Neutral Citation Number: [2011] EWHC 2325 (Admin)
IN THE HIGH COURT OF JUSTICE CO/13334/2010
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 23 August 2011

B e f o r e:

MR CHARLES GEORGE QC
(Sitting as a Deputy Judge of the Queen's Bench Division)

The Queen on the application of

BIZZY B MANAGEMENT LIMITED

Claimant

- v -

STOCKTON-ON-TEES BOROUGH COUNCIL

Defendant

and

PYTHON PROPERTIES
(A Firm)

Interested Party

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Mr Gerard Clarke (instructed by Blick & Co) appeared on behalf of the Claimant
Mr Andrew Tabachnik (instructed by Stockton-on-Tees Borough Legal Services) appeared on behalf of the Defendant
Mr Peter Broome (appeared in person) for the Interested Party

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J U D G M E N T
(As Approved by the Cour)

Tuesday 23 August 2011

THE DEPUTY JUDGE:

Introduction

1. This application for judicial review concerns the aftermath of service of a Building Notice under section 79(1) of the Building Act 1984 ("the 1984 Act"). In particular it concerns the position of a local authority when an owner, required by such a notice to execute works of repair or, if he so chooses, demolition instead, fails to comply. Such a local authority then has the right under section 79(3)(b) itself to repair the building or demolish it, and recover its reasonable expenses in doing so. As the facts of this case show, it has various further obstacles to overcome.

2. The claimant, Bizzy B Management Limited ("Bizzy B"), describes itself as a Single Purpose Vehicle owned by an international trading company. Bizzy B operates through external consultants and contractors. In these proceedings its key consultant has been Mr Rabinovitch who has made no fewer than five witness statements. The asset in the Single Purpose Vehicle is Billingham House, a nine-storey office building in Stockton-on-Tees, which has been unoccupied and in a dilapidated state for many years.

3. When served with a Building Notice in 2007 by the defendant, Stockton-on-Tees Borough Council ("the Council"), the terms of which had been agreed in advance, Bizzy B (again by agreement with the Council) did not exercise its appeal rights under section 102 of the 1984 Act, and elected to demolish. At that time Bizzy B was negotiating with a local property developer, Python Properties ("Python"), the Interested Party in these proceedings, and it anticipated entering a development agreement fairly promptly. Three years later, in October 2010, the Council lost patience with what it saw as Bizzy B's procrastination and commenced preliminary works of demolition. Those steps were then challenged at the end of December 2010 by an application for judicial review made by Bizzy B. In March 2011 the Council gave an undertaking not to demolish Billingham House until the determination of the claimant's application for judicial review. In late April 2011 the Council was alerted by Bizzy B to the need for planning permission before it could demolish Billingham House. In May 2011 it was given a negative screening opinion that a planning application need not be subject to Environmental Impact Assessment ("EIA"). It then, belatedly, sought and obtained planning permission in June 2011. Both the screening opinion and the planning permission were issued by the local planning authority, that is by the Council to itself as applicant.

4. By its application, which is now in re-re-amended form to cater for what has happened since the application was issued, Bizzy B seeks to quash:

> (1) the Council's decision, communicated by letter of 8 February 2011, to continue with demolition;
>
> (2) the negative screening opinion issued on 9 May 2011; and
>
> (3) the planning permission issued on 29 June 2011.

5. In addition, the Council seeks a declaration that the demolition of Billingham House and associated car parking structures is and would be permitted development within the meaning of

Part 31 to Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995, upon which permission the Council would seek to rely were the planning permission of 29 June 2011 to be quashed. There has been a "rolled-up hearing", in which Python also participated in support of the claimant's application. The documentation is voluminous, running to eight lever arch files (excluding authorities).

Statutory background to the Building Notice:

6. Section 79 of the 1984 Act provides:

> "**Ruinous and dilapidated buildings and neglected sites.**
>
> (1) If it appears to a local authority that a building or structure is by reason of its ruinous or dilapidated condition seriously detrimental to the amenities of the neighbourhood, the local authority may by notice require the owner thereof --
>
> (a) to execute such works of repair or restoration, or
>
> (b) if he so elects, to take such steps for demolishing the building or structure, or any part thereof, and removing any rubbish or other material resulting from or exposed by the demolition,
>
> as may be necessary in the interests of amenity.
>
> (2) If it appears to a local authority that --
>
> (a) rubbish or other material resulting from, or exposed by, the demolition or collapse of a building or structure is lying on the site or on any adjoining land, and
>
> (b) by reason thereof the site or land is in such a condition as to be seriously detrimental to the amenities of the neighbourhood,
>
> the local authority may by notice require the owner of the site or land to take such steps for removing the rubbish or material as may be necessary in the interests of amenity.
>
> (3) Sections 99 and 102 below apply in relation to a notice given under subsection (1) or (2) above, subject to the following modifications --
>
> (a) section 99(1) requires the notice to

indicate the nature of the works of repair or restoration and that of the works of demolition and removal of rubbish or material, and

(b) section 99(2) authorises the local authority to execute, subject to that subsection, at their election either the works of repair or restoration or the works of demolition and removal of rubbish material.

(4) This section does not apply to an advertisement as defined in section 336(1) of the Town and Country Planning Act 1990.

(5) This section has effect subject to the provisions of the Planning (Listed Buildings and Conservation Areas) Act 1990 relating to listed buildings, buildings subject to building preservation notices and buildings in conservation areas."

7. Section 99 of the 1984 Act provides:

"**Content and enforcement of notice requiring works.**

(1) A notice in relation to which it is declared by any provision of this Act that this section applies shall indicate the nature of the works to be executed and state the time within which they are to be executed.

(2) Subject to any right of appeal conferred by section 102 below, if the person required by such a notice to execute works fails to execute them within the time limited by the notice --

(a) the local authority may themselves execute the works and recover from that person the expenses reasonably incurred by them in doing so, and

(b) without prejudice to that power, he is liable on summary conviction to a fine not exceeding level 4 on the standard scale and to a further fine not exceeding £2 for each day on which the default continues after he is convicted.

(3) This section has effect subject to any modification specified in the provision under which the notice is given."

8. Section 102 of the 1984 Act provides (so far as is relevant):

"**Appeal against notice requiring works.**

(1) Where a person is given a notice in relation to which it is declared by any provision of this Act that this section applies, he may appeal to a magistrates' court on any of the following grounds that are appropriate in the circumstances of the particular case --

(a) that the notice or requirement is not justified by the terms of the provision under which it purports to have been given,

(b) that there has been some informality, defect or error in, or in connection with, the notice,

(c) that the authority have refused unreasonably to approve the execution of alternative works, or that the works required by the notice to be executed are otherwise unreasonable in character or extent, or are unnecessary,

(d) that the time within which the works are to be executed is not reasonably sufficient for the purpose,

...."

9. As is apparent from section 79(1) the mischief to which a Building Notice is directed is the amenities of a building's neighbourhood, and a Building Notice can only be served where the building is in such a ruinous or dilapidated condition that it seriously threatens those amenities. There is no dispute that at the time of issue of the Building Notice on 12 September 2007 Billingham House was in such a dilapidated condition as seriously to threaten the amenities of

the neighbourhood; and that it still does four years later. That is why the Council seeks to exercise its power of demolition under section 79(3)(b).

The Building Notice

10. As required by section 79(3)(a) of the 1984 Act, the Building Notice of 12 September 2007 listed both works of repair or restoration and works of demolition and removal of rubbish or material and, as required by section 99(1), the time by which the works were to be completed. The former, to be completed by 31 December 2008, consisted of:

> " 1) the removal of all rubble, waste, materials, rubbish, and all other materials whatsoever from the building and its associated hard-standing and all external structures using where necessary any appropriate procedures due [to] the existence of asbestos or other contaminated materials.
>
> 2) Drain the flooded basement area and cleanse and make good the drained area, disposing of the contaminated water in accordance with recommended practice.
>
> 3) Secure all entrance points to the basement to prevent unauthorised access.
>
> 4) The safe removal and replacement or repair of all structural linings to columns, beams, floors, riser ducts and other such structures, or parts of structure, howsoever composed, from the exterior of the building or from the rooms or internal spaces immediately adjacent to the exterior of the building.
>
> 5) The removal of all asbestos contained within the building, or its exterior, and the safe removal of all materials removed or debris resulting from its removal from the site.
>
> 6) Repair, replace or reinstate all concrete sections, including columns, beams, floor slabs, and all other structural members on the exterior of the building and to repair or replace all concrete structures damaged as a result of degradation due to age, carbonation, weather ingress and structure failure.
>
> 7) Remove all existing windows, including frames and loose or damaged materials on or near to the window casements, and replace with new sections in accordance with Building Regulation standards.
>
> 8) Repair ceilings to all offices, rooms or internal spaces that

are immediately adjacent to the exterior of the building, including, but not exclusively, the removal and replacement of all loose or broken ceiling tiles.

9) Repair, replace or remove all damaged interior partition walls to offices, rooms or internal spaces that are immediately adjacent to the exterior of the building, making good any damage caused by their removal.

10) Remove existing waterproofing layer on all flat roof structures and replace with new Mastic Asphalt waterproofing layer.

11) Replace all doors to entrances and exits to building to accord with Building Regulations standards.

12) Repair all external walls (including cladding tiles), canopies and porches of the main building and all external structures or outbuildings, including structures erected to provide shelter for pedestrian walkways, to their original condition.

13) Remove staining and clean down areas of all external walling that have been stained by fire damage.

14) Make good and repaint all external pained surfaces."

The latter consisted of:

"or if you should elect demolition, to take the following steps for demolition of the building and the removal of any rubbish or other material resulting from or exposed by the demolition:-

1) erect hoarding and secure the site from unauthorised access by 31 March 2008;

2) disconnect water, electricity and gas supplies by 7 April 2008;

3) board up and secure all broken windows and doors by 7 April 2008;

4) remove water from basement, disposing of the water at an

authorised disposal point if contaminated by 7 April 2008;

5) remove all asbestos from the 4th to 8th floors of the building by 19 May 2008;

6) remove all asbestos from the basement to the 3rd floor of the building by 30 June 2008;

7) remove all fixtures, fittings and linings (ie soft strip) the 4th to 8th floors of the building by 30 June 2008;

8) remove all fixtures, fittings and linings (ie soft strip) the basement to 3rd floors of the building by 8 June 2008;

9) demolish the building and its associated structures in its entirety by 12 December 2008;

10) backfill basement to ground level by 31 December 2008;

11) remove all rubbish, rubble and other material resulting from the works of demolition from the site by 31 December 2008."

11. As I have already stated, the terms were agreed, prior to issue of the Building Notice, to prevent an appeal such as had occurred in relation to a Building Notice issued the previous year.

Further factual background
in relation to the decision in February 2011

12. Billingham House, once an iconic headquarters building of ICI, became vacant in 1995, and was acquired by Bizzy B in 2000. In 2001 the building was heavily damaged by fire and vandalism; and incidents of occasional fires and persistent misuse and vandalism have continued over the years to the distress of local residents and local businesses. In a letter of 7 April 2008 Bizzy B stated that

> "the building has been constantly vandalized despite all measures to secure the building, including hoarding, 24 hour security and random security patrols. These measures have not protected the building and it has been vandalized to such an extent that the building now has to be demolished."

In 2004 planning permission was approved for a garden centre on site; and in 2005 for five two-storey office units, with partial demolition. Neither permissions have been implemented. In 2006 planning permission for 128 private dwellings was refused. Soon after issue of the first

Building Notice in 2006, Python entered into negotiations to purchase the building from Bizzy B. In August 2007 Bizzy B sent the Council a demolition programme to be implemented should a proposed sale to Python not take place.

13. The first Building Notice was withdrawn in 2007, at the same time as the issue of the second Building Notice. Bizzy B had agreed not to appeal against it and to elect, under section 79(1)(b) of the 1984 Act, to demolish as opposed to restore or repair it. In May 2009 the Council issued proceedings under section 99(2)(b) of the 1984 Act against Bizzy B for failure to comply with the Building Notice. In October 2009 Bizzy B was convicted at Teesside Magistrates' Court for non-compliance, fined £1,650, and ordered to pay the Council's costs.

14. From 2006 onwards Bizzy B and Python, with encouragement from the Council which lasted until late in 2010, have attempted to put together a redevelopment package as an alternative to demolition. Initially Python was to purchase the freehold. This then changed in 2007 to a proposal that Python take a long lease from Bizzy B. In 2009 Bizzy B commissioned works which resulted in documents supplied to the Council showing that the building had been certified asbestos-free.

15. There were problems in achieving a viable project. The Council's preference was for a bold scheme involving the closure of Belasis Avenue, so that Billingham House could form part of a campus development along with the existing industrial premises lying to the south of that road, which included several major employers involved in chemicals. In October 2009 the Council referred to the opportunity for the project "to both be an economic driver as well as icon for Billingham (even a Tees Valley giant!!)". The Council, together with Python, started to prepare a draft Business Case in 2009, the latest version of which was dated 17 May 2010, aimed at securing public funding from ONE North East ("ONE"), the regional development agency. The draft Business Case starkly contrasted the benefits of refurbishing Billingham House as against demolition by the Council using its default powers under section 79(3)(b) of the 1984 Act, followed by redevelopment to provide new office accommodation. Refurbishment, it was contended, "will not only create high quality office accommodation, but generate the intangible aesthetic benefits of improving the quality of life for local residents and the marketability of the chemical complex". What was envisaged was a Phase 1 in which Python would (subject to pre-lets) refurbish two floors of offices, and then gradually as tenants were identified, bring back the other six floors of offices into occupation. The belief was expressed that adjacent employers would continue to require additional accommodation if their own growth plans came to fruition. The demolition alternative, whilst cheaper and allowing for more sustainable building design in the future, was described as "high risk", because of the cost of redeveloping the site post-demolition. In particular the draft Business Case said that "Redevelopment of the site would result in the loss of a local landmark", and that "Demolition and redevelopment of the site will be less sustainable than refurbishment of the existing building [and] will utilise considerably more materials". Bizzy B rely on these observations in its challenge both to the February 2011 decision to proceed with demolition and to the Planning Permission.

16. By August 2010 there had been two developments. First, it had become clear that the campus proposal would not achieve funding, so that the only refurbishment scheme with any chance of going ahead was once which excluded the road closure, and was therefore likely to be less attractive to would-be tenants. Python was still keen to proceed on that basis, whilst

emphasising in an e-mail of 11 June 2010 that "we have from the start of our involvement in Billingham House .... needed two floors pre-let to comfortably move ahead with out project". It was also assumed by the Council that ONE funding would be required (though in a reduced amount compared with the more ambitious scheme). Second, the Council's forbearance was running out. As long ago as December 2008 it had been assured by Bizzy B that a development agreement with Python was expected to be completed "this week". But terms were still being negotiated with no certainty that any development agreement would result. Therefore on 5 August 2010 the Council's Cabinet resolved (a) to support the refurbishment scheme if a development agreement was signed by 30 September 2010; (b) to apply for a grant for the demolition from ONE North East; and (c) to approve use of its own funds for demolition in the meantime. Bizzy B was informed by the Council on 19 August that this was a reasonable deadline, given the length of time already incurred in preparation of the scheme and drafting the legal agreements.

17. On 20 September 2010 Bizzy B informed the Council that, despite strenuous efforts, it had not been possible to conclude the contract within the suggested time-frame, observing that the present financial situation had not assisted. On 29 September 2010 Python told the Council that the development agreement would be completed within two weeks. Then on 1 October 2010 the Council informed Bizzy B that works to demolish the building would commence on 4 October, a letter that was re-sent to a different address on 13 October. On commencing survey works the Council found asbestos in water within the flooded basement, and further asbestos was then found throughout the ground floor, notwithstanding the asbestos removal carried out for Bizzy B in 2009. Even Python's asbestos consultants agreed in December 2010 that further asbestos removal works were required (whether for demolition or refurbishment), though there is disagreement as to the extent of those works (and therefore their cost). By 30 November the Council had incurred costs of £111,000, with an estimated further spend of £230,000 by late January 2011.

