Neutral Citation Number: [2018] EWHC 604 (Admin)

Case No: CO/3387/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2018

Before :

THE HONOURABLE MR JUSTICE STUART-SMITH

- -

Between :

THE QUEEN on the application of JH and FW GREEN LTD	**Claimant**
- and -	
SOUTH DOWNS NATIONAL PARK AUTHORITY	**Defendant**
- and –	
HOME GROWN HOTELS LTD	**Interested Party**

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- -

John Hobson QC and Miriam Seitler (instructed by **Lester Aldridge Solicitors**) for the **Claimant**
Toby Fisher (instructed by **West Sussex County Council**) for the **Defendant**
John Litton QC (instructed by **Lacys Solicitors**) for the **Interested Party**

Hearing dates: 13th and 14th March 2018

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Judgment Approved

Stuart-Smith J :

Introduction

1. The Claimant challenges the grant of planning permission and listed building consent by the Defendant in respect of a proposal for the redevelopment of Madehurst Lodge, a Grade II listed building in the South Downs National Park. The applicant for permission is now the Interested Party: it is an Hotel Group to which I shall refer as "Grown". The Claimant is a local landowner who objected to the application when it came before the Defendant as planning authority for the South Downs National Park.

2. Madehurst Lodge is a large 2-storey detached Grade II Listed Georgian house, most recently used as a private dwelling. It has a veranda along one side and is set in substantial grounds, with a collection of detached buildings. It has a large walled garden and fields and paddocks that formed part of the application site. Grown applied for permission for:

> "the conversion of dwellings and associated outbuildings and land to Hotel / Restaurant (28 rooms) (Class C1 / A3) and

> associated facilities including staff accommodation and provision of parking spaces (68). Single storey extension and alterations to Madehurst Lodge (after removal of veranda), Reconstruction of the former Garden Lodge, erection of single storey building (in Walled Garden) to form treatment rooms, erection of single storey building to form hotel accommodation (referred to as the Chicken Coop) and the erection of storage sheds and bike stores. External alterations to Stable Block, Grooms House and Chicken Shack."

3. The challenge focuses on two alleged deficiencies in the Officer's Report ["the OR"] to the Defendant's planning committee:

   i) Ground 1 is that the OR failed to correctly apply the test for major development in NPPF paragraph 116;

   ii) Ground 2 is that the officer misinterpreted the meaning of NPPF paragraph 134, specifically the meaning of "optimum viable use" and has failed to take into account whether the existing residential use is the optimum viable use.

   It is common ground that the challenges to the grant of planning permission and listing building consent respectively stand or fall together.

4. Since the OR is central to this case, and to avoid setting out large chunks in the body of this judgment, it is attached as Annex 1.

The Court's Approach

5. The approach of the Court when reviewing the contents of an officer's report was summarised by Hickinbottom J in R *(Midcounties Cooperative) v Forest of Dean DC* [2014] EWHC 3059 (Admin) at [5], which I respectfully adopt without setting it out again here. Of particular interest for the present case are the following principles:

   i) An application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken;

   ii) In construing reports, it has to be borne in mind that they are addressed to a "knowledgeable readership", including council members "who, by virtue of that membership, may be expected to have a substantial local and background knowledge." That background knowledge includes a working knowledge of the statutory test for determination of a planning application.

6. The approach expected of the planning committee and the Court was conveniently summarised by the Court of Appeal in *Barwood Strategic Land II LLP v East Staffordshire DC* [2017] EWCA Civ 893 at [50]:

> "Excessive legalism has no place in the planning system, or in proceedings before the Planning Court, or in subsequent appeals to this court. The court should always resist over-complication of concepts that are basically simple. Planning decision-making is far from being a mechanical, or quasi-mathematical activity. It is essentially a flexible process, not rigid or formulaic. It involves, largely, an exercise of planning

> judgment, in which the decision-maker must understand relevant national and local policy correctly and apply it lawfully to the particular facts and circumstances of the case in hand, in accordance with the requirements of the statutory scheme. The duties imposed by section 70(2) of the 1990 Act and section 38(6) of the 2004 Act leave with the decision-maker a wide discretion. The making of a planning decision is, therefore, quite different from the adjudication by a court on an issue of law (see paragraphs 8 to 14, 22 and 35 above)."

7. To similar effect, in *R (Morge) v Hampshire County Council* [2011] UKSC 2, Baroness Hale of Richmond said at [36]:

> "Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's, to weigh the competing public and private interests involved."

8. I bear these authoritative statements in mind both when considering the proper function and approach of the officer's report and when considering the approach that the Court should take when such a report is challenged.

Factual Background

9. Grown's application for planning permission was validated on 19 December 2016. It was initially registered as a "minor development" for the purposes of Article 2 of the Town and Country Planning (Development Management Procedure) Order 2015 ["the Order"]. Article 2 provides a definition of "major development" where it appears in the Order, as follows:

> "major development" means development involving any one or more of the following—
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> (a) the winning and working of minerals or the use of land for mineral-working deposits;
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> (b) waste development;
>
> (c) the provision of dwellinghouses where—
>
> (i) the number of dwellinghouses to be provided is 10 or more; or
>
> (ii) the development is to be carried out on a site having an area of 0.5 hectares or more and it is not known whether the development falls within sub-paragraph (c)(i);

(d) the provision of a building or buildings where the floor space to be created by the development is 1,000 square metres or more; or

(e) development carried out on a site having an area of 1 hectare or more;

10. By 21 December 2016, it had been brought to the attention of Kelly Porter, the Defendant's Major Projects Lead, that the application site was more than one hectare and should therefore be classed as a "major development" under the Order. Ms Porter accepted that the "red line" of the whole area included in the application was over one hectare. The application was therefore re-classified as a "major development" under the Order. The effect of this re-classification was procedural and did not affect the substantive approach that the Defendant was required to adopt in determining the application: see articles 9, 15 and 34(2) of the Order.

