Neutral Citation Number: [2023] EWHC 688 (Admin)

Case No: CO/2909/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/03/2023

Before :

MR JUSTICE LANE

- -

Between :

FUTURE HIGH STREET LIVING (STAINES) LIMITED	**Claimant**
- and –	
SPELTHORNE BOROUGH COUNCIL	**Defendant**

- -
- -

Mr P Tucker KC and Mr J Easton (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**
Ms H Townsend (instructed by **Spelthorne Borough Council**) for the **Defendant**

Hearing date: 21 February 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 28 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE LANE

Mr Justice Lane:

A. THE FORMER DEBENHAMS DEPARTMENT STORE IN STAINES

1. The claimant owns the former Debenhams department store at 37 – 45 High Street, Staines-on-Thames ("the Building"). It wishes to demolish the former store and provide residential accommodation on the site. This wish has generated considerable local controversy regarding the loss of the Building.

2. With permission granted by Lang J on 6 December 2022, the claimant seeks an order quashing the decision made by the defendant local planning authority dated 29 June 2022 to extend the Staines Conservation Area ("SCA") to include the Building and other land ("the Decision").

3. The defendant produced a Supplementary Report ("SR") dated 31 August 2022, by which it purported to review the Decision. The SR concluded that no change should be made to the Decision or to the Appraisal which underpinned the defendant's review of the SCA. As a consequence of the SR, the claimant amended the Statement of Facts and Grounds to address the purported review.

4. The claimant submits that the defendant fell into a number of legal errors, which I shall describe in due course.

B. FACTUAL BACKGROUND

5. The relevant factual background is as follows.

Planning application

6. On 10 November 2021, the claimant submitted a planning application (Ref: 21/01772/FUL) to the defendant for the following scheme:

> "Demolition of the former Debenhams Store and redevelopment of site to provide 226 Build-to-Rent dwellings (Use Class C3) and commercial units (Use Class E) together with car and cycle parking, hard and soft landscaping, amenity space and other associated infrastructure and works."

7. The planning application elicited 268 letters of objection. Reasons for objection included "loss of an iconic building – should be retained and converted" and "heritage impacts on nearby Conservation Areas and Listed building".

8. The planning application was recommended for refusal in an Officers' Report ("the Planning OR") of the defendant, dated 24 May 2022 and updated on 1 June 2022.

9. Planning permission was refused by a decision notice dated 6 June 2022. The notice alleged (i) harm to the significance of designated heritage assets (including the SCA) and non-designated heritage assets; (ii) overdevelopment causing harm to the character and appearance of the area; and (iii) insufficient affordable housing. At the date of the decision notice, the Building did not fall within the SCA.

10. On 25 July 2022, the claimant submitted a notification of intention to submit an appeal against the refusal of planning permission.

Prior approval application for demolition

11. On 25 February 2022, the claimant made an application to determine if prior approval was required for the demolition of the Building under the Town and Country Planning (General Permitted Development) (England) Order 2015 Schedule 2, Part 11, Class B.

12. Under cover of an email dated 24 March 2022, the defendant determined that prior approval would be required for the demolition. The Building did not fall within the SCA at that date.

13. By a decision notice dated 1st July 2022, prior approval was refused for the following reason:

> "The former Debenhams building, subject to this application, is located within the Staines Conservation Area and its demolition would be development and relevant demolition and NOT be Permitted Development under Part 11 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) and would require planning permission."

14. The Building had been included within the extended SCA on 29th June 2022.

Local listing

15. Following a report to the defendant's Planning Committee dated 30 March 2022, the Building was included in the Local List of Buildings and Structures of Architectural or Historic Interest ("Local List") with immediate effect.

Conservation Area Review

16. The decision-making process that led to the inclusion of the Building in an extended SCA may be summarised as follows.

17. The defendant instructed AHC Consultants to prepare an Appraisal of the SCA. The AHC's letter of instruction and terms of reference have not been produced in these proceedings. The draft Appraisal (written by Dr Carole Fry) recommended changes to the SCA, including its extension to incorporate the Building.

18. By an Officers' Report dated 10 May 2022 ("the May OR"), the defendant's Environment and Sustainability Committee ("E&SC") were invited to:

> i. agree the draft Appraisal for consultation;
>
> ii. agree to go out to 6 weeks' public consultation on the proposed amendments to the SCA;
>
> iii. delegate authority to the defendant's Group Head Regeneration and Growth, in consultation with the Chair and Vice Chair of the Environment and Sustainability Committee, to

approve the final document, taking account of comments, as required, which arise from the consultation.

