Neutral Citation Number: [2022] EWHC 404 (Admin)

Case No: CO/1338/2021

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 25/02/2022

Before :

MR TIM SMITH

(sitting as a Deputy High Court Judge)

- -

Between :

THE QUEEN

on the application of

ANTONY STRATTON **Cla**

- and –

THE LONDON BOROUGH OF ENFIELD **Defe**

- and –

MR ENZO DI PAOLA **Interested**

- -

- -

Ben Du Feu (instructed by **Holmes & Hills LLP**) for the **Claimant**

Michael Smith (of **Enfield Legal Services**) for the **Defendant**

(The **Interested Party** did not appear and was not represented)

Hearing dates: 26 January 2022

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10am 25 th February 2022.

MR TIM SMITH (sitting as a Deputy High Court Judge):

Introduction.

1.
This claim concerns a challenge to the grant of planning permission by the Defendant. The planning permission in question benefits the property at 17 Chase Side Avenue, Enfield owned by the Interested Party. The Claimant owns the neighbouring property at 31 Riverside Gardens, Enfield. Through his challenge he seeks the quashing of the planning permission.

2.
The Defendant accepts that the planning permission was granted unlawfully. However it has maintained consistently that, pursuant to section 31(2A) of the Senior Courts Act 1981, the Court should withhold substantive relief. The question of what relief should be granted in the circumstances of this case - if any - is therefore the sole issue for the Court to determine.

3.
Two days before the hearing, on 24th January 2022, the Court sealed the application made by the Defendant to rely upon fresh evidence and to supplement its previously filed skeleton argument (the application having been served and filed on the afternoon of 21st January 2022). The fresh evidence comprised a second witness statement from Mr John Hood together with supporting enclosures. It was, maintained the Defendant, highly germane to the question the Court had to determine. The supplemental skeleton argument sought to develop the earlier submissions based upon the fresh evidence.

4.
The Claimant resisted the Defendant's application. I therefore heard submissions from the parties at the outset of the hearing. In a separate ruling I allowed the new evidence to be introduced and the Defendant's skeleton argument to be amended. I reserved the costs of the Defendant's application pending the outcome of the substantive hearing.

Factual background.

5.
The Interested Party applied to the Defendant for planning permission on 20th October 2020. The application sought permission for a "Single storey side and rear extension" at 17 Chase Side Avenue. It was allocated the reference number 20/03192/HOU.

6.
The planning application was accompanied by four plans. Two of these plans – the site location plan and a plan showing the existing elevations and floorplan of the Interested Party's property – both showed what were said to be the existing elevations and floor plans of the Claimant's property at 31 Riverside Gardens. Each of these plans purported to show a bricks-and-mortar extension to the rear of number 31 along the boundary it shared with the Interested Party's property.

7.

The Claimant objected to the planning application on 9th January 2021. He pointed out, amongst other things, that the indication of a rear extension to his property built along the boundary was incorrect. His objection included the following statement:

"… the plans that have [been] submitted are misleading as the site plan showing aerial layouts of our property are incorrect, it shows our property as having a back addition, where in fact our property finishes on the same line as all other properties in Riverside Gardens thus our property has no back addition as shown"

8.
For completeness it should be noted that the Claimant did have what can be described as a "temporary canopy" erected at the rear of his property along the shared boundary but the Defendant accepts that it was wrong to describe this as it did in subsequent documentation.

9.
Planning permission was granted by the Defendant on 3rd March 2021 ("**the First Permission**"). The decision was taken by one of the Defendant's planning officers acting under delegated powers.

10.
A report was prepared by the planning officer explaining the basis for his decision **("the First Officer's Report"**) and it was made available to the Claimant after the First Permission had been granted.

11.
The First Officer's Report records one objection to the application having been received. It does not say so in terms but I assume this will be the objection made by the Claimant. However what is set out in the First Officer's Report as the "summary of objections" does not record the comment made about correcting the inaccuracy in the application plans nor is there any other reference to it in the First Officer's Report.

12.
In fact the First Officer's Report reveals that the officer mistakenly accepted there was a bricks-and-mortar rear extension along the common boundary with the Claimant's property.

13.
This error was clearly influential in the officer's assessment of the application, especially in relation to the impact of the proposed development on the amenity of neighbours. For example at paragraph 6.5 the First Officer's Report records:

"The proposed extension would be located towards the common boundary of no.31 Riverside Gardens, which also has a single storey rear extension similar in depth and height as the proposed extension and as such there would be no adverse impact on the amenities of the occupiers in terms of loss of outlook, light and privacy"

14.
The First Permission was challenged by the Claimant. Two grounds of claim were cited. The first ground was that the decision to grant the First Permission was based on a material error of fact, namely the existence of a bricks-and-mortar rear extension at the Claimant's property along the common boundary. The second ground was that the reasons given for the decision were inadequate.

15.

The Defendant filed an Acknowledgement of Service resisting the claim. In doing so the Defendant conceded that ground 1 (at least) was made out, but it continued to resist the claim. The pertinent parts of the Defendant's Summary Grounds of Resistance explain the reason for this as follows:

"5. Whilst the canopied area extends the living area, it is not a bricks and mortar extension which would have a wall along the common boundary that would block out light for the occupants of no. 31. It is therefore accepted that the Officer made a mistake in relation to what type of boundary treatment existed along the part of the common boundary that would be co-existent with the proposed extension. It is accepted that this was material in his conclusion that there would be no adverse impact on the outlook and light for the occupants of no.31.