11. The Defendant sought and received consultation responses from several sources, including its Conservation Officer, its Landscape Officer, its Sustainable Tourism Officer, its Dark Skies Ranger, Historic England, and the Local Highway Authority. In addition, the Defendant received responses from a wide range of public stakeholders. It was a controversial application.

12. In the light of the consultation and responses the reporting officer produced the OR in preparation for the meeting of the Defendant's Planning Committee on 13 April 2017. The OR listed all consultation and third-party responses for the application as background documents. They were therefore available but there is no evidence about whether or to what extent any Committee Members read them.

13. Amendments were made to the application in the light of consultation responses; and it is apparent from the terms of the OR that further information was provided by Grown and its advisers in response to points raised during the consultation. These amendments and further consultation responses were taken into account in the OR and an update sheet.

14. The Committee Members carried out a site visit on 6 April 2017 that included a full tour of the house and all the grounds. Whilst on site, members were also invited by some of the local residents to view the application site from the neighbouring properties of a nearby farm, which they did. The OR referred very frequently to the fact that the application site was in the South Downs National Park and to the character of the landscape. Its Site Description at [1.1]-[1.4] referred to the location of the application site in terms that made clear that it was a predominantly rural location. It described Madehurst as a small hamlet comprising sporadic residential development amounting in 2011 to 54 dwellings. At the meeting Ms Porter made a presentation to members including the use of a set of slides which included location maps in three different scales. Even without the substantial local and background knowledge that they may be assumed to have had, the rural nature of the surrounding area, the extent of other development in the area, the size of the application site and the previous use of the site would have been known to the Committee Members on the basis of the information provided in the OR, the presentation slides and their site visit. In addition, and for the same reasons, the Committee Members would have known that the area of actual development proposed by the application was only a small part of the overall area of the application site included within the red-line boundary. In short, the Committee Members were fully aware of the site and its local context. Realistically, and on being expressly asked to confirm the position, the Claimant does not submit to the contrary.

15. The Committee had the benefit of legal advice from two Leading Counsel. The Defendant was conscious of the significance of categorising the application as a "major development" when applying paragraphs 115 and 116 of the NPPF, which are set out below at [25]. In the knowledge that there is no formal definition of "major development" as it appears in paragraph 116, the Defendant had obtained advice from Mr James Maurici QC, with the most recent guidance having been given in October 2014. On the evidence, Mr Maurici's Opinions form part of a Member's training programme and the test of what amounts to a "major development" within the meaning of paragraph 116 is an issue which is often referred to in planning applications that come before the Defendant's Planning Committee. The most relevant parts of Mr Maurici's Opinion were the formulation of a set of principles that were derived from caselaw, guidance and appeal decisions (some of which I will refer to below) and were set out at [23]-[29] as follows:

> "23… I set out below a set of principles … to be applied by decision makers when determining whether an application is for "major development".
>
> 24. First, the overarching principle is that the determination of whether a proposal amounts to "major development" for the purposes of paragraph 116 of the NPPF is a matter of planning judgment to be decided by the decision maker in light of all the circumstances of the application and the context of the application site.
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> 25. Secondly, the phrase "major development" is to be given its ordinary meaning. Accordingly, it would be wrong in law to:
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> > a. Apply the definition of major development contained in the 2010 Order to paragraph 116 of the NPPF;
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> > b. Apply any set or rigid criteria to defining "major development";
> >
> > c. Restrict the definition to proposals that raise issues of national significance.
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> 26. Thirdly, in making a determination as to whether the development is "major development", the decision maker may consider whether the development has the potential to have a serious adverse impact on the natural beauty and recreational opportunities provided by a National Park or AONB by reason of its scale, character or nature. However, that does not require (and ought not to include) an in-depth consideration of whether the development will in fact have such an impact. Instead, a prima facie assessment of the potential for such impact, in light of the scale, character or nature of the proposed development is sufficient.
>
> 27. Fourthly, as a matter of planning judgement, the decision maker must consider the application in its local context. This is made clear in the PPG, but also appears implicit in the caselaw. In Forge Field, for instance, Lindblom J noted that "major developments" would normally be projects much larger than six dwellings on a site the size of Forge Field." In so observing,

> he appears to have contemplated the possibility that, depending on the local context, there may be circumstances in which a project of six dwellings could amount to major development on a site the size of Forge Field. Accordingly, in principle, the same development may amount to "major development" in one National Park, but not in another; or in one part of a National Park, but not in another part of the same National Park.
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> 28. Fifthly, the application of criteria such as whether the development is EIA development, whether it falls within Schedule 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 (as amended), whether it is "major development" for the purposes of the 2010 Order, or whether it requires the submission of an appraisal/ assessment of the likely traffic, health, retail implications of the proposal will all be relevant considerations, but will not determine the matter and may not even raise a presumption either way.
>
> 29. Finally, and fundamentally, in making a determination, it is important to keep in mind the ordinary, common sense, meaning of the word "major". Although Lindblom J appears to have contemplated the theoretical possibility of 6 dwellings amounting to "major development" he noted (rightly in my opinion), that in ordinary language a "major development" will normally be much larger than 6 housing units. Accordingly, having considered all the circumstances, including the local context, the decision maker must take a common sense view on whether the proposed development can appropriately be described – in ordinary language - as "major development".

16. In a subsequent Opinion Mr Maurici explained that his references to "natural beauty" and "recreational opportunities" derived from s. 5 of the National Parks and Access to the Countryside Act 1949 (as amended) ["the 1949 Act"].

17. The OR summarised this advice at [7.7] and assessed whether the application was a "major development" within the meaning of paragraph 116 of the NPPF in the light of the opinions, at [7.6]-[7.8], to which I will return.