19. Paragraph 3.3 of the May OR quoted directly from the draft Appraisal, which had this to say about the extension of the SCA to cover the Building:

> "The four storey, former Debenhams building was built in 1956 by George Coles, the renowned Art Deco architect. This landmark building is an important building of high visual quality which terminates the long views along Clarence St and from Thames Street. It is of good architectural quality and it reinforces the historic bult character of character area 3".

20. Paragraph 3.3 then said that the extension of the SCA also "includes the adjacent buildings of nos. 47-57 High Street which contribute to the setting of Debenhams".

21. At a meeting of the E&SC on 10 May 2022, the E&SC approved the recommendations outlined above.

22. The defendant invited representations on the Appraisal between 13th May and midnight on Friday 24th June 2022. The invitation to produce representations was publicised on the defendant's website.

23. A delegated report dated 27th June 2022 ("the June OR") produced by the defendant's Planning Development Officer and Principal Planning Officer sought approval of the amended SCA by the Group Head Regeneration and Growth in consultation with the Chair and Vice-Chair of the E&SC. The June OR recorded that "there have been no material objections to the content of the Conservation Area Appraisal or to the revisions to the boundary".

24. The June OR was shared with the Chair and Vice Chair of the E&SC, who both confirmed their approval of the recommendation to adopt the Appraisal and the changes to the boundary. The Group Head Regeneration and Growth signed the June OR on Wednesday 29th June, formally adopting the Staines Conservation Area Appraisal and the revisions to the boundary, with immediate effect.

Claimant 's representations on the Review

25. Ms Gail Stoten, Executive Director (Heritage) at the Pegasus Group, prepared detailed representations on behalf of the claimant in response to the defendant's proposed extension of the SCA and duly uploaded them to the defendant's consultation portal. Amongst other things, the representations highlighted Historic England's views on the Building's lack of special architectural merit. Ms Stoten received confirmation that the representations had been duly received prior to the end of the consultation period. Ms Stoten's representations raised a number of objections to the proposed extension of the SCA, particularly the inclusion of the Building.

26. It is common ground that Ms Stoten's representations were not taken into account by the defendant, prior to the decision being made on 29 June 2022 to extend the SCA. A main thrust of the claimant's challenge concerns the way in which the defendant

addressed that important matter. It is also important to record that the error is accepted by the claimant to have been entirely accidental in nature.

Pre-action correspondence

27. In accordance with the CPR Pre-Action Protocol in relation to judicial review claims, the claimant sent a Pre-Action Protocol letter ("PAP Letter") to the defendant on 22 July 2022.

28. The defendant responded to the PAP Letter on 4 August 2022 ("the PAP Response"). The defendant rejected the proposed basis of the judicial review claim.

Reconsideration of the Decision

29. The SR was produced after the PAP Letter, PAP Response and issue of the Claim. In the SR, the defendant purported to "address the additional comments received in respect of the Staines Conservation Area Appraisal following consultation"; ie the Stoten/Pegasus representations and four others, which had not been taken into account owing to the same accidental error. Paragraph 1.3 said that the purpose of the SR was to address "whether these representations would make a material difference to the decision to agree the Staines Conservation Area Appraisal and the revisions to the boundary." The representations were then summarised.

30. Paragraph 3 of the SR is headed "Response". Paragraph 3.1 stated that each of the matters raised by the "Pegasus objection has been considered carefully and the question of where the conservation area boundary should lie has been considered afresh". Paragraph 3.1 said "Officers bear in mind that the Appraisal and recommended changes to the boundary were the result of an independent and expert appraisal by AHT Consultants." It was not considered that any of these representations altered the recommendation in respect of the SCA for a number of reasons, which were then given in the form of bullet points.

31. The first bullet point said that the June OR and the SR related to the Appraisal, not the assessment by Historic England for the inclusion of the Building within the statutory list of buildings of special architectural or historic interest. The SR said the tests " are by necessity, distinct and different and Historic England was not considering the proposed revisions to the conservation area. The Council recognises that the former Debenhams building is not of national significance".

