CWCC

CLAYTON WEST CRICKET CLUB

Members of the Huddersfield Drakes League

Yvonne Parker
Programme Officer
Kirklees Local Plan
9A Priory Court
Burnley
BB11 3RH

31st January 2018

Dear Sir / Madam

Hearing statement on behalf of Clayton West Cricket Club – Site Ref H498 / Matter 41 (Denby Dale allocations).

Context:

Clayton West Cricket Club is run on a voluntary basis by members of the local community for the benefit of the local community and is a valuable Community Asset that has existed for over 140 years. It is funded by its members and by contributions from the local community and is run on a not-for profit basis.

Considerable resources (time, effort and money) have been invested in the Cricket Club by members of the local community over the years to maintain, develop and improve the club, the club house and the ground. As a result, the Cricket Club is highly valued by the local community that it serves and is one of only two sports facilities in Clayton West (the other being the bowls club). Throughout the summer months it is a hive of activity utilised 7 days a week, with the clubhouse acting as a venue for a wide range of community events.

It currently has over 400 members, including over 100 junior members (junior membership has increased significantly as a result of a concerted effort to improve coaching capability and resources). It is anticipated that membership will continue to increase over the coming years and in 2018 the Club have committed to the England & Wales Cricket Board (ECB) to make an application for ClubMark status. (the ECB accredited scheme awarded to Clubs that demonstrate a commitment to creating a sustainable and ethical infrastructure). The Club has two Senior teams and four junior teams. The junior teams feature several female players and the Club adopt a positive ethos towards diversity and inclusion. It is anticipated the number of junior teams will increase to six in the next three years.

There is therefore a significant and increasing demand for this particular facility; and there is a significant and increasing need for more leisure facilities generally and for more people to become active in Kirklees (as the Kirklees Physical Activity Sports Strategy 2015-2020). The Cricket Club is therefore an extremely precious asset for the local community and for the wider Kirklees

community. It needs to be afforded the very highest level of protection by the Local Plan.

The Cricket Club does not own the cricket ground, nor does it benefit from any rights of easement or restrictive covenants to protect the cricket ground use. As a result, the cricket ground and the Cricket Club are particularly vulnerable to change – and to possible extinction.

The Cricket Club is reliant on the planning system - and the high level of protection for sports pitches and leisure facilities that the planning system is supposed to afford – to ensure that the cricket ground is retained for cricket ground use for the benefit of the local community.

There are two very real threats to the cricket ground that would result from the allocation of sites H498 (and H454a) for housing unless adequate provisions and protection was put in place. The first is the direct threat caused by building housing immediately adjacent to (at an insufficient distance from) the cricket ground; the second is the indirect threat that would result from the loss of grazing land (which is what the allocated sites currently are) to housing.

(i) The Direct Threat: Housing Adjacent to Cricket Ground

Building housing immediately adjacent to a cricket ground will create conflict, as it has created conflict in the past.

The case of *Miller v Jackson* [1977] QB 966 emphasised that planning authorities should not allow houses to be built too close to cricket grounds. If houses are built too close to cricket grounds, conflicts will result, which may lead to the cricket ground use having to be brought to an end.

It is not simply about protecting the cricket ground itself; it is also about ensuring that the development of the land surrounding the ground will not result in conflict, which in turn will threaten the cricket ground use.

The Inspector should only be allocating sites for housing where it is reasonably certain that housing can be built without creating conflict (in allocating sites for housing, the Inspector must be convinced that the sites are 'deliverable' and 'developable'[1]). On sites H498 (H454a) the potential for conflict with cricket is clear, without adequate protection and provisions being put in place to mitigate such conflict.

When struck, cricket balls can travel for distances in excess of 90 metres at a velocity in excess of 20 metres per second (72kmph). Sites H498 (and H454a) are located just 45 metres from the square of the cricket ground. Development this close to the cricket ground will inevitably lead to unacceptable conflict and very real risk of personal injury, or worse still, death.

Balls striking houses or greenhouses or people in gardens etc. are likely to lead to damage and/or serious injury and to residents seeking compensation for damage or injunctions to stop cricket being played or the Cricket Club being forced to obtain insurance to cover claims against it (which may in turn force the Cricket Club to close).

[1] NPPF paragraph 47

(ii) The Indirect Threat: The Loss of Grazing Land

The cricket outfield is owned in part (approx. 1/3rd) by farmers, Nigel & Lynn Hardy, proposes of land allocation H498 & who also currently use the housing allocation site H454a for grazing land. *(see appendix 1 detailing the Hardy's ownership of the cricket field) .* The cricket club have enjoyed a long and positive working Relationship with the Hardy's. The cricket club pay an annual rent payment for leasing the aforementioned 1/3rd of the cricket field, however no formal lease exists.

Were site H454a to be developed for housing, the Hardy's would need more grazing land and have indicated that they would look to recover that part of the cricket ground that they own and restore it to grazing. The cricket outfield is not of sufficient size to meet the ECB minimum size requirements for cricket to continue to be played should the Cricket Club be left with the remaining 2/3 of the outfield. As such, the Cricket Club support any move to consider a *joint proposal and comprehensive approach* (as referenced under Matter 41, MIQ's) to ensure the implications of both proposed sites are considered collectively and to provide the necessary long term protection and provision to enable cricket operations to continue.

Should site H498 be fully developed, this would lead to a loss of some of the Hardy's farming land. While no such indication has been provided to repossess the 1/3rd of the cricket field which they own and return this back to grazing land, we don't have any such guarentees to our long term ability to retain this land for cricketing purposes if site H498 is developed.The only way that the cricket ground can be satisfactorily protected (its loss guarded against) through local planning policies – is if adequate protection and provisions are put in place at this stage of the process, as opposed to relying upon the planning application process to provide such safeguards.

Specific questions relating to MIQ's:

i) Will the proposals affect the viability and operations of the adjoining cricket ground:

Yes. As previously outlined, the viability and operations of the Cricket Club would be significantly impacted (including risk of closure) unless adequate (and long term) protection & provisions are put in place. Three specific areas where such provisions & protections are required are-

a. Installation of a safety feature (netting structure or equivalent) and/or sufficient 'no housing area' to prevent risk of injury or harm to any resident from cricket balls in the proposed housing site. The speed, velocity and distance at which a cricket ball can travel is outlined previously and presents a very clear and obvious risk of conflict without adequate protective measures being in place to remove such conflict.
b. That the 1/3 cricket outfield (owned by the Hardy's) is protected for the purposes of playing cricket, therefore guaranteeing that cricket operations can continue - this is most likely best achieved by considering a joint proposal with H454a.

c. A long term lease agreement with Taylor Wimpey (owners of land allocated for housing – Site H454a) under existing lease terms *(copy of existing lease enclosed in Appendix 2)* for the provision of car parking and essential access in to the cricket club. This would remove any potential for this land to be considered for future housing and safeguard the only access route in and out of the cricket club for essential cricket club ground machinery. This latter proposal (point c) would only be relevant to site H454A, however is worth pointing out within this statement.

The Cricket Club also enclose two legal judgements that it feels are relevant to this situation, including appeal outcomes. *(appendix 3- Miller & Jackson, appendix 4- The Forge Judgement)*

ii) What is the relationship between sites H454a and H498? Would a joint proposal and comprehensive approach to developments be appropriate:

We specifically refer you to the Hearing statement for Site reference H454a/ Matter 41

Whilst the cricket club is aware that both sites are being proposed independently by two different parties, they are inextricably linked. This is due to the signficiant risk (as stated by the Hardy's)) that should site H454a be accepted for housing, yet H498 not, the Hardy's will be forced to terminate the existing lease agreement with the cricket club and use the same land for grazing purposes.

Only through a joint (accepted) proposal would the Hardy's consider 'gifting' the 1/3 cricket to the cricket club on a long term lease (or other similar agreement). The cricket club would therefore welcome an approach to consider a joint proposal if this better guarantees that the cricket club operations can be safeguarded on a long term basis.

Summary:

Clayton West Cricket Club are in a 'catch 22' situation. We understand the requirement to develop land for housing and that the proposed allocation to housing of sites H454a and H498 presents a very real risk of closure of the cricket club due to the inevitable conflict should houses be built up to the existing cricket outfield boundary.

In addition, we are greatly exposed to the threat of losing 1/3rd of the cricket outfield as a directly result of site H454a being agreed and H498 not, or indeed if site H498 is agreed.

Guarantees are also sought, specifically relating to site H454a, to obtain long term security of tenure on the Club's car parking facilities.

The value that the cricket club brings to many people's lives, including many children should not be underestimated – and to risk losing such a valuable community asset for the number of homes that could be built on the combined sites (H454a and H498) would be a terrible outcome. Through a collaborative and joined up approach by all parties relating to sites H454a and H498, the

cricket club ask the Inspector to guarantee such protection and provisions are made at this stage of the process, as opposed to relying upon future stages (including planning application stage) to enable cricket operations to continue for many years to come.

