Neutral Citation Number: [2016] EWHC 3283 (ADMIN)

Case No: CO/2910/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2016

Before :

JOHN HOWELL QC
Sitting as a Deputy High Court Judge

- -

Between :

THE QUEEN
on the application of

RIKA SHASHA, TONI SHASHA AND ROWNAMOOR TRUSTEES LIMITED AS TRUSTEES OF THE PLACEMOUNT PENSION FUND	**Claimants**
- and -	
WESTMINSTER CITY COUNCIL	**Defendants**
- and -	
PORTMAN MANSIONS RESIDENTS COMPANY LIMITED	**Interested Party**

- -
- -

Ms Victoria Hutton (instructed by **Glinert Davis LLP**) for the **Claimants**
Mr Meyric Lewis (instructed by **the Director of Law, Westminster City Council**) for the **Defendants**

Hearing dates: 29th November 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

JOHN HOWELL QC

Mr John Howell QC:

1. This is a claim for judicial review of a decision by Westminster City Council on April 29th 2016 to grant planning permission for development at Portman Mansions, Chiltern Street, London W1. Permission to make this claim was granted by Ouseley J.

2. The Claimants, the Trustees of the Placement Pension Fund, contend that that decision was flawed on four grounds. In summary these are (i) a failure to consider the Trustees' objections to the effect of the proposed development on the amenity of their premises in Portman Mansions on their merits; (ii) a failure to interpret correctly and to apply a development plan policy, Policy ENV13; (iii) a failure to ensure that there was sufficient information on the impact of the development on the amenity of the Trustees' premises and a failure to take into account its proximity to their bay windows; and (iv) a failure to comply with the requirements arising from section 70(2) of the Town and Country Planning Act 1990 ("*the 1990 Act*") and section 38(6) of the Planning and Compulsory Purchase Act 2004 ("*the 2004 Act*").

BACKGROUND

3. Portman Mansions comprise a number of red brick, residential blocks built between 1890 and 1900 containing some 120 residential units. They are unlisted buildings of merit within the Portman Estate Conservation Area. They face Porter Street to the south, Chiltern Street to the east and Marylebone Road to the north.

4. The Claimants are the long leaseholders of 2A Portman Mansions ("*the premises*") in Block 2 which itself contains 48 residential flats. Although their long lease also permits residential use, the premises are currently used as offices.

5. The premises are at lower ground floor level mainly facing Marylebone Road. They are set back from the pavement on that road behind an open area planted with some small bushes and trees. This open area is at street level behind a small wall with railings next to the pavement but then, nearer the premises, it slopes down towards them. At the bottom of that slope, between it and the premises, there is a narrow, flat hard-surfaced area.

6. The premises have 10 windows facing Marylebone Road and two smaller windows facing Chiltern Street. Six of the windows facing Marylebone Road are in two bays (each containing three windows). Photographs taken from within the premises show that those inside them can see not only the sloping bank outside facing them but also the wall and railings along Marylebone Road and the buildings on the opposite side of it.

7. On April 29th 2016 the City Council decided to grant planning permission for a development at Portman Mansions comprising a number of elements. One element (which is the subject of this claim for judicial review) was the "excavation of a new subterranean building to provide an estate office, meeting rooms and a residents' gym.....below a ground level roof covered by soft landscaping".

8. The development proposed involved excavating the area behind the wall and railings along Marylebone Road to create a new, single storey building (with an area of 86m^2). That building would be provided with a planted roof incorporating a number of semi-mature trees. The wall of new building, constructed approximately at the bottom of the existing slope, would be directly opposite the premises and on the edge of the existing narrow hard-surfaced area adjoining Block 2. It would be about as

high as the existing wall along the edge of the pavement on Marylebone Road but it would, of course, be far closer to the premises. It would be about 1.3m from the main elevation of the Block 2 (and those windows in the premises in that elevation) and only 0.8m from their bay windows.

9. It would appear that the western part of the wall (behind which the gym is located) is glazed, whereas the eastern part of the wall (behind which the estate office and meeting rooms are located) would not be.

10. Access to the new building was proposed to be by an entrance on a new paved area at the corner of Marylebone Road and Chiltern Street (opposite one of the premises' bay windows) at the level of existing narrow, flat hard-surfaced area immediately adjacent to Block 2. Access to that paved area was to be provided by new stairs from street level (as well as by use of a new disabled access platform lift).

11. The plans also show that access to the gym could be obtained at its western end through a door onto existing narrow, flat hard-surfaced area immediately adjacent to Block 2. Although the plans show that access to the gym would be obtainable through the new building itself at its eastern end from the entrance on the new paved area, evidence given by Mr Alistair John Redler, a qualified Chartered Surveyor (which was not contradicted by the Council) is that the existing narrow hard surfaced area in front of the premises "will become an access corridor for those entering and exiting the development via the door near the gym at the furthest end of the corridor."

12. The application for planning permission was submitted on behalf of the Interested Party, the Portman Mansions Residents Company Limited, on February 3rd 2016. Effectively it replicated an application for which the City Council had previously

granted conditional planning permission on April 4th 2013. That permission had not been implemented and was about to expire on April 4th 2016. The application was accompanied by a Design and Access Statement. In relation to the new building proposed it was asserted in the Statement that "given the location of the site there are no issues of overlooking or loss of amenity to adjacent sites." The plans describing the development for which permission was sought did not show the premises' bay windows.

