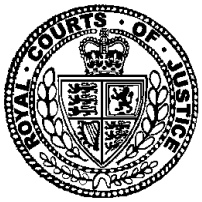


Neutral Citation Number: [2024] EWHC 2030 (Admin)

Case No: AC-2022-MAN-000340

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

Wednesday, 21st August 2024

Before:
FORDHAM J

- -

Between:

THE KING (on the application of HALTON BOROUGH COUNCIL)	**Claimant**
- and -	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendant**
- and -	
(1) HEALTH & SAFETY EXECUTIVE	**Interested**
(2) VIRIDOR ENERGY LTD	**Parties**

- -

- -

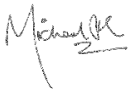
John Hunter (instructed by Halton BC) for the **Claimant**
Robert Williams (instructed by Government Legal Department) for the **Defendant**
The Interested Parties did not appear and were not represented

- -

Hearing date: 25.7.24
Draft judgment: 2.8.24

- -

Approved Judgment



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FORDHAM J

Remote hand down. This judgment was handed down remotely at 10am on 21st August 2024 by circulation to the parties or their representatives by email and by release to The National Archives.

FORDHAM J:

Introduction

1. This is a case about costs orders made against a local planning authority (LPA), after its safety expert witness failed to come up to proof at a "called-in" planning inquiry. The legally correct mode of challenge was resolved by HHJ Stephen Davies at [2023] EWHC 293 (Admin) [2023] PTSR 1125. The targets for judicial review are twin decisions (27.7.22) ordering the Council to pay costs. First, the HSE's costs from 23.6.21 (the date of HSE's rule 6 statement of case). Secondly, Viridor's costs from 2.11.21 (the date Viridor was added as a rule 6 party). The rules governing planning inquiries are the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000 No. 1624). Called-in planning inquiries are governed by s.77 of the Town and Country Planning Act 1990. The power to award costs is in s.250(5) of the Local Government Act 1972. The Guidance as to costs is the PPG, the Planning Practice Guidance on Appeals (6.3.14).

2. In September 2017, a developer (MJ Gleeson) had submitted a planning application (reference 17/00468/FUL) to the Council as LPA. Planning permission was sought for 139 dwellings, with associated demolition and ancillary development, on land at Runcorn (WA7 4EX). The HSE objected to the application and advised against it (21.5.20) on safety grounds, the site being located within the vicinity of the Runcorn Chemicals Complex. The Council resolved (5.10.20) to grant the planning application, in line with an Officer Report. As to the position at that stage, here is how the Council subsequently described the position in representations resisting costs awards (11.3.22):

> ***… "the most careful consideration" was given to the HSE's response advising against the grant of permission… However, … the proposals were judged to be in accordance with the LPA's own adopted development plan policies on risk and … the LPA came to the conclusion that the HSE's advice did not justify departing from the plan. In this connection, it should be noted that [the Council] has an extensive experience and history with the chemicals industry which stretches back over a century and appears to be unique in terms of local planning authorities insofar as it has a robust policy framework for taking the risks posed by it into account in planning decisions. Furthermore, that framework (unlike the HSE's) has twice been through extensive public consultation and examination as part of the statutory plan-making process and found to be sound by the inspectors who examined it. In addition, the Council has for many years taken advice on risk-related issues, including in relation to its adopted policies and the Pavilions site itself, from specialist risk management consultants (DNV) who have extensive national and international experience in this field.***

3. The Secretary of State called-in the planning decision (7.5.21), at the HSE's request, in light of the public safety concerns which the HSE had raised. Rule 6 statements of case were submitted by the Council and the HSE (23.6.21). At the same time, the developer submitted a position statement (23.6.21) which said that, although it remained committed to the development, the primary public safety matter was between the HSE and the Council, and it did not intend to provide evidence at the Inquiry. The Council and HSE proceeded to submit their rule 13 proofs of evidence relating to public safety matters (on 4.8.21) and an HSE rebuttal proof (on 17.12.21), in readiness for 8 days of inquiry hearings (starting on 11.1.22). The Planning Inspector was Brian Simms. Viridor operates one of the UK's largest energy-from-waste plants at Runcorn near the proposed development, and also objected to the application. It was joined to the inquiry proceedings as a rule 6 party (2.11.21). The Council's rule 13 proof of evidence on the public safety matter was expert evidence of Mr Hopwood of DNV (the consultants who had been advising the Council). It was submitted (4.8.21) with an expert evidence

declaration. As had been requested in the HSE's rule 6 statement of case (23.6.21), a direction was made by the Secretary of State under s.321(3) of the 1990 Act (27.10.21), to hold part of the inquiry in private due to national security concerns regarding public safety matters.

4. When he was cross-examined by HSE's advocate at the (closed) inquiry hearing on Day 3 of the inquiry (13.1.22), Mr Hopwood agreed that – if he were in a Planning Inspector's position – he would have to advise the Secretary of State strongly against the grant of planning permission. That turn of events had a domino effect. There was an adjournment of the inquiry hearing. GLD (as solicitors for the HSE) wrote to the Council (13.1.22) saying:

> ***In light of the evidence provided by Mr Hopwood, HSE sees no basis on which the Council's [support for the planning application] can be maintained in respect of the public safety matters.***

The Council responded (14.1.22), recognising that it could no longer maintain its support for the application. The developer's agent then wrote (17.1.22) to say that, in those circumstances, it was withdrawing the application. That brought the inquiry to an end. It means the Planning Inspector's role came to an end. HSE and Viridor made applications (11.2.22) for decisions ordering the Council to pay their costs, in full or in part.

5. Since the Planning Inspector's role had come to an end, a member of the Costs & Decisions Team at the Planning Inspectorate (Steve Parsons) was authorised as Decision-Maker, to determine the costs applications. That is the practice (Guidance paragraph 039) when an inquiry is discontinued after withdrawal of a planning application, appeal or enforcement notice. The s.321(3) direction was amended to allow the Decision-Maker access to the restricted documents. Written submissions on costs were made by all relevant parties. These were placed before me in these proceedings. Other key documents from the inquiry proceedings were before the Decision-Maker – such as statements of case, proofs of evidence and an unagreed HSE solicitors' note of the Hopwood cross-examination. These were not placed before me in these proceedings. The Decision-Maker (Mr Parsons) was not as well-placed as the Planning Inspector (Mr Simms) would have been. But he was certainly better-placed than me. Added to which, he is the primary decision-maker entrusted with latitude for judgment and appreciation. My role is a secondary review function in the exercise of a supervisory jurisdiction.