Chairman ***Secretary*** ***Treasurer***

H.M. LAND REGISTRY

WYK624017

ORDNANCE SURVEY PLAN REFERENCE	SE2511 SE2611	SECTION	Scale 1/2500
COUNTY WEST YORKSHIRE	DISTRICT KIRKLEES		© Crown Copyright 1998

= 1/3RD CRICKET GROUND OWNED BY NIGEL + LYNN HARDY.

SE2511

SE2611

DATED 2005

TAYLOR WOODROW HOLDINGS LTD

and

CLAYTON WEST CRICKET CLUB

CAR PARKING LICENCE

AN AGREEMENT made the day of Two thousand and FIVE

BETWEEN Taylor Woodrow Holdings Ltd (hereinafter called "the Owners") of the one part and Clayton West Cricket Club c/o Mr K Firth of 41 Spring Grove Clayton West Huddersfield (hereinafter called "the Licensee") of the other part

WHEREBY IT IS AGREED as follows:

1. The Owners hereby grant to the Licensee from the 1st day of January Two thousand and Six the right to park motorised vehicles only on the Owners Property (herinafter called "the Property") the area as shown delineated in red on the attached plan and referred to as Schedule One together with the right to enter upon and pass and repass over such portions of the Property as may be reasonably necessary for the adequate exercise of the said right and privilege including rights of vehicular and pedestrian access between Wakefield Road the Property and the cricket ground

2. The Licensee shall pay to the Owners a licence fee of £10 per annum payable in advance on the 1st January in each year (the initial licence fee payment to be paid on the signing of this Licence)

3. The Licensee shall tidy the Property from all rubbish, grass clippings and discarded/unused items and maintain it free from all rubbish, grassclippings and discarded/items throughout this Licence and maintain the Property and cut the grass regularly

4. The Property shall not be used for the purposes of any trade or business but shall be used for the parking of motorised vehicles only

5. No buildings or structures of any kind are to be erected on any part of the Property without the Owners or their Agents prior written consent

6. The Licensee shall not at any time park cars or allow cars to be parked in such a way as to obstruct other vehicles tracks or access-ways

7. No animals shall be kept or let loose on the Property

15. The regulations with regard to notices contained in Section 196 of the Law of Property Act 1925 as amended by the Recorded Delivery Service Act 1962 shall apply to this Licence as if incorporated herein and as if the Owners were the lessors and the Licensee were the lessee

16(a) Where the context so admits the expression "the Owners" includes their successors in title the masculine shall include the feminine and neuter and the singular shall include the plural

(b) Any obligation in this Agreement to pay money refers to a sum exclusive of Value Added Tax and any Value Added Tax charged on it is payable in addition

THE SCHEDULE hereinbefore referred to
("the Property")

Shown delineated in red on the attached Plan labelled "Schedule One"

SIGNED by the said)
Taylor Woodrow Holdings Ltd)
)
in the presence of:-)

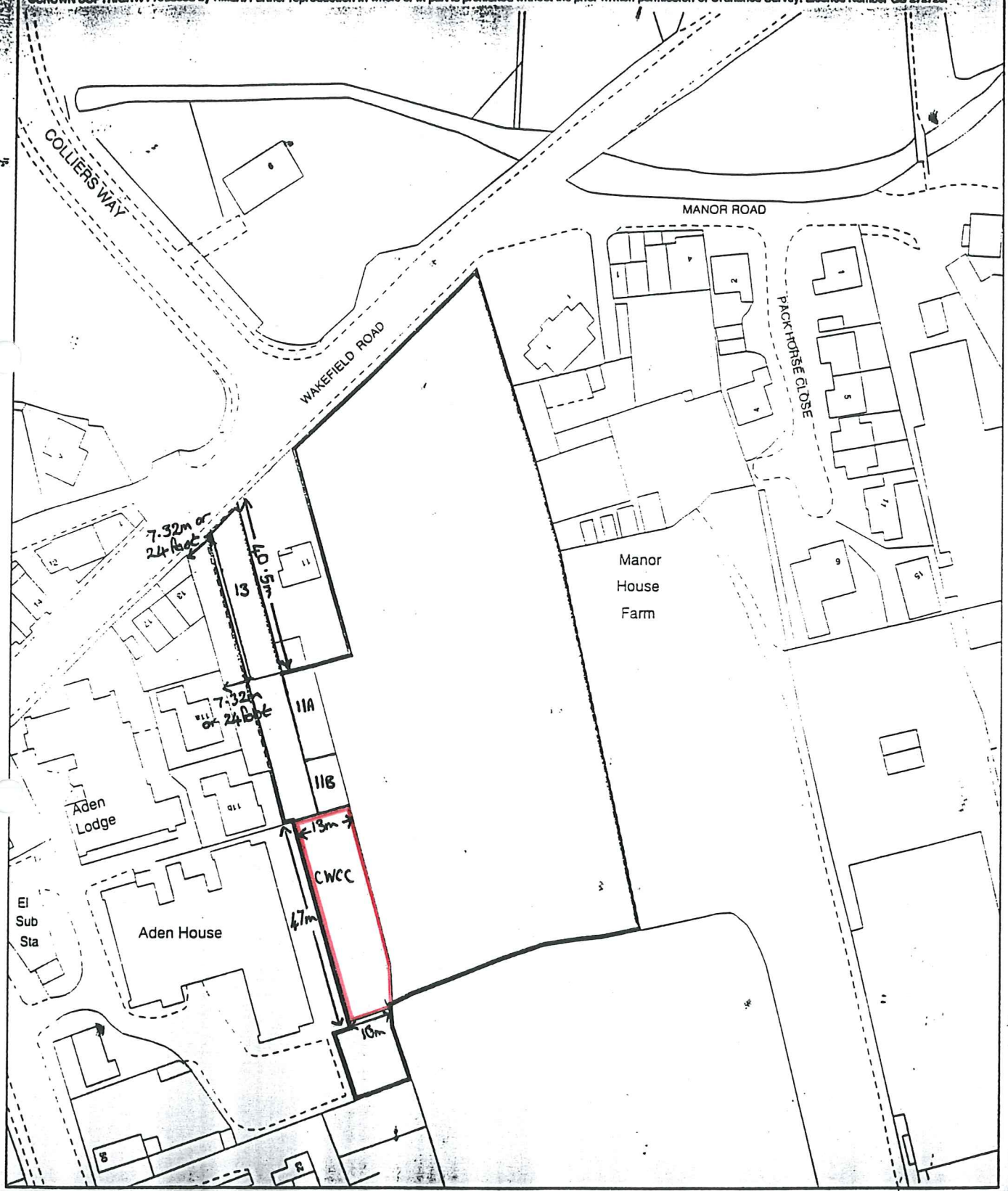
SIGNED by the said)
Clayton West Cricket Club)
)
in the presence of:-)

WYK609812

WEST YORKSHIRE : KIRKLEES

ORDNANCE SURVEY MAP REFERENCE: SE2311NE

SCALE 1:1250 Enlarged from 1/2500



This title plan shows the general position of the boundaries: it does not show the exact line of the boundaries. Measurements scaled from this plan may not match measurements between the same points on the ground. For more information see Land Registry Public Guide 7 - Title Plans.

This official copy shows the state of the title plan on 20 October 2004 at 10:02:14. It may be subject to distortions in scale.

Under s.67(3) of the Land Registration Act 2002 this copy is admissible in evidence to the same extent as the original.

Issued on 20 October 2004

H.M. LAND REGISTRY 1CM 0/2000

England and Wales Court of Appeal (Civil Division) Decisions

BAILII Citation Number: [1977] EWCA Civ 6
Case No.: 1975 M. No. 173

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DURHAM DISTRICT REGISTRY
(MR. JUSTICE REEVE)

Royal Courts of Justice.
6th April 1977.

B e f o r e :

THE MASTER OF THE ROLLS (Lord Denning)
LORD JUSTICE GEOFFREY LANE
and
LORD JUSTICE CUMMING-BRUCE

JOHN EDWARD MILLER	**First Plaintiff (Respondent**
and	
BRENDA THERESA MILLER	**Second Plaintiff (Respondent)**
-v-	
R. JACKSON	**First Defendant (Appellant)**
and	
J. J. CROMERTY	**Second Defendant (Appellant)**

(On their own behalf and on behalf of all other members of

the Lintz Cricket Club)

(Transcript of the Shorthand Notes of the Association of Official Shorthandwriters Ltd., Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London, W.C.2).