18. The Claimant objected to the application and commissioned an Opinion from Mr Hobson QC, who was then advising and now represents the Claimant. The Claimant provided Mr Hobson's Opinion to Committee Members; and it was referred to by a speaker on behalf of the Claimant at the meeting in urging the Committee to treat the application as a "major development" within the meaning of paragraph 116. It is convenient to note at this point that Mr Hobson QC recorded his instructions as being "to review the [OR]". In doing so he addressed the question whether the application was for a "major development" within the meaning of paragraph 116 and expressed the opinion that the report was flawed because it failed to address harmful impacts raised by consultees. He did not suggest that the failure to refer to the categorisation of the application as a "major development" under the Order was an omission or that it was relevant to the different question whether it was a "major development" within the meaning of paragraph 116 of the NPPF.

19. The Decision Notice granting planning permission was dated 9 June 2017. On 20 June 2017 the Claimant sent its letter before action. What is now Ground 1 was advanced in the letter before action alleging failure to deal properly with the

consultees' responses and failure to take into account relevant considerations relating to the local context: no mention was made of categorisation of the application as a "major development" under the Order.

20. The Claim was issued on 20 July 2017. On 14 September 2017 Lang J refused permission. On 19 October 2017 Sir Wyn Williams gave permission on both grounds upon oral renewal of the application.

The OR in Outline

21. No criticism is levelled at Sections 1 to 6. Section 6 correctly identified the need to determine the application in accordance with the Development Plan and that the two statutory purposes of the South Downs National Park designation are to conserve and enhance the natural beauty, wildlife and cultural heritage and to promote opportunities for the public understanding and enjoyment of the special qualities of their areas, with conservation taking precedence if there is a conflict between those two purposes.

22. Section 7 addressed Planning Policy. I set out [7.5]-[7.7] at [28] below when considering Ground 1. There is no criticism of any other part or parts of Section 7 or their application.

23. Section 8 was expressly concerned with the making of the Planning Assessment. As part of that exercise it set out to inform and make the judgment whether "substantial" or "less than substantial harm" would be caused to the heritage asset: see [8.2]. These phrases were a reference to paragraphs 132-134 of the NPPF; but in forming that judgment, section 8 identified and assessed areas of potential damage and the impact of the proposals on Heritage Assets at [8.9] ff. At [8.11]-[8.13] it assessed the internal and external alterations to existing buildings, noting that the existing outbuildings and parts of the main house are in a poor state of repair. In assessing the impact of the proposals it expressed the acceptable planning judgment that generally the proposals would not harm the heritage asset and would be of benefit by improving the management of the heritage asset, enhancing the historic features and allowing the heritage assets to be appreciated. In addition it considered that the proposals for the walled garden and grazing meadows would be considered as a very significant benefit of the proposal. From [8.14] and [8.17] respectively it addressed the concerns that had been expressed about the removal of the veranda and the proposals for car parking. From [8.19] to [8.25] it considered the question of viability and whether there was an alternative option; and in doing so it considered the applicability of NPPF paragraph 134, which is the subject of Ground 2 of the Claimant's challenge. The OR then continued to address particular points raised in consultation responses or elsewhere. Some aspects of the treatment of points of concern form part of the Claimant's supporting arguments, to which I will return later. Overall, the section laid the basis for the report's conclusion in section 9 that, on balance, the proposal would make a positive contribution to the character of the local area, would conserve and enhances the natural beauty, wildlife and cultural heritage of the National Park, promote opportunities for the understanding and enjoyment of the special qualities of the National Park without having a detrimental impact on the amenity of local residents. The formulation of this conclusion followed closely and appropriately the objects of the National Park as set out in s. 5 of the 1949 Act. The OR continued by concluding that any limited harm caused by the proposal can be predominately [sic] mitigated against and was outweighed by securing a long term use for the buildings and land and the wider benefits to the purposes of the National Park. The reference to mitigation was evidently a reference to the 28 conditions that it proposed should be attached to any planning permission and the additional 6 conditions that it proposed

should be attached to any listed buildings consent, the full extent and scope of which are set out in Annex 1.

24. Before looking at the criticisms that are made, it is appropriate to record my general and provisional view that the OR was a suitably detailed and thorough document that attempted to address the planning and other issues that arose on this controversial application. Inevitably and appropriately it summarised the views of others in some places and expressed planning judgments and the views of the reporting officer in others. This provisional view does no more than to describe part of the context for the issues raised on this challenge; it does not involve any prejudgment of whether the OR succeeded in its attempt or whether the issues raised by the Claimant are soundly based or not.

Ground 1: the OR failed to correctly apply the test for major development in NPPF paragraph 116

25. Paragraphs 115 and 116 of the NPPF provide:

> "115. Great weight should be given to conserving landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty. The conservation of wildlife and cultural heritage are important considerations in all these areas, and should be given great weight in National Parks and the Broads.
>
> 116. Planning permission should be refused for major developments in these designated areas except in exceptional circumstances and where it can be demonstrated they are in the public interest. Consideration of such applications should include an assessment of:
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> - the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy
> - the cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for it in some other way
> - any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated."

26. There is no definition of "major developments" as it appears in paragraph 116 either in the NPPF or elsewhere. The relevant National Planning Practice Guidance provides limited assistance:

> "Whether a proposed development in these designated areas should be treated as a major development, to which the policy in paragraph 116 of the Framework applies, will be a matter for the relevant decision taker, taking into account the proposal in question and the local context."

27. As set out at [15] above, Mr Maurici advised that a "major development" in the context of paragraph 116 is

> "any development which, by reason of its scale character or nature, has the potential to have a serious adverse impact on the natural beauty, recreational opportunities, wildlife or cultural heritage provided by a National Park. Obviously, the assessment of whether the proposal is major is therefore a matter of judgment based on all the circumstances, including the local context."

Subject to a limited dispute about the word "potential", the parties are agreed that this is reasonable working guidance for a reporting officer or committee that has to decide whether or not paragraph 116 applies, it being also agreed that the major significance of paragraph 116 is that it gives rise to a presumption of refusal in the absence of exceptional circumstances.