The Impugned Decisions

6. In granting permission for judicial review at [2024] EWHC 705 (Admin), I ventured this overview (at §3):

> ***The … impugned decisions record that the Council's changed position had caused the inquiry to collapse and found costs orders warranted based on "unreasonable" conduct. The unreasonable conduct was the withdrawal by the Council, "when they did", with "no good reason". The unreasonableness found lay in the Council's failure, in "appointing" an expert, as well as in continuing to appraise the position, to be "satisfied with the strength" of the expert evidence relied on and, "crucially", its "being capable of standing up to scrutiny". The decisions emphasised that Mr Hopwood's concessions, and the Council's changed position, were a "volte face" which had arisen in circumstances where there had been: no change in the position being adopted by the HSE in objecting to planning permission; no change in the evidence of the HSE; and no change in the planning circumstances.***

7. I will later identify three key features of the decision (§30 below). For now, and having given that overview, it is sufficient to set out the following passages from the Decision Letter which awarded the HSE its costs. That reasoning was adopted in the decision awarding costs in favour of Viridor. First, this passage (Decision Letter §§5-7, 10), setting the scene:

> ***5. In planning proceedings, the parties are normally expected to meet their own expenses irrespective of the outcome. Costs are only awarded on the grounds of "unreasonable" behaviour, resulting in any wasted or unnecessary expense. Published guidance is in the Government's Planning Practice Guidance (PPG).***
>
> ***6. In the case of planning applications called-in for decision by the Secretary of State under section 77 of the 1990 Act, all the parties involved in such a case are differently placed than they would be at a planning appeal inquiry. The participation of the parties in a called-in case is primarily to assist the Secretary of State in the process of determining the relevant planning issues. The local planning authority is not defending a decision to refuse planning permission, while the applicant pursuing their application is exercising their right to apply for planning permission.***
>
> ***7. In these circumstances, as stated in the guidance at paragraph 034 of the PPG, it is not normally envisaged that a party will be at risk of an award of costs relating to the substance of the case or action taken prior to the application being called-in. However, a party's failure to comply with the normal procedural requirements of inquiries, including aborting the process by withdrawing the application without good reasons, may risk an award of costs should that amount to unreasonable behaviour…***
>
> ***10. … The guidance in paragraph 056 of the PPG which deals with awards of costs to (or against) third parties is considered particularly relevant. Although this guidance refers to the withdrawal of appeals it is considered applicable, by analogy, to called-in applications…***

8. Secondly, this passage (Decision Letter §15) relating to the Council's original resolution to grant planning permission:

> ***15. HSE are evidently aggrieved that the Council had resolved to grant planning permission for the proposed development against their advice. However, as the called-in application was never determined because it was withdrawn by the applicant it is considered a matter of conjecture as to what the outcome on the merits of the planning application would have been if it had not been withdrawn and the Inspector had heard the respective parties' evidence, inspected the site and reported to the Secretary of State, resulting in a formal decision on the called-in planning application. While HSE argue that the Council failed to give proper consideration to the strength of their public safety objections and the unique scale of the risks proposed by the development when resolving to approve the application, the Secretary of State has had regard to the fact that this was a called-in planning application and therefore it is not normally envisaged that a party will be at risk of an award of costs relating to the substance of the case or action taken prior to the application being called-in, as already noted in paragraph 7 above. In the absence of a formal decision on this matter therefore the Secretary of State cannot conclude that the Council acted unreasonably by resolving to approve planning permission for the proposed development at the outset.***

9. Thirdly, this passage (Decision Letter §§16-20), relating to the Council's withdrawal of support for the application for planning permission:

> ***16. However, the final sentence of paragraph 034 of the PPG makes it clear that a party's failure to comply with the normal procedural requirements for inquiries, may place them at risk of a partial award of costs for unreasonable behaviour in a call-in case. In this case the work undertaken by parties to comply with the relevant requirements of the call-in were rendered abortive by the Council's decision to no longer support the application made by M J Gleeson.***

> ***Careful consideration has therefore been given to the Council's stated reasons for withdrawing their support for the proposals when they did.***
>
> ***17. It is undisputed that the Council decided that they could no longer support the application in the light of evidence heard in the closed public safety session held at the inquiry on 13 January 2022. This resulted in the call-in process being aborted as the applicant decided to withdrawal their planning application as they had previously stated that they would be relying on the Council to provide evidence in support of their resolution to approve the application. In their defence of the costs application the Council say that Mr Hopwood, their expert witness on public safety matters, gave certain answers in cross-examination by the HSE's representative which were inconsistent with the advice previously received. The Council considered that the responses given by Mr Hopwood harmed their case so significantly that they no longer believed that they had any prospect of success. The Council argued that it was not unreasonable to have withdrawn their support for the application in these circumstances.***
>
> ***18. However, the Council have not explained, in clear and precise terms, the details of the responses given by Mr Hopwood in cross-examination that caused them to change their position on their reasons for supporting the application and why they now considered that their case had been seriously undermined. It appears to the Secretary of State that the responsibility for appointing Mr Hopwood as their expert witness on public safety matters rests with them and they should have been satisfied with the strength of the advice received and crucially that they could rely on it being capable of standing up to scrutiny by any other parties through cross-examination. Having resolved to approve the application the onus was on the Council to ensure that they were in a position to prosecute their case through to a decision.***
>
> ***19. The view is taken that the Council would, or should, have known of the full extent of HSE's public safety objections to the proposed development when they submitted their Rule (6) pre-inquiry statement of case and that they would be required to address those concerns at the forthcoming call-in inquiry. No evidence is seen to suggest that HSE changed their position regarding the public safety aspect of the proposed scheme during the call-in process and it appears to the Secretary of State that the public safety issues to be considered at the inquiry remained the same.***
>
> ***20. It was incumbent upon the Council, as the call-in inquiry process progressed, to continue to appraise their position ensuring that their original grounds for resolving to approve the planning application remained. Instead, the Council changed their previous stance at the inquiry, but it is evident that there had been no material change in the planning circumstances or evidence sufficient to justify such a volte face. In the circumstances, it is difficult not to conclude that the situation that the Council found themselves in at the inquiry was of their own making. The practical consequences of the Council's decision to no longer support the application caused the inquiry to collapse and the call-in proceedings were subsequently aborted following the applicant's decision to withdraw the planning application. The conclusion therefore reached is that the Council's decision to withdraw their support for the application when they did was unreasonable, with the result that HSE, as a Rule 6 party in the call-in proceedings, incurred unnecessary wasted expense in preparing to resist the application. An award of costs will therefore be made.***

10. Finally, this passage (Decision Letter §21), dealing with the temporal scope of the costs award in favour of the HSE:

> ***21. As to the extent of the award, while the Council would, or should, have been aware at planning application stage of HSE's public safety concerns regarding the proposed development, it is concluded that an award of costs is justified from the date of HSE's email of 23 June 2021 enclosing their Rule (6) pre-inquiry statement of case which set out in full the precise basis on which they were preparing to resist the planning application following the call-in of the application. A partial award will therefore be made from 23 June 2021 (inclusive).***

The Guidance

11. It will be sufficient for present purposes for me to set out the following passages from the Guidance (numbers in square brackets are bullet points in the original). First, Paragraphs 028, 030 and 031 of the Guidance say this:

> ***028. Why do we have an award of costs? Parties in planning appeals and other planning proceedings normally meet their own expenses. All parties are expected to behave reasonably to support an efficient and timely process, for example in providing all the required evidence and ensuring that timetables are met. Where a party has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs. The aim of the costs regime is to: [1] encourage all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case; [2] encourage local planning authorities to properly exercise their development management responsibilities, to rely only on reasons for refusal which stand up to scrutiny on the planning merits of the case, not to add to development costs through avoidable delay; [3] discourage unnecessary appeals by encouraging all parties to consider a revised planning application which meets reasonable local objections.***
>
> ***…***
>
> ***030. In what circumstances may costs be awarded? Costs may be awarded where: [1] a party has behaved unreasonably; and [2] the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.***
>
> ***031. What does "unreasonable" mean? The word "unreasonable" is used in its ordinary meaning, as established by the courts in Manchester City Council v SSE & Mercury Communications Limited [1988] JPL 774. Unreasonable behaviour in the context of an application for an award of costs may be either: [1] procedural - relating to the process; or substantive - relating to the issues arising from the merits of the appeal. The Inspector has discretion when deciding an award, enabling extenuating circumstances to be taken into account.***