13. On March 18th 2016 the Claimants' planning consultants submitted objections to the planning application. Some of the objections were based on the fact that the main facing elevation to this new building was less than 1.5m at its closest point from the 10 windows in the premises that face Marylebone Road. At that stage it appears that neither the Claimants nor their planning consultants had recognised that the bay windows were not shown on the plans for which permission was sought. Among the concerns raised by the Claimants' planning consultants were the potential impact of the development on the levels of daylight enjoyed in, and its overshadowing of, the premises. They pointed out that no supporting daylight analysis, and no evidence that there would not be an unacceptable degree of overshadowing, had been submitted with the planning application. They also objected to the proposed development on the basis that it would result in a significantly increased sense of enclosure within the premises due to its siting and close proximity as well as on the basis that it would lead to a loss of privacy and increased levels of overlooking. In addition they objected to the increased levels of noise and disturbance from the use of the proposed new facilities directly opposite the premises. It was contended that the impact of amenity

would be contrary to Policy ENV13 in the City of Westminster Unitary Development Plan.

14. Policy ENV13 forms part of the development plan for the City of Westminster. It provides inter alia that:

> "(E) The City Council will normally resist proposals which result in a material loss of daylight/sunlight, particularly to existing dwellings and educational buildings. In cases where the resulting level is unacceptable, permission will be refused.
>
> (F) Developments should not result in a significant increase in the sense of enclosure or overlooking, or cause unacceptable overshadowing, particularly on gardens, public open space or on adjoining buildings, whether in residential or public use."

15. The Marylebone Association also objected to the loss of natural light to the premises and pointed out that no daylight study appeared to have accompanied the application.

16. On April 29th 2016 Ms Helen Mackenzie, an Area Planning Officer employed by the City Council, completed a report recommending the grant of planning permission ("*the Report*"). The Report stated that:

> "An objection has been received from 2A Portman Mansions which is currently used for office purposes. They are concerned that the proposals would have an impact on existing working/office environment as a result of loss of daylight and potential overshadowing and increase sense of enclosure. The objectors office is located at lower ground floor with windows overlooking the currently sloped landscaped bank, with Marylebone Road behind. UDP Policy ENV13 (E) states that the City Council will normally resist proposals which result in a material loss of daylight/sunlight particularly to existing dwellings and educational buildings. ENV13 (F) states

> that developments should not result in a significant increase in the sense of enclosure or overlooking, or case unacceptable overshadowing particularly on gardens, public open space or on adjoining building, whether in residential or public use.
>
> The proposal will include a sheer wall in front of the windows at lower ground floor level and this will have some impact on the office windows at lower ground floor level. The windows at lower ground floor level are partially restricted by the landscaped sloped bank. The windows face north and therefore will receive very limited levels of sunlight. It is noted that there is likely to be a loss of daylight to these windows. Policy ENV13 (E) seeks to resist material losses of daylight to residential and educational buildings, and losses to office accommodation is not given the same high protection. As permission has previously been granted for the proposal the objections on the loss of daylight and increase sense of enclosure are not considered sustainable to justify a reason for refusal of the scheme.
>
> The objection also refers to the impact the relocated office and resident's gym will have on the working environment of the office accommodation. It is unlikely that the estate office will have an impact on noise and disturbance, especially considering that the estate office will not want to have an impact on the existing residential properties.
>
> The Marylebone Association has objected to the scheme on the basis that the new building will have an adverse impact on the residential windows at lower ground floor level and that a daylight study has not been submitted. These are the same windows occupied by the offices at 2A Portman Mansions. Therefore the objection on these grounds is not considered sustainable to justify a reason for refusal. "

Accompanying the report was a draft letter granting conditional planning permission for the development.

17. On April 29th 2016 the City Council granted conditional planning permission for the development proposed.

18. In her first witness statement dated August 9th 2016 Ms Mackenzie stated that she "referred [the application] to the officer's Team Leader who agreed with my recommendation, having considered the application and the objections to it." It was asserted both in the City Council's Detailed Grounds of Resistance and in Ms Mackenzie's first witness statement, however, that she had herself granted the planning permissions under delegated authority on the applications submitted in 2013 and 2016. In response to my question during the hearing about the compatibility of these claims with the form of the reports in respect of those applications (which in each case were said to contain her recommendation) and that she had herself referred in her statement to her "recommendation" in April 2016, the City Council subsequently stated that the individual who in fact took the decision to grant planning permission in each case was Ms Mackenzie's Team Leader at the time. This was subsequently confirmed in Ms Mackenzie's second witness statement. Although I accept that there was no intention to mislead the court, I am unimpressed by her explanation that her statement "reflects the colloquial use of language used by case officers when discussing planning permissions" and that she "did not appreciate how" her statement read.