28. The Claimant concentrates on [7.6]-[7.8] as the section of the report which directly addressed the applicability of paragraph 116. For convenience I set those paragraphs out again here:

> "7.6 Paragraph 116 states that planning permission should be refused for major developments within designated areas such as the National Park except in exceptional circumstance and where it can be demonstrated they are in the public interest. Consideration then has to be given as to whether this proposal is a 'major development' as referred to in paragraph 116 of the NPPF when considering the principle of development.
>
> 7.7 The NPPF does not provide a definition of what constitutes 'major development'. The Authority has sought legal advice on the definition of major development from James Maurici QC, the most recent guidance being given in October 2014. The Maurici legal opinion provides guidance on the definition of major development within National Parks. The opinion advises that major development is any development which, by reason of its scale character and nature, has the potential to have a serious adverse impact on the natural beauty, recreational opportunities, wildlife or cultural heritage provided by a National Park. Obviously, the assessment of whether the proposal is major is therefore a matter of judgement based on all the circumstances, including the local context.
>
> 7.8 In this instance, it is considered that the physical proposed changes to the existing buildings and new buildings/structure are relatively modest in scale and the potential impacts resulting from the use of the development are localised. As such, it is not considered this proposal constitutes 'major development' for the purposes of paragraph 116 of the NPPF and therefore it is not necessary to demonstrate that there are exceptional circumstance in the public interest. The assessment set out in section 8 does consider the land use, landscape and heritage implications of the proposal."

29. Two things may immediately be noted. First, there is no mention here or elsewhere in the OR of the fact that the application had been categorised as a "major development" within the meaning of the Order. Second, the features mentioned in [7.8] are evidently being summarised in the form of an assessment or judgment rather than

being an attempt to set out all material facts giving rise to that assessment or judgment. The need to look elsewhere for further detail is confirmed by the last sentence of [7.8] which indicates where consideration of land use, landscape and heritage implications – all of which are or include matters that are directly relevant to the application of Mr Maurici's guidance – is to be found. The Claimant suggested that the Court should look solely at what was set out within [7.6]-[7.8] of the OR as being relevant to the report's advice that the proposal was not a "major development" within the meaning of paragraph 116. I disagree, for two related reasons. First, such an approach would deprive the last sentence of [7.8] of any substance or relevant meaning. When pressed, Mr Hobson QC was reduced to submitting that the last sentence was an irrelevance. Second, once an approach is adopted which looks for cogency in the OR, it becomes clear that the last sentence is necessary either to incorporate relevant matters in section 8, or at least to signpost that section 8 contains material that underpins the assessment set out in [7.6]-[7.8].

30. In support of its Ground 1 challenge, the Claimant submits that the OR's conclusion on "major development" is flawed, for three reasons:

    i) First, the Report entirely fails to take into account the designation of the Proposal as major development under the 2015 Order;

    ii) Second, the Report fails to consider "all the circumstances" as advised by Mr Maurici; and in particular fails to consider, as part of the test, the consultee responses which identified the potential for serious adverse impacts resulting from the Proposal;

    iii) Third, the Report fails to fully consider the local context, as required by the NPPG and advised by Mr Maurici.

31. I consider these alleged failures in turn.

Failure to take into account the designation of the Proposal as major development under the Order

32. The Claimant places at the forefront of this argument Mr Maurici's statement at [28] of his opinion that:

> "The application of criteria such as whether the development is …. "major development" for the purposes of the 2010 Order … will all be relevant considerations, but will not determine the matter and may not even raise a presumption either way."

The 2010 Order was the precursor to the Order and was in materially the same terms. Nothing turns on the fact that we are concerned with the Order rather than its precursor.

33. With all due respect to Mr Maurici, I am not convinced that this is an accurate statement. No authority has been cited to me that supports or mandates the assertion that the categorisation of a proposal as a "major development" under the Order *will* be a relevant consideration when making the quite separate judgment whether the proposal is a "major development" within the meaning of paragraph 116.

34. The interpretation of paragraph 116 and the approach to be adopted have been considered in two decisions of this court, which provide no support for Mr Maurici's statement:

i) in *Aston v Secretary of State for Communities and Local Government* [2013] EWH 1936 (Admin) Wyn Williams J rejected a submission that the phrase "major development" should be given a uniform meaning wherever it appears in the context of town and country planning documents of different kinds. In doing so he rejected the submission that "major development" in paragraph 116 should be given the same meaning as where the term appears in the Order (or its precursor). Instead, he held that the term "should be construed in the context of the document in which it appears": see [93]. Later he upheld the Inspector's approach, which was that the meaning of the phrase major development was that which would be understood from the normal usage of the words: see [94]. I respectfully agree with and endorse that approach;

ii) In *R (on the application of Forge Field Society) v Sevenoaks DC* [2014] EWHC 1895 (Admin) Lindblom J endorsed the approach that Wyn Williams J had adopted in *Aston*.

35. It is in theory possible that the categorisation of a proposal as a "major development" under the Order may in some cases be relevant and material. But what is relevant or material in any given case is fact sensitive and not susceptible to hard and fast rules or set criteria. In the present case, the only reason why the proposal was categorised as a "major development" under the Order was because the red-line boundary enclosed an area in excess of 1 hectare. Therefore, referring to that categorisation would merely have informed the committee that the area within the red-line boundary was in excess of 1 hectare. It would say nothing about the scale and scope of the actual changes that were proposed by the development. Specifically, it would tell the reporting officer and Committee Members nothing about whether the proposal would have a serious adverse impact on the natural beauty, recreational opportunities, wildlife or cultural heritage provided by a National Park, which is the agreed touchstone for determining whether it is a "major development" within the meaning of paragraph 116.

36. In the present case, the scale and scope of the proposed development was clearly set out and known to the Committee Members. They knew both the location and extent of the red-line boundary and the location and extent of what was to be developed and changed under the proposal. They cannot have been unaware that the application site as defined by the red line boundary exceeded one hectare. That being so, the fact that the application had been recognised as exceeding 1 hectare for the purposes of the Order added nothing relevant or material to what they knew already.