MR. J. A. CHADWIN, Q.C . and MR.P.N. SUCH
(instructed by Messrs Hay & Kilner, Solicitors, Newcastle upon Tyne)
appeared on behalf of the Plaintiffs (Respondents).
MR. M. KEMPSTER, Q.C. and MR.J. HARPER
(Instructed by Messrs .Halsey, Lightly and Hemsley, Solicitors,
London agents for Messrs. Nicholson, Martin & Wilkinson, Newcastle upon Tyne)
appeared on behalf of the Defendants (Appellants).

HTML VERSION OF JUDGMENT

THE MASTER OF THE ROLLS: In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last seventy years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club-house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practice while the light lasts. Yet now after these 70 years a Judge of the High Court has ordered that they must not play there anymore, lie has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that, when a batsman hits a six, the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at weekends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the Judge to stop the cricket being played. And the Judge, I am sorry to say, feels that the cricket must be stopped: with the consequences, I suppose, that the Lintz cricket-club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground.

I must say that I am surprised that the developers of the housing estate were allowed to build the houses so close to the cricket ground. No doubt they wanted to make the most of their site and put up as many houses as they could for their own profit. The planning authorities ought not to have allowed it. The houses ought to have been so sited as not to interfere with the cricket. But the houses have been built and we have to reckon with the consequences.

At the time when the houses were built it was obvious to the people of Lintz that these new houses were built too close to the cricket ground. It was a small ground, and there might be trouble when a batsman hit a ball out of the ground. But there was no trouble in finding purchasers. Some of them may have been cricket enthusiasts. But others were not. In the first three years - 1972, 1973 and 1974 - quite a number of balls came over or under the

boundary fence and went into the gardens of the houses: and the cricketers went round to get them. A lady in one of the houses, a Mrs. Miller, of house number 20, Brackenridge, was very annoyed about this. To use her own words:

> "...When the balls come over, they the cricketers, either ring or come round in two's and three's and ask if they can have the ball back, and they never ask properly. They just ask if they can have the ball back, and that's it. They have been very rude, very arrogant and very ignorant, and very deceitful ... to get away from any problems we make a point of going out on Wednesdays, Fridays and the week-ends."

Having read the evidence, I am sure that was a most unfair complaint to make of the cricketers. They have done their very best to be polite. It must be admitted, however, that on a few occasions before 1974 a tile was broken or a window smashed.

The householders made the most of this and got their rates reduced. The cricket club then did everything possible to see that no balls went over. In 1975, before the cricket season opened, they put up a very high protective fence. The existing concrete fence was only six feet high. They raised it to nearly 15 feet high by a galvanised chain-link fence. It cost £700. They could not raise it any higher because of the wind. The cricket ground is 570 feet above sea level. During the winter even this high fence was blown down on one occasion and had to be repaired at a cost of £400. Not only did the club put up this high protective fence. They told the batsmen to try to drive the balls low for four and not hit them up for six. This greatly reduced the number of balls that got into the gardens. So much so that the rating authority no longer allowed any reduction in rates.

Despite these measures, a few balls did get over. The club made a tally of all the sixes hit during the seasons of 1975 and 1976. In 1975 there were 2,221 overs, that is, 13,326 balls bowled. Of them there were 120 six hits on all sides of the ground. Of these only six went over the high protective fence and into this housing estate. In 1976 there were 2,616 overs, that is 15,696 balls. Of them there were 160 six hits. Of these only 9 went over the high protective fence and into this housing estate.

No one has been hurt at all by any of these balls, either before or after the high fence was erected. There has, however, been some damage to property, even since the high fence was erected. The cricket club have offered to remedy all the damage and pay all expenses. They have offered to supply and fit unbreakable glass in the windows, and shutters or safeguards for them. They have offered to supply and fit a safety net over the garden whenever cricket is being played. In short, they have done everything possible snort of stopping playing cricket on the ground at all. But Mrs. Miller and her husband have remained unmoved. .Every offer by the club has been rejected. They demand the closing down of the cricket club. Nothing else will satisfy them. They have obtained legal aid to sue the cricket club.

In support of the case, the Plaintiff relies on the dictum of Lord Reid in Bolton v. Stone [1951] AC 850, at page 867:

> "If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all".

I would agree with that saying if the houses or road was there first, and the cricket ground came there second. We would not allow the garden of Lincoln's Inn to be turned into a cricket ground. It would be too dangerous for windows and people. But I do not agree with Lord Reid's dictum when the cricket ground has been there for 70 years and the houses are newly built at the very edge of it. I recognise that the cricket club are under a duty to use all reasonable care consistently with the playing of the game of cricket, but I do not think the cricket club can be expected to give up the game of cricket altogether. After all they have their rights in their cricket ground. They have spent money, labour and love in the making of it: and they have the right to play upon it as they have done for 70 years. Is this all to be rendered useless to them by the thoughtless and selfish act of an estate developer in building right up to the edge of it? Can the developer or a purchaser of the house say to the cricket club: "Stop playing. Clear out". I do not think so. And I will give my reasons.

THE LAW IN THE 19th CENTURY

If we were to approach this case with the eyes of the Judges of the 19th Century, they would, I believe, have seen it in this way: .Every time that a batsman hit a ball over the fence so that it landed in the garden, he would be guilty of a trespass. If he hit it so that it went under the fence and down the bank, he would be guilty of a trespass. So would the committee of the cricket club, because they would have impliedly authorised it. They cheered the batsman on. If one or two of the players went round and asked the householder if they could go into the garden to find it, the householder could deny them access:

> "You are not to come in here",

he could say,

> "to get your ball. I am not going to get it for you. For will I let you. It is going to stay there".

If the cricketers said:

> "It's a new ball. It cost us over £6",

the householder could say:

> "That is your look-out. You ought not to have put it there".

Of course, if the householder picked up the ball himself and gave it to his son to play with, he would be liable in conversion. But otherwise he would not be liable at all. He could say:

> "An Englishman's house is his castle. You are not coming in. Nor are you to hit your cricket ball in here. If you go on doing it, I am going to get an injunction to stop you. Once I prove the violation of a legal right, the Court of Chancery will grant me an injunction to prevent the recurrence of that violation" –

see Imperial Gas Light and Coke Co. v. .Broadbent (1859) 7 House of Lords Cases 600. Even if there was any doubt about the plaintiff's right to sue in trespass, he would have a claim in nuisance, once he proved that the balls were repeatedly coming over or under the fence and making things uncomfortable for him. To those claims, in the 19th Century, either in trespass or in nuisance, the committee of the cricket club would have no answer. They could not claim an easement because there is no such easement known to the law as a right to hit cricket balls into your neighbour's land. It would be no good for them to say that the cricket ground was there before the house was built. The householder could rely on the case a hundred years ago of the physician who built his new consulting-room next to the old established kitchen of his neighbour. The physician was held entitled to stop the working of the kitchen on the ground that the noise was a nuisance to him in his consulting-room - see Sturges v. Bridgman (1879) 11 Chancery Division 852.

The only way in which the cricket club could have succeeded in the 19th Century would have been by invoking the doctrine of "derogation from grant". We were told that until recently the cricket ground and the neighbouring fields were all owned by the National Coal Board. The Coal Board let the cricket ground to the cricket club on a long lease for years knowing that the very purpose of the lease was that the club should play cricket on it for the term of the lease. So long as the National Coal Board owned the neighbouring field, they could not complain of the occasional ball being hit out of the ground on to the field: nor could they have got an injunction to restrain the playing of cricket on the ground, seeing that they had leased it to the club for that very purpose. The reason being simply that it would be a derogation from the grant of the lease for them to do so. And if the National Coal Board sold the land to a purchaser (as they did), the purchaser and subsequent successors in title also could not complain of the occasional ball: nor could they have got an injunction: for the obligation imported by the doctrine of "derogation from grant" runs with the land just as do obligations which arise from a restrictive covenant - see Browne v. Flower (1911) 1 Chancery at page 226, by Mr. Justice Parker.

> "They bind not only the grantor but also all who claim through him ..."

It is in this that the importance of the doctrine lies - see Wade and Megarry's law of Real Property, 4th Edition, page 820.

THE LAW IN THE 20th CENTURY

The case here was not pleaded by either side in the formulae of the 19th Century. The plaintiffs did not allege trespass. The defendants did not raise the doctrine of derogation from grant. The case was pleaded in negligence or alternatively nuisance. That was, I think, quite right, having regard to the decision of the House of Lords in Bolton v. Stone [1951] AC 850,. Miss Stone had just stepped out of her garden gate on to the pavement when she was hit by a cricket ball. She did not sue in trespass to the person. That would be quite out of date. As I said in Letang v. Cooper (1965) 1 Queen's Bench at page 239:

> "If the defendant does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care",

Miss Stone did seek to put her case on the doctrine of Rylands v. Fletcher. She suggested that a cricket ball was a dangerous thing which the defendants had brought on to the cricket ground and it had escaped. That suggestion was dismissed by the House of Lords out of hand. Lord Reid said:

> "There is no substance in that argument"

- see [1951] AC at page 867. She also suggested that the club were liable in nuisance: but this was not pressed in the House of Lords, because nuisance was not distinguishable from negligence. Lord Porter remarked that

> "in the circumstances of this case nuisance cannot be established unless negligence is proved", see (1951) Appeal Cases at page 860.

