Neutral Citation Number: [2019] EWHC 2631 (Admin)

Case No: CO/384/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 October 2019

Before :

SIR DUNCAN OUSELEY
Sitting as a High Court Judge

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Between :

SATNAM MILLENIUM LTD	**Claimant**
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
-and-	**Interested Party**
WARRINGTON BOROUGH COUNCIL	

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Christopher Lockhart-Mummery QC and Heather Sargent (instructed by **Town Legal LLP**) for Satnam
Hereward Phillpot QC (instructed by **GLD**) for the **Secretary of State**
David Manley QC (instructed by the **Solicitor to Warrington Borough Council**) for Warrington Borough Council

Hearing dates: 16 and 17 July 2019

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Approved Judgment

Sir Duncan Ouseley:

1. Satnam Millenium Ltd, Satnam, was refused planning permission by Warrington Borough Council, WBC, for a development which was described as a new residential neighbourhood. It included up to 1200 dwellings, and other facilities appropriate to a neighbourhood. Satnam appealed against that refusal; the appeal was heard at a public Inquiry over a number of days between April and July 2018, before a Planning Inspector. He reported to the Secretary of State for Housing, Communities and Local Government who, in a decision letter, DL, dated 20 December 2018, accepted the Inspector's conclusions and recommendation, and accordingly dismissed the appeal.

2. This is an application under s288 Town and Country Planning Act 1990 by Satnam questioning the validity of that decision. It does so on four grounds: (1) the Secretary of State had misinterpreted or misapplied paragraph 11(d) of the National Planning Policy Framework, the Framework; (2) he had erred in law in his approach to whether the proposed development was deliverable; (3) he had erred in law in applying the criminal standard of proof to the assessment of traffic impact; (4) the decision was vitiated by the apparent bias of the Inspector shown in his conduct of the Inquiry and site visit.

The Inspector' s Report

3. The material policies of the Core Strategy were described by the Inspector in IR section 5. QE6 states that the Council will only support development which would not lead to an adverse impact on the environment or amenity of future occupiers or would not have an unacceptable impact on the surrounding area. MP1, on general transport principles, sought to ensure that new development reduced the demand for private car use, amongst other matters, and mitigated the impact of development on, or improved the performance of, the transport network. MP4 dealt with public transport: development should be located where it had easy access to public transport, and additional public transport infrastructure should be provided where the existing infrastructure was in need of improvement. MP7, on Transport Assessment and Travel Plans, "requires all developments to demonstrate that they will not significantly harm highway safety and that additional trips can be adequately served by the transport network, providing appropriate mitigation to the satisfaction of the local highway authority."

4. At IR 7.1, the Inspector summarised the main areas of disagreement between the parties, after the 12 day Inquiry, as follows:

> "The substantive areas of disagreement between the parties were a) whether there is sufficient evidence provided to enable one to reach a conclusion that the appeal proposal would not have adverse air quality, noise and highways impacts and b) whether the proposal would deliver the social infrastructure necessary to support it."

5. The Inspector set out his conclusions on the four main considerations he identified in section 13 of his Report, before drawing the threads together and striking the overall planning balance in section 14. Those four main considerations were, IR13.6:

> "The effect of the proposed development on the safety and efficiency of the local and strategic highway network; the effect of the proposed development on the character of the area; the effect of the proposed development on local air quality; and whether the appeal proposal can be regarded as deliverable."

6. There had been no dispute at the Inquiry about those issues being relevant.

7. On highways, in simple terms, Satnam contended that WBC had failed to show that there would be severe residual impacts from the development on the highway network; WBC contended that it would only be for WBC to do so if the developer had produced a competent and reliable Transport Assessment. Here, it had not done so, because it had inexplicably not used up to date, 2017, origin and destination data in its traffic modelling, nor had it used the WMMTM 2016 model, but instead had used the 2008 version. This too fed into doubts about the air quality assessment.

8. The Inspector said, in IR [13.8], that the evidence of WBC, local residents, and his own experience from his many car journeys in the area made it abundantly clear:

> "that the appeal site is situated in an area that suffers from high levels of traffic congestion, chiefly at peak periods in the morning and evening, on a daily basis. The M62 and A49 appeared to be particularly badly affected. I have no reason to doubt that congestion is more acute still when there are accidents on the M62, resulting in drivers diverting on to local roads."

9. After referring to other problems, he said at IR [13.9], that the concerns of WBC, Highways England, Cheshire Constabulary and of local residents in relation to highway safety and efficiency were readily understandable. He continued:

> "13.10 Notwithstanding the lengthy exchanges of evidence on this issue, the substantive dispute between the main parties boils down to whether the appellant's use of superseded local highways data to inform their transport assessment (TA), rather than the quality of the transport work *per se*, matters."

10. The Inspector then discussed the various technical issues; he could find no compelling reason why the WMMTM 2016 model had not been used or at least the up to date origin and destination data. There had even been an adjournment to enable further work to be done by Satnam's highways consultant. Satnam had agreed to Highways England carrying out additional modelling of the relevant junction of the M62; the Inspector expressed anxiety about certain assumptions it made, and aspects of its output. He described various problems on two local roads.

11. In IR [13.35], he said that the significance of the differences between the models and data:

> "was the focus of much debate at the Inquiry, not least because the Council accepted that any mitigation needed at affected junctions (that have been modelled) could, in principle, be

> accommodated within the bounds of the existing highway. That said, it seems reasonable to have, in advance, clarity about the full gamut of potentially affected junctions as well as some degree of assurance, rather than a reliance on theoretical solutions, that a full range of junction works could be delivered without unexpected hiccups or knock-on effects.
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> 13.36 Ultimately, this is a matter of judgment. It could be that the results of the [appellant's work] give an accurate picture of the impact of the appeal scheme on the highway network, insofar as safety and efficiency are concerned. In my view, however, there is sufficient uncertainty, as well as an acceptance by the appellant that one would usually be required to use the most up-to-date data at the point of decision-making, that a precautionary approach is entirely appropriate in this instance."

12. The Inspector was mindful of alterations to junctions in the immediate area in the interests of safety, reduction of volume of traffic and its speed, and improving conditions for pedestrians, cyclists and buses. At IR [13.37], he said:

> "One would wish to be certain that the appeal proposal would not undo any benefits of such work (indicative of an already strained network) by giving rise to works based upon assumptions from now superseded data."

13. He continued:

> "13.38 There is no dispute between the main parties that the Council does not demonstrate, nor seek to demonstrate, that the appeal proposal would give rise to unacceptable highway safety impacts or severe residual cumulative impacts on the road network. The appellant is, therefore, dismissive of the Council's case. This rather misses a fundamental point.
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> 13.39 It is for the appellant to demonstrate, beyond reasonable doubt, that its scheme would not give rise to such effects, not for the Council to demonstrate that it would not. I do not consider that the appellant has done this, given the more recent origin/destination data available and the potential implications of it for the local and strategic highway network in an area with evident highway capacity issues.
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> 13.40 To be clear, I am far from unsympathetic to the appellant's predicament order what appears to be, for whatever reasons, a protracted and difficult process to achieve *any* sort of TA. I am also mindful that one must draw a line somewhere, in so far as evidence gathering in modelling is concerned, if planning decisions are ever to be made. The Secretary of State may well consider that this is one of those instances and that

> the appellant's work, the lack of origin/destination data validation aside, is sufficiently robust that it is fit for purpose.
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> 13.41 In my judgment, however, in this instance there does not appear to be any compelling reason why the most up-to-date modelling data, being WMMTM 2016, has not, or could not, be used to provide the most accurate and reliable picture the impacts of the appeal scheme.
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> *Conclusion on the highway safety and efficiency*
>
> 13.42 I conclude that, overall, the appeal proposal has failed to demonstrate that it would not create an adverse impact upon the safety and efficiency of the local and strategic highway network. It would conflict with Core Strategy policy MP7 and relevant paragraphs of the Framework, the requirements of which are set out above.
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> 13.43 The appellant implied in Closing, albeit not terribly forcefully, that the relevant Core Strategy policies may set a lower bar than the Framework with regard to when highways issues may constitute a reason for refusal. As such, only limited weight should be given to them.
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> 13.44 The word "severe" may not feature in policy MP7 but that does not in my view, render the policy inconsistent with the Framework. Both clearly seek to ensure that highway efficiency is not compromised by new development; severity is a matter of judgment. Either way, with semantics aside, my concern remains that the evidence does not allow one to be satisfied that the requirements of either the development plan or the Framework have been met in this regard. A precautionary approach is appropriate."

14. Satnam had in effect set aside its initial air quality work; additional information was submitted during the Inquiry to explain it, but the Inspector had not found the explanations to be "in all areas entirely satisfactory." In IR 13.56-63, he explained why. Many of his concerns related to the traffic data used in the air quality modelling, both where it was consistent with the data used in the highways impact assessment and where it was not.

15. The Inspector said at IR13.64:

> "As with its approach to the appellant's highways work, the Council does not seek to identify any significant adverse impacts that arise from the appeal proposal. Again, therefore the appellant dismisses the Council's case and, again, I must beg to differ."

16. The site was in a very sensitive location and the public policy focus on air quality made it "imperative that one can be satisfied that the issue of air quality has been

robustly addressed." The evidence lacked clarity in places and the necessary supporting detail for some of the conclusions, which, together with his doubts about the input from the transport modelling, meant that "precaution is warranted". Overall, the proposal had "failed to demonstrate" that there would be no adverse impact upon local air quality. It would conflict with policy QE6 and the relevant paragraphs of the Framework; IR 13.65-67.

17. The Inspector then turned to whether the proposal could be regarded as deliverable. He identified two issues at IR13.68: Satnam did not control the entirety of the appeal site, and appeared to lack support from a bus operator to run the proposed service through the site. He took first the ownership of the Mill Lane playing fields, through which the key access route into the eastern part of the site and serving up to 700 dwellings, would run, as well as providing the land for some dwellings. The playing fields were owned by Homes England. He said at IR13.70 that the evidence before him:

> "in the form of direct correspondence solicited by me from Homes England shows consistently that there is not, nor does there appear ever to have been, an agreement, formal or otherwise, between Homes England and the appellant in relation to the sale, transfer or development of the playing fields. Homes England has also consistently declined to be a party to the s.106 agreement."

18. The fact that Homes England had never submitted this land as part of any call by the Council for sites available for housing, supported the prima facie evidence that it was not presently available for development. In the absence of evidence that it was available for the development proposed "it is very difficult to see how the scheme can be regarded as deliverable." Indeed, all the transport plan and travel assessment assumed access would be achieved over that land. "The appellant's view that it is "*fanciful*" that the playing fields would not be brought forward is itself quixotic given the lack of any evidence to support it." Even if development on the playing field site were inevitable, it would not necessarily be for this scheme or sold to this appellant; IR13.73.

19. Satnam accepted that its bus service proposals were a key plank of the development, and needed as mitigation for access problems. The Inspector then said this:

> "I expressed reservations in advance of and during the Inquiry about whether the obligations would, in fact, provide an adequate period of financial support for the new service, as well as concerns about the lack of any recent evidence of commitment from a service provider to the proposed routes. Indeed, the most recent evidence before me, rather than being a commitment to the appeal scheme, was one of objection to the Option B proposal and a lack of willingness to consider anything else until that was resolved.
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> 13.76 On the penultimate day of the Inquiry, Cllr Cathy Mitchell, Chair of Network Warrington/Warrington's Own Buses, appeared at the Inquiry…. She confirmed that there was

> no agreement in place between the bus company and the appellant to provide a service to the site. This was later confirmed by a letter from the Managing Director of Warrington's Own Buses."

20. Whilst he would not expect a legal agreement in place, he would expect "some form of recent written commitment in place from a local bus service provider giving an assurance that a "*key plank*" of the travel strategy would be deliverable." No such assurance was before him; IR13.79. "Indeed, the evidence points quite emphatically in the opposite direction."

21. So, at IR13.81, the Inspector concluded that he was not persuaded that the appeal scheme was deliverable as proposed. The uncertainties over the availability of the playing fields for vehicular access and bus services, and over the proposed bus service itself, conflicted with policies MP1 and 4. Nor, IR13.82, was the site "available for housing now" and thus "deliverable", and so it could not make the vital contribution claimed by Satnam, to the forward supply of housing sites.

22. At section 14, the Inspector set out his overall planning balance. He began at IR 14.1-2 as follows:

> "14.1 I have found that it has not been proven, to my satisfaction, that the appeal proposal would not have adverse impacts upon the safety and efficiency of the highway network or upon local air quality. I have also found that it would have an adverse impact upon the character of the area. In addition, I have concluded that, on the basis of the evidence before me, the scheme does not appear to be deliverable as proposed.
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> 14.2 In reaching these findings, I have found conflict with a range of Core Strategy policies, to which I attributed full weight. I find that the appeal proposal would conflict with the development plan when taken as a whole and that very significant weight should be attached to this conflict."

23. However, as it was common ground that WBC could not demonstrate that it had a five-year supply of housing land, paragraph 11 of the Framework, a significant material consideration, meant that he had to consider whether the adverse impacts of granting planning permission would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework as a whole. Assuming that it was deliverable, it would provide up to 1200 dwellings, 30% of which would be affordable in a borough with a significant undersupply; this was of significant weight. WBC agreed with Satnam that the proposal had the potential to deliver transformational change to the area; some areas to the south of the site were among the more deprived in England. He then said this at [14.7], after pointing out that areas to the north, east and west were considerably less deprived, and it is relevant to the apparent bias ground:

> "14.7 In addition, local residents, who attended the Inquiry consistently, often in large numbers, spoke eloquently and at length in opposition to the appellant's suggestion that their area

> was in need of being transformed in the ways proposed, or that they lived in a "*slightly forgotten part of Warrington*". They were firmly of the view that the suggested benefits of the appeal scheme will be anything but. No evidence was presented, either by the Council or the appellant, which suggested the local residents had been asked what, if anything, they would find of benefit to their community.
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> 14.8 Nor was there any cogent explanation, from either of the main parties, how this transformational social change would be manifested. It might be that the scheme would, eventually, result in a more mixed community in the immediate area but there is no substantive evidence to support such a view. The site is on the edge of, rather than within, the more deprived area, with ready access to less deprived areas. It would, in effect, be a self-contained extension, with its own shops, primary school and sports facilities, rather than an integrated development that may serve to rebalance the socio-economic make up of the area to the south, even if that was desirable."

24. Having dealt with the new school, a necessary corollary of the scheme rather than a benefit, the proposed local centre for an area well served by convenience stores and pub and public houses, and the proposed sports hub, which could be of greater benefit though chiefly mitigation for the loss of the Mill Lane playing fields, he said at 14.11 that he was mindful of the views of residents living near and using those playing fields who would lose green space and an informal recreational area, to their detriment. So he gave only moderate weight to this "transformational" factor. He gave moderate weight to the economic benefits, little weight to the income advantages to WBC, concluded that overall there would be adverse ecological disadvantages, and a very limited advantage from additional on-site open space, leading to environmental benefits of limited weight.

25. At 14.20, he concluded that the adverse impact significantly and demonstrably outweighed the benefits, when considered against the policies and the Framework taken as a whole. It would not represent a sustainable form of development. He added "Indeed, the issues arising from either the scheme's highways or air quality modelling work would alone be sufficient to lead me to this conclusion."

26. He then recommended that the appeal be dismissed.

The decision letter, DL

27. At DL [4], the Secretary of State said, in a simple sentence upon which Mr Phillpot QC, for him, placed considerable weight in his submissions:

> "For the reasons given below, the Secretary of State agrees with the Inspector's conclusions and agrees with his recommendation. He has decided to dismiss the appeal."

28. The DL dealt with the main issues. First was the effect of the development on the safety and efficiency of the local and strategic highway network. At DL [13], the Secretary of State said:

> "For the reasons given at IR 13.8 -13.4.1, the Secretary of State agrees with the Inspector that, overall, the appeal proposal has failed to demonstrate that it would not create an adverse impact upon the safety and efficiency of the local strategic highway network, so that it would conflict with CS policy MP7 (IR 13.42). He also agrees with the Inspector that, while the word 'severe' does not appear in policy MP7, that does not render it inconsistent with the Framework. Overall, the Secretary of State agrees with the Inspector that the requirements of neither the development plan or the Framework have been met in this regard, so that a precautionary approach is appropriate (IR13.43-13.44)."

29. Mr Lockhart-Mummery QC for Satnam pointed in particular to the language of the first sentence as reflecting the language of the Core Strategy policy MP7, but not the language of the Framework.

30. The Secretary of State agreed that the proposal would have an adverse effect on the character of the area. On local air quality, he said at DL [15]:

> "For the reasons given at IR 13.55-13.65, the Secretary of State agrees with the Inspector that the evidence provided lacks clarity in a number of areas while the appeal site is in a very sensitive location regarding air quality management. Overall, therefore, the Secretary of State agrees with the Inspector's conclusion at IR 13.67 that the appeal proposal has failed to demonstrate that it would not give rise to an adverse impact upon local air quality-thereby conflicting with CS policy QE6."

31. Under the heading "Whether the proposal can be regarded as deliverable", the Secretary of State said this:

> "16. The Secretary of State agrees with the Inspector at IR 13.68 that there are 2 issues, namely, that the appellant a) does not have control of the entirety of the appeal site and b) does not appear to have support from a bus operator to run the proposed service through the site."

32. The part it did not control was a relatively small part of the site to the east but it was of particular importance because the principal highway access into the proposed neighbourhood would be created over it, and new bus services for the neighbourhood would use it. It was owned by Homes England. The site is called the Mill Lane playing field site.

33. The Secretary of State continued:

> "17. For the reasons given at IR13.69-13.72. the Secretary of State agrees with Inspector at IR13.72 that, without any evidence that the Mill Lane playing field site is available for the development proposed, it is very difficult to see how the scheme can be regarded as deliverable as there is no reason to consider that the site would necessarily be sold to the appellant or that it would come forward as part of, or linked to, this scheme.
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> 18.Turning to the appellant's bus service proposals (IR 13.74-13.80), the Secretary of State agrees with the Inspector that it would be reasonable to expect some form of recent written commitment from a local bus service provider that an enhanced bus service would be deliverable and confirming that the s.106 obligations are fit for the purposes expected, whereas the evidence points in the opposite direction (IR 13.79).
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> 19. Overall, therefore (IR13.69-13.82), the Secretary of State is not persuaded that the appeal scheme is deliverable as proposed and considers that there is conflict with CS policies MP1 and MP4."