18. On 18 October 2010 the Council submitted an application to ONE for £400,000 demolition funding towards a project cost of £464,000. The accompanying Business Case noted that these costs would later be recouped from Bizzy B and that the demolition proposal "will unlock 3.2 hectares of brownfield land at the heart of the region's strategic process industries cluster, immediately adjacent to the Chilton site, which will encourage and support the growth of industries in the biotechnology and life sciences". The building's derelict appearance was referred to as having a detrimental impact on local amenity, prejudicing the competitiveness and expansion plans of the neighbouring world-renowned chemical companies. ONE promptly approved £400,000 grant funding on 1 November, setting a completion date for the works of March 2011 (later extended, as a result of these proceedings, first to 30 September and then to 16 December).

19. At long last, on 23 November 2010, a development agreement was signed between Bizzy B and Python and sent to the Council on 25 November. In essence, Python was granted a 127 year lease, with an option to purchase the freehold for £1 million, plus an additional sum. The Works which Python was to undertake consisted of:

"**Initial Works**

1. To secure the Demised Premises with hoarding.

STAGE 1

To clean the exterior of the building erected upon part of the Demised Premises and known as Billingham House;

to complete external landscaping;

to secure the basement with hoarding;

to complete access roads to the front of the Demised Premises;

to complete car parking front and rear;

to complete fencing and all boundary treatments;

to complete all external areas and external building envelope, including new windows and glazing throughout all buildings, cleaning of brick and stone, external repairs and roof coverings of all buildings;

to remove/rebuild front reception canopy;

to internal fit out one floor as offices;

to connect/reinstate all utilities and drainage;

to render building operational.

STAGE 2

to fit out interior of building on a floor-by-floor basis to standard Python Properties' internal specification, as attached to this agreement, to provide a maximum of 157,000 square feet Net Internal Area (as defined in the RICS Code of Measuring Practice) primarily for office accommodation but to allow for ancillary uses including A1/A3 Retail, C3 Residential, D2 Leisure and D1 Creche/Nursery (subject to all necessary Planning Permissions, Building Regulation Approvals and other Approvals being first obtained."

The Initial Works were to be begun immediately and completed within four weeks. The Stage 1 works were then to be commenced and completed not later than 31 months from the date of the

agreement, with an extendable back-stop of 36 months (Clauses 1.1 and 1.3.4), Bizzy B having a right to determine the agreement in default (Clause 1.7.1). All works were subject to Bizzy B's written approval of drawings and specifications (Clause 1.2). No date was set for start or completion of the Stage 2 works, but this is not of immediate concern to the Council, provided the Stage 1 works address all the matters in the 2007 Building Notice which relate to the amenities of the neighbourhood.

20. Three other aspects of the development agreement need to be mentioned. First, the whole agreement was expressly dependent on the Council agreeing to Python carrying out its refurbishment scheme (Recital (B)), with a right to Python to terminate the agreement if at any time prior to the completion date the Council had not confirmed that all enforcement action in respect of the premises had been withdrawn absolutely (Clause 17.4). Second, Python was entitled to terminate the agreement at any time during the first 30 months if it had "not secured sufficient funding to enable the Tenant to complete the Tenant's Works on such terms as the Tenant shall consider to be in its absolute discretion commercially acceptable to the Tenant" (Clause 17.1). The phrase "the Tenant's Works" included not merely the Stage 2 works (Recital A1.4). Third, presumably because of the known risk of expensive further asbestos removal works, Python was entitled to determine the agreement if at any time it became aware of the existence of any asbestos or deleterious material at the premises (Clause 17.3). As an alternative to determination, Python expressly assumed no responsibility whatever for the existence of asbestos at the premises and was entitled to serve notice on the tenant to procure the removal of the asbestos by Bizzy B (Clause 8.3).

21. On 24 November 2010 Python started work on site, but did not proceed because the Council indicated that it was pressing ahead with demolition. On 29 November a meeting took place between representatives of the Council, Bizzy B and Python, at which it was clear that full detail for the site had still not been worked out by Python, nor had funding been confirmed. On 2 December Python assured the Council in an e-mail that it would have "funding and contracts firmly in place, within January, at the very latest", and that they did not require the Council to lift the demolition order at that stage, but simply agree to do so "when we put the contract and funding in place in January". The Council did not close the door entirely to a refurbishment scheme. On 7 December Bizzy B's solicitors proposed appointment of a joint expert as a matter of urgency to resolve any difference of opinion concerning the presence or not of asbestos, an offer not taken up by the Council. Bizzy B was sufficiently concerned to start judicial review proceedings on 31 December 2010 challenging the Council's decisions of 13 October to demolish the property, and of (or soon after) 23 November to continue with demolition. Whilst still maintaining the irrationality of those decisions, they are no longer formally challenged in these proceedings.

22. On 11 January 2011 the Council, responding to the judicial review application, noted Bizzy B's request that it reconsider its decision to demolish and the contention that there was now a real opportunity to move forward. The Council's letter continued:

> "Please therefore provide the Council with evidence that the scheme is now deliverable, including evidence that funding in full has been obtained and is immediately available, that all planning permissions, building regulation approvals and other consents that

> may be necessary have been obtained. Please provide the programme of works for the completion of the refurbishment of the building and evidence that contractors are now in a position to sign contracts and commence works, without which the Council will not be in a position to consider reviewing its decision to demolish the building in default of the section 79 notice."

A meeting was agreed for 21 January 2011, though the Council made plain that this was "without any commitment on its part to review its decision". This was followed by a letter from the Council noting that instances of asbestos were many in number and virtually throughout the building.

23. On 21 January Council representatives, including the Leader and the Chief Executive, met with Bizzy B and Python. The latter presented its proposals. Bizzy B's notes of the meeting record that the background was that they were asking that "the demolition order for Billingham House be deferred for a short period of time to enable [Python] to institute their refurbishment proposals [which] could start in February and were solely dependent on the [Council's] decision to stay the demolition order, everything else being in place". During the meeting it was explained that what was sought was "a development window from February to the summer with fixed points to assess progress of the project in between. The demolition play [sic] could be reverted to at any time if [Python] miss their milestones". Python explained that their indicative programme envisaged a start of construction works on 16 February with an anticipated completion of the Stage 1 works by mid-June. It was accepted on Python's behalf that the building "in its present condition is an eyesore", but it was argued that "demand is there" from potential occupiers and that the scheme would not need to obtain external finance. Discussion on finance showed that Python would require Bank funding of £250,000, Python funds of £550,000, and ONE funds of £250,000-£400,000. These covered the whole project and not merely the Stage 1 works. It was noted that ONE's agreement would be needed to reallocate funding already agreed to the Council for demolition to support refurbishment. The parties disagreed on the asbestos issue. Python accepted that the matter needed to be looked at closely, and stated that the costs of asbestos removal were not in their appraisal as this was specifically excluded from their agreement with Bizzy B. The latter confirmed that contractual obligations existed for Bizzy B to deal with the issue. Plans of Python's proposals were circulated, which no longer included two floors of office, but contained a heritage centre and a bistro, so that there might be a requirement for planning permission.

24. Following this meeting, Bizzy B's solicitors repeatedly sought a response from the Council, and by letter of 8 February expressed concern at the absence of a response and that the Council had issued a press release stating that it intended to continue with its plan to demolish the building. Meanwhile, on 4 February, the Council's Chief Executive wrote to Python. The terms of that letter are important. Having expressed confidence in the history, credibility and track record of Python, the Chief Executive's letter continued:

> "Regrettably, there is no such reassuring history and relationship with the building's owners, Bizzy B, who will remain the freehold

owner of Billingham House and who are still pursuing legal actions against Stockton Borough Council.

We have considered and deliberated on the proposals you presented and have also consulted widely with elected members, Town Council, Area Partnership and the local community on the option you have prepared as an alternative to the demolition of the irritation represented by what is now a derelict structure.

We have considered in particular the risks associated with your alternative proposals which ultimately offer no guarantees. In particular, we have explored:

- Public opinion; despite a suggestion that public opinion had moved, we have been presented with a validated petition, with continuing additions approaching 1000 signatures of local people who are forcibly voicing their wish to see the remaining fabric of the building removed. This is confirmed by locally elected members of the Borough Council, Billingham Town Council, and the partnership body for the area.

- The ONE funding you are seeking. As you identified, this is a key factor in your plans and would require a substitution of the redevelopment business case for that of demolition which is already approved. This we consider to be a high risk as we have already commenced the process of demolition since our final deadline of 30 September 2010 confirmed in the Council decision. In addition, we already have claims against a major proportion of the funds for work already undertaken in line with the approved project.

- Prospective Tenants -- Whilst we accept the list of enquiries you have identified in general, the two major local businesses on whom your earlier and original proposals were based are not current enquiries with no immediate or guaranteed future requirements. The other enquiries you identify are of a general nature with no guaranteed commitment to this building of which we are aware. This leaves no certainty in the near future of occupation.

- The significant issue of asbestos appears to still be a matter of contention; despite a thorough, detailed and independent survey commissioned by Stockton Council as to the extent of the contamination, Bizzy B and yourselves

> appear unwilling to accept these findings. Fundamentally, our specialist's report raises questions about the success of the original asbestos clearance work conducted by Bizzy B.
>
> - The matter of costs already incurred by Stockton Council in meeting our obligations and process to carry out the agreed fulfilment of the section 79 notice confirmed by full legal process. As you are aware, we have sunk a large amount of funds already into progressing the demolition of the building in the line with the stated legal confirmed objective. The cost plans you submitted make no reference to reimbursement in full of the Council's costs incurred to date.
>
> Billingham House is a unique situation, having been the subject of major public dissatisfaction for many years, a long and protracted process in securing the power to demolish interspersed with several suggestions of refurbishment or development in between, all of which have resulted in no satisfactory confirmed and viable solution.
>
> Taking all of these factors carefully into account, we feel we must re-confirm our commitment to proceed with the demolition of Billingham House."

This letter was then copied to Bizzy B on 8 February, confirming that the Council "will not be suspending the works in default in the light of that position". It is the decision evidenced by the letters of 4 February and 8 February that is now the first ground of challenge in these proceedings.

The First Ground of Challenge: The February Decision to continue with the demolition

25. Mr Clarke, who appears for Bizzy B, puts its case under two heads: first, pure Wednesbury irrationality; and second, unjustified interference with his client's rights under Article 1 of the First Protocol to the European Convention on Human Rights, as incorporated into domestic law by the Human Rights Act 1998.

(1) The legal context

26. So far as the first part of the challenge is concerned, the parties are agreed that the appropriate test is that of Lord Diplock in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 at 1064:

> "My Lords, in public law 'unreasonable' as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall

> within this expression it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt."

Although cases where a challenge succeeds on this head are relatively few, Tameside itself was of course one of those.

27. So far as the second part of the challenge is concerned, Article 1 of the First Protocol provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

It has been held that there are three distinct rules or types of property interference embraced by Article 1 of the First Protocol. The first is the broad principle contained in the first sentence. The second is deprivation of possessions contained in the second sentence. The third is control of the use of property contained in the third sentence: see Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37; [2004] 1 AC 546 at paragraph 69, per Lord Hope of Craighead. Whatever the type of interference, if it has taken place it must be justified in the public or general interest, which appear to be interchangeable terms.

28. There is no dispute that, whereas the burden of proof is on the claimant to prove irrationality, it is for the Council to justify any Article 1 of the First Protocol interference. Thus, at least in theory, a claim could fail on the one ground, whilst still succeeding on the other.

(2) Submissions on the February 2011 decision

29. Mr Clarke argues that the only legitimate question for the Council was whether Python could carry out the works required by the Building Notice. As at February 2011, Python's project was sufficiently funded to allow the repair works required by the Building Notice to be accomplished within six months and without pre-letting of space or ONE funding. He says that in these circumstances it is unreasonable for the Council to spend a very substantial sum of public money demolishing the building to leave an empty site, which will then need to be fenced and maintained empty. He also refers back to the draft Business Case for the campus project, when the disadvantages and high risk of demolition had been emphasised by the Council. He

suggests that the various matters now relied upon by the Council, through the three witness statements of its Head of Economic Development and Director of Regeneration, Mr Poundford, are late quibbles about Python's proposals only raised several months after being provided with Python's proposals at the meeting of 21 January 2011. He relies on the evidence of Python, which suggests that there is no reasonable basis for doubting Python's ability to deliver the whole project, but says that the Council's concern should have been confined to whether the Stage 1 works would go ahead.

30. Mr Clarke also says that the Council has allowed itself to be driven by three irrelevant concerns: first, impatience with Bizzy B for taking so long to find a developer and missing previous deadlines to fix the building. Exasperation, he says, is no basis for sound public administration, and particularly so since under the development agreement Bizzy B will be in the back seat, with control passing to Python in whose track-record the Council has stated its confidence. Secondly, the Council has allowed its thinking to be dominated by the large costs it has run up or contracted for in relation to demolition. He describes this as the tail wagging the dog. Third, the asbestos issue would (if it arose) be dealt with under the provisions of the development agreement (which is also the view expressed in Mr Broome's witness statement). In Mr Clarke's words it was "not a deal breaker".

31. In his witness statement Mr Broome of Python says that at a meeting with Mr Poundford on 20 August 2010 and on numerous occasions since then, Python has made clear that its normal business model would be applied, that is to regenerate to a standard to attract tenants without any requirement for pre-lets, a point he reiterated in his submission in reply. As part of the Stage 1 works (even in their amended form to exclude one floor of offices) the whole exterior of the building would be regenerated, and external structures repaired. Admittedly the complete renewal of the roof coverings would not take place (though required by item 10 of the Building Notice), but this was because complete renewal was not needed and it would be sufficient for the roof to be "repaired as required". Stage 1 of the Python scheme would include many items of improvement (reception fit out, bistros and the heritage gallery) which went beyond the section 79 required works. He states that whilst ONE funding is desirable (and indeed in his opinion justifiable) it is not essential to the scheme. I take this to be a reference to Stage 1, rather than the entire project; Mr Clarke contended that public funding was not needed for the Stage 1 works as at February 2011, but only for the next stage and may not be needed at all. Mr Rabinovitch states that the section 79 works are an integral part of the refurbishment, and draws attention to the list of Stage 1 works in the development agreement. He states that the scope of the work is clear and unambiguous, covering all the work that is outstanding in the Building Notice.

32. In his oral reply, Mr Clarke criticised the Council for not concentrating enough on the terms of the Building Notice in January/ February 2011, but rather concerning themselves overmuch with issues of viability and the rental market. He drew attention to the e-mail from Mr Rabinovitch to Python of 20 January 2011, showing that Bizzy B had given landlord's consent to the (slightly revised) initial works which Python was proposing.

33. In relation to the Article 1 of the First Protocol claim, Mr Clarke contends that demolition of the building is a straightforward deprivation of property, notwithstanding that legal title to the land will remain with Bizzy B. They will have lost an asset, just as if chattels on the land had been expropriated by the Council. Under the 1984 Act there was no compensation which

underlined the hardship. If he was wrong on this, execution of demolition would be a control on Bizzy B's use of the property, by removing the use rights which attached at the present time to the building. He accepted that the effect of the unappealed statutory Building Notice had been to erode and partly encumber Bizzy B's property right, but it remained a property right nonetheless. In his oral reply Mr Clarke stressed that the Council had in practice for a long period stayed its hand and chosen not to enforce the Building Notice because of continuing negotiations. Therefore it was only in February 2011, when the Council refused to negotiate further, that the threatened deprivation of property materialised; it had been "abstract and theoretical" before then. For all the reasons which he had advanced in relation to unreasonableness, demolition as at February 2011 could not be justified. It was disproportionate, given the viability of the alternative scheme.

