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INTRODUCTION

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Call 1990



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Welcome to our October 2026 edition of the Planning, Environment & Property Newsletter. It has been a busy summer for the planning world with the brand new NPPF being published on 17 August 2026.

We start off this edition with **Daniel Kozelko's** article looking at the Court of Appeal's decision in *R (on the application of Barclay) and Another v Secretary of State for Transport* [2026] EWCA Civ 1040, concerning Gatwick's proposed second runway, one of the largest infrastructure projects currently consented in the UK. *Barclay* was also a case in which 6 members of 39 Essex Chambers represented three parties throughout the course of proceedings (Nigel Fleming KC, James Strachan KC, Rose Grogan KC, Victoria Hutton, Gethin Thomas, and Daniel Kozelko).

On top of this we have articles covering the following:

- **Thomas Hill KC** discusses a rare defeat for a solar farm on landscape and heritage grounds following a 4-week long inquiry in which he acted for the Rule 6 Party.
- **Daniel Stedman Jones** addresses *R(Thomas) v Lewisham LBC* [2026] EWHC 1840 (Admin) where the High Court considered planning policy applicable to purpose-built student accommodation and in which he and Thomas Hill KC acted for the interested party.
- **Christopher Moss** looks at two recent High

Court decisions on flood risk in Faversham [2026] EWHC 1651 (Admin) and Yatton [2026] EWHC 1430 (Admin).

- Continuing on the theme of water, **Nigel Mpemba Patel** opines on the unsatisfactory law on compensation for sewage pollution and proposes the solution lies in a regulatory regime.
- Lastly, **Ella Grodzinski** covers the decision in *R. (on the application of Wild Justice) v Natural England* [2026] EWHC 1573 (Admin) on whether a judicial review court should make an advisory declaration, on a hypothetical question whose answer involved no material dispute, in circumstances where there was no question of unlawfulness of the public authority's action or any proposed action.

We do hope you enjoy this edition of the PEP newsletter and have a productive Michaelmas term.

GATWICK'S SECOND RUNWAY CLEARED FOR TAKE-OFF: *R (ON THE APPLICATION OF BARCLAY) AND ANOTHER V SECRETARY OF STATE FOR TRANSPORT* [2026] EWCA CIV 1040

DANIEL KOZELKO
Call 2018



Introduction

This case concerned two challenges to the grant of a Development Consent Order ("**DCO**") for a second operative runway at Gatwick Airport ("**Gatwick**"). Made by the Secretary of State for Transport ("**SST**"), it granted Gatwick Airport Limited ("**GAL**") development consent for what is known as the Northern Runway Project. Challenges were brought by Mr Barclay and Communities Against Gatwick Noise Emissions ("**CAGNE**"), which were rejected by Mould J (see [2026] EWHC 1556 (Admin)). Both claimants

then sought permission to appeal to the Court of Appeal, and Holgate LJ listed an urgent 2-day permission hearing. By their judgment of 4 August 2026, Holgate and Dove LJ refused permission to appeal, and certified that their judgment could be cited as an authority (para 98). The judgment gives the green light to what will be only the second airport in the UK to have a second runway, while providing clarity on a range of key legal issues relating to large aviation (and transport) development.

39 Essex Chambers had six barristers representing three parties throughout the course of proceedings (Nigel Fleming KC, James Strachan KC, Rose Grogan KC, Victoria Hutton, Gethin Thomas, and Daniel Kozelko).

Background

On 21 September 2025 the SST granted the Gatwick Airport (Northern Runway Project) Development Consent Order (SI 2025/10554) ("**the Order**"). The Order gave consent, pursuant to the Planning Act 2008 ("**PA 2008**"), for the redevelopment of an existing emergency northern runway at Gatwick. Until the Order, that runway was conditioned so that it could not be operated simultaneously with the main runway. Among other things, the Order removes that condition and permits GAL to build infrastructure to operate as a dual runway airport. Given the scope of the application, the proposed development is a Nationally Significant Infrastructure Project ("**NSIP**") for the purposes of the PA 2008.

Procedure

Before getting to the substance of the case, it is important to first recognise the unusual procedure adopted by the Courts, as a result of reforms introduced following Lord Banner's "Independent review into legal challenges against Nationally Significant Infrastructure Projects". Following the claims having been issued on 30 October 2026 and 3 November 2026, Mould J held a CMC on 10 December 2025 and listed them for a four-day rolled-up hearing commencing 20 January 2026. Once judgment was given on 23 June

2026, appeals were filed within seven days, and the Court of Appeal listed a 2-day permission to appeal hearing beginning 27 July 2026. Judgment refusing permission to appeal was issued 4 August 2026.

That the case proceeded at this breakneck speed reflects the fact that Lord Banner's recommendations were that NSIP challenges should proceed with expedition. Amendments to the CPR removed the papers permission stage for judicial review of NSIPs (albeit, going further, Mould J listed the case for a rolled-up hearing anyway), and changed the period in which to seek permission to appeal from 21 days to 7. This had already had a significant effect in another case, with an appeal of the first instance decision on the Luton DCO being scuppered by a failure to appeal in time (see *R (LADACAN) v SST* [2026] EWCA Civ 697). That expedition is similarly seen in the timeline set in the Gatwick challenge and is likely to be a feature of all NSIP challenges in the future.

High Court

Between the two claimants, 12 grounds were run in the High Court (albeit two fell away due to a correction notice to the DCO which remedied a noise requirement, and the decision in *R (Possible (The 10:10 Foundation) v SST* [2025] EWHC 1101 (Admin) which upheld the validity of the Jet Zero Strategy ("**JZS**"). Focusing only on those which ultimately were appealed to the Court of Appeal, the grounds were (in summary):

Barclay Ground 1: Mr Barclay alleged that the SST had misinterpreted the Airports National Policy Statement ("**ANPS**") and the Making Best Use ("**MBU**") policy in failing to identify that there was a specific policy indication against expansion of Gatwick because such expansion would challenge the hub status of Heathrow Airport ("**Heathrow**"). Mould J rejected this argument and held that there was no reason to read the ANPS and MBU as indicating against Gatwick making best use of its existing (standby) second runway. That was distinct to the construction of a new runway (which was still being pursued at Heathrow).

Barclay Ground 4: Mr Barclay alleged that the SST had failed to consider flaws in the need and economic benefits modelling, in that GAL's National Economic Impact Assessment ("**NEIA**") relied upon a growth in and the value of business passengers which was not properly made out. Mould J rejected this argument and held that the SST had not relied upon the NEIA, but had instead relied upon national policy supporting airport expansion, other economic provision in GAL's application, and the fact that Gatwick (unlike Heathrow) was dominated by low-cost carriers which provided for the need and growth.