12. Next, paragraphs 034 and 056 of the Guidance – which were paragraphs of the Guidance expressly referred to in the Decision Letter (at §§7, 10 and 16) – say this:

> ***034. How does the award of costs apply to called-in planning applications? When a planning application is "called-in", it is determined by the Secretary of State rather than by the local planning authority. This places the parties at a called-in proceeding in a different position from that in a planning appeal. The local planning authority is not defending a decision to refuse planning permission, or a failure to determine the application within the prescribed period. In these circumstances, it is not envisaged that a party would be at risk of an award of costs for unreasonable behaviour relating to the substance of the case or action taken prior to the call-in decision. However, a party's failure to comply with the normal procedural requirements of inquiries, including aborting the process by withdrawing the application without good reason, risks an award of costs for unreasonable behaviour.***
>
> ***…***
>
> ***056. When might an award of costs be made against an interested party? Interested parties who choose to be recognised as Rule 6 parties under the inquiry procedure rules, may be liable to an award of costs if they behave unreasonably. They may also have an award of costs made to them. See the Planning Inspectorate guide on Rule 6 for more detail. It is not anticipated that awards of costs will be made in favour of, or against, other interested parties, other than in exceptional circumstances. An award will not be made in favour of, or against interested parties, where a finding of unreasonable behaviour by one of the principal parties relates to the merits of the appeal. However an award may be made in favour of, or against, an interested party on procedural grounds, for example where an appeal has been withdrawn without good reason or where an unnecessary adjournment of a hearing or inquiry is caused by unreasonable conduct.***

In cases dealt with by written representations, it is not envisaged that awards of costs involving interested parties will arise.

13. Finally, paragraphs 042, 046, 047, 049 and 054 of the Guidance say this:

042. What happens if the appeal or an enforcement notice is withdrawn and the appeal is not decided? If the appeal or enforcement notice is withdrawn without sound reason, or with avoidable delay, giving rise to unnecessary or wasted expense for another party, an application for costs can be made.

…

046. When might an award of costs be made against a local planning authority? Awards against a local planning authority may be either procedural, relating to the appeal process or substantive, relating to the planning merits of the appeal. The examples below relate mainly to planning appeals and are not exhaustive. The Planning Inspectorate will take all evidence into account, alongside any extenuating circumstances.

047. What type of behaviour may give rise to a procedural award against a local planning authority? Local planning authorities are required to behave reasonably in relation to procedural matters at the appeal, for example by complying with the requirements and deadlines of the process. Examples of unreasonable behaviour which may result in an award of costs include: [1] lack of co-operation with the other party or parties; [2] delay in providing information or other failure to adhere to deadlines; [3] only supplying relevant information at appeal when it was previously requested, but not provided, at application stage; [4] not agreeing a statement of common ground in a timely manner or not agreeing factual matters common to witnesses of both principal parties; [5] introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen; [6] prolonging the proceedings by introducing a new reason for refusal; [7] withdrawal of any reason for refusal or reason for issuing an enforcement notice; [8] failing to provide relevant information within statutory time limits, resulting in an enforcement notice being quashed without the issues on appeal being determined; [9] failing to attend or to be represented at a site visit, hearing or inquiry without good reason; [10] withdrawing an enforcement notice without good reason; [11] providing information that is shown to be manifestly inaccurate or untrue; [12] deliberately concealing relevant evidence at planning application stage or at subsequent appeal; [13] failing to notify the public of an inquiry or hearing, where this leads to the need for an adjournment. (This list is not exhaustive.)

…

049. What type of behaviour may give rise to a substantive award against a local planning authority? Local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example, by unreasonably refusing or failing to determine planning applications, or by unreasonably defending appeals. Examples of this include: [1] preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations; [2] failure to produce evidence to substantiate each reason for refusal on appeal; [3] vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis; [4] refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs, where it is concluded that suitable conditions would enable the proposed development to go ahead; [5] acting contrary to, or not following, well-established case law; [6] persisting in objections to a scheme or elements of a scheme which the Secretary of State or an Inspector has previously indicated to be acceptable; [7] not determining similar cases in a consistent manner; [8] failing to grant a further planning permission for a scheme that is the subject of an extant or recently expired permission where there has been no material change in circumstances; [9] refusing to approve reserved matters when the objections relate to issues that should already have been considered at the outline stage; [10] imposing a condition that is not necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects, and thus does not comply with the guidance in the National Planning Policy Framework on planning conditions and

> ***obligations; [11] requiring that the appellant enter into a planning obligation which does not accord with the law or relevant national policy in the National Planning Policy Framework, on planning conditions and obligations; [12] refusing to enter into pre-application discussions, or to provide reasonably requested information, when a more helpful approach would probably have resulted in either the appeal being avoided altogether, or the issues to be considered being narrowed, thus reducing the expense associated with the appeal; [13] not reviewing their case promptly following the lodging of an appeal against refusal of planning permission (or non-determination), or an application to remove or vary one or more conditions, as part of sensible on-going case management; [14] if the local planning authority grants planning permission on an identical application where the evidence base is unchanged and the scheme has not been amended in any way, they run the risk of a full award of costs for an abortive appeal which is subsequently withdrawn. (This list is not exhaustive.)***
>
> …
>
> ***054. Can an award of costs be made if the appellant withdraws an appeal? Yes, if the appeal is withdrawn without good reason. Appellants are encouraged to withdraw their appeal at the earliest opportunity if there is good reason to do so. If an appeal is withdrawn without any material change in the planning authority's case, or any other material change in circumstances relevant to the planning issues arising on the appeal, an award of costs may be made against the appellant if the claiming party can clearly show that they have incurred wasted expense as a result.***

"Good Reason" and "Withdrawal"

14. The Guidance contains many references to unreasonable behaviour which may justify costs, where there has been "withdrawal", and in particular "without good reason" (see §§11-13 above):

    i) Paragraph 034 refers to the costs risk in a call-in case for "aborting the process by withdrawing the application without good reason".

    ii) Paragraph 042 refers to costs where an appeal or enforcement notice is "withdrawn without sound reason, or with avoidable delay", giving rise to unnecessary or wasted expense for another party.

    iii) Paragraph 047 gives as examples of unreasonable behaviour giving rise to a "procedural award" against an LPA (at [7] and [10]): "withdrawal of any reason for refusal", "withdrawal of any … reason for issuing an enforcement notice" and "withdrawing an enforcement notice without good reason".

    iv) Paragraph 052 gives as an example of unreasonable behaviour, giving rise to a "procedural" award of costs against an appellant: "withdrawal of an appeal without good reason".

    v) Paragraph 054 refers to costs awarded against an appellant "if the appeal is withdrawn without good reason".

    vi) Paragraph 056 refers to costs "on procedural grounds" where an appeal has been "withdrawn without good reason".

