Neutral Citation Number: [2018] EWCA Civ 450

Case No: C1/2016/4308

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE KERR
[2016] EWHC 2664 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 March 2018

Before:

Lord Justice Underhill
Lord Justice Lindblom
and
Lord Justice Singh

- -

Between:

Kebbell Developments Ltd.	**Appellant**
- and -	
Leeds City Council	**Respondent**
- and -	
Collingham with Linton Parish Council	**Interested Party**

- -
- -

Mr Christopher Young and Mr Christian Hawley (instructed by **Walker Morris LLP**) for the **Appellant**
Mr Alan Evans (instructed by **Leeds City Council**) for the **Respondent**
The Interested Party did not appear and was not represented

Hearing date: 30 November 2017

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Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. Was a neighbourhood plan unlawfully put to a referendum after modifications had been made to it by the local planning authority, differing in part from those recommended by the examiner? That is the basic question in this appeal.

2. In a claim for judicial review, the appellant, Kebbell Developments Ltd., challenged the decision of the respondent, Leeds City Council, to allow the Linton Neighbourhood Plan – prepared by the interested party, Collingham with Linton Parish Council – to proceed to a referendum under paragraph 12 of Schedule 4B to the Town and Country Planning Act 1990 before its adoption under section 38A(4) of the Planning and Compulsory Purchase Act 2004. The claim was dismissed by Kerr J. on 28 October 2016. I granted permission to appeal on 21 June 2017.

3. The proceedings concern a piece of farmland known as "The Ridge", about 4.5 hectares in area, on the north-western edge of the village of Linton, near Wetherby. The site is owned by Mr Jeremy Lenighan, but Kebbell hold an interest in the access to it – with a view to developing it for housing. They have applied for outline planning permission for a development of 26 dwellings on the site, and have appealed to the Secretary of State against the city council's failure to determine that application. The site was once in the West Yorkshire Green Belt, but was taken out in 2001. In the Leeds Unitary Development Plan (Review 2006), adopted by the city council in 2006, it was identified as a Protected Area of Search, safeguarded under Policy N34. The parish council opposes its development and seeks its return to the Green Belt.

4. In 2014 the parish council began the preparation of the neighbourhood plan, which went to an examination in 2015. Although Kebbell did not make representations to the examiner, Mr Lenighan did. His concern was that Policy B2 in the draft plan, which related specifically to "The Ridge", would undermine the status of the site as a Protected Area of Search. In a report submitted to the city council in August 2015 the examiner concluded that, subject to the modifications he recommended, the neighbourhood plan met the "basic conditions" in paragraph 8(2) of Schedule 4B to the 1990 Act. Among those modifications was the deletion of Policy B2 and "all associated text". In November 2015 the city council decided to make a number of modifications to the plan, including the deletion of Policy B2 and its accompanying text. But it went further by adding some text to a surviving part of the plan, explaining why the parish council considered "The Ridge" unsuitable for development. It decided to allow the plan, as modified, to proceed to a referendum. The referendum was held in December 2015, but the neighbourhood plan is yet to be made.

The issues in the appeal

5. In rejecting Kebbell's challenge to the city council's decision to put the neighbourhood plan to a referendum, Kerr J. concluded that the city council had not dealt with the examiner's recommendations unlawfully. That conclusion is attacked in this appeal. Three main issues arise from the four live grounds of appeal – ground (iv) having been abandoned at the hearing – and the city council's respondent's notice:

(1) Did the city council act outside its powers under paragraph 12(6)(a) of Schedule 4B to the 1990 Act in departing from the examiner's recommendations when modifying the provisions of the neighbourhood plan relating to "The Ridge"?
(2) Did the city council fail to give sufficient reasons for its modifications, as required under paragraph 12(11)(b) of Schedule 4B and regulation 18 of the Neighbourhood Planning (General) Regulations 2012?
(3) In the light of the requirements in paragraph 13 of Schedule 4B and regulation 17A of the 2012 regulations, ought the city council to have consulted on the modifications?

The statutory scheme for the preparation of neighbourhood plans

6. Section 38A(2) of the 2004 Act defines a "neighbourhood development plan" as "a plan which sets out policies (however expressed) in relation to the development and use of land in the whole or any part of a particular neighbourhood area specified in the plan". Once made, a neighbourhood plan becomes part of the development plan (section 38(3)(c)), in accordance with which applications for planning permission must be determined unless material considerations indicate otherwise (section 38(6)).

7. Under paragraph 1(2) of Schedule 4B to the 1990 Act, the "qualifying body" intending to produce a neighbourhood plan – here the parish council – must prepare a draft "neighbourhood development order". If satisfied that the draft order meets certain statutory requirements, the local planning authority – here the city council – must submit it for independent examination by an examiner (paragraph 7(2)). The examiner must consider whether the draft order meets "the basic conditions" (paragraph 8(1)(a)). The requirements constituting the "basic conditions" are set out in paragraph 8(2). The condition in paragraph 8(2)(a) is that it must be "appropriate to make the order", having regard to national policies and guidance. The condition in paragraph 8(2)(e) is that the making of the order is "in general conformity with the strategic policies contained in the development plan" – here the relevant policies of the unitary development plan and the Leeds Core Strategy, adopted by the city council in November 2014.

8. The "general rule" is that the examination will be conducted on the basis of a "consideration of written representations" (paragraph 9(1)). But the examiner must hold a hearing to receive "oral representations about a particular issue at the hearing" if, in his view, "the consideration of oral representations is necessary to ensure adequate examination of the issue or a person has a fair chance to put a case" (paragraph 9(2)(a)). The hearing must be in public (paragraph 9(4)). The examiner must prepare a report on the draft order, recommending that it be submitted to a referendum, or submitted with modifications specified in his report, or that the proposal for the order is refused (paragraph 10(1) and (2)). The only modifications he may recommend include "modifications that [he] considers need to be made to secure that the draft [plan] meets the basic conditions mentioned in paragraph 8(2)" (paragraph 10(3)(a)). His report may not recommend that the order is put to a referendum, whether with or without modifications, if he considers that it does not meet the "basic conditions" (paragraph 10(4)(a)).