34. Mr Broome, in his oral submissions on behalf of Python, drew attention to the successful record of Python, and to the inevitability of their refurbishment proposals having changed, given a changing market. Their proposals to the Council in January 2011 would attract tenants. Python had had, and still have absolute confidence their scheme can be completed on time and on budget. They had tried to start before Christmas 2010, but had been prevented by the Council. All they then or now sought was a pause from the Council to allow them to demonstrate their ability to do the work. They were happy to engage with the Council and agree a time-line, but had been rebuffed. In his submission in reply, Mr Broome also said that on the day when the development agreement was signed in November 2010, he received a telephone call from Mr Poundford, who was "absolutely furious that we had had the audacity to sign the Development Agreement, in his words 'when he had already announced the demolition of Billingham House to the press'". The Council was given no advance warning of this allegation, and I was told by Mr Tabachnik, representing the Council, that this is strongly denied.

35. For the Council Mr Tabachnik disputes both heads of challenge to the February decision to proceed with the demolition. His starting point is the validity of the unappealed Building Notice, and the Council's right to execute demolition works under section 79(3)(b) of the 1984 Act. He accepts that the Council has no duty to proceed and must act reasonably, but that is precisely what it has done. The Council would have preferred not to be in the position they were in last February, where there had been no alternative but to enforce demolition. Even at this late stage, if a proposal was put to the Council, it would have to consider it. But one could not ignore the history of the matter.

36. He draws attention to the continuing absence of any remedial works and to the continuing serious detriment to the amenities of the neighbourhood. Various extensions of time have been granted to the defendant, and there has been a complete failure to comply with the 30th September deadline set by the Council's Cabinet on 5 August 2010. Since at least 5 August Bizzy B (and for that matter Python) have known of the urgency, and nothing done by the council since then has suggested that there is any further scope for delay. The Council is being pressed by local people to take action and has not acted unreasonably in enforcing the demolition option of which Bizzy B has at all times been aware.

37. Mr Tabachnik says that Bizzy B faces a high threshold in showing irrationality, where the Council has weighed the certainty of demolition, which will inevitably remove the eyesore and potential nuisance of Billingham House, and thereby eliminate the detriment to local amenities

against the risk that the redevelopment proposed by Bizzy B and Python will not occur, or will not occur in a reasonable timescale. If there were two reasonable opposing views, then the Council could not be held to be acting perversely.

38. Relying on the evidence of Mr Poundford he points to the failure to address all the refurbishment requirements of the Building Notice, pointing out that amongst other matters item 5 (asbestos removal) and 10 (roof replacement) are not addressed. The Council estimates that there will be substantial additional costs in addressing these matters, assessed at £360,000. Mr Tabachnik describes Bizzy B as being in a state of denial in relation to the issue of remaining asbestos, particularly referring to Mr Rabinovitch's reliance (as late as his fifth witness statement of 5 August 2011) on the early certificate of Bizzy B's own asbestos contractors. This was despite the evidence produced by the Council and the admission in the report to Python by its (Python's) consultants, Orangery Environmental, on 21 December 2010 that "further asbestos removal works following those carried out by the building owner Bizzy B would be required", even if not to the extent suggested by the Council's consultants (who had estimated a cost of £130,000). The Council had been entitled to fear that Python would exercise its right to terminate the contract upon discovery of asbestos (Clause 17.3 of the development agreement).

39. Mr Tabachnik draws attention to Python's provisional costings tabled at 21 January 2011 meeting which suggest as a minimum that over £800,000 would be required for the initial refurbishment stage, excluding any asbestos works. Yet Python has only set aside £550,000 for the project as a whole, hence the need for ONE and bank borrowings. He points to Mr Poundford's uncontradicted evidence that Python had made it clear at the meeting on 29 November 2010 and 21 January 2011 that its proposals were dependent on ONE grant funding, reflected also in a letter from Python's bank of 19 January 2011. He placed particular emphasis on an e-mail from Python of 8 February 2011 (the date of the decision challenged) recording that "We believe we can negotiate with both [Bizzy B] and ONE. This funding will provide us with the remainder of the grant not claimed for the demolition. [Bizzy B] and ourselves can then fill the financial gap of the short fall between the original grant promised and the remaining amount". He suggests that no credibility should attach to later statements by Mr Rabinovitch and Mr Broome that ONE funding is now not necessary for the Stage 1 works.

40. Mr Tabachnik also argues that the scheme, certainly as at January 2011, required an element of bank funding, which was not yet in place.

41. These concerns about funding have to be seen in relation to Clause 17.1 of the development agreement which enable Python to terminate and walk away if unable to secure acceptable funding for the contractual works. Alternatively, the funding problem and the difficulty in securing pre-lets would be likely to cause the postponement of much if not all of the initial refurbishment works, with Python constantly asking for more time to proceed.

42. Mr Tabachnik accepts that the Council is concerned at the expenditure it has already incurred, and wishes to recover its reasonable costs, as it is entitled to do under section 99(2)(a) of the 1984 Act. But this has not fuelled its stance to demolition.

43. For all these reasons it cannot be said, says Mr Tabachnik, that the Council acted irrationally in deciding to continue with its demolition programme in February 2011.

44. In respect of the Article 1 of the First Protocol claim, Mr Tabachnik's primary position is that execution of the demolition works, pursuant to an unappealed Building Notice, does not involve any interference with Bizzy B's property rights. Billingham House is an unencumbered property, liable at the Council's discretion to be demolished. A parallel can be drawn with property the subject of a restrictive covenant or positive obligations under an agreement under section 106 of the Town and Country Planning Act, when legitimate rights are asserted against it. Another parallel would be property subject to chancel repair rights, such as those the subject of enforcement proceedings in the Aston Cantlow case. (Though not specifically cited to me by Mr Tabachnik, the relevant passages in that judgment appear to be per Lord Hope at Craighead at paragraph 72:

> "[Mr and Mrs Wallbank] are not being deprived of their possessions or being controlled in the use of their property, as those expressions must be understood in the light of the general principle of peaceful enjoyment set out in the first sentence of Article 1 of the First Protocol. The liability is simply an incident of the ownership of the land which gives rise to it. The peaceful enjoyment of land involves the discharge of burdens which are attached to it as well as the enjoyment of its rights and privileges."

See to the same effect per Lord Hobhouse of Woodborough at paragraph 91 and Lord Scott of Foscote at paragraphs 133-134.) If he was wrong on that, Mr Tabachnik argues that the Council's actions were plainly justified for the reasons he also relied on to show they had not acted irrationally.

(3) Analysis

45. Because of all that has happened since early February, including the metaphorical exchange of fire between the parties, engaged in litigation and planning disputes, intermingled with attempts at negotiation, those making witness statements have tended to confuse the position as it was in early February 2011 with the position as it is today. This was particularly so in the case of the submissions made to me by Mr Broome on behalf of the Interested Party, but it also affected the submissions of counsel. What happened after 8 February 2011 is not necessarily wholly irrelevant to the matters I have to decide on Ground 1, but it is largely so. The focus has to be on the position leading up to the decision in early February to continue with demolition, rather than on what came after.

46. My initial view on reading the papers was that this was a clear-cut case and that the Council had acted in a demonstrably reasonable manner. I confess that as the hearing progressed, I have wavered, because instinctively it seems regrettable that matters such as those relating to asbestos, funding, and the extent of the Stage 1 works, were not explored in more detail by the Council before the Python scheme was finally rejected. Some of the points made by Mr Poundford in his third witness statement of 5 August 2011 do come at a very late date and do not appear to have been key to the Council's decision-making in February 2011. It is clear that the Python scheme, backed by the redevelopment agreement, was considerably the most realistic scheme to have

emerged over the decade that Billingham House had been a problem and that in Python the Council had a developer in whom it had confidence. In an analogous context, that of a General Vesting Declaration made pursuant to a confirmed Compulsory Purchase Order, it was said by Wyn Williams J in R (Iceland Foods Ltd) v Newport City Council [2010] EWHC 2502 (Admin) at paragraph 44:

> "I make it clear that I accept that the implementation of the CPO is just as draconian a measure for the property owners concerned as the making of a CPO or its confirmation. That being so I also accept that it is incumbent on a local authority to act both fairly and reasonably in deciding whether and when to take the step of executing a GVD ...."

47. On the other hand, I agree with Mr Tabachnik that the claimant too readily brushes aside the fact of an unappealed Building Notice, and, even more importantly, a building still dilapidated and an eyesore four years later. Mr Tabachnik is able to point to Python's e-mail to the Council of 2 December 2010. Two months later, the funding and contracts were still not in place. A choice had to be made. There was no necessarily right answer. I do not consider that Bizzy B or Python were acting unreasonably in seeking a further opportunity to resolve remaining concerns, though it is a pity they did not make a detailed offer, such as that made on 15 March 2011 for a contractual agreement between the Council and Bizzy B and Python, with proper step-in rights for the Council, way before 15 March 2011, and well in advance of the meeting in January 2011, though even if it had, some further time would have been needed for the legal implications to be explored and the Council's position fully secured.

48. Absent such contractual agreement, it is difficult to say that the Council acted in a way no sensible and responsible authority could have done in exercising its discretion to enforce demolition pursuant to the Building Notice.

49. Reverting to the matters identified in the Council's letter to Python of 4 February 2011, none of these can be said to be irrelevant to the decision which had to be made. Local people (affected by the dilapidated building not merely visually but in terms of the undesirable uses attracted to a vacant building), locally elected members and the partnership body for the area were all pressing for demolition, which was after all an outcome contemplated by the Council and Bizzy B from the outset in 2007. By February 2011 the Council contractors were on site, the fencing had been erected and demolition had commenced. Far from suggestion that ONE funding was not needed, Python had made it clear at meetings that it was needed, and this would have required, as the Council's letter said, a substitution of the redevelopment business case for that of demolition which had already been approved. There could be no certainty this would have been approved. There undoubtedly was no certainty in the near future of occupation by tenants, which went not merely to funding (whether of Stage 1 or beyond), but also left open the prospect of a building falling back into disrepair, even if the Stage 1 works went ahead; although that risk would have existed if Bizzy B had simply carried out the repair works in the Building Notice. The asbestos issue remained a live one, and the development agreement was undoubtedly worded in such a way that the whole project could fall apart on this issue. It could (to return to Mr Clarke's

phrase) be a deal breaker. Finally, even though the Council had recovery rights under section 99(2)(b) of the 1984 Act, it was reasonable to expect reference to reimbursement in full of its costs to be included in the cost plans being pressed on it by Bizzy B and Python.

50. Other local authorities in the Council's position, acting reasonably, might have given Bizzy B and Python more time, but I do not see that the decision taken, after exhaustive consideration of the issues, can be considered irrational. As Lord Diplock said in a celebrated passage in Tameside (at 1064):

> "The very concept of administrative discretion involves a right to choose between more than one possible cause of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred."

51. I do not consider that a different conclusion can be reached when the matter is approached through the lens of Article 1 of the First Protocol. Even though the Council had a discretion not to enforce demolition, Mr Tabachnik is probably right that enforcement of an unappealed Building Notice cannot be regarded as an interference at that stage with property rights. If that is wrong (and I accept that the matter was not approached in that way in relation to the General Vesting Declaration in the Newport case: see paragraph 51 of the judgment where the emphasis was placed on justification), then one cannot ignore the Building Notice and the Council's statutory enforcement powers. In those circumstances it seems to me that first sentence interference with peaceable enjoyment, or second sentence deprivation of property (for it cannot sensibly be termed a control of use of property under the third sentence of Article 1 of the First Protocol), was an interference with severely encumbered property and relatively easy to justify. Here there was perceived by the Council to be a public interest in finality. Given the margin of appreciation in cases such as this where social welfare, including the protection of the amenities of the neighbourhood, is involved, the interference was justified.

52. For the above reasons the challenge to the February 2011 decision to demolish the building, whilst arguable and warranting permission, fails substantively.

Second Ground of Challenge: The Screening Opinion

Legal Framework

53. When the 1984 Act was passed, I doubt anyone supposed that demolition pursuant to a Building Notice required planning permission, much less that it might need Environmental Impact Assessment before it could be permitted. Had either been contemplated, one would have expected reference to the Town and Country Planning Act 1990 ("the 1990 Act") in section 79(5) of the 1984 Act (as amended).

54. However, section 55(1A)(a) of the 1990 Act provides that "building operations" includes "demolition of buildings", so that demolition is brought within the ambit of the 1990 Act. That of its own does not mean that a planning application is always required, since the demolition may

be permitted development under the GPDO (provisions of which I have to consider in respect of the Declaration sought) or a lawful direction given under section 55(1)(g) of the 1990 Act. I say lawful, because the relevant paragraphs of the Town and Country Planning (Demolition -- Description of Buildings) Direction 1995 ("the Demolition Direction") were held to be unlawful in R (Save Britain's Heritage) v Secretary of State for Communities and Local Government and Lancaster Council [2011] EWCA Civ 334, a decision of the Court of Appeal on 25 March 2011. This was shortly after the first hearing of the present application in the Administrative Court, when a rolled-up hearing was ordered for 10 May 2011 and an undertaking not to demolish pending the outcome of proceedings was given.

55. Fundamental to the decision in Save Britain's Heritage was the decision in Commission v Ireland (Case C-50/09) on 3 March 2011 that "demolition works come within the scope of Directive 85/337 and, in that respect, may constitute a 'project' within the meaning of Article 1(2) thereof" (paragraph 101 of the judgment of the European Court of Justice). In Save Britain's Heritage it was held at paragraph 23 per Sullivan LJ that:

> "demolition works which leave a site on completion in a condition which protects the public and preserves public amenity are capable of being a 'scheme' for the purposes of Article 1.2 [of Directive 85/337/EC]."

Further, at paragraph 26 Sullivan LJ said:

> "If demolition is capable of being a 'scheme' for the purposes of Article 1.2, it is also capable of being an 'urban development project' within paragraph 10(b) of Annex II, even though the project comprises only demolition and restoration of the site in accordance with a notice under section 81(1) of the 1984 Act."

56. The illegality in the Demolition Direction was that by providing that demolition of certain descriptions of buildings (which included a building such as Billingham House) were not to be taken to involve development of land, the Direction precluded them from the possibility of EIA under Directive 85/337/EC, as transposed by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the EIA Regulations").

57. None of this is in dispute. What it means is that the Council could not proceed with the demolition of Billingham House without obtaining at the very least a screening opinion that the demolition was not "EIA development", which here means an urban development project "likely to have significant effects on the environment by virtue of factors such as its nature, size or location" (see regulation 2(1) of the EIA Regulations).

58. In order to be "likely", an environmental effect must be more than a bare possibility; there must be a "real risk" or "serious possibility" of it coming about: see Morge v Hampshire County Council [2010] EWCA Civ 608 at paragraph 80 per Ward LJ, and Bateman v South Cambridge District Council and Camgrain Storage Ltd [2011] EWCA Civ 157 at paragraph per Moore-Bick LJ.

59. The courts have declined to provide a definition or gloss on the words "significant environmental effect". As held by Lloyd Jones J in Loader v Secretary of State for Communities and Local Government [2011] EWHC 2010 (Admin) at paragraph 45:

> "The test of 'significant effects on the environment' is intended to confer discretion on expert decision-makers to take decisions on a case-by-case basis. There is no single, hard-edged test appropriate for application in all cases."

See also per Moore-Bick LJ in Bateman at paragraphs 18-19. In particular the test of significance is not whether the effect might have an influence on the decision whether to grant development consent.

60. The procedure for applying for a screening opinion in a case such as this is contained in regulation 22(2) to (4) of the EIA Regulations, which provides:

> "(2) An authority which is minded to make a planning application in relation to which it would be the relevant planning authority may adopt a screening opinion or request the Secretary of State in writing to make a screening direction, and paragraphs (3) and (4) of regulation 6 shall apply to such a request as they apply to a request made pursuant to regulation 5(6).
>
> (3) A relevant planning authority which proposes to carry out development which they consider may be --
>
> (a) development of a description specified in Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995(25) other than development of a description specified in article 3(12) of that Order; or
>
> (b) development for which permission would be granted but for regulation 23(1),
>
> may adopt a screening opinion or request the Secretary of State to make a screening direction, and paragraphs (3) and (4) of regulation 6 shall apply to such a request as they apply to a

request made pursuant to regulation 5(6).