32. The second bullet point stated that the Building had been included within the revisions to the boundary because of its contribution to the character and appearance of the area, particularly Character Area 3: Market Square and Memorial Garden: "The points made in the Pegasus objection do not alter the Council's judgment on that question."

33. The third bullet said the buildings to the north-east of the Building were assessed by Dr Fry to have a degree of architectural and historic interest and to contribute to the character and appearance of the public realm which would merit their inclusion within the CA. The proposal was to include them within the CA; and that the "bar" is not comparable to that used to assess inclusion within the statutory list".

34. The fourth bullet point argued that the shape of the CA at this point reflected the elements that were considered to contribute to its character and appearance, and excluded those elements that were unlikely to contribute positively in the short/medium term.

35. The fifth bullet point stated that the Building "has been assessed as sharing many of the features characteristic of the historic buildings in Character Area 3 in terms of scale, string rhythm, architectural language and detail and reinforces those characteristics".

36. The sixth bullet point stated that the Building and the buildings to the north east "have been included within the conservation area for the contribution they make to its character and appearance…". The inclusion of a building within a conservation area renders it subject to planning controls intended to preserve or enhance the special character, features, or appearance of that area and guard against inappropriate work. This equates to requiring good design and sympathetically managed change".

37. The seventh bullet point said the assessment of Historic England regarding the inclusion of the Building within the statutory list was "not considered to be comparable to the text used within the Conservation Area Appraisal".

38. The ninth bullet point dealt with the statement in the Stoten/Pegasus representations, which quoted a passage from the Guidance issued by Historic England in 2019, entitled "Conservation Area Appraisal, Designation and Management". The conclusion in the representations was that there is no open space of particular interest in the proposed area of extension. The SR, however, said that this ignored the first part of the paragraph of the Guidance, which relates to areas being designated "because of the quality of the public realm or a spatial element, such as a design form or settlement pattern". The SR said that the Appraisal "is very clear on why the Debenhams building has been included and it has nothing to do with open space." This meant that "this criteria had not been used correctly in the Pegasus assessment".

39. The tenth bullet point dealt with another passage from the Historic England Guidance. This concerns the issue of whether the CA should run along the middle of a street. The SR said this issue had been discussed with Dr Fry. It was determined that "it would be appropriate not to include the north side of the street and that the space would not be adversely impacted as a result."

40. Part 4 of the SR contains the following conclusions:

> 4.1 Conservation areas are normally designated by the local planning authority where an area is identified as being of special architectural or historic interest and are generally valued as special places by those living and working in them. There is no statutory requirement for consultation before designation of an area, or for changes to the area designated. However, consultation having been offered, the Council should have taken into account all relevant responses. It is highly regrettable that this did not happen, and steps are being taken to ensure that it does not happen again."

> 4.2 The Pegasus objection represents an alternative planning judgement and interpretation of the Historic England Guidance. However, these are judgments which are simply different from (not better than) those of the consultant employed by the Council, and those of the Council's own professional officers and have now been taken into account in full. They do not alter the Council's judgment as set out in the report of 27 June 2022, that the Staines Conservation Area Appraisal and the revisions to the boundary should be approved.

41. The recommendation of the SR was that "no change is made to the Appraisal or the Staines Conservation Area boundary from that approved in June 2022" .

42. The SR was authorised by Terry Collier, the defendant's Deputy Chief Executive. He was a different officer from the one authorised by the E&SC to make the changes to the SCA. That person was Heather Morgan, Group Head Regeneration and Growth.

C. LEGAL FRAMEWORK

Planning judicial review

43. In Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin), Lindblom J, as he then was, summarised the relevant legal principles to be applied to a statutory challenge. In the light of Bloor and later case law, it is now established that, amongst other matters, officers' planning reports are to be read with reasonable benevolence, without the strictures applied to Acts of Parliament and other legislative instruments. Such reports are to be construed on the understanding that they are addressed to members who possess both a working familiarity with planning law and a knowledge of the locality in question.

Review of conservation areas

44. Section 69(1) and (2) of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the LBCA Act") provide for the designation by a local planning authority of conservation areas:

> "(1) Every local planning authority—
>
> (a) shall from time to time determine which parts of their area are areas of special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance, and
>
> (b) shall designate those areas as conservation areas.
>
> (2) It shall be the duty of a local planning authority from time to time to review the past exercise of functions under this section and to determine whether any parts or any further parts of their area should be designated as conservation areas; and, if they so determine, they shall designate those parts accordingly".

