



Neutral Citation Number: [2023] EWCA Civ 359

Case No: CA-2022-002218

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
MR JUSTICE HOLGATE
[2022] EWHC 2752 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 March 2023

Before :

SIR KEITH LINDBLOM
(SENIOR PRESIDENT OF TRIBUNALS)
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

Between :

EAST QUAYSIDE 12 LLP

Appellant

- and -

**THE COUNCIL OF THE CITY OF NEWCASTLE UPON
TYNE**

Respondent

- and -

**(1) SECRETARY OF STATE FOR LEVELLING UP,
HOUSING AND COMMUNITIES**

(2) ST ANN'S QUAY MANAGEMENT LIMITED

Interested Parties

**Paul Tucker KC and Freddie Humphreys (instructed by Womble Bond Dickinson (UK)
LLP) for the Appellant**

**Anjoli Foster (instructed by the Council of the City of Newcastle upon Tyne) for the
Respondent**

The Interested Parties did not appear and were not represented

Hearing date : 3 March 2023

Approved Judgment

This judgment was handed down remotely at 3.45pm on 31 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Richborough Estates

The Senior President of Tribunals:

Introduction

1. The central question in this case is whether an inspector who allowed an appeal against the refusal of planning permission for a large development of housing and commercial uses in the East Quayside area of Newcastle upon Tyne erred in law when considering the likely effects of the development on “heritage assets”, in particular the setting of St Ann’s Church, a grade I listed building. It does not give rise to any new point of law.
2. The appellant, East Quayside 12 LLP, is the developer. With permission granted by Lewison L.J., it appeals against the order of Holgate J., dated 1 November 2022, allowing an application made by the respondent, the Council of the City of Newcastle upon Tyne, under section 288 of the Town and Country Planning Act 1990 and quashing the decision of the inspector appointed by the Secretary of State for Levelling Up, Housing and Communities, the first interested party, to allow East Quayside 12’s appeal under section 78 of the 1990 Act against the council’s refusal of planning permission for development on Plot 12, East Quayside. The proposal was for the construction of 289 apartments and up to 430 square metres of residential amenity and commercial space in a building of between 11 and 14 storeys, with parking and other development. An objector, St Ann’s Quay Management Ltd., is the second interested party. It supported the council’s challenge at the hearing below.
3. East Quayside 12’s application for planning permission was submitted to the council in March 2020. The council refused it in March 2021. The inspector held an inquiry into East Quayside 12’s section 78 appeal over seven days in March 2022. Her decision allowing the appeal is in a decision letter dated 6 May 2022. The council’s challenge under section 288 was on three grounds. We are concerned only with one of those grounds, ground 2, which asserts that the inspector fell into error in assessing the harm the development would cause to the setting of St Ann’s Church. The challenge succeeded on that ground alone. The Secretary of State did not appeal against the judge’s order. He has taken no part in the proceedings in this court. Neither has St Ann’s Quay Management.

The issues in the appeal

4. Ground 2 of the section 288 application was this:

“In assessing the harm to the significance of St Ann’s Church as at the “lower end of less than substantial harm” the Inspector failed to pay special regard to the desirability of preserving the Church’s setting contrary to section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 [“the Listed Buildings Act”] and failed to attribute great weight to the conservation of the Church contrary to the National Planning Policy Framework [“the NPPF”], and/or had regard to irrelevant considerations and/or acted irrationally. Further, and/or alternatively, the Inspector failed to provide proper reasons.”

5. Holgate J. largely accepted those contentions. East Quayside 12 says he was wrong to do so. Its appeal to this court raises two main issues. The first is whether the judge wrongly interpreted the last sentence of paragraph 71 of the decision letter, in which the inspector said that, "... given the key constraints of the plot and the nature of the harm identified, this is towards the lower end of any such scale within that classification" – that is, "less than substantial harm". The second is whether the judge was wrong to conclude that the inspector's "legal error" in paragraph 71 tainted her disagreement with Historic England's advice that the harm to the setting of the listed building would be "moderate". These two issues can conveniently be dealt with together.

Section 66(1) of the Listed Buildings Act

6. Section 66(1) of the Listed Buildings Act provides:

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

Relevant national policy and guidance

7. In the version of the NPPF current at the time of the inspector's decision, paragraph 195 states, under the heading "Proposals affecting heritage assets":

"195. Local planning authorities should identify and assess the particular significance of any heritage asset that may be affected by a proposal (including by development affecting the setting of a heritage asset) taking account of the available evidence and any necessary expertise. They should take this into account when considering the impact of a proposal on a heritage asset, to avoid or minimise any conflict between the heritage asset's conservation and any aspect of the proposal."

8. Under the heading "Considering potential impacts", paragraphs 199, 200 and 202 state:

"199. 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 (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.

200. Any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification. Substantial harm to or loss of:

...

b) assets of the highest significance, notably ... grade I and II* listed buildings ... , should be wholly exceptional.

...

202. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.”