34. Planning conditions were relevant, but the Secretary of State did not consider that they would overcome his reasons for dismissing the appeal. Satnam had tried to address some of the deliverability issues in the s106 agreement which it and WBC had signed, including the fact that Satnam did not control the whole site. At DL [22], the Secretary of State, concerned that Satnam did not have control of the whole appeal site, said:

> "Therefore, given that there are parties with interests in the site who are not signatories to the obligation, the Secretary of State is not satisfied that the appellant, or any successors, would have sufficient control to ensure that the scheme could be implemented as proposed; and so he does not consider that the obligation overcomes his reasons for dismissing the appeal and refusing planning permission."

35. The Secretary of State's next heading was "Planning balance and overall conclusions". The language of the two paragraphs I quote is crucial to ground 1:

> "23. For the reasons given above, the Secretary of State considers that the appeal scheme is not in accordance with CS Policies MP1, MP4, MP7, QE6 and QE7, and is not in accordance with the development plan overall. He has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in accordance with the development plan.
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> 24. As the CS has no housing requirement policies [as a result of their being quashed], the Council is unable to demonstrate a five year supply of deliverable housing land. Hence, paragraph

> 11(d) of the Framework indicates that planning permission should be granted unless: (i) the application of the policies in the Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or (ii) any adverse impacts of doing so significantly and demonstrably outweigh the benefits, when assessed against policies in the Framework taken as a whole. The Secretary of State is not satisfied that there would be no adverse impacts on the efficiency and safety of the local and strategic network or on local air quality and he gives significant weight to these factors. Of even greater weight, however, is the fact that he considers the scheme is not deliverable as proposed. He also affords moderate weight to the adverse impact upon the character of the area. The Secretary of State recognises that, if the scheme were to be considered deliverable, the fact that it could provide up to 1200 dwellings, 30% of which would be affordable, would attract significant weight. However, he considers that the merits of the scheme need to be left for further consideration once the issue of control over all parts of the site has been resolved and it becomes capable of implementation."

The 2018 National Planning Policy Framework, NPPF or Framework

36. Two paragraphs of the Framework, using the 2018 version numbering, are relevant to highways:

> "109. Development should only be prevented or refused on highways grounds if there would be an unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe.
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> 111. All developments that will generate significant amounts of movement should be required to provide a travel plan, and the application should be supported by a transport statement or transport assessment so that the likely impact of the proposal can be assessed."

37. Its policies on air quality state that new development should not contribute to air pollution, should ensure that new development is appropriate for its location having regard to the likely effects of pollution on health, as well as the potential sensitivity of the site or wider area to impacts that could arise from the development; opportunities to improve air quality or mitigate impacts should be identified.

38. The Framework also defines "deliverable," in the context of housing development and a five-year supply of housing:

> "To be considered deliverable, sites for housing should be available now, of a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years."

Ground 1: misinterpretation or misapplication of paragraph 11(d) of the Framework

39. DL24 is crucial to this ground. In it, the Secretary of State was considering the operation of what in the jargon is known as the "tilted balance," in paragraph 11(d) of the Framework. Although the wording of paragraph 11 has some oddities, there was no issue before me but that the Inspector and Secretary of State were right to consider the tilted balance, particularly in the light of footnote 7 explaining certain circumstances in which a plan is "out of date". The issue before me concerns paragraph 11(d)(ii), which is sufficiently set out in DL24, and the possible interaction in DL24 between the Core Strategy policies of the development plan, and the policies in the Framework. A further issue concerns whether the Secretary of State treated the lack of deliverability as a factor, and a significant factor at that, against the grant of planning permission, and if so whether that was lawful.

40. Mr Lockhart-Mummery submitted that, on the true interpretation of paragraph 11d(ii), the Secretary of State ought to have identified the adverse impacts and the benefits, and then weighed one against the other. The way in which he dealt with the Framework in DL24 demonstrated that he had misinterpreted it, the error identified in the fifth of the familiar principles re-stated by Lindblom LJ in *St Modwen Ltd v SSCLG* [2017] EWCA Civ 1643, [2018] PTSR 746**.** First, he did not conclude that there would be adverse highway or air quality impacts; he only concluded that he "was not satisfied that there would be no adverse impacts" in those respects, and he gave "significant weight to these factors." Here, the Secretary of State was applying the Framework policies, rather than the development plan policies. They were different in the way adverse impacts had to be shown; the development plan policies required the developer to show that there would be no adverse impacts whereas the Framework in paragraph 109 would require the Inspector to be satisfied that there would be adverse impacts and severe ones too.

41. The Secretary of State, second, had then given "even greater weight" to his conclusion that the scheme was "not deliverable as proposed"; I note those last qualifying words. The merits of the scheme had to be left for further consideration once the issue of control over the whole site had been resolved, and it was capable of implementation. However, if the scheme were not deliverable as proposed, there would no impacts at all, let alone a greater adverse factor.

42. The Secretary of State, third, and related, failed in carrying out the balancing exercise to bring into account the benefits of the scheme. The housing benefit was not said to attract considerable weight; it was merely that it would do so if the scheme were deliverable. But the same would apply to the adverse effects which he had allowed for.

43. Mr Lockhart-Mummery observed that the Secretary of State's approach in DL24 contrasted with the approach of the Inspector to the overall balance, which the Secretary of State did not in fact adopt. The Inspector had not fallen into error. In IR 14.5, he had accorded significant weight to the housing benefits, on the assumption that the scheme would be implemented. He had also identified other moderately weighty benefits, in the overall "transformational" effect and economic benefits, and a more limited one in environmental benefits, which the Secretary of State had left out of account. IR14.20 showed how the weighing exercise should be done.

44. Mr Lockhart-Mummery put his case on ground 1 on the alternative basis that the Secretary of State had misapplied paragraph 11d of the Framework. This contrasts with the primary contention, which is an error of law in interpretation, and attacks instead the rationality of the planning judgment, focusing on the lack of a rational evidence base for the conclusion. The submissions here focused on the IR, rather than the DL, but it was contended that in this respect, the error of the Inspector had been adopted by the Secretary of State.

45. The Inspector at IR13.38 had found that there was no dispute but that WBC did not demonstrate or even seek to demonstrate that there would be unacceptable highway safety impacts or severe residual cumulative impacts on the road network. He did not then himself identify any adverse effects. Air quality was dealt with in IR13.64 in the same way. The DL adopted that approach in DL13, 15 and specifically, at DL24, the Secretary of State gave significant weight to the fact that he was not satisfied that there would be no adverse effects in respect of those issues. It was not rational to give weight to that fact; there was no evidence that an adverse effect would arise, nor was it lawful to apply paragraph 11d of the Framework in that way.

46. Mr Phillpot QC for the Secretary of State characterised Mr Lockhart-Mummery's submission as being that paragraph 11d of the Framework required all the benefits and adverse impacts of a proposal to be identified in one place, and for how they were balanced against each other to be expressly recorded, whereas paragraph 11d contained no express requirement as to how that balancing exercise was to be recorded. It was flexible policy guidance. How the striking of a balance was to be recorded was governed by the general principles on reasons in DLs.

47. He had failed to identify what the correct interpretation was and how the interpretation in the DL departed from it; he had examined DL24 in isolation. The crucial paragraph was DL4, and the reasoning in the DL was therefore elaborated and supported by the reasoning in IR 14. 4-14.20; no issue was taken with that formulation. The DL reasoning was therefore legally adequate.

48. Mr Phillpot also invited me to consider and rely on the submission to the Minister exhibited by Ms Nowak. This was said to be an entirely orthodox expression of the overall planning balance; the DL should be read in its light. I have set this out later in relation to ground 4, apparent bias.

49. The conclusion that Satnam had failed to demonstrate that there would be no adverse highway and air quality impacts reflected the requirements of the development plan policies which required, QE6, the decision-maker only to support development where there would be no adverse impact on the environment. This included air quality. MP7 required all developments to demonstrate that they would not significantly harm highway safety, and that additional trips could be adequately served by the transport network, with appropriate mitigation to the satisfaction of the local highway authority. Indeed, the IR identified that there would be harm: IR 13.8-9, and 13.65-7, accepted in DL13 and 15. There was no misapplication of paragraph 11d of the Framework; the area already suffered from high levels of traffic congestion, IR 13.8; the local road network was under considerable pressure and was congested, IR 8.2. There were two Air Quality Management Areas, sensitive areas close by where this significant further development was proposed, IR 8.28. There would be significant additional traffic, IR 8.43. Local residents also gave evidence on these matters recorded in the IR.

50. The contention that there could not be adverse impacts from a development which was not deliverable was answered in IR13.82 and DL19. The problems with access and bus services conflicted with policies to mitigate the transport impact of the development and to provide public transport infrastructure, set out in IR 5.8 and 5.10. Mr Lockhart-Mummery's approach to the way in which deliverability had been treated by the Secretary of State was overly forensic. He was really just saying that the benefit was removed by the want of deliverability.

51. Mr Manley QC for WBC adopted Mr Phillpot's submissions. He also pointed out that no Transport Assessment had been submitted with the application, and none had been submitted until the appeal had been lodged. The position of the developer on traffic and air quality issues had altered during the Inquiry; one access option was withdrawn as were significant parts of the Air Quality chapter of the Environmental Statement. There was no challenge to the Inspector's conclusions that the developer's evidence on those topics was inadequate. His own observations and other evidence about the stressed nature of the highway system in the area, allied to those inadequacies in the developer's evidence, led him to the conclusion that a precautionary approach was required. It was that which then led him to conclude that the developer had not shown that there would be no harm. Paragraph 109 of the Framework assumed that the work referred to in paragraph 111 had been carried out properly, but here there had been no reliable Transport Assessment or reliable traffic evidence. The DL adopted the balancing exercise carried out by the Inspector.

Conclusions on ground 1

52. I start by noting that, in these respects, Satnam does not take issue with the balancing exercise carried out by the Inspector in section 14 of his report in considering paragraph 11d(ii) of the Framework; indeed, this was how it should be done. I do not need to repeat it, but it assumes that the scheme would be deliverable when considering the benefits of the supply of housing and affordable housing and giving them considerable weight on that basis. He gave moderate weight to the various factors making up the transformational change issue. Economic benefits were given moderate weight. Little weight was given to the increased receipts which WBC might enjoy, and environmental benefits received limited weight. The Inspector only dealt with the adverse impacts in this section very briefly, in IR14.1 and 14.20, in concluding that they would outweigh the benefits and that the "issues arising from either the scheme's highways or air quality modelling work would alone be sufficient to lead me to this conclusion." The adverse impacts for the purposes of his analysis of the policies in the Framework are identified at 14.1 as being the lack of proof, to his satisfaction, that the appeal proposal would not have adverse impacts on the highway network or air quality.

53. The detail of that is spelt out in his reasoning on the development plan policies, MP7 and QE6, which he interprets, correctly for these purposes, as requiring the developer to show that that there would be no adverse impact.

54. In DL23, the Secretary of State accepted the conclusions of the Inspector on the effect of the development plan policies, that the proposal did not accord with the development plan, and then, in the contentious DL24, considered whether material considerations indicated a different decision, in the context of the "tilted balance". No issue arises over paragraph 11d (i). His task was to consider whether any adverse

impacts of granting permission significantly and demonstrably outweighed the benefits of doing so, when assessed against the policies in the Framework taken as a whole.

55. Mr Lockhart-Mummery's first contention under this ground is that the Framework adopted a different approach from that in the development plan. The relevant transport policy required, [109], that the impact should be shown to be severe; it was not enough that the absence of adverse impact had not been proved. There was however what I regard as a critical requirement, that the likely impact had to be demonstrated by a transport assessment, [111].

56. Here, it was for the developer to provide a transport assessment showing the likely impact of the proposal on the highways. However, unless the impact was unacceptable or severe, permission was not to be refused on that ground, applying the Framework policy. There was no issue but that WBC had not set out to show such a degree of impact nor had the Inspector found such a degree.

57. I consider that there is no divergence between the Inspector's approach and that of the Secretary of State in this respect. Rightly or wrongly, both interpret the Framework policies as not being materially different in their overall requirements from those in the development plan, and agree that there is a sufficiently severe impact, on the Inspector's findings.

58. The fundamental problem in the way of Mr Lockhart-Mummery's argument is that the development plan and paragraphs 109 and 111 of the Framework are compatible. The effect of paragraph 111 of the Framework is to require a developer to produce a transport assessment which is sufficiently satisfactory for a conclusion about the severity of the impact to be reached. If that is done, and the impact is less than unacceptable or severe, there is no highway basis in the Framework for refusing permission in a "tilted balance" case. But if the transport assessment is too deficient in that respect for a judgment to be reached, paragraph 109 cannot assist. Otherwise, it would be open under the Framework for a developer to come forward with no sound work, and require the Council to prove the serious impact. That is not how the two paragraphs are meant to work. Both the Framework and the development plan start from the same premise, that the developer must have produced a sound and reliable transport assessment. The IR is at pains to explain the significant deficiencies in the work done by Satnam, such that no sound and reliable conclusion about the degree of impact could be drawn from it. In certain circumstances, that might not matter, where there was clearly no problem; it might be, as the Inspector may have been concerned here, that Satnam might not have had all the assistance from authorities that it required to carry out the necessary work; it might also be that, in the nature of transport modelling, one could always seek further data, validation and studies, and the time had to come when the decision-maker was entitled to say that enough was enough. The Inspector was conscious of that too.

59. But all that said and done, the Inspector concluded reasonably, that the data used was too old; there was no adequate explanation as to why later data and the 2016 model had not been used. The manner in which the work came forward, after a significant delay to the Inquiry, clearly troubled the Inspector as to its reliability. The Inspector also accepted that the highways which would be affected, were congested, experienced delays and further congestion when vehicles diverted off the M62, and it

was possible that recent highway improvements for the benefit of all users could be negated by the traffic from this development. Whilst the junction improvements could work and be satisfactorily emplaced, he was concerned that that needed to be demonstrated; and there could also be a loss of the benefits of recent improvements. Against the background of the existing highway problems, introduction of significant further traffic required a precautionary approach, so that there would be no severe impacts. That precautionary approach required a satisfactory and reliable transport assessment, which was not provided.

60. I consider that in those circumstances, the Inspector and Secretary of State were entitled to conclude that there was too much risk of a severe unacceptable impact, in the light of the unreliable transport assessment. Paragraph 109 of the Framework, I emphasise, is not to be understood in isolation from paragraph 111.

61. The same approach applies in my mind to air quality, with the doubtful reliability of the transport assessment affecting the air quality work, which was itself substantially altered during the Inquiry itself. The site was in the vicinity of two Air Quality Management Areas, and of heavy traffic; there was now a considerable general public focus on air quality. The Framework required new development not to contribute to air pollution. It is less helpful to Mr Lockhart-Mummery than the transport policies.

62. Mr Lockhart-Mummery's second contention under ground 1 was that, whereas the Inspector had reached his conclusions about the benefits on the assumption that the development was deliverable as proposed, the Secretary of State had treated the absence of deliverability as a significant adverse effect, indeed of greater adverse weight than the impact on the highway network or air quality. This ignored the benefits which would accrue if the adverse impacts occurred. Lack of deliverability could not rationally be an adverse factor of itself here.

63. DL 24 is something of a muddle. The Secretary of State acknowledges that, if the scheme were deliverable, there would be housing benefits of considerable weight, but because it was not capable of implementation, its merits needed to be left for further consideration. He agreed with the Inspector in that respect. If he had left it there, the decision might have been unchallengeable. If the scheme were not deliverable, although the advantages in relation to the five-year housing supply position and affordable housing could not accrue, neither would the disadvantages. In reality, none of those impacts would occur without the benefits of the scheme. There is no suggestion of how the one could occur without the other. But the impacts of a deliverable scheme were allowed for without the benefits of the scheme which would produce those impacts. This approach is irrational; it ignores the benefits of the proposal which were a material consideration; it misinterprets the Framework, and indeed the OR.

64. Thirdly, lack of deliverability was not raised simply to neutralise benefits. The structure of DL24 shows that the lack of deliverability was treated as an adverse factor in itself; the factor is raised in the part dealing with adverse factors. It was not simply an important factor which did not weigh, adversely to the proposal, in the balancing exercise he purports to carry out. This is irrational. The point cannot simply be dismissed as overly forensic.

65. The Secretary of State does not say either that the lack of deliverability meant that the balancing exercise could not be carried out. If he had simply left the benefits out of account, he would have had to leave the adverse impacts out of account also. But that is not what he did either.

66. I do not think that the Secretary of State considered that adverse impacts would arise without the benefits of the scheme, to some unspecified degree, because it might not be controlled or implemented as proposed. I would have expected him to identify that point, if that were his thinking.

67. The Secretary of State also accepted the conclusions and recommendations of the Inspector, who clearly did not adopt that approach. In assessing the benefits, he made the explicit assumption that the scheme was deliverable. The conflict between DL24 in relation to deliverability and DL4, in which the IR is accepted without relevant qualification, is to my mind stark and irresolvable, so that the Inspector's clarity cannot explain this muddle in the DL.

68. His treatment of the consequences of the scheme not being deliverable is irrational. At the least, the reasoning behind it is wholly unclear, and this is fundamental to the decision.

69. I have also considered whether it is so clear that the Secretary of State meant to adopt what the Inspector said, but just muddled it up, that the decision would inevitably have been the same without that muddle. I do not consider that I can. The Secretary of State chose to use the language he did, distinguishing his thoughts unintentionally or otherwise, from those of the Inspector, despite seeming to accept them. While I think it unlikely that the Secretary of State intended this degree of departure, I cannot say that his decision would inevitably have been the same. I have to quash it on that ground.

70. I do not consider it necessary to explore further any rationality argument; the sentence in DL24 beginning "Of even greater importance…" is irrational. The submission otherwise seemed to me in the end to depend on Mr Lockhart-Mummery's approach to paragraph 109 which I have already rejected.