45. There is no specific statutory timeframe within which existing conservation areas should be reviewed.

46. Since the purpose of designating or extending conservation areas is to preserve or enhance areas of "special architectural or historic interest", the designation or extension of a conservation area which is motivated principally by a desire to protect a specific building and prevent its demolition will be unlawful.

47. In R (on the application of Arndale Properties Ltd) v Worcester City Council [2008] EWHC 678 (Admin), the claimant was able to show that the designation of a conservation area was effectively a pretext to prevent the demolition of a building, where that demolition was necessary in order for the claimant's development ambitions to be fulfilled.

48. Similarly in Metro Construction Limited v LB Barnet [2009] EWHC 2956 (Admin), Collins J quashed the designation as a conservation area of a former Carmelite monastery which was set in a garden of 2.5 acres surrounded by a high wall. At paragraph 10 of the judgment, Collins J observed that:

> "… It is clear that the future of unlisted buildings may be a relevant consideration if they do provide a material contribution to an area which is worthy of designation and which would be harmed if they were to be demolished. But it is apparent that the desire to protect unlisted buildings and I think a fortiori a single unlisted building cannot justify a designation unless there is an area to which that building or those buildings make a real contribution. Thus if the motive for designation is to protect an unlisted building, that will suggest that the statutory powers are being used for a wrong purpose and so, as it seems to me, the planning authority must show a clear justification for the designation."

49. Collins J concluded that designation should never be undertaken in order to bring the future of an unlisted building under control. This means the conservation area must exist independently of the building, albeit that the building may be an important feature within it (paragraph 20).

50. In Trillium (Prime) Property GP Ltd v Tower Hamlets LBC [2011] EWHC 146 (Admin), Ouseley J (at paragraph 20) observed that:

> "It is a question of fact, in my judgement, whether the Limehouse Cut Conservation Area was designated for the improper purpose of preventing the demolition of 307 Burdett Road, or whether the Council genuinely considered that the area designated met the statutory criteria. The decision would not be unlawful merely because the wish to protect 307 Burdett Road from demolition was father to the thought that a Conservation Area should be designated; what matters is whether the Council then genuinely thought that the area met the criteria …".

51. In R (Silus Investments S.A.) v London Borough of Hounslow [2015] EWHC 358 (Admin), Lang J summarised the position as follows:

> "The Court will strike down a decision to designate if the desire to protect a building was the impetus for designating the conservation area and that the designation of a conservation area was simply a pretext to prevent the demolition of a specific building or if the "true reason" is to prevent the demolition of a building …" (paragraph 35).

The law on demolition

52. As Lang J noted in Silus, the demolition of a building (subject to certain immaterial exceptions) is operational development requiring planning permission: sections 55 and 57 of the Town and Country Planning Act 1990 ("TCPA"). The permitted development rights for demolition are in Part 11 of Schedule 2 to the General Permitted Development Order 2015. Class B of Part 11 of Schedule 2, applies to the demolition of buildings. Under Class A the permitted development is "Any building operation consisting of the demolition of a building".

53. Before demolition can take place under Class B of Part 11 of Schedule 2, an application has to be made to the local planning authority for a determination whether prior approval of the method of demolition and any proposed restoration of the site is required. Demolition may then proceed if prior approval is granted, notice is given that it is not required or on "the expiry of 28 days from the applicant's giving of notice without the local planning authority determining whether prior approval is required or notifying the applicant of their determination": condition B.2(vii)(cc).

54. Importantly, however, those permitted development rights do not apply in conservation areas: . Class B of Part 11 of Schedule 2. The demolition of buildings within conservation areas is "relevant demolition" which has to be authorised by the grant of planning permission by the local planning authority or Secretary of State. Section 196D of the TCPA makes demolition in conservation areas without planning permission a criminal offence. Accordingly, once the Building was included within the SCA, planning permission was required for its demolition.

D. THE GROUNDS OF CHALLENGE

55. Ground 1 contends that the defendant acted illegally in making the decision to extend the SCA. The true purpose of including the Building in the extended area was to prevent its demolition and redevelopment. That amounted to an improper purpose and thus was contrary to law.

56. Ground 2 argues that the defendant failed to take into account the representations made on behalf of the claimant in response to the consultation exercise.

