IN THE HIGH COURT OF JUSTICE **Claim ref: AC-2023-CDF-000108**
KINGS BENCH DIVISION
PLANNING COURT

B E T W E E N :

THE KING
on the application of
GREENFIELDS (IOW) LIMITED

Claimant

-and-

THE ISLE OF WIGHT COUNCIL

Defendant

-and-

WESTRIDGE VILLAGE LTD

Interested Party

CLAIMANT'S REPLY

References to the Claim Bundle take the format CB/Tab/Page

A. Delay

1. It is hopeless to suggest that Claim is brought out of time (DSGR paras. 3-4, 17-18, 24-25): such an argument is directly contrary to binding authority. In *R(Burkett) v Hammersmith and Fulham LBC* [2002] 1 WLR 1593 at para. 51, the House of Lords made clear that "the words "from the date when the grounds for the application first arose" refer to the date when the planning permission was granted".

B. Grounds Not Academic

2. The Claimant ("C") denies that that Grounds 1 and 2 of the claim are academic. *First*, the Committee was expressly advised by the Council's Strategic Manager for Planning and Infrastructure Delivery that its previous resolution on 27 July 2021 was a material consideration to be taken into account **[CB/195]**. If that resolution was unlawful and members relied on it on 25 April 2023, their further resolution on that date was also unlawful.

3. *Second*, the officers' reports advised that the matter had been returned to the Committee because of curlew mitigation and human rights implications. The report for the meeting on 25 April 2023 (the 4th OR) did not involve any substantive consideration of the application, but stated that members were considering a deferral of the matters before them on 21 March 2023

[CB/972]. The officers' report for 21 March 2023 was placed before members, which made clear that members were only to consider changes of circumstances since 27 July 2021, specifically in relation to curlew mitigation and human rights **[CB/1057]**.

4. *Third*, the debate in fact proceeded in line with that advice. The Chair stated that he wished to confine the debate to the "Curlew Issue" **[CB/265]**. Officers advised that, since the previous resolution, "Natural England raised an objection related to the impact of the development on the curlew. This was a new material consideration that had not been raised before… it was considered that it met that threshold for a referral back to the Committee, as the Committee were the decision maker <u>on this one issue alone</u>… officers are not suggesting that are Members are required to debate all issues, it's just not for Officers to stifle debate when the permission has not been issued" **[CB/268-269]** (emphasis added). The Chair limited the initial debate to curlew mitigation **[CB/269]**; a vote was tabled as to whether the curlew mitigation was inadequate, failing 6 votes to 5 **[CB/312]**; without any further debate, a motion (seconded by Cllr Brodie) was put to approve the recommendation of officers **[CB/312]** and immediately put to a vote, passing 6 votes to 5 **[CB/314]**.

5. The only substantive consideration of the merits of the application took place at the meeting on 27 July 2021 upon which the Committee relied in granting planning permission. The lawfulness of that resolution is not therefore academic.

C. <u>Ground 1 - Procedural Unfairness</u>

6. D and IP's response to Ground 1 is wrong as a matter of fact. *First*, D attempts to rewrite history by asserting (DSGR paras. 9-11) that Cllr Price was not "excluded" or "prevented" from participation at the meeting 27 July 2021, but *chose* not to participate. Cllr Brodie himself stated in correspondence on 25 November 2021 that Cllr Price was "Prevented by me from either participating or voting on the application as he had not attended the entirety of the prolonged and then 'compulsory' site visit" **[CB/192]**. At the meeting, Cllr Brodie had stated his decision that Cllr Price "will not participate in any voting tonight. That is because he was unable to attend the whole of the site visit last Friday" **[CB/200]**.

7. Cllr Price himself says "I did NOT abstain" but rather, because he could not attend all of the site visit he was "wide open to exclusion from the debate and then voting at the meeting" such that he was prevented from participating. **[CB/180**] This is also reflected in Cllr Price's own words at the subsequent meeting: "I was not allowed to join the debate or vote because I hadn't been able to attend the whole site visit" **[CB/262]**.

8. *Second*, contrary to DGR para. 13, Cllr Lilley was also prevented from participating in the 27 July 2021 meeting. Cllr Brodie states as much in his email of 25 November 2021 **[CB/192]**, and the Council's Solicitor baldly instructed Cllr Lilley by email that **[CB/149-150]**: "you cannot attend in person nor can you attend remotely… therefore you cannot participate…".

9. *Third*, the submission at DSGR para. 14 that the Committee was able lawfully to exceed three hours because "the Committee resolved by affirmation" is a nonsense. The Council's Constitution did not allow an extension of time by affirmation. In any event, Cllr Critchison dissented, making affirmation impossible **[CB/46]**. D accepts that that the vote on the application was taken after three hours had expired: that vote was therefore unlawful.

D. <u>Ground 2 – Bias</u>

10. Cllr Brodie's Witness Statement ("W/S GB") is not credible. Drafted by a lawyer in 2023 on his behalf, it is contradictory of his previous contemporaneous statements and with the evidence of other councillors prepared in 2021 shortly after the events in question. If anything, the inconsistences further expose his apparent/ actual bias. In particular:

    (1) W/S GB para. 5 feigns surprise at the suggestion he was involved in the preventing Cllr Lilley from attending the meeting. However, his own email of 25 November 2021 to John Medcalfe, the Council's Chief Executive, explained "I was part of that exchange with you over the weekend of 23-25 July. Although it was Cllr Lilley's decision not to attend, he clearly felt immense pressure and little option" **[CB/192]**. D has offered no evidence as to the nature of those exchanges (DSGR paras. 47-50).