6. However, the Defendant contends that the decision should not be quashed because it is highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred"

16.
Permission to proceed with the claim was granted on the papers by Lavender J on 9th July 2021.

17.
Meanwhile in the period between permission to proceed with the claim being granted and the substantive hearing of it the Interested Party made a separate application for planning permission to the Defendant on 6th October 2021. It was allocated reference number 21/03822/HOU. The application was made under section 73A of the Town and Country Planning Act 1990 and sought planning permission for "Single storey side and rear extension (RETROSPECTIVE)". Although the development description was identical to that used in the First Permission (other than the use of the word "retrospective") the development was not of the same scale but larger. In his second witness statement for the Defendant Mr Hood confirms that:

"the development for which permission was sought under section 73A is similar to, albeit larger than, the development which is the subject of these proceedings"

18.
Upon becoming aware of this subsequent application the Claimant's solicitors wrote a letter of objection to it on 11th November 2021. The objection noted, amongst other things, that section 73A was a curious power to use in view of the fact that no development had been commenced in breach of planning control (the First Permission being presumed to be lawful unless and until quashed) and hence there was nothing to apply for retrospectively. The letter concluded with the assertion that:

"As there is no legal basis for the Council to entertain or determine the s73A Application, any subsequent decision to determine the S73A Application would be ultra vires"

19.
Planning permission was nevertheless granted by the Defendant on 22nd November 2021 **("the Second Permission"**). The determination was once again made by an officer exercising delegated powers. A report on this application was prepared by the planning officer (**"the Second Officer's Report"**) and has been exhibited to the second witness statement of Mr Hood.

20.
Despite the implicit threat of a legal challenge to the Second Permission by the Claimant no challenge has been commenced (whether by the Claimant or by anyone else) and, according to my calculations, by the date of the substantive hearing the Second Permission was beyond the ordinary challenge

period set by CPR 54.5. In light of this Mr Du Feu for the Claimant accepted that nothing in this case turns on the fact that the Second Permission was granted pursuant to section 73A.

21.
The substantive hearing of the claim was listed originally for 7th December 2021. However following submissions by the parties it was adjourned by Order of Lang J on the basis that the time estimate for the hearing was insufficient.

22.
The case therefore came before me on 26th January.

The grounds.

23.
The Defendant has conceded both of the substantive grounds of claim. In my judgement it has been right to do so.

24.
In relation to ground 1 it suffices for me to acknowledge that all four of the criteria for establishing a material error of fact, as set out by Carnwath LJ (as he then was) in E v Secretary of State for the Home Department [2004] QB 1044, are satisfied.

25.
In relation to ground 2 although the Defendant did not concede this ground clearly in its Summary Grounds of Resistance subsequently Mr Smith for the Defendant conceded it unequivocally in paragraph 5 of his original skeleton argument.

26.
As I note above, though, the Defendant continues to resist the claim on the basis that substantive relief should be withheld. Paragraph 6 of Mr Smith's skeleton argument records that:

"The Defendant's defence accordingly rests on the sole ground of the application by the Court of section 31 of the Senior Courts Act 1981"

27.
In his supplementary skeleton argument Mr Smith cites a wider range of authorities on discretion. These, he submits, further support his fundamental argument that the Court should exercise its discretion under section 31(2A) of the Senior Courts Act 1981 not to grant substantive relief. Whether in fact the Defendant's case on relief remained confined to section 31(2A) despite these statements is a matter which I consider further below.

28.
Where a defendant asserts that relief should be withheld pursuant to section 31(2A) the defendant bears the burden of proof (R (Bokrosova) v London Borough of Lambeth [2016] PTSR 355). For that reason it is convenient to summarise the Defendant's submissions on section 31(2A) before summarising the Claimant's response to them.

The Defendant's submissions:

29.

Section 31(2A) was inserted into the Senior Courts Act 1981 by section 84 of the Criminal Justice and Courts Act 2015. It came into force on 13th April 2015. So far as is relevant to the substantive hearing rather than the permission stage it provides as follows:

"(2A) The High Court –

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under section (4) on such an application,

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred"

30.
In this case it is clear that "the conduct complained of" means the factual error made in the Defendant's officer's consideration of the application. In short the Defendant submits that the First Permission would still have been granted even if the error identified by the Claimant had not been made by the planning officer when deciding to grant it.

31.
There are several limbs to the Defendant's argument on why this is so.

32.
Firstly the Defendant relies on the existence of a fall-back argument in the form of permitted development rights for developments of this nature and scale.

33.
Permitted development rights for development within the curtilage of a dwelling house are found in Schedule 2 Part 1 Class A to the Town and Country Planning (General Permitted Development) (England) (Order) 2015 (SI 2015/596) (**"GPDO"**).

34.
The Defendant submits that the Interested Party could have relied upon his permitted development rights to construct a very similar development to that permitted by the First Permission. In his oral submissions Mr Smith took me through the differences between what Part 1 Class A permitted development rights allow in this location and the development permitted by the First Permission. The parties accept that the two outcomes are not identical and that permitted development rights would only have allowed development slightly smaller and with a different configuration to that for which express planning permission was granted. Nevertheless I am prepared to accept as accurate the descriptions applied by Mr Smith in his skeleton argument to permitted development rights allowing the Interested Party to "construct a development very nearly co-extensive with the development for which he applied for express planning permission" and to the fact that the development permitted by the First Permission would be "only marginally more extensive" than would development resulting from the exercise of permitted development rights.

