretaries of State failed to discharge the requirements for decision-makers in section 16(2), 66(1) and 72(1) of the Listed Buildings Act. To be fair to Mr Drabble, this was not a submission that he pursued with any vigour, and in my view he was right not to do so. There are several distinct and accurate references to the statutory duties in the inspector's report (in paragraphs 204, 603, 877 and 878), and also in the decision letter of the Secretary of State for Transport, in which (in paragraph 9) he accepted the inspector's relevant conclusions. The Secretary of State for Communities and Local Government, in agreeing with the inspector that the listed building consents should be granted (in paragraph 5 of each of his decision letters), may also be taken to have adopted his conclusions on the statutory duties. Much of Mr Drabble's criticism of the inspector's report was focused on paragraphs 633 and 634. In paragraph 634 there is an explicit reference to this court's decision in *Barnwell Manor*. The inspector returned to it in his "Overall Conclusions" (in paragraphs 877 to 879). All of these passages in his report reflect a correct and complete understanding of the law. In paragraph 877 he left no room for any dispute about this. He expressly acknowledged the requirement that "considerable importance and weight" be given to the desirability of preserving a listed building or its setting and preserving or enhancing the character or appearance of a conservation area. And he very obviously did that. In the circumstances it cannot sensibly be argued that either the inspector or the Secretaries of State failed to grasp what the statutory duties required. Nor can it be argued that the requirements in those duties were not properly performed. They clearly were, in substance as well as in form.

42. Secondly, in my view, it is no less clear that the inspector and the Secretaries of State also had in mind the requirements of government policy in paragraphs 132 and 133 of the NPPF. Again, there are several references in the report and in the Secretary of State for Transport's decision letter to these policies (in paragraphs 205 to 207, 605, 607, 633 to 635, 696 and 697, and 875 to 880 of the report, and in paragraphs 11 and 16 of the decision letter). And again, the Secretary of State for Communities and Local Government may be taken to have had them in mind when he accepted the inspector's relevant conclusions (in paragraph 5 of each of his decision letters). In paragraph 634, having referred to the policy in paragraph 132 and to this court's decision in *Barnwell Manor*, the inspector acknowledged that substantial harm to heritage assets of the highest significance should be "wholly exceptional", and reinforced the point by saying that "the necessity for such harm" had to be "rigorously tested". In paragraph 873 he referred to the test set by the policy in paragraph 133 of the NPPF. It is plain from the foregoing assessment in paragraphs 633 to 635 and 696 and 697, and from the concluding analysis in paragraphs 875 to 880, that he understood and sought to apply

that policy. So too did the Secretaries of State: the Secretary of State for Transport in paragraphs 11 to 14 and 16 of his decision letter, and the Secretary of State for Communities and Local Government by necessary implication in paragraph 5 in each of his. I therefore see no scope for an argument that relevant national policy for heritage assets was misconstrued or ignored.

43. Thirdly, the inspector and the Secretaries of State also took into account and followed the guidance in paragraph 91 of the PPS5 Practice Guide. The inspector referred to it in describing the content and effect of the relevant statutory provisions, policy and guidance (in paragraph 608), and in his evaluation of Option 15 as a suggested alternative to the order scheme (in paragraph 634). The language of the guidance, or a paraphrase of it, is to be seen in his conclusion on Option 15 (in paragraphs 696 and 697) and in his "Overall Conclusions" (in paragraphs 875 to 879), which the Secretary of State for Communities and Local Government accepted, and it appears unmistakably in the decision letter of the Secretary of State for Transport (in paragraphs 11, 14 and 16).

44. Turning now to look more closely at Mr Drabble's argument, one has to begin by reminding oneself that inspector's reports and decision letters of the Secretary of State must always be read fairly and as a whole, and not with undue rigour. As Lord Brown of Eaton-under Heywood said in *South Bucks District Council v Porter (No. 2)* [2004] UKHL 33 (at paragraph 36 of his speech), "[decision] letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced". The crucial question here is whether, on a fair and unselective reading of the inspector's report, including his summary of the parties' evidence and submissions at the inquiry, he can be said to have misinterpreted or misapplied policy and guidance to which he repeatedly referred in his conclusions. I do not think it can properly be said that he did.

45. Mr Drabble's criticisms of paragraphs 633 and 634 of the inspector's report must be viewed in the light of Mr Whitby's case at the inquiry. The inspector's conclusions in those two paragraphs grapple with that case, as Mr Whitby chose to present it.