CAGNE Ground 1: CAGNE asserted that the SST had erred in concluding on the one hand that greenhouse gas ("**GHG**") emissions were a significant negative effect of the proposal in environmental impact assessment ("**EIA**") terms, but on the other that the development would not *"have a material impact on the UK's ability to meet its carbon reduction targets"* for the purposes of para 5.82 of ANPS. Mould J concluded that these were distinct questions, and the latter concerned evaluating the risk that the project would present to achievement of carbon reduction targets. In assessing that risk, the SST could (e.g.) take account of policies to be brought forward in the long term through review of the JZS. That was an issue distinct to the assessment of the effects in EIA terms.

CAGNE Ground 3: CAGNE alleged that the SST had erred in not requiring the quantification of non-CO2 emissions for the purposes of assessing them in EIA terms. Mould J rejected this argument, concluding that a qualitative assessment was sufficient, and that this had been taken into account. There was not an alleged consensus which led to the conclusion that it was irrational to conclude that there could not be meaningful assessment of these emissions on a quantitative basis. He also held the precautionary principle added nothing to this ground.

CAGNE Ground 4: CAGNE asserted that the SST had unlawfully ignored information held by the Department which could have been taken into

account to identify the increased risk of the failure to achieve the policy outcomes in the JZS. Mould J rejected this and relied upon the principle in *R (Global Feedback) v HM Treasury* [2025] EWCA Civ 624 to conclude that considering such risk is a matter for a different Secretary of State (the Secretary of State for Energy Security and Net Zero).

CAGNE Ground 7: CAGNE asserted that the wastewater treatment works requirement in the DCO neither secured use of the proposed treatment plant if it were built and also allowed GAL and Thames Water to agree to depart from the requirement without lawful constraint (a so-called impermissible 'tailpiece'). Mould J rejected this; it was fanciful to suggest that GAL would not use the wastewater treatment plant if built, it was not irrational for the SST to conclude the requirement was sufficient, and the tailpiece lawful as it had to be read in the context of the overall decision.

The Court of Appeal – Barclay

Barclay's Ground 1: the Court of Appeal upheld Mould J's decision for essentially the reasons that he had given. The Court emphasised that policies must be read as a whole, not as contracts, and as documents intended to assist practical decision-taking (para 14). On the facts, they did not consider that the ANPS and MBU sought to single out Gatwick as a threat to the hub status of Heathrow, and rather recognised that the policy on making best use of existing runways applies to all airports. The need to make best use reflected the fact that a new runway at Heathrow was likely at least a decade away (para 16-19). Any impact on the hub status of Heathrow was not thought to be significant or long lasting (para 21), and any indication in the ANPS against Gatwick rather represented (1) reasons for selecting Heathrow for the **new** runway; or, (2) reflected the fact that Gatwick was thought at the time to be at capacity (para 22-23). This proposal was one contemplated by the policy, and there was not a basis to take the narrow reading that the claimant did (para 24-25).

Barclay's Ground 4: again, the Court of Appeal agreed with Mould J. The Court noted the extensive analysis conducted by Mould J of the underlying documents (para 29) and agreed with him that the NEIA had not been relied upon in the way that the Claimant alleged. While that document was in the wider evidence base, it did not ground the conclusions reached by the SST (para 32-33). Ultimately, the SST had chosen to avoid the dispute surrounding the NEIA by relying on other evidence, and there was no obligation on her to take the NEIA into account or resolve that dispute (para 34).

The Court of Appeal – CAGNE

CAGNE Ground 1: on this ground the Court of Appeal agreed with the analysis of Mould J. That the IEMA Guidance on GHG emissions had been applied to identify a significant effect from GHGs in EIA terms did not dictate the outcome of the para 5.82 ANPS question. Quite properly, the SST was entitled to find that a proposed development is not fully compatible with the net zero trajectory, while also concluding that the proposal will not have a material impact on the meeting of net zero and carbon budgets. There are degrees of compatibility which allow for the conclusions reached by the SST (para 46).

CAGNE Ground 3: again, the Court of Appeal agreed with Mould J. The Court noted that JZS itself recognised the uncertainties over magnitude of non-CO2 impacts on the climate (para 52). They rejected the reading of the SST expressing "disappointment" that GAL had not taken a "precautionary approach" in quantifying such effects as meaning the approach was unlawful. The adequacy of information in an environmental statement is subject to rationality review; the uncertainties surrounding non-CO2 effects were relevant to deciding whether the EIA was adequate (para 56). While CAGNE relied on new evidence to assert a way of quantifying non-CO2 emissions had been established, the Court of Appeal rejected that this was a basis to challenge the conclusions of the SST on what was appropriate in assessment (para 66). In any event, the SST did take into

account non-CO2 emissions on a qualitative basis and included it as an additional negative impact in the balance (para 67). That was an acceptable approach.

CAGNE Ground 4: while on this ground the Court of Appeal reached the same conclusion as Mould J, they did not rely upon *Global Feedback* in doing so (para 90). Before the Court of Appeal, CAGNE focused on GAL choosing to use the JZS High Ambition scenario to quantify emissions in its environmental statement and said as a result the SST was required to consider the evidence the Department held on risks to that scenario. However, the Court of Appeal disagreed. Following *R (Dawes) v SST* [2023] EWHC 2352 (Admin), the SST was entitled to rely on her own policies, including JZS, to deliver on the purposes for which they were designed (para 82). Indeed, it was not appropriate to try and conduct an ad hoc review of policy as part of the planning decision-making process, especially where the information available to the SST would regularly change (para 88). As to the specific policy return upon which CAGNE relied to assert an error, there was not something sufficiently weighty which would require a different approach to JZS, and the SST was entitled to rely on her policy (para 89).

CAGNE Ground 7: on this ground the Court of Appeal shortly agreed with Mould J on the first issue. The SST had concluded rationally that the wastewater treatment works requirement did enough; the concerns raised by CAGNE were farfetched, and it would be reasonable to conclude that GAL would build a wastewater treatment works but then not use it (para 95). As to the tailpiece, the Court of Appeal considered it was properly constrained by requirement 1(4) which required any matter agreed pursuant to it to not give rise to any materially new or materially different effects. As a result, it was permissible (para 97).

Comment

This case is an important one, concerning one of the largest infrastructure projects currently

consented in the UK, and providing for the elusive second operational runway at an airport. It shows that the Courts will take seriously the expedition intended by the changes brought forwards in consequence of Lord Banner's review and will make decisions to facilitate that expedition (including rolling-up judicial reviews, or listing substantive permission to appeal hearings at short notice). It also offers important guidance on the proper approach to assessing significance, and quantifying GHG effects.