35.
Mr Smith's submission regarding the fall-back argument was that, the Defendant having identified it as a possibility, the Court discharging its section 31(2A) duty is entitled to infer that it would have had regard to the existence of permitted development rights as a material consideration in favour of the grant of planning permission and that this would have been lawful. Indeed he went further and

submitted that it would not be open to the Defendant to refuse to treat the existence of permitted development rights as a material consideration.

36.
In support of this submission Mr Smith cited the judgment of Lindblom LJ in Mansell v Tonbridge and Malling Borough Council [2019] PTSR 1452 to the effect that permitted development rights may be relied upon as establishing the requisite "real prospect" of fall-back development being undertaken even if the applicant for planning permission does not assert precisely how he intends to make use of them.

37.
The second and third limbs to the Defendant's section 31(2A) argument are all found in Mr Smith's supplementary skeleton argument which I allowed to be admitted.

38.
The second limb relies on the grant of the Second Permission. Mr Smith submitted that the Court is permitted to have regard to the later permission in informing its consideration under section 31(2A). He answered his own rhetorical question of whether this subsequent addition to the factual background can be taken into account with a resounding "yes". As authority for this proposition he cited the cases of R (Cava Bien) v Milton Keynes Council [2021] EWHC 3003 (Admin) and R (Gathercole) v Suffolk County Council [2020] PTSR 359.

39.
Cava Bien was a decision of Ms Kate Grange QC (sitting as a Deputy High Court Judge). Describing the purpose and effect of section 31(2A) at [51(viii)] of her judgment Ms Grange QC cited with approval the judgment of Coulson LJ in Gathercole at [38] where he said:

"The provision is designed to ensure that, even if there had been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application instead should be rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic"

40.
Gathercole involved a challenge to the decision of Suffolk County Council to grant planning permission for a new school in the village of Lakenheath. The school would be located next to a military airfield. The claimant was concerned about the impact from aviation noise on pupils at the school. He challenged the decision to grant permission on the grounds that the County Council had failed to discharge its public sector equality duty under section 149 of the Equality Act 2010 and that the assessment of likely environmental effects in the environmental statement accompanying the planning application was inadequate.

41.
The Court of Appeal accepted that the County Council had failed to discharge its public sector equality duty, but pursuant to section 31(2A) the Court declined to allow the appeal on this ground of claim on the basis that it was "highly likely – if not inevitable – that the same decision would have been reached in any event" (per Coulson LJ at [44]).

42.

Relying on Coulson LJ's warning against quashing decisions where it would be a waste of time and public money to do so Mr Smith submits that the Court is entitled – if not obliged – to have regard to factors which arose after the decision in question.

43.
Thirdly Mr Smith submitted that in discharging its section 31(2A) duty the Court should have regard to the counter-factual scenario of what the Defendant would have to consider if development equivalent to that permitted by the First Permission were undertaken in breach of planning control. He referred to the Defendant's enforcement powers under Part VII of the Town and Country Planning Act 1990 and to the reference in section 172(1)(b) allowing a local planning authority to serve an enforcement notice if it detects a breach of planning control and considers it "expedient" to take enforcement action.

44.
Mr Smith submitted that the relevance of the "expediency" test in this case is that the existence of permitted development rights would have precluded the Defendant from taking enforcement action had it refused the First Permission and had the Interested Party opted to carry out the development applied for notwithstanding the refusal. He relied upon the decision of the Court of Appeal in Duguid v Secretary of State for the Environment, Transport and the Regions [2001] 82 P&CR 6 and of the High Court in Nolan v Secretary of State for the Environment [1998] 1 WLUK 222 as illustrating the limits that would be imposed on the ability to take enforcement action by the existence of permitted development rights.

45.
There was a further theme to the Defendant's submissions on relief. They were based on the Court's general discretion to withhold relief, extending beyond the confines of section 31(2A). I have chosen to characterise this as a separate theme from the various limbs of the section 31(2A) grounds, although it was often unclear whether Mr Smith intended his arguments to be understood as such rather than as additional arguments underpinning the section 31(2A) ground. Be that as it may in addition to his reliance on case-law post-dating the coming into force of section 31(2A) Mr Smith also relied upon the cases cited in an extract from volume 61A of Halsbury's Laws at paragraph 109. Volume 61A relates to Judicial Review and paragraph 109 appears under the sub-heading "Discretion".

46.
Mr Smith emphasised the commentary in paragraph 109, relying in particular on the section I have underlined:

"In deciding whether to grant a remedy the court will take account of the conduct of the party applying, and consider whether it has been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver of the right to object may all result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience, would result, the effect on third parties, and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment"

47.

He noted, correctly, that most of the cases referred to in this section predated the coming into force of section 31(2A) but he submitted that the principles established by those cases remain as relevant now to the question of whether to withhold relief as they did before section 31(2A) came into force.

The Claimant's response:

48.
In response to the Defendant's submissions Mr Du Feu for the Claimant submitted that the Court must take great care to maintain a separation between discharging its duty under section 31(2A) and being drawn into assessing planning merits. He referred to the recent summary by Holgate J in Pearce v Secretary of State for Business Energy and Industrial Strategy [2021] EWHC 326, at [152], of the importance of this separation:

49.
Mr Du Feu added by reference to the judgment of Sales LJ in R (Public and Commercial Services Union) v Minister for the Cabinet Office [2018] ICR 269 at [89] that the threshold applied by section 31(2A) – "highly likely" – is a high one and that it is not met in this case.