15. This calls for some elaboration. Where it is realised by a party that they are no longer able to maintain an application, appeal, enforcement notice or reason for refusal there should be prompt withdrawal. Withdrawal may be for good reason; or there may be no good reason. An example of a good reason is a material change in another party's case

or material change in circumstances relevant to the planning issues (see paragraph 054). Withdrawal will always have the virtue of avoiding ongoing and future costs and expenses. In that sense, it will always be reasonable – and there will always be good reason – for withdrawal as distinct from failure to withdraw. But withdrawal raises an important temporal question. Should it have been earlier? Suppose, much earlier, the party knew perfectly well – or should have appreciated – that they were no longer able to maintain an application, appeal, enforcement notice or reason for refusal. The late withdrawal may be unreasonable behaviour. This temporal perspective is strongly reinforced by what is said at paragraph 054, amplifying withdrawal without good reason by emphasising the importance of withdrawal "at the earliest opportunity". The idea of withdrawal "without good reason" must therefore include withdrawal "whose belated timing was" without good reason.

Case-Law

16. The parties have cited 5 cases in which planning inquiry costs orders have been challenged by way of judicial review.

i) In R v Environment Secretary, ex p Chichester DC [1993] 2 PLR 1 (Hutchison J, 27.10.92) the LPA's judicial review claim unsuccessfully challenged a planning inspector's costs award in favour of a developer who had successfully appealed a reserved matters approval matter undetermined by the LPA within the prescribed period. The guidance was in Circular 2/87. The test in that guidance – and ever since – was whether unreasonable conduct by the LPA had caused the unnecessary expense. The inspector had asked the right question, with no misdirection, and an inaccuracy did not constitute a material misdirection when the decision letter was read fairly and as a whole.

ii) In R v Environment Secretary, ex p North Norfolk DC [1994] 2 PLR 78 (Auld J, 12.7.94) the LPA's judicial review claim successfully challenged a planning inspector's costs award in favour of a developer who had unsuccessfully appealed a planning application undetermined by the LPA within the prescribed period. The guidance was again Circular 2/87. The inspector's decision letter had given legally inadequate reasons, failing to explain on what basis the LPA's evidence in support of its putative reasons for refusal had not been substantial, and the decision was remitted for reconsideration afresh.

iii) In R v Environment Secretary, ex p Wakefield MBC (1998) 75 P & CR 78 (Jowitt J, 16.10.96) the LPA's judicial review claim unsuccessfully challenged a planning inspector's costs award in favour of a developer who had unsuccessfully appealed a refusal to permit opencast coal extraction. The relevant guidance was now Circular 8/93. There was no material error of law or unreasonableness in the costs decision; and the inspector was entitled to conclude that the LPA had not crossed the evidential threshold of a sufficient evidential basis capable of making good an objection.

iv) In R (Golding) v Communities Secretary [2012] EWHC 1656 (Admin) (HHJ Waksman QC, 27.4.12) the developer's judicial review claim unsuccessfully challenged the planning inspector's costs awards in favour of the LPA and an objector, after a successful planning appeal relating to conversion of a caravan site, where wasted costs had arisen from an adjournment and late evidence. The

inspector's decision involved no material error of law or unreasonableness. The relevant guidance was now a March 2009 Circular.

v) In R (Swale BC) v Housing Secretary [2020] EWHC 3482 (Admin) (Sir Ross Cranston, 17.12.20) the LPA's judicial review claim unsuccessfully challenged a planning inspector's costs award in favour of a developer who had successfully appealed a refusal of planning permission. There was no material error of law or unreasonableness in the decision. By now the relevant guidance was, as it is now, in the PPG (3.3.14).

17. The following key points which are relevant to the present case can all be derived from the line of cases to which I have referred:

i) The judicial review court can intervene in the exercise of its supervisory jurisdiction where (see Swale §57): (a) the costs decision-maker has materially misdirected themselves (see Chichester at pp.9-11); or (b) the decision is unreasonable in a public law sense (see Golding §§22, 35). A material misdirection can include deciding the case other than in accordance with the Guidance (see Swale §54, 58i).

ii) Clear and intelligible reasons must be given for the decision, so that the reasons do not raise a substantial doubt as to whether the decision was lawful including as a proper exercise of discretion having regard to the Guidance (North Norfolk at p.89).

iii) The decision letter must be read straightforwardly and as a whole (Chichester at 11; Swale §70).

iv) The decision as to costs involves a wide statutory power vested in the costs decision-maker (North Norfolk at 84; Swale §49). Costs are pre-eminently a matter for the decision-maker; a decision is not unreasonable because a different decision-maker might have taken a different view, or because there is room for significant disagreement (Golding §§22, 35, 36; Swale §69).

18. The following further points were made, by reference to the following authorities:

i) There is a clear distinction between interpretation of policy (appropriate for judicial analysis on an objective correctness standard) and application of policy (an exercise of judgment for the primary decision-maker subject to a reasonableness standard): Barker Mill Estates Trustees v Test Valley BC [2016] EWHC 3028 (Admin) [2017] PTSR 408 at §§83-84; Mead Realisations Ltd v Levelling Up Secretary [2024] EWHC 279 (Admin) at §72.

ii) Public law unreasonableness means (a) the decision is outside the range of reasonable decisions open to the decision-maker or (b) there was a demonstrable flaw in the reasoning which led to the decision, such as the absence of evidence to support an important step in the reasoning or a serious logical or methodological error: R (Finch) v Surrey County Council [2024] UKSC 20 at §56.

iii) The courts should respect the expertise of specialist planning decision-makers, and can start from the position that the policy framework will have been known and

understood: Hopkins Homes Ltd v Communities Secretary [2017] UKSC 37 [2017] 1 WLR 1865 at §25.

iv) A decision-maker may depart from policy guidance if clear reasons are given for the departure: Gransden & Co Ltd v Environment Secretary (1987) 54 P & CR 86 at p.94.

v) Reasons must be intelligible and adequate, enabling a reader to understand why the matter was decided as it was, what conclusions were reached on the principal controversial issues, and how issues of law or fact were resolved; not giving rise to substantial doubt as to misunderstanding relevant policy or failing to reach a reasonable decision on relevant grounds; with the degree of particularity depending on the nature of the issues. Decision letters should be read in a straightforward manner recognising that they are addressed to parties well aware of the issues involved and arguments advanced: South Bucks DC v Porter [2004] UKHL 33 [2004] 1 WLR 1953 at §36. Conclusions in a decision letter should not be laboriously dissected in an effort to find fault: St Modwen Ltd v Communities Secretary [2017] EWCA Civ 1643 [2018] PTSR 746 at §7.

The Procedural-Only Point

19. On this first part of the case the agreed issues are whether the Decision-Maker (a) misunderstood the Guidance or (b) applied it in a manner which was unreasonable.