37. I therefore reject the submission that failure to refer to or take into account the categorisation of the proposal as a "major development" under the Order was a flaw in the OR. The fact that neither Mr Hobson's opinion nor the pre-action letter mentioned the failure to mention the categorisation under the Order is not of itself a reason for my conclusion, though it is consistent with it.

38. The Interested Party takes an additional point that the Case Officer for the application was Ms Porter, who made the presentation to the Committee Members, and who would have been known to the Members as being the Defendant's Major Projects Lead. It is therefore submitted that the Members would automatically have been aware that the proposal was a "major development" for the purposes of the Order. That may well be so but, for the reasons I have set out above, it does not matter.

Failure to assess the consultee responses which identified the potential for serious adverse impacts resulting from the Proposal

39. The OR set out Mr Maurici's guidance at [7.7], correctly recognised and identified that this gave rise to a decision based on judgment, and applied it at [7.8].

40. The Claimant first submits that the OR reached its conclusion on paragraph 116 before considering the statutory consultee responses at all. There is no merit in this submission. On a fair reading of the OR it is clear that the conclusion on paragraph 116 set out at [7.8] took into account the relevant features identified in Section 8: see [29] above. On a fair reading it is also clear that Section 8 did go to the question of impact and harm: this is clear both from the contents of Section 8 itself and the conclusions set out in Section 9, to which I have referred. For similar reasons I reject the Claimant's second submission in support of this line of argument, which is that the OR did not reach a view at all on the extent of possible negative impacts and therefore did not make a valid assessment of the applicability or otherwise of paragraph 116. On a fair reading, the view expressed in [7.8], that "the physical proposed changes to the existing building and new buildings/structures are relatively modest in scale and the potential impacts resulting from the use of the development are localised", is the expression of a view on possible negative impacts (based on materials identified in the OR) which justifies the conclusion which follows, namely that "As such it is not considered this proposal constitutes "major development" for the purposes of paragraph 116 of the NPPF". The third submission in support of this line of argument is that Section 8 fails to address the distinct question of the potential for serious adverse impacts rather than actual adverse impacts. Even if this were so, it is clear that the potential for adverse impacts was considered when assessing the applicability of paragraph 116, because the OR set out the correct test at [7.7] (including "the *potential* to have a serious adverse impact…") and answered it by reference to the correct criteria at [7.8] (including "… the *potential* impacts from the use of the development are localised."). This criticism, in my view, is based upon an impermissibly legalistic approach to and failure to analyse the substance of the OR. I reject it.

41. The Claimant's final submission in support of this line of argument is that the OR did not sufficiently reflect the strength of the views expressed by consultees. In the Grounds the Claimant identified the consultation responses from the Defendant's Landscape Architect, Historic England, and the Defendant's Dark Skies Officer. In written and oral submissions the Claimant also referred to the response of the Local Highway Authority. The Claimant identified those passages which its submits indicate concerns; this led to a close analysis by Counsel for the Defendant which sought to put the Claimant's chosen passages into a fuller context. It is necessary to deal with the Claimant's criticisms and the Defendant's responses in a little detail.

42. The Claimant points to the Defendant's Landscape Architect's references to "potential significant adverse landscape and visual effects" and the "significant adverse effects" caused by the location of the car park. As to the proposed mitigation of screen planting the Claimant points to his statement that "a thick belt of screen planting immediately adjacent to the rural lane would fundamentally alter its key landscape and visual component in an adverse way". It submits that it was the Landscape Architect's firm view that the location of the car park and the mitigating screen planting could, and would, cause significant adverse impacts and was "not acceptable in landscape terms in its current form".

43. The OR identified these concerns with sufficient clarity at [4.3], noting that, even after the provision of further information, the Landscape Officer objected to the proposal and remained concerned that the proposed location of the car park was not appropriate and the proposed mitigation measures of providing screen planting would in itself cause landscape and visual effects. The same section of the OR recorded the Landscape Officer's view that "the potential significant adverse landscape and visual effects of the proposed development would be avoidable" and that finding an alternative location would be the appropriate mitigation strategy. The OR returned to

the Landscape Architect's views at [8.29]-[8.33]. In the course of that passage the OR engaged in a detailed debate as to the actual and potential impact of the proposal. In particular, at [8.33] the OR recorded that, in the light of the Landscape Architect's suggestion that an alternative place might be found for the car parking, alternative locations had been explored but that, while they would have a lesser impact in landscape and visual terms, they would have a greater impact on the heritage asset and its setting. In my judgment, this treatment was balanced and fairly represented the Landscape Architect's views, placing them in the wider context of consideration of the proposal as a whole.

44. The Claimant identifies that Historic England's response referred to the harm that would result to the cultural heritage of the National Park resulting from the loss of the veranda and location of the car park. As to the veranda, their view included that "the loss of this feature and its replacement with a conservatory style extension will therefore cause harm to the appreciation and understanding of the predominant architectural style and age of the house". As to the impact of the car park, the view was "In heritage terms it is not desirable to locate such facilities where visual intrusion could harm the sense of arrival at an historic country house and undoubtedly this will also impact upon the character of the National Park".

45. What the Claimant does not identify is that Historic England also said that "overall … the proposed conversion of the main house and service wings to guest accommodation is fairly sensitive", that the veranda was a later replica of the original and was not in good condition, and that their advice to the Defendant was that it should "rigorously scrutinise the justification for the loss of the veranda, to ensure that all options for providing a restaurant elsewhere have been explored." Similarly in relation to the car park, Historic England "encourage[d] the [Defendant] to ensure that all options for car parking have been thoroughly explored …" Its ultimate recommendation was that:

> "Historic England has some 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 129, 132 and 134 of the NPPF.
>
> We recommend that the [Defendant] assesses the full detail of the proposals in relation to national and local planning policy and with due regard to any public benefits that would be delivered by the development."