50.
Mr Du Feu submitted further that the mistake of fact admitted by the Defendant was pivotal to the officer's conclusion that the proposed development would result in no adverse impact on the Claimant's property, and that once this mistake was excised from the officer's reasoning there was no untainted part of the reasoning left from which to conclude that the result was highly likely to have been the same.

51.
So far as the Defendant's submissions on the fall-back argument go Mr Du Feu noted, correctly, that there is no mention of permitted development rights or of the fall-back position in the First Officer's Report. Furthermore he submitted that for the Court to undertake a necessarily subjective assessment of the weight that any fall-back argument might have had in the planning balance would be to step firmly into the forbidden territory that the authorities warn against.

52.
Finally in relation to the Defendant's submissions regarding the relevance of possible enforcement considerations Mr Du Feu submits simply that these were considerations which are found in neither the First Officer's Report nor the Second Officer's Report and hence this argument by the Defendant is another example of the Court being invited into forbidden territory.

Analysis:

53.
The Defendant has already conceded that the First Permission was granted unlawfully. The only issue before the Court is therefore what relief, if any, should flow from this concession.

54.
In the course of oral argument I posited that the range of options open to me ran from (at its highest for the Claimant) a decision to quash the First Permission, to making a declaration that it was granted unlawfully but leaving it intact, to granting no relief at all. The award of costs is also a factor relevant to whichever option I chose. Both parties agreed with this assessment.

55.

As the Defendant’s arguments developed it became clear that there were two alternative bases on which I was being invited to withhold substantive relief. The Defendant’s primary ground was based on the duty in section 31(2A). This was the only ground cited by the Defendant in its original skeleton argument and it remained the primary submission from the supplementary skeleton argument too. But the secondary submission which emerged from the supplementary skeleton and which was developed orally by Mr Smith related to the Court's more general discretion to withhold substantive relief if, for example, it were concluded that the challenge had become academic. For the Claimant Mr Du Feu acknowledged that declining relief on this basis would be a course open to me if I did not accept the Defendant’s submissions on section 31(2A), although understandably he did not support such a conclusion.

56.
As section 31(2A) remained the Defendant’s primary submission I consider it first, followed by the submissions regarding a more general exercise of discretion.

Section 31(2A):

57.
Although the facts are not close to the present case the judgment of Deputy High Court Judge Kate Grange QC in Cava Bien is especially helpful in drawing together (at [52]) a number of themes from cases that have considered section 31(2A) in the recent past. She held:

“52. The proper approach to this test is not in dispute between the parties. It has been considered in a number of authorities and it seems to me that the central points can be summarised as follows:

i) The burden of proof is on the defendant: R (Boskova) v Lambeth Borough Council [2016] PTSR 355 [88];

ii) The "highly likely" standard of proof sets a high hurdle. Although s.31(2A) has lowered the threshold for refusal of relief where there has been unlawful conduct by a public authority below the previous strict test set out in authorities such as Simplex GE (Holdings) Ltd v Secretary of State for the Environment (1988) 57 P&CR 306 , the threshold remains a high one: R (Public and Commercial Services Union) v Minister for the Cabinet Office [2018] ICR 269 at [89] per Sales LJ, approved by Lindblom, Singh and Haddon-Cave LJJ in R (Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214, [2020] PTSR 1446 at [273].

iii) The "highly likely" test expresses a standard somewhere between the civil standard (the balance of probabilities) and the criminal standard (beyond reasonable doubt): R (Ron Glatter) v NHS Herts Valleys Clinical Commissioning Group [2021] EWHC 12 (Admin) at [98] per Kerr J.

iv) The court is required to undertake an evaluation of the hypothetical or counterfactual world in which the identified unlawful conduct by the public authority is assumed not to have occurred: R (Public and Commercial Services Union) v Minister for the Cabinet Office (supra) [89], R (Plan B Earth) v Secretary of State for Transport (supra) [273], R (Ron Glatter) v NHS Herts Valleys Clinical Commissioning Group (supra) [98].

v) The court must undertake its own objective assessment of the decision-making process and what the result would have been if the decision-maker had not erred in law: R (Goring-on-Thames Parish Council) v South Oxfordshire District Council [2018] 1 WLR 5161, judgment of the whole court at [55], R (Gathercole) v Suffolk County Council [2020] EWCA Civ 1179, [2021] PTSR 359 at [38] per Coulson LJ, (Asplin and Floyd LJJ concurring at [78] and [79]).

vi) The test is not always easy to apply. The court has the unenviable task of (i) assessing objectively the decision and the process leading to it, (ii) identifying and then stripping out the "conduct complained of" (iii) deciding what on that footing the outcome for the applicant is "highly likely" to have been and/or (iv) deciding whether, for the applicant, the "highly likely" outcome is "substantially different" from the actual outcome': R (Ron Glatter) v NHS Herts Valleys Clinical Commissioning Group (supra) [98]-[99].

vii) It is important that a court faced with an application for judicial review does not shirk the obligation imposed by s31(2A); the matter is not simply one of discretion but becomes one of duty provided the statutory criteria are satisfied: R (Gathercole) v Suffolk County Council (supra) at [38], [78] and [79] and R (Plan B Earth) v Secretary of State for Transport (supra) at [272].

viii) The provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic: R (Gathercole) v Suffolk County Council (supra) at [38], [78] and [79].