In our present case, too, nuisance was pleaded as an alternative to negligence. The tort of nuisance in many cases overlaps the tort of negligence. The boundary lines were discussed in two adjoining cases in the Privy Council. The Wagon Mound in [1967] 1 AC 617 at page 639; and Goldman v. Hargrave in [1967] 1 AC 645 at page 657. But there is at any rate one important distinction between them. It lies in the nature of the remedy sought. Is it damages? Or an injunction? If the plaintiff seeks a remedy in damages for injury done to him or his property, he can lay his claim either in negligence or nuisance. But, if he seeks an injunction to stop the playing of cricket altogether, I think he must make his claim in nuisance. The books are full of cases where an injunction has been granted to restrain the continuance of a nuisance. But there is no case, so far as I know, where it has been granted so as to stop a man being negligent. At any rate in a case of this kind where an occupier of a house or land seeks to restrain his neighbour from doing something on his own land, the only appropriate cause of action - on which to base the remedy of an injunction - is nuisance - see the report of the Law Commission on dangerous activities, Law Commission Report No. 32 at page 25. It is the very essence of a private nuisance that it is the unreasonable use by a man of his land to the detriment of his neighbour. He must have been guilty of the fault, not necessarily of negligence, but of the unreasonable use of the land - see The Wagon Mound (1967) 1 Appeal Cases at page 639 by Lord Reid.

It has been often said in nuisance cases that the rule is six utere tuo ut alienuin non laedas. But that is a most misleading maxim. Lord Wright put it in its proper place in Sedleigh-Denfield v. O'Callaghan [1940] AC 880, at page 903:

> "It is not only lacking in definiteness, but is also inaccurate. An occupier may make in many ways a use of his land which causes damage to the neighbouring landowners, and yet be free from liability ... a useful test is perhaps what is reasonable according to the ordinary uses of mankind living in society, or, more correctly, in a particular society."

I would, therefore, adopt this test: Is the use by the cricket club of this ground for playing cricket a reasonable use of it? To my mind it is a most reasonable use. Just consider the circumstances. For over 70 years the game of cricket has been played on this ground to the great benefit of the community as a whole, and to the injury of none. No one could suggest that it was a nuisance to the neighbouring owners simply because an enthusiastic batsman occasionally hit a ball out of the ground for six to the approval of the admiring onlookers. Then I would ask: Does it suddenly become a nuisance because one of the neighbours chooses to build a house on the very edge of the ground - in such a position that it may well be struck by the ball on the rare occasion when there is a hit for six? To my mind the answer is plainly No. The building of the house does not convert the playing of cricket into a nuisance when it was not so before. If and in so far as any damage is caused to the house or anyone in it, it is because of the position in which it was built. Suppose that the house had not been built by a developer, but by a private owner. He would be in much the same position as the farmer who previously put his cows in the field. He could not complain if a batsman hit a six out of the ground - and by a million to one chance - it struck a cow or even the farmer himself. He would be in no better position than a spectator at Lord's or the Oval or at a motor rally. At any rate, even if he could claim damages for the loss of the cow or the injury, he could not get an injunction to stop the cricket. If the private owner could not get an injunction, neither should a developer or a purchaser from him.

It was said, however, that the case of the physician's consulting room was to the contrary. Sturges v. Bridgman (1879) 11 Chancery Division 852. But that turned on the old law about easements and prescriptions, and so forth. It was in the days when rights of property were in the ascendant and not subject to any limitations except those provided by the law of easements. But nowadays it is a matter of balancing the conflicting interests of the two neighbours. That was made clear by Lord Wright in Sedleigh-Denfield v.O'Callaghan [1940] AC 880, at page 903, when he said:

> "A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with".

In this case it is our task to balance the right of the cricket club to continue playing cricket on their cricket ground - as against the right of the householder not to be interfered with. Upon taking the balance, I would give priority to the right of the cricket club to continue playing cricket on the ground, as they have done for the last seventy years. It takes precedence over the right of the newcomer to sit in his garden undisturbed. After all he bought the house four years ago in mid-summer when the cricket season was at its height. He might have guessed that there was a risk that a hit for six might possibly land on his property. If he finds that he does not like it, he ought, when cricket is played, to sit in the other side of the house or in the front garden, or go out: or take advantage of the offers the club have made to him of fitting unbreakable glass, and so forth. Or, if he does not like that, he ought to sell his house and move elsewhere. I expect there are many who would gladly buy it in order to be near the cricket field and open space. At any rate he ought not to be allowed to stop cricket being played on this ground. This case is new. It should be approached on principles applicable to modern conditions. There is a contest here between the interest of the public at large; and the interest of a private individual. The public interest lies in protecting the environment by preserving our playing fields in the face of mounting development, and by enabling our youth to enjoy all the benefits of outdoor games, such as cricket and football. The private interest lies in securing the privacy of his home and garden without intrusion or interference by anyone. In deciding between these two conflicting interests, it must be remembered that it is not a question of damages. If by a million-to-one chance a cricket ball does go out of the ground and cause damage, the cricket club will pay. There is no difficulty on that score. No it is a question of an injunction. And in our law you will find it repeatedly affirmed that an injunction is a discretionary remedy. In a new situation like this, we have to think afresh as to how discretion should be exercised. On the one hand, Mrs. Miller is a very sensitive lady who has worked herself up into such a state that she exclaimed to the Judge:

> "I just want to be allowed to live in peace. Have we got to wait until someone is killed before anything can be done?"

If she feels like that about it, it is quite plain that, for peace in the future, one or other has to move. Either the cricket club have to move: But goodness knows where. I do not suppose for a moment there is any field in Lintz

to which they could move. Or Mrs. Miller must move elsewhere. As between their conflicting interests, I am of opinion that the public interest should prevail over the private interest. The cricket club should not be driven out. In my opinion the right exercise of discretion is to refuse an injunction. I would allow the appeal, accordingly.

LORD JUSTICE GEOFFREY LANE. Since about 1905 cricket has been played on a field at the village of Lintz, County Durham. The village cricket ground is an important centre of village life in the summer months. It provides pleasure and relaxation for many, whether as spectators or players. We are told that the land is owned by the National Coal Board who let it to the club. The National Coal Board had also been the owners of an area of pasture-land to the north of the cricket ground. No difficulties arose from the use of the ground until 1972. The pasture-land had been sold by the National Coal Board to the Stanley Urban District Council in 1965, but in about 1972 it was bought from the J.D.C. by Messrs, Wimpey's Ltd. Wimpey's built a line of semi-detached houses there. One of those was bought by the plaintiffs. That is No. 20, Brackenridge - the name of the road.

The ground is small. In the centre is the "square" on which the wickets are prepared. This area is roughly 95' x 90' wickets are prepared North - South. From the Northern edge of this square to the boundary of the ground and the Plaintiffs' garden is only 102 feet. From the Southern crease to the garden is about 200 feet and to the house is only another 60 feet or so. In terms of cricket pitches, from the Southern crease to the Northern boundary it is only about 3 cricket pitches. From there to the house, less than another cricket pitch. It is therefore not surprising that since the houses were built, there have been a number of occasions on which cricket balls have been hit from the ground into the gardens of the various houses in Brackenridge.

The Judge accepted that the Plaintiffs when they bought the house did not pay any particular attention to the fact that it was a cricket field at the bottom of their garden, rather than any other sort of open space.

At that time there was a 6 foot high concrete fence between the ground and the gardens. But there was a sharp slope down from the fence to the gardens which were well below the level of the pitch. Thus the top of the 6 foot fence is roughly on a level with the eaves of the houses. The Judge accepted the Plaintiffs' evidence that on a number of occasions cricket balls have been struck into their garden or against their house. Some chipped the brick-work - some damaged the roof. In particular in 1972 three caused damage. In 1974 several balls came over - one of which caused damage.

The Plaintiffs complained. At the beginning of the 1975 season, as a result, the club erected a galvanised chain-link fence above the wall. The total height of wall and fence then became 14 feet 9 inches. It was an expensive operation costing some £700. Since then the Defendants have kept a tally of offending six-hits over this boundary. In 1975 9 balls hit the fence and 6 went over it. In the 1976 season 4 hit the fence and 8 or 9 went over it - 3 on one single day - August 21st. According to the Millers, five of the 1975 ones landed in their garden and 2 of those in 1976. On the 26th July, 1975 one just missed breaking the window of a room in which their son was seated. He was then aged about 11 or 12.