(4) A request under paragraph (2) or (3) shall be accompanied by --

(a) a plan sufficient to identify the land;

(b) a brief description of the nature and purpose of the development and of its possible effects on the environment; and

(c) such other information or representations as the authority may wish to provide or make."

61. Regulation 4(5) then provides:

"Where a local planning authority .... has to decide under these Regulations whether Schedule 2 development is EIA development the authority .... shall take into account in making that decision such of the selection criteria set out in Schedule 3 as are relevant to the development."

62. Schedule 3 to the EIA Regulations lists Selection Criteria for Screening Schedule 2 Development under three heads: Characteristics of Development, Location of Development, and Characteristics of the Potential Impact. It is unnecessary to set these out at this stage, because, as will become apparent, the local planning authority says that it had specific regard to them.

63. The parties were directed to agree propositions of law, and in respect of the legal test in challenging a screening opinion they are agreed:

(1) The assessment of a local planning authority as to whether a development is likely to have significant effects is capable of being challenged on the usual public law grounds, in particular as Wednesbury unreasonable: see Goodman v London Borough of Lewisham [2003] EWCA Civ 149.

(2) As held by the European Court of Justice in Commission v Italy [2004] Case C-87/02 at paragraph 44:

"..... no project likely to have significant effects on the environment, within the meaning of the Directive, should be

> exempt from assessment, unless the specific project excluded could, on the basis of a comprehensive screening, be regarded as not being likely to have such effects."

(3) As Moore-Bick LJ stated in Bateman (above) at paragraphs 20-21:

> "[Screening] is not intended to involve a detailed assessment of factors relevant to the grant of planning permission, that comes later and will ordinarily include an assessment of environmental factors, among others. Nor does it involve a full assessment of any identifiable environmental effects. It involves only a decision, almost inevitably on the basis of less than complete information whether an EIA needs to be undertaken at all. I think it important, therefore, that the court should not impose too high a burden on planning authorities in relation to what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment, hence the terms 'screening opinion'.
>
> Having said that, it is clear from Mellor that when adopting a screening opinion the planning authority must provide sufficient information to enable anyone interested in the decision to see that proper consideration has been given to the possible environmental effects of the development and to understand the reasons for the decision. Such information may be contained in the screening opinion or in separate reasons, if necessary, combined with additional material provided on request."

(The reference was to R (Mellor) v Secretary of State for Communities and Local Government (Case C-75/08), [2010] Env LR 18 at paragraphs 59-60.)

(4) This reflects the approach of Ouseley J set out in Younger Homes (Northern) Ltd v First Secretary of State and Calderdale Metropolitan District Council [2003] EWHC 3058 (Admin) (recently endorsed by the Court of Appeal in Friends of Basildon Golf Course v Basildon District Council [2010] EWCA Civ 1432 at paragraph 36). Ouseley J warned that the screening opinion stage "cannot turn into something equivalent to the environmental statement itself". Pill LJ said (Basildon at paragraph 62):

> "What is clear is that the decision taken on a screening opinion must be carefully and conscientiously considered and it must be based on information which is both sufficient and accurate. The opinion need not be elaborate but must demonstrate that the issues

have been understood and considered."

(5) It is permissible to have regard to proposed remedial measures where they are before the local planning authority, and where there is no real doubt about their availability or effectiveness: see the decision of the Court of Appeal in Catt v Brighton and Hove City Council [2007] EWCA Civ 298; [2007] Env LR 32.

This is a recently much litigated area of the law but I endorse this summation of the principles. As the actual decision in Bateman shows, there can be cases where the reasoning in a screening opinion, even by reference to further explanatory material, fails to make sufficiently clear why the person giving the screening opinion did not consider that there was a real risk of potential significance (see per Moore-Bick LJ at paragraph 28). But that is not argued to be the case here.

Factual Background

64. On 21 April 2011 Bizzy B's solicitors raised in correspondence with the Council the implications of the decision in Save Britain's Heritage. They said:

"It appears that an EIA planning permission may now be a requirement in relation to demolition. May I please have your view on the impact of this case on your client's proposal."

In a further letter of 26 April Bizzy B's solicitor wrote that it was her understanding that the Council "will now require planning permission to demolish Billingham House".

65. On 3 May 2011 the Council requested of itself (as local planning authority) a screening opinion under regulation 22(2) of the EIA Regulations. The request concluded:

"It is our view that the proposed demolition can be considered to fall within schedule 2(1) of the regulation and it therefore lies within the discretion of the local planning authority as to whether they consider the proposal requires formal assessment. In terms of potential adverse environmental impacts, we do not consider that the proposal will result in any."

The request was accompanied, as required by regulation 22(4), by a plan with a red line around the entire triangle which comprised the site, a Method Statement for the demolition and site clearance, a Method Statement for the removal and disposal of asbestos-containing materials (both statements relating specifically to Billingham House), and a Bat Survey Report dated 13 September 2010. The first Method Statement (which expressly covered not only the building, but also the car port) explained in particular the techniques which would be used to damp down dust using fine mist water sprays, with monitoring stations at various locations surrounding the

site; and how processing and crushing of arisings would be carried out, including use of a mobile crusher, prior to transportation of waste from the site. The second Method Statement explained the combination of controlled methods which would be used for removing asbestos, including the enclosure systems to be used. The Bat Report recorded the results of a daytime inspection on 23 August 2010, an evening survey on 23 August and a dawn survey on the morning of 10 September. The bats' active season is April to October. Whilst there was evidence of pigeons nesting in the building, there were no signs indicative of bat roosting, with no bats seen to emerge or enter the building during the bat surveys. Common pipistrelle bats were recorded flying across the site during both surveys, foraging in the grounds or flying through the building. The conclusion of the report was:

> "As no bats were found to be using the buildings for roosting, a mitigation strategy to protect bats during the demolition is not deemed necessary."

66. Mr Archer, the Major Projects Officer within the Planning Service of the Council, was the person to whom the request was directed. In his first witness statement of 25 May 2011 (thus shortly after the event) he explains that he was made aware that the judicial review hearing was listed for 10 May and was asked to expedite the screening opinion so that it would be available for the hearing. He was already familiar with the building, the surrounding area and the planning history of the site. He was and remains satisfied that he had received sufficient information upon which to reach a screening opinion and that the process was not prejudiced by expediting it. He says that he considered the Schedule 3 selection criteria and reached the following conclusions by reference to them:

> "**1. Characteristics of development**
>
> The proposed development consisted of the demolition of a building without any significant character or visual contribution to the area. The building currently detracts from visual amenity of area due to its dilapidated state. In particular I considered
>
> (a) *the size of the development* -- the foot print of the building is 87m x 21m x 9 storeys;
>
> (b) *the cumulation with other developments* -- Billingham House is a stand alone building and unrelated to surrounding developments;
>
> (c) *the use of natural resources* -- I was aware from the method statement that demolition materials were to be removed off site and recycled or used as backfill;
>
> (d) *the production of waste* -- I was aware that asbestos to be removed would be removed under consignment

notification to the Environment Agency to a licensed landfill site. Billingham House has been the subject of previous clearance and asbestos removal works and as such most of the soft finishes within the building have been removed along with the bulk asbestos;

(e) *pollution and nuisances* and (f) *the risk of accidents, having regard in particular to substances and technologies used* -- I was aware that the demolition works would be undertaken under Health and Safety at Work Act best practice and Environmental Protection Act. A demolition method statement and a method statement for the removal and disposal of asbestos-containing materials had also been commissioned to ensure the safe demolition and site clearance.

2. Location of development

The environmental sensitivity of geographical areas likely to be affected by development must be considered, having regard, in particular, to --

(a) *the existing land use*; I was aware that Billingham House is a redundant stripped office building surrounded by areas of hard standing, rough grassland with scattered trees around the periphery and areas of scrub and overgrown ornamental planting.

(b) *the relative abundance, quality and regenerative capacity of natural resources in the area*; I was aware that the nearest local nature reserve is 0.4 kilometres away from the site and is separated by other uses.

(c) *the absorption capacity of the natural environment, paying particular attention to the following areas*:

(i) wetlands

(ii) coastal zones

(iii) mountain and forest areas

(iv) nature reserves and parks

(v) areas classified or protected under Member States' legislation; areas designated by Member States pursuant to Council Directive 79/409/EEC on the

conservation of natural habitats and of wild fauna and flora

(vii) densely populated areas

(viii) landscapes of historical, cultural or archaeological significance.

None of the above applied or were considered to suffer from adverse impact (as indicated already, I was aware that the nearest local nature reserve is 0.4 kilometres away from the site and is separated by other uses).

3. Characteristics of the potential impact

In particular --

(a) *the extent of the impact (geographical area and size of the affected population)*; I considered that there would be no impact;

(b) *the transfrontier nature of the impact*; There would be no transfrontier impact;

(c) *the magnitude and complexity of the impact*; There would be no significant or inherent complexity of the impact;

(d) *the probability of the impact*; The level of impact assessed was considered to fully reflect the probable impact which will be produced;

(e) *the duration, frequency and reversibility of the impact*; The period for demolition works was anticipated to last 16 weeks with no significant impact for duration of works."

67. In the light of this consideration Mr Archer says that he formed the opinion that the proposed demolition would not have a significant effect on the environment and therefore did not constitute EIA development.

68. His screening opinion was dated 9 May 2011. It is contained in a short document with only one page of text. Having referred to the request and plan, the location of the property, what lay to its north (a residential estate, the Synthonia Sports Ground and Charlton's Pond Local Nature Reserve) and the nature of the land surrounding Billingham House ("areas of hardstanding, rough grassland, with scattered trees around the periphery and areas of scrub and ornamental planting"), the screening opinion stated:

> "The demolition of the existing building will not have a significant adverse effect on the character of the area.
>
> The location is not an environmentally sensitive location of special importance.
>
> The building has been assessed for the presence of protected species and it is considered the impact of the demolition does not give rise to any undue ecological impact.
>
> The demolition of the building and the removal of the waste will be undertaken using best practice under the Health and Safety at Work Act and the Environmental Protection Act, and it considered that the works for demolition would not give rise to any complex and hazardous environmental effects and it will not result in any significant production of waste, pollution or nuisance requiring significant mitigation works.
>
> Accordingly the development is not considered EIA development.
>
> Therefore, in accordance with Section 5 paragraph (4) of the [EIA Regulations], Stockton-on-Tees Borough Council as the Local Planning Authority has adopted officer's opinion to the effect that the development is not considered EIA development. Accordingly the Council as the Local Planning Authority does not require an Environmental Impact Assessment to be carried out in relation to the proposed demolition."

69. In a second witness statement of 5 August 2011, Mr Archer clarified that he had considered the full extent of the demolition works, including all affected structures, the suggestion having been made that he had omitted to consider the demolition of the car port. This point was not pursued by Mr Clarke in his oral submissions.

Submissions on screening opinion

70. Mr Clarke submits that the screening was hurried and cursory. The Council had simply "gone through the motions of dealing with the EIA point", and had dealt with it in a hasty and barely considered manner. This was because (in his phrase) "it wanted the building gone". He takes three points.

71. First, the court must investigate the merits, because Article 6 of the European Convention on Human Rights is engaged. The screening opinion, he asserts, determines a civil right of the claimant, because it paves the way for the Council to take away the claimant's property. He points particularly to the summary by Lord Hutton in R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2

AC 295 at paragraphs 182-185, whilst accepting that these were in the context of a planning permission, rather than a screening opinion.

72. Second, the screening opinion was not comprehensive. It failed to have any or sufficient regard to ecological factors, including the wildlife present at the site and surrounding the building, which includes bats, frogs, other animals, birds and insects, and the proximity to the building of a nature reserve and other sensitive sites. The Council's Bat Survey was defective, being conducted at the wrong time of year and partly in unsuitable weather, with an insufficient number of surveys. In his third witness statement Mr Rabinovitch complained that:

> "The Council did not take account of the possibility that there might also be risks from/to other species of flora and fauna given the nature of the building, the size of the site, and its location and proximity to other natural habitats."

In his oral submissions Mr Clarke drew attention to the open land lying across the main road from the site and before the local nature reserve was reached, and posed the question: who knew what wildlife there might be there?

73. Third, other matters insufficiently considered were the Council's own concerns about asbestos in the building, and the proposal to crush waste produced by demolition on site, thereby creating dust and leaving waste on completion. Mr Clarke dealt with these issues only very briefly in his oral submissions (to such an extent that Mr Tabachnik assumed at one stage that they were no longer pursued, although Mr Clarke clarified that he was pursuing them).

74. Mr Clarke placed particular emphasis on the absence of "comprehensive screening", as required by Commission v Italy. Instead, this was a very thin opinion which gave the Council the desired effect.

75. In response to these points Mr Tabachnik contends that there is no basis for asserting that the screening opinion, though expedited, was an inadequate document. He particularly relied upon items (3), (4) and (5) above in the agreed points of law.

76. On ecological factors, he relies on the findings of the Bat Survey Report, which I have already referred to, and to the further comments of Argos Ecology who conducted it, set out in Mr Archer's second witness statement, explaining that the number of surveys was within the Bat Conservation Trust's Good Practice Guidelines, that September was a valid time to carry out surveys, and that bats had left the site before the rain started, so that conditions were good for most of the survey period. In respect of the nearest local nature reserve (Charlton's Pond), Mr Archer had taken it into account. It was 0.4 kilometres to the north east of the site, and separated from it by a road and ecologically disconnected from the Billingham House site, so that the demolition works were extremely unlikely to impact on ecological features within the nature reserve. Mr Tabachnik argues that the reasonableness of Mr Archer's conclusion is confirmed by the fact that no concern about effects on the nature reserve were raised later during consideration of the planning application, whether by Natural England or by the Tees Valley Wildlife Trust.

So far as the claimed significant impacts on birds is concerned, Mr Archer pointed out that birds utilising Billingham House which included feral pigeons and a nesting pair of herring gulls (as referred to in the Bat Survey Report) were unlikely to be species showing a habitat preference for the wetland and woodland habitats in the local nature reserve. So far as the other wildlife which the claimant suggested might be significantly harmed, there as an entire absence of any evidence of their presence, much less of any "real risk" to them (see the tests in Bateman and Morge).

77. So far as the claimant's concerns about asbestos, the method statement submitted with the request for a screening opinion showed how asbestos could be removed without a significant environmental effect. In the recent case of Loader (at paragraph 74), remedial measures as regards asbestos clearance were properly regarded as falling within this category. Similarly, the other method statement submitted with the request dealt fully with dust suppression. As Mr Archer explained in his first witness statement, the demolition method statement made it clear that no waste would be left on site at completion of demolition, thus there was no basis for the allegation that this matter had been left out of account in the screening exercise.

78. A screening opinion, said Mr Tabachnik, was not a determination of Bizzy B's civil rights; even if it were the procedure under regulation 22 of the EIA Regulations was Convention-compliant, given the availability of judicial review (as recognised in Alconbury and a number of subsequent cases), it mattering not that the Council/local planning authority had an interest in the outcome of the screening opinion. Therefore there was no power for the court to conduct a "merits review" of the screening opinions and no warrant for doing so.

Analysis

79. Although the screening opinion was unusually brief, and one can readily understand Bizzy B's concern that the result was a foregone conclusion, I am entirely satisfied that there is no basis for this, and that Mr Archer took into account in an appropriate way all relevant matters. There has been the requisite careful and conscientious consideration of which Pill LJ spoke in Basildon.

80. Article 6 is simply not in play. A screening opinion will normally (though not necessarily) be followed by a planning application, with EIA in between unless the screening opinion has been negative. It is simply a procedural step. It does not determine civil rights in the way that that expression has been recently construed and applied by the Supreme Court in R (G) v Governors of X School [2011] UKSC 30; [2011] 3 WLR 237, where the relevant case law was extensively reviewed.