9. In its guidance on the “Historic Environment”, the Planning Practice Guidance issued by the Government in July 2019 (“the PPG”) states in paragraph 008, under the heading “How can proposals avoid or minimise harm to the significance of a heritage asset?”, that “[early] appraisals, a conservation plan or targeted specialist investigation can help to identify constraints and opportunities arising from the asset at an early stage”, and that “[such] appraisals or investigations can identify alternative development options, for example more sensitive designs or different orientations, that will both conserve the heritage assets and deliver public benefits in a more sustainable and appropriate way”. In paragraph 018 the PPG says that where potential harm to designated heritage assets is identified, it needs to be categorised as either less than substantial harm or substantial harm, and that “[within] each category of harm (which category applies should be explicitly identified), the extent of the harm may vary and should be clearly articulated”.
10. Guidance has also been issued by Historic England in a document entitled “Historic Environment Good Practice Advice in Planning: 3” (“GPA3”), which describes the steps to be taken in assessing harm to the significance of an historic asset:
 - “Step 1: Identify which heritage assets and their settings are affected
 - Step 2: Assess the degree to which these settings and views make a contribution to the significance of the heritage asset(s) or allow significance to be appreciated
 - Step 3: Assess the effects of the proposed development, whether beneficial or harmful, on the significance or on the ability to appreciate it
 - Step 4: Explore ways to maximise enhancement and avoid or minimise harm”.
11. Paragraph 39 of GPA3 gives advice on step 4:

“Options for reducing the harm arising from development may include the repositioning of a development or its elements, changes to its design, the creation of effective long-term visual or acoustic screening, or management measures secured by planning conditions or legal agreements. For some developments affecting setting, the design of a development may not be

capable of sufficient adjustment to avoid or significantly reduce the harm, for example where impacts are caused by fundamental issues such as the proximity, location, scale, prominence or noisiness of a development. In other cases, good design may reduce or remove the harm, or provide enhancement. Here the design quality may be an important consideration in determining the balance of harm and benefit.”

Plot 12

12. Plot 12 comprises about 0.72 hectares of open land on the northern bank of the River Tyne. The upper part of the site extends to City Road to the north. The lower part is adjacent to the quay. Between the two levels is a steep grass embankment, concealing a retaining wall. The difference in level is about 15 metres. St Ann’s Church is to the north of City Road, on higher ground, in a locally listed graveyard sloping down to the road. A grade II listed building, the Sailor’s Bethel, stands to the east of Plot 12. Two conservation areas have been designated on either side of the site, the Lower Ouseburn Conservation Area to the east, the Central Conservation Area to the west.
13. Regeneration in the Quayside area of the city has taken place over many years. In 1989 the Tyne and Wear Development Corporation published the Newcastle Quayside Masterplan, prepared by Terry Farrell and Partners. This envisaged a row of commercial buildings with Plot 12 at its end, and housing to the east. Plot 12 was intended to be developed as a hotel. In 2003 the Urban Landscape Study of the Tyne Gorge was prepared for the council and English Heritage (now Historic England), identifying opportunities for new development, but efforts to bring forward proposals for mixed use development on Plot 12 came to nothing. With Malmo Quay to the east it was the last land awaiting development in the masterplan area. It eventually came into the ownership of Homes England, whose statutory remit was to secure the regeneration or redevelopment of land. In November 2018 Homes England published a planning brief for its development, in consultation with the council.

The planning brief

14. The planning brief was not a local development document under the Planning and Compulsory Purchase Act 2004. But in a letter attached to the brief the council said it “provides a framework for how the site can be developed”, and that this was “an exciting opportunity to provide a high quality scheme on this tightly constrained site”. The brief welcomes the prospect of development taking place on both the lower and upper parts of the site. It envisages a residential-led mixed use development, and indicates the relevant considerations for the design of such a scheme.
15. In section 3.0, “Heritage”, describing the “Historic context”, the planning brief says that “[historically], the East Quay site was a hive of industrial activity, but “was cleared as part of the redevelopment of the quayside in the late twentieth century and has stood empty for a number of years”. Under the heading “Historic environment”, it says:

“The site contributes to the setting of Saint Ann’s Church, which is identified as a grade I listed building (designated heritage asset). It is acknowledged that

“any proposals for development on this site would result in a level of harm to the setting of Saint Ann’s Church”, and it is emphasised that “[any] proposal for development of this site should look to ensure that the level of harm is considered as “less than substantial” as identified within paragraph 134 of [the NPPF]. ...”.

16. Text under the heading “Historical analysis and constraints” includes this:

“There are several heritage assets in the area surrounding the site, notably the Grade I listed Church of St Ann (known as St Ann’s Church). St Ann’s Church has been a site of worship since 1344. The church was built between 1764 and 1768 and is a rare surviving example in Newcastle of an eighteenth century church. The topography of the Tyne Gorge meant that, early in its history, the church was a focal point for its parish, the wider community and river traffic. The connection between the church and the river is a significant experience both visually and historically. ... Some heritage assets are appreciated predominantly through their landmark element, symbolising their function, whether the spires of St Ann’s and [Sailor’s Bethel], or the chimney of the Toffee Factory.

Views to and from St Ann’s Church have evolved over time, from a strong connection with the river in the eighteenth century when the church was first built, through the expansion of industry along the banks of [the] Tyne, and subsequent twentieth and twenty first regeneration. The church and the other surrounding heritage assets are experienced within this contemporary built form. Currently, the vacant and neglected East Quay development site detracts from the experience of the surrounding heritage assets.

The setting of St Ann’s Church and the other identified heritage assets must be taken into account in any proposals coming forward.

In assessing the impact upon views towards and the setting of the designated heritage asset (Saint Ann’s Church), views of the church should be considered not only from St Ann’s [Steps] to the right of the site, but also from key viewpoints identified by [the council] and should take into consideration changing perspectives perceived whilst progressing along the river frontage.

...”