The Plaintiffs claimed damages and an injunction on the grounds of negligence and nuisance. The Judge upheld their claim. He granted an injunction, the effect of which in practical terms will be to stop cricket from being played on the ground.

The Defendants now appeal.

The Millers were not the only people in Brackenridge who suffered in this way. The Craigs moved to the next-door house, No. 19, in June 1975. By the time of the hearing in October 1976 they had had quite a number of balls come into their garden; about 6 to 8 in the 1975 season and the same number in 1976. One of them went through a glass pane and into the dining-room. That ball went over Mr. Craig's head as he was picking raspberries in his garden. His wife was in the house. Broken glass landed all around her. Mr. Craig since then does not venture out into the garden while there is a match in progress.

The Milners live at No. 24. They have been there for 4 years. They have only had 2 balls come over into their garden. They have a baby who was about 9 months old at the time of trial. Mrs. Milner would not leave him in the garden whilst a match was in progress.

There is no doubt however that of all the residents in Brackenridge the Millers were the people who seemed to have suffered the most. Judging from the evidence, Mrs. Miller -whether justifiably or not - seems to have become almost neurotic about this trouble. Certainly the Millers now take themselves off elsewhere while cricket is in progress, so that they will not be troubled by the incursions of cricket balls and of those who seek to retrieve them. It is perhaps worth remarking in passing that one of the things Mrs. Miller said she objected to was the attitude of club members who came to No. 20 in search of the balls. Although the Judge made no specific finding on the matter, it seems that she may have been unduly sensitive on this aspect of the affair at least.

In the end there was little if any dispute as to the basic facts. Taking the 1975 season as typical, the following statistics emerge. The season lasted 20 weeks. There were 36 matches. Three were on Sundays lasting 5 hours each. 14 were on weekdays lasting 2½ hours. 19 were on Saturday lasting about 5 hours. That is 145 hours in all, of which 110 were at the weekend. Thus on almost every Saturday during the summer when the weather was fine the houses and gardens in Brackenridge and anyone in them would be at risk.

The club officials who gave evidence were refreshingly candid and forthright. Mr. Jackson, the Chairman of the Club, freely conceded that there was no way in which they could stop balls going into the premises in Brackenridge from time to time; that the Plaintiffs were likely to suffer in the future as they had done in the past from broken tiles and so on; that something like an average of eight balls a year were going to land in the vicinity of the Millers' house. Mr. Nevins, the captain of the first team, agreed that when these homes were first built it was obvious that there was going to be trouble from balls driven over the bowler's head into the gardens.

I have dealt with the evidence at some length because in the end the outcome of the case may depend upon a decision as to the degree of potential or actual danger to person or property.

No one has yet suffered any personal injury, though Mrs. Craig at least was perhaps lucky to have avoided it. There is no doubt that damage to tiles or windows at the Plaintiffs' house is inevitable if cricket goes on. There is little doubt that if the Millers were to stay in their garden whilst matches are in progress they would be in real danger of being hit.

In these circumstances, have the Plaintiffs established that the Defendants are guilty of nuisance or negligence as alleged? No technical question arises as to the position of the Defendants. It is conceded that if the actions of the players in striking the ball into the Plaintiffs' property is tortious, the Defendants are responsible therefore.

Negligence

The evidence of Mr. Nevins makes it clear that the risk of injury to property at least was both foreseeable and foreseen. It is obvious that such injury is going to take place so long as cricket is being played on this field. It is the duty of the cricketers so to conduct their operations as not to harm people they can or ought reasonably to foresee may be affected. The Defendants' answer to this, as I understand it, is as follows. They have taken every feasible step to prevent injury by erecting as high a fence as is possible having regard to the likely wind-forces. They have offered to fit louvered shutters to the Millers' south-facing windows to prevent the glass being broken. They have as an alternative offered to fit unbreakable glass to these windows. The Plaintiffs have declined the offer. The Defendants have now, since the trial, offered to erect a wire mesh cage or roof over the whole garden whilst matches are in progress, the cage to extend from the top of the concrete wall to the eaves of the house. Thus, say the Defendants, they have taken or offered to take all reasonable steps to protect the Plaintiffs from harm and consequently should not be liable on the basis of lack of reasonable care for the safety of their neighbours. That argument is fallacious. There is no obligation on the Plaintiffs to protect themselves in their own home from the activities of the Defendants. Even if there were such an obligation it would be unreasonable to expect them to live behind shutters during the summer weekends and to stay out of their garden. The latest idea of roofing over the garden with wire mesh is ill-thought out and impracticable. The drawing shows an unsupported 30 ft. span of netting. This is inaccurate. The agreed plan makes it clear that the true span is 60 ft. This obviously could not be kept in place without intermediate supports in the garden. It would be quite unreasonable to expect the Plaintiffs to consent to that sort of construction. There is no way in which damage to the Plaintiffs' property can reasonably be prevented except by ceasing to play cricket on this ground. The learned Judge put the matter in

the following terms:

> "I have no hesitation in reaching the conclusion that when cricket is played on this ground any reasonable person must anticipate that injury is likely to be caused to the property at 20 Braekenridge or its occupants."

That is a finding from which it would be improper to depart even if one were minded to, which I am not.

It is true that the risk must he balanced against the measures which are necessary to eliminate it and against what the Defendants can do to prevent accidents from happening - Latimer v. A.E.C. [1953] AC 643. In that case a sudden storm had caused a factory floor to become flooded and slippery. The Defendants did all that could reasonably be expected of them, short of closing the factory, to prevent injury. It was held by the House of Lords that the risk of injury from the slippery floor was not sufficient to require the Defendants to shut the factory. Their decision in the words of Lord Oaksey (at page 656) was at the highest "an error of judgment in circumstances of difficulty, and such an error of judgment does not amount to negligence". In the present case, so far from being one incident of an unprecedented nature about which complaint is being made, this is a series of incidents, or perhaps a continuing failure to prevent incidents from happening, coupled with the certainty that they are going to happen again. The risk of injury to person and property is so great that on each occasion when a ball comes over the fence and causes damage to the Plaintiffs, the Defendants are guilty of negligence.

Nuisance

In circumstances such as these it is very difficult and probably unnecessary, except as an interesting intellectual exercise, to define the frontiers between negligence and nuisance. See Lord Wilberforce in Goldman v. Hargrave [1967] 1 AC 645, 656.

Was there here a use by the Defendants of their land involving an unreasonable interference with the Plaintiffs' enjoyment of their land? There is here in effect no dispute that there has been and is likely to be in the future an interference with the Plaintiffs' enjoyment of No. 20 Brackenridge. The only question is whether it is unreasonable. It is a truism to say that this is a matter of degree. What that means is this. A balance has to be maintained between on the one hand the rights of the individual to enjoy his house and garden without the threat of damage and on the other hand the rights of the public in general or a neighbour to engage in lawful pastimes. Difficult questions may sometimes arise when the Defendants' activities are offensive to the senses for example by way of noise. Where, as here, the damage or potential damage is physical the answer is more simple. There is, subject to what appears hereafter, no excuse I can see which exonerates the Defendants from liability in nuisance for what they have done or from what they threaten to do. It is true no one has yet been physically injured. That is probably due to a great extent to the fact that the householders in Brackenridge desert their gardens whilst cricket is in progress. The danger of injury is obvious and is not slight enough to be disregarded. There is here a real risk of serious injury.

There is, however, one obviously strong point in the Defendants' favour. They or their predecessors have been playing cricket on this ground (and no doubt hitting sixes out of it) for 70 years or so. Can someone by building a house on the edge of the field in circumstances where it must have been obvious that balls might be hit over the fence, effectively stop cricket being played. Precedent apart, justice would seem to demand that the Plaintiffs should be left to make the most of the site they have elected to occupy with all its obvious advantages and all its equally obvious disadvantages. It is pleasant to have an open space over which to look from your bedroom and sitting room windows, so far as it is possible to see over the concrete wall. Why should you complain of the obvious disadvantages which arise from the particular purpose to which the open space is being put? Put briefly, can the Defendants take advantage of the fact that the Plaintiffs have put themselves in such a position by coming to occupy a house on the edge of a small cricket field, with the result that what was not a nuisance in the past now becomes a nuisance? If the matter were res integra, I confess I should be inclined to find for the Defendants. It does not seem just that a long-established activity - in itself innocuous - should be brought to an end because someone chooses to build a house nearby and so turn an innocent pastime into an actionable nuisance. Unfortunately, however, the question is not open. In Sturges v. Bridgman (1879) Law Report Chancery Division

852 this very problem arose. The Defendant had carried on a confectionary shop with a noisy pestle and mortar for more than twenty years. Although it was noisy, it was far enough away from neighbouring premises not to cause trouble to anyone, until the Plaintiff who was a physician built a consulting room on his own land but immediately adjoining the confectionary shop. The noise and vibrations seriously interfered with the consulting room and became a nuisance to the physician. The Defendant contended that he had acquired the right either at Common Law or under the Prescription Act by uninterrupted use for more than twenty years to impose the inconvenience. It was held by the Court of Appeal affirming the judgment of Lord Jessel, the Master of the Rolls, that use such as this which was, prior to the construction of the consulting room, neither preventable nor actionable, could not found a prescriptive right. That decision involved the assumption, which so far as one can discover has never been questioned, that it is no answer to a claim in nuisance for the Defendant to show that the Plaintiff brought the trouble on his own head by building or coming to live in a house so close to the .Defendant's premises that he would inevitably be affected by the Defendant's activities, where no one had been affected previously. See also Bliss v. Hall (1838) 4 Bingham New Cases 183. It may be that this rule works injustice, it may be that one would decide the matter differently in the absence of authority. But we are bound by the decision in Sturges v. Bridgman and it is not for this Court as I see it to alter a rule which has stood for so long.