71. I should add that, while I can see the relevance of Ms Nowak's evidence to one of the Secretary of State's contentions on ground 4, I am reluctant without clear submissions from both sides to admit it as evidence of the Secretary of State's reasoning in the DL. Although it does not suffer from the drawback of being reasoning after the event, possibly affected by a challenge to the decision, challenges under s288 are to the DL, as sent out to the parties in fulfilment of a statutory duty to reach and publish decisions, and in response to which challenges may be brought. There is no provision in the legislation or CPR for deficiencies in reasoning, or explanations for how material factors were in fact considered, to be deployed in response to this form of statutory challenge. Nor is there a sound basis for requiring the routine production of the submission to Ministers, before the time for challenge expired and for amendment. I have considered it *de bene esse* as there was no strong objection to my doing so at all; but it does not help the Secretary of State on this point.

Ground 2: the unlawful approach to deliverability

72. Mr Lockhart-Mummery submitted that the prospect that an owner of land, which was the subject matter of a planning application, would not agree to its development, should not be a reason in general for refusing permission. A *Grampian* condition, a condition preventing the start of development, or particular parts, until for example crucial infrastructure is begun or completed, is the commonplace means whereby a local planning authority can prevent development proceeding where there is uncertainty about the prospect of necessary infrastructure being provided. The lawful approach to an application where the applicant does not control all or part of the application site was stated by Lord Keith in *British Railways Board v Secretary of State for the Environment* [1994] JPL 32, HoL, at [38]:

> "The function of the planning authority was to decide whether or not the proposed development was desirable in the public interest. The answer to that question was not be affected by the consideration that the owner of the land was determined not to allow the development so that permission for it, if granted, would not have reasonable prospects of being implemented. That did not mean that the planning authority, if it decided that the proposed development was in the public interest, was absolutely dissing titled from taking into account the improbability of permission for it, if granted, being implemented. [He instanced competition between two sites for a single desirable development, only one of which would be granted permission.] But there was no absolute rule that the existence of difficulties, even if apparently insuperable, had to necessarily lead to refusal of planning permission for a desirable development. A would-be developer might be faced with difficulties of many kinds, in the way a site assembly or securing the discharge of restrictive covenants. If he considered that it was in his interests to secure planning permission notwithstanding the existence of such difficulties it was not for the planning authority to refuse it simply on their view of how serious the difficulties were."

73. The Inspector had introduced deliverability as one of the main issues on the appeal, as he said at IR13.6 and 13.68, leading to his conclusion at IR 13.81-82. These deliverability problems were then weighed in the planning balance at IR14.1, adversely to the applicant. These conclusions were adopted by the Secretary of State in DL16-19. Overall, at DL24, he gave even greater weight to this than to his conclusion that he was not satisfied that there would be no adverse highway or air quality impacts. This led on to his view that the merits should be considered on a later occasion, and that the appeal should therefore be dismissed.

74. Mr Lockhart-Mummery submitted that this approach was simply unlawful, and contrary to the *British Railways Board* decision. It could not be justified by claiming that deliverability was relevant to the benefits of the scheme, since those benefits had been left out of account in DL24. For the same reason, DL19 had erred in adopting the erroneous reasoning of the Inspector about the Framework, paragraph 11d, at IR13.82. It was irrelevant whether the site was "deliverable", as defined in the

Framework, for the purposes of contributing to a five-year housing land supply, because its benefit in that respect had been left out of account anyway.

75. Mr Lockhart-Mummery also submitted that the legal and evidential basis upon which the Inspector had concluded that site access and bus operations were not deliverable was flawed, and could not justify his conclusions. In respect of the Mill Lane playing fields, the Inspector's concern was that the access route, and some housing, could not be built; that access underlay the highway assessment, travel plan and bus provision; if that were not provided there would be even less certainty about the highway implications of the proposal; IR13.72.

76. Mr Lockhart-Mummery said that this approach was flawed because condition 11 proposed for the planning permission would have required completion of the access points over the Mill Lane playing fields, before the relevant phases of the development could be built, so there could be no increased uncertainty. This would have been a commonplace application of a Grampian condition. A material consideration had been ignored.

77. The conclusion was also flawed on the evidence about the position of Homes England. The Inspector had two letters from Homes England, one dated 15 May 2018, the second dated 10 July 2018. The former dealt with two issues: the participation of Homes England in the section 106 agreement, and access rights. Homes England said that until recently it had not been involved in preparation for the appeal, nor consulted about the agreement and its implications for its land. It had concluded "reluctantly" that it was not in a position to enter the agreement as it stood because it was not certain as to who would make and when the necessary infrastructure contribution payments, putting it at risk of having to make a disproportionate contribution. However it was not unusual for a landowner during appeal proceedings not to agree to enter into a section 106 agreement, but drafting mechanisms were available enabling that issue to be dealt with, or for appropriate conditions to be imposed by the Inspector. On access rights, it noted the Inspector's previous reference to deliverability; it confirmed that no agreement was in place between Homes England and Satnam. Homes England was required by statute to obtain the best consideration for the grant of rights to enhance Satnam's access arrangements:

> "Homes England remains open to negotiations with the appellant for a grant of access rights for a sum that represents best consideration but as yet no offer has been received from it. Homes England would be prepared, subject to contract, to grant rights to the appellant provided that terms, including the price, can be agreed."

78. It asked for this letter to be shown to the Inspector.

79. The July 2018 letter stated that the July version of the section 106 agreement had not been agreed by Homes England, but would be agreed if a particular clause, which the letter then set out, were incorporated, enabling amendments acceptable to Homes England to be made. The position in relation to access rights remained unchanged, and Homes England remained willing to discuss matters with a view to reaching an agreement.

80. The Inspector said this at IR12.31-38, in the section of his report dealing with conditions. Condition 7 sought to prevent development on the playing fields until all those with an interest in the land were bound by the terms of the section 106 agreement, to be achieved by a further obligation. The condition was relevant to planning and the proposed development, would be enforceable, precise and reasonable. But Planning Policy Guidance set out criteria for such a condition; this proposal was not exceptional, simply because there was a lack of a five-year housing land supply. The proposal was not particularly complex nor strategically important; nor had Satnam presented evidence to suggest "that the development would be at serious risk of non-delivery without the proposed condition." This was because the site's ability to deliver a high rate was a suggested benefit. The further difficulty was that the condition, on the evidence, would make little difference to an "undeliverable scheme."

> "The current landowner, namely Homes England, whom the conditions seeks ostensibly to tie into the s.106, has been very clear that it is not proposing to part with the land. It has consistently declined to sign up to a s.106 agreement (hence the need for the proposed condition) and it is difficult to see how the condition would change this. It is not unreasonable to consider, somewhat ironically, that the need to find a landowner…willing to tie themselves to a s.106, already agreed between other parties, before their land could be developed, could well become a risk to scheme delivery of itself."

81. He was not persuaded, therefore, that the proposed condition was appropriate but it was "indicative of Satnam's failure to secure the land necessary for the development proposed."

82. However the Inspector's recommendation and the Secretary of State's conclusion were flawed in the light of the Homes England letters, and in the light of the purpose for which land was vested in Homes England, summarised in Satnam's contention, recorded at IR9.117, that it was for the purpose of delivering land for homes, a role which could not be contested in the light of its Strategic Plan "Making homes happen". The Inspector's conclusion was irrational on that evidence.

83. The position in relation to the bus service was similar. The IR at 13.78 and 13.79 pointed to the absence of the written commitment he expected from local providers to provide the service, and to the evidence pointing in the opposite direction. This conclusion did not take account of all the evidence, and was irrational.

84. A Technical Note before the Inspector referred to the meetings that had been held with Network Warrington over two years, summarised its proposals in its supporting note, which was appendix 2 to the Technical Note. This covered route options including service extensions, bus stop locations, turning heads and indicative timetables. Network Warrington had confirmed that they would be happy to provide an extension of a bus service into the site once 120 units had been built within a particular phase and had bus stop access. A cost figure had been discussed, and it had confirmed the draft Heads of Terms were acceptable. On 3 August 2018, a s.106 agreement had been signed between WBC and Satnam which obliged Satnam to make

very substantial financial contributions for bus services for the site, which had to be applied to that end.

85. IR 13.76 referred to the evidence given by Cllr Mitchell. The letter of 13 July from Network Warrington/Warrington's Own Buses confirmed that there was no agreement for the provision of bus services.

86. Mr Phillpot discerned three strands to Mr Lockhart-Mummery's submissions: concerns over deliverability were irrelevant in law, "deliverable" as defined in the Framework, and applied in IR 13.82, was irrelevant where no weight was being assigned to the contribution which the site would make to the five-year housing supply; the conclusion in the DL was irrational and ignored a material consideration.

87. On the first point, Mr Phillpot submitted that Satnam had argued before the Inspector that an advantage of the proposal was that it would contribute to the housing supply, but the Inspector concluded that it could not be delivered, and the condition proposed to overcome the lack of control over the Mill Lane playing fields was contrary to the Government's Planning Practice Guidance, PPG; IR5.23 and 12.39. This was relevant to assessing the benefits of the proposal in contributing to meeting a shortfall in the five-year housing land supply, as put forward by Satnam; IR13.82. The development of housing on the Mill Lane playing fields was also relevant to the total quantum of housing which would be delivered. The inability to deliver the key access route into the site, and the effect which that would have on public transport services into the site was also relevant to the mitigation of the impact of the proposal. Planning permission was not refused simply because the scheme was not deliverable, but because the fact that it could not be delivered meant that the policy based and other benefits would not accrue.

88. On the second point, Mr Phillpot submitted that the meaning of "deliverable" in the Framework was relevant to judging whether the scheme would make a contribution to meeting the five-year housing supply; IR14.5 assumed the scheme was deliverable, in case the Secretary of State took a different view about that. There was no difference in view between them.

89. On the third point, Mr Phillpot submitted that the Inspector's conclusions on deliverability were reasonable ones for him to reach based on the Homes England letters. Despite months of negotiations, the position did not change: there remained no agreement between Homes England and Satnam, IR13.70. It was a reasonable judgment for him to reject Satnam's assertion that an agreement was inevitable. There remained no commitment to the provision of the bus services.

90. Mr Manley again adopted Mr Phillpot's submissions. Deliverability was material because without delivery none of the benefits relied on by Satnam would come about. The operation of the tilted balance assumed that the development would be delivered; if not, the tilted balance would have no place in the decision. Satnam had had a long time to come to an agreement with Home England over the Mill Lane playing fields. The judgment of the Inspector was one for him and he was entitled to conclude as he did.

Conclusions on ground 2

91. The law, as stated in the *BRB* case, means that, in general, the question of whether a proposal can be implemented is irrelevant to the decision whether to grant permission. There is no legal requirement that planning permission be refused unless a developer commits itself to implementing a proposal. But a proposal can be refused permission on the grounds that it cannot be or is unlikely to be implemented, where difficulties of implementation are relevant to the planning merits of the decision; for example, where there is a need to be met, and two or more sites compete for the single opportunity, the ability of one to meet the need through implementation and the difficulties of the other to do so, are plainly material. There may be cases where a partial implementation might create a rather different balance between benefits and impacts.

92. The issue raised by this ground is why planning permission should be refused because it cannot be implemented; why should that tell against the grant of permission? I have already concluded under ground 1 that, deliverable or not, it was unlawful on many bases to allow for the adverse impacts without considering the benefits which they would bring; and irrational to treat the lack of deliverability as an adverse factor. This is closely related to those errors. I cannot discern here what material planning consideration could warrant a refusal of permission on the grounds that the proposal could not be implemented. There were no competing sites. There was no competing proposal for this site which could find greater favour with Homes England or the local bus company, which this permission might stultify. There was no suggestion that an unimplemented planning permission would in some way blight the site or discourage other proposals with better prospects.

93. Nor do I see any reasoning in the DL, which treated lack of deliverability as an adverse factor, as to why that was either adverse or relevant, beyond that there would be no benefits, if it were not delivered. But nor would there have been any disadvantages. Of course, if it is not or cannot be implemented, it can bring no benefits by way of housing. But it is impossible to see here why that should be a factor telling against the grant of permission unless that has some planning implications. Those are not identified.

94. There was no conclusion that development could not be prevented until access was obtained over the Mill Lane playing fields, or that the rest of the houses could be built but it was those on Mill Lane that tipped the balance from adverse to positive. There was no suggestion that the development of the site could not be prevented if there were no suitable agreement with the bus company. There was a debate over the terms of the conditions, and the s106 agreement, which Homes England was not happy with, and the bus operator had not made the level of commitment expected by the Inspector. But I do not see those as the basis upon which deliverability was thought material, since the risk of permission without those agreements in place could be controlled by condition or agreement. That issue, the risk of implementation without them, was not the reason for deliverability being material. I do not see the materiality of deliverability as turning on the debate about proposed condition 7 and the policy basis for not accepting it as an effective means of binding Homes England to the s106 agreement when they were willing to sell; see IR12.30 and following. That was not what made deliverability material.

95. It could be argued that it might receive planning permission on the basis that there was no five-year housing supply, yet if it were not implementable so as to contribute

to that shortfall, it could have got permission on a false basis, and come forward for implementation at a time when there was no shortfall, and when it would not have received permission on that basis. I do not see that reasoning in the IR.

96. I do not consider that the decision can stand on this ground either. The issue of deliverability was not legally relevant to the refusal of planning permission, at least on the reasoning provided. It was relevant to the achievement of the benefits of course, but would be equally relevant to the absence of impact. But if the benefits were not provided, then neither would the impacts arise.

97. I am less persuaded by the arguments that, if relevant, the conclusion had no sound basis in the exchanges between Homes England and Satnam or in the bus operator evidence. These two conclusions of the Inspector fall within the permissible range of rational judgments, in this planning context. Homes England were willing to negotiate, but over some long time, no agreement had been reached. It was not said that the absence of planning permission was itself the obstacle to the conclusion of an agreement with Satnam. The mechanism whereby its concerns about the s106 could be allayed, were not ineffective, but were contrary to government guidance. So there remained a legitimate concern on that front too.

98. A cynic might have concluded that the last-minute evidence from a Councillor from the opposing Council was just helping to throw a spanner in the planning works. Yet the judgment on that was for the Inspector; he did not make that judgment. He took the evidence at face value as he was entitled to. There was considerable evidence about prior bus operator involvement, to a considerable level of detail. Yet the experienced Inspector was entitled to say that the sort of comfort he would hope for had not been provided. Again, it was not suggested that the grant of planning permission would cause a change of heart.

99. So, while I accept the lawfulness of the conclusion that the scheme was not deliverable as proposed, I do not accept that that was a material consideration which should have weighed in the balance against the grant of permission, at least on the reasoning of the Secretary of State. There was no conclusion that the development could then proceed without the adverse impacts being mitigated as required. If they could not be provided, in the usual way, the development would not proceed.

100. The decision is quashed on this ground as well.

Ground 3: the wrong standard of proof

101. This ground arises out of IR13.38-39, and DL 13. These have been set out already. Mr Lockhart-Mummery focused on the language at the start of IR 13.39 in which the Inspector stated that it was for Satnam to demonstrate that its scheme would not give rise to severe adverse effects on the highway network "beyond reasonable doubt". DL13 states that the Secretary of State agreed that the appeal proposal had failed to demonstrate that it would not create an adverse impact on the safety and efficiency of the highway network, "for the reasons given at IR 13.8-41." There was no qualification of the Inspector's comment about the standard of proof.

102. The very notion of a burden and standard of proof in planning cases had long been deprecated because of the nature of the Inspector's task. An early example was the

comment of David Widdicombe QC sitting as a Deputy High Court Judge in *Pye (Oxford) Estates Ltd v SSE* (1984) 47 P&CR 125. Latterly, in *R (Mynydd y Gwynt Ltd) v SSBEIS* [2018] PTSR 1274, Peter Jackson LJ agreed that the notion of a burden of proof was not helpful; rather an assessment had to be made on the basis of all the information available. There was no legal burden as such; rather it was simply in the interests of an applicant, who obviously wished to succeed, to provide the information necessary to enable a favourable decision to be made. The Inspector Training Manual is to the like effect in relation to decisions on the planning merits. The burden of proof was relevant to the "legal grounds of appeal" in enforcement notice appeals, which essentially are concerned with past events, but that was on the balance of probability, and the criminal burden of proof should not be referred to at all. However, at hearings, Inspectors are advised that, in judging how the parties' arguments stand up when tested, "the burden of proof generally lies with the party who made the point."

103. It could also be inferred, submitted Mr Lockhart-Mummery, that the Inspector's error, in applying the criminal standard of proof to the impact of the proposal on highways, had also affected his approach to air quality, at IR13.64, in view of the importance to both of the traffic data, about which he entertained considerable doubts. Mr Lockhart-Mummery relied on IR13.42, 13.44, 14.1-2, and 14.20, and again on DL13. DL13 was taken on to the overall conclusion in DL24. When the Secretary of State stated that he was not satisfied that there would be no adverse impacts, to which he gave significant weight, he was adopting the Inspector's conclusions, and applying the same standard of proof. It was not realistic for the Secretary of State to contend that, despite the language of DL4, he had not adopted the same standard of proof as had been applied by the Inspector's whose conclusion he had endorsed without qualification. WBC was realistic in accepting that the Secretary of State had erred as submitted by Mr Lockhart-Mummery, but wrong to suggest that the error was unlikely to have had any effect upon the outcome of the decision.

104. Mr Phillpot submitted that policies MP7 and QE6 placed the burden on the developer to show that there would be no adverse effects from the development. Policies were not uncommonly couched in that language; see *Vicarage Gate Ltd v FSS* [2007] EWHC 768 (Admin), at [44-54], HHJ Gilbart QC. This language did not create a legal burden of proof, but the effect was similar: the decision-maker would still be looking to the applicant for planning permission to provide information of the kind required by the policy to the standard required by the policy. If it failed to do so, the application could be rejected because it failed to comply with policy.