THE LEGAL FRAMEWORK

(i) the statutory requirements governing the determination of planning applications

19. In dealing with any application for planning permission a local planning authority is required to have regard to the provisions of the development plan so far as material: see section 70(2)(a) of the Town and Country Planning Act 1990. Where section 38(6) of the 2004 Act applies, as it does when a local planning authority determines whether or not to grant planning permission, it requires that "the determination must

be made in accordance with the [development] plan unless material considerations indicate otherwise".

20. In discharging these requirements reference to relevant policies is not of itself sufficient. An authority must interpret the policies correctly and, given the duty imposed by section 38(6) of the 2004 Act, as a general rule, it must also determine (a) whether the individual material policies support or count against the proposed development or are consistent or inconsistent with them and (b) whether or not the proposed development is in accordance with the development plan as a whole.: see *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983, per Lord Reed at [17]-[19], [22]; *R (Hampton Bishop Parish Council) v Herefordshire County Council* [2014] EWCA Civ 878, [2015] 1 WLR 2367 , per Richards LJ at [28], [32]-[33].

(ii) the requirement to give reasons for granting planning permission in exercise of delegated powers

21. A local planning authority as such is not under any statutory obligation to give any reasons, or to give any summary of their reasons (as they once were), for the grant of planning permission, whereas they are required to give full reasons for any refusal of permission and for any conditions imposed on any permission[1]. In such circumstances the Court of Appeal has found that there is no general obligation at common law requiring reasons to be provided for the grant of planning permission: see *R v Aylesbury District Council ex p Chaplin* (1998) 76 P&CR 207. There may

[1] see article 35(1) of the Town and Country Planning (Development Management Procedure)(England) Order 2015 as amended by article 7 of the Town and Country Planning (Development Management Procedure) (England) (Amendment) Order 2013.

nonetheless be something in the circumstances such that reasons need to be provided as a matter of fairness: see eg *R v Mendip District Council ex p Fabre* (2000) 80 P&CR 500 per Sullivan J (as he then was) at pp509–513, *Oakley v South Cambridgeshire District Council* [2016] EWHC 570 (Admin) per Jay J at [35]-[41]. This may mean, as Lang J stated in *R (Hawksworth Securities PLC) v Peterborough City Council* [2016] EWHC 1870 (Admin) at [80], that a requirement to give reasons may only arise "exceptionally" to meet the requirements of fairness. Article 6 of the ECHR may also require reasons to be provided to a person whose civil rights are determined by the grant of permission.

22. In this case Ms Victoria Hutton did not contend on behalf of the Claimants that there was any obligation to give reasons for the decision impugned as a matter of fairness or in order to comply with the requirements of article 6 of the ECHR. Instead she submitted that there was an obligation to provide reasons by virtue of regulation 7 of the Openness of Local Government Bodies Regulations 2014 ("*the 2014 Regulations*").

23. Ms Hutton was concerned to establish that there was such an obligation to give reasons to lay the foundation for her submissions about inferences to be drawn from the report written by Ms Mackenzie and to support her claims that Ms Mackenzie's witness statement was inadmissible.

24. Part 3 of the 2014 Regulations (which contains regulation 7) was made under section 40(3) of the Local Audit and Accountability Act 2014. For the purposes of that Part a "relevant local government body" includes bodies which are local planning authorities

(such as district councils, county councils and London Borough Councils such as the City Council)[2]. Regulation 7 provides that:

> "**(1) The decision-making officer must produce a written record of any decision which falls within paragraph (2).**
>
> **(2) A decision falls within this paragraph if it would otherwise have been taken by the relevant local government body, or a committee, sub-committee of that body or a joint committee in which that body participates, but it has been delegated to an officer of that body either—**
>
> **(a) under a specific express authorisation; or**
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> **(b) under a general authorisation to officers to take such decisions and, the effect of the decision is to—**
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> **(i) grant a permission or licence;**
>
> **(ii) affect the rights of an individual; or**
>
> **(iii) award a contract or incur expenditure which, in either case, materially affects that relevant local government body's financial position.**
>
> **(3) The written record must be produced as soon as reasonably practicable after the decision-making officer has made the decision and must contain the following information—**
>
> **(a) the date the decision was taken;**
>
> **(b) a record of the decision taken along with reasons for the decision;**
>
> **(c) details of alternative options, if any, considered and rejected; and**
>
> **(d) where the decision falls under paragraph (2)(a), the names of any member of the relevant local government body who has declared a conflict of interest in relation to the decision.**

[2] see regulation 6 of the Openness of Local Government Bodies Regulations 2014.

> **(4) The duty imposed by paragraph (1) is satisfied where, in respect of a decision, a written record containing the information referred to in sub-paragraphs (a) and (b) of paragraph (3) is already required to be produced in accordance with any other statutory requirement.**"

A "decision-making officer" is "an officer of a relevant local government body who makes a decision which falls within regulation 7(2)"[3]. As soon as reasonably practicable after the required record is made it must be made available to the public, together with any background papers, in accordance with the provisions of regulation 8.

25. In this case, so Ms Hutton submitted, the decision to grant planning permission had been delegated under a general authorisation to officers to take such decisions and its effect was to grant a permission. Accordingly the decision fell within regulation 7(2)(b)(i) and it followed that the decision-making officer was required to produce a written record of the decision taken along with the reasons for it by virtue of regulation 7(3)(b).