ix) The provisions 'require the court to look backwards to the situation at the date of the decision under challenge' and the 'conduct complained of' means the legal errors that have given rise to the claim: R (KE) v Bristol City Council [2018] EWHC 2103 (Admin) at [139] per HHJ Cotter QC, citing Jay J in R (Skipton Properties Ltd) v Craven DC [2017] EWHC 534 (Admin) at [97]-[98].

x) The Court can, with due caution, take account of evidence as to how the decision-making process would have been approached if the identified errors had not occurred. Section 31(2A) is not prescriptive as to material which the Court may consider in determining the "highly likely" issue: R (Enfield LBC) v Secretary of State for Transport [2015] EWHC 3758 at [106], per Laing J. Furthermore, a witness statement could be a very important aspect of such evidence: R (Harvey) v Mendip District Council [2017] EWCA Civ 1784 at [47], per Sales LJ, although the court should approach with a degree of scepticism self-interested speculations by an official of the public authority which is found to have acted unlawfully about how things might have worked out if no unlawfulness had occurred: R (Public and Commercial Services Union) v Minister for the Cabinet Office (supra) at [91].

xi) Importantly, the court must not cast itself in the role of the decision-maker: R (Goring-on-Thames Parish Council) v South Oxfordshire District Council (supra) at [55]. While much will depend on the particular facts of the case before the court, 'nevertheless the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law.' R (Plan B Earth) v Secretary of State for Transport (supra) [273].

xii) It follows that where particular facts relevant to the substantive decision are in dispute, the court must not 'take on a fact- finding role, which is inappropriate for judicial review proceedings' where the 'issue raised…is not an issue of jurisdictional fact'. The court must not be enticed 'into forbidden territory which belongs to the decision-maker, reaching decisions on the basis of material before it at the time of the decision under challenge, and not additional evidence after the event when a challenge is brought'. To do otherwise would be to use s31(2A) in a way which was never intended by Parliament: R (Zoe Dawes) v Birmingham City Council [2021] EWHC 1676 (Admin), unrep., at [79] – [81] per Holgate J.

xiii) The impermissibility of the court assuming the mantle of the decision-maker has been particularly emphasised in the planning context where e.g. it may require an assessment of aesthetic judgment or adjudicating on matters of expert evidence: R (Williams) v Powys CC [2018] 1 WLR 439 per Lindblom J at [72] and R (Thurloe Lodge Ltd) v Royal Borough of Kensington & Chelsea [2020] EWHC 2381 (Admin) at [26] per David Elvin QC (sitting as a Deputy High Court Judge).”

xiv) Finally, the contention that the s31(2A) duty is restricted to situations in which there have been trivial procedural or technical errors (see e.g. the dicta of Blake J in R (Logan) v Havering LBC [2015] EWHC 3193 (Admin) at [55]) was rejected by the Court of Appeal in R (Goring-on-Thames Parish Council) v South Oxfordshire District Council (supra) and in R (Gathercole) v Suffolk County Council (supra) [36], [77] and [78]”

58.
I respectfully agree with this careful analysis. The elements of the summary that are especially germane to the facts of this case, beyond those I have referred to already, are [52(ix)] and [52(xii)].

59.
[52(ix)] refers to the judgment of HHJ Cotter QC in KE which in turn refers to the judgment of Jay J in R (Skipton Properties) v Craven DC [2017] EWHC 534 (Admin). Skipton Properties concerned a challenge to a local planning authority’s decision to adopt a new supplementary planning document “Negotiation of Affordable Housing Contributions 2016” to replace a separate document of the same name dating from 2015. Jay J found that the adoption was unlawful and he declined to accept the local authority’s submission that relief should be withheld based on section 31(2A). He held at [96]-[98]:

“96. Mr Bedford submitted that I should refuse relief in this case because, if the NAHC 2016 is quashed, the Defendant will revert to the NAHC 2015. On his submission, the correct approach to s31(2A) is that I should proceed on the premise that the NAHC 2016 was never adopted.

97. In my judgment, this submission cannot be accepted. I am required to refuse relief, namely a quashing order, if “it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred”. This is a backward-looking provision. However, and contrary to Mr Bedford's argument, the “conduct complained of” here is the various omissions I have listed (the failure to consult, assess and submit for examination), not the decision to adopt. “The conduct complained of” can only be a reference to the legal errors (in the Anisminic sense) which have given rise to the claim.

98. Had the Defendant not perpetrated these errors, by omission, I simply could not say what the outcome would have been, still less that it would highly likely have been the same”

60.

[52(xii)] refers to the judgment of Holgate J in R (Zoe Dawes) v Birmingham City Council [2021] EWHC 1676 (Admin). That case concerned a challenge brought against the defendant local authority's making of a general vesting declaration pursuant to a compulsory purchase order aimed at acquiring properties that had been unoccupied for some time because they were unfit for habitation. The claimant's complaint in that case was that the local authority had not undertaken a full inspection of the property to check on its state and condition prior to making the general vesting declaration. The defendant's response was that at the date the vesting declaration was made it had undertaken an external inspection of the property but not an internal inspection because the claimant had not been in occupation of the property. As part of its resistance to the claim the local authority argued that the result would have been no different had an inspection actually taken place. Holgate J addressed the defendant's argument regarding section 31(2A) at [76]-[80] of his judgment:

"76. BCC submit that in the event of the claimant establishing a ground of challenge, the court should nonetheless refuse to grant any relief because it is highly likely that the outcome for the claimant would not have been substantially different "if the conduct complained of had not occurred."