17. In section 4.0, “Site Analysis”, under the heading “Constraints and opportunities”, several constraints on the site’s development are identified:

“

- Potential heritage impact upon the Church of St Ann and its setting
- Tyne Gorge study and impact upon established key views
- Site topography, retaining structure and potential ground abnormalities [sic]

- Juxtaposition of the scale and massing of adjacent buildings – the site sits at the point of [convergence] between large scale, set back development to the west and low, domestic scale development, stepped forward to the quay wall to the east
- Impact of overshadowing and daylight issues to adjacent buildings
- Bus routes/highways”.

18. In section 5.0, “Design Parameters”, under the heading “... Visual connection”, the planning brief says:

“A perpendicular visual connection between the church of St Ann and the River Tyne is recognised as important within the heritage analysis and referenced in the listing. Within this view corridor an opportunity for forming a viewing/resting platform at the head of the existing stairs to the east of the site is recognised as a community benefit.”

Historic England’s advice on East Quayside 12’s proposed development

19. On 15 May 2020 Historic England wrote to the council, setting out its advice and recommendation on the proposal. Its advice included these observations:

“Historic England’s remit with this application focuses on the impact upon the significance of St Ann’s Church, a grade I listed building, through changes to its setting. When opened in 1768 the church would have served a community whose working life was on and close to the Tyne, its siting above the river bank reflects and reinforces this. Its surroundings have changed markedly since that time, running through intensive industrialisation to equally intensive regeneration in the form of housing. Its connection with the river has been denuded in the process but not lost and is powerfully expressed within the church yard and at points along the Tyne Gorge, where it appears as one of the historic landmarks that punctuate the central section of the Tyne Gorge.

The visual connection with the river is greatly helped by the openness of Plot 12. This is accidental rather than long-standing or intentional and it is acknowledged that the redevelopment of the plot is in line with its past history and current land use in the area. The issue is how continuing the established height of development along City Road curtails the last large open vista between church and river.

...

To conclude, the setting of St Anne’s Church, as expressed by its relationship with the river, makes a strong contribution to its significance as a grade I listed building and the curtailing of that relationship will be harmful to its significance to a moderate degree. Mitigation in the form of landscaping around the proposal reduces harm but does not remove it.

...”

The recommendation included this:

“Historic England has concerns regarding the application on heritage grounds. We consider that the issues and safeguards outlined in our advice need to be addressed in order for the application to meet the requirements of paragraphs 194 and 196 of the NPPF.

...”

20. After changes had been made to the proposal, Historic England sent a further letter to the council, dated 20 November 2020, in which its advice was this:

“The amendments present a reduction in the eastern width of the proposed apartments. This gives a slightly wider viewing corridor between the River Tyne and the grade I listed St Anne’s Church before it would be cut off by this proposal.

In views directly to the south the increased space is noticeable and the church more prominent. However, this is a relatively narrow field of view and the blocking impact of the proposal remains a concern that causes a moderate degree of harm to the significance of the listed church through change to its setting. Consequently Historic England retains its original view outlined in our letter of 15th May 2020.”

The recommendation was, in substance, the same as in the previous letter.

The inspector’s conclusions on the likely effects of the development on heritage assets

21. At the inquiry into East Quayside 12’s section 78 appeal the likely degree of harm to the significance of St Ann’s Church as a heritage asset was a matter of dispute. The parties agreed that any harm caused by the proposed development to its setting fell into the category of “less than substantial harm” in the NPPF, not “substantial harm”. Historic England, the council and St Ann’s Quay Management all maintained that the development would cause a “moderate” degree of “less than substantial harm”. East Quayside 12, having contended at first that the development would cause a “low” level of harm, changed its position at the inquiry, and said there would be no harm.
22. In her decision letter the inspector identified as one of the “main issues” in the appeal “[the] effect on designated heritage assets” (paragraph 7). She dealt with that issue in a section headed “Heritage” (paragraphs 62 to 87). Having referred to the location of St Ann’s Church (in paragraph 62), she went on to describe the listed building and its setting and their architectural and historic significance (in paragraphs 63 to 65):

“63. Dating from 1764-68, St Ann’s Church was built by William Newton, a prominent local architect, and replaced a previous chapel on the site. It has an understated classical design and is a rare surviving example in Newcastle. It is

of sandstone construction and has a rectangular plan form and pedimented western elevation with clock tower and elegant spire above, and a pedimented porch. It is set in a graveyard (locally listed) which slopes down towards City Road and is bounded by stone wall and railings.

64. Historically the Church served the community working along the Tyne. It was originally set in an isolated position but its setting evolved as industry expanded in this area and with the development of Quayside with railways and warehousing giving rise to intervening development. Today the Church is surrounded by modern buildings. Due to its position on the top of the plateau, above City Road, it has a visual presence in the wider area; its tower is visible across a long distance as a backdrop as part of the Newcastle skyline. The graveyard offers verdant relief from the built-up townscape along this main transport route. St Ann's overlooks the Quayside across Plot 12, and although accidental and unplanned, clear views of the Church are enjoyed from this area and have been for a considerable number of years.

65. Based on the above analysis, the Church has architectural significance as a fine example of a Georgian Church and historic significance, derived from its association with William Newton, and its association with the Quayside. Its setting also contributes to its significance as a landmark building and its visual connection with the Quayside and cityscape. As a cleared site, Plot 12 falls squarely within the setting of this asset."