26. On behalf of the Defendants, Mr Meyric Lewis submitted that there was no duty to give reasons for the grant of planning permission under regulation 7. He submitted that, as Lord Scarman put it in *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132 at p141, "Parliament has provided a comprehensive code of planning control" and that it would be "beyond anomolous" if there was requirement to give reasons for the grant of permission only under delegated powers when the requirement in all cases to provide merely summary reasons for the grant of planning permission had been revoked. Mr Lewis further submitted that, even if there was any duty to give reasons under regulation 7, it would be satisfied (given

[3] see regulation 6 the Openness of Local Government Bodies Regulations 2014.

regulation 7(4)) by a notice provided in accordance with article 35 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 containing the reasons for any conditions imposed.

27. In my judgment regulation 7 is applicable to a decision taken under delegated powers to grant planning permission. There is no basis for holding that a decision to grant planning permission is not a decision "the effect of" which "is to...grant permission" (to which regulation 7(2)(b)(i) applies).

28. True it is that planning legislation provides a comprehensive code of planning control. But that legislation does not by itself provide a comprehensive code that governs by whom and how planning decisions are to be taken by local authorities. Those matters are also governed by the primary legislation applicable to the discharge of their functions by local authorities, including in particular, in England, Parts V, VA and VI of, and Schedule 12 to, the Local Government Act 1972 and Part 1A of the Local Government Act 2000, and subordinate legislation made under such Acts, and in this case the Local Audit and Accountability Act 2014.

29. The suggestion that imposing a requirement to give reasons for the decision to grant planning permission under delegated powers with effect from August 6th 2014 under the 2014 Regulations sits ill with the earlier removal of the requirement in all cases to give summary reasons for the grant of planning permission on June 25th 2013 provides no reason to construe regulation 7 of the 2014 Regulations other than in accordance with its terms. The Explanatory Memorandum to Order which removed the requirement, the Town and Country Planning (Development Management Procedure) (England) (Amendment) Order 2013, explained the change on the basis that officer reports typically provided more detail on the logic and reasoning behind a

particular decision to grant planning permission than the decision notice and that the requirement to provide summary reasons for that decision added little to the transparency and quality of the decision making process but that it did add to the burdens on local planning authorities. It is at least consistent with such reasons for that change that reasons should nonetheless be required to be provided for delegated decisions. Whereas officer reports are almost invariably produced when decisions are taken by members of planning authorities, an equivalent document or one with the content that regulation 7(3) requires need not be produced when an officer takes a decision to grant planning permission[4]. But, whether or not that provides an explanation for regulation 7 of the 2014 Regulations and whether or not the requirement it imposes may be thought anomolous given the removal of the requirement to give summary reasons in all cases, in my judgment there is no basis for reading the words "other than a planning permission" into regulation 7(2)(b)(i), where they do not appear, or to exclude decisions to grant planning permission from those falling within section 7(2)(a) or 7(2)(b)(ii) if they would also otherwise fall within those provisions.

30. Mr Lewis' submission that, given regulation 7(4), the duty to give reasons for the decision to grant permission under regulation 7(3)(b) would be satisfied by a notice provided in accordance with article 35 of the Town and Country Planning

[4] Regulation 7(3) provision replicates requirements that already exist when an officer takes an "executive decision" which the grant of planning permission and certain other decisions are not: see regulation 13(4) of Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012. For the purpose of that provision an "executive decision" means a decision made or to be made by a decision maker in connection with the discharge of a function which is the responsibility of the executive of a local authority: see regulation 2 of those Regulations. The power to determine applications for planning permission is not a responsibility of a local authority executive: see regulation 2(1) of, and Schedule 1 to, the Local Authorities (Functions and Responsibilities) (England) Regulations 2000.

(Development Management Procedure Order) (England) Order 2015 containing the reasons for any conditions imposed is misconceived. Such a notice is not required to contain the reasons for the grant of the permission. It is only required to give reasons for each condition imposed and for any refusal of permission.

31. For these reasons in my judgment there was an obligation on the decision-making officer in this case to produce a record of the decision to grant planning permission and the reasons for it as soon as practicable after the decision-making officer made the decision[5].

32. In this case that did not happen. Understandably Ms Hutton took no point on that. Where members of an authority take a decision, it is a reasonable inference, in the absence of contrary evidence, that they accepted the reasoning in any officer's report to them, at all events where they follow the officer's recommendation: see *Palmer v Hertfordshire County Council* [2016] EWCA Civ 1061 per Lewison LJ at [7]. In my judgment the same inference in the like circumstances is reasonable when one officer takes a decision having received a report from another officer containing a recommendation.

iii. the standard of reasons required from an officer acting under delegated powers for a decision to grant planning permission

33. As Lord Scarman stated in Westminster City Council v Great Portland Estates Plc [1985] AC 661 at p673,

[5] It should be noted that, in *R (Cooper) v Ashford BC* [2016] EWHC 1525 (Admin), it was not suggested that there was any such duty. The judgment in that case needs to be read, therefore, in the light of the finding in this case that there is an obligation to produce reasons for a delegated decision by an officer under regulation 7 of the 2014 Regulations.