77. Mr. Habteslasie accepts that the issue posed by s31(2A) is whether the carrying out of further inquiries would have made a difference to the decision to execute the GVD. He submits that the answer is no because the claimant says she only moved into the property on 1 July 2020 whereas the decision had already been taken on 24 June 2020.

78. With respect, the submission that relief should be withheld under s31(2A) on that basis is untenable. If an inspection had been made it would have revealed to BCC the condition of the property and whether it was suitable for habitation. Actual occupation was not the sole issue. If the property had been physically suitable for habitation that would have led to the inevitable question when would it be occupied. It is reasonable to suppose that if she had been asked on 24 June 2020, the claimant would have said that she was about to move in. The fact that she had not done so by 24 June 2020 would not have been determinative in the circumstances. In any event, the matter was revisited on 13 July 2020 and the GVD was not executed until 13 August 2020.

79. A further problem with BCC's submissions is that the court does not know what would have been discovered if the authority had complied with its obligation to make further inquiries at the relevant time. Instead, BCC's officers have devoted many pages of witness statements to making claims as to why, in the light of subsequent material, they do not accept that the claimant moved into the property on 1 July 2020. By definition, this is not evidence which was available to the authority at the time of the decision impugned ...

80. ... the issue raised by BCC is not an issue of jurisdictional fact. Instead, BCC is seeking to entice the court into forbidden territory which belongs to the decision-maker, reaching decisions on the basis of material before it at the time of the decision under challenge, and not additional evidence after the event when a challenge is brought. If the court were to accede to the authority's suggestion, that approach could be replicated in many other claims for judicial review, using s31(2A) in a way which was never intended by Parliament"

61.
Applying the principles from this case-law to the present case it is clear that I must look back to the facts as they were known and applied by the Defendant when the First Permission was granted and to consider whether I am in a position to conclude that the outcome was highly likely to have been the same had the mistake of fact not been made.

62.
The First Officer's Report makes clear that the erroneous assumption of this rear built extension to the Claimant's property was pivotal to the conclusion that the proposed development would have no adverse impact on the Claimant's amenity. That much can be seen from paragraph 6.5 of the First Officer's Report:

"The proposed extension would be located towards the common boundary of no.31 Riverside Gardens, which also has a single storey rear extension similar in depth and height as the proposed extension and as such there would be no adverse impact on the amenities of the occupiers in terms of loss of outlook, light and privacy" (my emphasis)

63.
The exercise that I must now conduct is to consider what the result would have been had this error not been made whilst heeding the guidance seen in [55] of the judgment of the Court of Appeal in R. (on the application of Goring-on-Thames Parish Council) v South Oxfordshire District Council [2018] EWCA Civ 860:

"55. The mistake in Mr Streeten's submissions here is that, in the context of a challenge to a planning decision, they fail to recognize the nature of the court's duty under s31(2A) . It is axiomatic that, when performing that duty, or, equally, when exercising its discretion as to relief, the court must not cast itself in the role of the planning decision-maker (see the judgment of Lindblom L.J. in Williams, at paragraph 72). If, however, the court is to consider whether a particular outcome was "highly likely" not to have been substantially different if the conduct complained of had not occurred, it must necessarily undertake its own objective assessment of the decision-making process, and what its result would have been if the decision-maker had not erred in law"

64.
Moreover I must undertake this assessment based on the facts that existed at the date the decision was taken originally (per Jay J in Skipton Properties and Holgate J in Dawes).

65.
Clearly I can exclude from this consideration the fact of the Second Permission. It was not in existence when the decision was made to grant the First Permission, nor had it even been applied for.

66.
The Defendant relies on the existence of permitted development rights as providing a powerful fall-back argument in favour of granting the First Permission. The difficulty faced by the Defendant with this submission is that permitted development rights are not referred to anywhere in the First Officer's Report. They were not relied upon nor even mentioned by the Interested Party in his planning application. The first time the existence of permitted development rights was even acknowledged was in the first witness statement of Mr Hood for the Defendant in these proceedings dated 17th May 2021 and in the Defendant's Summary Grounds of Resistance drafted by Megan Thomas QC and filed with the Acknowledgement of Service on the same day. The witness statement appended an extract of Schedule 2 Part 1 Class A to the GPDO and an annotated plan comparing what had been applied for with what could be developed using permitted development rights alone. But the witness statement does not attempt to assert that permitted development rights were in the mind of the case officer when the First Officer's Report was written and the First Permission granted. On the documentary evidence it is difficult to see how such an assertion could possibly have been sustained in any event.

67.
Mr Smith sought to overcome this hurdle in his oral submissions. Recognising that he was on the threshold of the advocate's forbidden territory of giving evidence to the Court he submitted that the existence of permitted development rights would have been obvious and that any competent officer would have been aware of them. But he could offer no explanation as to why they had not been referred to anywhere in the First Officer's Report.

68.
Mr Smith sought to rely on the case of Mansell v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314 as demonstrating that the existence of permitted development rights could be assumed in this case.