SUFFOLK SOLAR APPEAL DISMISSED ON HERITAGE AND LANDSCAPE GROUNDS

THOMAS HILL KC
Call 1988 Silk 2009



A recent planning appeal decision at Bentley in Suffolk has demonstrated that the significant benefits of delivering renewable energy are capable of being outweighed by landscape and heritage objections where the evidence supporting these objections is carefully and powerfully articulated. References to paragraphs within the decision letter are given in square brackets.

The decision

A solar proposal at Grove Farm and Falstaff Manor in Bentley for up to 40MW export capacity, including 2 substations, across approximately 116 acres of arable farmland was refused planning permission by Babergh District Council on two grounds: namely impacts on the landscape and on the setting of nearby listed buildings and undesignated heritage assets.

Time was spent at the inquiry agreeing with rather more precision than is often the case the vital statistics of the development: 63,900 solar modules, 11 transformers, 2.18km of tracks, 3.65 km of perimeter fencing and either 37 or 74 CCTV cameras depending upon spacing, these cameras

having a maximum height of 3m, along with two substations, the dimensions of which were also specified [6].

The Inspector dealt with the heritage issue first and reviewed the listed buildings, the setting of which was affected by the solar proposals. These included a Grade I Barn, a Grade II* Church and a Grade II* Hall and Brew House complex. She found that their settings would be adversely affected and there would be *"less than substantial harm of a moderate level"*, noting that *"less than substantial harm does not amount to less than substantial planning objection and that the courts attach considerable importance to such harms"* [46].

After the issue of the refusal, but before the appeal was lodged, the Council had designated a conservation area across the northern part of the parish of Bentley, having determined that it was an area of special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance.

This interest was summarised by the Inspector as follows:

"the character of the Conservation Area is established by the medieval buildings, the medieval fishponds, ancient woodlands, historic farmsteads and associated farmland. The historic interest and significance is formed by the sum of these elements, the rural landscape and direct links to the Tollemache family. It is critical to understand, as set out in respect of many of the listed buildings above, that the open land, woodland and access routes along with the medieval buildings are historically all part of a holistic system of farming and land management, including the growing, harvesting and storage of crops for use, sale and capital accumulation, which will have sustained the whole community, its hierarchical structure and local system of governance." [60]

After reviewing the evidence in considerable detail, the Inspector rejected the appellant's case that the proposed screen and hedgerow planting

would recreate a more enclosed landscape which was historically authentic – in the face of expert evidence from a landscape historian and archaeologist that this was an area where largely open farming systems were commonplace; this expert witness also identified that the tree fringed lanes surrounding the site were at least early medieval (some possibly Saxon) in origin and that one (that had been dismissed by the appellant as a 19th century farm track) was named in surviving 13th century documents as the Hundred Way leading to the Hundred Court. The Inspector concluded that:

*“Given the profile, fabric and construction of the proposed panels and the associated infrastructure... I cannot conclude that the character or appearance of the Conservation Area would be preserved. Rather, the proposed development would appear to be a stark, modern, utilitarian, and industrial intrusion, covering a large area of currently undeveloped land within it, which in turn significantly contributes the importance of the Conservation Area as a whole. Therefore, to allow this proposed development would be contrary to the clear expectations of s.72 the LB&CA Act and to the provisions of the Framework which is clear that great weight should be given to an asset’s conservation and the more important the asset the greater the weight should be.... It is important that having considered all the evidence before me this is very much a case where the proposed development is at **the very top end of less than substantial harm to the character and appearance of the Bentley Conservation Area**” (emphasis added). [68-69]*

After identifying further harm to a series of non-designated heritage assets, the Inspector concluded on heritage as follows:

“It is important to acknowledge a key feature of the Conservation Area is its buildings that are heritage assets both as designated and NDAs. This includes some very highly graded and significant assets. All of these assets have a setting, and, in the nature of this case, those settings are expansive. Each setting contributes

*to the significance of the asset to which it relates in a positive way. Thus, those individual harms are also harmful to the Conservation Area to which they, as buildings of special and/or of local architectural and historic interest, are inexorably linked. It is therefore appropriate to consider the designated assets together, whilst not detracting from the specific harm in any individual case. Doing so, I conclude that **heritage harms identified amount to substantial planning objection to this proposed development**” (emphasis added).[93]*

She then went on to consider the landscape reason for refusal, finding the landscape was a valued landscape (in the terms of the NPPF then in force) and also that, whilst not being part of a designated landscape, it played a role in the wider setting of the nearby Suffolk Coast and Heaths National Landscape.

She continued:

“In terms of the Framework, I conclude that the scheme would not recognise the intrinsic character and beauty of the countryside, and nor would it protect or enhance valued landscapes including having regard to the need to sensitively locate development in the setting of a NL. As such, I find discord with paragraphs 187 and 189. The harm to the landscape that would arise would be significant and would be likely to persist long after the temporary period sought for the proposed solar farm. I accord significant weight to that harm particularly given that this landscape is sensitive given its proximity to the SC&H NL and that it is, in my view, a valued landscape.” [133]

The Inspector also gave full weight to the benefits of the scheme:

“The proposed development would undoubtedly have significant benefits. It would generate 43.3 GWh of renewable energy per annum which would save 8,963 tonnes of carbon dioxide and approximately equates to the electricity need for 10,823 homes. Generation of renewable energy policy support for the UK’s transition to

a low carbon economy, addressing the climate emergency must be a significant benefit of the scheme.” [146]

However, when she came to strike the heritage balance and the overall planning balance, this came down decisively against allowing the appeal:

“the harms identified to this nationally important group of highly graded designated assets would cause an immediate harmful effect that cannot be satisfactorily mitigated in the short or longer term, notwithstanding the temporary characterisation of the proposal. Particularly, and in exceptionally in this case, it fails to preserve the historic interest of a designated Conservation Area, when considered as a whole. This is contrary to expectations of section 72 of the LB&CA Act with which it would thus manifestly conflict. It should be remembered that the special attention to the desirability of preserving such historic interest is a matter of considerable importance and weight. A failure to meet that expectation, and indeed those framed in the other relevant sections of the LB&CA Act, can rightly be afforded great weight. I therefore find, that in the particular set of circumstances before me, the need to preserve these assets outweighs the public benefits identified, including the main benefit of delivering renewable energy of the quantum proposed here. Therefore, I find the heritage balance means that the public benefits do not outweigh the harms.” [171-172]

The landscape harm drove in a final nail: *“In addition to the heritage harms, which are not outweighed by public benefits, there is harm to the landscape character of the area, with further modest harm to the setting of the national landscape, which attracts further policy conflict...” [173]*

Commentary

It is axiomatic that every planning appeal decision turns on its own merits, but this was a case where those merits were capable of being overlooked and required careful analysis and articulation

through expert evidence and submissions. The stand-out factor in this case was, of course, the designation of a conservation area across the entire appeal site between the refusal of the planning application and the lodging of the appeal. This introduced statutory protection to the matrix of features of historic interest across the area which added heft to the heritage objection: the sum of the significance of the individual designated and non-designated heritage assets was plainly materially greater than that of the parts considered individually. The Inspector clearly understood and upheld the basis on which the conservation area was designated and found that harm to it would be at the very highest level of *“less than substantial harm”* using the terminology then deployed by the Framework.