105. The phrase "beyond reasonable doubt" did not necessarily mean that the criminal standard of proof had been applied; it all depended on the context; *Vicarage Gate* [55-56]. Here, the Inspector and Secretary of State accepted WBC's arguments that the developer's evidence was inadequate, uncertain and unreliable in a number of respects, and it did not persuade him that there would be no adverse highway or air quality impacts. A precautionary approach was called for, a legitimate conclusion as a matter of planning judgment. In effect, Mr Phillpot's argument was that the Inspector's expression of the standard of proof was the way of meeting the requirements of a precautionary approach.

106. Mr Manley did not adopt Mr Phillpot's submissions here. Although it was for the developer to provide evidence which would satisfy the policy, he did err in applying the criminal standard of proof to the highways issue, though he did not apply it to the

air quality issue. Had the Inspector formulated the issue correctly, he would still have come to the same conclusion, as is evident from the way in which he expressed his conclusions about the poor quality of the developer's evidence on those topics.

Conclusions on ground 3

107. A criminal standard of proof is not appropriate because an Inquiry is not a form of criminal proceedings, and the issues which arise in planning judgments, whether evaluative or forecasts or estimates about any particular future, are by their nature probably incapable of proof to that standard anyway. No one, for example, would expect a highways model to be measured against that standard, or a five-year housing land supply assessment. That is why the language is inappropriate. It was wrong to use the language of "beyond reasonable doubt", and it should have led to a word of caution in the DL. Those words, however, may be used to reflect, inaptly in language, but not so wide of the mark in substance, a genuine point about a precautionary approach and where the risk of error should lie.

108. I do not see the need to debate the difference between an assessment and judgment using a standard or burden of proof, in a non-legal sense. Policies can and do, properly, whether or not in so many words, require the developer to produce the evidence to a standard which meets the objective of showing that a particular adverse effect will not occur, or is very unlikely to occur. The more serious the risk, the greater the certainty or degree of precaution required.

109. The Inspector has used a variety of language to describe what he sees as the requirement of the development plan policies and the Framework. He has not always used the offending words "beyond reasonable doubt;" see for example IR 13.41–13.44, IR 13.64-67, and IR14.2. What he is conveying is that a precautionary approach is required. The development plan policies and the Framework required the developer to produce reliable evidence of transport impacts so that a judgment could be reached on a sound basis as to the severity of the impacts. This is an area of already significant traffic and air quality problems, as I have pointed out in relation to ground 1. There had been recent improvements to the highway system which it was important that the development should not negate or reduce in effectiveness. The evidence from the developer on highways impact, and this fed into the air quality work, was not reliable. A precautionary approach was therefore required. The highways evidence had to be very clear, soundly based, and should not leave a substantial risk that the adverse impacts would occur. If there were such a doubt, the risk should not be taken that severe impacts would arise, to be visited on the highway system, its users, and those living nearby the highways which would be adversely affected, all for the highways authority to resolve but not at the developer's expense. It was for the developer to do the work properly. A judgment that there is a significant risk of serious harm is a proper planning judgment; the judgment that that level of risk should not be run is also a legitimate planning judgment. It was a legitimate planning view there was a real or significant risk that serious harm would occur to the highway network, and that it should not be allowed. That is all he was saying, and it was lawful: such a risk should not be run at public detriment or expense. The Inspector's language, on the one occasion he expressed himself in that way, was inapt; the thought process behind it was not, and the Inspector used other unobjectionable expressions in this context, and it was not used by the Secretary of State. I am not

prepared to find that the IR and DL, adopting it, were unlawful, and beyond the powers of the Act on that basis.

110. There is no basis for supposing that that statement of the standard of proof had any effect on the decision. It is not as though there is any suggestion that the point was proved on the balance of probability but not proved beyond reasonable doubt.

111. This ground is dismissed.

Ground 4: apparent bias

112. This ground of challenge relates to the conduct of the Inspector on the site visit and later during the Inquiry, and concerns apparent partiality shown to local residents and other objectors.

113. Satnam produced 6 witness statements in support of this ground, 2 in reply to the witness statement from the Inspector. WBC produced 3 statements. There was no application to cross-examine by any party.

114. Mr Griffiths, a director of Satnam and of Satnam Planning Services Ltd, led the preparation of the planning application, and gave planning evidence at the appeal. His witness statement referred to the strength of feeling amongst local residents and politicians, whom he saw as the chief opponents at the Inquiry. A campaign group, "Save Peel Hall" organised various events, a poster campaign and social media activity. He described the Inspector, throughout the Inquiry, as being at pains to make the public and local residents feel part of and to have a full role in the proceedings, even though none of them had applied for Rule 6 party status. (Under the Town and Country Planning (Inquiries Procedure) (England) Rules 2000/1264, Rule 2 and 6, certain persons have a statutory status at Inquiries; the local residents were not in that category; and were not among those who under Rules were entitled to accompany the inspector on his accompanied site visits; that is not to say that there was no entitlement under more generally implied duties of fairness.)

115. Although the Inspector had asked for spokespersons to be appointed for the residents, he in fact allowed everyone a full opportunity to have their say, sometimes on more than one occasion. The residents' contributions were timed to suit them, even at the price of interrupting Satnam's evidence. As Mr Griffiths said, that is not uncommon at a public Inquiry, but his clear impression was that: "it gave the local residents the feeling that the Inspector was "on their side" and encouraged them to push for more involvement and to make more contributions than would normally be the case in a well-run public Inquiry." He gave an example, where after one appellant witness had left the witness table, and another had concluded his evidence, the Inspector allowed a resident to ask a further question of the first witness. Mr Griffiths said that he had never come across this sort of informal questioning before, nor the extent of questioning the Inspector allowed from residents of Satnam's witnesses, even though they were not Rule 6 parties.

116. He required Satnam to provide documentary support for the evidence of its witnesses, but made no such requirement of the residents; he gave two examples, in which documentary support was provided for certain evidence which Mr Griffiths gave about option agreements over land required for access, and data supporting air quality

evidence. Mr Griffiths claimed that the oral representations of residents "were largely taken at face value and Satnam's witnesses were hardly ever asked for their comments on what the Inspector was being told." He thought this unusual by comparison with other Inquiries he had experienced.

117. He gave that evidence as what he described as background to "the acute concerns that I had during the inquiry (and site visit) that relate to (i) discussions that the Inspector had with objectors and (ii) the Inspector's undue familiarity with objectors."

118. As to the first, Mr Griffiths described the Inspector entering into side discussions or exchanges with local residents on frequent occasions throughout the Inquiry, and at one point with Highways England. These occurred at the opening and closing of Inquiry days or at the beginning and end of breaks in proceedings, as the Inspector entered or left the Inquiry, either inside the Inquiry room itself or in the lobby/stairs outside the Inquiry room or in the reception area in the Village Hotel to which the Inquiry moved. At other Inquiries he had attended, by contrast, Inspectors had meticulously maintained a sense of separation from participants.

119. At the beginning of Inquiry Day 4, he saw the Inspector in conversation with Highways England towards the middle of the public seating area in the Inquiry room. Highways England were objectors, and its evidence was accepted in the IR. Mr Griffiths could not hear what was said, from his table in the room. Neither WBC nor appellant were asked to join the conversation, which lasted about 4 to 5 minutes, during which the Inspector received information from Highways England. At that stage, Highways England had only made written representations. When the Inquiry resumed, the Inspector "briefly explained what he had been told by Highways England and shortly thereafter gave Highways England the opportunity to explain its position to the other inquiry participants. Nonetheless, Satnam's team were concerned at the notion of the Inspector having an initial discussion with an objector in this way."

120. Mr Tighe, Satnam's highway consultant, who also attended the site visit, provided a witness statement. He had 40 years' experience of public inquiries. He too had observed the Inspector in quiet private conversation with Mr Marsh, a representative of Highways England for about 5 minutes. They were about 3-4 ms from Mr Tighe; he could not hear what they were saying, but the Inspector was nodding. Mr Tighe added to what Mr Griffiths said: the Inspector had explained that Mr Marsh had offered to carry out some modelling work which the Inspector had invited Mr Marsh to explain to the Inquiry. Mr Marsh's explanation took about 1 minute; and the upshot was that he was to undertake some modelling of the M62 junction 9 and the nearby stretch of the A49, if Satnam was unwilling to do so. Mr Tighe said that neither Mr Marsh nor the Inspector had mentioned the work which Mr Tighe had carried out and set out in his evidence, and the mitigation he had proposed. He did not know what was said exactly between the two of them nor could he hear the nuances of the conversation.

121. Ms Bennett, from Mr Tighe's firm of highways consultants, also gave evidence about this conversation. She too had observed but not heard this conversation. She also said that she had seen the Inspector in informal conversation with representatives of Highways England on other occasions during breaks in Inquiry proceedings, but these had not lead to any explanations to the Inquiry.

122. Mr Griffiths said that there were many other instances of the Inspector engaging in private conversations with local residents, but proffering no explanation of what had been said. The Inspector repeatedly engaged in exchanges with three local residents, Mrs Dutton, Mrs Steen and Mrs Kavanagh, who were the leading representatives of a group of objectors; this, said Mr Griffiths, occurred to such a degree that they became "very friendly and "familiar" in their way of speaking to the Inspector and their overall approach to engaging with him. This included humorous exchanges and "banter" in the inquiry room itself…." These exchanges, which Mr Griffiths saw as anything but professional, contrasted with his experience of Inspectors taking a very professional and clear line in dealings with participants. He gave one example, also on Day 4; after a resident had provided her contribution in song, another resident asked if she could dance, adding that it was by way of a joke, to which a third commented that that was northern humour, leading the Inspector to join in by adding that his wife was a northerner and so he was very familiar with such humour. He would have expected the Inspector to stamp on such behaviour immediately, and put matters back on a professional basis. He had raised these issues with his team, and with his solicitors. A post by one resident after Day 8 of the Inquiry, which was what she called "residents' day" at the Inquiry, referred to the song and invitation to dance and northern humour, and how well the day had gone.

123. An accompanied site visit took place on the day before Inquiry Day 4. It was unusual in taking place early on during the Inquiry, so that the Inspector could familiarise himself with the locations which were to be the subject of the evidence to come. Mr Griffiths, with a 30-year career to draw on, said that it was quite unlike any other site visit he had participated in. On Day 1, the Inspector said that it would not be an opportunity for debate. But in fact, during the site visit, Mr Griffiths said that the Inspector "was quite happy to be amongst the "crowd" even seeking out parties to chat with along the way", of whom he named four, three of whom he was said to have repeatedly engaged in exchanges with in the Inquiry room. He never sought to distance himself from the objectors or to make clear that those attending were there simply to point out information raised in evidence and to respond to his queries. It very much felt like an informal hearing being run during the site visit.

124. Mr Tighe said that this was the only site visit he had attended which had been conducted in so informal a manner, and with so much evidence given. The Inspector had spoken frequently to objectors out of earshot of Satnam's representatives, and had walked ahead with them, or with them beside him on a narrow footpath. He saw this as all contrary to what the Inspector had told everyone, which was that the site visit was not an occasion for giving evidence. He also confirmed, in a general comment, the friendly private conversations which the Inspector had with local residents at the Inquiry itself.

125. The first part of site visit had begun at 08.30; three people attended for Satnam, two for WBC, and Mrs Steen for the residents. Mill Lane was nearby, and there they were joined by 4 to 5 other residents. Mr Tighe noted that the Inspector did not remind those present that this was not an occasion for giving evidence. Mr Griffiths said:

> "[The local residents] proceeded to give evidence to the Inspector regarding what was in their view excessively high traffic flows/inadequate visibility at the junction of Mill Lane and Delph Lane and excessive vehicle speeds. I intervened to

> suggest to the Inspector that this was evidence and the site visit was only for matters to be "pointed out" to the Inspector. The Inspector, who was surrounded by about four local residents at this point, replied that he was quite happy for the local residents to tell him this information."

126. Mr Tighe identified Mrs Steen as one of those who spoke about the traffic at that junction, and he described the Inspector as surprised at Mr Griffiths' intervention, responding that he was quite happy to receive such information. The Inspector asked Mr Tighe whether Satnam was proposing to seek a lowering of the speed limit; he replied no, and Mr Taylor, from WBC said that the proposals met all design standards. Mr Tighe said that all this was audible to all present. The first part of the site visit continued in much the same manner, according to Mr Griffiths, until they returned to where they had begun. The Inspector, as Mr Griffiths saw it, "made no effort to isolate himself from the parties and was quite willing to engage in chatter and banter with the local residents and other parties."

127. Mr Griffiths tried to have one of Satnam's trio close to the Inspector at all times, but the narrowness of the path prevented it. He was therefore not able to hear the majority of the exchanges between the Inspector and the local residents or WBC, as he was mostly behind them. Local residents were trying to keep up with the Inspector and to engage him in conversation and exchanges, and it was this group that led the walk along that section of the site visit. Mr Tighe's evidence was similar.

128. At Winwick, the second stage began. The Inspector was shown around the village by another group of local residents, and seemed happy to follow the route they chose and did not ask to see any particular location, or say that any area was of no interest or that he could see certain areas on his own another day, whereas Inspectors usually preferred to see publicly accessible areas, unaccompanied. Mr Griffiths objected to Mr Mann, a local resident, introducing what he saw as new evidence but the Inspector stated that he was happy to receive it. Mr Mann said that he was not familiar with the rules. Mr Mann explained the extensive rat running to avoid the M62, car movements and traffic queues, introducing evidence not yet before the Inquiry, showing photographs and a video, as Mr Tighe described it, of congestion which Mr Mann said happened every day. Mr Griffiths told the Inspector that this material should be submitted to the Inquiry first and then considered, but he described the Inspector as brushing those concerns aside, stating that he was happy to look at the evidence and watch the video there. Mr Griffiths said it was difficult to see and hear all the video because of the number of people around the Inspector and the general noise in the vicinity. Mr Tighe confirmed this; he had only been able to see the video for a minute in order to give others the chance to see it. A video was shown to the Inquiry later, but without confirmation that it was the same. Satnam was given a copy of that video, but Mr Griffiths did not know whether it had been submitted as an Inquiry document, and was surprised that his highway witness was asked no questions about it by the Inspector.

129. The third stage of the site visit was to a road adjoining the appeal site. Mrs Dutton and Mrs Kavanagh were present. Mr Griffiths commented that they "clearly felt familiar and "safe" with the Inspector, and made jokes." One was about a resemblance between the Inspector and a well-known actor; Mrs Dutton commented that she was said to resemble, other than facially, a well-known US country and

western singer. The Inspector joined in with the joke atmosphere, as Mr Griffiths saw it.

130. The Inspector, according to Mr Griffiths, did not ask for order nor seek to formalise the site visit, which was at times "very much a "free for all" with local residents making significant evidential contributions and the Inspector engaging with this information." He did not call for contrary evidence or information, but it would not have been the correct forum for such evidence to be presented. Mr Griffiths and his highway witness tried to present information but the Inspector appeared not to be interested; exaggerated and misleading claims were made by local residents, but the Inspector did not ask for further information in relation to the particular example Mr Griffiths identified. Mr Tighe referred to evidence given by local residents about where the employees on the employment part of the development would park to avoid congestion. He felt that the Inspector had ignored what he had to say about passing places in response to what local residents were saying about the narrowness of roads. The Inspector heard from residents about their concerns at the proximity of lights to a junction, which he said that he too was concerned about and would be seeking clarification from the relevant witnesses about this.

131. Again, in the fourth and final stage of the site visit, the Inspector walked along the footpath beside the roads "chatting quite happily with the group of local residents who met us there," as Mr Griffiths described it. But footpath widths made it difficult to walk alongside him at all times. Mostly, local residents were talking with him, again at the front of the party, and it was difficult for Satnam's trio to hear what either the Inspector or local residents were saying. Mr Griffiths could not hear most of it, trailing 3 to 4ms behind him, and separated from him by local residents. He added that the Inspector "appeared to be quite happy to engage in discussions with them out of earshot of the Council and Appellant."

132. Mr Tighe said that when Mr Sawyer joined them and led the tour, Mr Sawyer had commented on the problems for the disabled of the locations proposed for bus stops, to which Mr Tighe had responded by saying that only applied in one of the options, and such relocations tended to balance each other out. The Inspector had not reacted. But Mr Sawyer had "continued to engage the Inspector in conversation throughout the walking tour, mostly out of earshot of the rest of the group" which straggled along over some 30 ms. At no point, when Satnam's team had been out of earshot, had the Inspector explained to Satnam's team what local residents had said to him nor what he had said in reply.

133. Mr Starkie, landscape architect for Satnam, also attended the site visit. His witness statement deals principally with the site visit. His description of how it was conducted is very similar to Mr Griffiths' description. He does say that, at one point, a local resident claimed that bats nested in trees they were passing; the Inspector had looked to him for a response which he had given. Later, some residents pointed out trees which they said were subject to a TPO; this was new information, Satnam was unaware of it, the Council thought that unlikely as the trees were in the adopted highway, but the Inspector took no part in the conversation. At no time did he tell them that this was not the occasion to give evidence; he did not decline to receive any of the evidence which he residents offered, nor display the usual impartiality, nor assert any ground rules, or try to formalise proceedings or to curtail what the residents

were saying to him: "it felt like an open day for the local residents to talk freely at length about their concerns."

134. Social media comments by local residents bore out this concern. He summarised those comments: they spoke to the Inspector, making their own points, one noted that Satnam was not very keen that they should talk to the Inspector, but "my friend managed to have a chat with him anyway." Mr Mann explained what he had been able to tell the Inspector; on its face, it was clearly evidence about the operation of the highway system.

135. Mr Griffiths described himself as being very concerned about the site visit both during the visit and afterwards. His team members during the visit, were surprised that it was so informal and the Inspector so "in the middle" of the group. Mr Griffiths spoke to the Council's planning witness, Mr Davies, who expressed similar concerns and surprise. The whole of Satnam's team was very surprised by how it had been conducted. Mr Lockhart-Mummery and the team:

> "considered whether to raise our concerns with the Inspector the next day but felt that, on balance, it would be harmful to the appellant's case if the Inspector were accused of such behaviour in front of the public at the inquiry. We felt in a real dilemma on this point."

136. The Inquiry venue changed for the last few days of the Inquiry to the Village Hotel. On Day 9, Mr Griffiths saw the Inspector talking to Mrs Kavanagh and Mrs Dutton on a number of occasions both inside the Inquiry room and outside in the hotel reception area, without any other parties being present. They had also approached his table to speak to him, and handing in documents without other parties being present. He made no efforts to end or curtail these approaches, nor did he subsequently tell the other participants what had been said.