46. Historic England's recommendations were set out, almost verbatim, at [4.2] of the OR. The veranda and Historic England's position were discussed at [8.14] which identified Historic England's concerns, discussed them and, for the reasons there set out, recommended that the proposal as revised was acceptable, subject to the imposition of identified conditions. It did not shrink from the fact that the veranda extension would cause harm by being a larger and more modern extension but, for the reasons given, expressed the view that the harm was less than substantial and could be justified: see [8.15] of the OR. In reaching that conclusion it accepted the observation from Historic England about the causing of harm, but formed a legitimate view of the seriousness of such harm. The car park was discussed at [8.17], which identified Historic England's reservations about the positioning of the car park. It recorded that, as suggested by Historic England, the applicant had explored alternative locations but concluded that "each of the other locations have an equal, or in some cases more significant, impact in heritage terms." Once again, it was accepted that some harm

would result but the view was expressed that it would be less than substantial harm. There is no submission that these were judgments that the reporting officer and Defendant was not entitled to reach.

47. The Claimant submits that the Dark Skies Ranger concluded that the new lighting would amount to a "significant threat to dark skies in the area" and even with the proposed mitigation "will have a noticeable impact on sky quality". He also expressed concerns about the glazed restaurant, concluding that it will cause "a significant amount of light pollution and spill". There were three responses from the Dark Skies Ranger. The comments highlighted by the Claimant come from the first two responses. The first, dated 5 January 2017, was very general. It referred to both positive and negative aspects of the proposed lighting. The second, dated 6 January 2017, concentrated mainly on light from the restaurant and made recommendations for the reduction of light spill. The third, dated 20 March 2017, started with the observations that "it is encouraging to see that the developer has addressed points raised in my comments in protecting dark skies." It requested further clarification on the use of other types of lighting and about low level lights proposed for the car park. In relation to the veranda/restaurant, the tone and substance of the response had changed significantly: the Dark Skies Ranger said "I am encouraged to see that lead roofing and blinds are to be used on the veranda. However, it would be good to know what the level of transmittance the blinds will operate at. I recommend that the blinds act to eliminate all transmission of light to protect dark skies."

48. The OR summarised the views of the Dark Skies Ranger at [4.11] in terms which reasonably reflected the Ranger's views as set out in the responses to which I have referred. It addressed the impact on the Dark Skies Reserve at [8.52] ff. In doing so it recognised that the proposal was introducing new and additional lighting sources (where there is currently no or little lighting) which could impact on the quality of the dark skies: see [8.53]. It expressed the view that such impacts could be reasonably mitigated via suitably worded conditions. There is no submission that this was an assessment or judgment which the reporting officer or the Defendant was not entitled to reach. Conditions 4 and 15 addressed the need to reduce the impact on the dark skies reserve. It is not submitted that Conditions 4 and 15 were not appropriate measures to address the potential impact.

49. The Claimant identifies that the Highway Authority referred to the need for road widening and passing places. This would impact on the quality of the country lane. A fair reading of the Highway Authority's response would note that it included "the LHA support the applicant's proposal to implement passing lay-bys along the Madehurst Road which allow vehicles to pass when necessary." The OR summarised the Highway Authority's views at [4.4] and considered the impact of the development for the highways at [8.36] ff. It concluded that the proposal would not have a severe residual impact: see [8.39]; and it expressed the view that (as supported by the comments from the Highway Authority) Grown's proposals, including the implementation of passing bays would benefit all road users and help to mitigate the (modest) increase in traffic movements along the road.

50. Viewed overall, I am quite unpersuaded that the OR failed adequately to reflect the views of the consultees as alleged by the Claimant. It is to be noted that none of the consultation responses used the language of "serious" impact; nor did they use language that should necessarily or reasonably have been interpreted as asserting the potential for "serious" impact. In each case, the concerns were suitably noted and discussed, and judgments formed. I reject the submission that the OR failed correctly to inform members of the Committee of the considerations raised by consultees so as

to vitiate the Committee's decision about whether or not the proposal was a "major development" for the purposes of paragraph 116.

Failure to take into account the local context

51. In support of the submission that the OR failed to take into account the local context, the Claimant submits that:

> "The following relevant considerations are overlooked: whether the surrounding area is rural, residential or urbanised, whether there are other similar hotel or restaurant developments nearby, the extent and nature of other development in the area, the size of that area or the previous use of the site."

52. On a fair reading of the OR, the local context infuses and informs the document from start to finish. I have already noted reasons why the Committee Members were made fully aware of the nature of the local context at [14] above. Dealing with the specifics of the allegation set out above: the Committee Members knew that the area was rural, situated within the National Park and close to the hamlet of Madehurst. There is no suggestion and no evidence that there were in fact other similar hotel or restaurant developments nearby and therefore no reason to suppose that any should have been mentioned. Similarly, there is no suggestion or evidence that there was other development in the area that should have been taken into consideration. For the reasons already given, the reporting officer and the Committee Members knew the size of the application area; and the previous use of the site was stated in [1.1] to be as a private dwelling. There is no suggestion or evidence that there was any other relevant previous use.

53. There were numerous references in the OR that made clear the inherently rural nature of the locality and that it was relatively tranquil. Any suggestion that the Committee Members were not aware that the proposal was in the Dark Skies Reserve, if made, would have been quite unfounded: none is in fact made. Equally the descriptions of the road made clear that it was a little-used country lane, which would be dark at night.

54. This submission has no merit and is rejected.

55. Standing back and taking a reasonable approach to the OR as a whole, it properly reflects the Defendant's legitimate judgment on reasonable grounds that the proposed development was not a "major development" within the meaning of paragraph 116. I reject any suggestion based on Ground 1 that the overall effect of the report was to mislead the Committee either significantly or at all about matters material to the exercise of its judgment about the applicability or otherwise of paragraph 116. In the context of the OR as a whole, I regard any distinction between "potential" for harm and "likelihood" of harm as sterile and unimportant. Any assessment of potential for harm necessarily includes some consideration of whether harm is likely; and if Mr Maurici meant to advise that the existence of any possibility at all of serious harm would require any development to be categorised as a "major development" within the meaning of paragraph 116, I would respectfully disagree. What the OR did was to conduct a reasoned and reasonable assessment of the potential for harm and to conclude that, although some harm would eventuate, the criteria for categorising the proposal as a "major development" within the meaning of paragraph 116 were not satisfied.