9. The local planning authority must consider the examiner's recommendations in his report and decide what action to take (paragraph 12(2)). If satisfied that the draft plan meets the "basic conditions", or that it would do so if modifications, "whether or not recommended by

the examiner", were made to it, the authority must put it to a referendum (paragraph 12(4)(b)). Paragraph 12(6) provides, so far as is relevant in these proceedings:

> "(6) The only modifications that the authority may make are –
> (a) modifications that the authority consider need to be made to secure that the draft order meets the basic conditions mentioned in paragraph 8(2),
> …
> (e) modifications for the purpose of correcting errors."

10. Paragraph 12(11) provides:

> "(11) The authority must publish in such manner as may be prescribed –
> (a) the decisions they make under this paragraph,
> (b) their reasons for making those decisions, …
> … ."

The arrangements to be made for the "Publication of the examiner's report and plan proposal decisions" are in regulation 18 of the 2012 regulations, which provides:

> "(1) Paragraph (2) applies where a local planning authority decide –
> …
> (c) what action to take in response to the recommendations of an examiner made in a report under paragraph 10 of Schedule 4B to the 1990 Act … in relation to a neighbourhood development plan;
> (d) what modifications, if any, they are to make to the draft plan under paragraph 12(6) of Schedule 4B to the 1990 Act … ;
> …
> (2) As soon as possible after making a decision referred to in paragraph (1), a local planning authority must publish –
> (a) the decision and their reasons for it ("the decision statement"),
> (b) details of where and when the decision statement may be inspected; and
> (c) in the case of a decision mentioned in paragraph (1)(c), the report made by the examiner under paragraph 10 of Schedule 4B to the 1990 Act … ,
> on their website and in such other manner as they consider is likely to bring the decision statement and, as the case may be, the report to the attention of people who live, work or carry on business in the neighbourhood area."

11. Paragraph 13 of Schedule 4B provides:

> "(1) If –
> (a) the local planning authority propose to make a decision which differs from that recommended by the examiner, and
> (b) the reason for the difference is (wholly or partly) as a result of new evidence or a new fact or a different view taken by the authority as to a particular fact,
>
> the authority must notify prescribed persons of their proposed decision (and the reason for it) and invite representations.
> (2) If the authority consider it appropriate to do so, they may refer the issue to independent examination.

(3) Regulations may make provision about examinations under this paragraph (and the regulations may include any provision of a kind mentioned in paragraph 11(2)).
(4) This paragraph does not apply in relation to recommendations in relation to the area in which a referendum is to take place."

Persons were "prescribed" for this purpose by regulation 17A of the 2012 regulations, with effect from 1 October 2016. Paragraph 17A(2)(b) provides that the "persons prescribed for the purposes of paragraph 13(1)" include "any person whose representation was submitted to the examiner of the plan proposal in accordance with regulation 17(d)".

Policy N34 of the unitary development plan

12. Paragraph 5.4.9 of the unitary development plan, introducing Policy N34, states:

> "To ensure the necessary long-term endurance of the Green Belt, definition of its boundaries was accompanied by designation of Protected Areas of Search to provide land for longer-term development needs. Given the emphasis in the UDP on providing for new development within urban areas it is not currently envisaged that there will be a need to use any such safeguarded land during the Review period. However, it is retained both to maintain the permanence of Green Belt boundaries and to provide some flexibility for the City's long-term development. The suitability of the protected sites for development will be comprehensively reviewed as part of the preparation of the Local Development Framework, and in the light of the next Regional Spatial Strategy. Meanwhile, it is intended that no development should be permitted on this land that would prejudice the possibility of longer-term development, and any proposals for such development will be treated as departures from the Plan."

Policy N34 states:

> "Within those areas shown on the proposals map under this policy, development will be restricted to that which is necessary for the operation of existing uses together with such temporary uses as would not prejudice the possibility of long term development."

"The Ridge" was one of 34 sites protected under that policy.

13. When the city council's core strategy was adopted in November 2014, the site retained its status as a Protected Area of Search in the unitary development plan. In the draft Leeds Site Allocations Plan published in September 2015 it was one of the areas of "Safeguarded Land" proposed to be identified under Policy HG3 to give effect to Spatial Policy 10 of the core strategy, as a site "safeguarded from development for the plan period (to 2028) to provide a reserve of potential sites for longer term development post 2028 and protect the Green Belt".

The March 2015 draft neighbourhood plan

14. The history of the preparation of the Linton Neighbourhood Plan is very clearly set out in Kerr J.'s judgment (in paragraphs 13 to 35), and I gratefully adopt his narrative.

15. In the draft neighbourhood plan published in March 2015, section 12 dealt with "Category B: New Housing Development". In sub-section 12.1, "B1: Small Scale Development", Policy B1, "Small Scale Development", supported only development of three kinds: "windfall development within the village built area by the addition of a number of smaller dwellings on an existing plot", development "on land allocated for housing by [the city council]", and "small scale [development] with 10 or less dwellings". The text preceding that policy said that "[it] is … important to be mindful that the PAS site (SHLAA 2136 The Ridge), or other sites currently designated Green Belt, may be allocated for housing" (paragraph 105). Under the heading "Feedback from the Community", paragraph 106 said that "[notwithstanding] the fact that Linton is not considered to be a sustainable location for significant development, the [Drafting Committee] undertook a thorough evaluation of all the possible sites". Paragraph 107 said:

> "107. Taking all the information and comments into account, it was felt that none of the sites that were put forward were suitable for development; the principal reason being their allocation as Green Belt. The other reasons are tabulated below …".

In the table beneath that text the entry for "The Ridge", in the column headed "Summary of Main Reasons", said, simply:

> "See section B2".

This was a reference to subsection 12.3, "B2: Protected Area of Search Site (The Ridge)", in which paragraphs 111 and 112, under the heading "Justification and Evidence", said:

> "111. The one significant area of land in Linton not in the Green Belt (known as the The Ridge site) was designated as a Protected Area of Search (PAS) in the LCC's UDP, which means this land has been identified for possible future development. LCC have been considering the consultation responses to the SA Issues and Options Report, and have decided to retain this site as PAS. This decision has been recorded in the report presented to the Development Plans Panel on 13th January 2015. The schedule accompanying the report states:
>
> > "Site allocated as PAS (safeguarded land) in the UDP and not situated within land defined as the Green Belt. Site is well related to the existing settlement; however Linton is not within the settlement hierarchy. Access to the site is difficult to achieve. Site not required to meet the housing numbers due to local preference for an alternative strategic option and should therefore be retained as PAS."
>
> 112. In addition, site-specific problems make The Ridge unsuitable for development. These include:
>
> - The site occupies a prominent ridgeline and extends beyond the village built area.
> - If developed it would impact upon open countryside views and would be an unacceptable extension into the countryside.
> - There is opportunity to return this land to agricultural use and possibly also to Green Belt.