This case is a useful reminder that local planning authorities are, by virtue of section 69(1) of the Town and Country Planning (Listed Building and Conservation Areas) Act, under a statutory duty to from time to time determine which parts of their area are areas of special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance and to designate those areas as conservation areas. Subsection (2) additionally obliges local planning authorities to review the past exercise of functions under this section and to determine whether any parts or any further parts of their area should be designated. However, the exercise of these powers inevitably requires both a diligent and well-resourced conservation team within the local planning authority – as well as local historians and architects to draw candidate areas to their attention.

Thomas Hill KC acted for the Rule 6 Party at this appeal.

A copy of the appeal decision can be accessed [here](#).

THE HIGH COURT EXAMINES STUDENT ACCOMMODATION POLICY – *R(THOMAS) v LEWISHAM LBC* [2026] EWHC 1840 (ADMIN)

DANIEL
STEDMAN-JONES
Call 2011



There is no requirement for a developer to have in place a binding contractual arrangement with a student accommodation provider in London in order for a purpose-built student accommodation ("PBSA") application to comply with the need to "secure" such provision in Lewisham's local plan and London Plan policy on PBSA. Nor did a student housing Nominations Agreement, the usual vehicle for PBSA development, with a higher education provider ("HEP") need to be contained within a s. 106 Agreement before permission could be granted lawfully by the planning committee to accord with the applicable policy. So held the court in *R(Thomas) v Lewisham LBC* [2026] EWHC 1840 (Admin) in an important judgment handed down on 21 July 2026. The case raised significant issues of principle concerning the interaction of planning policy, its interpretation and the operation of s. 106 Agreements.

The claim was brought by a Lewisham local resident concerned at the proposed PBSA redevelopment of Scott House, a large Victorian building on Grove Street in Lewisham, promoted by Tribe Scott House Limited (Tribe). The Claimant was involved with a local action group, formed to oppose the development, Save Scott House. The claim was brought on two grounds. The first ground impugned the local planning authority's assessment of the compliance of the application with PBSA policy and the statutory requirements of the Community Infrastructure Levy Regulations 2010 and s. 38(6) of the Planning and Compulsory Purchase Act 2004. The second ground challenged the s.106 Agreement's provisions in respect of assisting residents with relocation. Both grounds

were dismissed but Ground 1 is of most wide interest to planners and, in particular, the proper approach to PBSA applications in London and, where similar policy wording applies, across the country.

Policy H07 of the newly adopted local plan provides materially that "A. *Development proposals for... PBSA will be supported where they robustly demonstrate through evidence that: [...]* b. *The accommodation is secured for use by students, as demonstrated by an agreement with one or more specific higher education provider(s)...*"

The supporting text to the policy makes clear that the purpose is to "guard against speculative development and ensure proposals genuinely help to address identified need" and cross-refers to the London Plan. Policy H15 of the London Plan provides materially that "Boroughs should seek to ensure that local and strategic need for purpose-built student accommodation is addressed, provided that: [...] 2) the use of the accommodation is secured for students." The supporting text to that policy explains that "the borough should ensure, through condition or legal agreement, that the development will, from the point of occupation, maintain a nomination agreement or enter a new nomination agreement with one or more higher education provider(s) for a majority of the bedrooms in the development, for as long as it is used as student accommodation."

The Claimant argued that the Policy H07 requirement to secure the PBSA for students must be met by a binding contractual arrangement with a HEP to be entered into before planning permission could be granted in order for an application to attract the full weight of policy support. The Defendant, Lewisham Council, and Tribe submitted that Tribe's engagement with HEP, Trinity Laban, as evidenced by a letter of support coupled with the provisions contained in the s. 106 Agreement, which provided for a staged process incorporating a Nominations Agreement prior to occupation and default provisions, was sufficient for compliance with Policy H07 and the London Plan.

Timothy Corner KC (sitting as a Deputy Judge of the High Court) agreed with Lewisham and Tribe. The Judge held that the policy did not require a binding contractual arrangement to be in place prior to permission being granted. Firstly, the PBSA was “secured” within the meaning of the policy by the nature of the permission, which is for PBSA and condition 3 of which further requires accordance with 502 PBSA bedspaces. Secondly, the policy wording requiring an agreement with an HEP was silent as to timing. Thirdly, the supporting text to Policy HO7 indicated that the policy was to be consistent with London Plan PBSA policy which does not require a binding contractual agreement before permission is granted. Finally, the policy required evidence of engagement with an HEP, as suggested in the London Plan Guidance (LPG), and evidenced in this case by Tribe’s letter from the HEP.

The Judgment makes practical sense. As the London Plan Guidance advises, “*HEPs are unlikely to enter into such agreements until plans and, indeed, construction are sufficiently advanced that they can rely on bed spaces being available when needed (e.g. for the start of a particular academic year).*” With the LPG and the Council and Tribe’s evidence firmly in mind, the Judge emphasised that “*it is simply impractical to expect HEPs to enter into a binding contract – in any form – until after permission has been granted*” (para [94]). The case therefore represents a welcome recognition by the court of the market realities for the successful delivery of PBSA in London.

Thomas Hill KC and Daniel Stedman Jones acted for Tribe.

The judgment can be accessed [here](#).

“MANY WATERS CANNOT QUENCH [HOUSING], NEITHER CAN FLOODS DROWN IT” – CONSIDERING TWO RECENT HIGH COURT DECISIONS ON FLOOD RISK – FAVERSHAM [2026] EWHC 1651 (ADMIN) AND YATTON [2026] EWHC 1430 (ADMIN)

CHRISTOPHER MOSS
Call 2021



Introduction

Flood risk remains a key issue in planning policy and decision-making, the core element of which is the ‘sequential test’. The aim of the sequential test is to avoid, where possible, flood risk to people and property. It provides that new development is to be steered to areas with the lowest risk of flooding, and that development proposals should not be located in areas at risk of flooding where alternative sites, appropriate for the development, are reasonably available in areas with a lower risk of flooding.