46. The conclusions in paragraph 633 are directed to Mr Whitby's contention that the harm the proposed works would cause to heritage assets was not "necessary", in the sense of paragraph 133 of the NPPF, because Option 15 was a "reasonable alternative" and Network Rail had not proved the contrary. As he said, the judgment he had to make here was "not a straightforward balance of harm to Middlewood Locks against the substantial benefits of an Ordsall Chord, which might be the case if Option 15 were before the Secretaries of State". This was right. Option 15 was not the order scheme, and the balance the inspector and the Secretaries of State had to strike was not, therefore, simply a balance between the benefit and harm of "an Ordsall Chord" on the alignment in that alternative. The inspector's remark that Option 15 was "not before the Secretaries of State because the promoters have rejected it" was also true as a matter of fact. It does not show that he was downplaying the merits of Option 15 in considering whether it enabled him to conclude, under the policy in paragraph 133 of the NPPF, that "the substantial harm" the proposed works would cause to heritage assets was "necessary to achieve substantial public benefits that outweigh that harm …". Far from it, in paragraph 646 he expressly accepted that Mr Whitby's masterplan "should not be assessed as if it were being put forward now for planning permission …".

47. As the inspector said at the end of paragraph 633, the issue for him and the Secretaries of State was whether Option 15 would provide a "reasonable alternative" to the order scheme, and would be on an "appropriate alternative site". The paragraph references given at the end of paragraph 633 relate to the inspector's summary of Mr Whitby's case on the policy in paragraph 133 of the NPPF and the guidance in paragraph 91 of the PPS5 Practice Guide, and Network Rail's response to English Heritage's objection in the same context. The inspector's reference to a "reasonable" alternative to the order scheme and to "an appropriate alternative site" corresponds to the guidance in paragraph 91 of the PPS5 Practice Guide. He was faithfully applying the guidance, which amplifies the policy in paragraph 133 of the NPPF, that "[for] the loss to be necessary there will be no other reasonable means of delivering similar public benefits, for example through different design or development of an appropriate alternative site" (my emphasis). As Ms Lieven submitted, he was not simply undertaking a conventional comparison between alternative sites or schemes, without heed to the relevant statutory imperatives for decision-makers in sections 16(2), 66(1) and 72(1) of the Listed Buildings Act, and the relevant national policy and guidance. On the contrary, he was doing exactly what statute requires of a decision-maker in a case of substantial harm to the significance of designated heritage assets, including substantial harm to grade I listed buildings, and exactly what the decision-maker is enjoined to do by government policy in the NPPF and by the PPS5 Practice Guide. Once this is recognized, the main thrust of Mr Drabble's argument falls away.

48. I see no error in the approach described by the inspector in paragraph 634 of his report. Five things may be said about that paragraph. First, the inspector's comment that the judgment to be made was "not merely a comparison of the heritage impacts of the two alternatives" was not inconsistent either with NPPF policy or with the PPS5 Practice Guide. The same may also be said of his observation that "it does not follow that substantial harm to heritage assets on an application site should necessarily justify substantial harm to other interests on an alternative site". Secondly, it was not wrong to say, as he did, that "[the] test is one of reasonableness". This again was clearly a reference to the guidance in paragraph 91 of the PPS5 Practice Guide, where the concept of necessity is described in terms of there being "no other reasonable means of delivering similar public benefits" (my emphasis). And in the next sentence the inspector referred to "[the] relevant PPS5 guidance" relating "specifically to cases of substantial harm or total loss of significance". Thirdly, as I have said, he directed himself to the relevant part of the policy in paragraph 132 of the NPPF, which refers to substantial harm to heritage assets of the highest significance being "wholly exceptional". And he said that the "the necessity for such harm must be rigorously tested", which is clearly a reference to the policy in paragraph 133. Fourthly, he quoted the relevant passage of Sullivan L.J.'s judgment in *Barnwell Manor* (in paragraph 28), where Sullivan L.J. referred to the section 66(1) duty applying "with particular force if harm would be caused to the setting of a Grade I listed building, a designated heritage asset of the highest significance". And fifthly, he noted that "an exceptional degree of justification" is not a test to be found in the NPPF or the PPS5 Practice Guide. All of this was impeccable.

49. The inspector did not impose on Mr Whitby the onus of demonstrating the superiority of Option 15. Paragraph 635 of his report, which introduces his consideration of Option 15 as a suggested "reasonable alternative" to the proposed works, indicates the right approach. He said there that it was necessary to consider "the issues raised by Network Rail to justify [the] dismissal" of Option 15. The task of justifying the rejection of

Option 15 lay with Network Rail. The inspector acknowledged this. There is nothing in the following assessment to suggest that he thought it was incumbent on Mr Whitby to disprove the case for the order scheme.