Injunction

Given that the Defendants are guilty of both negligence and nuisance, is it a case where the Court should in its discretion give discretionary relief, or should the Plaintiffs be left to their remedy in damages? There is no doubt that if cricket is played damage will be done to the Plaintiff's tiles or windows or both. There is a not inconsiderable danger that if they or their son or their guests spend any time in the garden during the weekend afternoons in the summer they may be hit by a cricket ball. So long as this situation exists it seems to me that damages cannot be said to provide an adequate form of relief. Indeed, quite apart from the risk of physical injury, I can see no valid reason why the Plaintiffs should have to submit to the inevitable breakage of tiles and/or windows, even though the Defendants have expressed their willingness to carry out any repairs at no cost to the Plaintiffs. I would accordingly uphold the grant of the injunction to restrain the Defendants from committing nuisance. However, I would postpone the operation of the injunction for 12 months to enable the Defendants to look elsewhere for an alternative pitch.

So far as the Plaintiffs are concerned, the effect of such postponement will be that they will have to stay out of their garden until the end of the cricket season but thereafter will be free to use it as they wish.

I have not thought it necessary to embark upon any discussion of the possible rights of the Defendants arising from matters which were neither pleaded nor argued.

LORD JUSTICE CUMMING-BRUCE: I agree with all that Lord Justice Lane has said in his recital of the relevant facts and his reasoning and conclusion upon the liability of the Defendants in negligence and nuisance, including his observation about the decision in Sturges v. Bridgman. The Plaintiffs are successors in title to the National Coal Board, who granted the present lease to the Defendants in 1970, and that lease replaced an earlier lease. Both leases let the land for use as a cricket ground. It might seem strange therefore that the Defendants have not relied upon the defence that by their claim the Plaintiffs seek to achieve a derogation of the grant of their predecessors in title. If available, this would be a defence to the actions in negligence and nuisance. It is a principle now established as a rule of law, and applies equally to assignees and purchasers with and without notice. That approach to the facts was suggested by the Court in this court, but the Plaintiffs did not apply to amend their defence, and made no submission upon it. We have been told today that the National Coal Board sold the Brackenridge land five years before the new lease. It is not open to this court to consider that defence.

The only problem that arises is whether the learned Judge is shown to be wrong in deciding to grant the equitable remedy of an injunction which will necessarily have the effect that the ground which the Defendants have used as a cricket ground for 70 years can no longer be used for that purpose.

Mr. Justice Reeve correctly directed himself that the principles which apply are those described by Lord Evershed, the Master of the Rolls, in the Pride of Derby case, and by Lord Justice A.L. Smith in Shelfer v. City of

London Electric Lighting Co. (1895) 1 Chancery 287. Did he correctly apply those principles to the facts of the case? There is authority that in considering whether to exercise a judicial discretion to grant an injunction the court is under a duty to consider the interests of the public. So said Lord Romilly, Master of the Rolls, over 100 years ago, but the conflict of interest there was between proprietary private rights and the inconvenience to be suffered by users of a railway. Courts of equity will not ordinarily and without special necessity interfere by injunction where the injunction will have the effect of very materially injuring the rights of third persons not before the court. The principle has recently been accurately stated in a text book:

> "Regard must be had not only to the dry strict rights of the plaintiff and the defendant, but also the surrounding circumstances, to the rights or interests of other persons which may be more or less involved. So it is that where the Plaintiff has a prima facie right to specific relief, a court of equity will, if occasion should arise, weigh the disadvantage or hardship which he will suffer if relief were refused against any hardship or disadvantage which would be caused to third persons or to the public generally if relief were granted". See Spry on Equitable Remedies at page 365, and the cases referred to in the footnote.

Putting it in a slightly different way, Lord Wright said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society (Sedleigh-Denfield v. O'Callaghan [1940] AC 880, at page 903).

So on the facts of this case a court of equity must seek to strike a fair balance between the right of the Plaintiffs to have quiet enjoyment of their house and garden without exposure to cricket balls occasionally falling like thunderbolts from the heavens, and the opportunity of the inhabitants of the village in which they live to continue to enjoy the manly sport which constitutes a summer recreation for adults and young persons, including one would hope and expect the plaintiffs' son. It is a relevant circumstance which a court of equity should take into account that the plaintiffs decided to buy a house which in June 1972 when completion took place was obviously on the boundary of a quite small cricket ground where cricket was played at weekends and sometimes on evenings during the working week. They selected a house with the benefit of the open space beside it. In February, when they first saw it, they did not think about the use of this open space. But before completion they must have realised that it was the village cricket ground, and that balls would sometimes be knocked from the wicket into their garden, or even against the fabric of the house. If they did not realise it, they should have done. As it turns out, the female plaintiff has developed a somewhat obsessive attitude to the proximity of the cricket field and the cricketers who visit her to seek to recover their cricket balls. The evidence discloses a hostility which goes beyond what is reasonable, although as the learned judge found she is reasonable in her fear that if the family use the garden while a match is in progress they will run risk of serious injury if a great hit happens to drive a ball up to the skies and down into their garden. It is reasonable to decide that during matches the family must keep out of the garden. The risk of damage to the house can be dealt with in other ways, and is not such as to fortify significantly the case for an injunction stopping play on this ground.

With all respect, in my view the learned judge did not have regard sufficiently to these considerations. He does not appear to have had regard to the interest of the inhabitants of the village as a whole. Had he done so he would in my view have been led to the conclusion that the plaintiffs having accepted the benefit of the open space marching with their land should accept the restrictions upon enjoyment of their garden which they may reasonably think necessary. That is the burden which they have to bear in order that the inhabitants of the village may not be deprived of their facilities for an innocent recreation which they have so long enjoyed on this ground. There are here special circumstances which should inhibit a court of equity from granting the injunction claimed. If I am wrong in that conclusion, I agree with Lord Justice Lane that the injunction should be suspended for one year to enable the defendants to see if they can find another ground.

(Order: Appeal allowed. Past and future damages at £400. No order for costs here or below save legal aid taxation)

Neutral Citation Number: [2014] EWHC 3543 (Admin)

Case No: CO/1894/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 31st October 2014

Before:

THE HONOURABLE MRS JUSTICE LANG DBE

- -

Between:

THE QUEEN
on the application of

EAST MEON FORGE AND CRICKET GROUND PROTECTION ASSOCIATION
(acting by its Chairman GEORGE BARTLETT)

Claimant

- and -

(1) EAST HAMPSHIRE DISTRICT COUNCIL
(2) SOUTH DOWNS NATIONAL PARK AUTHORITY

Defendants

(1) J. CROUCHER
(2) I. CROUCHER

Interested Parties

- -
- -

Robert Fookes (instructed by **Prospect Law Ltd**) for the **Claimant**
David Forsdick QC (instructed by **East Hampshire District Council Legal Services Department**) for the **First Defendant**
The **Second Defendant** did not appear and was not represented
The **First Interested Party** did not appear and was not represented
The **Second Interested Party** appeared in person

Hearing dates: 23rd & 24th October 2014

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Approved Judgment

Mrs Justice Lang:

Introduction

1. The Claimant applies for judicial review of the Defendants' decision, dated 7th April 2014, to grant planning permission to make alterations and additions to the property known as The Forge, High Street, East Meon, Petersfield, Hampshire GU32 1QD, by constructing a first floor residential flat, with a deck to the rear.

2. The East Meon Forge and Cricket Ground Protection Association is an unincorporated association, formed in September 2013, with the aim of protecting both The Forge and the use of the adjoining recreation ground for the playing of cricket. It now has about 150 members, who are local residents.