- Vehicular access is via Tibgarth, off Northgate Lane. This access is very steep and would require significant excavation works which would impact on the natural ridge line. This is part of a key view to be protected, and it is likely the excavation works would extend beyond the existing built area. The completed access would remain steep and could have highway safety concerns.
- Northgate Lane is unsuitable for extra traffic flow having unsafe junctions and single car width sections to the East and the West. The footpath is discontinuous.
- The distance to the nearest bus stop and services is significantly greater than the accessibility thresholds included in Leeds Core Strategy, and it seems inevitable that the vast majority of journeys created would be by car.
- The site fulfils the requirements for Green Belt status as set out in the NPPF and the Local Plan (CS10)."

Under the heading "Feedback from the Community", paragraph 113 said:

> "113. Feedback from the Open Weekend in June 2013 confirmed the residents of Linton do not think this site is suitable for development for the reasons outlined above. The subsequent SG meeting confirmed this opinion and agreed to investigate returning the whole of the site to Green Belt."

Policy B2, "PAS Site (The Ridge)", in sub-section 12.4, stated:

> "SHLAA 2136, The Ridge, Linton will continue to be protected from development until its longer term allocation has been determined via the Local Plan Sites Allocation Plan, following a Green Belt review, housing needs and sites assessments."

Sub-section 12.5 describes the "Project to Help Deliver Our Vision" as being to "[examine] returning all or part of The Ridge to Green Belt".

16. In section 18, "Projects for Linton", the part of the "Projects Priority List" headed "High Priority" includes, as project 2, "Examine returning all or part of The Ridge to Green Belt and agricultural use", and a reference to Policy B2.

The examiner's report

17. In section 6 of his report to the city council, the examiner recommended that Policy B1, "Small Scale Development", be changed, to state that "[developments] of less than ten dwellings will be allowed within the built-up part of Linton, outside the Green Belt, subject to respecting and where possible, enhancing local character and maintaining residential amenity".

18. Under the heading "Policy B2: PAS Site (The Ridge)" he concluded:

> "Policy B2 seeks to protect a site named in Leeds City Council's Strategic Housing Land Availability Assessment (SHLAA), The Ridge, from development, until its longer term allocation has been determined via the Local Plan Sites Allocation Plan and following a Green Belt review.

> Policy B2 clearly relates to matters under the consideration of Leeds City Council. The Local Plan Sites Allocation Plan does not form part of the Neighbourhood Plan and Green Belt Review is a strategic matter, rather than a neighbourhood planning matter. In addition, The Ridge is already subject to Leeds UDP saved policy N34. It is not the role of neighbourhood plans to simply repeat existing policy."

and he made this recommendation:

> "
>
> - Delete Policy B2 and all associated text".

19. As for the "Projects Priority List" in section 18 of the plan, the examiner's conclusions and recommendation, in section 6 of his report, were:

> "The High, Medium and Low Priority Lists simply set out the aspirations of Collingham with Linton Parish Council. These are not Policy matters. I recommend:
>
> - Delete the Policy Number column of each table
>
> I note that the changes to the Neighbourhood Plan need not impact on the Priority Lists, as the Lists simply reflect actions that Collingham with Linton Parish Council would like to progress."

20. In section 8 of his report, "Summary", the examiner confirmed that, subject to the modifications he had recommended, the neighbourhood plan, among other things, "… is in general conformity with the strategic policies of the development plan for the area …". He concluded that "[taking] the above into account", the neighbourhood plan "meets the basic conditions".

The city council's decision statement

21. The city council's decision statement on the neighbourhood plan was published on 4 November 2015. In section 3, "Decisions and Reasons", paragraph 3.2 said that the city council accepted "the majority of the modifications and the reasons put forward by the Examiner for them", but that some of them it "partially or fully [rejected]". One of these was "[proposed] modification M23 (Policy B2)". In the schedule of modifications recommended in the examiner's report, in Table 1 of the decision statement, blue highlighting indicated "where the examiner's proposed modifications are partially or fully rejected". The city council also stated that it "considers the Plan (as amended) will meet the Basic Conditions" (ibid.).

22. In Table 1 the city council indicated that it accepted the examiner's recommended modification to Policy B1. This was modification M22.

23. The modification relating to "Policy B2: Protected Area of Search Site (The Ridge)" was modification M23. The entry for that modification was highlighted in blue. In the column headed "Page/Part of the Plan", the relevant provisions in the neighbourhood plan were identified as "Policy B2, page 28, section 12.4". In the column headed "Examiner's

recommended changes", the relevant change was described as "Delete Policy and all associated text". In the column headed "Reason", which contained a summary of the examiner's relevant conclusions, it was stated:

> "This relates to (strategic) matters under the consideration of Leeds City Council and does not form part of the Neighbourhood Plan. The Ridge is already subject to Leeds UDP saved policy N34, neighbourhood plans should not simply repeat existing policy."

and in the column headed "Leeds City Council's decision and reason":

> "Modify the text as indicated to comply with examiner's recommendations and remove strategic matters dealt with by [the city council]. Delete "See section B2" in the table in para 107 [i.e. section B1] to reflect the deletion of Section B2 and insert "*PAS site. Elevated site on ridgeline with risk of visual impact; vehicular access is steep. Traffic issues same as SHLAA 1252. Distance to bus stop outside Core Strategy threshold*" to correct a resulting error in cross-referencing."

24. The modification relating to the "Projects for Linton" in section 18 of the plan was modification M39. The entry for this modification was not highlighted in blue. The relevant part of the plan was identified as the "Projects list". The "Examiner's recommended changes" were described as "Delete the Policy Number column of each table", and the "Reason" was stated to be that "[the] Priority Lists are aspirations of Linton Parish Council and are not Policy matters". The city council's "decision and reason" were to "[modify] text as indicated to comply with examiner's recommendations and to clarify the status of the projects".