    (2) Cllr Brodie does not deny (W/S GB para. 6) that he tried to persuade Cllr Jarman that he had "predetermined" the application. His suggestion that Cllr Jarman approached him is inconsistent with the evidence of Cllr Jarman (sworn in 2021) that Cllr Brodie "contacted me the week prior to the planning meeting with his concerns that I was predetermined" **[CB/137]**.

    (3) At paras. 7-10, Cllr Brodie attempts to rationalise his refusal to permit Cllr Churchman to attend the meeting "unless [she] could support the application" **[CB/167-168]** on the grounds that she "failed to identify any material considerations which were not already put to the committee". Cllr Churchman's contemporaneous evidence from 2021 explains she wished to speak *inter alia* to address the use of the policy wording "adjacent to the settlement boundary" which she thought was being applied incorrectly **[CB/102]**. This

was a material planning consideration which had not been raised before the Committee. In any event, Cllr Brodie had no power to "decline to invite" anyone to the meeting.

(4) At W/S GB para. 11, it is asserted that "I did not exclude Cllr Price from the meeting… Cllr Price is another very experienced councillor and was following the code of practice". But at the time in 2021, Cllr Brodie himself wrote to the Council's Chief Executive that Cllr Price was "Prevented by me from either participating or voting on the application" **[CB/192]**. Both statements cannot be true.

(5) Finally, as to Cllr Brodie's assertion at para. 12 that he is merely "a forceful character", he is plainly a bully. One email to Cllr Lilley described him as "cowardly" and said "I don't know how you look yourself in the mirror. Pathetic" **[CB/166]**.

11. Comments made by Cllr Brodie during the debate and relied on by D, that "I'm entirely comfortable with whatever you propose, provided its sustainable. You can't just be against it" and "I'm quite relaxed whatever decision we make, but I want it to be a planning decision", do not dispel the appearance of bias and/ or the Cllr's actual bias. The words written on the page are devoid of the tone and context in which they were made. These mantras are classic examples of the rhetorical technique of apophasis: it is plain he was far from "relaxed" or "comfortable".

12. Finally, the submission that Cllr Brodie's appearance of bias or actual bias is irrelevant is utterly hopeless. He voted at earlier meetings and at the meeting on 25 April 2023. The final resolution to grant passed by just one vote. His vote made all the difference.

E. <u>Ground 3 – The 106 Planning Obligation</u>

13. D admits that it did not comply with article 40(3)(b) DMPO, but says that this breach does not matter. The purpose of article 40(3)(b) is to facilitate the making of submissions by interested persons before planning permission is granted. Nothing in the various officers' reports prepared for the Committee set out how the Council proposed to allocate the costs of highways improvements to differing developments or take account of the deliverability of those developments in determining to grant planning permission. The first time any information on this has been provided is in the Witness Statement of Sarah Wilkinson ("W/S SW") before this Court.

14. C would have wished to explain and make representations, in accordance with Ground 4 below, to the effect that the £400,000 secured by the planning obligation is far from adequate to ensure that the highways issues can be remedied, especially given the uncertainties regarding the

delivery of other sites. That opportunity was denied them by D's admitted breach of the statutory scheme, causing prejudice which justifies quashing the grant of planning permission.

F. Grounds 4 & 5 – Witness Statement of Sarah Wilkinson

15. D relies, in responding to C's grounds, on upon W/S SW paras. 3-13. *First*, W/S SW is not admissible and should be excluded, since it is a detailed *ex post facto* justification of the decision challenged (see *Kenyon v Secretary of State for Communities and Local Government* [2020] EWCA Civ 302 per Coulson LJ at paras. 27–30). The narrow circumstances in which the Court will admit "elucidatory evidence" are not met in this case (see *Ermakov v Westminster City Council* [1995] EWCA Civ 42 per Hutchison LJ in at 315H-J)

16. *Second*, if the witness statement is admitted, Ms Wilkinson's *ex post facto* reasoning departs from the advice of a statutory consultee (Island Roads) and so should have been recorded contemporaneously (see the Openness of Local Government Regulations 2014 and *Visao v SSHCLD* [2019] EWHC 276 (Admin) at paras. 65-68). Her evidence thus strengthens C's claim by exposing what was not (but should have been) in the contemporaneous documents (see *Watermead PC v Aylesbury Vale DC* [2018] PTSR 43 per Lindblom LJ at para. 35).

17. *Third*, C does not agree with Ms Wilkinson's analysis. C would have expressed its position (see SFG para. 120 **[CB/54-55]**) had it not been for D's breach of article 40(3)(b) of the DMPO.

18. *Fourth*, W/S SW is factually inaccurate, at para. 10 referring to the "Ryde Transport Projects Project Board". This entity does not exist: there is no record of it on the Council's website or in the Council's files; and the Council's Cabinet Member for Transport and Road Infrastructure and Leader of the Council has confirmed as much to C. The only evidence to suggest its existence is Exhibit SW1, a draft document from 2020 of no probative value.

19. Ground 5 is not a disagreement with D's judgment as alleged at DSGR para. 40. The judgment referred is that now asserted retrospectively by Ms Wilkinson that she reached, which were not previously available to C (going directly to C's Ground 3), and which the Committee did not consider.

G. Conclusion

20. C accordingly seeks permission for judicial review and the relief sought in the SFG.

CHARLES STREETEN
BRENDAN BRETT
FTB