3. The planning authority is the South Downs National Park Authority, but the application for planning permission was determined by East Hampshire District Council (hereinafter "the Council") under an agency agreement.

4. The Interested Parties are the owners of The Forge who successfully applied for planning permission, at the third attempt. They had previously withdrawn their first application in March 2013. Their second application was granted by the Council, but quashed by consent on 22nd April 2014 in the Claimant's first claim for judicial review.

5. Collins J. granted the Claimant permission to apply for judicial review in this claim on 5th June 2014.

6. At the hearing, the Claimant re-formulated its grounds to some extent, and did not pursue its original grounds 5, 8, 9 and 10. It did not pursue an application to add a further ground.

7. On 23rd June 2014, Mitting J. granted the Claimant an injunction restraining the Interested Parties from carrying out development before the judicial review claim had been determined. There was evidence that the floor had been excavated by a digger and that a chimney had been smashed.

8. The Interested Parties subsequently applied to vary this order to allow "vital repairs" to be carried out, following service of a letter from the Council's Building Control Surveyor, headed 'Building Act 1984 Section 77/78 Dangerous Structure', stating that signs of movement of an exterior wall meant that the structure was in imminent danger of collapse. The application was opposed by the Claimant because of the irreparable damage it would do to the building. The application was adjourned by Sales J. because he was not satisfied that the proposed works, which included removal of the roof and partial demolition of the walls, were urgently required. Sales J. ordered that the Claimant and the Interested Parties obtain independent surveyors' reports. When the surveyors inspected the property it was agreed that (1) the bowing of the exterior wall was not recent; (2) any further movement could be prevented by timber ties to the underside of the roof; and (3) there was no imminent danger of collapse. The Interested Parties did not renew their application. The costs were reserved. I am satisfied that the Interested Parties ought to pay the Claimant's costs in respect of that application.

9. On 23rd June 2014, Mitting J. also imposed a stay on the Council restraining it from determining matters reserved for further approval under conditions.

The Forge

10. The Forge was the site of the village blacksmith, and it is an important part of the local heritage. It was in use as a wrought iron workshop until about 2010. Since then it has been empty. It is a single storey vernacular industrial building of simple design. It is small (about 71.13 sq. metres or 765 sq. feet, according to the Valuation Office) and low in height (only 5.4 metres or 17.7. feet) to the ridge line of its pitched roof. The building is L-shaped, following the line of the two roads which it abuts: the High Street and Frogmore/ Mill Lane. The current building dates from the 19th century, though it is believed that the site has been used as a smithy for much longer than that. It is constructed of brick, with a tile gabled roof. There is a small modern lean-to extension which houses an office and WC. The building is in a poor state of repair.

11. It is on a small plot, comprising an area of hard standing, some rough grass and a large sycamore tree at the boundary with the recreation ground.

12. The proposed development will retain the ground floor for an industrial use (carpentry), and build a new residential flat above it, to be occupied as a live/work unit. The flat will comprise a bedroom, bathroom, open plan living room and kitchen, utility room, store and separate WC. The evidence of dimensions is incomplete and contradictory, but Mr Mitchell, chartered surveyor for the Claimant, estimated the proposed development would provide approximately 1,700 sq ft over 2 floors. This would more than double its size, adding an additional 935 sq ft.

13. Access to the first floor unit will be via external steps, leading on to a wooden deck, some 10 feet deep. looking towards the recreation ground. The solid front door will lead from the deck into the living room. The living room will have floor to ceiling sliding patio doors on to the deck. The deck will continue around the side of the first floor, creating a veranda, in front of two large floor to ceiling windows, also looking towards the recreation ground. Windows from other rooms and some Velux roof lights will overlook the deck. The deck, the steps and the windows will all potentially be at risk from cricket balls coming from the recreation ground.

14. The height of the extended building will increase by 2.2 metres to 7.6 metres (24.9 feet). The footprint of the building will also be enlarged because the deck and steps will extend out over the existing yard area, creating a covered area for parking and loading underneath.

15. The Forge is included in the Hampshire County Council list of 'Treasures' which are man-made features of public interest in the county, the destruction of which would represent serious loss to the heritage of the county.

16. In 2009, English Heritage decided that The Forge did not meet the national criteria for listing, mainly because of past alterations to the building and its fabric. The report commented:

> "It is undeniably true that the Forge adds to the picturesque aspect of East Meon, and is a valuable reminder of the

> importance of the forge or smithy in village life. For this reason the building is of local interest and its protection should lie in the local designations of conservation area, Area of Outstanding Natural Beauty and National Park."

17. On 6th March 2014, The Forge was listed as an asset of community value, pursuant to section 91(2) of the Localism Act 2011. The reason given was that it "has a special resonance for the local community and furthers the cultural interests of the community". The application, made by the Claimant, stated that it was a valuable reminder of the importance of the forge or smithy in village life, and should be retained for industrial use.

18. The Forge is in a prominent location in the village, at the corner of the High Street and the road to Frogmore. The Forge is within the East Meon Conservation Area. The boundary of the conservation area detours around The Forge, suggesting that it was specifically included. As the Conservation Officer said in his report:

> "It is a worthy candidate for inclusion in the conservation area due to its historical association, location and juxtaposition with other historic buildings, most notably Forge Cottage to the west, which is grade 11 listed. "

19. The East Meon Conservation Area is within the South Downs National Park.

20. The Forge is situated at an entrance to the village recreation ground: there is a track and farm gate leading to the recreation ground running along the side of the plot. The rear of the building backs onto the recreation ground, with a view obscured to some extent by the sycamore tree. The building is set down at a lower level than the recreation ground so that its eaves are close to the ground level of the recreation ground.

21. The recreation ground was created as a charitable foundation in 1894 specifically for the purpose of enabling cricket to be played on the ground, and cricket has been played there ever since. The East Meon Cricket Club is a flourishing club which plays there regularly. The cricket square is only 36 metres (just over 39 yards) from The Forge at present, and when the building is extended, the distance will be even less. Cricket balls already fly on to the roof of the building and the surrounding plot at present.

Submissions

22. The Claimant made three main submissions. First, that the Council erred by failing to determine the planning application in accordance with statutory requirements, the National Planning Policy Framework (NPPF) and the relevant local policies.

23. The Defendants submitted in response that the Council had correctly considered and applied the relevant statutory requirements and policies.

24. Second, the Claimant relied on the listing of The Forge as an asset of community value, and submitted that the officers failed to inform the Planning Committee that the Claimant had sufficient funds to enable the craft/industrial use of the building to

continue without the need for a residential floor to make it financially viable, despite an earlier assurance that the funding information would be made available to the Committee. This meant that the Conservation Officer's judgments, on which the Committee relied, were made on a flawed basis. The eventual decision was made on incomplete information and the Committee was misled.

25. The Defendants submitted in response that the Council was under no obligation to consider alternative schemes for use of The Forge, in the absence of exceptional circumstances, such as the proposed development giving rise to conspicuous adverse effects, which was not the case here. The listing as an asset of community value only has effect when the property is put up for sale, and does not give a right of first refusal, and so the officers rightly advised that it should be given negligible weight.

26. Third, the Claimant submitted that the Council failed to have proper regard to the representations made by Sport England, a statutory consultee, about the potential conflict between the use of the recreation ground for cricket and the residential use of The Forge, and the risk of damage to persons and property from cricket balls.

27. In response, the Defendants submitted that the Council gave full and careful consideration to the concerns of Sport England and arrived at a conclusion which, in its judgment, mitigated the risk to an acceptable extent.

28. There was a significant development during the course of the hearing when, in the light of information given by Mr I. Croucher, it emerged that the Defendants' submissions to me about the protective measures against damage to the window glass from cricket balls were incorrect. The Defendants had submitted, by reference to paragraph 8.11.16 of the officers' report, that it had been accepted that moveable shutters on the windows were not adequate protection because it was not possible to ensure that they would always be closed when a game was played. So the Council decided that permanent barriers such as guard railings should be installed over the windows, and planning permission was given on that basis. This was the effect of Condition 12, according to the Defendants.

29. However, once the documents were produced, it was clear that the scheme approved by the Council in June 2014, pursuant to Condition 12, permitted Mr Croucher to install moveable shutters over the windows, not barriers which were permanently in place.

30. Counsel for the Defendants submitted that the Council had simply made a mistake when approving the scheme. He further submitted that this was outside the scope of the current judicial review. The Claimant should have filed a further judicial review claim to challenge the lawfulness of the approved scheme, but was now out of time to do so.