23. Turning to the relevant content of the masterplan documents and the planning brief, she said this (in paragraph 66):

"66. The effect of development at Plot 12 upon St Ann's Church has long been recognised; the masterplan documents, the Tyne Gorge Study and Planning Brief all reference it. Indeed, the Planning Brief specifically highlights that *"The site contributes to the setting of Saint Ann's Church ... It is acknowledged that any proposal for development on this site would result in a level of harm to the setting of Saint Ann's Church. Any proposal for development of this site should look to ensure that the level of harm is considered as 'less than substantial.'*" In reviewing the proposals, Historic England also identified such harm in their response to the proposals, to a moderate degree."

24. She then considered the likely effects of the proposed development on the setting of the listed building (in paragraphs 67 to 71):

"67. The Heritage Impact Assessment (HIA) submitted with the application also considered there to be less than substantial harm to St Ann's Church, albeit to a low level, arising from the development within its setting. However, the appellant's witness to the Inquiry revised that position and considered there to be no harm.

68. In light of the scale of the development and its location on the Quayside harm would be caused to the significance of the Church, as derived from its

setting. While the current open aspect to the Quayside is only a consequence of the site clearance, this is a view that has been open and enjoyed for a significant period which the development will visually disrupt. A development of this scale and stature could not reasonably be judged as improving the setting of this Grade I listed building as put to me by the appellants.

69. That said, the positioning of the development would retain a framed open view of the Church from the Quayside to the east of the proposed building. This would be to a smaller degree than what is currently experienced, however I am mindful that the Quayside is a vibrant and predominantly pedestrian space (to both the Newcastle and Gateshead sides), and thus it would be experienced from kinetic movements rather than from fixed vantage points. The visual link from the Church, across the Graveyard to the Tyne River would also be retained, albeit reduced. Longer distance views of the spire would largely be retained. The set back of the northern elevation of the proposed building and the landscaping would also provide space along City Road and to the heritage asset.

70. The Framework requires that proposals should avoid or minimise any conflict between a heritage asset's conservation and any aspect of the proposal. While I have identified issues with specific design elements of the development, my view is that it is not these which would cause heritage harm, and I agree with the Planning Brief that any development at Plot 12 would affect the setting of St Ann's Church [the inspector's emphasis]. In this regard I consider that there could not be a vastly different design response which could further minimise the harm caused to this Grade I listed building.

71. Overall, the level of harm to St Ann's Church is less than substantial. This assessment of harm still amounts to a significant objection and I am mindful that the more important the asset, the greater the weight should be. [Here a footnote refers to paragraph 199 of the NPPF.] However, given the key constraints of the plot and the nature of the harm identified, this is towards the lower end of any such scale within that classification."

25. When she came to her "Heritage Conclusions", she said (in paragraph 86):

"86. However, there would be less than substantial harm to St Ann's Church and as such there would be conflict with CS Policy UC14 which seeks to sustain and enhance the significance of heritage assets and their setting and DAP Policy DM16 which requires the conservation and enhancement of the setting of heritage assets."

26. In the section headed "Planning and Heritage Balance", under the sub-heading "Overview of Findings", she said (in paragraph 130):

"130. I have identified some limited policy conflict in terms of character and appearance, relating to architectural design. I have also found harm to the setting of St Ann's Church, qualified as being towards the lower end of less

than substantial harm. I have found, however, no harm to other heritage assets.”

and under the sub-heading “Balance” (in paragraphs 138 to 140, and 145):

“138. ... Paragraph 202 of the framework also requires that less than substantial harm to a heritage asset should be weighed against the public benefits of the proposal.

139. What is extremely clear to me is that Plot 12 is an exceptionally difficult site to develop with many competing elements and, in this regard, this is a finely balanced decision with clear policy conflict but with important and weighty material considerations in play. Both the Council and SAQML also had very credible witnesses, particularly for the design and living conditions issues.

140. Beginning with heritage, any harm to heritage assets should be given considerable importance and weight, nevertheless greater weight can be afforded to public benefits. The benefits, as outlined above, would comprise public benefits for the purpose of this balancing exercise. Taken together, the improvements to the churchyard, the repairs to St Ann’s Stairs, plus the more general economic, social and environmental benefits are more than sufficient to outweigh the lower end of less than substantial harm to the significance of St Ann’s Church. I am thus satisfied that there is clear and convincing justification for that harm, in accordance with paragraph 202 of the Framework.

...

145. Overall, in light of my analysis above, I consider that the benefits would outweigh the planning harms as material considerations and there would be no justification to hold back permission for an unknown future scheme which may or may not come forward given the site constraints. This points towards the grant of planning permission.”

Holgate J.’s relevant conclusions

27. Before the judge, the council put forward two main arguments on ground 2. The first was that the inspector’s conclusion in paragraph 71 of her decision letter, that the degree of likely harm to the significance of St Ann’s Church was “towards the lower end” of “less than substantial harm”, was based not merely on her findings in paragraphs 63 to 69 – as the Secretary of State and East Quayside 12 maintained – but also, wrongly, on her conclusion in paragraph 70 that the level of harm could not be minimised further by a different design, a conclusion legally irrelevant to her assessment of the degree of harm that would be caused to the significance of the listed building by the development actually proposed. Thus she failed to comply with the decision-maker’s duty under section 66(1). The second main argument was that she failed to deal properly with the advice given by Historic England. She did not give

“great” or “considerable” weight to that advice, nor did she provide “cogent and compelling reasons” for departing from it.