57. Ground 3 contends that the officers' reports of the defendant were seriously misleading. They omitted to mention a number of material considerations. First, they omitted the important fact that an application to place the Building on the statutory list held by the Secretary of State (in common parlance, to make it a "listed building") had been rejected by the Designation Team of Historic England on the basis that the Building did not possess the quality of design, decoration and craftsmanship to merit being of special architectural interest. The claimant says that information would have been highly relevant to Members deciding on the proposed revision to the boundary of the SCA.

58. Additionally under this ground, none of the officers' reports advised Members that the Building had not even been included in the local list of non-designated heritage assets, created by the defendant in 2004 and reviewed in 2006. On neither occasion was the Building considered sufficiently important to be locally listed, let alone to trigger a conservation area review.

59. Ground 4 concerns the purported reconsideration of the decision through the mechanism of the SR of 31 August 2022. The claimant contends that the exercise undertaken by the defendant in connection with the SR was unlawful. It is also unclear whether the SR was meant to replace the original decision to extend the SCA or, rather, to be a review of that decision in the light of information that should have been considered in the first instance, as part of the consultation exercise.

60. In any event, the claimant says any decision expressed through the SR must be unlawful because first, the Deputy Chief Executive did not have authority to reconsider the original decision; and second, because the defendant acted illegally in making the decision to extend the SRA, and the SR simply reaffirmed that unlawful decision and did not address the claimant's concerns regarding the extension. Having identified the patent illegality of the original decision, and in order to ensure that any subsequent decision was taken with a demonstrably open mind, the defendant should simply have consented to judgment in the judicial review claim, so as to facilitate such a reconsideration. Not to do so gives the unavoidable appearance of a predetermined outcome.

E. DECIDING THE CLAIM

Grounds 2 and 4

61. It is convenient to begin with grounds 2 and 4, taking them together. At the hearing, Mr Tucker KC understandably concentrated upon these grounds.

62. As I have already recorded, it is accepted that the claimant's submissions in the form of the Stoten/Pegasus representations to the consultation on the extension of the SCA were not considered before the defendant took the decision on 29 June 2022 to extend the SCA to include the Building (and some shops close to it); as well as land within Memorial Park.

63. The defendant's case in response to ground 2 is that the SR represents a proper consideration of the Stoten/Pegasus representations. Alternatively, the defendant argues that the SR shows it is highly likely that the outcome for the claimant would not have been substantially different, if the defendant had taken the claimant's representations into account when making the Decision. If that is so, then section 31(2A) of the Senior Courts Act 1981 ("SCA") requires this court to refuse to grant relief. In the further alternative, Ms Townsend says that, in the event ground 2 is made out, this court should, in the exercise of its discretion, withhold a remedy from the claimant.

64. I agree with Ms Townsend that the present case is not to be equated with the situation where an authority has decided to refuse planning permission, in which event the authority is *functus officio*. The duty in section 69(1) of the LBCA Act to review the past exercise of its duty to determine what, if any, parts of an authority's area should be conservation areas is both broad and ongoing.

65. Two important points nevertheless must be borne in mind. First, the decision to extend the SCA to include the Building and (albeit less directly) Memorial Park has a material bearing on the claimant's ability to deal with its property, in that the claimant cannot demolish the Building without express planning permission, if it is in a conservation area. Secondly, in a public law challenge of whatever kind, the courts are as a general matter cautious in their approach to *ex-post facto* reasoning.

66. With these points in mind, it is necessary to consider the status of the SR. Mr Tucker questioned what purpose the SR was supposed to have. I find he was right to do so.

67. The recommendation at paragraph 5.1 was that the "report is agreed and that no changes made to the Appraisal or the Staines Conservation Area boundary from that approved in June 2022". The SR was addressed to two named Councillors, respectively the Chairman and Vice-Chairman of the E&SC. It is, however, unclear whether they made a decision in respect of the SR. Ms Townsend was unable to shed any relevant light on the matter. Instead, she concentrated on section 31(2A) of the SCA and the issue of discretion. Whatever its formal status, Ms Townsend submitted that the SR shows that the defendant's Officers would still have advised Members to accept the recommendations of the Appraisal, and so extend the SRA to include the Building/Memorial Park, even if the Stoten/Pegasus representations had been considered, as they ought to have been, as part of the consultation process leading to the Decision.