50. I do not think one can fault the inspector's careful analysis of the considerations relevant to the merits of Option 15 as an alternative to the proposed works. Mr Drabble did not produce any cogent complaint about it. The decisive factor, though not the only one, was the harm that a railway on the alignment of Option 15 would cause to the development of Middlewood Locks, and the serious consequences of this for the regeneration of central Salford. Delay clearly was a consideration, though on a fair reading of the inspector's conclusions in paragraphs 694 and 695 of his report, not critical in itself. Uncertainty as to the prospects of a scheme based on Option 15 coming forward at all was another consideration, though again not critical.

51. The inspector's conclusions in paragraphs 696 and 697, accepted by the Secretary of State for Transport in paragraph 14 of his decision letter, show, once again, that he had adopted the approach required by NPPF policy and the PPS5 Practice Guide. The "outstanding engineering issues", the "considerably higher costs" and "the disruption to rail travel", taken together, were not enough to rule out Option 15 (paragraph 696). At this stage the inspector seems to have been applying a still more demanding test than is to be found either in the NPPF or in the PPS5 Practice Guide: not merely the test of whether the substantial harm that the proposed works would cause to designated heritage assets was "necessary" – the word used in both in paragraph 133 of the NPPF and in the paragraph 91 of the PPS5 Practice Guide – but whether it was "absolutely necessary". Applying this test, he found the consideration that brought the balance down against Option 15 was "the likely adverse impacts on the prospects of successful comprehensive development of the Middlewood Locks site, which would have serious consequences for the regeneration of Central Salford, both in the immediate and longer term …". With this factor included, the scales came down "clearly" against Middlewood Locks being seen as an "appropriate alternative site" – again the language of paragraph 91 of the PPS5 Practice Guide. It was on this basis that the inspector concluded, in paragraph 697, that Option 15 did not provide a "reasonable alternative" to the proposed works.

52. This was a classic exercise of decision-making judgment, wholly in line with the policies in paragraphs 132 and 133 of the NPPF and the guidance in paragraph 91 of the PPS5 Practice Guide. Paragraph 133 is not prescriptive as to the considerations that may be relevant to an assessment of the kind it requires. This will depend on the particular circumstances of the case in hand, which will vary widely. But in this case it was undeniably open to the inspector, and in their turn the Secretaries of State, to bring the harm to the redevelopment of Middlewood Locks and to the regeneration of central Salford into account in assessing the merits of Option 15 as an alternative to the order scheme. Indeed, the assessment would have been futile if this had not been done. The potential effects of the Option 15 alignment on regeneration were patently relevant to the question of whether there was any "other reasonable means of delivering similar public benefits" and whether Middlewood Locks was "an appropriate alternative site", and therefore whether the loss to heritage assets was "necessary". In short, it was essential to consider the potential harm to regeneration in deciding whether it was in the public interest for the proposed works to be approved.

53. The inspector's "Overall Conclusions", which were accepted by the Secretary of State for Transport in paragraph 16 of his decision letter, flowed from the assessment he had already set out. In my view they too demonstrate an entirely lawful approach, in accordance with the Listed Buildings Act duties and with government policy in the NPPF and the guidance in the PPS5 Practice Guide. The inspector adhered to the approach confirmed by the Court of Appeal in *Barnwell Manor*, subsequently re-affirmed in *Jones v Mordue*, and to the relevant policy and guidance. He identified the two strands to the test in paragraph 133 of the NPPF, namely necessity and the question of whether substantial public benefits outweigh the harm to heritage assets. He applied both strands of the test properly, and in clearly reasoned conclusions – the first strand in paragraphs 875 and 876, the second in paragraph 877. On a fair reading of paragraphs 873 to 880, in particular paragraphs 875 and 880, he found the harm to regeneration associated with Option 15 sufficient to exclude that alternative as a "reasonable means" of delivering the public benefits of an Ordsall Chord and as an "appropriate alternative site". Inherent in this conclusion is that the harm to regeneration associated with Option 15 was, in his view, decisively greater than the harm to heritage assets of the highest significance associated with the order scheme. There is, and can be, no challenge to any of these conclusions. They represent an entirely reasonable exercise of planning judgment. And the reasons given for them were perfectly adequate and perfectly clear.

54. In my view, therefore, Mr Drabble's argument falls a long way short of establishing any error of law in the decisions made by the Secretaries of State in this case. The requirements of sections 16, 66 and 72 of the Listed Buildings Act were fully and lawfully met. Relevant policy for heritage assets in the NPPF and the guidance in paragraph 91 of the PPS5 Practice Guide were properly construed and lawfully applied.

Conclusion

55. It is for those reasons that I would dismiss these appeals.

Lord Justice Hamblen

56. I agree.

Lord Justice Simon

57. I also agree.