28. On the first argument, Holgate J. pointed out that step 4 in paragraph 39 of GPA3 recognises that there may be some cases where an alternative design is not available, so that harm cannot be reduced further, and others where an alternative could reduce harm. These considerations, he said, “are treated as being relevant to the balance between scheme harm and benefit, not to assessing the level of harm that the proposed scheme would cause”. This point had been made on behalf of the council, and “was not disputed by [the Secretary of State] or by [East Quayside 12]”. Not surprisingly, said the judge, “GPA 3 does not suggest that either the availability or non-availability of an alternative option reducing the harm that would be caused by the scheme for which consent is sought can be relevant to deciding how much harm that scheme would actually cause”. He “[did] not see how logically a contrary view could be taken”, and again “[the Secretary of State] and [East Quayside 12] did not suggest otherwise”. They had “sought to defend [paragraph 71 of the decision letter] on the basis that it had no regard to [paragraph 70] and so the issue of law did not arise” (paragraph 65 of the judgment).
29. The judge was in “no doubt that the last sentence of [paragraph 71 of the decision letter] makes it clear that the [inspector’s] conclusion on the level of harm to [the listed building] was partly based on her conclusions in [paragraph 70]”. He saw “no other way of reading [paragraph 71]”. The contested sentence in that paragraph, he said, “relies expressly on the nature of the harm previously identified (e.g. in [paragraph 69]) and in the same breath relies expressly upon the key constraints of the site”. Those “constraints were referred in several parts of the decision letter specifically in the context of considering alternative design solutions”. The judge accepted the submission for the council “that the “key constraints of the [plot]” can only be read as including the reasoning in [paragraph 70]”. The fact that the reasoning in paragraph 70 was placed immediately before paragraph 71, he said, “supports this reading” (paragraph 70). It followed that the inspector “took into account a legally irrelevant consideration when she reached her conclusion in [paragraph 71] on the level of harm that would be caused by the proposed development itself”. As the judge put it, “[even] if that level of harm had been “minimised”, in the sense that it could not be reduced any further by adopting a different design solution, that tells the reader nothing about what that “minimised” level of harm amounts to”. In any given case, he said, “harm to a heritage asset might be “minimised” by the design solution selected, but nevertheless still be “substantial”, or at the upper end or in the middle of the “less than substantial harm” range” (paragraph 71).
30. Had he “not been certain about the proper reading of the decision letter”, the judge would have accepted the council’s alternative submission that the inspector’s reasoning in paragraph 71 was “inadequate in the sense explained in [*Save Britain’s Heritage v Number 1 Poultry Ltd.* [1991] 1 W.L.R. 153 and *South Bucks District Council v Porter (No.2)* [2004] 1 W.L.R. 1953]”. The level of harm to the significance of the listed building was a “principal important controversial issue”. Neither the Secretary of State nor East Quayside 12 had suggested otherwise. The inspector’s “reliance in [paragraph 71 of the decision letter] on “the key constraints of the plot”, he said, “raises at least a “substantial doubt” as to whether she took into account a consideration which was irrelevant to her assessment of the level of harm

that would be caused by the appeal scheme, namely her conclusion in the last sentence of [paragraph 71] applying para. 195 of the NPPF”. The inadequacy of the reasons given had “caused genuine and substantial prejudice” both to the council and to St Ann’s Quay Management (paragraph 72).

31. On the second argument, in the judge’s view, the “legal error” identified in the council’s first argument “also taints the basis upon which the Inspector disagreed with Historic England’s advice” (paragraph 79).
32. Finally, under the heading “Discretion”, the judge concluded, having in mind the well-known principle in *Simplex GE Holdings Ltd. v Secretary of State for the Environment* [2017] PTSR 1071, that it was “impossible ... to say that the decision to grant planning permission would inevitably have been the same” if the legal error had not been made, or if the inspector’s reasons had not been legally inadequate (paragraph 110).

Did the inspector err in law in her assessment of harm to the setting of the listed building?

33. On the first of the two main issues in the appeal, Mr Paul Tucker K.C., for East Quayside 12, submitted that in paragraph 70 of the decision letter the inspector had applied her mind to the policy in paragraph 195 of the NPPF “to avoid or minimise any conflict between the heritage asset’s conservation and any aspect of the proposal”. She concluded, in effect, that the design of the proposed development had achieved that. She did so in the light of the planning brief. As she saw it, “there could not be a vastly different design response which could further minimise the harm caused to this Grade I listed building”. This conclusion was not an assessment of the intrinsic harm the development would cause to the significance of the listed building. It was the inspector’s view on the question implicit in paragraph 195 of the NPPF.
34. Paragraph 71 of the decision letter, Mr Tucker submitted, was clearly intended by the inspector to be a summary of the preceding eight paragraphs – all of which the judge had found legally impeccable. It should not be read only with paragraph 70. The inspector had done two things. She had lawfully considered the likely effects of the development on the setting of the listed building, concluding that the harm it would cause would be at the “lower end” of “less than substantial harm”. And she had also, separately, applied the test required by the policy in paragraph 195 of the NPPF. It might have been better if the words “the key constraints of the plot” had not appeared in the final sentence of paragraph 71. However, the court had always stressed that inspectors’ decision letters should not be read in a hypercritical or overly legalistic manner, but fairly and as a whole, and with reasonable benevolence. Reading the decision letter as it should be read, one could not fault the inspector’s assessment of harm to the listed building in paragraphs 63 to 71. The inspector’s reasons were neither unintelligible nor inadequate. The judge was wrong to conclude otherwise. It would follow, Mr Tucker submitted, that his conclusion on the second issue in ground 2 was also incorrect.
35. For the council, Ms Anjoli Foster submitted that the judge’s conclusions were clearly correct. It was telling that the Secretary of State had not sought to impugn the judge’s analysis and had not supported East Quayside 12’s appeal. Here, the inspector did not

say that she considered the “nature of the harm identified” to be sufficient in itself to found her conclusion on harm in paragraph 71. She also relied on “the key constraints of the site”, which clearly brought in the comparative conclusion at the end of paragraph 70. It was impossible to say that she would necessarily have found the harm to the listed building likely to be caused by the development would fall at the “lower end” of the “less than substantial” category if she had not done that. Alternatively, Ms Foster submitted, the inspector’s reasons were defective, leaving a “substantial doubt” over the lawfulness of her approach to the assessment of harm.