137. On Day 10, the Inspector entered the Inquiry room after a break and spoke for 2 to 3 minutes, according to Mr Griffiths, to a lady on a mobility scooter. He appeared relaxed and willing to engage in conversation. No explanation was given about it. Ms Bennett said that this conversation lasted at least 5 minutes, the Inspector had appeared "open and interested" and had not explained to the Inquiry what had transpired between the two of them. The resident gave evidence later that day, having asked Ms Bennett about an area of the masterplan and public transport.

138. Ms Bennett could also recall an occasion when the Inspector had spoken privately in the Inquiry room to the WBC team. She could not hear what was said in what to her appeared to be a friendly chat lasting a few minutes; the Inspector left and the Council team continued its conversation. There was no explanation to the Inquiry about what was said.

139. Mr Starkie also gave brief evidence about the conduct of the Inspector in the Inquiry room, again much along the same lines as Mr Griffiths. He added a reference to one incident when a resident was setting up a video to be played after a break; there was a brief conversation between the Inspector, who was behind his desk, and the resident; Mr Starkie was at the far end of the table and could not hear what was said. Mr Starkie said that at times the informality was such that it felt like an informal hearing

rather than an Inquiry. He had never been involved in an Inquiry which had such casual aspects.

140. Mr Griffiths summed up his view thus: the Inspector's conduct was very surprising and concerning, unlike anything he had experienced before. He, and all his team, were "under the clear impression that, through his conduct as described, the Inspector had sided with the local residents. My concern is, of course, heightened by the fact that the great majority of the local residents' objections have been accepted in the Inspector's report (and thereafter in the decision letter)". Mr Griffiths produced his short note of the site visit, made the same day a few hours later. Mr Tighe described the Inspector as being concerned to be seen as the "people's champion."

141. Mr Clisby, a solicitor since 1991, and with considerable experience of planning Inquiries, had the management of the Inquiry, and its conduct on behalf of WBC. He did not attend the site visit, and was not always present. He described it as unusual Inquiry, because of its sitting progress; and it sat at two locations. The IR records, [1.1], that it sat on 12 days from 23 April 2018 to 11 July 2018, with numerous adjournments "to allow for additional work to be undertaken, most notably in relation to traffic modelling for Junction 9 of the M62…"

142. Mr Clisby said this in his witness statement:

> "4. There was a significant level of public interest with members of the public attending throughout. It is important to note, that different members of the public attended on different occasions, with some members of the public returning on a number of occasions. The Inquiry was disjointed by the fact that, as submitted by the Council in closing, in respect of Highways and Air Quality issues, the evidence in the Inquiry was running to catch up with, and justify, the proposal. I have never been involved in an Inquiry where it appeared to me that so much vital information that the Inspector would require to make a reasoned judgement was unavailable at the start of the Inquiry. Significant additional evidence on traffic and air quality was introduced throughout. That led to adjournments and additional information being sought and evidence by way of a number of supplementary proofs and technical notes. The public access to that material was at the Inquiry itself. Professional witnesses had to be recalled. There is difficulties were not of the Inspector's making.
>
> 5. Members of the public wished to speak and ask questions. At a long inquiry, it is clearly difficult to predict at what stage interested people will be given the chance to speak. It was clearly impractical for members of the public to stay at the Inquiry all the time. The Inspector sought to understand and be helpful by hearing their representations at different stages of the inquiry where that was possible…it was not evident to me that the members of the public who wished to speak were well organised to do that."

143. He considered that an Inspector would rarely refuse to allow a member of the public to appear. He considered that the Inspector was "at pains to make the public feel part of and to have a full role in proceedings." Timings were arranged to suit the particular dates or times which some of them could manage, as happened with the professionals.

> "No doubt there was some repetition of evidence and some members of the public were allowed, and did speak, more than once. Given the piecemeal way in which evidence was produced and issues revisited that seems a reasonable way to deal with the public contribution. This was not in my experience unusual and in the particular circumstances of this Inquiry unsurprising."

144. No objection was raised to the couple of brief questions from the public asked of Mr Robinson on Day 1 after he had left the witness table, and which he answered from where he was. Although Mr Clisby did not consider that he had significant experience of longer inquiries, it was nevertheless not unusual in his experience for members of the public to ask questions informally of a witness who has left the witness chair.

145. Although Satnam said that its witnesses were hardly ever asked for their comments on what the local residents told the Inspector, Mr Clisby saw no reason why its advocate could not have asked them. Local residents could be cross-examined and asked about documentary evidence.

146. Local residents, it was said, felt that the Inspector was on their side. But that may have been a misunderstanding of the Inspector's allowing them to be heard,

> "his considerate and courteous manner to all parties and his (quite normal) questioning of evidence as partiality. However, at no time did I witness anything which gave me any concern that the Inspector favoured anyone and at the end of the Inquiry I felt the matter could be decided for or against the appeal. If I had witnessed anything which I considered untoward, I would have instructed Counsel to raise the matter."

147. Mr Clisby did not see the Inspector entering into side discussions with anyone other than those he later advised the Inquiry about, and a housekeeping discussion. Mr Clisby was not always in attendance however. But he described the nature of the accommodation, which is important.

> "The nature of the accommodation was such that [the Inspector] did have to pass others on the way to and from the Inquiry rooms and I am aware that very short social pleasantries, such as good morning, were exchanged at the opening and closing of Inquiry days or at the commencement or end of a break in proceedings. These would be in public areas of the venue or in the Inquiry room itself. They were in no way surreptitious or at any length and the Inspector did maintain a sense of separation. He kept to his room when out of the Inquiry, his table when he was in the room and I saw him rebuff approaches from members of the public."

148. The Inquiry rooms at each venue such that the participants would all be within earshot of each other and all encounters could be easily overseen.

149. Mr Clisby described the Inspector's conduct at the Inquiry in this way.

> "13. Members of the public were informal in the Inquiry and I agree that was not stamped down upon officiously, but there was good order throughout and I am not aware that any of the participants raised any concerns. That informality was towards witnesses, advocates and the Inspector. In my experience, it is not uncommon for members of the public to make informal interventions in proceedings. This Inspector was less formal and more accommodating than some other Inspectors I have experienced. However, this was a lengthy inquiry, where the participants did become familiar to one another, so members of the public who attended regularly did seem to become less intimidated by the formality of proceedings."

150. Mr Clisby also described the evidence which a member of the public gave in song: he found it cogent, to the point and memorable. No one had objected to her doing so. That was followed by the short joke made by a witness as he walked to the witness chair that he would give his evidence in dance, and the interchange about northern humour, again to which no one objected. It was but a brief interlude in the "otherwise generally formal nature of the Inquiry."

151. Mr Clisby recalled two occasions when he had discussions with the Inspector outside the Inquiry, a point raised by Ms Bennett. One concerned the air conditioning, and the other the number of microphones. He thought that would have been obvious what those conversations were about; he was under the table at one point dealing with the microphones. He thought also that the Inspector had relayed those discussions to the Inquiry. He had made no note about those events, as he thought there was nothing worthy of note. None of Satnam's team, which included leading counsel, raised any issues with the Inspector so far as he was aware.

152. Mr Taylor, Team Leader of WBC's Transport Development Control Team, had over 30 years of professional experience, including giving evidence at Inquiries. He provided a witness statement in which he commented: "At no time during my attendance at the Inquiry or the site visit did I note any feeling that something untoward had gone on or that the appellant or its team were unhappy with proceedings." Mr Griffiths and Mr Tighe each made reference to an occasion on the site visit when there were discussions between Mr Taylor and the Inspector. Mr Griffiths' note of the site visit referred to an occasion when the Inspector engaged both Mr Tighe and Mr Taylor in discussion; Mr Griffiths had "suggested", as he put it, that this was a matter for the Inquiry hearing. Mr Taylor said that in fact there had been a number of occasions during the site visit when he had provided "clarity as to the relevant issues being raised by both parties and each conversation was made in company and earshot of the appellant's representative." The conversation to which Mr Tighe had referred appears to have been another example, but he had said that the Inspector's conversation was with Mr Tighe and Mr Taylor, audible to all present.

153. Mr Davies, a Senior Planning Officer at WBC, with nearly 30 years' professional experience, attended the Inquiry on every day, and the site visit. He commented generally in his witness statement:

> "3. The Inspector certainly appeared keen to give any local resident a fair crack of the whip, and every opportunity to speak- sometimes as a way of filling in short periods of "free time" at the inquiry- when such sessions had not been requested. I generally share the view that local residents were given a very full opportunity to make verbal representations and to informally question whoever they wished, whenever they wished- in terms of both Party's appeal teams I would comment generally, based on my past experience, that the behaviour, conduct and overall demeanour of Inspectors covers a very wide spectrum-so it is hard to conclude whether Mr Schofield was "unusual" in any of these regards…
>
> 5. The Inspector's interactions with local residents, at times, "could be described as familiar or very familiar, in terms of exchanging banter - but I did not perceive anything beyond this." He thought the song faintly ridiculous, but it provided light relief.
>
> 6. The site visit felt generally quite informal. I remember being irritated by the amount of attention the Inspector was giving to local residents - primarily as they did not have Rule 6 status, but also because this prolonged the site visit possibly unnecessarily - and their residents were on occasions allowed pretty much free rein by the Inspector to say what they wished, whenever they wished. Mr Griffiths noticed my consequential frown on one such occasion. Some such interaction between the Inspector and residents would have taken place out of earshot - but this is almost inevitable in larger groups, especially on narrow paths."

154. Mr Davies agreed with Mr Griffiths', Mr Tighe's and Mr Starkie's accounts of events at the site visit, but commented "generally that at no point on the site visit did I get the conviction that local residents were making significant (solicited or unsolicited) evidential contributions." He could not recall how much interest the Inspector showed in what Satnam's team had to say on the site visit, but he did recall telling Mr Griffiths that he was irritated by the amount of attention the Inspector was giving to local residents. He was surprised by the level of informality, and at how much things appear to have changed since he last went on a site visit. However:

> "I did not feel that the Inspector's behaviour was seriously unprofessional, and I personally did not come close to feeling it should be raised as a complaint during or after the Inquiry sitting."

155. He had some recollection of the Inspector asking the main parties in the Inquiry if they wished to comment on objectors' evidence, and gave the general impression that

they could do so if they wished. The Inspector made "at least generalised efforts" to clarify what objectors said, when necessary, and to seek some sort of corroboration for their significant points. He could not recall if the Inspector explained every conversation he had with local residents in the Inquiry. The snippets Mr Davies heard were matters of appeal timetabling or generalised questions about appeal procedure and so on. He spoke to each party's appeal teams, but did not have a private or undisclosed conversation in a huddle with WBC. He could not recall the conversation described by Ms Bennett. Mr Davies could not recall any conversations:

> "which concerned me unduly at all, between the Inspector and local residents outside the inquiry, during breaks etc. at either of the venues. It was a long Inquiry, with a lot of people, large venues and therefore there were many opportunities for those from different parties to bump into each other outside of the formal sitting sessions."

156. The Inspector, Mr Richard Schofield, also provided a witness statement. He had worked in planning for over 15 years and had been an Inspector almost 6 years, and by the time of the Inquiry, was in the most senior band. He had dealt with 43 public Inquiry or hearings, out of 296 appeals. He thus had considerable experience of site visits and was familiar with the Inspector Training Manual relating to public Inquiries. As a senior Planning Inspector, in addition to his intensive initial training, he had had further specific training for public Inquiries, and annual updating training sessions. This specific training had included role playing and discussions with leading members of the Planning Bar.

General relations with the local residents:

157. Mr Schofield agreed that he had indeed made sure that interested parties felt part of the proceedings and were able to participate fully in; He regarded that as consistent with good practice; the Planning Inspectorate's Guide to Taking Part in Planning Inquiries, the PINS Guide, said that local people were encouraged to take part in Inquiries, and that their local knowledge and opinion could often be a valuable addition to the evidence. But the Inspector Training Manual, ITM, said that they might be unfamiliar with Inquiry procedures, and that it was the Inspector's role to ensure that they did not feel intimidated by the proceedings or participants, and to help ensure that they were able to get their arguments across, for example in helping them to frame their questions. The ITM showed that one of the three main objectives of an Inquiry was to ensure that all parties and interested persons had a reasonable opportunity to participate and to have a fair hearing. Mr Schofield said that this meant it could often be necessary for the Inspector "to provide guidance and assistance to interested parties, who otherwise struggled to participate effectively."

158. However, he had not involved interested parties to any greater or lesser extent than he had done, without complaint, at any other Inquiry. Many could not attend all the time, and so he usually tried to accommodate their oral representations as and when possible during the Inquiry, as he had done here. The ITM and the PINS Guide recognised that, with the agreement of the main parties, they could be heard out of order, as happened here. They also had a full day for the majority of the oral representations of local residents. He also sought to accommodate Satnam, which had

asked for its air quality witness to be heard out of turn for medical reasons, and he heard two of the WBC witnesses out of the usual order.

159. He could not remember asking local residents to appoint spokespeople; he might well have done so but in fact none were appointed. He found it difficult to understand Mr Griffiths' perception that his approach, described by Mr Griffiths as "not in itself unusual," made local residents feel that he was on their side. There was no objection to it from Satnam during the proceedings, and he thought it reflected the guidance in the ITM. Allowing local residents to question an appellant's witnesses was a normal part of procedure, recognised in the ITM and the PINS Guide; he had stated that he was going to permit that, there was no objection, and he allowed no more questioning by them than he usually did. The Inspector distinctly recalled cutting off local residents' questions when they became statements, repetitive or were addressed to the wrong witness, or were irrelevant; he also refused a disgruntled and heated local resident's request for Satnam's ecology witness to be recalled, sometime after his evidence had finished, even though the local resident had not attended that session.

160. The Inspector could not recall the incident when Mr Griffths said that he had allowed a resident to ask questions of a witness who had left the witness seat and had returned to his own. But he did not dispute that that could have occurred, on the basis that the witness could be recalled for further re-examination if required. This usually arose where a local resident had not appreciated that the departed witness was the one to whom a particular point ought to have been put. He recalled no objection to it happening.

161. He did not understand what Mr Griffiths meant by saying that third party representations were taken at face value; the IR showed that his ultimate recommendation did not turn on their representations. He also gave examples, noted in the IR, of where he had requested further material in relation to assertions made by local residents. He had also asked for evidence on two occasions from Satnam, to support what they were asking him to take as fact on disputed evidence. Satnam's QC had asked why that was necessary, but that was a judgment made by the Inspector. That was the only occasion which he could remember when one of Satnam's team had challenged his judgment. His practice was not to ask Satnam's witnesses to comment on the evidence of local residents unless it was on an issue which was of particular interest to him. He relied on the parties to put their cases as they saw fit, and to respond to any local resident's evidence when Satnam or the Council came to give their evidence. He also invited Satnam's QC to cross-examine the local residents on their evidence, but the invitation was declined as a matter of routine, so that it was left to the advocate to indicate that he wished to ask questions of a particular local resident. He could not recollect any who in fact were cross-examined, and counsel told the Inspector that he would pick up any points with his own witnesses. All this, said the Inspector, was perfectly normal Inquiry practice. He regarded his approach as entirely in line with the ITM, orthodoxy and the practice he had adopted in other Inquiries.

162. He also pointed out that the whole Inquiry had been adjourned from February 2018 to April 2018, at Satnam's request, and contrary to WBC's strong objections, so that it could prepare additional highways evidence, nor had he objected to the submission of "completely new and revised air quality evidence" in Satnam's evidence. He had sought to treat all parties fairly.

Interaction with persons outside the formal Inquiry sessions:

163. The Inspector said that there was considerable local resident interest, the Inquiry was well-attended throughout, but most had no knowledge of how the Inquiry process worked and how they should participate. Some were very nervous, others "forthright to the point of interruption." There was also "obvious antipathy" between the main parties which was "exceptionally challenging and difficult to manage." Local residents raised many procedural queries with him, which "inevitably" were made when he was sitting at his desk in the Inquiry room, or as he moved between the Inquiry room and his retiring room. The vast majority of the interactions he had with local residents outside of the formal sessions were of that sort of procedural nature: how they could ask questions, timing of the evidence of the individuals residents, copies of their evidence, how it should be submitted and so on.

164. The Inspector pointed out that he also had to deal directly with the practical management of the Inquiry, covering such matters as the setting up of the room, and microphones. As they have no administrative support, they have to speak with venue staff or Council staff; it is common for an Inspector to be alone with Council staff during the setting up of an Inquiry. It is not practical or possible for representatives of all parties to be gathered around every time an administrative issue had to be addressed. He would never enter a "huddle" with any party, and he had no recollection of the event Ms Bennett described, of him huddled with the Council team behind the Council's desk in the Inquiry room, for a friendly chat. He said that the only conversations he had with WBC representatives about the Inquiry related to "straightforward and uncontroversial administrative matters."

165. As was commonplace, the Inspector had no entry to the Inquiry room separate from the participants. At this Inquiry, he had to walk the length of the room from his desk to the door, and through public areas used by those attending the Inquiry, to reach his retiring room. The facilities were shared. The Inquiry was well-attended throughout and so there was always a throng at the start of the day and at the breaks, but an absence of segregation was not unusual at Inquiries. It was impossible to avoid contact with the parties including local residents, or to stop them greeting him, making comments or asking questions. This was inevitable at every Inquiry or hearing. He gave examples of the sort of comments made or questions asked e.g the length of the day's sitting, when evidence could be given, or how tired he looked, to which he would make a brief response as courtesy demanded. He said that if someone tried to "speak about the case", he would say that that was not something he could talk about and it had to be raised when the Inquiry resumed. He regarded it as common for local residents to approach his table to speak to him alone at some point during proceedings to receive documents or for someone to ask when they could speak. When Counsel for the main parties approached him, they did so together, but not with local residents, to tell him for example, of estimated timings, and he did not relay that to the Inquiry either.