69.
Mansell involved a challenge to a decision by the defendant local planning authority to grant planning permission for the demolition of two buildings and the erection of four replacement buildings on the site. In recommending the grant of planning permission the planning officer had relied upon the fall-back argument derived from permitted development rights – in that case rights found in Schedule 2 Part 3 Class Q of the GPDO – as a material consideration in favour of the grant of permission even though those permitted development rights had not been asserted by the applicant for permission. In those circumstances the claimant submitted that the fall-back argument should not have been relied upon by the authority because it could not be concluded that there was a real prospect of the fall-back position being implemented, the criterion of "real prospect" being a pre-requisite confirmed by the judgment of Sullivan LJ in Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government [2009] EWCA Civ 333, [2009] JPL 1326.

70.
At [27] of his judgment Lindblom LJ stated:

"… when the court is considering whether a decision-maker has properly identified a "real prospect" of a fallback development being carried out should planning permission for the proposed development be refused, there is no rule of law that, in every case, the "real prospect" will depend, for example, on the site having been allocated for the alternative development in the development plan or planning permission having been granted for that development, or on there being a firm design for the alternative scheme, or on the landowner or developer having said precisely how he would make use of any permitted development rights available to him under the GPDO. In some cases that degree of clarity and commitment may be necessary; in others, not. This will always be a matter for the decision-maker's planning judgment in the particular circumstances of the case in hand"

71.
Even though Lindblom LJ recognised expressly that permitted development rights can form the foundation to a fall-back argument I do not consider that Mansell supports the Defendant's case. It dealt with a very different set of facts. In Mansell the fundamental complaint was that the local planning authority should not have relied upon the fall-back argument as a material consideration in the way it did when the applicant for planning permission had not relied upon it himself. This complaint was not upheld by the Court. But more importantly for the present case the fact that the Council did rely on the permitted development rights as establishing a fall-back argument was plain for all to see in the advice given by the officer to the Planning Committee. By contrast, in the present case none of the evidence suggests that permitted development rights were even in the contemplation

of the officer at the time he wrote the First Officer's Report and granted the First Permission under delegated powers.

72.
In any event even if I were to conclude that the fall-back argument arising from permitted development rights would have been considered by the officer when determining the planning application the Defendant faces a further, in my view insuperable, hurdle.

73.
It is not enough to acknowledge that the existence of a fall-back argument represents a material consideration in the determination of a planning application. One must also consider the weight which should be accorded to it. That consideration inescapably requires the exercise of planning judgement.

74.
Such a conclusion wholly accords with the judgment of Ian Dove QC, sitting then as a Deputy High Court Judge, in the case of Gambone v Secretary of State for Communities and Local Government [2014] EWHC 952 (Admin). Commenting on the approach to be taken to fall-back arguments the Deputy Judge commented at [26]-[27]:

"26. Once the question of whether or not it is material to the decision has been concluded, applying that threshold of theoretical possibility, the question which then arises for the decision-maker is as to what weight should be attached to it. The weight which might be attached to it will vary materially from case to case and will be particularly fact sensitive. Issues that the decision-maker will wish no doubt to bear in mind are as set out in the authorities I have alluded to above such as the extent of the prospect that that use will occur. Allied to that will be a consideration of the scale of the harm which would arise. Those factors will all then form part of the overall judgment as to whether or not permission should be granted. It may be the case that development that has less harm than that which is being contemplated by the application is material applying the first threshold, and then needs to be taken into account and weight given to it.

27. However, the question of whether or not there is more or less harm applies at the second stage of the assessment and not at the first stage when deciding whether or not such existing land use entitlements, as may exist in the case, should be regarded as material. In short, there is nothing magical about a fallback argument, it is simply the application of sensible legal principles to a consideration of what may amount to a material consideration, and then the application of weight to that in context in order to arrive at the appropriate weight to be afforded to it as an ingredient in the planning balance"

75.
On the facts of the present case I have no basis whatsoever for concluding what weight the decision-making officer would have given to the fall-back argument even if he permissibly had regard to it. The First Officer's Report and the other contemporaneous evidence are wholly silent on it. Moreover it is not possible even to infer with any confidence what weight would have been accorded to it, not least because the development applied for exceeded the scale of development that permitted development rights would have allowed. I find myself in the same difficulty experienced by Jay J in Skipton Properties at [98]. Having reached that conclusion it follows that the Defendant's submissions are inviting me to trespass well into the forbidden territory.

76.

Furthermore reference to the Second Officer's Report undermines rather than supports the Defendant's case. In stark contrast to the First Officer's Report the Second Officer's Report includes extensive references to, and analysis of, the permitted development rights in paragraphs 6.8-6.15 in the section of the report headed "Impact on neighbouring amenities". These paragraphs include a comparison, both descriptively and pictorially, between the development applied for and the development that could be achieved using permitted development rights. Tellingly the final paragraph in the "Conclusion" section of the Second Officer's Report states:

"6.23 It is not considered that the proposal would give rise to any significant amenity impacts such that would warrant a refusal of planning permission or a change in its design, in particular by comparison with the combined side and rear extensions which the applicant could build, to a height of 4 metres, without planning permission in reliance on his permitted development rights under the GPDO. The fact that the previously approved scheme is presently under construction demonstrates the very real likelihood that this fallback position is an alternative route to extend the house that would have been used" (my emphasis)

77.
The only part of this passage that I take issue with is the conclusion that the fact the development has commenced pursuant to the First Permission illustrates the very real likelihood that the fall-back position based on permitted development rights would have been utilised. That is a non sequitur in my judgement. The fact that development had commenced suggests no more than that the First Permission – if it survives – represents a fall-back argument in support of the Second Permission. The inference cannot extend to reliance on permitted development rights as a fall-back since I have concluded that they were evidently not in the contemplation of either the Defendant or the Interested Party at the time the First Permission was granted.