68. The defendant's case, accordingly, depends upon the SR being, in its own terms, free from material legal error. Having considered the written materials and the oral submissions, I find that the SR is flawed for the following reasons.

69. Despite the bald assertion at paragraph 3.1 that " the question where the Conservation Area boundary should lie has been considered afresh", this is not borne out by a proper reading of the document (applying the Bloor criteria). I agree with Mr Tucker that the entire thrust of what follows in paragraph 3.1 and its various bullet points, together with the conclusions in paragraphs 4.1 to 4.3, show that what the authors of the report were doing was to take the Decision as their starting point and then see whether anything in the Stoten/Pegasus representations was sufficiently persuasive to change that decision.

70. Importantly, the SR seeks to row back from the May OR, in the face of what was said in the Stoten/Pegasus representations about the views of Historic England on the Building. The SR contends that (i) the tests for including a building within the National Statutory List of Buildings of Special Architectural or Historic Interest and (ii) the criteria under section 69 for designating a conservation area are "distinct and different".

71. There is a fundamental problem with this. Section 69 (1)(a) states in terms that what is "desirable to preserve or enhance" by designation as a conservation area are "areas of special architectural or historic interest". It is quite evident from the Appraisal, quoted at length in paragraph 3.3 of the May OR, that great emphasis was placed, with regard to the proposed extension in respect of the Building, upon the architectural interest of the Building (see above). This was emphasised by the fact that the buildings to the north-east were proposed to be included in the extension because they "contribute to the setting of Debenhams". The belated suggestion that these shop buildings may themselves be of architectural relevance is itself problematic. It is a good exemplar of why *ex post facto* reasoning tends to be viewed with caution, if not suspicion.

72. The extension of the SCA to cover Memorial Park and the adjacent car park was, likewise, heavily justified in the Appraisal by reference to the Building. The Appraisal said:

 - " the former Debenhams building is clearly visible from Thames Street and from the carpark on Thames Street, adjacent to Memorial Park. The view from the Thames Street shows the long and undulating side elevation of the Debenhams building which is not visible from Clarence Street. It shows another aspect of the high architectural quality of this large building that influences so much of the Conservation Area."

73. It was, accordingly, highly relevant that Historic England had declined to list the Building, for the reasons it gave.

74. These reasons are to be found in the Stoten/Pegasus representations. Historic England described the Building as "… comparable in quality to a very large number of high street buildings of the inter-and post-war period across the country; it does not possess the quality of design, decoration or craftsmanship to mark it of special architectural interest".

75. In her expert view, Ms Stoten regarded the Building as coming "nowhere close to being considered of Listable quality". Her reasoning was that, had Historic England considered the Building to represent a "more marginal case" for listing, it would have undertaken a fuller assessment. Historic England did not do so.

76. Faced with all this, the SR needed to grapple with the substance of what was being said in the Stoten/Pegasus representations about the nature and significance of the Building, instead of dismissing the issue in a manner that involved a significant *volte face* from the position previously taken.

77. Ms Townsend submitted that the SR was written by Officers who are experts in their field. The inescapable fact is, however, that Dr Fry had been commissioned to produce the Appraisal, recommending extensions to the SCA, and that her expertise was stressed by the Officers in their reports.

78. Furthermore, Dr Fry was consulted by Officers in connection with the SR. This can be seen from the tenth bullet point in paragraph 3.1 of that document.

79. At paragraph 4 of her witness statement, Ms Heather Morgan, the defendant's Group Head Regeneration and Growth, says that before she "went on annual leave I read the claimant's representations prepared by Gail Stoten of Pegasus and Dr Fry's response to them. They did not alter the view I had in June".

80. As well as underscoring the point made by the claimant, that the defendant approached its belated consideration of these submissions from the wrong starting-point, the defendant was unable to inform the court what Dr Fry's response had been at that time. During the short adjournment on 21 February 2023, Ms Townsend obtained from her client copy emails of 30 and 31 August between Ms Spinks, the defendant's Planning Development Manager, and Dr Fry. It was, however, common ground at the hearing

that the dates of these emails mean they cannot be the response referred to by Ms Morgan. What that response amounted to remains unknown to the court and the claimant.

81. Dr Fry's e-mail of 31 August 2022 says that she had been "looking at the amended report and the objection from Gail Stoten and it seems to me that all the points they make have been answered in the delegated report". Dr Fry then makes reference to one particular aspect of the submissions, describing it as "disingenuous".