The neighbourhood plan as modified

25. In the neighbourhood plan as modified, the text introducing Policy B1, under the heading "Justification and Evidence", replicates that in the March 2015 draft. Paragraph 82 repeats paragraph 105 of that draft. Under the heading "Feedback from the Community", paragraph 83 repeats paragraph 106 of the March 2015 draft. In paragraph 84 the text above the table replicates the text above the table in paragraph 107 in that draft, word for word (see paragraph 15 above). In the table, in the entry for "The Ridge" under the heading "Summary of Main Reasons", the words "See section B2" are replaced by this note:

> "PAS site. Elevated site on ridgeline with a risk of visual impact; vehicular access is steep. Traffic issues are the same as SHLAA 1252. Distance to bus stop outside Core Strategy threshold."

"SHLAA 1252" is a site at Northgate Lane, for which the corresponding note states:

> "Northgate Lane is narrow with a substandard junction at Main Street and discontinuous footpath to Linton centre".

Policy B1 is in the terms recommended by the examiner. Sub-section 12.3 of the May 2015 draft plan, comprising the text that had introduced Policy B2 in paragraphs 111 to 113, the

policy itself in sub-section 12.4, and sub-section 12.5 were all deleted in their entirety (again, see paragraph 15 above).

26. In section 18, "Projects for Linton", the part of the "Projects Priority List" headed "High Priority" retains, as project 2, "Examine returning all or part of The Ridge to Green Belt and agricultural use". Now, however, in accordance with the examiner's recommendation and the city council's modification M39, there is no reference to Policy B2, or to any other policy.

Issue (1) – did the city council act outside its powers under paragraph 12(6) of Schedule 4B?

27. Mr Christopher Young, for Kebbell, did not submit to us that the city council's modifications M23 and M39 rendered the neighbourhood plan "as a whole" out of "general conformity with the strategic policies contained in the development plan", or contrary to any of the other "basic conditions" in paragraph 8(2) of Schedule 4B. He was right not to make that submission. It would clearly have been unsustainable in the light of the decisions of this court in *Persimmon Homes (Thames Valley) Ltd. v Stevenage Borough Council* [2005] EWCA Civ 1365 (see paragraphs 24 to 31 in the judgment of Laws L.J.) and *R. (on the application of DLA Delivery Ltd.) v Lewes District Council* [2017] EWCA Civ 58 (see paragraphs 23 to 26 of my judgment), and the first instance decision of Holgate J. in *R. (on the application of Crownhall Estates Ltd.) v Chichester District Council* [2016] EWHC 73 (Admin) (see paragraph 29 of his judgment).

28. Kerr J. identified the "overarching question" in the case as being whether the city council was entitled to be "satisfied" that it was "appropriate" to adopt the neighbourhood plan, having regard to national planning policy and guidance, and that the making of the plan was in "general conformity" with the strategic policies in the development plan (paragraph 40 of the judgment). That question required the court to "assess whether the designation of ["The Ridge"] as a PAS site in the Leeds Local Plan precluded the city council from accepting [the neighbourhood plan] in its final form". As the judge acknowledged (in paragraph 45), having referred to what Laws L.J. said in *Persimmon Homes* (in paragraph 28 of his judgment), the question of whether one plan is in general conformity with another is "a matter of planning judgment for the decision maker", and the court's role here is "supervisory, applying the usual public law standard and not any enhanced standard: per Laws [L.J.] … at paragraphs 29-30". The appropriate planning judgment was exercised in this case, and, in my view, it was exercised lawfully.

29. There is no criticism of the examiner's relevant conclusions, or of the modifications he recommended. He was entitled to conclude that the change he recommended to Policy B1, his recommended deletion of Policy B2 and "all associated text" and of the policy numbers in the "Projects Priority List" were necessary to bring the neighbourhood plan into general conformity with the strategic policies of the development plan. And where the city council faithfully reflected those recommendations in its modifications, there is – and can be – no criticism of what it did.

30. The focus of Mr Young's argument here was on the city council's modification M23 in so far as it went beyond simply giving effect to the examiner's recommendation to "[delete] Policy B2 and all associated text". He submitted that the city council had gone too far by inserting into the table in paragraph 84 of the neighbourhood plan, as modified, a summary

of the text it had deleted in the March 2015 draft plan, in particular paragraph 112 – so far, in fact, as to be acting outside its powers in paragraph 12(6) of Schedule 4B to the 1990 Act.

31. Kerr J. rejected that argument. The city council had not been obliged to limit itself to the modifications recommended by the examiner, and it had not done so. It had put into the table in paragraph 84 text explaining the parish council's reasons for regarding "The Ridge" as unsuitable for housing development "of its own volition, consciously departing from the examiner's proposal" (paragraph 55 of the judgment). The result was "a degree of tension" between the neighbourhood plan and the unitary development plan. The neighbourhood plan includes text suggesting that "The Ridge" should not have dwellings built on it and should be returned to the Green Belt, while the unitary development plan leaves open the possibility of there being dwellings on it and says nothing about its being returned to the Green Belt. But this was "not of itself sufficient to compel a finding of general disconformity between the two plans" (paragraph 56). Policy B1 says nothing about "The Ridge", and "a description of some sort was necessary against the table entry mentioning ["The Ridge"] as among the sites which the parish council regarded as unsuitable for development". The parish council was "not bound to keep silence on the subject of [the site]" merely because it is a Protected Area of Search (paragraph 57). The new text in the table in paragraph 84 acknowledged the status of the site and, implicitly, that it might one day be developed. No mention was made of development being an unacceptable extension into the countryside, or of the opportunity to return the site to agricultural use and, possibly, the Green Belt (paragraph 58). This possibility was relegated "to the level of a mere aspiration" in section 18, "Projects for Linton", and was "neither a policy nor part of the explanatory material accompanying a policy" (paragraph 59). Although the plan mentioned the parish council's opposition to "The Ridge", this did not mean that planning permission for housing development "would necessarily have to be refused" (paragraphs 60 and 61). It had been "open to the city council to make the modifications which it made, and to profess itself satisfied that the basic conditions were met". Once it had reached that conclusion, it was "bound to accept [the neighbourhood plan] and submit it to a referendum" (paragraph 62).