> "When a statute requires a public body to give reasons for a decision, the reasons given must be proper, adequate, and intelligible. In *In re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467,.... Megaw J. commented, at p. 478:
>
> > 'Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised.'
>
> He added that there must be something 'substantially wrong or inadequate' in the reasons given. In *Edwin H. Bradley and Sons Ltd. v. Secretary of State for the Environment* (1982) 264 E.G. 926 , 931 Glidewell J. added a rider to what Megaw J. had said: namely, that reasons can be briefly stated. I accept gladly the guidance given in these two cases."

34. As noted above, regulation 7(3) of the 2014 Regulations replicates the requirements imposed on an officer of a local authority operating executive arrangements taking an "executive decision". Plainly, however, what such provisions require by way of reasons for any decision will vary depending on the nature of the decision to which they apply.

35. In this case regulation 7(3) applies to the decision to grant planning permission by an officer under delegated powers and it requires reasons (not merely summary reasons) to be produced for that decision.

36. In my judgment the reasons to be produced for such a decision should make clear whether or not the decision to do so was in accordance with the development plan and, if it was not, what material considerations indicated that planning permission should be granted otherwise than in accordance with it. It may be clear whether or not the development was considered to be in accordance with the development plan,

however, even when that is not stated explicitly: see *Secretary of State for Communities and Local Government v BDW Trading Ltd* [2016] EWCA Civ 493 per Lindblom LJ at [25], [27].

37. In *R (Hawksworth Securities Plc) v Peterborough City Council* [2016] EWHC 1870 (Admin) Lang J suggested (obiter) at [87], that, where fairness required a planning authority to give reasons for a decision to grant planning permission, "it is not required to give reasons for rejecting the representations made by those who object to the grant of planning permission." But, as Laws LJ stated in *R (CPRE Kent) v Dover District Council* [2016] EWCA Civ 936 at [21], "Lang J's approach needs to be treated with some care. Interested parties (and the public) are just as entitled to know why the decision is as it is when it is made by the authority as when it is made by the Secretary of State." In my judgment, as the guidance provided in Lord Scarman's speech indicates, the reasons given by an officer for a decision granting planning permission also need to "deal with the substantial points that have been raised" and that may well involve giving reasons for rejecting any objections which raise substantial points to the grant of planning permission. Such reasons, however, may be briefly stated.

iv. the admissibility of evidence about the reasons for a decision when there is an obligation to have provided them

38. Ms Hutton submitted that Ms Mackenzie's first witness statement should not be admitted in evidence to shore up the reasoning in the Report with additional *ex post facto* reasoning. She contended that, just as an Inspector or Secretary of State should not be permitted to add to the reasoning in their decision letters (as Ouseley J thought in *Ioannou v Secretary of State for Communities and Local Government* [2013]

REHC 3954 (Admin) at [51]), so equally a decision-making officer should not be permitted to add to the reasoning required to be provided by regulation 7 of the 2014 Regulations. Alternatively she submitted that the statement should be treated as inadmissible on the basis of the principles enunciated by Hutchison LJ in *R v Westminster City Council ex p Ermakov* (1995) 28 HLR 819 at pp833-834. Ms Mackenzie was not merely elucidating the reasons in her report.

39. Mr Lewis submitted that Ms Mackenzie's evidence was not equivalent to a "backdoor second decision letter" which, as Ouseley J had stated in *Ioannu,* a witness statement should not be nor did it involve any "fundamental alteration" or "contradiction" of the reasons in the Report of the kind that was impermissible in accordance with the decision in *ex p Ermakov*.

40. In my judgment, when a local authority is required to give a notice of its decision with reasons (as it was when it was obliged to give notice of the grant of planning permission with a statement of its summary reasons for the grant), it may not adduce evidence to contradict its stated reasons or its own "official records of what it decided and how its decisions were reached" including any relevant officer's report: see *ex p Ermakov supra* and *R (Lanner Parish Council) v Cornwall Council* [2013] EWCA Civ 1290 per Jackson LJ at [61]-[64].

41. It does not follow, however, that it may not adduce any evidence of any description as to the reasons for its decision. While Sullivan LJ (in *Secretary of State for Communities and Local Government v Ioannu* [2014] EWCA Civ 1432, [2015] 1 P&CR 185) endorsed at [41] Ouseley J's view that evidence about the reasons for a decision on a planning appeal by the Secretary of State or an Inspector should be discouraged, he neither endorsed, nor dissented from, the view that such evidence

should in all cases be inadmissible. But, whatever the position may be in respect of decision on planning appeals, in my judgment such an exclusionary rule ought not to be applied in any event to local authority decisions on planning applications, whether by the authority itself or one of its committees. The nature of the decision-making processes involved is different from that on an appeal. The same is true when the decision to grant planning permission is taken under delegated powers by an officer of the authority. In such a case, where the officer has to produce a written record of the decision along with the reasons for it, in my judgment the principles enunciated in *ex p Ermakov* should govern the admissibility of evidence as to the reasons for the decision.