166. The Inspector agreed that the conversation with Highways England, referred to by Mr Griffiths and Mr Tighe, had taken place. Its purpose was to confirm his understanding of when they would complete certain work which they had stated in a formal session was missing, in the hope that agreement could be reached between the parties. As that was more than just an administrative point, he explained in formal session what had been said. Highways England then did the same, explaining the likely timing for its

work. He said that what was said was accurate and omitted nothing material. The work was done, and with Satnam's mitigation would improve the junction in question. He had no recollection of any other discussions with Highways England, as described by Ms Bennett.

167. Mr Starkie had described an occasion when the Inspector had spoken to a local resident who was setting up a video; the equipment was near his table and he had just checked with the objector that it was working and that the objector needed no assistance to work it.

168. The Inspector could remember clearly the incident, about which both Mr Griffiths and Ms Bennett gave evidence, concerning the lady on the mobility scooter. She had stopped him as he entered the Inquiry room, to alert him to her presence, as she was due to give evidence that afternoon. He had agreed with a neighbour that that was when she would give her evidence, but had not been informed that she was disabled. He could see that she could not get to the front of the room to speak, and he had asked her if she would like the room re-arranged so that she could do so. But she preferred to give evidence from where she was, which he agreed to. He saw no reason to repeat this to the Inquiry, and it could have embarrassed the objector.

Conduct of the Inquiry:

169. The Inspector described his general approach:

> "My approach to the conduct of enquiries is to seek to maintain the event's overall structure, formality and impartiality but to do so without being po-faced. I have found that some degree of levity and friendliness on the part of the Inspector goes a long way to putting interested parties at their ease and to making what can be lengthy, and at times difficult, events more bearable for everyone."

170. There were such moments; he had yet to hold an Inquiry of any length where that did not happen; and it was consistent with the comment in the ITM that a degree of humour could be injected by the Inspector.

171. He had not however engaged in banter with anyone, although as at least one of Mr Dutton, Mrs Steen or Mrs Kavanagh was present every day, he would return their greetings and goodbyes. The only occasion when Mrs Kavanagh made a formal statement to the Inquiry was when she gave her evidence. The second of the three occasions referred to by Mr Griffiths about statements made by Mrs Kavanagh, was when she formally admitted to the Inquiry that she had made a mistake about a former gas depot on the site, and supplied further information about TPO which the main parties had been unaware. She had approached the Inspector when he was between his retiring room and the Inquiry room ask how she should submit the documents, and he had told she would need to raise the matter in formal proceedings, which she did. The Inspector saw this as a prime example of the sort of questions an Inspector receives from those unfamiliar with the process. The third occasion was when she handed in a letter about parking issued to certain residents by Satnam during the adjournment of the Inquiry, which he had not seen.

172. The Inspector regarded the interchange about a jocular request from an objector to give evidence while dancing, immediately after another objector had given evidence in song, as merely an isolated moment of quick wittedness. He regarded his response is simply a means of shutting down further comment without appearing "formidable and authoritarian", an approach which he regarded as unhelpful to inexperienced witnesses. Mr Griffiths was wrong to see this as a failure to stamp on inappropriate behaviour, because it was not inappropriate. There was at times but he would regard as "banter" between opposing counsel and witnesses who knew each other well; he gave examples. He had made it clear he would not tolerate clapping, cheering or calling out from those attending; he threatened to clear the room of all interested parties after Satnam's counsel had been heckled. There were no other such incidents, and the offending objector apologised to the Inspector at the end of the session, approaching his table alone.

173. He regarded himself as equally chatty with Satnam's team as with objectors. He instanced a few occasions when he had chatted with Satnam's QC outside the proceedings, involving what was essentially small talk, such as when the QC had appeared before him a few years before at another Inquiry.

The site visit:

174. The Inspector pointed out in his witness statement that the site visit was not going to be "a standard affair."

> "74. It took place very early on in the inquiry, rather than, as is more usual, at the end of proceedings once all of the evidence has been heard and the inquiry has been closed. This meant that I had yet to hear any substantive highways evidence and, thus, some explanation of the particular points of concern was necessary in order for me to understand why particular features were being pointed out.
>
> 75. In addition, and importantly, I had made it clear to the appellant in advance of the inquiry that I saw the visitors an opportunity that could be used to make "… *more efficient use of inquiry time if local residents are able to* ***have their say*** *on site*". An email from Helen Skinner of the Planning Inspectorate was sent to the parties on 12 March 2018 suggesting this. Mr Griffiths replied on the same day saying: "*Helen, yes, agreeable to us*" … Again, therefore, there was a clear expectation that some discussion would be involved, as all parties sought to articulate the reasons why it was necessary for me to view certain things. Importantly, this was agreed by Mr Griffiths on behalf of the appellant.
>
> 76. The fact that the site visit took place when it did (i.e. well before it gave any evidence on the key matters in dispute) meant that the appellant could easily address any issues arising, later in the proceedings. Indeed, it was not until several weeks later, following a lengthy adjournment (during which time several Transportation Technical Notes were submitted by the

> appellant to the inquiry), that the appellant's highways evidence was heard."

175. Mrs Steen on behalf of the Save Peel Hall Campaign had emailed Ms Skinner, and Satnam had a copy, with the proposed list of areas which local residents would like the Inspector to visit, with each area of concern represented by an individual with local knowledge. She stated that they understood that the merits of the case could not be discussed during a site visit. A timed itinerary, identifying which individuals would represent local residents at each place, was provided. This led to Ms Skinner's email to them, Satnam and WBC. A further route was provided by Mrs Steen on 28 March 2018, to which Mr Griffiths replied, copying in Ms Skinner, asking for a route plan and who would represent the residents; it did not take issue with what Ms Skinner had said about the form of site visit.

176. The Inspector explained that although this type of site visit was uncommon, he had done similarly extensive visits before, "and it was very challenging". It took most of the day, covered an extensive distance on lengthy walking tours of different parts of the site and different areas in its locality. Eight or nine individuals were present on these tours: three from Satnam, two from WBC, and changing local residents over different sections. An itinerary had been prepared by local resident, in liaison with the main parties, before the inquiry opened. It was not chosen by local residents. Satnam and WBC asked the Inspector to view specific junctions. The Inspector thought the site visit well-ordered and extremely well organised, contrary to the picture painted by Satnam. Although he could have seen all of this unaccompanied from the public realm, and did so on several occasions, before and after the visit, he thought it prudent for him to be seen to have covered all of the locations of concern to all of the parties.

177. He agreed that he was in the middle of the group, but rejected Mr Griffiths' criticism of that. He deliberately tried to be in the middle so far as possible to avoid becoming separated off with any particular party. But in places there was a narrow footpath, and people had to walk in single file. People walked at different speeds, and however hard he tried to keep people together, it was inevitable that some degree of spacing out would happen.

178. He agreed that it was more than likely that he exchanged words:

> "on benign topics with Council officers, local residents and members of the appellant's party during the day, while I endeavour to keep people together and to remain an appropriate distance to all of them.
>
> 84. I do not recall becoming detached significantly from the overall group with any party at any point, such that words were exchanged in the absence of any other party."
>
> He interpreted the appellant's evidence as confirming that its representatives "were directly involved with, or present for, discussions that took place throughout the visit".

179. The Inspector denied striding out with local residents, or seeking them out, or leaving Satnam's team labouring in vain to keep up. Nor did he recall anyone becoming

separated from the main group or being left behind at any point during the site visit. A degree of informality was inevitable; it would be:

> "entirely impractical for an Inspector to operate as an island, spending the day walking in silence, and there is a fine line between maintaining one's distance and being rude. Common courtesy, if nothing else, require some interaction."

180. The Inspector instanced benign small talk which he had with Mr Starkie and Mr Griffiths, about cars. He responded to the comments from Mr Griffiths and Mr Tighe about what residents said about his resemblance to a well-known actor: he had not invited any such comment from residents, and he did not think that an Inspector could just ignore people who spoke to him. He regarded his response, that others had noted that resemblance, as "completely benign," he did not respond to an objector's further comment, and the party moved on. This, said the Inspector, was one incident on one day in a long Inquiry, and could not be regarded as creating a "joke atmosphere" or "free for all".

181. At the Mill Lane/Delph Lane junction, all parties had joined in pointing out where the proposed new roundabout would be; passing cars prompted comment about their speed. He disagreed with Mr Griffiths that this was evidence; the resident was imply pointing out what everyone could see "to give context to their concerns." He also disagreed with what Mr Griffiths was complaining about on a couple of other occasions on the site visit, but he was not "brushing aside" Mr Griffiths' concerns. He disagreed with Mr Tighe's contention that he was not interested in what Satnam's team had to say. Mr Tighe had volunteered comments about a particular road surfacing, and Mr Griffiths referred to the conclusions of an Inspector on a previous appeal involving this appellant and Mill Lane as an access route. This too he saw as providing useful context, for why certain features were relevant.

182. At Winwick, "we were all shown some short footage of a particular junction, gathered around the resident's iPad in the churchyard." Space "was not confined", though I doubt that his comment about the size of the churchyard tells anything of the space round the iPad. The Inspector had explained to those there that the footage showed no more than he had already seen on his daily journey from his hotel to the inquiry and what residents had already referred to in their written representations submitted in advance of the Inquiry. He confirmed with Mr Tighe that he had covered this junction in his proof of evidence, and could cover it again when he gave his evidence. The resident with the iPad gave extensive evidence about traffic in Winwick, well before Mr Tighe gave evidence, so Satnam's QC could ask any questions required of Mr Tighe in response to that evidence. This video was formally submitted on a USB stick.

183. He could only recall two occasions when residents approached him during the site visit. A gentleman came out of his house on Elm Road to point out to him in front of everyone where he believed the proposed employment units go, behind his house; the Inspector thought this was the man who "managed to have a chat" with him, according to Mr Starkie. On Birch Avenue, an elderly couple proffered some old photographs of crops on the appeal site, which he refused to accept and which another resident later submitted to the Inquiry. He was not handed photographs of parked cars; they were submitted by a resident as part of her evidence of parking concerns. He

could not recall the specific points made by Mr Tighe, about parking on Elm Road and Birch Avenue being made on the site visit; they were in fact put to Mr Griffiths by local residents when he was giving evidence. The Inspector listed the several locations to which residents referred at Birch Avenue, noting the response of Mr Griffiths to one of them. Both local residents and Mr Tighe, who had plans with him, pointed out the location of the proposed junction arrangements on Winwick Road, to which Birch Avenue led. Mr Starkie identified the distance into the site from the proposed first line of dwellings, and the line of the high-pressure gas main. The Inspector had not taken at face value a resident's assertion about bats; he asked Mr Starkie to provide a response, which led to an email from him. The resident's assertion was in fact already before the Inquiry in written submissions. The Inspector queried the comment of a local resident about a former gas depot, which she formally corrected at the Inquiry. Those points were wrongly described by Satnam as "significant evidential contributions."

184. At Poplar Avenue, accompanying residents pointed out the large poplar trees which Satnam's Option B would require to be felled. A debate began over whether they were subject to a TPO, which the Inspector curtailed by requiring evidence to be submitted to the Inquiry. Option B was withdrawn shortly after the existence of the TPO was confirmed. He did not recall meeting any residents there, other than those accompanying the site visit. The Inspector again listed in his evidence the several locations pointed out by residents, and one pointed out by residents and WBC. In the latter part of the section of the site visit, Mr Tighe took the opportunity to explain to the Inspector, with the benefit of his plans, the works being proposed; the Inspector did not regard this as an inappropriate volunteering of information.

185. None of the concerns raised now by Satnam had been raised with the Inspector were about the site visit or his general conduct of the Inquiry, either during the Inquiry or during the lengthy adjournment after the site visit, in public or private. The only time when its QC had questioned what the Inspector had decided related to his request for additional evidence to substantiate Mr Griffiths' oral evidence.

186. The Inspector also commented that his Report made it clear that his recommendation did not turn upon representations made by local residents. Two of their concerns, highways and air quality impacts, were accepted, that was only because their concerns mirrored those of the WBC as a main party. Their wider points, IR 13.85-13.94], did not find favour, nor did he support other objections on site impermeability or the inappropriateness of access via Mill Lane. He had also expressed sympathy for Satnam's position in relation to highways data. The explicit view of local residents was that the site was fundamentally unsuitable for development, which was not a view accepted by the Inspector, and was contrary to his comment at IR13.87.

187. He was "acutely aware" of the responsibilities of his position as a Planning Inspector, including the need to avoid any appearance of bias. He did not consider that his conduct of the Inquiry was anything out of the ordinary for him or Inspectors generally.

188. Ms Bennett made a second witness statement. She remained "absolutely certain" that the Inspector had spoken privately with representatives from Highways England on a number of occasions during breaks in proceedings but she was in the Inquiry room when both Mr Griffiths and Mr Tighe were absent. She had no contemporaneous

notes. She also reiterated that the conversation she had described as a "huddle" between the Inspector and the Council team took place. She also said that it was not obvious to her what the discussion between Mr Clisby and the Inspector was about.

189. Mr Griffiths' second witness statement said that the Inspector's comment, that exchanges with interested parties outside of the formal Inquiry sessions were no more than brief, passing niceties or explanations about procedure, was inaccurate. Some, he said, were quite prolonged. He also criticised the Inspector's statement that some explanation of the particular points of concern was necessary for him to understand why particular features being pointed out; Mr Griffiths was of the view that the explanation should have been provided subsequently in the formal Inquiry sessions; where the site visit preceded the evidence, an Inspector should have been specially careful to avoid receiving evidence on the site visit. Mr Griffiths had also not understood Ms Skinner to be suggesting that residents give evidence during the site visit, in the light of Mrs Steen's comment that they knew that the merits of the case could not be discussed in the site visit. He thought she meant that residents would point out locations, without departing from usual practice. There had been no change to that practice. He thought that the Inspector's "conduct was plainly and frequently contrary to extant PINS' guidance."

The PINS Manual

190. Mr Lockhart-Mummery referred to what he said was non-compliance by the Inspector with this guidance in support of his contention of apparent bias.

191. It explains that the purpose of the site visit is not to provide an opportunity for anyone present:

> "to discuss the merits of the appeal or the written evidence they may previously have provided. The Inspector…will therefore not allow any discussion about the case with anyone at a site visit, except if it is an accompanied site visit…the Inspector…may ask the invited parties to point out physical features that they have referred to in their written evidence."

192. At the start of the visit, the Inspector should explain that the purpose of the site visit is for him or her to see the site and surroundings, that he "cannot listen to any representations/discussion/arguments - but that the parties can point out physical features." If necessary, he or she should remind the parties of this during the site visit. During the site visit, the Inspector should never allow himself or herself to be drawn into "conversations about the case or other matters – remarks that may seem harmless could be misrepresented (for example, avoid commenting on how lovely the site is or the view)." The Inspector "should firmly resist accepting any evidence or revised plans …offered at the site visit. This is to avoid any accusations of unfairness." If third parties ask to attend the site visit, as happened here, the Inspector could reiterate that he or she could not listen to representations, but the third parties could be told that they could draw the Inspector's attention to physical features which they wanted the Inspector to see.

193. Within the Inquiry, it was best to leave the room after setting out the papers so as not to be left alone in the room with just one party. The Inspector should avoid

involvement in any discussions. If anyone sought to engage the Inspector in conversation "about the appeal, [the Inspector should] ask them to raise it…" once the Inquiry was opened. But the Inspector could deal with matters relating to the hearing venue. This section also advised Inspectors that as the Inquiry was based on the formal presentation and examination of evidence, "it is not appropriate to allow discussion at the site visit (as [the Inspector] might with a hearing which has not yet been closed)."

194. It is clear that the advice about site visits is addressed to the normal site visit conducted at the conclusion of the Inquiry. The advice about being left alone in the room after setting up, is applicable more generally, although entitled "The day of the Inquiry". The advice, about conversations about the hearing venue, recognises that these can take place alone with the Council, which is usually responsible for the venue.

The general principles

195. The general principles were not at issue. I prefer to start with *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 rather than *Turner v SSCLG* [2015] EWCA Civ 582. In *Porter*, Lord Hope, with whom the rest of their Lordships agreed on this point, approved at [103] the formulation of the test for apparent bias laid down by Lord Phillips MR in *In re Medicaments and Related Categories of Goods (No.2)*, [2001] 1 WLR 700 at [85] with one excision, leading to the following test:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded observer to conclude that there was a real possibility that the tribunal was biased."

196. In *Turner*, Sales LJ giving the judgment of the Court, said at [8]:

> "The test applicable to determine whether there has been apparent bias is based on the notional fair-minded and informed observer. That individual must be taken to have formed an objective judgment having regard to all the circumstances. The fears expressed by a complainant that there has been an appearance of bias relevant, as Lord Hope said in paragraph 104 of *Porter v Magill* [2002] 2 AC 387 at 494, at the initial stage when the court has to decide whether the complaint needs to be investigated. But they lose their importance when the stage is reached of looking at the matter objectively. And the assertions by the inspector that he was not biased are not likely to be helpful even if true. The test applicable is whether having regard to all the circumstances if our minded observer would conclude that there was a real possibility that the inspector was biased."

197. *Turner* also noted that the test required the court to "look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or available to the hypothetical observer at the time of the decision." See *National*

Assembly for Wales v Condron [2007] 2 P&CR 4 Richards LJ at [50]. This is important: the Court knows such facts as it finds on the evidence, including as to what conversations passed between an Inspector and participants, even though the complaining party may not have known at all.

198. Sales LJ also referred to two aspects of the context which the fair-minded observer would know. First, [18], there was an expectation that n Inspector should be actively managing the Inquiry process to ensure that it was efficient, effective and fair to all interested parties. Second, [19], the PINS Guide was designed to promote best practice, but did not of itself provide the standard by which an appearance of bias was to be judged; for example, a lapse in courtesy or patience on the part of the Inspector during an Inquiry would not of itself give rise to an appearance of bias, "a great deal more than that would be required." Breaches of the Guide are not as such sufficient to prove apparent bias, though they can be relevant to the judgment or assessment of whether conduct created the real possibility of apparent bias.