36. Determining which of those competing arguments is correct should not be an unduly taxing or complicated exercise. The principles that guide it are familiar. Inspectors’ decision letters, like planning officers’ reports to committee, ought not to be read with excessive legalism but with appropriate benevolence, bearing in mind they are written for parties who understand the issues to be decided, and with appropriate respect for the expertise of specialist planning inspectors (see, for example, the judgment of Lord Carnwath in *Hopkins Homes Ltd. v Secretary of State for Communities and Local Government* [2017] UKSC 37; [2017] 1 W.L.R. 407, at paragraphs 24 to 28, and, in this court, the leading judgment in *St Modwen Development Ltd. v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643 [2018] PTSR 88, at paragraphs 6 and 7, and the judgment of Sales L.J., as he then was, in *Daventry District Council v Secretary of State for Communities and Local Government* [2017] J.P.L. 402, at paragraph 35).
37. Where an inspector’s reasons are called into question, the court will ask itself whether the interests of the applicant have been “substantially prejudiced” by the deficiency of the reasons given. It will ask itself whether the reasons are “intelligible and adequate”, and, in particular, whether they enable the reader to understand what conclusions were reached on the “principal important controversial issues”, and why the appeal was decided as it was. It will only set aside the decision if the reasoning gives rise to a “substantial doubt as to whether [the inspector] erred in law ...” (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council v Porter (No.2)*, at p.1964B-G, and the speech of Lord Bridge of Harwich in *Save Britain’s Heritage*, at pp.166 to 168). The question for the court will be whether the decision-maker’s reasons leave “genuine”, rather than merely “forensic”, doubt over what was decided and why (see the judgment of Lord Carnwath in *R. (on the application of CPRE Kent) v Dover District Council* [2017] UKSC 79, at paragraph 42).
38. Before us, as before the judge, there was much common ground. In the first place, it was acknowledged that the nature of the decision-maker’s duty under section 66(1) of the Listed Buildings Act has been considered several times in this court (see the judgment of Sullivan L.J. in *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137; [2015] 1 W.L.R. 45, at paragraphs 16 to 24 and 26 to 29; and, generally, the notes in the Encyclopaedia of Planning Law and Practice, at paragraphs L66.03 to L66.06). Section 66(1) does not state how a decision-maker must go about discharging the duty to “have special regard to the desirability of preserving the [listed] building or its setting ...”. Under government policy in the NPPF, what amounts to “substantial harm” or “less than substantial harm” in a particular case will always depend on the circumstances. This is a matter of fact and planning judgment for the decision-maker. The NPPF does not prescribe any particular approach to identifying harm or gauging

its extent. And the requirement to give “considerable importance and weight” to any harm to the setting of a listed building does not mean that the weight to be given to the desirability of preserving its setting is the same in every such case (see the leading judgment in *City and Country Bramshill Ltd. v Secretary of State for Housing, Communities and Local Government* [2021] 1 W.L.R. 5761, at paragraphs 60, 61 and 71 to 83, and the leading judgment in *Catesby Estates Ltd. v Steer* [2018] EWCA 1697, at paragraph 30).

39. Secondly, it has been accepted on both sides in this appeal, as evidently it was in the court below, that in assessing harm to the significance of a heritage asset, including harm to the setting of a listed building, the decision-maker must focus on the harm that the proposed development itself would cause, not the harm that some other development on the site, or a differently designed development, might cause. Logically, as the judge recognised (in paragraph 65 of his judgment), the existence or absence of another scheme or design which would or might produce less harm is not relevant to the level of harm that the proposed development itself would cause. That harm would be the same either way. This, of course, is not to say that the absence of an alternative design that would cause less harm than the development proposed is irrelevant to the decision on the application for planning permission, and an immaterial consideration. As the judge said, it can be relevant, and may be important, in the balance finally struck between harm and benefit.
40. Thirdly, there is no dispute, and I accept, that the inspector dealt impeccably with the significance of St Ann’s Church as a listed building, in paragraphs 63 to 65 of the decision letter; properly understood and took into account in paragraph 66 the opinion of Historic England that the harm likely to be caused by the proposed development to the significance of the listed building would be “less than substantial harm”, and “to a moderate degree”; correctly noted in paragraph 67 the conclusion of East Quayside 12’s heritage impact assessment that there would be “less than substantial harm ... , albeit to a low level”, and its witness’s evidence to the inquiry that there would be “no harm”; and lawfully concluded as a matter of her own planning judgment that “harm would be caused to the significance of the Church” for the reasons she gave in paragraphs 68 and 69. None of this is controversial.
41. And fourthly, it is agreed and again I accept, that in paragraph 70 the inspector referred accurately to the requirement in paragraph 195 of the NPPF that proposals should “minimise any conflict between the heritage asset’s conservation and any aspect of the proposal”. She concluded lawfully, as a matter of planning judgment, that the design of the proposed development, despite her concerns about it, would not itself cause “heritage harm”, that any development on Plot 12 would affect the setting of St Ann’s Church, and that there could not be a different design which would “further minimise” the harm. Viewed on their own, these are unimpeachable conclusions, and the court could not properly interfere with them.
42. But that is where the agreement ends. The essence of the dispute in this appeal goes to the meaning of the inspector’s words at the beginning of the final sentence of paragraph 71, “given the key constraints of the plot and the nature of the harm identified”, read properly in context. The question is whether, in using that phrase where she did, the inspector showed that she had brought into her assessment of the level of harm the development itself would cause to the significance of St Ann’s Church as a listed building and her conclusion that such harm would be “towards the