42. Those principles allow for the admission of evidence to elucidate but only exceptionally to correct, or to add to, the reasons required to be produced. The examples of the corrections which may be exceptionally be considered (which do not amount to an impermissible contradiction or alteration) include errors in transcription or expression and words inadvertently omitted. An example of an addition that may be permitted exceptionally is where the language used may be lacking in clarity in some way: see *ex p Ermakov* at p833. Such corrections or additions ought now to emerge in any event before any claim for judicial review is brought if the pre-action protocol is complied with.

43. Ms Mackenzie was not the decision-maker in this case. Her evidence on what she may have thought when writing the Report or intended it to mean, therefore, is not evidence as such (even if admissible) as to the reasons for the grant of planning permission by the decision-maker. The Report must be taken to mean what it appears to say, since there is no evidence (even were it to be admissible) of what the decision-

maker understood it to mean. That is not to say that her statement is all necessarily inadmissible. Some parts of it state facts evidence of which is plainly admissible, for example about the relationship between the developments eventually permitted in 2013 and 2016, the content of the objections in each case and the fact that she visited Portman Mansions in February 2013. I will consider the admissibility of her evidence on what she did and thought in 2013, and on the Report, below (where appropriate) in the light of the principles enunciated in *ex p Ermakov*.

44. As *R (Lanner Parish Council) v Cornwall Council supra* shows, those principles applied to the official documents including any officer's report when the City Council was under an obligation (as it was when it granted the planning permission in 2013) to give notice of its decision including a summary of its reasons for doing so. There is no reason why the test for the admissibility of material for the purpose of determining why a planning permission was granted by a local planning authority should differ in such circumstances depending on whether the decision to grant the permission is the subject of the claim for judicial review or one of relevance to it, such as in this case the planning permission granted in April 2013 (albeit recognising in that case that only summary reasons were required to be given and that they may be amplified by the officer's report recommending its grant).

GROUND 1: WHETHER THE CLAIMANTS' OBJECTIONS WERE CONSIDERED ON THEIR MERITS

45. On behalf of the Claimants Ms Hutton submitted that the City Council had failed to consider the Claimants' various amenity objections on their merits. These concerned the loss of daylight and the increased overshadowing, sense of enclosure and overlooking of the premises that the development would cause. She submitted that

the statement in the report, that the objections based on the loss of daylight and increased sense of enclosure were not considered sustainable "as permission has previously been granted", shows that to have been the case. The officer had merely treated objections on those matters as foreclosed by the grant of permission in 2013 for the same development when there had then been no objection that raised those issues nor the issues of overshadowing and overlooking. Moreover the Report did not address overshadowing or overlooking which were also material considerations to be taken into account having regard to policy ENV13.

46. On behalf of the Council, Mr Lewis submitted that it could not be said that the Claimants' objections had not been taken into account. They demonstrably were. The Report referred, when dealing with consultation on the application, to the objection by the long leaseholders of the premises raising the "impact of the new building on the existing office accommodation.., including loss of daylight and sunlight, increase sense of enclosure" and "impact of the estate office and resident's gym on the office floorspace". Moreover the Report recognised that there would be a "likely" loss of daylight and an increased "sense of enclosure". While the Report states this in the context of the previous grant of planning permission in April 2013, there was no reason to reach a different decision in April 2016. Ms Mackenzie states that she visited the site in February 2013 and looked at the Marylebone Road frontage of Portman Mansions. She states that, although objections were then made to the application on different grounds not relating to the premises, she had the potential impact on sunlight and daylight from the development clearly in mind given an objection on those grounds relating to a different part of Portman Mansions. She says that she had assessed the situation on the ground and was well aware of what the

amenity impacts on the premises would be and that she had responded to them in detail in her report.

47. In my judgment the issue is not whether the decision-maker in 2016 had regard to the Claimants' objections. For present purposes I assume that they were sufficiently described in the Report. It also recognised that the development would cause a loss of daylight and an increased sense of enclosure.

48. The issue is whether the decision-maker considered whether such effects could provide a reason for refusal on their merits.

49. The Report states that the objections based on such matters "are not considered to be sustainable as a reason for refusal of the scheme" "as permission has previously been granted for the proposal". The grant of a planning permission, even one that has expired, may be a material consideration in the determination of a planning application but a local planning authority is in no way bound by a previous planning permission that has expired: see *South Oxfordshire District Council v Secretary of State* [1981] 1 WLR 1092 per Woolf J at p1096e.

50. In my judgment the Report indicates that it was considered that the City Council was so bound.

51. The Report did not say (as it could have done) that the amenity objections were unsustainable as they had been previously considered and rejected on their merits when permission was granted in April 2013 and that there had been no material change of circumstances, and no new information of relevance about them which had emerged, since then.

52. Any misdirection might well be immaterial, however, if it could be shown that that was in fact the case. But, in my judgment that has not been shown to be the case. There were no objections to the development in 2013 on the basis of its impact on the premises on any of the same grounds as were raised by the Claimants in 2016 (as they say they were unaware of the planning application). Unsurprisingly, therefore, the officer's report on the application in March 2013 does not consider any of those objections. There is no material that indicates that the decision-maker in April 2013 considered the amenity objections that were subsequently raised by the Claimants. Indeed the summary reasons for granting permission (provided in the first informative contained in the notice granting it) did not identify Policy ENV13 as one of the 11 policies of particular relevance in the determination.