81. The decision of the European Court of Justice in Commission v Italy should not be interpreted as requiring every possible impact to be considered at the screening stage. Only real risks have to be considered. As Moore-Bick LJ said in Bateman, "something more than a bare possibility is probably required, though any serious possibility would suffice". The claimant has failed to identify any such real rusks or serious possibilities left out of account in this screening opinion. I accept the submissions of Mr Tabachnik as set out above. In relation to the open green space between the site and the nature reserve, all that Mr Rabinovitch says (in his third witness statement) is that "various types of flora and fauna may be found" there; that is quite insufficient to require EIA. In so far as the claimant relies on an alleged difference of approach to asbestos between the Council's concern about its presence in their negotiations with Bizzy B, whilst not regarding asbestos as being a potential significant environmental impact, the reason

for the difference is plain. In negotiations and in this litigation the Council has stressed the potential cost of asbestos removal and its implications for funding and for the development agreement. That is very different from accepting that removal constitutes (or risks) a significant environmental effect.

82. I suspect that there will be relatively few cases where demolition of an unlisted building, outside a conservation area, and not within some form of ecological designation, will call for EIA. Such cases may arise. This was not one of them.

Conclusion on screening opinion

83. The challenge to the screening opinion fails as unarguable.

Permitted Development Rights: The Declaration

84. It is convenient to consider the declaration sought with regard to the GPDO, before turning to the challenge to the planning permission of 29 June 2011. The Council has at all times maintained that it did not need to apply for planning permission, because demolition had the benefit of the GPDO. It was only because the Council was less than entirely confident of this position (and knew that reliance on the GPDO would involve further challenge from Bizzy B) that it submitted the planning application.

Legal Framework

85. Under Part 31 Class A, permitted development includes "Any building operation consisting of the demolition of a building". Questions of EIA do not arise because of my finding that the negative screening direction was lawful. Article A.1. of Part 31 Class A provides:

> "Development is not permitted by Class A where --
>
> (a) the building has been rendered unsafe or otherwise uninhabitable by the action or inaction of any person having an interest in the land on which the building stands; and
>
> (b) it is practicable to secure safety or health by works of repair or works for affording temporary support."

86. Under Article A.2. in most cases notification to the local planning authority has to be given, although the local authority's powers are confined to approval of the method of demolition and any proposed restoration of the site (Article A.2.(b)). In the case of urgently necessary demolition all that need be served is a written justification (Article A.2.(a)). Certain demolitions are excluded from the scope of Article A.2.(a) as "excluded demolition", including demolition "required or permitted to be carried out by or under any enactment" (Article A.3.(b)).

87. My attention has not been drawn to any decided cases in relation to Part 31.

Submissions on permitted development

88. Mr Clarke contends that Article A.1. shows decisively that the proposed demolition cannot be permitted development.

89. First, on the Council's own case, Billingham House has been rendered unsafe or otherwise inhabitable by the action or inaction of its owner, as it was on that basis that the Building Notice was issued.

90. Second, it would be practicable to secure safety or health by works of repair, as contemplated by the Building Notice itself. The issue here is not whether the particular works proposed by Python are feasible, but whether the works by the Building Notice are practicable. That question would have to be determined even if Python's proposals did not exist. When the Council itself has listed the works that it wants done to comply with the Building Notice, the Council cannot now say that such works are not practicable.

91. In so far as the Council seek to rely on Article A.2(b), that is irrelevant to the interpretation of Article A.1.(b).

92. Mr Tabachnik starts from Article A.3.(b). The Council's proposed demolition is "required or permitted to be carried out by or under any enactment", namely section 79 of the 2004 Act. That suggests that it falls within, rather than outside, the scope of the permitted rights under Class A.

93. The Council concedes that the present condition of Billingham House falls within Article A.1.(a), but not that it falls within Article A.1.(b).

94. The word "practicable" cannot mean possible, since the skill of engineers is such that, with sufficient resources available to them, it will always be possible to secure safety or health by works of repair or works for affording temporary support. "Practicable" should be read as "likely to happen". The test was whether there is a realistic likelihood. Here the Council does not believe that, absent demolition, works of repair to secure safety or works for affording temporary support are likely to happen. Python's proposals are manifestly uncertain, particularly because there are funding and viability problems, and because some of the requirements of the Building Notice will not be addressed by the Python proposals, even if they come forward such as asbestos removal, and the necessary replacement of the roof. Therefore Article A.1.(b) has no application.

Analysis

95. In company with Mr Clarke I do not find any assistance from Article A.2.(b) in answering the key question posed by Article A.1.(b).

96. I agree with Mr Tabachnik, for the reasons he gives, that there is difficulty in interpreting "practicable" simply as meaning "possible", though that is one of the ordinary meanings of the word. It is tempting to interpret "practicable" as meaning "reasonably possible", though cases, admittedly in very different areas of the law, have drawn a distinction between "practicable" and "the rather more elastic *reasonably practicable*" (for example, Nikonous v Governor of HM Brixton Prison and Republic of Latvia [2005] EWHC 2405 (Admin) at paragraph 21). Thus

normally use of the former rather than the latter word shows that Parliament, or in the case of a statutory instrument the maker, intended a stricter requirement than "reasonably practicable". I believe the correct interpretation here is "feasible" or "doable" or "capable of being accomplished", which is only marginally (if at all) different from "possible".

97. On the facts of this case, one does not look to whether Python's proposals are likely to go ahead at the present time, but rather asks whether it is feasible to secure safety and health by works of repair or works for affording temporary support.

98. In the case of this building, works of temporary support would not achieve the result, but works of repair such as those in the Building Notice would do. They are plainly practicable in the sense that they are feasible and could be accomplished.

Conclusion on the Permitted Development

99. Therefore the demolition of Billingham House at the present time is not permitted development under Class A of the GPDO and I decline to make the declaration sought.

Third Ground of Challenge: The Planning Permission of 29 June 2011

Factual Context

100. It is necessary to take up the story since the decision of the Council in early February 2011 to press ahead with the demolition, which was the subject of the first ground of challenge.

101. On 16 February 2011 Bizzy B made an offer, though the parties disagree on what that offer in fact proposed, which was followed by an offer to mediate in early March. On 15 March Bizzy B offered to demolish the building if Python could not do the works in time. Bizzy B offered to enter a demolition contract and to place funds in an escrow account to pay for demolition if this became necessary. This offer was eventually rejected by the Council on 26 April 2011. At a hearing before the court on 15 March the Council gave an undertaking not to demolish Billingham House while the proceedings were continuing, and a rolled-up hearing was ordered for 10 May.

102. Then there followed the matters already mentioned in relation to the screening opinion, eventually given on 9 May 2011. The hearing of the judicial review application was adjourned on 10 May. Bizzy B was given permission to amend the grounds to include a challenge to the screening opinion. On 24 May the Council applied for planning permission to demolish Billingham House and the associated car parking structure. Consultation took place with various bodies, including English Nature, which replied on 6 June that the local planning authority should itself assess and consider any ecological impacts.

103. On 10 June there was a further adjournment of the judicial review proceedings to ensure that the applicants had time to challenge any grant of planning permission.

104. On 16 June Mr Cooper, a planning consultant acting for the claimant, made representations to the Council relating to the absence of a Design and Access Statement and the development plan context relevant for determining the application. The Council then prepared a Design and Access Statement and submitted this to be considered alongside its application for planning permission. This made reference to the Bat Survey and its findings, which had been taken into

account in connection with the screening opinion. The Design and Access Statement was sent to English Nature on 20 June, whose further response of 21 June said that they had no further comment to make on the application.

105. On 20 June a 19 page Officer's Report was placed on the Council's intranet and members informed, written copies being received by members the following day. This advised that the application accorded with the development plan and government planning policies, that the principle of demolition was acceptable, and that there were no sound planning policies for the building to be retained. The Report explained the background, including the Building Notice and Bizzy B's application for judicial review (whilst advising that the judicial review was not a material planning consideration and should not be taken into account in determining the planning application). Natural England's response was reported (that the application did not appear to fall within the scope of the consultations that Natural England would routinely comment on, but that the local planning authority should itself assess the possible impacts on ecological interests). The representations of Bizzy B were set out at length, including the reasons why it considered the application to be contrary to development plan policy and why demolition should not be permitted since refurbishment and re-use were the preferable, and more sustainable, option. Planning permission subject to conditions was recommended.

106. Further representations were then made to the local planning authority from both supporters and opponents of the proposal to demolish. The latter included further representations from both Bizzy B and Python, critical of the Officers Report and its recommendations. These were set out at length in a 10 page Update Officer's Report which was made available to members of the Planning Committee on the day of the Planning Committee meeting.

107. On 23 June one of the Council's lawyers sent an e-mail to all members of the Planning Committee asking each member to ask himself (or herself) whether they might be considered to have pre-determined the issue by previous conduct, and, if so, advising them not to vote. Members were advised to seek legal advice from named individuals before taking part in the vote. As a result of this, none of the members who voted on the planning decision were members who had taken part in relevant earlier Council decision-making concerning demolition of Billingham House. Councillor Beal, who had been present at the Cabinet meeting on 5 August 2010, which had fixed a deadline in default of signature of a development agreement, has made a witness statement in these proceedings that he specifically sought legal advice whether his participation on 5 August fettered his discretion so that he should not vote at the forthcoming Planning Committee. He was advised that there was no reason not to vote since the decision taken by the Cabinet on 5 August had been materially different. The same seems to have happened in respect of one other Committee member.

108. On 28 June the claimant's solicitor was sent a copy of the Bat Report, though a copy had been previously supplied on 11 May, together with the other documentation considered by the local planning authority in connection with the screening opinion.

109. Bizzy B requested the Secretary of State for Communities and Local Government to call in the application, but by letter of 29 June this request was refused on the ground that the issues raised did not relate to matters of more than local importance and should be decided by the Council.

110. Various accounts have been given in witness statement relating to what took place at Planning Committee on 29 June. The following matters are relevant:

(1) Mr Poundford (who was the officer with principal responsibility for making the application) sat with other officers of the Council (including Mr Archer) and the Chair and Vice-Chair of the Planning Committee at a table, facing the other members of the Committee. This was in accordance with the Council's practice.

(2) Mr Archer introduced the application, making specific reference to the Update Officer's Report and why the owner's objections were not considered valid.

(3) Mr Poundford then read out a statement explaining why the Council had arrived at "the necessity of pursuing the demolition of this building that has become a matter of great concern to the local residents and businesses in its proximity". He recognised that the latest situation was that Python did not now require grant funding, but concluded that "the only guarantee of a satisfactory and final solution to this long-standing problem is that of demolition". According to notes taken at the time by the Head of Legal Services, Mr Poundford spoke for five minutes (which is consistent with the length of the copy of the text he read out). On the other hand, Mr Glover has made a witness statement on behalf of Bizzy B, to which he exhibits his own notes of the meeting, showing that Mr Poundford "spoke without interruption for 14 minutes". This seems improbable.

(4) There then followed various contributions from persons present, including both supporters and opponents of the application to demolish. These included Mr Hesmondhalgh and Mr Johnson for Python, and Mr Cooper and Mr Rabinovitch for Bizzy B. These contributions from Python and Bizzy B each lasted approximately three minutes, a total therefore of twelve minutes.

(5) A number of councillors raised questions about aspects of the application and of the Python/Bizzy B proposals, and Mr Rabinovitch was allowed to respond in relation to a question concerning the escrow account offered in March 2011.

(6) The meeting ended with a decision (by majority of 13:1) to grant planning permission.

111. Two witness statements have been made on behalf of the claimant criticising as unfair the manner in which the Planning Committee considered the application. Mr Rabinovitch says that the objectors were cut short when making their representations (and indeed it is clear from the note of the Director of Legal Services that Mr Cooper was warned about time by the Chair). Mr Glover (currently Chair of the ruling political group on Southwark Council in London) criticises the layout of the meeting, saying that the applicant, even when a Council officer, should not sit with the decision-makers, and that "the Planning Committee was not conducted in an appropriate semi-judicial manner". Mr Cooper's evidence concentrated on the way the planning issues were dealt with in the Officer's Report and the Update Officers Report and in the consequent debate.

112. Nine members of the Planning Committee, including the Vice-Chair, have made witness statements that they do not consider that the meeting was conducted in a biased manner and that they did not approach the application in a pre-determined manner. They all say that they had read the various reports, and several refer to having received training on probity with particular reference to Planning Committees, including issues on pre-determination and pre-disposition.

113. On the evening of 29 June (and after the planning permission had actually been issued), a meeting of the full Council took place where Python presented a petition with over 4,000 signatories supporting its scheme to regenerate Billingham House. A lively debate followed and no vote was taken. Mr Glover is critical that the Chair did little to keep order and that councillors gave little attention to the evidence provided by Python at that meeting.

Legal Context

114. The following propositions to the third Ground were not eventually, I believe, in dispute:

> (1) The starting point for consideration by a local planning authority of a planning application is the development plan; and as required by section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") "the determination must be made in accordance with the plan unless material considerations indicate otherwise".
>
> (2) A planning decision affects civil rights and therefore falls within the ambit of Article 6 of the European Convention on Human Rights. As expressed by Lord Hoffmann in Alconbury (at paragraph 79):
>
> > "The [European court of Human rights] has not simply said, as I have suggested one might say in English law, that one can have a 'civil right' to a lawful decision by an administrator. Instead, the court has accepted that 'civil rights' means only right in private law and has applied Article 6(1) to administrative decisions on the ground that they can determine or affect rights in private law."
>
> (3) "…. [W]here an administrative decision is to be taken in the public interest constitutes a determination of a civil right within the meaning of Article 6(1), a review of the decision by a court is sufficient to comply with Article 6(1) notwithstanding that the review does not extend to the merits of the decision …. [A]rticle 6(1) does not guarantee a right to full review by a court of the merits of every administrative decision affecting private rights, but that there is compliance with the article where there is a right of judicial review of such a decision of the nature exercised by the High Court in England." (Alconbury per Lord Hutton at paragraph 189).

(4) A planning permission is subject to challenge on normal public law grounds, including Wednesbury irrationality.

(5) Even where findings of fact by administrative bodies are involved, including those in planning cases, "conventional judicial review .... is sufficient" and "the requirements of Article 6 [do not mandate] a more intensive approach to judicial review of questions of fact" (Runa Begum v Tower Hamlets London Borough Council [2003] UKHL 5; [2003] 2 AC 430, at paragraph 50 per Lord Hoffmann, who at paragraph 59 described "schemes .... for granting planning permission [as falling] within recognised categories of administrative decision making" (see also paragraph 42).

(6) Weight is for the decision maker. As Lord Hoffmann explained in Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 at page 780:

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planing authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to gave them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regard something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.
>
> The distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."

(7) The planning officer's report will always play an important role in the decision-making. Such reports will seldom be perfect documents. The proper approach to review of an officer's report was set out by the Court of Appeal in R (Morge) v Hampshire County Council [2010] EWCA Civ 608; [2010] PTSR 1182, where at paragraph 63 Ward LJ said:

> "To summarise those authorities the court will not zealously scrutinize every word of the report as if construing a statute: the question is rather one of considering the overall fairness of the report in the context of the relevant legislative and policy requirements and of assessing whether its overall effect significantly misled or failed properly to inform the Planning Committee."

(8) Where issues of predetermination or apparent bias arise, then as said by Pill LJ in R (Lewis) v Redcar and Cleveland Borough Council and Persimmon Homes Teesside Limited [2008] EWCA Civ 746; [2009] 1 WLR 83 (at paragraph 71):

> "It is for the court to assess whether the Committee members did made the decision with closed minds or that the circumstances give rise to such a real risk of closed minds that the decision ought not in the public interest to be upheld. The importance of appearance is, in my judgment, generally more limited in this context than in a judicial context .... [T]he appearance created by a Councillor voting for a planning project he has long supported is, on analysis, to be viewed in a very different way [to participation in judicial decisions]."

The court puts "itself in the shoes of [the fair-minded] observer and [makes] its own assessment of the real possibility of predetermination .... The court, with its expertise, must take on the responsibility of deciding whether there is a real risk that minds were closed" (per Pill LJ at paragraph 68). "A series of statements from Council members saying they had open minds would not inevitably conclude that issue" (per Pill LJ at paragraph 66).