199. Mr Lockhart-Mummery referred me to number of decisions involving Planning Inspectors. In *Simmons v SSE* [1985] JPL 253 Forbes J, the Chairman of the Council, who had been a potential witness and had attended the Inquiry throughout, had a conversation lasting some minutes with the Inspector and the Council solicitor after the close of the Inquiry. The Inspector had sought to disengage himself as soon as he could. The conversation was not about the case but the Chairman was asking the Inspector whether some variation in Inquiry procedure would be of general value. The Inspector did not want to have any conversation and disengaged himself as soon as he could without being rude. Forbes J said that if the Inspector had not wanted to be rude, he could have told the other parties, who were still around, what in fact had happened. But the test he applied, which in my judgment does not fit with *Turner*, was that where "circumstances gave the impression that something was being done which should not be done, in relation to the matter which was under adjudication, then that was exactly what this branch of the law was concerned with - that justice was not being manifestly seen to be done." Forbes J thought that the inference of impropriety could reasonably be drawn, though in fact there was none. This is not the language of the objective and fully informed observer, knowing what those who simply saw the conversation may not have known. It precedes the development of the test for apparent bias. I am not sure that the outcome would be the same.

200. In *British Muslims Association v SSE* (1988) 55 P&CR 205, Stuart-Smith J, a substantial conversation took place between the Inspector and Council representatives during the site visit, out of earshot of the appellant and his representatives, and at some distance from them. Again, the test he applied was whether a reasonable person in the position of the applicant could reasonably draw the inference that there had been an impropriety, that justice did not seem to be done, even though there had been no impropriety in fact. I have the same strong reservations about the compatibility of the test applied with the modern law as I do over the decision in *Simmons.* I cannot regard those decisions as useful applications of the current test, and I cannot tell whether the decision would have been the same if the modern test had been applied. I rather doubt it, and see little point in trying to resolve that. The question is whether on the facts I have to grapple with, the modern test is satisfied.

201. In *Cotterell v SSE* [1991] JPL 1155, Roy Vandermeer QC sitting as a Deputy High Court Judge, all parties and the Inspector went to a pub after the site visit. The

appellant's team left, leaving its opponents with the Inspector, expecting that it would all end soon. They stayed longer than anticipated, but the nature of the conversation did not change from what it had been when they were present. It was not a discussion about the case. The judge found that the inference could not reasonably be drawn that bias was apparent, largely because it had been known to the appellant's team when it left, that the others would be left alone together.

202. In *R(Tait) v SSCLG* [2012] EWHC 643 (Admin), Vincent Fraser QC sitting as a Deputy High Court Judge, considered that the general approach from the cases was that "if an inspector has a conversation about the case with one party in the absence of the other, that raises a real risk that justice will not be seen to be done." This is far too general a comment to be of assistance, and draws too heavily on old cases to provide a useful test; it is different in language from *Porter v Magill*, although it may not have affected the outcome. The case concerned what was in effect a site visit accompanied by one party only. I very much doubt the value of the continued citation of cases which precede or which did not expressly apply the test in *Porter v Magill*.

203. In *Turner*, there were conflicting accounts of what happened at the inquiry and of the overall impression which the Inspector gave. None of those who provided witness statements were disinterested observers, and so could not be treated as the notional fair-minded observer. The same applies here. In reality, the fair-minded observer is the court deciding the apparent bias issue.

204. Mr Phillpot referred me to *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin) for what the Divisional Court held should be the approach to contested factual evidence in judicial review cases. The judgment of the Court, Scott Baker LJ, Silber and Sweeney JJ, [17], explained why it had allowed cross-examination of defence witnesses: in the absence of such cross-examination, factual disputes ordinarily had to be resolved in favour of the defendant. It cited, as an example of such a holding, the decision of Geoffrey Lane LJ in *R v Board of Visitors of Hull Prison ex p St Germain (No. 2)* [1979] 1 WLR 1401 at p1410H. This approach was not challenged by Mr Lockhart-Mummery who sought to reconcile the various statements, comparing positive recollection with absence of recollection.

205. Mr Phillpot also contended that, if I found that there was apparent bias on the part of the Inspector, it had not tainted the Secretary of State's decision. The relevant test is set out in R *(Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472. The issue concerned the effect of apparent bias in advice upon which a decision-maker acted. The *Porter v Magill* test was adapted at [125]: would the fair-minded observer, knowing of all the facts and of the composition and remit of both the advisory body and the deciding body, conclude that there was a real possibility that, if the advice was tainted by apparent bias, the decision had also been affected?

206. Mr Phillpot contended and Mr Lockhart-Mummery disputed that Satnam had waived its right to raise the issues of apparent bias it now raised, because it had had the opportunity to do so during the site visit and Inquiry, but had not done so. The dispute concerned the application of the principles rather than the principles themselves. The principles are to be found in *R v SSHD ex parte Al-Fayed (No.2)* [2001] Imm AR,134. The allegation was that the Home Secretary had shown apparent bias in relation to an application for British citizenship. Any waiver had to be clear, unequivocal and made

with full knowledge of all the facts relevant to the decision whether to waive or not, [84]. Kennedy LJ said, [85], that a person who had the relevant information which could warrant an objection on the basis of apparent bias, but continued without objection to the decision-maker deciding the application, had waived his rights. He could not "simply reserve his position until he sees how the decision goes. If with the relevant information he presses for a decision he thereby waives any right he may have to object to the decision-maker." Rix LJ dealt with a submission made on behalf of Mr Al-Fayed that it would have been invidious for him to have asked the Home Secretary to stand down and for a substitute to take the decision instead. There had been no lack of time to discuss the matter with his lawyers, and he had also been aware of the risk of waiver. The submission was not accepted on the facts or as a matter of principle as I read it.

The submissions

207. Mr Lockhart-Mummery submitted that the evidence showed that the Inspector had had conversations with local residents which Satnam's team could not hear, and which were repeated and not brief. There was no explanation of those conversations at the time. There was a conflict of evidence between the Inspector who said that he recollected only the one private conversation with Highways England, about which a short explanation had been given to the Inquiry, whereas Ms Bennett was absolutely certain that there had been several which she saw while she was there in the Inquiry room. This would be "grossly inappropriate", he submitted, as Highways England was a major objector. The Inspector denied any private conversation with the Council, yet Mr Clisby accepted that there had been one, about which no explanation had been offered and the purport of which had not been obvious to Satnam's team. The conversation which Mr Clisby referred to appeared to be different from the one Ms Bennett referred to.

208. Mr Griffiths' evidence, and others, notably Mr Davies from WBC, was that the site visit was unlike any they had attended in its informality, and the amount of oral evidence the Inspector received from local residents, including photographs and videos which had not, at that stage, been submitted to the Inquiry. Evidence was accepted despite Mr Griffiths reminding the Inspector four times that he should not accept evidence on a site visit. Much of what transpired between the Inspector and local residents was out of earshot of Satnam's team, as the evidence of both Mr Griffiths and Mr Davies showed. The PINS Guidance/Manual did not say that evidence could be received where the site visit took place early in the Inquiry, and Mr Griffiths was right to say that that made it more important that explanation of what the Inspector had seen should await the formal sessions.

209. Mr Lockhart-Mummery did not pursue submissions about what had happened in the giving of evidence at the Inquiry, whether of questioning by residents, the timing of their giving evidence or its extent, or differences in the way in which supporting evidence was sought from residents and Satnam, or in relation to "banter". I propose to comment on those points however as Mr Griffiths raised them.

210. The Inspector had agreed with local residents; IR 13.9, 13.20-13.25, 13.388, 13.45, 13.64, 14.7, and 14.11. The Secretary of State in the DL had adopted the IR reasoning and recommendations. His DL was thus tainted by the apparent bias of the Inspector. There was nothing in the evidence of Ms Nowak to suggest that the apparent bias did

not travel from the Inspector to the Secretary of State. At all events he was not in a position to correct it or to make allowances for it. The decisions quashed in *Simmons*, *British Muslims* and *Tait* were those of the Minister, but on the basis of apparent bias by the Inspector.

211. Concern had been expressed to the Inspector by Mr Griffiths about the most objectionable aspect of the Inspector's conduct of the site visit. Satnam's team had considered carefully whether to raise their concerns with the Inspector during the Inquiry, but did not do so to avoid his disfavour. Satnam's team had been placed in a very difficult position by the Inspector, and it was not for the Secretary of State to complain about their response to the problem created by the Inspector. The apparent bias could only be waived with full knowledge, freely, clearly and unequivocally; that was not the case here.

212. Mr Phillpot submitted that the Inspector was trained and highly experienced. There was no allegation his actions breached the Inquiries Procedure Rules, or gave rise to procedural unfairness. There was no allegation that his procedural decisions put Satnam at a disadvantage or were disproportionately beneficial to its opponents. The Rules were not prescriptive, because of the obvious need for flexibility to accommodate myriad different circumstances. The Inspector had to engage with members of the public who might be unfamiliar with the Inquiry process, to ensure that they had a fair and proper opportunity to participate, and to ensure the process as a whole was fair, efficient and effective. The Inspector's evidence showed the same informality of approach when dealing with Satnam's witnesses and counsel. An informal and chatty style was not of itself procedurally unfair or evidence of favouritism. Satnam was represented at the Inquiry by Mr Lockhart-Mummery, an experienced QC, and was well placed to raise any concerns with the Inspector. It did not do so, and the consequences of not doing so were made clear in *Al Fayed*, above.

213. The Inspector had also demonstrated his impartiality in adjourning the Inquiry for a lengthy period at the start at Satnam's request, against the strong objections of WBC, to enable it to prepare additional evidence. He intervened to make clear that he would not tolerate, clapping and cheering or calling out in response to Satnam's witnesses, and threatened to clear the room when its QC was heckled. There is no suggestion that Satnam was hindered in its presentation of its case, or unable to answer points made by objectors, or unable to cross-examine them if it so chose.

214. The involvement of local residents was managed in a way that was appropriate, commonplace and in line with the ITM. No objections were raised to the way in which local residents' evidence was accommodated, or to their questioning of Satnam's witnesses, or to the opportunity to cross-examine them. It was not suggested that any of that indicated any apparent bias.

215. In the upshot, the IR did not turn on representations from local residents; their arguments were rejected where they did not mirror those raised by WBC.

216. As was common, the Inspector had no assistant with whom the public could speak about the conduct of the Inquiry. The layout of neither venue permitted him to maintain clear physical segregation from the parties or members of the public between Inquiry sessions. All used the same room, entrance and facilities during breaks, so he would have to mix with participants and the public before and after the sitting day and

during breaks. He could not prevent members of the public approaching him at his table or when moving through the Inquiry room, or outside. The evidence shows that he responded briefly and unremarkably to these innocuous greetings, comments or questions about procedural matters, which were unavoidable in such a public Inquiry.

217. These were not conversations "about the case" of the sort *Tait* was concerned with and *Tait* was not setting down a hard and fast legal principle anyway. A casual conversation between an Inspector and a participant, in the absence of the other side, could not give rise to the appearance of impropriety; *British Muslims Association* above, at p 212.

218. Mr Phillpot acknowledged that the conversation with Highways England on 27 April 2018 "was more substantive in nature and it is accepted that this conversation might have been deferred to an appropriate point in the inquiry." The fair-minded and fully informed objective observer would note that the conversation was intended to help an agreement to be reached between Satnam and Highways England on the evidence to demonstrate an improvement to the junction in question; so the action was intended to resolve a matter which could assist Satnam; everyone could see the conversation; the Inspector provided a full account to the Inquiry when it resumed; no objection or concern was raised until after the appeal was dismissed. This was not one of the incidents identified in Satnam's contemporaneous note of internal discussions. In context, there was nothing about the Inspector's interactions with participants outside the formal Inquiry sessions which would lead a fair-minded and informed observer to conclude there was a real risk the Inspector was biased.

219. The allegations that the Inspector participated in a "huddle" with members of WBC's team, and of multiple discussions with representatives of Highways England were disputed matters of fact. The normal rule was that the Defendant's evidence should be accepted.

220. In the Inquiry sessions, there were moments of light humour and relative informality, in what was a lengthy and at times fractious Inquiry. These commonplace occurrences could not be evidence of bias, and also occurred between the Inspector and Mr Lockhart- Mummery. This was in line with the ITM. The great majority of humour or informal conversation was initiated by local residents anyway, who could not be prevented from behaving in that way. Again, there was nothing which could give rise to an appearance of bias.

221. In judging the allegations about the site visit, it was important for the informed and fair-minded observer to consider the particular circumstances and timing of the site visit, which were unusual. Where the site visit takes place, in the normal way, after all the evidence has been presented, and the Inquiry closed, all the evidence relating to what could be seen on site will already have been given. This effectively limits what can be said to pointing out what has already been referred to, and there is no opportunity for an evidential response to anything more. Here the accompanied site visit took place after three of the eventual twelve Inquiry days, before any evidence on the key highways issue had been called, and before local residents gave their oral evidence. In those circumstances, the Inspector thought it appropriate for those pointing out features on the site visit to be able to offer some explanation as to why they were doing so, as to why what was being pointed out mattered. Anything that

sort said by local residents would be in the presence of Satnam's representative, and in due course evidence about anything seen or said could be given and tested.

222. The informed observer would note the exchange of emails about residents having their say on site, the fact that local residents simply explained why they were concerned about particular issues directly relevant to the site visit, the fact that Satnam's representatives also made comments about what was proposed, the absence of evidence that its representatives were treated differently in relation to what they could or could not say on site, or that any matters were raised to which they could not adequately respond in evidence later, in the absence of complaint about the conduct of the site visit during the remainder of the Inquiry or to the Inspectorate or the Secretary of State.

223. The route and locations for the site visit were agreed by all parties; the Inspector sought to avoid being separated with any particular party, but there were places where people had to walk in single file, and people walked at different speeds. There were informal exchanges on benign topics with the representatives of all parties. No documents were accepted. The video footage, which all parties viewed during the site visit, was subsequently provided to Satnam on a USB stick, after the Inspector had made it clear that he would only view the video after the resident had confirmed that it would be submitted in evidence, and that his concerns were already set out in his evidence, and covered in evidence by Mr Tighe for Satnam, and confirmed with Mr Tighe that he could address the issue again orally, which Mr Tighe said he would do. There was no evidence of any material disadvantage to Satnam in what the Inspector did. Again, the fair-minded and informed observer would not conclude that there was a real risk of bias on the part of the Inspector.

224. Moreover, there was no evidence that, if there were apparent bias on the part of the Inspector, it had travelled to the Secretary of State, applying the test in *Royal Brompton* above.

225. Unusually, in this case, there was evidence about the Secretary of State's decision-making process, in the form of a witness statement from Ms Nowak, a Decision Officer in the Planning Casework Unit at the Department. Once an IR has been received from the Planning Inspectorate, the Case Officer and Decision Officer review and appraise it critically. They prepare an Initial Assessment which is circulated to the Head and other members of the Planning Casework Unit, Legal and Policy colleagues and to the Chief Planner. The Case Officer and Decision Officer then prepare a draft submission for the Secretary of State or Minister; before submission the draft is reviewed by the Head of Planning Casework and the Chief Planner. Once the Minister has considered the submission and its accompaniments, which include the IR, and taken the decision, the Case Officer and Decision Officer prepare the draft DL. That was the procedure followed here. Ms Nowak also produced the submission to the Minister.

226. Mr Phillpot submitted that Ms Nowak's evidence demonstrated the decision-making process after the receipt of the IR. Critical appraisal by the Planning Casework Unit and review by a senior civil servant, before a submission to Ministers, were important stages. This was a decision made by the Minister; the evidence was reviewed and analysed; it was far from an uncritical rubber-stamp of the Inspector's

recommendation; the decision was not automatically tainted by any taint in the recommendation, even if the recommendation were accepted.

227. Satnam should not now be able to raise a challenge based on allegations which it did not raise with the Inspector or Secretary of State. All the matters complained of were known to Satnam before the Inquiry was closed; most occurred in April and May, before the two months adjournment. Satnam chose not to raise their concerns, having taken advice from its lawyers. Here, Satnam had the information it now relied on, considered but decided not to raise the point; its dilemma about aggravating the Inspector rather than bringing about an adjustment to his conduct, was an argument which found no favour in *Al-Fayed*; [118-120]. Such an issue had to be looked at with realism, although in that case the decision could be taken by someone other than the Home Secretary, who was the person against whom bias was alleged.

228. Mr Manley QC for WBC adopted Mr Phillpot's submissions. He pointed out that the witness statements submitted on behalf of WBC were broadly consistent with the Inspector's evidence. Satnam could have but did not raise these concerns with the Inspector or with Mr Manley. The Inspector was plainly not biased given the time he allowed Satnam to run the 2016 WMMTM.

Conclusions on apparent bias

229. I note at the outset that there is no allegation of a breach of the Inquiries Procedure Rules, and that Rule 15 states that, except as provided by the Rules, "the inspector shall determine the procedure at an inquiry." I detected nothing in the IR itself - by tone, content, weight or reasoning - to suggest that the Inspector may have been biased. I accept his analysis that the only points on which the views of the residents succeeded were those which WBC pursued anyway. In all other respects, the residents did not succeed. There was a clear recognition that another scheme, deliverable and properly supported by highways and air quality evidence, could receive permission. This is not what many, perhaps all, residents sought. I also consider that the adjournment of the whole Inquiry for some months, opposed by WBC, and strongly, so that Satnam could get its transport case in order, showed a determination to be fair and effective, of which Mr Griffiths could have shown greater awareness, before making some of the criticisms he did.

230. Many of the points raised by Mr Griffiths seem rather petty, and indeed overly critical, suggesting an unwarrantedly aggrieved approach, which make me reluctant to take his points at the level of gravity which he attaches to them. Many provide no basis at all for an allegation of apparent bias. Granted that Mr Lockhart-Mummery did not pursue some of them to any degree, focussing instead on the interaction with Highways England, the Council and with the residents on the site visit, nonetheless I cannot ignore them, when invited to give weight to Mr Griffths' evidence and appraisal. They were intended to influence my judgment.