82. The nature and extent of the defendant's interaction with Dr Fry are plainly relevant to ground 2. It is a matter of some regret that the information adduced at the hearing was not provided earlier. It remains puzzling what further input Dr Fry may have had in connection with the SR. As matters stand, the conclusion can only be that Dr Fry's input was perfunctory and that, from what this court has been shown, it was very much in the nature of a "defensive" approach.

83. In so saying, I wish to make it clear that there is no question as to Dr Fry's expertise or professionalism. She was placed in a very difficult position, not only as a result of the defendant's failure to include the Stoten/Pegasus representations in the responses considered prior to the Decision but also because of the way in which the defendant attempted to address that failure, which appears to have left Dr Fry with insufficient time to do more.

84. Standing back, I find that the SR does not, in its own terms, represent a legally satisfactory response to the fact that the Stoten/Pegasus representations were not considered at the time they should have been. The flaws in the SR are such that section 31(2A) of the SCA can have no bearing. There is more than a fanciful prospect of a different outcome, were the impugned decision to be taken afresh. *A fortiori,* there is no legitimate basis for withholding relief.

85. In the circumstances, it is unnecessary to reach a decision on whether there was lawful delegation to Mr Collier, the Deputy Chief Executive, as opposed to Ms Morgan. It was to her that the defendant's E&SC had delegated authority, in consultation with the Chair and Vice Chair, in relation to the decision to amend the SCA.

86. At the hearing, Mr Tucker did not press this aspect of the ground 4 challenge. Had he done so, it would have been necessary to consider whether delegation to a particular officer (A) impliedly includes delegation to officer B, where officer B is more senior to officer A. That potentially interesting question will have to await another day.

87. In conclusion on grounds 2 and 4: (i) the defendant failed to take account of the claimant's representations in response to the consultation at the proper time; (ii) it did not do so in a legally adequate manner in the SR (if that was what the defendant purported to do in the SR); and (iii) having regard to (ii), it cannot be said that it is inevitable or even highly likely the outcome would not have been substantially different if the conduct complained of had not occurred.

88. Grounds 2 and 4 accordingly succeed.

Ground 3

89. Ground 3 argues that the Officers' reports were seriously misleading in that they omitted to mention the fact that the application to place the Building on the statutory list had been rejected by Historic England; and that neither the May OR nor the June OR advised Members that the local list of non-designated heritage assets, created in 2004 and last reviewed in 2016, had included the Building.

90. In view of my conclusions on grounds 2 and 4, it is unnecessary to spend much time on this ground, which is closely related to them. The claimant submits that there are clear parallels between the present case and those of Trillium, where Members were not told that the area in question had previously been rejected for designation; or that the building in question had been refused local listing because of its lack of architectural merit. In that case, Ouseley J held that the Officer's report failed to give Members clear advice as to the proper basis for considering designation, which they needed. Accordingly, the decision was quashed: paragraph 163 of the judgment.

91. The defendant submits that the facts of the present case are distinguishable from those of Trillium. As the Appraisal made clear, it was the contribution made by the Building to the character/appearance of the SCA that had to be considered and which justified the decision to include the Building within the extended SCA.

92. I do not accept the defendant's submission on this ground. Although I acknowledge that such a contribution is, of course, relevant to the exercise which must be undertaken pursuant to section 69, the alleged architectural quality of the Building itself was an important, if not central, consideration in the Appraisal. It also has to be borne in mind that Members considering the May OR, and those considering the June OR which led directly to the impugned decision, would have been aware of the controversy aroused locally by the stated intention of the claimant to demolish the Building. Indeed, ground 1 centres on what the claimant says was an improper purpose behind the defendant's setting in motion the process leading to the two extensions to the SCA.

93. Regardless of the resolution of ground 1, I find that it is plain Members would have had at the forefront of their minds the issue of the architectural merits or otherwise of the Building. I therefore regard the parallels with Trillium and the present case as striking.

94. In the present case, there was a clear need to provide Members with a fair and balanced analysis of the architectural worth of the Building. This included informing them of the outcome of the approach made to Historic England regarding possible statutory listing. Although that outcome was not determinative of the view Members could have taken of the Building in the context of a review under section 69, it was obviously material.