20. Here is the essence – as I saw it – of Mr Hunter's argument:

i) The Guidance draws an important distinction between unreasonable behaviour which is "procedural" and "substantive" (see paragraphs 031 and 046). This is a crucial distinction, because the relevant paragraph of the Guidance for costs in a called-in case (see paragraph 034), and the paragraph regarding costs in favour of interested parties which the Decision-Maker identified as applicable by analogy (see paragraph 056), each make clear that they are contemplating costs awards for unreasonable behaviour which is "procedural" (ie. relating to the process) and not "substantive" (ie. relating to issues arising from the merits). There is another restriction in called-in cases, namely that the unreasonable behaviour cannot be action taken prior to the call-in decision (paragraph 034). The Decision-Maker recognised this (Decision Letter §7). The rationale was also rightly recognised (Decision Letter §6): the parties in a called-in case participate primarily to assist the Secretary of State in the process of determining the issues; the LPA is not defending a decision to refuse planning permission. This important and fundamental restriction to unreasonable behaviour which is "procedural" is, for called-in cases, the relevant policy (Swale §58i), which narrows the general test in the Guidance (Chichester p.8) of whether "unreasonable behaviour" has directly caused unnecessary or wasted expense (paragraph 030).

ii) The Guidance also gives clear examples of unreasonable behaviour by an LPA which is "substantive" (paragraph 049). Two of these are: "failure to produce evidence to substantiate" a reason for refusing planning permission (paragraph 049 at [2]; Swale §58iv); and the LPA "not reviewing their case promptly … as part of sensible on-going case management" (at [13]). The first of these links to the aim described in paragraph 028 of the Guidance (at [2]), about encouraging LPAs to

rely on reasons for refusal "which stand up to scrutiny on the planning merits of the case" (Swale §51). That is plainly "substantive".

iii) Turning to the impugned decisions, the adverse conclusions on costs are squarely based on two key aspects of the Council's conduct. The first key aspect is about the Council's responsibility to be satisfied with the strength of the evidence of an appointed expert witness, and crucially that it could be relied on as capable of standing up to scrutiny on cross-examination (Decision Letter §18). But that first aspect is squarely "substantive". It relates to issues arising from the merits. It is the clear example of "substantive" unreasonable behaviour in the Guidance: failure to produce evidence to substantiate a position (paragraph 049 at [2]). It links to the "substantive" matter considered in the case-law, where what is said is that the LPA has to meet an evidential threshold, of evidence providing "some respectable basis", not lacking in real substance (North Norfolk at p.83; Wakefield pp.80-81). The second key aspect is about the Council's responsibility to appraise the position ensuring that the original grounds remained (Decision Letter §20). But that too is squarely "substantive", relating to issues arising from the merits. It is the other clear example of "substantive" unreasonable behaviour in the Guidance: not reviewing the case as part of on-going case management (paragraph 049 at [13]). Indeed, the clear implication of the reasoning is that the HSE had an unassailable position on the merits of the safety issues, which again is plainly "substantive".

iv) It follows from all of this that the Guidance must have been misinterpreted, or alternatively has unreasonably been applied. The Decision-Maker's reasons do not grapple with the distinction between "procedural" and "substantive". They do not refer to or consider the examples at paragraph 049 of the Guidance. They do not identify the fact that this is a departure from the Guidance; still less do they identify a clear and good reason for the departure. The decision is outside the range of reasonable decisions or involves a demonstrable flaw.

v) It is true that there can be overlap between unreasonable conduct which is "procedural", and that which is "substantive". These are overlapping circles. However, where behaviour is in the overlap area – being capable of characterisation as "procedure" and as "substantive" – it must be excluded from the scope of the Guidance (paragraph 034). It is fatal that the unreasonable conduct can be characterised as "substantive". Costs cannot, consistently with the objectively correct interpretation (or alternatively the reasonable application) of the Guidance be awarded; except by departure from the Guidance which is recognised by the costs decision-maker and justified by good reason.

21. I have been unable to accept these submissions. In my judgment, there was no material misdirection of the Guidance – but rather its lawful and reasonable application – so far as concerns the distinction between "substantive" and "procedural". I accept the submissions of Mr Williams. That is for these reasons.

22. First, the Decision-Maker plainly had regard to the Guidance paragraph 034 (Decision Letter §7) and its rationale (§6). He applied the very restriction on which Mr Hunter relies, recognising that it is not normally envisaged that a party will be at risk of a costs award "relating to the substance of the case or action taken prior to the application being called-in" (§15). It was by reference to that very restriction that he rejected the HSE's characterisation of the original resolution (5.10.20) as unreasonable behaviour. It was

conduct prior to the call-in. It was also substantive, and the Decision-Maker was not forming a view on the merits – in circumstances where the inquiry had been halted and the merits had never been determined – as he said at the beginning and end of that paragraph (Decision Letter §15).

23. Secondly, the Decision-Maker identified – in clear terms – the basis on which the conduct, of late withdrawal of support for the application, fell within the scope of Guidance paragraph 034. This was "the final sentence of paragraph 034" and the action of "withdrawing their support for the proposals when they did" (Decision Letter §16); and it was the action "to withdraw their support for the application which they did" which "was unreasonable" (Decision Letter §20). Guidance paragraph 034 (final sentence) expressly identifies, as within the scope of a relevant "procedural" matter, "aborting the process by withdrawing the application without good reason". That was what the Decision-Maker was applying to the facts and circumstances. The Council was not the applicant making the application. But, as Mr Hunter rightly accepts, the special circumstances where the developer had stepped back and the Council was taking the lead on the safety concerns, meant that the Decision-Maker could reasonably apply "withdrawing the application" to the Council withdrawing its support for the application.

24. Thirdly, the Decision-Maker was necessarily required to consider whether the withdrawal was "without good reason". That included the timing of the withdrawal. This meant that "careful consideration" had to be given to "the Council's stated reasons for withdrawing their support for the proposals when they did" (Decision Letter §16). What the Decision-Maker had to do was identify relevant features and circumstances, to decide whether the withdrawal by the Council – when it did – was unreasonable conduct. That was the "without good reason" within the scope of Guidance paragraph 034. It is obvious that this "without good reason" could be informed by matters which touched on the substance, albeit without needing to determine the merits. It is not difficult to see how an LPA or a developer could demonstrate "good reason" by points touching on the merits. Suppose the substance of the HSE's position on the merits had changed; or the planning circumstances had materially changed; or the relevant planning policies had materially changed. All of this would touch on substance. I cannot accept that where a point falls within the overlap area of "substantive" and "procedural" – or more accurately "substantive" and "withdrawing the application without good reason" – that it cannot be relied on under Guidance paragraph 034, correctly interpreted and reasonably applied.

25. Fourthly, this fits with the basic idea that a "procedural" matter – involving withdrawing "without good reason" – can be about the way in which the case, and the evidence, is handled; without needing to make a finding about the underlying "merits". Suppose that a relevant and important expert proof of evidence is not adduced at the appropriate point in the inquiry timetable, but only on the eve of the inquiry hearing, which has to be adjourned in consequence. That is conduct which is to do with the handling of the case, and of the evidence. It is introduced late. That can be unreasonable behaviour. And the costs decision-maker is not taking a position on the merits. Now suppose that, instead of being introduced at the last minute, there is a relevant and important expert proof of evidence which is adduced at the appropriate point in the inquiry timetable, but then withdrawn on the eve of the inquiry hearing, with the consequence of "aborting the process" (paragraph 034). That is conduct which is to do with the handling of the case, and of the evidence. It is withdrawn late. That too can be unreasonable behaviour. And, again, the costs decision-maker is not taking a position on the merits. Test it this way.