56. In the light of my conclusions on the Claimant's submissions thus far, it is not necessary to consider s. 31(2A) of the Senior Courts Act 1981. I therefore merely say

that, having regard to the contents of the OR as a whole, even if I had found in favour of the Claimant on one or more of its submissions, I would have concluded that it would have remained highly likely that the outcome for the Claimant would not have been substantially different (or different at all) if the putative error had not been made.

57. For the reasons set out above, Ground 1 fails.

Ground 2: the officer misinterpreted the meaning of NPPF paragraph 134, specifically the meaning of "optimum viable use" and has failed to take into account whether the existing residential use is the optimum viable use.

58. Paragraphs 132 to 134 of the NPPF provide as follows:

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

59. The PPG provides further guidance on viability of heritage assets as follows:

> "**What is a viable use for a heritage asset and how is it taken into account in planning decisions?**
>
> The vast majority of heritage assets are in private hands. Thus, sustaining heritage assets in the long term often requires an incentive for their active conservation. Putting heritage assets to a viable use is likely to lead to the investment in their maintenance necessary for their long-term conservation.
>
> By their nature, some heritage assets have limited or even no economic end use. A scheduled monument in a rural area may preclude any use of the land other than as a pasture, whereas a listed building may potentially have a variety of alternative uses such as residential, commercial and leisure.
>
> In a small number of cases a heritage asset may be capable of active use in theory but be so important and sensitive to change that alterations to accommodate a viable use would lead to an unacceptable loss of significance.
>
> It is important that any use is viable, not just for the owner, but also the future conservation of the asset. It is obviously desirable to avoid successive harmful changes carried out in the interests of repeated speculative and failed uses.
>
> If there is only one viable use, that use is the optimum viable use. If there is a range of alternative viable uses, the optimum use is the one likely to cause the least harm to the significance of the asset, not just through necessary initial changes, but also as a result of subsequent wear and tear and likely future changes.
>
> The optimum viable use may not necessarily be the most profitable one. It might be the original use, but that may no longer be economically viable or even the most compatible with the long-term conservation of the asset. However, if from a conservation point of view there is no real difference between viable uses, then the choice of use is a decision for the owner.
>
> Harmful development may sometimes be justified in the interests of realising the optimum viable use of an asset, notwithstanding the loss of significance caused provided the harm is minimised. The policy in addressing substantial and less than substantial harm is set out in paragraphs 132 – 134 of the National Planning Policy Framework.

60. It is common ground that Grown's proposal will lead to less than substantial harm, so that paragraph 134 is directly applicable. Before turning to its meaning it may be noted that, under paragraphs 132 and 133, great weight should always be given to an asset's conservation; but also that even substantial damage to an asset may be permissible in certain (exceptional or highly exceptional) circumstances.

61. The structure of paragraph 134 is clear even if the language is inelegant and, in one respect, opaque. The task to be undertaken by the Committee where, as here, the

proposal will lead to less than substantial harm to the significance of a designated heritage asset, is that the harm should be weighed against the public benefits of the proposal. It is also clear that securing the optimum viable use of the asset is expressly included within "the public benefits of the proposal" that are to be weighed in the balance against the harm to which the proposal will lead.

62. The guidance states that if there is only one viable use, that is the optimum viable use. In such a case, and assuming that the proposal incorporates the one viable use, it is easy to see how that is brought into the balance as a public benefit to be weighed against the harm to which the proposal will lead. What is less clear on the terms of paragraph 134 itself or the guidance is how the case should be approached if there are two viable uses. If the proposal is the one likely to cause the least harm to the significance of the asset, then it will be the optimum viable use, which paragraph 134 states should be included in the public benefits that are brought into the balance. Even so, the terms of paragraph 134 do not require that any and all other viable uses should be excluded from consideration. Furthermore, if the proposal were not to be the optimum viable use because (as explained in the guidance) there is another viable use which is likely to cause less harm than the proposal, the terms of paragraph 134 do not require automatic refusal of permission for that reason.

63. Similar questions were addressed in two related cases, colloquially known as *Gibson 1* and *Gibson 2*, and more formally known as *R (Gibson) v Waverley Borough Council (No. 1)* [2012] EWHC 1472 (Admin), a decision of Cranston J, and *R (Gibson) v Waverley Borough Council (No. 2)* [2015] EWHC 3784 (Admin), a decision of Foskett J. Both cases concerned a property called Undershaw which had originally been constructed as a single dwelling by Sir Arthur Conan Doyle as his private residence.

64. In *Gibson 1*, the planning authority had made its decision on a proposal advanced by Fossway Ltd, which involved dividing Undershaw to create a terrace of three houses. The planning authority made its decision disregarding the existence of an alternative proposal that was being advanced by a Mr Norris, which would involve restoring Undershaw to its original use as a single family home. As such, the Norris proposal could be said to be less harmful to the heritage asset and, assuming it to be viable, to be the optimum viable use. Having referred to the current guidance, Cranston J said at [36]:

> "In my view the result is that if one of the alternatives would secure the optimum viable use, and another only a viable use, not only does that have to be taken into account in determining an application but it provides a compelling basis for refusing permission for the non-optimum viable proposal."

Later, at [37], he said that "the Council were obliged to treat [Mr Norris' planning application and proposal] as a highly material planning consideration when deciding on the Fossway applications."