(9) A Design and Access Statement was required in this case by Article 8(2) of the Town and Country Planning (Development Management Procedure) (England) Order 2010 ("the DMPO").

(10) The effect of section 327A of the Town and Country Planning Act 1990 is that a local planning authority "must not entertain" a planning application for demolition in the absence of a Design and Access Statement.

(11) Article 8(3)(b) provides that a Design and Access Statement shall (amongst other things):

> "demonstrate the steps taken to appraise the context of the

development and how the design of the development takes that context into account in relation to its proposed use."

Article 8(5) provides that:

"'context' means the physical, social, economic and policy context of the development".

Submissions on the Planning Permission

115. Before turning to his standard public challenge to the planning decision Mr Clarke takes two preliminary points.

116. First, he raises the application of Article 6, taken together with Article 1 of the First Protocol. An unusual feature of this case is that it involves a grant of planning permission that will deprive a property owner of its property but in respect of which the property owner has no right of appeal. The unexercised right of appeal against the Building Notice is not relevant, since the planning decision is a distinct decision. Alconbury, even as modified by Runa Begum, does not deal with this unusual situation. Therefore the court can and should take a positive approach to the protection of the claimant's Convention rights, by assessing the planning application on its merits, as would happen on an appeal. The expert evidence of Mr Cooper explains why the planning decision is a bad one.

117. Second, the decision should be quashed for apparent bias. This should be assessed not simply by reference to the Council having an interest in the outcome of the application (something Mr Clarke did not expand upon), but by reference to the particular context in which the Council, having clearly determined that the building should be demolished, and having been challenged on that decision and finding that it needed planning consent, effectively waved through the accelerated application. The Council had made its position very plain: it insisted on demolition and had told the press and public of this in no uncertain terms. The suggestion that the Committee members were able to view the planning application in isolation and only by reference to its planning merits is not realistic, notwithstanding the evidence provided by the councillors. Applying the "fair-minded observer" test, it was scarcely conceivable that the application would have been refused. In his oral submissions Mr Clarke placed particular reliance on the approach and decision to quash in Georgiou v Enfield Borough Council [2004] EWHC 779 (Admin); [2004] LGR 497. Bizzy B's case, said Mr Clarke, was straightforward, as had been the claimant's in Georgiou.

118. In relation to a standard public law challenge, Mr Clarke takes in effect three points.

119. First, the absence of careful balancing in the Officer's Report of the merits of regeneration as opposed to demolition. Sustainability, he says, played no apparent part in the decision. This

Mr Clarke described orally as the "key omission in the weighting". The reservation of the site for employment use was skipped over. There was no analysis of how the two options compared in terms of compliance with the Planning for Growth Agenda. The Officer's Report was wrong to refer to the fact that demolition was subject to the court's decision, since this implied that the planning decision did not have to weigh the alternatives of demolition and regeneration. Mr Clarke boldly puts irrationality at the heart of his challenge under this head. He says that the case for refurbishment was overwhelming, so that the only sensible course open to the local planning authority was to refuse the planning application for demolition. He accepts that there is therefore a considerable overlap between the argument on grounds 1 and 3. But he draws attention also to changes which had taken place since early February, including the escrow offer of March 2011, which (to use his own phrase in oral submissions) "did not get proper consideration".

120. Second, Natural England should have been specifically informed that a Bat Survey had been carried out and that the claimant had raised concerns about protected habitats. It is unsurprising, he says, that Natural England expressed no views on the matter given that it had not been provided with relevant information.

121. Third, the Council should not have registered or consulted upon the planning application in the absence of the Design and Access Statement. If "entertain" in the DMPO meant "determine", Parliament would have used that word. Even when provided, the Design and Access Statement was defective in failing to comply with Article 8(3)(b) of the DMPO and therefore the planning permission had been unlawfully determined.

122. In the Re-re-amended Grounds, the conduct of the Planning Committee meeting was taken as a separate planning ground, specific points being made in relation to the seating arrangements, restrictions of time placed on objectors, and that officers declined to allow discussion of allowing Python time to work on the building, with demolition to follow if Python failed. These specific points were not raised in Mr Clarke's Skeleton Argument, where complaint was made in more general terms about unfairness, undue haste and cursory condition. It seems that, in the light of the latest evidence from the Council, the conduct of the Committee meeting no longer plays a major role in the way the claimant's case was being put, the issue of apparent bias/predisposition apart. Mr Clarke also placed some reliance on the way in which the full Council meeting later the same day was conducted which was an indication of the generally unsatisfactory nature of the Council's decision-making. Mr Clarke says that this showed the Council was set against his client. He conceded, however, that this was not a matter which would justify a judicial review challenge in its own right.

123. Mr Broome emphasised the importance of the March offer of an independently administered escrow account which would, in his phrase, "guarantee closure". According to Mr Broome, the view of Python's planning consultant who attended the Planning Committee meeting (but from whom there is no witness statement) was that he had never in all his experience seen a more biased and misleading report presented by a planning officer. Mr Broome complains that the Council gave itself planning permission contrary to its own planning policy. Python sought the court's protection and support so that its much needed scheme could be brought forward at the earliest possible opportunity.

124. Mr Tabachnik relies on Alconbury and Runa Begum as showing that the court is not empowered to conduct a "merits review" of the decision to grant planning permission, and that this would be profoundly undemocratic. He accepts that it is rare for an application made by a council to itself to be refused, but that is no reason for a different approach in judicial review, nor is it decisive that the planning application is in respect of Bizzy B's land and that (as a result of the Building Notice) planning permission once granted can be implemented without Bizzy B's consent. Planning, says Mr Tabachnik, is concerned with impacts on land use, not with questions of ownership. In any event, Bizzy B had a full opportunity for a "merits review" of the Building Notice by way of appeal to the magistrates' court. It failed to take advantage of this right of appeal, because it had undertaken to elect for demolition and not appeal.

125. He relies on the Council's evidence as showing that there was no bias, apparent bias or predisposition. The consideration by councillors focused on the key planning issues. He relies principally on various passages in Persimmon, in the judgment of Pill and Rix LJJ.

126. Far from the decision to grant planning permission being Wednesbury irrational, there was nothing in the Officer's Report and Update Officer's Report to suggest that members of the Committee had been misled or not properly informed (the test in Morge). Nothing had been left out of account and weight was entirely for the local planning authority (Tesco). The Council did weigh demolition against regeneration and Python's proposals were uppermost in the councillors' minds. They had been specifically advised in the Officer's Report that the refurbishment scheme was a material consideration and the various written and oral representations from Bizzy B and Python had largely focused on the advantages of refurbishment. There was nothing perverse or irrational in the view taken by the majority of the Planning Committee that the refurbishment proposals lacked sufficient certainty to weigh significantly in the decision. The promotion of sustainability was drawn to members' attention and self-evidently considered by members. Core Strategy policy CS4 was directed at retaining the site in employment use; it was not a policy for retention of the buildings presently on site per se. Planning for growth was plainly taken into account; councillors' attention was directed to it in the Officer's Report. Councillors were expressly advised in the Officer's Report that "the judicial review is not a material planning consideration and should not be taken into account in determining the planning application". There was therefore no suggestion that the application could simply be rubber-stamped because the High Court would be the ultimate arbiter of decision.

127. There was no error of law in respect of the Bat Report. In its initial response, Natural England did not ask to be provided with any ecological surveys or comment on the fact that none had been provided to it. When sent the Design and Access Statement, which made reference to the Bat Survey, Natural England did not ask to be provided with this prior to its second consultation response or at all. The Council had also consulted Tees Valley Wildlife Trust because of their familiarity with the site, and they did not oppose demolition. The Bat Report was not defective, but in any event Bizzy B had a full and fair opportunity to make whatever representations it wanted to as part of its representations against the planning application. No specific criticisms of the content of the Bat Report were advanced by Mr Cooper in his lengthy written representation to the local planning authority, notwithstanding that Mr Cooper admits that he had been informed by Mr Rabinovitch that a bat survey had been commissioned which the latter regarded as defective.

128. So far as concerns the Design and Access Statement, "must not entertain" meant "must not decide". It was enough that the application was accompanied by a Design and Access Statement when it was decided. If that was wrong, it was permissible to supplement the application at a time consequent to its initial presentation, since the provisions were merely directory. In any event there was no prejudice. In respect of the content of the Design and Access Statement, the application was to demolish the buildings on site and leave a cleared site. The requirements of Article 8(3) of the DMPO were complied with so far as it was sensibly possible given the nature of the application. In any event, any omission did not go to the heart of the planning permission or provide a basis for quashing it. Amongst other cases, he cited Parker v Secretary of State for Communities and Local Government [2009] EWHC 2330 (Admin) (at paragraph 21), a case specifically relating to Design and Access Statements.

129. As Mr Archer's second witness statement showed, there was nothing unusual about the seating arrangement; everyone knew the application was submitted by the Council. No one complained about being cut off or requested more time to speak. The likelihood or otherwise of the Python proposals was a key matter grappled with by the Planning Committee. Councillors were (quite properly) advised that those who favoured the option of allowing an opportunity for the refurbishment to proceed should vote against the application.

130. Bizzy B's complaint about the Petition debate in full Council has no bearing on the challenge to the planning permission.

Analysis

131. Although the alternative option of refurbishment was plainly a matter which members could take into account in connection with the planning application, this was a decision whether, on planning grounds, the development should be permitted or refused. The building and site were agreed to present a neglected and dilapidated appearance and to be in a condition seriously detrimental to the amenities of the area; the demolition proposal had been held not to be likely to have significant environmental effects (hence the negative screening opinion); demolition would be a one-off building operation, of free-standing buildings within a 3.2 hectare site, to be conducted during controlled daytime hours (condition 03 to the planning permission); it would leave a "site left in a clean and tidy condition" (the phrase in the Demolition Method Statement and a mitigation measure required by condition 05 to the planning permission); and finally the cleared site would provide potential for future development in line with the current employment use. In these circumstances it is not easy to see how planning permission could have been reasonably refused.

132. That approach of course involves looking at the planning merits as, ironically, I am urged to do so by Mr Clarke, in reliance on Bizzy B's rights under Article 6 and Article 1 of the First Protocol. But that is not a legitimate approach. Judicial review can be intensive (and should be in a case such as this), but it still falls short of reviewing the merits. I can find nothing in the decisions in Alconbury or Runa Begum (or the other authorities to which I was referred by both parties) to suggest that judicial review of this nature will not be sufficient to protect Bizzy B's rights. I accept that in Runa Begum (at paragraph 54) Lord Hoffmann's statement that "In the normal case of an administrative decision, however, fairness and rationality should be enough", leaves open the possibility of a different approach in an exceptional case, but I am not convinced that this is such a case, despite the rareness of its factual circumstances. In any case, Mr Clarke

did not suggest that the local planning authority should itself have appointed an Inspector to hold a Public Inquiry under section 111 of the Local Government Act; or that it should have joined in Bizzy B's request to the Secretary of State to call the application in for his determination, though he reserved Bizzy B's right to challenge the Secretary of State's decision not to call the application in (accepting the difficulties in the light of Adlard v Secretary of State for the Environment, Transport and the Regions [2002] EWCA Civ 671).

133. So far as Mr Clarke's reliance on certain passages in R (Kathro) v Rhondda Cynan Taft County Borough Council [2001] EWHC 527 (Admin) (especially paragraph 29), and his contention that there were here disputed facts (which would no longer be material, in my view, in the light of Lord Hoffmann's clarification in Runa Begum of what he there described at paragraph 40 as "an incautious remark" he had himself made in Alconbury at paragraph 117), I do not agree. The questions which arose in relation to the viability and timescale of the Python proposals all involved ultimately opinion and judgment rather than hard facts, which had to be approached within a policy framework as with all planning decisions. Indeed at the conclusion of his oral submissions I do not think that Mr Clarke was asking anything more of the court than that it adopt a sceptical approach to the Council's evidence, because it was the promoter of demolition. I have endeavoured to approach all the evidence (including that of the claimant) critically, because plainly there is considerable antagonism on both sides.

134. Whilst I can readily understand the concern of Bizzy B that the Planning Committee might not act independently towards the council's planning application, I am satisfied that it did consider the matter in such a way that it was not infected by bias, apparent bias or predisposition. The case of Georgiou to which Mr Clarke referred me was very much one on its own fact. Three members of the Planning Committee which resolved to grant the listed building and planning contents had also participated in meetings of the defendant's conservation advisory group which had considered and supported the applications. This gave rise to what Richards J described as "the possibility that the three members .... approached the matter with closed minds" (paragraphs 34-35). No such problem of dual membership arises in the present case. Furthermore, the scrupulous way in which members were advised in relation to predisposition, and the way in which Councillor Beal and one other demonstrably complied with this by seeking guidance in relation to their role in the Cabinet meeting almost a year earlier in August 2010, shows that positive steps were taken to prevent anything approaching a Georgiou situation arising. It is clear from the decisions of the Court of Appeal in Condron v National Assembly for Wales [2006] EWCA Civ 1573; [2007] LCR 87 and Persimmon that account can be taken of matters such as the training undertaken by members of a planning committee and that they have agreed to be bound by a code of conduct; and that even where they have, as elected members, expressed views in the past this is now treated with understanding by the courts. I do not think it helpful any longer to go back to authorities decided before those two cases, which appear to me to be definitive for this (and for most) challenges to planning permissions on grounds of apparent bias/predisposition. I do not consider that Bizzy B's case gets off the ground on this issue.

135. This then leaves Bizzy B's challenge on conventional public law grounds.

136. It is convenient to take first the allegation of illegality (or perhaps procedural impropriety) in respect of the Design and Access Statement. At first blush, one would not expect that pure works of demolition would require such a statement, though obviously the method of demolition

could be embraced by the term design (and also the restoration proposals), and lorry movements in connection with removing the spoil could give rise to access issues. "Engineering or mining operations" are specifically excluded from the need for a Design and Access Statement by regulation of 8(1)(b) of the DMPO, and demolition might be considered to have more in common with engineering operations than with building operations. However, Parliament in enacting section 55(1A) of the 1990 Act has chosen to categorise demolition as part of building operations. Thus a planning application for demolition such as that of Billingham House and its carport does require a Design and Access Statement, which needs to cover not just design principles and how access will be dealt with (see Article 8(2)(a) and (b) of the DMPO), but also "demonstrate the steps taken to appraise the context of the development etc" under Article 8(3)(b).

137. I consider that Mr Clarke is right that "must not entertain" in section 327A(2) of the 1990 Act cannot mean "must not determine", and relates to an earlier stage. The planning application is not complete without a Design and Access Statement and should not be dealt with as a planning application until the Design and Access Statement is supplied.

138. On the other hand where, as here, in error the application was not accompanied by a Design and Access Statement, the deficiency was not identified by the local planning authority at the outset, and where processing of the application began before the error was identified, the entire process does not have to recommence. A late Design and Access Statement can be fed into the process, provided that this can be done without prejudice to anyone. That was what happened here. Indeed Mr Clarke did not urge that the permission should be quashed simply because there had not been a Design and Access Statement at the outset. On the facts of this case I do not need to consider what would be the position if planning permission had been granted in the entire absence of a Design and Access Statement.

139. Mr Clarke's is a more subtle point, that even the late Design and Access Statement was deficient, because it failed to "demonstrate the steps taken to appraise the context of the development and how the design of the development takes that context into account in relation to its proposed use" (see Article 8(3)(b)). There is no dispute that it failed to do so in some respects. But it did not fail in all respects. Applying the definition of "context" in Article 8(5), the Council's Design and Access Statement described the "physical context of the demolition", describing its physical condition, the "natural environment" and the relationship to (for example) roads and the local nature reserve. It referred to the fact that the building had been vacant since 1995, to the negative impact of the existing situation on local residents and the local business community, and that the consequence of development would be "the provision of a cleared 3.2 hectare site for development, possibly for the adjacent chemical industry process". This was sufficient to demonstrate the steps taken to appraise also the social and economic context.