Suppose an expert witness promptly contacts the LPA to say they cannot maintain their position in light of the expert proof of evidence relied on by another party; but the LPA does nothing until the eve of the hearing. Now suppose the expert witness tells the LPA on the eve of the hearing that they cannot maintain their position in light of the expert proof of evidence relied on by another party; and the reason this was not communicated earlier was that the proofs of evidence were never sent by the LPA's representatives to their expert for consideration. These can be said to touch on substance; on substantiation; on withstanding scrutiny; and on keeping the case under review. But the point is that they are also capable reasonably of being regarded as relevant to whether a withdrawal has been "without good reason" for paragraph 034.

26. A helpful reference point in relation to this aspect of the case was to be found in the costs representations made by Viridor who, having drawn attention to paragraphs 034 and 054 of the Guidance, and having drawn attention to the crucial nature of the Council's support for the developer's application said that the Council's behaviour was "akin to a party abandoning its case with unreasonable delay and causing other parties to incur unnecessary costs". That was exactly how the Decision-Maker saw it. There was no material misdirection, because the Guidance was understood and the decision-maker was locating the shortcomings as being procedural in nature, involving aborting the process by withdrawal without good reason. In these circumstances, there is nothing in the criticism made of the Decision-Maker for not expressly referring to the examples in the Guidance at paragraph 053. And, in fairness to the Decision-Maker, Mr Hunter was unable to show me anywhere in the Council's costs representations where that paragraph or those examples were being relied on by the Council to support its argument that its conduct was "substantive".

The Review-Finding Point

27. On this part of the case the agreed issues are whether (a) the impugned decisions were based on a finding of fact by the Decision-Maker that the Council had failed to keep its position under review in the lead up to the inquiry and, if so, (b) whether that finding of fact could reasonably be made on the evidence before the Decision-Maker.

28. Here is the essence – as I saw it – of Mr Hunter's argument:

    i) The Decision-Maker reasoned (Decision Letter §20) that it was incumbent on the Council "to continue to appraise their position, ensuring that their original grounds for resolving to approve the planning application remained". This was in the context of representations by the HSE and Viridor that there had been a failure to review the case. Given that what follows is a description of a "volte face" and a "situation … of their own making", and so withdrawal of support "when they did" was unreasonable (§20), it must follow that the Decision-Maker found – as a fact – that the Council had failed to continue to appraise their position. That is what the Decision Letter is clearly saying, when read fairly and as a whole.

    ii) That finding of fact could not reasonably be made on the evidence. The Decision-Maker did not identify any evidence on which such a finding could be based. The Decision-Maker had received representations from the Council which stated, twice, that the matter had indeed been kept under review. First, in the original representations (11.3.22) the Council had said this:

> ***The HSE is wrong to claim that the LPA failed to review its case. On the contrary, the LPA kept this under constant review throughout the inquiry process (as, indeed, its decision to reconsider its position in light of Mr Hopwood's oral evidence demonstrates). Multiple conferences were held involving counsel, Mr Hopwood and Mr Gibbs [the Council's planning witness], both before and after the exchange of evidence, at which the merits of both parties' positions and their evidence were discussed extensively.***

Secondly, in subsequent representations (6.4.22), the Council said:

> ***As explained in the LPA's original submissions, not only did it keep its case under constant review (including by taking advice from counsel at all key stages) but the fact that it changed its position following Mr. Hopwood's evidence is clear demonstration that this was what it was what it was doing and of its reasonableness.***

This description was never contradicted or rebutted. There was no evidential basis on which the Decision-Maker could reasonably find that there had been a failure to keep the matter under review.

29. I have been unable to accept these submissions. In my judgment, there was no finding of fact that the Council had failed "to continue to appraise their position" and no finding of fact that the case had not been kept under review. The Decision Maker, acting reasonably, was identifying a responsibility which was one of the key features in its conclusion of "unreasonable" behaviour in the action to "withdraw their support for the application when they did". I accept the submissions of Mr Williams. That is for these reasons.

30. First, reading the substantive content of the Decision Letter (§§16-21) fairly and as a whole, these were key features of the circumstances which combined to support the conclusion that "the decision to withdraw their support for the application when they did was unreasonable":

    i) This was a collapse. The call-in process had been aborted because of a collapse in the Council's case on the safety issue, for which the developer was relying on the Council and on which the Council had made a prior resolution to approve the application. Oral answers from the Council's public safety expert witness (13.1.22) harmed its case so significantly that it was believed now to have no prospect of success; but the Council had not provided any clear and precise explanation of the details.

    ii) The Council had responsibilities. These were to appoint its expert witness; to satisfy itself of the strength of the expert's advice; to satisfy itself that they could rely on it standing up to scrutiny; to ensure it was in a position to prosecute the case through to decision; and to appraise the position, ensuring that its grounds remained.

    iii) Nothing else had changed. The volte face, after the answers given at the hearing, came in circumstances where there was no material change in the planning circumstances and no material change in the evidence; where the Council knew or should have known throughout the inquiry (from 23.6.21) the full extent of the HSE's public safety objections, from the planning application stage and the Council's resolution.

31. Secondly, this did not involve any finding of fact about not holding meetings and not discussing the evidence. Mr Hunter emphasises "continue to appraise"; but the operative

word is really "ensuring" ("continue to appraise their position ensuring that their original grounds for resolving to approve the planning application remained"). The Decision-Maker's point was about one – of several – aspects seen as the Council's responsibility. All of which were relevant features when considering the collapse and whether the late withdrawal was "without good reason". To the Decision-Maker, the proof of the pudding was in the collapse, in light of the responsibilities and the absence of any other change.

The Changed-Evidence Point

32. The agreed issue on this part of the case is whether the Decision-Maker's finding that there had been no material change in the planning circumstances or evidence sufficient to justify the Council's change of position was unreasonable.

33. Here is the essence – as I saw it – of Mr Hunter's argument. The Decision-Maker's reasoning (Decision Letter §20) describes the Council as having changed its previous stance in the inquiry in circumstances where it is evident that there had been "no material change" in the planning circumstances, or in the "evidence", sufficient to justify such a "volte face". It is true that the planning circumstances had not changed. But the evidence had certainly changed. Mr Hopwood had given oral evidence under cross-examination in which he had failed to "come up to proof". He was saying things orally that he had not said in writing. What he said orally was evidence. His "evidence" had "changed". The change, moreover, was "material". Its materiality was recognised in GLD's letter (13.1.22) (§4 above). Accordingly, it was unreasonable to find as the Decision-Maker did that there was no material change in the planning circumstances "or evidence" sufficient to justify the Council's change of position. It was also unreasonable to treat Mr Hopwood's volte face as the Council's volte face. The Council and its witness were distinct.

34. I have been unable to accept these submissions. Again, I accept the submissions of Mr Williams. The decision letter has to be read fairly and as a whole. The decision-maker was very well aware that the Council's position arose out of what Mr Hopwood – its expert witness – had said in answers under cross-examination. That was the collapse (Decision Letter §17). It meant that Mr Hopwood's written evidence had proved not to be "capable of standing up to scrutiny … through cross-examination" (Decision Letter §18). That was the moving part, recognised in the impugned decisions. The point was that there were no other moving parts: in the HSE's case or evidence; or in relevant policy; or in other planning circumstances (cf. Guidance paragraph 054). Questions were asked in cross-examination, and the Council's position collapsed. The Council could not point to anything else to justify its – the Council's – volte face. Its witness, in respect of which it had the responsibilities, had collapsed with no other change. Those were the key features (§30 above).