32. Mr Young attacked those conclusions of the judge. Modification M23 was not a modification permitted under the statutory scheme. Not only was it a clear departure from the examiner's recommendations; it was unnecessary for the purposes of meeting the "basic conditions" in paragraph 8(2) of Schedule 4B, and thus outside the scope of paragraph 12(6)(a). As the judge had accepted (in paragraph 63 of his judgment), it "went well beyond merely correcting a cross-referencing error", and was also, therefore, outside the scope of paragraph 12(6)(e). The city council itself seemed unsure of the statutory power under which it acted, and the judge had not answered that question. The result, however, was plain. In its final form the neighbourhood plan contains text that should not have been there. This, submitted Mr Young, is a serious flaw. Supporting text in a development plan document does not have the same force as the policies themselves (see the judgment of Richards L.J. in *R. (on the application of Cherkley Campaign Ltd.) v Mole Valley District Council* [2014] EWCA Civ 567, at paragraphs 16 to 21), but it will nevertheless be taken into account in a development control decision (see my judgment in *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin), at paragraphs 40 to 45).

33. I cannot accept that argument.

34. One must not adopt too narrow an understanding of the local planning authority's statutory power to make modifications in paragraph 12(6) of Schedule 4B. The power in paragraph 12(6)(a) allows the authority a broad discretion in considering whether a particular modification is necessary for the purposes of satisfying the "basic conditions" in paragraph 8(2): whether the modification "[needs] to be made to secure that the draft order meets the basic conditions …". The question of whether such a modification is necessary, and, if so, what form it should take, requires the exercise of planning judgment. And so does the ultimate question of the "basic conditions" being met or not, regardless of whether it has been necessary to make modifications to the plan to ensure that they are. To the extent that these are matters of planning judgment, they are for the local planning authority to resolve, subject to review by the court in accordance with the principles of public law. But the broad ambit of a legitimate planning judgment on the question inherent in paragraph 12(6)(a) suggests a generous view of the local planning authority's statutory power, and that the court should be cautious before accepting an argument that the power has been exceeded.

35. A realistic view must also be taken of the power in paragraph 12(6)(e) to make modifications "for the purpose of correcting errors". This power is not, I think, confined to the correction of typographical mistakes and other minor infelicities. It embraces amendments necessary to achieve accuracy and consistency in the wording of policies and their supporting text. The local planning authority has a wide discretion in judging what errors need correcting, and how. And again, therefore, the court should not be quick to hold that an authority has gone further than the statutory power permits.

36. Four things may be said about the city council's modification M23. First, it must be seen in the light of the examiner's relevant conclusions and recommendations and the city council's response. The examiner was concentrating on the mischief of the neighbourhood plan clashing with the strategic policies of the development plan. This is plain from his reference to the inclusion of "The Ridge" in the city council's "Strategic Housing Land Availability Assessment", and to the process in which the question of "its longer term allocation … via the Local Plan Sites Allocation Plan and following a Green Belt review" would be considered. The Green Belt review was, as he said, "a strategic matter, rather than a neighbourhood planning matter". The source of the mischief, as he recognized, was Policy B2. It was Policy B2 that offended the "basic condition" in paragraph 8(2)(e) of Schedule 4B, by intruding on strategic matters affecting the whole of the city council's area, which the neighbourhood plan had no business to deal with – including the review of Green Belt boundaries and the fate of this site, given its status as a Protected Area of Search under Policy N34 of the unitary development plan. The examiner did not, however, conclude that the neighbourhood plan should avoid referring to the parish council's opinion on the development potential of the sites listed in the table in paragraph 107 of the March 2015 draft plan, including "The Ridge".

37. Secondly, the modification recommended by the examiner was succinctly expressed: "Delete Policy B2 and all associated text". What was required, in substance, was the deletion of the offending policy and the text explaining and justifying it. The examiner did not say that the text "associated" with Policy B2 ought to be removed from the neighbourhood plan because it expressed the parish council's opposition to development on "The Ridge". The deletion of the text was necessary because it was "associated" with Policy B2, because it explained and justified that policy, and because it would no longer be doing that when the policy itself was removed from the plan. If it were retained, however, it would not be wholly redundant. It would still explain why the parish council was opposed to the

development of "The Ridge", without in any sense pre-empting or prejudicing the strategic decisions that lay in the future – decisions that were for the city council to make.

38. Thirdly, the city council's modification M23 was faithful to the examiner's conclusions and recommendation. It completely removed both Policy B2 and "all associated text". It did not replace the policy with another to similar effect, nor did it retain the explanation and justification given for the policy in the text. It stopped well short of generating any new policy or new explanation of any policy that had survived. It deliberately went further than the examiner in one respect, which was to replace the words "See section B2" in the table in paragraph 107 of the March 2015 draft plan – which was now to be paragraph 84 – with a short summary of the reasons why "it was felt" that this site, as well as the Green Belt sites included in the table, was not "suitable for development". This was not part of the modification recommended by the examiner. But it was not at odds with what he had recommended, and his relevant conclusions, both on Policy B2 and on the "Projects Priority List".

39. Fourthly, modification M23 did not go further than it properly could. It did not reproduce the mischief in the deleted Policy B2 and its "associated" text. But, as Mr Alan Evans submitted on behalf of the city council, a consequence of deleting that policy and the text "associated" with it was that the modification also had to put right what would otherwise have been an error in the table in paragraph 84 – an unexplained cross-reference to a policy no longer in the plan. Modification M23 did that. As Mr Evans submitted, "the limit of the error correction was self-defining". The modification avoided leaving the table incomplete, which would have been so if the reference to "The Ridge" or to the parish council's reasons for opposing development on the site had simply been taken out. It recorded the relevant reasons accurately, and without replicating the deleted text "associated" with Policy B2. It amended the table in simple, factual terms, which acknowledged the land's status as a "PAS site". It reduced the explanation of the parish council's view about development on "The Ridge" from the deleted text to note form in the retained table. And it was also consistent with modification M39, which removed the reference to Policy B2 from the "Projects Priority List" but left in place the reference to the parish council's aspiration to "examine" returning the site to the Green Belt. It can therefore be seen as the least change that would give effect to the examiner's concerns without removing more from the plan than was necessary.