65. There is a cautionary tale embedded in the two Gibson cases. At the time of *Gibson 1*, the Norris proposal seemed substantial and viable. Mr Norris had confirmed via reputable agents an intention to purchase Undershaw and had submitted his own planning application, which was granted on 2 August 2010. He appears to have had funds and a track record of having previously renovated another Grade II listed house. However, by the time of *Gibson 2* his single interest "would appear to have waned…". His permission had not been implemented and had expired: see *Gibson 2* at [9]. Unsurprisingly, Foskett J held that Cranston J's ruling in *Gibson 1* did not bind

the planning authority to regard the residential dwelling option as the only optimum viable use for all time: see [60]. Having reviewed the challenge to the Defendant's current decision, Foskett J said at [62] "I am unable to see that the Committee's approach was in any way invalidated by a failure to identify single residential use as the viable option for preserving the heritage asset."

66. With one minor gloss, I respectfully agree with and adopt the approach of Cranston J and Foskett J in the two *Gibson* cases. To my mind, they emphasise the need for alternative proposals to be demonstrably substantial rather than speculative before they can realistically be considered as candidates to be the optimum viable use. A proposal which is merely speculative is not viable, whether or not it might otherwise be optimal. This is, to my mind, clear both from the current guidance and from the Gibson cases. The gloss is that I can envisage circumstances where the difference in the level of harm inflicted by two proposals was limited so that, although one would be regarded as the optimum viable use, it would not be right to regard that as a compelling basis for refusing permission to the other if the overall balance between harm and public benefits favoured the other. This serves to reinforce that the planning authority's task is to weigh any harm to the significance of a designated heritage asset against the public benefits of the proposal and that securing optimum viable use is only one part of that balancing exercise.

67. The OR addressed the issues arising under paragraph 134 at [8.19]-[8.25]. It is common ground that the OR did not set out the correct test at [8.20]. The Claimant submits that it repeated the error in [8.21]. I am not convinced. Although it is not entirely clear, it seems to me that [8.21] is addressing a slightly different question from that being addressed in [8.20]. What [8.21] seems to be saying is that when considering alternative proposals which may include the question of which proposal is the optimum viable proposal, the balance to be struck between the two alternative proposals should carry out a comparative balancing exercise between the levels of public benefit and harm to the heritage asset in each case. If that is what is meant, I agree – and it would fall within the gloss that I have indicated above. In other words, the fact that one of two alternative proposals is the optimum viable use is not of itself necessarily determinative of the outcome.

68. The Claimant submits that the misstatement of the paragraph 134 test in [8.20] infects and vitiates the OR's approach to and assessment under that paragraph. That requires close attention to the relevant passage in its proper context in the OR as a whole. Specifically, in the immediately preceeding paragraphs ([8.9]-[8.13]) the OR addressed the heritage impacts of the Proposal, identifying various impacts and, in relation to each, concluding that they were less than substantial and outweighed by the public benefits that the proposal would bring: see [8.13], [8.16] and [8.19]. Those public benefits were outlined at [8.4], [8.5], [8.12], and [8.16], with other references at [8.29], [8.32] and [8.41]. At the conclusion of [8.19]-[8.25] the OR applied the correct test under paragraph 134 by conducting a balancing exercise placing the harm to the heritage asset on the one side and the wider public benefits of the scheme that had previously been identified.

69. However presented, the Claimant's complaint under Ground 2 is in substance that the OR failed to treat a suggested continuation of use as a private residence as the optimum viable use. This suggested alternative use was specifically addressed in paragraphs [8.23] and [8.24]. The Claimant places great weight upon the sentence "It is accepted that the existing residential use might be a viable use and could result in less harm to the heritage asset… ." However, when this sentence is read in context it becomes clear that all that is being said is that *in theory* it might be a viable use. The rest of the passage makes clear that in fact it was not. The features which point to that

conclusion are set out in [8.25] after pointing out in [8.24] that substantial houses require significant investment for their maintenance and that although the main house was in a reasonable state of repair, the same could not be said of a number of the existing outbuildings or the walled garden. The relevant features are:

i) Grown was successful in purchasing the house after a sufficient marketing period i.e. a sufficient period during which no one had bought the house for use as a private dwelling;

ii) Although third parties were asserting that there were alternative purchasers who would keep the asset in its existing use, these assertions were purely anecdotal i.e. there was no evidence to substantiate the anecdotal assertions.

70. It is not irrelevant to compare the situation facing the Planning Committee with the situation that confronted the planning authority at the time of *Gibson 1*. In the present case there was no formal approach indicating an intention to buy, no evidence of a prospective purchaser with the funds necessary to make a proposal viable, and no application for planning permission on behalf of a prospective purchaser. In fact, none of the features that justified treating Mr Norris' proposal as viable at the time of *Gibson 1* were present. For completeness I add that the Claimant has advanced no evidence in the present proceedings to suggest that there was either any or any realistic prospective purchaser waiting in the wings.

71. In such circumstances, it would have been open to the OR to discount any alternative use altogether. In fact, the OR adopted a more cautious approach: it recognised the existence of the assertions but, because they were purely anecdotal, afforded them "limited weight". That was, in my judgment, a reasonable approach and more generous to the Claimant's position than was merited. Having made that assessment the OR was entitled and right to proceed to the assessment pursuant to paragraph 134 as it did at [8.25]. There can be no valid criticism of the planning judgment that was made.

72. For these reasons, I consider the error in [8.20] (and, if I am wrong in my understanding, in [8.21] to be immaterial. There was in truth no alternative viable proposal that the OR and Committee Members should have considered. It is therefore irrelevant if they misunderstood the definition of optimum viable use because the proposal was the optimum viable use and was effectively treated as such.

73. As before, in the light of my conclusions thus far, no issue arises under s. 31(2A) of the Senior Courts Act. However, even if my conclusion were wrong, I would conclude that the prospect of single residential use was so tenuous that it would have remained highly likely that the outcome for the Claimant would not have been substantially different (or different at all) if the putative error had not been made.

74. Ground 2 therefore fails.

75. The challenge is based upon an over legalistic reading of selected parts of the OR. When the OR is read fairly, in full and in its proper context, there is no substance in the grounds of challenge.

ANNEXE A