Where the sequential test establishes that it is not possible for development to be located in areas with a lower risk of flooding, the exception test applies. At the time of the decisions discussed in this article, this required demonstrating that both:

- a) the development would provide wider sustainability benefits to the community that outweigh the flood risk; and
- b) the development will be safe for its lifetime taking account of the vulnerability of the users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.¹

The approach to flood risk has seen renewed

¹ The exception test has been modified in the August 2026 version of the NPPF. Policy F6 states that the exception test requires three criteria to be met, that the development will: “i. Provide wider sustainability benefits to the community that outweigh the flood risk; ii. Be safe for its anticipated lifetime in accordance with policy F7; and iii. Not increase flood risk elsewhere and, where possible, reduce flood risk overall.”

attention in recent years, the two cases discussed in this article follow on from the Court of Appeal's decision in *Mead Realisations Ltd v Secretary of State for Housing, Communities and Local Government* [2025] EWCA Civ 32; [2025] 1 P.&C.R. 16 which established that a failed sequential test is not automatically fatal to a planning application.

The cases discussed in this article were concerned with the pre-August 2026 version of the NPPF. "Managing Flood Risk and Coastal Change" is now its own Chapter, Chapter 18 with a number of changes made to both the sequential and exception tests. This article does not address the substance of these changes though there seems little doubt that the High Court will be required to in future.

Faversham [2026] EWHC 1651 (Admin)

This was a challenge to the decision of a planning Inspector dated 27 June 2025 granting planning permission for up to 250 dwellings at a site on the edge of Faversham, Kent. Most of the site lay in Flood Zone 1, and it was common ground that without mitigation measures some parts of the site were at risk of flooding under the appropriate climate change scenarios. The developer had not undertaken a sequential test. By the end of the inquiry, it also appeared to be common ground that with the mitigation measures proposed the development would be safe from flooding for its lifetime.

The Inspector determined that a sequential test was required and that the exception test was not engaged as it could only be carried out after a proper sequential test had been undertaken. He went on, nonetheless, to grant planning permission, noting that:

- The failure to perform a sequential test was a fundamental breach of planning policy.
- The tilted balance was engaged and footnote 7 of the NPPF made clear that areas at risk of flooding are counted as assets of particular importance.
- There was, however, no real-world harm from either the failure to undertake a

sequential test for tidal flooding or the failure to properly undertaken a sequential approach. It having been demonstrated that mitigation measures could make the development safe for its lifetime. There would also be no real-world surface water flood risk.

He concluded *"Overall, and particularly because of the importance and weight to be applied to the proposed housing, the adverse impacts of the proposal would not significantly and demonstrably outweigh the benefits of the proposal. The appeal should therefore be allowed"*.

The Inspector's decision was challenged by Faversham Town Council on four grounds:

- Ground One – the Inspector erred in law by "in effect" applying the Exception Test in NPPF [177] contrary to the terms of the NPPF;
- Ground Two – the Inspector was Wednesbury irrational in taking into account the mitigation measures in determining that the development could be made safe from flooding;
- Ground Three – the Inspector erred in his approach to a "strong reason" in [11(d)(i)] of the NPPF;
- Ground Four – the Inspector failed to apply the principles of consistency in decision making in relation to a number of previous decision letters.

Lieven J dismissed the Town Council's claim.

On grounds 1 and 2 she concluded that the Inspector had not erred in law as alleged or at all. He had correctly interpreted the NPPF – there was a requirement for the sequential test, and that the failure to carry it out was a conflict which he gave significant weight. He further made clear that the exception test should not be carried out. The Inspector went on to balance the serious conflict with the NPPF against other material considerations and was entitled to depart from the NPPF and give the provision of new housing

substantial weight. She determined that the Inspector had, plainly, not applied the exception test, rather:

"he gave weight to a number of factors that would also have arisen under the Exception Test, including the fact that mitigation measures would make the site safe from flooding and there were reasons other than flooding that result in the land raising measures. The lack of real-world harm was a material consideration. None of these were matters that the Inspector was not entitled to take into consideration." [44]

There was also nothing irrational or showing a serious logical error about the Inspector concluding that given the lack of real-world harm, and the significant benefits of the development, the planning balance was in favour for the grant of permission.

On ground 3, Lieven J concluded that the question of whether the breach of flooding policy gave a strong reason for refusal was *"a classic planning judgement for the Inspector"* [59]. She went on to note at [61] that:

"If the Inspector had been trying to lay down a universal approach in DL101 that a strong reason must always involve real world harm, rather than a breach of policy, then that would be wrong. However, reading the DL as a whole and being fair to the Inspector, that is plainly not what he was doing."

With respect to ground 4, the Inspector had taken into account the previous Inspectors' decisions however they did not fall within the category of case where the Inspector had to give any further reasons for explaining why he did not refuse permission on the grounds of departure from the sequential test.

Yatton [2026] EWHC 1430 (Admin)

In Yatton, Jefford J considered a challenge to the decision of a planning Inspector on 18 March 2025 to grant outline planning permission for 190 homes on land at Yatton, Somerset in flood zone 3a.

The developer had a previous application for the Scheme refused in June 2023 after a planning Inspector found it had failed the sequential test. The developer brought a claim for statutory review of the decision that was dismissed by Holgate J in *Mead* [2024] EWHC 279 (Admin).²

The developer subsequently submitted an updated sequential test assessment and an opinion from Lord Banner KC that Holgate J's decision made it clear that a failure to comply with the sequential test was not automatically fatal to a planning application, either within the parameters of the NPPF or having regard to the material considerations under s.38(6) of the Planning and Compulsory Purchase Act 2004.

The Inspector determined that the sequential test was not passed as there were 12 sequentially preferable sites. Again, as in *Faversham*, the Inspector noted that a failure to comply with the sequential test was not automatically fatal to a planning application, but he gave significant weight to this failure. He also determined that the proposed houses would be safe from flooding during the lifetime of the development. The proposed means of access from the south, which could be secured by a condition, would provide a safe route to and from the site during a flood event and that the proposal would not increase the risk of flooding elsewhere. The tilted balance was engaged due to the housing land supply position. On balance the Inspector concluded that *"the adverse effects do not significantly and demonstrably outweigh the benefits. The Framework therefore indicates that permission should be granted. This is a factor which outweighs the conflict with the development plan that I have identified."*

The Inspector's decision was challenged by North Somerset District Council on two grounds:

- Ground (1): The Inspector misunderstood and misapplied the First Defendant's policy by applying the exception test notwithstanding the proposal had failed the

² Whose decision was upheld by the Court of Appeal [2025] EWCA Civ 32, [2025] 1 P. & C.R. 16

sequential test and local and national policy would [not] rule out the development of sequentially preferable sites.