The Scrutiny-Testing Point

35. On this part of the case the agreed issues are whether (a) it was unreasonable for the Decision-Maker to find, and (b) whether there were legally adequate reasons for finding, that the Council had acted unreasonably because it should have been satisfied that Mr Hopwood's evidence would be capable of standing up to scrutiny through cross-examination.

36. Here is the essence – as I saw it – of Mr Hunter's argument:

i) The Decision-Maker clearly found that the Council had acted unreasonably, "crucially", because it should have been satisfied that Mr Hopwood's evidence would be "capable of standing up to scrutiny … through cross-examination" (Decision Letter §18). But that finding was unreasonable, and inadequately reasoned. The Decision-Maker failed to appreciate the relationship between a party and a witness called by a party. Especially where the witness is an independent expert witness. There are fundamental problems in terms of what can be required; what is possible; and what is proper.

ii) Even in the context of unreasonable behaviour which is "substantive", the responsibility "to produce evidence to substantiate" a position (Guidance paragraph 049 at [2]), there is an evidential threshold of evidence, providing "some respectable basis", and not lacking in real substance (§20iii above). There is no duty – acting reasonably – to test the evidence of a witness to ensure that it is capable of standing up to scrutiny on cross-examination. No rule, code of conduct or policy guidance describes such a duty. In civil litigation, if a witness fails to come up to proof and the case made cannot be substantiated, costs are likely to follow. But that is because costs follow the event in civil litigation. The loser pays the winner's costs. In the present context, what is needed is unreasonable conduct. There is nothing unreasonable – whether in legal proceedings or in a planning inquiry – in the conduct of a party whose witness fails to come up to proof. There is nothing unreasonable in failing to take steps to be satisfied that the witness's evidence will come up to proof.

iii) The legal representatives of a party, in proceedings or in an inquiry, are not entitled to 'coach' a witness and they are not entitled to conduct a 'rehearsal' with simulated cross-examination, to put the witness through testing as in an an oral hearing. Test this by supposing a witness of fact. But it is an important principle regarding all witnesses, including expert witnesses. In the RTPI (Royal Town Planning Institute) Practice Advice (2018): Planners as Expert Witnesses (p.8) the point is made (by reference to the Bar Council's Guidance (2017): Witness Preparation) that:

> ***There is guidance for barristers from the Bar Council in preparing witnesses, in particular in preparing a witnesses' written evidence. It emphasises the difference between acceptable witness preparation and coaching. Coaching is where it is suggested what the witness should say or express themselves, "you must not rehearse, practise with or coach a witness in respect of their evidence".***

The same principle is emphasised in the PEBA (Planning and Environmental Bar Association) Good Practice Guidance (2.11.23) at §§6 and 10, adding that it "applies to all the oral evidence to be given by a barrister's witness both in terms of evidence in chief and also later when cross-examined by the other side" (§7).

iv) It would therefore have been quite wrong for legal representatives to conduct any coaching or rehearsal of the expert witness by simulated cross-examination. Indeed, even if it were desired to undertake such an exercise so as to ensure that costs were not unnecessarily being incurred by other parties, it would still be inappropriate and impermissible to undertake that sort of testing. That is because of the obvious objection that the consequence would be that the witness was being prepared by being rehearsed for cross-examination.

v) Expert evidence is given by reference to professional and ethical standards of independence. The expert is not acting for the party. It is quite wrong to equate an expert not coming up to proof, or whose evidence does not withstand scrutiny at a hearing, with unreasonableness on the part of the party who – in good faith – has called that expert and has put forward the independent evidence contained in a report or proof of evidence which the expert has provided. Important illuminations of this principled position can be seen from two cases where costs orders needed a species of unreasonable behaviour by a prosecutor in a criminal trial. In R v Cornish [2016] EWHC 779 (QB) (Coulson J, 15.4.16) the trial judge, after a crown court prosecution for gross negligence manslaughter and corporate manslaughter had culminated in a finding of no case to answer, dealt with defendants' applications for costs from the prosecution. The species of conduct was described in the governing provisions – section 19 of the Prosecution of Offences Act 1985 and regulation 3 of the Costs in Criminal Cases (General) Regulations 1986 – where costs could be ordered in light of some "unnecessary or improper act or omission" by a party to the criminal proceedings. The judge dismissed the defendants' costs applications. In the judgment, he dealt with the expert evidence of Professor Hopkins who had been put forward as an expert by the prosecution. He explained that the expert views had not necessarily been "obviously wrong" and the Professor had not been expressing views which the Crown "should have concluded were wholly untenable" (§§34 and 35). What had gone wrong was a good example of the adversarial trial process in action (§44). That approach was endorsed by the Divisional Court in R (DPP) v Aylesbury Crown Court [2017] EWHC 2987 (Admin) [2018] 4 WLR 30 where the same statutory provisions were in play. The Divisional Court, having explained that the actions of an expert were not "by or on behalf of" the party calling the expert, endorsed Cornish (§23) so that the "appropriate test to apply" to the question of "individual responsibility" for the party instructing the expert "for an act or omission relating to that witness" was whether the evidence of the expert was "plainly wrong" in a way that should have been "obvious" to the prosecution (§23). The Court went on to say (§24) that once the expert in this case had given his opinion there was "nothing to suggest the need to interrogate the expert". This was distinct from the question whether there was conduct which was "improper" (§25). These are criminal cases, but they involve a conduct-based costs test, and there must be an equivalent (even if adjusted) principled position in relation to witnesses and costs and unreasonable behaviour in a planning inquiry.

vi) In the present case, the Council had – in good faith – put forward an expert who had given their independent expert opinion. There was no duty to interrogate the expert. There was no basis for saying, and the Decision-Maker did not conclude, that the expert's evidence was "plainly wrong" or that this should have been "obvious". The Decision-Maker thought a process of testing was necessary, in order to act reasonably. But that was not a reasonable finding. There was no such duty. It was not possible. And it was not permissible. The reasons do not address any of this. It could not, in all the circumstances, reasonably be concluded that there was any unreasonableness in the action of the Council in failing to satisfy itself that the expert evidence would be capable of standing up to scrutiny through cross examination. And in any event no legally adequate reasons were given why, on a correct appreciation of the position of a party and an expert witness, it could be

concluded and was being concluded that it was unreasonable to fail to take action to ensure that expert evidence was capable of withstanding scrutiny.