40. Can it be said that modification M23 was a modification the city council was unable to make in exercising its statutory powers in paragraph 12 of Schedule 4B? In my view it cannot. The modification was comfortably within the ambit of the local planning authority's statutory power to modify a neighbourhood plan before putting it to a referendum. Taken as a whole, it was, I think, both a modification under paragraph 12(6)(a), to secure compliance with the "basic conditions" in paragraph 8(2), in particular the "general conformity" requirement in paragraph 8(2)(e), and a modification under paragraph 12(6)(e), for the correction of an error that would otherwise have resulted from confining the modification to the strict terms of the examiner's recommendation. It achieved the required "general conformity". As Mr Evans submitted, the insertion made in the table in paragraph 84 was "within acceptable bounds" in that it significantly modified the reasoning in the text "associated" with the deleted Policy B2, without offending the requirement that the "basic conditions" be met. The city council was entitled to conclude that the modification was effective both in securing compliance with the "basic conditions" and in achieving internal consistency in the neighbourhood plan. There was no breach of the statutory procedure. The

approach required under paragraph 12 was lawfully followed. The city council did not exceed its statutory powers.

41. Mr Young complained that the parish council's opposition to development on "The Ridge" will now be recorded in the development plan, and will have that status for the purposes of section 38(6) of the 2004 Act when any application or appeal for development on the site is determined – though, of course, the note in the table in paragraph 84 is neither a policy nor the explanation for a policy, and its significance will have to be judged accordingly. That is so, I accept. But it does not upset the conclusion that the city council acted within its power under paragraph 12(6).

42. In my view, therefore, the judge's analysis was essentially correct, and it follows that this ground of the appeal must fail.

Issue (2) – reasons

43. Mr Young succeeded in persuading Kerr J. that the city council's reasons for amending the table in paragraph 84 of the neighbourhood plan in the way it did were "less than complete and decidedly economical" (paragraph 63 of the judgment). The judge said that the changes "went well beyond merely correcting a cross-referencing error", and that "that brief reason, as given, fell short of what was required under regulation 18(2) of the 2012 [regulations]". But he concluded that this "relatively minor deficiency in the city council's decision making process is nowhere [near] enough in itself to condemn the [neighbourhood plan] and the referendum result approving it, or to impugn the decision challenged in this application" (paragraph 64).

44. Mr Young submitted that the judge was in error because he did not confront the city council's lack of clear and adequate reasons to explain why it had come to a different view from the examiner on the re-insertion of text previously "associated" with Policy B2 – indeed, a view directly contrary to his. This failure to give reasons was, Mr Young contended, a distinct legal flaw in the preparation of the neighbourhood plan. The city council had failed to comply both with the requirement in paragraph 12(11) of Schedule 4B to publish its reasons for the decisions it had made under paragraph 12, and also the parallel requirement in regulation 18(2). This was not, Mr Young submitted, an excusable error on the part of the city council. The judge was wrong to regard it as a "minor deficiency" in the process of plan preparation.

45. I disagree. In the first place, I do not accept that in the circumstances here the city council's reasons, succinct as they were, can be regarded as unclear or inadequate. It is true that the examiner did not positively recommend the amendment of the table in paragraph 107 of the March 2015 draft neighbourhood plan, which was to become paragraph 84 of the plan once modified. It is also true that in the city council's decision statement of 4 November 2015 the amendment to the table was explained simply as the correction of an "error in cross-referencing" resulting from the deletion of the words "See section B2" in the table. The substitution for those words of the note explaining the reasons for the parish council's opposition to development on "The Ridge" was not specifically explained. But I cannot see why that particular change should have required a specific explanation of its own. It was plain in the examiner's relevant conclusions and recommendations that he did not criticize the inclusion of an explanation for the parish council's opposition to development on "The

Ridge", and that this was not, in itself, the basis for his recommendation that Policy B2 and its "associated" text be deleted. The city council might have amplified its reasons by stating as much. But it did not need to do so to comply with the statutory requirements for the giving of reasons in paragraph 12(11) and regulation 18(2). Its reasons were lawful as they stood. They did not fall below the requisite standard. Read fairly as a whole, they provided "an adequate explanation of the [city council's] ultimate decision", and did not "[leave] room for genuine as opposed to forensic doubt as to what [it had] decided and why" (see the general discussion of the duty to give reasons for planning decision-making in the judgment of Lord Carnwath in *Dover District Council v CPRE Kent* [2017] UKSC 79 – in particular, his observations on the "Standard of Reasons" in paragraphs 35 to 42).

46. Secondly, however, if I were wrong about that, and the judge's misgivings about the city council's reasons were justified, I would have concluded, as he did, that the city council's decision to submit the neighbourhood plan to a referendum was not vitiated by that deficiency. Certainly, if it came to a question of the court exercising its discretion as to any appropriate relief, I would have had no hesitation in withholding a remedy, because it is, in my view, perfectly plain that the city council's decision would have been no different if its amendment to the table in paragraph 84 had been expressly clarified in its decision statement. As I have already explained, the amendment to the table was not unlawful in itself, was not inconsistent with any modification recommended by the examiner, and was, in the circumstances, both justified and necessary. In effect, therefore, I agree with the judge's ultimate conclusion on this part of the challenge.

Issue (3) – consultation

47. In abandoning ground (iv) of the appeal, Mr Young accepted that in this case there was no breach of the requirements in paragraph 13 of Schedule 4B, because, at the relevant time, no persons had been "prescribed" under paragraph 13(1). This was only done by the insertion of regulation 17A into the 2012 regulations, with effect from 1 October 2016. As Kerr J. said (in paragraph 12(17) of his judgment), this was "nearly a year after the decision challenged in this case". Before us, Mr Young submitted in effect that, even before regulation 17A came into force, paragraph 13 indicated the existence of a common law duty to consult, at least in the particular circumstances envisaged by that provision. The city council's decision to proceed to a referendum had been at variance with the examiner's conclusions and recommendations on Policy B2 and its "associated" text, and was the "result of new evidence or a new fact or a different view taken by [it] as to a particular fact", namely the examiner's conclusions and recommendation themselves.

48. I consider that argument mistaken – for two reasons.

49. First, and fatally, the premise for it is wrong. The procedure provided for under paragraph 13 of Schedule 4B is additional to the provisions in paragraph 9 for the consideration of written and oral representations in the course of the examination of a neighbourhood plan. The scope of this further, post-examination procedure is tightly defined. The circumstances in which a local planning authority will be required to consult in accordance with it are limited to the particular circumstances referred to. It is, in my view, a misreading of paragraph 13(1) to construe the words "new evidence or a new fact or a different view … as to a particular fact" as embracing an examiner's conclusions and recommendations,

representing his exercise of planning judgment, as if they were matters of fact in themselves, or an expression of his "view … as to a particular fact".