- Ground (2) The Inspector's conclusion that the development could be made safe for its lifetime is (a) irrational, alternatively (b) not supported by any or any adequate reasons.

On ground 1, the claimant's claim was, in essence, that the Inspector in *"reality did what both the NPPF and PPG tell him not to do, that is treat the exception test as a material consideration, and thus improperly diminished the weight that he gave to the failure of the sequential test"* [52]. Jefford J dismissed this argument, nowhere did the Inspector say he was applying the exception test *"what he, in fact, did was take the factors that form the limbs of the exception test into account as material considerations in the planning balance"* [54], which he was fully entitled to do.

With respect to the continued relevance of the matters covered by the exception test where it did not apply, Lieven J stated:

***"If the matters covered by the widely framed exception test ceased to be material considerations once the sequential test was failed – 'the remaining material considerations would be severely restricted to the point where it is difficult to see what would be left. The effect would be to render the failure to pass the sequential test a bar to the grant of permission.'* [58]**

...
"...The NPPF and PPG state nowhere in terms that if the exception test is not reached, the matters that form the limbs of the exception test should not be taken into account." [65]

...
"Having found the sequential test to have been failed, he went on to consider other material considerations and weigh those in the planning balance. As I have said, the argument that the Inspector somehow took account of the product of the exception test (which was

***not open to him) rather than the material considerations (which were) seeks to draw a distinction without a difference."* [68]**

Emphasis added.

Ground 2 was also dismissed; the Inspector's conclusions were neither irrational nor inadequately reasoned.

Comment

Flood risk, and the approach to the sequential and exemption tests are likely to remain a hotly contested issue. From a developer perspective these decisions are clearly positive. In *Faversham* the High Court upheld a practical 'real-world' approach to flood risk, and in both cases Lieven J and Jeffords J endorsed the principle that flows from *Mead* that a failed sequential test is not a knockout blow to an application or appeal. The conclusion of both is that even where the sequential test is failed or a sequential assessment is not carried out, the application or appeal must be considered in the round on its planning merits, this may include assessing material considerations covered by the exception test even if the test itself is not engaged.

Both decisions have also been subject to criticism, primarily that they erode the importance and effectiveness of the sequential test. The Town and Country Planning Association published a briefing note in September 2025, after the Inspectors' decisions but prior to the High Court decisions, which expressed concern that they represent *"a backward step in the interpretation of flood risk policy for planning."*³ The High Court's decision in *Yatton* has faced the most significant criticism including by the All-Party Parliamentary Group on Flooding and Flooded Communities which has called for changes to the NPPF to reinforce the sequential test. Whether any changes are forthcoming remains to be seen. Albeit given the recently published new NPPF it seems, perhaps, unlikely that significant amendments will be made in the short term.

3 Town and Country Planning Association, 'A dangerous precedent for flood risk policy', (September 2025), <<https://www.tcpa.org.uk/resources/a-dangerous-precedent-for-flood-risk-policy/>> (accessed on 18 October 2026)

THE SEWAGE POLLUTION PROBLEM: A REGULATORY SOLUTION FOR ESCAPE AND DISCHARGE COMPENSATION⁴

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Call 2025



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At a glance:

- The law on compensation for sewage pollution remains unsatisfactory.
- Two landmark cases, *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66 and *Manchester Ship Canal Co Ltd v United Utilities Water Ltd* [2024] UKSC 22, show the problems with the compensation regime for sewage escapes and discharges.
- A regulatory approach is better suited than private law litigation to achieve fairness, consistency, and environmental protection.
- This article proposes a comprehensive strict liability statutory regulatory regime which will ensure compensation for actual loss and damage caused by escapes and discharges of untreated sewage.

Introduction

'The sewer is the conscience of the city,' writes Victor Hugo in *Les Misérables*.⁵ If so, the conscience of England and Wales is troubled. While there have been legislative efforts to address the problem,⁶ the state of the law on compensation

for sewage pollution remains unsatisfactory. Two landmark cases, *Marcic v Thames Water Utilities Ltd*⁷ (*Marcic*) and *Manchester Ship Canal Co Ltd v United Utilities Water Ltd*⁸ (*Manchester Ship Canal*) show the problems with the compensation regime for sewage escapes and discharges. In *Marcic*, the House of Lords held that there could be no action in nuisance against a sewerage undertaker for involuntary and unplanned sewage overflows due to insufficient sewer capacity (known as 'escapes'); an action in nuisance was held to be contrary to the Water Industry Act 1991 (Water Industry Act or the Act). In *Manchester Ship Canal*, the Supreme Court held that an action in nuisance could nonetheless be brought against a sewerage undertaker for deliberate and designed discharges of untreated sewage into watercourses (known as 'discharges').⁹ The Act did not preclude a claim in nuisance in a discharge case.

This article argues that these two decisions illustrate the limits of tort law in addressing compensation for sewage pollution. A regulatory approach is better suited than private law litigation to achieve fairness, consistency, and environmental protection. Therefore, this article proposes a comprehensive strict liability statutory regulatory regime that would provide compensation for actual loss and damage caused by escapes and discharges of untreated sewage (the 'reform proposal').

The current legal landscape

Water Industry Act

The Water Industry Act sets out the powers and duties of sewerage undertakers.¹⁰ The Water Services Regulation Authority (Ofwat) and the Secretary of State (SoS) have powers to regulate sewerage undertakers. Sewerage undertakers must provide and maintain effective sewer

4 This article is based on the essay that was awarded third place in the Association of Regulatory and Disciplinary Lawyers' Marion Simmons QC Essay Prize 2025.

5 Victor Hugo, *Les Misérables*, vol 2 (Wordsworth Classics 1994) 857.

6 See for example the Water (Special Measures) Act 2025.

7 [2003] UKHL 66.

8 [2024] UKSC 22.

9 For a further explanation of the distinction between escapes and discharges see *Smeaton v Ilford Corporation* [1954] Ch 450, 462.

10 Part IV of the Water Industry Act relates to sewerage services.

systems.¹¹ The Act limits the enforcement of the statutory requirements to Ofwat and the SoS.¹² Statutory requirements on sewerage undertakers cannot be enforced by bringing a claim in common law.¹³ However, common law actions and remedies against sewerage undertakers which do not depend on the Act remain. The Act provides full compensation only to persons who have sustained damage caused by sewerage undertakers exercising their powers under sewerage provisions.¹⁴ Escapes and discharges of untreated sewage are unauthorised and so damage caused by escapes and discharges is not compensated under the Act.