140. I find some difficulty in understanding what the Design and Access Statement should have contained by way of demonstrating the steps taken to appraise the policy context of the proposed demolition, given that there were no specific policies in the Core Strategy relating to demolition. Reference could have been made to the various policies later set out in the Officer's Report. This was not done. Given that there was no "proposed use", since any development on the cleared site would require a new planning permission, neither counsel was able to explain to me what steps could have been taken, and included in the Design and Access Statement, to appraise

"how the design of the development takes that [physical, social, economic and policy] context into account in relation to its proposed use". Mr Archer, in his second witness statement, says that the meaning of "design principles and concepts" must be considered in the context of the nature of the development in this case, namely a demolition, but this does not entirely meet Mr Clarke's point. Mr Archer does not accept that the Design and Access Statement is deficient (which technically it is), and says (which I agree) that the Design and Access Statement does not lack any information that was required to determine the application, and that his report and the representations to the Committee clearly demonstrate that the context of the site was considered.

141. Mr Tabachnik refers me to the view put forward on the Secretary of State's behalf in Parker (at paragraph 21) that even an application which failed the equivalent procedural requirements in the predecessor to the DMPO was not necessarily void, and that in the case of all such procedural defaults, even those relating to mandatory requirements, the question for the court is whether their being enforced would cause prejudice. As a simple statement of principle this was accepted by Mr Keith Lindblom QC, sitting as a Deputy High Court Judge, although he did not have to determine the issue on the facts of that case. This was because that case involved an appeal to the Secretary of State, where the Secretary of State (through the Planning Inspectorate), once seized of the appeal, had the power to deal with the application even if the Council as local planning authority might have had to refuse to determine it.

142. I am satisfied that there was here a Design and Access Statement, and that the deficiency in respect of part only of Article 8(3)(b) did not prevent the local planning authority from entertaining and deciding the application, in the situation that no prejudice was caused to anyone. If I am wrong on this, I would, in my discretion, certainly not quash the planning permission on this account.

143. Turning to the other planning points made on Bizzy B's behalf, some of them fall away entirely on close examination and in the light of all the evidence. I am satisfied that the way the meeting was held was not unfair, and I do not see how the question of the procedures adopted at the full Council, later the same day, in relation to Python's Petition, bear on the matter of the lawfulness of the planning permission. There is nothing in the suggestion that English Nature should have been specifically invited to comment on the Bat Report, or that the consideration of ecological issues was inadequate. For the reasons I have already explained in relation to the screening opinion, there is an entire absence of evidence of any potential harm to flora or fauna from the demolition proposal. I also consider that Bizzy B was wrong to suggest that demolition was contrary to Core Strategy Policy 4 (CS4) on Economic Regeneration. This objection was specifically referred to in the Officer's Report and Update Officer's Report, and the point was correctly made that the land would be retained for employment use. As Mr Archer explains in his second witness statement, the demolition of Billingham House will not affect the designation under CS4 of the land as employment land. To Mr Clarke's fall-back position, that implicitly office buildings such as Billingham House should be retained rather than demolished, the simple answer is that this was not a policy requirement, nor in any case has any office (or other) use been carried out at Billingham House for very many years.

144. On the other hand the Officer's Report was a far from perfect document, even when supplemented by the Update Officer's Report. It would, for example, have been more helpful to have had a rigorous examination of why the application was said to accord with the development

plan, and why the objectors' view to the contrary was rejected. In reality, as Mr Tabachnik conceded, there were no specific policies in the development plan which dealt with demolition, and therefore the matter turned on balancing the material considerations. The references in the Officer's Report to the judicial review application were potentially confusing. I also consider that there was overstatement in the final sentence of paragraph 38 of the Officer's Report that "there are no circumstances in this case that should warrant the local planning authority refusing planning permission for demolition on the grounds of the alternative scheme and therefore play a role in determining the future use of the building on site", a passage criticised by Mr Cooper in his further representations made on behalf of Bizzy B. Once it had been conceded that the alternative of refurbishment was a relevant matter, its merits as well as demerits had to be considered by the Planning Committee; and a case could be made that refurbishment, or at least a further delay to explore that option, better complied with principles of sustainability than did demolition.

145. Nevertheless, all the arguments raised on behalf of Bizzy B and Python were drawn to Committee members' attention, both in the Officer's Report and in the Update Officer's Report; and on 29 June the members also had the benefit of hearing from two representatives of Bizzy B and two of Python. It is plain that the likelihood or otherwise of Python's refurbishment proposals was central to members' consideration, even without reference to the witness statements from so many Committee members confirming that this was so. The note of the proceedings taken by the Council's Head of Legal Services shows that the matter of the escrow account was expressly raised in discussion by a member of the Committee, eliciting a reply from Mr Rabinovitch. This makes it difficult to understand Mr Cooper's suggestion in his first witness statement that members "were not aware of the significance of the offer". Given that the Update Officer's Report, in its first paragraph under the heading "Material Considerations", expressly referred to the objection that "demolition represents an unsustainable form of development", and went on in the following sentence to state that "the sustainability of a development is clearly [a] material planning consideration", it cannot be said that the sustainability issue was not addressed. The opinion of Mr Archer was that demolition and clearance of the site would provide greater opportunities for an appropriate development scheme. That was a planning judgment which members appear to have endorsed.

146. The Re-re-amended Grounds, and Mr Clarke's Skeleton Argument and submissions, made no reference to section 38(6) of the 2004 Act. I am not dealing with a challenge that there was illegality in the way that provision was addressed. Rather the complaint is that the whole approach was unfair and irrational, and that the weighing of relevant factors, including development plan policies, was done in a way that no sensible local planning authority could have done. That challenge is always extraordinarily difficult to mount, not least because of the principle enunciated by Lord Hoffmann in Tesco which I have set out above. Despite the plethora of arguments raised, the claimant comes nowhere near to establishing any of the aspects of Wednesbury unreasonableness.

Conclusion on planning permission

147. I do not consider Ground 3 to be arguable.

Overall Conclusion

148. Permission is refused on Grounds 2 and 3. Permission is granted on Ground 1, but judicial

review is refused. The defendant's application for a declaration is also refused.

MR CLARKE: My Lord, arising from my Lord's judgment I submit that there are four areas that need to be discussed if not agreed. The first is the question of permission to appeal on the ground on which my Lord has granted permission but refused substantive review. The second is timing for appeal. The third is the question of any undertaking or injunction to continue pending appeal. The fourth is the question of costs.

THE DEPUTY JUDGE: Yes.

MR CLARKE: I do not know if you want to take those one at a time or to have my submissions on all four?

THE DEPUTY JUDGE: Yes.

MR CLARKE: My Lord, on permission to appeal on ground 1, I invite your Lordship to grant permission to appeal. I submit that, my Lord having found the case to be arguable and having in my Lord's own words "wavered during the hearing" as to whether or not this was an irrational decision, for all the various reasons that have been argued and alluded to very fully in your Lordship's judgment, we would say there is here a proper basis for an appeal and the matter is clearly of some considerable importance, not just to the locality and the people of Stockton, but to my clients. So I would invite my Lord to grant permission to appeal.

My Lord, on the issue of timing, the issue here is that we have 21 days to appeal, but we have seven days to apply for permission in respect of those grounds on which my Lord has refused permission to apply for judicial review. What I would invite your Lordship to do is to extend the time for making a renewed application for permission on grounds 2 and 3, so that it corresponds with the time of appeal to 21 days from today. The claimant should make one application rather than several.

THE DEPUTY JUDGE: I shall order an expedited transcript of my judgment, but I am very well aware that by the time I receive the transcript and do the cross-checking, the seven days will be gone.

MR CLARKE: Yes, indeed. So I suggest that 21 days should be the period for both appeal and applications.

My Lord, undertaking or injunction, my Lord is aware that the present position is that up until now the Council has undertaken not to demolish, pending resolution of this application. My Lord, we submit that plainly an undertaking or injunction in terms should continue pending the determination of my client's appeal. If my Lord does grant permission to appeal, then certainly it should be until the Court of Appeal makes a decision on the case. If my Lord says no, then I would invite my Lord nonetheless to invite my friend to give an undertaking, or, if not, to grant an injunction until such time as the Court of Appeal has made up its mind on permission.

My Lord, costs, clearly we accept that costs must follow the event on the overall challenge, but there are three aspects of costs where we would say that the costs should be borne by the

defendant. They are these. First of all, the costs of and occasioned by the application for interim relief, which was effectively conceded by the Council at the last minute. Secondly, the costs of and occasioned by the adjournment of the hearing on 10 May --

THE DEPUTY JUDGE: They did concede eventually, but in that eventually I have decided in the Council's favour, it does not, I think, automatically follow, does it?

MR CLARKE: It does not automatically follow, my Lord, but we would say the logic is this. This was a case where interim relief should have been agreed or granted. Given the nature of the challenge, it would have been quite wrong for the Council to press ahead and knock down the building before the court could take a view on the legality of the Council's decision to do so. They were asked formally on 11 February of this year to agree not to demolish, pending the challenge. After some delay in responding, the Council eventually finally said no to that on 22 February. The references, if my Lord needs them, are A129 and C1048.

Then it was not until the day before -- it must have been just two days before the hearing on 15 March -- that the Council then decided to change its position and put forward a suggested basis pending the challenge.

THE DEPUTY JUDGE: But what extra costs? You were going to be having that hearing in any event for directions, were you not?

MR CLARKE: Well, my Lord, no, because that hearing was not for directions; it was the hearing of my application for interim relief. As it happened, it turned into a hearing for directions, but that was by-the-by.

THE DEPUTY JUDGE: Let us say they had agreed right at the outset to give you the undertaking, matters were moving at such a pace that you would have been going back in any event because you would have been wanting to amend your application, would you not?

MR CLARKE: Well, the amendments came later. That was when we moved into the realm of planning.

THE DEPUTY JUDGE: This is two days before the hearing -- this is the hearing of --

MR CLARKE: 15 March, when we were seeking interim relief.

THE DEPUTY JUDGE: And what you are saying is that you might not have needed that hearing at all?

MR CLARKE: No, because directions would probably have been agreed between the parties, or it would have been a short, cheap hearing.

THE DEPUTY JUDGE: So that is your first head is?

MR CLARKE: Yes. We say that those costs were needlessly occasioned in pursuing that application and preparing it right up to when it was before the court, when it really should have

been agreed from the outset.

My Lord, in respect of the next stage, the court directed that the hearing come on on 10 May, but it could not go ahead on that day because just one day before that hearing the Council delivered its screening opinion. It also served the statement of Mr Poundford. It sent the screening opinion the day before the hearing, but with no supporting documents, and the court was persuaded, in my submission quite rightly, that the claimant needed time to consider those documents and to consider whether or not there should be a challenge in relation to them. The case therefore could not go ahead on that day. So we say that the costs of, and occasioned by, the adjournment should be borne by the defendant. It was the defendant's fault for putting in these documents very late. They should have been aware of the planning problem since the Court of Appeal's decision -- or at the very least we raised it in correspondence in April.

THE DEPUTY JUDGE: I am sorry, so what happened was that the parties turned up on 10 May, did they?

MR CLARKE: Yes.

THE DEPUTY JUDGE: And then it was simply not effective?

MR CLARKE: Yes. We applied for an adjournment on the basis that we had just been served with the screening opinion the day before. At that stage there was no supporting document.

THE DEPUTY JUDGE: Well, you could not have been given the screening opinion earlier because it was not available until --

MR CLARKE: Well, what they could have done, my Lord, was taken all that on board much earlier --

THE DEPUTY JUDGE: Well, they might, but I do not think they are under any obligation to you to carry out the screening opinion according to any particular timing. They then supply you with the screening opinion as soon as it comes and in the result there is an adjournment. It does not seem to me --

MR CLARKE: The problem is, my Lord, the law had been clarified by the Court of Appeal in March, and it made plain that this would be relevant and therefore brought into play the question of environmental screening.

THE DEPUTY JUDGE: They carry it out -- had there meant to be the hearing on 10 May?

MR CLARKE: There was supposed to be the rolled-up hearing of the application.

THE DEPUTY JUDGE: Let us assume they had done it two weeks earlier or something -- or three weeks earlier. You still almost certainly could not -- the 10th May date was going to be in jeopardy, was it not?

MR CLARKE: It might have been but, my Lord, we would say that there are many other

aspects of this case if the Council had put its skates on earlier, particularly in relation to planning permission, then the case would have proceeded -- it might have been agreed between the parties. The parties could have agreed an order. It could have been said, for example, "Well, look, we are getting the screening opinion --"

THE DEPUTY JUDGE: Did both parties turn up expecting that you were going to fight it on 10 May?

MR CLARKE: Yes. I think we indicated the day before when we received the screening opinion, that that caused us a problem. If the Council had acted earlier, then what would probably have happened, my Lord, was that the parties would be able to agree a new timetable for the case without a hearing.

THE DEPUTY JUDGE: So what is it you --

MR CLARKE: The costs effectively thrown away by the adjournment. The wasted costs of having to prepare the case, coming to court and then having to have it adjourned.

The same point applies in a certain respect of the hearing on 10 June. It was the Council's idea to adjourn that one.

THE DEPUTY JUDGE: You had been re-fixed for 10 June, had you?

MR CLARKE: It was re-fixed for 10 June. It came in front of Lindblom J on that occasion. The Council suggested that it be adjourned in order to allow them to determine the planning application. They said that should be determined and any challenge to that should be mounted.

THE DEPUTY JUDGE: Did you resist that?

MR CLARKE: No, we did not, because we saw the sense in that. The learned judge took some persuading by both counsel that there should be an adjournment and set the timetable which has led up to this hearing. But again, if the Council had not left things until the last minute, the parties could have agreed on all the process and would probably have been able to agree earlier on that that hearing should be vacated. Again having these false starts in this case, we say, are the Council's fault. So money has been thrown away.

Certainly I accept the principle that the claimant must pay the overall costs of the claim, but we say there are those three instances in which the costs should be borne by the defendant.

My Lord, that was my shopping list of items for the court to consider post-judgment.

THE DEPUTY JUDGE: You said the first was the question of appeal; the second was timing; the third, you said, was the matter of the injunction, which you have dealt with --

MR CLARKE: Yes.

THE DEPUTY JUDGE: You say that that should continue effectively until the Court of

Appeal is seised of the matter?

MR CLARKE: Yes.

THE DEPUTY JUDGE: And costs. So you have dealt with your four matters, I think. Yes, Mr Tabachnik?

MR TABACHNIK: First of all can I say -- I am sure on behalf of both sides -- that we are very grateful indeed to my Lord for his careful and full, and indeed expeditious handing down of judgment in this matter.

My Lord, dealing otherwise with the matters Mr Clarke raises, permission to appeal, I say, very, very briefly, of course he needs to show, in order to obtain permission from my Lord, a real prospect of success. Plainly there is absolutely no prospect of that in respect of ground 2 and 3, where he has even been refused permission to apply.

THE DEPUTY JUDGE: Well, he is only applying for leave to appeal on ground 1. On the other one, I think he has a right to renew. Is that not right?

MR CLARKE: Yes.

MR TABACHNIK: He has a right to ask --

THE DEPUTY JUDGE: Yes, you have a right to ask the Court of Appeal, and you do not need anything from me on that.

MR CLARKE: That is right.

MR TABACHNIK: And what I say about ground 1 is that essentially, as with all irrationality challenges, it comes down to the facts. My Lord has given his view and assessment of the facts as they were, and the reasoning as it was in February, and really it is a matter for the Court of Appeal as to whether it thinks there is a real prospect of success in respect of those issues.

Subject to my Lord, I think I prefer to deal with issues of timing and the undertaking or the injunction once I know what the position is in respect of permission to appeal. It will also reduce slightly what I have to say.

THE DEPUTY JUDGE: Well, I can deal with that matter -- do you have anything further you want to say in reply to that on that issue?

MR CLARKE: My Lord, no.