95. So too was the fact that, in both 2004 and 2016, the Building had not been regarded as sufficiently important to merit even local listing. Whilst views can, of course, change over time, an understanding of that fact was necessary to reach an informed decision.

96. I do not consider the defendant can resist ground 3 on the basis that Members could have been expected to be aware of these matters. It has not been shown that their local knowledge extends to being aware of negative decisions on potential listing on the part of Historic England. Likewise, Members may not have been aware (or may have forgotten about), the previous local list review exercises.

97. Ground 3 accordingly succeeds.

Ground 1

98. Ground 1 contends that, on a fair and proper consideration of the factual context, the court should find as a matter of fact that the primary motivation of the defendant for making the relevant extensions to the SCA was not the protection of the character and appearance of that area but to prevent the demolition of the Building and the subsequent redevelopment of the site.

99. In Arndale, Sullivan J emphasised that it was necessary to "look at all the evidence in the round" (paragraph 50). I shall endeavour to do so.

100. Although the claimant accepts that the defendant did not make the request to Historic England for the Building to be listed (the request being made in late 2021, after the claimant's intentions became known), it is evident from emails involving the defendant's Councillors and Officers that some Councillors, at least, were concerned to do everything possible to prevent demolition of the Building. To that end, questions were asked about the significance of local listing. It was in this environment that the Appraisal process began. That process, according to the claimant, was initiated by and had as its aim the prevention of demolition, by including the Building within a conservation area.

101. Mr Tucker accepted that the emails did not constitute, in his words, "a smoking gun". He submitted, however, that, looked at in the round with the other evidence, including the timing of the commencement of the section 69 process and the claimant's application to the defendant for planning permission to demolish and construct a replacement building of site, the court could be satisfied that an improper purpose had driven the Decision.

102. Ms Townsend drew attention to the fact that the minutes of the E&SC of 10 May 2022 recorded concern being expressed at the length of time since the last appraisal of the SCA. Ms Townsend emphasised that the duty under section 69 (2) is a continuing one, under which the defendant must "from time to time... review the past exercise of functions under this section …".

103. Ms Townsend also submitted that the defendant had genuinely undertaken a consultation exercise, whereby everyone - including the claimant - had been given an opportunity to make submissions. It was unfortunate that, by accident, the Stoten/Pegasus representations had not been considered at the correct time.

104. So far as the emails were concerned, Ms Townsend drew attention to the fact that one of the exchanges between an Officer and a Councillor, relied on by the claimant, occurred some six months before the Decision was made. This concerned the effect of including the Building on the local list. The Councillor's concern about demolition was, according to Ms Townsend, perfectly proper. The advice given by the Officer was lawful. The Officer in question had pointed out that the approach which would be most relevant in the case of the Building was not the CA review, then underway, but, rather, reaching a decision on the claimant's planning application. By the same token, the Officer said that the CA review relied on " professional advice and assessment and

consultation is expected, with owners being advised of the intention to locally list an asset".

105. As was pointed out by Collins J in Metro Construction Ltd, there is nothing wrong with the desire to protect a building being an impetus for the designation of a conservation area. What it must not be, however, is the impetus.

106. In the same vein, as Lang J held in Silus, a designation of a conservation area is not unlawful because the process was prompted by a threat to demolish a particular building. Thus, a desire to protect an unlisted building from demolition cannot justify designation; but the existence of a particular building may contribute to the proposed area and a threat of demolition may prompt the taking of a decision whether to designate (paragraphs 37 and 38).

107. Ms Townsend drew particular attention to paragraph 138 of Trillium, where Ouseley J concluded "… that the evidence is not strong enough to show that Councillors were adopting an approach to the justification for designation other than that recommended by officers or for reasons other than those which officers presented to them …". At paragraph 141, Ouseley J concluded that "… the merits of designation and the timing and manner of the decision were inextricably but not unlawfully linked in the officers' minds. In my judgment, they remained so in the Cabinet's mind, adopting what officers recommended for the reasons officers had given …".

108. Considering the evidence as a whole, I have concluded that Ms Townsend's submissions have force and that ground 1 must fail. The evidence does not show more than that the desire to prevent the demolition of the Building was "*an* impetus" rather than "*the* impetus" for the relevant extensions to the SCA.

109. Ground 1 accordingly fails.

F. DECISION

110. This judicial review succeeds on grounds 2 to 4.