Marcic

In *Marcic*, the claimant suffered regular flooding of his home by untreated sewage due to escapes. The House of Lords held that an action in nuisance was inconsistent with the Act.¹⁵ The Act provided an exhaustive enforcement scheme. This case highlighted the lacuna in compensation for sewage escape cases, that is, there was neither a common law nuisance action nor any statutory right to full monetary compensation.¹⁶

The Guaranteed Standards Scheme (GSS)¹⁷

The GSS sets out regulatory standards for services that sewerage undertakers must not fall below.¹⁸ On 2 July 2025, the payments due to customers were increased in England, marking the first uplift in compensation rates in 25 years.¹⁹ In particular, the minimum and maximum payments for sewer flooding were doubled. For internal sewer flooding, customers are now entitled to a payment equal

to their annual sewerage charges, subject to a minimum of £300 and a maximum of £2,000. For external sewer flooding, the payment is equal to 50% of annual sewerage charges, subject to a minimum of £150 and a maximum of £1,000.²⁰ The amended scheme also provides higher payment bands for repeated sewer flooding. For each repeat internal flooding incident occurring within 12 months since the end of the first incident, the minimum payment increases by £100 and the maximum by £500. For each repeat external flooding incident occurring within 12 months since the end of the first incident, the minimum increases by £50 and the maximum by £250. The scheme therefore recognises, to some extent, the greater disruption caused by repeat sewer flooding.²¹ The revised payments provide greater redress than the previous scheme. However, they remain standardised charge linked payments rather than compensation assessed by reference to the customer's actual loss.

Manchester Ship Canal

Manchester Ship Canal involved a dispute between United Utilities (UU) and the Manchester Ship Canal Company (MSCC) over UU's discharges of untreated sewage into the Manchester Ship Canal. The legal issue was whether MSCC could bring a claim in nuisance against UU or whether this was barred because, as in *Marcic*, such an action would be inconsistent with the Water Industry Act.²² In *Manchester Ship Canal*, the Supreme Court distinguished *Marcic* and held that discharges of untreated sewage into a watercourse were actionable in nuisance. The

11 Section 94 of the Water Industry Act.

12 Ibid, section 18.

13 Ibid, sub-section 18(8).

14 Ibid, section 180 and schedule 12.

15 *Marcic* (n 4), [34].

16 Ibid [44].

17 The Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008 (SI 2008/594).

18 Ofwat, 'The guaranteed standards scheme (GSS) summary of standards and conditions' (June 2026) <<https://www.ofwat.gov.uk/wp-content/uploads/2026/02/The-guaranteed-standards-scheme-GSS-summary-of-standards-and-conditions-June-2026.pdf>> accessed 10 September 2026.

19 The Water Supply and Sewerage Services (Customer Service Standards) (Amendment) Regulations 2025 (SI 2025/662).

20 Ibid. See also Department for Environment, Food and Rural Affairs, 'Customers to receive up to £2000 for water service failures' (2 July 2025) <<https://www.gov.uk/government/news/customers-to-receive-up-to-2000-for-water-service-failures>> accessed 10 September 2026.

21 For companies operating wholly or mainly in Wales, the GSS currently provides a minimum of £150 and a maximum of £1,000 for internal sewer flooding and a minimum of £75 and a maximum of £500 for material external sewer flooding. See Ofwat (n 15).

22 *Manchester Ship Canal* (n 5) [134].

Supreme Court reasoned that sections of the Act limiting sewerage undertakers' statutory powers in relation to watercourses implied a right to common law remedies when those powers were exceeded.²³ This decision confirmed the availability of full compensation for discharge cases, but it also underscored the disparity between escape and discharge claims.²⁴

A disparate regime: a critique of the current legal landscape

Marcic and Manchester Ship Canal – Inconsistencies and uncertainty in tort compensation

The differing outcomes in *Marcic and Manchester Ship Canal* create unsatisfactory distinctions. Escapes and discharges both harm persons and the environment. However, only discharge cases allow full compensation through tort. This discrepancy in outcome disproportionately burdens persons who suffer damage because of escapes, who are denied redress under both tort law and the Act. Relying on tort law to fill gaps in statutory provisions has led to fragmented outcomes. Additionally, tort damages are uncertain, with differing views on how to calculate damages.²⁵

The GSS – An inadequate compensation scheme

The revised GSS increases the compensation for sewer flooding, but the character of the compensation payments is unchanged. The compensation does not correspond directly to actual damage or loss to property and does not adequately account for the severity or frequency of sewage flooding.²⁶ The increased GSS payments consequently reduce but do not solve the compensation problem considered in this article. The 2024 consultation on updating the GSS,

which led to the revised scheme, noted that the Consumer Council for Water's research had found that:

'...incidents of sewer flooding, whilst considered highly disruptive by customers, often resulted in the mistaken conflation of GSS payments with compensation for damages, leading to disputes with companies. The current statutory provisions allow for a payment set against a percentage of the annual average sewerage bill of the affected customer, with a given minimum and maximum payment level, but these payments are not compensatory for damages.'

The same problem remains under the revised GSS.²⁷

The reform proposal – A strict liability statutory regulatory regime

To address these issues, Parliament should enact a strict liability statutory regulatory regime which covers both escapes and discharges. The reform proposal could be modelled on section 209 of the Water Industry Act, which establishes a system of strict liability for water companies regarding any water loss from any of their pipes which results in damage or loss. The reform proposal would provide a consistent framework for compensating persons who suffer loss or damage due to sewage pollution. Key provisions could include:

- Liability: sewerage undertakers are strictly liable for losses caused by escapes or discharges.
- Exclusions: liability does not apply where a person's own fault caused the loss or damage.
- Apportionment: provisions for apportionment of loss among parties who have contributed to the loss or damage.
- Limitations: provisions on time limitation.

23 Ibid [114]-[115].

24 Also note *Roberts v Severn Trent Water Ltd & Ors* [2025] CAT 17; [2026] EWCA Civ 222; UKSC/2026/0042. The appeal concerns whether a cause of action under the Competition Act 1998 is excluded by section 18(8) of the Water Industry Act. It illustrates the complicated relationship between the enforcement scheme and what other actions lie. Professor Roberts sought collective proceedings orders against six water and sewerage undertakers, alleging that they under-reported pollution incidents and so charged higher prices than they would have been permitted to charge had they reported accurately. The Tribunal held that the claims were excluded by the Water Industry Act. The Court of Appeal dismissed the appeal by a majority, Zacaroli LJ dissenting. The Supreme Court has granted permission to appeal.

25 Damages in lieu of an injunction can be calculated on a diminution in value of property, negotiation, or profit-share basis.

26 Emma Joy Katherine Carle, 'A Fair System of Priorities: Competing Interests within the Sewerage Industry (and beyond)', (LLM in Environmental Law thesis, De Montfort University, Leicester December 2012) 47.