lower end” of “less than substantial harm”, an irrelevant matter, namely the absence of an alternative design that would or might cause less harm within that category.

43. Two quite different meanings are suggested. East Quayside 12 contends that the words “key constraints of the plot” cannot sensibly be understood as relating to the conclusions at the end of paragraph 70, but must be taken to refer to the preceding conclusions on harm in paragraphs 68 and 69. The council, however, adopting the judge’s analysis, contends that they must embrace the conclusion at the end of paragraph 70 – that such constraints make it impossible to produce a superior design with less harm to the setting of the listed building.
44. To a planning audience, the expression “the key constraints of the plot” denotes factors, whether physical – such as topography, infrastructure, the presence and form of development on adjacent land – or in relevant policy or guidance, or in some other way, which limit or restrict the ability of a developer to carry out development on a site. Such factors may also make it impossible for a viable alternative design to reduce planning harm, such as harm to heritage assets. But as the judge held and the parties agree, the absence, hypothetically, of a less harmful scheme cannot serve to reduce the level of harm which would actually be caused by the development itself.
45. The phrase “the key constraints of the plot” in paragraph 71 cannot just be ignored. Those words were not inserted accidentally where they were, but deliberately and for a reason. They appear in a paragraph beginning with the word “Overall”, which suggests a final and complete conclusion on the matter being considered, gathering together the assessment which has gone before. The previous eight paragraphs set out the inspector’s consideration of harm to the listed building, and paragraph 71 conveys the outcome of that exercise. It is not until the end of that paragraph that her conclusion on the precise level of harm to the significance of the listed building is expressed – not merely “less than substantial harm” but “towards the lower end of any such scale within that classification”. In coming to that conclusion she did not spell out what she meant by the words “the key constraints of the plot”. She did not say whether she was using them only to refer to their consequences for the intrinsic harm of the proposal itself – the harm attributable to the proposed development and only the proposed development – or rather to their consequences for the possibility of any other design reducing that harm to a lower level, which is the question she had just addressed in the second part of the preceding paragraph, or both.
46. I am left with an uncomfortable doubt about the inspector’s intended meaning. In their context, the words “the key constraints of the plot” do seem ambiguous. There is, I think, some merit in either party’s interpretation. But having reflected on the rival arguments with the benefit of the careful submissions made to us on either side, I am inclined to accept, though with some hesitation, that the judge’s understanding of paragraph 71 was correct, essentially for the reasons he gave.
47. Paragraphs 63 to 71 of the decision letter are to be read together, as a continuous suite of paragraphs addressing the question of what harm the proposed development would cause to the significance of the listed building. The inspector’s consideration of the likely degree of harm incorporates what she had to say about the unavailability of a less harmful design, in paragraph 70. The latter question – whether or not any other design would be less harmful – is not differentiated or detached from her consideration of the intrinsic harm of the proposal itself. She did not divide her

conclusions in that way. The two questions are dealt with together, and the crucial conclusion on harm at the end of paragraph 71 seems to depend not only on her conclusion on intrinsic harm but also, as well as that, her conclusion on comparative harm in paragraph 70. Those two conclusions seem to be woven together.

48. The difficulty I have with the interpretation of paragraph 71 urged on us by Mr Tucker, therefore, is that in reaching her conclusion “overall” on the level of harm that the development would cause to the significance of the listed building, the inspector seems to have taken into account, and relied upon, not only her assessment of the harm itself, in paragraphs 68 and 69 and the first part of paragraph 70, but also her view, in the second part of paragraph 70, on the impossibility of any alternative design that could “further minimise” that harm. The word “given” at the beginning of the parenthesis in the final sentence of paragraph 71 introduces an explanation. And that explanation consists of two factors, not merely one. The inspector did not confine herself to “the nature of the harm identified”. This was only the second of the two things she mentioned. The first, a distinct consideration in its own right, was “the key constraints of the plot”. On a natural reading, the inspector’s reference to that factor seems connected to what she had just said in paragraph 70 about there being no different design which “could further minimise the harm caused to this Grade I listed building” – presumably because “the key constraints of the plot” make that impossible. So this point does seem to have influenced her conclusion about the degree of harm – that it would be “towards the lower end” of “less than substantial harm”, not a higher degree of harm within the same category. She seems to have discounted the level of harm attributable to the proposed development to reflect her conclusion that no other design would be less harmful. And there is nothing to dispel that impression in later passages of the decision letter.
49. If this understanding of the inspector’s conclusion in paragraph 71 were right, it would follow that she has adopted an illogical approach to the task of assessing the level of harm the development itself would actually cause to the significance of the listed building, by taking into account a consideration immaterial to that assessment, relevant as it may be to the decision on the application for planning permission. On that basis, therefore, both main arguments on ground 2 of the application would be made good.
50. However, I am a good deal less convinced of the correctness of this interpretation than the judge. It is, in my view, the more plausible reading. But I am not persuaded that it is necessarily correct. The inspector’s conclusions could, I accept, be read as Mr Tucker submitted they should.
51. This brings me to what I think is ultimately the crucial question in the case, which is whether the inspector’s reasons were legally defective, because they were not “intelligible and adequate” in the sense of the relevant authorities. It must be remembered that the inspector was discharging a specific duty under statute, in section 66(1) of the Listed Buildings Act. This is a demanding duty for a decision-maker, whose rigour has been repeatedly emphasised in the case law. And it has to be performed in the light of carefully constructed national policy in the NPPF, which has undergone some revision before being drafted as it now appears, the guidance in the PPG, and that issued by Historic England. Here, the inspector was performing the statutory duty in assessing the likely harm to a designated heritage asset of the highest significance, a grade I listed building. And her conclusion was at odds with the advice