53. The question then arises whether there is any admissible material in Ms Mackenzie's witness statement that alters this analysis. In my judgment there is not.

54. The Report in March 2016 must be taken to mean what it says.

55. There is no dispute that Ms Mackenzie visited Portman Mansions in February 2013 or that she went to the lower ground floor level at the corner of Marylebone Road and Chiltern Street where the estate office was to be relocated. The Marylebone Association had made representations concerning, among other matters, details of the proposed disabled lift and the effect of the estate office being open 24 hours a day. Ms Mackenzie confirms, however, that the objections to grant of planning permission were made on different grounds on each occasion. Her report in March 2013 makes no mention of the relevant amenity objections now raised by the Claimants.

56. In my judgment what Ms Mackenzie says about her thought processes in 2013 is inadmissible. It does not elucidate or clarify any statement in her report in April 2013

or April 2016. What she says seeks to add to them. There is insufficient justification in my judgment for permitting such evidence to be adduced exceptionally. There is no evidence (admissible or otherwise) that her thoughts in 2013 were shared with, or by, the decision-makers in 2013 or 2016. No record has been produced of what she thought at the time (other than her report in March 2013). Further her witness statement raises questions about precisely what Ms Mackenzie thought in 2013 that the amenity impacts of the proposed development on the premises would be and about how they should be regarded in terms of policy ENV13. If her evidence were to be admitted, it would not resolve any question but would raise further issues that the obligation to give reasons for a decision is imposed to be obviate.

57. Thus Ms Mackenzie does not say what the particular amenity impacts on the premises were of which she was well aware in 2013. She claims that, because an issue had been raised about the impact of works in a courtyard elsewhere in the Mansions on sunlight and daylight of other premises, "it follows that I had the potential impact of loss of sunlight and daylight from the development clearly in mind when I made my site visit". Even if this should be understood to mean that she that potential impact on sunlight and daylight available to the premises in mind when she visited the site (which she does not in terms state), she does not say that she had in mind any potential overlooking, or increased overshadowing or sense of enclosure, of the premises in mind or that she assessed them. In fact the Report in 2016 in which she says that she dealt with the impacts in detail also makes no mention of overlooking or overshadowing of the premises. It is thus unclear which amenity impacts Ms Mackenzie may have considered in February 2013. Nor does she say whether or not, when considering any of the impacts in 2013, she had recognised that the new building would be only 0.8m from the premises' bay windows or whether she then

considered any of them in terms of Policy ENV13. As I have mentioned that was not a policy listed as being among those particularly relevant to the consideration of the application in 2013.

58. I have also taken into account, when considering whether to admit Ms Mackenzie's evidence about what she thought in 2013, her assertion in her first witness statement (now accepted to be untrue) that "acting under delegated authority, I granted planning permission under both applications". She also stated that "I did not grant planning permission in 2016 simply because I had granted it in 2013." Given that she did not grant planning permission on either occasion, the making of such statements must inevitably raise doubts about the reliability of her other statements that she has made about what she thought in 2013 and which are not confirmed by any record or note made in 2013.

59. In my judgment, therefore, the first ground on which this claim is brought is well founded. The Report on the basis of which it is to be inferred that the decision to grant planning permission was taken indicates that it was considered (erroneously as a matter of law) that the amenity objections raised by the Claimants did not constitute a reason for refusing permission as permission had previously been granted for the development. That misdirection was not immaterial: the relevant amenity objections had not been considered and dismissed on their merits by the decision-maker when permission for the same development was granted in April 2013.

GROUND 3: WHETHER THE DECISION-MAKER HAD SUFFICIENT INFORMATION ON THE AMENITY IMPACTS OF THE PROPOSED DEVELOPMENT

60. A local planning authority may not determine an application for planning permission without information that any reasonable planning authority would require in the circumstances for that purpose.

61. Ms Hutton submits that the documents submitted with the application did not provide any supporting daylight analysis or any evidence that there would not be unacceptable overlooking of the premises and that the failure to require the applicant to provide such information was unlawful. Such omissions she submits were aggravated by the failure of the application drawings to show the bay windows of the premises and their proximity (800mm) from the proposed new building. The failure to do so was also itself unlawful.

62. Mr Lewis submits that what the Defendants had was self-evidently sufficient and there was no obligation in law on them to seek further information.

63. In my judgment the nature of the Claimants' objections was such that they could have been assessed and conclusions reached on them not unreasonably as a matter of planning judgment on the basis of the application material, assisted if thought to be required by a site view, provided that the position of the windows in the premises was understood. There was no legal requirement in the circumstances for the Council to seek further information from the applicant for permission (which is what the first part of this ground is concerned with).

64. The Claimants also alleged that the Council unlawfully failed to take into account the correct distance from the bay windows to the new building. The application plans did not show them. The Defendants contend in response that Ms Mackenzie visited the site in February 2013. But she does not say in her witness statement, however, that she noticed the bay windows, that she realised that the application drawings failed to show them and that she appreciated that the bay windows were only 800mm from the new building. Nor, if she did, does she say that she communicated those facts to the decision-maker in 2013 or 2016. In my judgment, therefore, this ground succeeds at least to that extent.