50. Rather, it seems to me, paragraph 13 is concerned with giving participants in a neighbourhood plan process who qualify as "prescribed persons" a fair opportunity to address "new evidence" or "a new fact" that has emerged after the examination, or a "different view" taken by the local planning authority "as to a particular fact" from that expressed by the examiner in his report – when the local planning authority proposes to make a different decision from that recommended by him. It does not generate for participants in the process a general entitlement to consultation after the examination has taken place. Nor was it enacted to give parties a second opportunity to advance a case already heard and considered by the examiner, simply because the local planning authority is minded to depart from a recommendation he has made. Had Parliament intended to give participants in a neighbourhood plan process the chance to make further representations whenever a local planning authority proposed, in the light of the examiner's report, to take a different course from that recommended by him, or to promote modifications he did not recommend, it would have done so in different terms from those of paragraph 13. It would not have included the second stipulation, as to "the reason for the difference" in paragraph 13(1)(b). Only the first stipulation, in paragraph 13(1)(a) would have been necessary.

51. This case is not one in which it could sensibly be said that the circumstances were, in any respect, within the scope of paragraph 13(1). There was, in truth, no "new evidence". There was no "new fact". And the city council did not take a "different view" from the examiner's view "as to [any] particular fact". What it did was to promote a modification to the neighbourhood plan that went further than the modification he had recommended but was wholly consistent with it. That does not engage the requirement for post-examination consultation under paragraph 13.

52. Secondly, I cannot accept that, pending the coming into force of regulation 17A to prescribe the persons to whom the provisions of paragraph 13(1) of Schedule 4B would apply, the city council was under a duty to consult at common law that was not merely commensurate with the scope of the duty in paragraph 13(1) but whose scope was even broader.

53. No elaborate discussion of the law is necessary. The relevant principles seem reasonably well established. In *R. (on the application of Moseley) v Haringey London Borough Council* [2014] 1 W.L.R. 3947, Lord Wilson said (in paragraph 23 of his judgment) that "[a] public authority's duty to consult those interested before taking a decision can arise in a variety of ways", that "[most] commonly … the duty is generated by statute", but that "[not] infrequently … it is generated by the duty cast by the common law upon a public authority to act fairly". Lord Reed said (in paragraph 35):

> "35. The common law imposes a general duty of procedural fairness upon public authorities exercising a wide range of functions which affect the interests of individuals, but the content of that duty varies almost infinitely depending upon the circumstances. There is however no general common law duty to consult persons who may be affected by a measure before it is adopted. The reasons for the absence of such a duty were explained by Sedley LJ in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 … . A duty of consultation will however exist in circumstances where there is a legitimate expectation of such consultation, usually arising from an interest

> which is held to be sufficient to found such an expectation, or from some promise or practice of consultation. The general approach of the common law is illustrated by the cases of *R v Devon County Council, Ex p Baker* [1995] 1 All ER 73 and *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213 …, with which the *BAPIO* case might be contrasted."

In that case, as Lord Reed said (in paragraph 38), there was a "particular statutory duty to consult" whose purpose must be "to ensure public participation in the local authority's decision-making process".

54. The same is so in this case. Parliament has made specific provision for participation in the process of neighbourhood plan-making, including the provisions in paragraph 9 of Schedule 4B for the consideration of written and oral representations in the course of the examination, and those in paragraph 13 for the making of post-examination representations in the particular circumstances specified in paragraph 13(1). I do not see how, in view of those carefully framed provisions in the legislation, it can be submitted that there was, at common law, a further and more general duty to consult. Any common law duty corresponding to the statutory duty to "notify … and invite representations" in paragraph 13 would not have been engaged in this case. And I cannot see how any wider duty can be said to have existed. The common law did not superimpose on the statutory scheme more demanding requirements for participation and consultation than Parliament had provided in Schedule 4B (see the judgment of Sedley L.J. in *BAPIO Action Ltd*., in paragraphs 41 to 47 of his judgment, and the further observations of Maurice Kay L.J. in paragraph 58 of his).

55. There can be no argument here based on the general requirements of "procedural fairness". No breach of those requirements occurred. Nor can it be said that there was any "legitimate expectation" to be consulted. None has been shown.

56. The landowner, Mr Lenighan, availed himself of the opportunity under paragraph 9 to make representations to the examiner, and his objection to the draft neighbourhood plan was heard at that stage of the process, in the normal way. He therefore had, in the words of paragraph 9(2)(a), "a fair chance to put a case". He was not entitled, either under paragraph 13 or at common law, to be consulted again on the city council's decision to proceed as it did in the light of the examiner's recommendations.

57. In my view, therefore, Mr Young's argument does not demonstrate any unlawful failure by the city council to consult on modification M23. No relevant statutory requirement was ignored or misapplied, and there was no breach of any duty at common law.

Conclusion

58. For the reasons I have given I would dismiss this appeal.

Lord Justice Singh

59. I agree that this appeal should be dismissed for the reasons given by Lindblom LJ. I would like to add something of my own only in relation to the Appellant's argument on Issue (3), which concerns an alleged duty of consultation at common law.

60. In support of that argument at the hearing before this Court Mr Young cited the following passage from the judgment of Lord Wilson JSC in *Moseley* at para. 23:

> "A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation; such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in *R v Devon County Council, ex parte Baker* [1995] 1 All ER 73. But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted."

61. It is clear from that passage that, on its facts, *Moseley* concerned a situation in which there was a *statutory* duty of consultation. There was therefore no issue in that case about the *existence* of a duty of consultation.

62. In my respectful view, it is important to be careful to distinguish between different senses of the word "consultation" which can sometimes be found in the authorities on this subject. First, there may be cases in which there is no dispute about the existence of an obligation to consult which is imposed upon a public authority. Very often the source of that obligation will be legislation, so there will be a statutory duty of consultation. In such cases the context will usually be not an individual decision which affects a particular person or persons but rather the formulation of general policy or draft legislation.

63. The issue which may then arise is what the exact *content* of that duty of consultation requires. That was considered in the well known case of *R v Brent LBC, ex p. Gunning* (1985) 84 LGR 168, at 189, where Hodgson J cited with approval the following submissions of counsel, Mr Stephen Sedley QC (as he then was):

> "Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third … that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

64. In *Moseley*, at para. 25, Lord Wilson cited that passage in *Gunning* with approval. He said:

> "It is hard to see how any of his four suggested requirements could be rejected or indeed improved."