27 See Ofwat (n 15). Ofwat's current guidance notes 'The scheme does not affect any legal rights to compensation that customers may have'.

Why regulatory reform offers a solution

Fairness and consistency

A comprehensive strict liability statutory regulatory regime provides consistency in approach to compensation across comparable sewage pollution cases. The reform proposal provides that all persons who suffer loss or damage due to an escape or discharge are compensated in full for actual loss and damage.

Efficiency

Regulation reduces the burden on courts and claimants. The reform proposal would streamline the compensation process and reduce litigation on sewage pollution liability.

Environmental responsibility

The reform proposal reinforces the polluter pays principle,²⁸ holding sewerage undertakers accountable by ensuring they must compensate persons who have suffered loss and damage from sewage pollution. The strict liability nature of the reform would incentivise sewerage undertakers to improve their sewerage systems to reduce the risk of incurring the cost of compensation.²⁹

Conclusion

The current legal framework for compensating sewage pollution victims is inadequate. The case of *Manchester Ship Canal* clarified the legal position on compensation for discharges but highlighted the compensatory lacuna under *Marcic* and the GSS. The revised GSS does not remove that lacuna. Addressing these issues comprehensively as a regulatory matter rather than through tort law offers a practical and fair solution that ensures consistent compensation, reduces litigation, and incentivises environmental

protection. The reform proposal advances justice and sustainability in sewage pollution law (and in doing so it ensures the conscience of England and Wales is clean).

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R. (ON THE APPLICATION OF WILD JUSTICE) V NATURAL ENGLAND
[2026] EWHC 1573 (ADMIN)

ELLA GRODZINSKI
Call 2022



The Claimant, an environmental NGO, challenged a decision by Natural England to grant 26 Supplementary Badger Control (SBC) licences. These are licenses permitting badger culling for disease prevention purposes.

The Claimant initially brought the challenge on three distinct legality grounds, which were (1) acting for an improper purpose; (2) having regard to legal irrelevancies; and (3) legally inadequate reasons. By the time of the substantive hearing before Fordham J, only Ground 2 was still pursued, and only in interestingly altered manner.

Ground 2 concerned five considerations which were listed in an internal Natural England Briefing Note (termed “the Five Considerations” by the Court).³⁰ Ground 2, as originally pleaded, was

28 *Fishermen and Friends of the Sea v The Minister of Planning, Housing and the Environment* (Trinidad and Tobago) [2017] UKPC 37, [2]

29 Organisation for Economic Cooperation and Development, *Environmental risks and insurance – a comparative analysis of the role of insurance in the management of environment-related risks* (No 6, 2002), 23-24.

30 These Five Considerations were:

- [i] The consequences of not issuing the SBC licences for NE's relationship with Defra and the Animal and Plant Health Agency.
- [ii] The consequences of not issuing the SBC licences for NE's “wider relationships within the farming community” across NE's “Green Farming and Fisheries and Resilient Landscapes and Seas portfolios”.
- [iii] The fact that NE, rather than Defra, would be liable for the costs of compensation claims that could be submitted by members of the farming industry.
- [iv] The apparent need to make a decision by the end of April 2024 in order to avoid “jeopardising the timeline agreed with [farming] companies” and the fact that there would be “questions raised by the NFU and companies both to NE and Defra” if SBC licences were not issued before 15 May 2024.
- [v] The consequences of not issuing the SBC licences for NE's budget and the fact that this could result in staff layoffs and “wellbeing issues and work-related stress” among NE's employees.

that the decision-maker had taken the Five Considerations into account in making the decision, and that these Five Considerations were irrelevant, therefore consideration of them vitiated the decision to grant the SBC licences.

However, by the time of the substantive hearing, it was accepted that the decision-maker had not, in fact, ever accessed or read the Briefing Note containing the Five Considerations. (Spare a thought here for the Natural England employees considering the value of their work...) The Claimants therefore reformulated Ground 2 into what Fordham J called the "Would-If Question": would the Five Considerations have constituted irrelevant considerations for the purposes of Natural England's decision-making under s.10(2) of the Protection of Badgers Act 1992, if they had been taken into account by the decision-maker? The Claimant sought an advisory declaration saying that yes, the Five Considerations would have constituted irrelevant considerations had they been considered.

This pivot to pursuing an advisory declaration was, Fordham J said, "*ambitious*" (§21(ii)), and he declined to make such a declaration for the following reasons (§19):

Firstly, the issue was hypothetical. It proceeded on imagined facts which were the opposite of what had actually happened, and "*Courts do not in general decide hypothetical questions (R Rusbridger) v Attorney General [2003] UKHL 38 [2004] 1 AC 357*" (para 19(i)). Indeed, by the time of the substantive hearing, all parties agreed that the answer to the "Would-If" question was "yes, they would have been irrelevant". Nevertheless, Fordham J declined to make any declaration, citing *R (Bus and Coach Association Ltd) v Secretary of State for Transport* [2019] EWHC 3319 (Admin) at §§39, 66-67 and noting that "*the essential function of a court of law is to decide disputes between parties in particular cases*". Here there was no substantive dispute, only a dispute over remedy (see §§19(i)-(viii)).

Secondly, taking into account a legal irrelevancy

is not automatically unlawful. At common law, the public law error must also be material. Here, there was no actual decision-making process involving the Five Considerations which could be examined to determine whether the legal irrelevancy being taken into account made a significant difference to the outcome (relevant to the test under s.31(2A) of the Senior Courts Act 1981), and it would not be useful to decide this question without reference specific facts (see para 19(ii) and 16(ii)). This was not a question of pure statutory interpretation, which could usefully be decided in the abstract. Nor was Natural England proposing to make future similar decisions utilising the Five Considerations. This was therefore not a question of "*clarifying the law*" in the public interest.

The costs section of the Judgment is illuminating (§21), in that it reveals how the case played out in such a way that, ultimately, a claimant sought a remedy for events that everyone agreed had not occurred. Fordham J described the costs matter as "*hot controversy*". Natural England had abandoned key aspects of its case relatively late in the day, and although the Claimant had been unsuccessful, Fordham held that "*the points balance out*", leading to no order as to costs.

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Thomas Hill KC has 35 years' experience in the fields of planning, environmental, compulsory purchase and related administrative law. He is regularly instructed at public inquiries, hearings and examinations and in the High Court, acting for a wide variety of developers, local authorities and third party clients. His practice at the Bar has for many years encompassed advocacy and advisory work in relation to major infrastructure – with particular emphasis on the airport (runway and terminal expansion), port (container port proposals, HROs and harbour dues litigation) and energy sectors (biofuels, EfW, wind and solar energy). He is also

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