78.
A comparison between the First Officer's Report and the Second Officer's Report highlights the shortcomings of the former. If permitted development rights had been contemplated by the officer when deciding to grant the First Permission then the Second Officer's Report reveals how it would prudently have been addressed. But the difference between the two reports on this point is stark and leads me inevitably to the conclusion that, whether or not permitted development rights should have been considered when deciding to grant the First Permission, they were not considered.

79.
Put simply, then, if it be considered a mistake not to have had regard to the permitted development rights fall-back argument in the original determination then I must assume it is just as likely that the same mistake would have been made even once the tainted parts of the First Officer's Report have been excised. The evidence before me leads clearly to that conclusion.

80.
The Defendant's reliance on Gathercole is in my view misplaced. Whilst it is correct that Coulson LJ accepted the section 31(2A) submission and declined to grant substantive relief on the public sector equality duty ground it is equally clear that there was a wealth of contemporaneous evidence to lead him to the conclusion that it was "highly likely – if not inevitable – that the same decision would have been reached in any event" ([44]). In this case there is none.

81.
I have considered the Defendant's submissions relating to the hypothetical enforcement position. I have concluded that these do not assist me. I say that for two reasons. Firstly, in substance this

argument entails broadly the same considerations as do the main submissions regarding the permitted development rights fall-back argument. The only difference is that this argument considers the situation from a different viewpoint: retrospectively in the hypothetical scenario of planning permission being refused and development being carried out without it, rather than prospectively at application stage to justify why an express planning permission ought to be granted. But the two scenarios are two sides of the same coin. Secondly the argument suffers from the same absence of evidence as does the permitted development fall-back argument. There is simply no basis on which to conclude that it was in the mind of the officer at all when the decision to grant the First Permission was made. On this basis it cannot in my judgement inform a conclusion that the outcome was very likely to be the same.

82.
For these reasons I cannot conclude that it was highly likely that the outcome would not have been substantially different if the error had not been made. I therefore reject the Defendant's submissions based on section 31(2A).

The Court's general discretion not to quash:

83.
In my judgement Mr Smith was right to submit that the introduction of the statutory duty now found in section 31(2A) has not disturbed the general discretion of the Court to withhold substantive relief in circumstances which include, for example, the fact that the claim has become academic by reason of a subsequent change in circumstances.

84.
In this context section 31(2A) can be seen as a sub-set of the discretionary powers available to the Court to withhold relief, albeit it is one placed on a statutory footing and expressed as a duty to consider rather than a discretion to consider.

85.
For all of this, though, the Defendant's case on the Court exercising a general discretion not to quash has been lightly pleaded. It did not appear at all in the original skeleton argument and whilst it did appear in the supplementary skeleton argument the submissions were at times conflated with the Defendant's primary case on section 31(2A).

86.
An example of this is the Defendant's submissions relating to the case of R (Rogers) v Wycombe District Council [2017] EWHC 3317. Mr Smith cited [66]-[68] of the judgment of Lang J in Rogers and submitted that it provides an example of where the Court treated a post-decision matter as relevant to the exercise of a general discretion not to quash. It appears that this submission stems from the fact that Rogers is one of the cases referred to in the extract from paragraph 109 of Halsbury's Laws referred to above. But a reading of the two paragraphs which immediately follow the extract cited by Mr Smith reveals that the exercise of discretion by Lang J was firmly on the basis of section 31(2A). At [69] Lang J stated:

"69. In my judgment, this is the type of procedural error in an otherwise unmeritorious claim which section 31(2A) was enacted to address"

and she then proceeded to analyse the facts against the criteria of section 31(2A) before choosing to exercise her discretion not to quash pursuant to it.

87.
The significant new development since the grant of the First Permission is the grant of the Second Permission. We know that development under this permission has commenced because that is the basis on which the Defendant accepted the application under section 73A of the 1990 Act. Whilst the rationale underpinning that jurisdictional decision is at best questionable it is not a point in issue in this case.

88.
What it does mean, though, is that a quashing of the First Permission would serve no worthwhile purpose. It is no longer being relied upon nor is it going to be. In those circumstances it is fair to conclude that the claim is now academic by reason of the grant of the Second Permission. In saying that I imply no criticism of the Claimant for pursuing the claim as far as he did, not least in view of the fact that the evidence regarding the Second Permission was not put before the Court until two days before the hearing and there was no ruling on whether it should be admitted in the proceedings until the start of the hearing itself.

89.
However for these reasons I have concluded that it is appropriate for me to exercise my discretion not to quash the First Permission. The Defendant has openly admitted its error. The Second Permission has superseded the First Permission and it stands unchallenged. No worthwhile purpose is served by the Court granting the discretionary remedy of quashing a permission that has been overtaken by events.

Conclusion

90.
For the reasons set out above I make a declaration that the First Permission was granted unlawfully but in exercise of the Court's discretion I decline to go further and quash the First Permission. I make clear that this exercise of discretion is not on the basis of section 31(2A), since I have rejected the Defendant's submissions to that effect, but is instead on the basis of the Court's general discretion not to grant substantive relief in circumstances where to do so would be academic in light of subsequent events.

91.
I now invite the submissions of the parties in relation to costs (including the costs associated with the Defendant's application to admit new evidence and supplement its skeleton argument) and any ancillary matters. I will give directions separately in relation to those submissions.