As Lord Wilson noted, this Court has expressly endorsed them, first in *R v Devon County Council, ex p. Baker* and then in *R v North and East Devon Health Authority, ex p. Coughlan* [2001] QB 213, para. 108. Lord Wilson added:

> "The time has come for this Court also to endorse the Sedley criteria. They are … 'a prescription for fairness'."

65. Nevertheless, all of that goes to the *content* of the duty of consultation where it arises. In the present case, the issue is whether a duty of consultation arises at all. That is a logically prior question and requires the Court to consider what is said to be the source of such a duty if it is to be found to exist.

66. The word "consultation" may be used in a second sense, where, I would respectfully suggest, it may be preferable to speak of "procedural fairness." This is because what is under consideration is not consultation of the general public or a section of the public; but rather whether the duty to act fairly arises in relation to a particular person who is affected by a public authority's decision.

67. That is, as I understand it, the burden of what was said by Lord Reed JSC in *Moseley*, at paras. 34-38. The broad distinction between the two concepts was expressed as follows by Lord Reed, at para. 38:

> "Such wide-ranging consultation, in respect of the exercise of a local authority's exercise of a general power in relation to finance, is far removed in context and scope from the situations in which the common law has recognised a duty of procedural fairness. The purpose of public consultation in that context is in my opinion not to ensure procedural fairness in the treatment of persons whose legally protected interests may be adversely affected, as the common law seeks to do. The purpose of this particular statutory duty to consult must, in my opinion, be to ensure public participation in the local authority's decision-making process."

68. In my view, that passage sets out an important distinction, between (i) procedural fairness in the treatment of persons whose legally protected interests may be adversely affected and (ii) public participation in a public authority's decision-making process. It seems to me that, although the word "consultation" is often and understandably used in the former context, it would be preferable to reserve it for use in the latter context, to the extent that the word is said to have legal significance.

69. Procedural fairness in the former context is really the modern term for what used to be called "natural justice", in particular the limb of it which used to be called *audi alteram partem* ("hear the other side"). Public law no longer talks of "judicial" or "quasi-judicial" disputes and so even the notion of a "hearing" seems inapt now but the fundamental requirement of procedural fairness is to give an opportunity to a person whose legally protected interests may be affected by a public authority's decision to make representations to that authority before (or at least usually before) the decision is taken. To refer to "consultation" in that context is not wrong as a matter of language but I think it would be better to avoid using it in that context, so as to avoid confusion with the sense in which it is

used in the context of public participation in a public authority's processes for making policy or perhaps some form of legislation such as rules.

70. In the present case, Mr Young, on behalf of the Appellant, is unable to rely on either a statutory duty of consultation or the common law duty to act fairly in the first sense I have outlined above. What Mr Young submits is that there arose in the present case a duty of consultation, in the second sense I have outlined above, as a matter of common law. This is despite the fact that the legislature (in its widest sense) had chosen not to bring in the relevant regulations before 1 October 2016. He now accepts that he cannot rely on a statutory duty of consultation, since the relevant regulations were not in force before that date.

71. In addressing that submission, it is important to begin with what Lord Reed said in *Moseley*, at para. 35:

> "… There is however no general common law duty to consult persons who may be affected by a measure before it is adopted. The reasons for the absence of such a duty were explained by Sedley LJ in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139; [2008] ACD 20, paras. 43-47. …"

72. I will return to what Lord Reed then said about the circumstances in which a duty of consultation may arise where there is a "legitimate expectation". However, at this juncture I will go to the decision of this Court in *BAPIO*. That case later went to the House of Lords but not on the point about consultation: [2008] UKHL 27; [2008] AC 1003. I would note in particular what Sedley LJ said in that case, at para. 45:

> "The proposed duty is, as I have said, not unthinkable – indeed many people might consider it very desirable – but thinking about it makes it rapidly plain that if it is to be introduced it should be by Parliament and not by the courts. Parliament has the option, which the courts do not have, of extending and configuring an obligation to consult function by function. It can also abandon or modify obligations to consult which experience shows to be unnecessary or unworkable and extend those which seem to work well. The courts, which act on larger principles, can do none of these things."

73. Later, at para. 47, in similar vein, Sedley LJ said:

> "… I do not seek to elevate this to a general rule that fairness can never require consultation as a condition of the exercise of a statutory function; but in the present context it seems to me that a duty to consult would require a specificity which the courts, concerned as they are with developing principles, cannot furnish without assuming the role of a legislator. …"

74. In response to some of the difficulties identified by Sedley LJ at paras. 43-47, which were cited with approval by Lord Reed in *Moseley*, Mr Young submits that this Court need not have the sort of concerns that it clearly did have in *BAPIO*. This is because, he submits, the class of "prescribed persons" has already been defined by the legislature itself. He submits

therefore that there would be no impermissible intrusion by the Court into the province of legislation.

75. The fundamental difficulty with that submission, in my view, is that the very legislation which sets out the definition of "prescribed persons" was not in force at the material time. It only came into force on 1 October 2016. That was the policy choice which the legislature decided to make. Rather than being a point in the Appellant's favour, it seems to me that it is a point against it. What it indicates very clearly is that the policy of the legislature was not to impose a duty of consultation in the relevant context at the material time. In those circumstances, in my view, it would be wrong as a matter of principle for the courts to intrude and impose a duty of the same kind at common law.

76. As I have said, the only passage in the authorities on which Mr Young relied in support of his argument at the hearing before this Court is to be found in the judgment of Lord Wilson JSC in *Moseley* at para. 23, which I have cited earlier.

77. In the present case I did not understand Mr Young to contend for a duty of consultation whose source was any suggested legitimate expectation of consultation. The difficulty with any reliance on the doctrine of legitimate expectation to generate a duty of consultation in the present case is that there was neither any promise of consultation nor any past practice of it. Either a promise or a practice of consultation is required, in accordance with the authorities in this field, before there will be a legitimate expectation of such consultation: see *Moseley*, at para. 35 in the judgment of Lord Reed.

78. The insuperable difficulty for Mr Young's submissions is that, if there is neither a statutory duty of consultation nor can he identify any legitimate expectation which would be the source of such a duty, it is impossible to see how such a duty could arise in the present context. I would therefore reject the Appellant's argument that there was a duty of consultation in the present case.

Lord Justice Underhill

79. I agree with both judgments.