THE DEPUTY JUDGE: Well, I refuse permission to appeal. It may be that you can persuade the Court of Appeal who will have the benefit (if it be benefit) of the way I have set it out. It no doubt reveals strengths and weaknesses and you will be able to pick it to pieces before someone, but I think that should really be a matter for the Court of Appeal.

MR TABACHNIK: So far as timing and the undertaking is concerned, focusing on the undertaking first, our primary position is that permission to appeal having been refused, and in circumstances where we consider there to be no prospect of success on appeal, or indeed on renewed application, and that if matters were to be taken any further, that would be, frankly, nothing other than a delaying tactic; we would invite my Lord in effect to test the seriousness of any intention expressed today to take matters to the Court of Appeal by refusing what in effect is an application for a stay pending appeal and to leave it to my learned friend to apply -- and he will have to do this expeditiously -- to the Court of Appeal for both permission to appeal and renew, and a stay at the same time. That will effectively be as it were the surest of tests that the matters will hereafter proceed very expeditiously.

From the Council's perspective, the concern is in relation to the availability or otherwise of ONE funding. If I can just spend a moment to show my Lord what the position is on this --

THE DEPUTY JUDGE: The end date there is you have to have finished the works by the end of December, have you not, at present?

MR TABACHNIK: The middle of December, I think, is the date -- 16 December, and that comes from an e-mail in bundle D at page 1333.

THE DEPUTY JUDGE: D?

MR TABACHNIK: D1333.

THE DEPUTY JUDGE: Yes.

MR TABACHNIK: The first two paragraphs relate to applications from Python for funding. So we are not any more concerned with those. But I direct your Lordship's attention to paragraph 3, because not only is that where I have taken the date from, but they effectively say no more extensions of time.

THE DEPUTY JUDGE: When did ONE go out of business?

MR TABACHNIK: I think it will be the end of March 2012. So it is certainly right to say that they are in business. Somebody is there and the lights will not be turned off for a further few months, but this is what they have said to us in a very recent e-mail.

THE DEPUTY JUDGE: What is the programme for development? Six weeks, is it?

MR TABACHNIK: Sixteen.

THE DEPUTY JUDGE: Sorry, how long do the demolition works take?

MR TABACHNIK: It is a sixteen-week contract, which we are envisaging letting; and as a matter of chronology, sixteen weeks to 16 December starts today. We have not yet, for fairly obvious reasons, signed a contract with the winners of the tender process that we have previously undergone, and obviously therefore we would be expecting them to do work in slightly less than

the sixteen-week contract period.

THE DEPUTY JUDGE: You say that they should jolly well get to the Court of Appeal as fast as they can?

MR TABACHNIK: Yes, and this is the best way of making sure that they have to pick up the ball and run with it extremely fast, because otherwise it eats immediately into our time.

THE DEPUTY JUDGE: Yes.

MR TABACHNIK: If my Lord is against me on that and is minded to entertain a stay, then what I would say is that if he indicates that, then in those circumstances -- and only in those circumstances -- the Council would be prepared as it were to re-offer the undertaking so as to avoid my Lord being forced into a position where he has to make an order. In those circumstances I am going to ask for certain conditions --

THE DEPUTY JUDGE: I do not know whether you want to say anything, but it may help if I indicate my thinking on this matter. The way I am inclining to go is to extend your time for renewing your application for permission from seven days to fourteen days (not 21 days) -- to fourteen days -- and to invite the Council to extend their present undertaking for fourteen days, whilst the steps are being taken. It will then expire at the end of fourteen days. You will be entirely dependent upon anything further you obtain from the Court of Appeal. The fourteen days should not prejudice the Council's programme, because they are going to need a little bit of time to tee up. Fourteen days is, arguably, a bit generous for you, but we are in the middle of vacation and, as I say, it may take a few days to get you the transcript, but I want you to have plenty of time to put your case in its best way when you apply. If the Court of Appeal is looking at your application, if they see that there is potential merit in your application, then they will be minded no doubt to consider seriously granting some further stay. If, on the other hand, they do not see anything, they will not do that and the stay will be coming to an end. It seems to me that is a compromise. What would be rather unsatisfactory is that in a situation where you cannot really be doing anything because you have not received the transcript and so forth, potentially the builders could be on site demolishing. I doubt they would be, but potentially they could be.

MR CLARKE: My Lord, that is very helpful. My Lord, may I just say this? What we submit is that the position of the ONE company is completely irrelevant. If the Council delay the demolition of this building, it is entitled to look to my client to pay its reasonable costs. My client is good for the money, because my client's asset, which the Council currently controls, is the site which, on the Council's own valuation, my Lord may remember last year, the Council said that a cleared site would be worth £900,000.

THE DEPUTY JUDGE: Yes, but your client has made it very clear that it does not accept that a number of these costs have been reasonably incurred and so forth, and there is going to be an argument about that, and therefore the Council is quite enthusiastic, if there is some regional development agency money around, that that should be used.

MR CLARKE: Of course, it is entitled under the statute to claim its reasonable costs. It is a pretty unattractive position that it should be proposing that the public purse should pick up what

would on that basis be unreasonable costs.

THE DEPUTY JUDGE: Yes. I cannot get involved in the argument as to whether the costs are unreasonable. I understand their position. Anyway, that is the way I am minded to go and it is a question of whether, in those circumstances, Mr Tabachnik has instructions which would enable him to extend the existing undertaking for fourteen days.

MR TABACHNIK: My Lord, on instructions I can say that we would be content to extend the undertaking until four o'clock on Friday week. That is not quite fourteen days, because I have to say that in cases of extreme urgency, which this one has now become, and particularly when one is extremely familiar with the arguments, as Mr Clarke obviously is, and when, even though one does not have the final approved judgment, he has a document which is very, very near to it, one should expect that any grounds of appeal or of renewal will emerge pretty rapidly.

THE DEPUTY JUDGE: So you are accepting, therefore, until Friday 2 September?

MR TABACHNIK: Yes. That is in effect eight working days. That is what I would accept, and on that basis I would not need to weary my Lord with what would otherwise have been an application for a --

THE DEPUTY JUDGE: Well, I think I can cut this very short. With an undertaking which is going to last until that period, I think, Mr Clarke, you would be sufficiently safeguarded. I think the likelihood of any works taking place over that following weekend must be pretty slight. So, in effect, you have the two weeks.

MR CLARKE: My Lord, with respect, it is quite a tight timetable. I would submit that my Lord's instinct was correct, that fourteen days is the right time. My learned friend should go that far and my Lord order him to do so. The end of next week does not give us much more than seven days to obtain the transcript, to take instructions, etc. It is a very, very tight timetable. I suggest that my Lord's first instinct of fourteen days is the right one.

THE DEPUTY JUDGE: Mr Tabachnik, how about -- it is a bit unseemly this bargaining and so forth between you -- but you would not really lose anything, would you, if one said noon on the following Monday?

MR TABACHNIK: That is exactly what I have just been discussing with those who are instructing me.

THE DEPUTY JUDGE: Then let us go for noon on Monday 5 September.

MR TABACHNIK: And it may be appropriate if my Lord ties up, as it were, the question of the timing to appeal and the timing to renew within the same period. I would accept that time for renewal --

THE DEPUTY JUDGE: I think I can leave that as it were. It is simply Mr Clarke's clients who will be at risk if they leave it to the very last day. I said two weeks, and I do not see any reason to go back on that.

MR TABACHNIK: So be it.

THE DEPUTY JUDGE: So from seven days to two weeks' extension of time for you to lodge your application for permission to appeal on ground 1.

MR CLARKE: Your Lordship gave me 21 days in respect of ground 1.

THE DEPUTY JUDGE: Oh, you are absolutely right. I am extending the time to two weeks from seven days for renewing your permission on grounds 2 and 3.

MR TABACHNIK: My Lord, that just leaves costs. As Mr Clarke concedes, costs should follow the event, subject to three points that he raises, and I am going to suggest that there is no merit in any of the three matters to which he makes reference. But if you do not accept that, what I am going to suggest you do is that, rather than getting into allocating different elements of the case to different parties, that you knock down my percentage from as it were 100% of reasonable, taxed, standard basis costs -- because I am not making an indemnity costs application on any part of the case -- to whatever proportion you think is appropriate and meet the justice and the circumstances. So turning to the three matters --

THE DEPUTY JUDGE: So from 100% down to whatever ....?

MR TABACHNIK: Yes. You may think that really all the costs in this case -- and you have been involved with it for only a slightly shorter period of time than I have -- but part of our costs in this case have related to the last couple of weeks as we have all run around trying to sort out the evidence in the last round of evidence, and ending up with our long, detailed skeleton arguments on both sides.

THE DEPUTY JUDGE: It usually happens that the claimant's costs are front-loaded; your costs may be back-loaded.

MR TABACHNIK: Yes. But I think overall, if one simply applies a percentage reduction. If you are with Mr Clarke --

THE DEPUTY JUDGE: I am in difficulty with a percentage reduction as to have any idea what is going to be a sensible reduction -- even if I was with him on all those three matters -- to work out what percentage that would be.

MR TABACHNIK: Yes, one cannot be scientific about it, otherwise spends all one's time doing that and it becomes a disproportionate exercise. Obviously one has to start with what, if any, of those three points you are with Mr Clarke. If you are not with him on any of them, the point falls away. If you are with him on, say, the first one, you might think there were also directions given, etc, etc, that might justify giving the Council --

THE DEPUTY JUDGE: Well, I am not inclined at present -- I do not think I am with him on the first one. I do not think there was any compulsion on you earlier than you did to offer the interim relief. So I do not see that he gets anywhere on that matter.

So far as the second matter is concerned, I cannot see how the matter could really have gone ahead on 10 May if you had had a screening opinion a couple of weeks earlier than that, immediately after the case. It does not seem to me that that would have made two hoots of difference to the matter.

So far as the third matter is concerned, you sought the adjournment on 10 June. On the other hand, it does seem to me that it was the sensible course because otherwise what would have happened was we would have had two hearings and, on my findings, what would have happened, eventually there would have been two separate lots of costs of hearings which would be being paid by Mr Clarke. So I am not very tempted by any of them is the answer.

MR TABACHNIK: Yes. If you are not, then I do not need to address you any further and I am very happy not to take up any further time.

THE DEPUTY JUDGE: I will hear if Mr Clarke has anything further to say on that matter. But so far as a percentage, what are you suggesting? 5% or something like that?

MR TABACHNIK: Well, if you were with me, for example, in relation to the third one, yes. That is what I think you would be looking at, because at the 10th June hearing I would just make two points on that. First, in reality, with hindsight, the timetable set and agreed between the parties on 10 May simply proved too optimistic, given that once the planning application went in and Bizzy B's representations went in, again obviously there was going to be a challenge on whatever grounds to any kind of permission that was granted as well.

The second point I was going to make is that a week or so before that hearing we wrote to the other side suggesting that that hearing should be adjourned to what was then ordered to be today -- or at least the hearing last week -- so that all challenges then on foot or threatened could be accomplished within a single set of proceedings. What I am told -- I was not involved in the case at the time, as you know -- but what I am told is that the principle of an adjournment was agreed very quickly. There was then some haggling between the parties as to what the new directions should be. I think Bizzy B wanted a more extended period of time for this rolled-up hearing than the Council were suggesting, and in the end the judge made a decision on the matter. So in effect the parties did know for some considerable time before hand that it was not going to be an effective hearing, and that it was just going to be directions re-setting the timetable in a way that has enabled any challenge to the planning permission to come forward. But equally, the matters were to be resolved at the soonest possible opportunity. There is nothing else of which I am aware of on number 2.

On number 1 -- in other words, the initial directions hearing -- you have probably seen the order. There were a series of directions that were given. Obviously in the ordinary way there will sometimes be an oral permission hearing right at the beginning of a case, especially one which had already involved quite a lot of paperwork by that stage. There is a specific order in that 15th March order. For your note it is --

THE DEPUTY JUDGE: That was His Honour Judge Sycamore ordering a rolled-up hearing, was it not?

MR TABACHNIK: Yes, yes, it was. But the matter of costs for that hearing was also considered, and costs in case was ordered. Frankly, the appropriate time for any application relating to any argument of late offering of the undertaking was that occasion, and it is not seemly or appropriate for that matter to be revisited right at the end of the case when, as it turns out, the challenges have failed in their entirety. Unless I can assist any further, that is what I would have said on those three matters, and on that basis no reduction on the normal position is appropriate. I would say that even if my Lord was wavering ever so slightly about a minuscule reduction on the Council's costs, to bear in mind that, although I have not made an indemnity costs application, it is more than arguable that an indemnity costs application could have been made in respect of grounds 2 and 3.

THE DEPUTY JUDGE: I am not sure on that one. I think you might have been in some difficulty, but there we are.

MR CLARKE: I would agree with my Lord. There is just one point on the third set of costs. If the Council had taken seriously the planning challenge earlier, then we would not have got into the procedural timing mess that we did. Suddenly on 24 May they said, "Oh, we do not have planning permission". That would inevitably have made the hearing on 10 May doomed. That is the real problem. If the Council had woken up earlier to the reality of the problems they faced about planning permission, then the expensive preparation and hearing need not have taken place. That is my point on this.

THE DEPUTY JUDGE: Mr Clarke seeks that the defendant should be penalised in costs in respect of three matters: first, the delay in their giving of an undertaking; secondly, the costs of the adjournment of 10 May; and thirdly, the costs of the adjournment of 7 June.

I am not persuaded that those are matters which should be borne by the defendant. It seems to me that so far as interim relief, if a claimant seeks interim relief in proceedings on which they eventually lose, it will be very rare that they will be entitled to criticise the defendant for having been a little bit slow to offer the interim relief. So far as 10 May and 10 June, they only arose because the claimant insisted on bringing planning challenges, which I have held in both cases to be unarguable challenges. It seems to me that the bringing of those challenges inevitably meant that the timescale for the proceedings in respect of their original challenges had to be extended.

So there will be a simple order for costs: namely, that the claimant pay the costs of the proceedings.

MR TABACHNIK: I am much obliged.

MR CLARKE: Could I thank my Lord for sitting late to deal with these further matters?

THE DEPUTY JUDGE: I am sorry to everyone that we have gone on so long.

MR TABACHNIK: I will not ask you to sit much later, but I have one further and final, I hope, application, my Lord. I ask for an interim payment in respect of the costs order that my Lord has just made. Neither party has exchanged -- because this was longer than a day's hearing -- costs

schedules, but I can tell you that on instructions our costs are in the broad region of £70,000-£75,000 or thereabouts. I ask -- since you do not have a piece of paper showing that or any breakdown -- for £30,000 as an interim payment. That is less than 30% of that amount.

THE DEPUTY JUDGE: When do you want that paid by?

MR TABACHNIK: Well, it is normally fourteen days, and I cannot see any reason to depart from that.

MR CLARKE: My Lord, I oppose that. I had no kind of warning that my learned friend proposed to make that application and this, of course, was not a one day case. So this would never have been a summary assessment case. It will have to go for detailed assessment, unless the parties can agree on costs.

There still remains the matter of an appeal. It would be, in my submission, quite inappropriate and premature to order any payment of costs at this time. My learned friend can wait in due course to have his costs assessed and have them paid in due course. As I said before, he has a secure claimant who owns a very large asset of which it has control. There is no question of us disappearing. I submit that you should refuse his application.

THE DEPUTY JUDGE: Whilst by refusing permission to appeal on Ground 1, I have make it plain that I do not think that there is a realistic prospect of success henceforth, I have to accept that there are always possibilities. I do not think that this is a case where an interim payment would be appropriate.

Counsel, you will need to supply to the associate the wording of the undertaking which is going to Monday at noon. Please make sure it gets into the order in the correct form.

Can I thank whoever is responsible for the organisation of the bundles? In practice whoever has done the indexes to them has done a marvellous job. They are much better than those to many bundles. One could actually function from them. Both counsel could not have performed better in giving me clear Skeleton Arguments which I have benefited from enormously, as will be apparent from the way in which I tried to summarise the various arguments in the judgment. I am very grateful to both counsel and to their respective teams.