231. Nothing which happened during the Inquiry sessions could warrant any fair-minded observer alleging, let alone concluding, that there was a real possibility of bias. The time given to local residents to present evidence was a product of the number who wished to speak and the evolution of Satnams' evidence. This was very much a matter for the Inspector to judge; a resident's day is not uncommon at a long Inquiry. The scheduling of their evidence was likewise for him, and permitting them to fill in gaps

in the intended timetable was obviously sensible. The extent to which he permitted them to question witnesses for Satnam was a product of his desire to enable them to participate fully, and it would have come across to the fair-minded observer in that way. I accept the Inspector's account of the limitations he imposed on the extent of the questioning to avoid repetition and irrelevance. The fact that a resident was permitted to ask a question of a witness, still in the room after another had given evidence, seems to me no more than a reasonable response to a particular request. It can be described as informal, but that is no basis for an allegation of real possibility of bias. He pointed out that residents may not understand to whom a particular question should be addressed, which I regard as a very common problem, for example where the input of one witness is used in the evidence of another. The Inspector gave an example of refusing to allow a resident to question a Satnam's witness long after the witness had given evidence. He did not restrict the questions which Satnam might wish to put to residents, nor did he prevent any Satnam witness giving the evidence they might wish to give as result of what residents had written, or said at the site visit. He also rebuked a resident heckling Mr Lockhart-Mummery and threatened that residents would be removed; he warned residents that calling out would not be tolerated. An issue of apparent bias cannot be considered just by looking at a set of complaints in isolation from how the whole process was conducted. The Inspector's evidence is more helpful in that factual respect than that of Satnam's witnesses.

232. I do not accept Mr Griffiths' evidence, in the light of what the Inspector had to say, that the Inspector adopted a different approach, which could reasonably be seen as indicating bias, towards what supporting evidence he asked for from residents and that which he asked for from Satnam's witnesses. He did ask residents to produce support on a number of occasions as he says in evidence. Mr Griffiths is wrong to say that residents' evidence was taken at face value; it would have achieved greater success had that been so. The question is what the Inspector judges he needs for a particular point. There may have been a difference, in view of the professional nature of Satnam's witnesses and what they could be expected to produce. There is no evidence of any unduly onerous or irrelevant request for supporting data from Satnam, and none which suggests that, in comparable circumstances, residents were not asked for the sort of evidence which they could sensibly be expected to produce. The circumstances which Mr Griffiths speaks about are quite unspecific. There is no evidence either of such a point carrying any weight with the Inspector. The point was rightly not pursued, but its being raised at all suggests an overly critical and suspicious approach by Mr Griffiths, which causes me to consider his evidence on fact quite closely for what it actually says.

233. I regard Mr Griffiths' impression, and that of Mr Davies from WBC, that the residents had a very full say, as reflecting what the Inspector himself said about how he wished to treat them in a difficult Inquiry, with some edge to it, with late evolving evidence from Satnam, and it appears some difference of view between WBC and at least some residents about the potential for the site to be developed under some different proposal. That is consistent with guidance as to how he should handle an Inquiry of this sort, and it is important for all that the Inquiry be concluded within a reasonable time, rather than riven with procedural disputes, and a group of residents feeling marginalised and resentful. There is no evidence that Satnam was given a shorter time to present their case or to respond to their opponents, than they needed or

wished for, or that any part of its case was curtailed so that residents could give evidence or ask questions.

234. The grumbling from Mr Griffiths about a resident giving her evidence in song, followed by the quick interchange over giving evidence in dance and northern humour, rather illustrated my concern about where he was pitching his concern. This was but a moment of light heartedness, essentially initiated by the witness, and briefly responded to by the Inspector. Some Inspectors might have kept silent; but there is nothing in this at all. Not all judges or counsel are humourless automatons either. Although it would avoid some problems if Inspectors were, it could create others at an Inquiry with feelings running high and large numbers of the public attending. This was all very much part of a legitimate judgment about how to run a difficult Inquiry in those venues, with the facilities, and participants there were.

235. I turn to the way in which he dealt with residents and others outside the Inquiry sessions, and outside the Inquiry room, apart from the site visit. The layout of the venues, the use of shared facilities, and the route to his retiring room made contact with participants inevitable. His evidence showed that he had chats, of a wholly unobjectionable nature, with Satnam's team and local residents. I reject entirely the notion that the fair-minded observer would regard greetings and farewells of an ordinary nature as indicative of bias. The chats were not always so limited, but I accept the Inspector's description of what they were about: benign points which had nothing to do with the case, except when it came to procedural matters.

236. An Inspector could have adopted an approach of saying to each attempt at a general chat, not about the case, that he could not discuss anything; some are more reserved and formal than others. But, in view of the physical layout and frequency of inevitable contact, especially with those who were regular attenders, I am not prepared to conclude that they indicate possible bias, or are even relevant as background to the more substantial points. Satnam's team were well placed to see the pattern of behaviour and raise concerns with the Inspector, in company with WBC, if it felt the same way; he might have taken note of their concerns, however reluctantly, but it did not raise them. I accept that there would have been an impression of familiarity with individuals to whom he had spoken on a daily basis, but that does not contrast with how he spoke to the other participants; they were not ignored, their greetings, if any, dismissed. "Banter" is very much in the eye and ear of the beholder. I am not prepared to regard any of it as indicative of possible bias.

237. I accept the Inspector's evidence that he did not talk about the merits of the case with residents. He did deal with procedural issues which they raised, whether in the Inquiry room when they would approach his table or walking through it, or outside the Inquiry room, but on all occasions visible, or at least potentially so to the other participants' representatives. None of this was in private. I accept that, having no secretariat, he had to deal with these issues himself: when might the resident give evidence, what documents should be handed in for all to use, could she ask questions, and so on. He did rebuff approaches which were not simply administrative or procedural. I consider that the Inspector was entitled to make the judgment that this was the most effective way of dealing with all these administrative or procedural points; there is no evidence that any were controversial such as to occasion any objection when his programming or other decisions manifested themselves in the Inquiry. He could have had a short procedural session for residents to raise these

points in formal session, before or after every break. With the benefit of hindsight, that might have been wiser to avoid suspicion or concern, although it would have imposed a burden of speaking in public on residents lacking much experience of doing so. But no concerns were raised with him, or query as to what was being discussed. He could have said to the Inquiry, on each resumption of a formal session after he had had an administrative or procedural conversation with a resident, that that was what had happened. I can understand how an Inspector would judge that to be of no interest to the main Inquiry participants, unless he was aware of concerns from one of them. None were raised. I find it hard to accept that Mr Griffiths had no sense that this was what was happening, and if he did not understand that, that he did not ask counsel to approach the Inspector to ask for him and WBC's QC to be involved all the time. The Inspector could reasonably judge that it would have been unnecessarily burdensome to call a Satnam and WBC representative to his table, or to where the issue had been raised, every time an administrative or procedural point was raised by a local resident. I suspect that in a very short space of time, they would have left it to the Inspector to judge whether they needed to be involved or informed. No reasonable person would have thought that the Inspector might be biased.

238. This is illustrated by the concern about the resident on the mobility scooter, and the timing of her evidence agreed with a neighbour, and whereabouts in the Inquiry room she should give her evidence. The fair-minded observer, knowing of the facts, could not possibly have been concerned that there might be bias. The same applies to the discussion with a resident about whether the video machine he was intending to use was fully set up and he was able to operate it.

239. I take next the conversations with the WBC in the Inquiry room. I do not think that the fair-minded observer would regard this as indicating possible bias. I accept that there was more than the one conversation about the microphones, and that there was one about air conditioning. Other than the Inspector, the WBC witnesses are best placed to deal with this topic: what happened and why. The Inspector cannot remember this second conversation, but I accept that Mr Clisby remembers this accurately. These conversations took place in view of at least some of Satnam's team; no mention was made of them afterwards, because their purport was thought to be obvious to Satnam. Satnam could have asked the WBC team member what had happened, if not willing to broach the point directly with the Inspector. It did not do so. It could have found out quickly enough and realised that it was quite harmless. It was inevitable that the Inspector personally would have to deal with the Council over the logistics of the Inquiry room, as Satnam's team must have known. Knowing the full facts, I cannot accept that this indicated possible bias. Some Inspectors might have said what had happened, but his silence, given that on at least one of the two occasions he thought that it was obvious, cannot indicate possible bias.

240. More serious is the conversation he had with Highways England which Mr Phillpot accepted would have been better as part of the formal Inquiry session. I agree with that. If matters had stopped there, I would have regarded that as at least rather problematic. But it did not. The conversation was not away from the other participants but was in the Inquiry room, and participants could see that it was taking place and could have questioned what was happening. The Inspector did raise it in the formal session straightaway on resumption, and Highways England were invited to explain what had transpired, which the Inspector confirmed. Of course, the Inquiry was not

given a verbatim account of the discussion, rather I take it to have been the topic and upshot which were stated publicly. That was very much the remedy which Forbes J saw for the position where the Inspector had been cornered by the Chairman of the Council in *Simmons*, albeit that I accept that it arose in a different way. Whether the Inspector saw it as an error of judgment and tried to make amends, or not, the conversation was in the Inquiry room and not private in that sense; a relevant conversation was acknowledged to have taken place; its substance was then deliberately and immediately given to the Inquiry on its resumption rather than being drawn from the Inspector or Highways England, as a result of a challenge in the Inquiry; its substance was not adverse to but intended to be helpful to Satnam by working to resolve an issue which would be troubling to them. This all shows that the fair-minded individual, knowing of all the facts, would not conclude that there was a real possibility that in so acting the Inspector was actually biased.

241. The Inspector had no recollection of any further conversations with Highways England. Ms Bennett is the only witness who says that there were more; she was "absolutely certain." I am not persuaded by a witness' assessment of her own certainty to accept it. I do not accept that there were more of any significance. That is a point which should have been pursued in cross-examination of the Inspector, and it is not enough to say that he cannot remember so there was no point in doing so. "I cannot remember" is not saying that there could have been any number, or that they could have encompassed topics, such as that which was explained to the Inquiry, which clearly went beyond the administration of the Inquiry. He might have wished to answer that, if there had been more, they would not have been of the sort which he drew to the Inquiry's attention in a formal session. That is what his evidence strongly suggests.

242. I am also troubled that, if Satnam were being told by her that these unreported conversations were taking place in the Inquiry room, it did not react by asking the Inspector what was said. It could have been done courteously, and without appearance of a challenge to the Inspector's competence or integrity, and expressing the view that conversations with main participants should all take place with the others present. Satnam could have asked Highways England as well, without challenging the Inspector at all, but there is no evidence that it did so. This conversation was not sufficiently important to feature in Satnam's contemporaneous note of events which troubled them about the inspector.

243. If I had thought that there was anything of real substance in these points, about private conversations with WBC or Highways England, I would also have concluded that Satnam had waived the right to complain about them. They had seen it all, and the more general pattern of behaviour, well before the Inquiry ended. They decided not to raise the points with the Inspector. There is an element of dilemma, I accept, but that is not an answer to the point, as *Al-Fayed* shows. The issue must be raised. There was time and scope for a change to be brought about. I see no evidence that the Inspector would have been unresponsive to concerns. Satnam decided to take its chance. There is also a public interest in not allowing a participant, concerned about how an Inspector is conducting an Inquiry, to let the concern run on in case they win nonetheless. All participants have an interest in a fair Inquiry; there is no public interest in having to rerun an Inquiry because of apparent bias, if the factor leading to a concern about apparent bias can be disposed of.

244. I am not at all sure by contrast, however, that, if his approach towards local residents were regarded as giving rise to apparent bias, he would have altered his approach, which clearly he thought consonant with what his training and their participation, fully and fairly, required. I am satisfied that there is no real possibility of his being biased on account of that, but if I am wrong, then I am not satisfied that that issue has in effect been waived. Raising it would probably have made some short-term difference to how he dealt with the administrative and procedural issues, before everyone stopped being concerned, as a result. But the more general aspects of informality, I rather doubt would have changed.

245. While dealing with this point, before turning to the substance of the site visit issues, I do not accept that that there was any waiver over the site visit, if a real possibility of bias is shown. The problems arose at short notice, without time to take legal advice, or to reach a considered judgment. Afterwards, it is difficult to see that there was any waiver in continuing with the Inquiry. The events had already occurred; it is difficult to see that they were remediable for the future, or that there could have been a differently run, second, accompanied site visit as a corrective. The fact that Satnam did not raise the conduct of the site visit further with the Inspector, after the site visit was over, or seek his recusal, cannot constitute a waiver. The objectionable acts, if such they were, had already been completed and had worked what effect they were going to have.

246. I turn to the site visit. I am not here concerned with whether the site visit was more informal than was common, or whether the Inspector allowed evidence to be given, or with who organised the route. Those are not factors which really go to the appearance of bias. The Inspector was entitled to allow interested parties, who were not Rule 6 participants, to attend the accompanied site visit. The route and timings were agreed between the parties. There is no suggestion that junctions or other features which Satnam or WBC wanted the Inspector to see were not included in the schedule. I would have expected all participants to have been grateful that the local residents had a schedule of both what they wanted the Inspector to see and a restricted number of participants to accompany him at each of the four stages.

247. The exchange of emails does indicate something of a muddle as to what could or could not be said on the site visit. “Having their say” suggests that evidence would be given, yet that is not what the Inspector says in his witness statement he intended to happen. Nor does Mrs Steen who, in her email, said she knew the merits were not for discussion. No one seems to have expressed in language at any stage that the purpose was not giving evidence or discussion but was more than just pointing out features mentioned in evidence, because the Inquiry had not yet heard the evidence. Its purpose was to enable participants to point out features and, if necessary, to explain why they were doing so. Of course, that may shade into giving evidence: “I am pointing this out because of the extensive rat running that happens” is not noticeably different from saying “There is extensive rat running here.” However critical Mr Griffths was of the Inspector, the apparent bias issue is about how he treated participants at the site visit, rather than whether what they said was characterised as evidence or not. I accept that the Inspector was concerned that he should understand why he was being asked to look at something; it may not always have been apparent.

248. Aggravation at the attention given to the residents on the site visit fed into the grievance about the conduct of the Inquiry, which I have rejected as showing a real

possibility of bias. Mr Griffiths suggests that there was bias shown at the site visit because the residents were allowed to have a very full say. I do not think that the evidence begins to show a real possibility of bias in that way. It shows that the Inspector was keen to see what they wanted him to see and for them to explain why. Mr Griffiths did not like the approach, raised the point but the Inspector's approach, on his account, in relation to all the incidents recounted by Satnams' witnesses, whether they objected or raised concerns, seems to me to confound the possibility of bias. He asked the Satnam witnesses for comments, such as whether the point was covered, or a short answer; he may not have appeared responsive, but that is very different, and they could take the point up later. The Inspector's version of the events, and of what Satnam showed him and told him, is rather fuller than the Satnam witnesses' account, and I accept what he has to say. I accept that some of what the residents said can probably be characterised as evidence and that the Inspector could not draw a clear line between the evidence and explaining why a feature was being pointed out, but this appears to have cut both ways, and was remediable by evidence at the Inquiry. The Inspector gave evidence that the video shown on an iPad in the churchyard was produced to the Inquiry on a UBS stick, and that issues raised about the TPO and bats were dealt with further at the Inquiry, and that he did seek responses. He did not accept documents being handed in at the site visit.

249. I accept that the Inspector tried to be in the middle of the accompanying group. He did not adopt a formal approach towards conversing with participants as they went along; they could not always all walk together, and though Satnam tried to have one of its team always alongside, that was not always the case. It was however not necessary for all three of the Satnam team or Mr Griffiths to be in earshot. There is no evidence about how often or for how long *no* member of his team was in earshot of the Inspector when he was alone with residents or the Council, although I accept that it happened. The evidence of Mr Davies and Mr Taylor does not suggest that there were significant periods when the residents had exclusive access to the Inspector's attention; some such occasions did occur, I accept. I accept that the Inspector was aware of the need to have each party there if anything significant were being said, and that the conversations, when the parties were not all present, would have been of an insignificant or procedural nature. The snippets of conversation which Mr Davies heard were of a procedural nature.

250. The fair-minded observer, in possession of the full facts, knows all of this. The test is not how matters appeared to Satnam, or how they appeared to a fair-minded person simply observing the process from above, seeing all that went on. The fair-minded observer knows what the evidence before the court shows happened and did not happen; that includes what was said, where the evidence permits that to be known or inferred.

251. I cannot see that a degree of chattiness, or avoidance of the appearance of being rude, such as others may adopt, is indicative of a possibility of bias, especially as I accept that the same approach was applied by the Inspector to Satnam's team. I accept that the Inspector could have insisted on walking ahead on his own, or ensuring that WBC, Satnam and local residents always had someone in earshot of any conversation, or he could have insisted on walking in silence, gathering representative participants about him when he stopped to view some feature of interest. That degree of formality avoids the sort of suspicion which has arisen here. But I am satisfied that the evidence shows

that the conversations, when Satnam were not present, were either not about the case at all, or covered procedural or administrative matters, which were not of any interest to Satnam, and gave rise to no issues when their import manifested itself at the Inquiry.

252. The Satnam evidence complains that evidence was given by local residents, but, if properly so characterised, the evidence they gave was of course evidence given in the presence and hearing of one of the Satnam team. Satnam gave no evidence, gleaned from other sources or inference, of anything of substance being said which they were unaware of during the site visit, and only discovered later. Nor does any such point feature in the IR.

253. Satnam's concern that the participation of the residents may have prolonged the site visit "possibly unnecessarily" is not evidence of possible bias. I do not see the opportunities which the Inspector gave to the residents on the site visit as showing more than a determination that they should be able to participate fully and to feel that they had done so; I accept his evidence that they were not an organised group and varied greatly in their confidence and understanding of procedures at the site visit and later. That is in line with the guidance Inspectors have.

254. Accordingly, I have come to the conclusion that none of the factors relied on by Satnam, separately or cumulatively, show that there was a real possibility that the Inspector was biased in favour of the local residents. This ground is dismissed.

255. Had I come to a different conclusion on this issue, I would have quashed the decision. I am satisfied that the way in which the decision was taken, as described by Ms Nowak, could not remove the effect of a tainted report. None of the steps she described would have been capable of doing so. The IR conclusions were adopted. It would be difficult to tell what were affected by the real possibility of actual bias or how. The Minister and civil servants did not know that that was something they might have to consider. There was no independent reasoning, or at least none that was intentionally different on that account.

Overall conclusions

256. This application is allowed on grounds 1 and 2.