37. I have been unable to accept these submissions. I accept, as does the Secretary of State (through Mr Williams), that it would not be appropriate for legal representatives in a planning inquiry to rehearse, practise with or coach a witness in respect of their evidence; which includes an expert witness. But I accept the submissions of Mr Williams, that the impugned decisions involve no unreasonableness or legally adequate reasons on this aspect of the case. There is nothing in the Decision-Maker's reasoning said, or suggested, that the Council or its legal representatives ought to have engaged in rehearsing, practising with or coaching Mr Hopwood. What the Decision-Maker was doing, based on all the material and in light of the parties' representations on costs, was considering a question of unreasonable behaviour. The unreasonable behaviour was the withdrawal of support by the Council, when it did, "without good reason". The Council had been given the opportunity to provide the good reason. Far from saying it was impossible or improper to review the position with Mr Hopwood, the Council had itself described "multiple conferences" involving Counsel, Mr Hopwood and Mr Gibbs, both before and after the exchange of evidence "at which the merits of both parties' positions and their evidence were discussed extensively". It follows that it was – and must be – common ground that extensive discussion of the merits can appropriately be taken. The RTPI Advice (p.12) refers to advocates being able to help an expert understand and draw out the weakest aspects of their evidence; and the RICS (Royal Institution of Chartered Surveyors) Practice Statement and Guidance Note (February 2023) on Surveyors Acting as Expert Witnesses describes (p.39) team meetings at which weakness of professional opinion can be established and the potential for success evaluated. The problem was that when the expert came to give evidence, there was the collapse. This, in the context of identified responsibilities and the absence of anything else changing. And this, in a context where the stated aims of costs include encouraging LPAs to rely on reasons "which stand up to scrutiny on the planning merits" (Guidance paragraph 028; Swale §51), where that idea featured in the present case as part of the handling of the case, and of the evidence, informing the question of whether withdrawal – at this time – was without good reason. So far as the criminal cases are concerned, the test of expert evidence being "plainly wrong" which "should have been obvious to the Crown" is one articulated in the context of a threshold of impropriety which is deliberately much higher than unreasonableness (Cornish at §16c; DPP (Aylesbury) at §28). I have been able to see in the Decision Letter no unreasonableness and no legal inadequacy of reasoning.

The Insufficient-Time Point

38. On this final part of the case, the agreed issue is whether it was reasonable for the Decision-Maker to award costs to the HSE from the date of the service of its statement of case (23.6.21).

39. Here is the essence – as I saw it – of Mr Hunter's argument. The ultimate decision was that the unreasonable action was the withdrawal of support "when it did" (14.1.22). The thrust of the Decision-Maker's underlying reasoning was about responsibilities to be satisfied as to the strength of its evidence, to continue to appraise its case, and to test that its evidence was capable of withstanding scrutiny by cross-examination. It is quite impossible to identify any unreasonable behaviour constituting a default in any of these respects as having arisen back on 23.6.21, to cover all of HSE's costs incurred on and after that date. This date plainly gives insufficient time for any of the things – said to be

the Council's responsibility – to have happened. On 23.6.21 the parties provided their initial statements of case. The expert evidence of Mr Hopwood had not even been adduced. His proof of evidence was not until 4.8.21. Still less – in preparing it – could that evidence be tested in light of the HSE's case. The HSE's own evidence had not yet been adduced, so the material against which to appraise and test the position was not available. Since there could have been no appraisal or testing, there can have been no unreasonableness in failing to carry out appraisal or testing. The Council would have needed not only the rule 6 statement of case (23.6.21) but also the detailed evidence (4.8.21); and then a reasonable period of time in which to conduct the supposed ongoing appraisal, to ensure that its evidence was capable of withstanding scrutiny on cross-examination. Put another way, a withdrawal at that earlier stage could not have been unreasonable, and so there is no unreasonable action causative of the costs and expenses back to 23.6.21. It is unreasonable for the Decision-Maker to identify what was in effect the earliest possible date in the enquiry process, following the Secretary of State's call-in decision (7.5.21). Furthermore, even if with hindsight the HSE's case was fully set out in its statement of case (23.6.21) that could not have been known at the time, since the HSE was asking to be able to submit evidence under a s.321(3) direction.

40. I have again been unable to accept the submissions. I accept the submissions of Mr Williams. The Decision-Maker's reasons need to be read fairly and as a whole and in the context of the circumstances and features of the case. Costs were not awarded back to the date notifying the call-in (the earliest date of "eligible costs" under Guidance paragraph 040), nor based on pre-call in behaviour as unreasonable (Decision Letter §15). On the other hand, the points about collapse, responsibilities and lack of other change (§30 above) did not arise in a vacuum. The Council had in this case made its resolution in support of the application, it was "having resolved to approve the application" that the onus on it arose (Decision Letter §18), and it was the responsibility to ensure that what remained were the "grounds for resolving to approve the planning application" (Decision Letter §20). The Decision-Maker has unimpeachably found that the Council would or should have been aware of the HSE's public safety concerns "at [the] planning application stage" (Decision Letter §21). And I remind myself that DNV Consultants had given advice to the Council during the planning application stage, as the Council had emphasised in its costs representations to the Decision-Maker. It is in the particular circumstances of the prior position that the Decision-Maker identified the relevant date as 23.6.21. Having examined a document not placed before me – the HSE's statement of case – the Decision-Maker found that the "basis" on which the HSE was "preparing" (including with a s.321(3) direction) to resist the planning application following call-in was a "full" and "precise" basis. There are no grounds for impugning that characterisation as unreasonable, or as distorted by hindsight. By including 23.6.21, the costs in the run up to that date – in preparing the statement of case – would fall outside the scope of the costs order. But that was the moment from which it was unreasonable behaviour by the Council – in the evaluative judgment of the Decision-Maker – which caused costs and expenses to be incurred which "in the particular circumstances" justified the awards of costs. I am unable to see that as an unreasonable conclusion outside the range of reasonable decisions open to the decision-maker or involving a demonstrable flaw in the reasoning. The question is not whether other dates could reasonably have been identified, within the broad power and latitude for evaluative judgment entrusted to the primary decision-maker.

Conclusion

41. This, in my judgment, is a classic example of a situation where what was called for was the evaluative judgment of the primary decision-maker, in the application of the Guidance. As all the cases emphasise, there is a wide latitude in costs decisions. That primary decision-maker is entrusted with the exercise of the statutory power in making the decision on costs. I have a secondary and supervisory judicial review jurisdiction and I am duty bound to respect the latitude for primary judgment. Otherwise, in policing the boundaries of lawful decision-making by the impugned public authority, I cross the boundaries of my own. Costs decisions may well give rise to the possibility that different conclusions could reasonably have been arrived at. I may or may not have been able to accede to the challenge, had I a merits-substitution jurisdiction, and had I been equipped with all the materials which the primary decision-maker has and read. It is not the function of the judicial review court to substitute its own view of the merits, even if I were in a position to do so. Put another way, there is no appeal to the High Court from the exercise of the evaluative judgment in deciding as a matter of judgment and discretion whether there has been unreasonable conduct resulting in unnecessary or wasted expense which in all the circumstances justifies an order for costs in relation to a planning enquiry. In all the circumstances, and for all these reasons, the claim for judicial review fails and will be dismissed.

42. Counsel were agreed that the appropriate Order in light of the judgment circulated in draft, is as follows. (1) The Council's claim for judicial review is dismissed. (2) The Council shall pay the Secretary of State's costs of the claim as incurred from 22nd February 2023 to be the subject of detailed assessment, if not agreed.

Permission to Appeal

43. Mr Hunter asks me to grant permission to appeal, arguing that there is a real prospect of the Court of Appeal allowing an appeal. That is on a stripped-back basis: essentially, that the Decision-Maker acted unreasonably or gave legally inadequate reasons, failing to identify any sustainable unreasonableness of conduct of the Council, beyond the "collapse" and "responsibilities" which were "key features of the circumstances" (see §30i-ii above). I am going to refuse permission to appeal. The primary decision-maker's evaluative judgment – which I have held to be within the range of reasonable responses with adequate reasons and no demonstrable flaw – was that the Council's unreasonable action lay in its failure to ensure that evidence put forward was capable of standing up to scrutiny (see §§6, 31, 36i, 37, 40 above). I have not been persuaded that the proposed appeal has a realistic prospect of success.