of Historic England, which was that the likely harm was of a “moderate degree”. These are the circumstances in which the lawfulness of the inspector’s reasoning is to be judged. To be clear, however, I am not suggesting that the relevant standard to apply in assessing the adequacy of her reasons is other than the usual standard under the principles explained in *Save Britain’s Heritage* and *South Bucks District Council v Porter (No.2)* (see the judgment of Sales L.J. in *Mordue v Secretary of State for Communities and Local Government* [2015] EWCA Civ 1243; [2016] 1 W.L.R. 2682, at paragraph 26).

52. Applying those principles, the court must consider whether there is “substantial doubt” that the inspector’s assessment of the likely harm to the significance of St Ann’s Church as a grade I listed building was lawful. In my view there is such doubt. Like the judge, I am drawn to the conclusion that even if the principal argument put forward by the council is over-stated, there is a deficiency in the inspector’s reasoning – because it is not clear what she meant in the contentious final sentence in paragraph 71 of her decision letter. Reading that sentence, in context, I simply cannot be confident that she did not take into account an immaterial consideration in assessing the level of harm to the listed building. This is not a merely forensic or artificial doubt. It is not generated by an unduly legalistic review of the inspector’s conclusions. It is a real uncertainty about what she meant in her reasoning on one of the “principal important controversial issues” in the section 78 appeal. In short, her reasons are sufficiently obscure to invalidate her decision. And it is on this basis that I would uphold the judge’s order.
53. As Holgate J. concluded, and Mr Tucker conceded in argument, this is not a case in which, under the principle stated in *Simplex*, the court can be sure that the decision would necessarily have been the same if the error of law had not been made. The flaw in the inspector’s reasons affected her performance of the section 66(1) duty, and her consideration of one of the main issues in the section 78 appeal. I accept that if the appeal goes back to the Secretary of State for redetermination the outcome may well be the same – assuming there has been no material change in circumstances. But in my view it is not impossible to foresee a different outcome.

Conclusion

54. For the reasons I have given, I would dismiss the appeal.

Lord Justice Lewis:

55. For the reasons given by the Senior President of Tribunals at paragraphs 51 to 53 of his judgment, I would dismiss this appeal. The issue concerns the meaning of five words in paragraph 71 of the inspector’s decision later, namely “key constraints of the plot”. Different meanings have been suggested, as the Senior President identifies at paragraph 43 of his judgment, namely that the words refer back to the previous conclusions on harm in earlier parts of the decision letter or that those words mean that it would not have been possible, given the constraints of the site, to produce a design which did less harm to the setting of the listed building. If the latter meaning is

correct, then it is accepted that the inspector did have regard to a legally irrelevant consideration in concluding that the harm in the present case was at the lower end of the scale of less than substantial harm.

56. For my part, I would have been inclined to read paragraph 71 as relating back to the section dealing with St Ann's Church, that is paragraphs 63 to 70. That follows from its wording and place in the structure of the decision letter. Paragraph 71 comes at the end of the section on assessment of the impact on St Ann's Church and begins "Overall", indicating that it is setting out the inspector's overall conclusions on that issue. The reference to "key constraints of the plot" appears to me to relate to back to the description of St Ann's Church and its setting at paragraph 63 and 64, the conclusions on harm at paragraphs 68 and 69 and the first two sentences of paragraph 70, namely that it is not design issues that would cause harm and that any development at Plot 12 would affect the setting of St Ann's Church. I would, therefore, be inclined to read the reference to the "key constraints of the plot" as being a reference to the physical features of the plot which means that any development would harm the setting – because the church is viewed, essentially, through a gap between existing buildings – but that the harm would be at the lower end of the scale of less substantial harm for the reasons given at paragraph 69 of the decision letter. Nevertheless, I recognise that there is a real ambiguity about the words used. That is reinforced by the fact that the Senior President of Tribunals and Holgate J. at first instance both consider, albeit with different levels of certainty, that the words do not mean that. The issue of the impact on St Ann's Church was an important issue. The reasons do not adequately explain the inspector's conclusion on that issue and leave a genuine and substantial doubt as to whether or not the inspector had taken a legally irrelevant consideration into account. For that reason, I agree that the appeal should be dismissed.

Lady Justice Elisabeth Laing:

57. I agree with the Senior President of Tribunals and Lewis L.J. that the appeal should be dismissed, for the reasons given by Lewis L.J. in his judgment.