GROUNDS 2 AND 4: WHETHER THE CITY COUNCIL FAILED TO INTERPRET CORRECTLY AND TO APPLY DEVELOPMENT PLAN POLICY ENV13 AND TO COMPLY WITH SECTION 38(6) OF THE 2004 ACT

65. The second ground on which the decision is impugned is that Policy ENV13 was not interpreted correctly and was not applied.

66. Ms Hutton contends that the statement in the Report, that "Policy ENV13 (E) seeks to resist material losses of daylight to residential and educational buildings, and losses to office accommodation is not given the same high protection", shows that the Policy was not thought to apply to offices. In my judgment, had it been thought that that policy could not apply to offices, that would have involved a misdirection. But that is not what the Report states. Nor would it be a fair reading of the Report as a whole. Had its author or any reader thought that it could not apply to offices there would have been no reason for considering (as the Report does to some extent) that there would be a loss of daylight to windows of the premises.

67. Ms Hutton alternatively submits that no conclusion was reached on whether the proposed development would result in a material loss of daylight to the premises and whether it was unacceptable. Had it been, no conclusion other than it was material could have been reached in the circumstances. In response Mr Lewis submits that, on a fair reading of the Report, the loss of daylight was not regarded as being so material as to require refusal of permission.

68. The Report stated, correctly that "Policy ENV13 (E) states that the City Council will normally resist proposals which result in a material loss of daylight/sunlight particularly to existing dwellings and educational buildings." That Policy also states that, "in cases where the resulting level is unacceptable, permission will be refused". In my judgment it is clear from the Policy that there may be a material loss of daylight but one that is not unacceptable. No doubt a material loss is particularly likely to be unacceptable in the case of dwellings and educational buildings as their use is more likely to be sensitive to such losses than some other uses of land.

69. The Report pointed out that the proposed development would involve "a sheer wall in front of the windows at lower ground level" and this will have "some impact" on them. It stated that there was likely to be "a loss" of daylight to those windows which are already "partially restricted by the landscaped sloped bank" and which "receive very limited levels of sunlight" as they face north. No conclusion is expressed whether or not the loss of daylight would be "material" given the existing limitations on daylight and sunlight reaching the premises.

70. In my judgment a conclusion on that issue was one that necessarily had to be reached if the Policy was to be applied lawfully. The policy is that normally any material loss will lead to refusal of permission. There may, of course, be other factors that mean

that such a material loss is not unacceptable. But those would then need to be identified. Mr Lewis' submission, that on a fair reading of the Report, the loss of daylight was not regarded as being so material as to require refusal of permission, involves an incorrect interpretation of the policy conflating the question whether the loss is "material" with the question whether it is "unacceptable". But in any event it is not what the Report says. For the reasons given above, in my judgment the objection based on loss of daylight was not regarded as "sustainable" because permission had previously been granted for the development, not because it was said not to be material or not to be unacceptable.

71. Policy ENV13(F) provides that "developments should not result in a significant increase in the sense of enclosure or overlooking, or cause unacceptable overshadowing.." The Report recited the Policy and stated that there will be a sheer wall in front of the windows of the premises at lower ground floor level. It did not say whether or not the increased sense of enclosure or overlooking was significant or any overshadowing was unacceptable. In my judgment conclusions on those matters had also necessarily to be reached if the policy was to be applied to this development. Policy EN13(F) does not say that permission should be refused for any development which results in a significant increase in the sense of enclosure. Like significantly increased overlooking, it may itself justify the refusal of permission but, even if it does not do so, it may be a consideration that is to be weighed in the balance when considering the merits of any proposed development in accordance with the development plan.

72. Mr Lewis submitted that, on a fair reading of the Report, the increased sense of enclosure was not considered to be so significant as to require permission to be

refused. But that again is not what the Report says. All that it says is that the objection based on the increased sense of enclosure is "not considered sustainable to justify a reason for refusal of the scheme" "as permission has previously been granted for the proposal".

73. These matters also affect Ground 4, the contention that there was a failure to determine whether or not the proposed development was in accordance with the development plan. Ms Hutton is correct when she submits that no conclusion was reached in the Report on that question (which is not addressed). Without determining whether or not the loss of daylight was material, whether or not the increased sense of enclosure and overlooking would be significant and whether any overshadowing was unacceptable, no conclusion could be reached whether or not the proposal was in accordance with Policy ENV13. Although no other policies are mentioned in the Report, however, that does not mean that no other policies were material as Ms Hutton suggested. As mentioned above, the informative on the permission for the development in 2013 listed 11 other policies in the City Council's Core Strategy and Unitary Development Plan which were particularly relevant. Whether or not such policies are relevant, there is nonetheless no conclusion reached on whether or not the proposed development was in accordance with the development plan and, absent any conclusions on the matters that ENV13 raises, nor could there properly be.

74. For these reasons the claim also succeeds on Grounds 2 and 4.

CONCLUSION

75. It does not appear to me to be highly likely that the outcome for the Claimants would not have been substantially different if the conduct which I have found to be unlawful had not occurred.

76. For the reasons given above, therefore, this claim for judicial review succeeds.