31. Counsel for the Claimant submitted that the planning permission had been granted on an erroneous basis, on the assumption that Condition 12 would give effect to the stated intention to require permanent guard rails over the windows. However, the wording of Condition 12, which required the fitting of defensive guards to the windows, did not specify that they should be immoveable. Mr Croucher's assurances that the moveable shutters would be kept in the closed position were not enforceable and were unrealistic, as the outlook from the residence would be significantly

impaired. Moreover, the approved scheme did not require the shutters to be kept closed at all times; indeed, the notes on the plans referred to the shutters for the patio doors being retracted when matches were not being played.

Planning officers' reports

32. The Claimant was highly critical of the Report provided by the planning officer to the Planning Committee.

33. Mr Forsdick submitted that the courts deprecate an unduly demanding reading of committee reports in much the same way as the courts deprecate the overly sophisticated reading of decision letters from Inspectors, exemplified in *Clarke Homes v. Secretary of State for the Environment* (1993) 66P&CR 263 at 271.

34. In *Oxton Farms v. Selby DC* [1997] EGCS 609 Judge LJ stated:

> "17. The report by a planning officer to his committee is not and is not intended to provide a learned disquisition of relevant legal principles and to repeat each and every detail of the relevant facts to members of the committee who are responsible for the decision and who are entitled to use their local knowledge to reach it. The report is therefore not susceptible to textual analysis appropriate to the construction of a statute or the directions provided by a judge when summing a case up to the jury….
>
> 18. In my judgment an application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken."
>
> The issue for this Court is therefore whether the report to committee significantly misled on key issues. It is not whether the report could have been better worded or more clearly expressed."

The previous claim for judicial review

35. The Claimant submitted that the Report to the Planning Committee was defective in that it failed to explain exactly why the Council had consented to the quashing of the previous grant of planning permission. In my judgment, it was neither necessary nor appropriate for such details to be included in the Report on the fresh application for planning permission. There is a danger that it would distract the Committee from consideration of the fresh application with an open mind.

Statutory provisions

36. The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise: section 38(6) of the Planning and Compulsory Purchase Act 2004, read together with section 70(2) of the Town and Country Planning Act 1990.

37. The duty under the equivalent Scottish provision was explained by Lord Clyde in *Edinburgh City Council v. Secretary of State for Scotland* [1997] 1 W.L.R. 1447, at p.1459:

> "In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will be required to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

38. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13.

39. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28 and *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 W1.R 759, at 780. In *Tesco Stores* Lord Hoffmann said, at 780F-H, that the weight to be given to a material consideration was a question of planning judgment for the planning authority.

40. Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides:

> "In the exercise, with respect to any building or other land in a conservation area, of any function under [the planning Acts], special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

41. In *South Lakeland District Council v Secretary of State for the Environment* [1992] 12 AC 141, the House of Lords considered the predecessor provision to section 72(1) which was in identical terms and held, per Lord Bridge at 146F:

> "There is no dispute that the intention of section 277(8) is that planning decisions in respect development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest. But if a development would not conflict with that objective, the special attention required to be paid to that objective will no longer stand in its way and the development will be permitted or refused in the application of ordinary planning criteria."

42. Later in his judgment Lord Bridge went on to consider whether, on a proper construction of section 277(8), it was necessary that the proposed development would make a positive contribution to the preservation of character or appearance. At 150E, he cited with approval a passage from the judgment of Mann LJ in the Court of Appeal who said:

> " "The statutorily desirable object of preserving the character or appearance of an area is achieved either by a positive contribution to preservation or by development, which leaves character or appearance unharmed, that is to say, preserved."

43. In *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2014] 1 P&CR 22, 387 Sullivan LJ held that section 72(1) imposed the same duty as section 66(1), in relation to listed buildings, despite the slight difference in wording. The term "preserving" in both enactments means doing no harm: see *South Lakeland DC*, per Lord Bridge at 150. Parliament's intention was that decision-makers should give "considerable importance and weight" to the "desirability of preserving or enhancing the character or appearance" of the conservation area when carrying out the balancing exercise. It was not open to decision-makers to afford this consideration less weight than this, in the exercise of their own planning judgment.

National Planning Policy Framework (NPPF)

44. Planning authorities must have regard to the presumption in favour of sustainable development (paragraph 14).

45. Section 12, headed 'Conserving and enhancing the historic environment' requires planning authorities to set out a positive strategy for the conservation and enjoyment of the historic environment, recognising that heritage assets are an irreplaceable resource (paragraph 126).

46. It was common ground before me that The Forge was a non-designated heritage asset for the purposes of the NPPF. It comes within the definition of 'heritage asset' in the Glossary by virtue of its listing by Hampshire County Council as a 'treasure':

> "A building … identified as having a degree of significance meriting consideration in planning decisions, because of its heritage interest. Heritage asset includes designated heritage assets and assets identified by the local planning authority (including local listing)"

47. Therefore paragraph 135 applies:

> "The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighting applications that affect directly or indirectly non-designated heritage assets, a balanced judgment will be required having regard to the scale of any harm or loss and the significance of the heritage asset."

48. The East Meon Conservation Area is a designated heritage asset, and therefore more stringent tests apply. Under paragraph 133, where a proposed development will lead to substantial harm to or total loss of significance, consent should be refused unless substantial public benefits outweigh that harm or loss. Under paragraph 134, where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use.

49. Paragraph 138 provides:

> "Not all elements of a World Heritage Site or Conservation Area will necessarily contribute to its significance. Loss of a building or other element which makes a positive contribution to the significance of the Conservation Area or World Heritage Site should be treated either as substantial harm under paragraph 133 or less than substantial harm under paragraph 134, as appropriate, taking into account the relative significance of the element affected and its contribution to the significance of the Conservation Area or World Heritage Site as a whole. "

50. It seems to me that Mr Forsdick is correct in submitting that paragraph 138 only applies where there is a <u>loss</u> of a building or other element. Throughout section 12, it

is clear that 'harm' and 'loss' are different concepts. Although the development may harm the character and appearance of The Forge, there is no suggestion that it will be lost. However, I am unclear why the principle expressed in paragraph 138 should be confined to cases of loss, and so I am uncertain about the intended scope of this paragraph.

Development Plan

51. The Officer's report to committee ('the Report') correctly identified and considered the relevant provisions in the Development Plan, namely, policies HE2, HE5, HE6 and HE13 in the Local Plan.

52. HE2 states:

> "Alterations and extension to buildings will only be permitted if they are designed to take account of the design, scale and character of the original building, its plot size and its setting. The roof form of any extension or alteration should respect the form of the original building."

53. HE5 states:

> "An alteration or extension of an unlisted building in a Conservation Area will not be permitted unless it would preserve or enhance the character and appearance of the building and the Conservation Area by:
>
> a reflecting the scale, design, finishes and landscaping of the building;
>
> b. retaining and, where necessary, restoring traditional features such as shop fronts, boundary walls, paved surfaces and street furniture;
>
> c where appropriate, using materials traditionally characteristic of the area; and
>
> d improving the condition of the building and ensuring its continued use."

54. HE6 states:

> "Planning permission for the change of use of a building in a Conservation Area will be permitted provided that it would neither:
>
> require any changes in the appearance or setting of the building other than those that will preserve or enhance the character or appearance of the area;

> nor harm the surroundings as a result of traffic generation, vehicle parking and servicing or noise"

55. HE13 states:

> "Proposals for Buildings of Local Architectural, Historic or Townscape Interest …. involving alterations, additions or other development, including changes of use, will be permitted provided that such development does not adversely affect the character or setting of the building."

56. These policies distinguish between the effect of a development on individual buildings and its effect on the conservation area. The Report correctly considered the building and the conservation area separately, as well as together.

The effect of the proposed development on The Forge

57. The Report correctly began by considering the effect of the works upon the character and appearance of the building, at 8.2.7 to 8.2.19. The Report concluded that the proposed development would conflict with policy HE2 and policy HE5 sub-paragraph (a) because of the increase in the scale of the building which would be significant. The additional storey would increase the height and overall size, and enlarge the footprint of the original building. Despite the mitigating factor of good design, the Report concluded, at paragraph 8.2.13,

> "Overall though, the additions to the building would not reflect the scale of the building and would harm its existing character and appearance".

58. At paragraph 8.2.32, the Report also advised that the proposed development was in conflict with HE13.

59. The Report advised that the proposed development did not conflict with any other parts of policy HE5.

60. Contrary to Mr Forsdick's submission, I consider that this case is distinguishable from *R (Cummins) v London Borough of Camden* [2001] EWHC Admin 1116 and *R (TW Logistics) v Tendring District Council* [2013] EWCA Civ 9 because here the Council was not considering differing policies in the Development Plan which appeared contradictory or pulled in different directions. Although there was only conflict with one part of HE5, the factors in HE5 are not alternatives. Each represents an equally important consideration. On a proper interpretation, the Council has to consider each part in turn, which it did. Whether or not there is conflict with the policy will depend on the Council's assessment of the proposal in any particular case. Here, the planning officer (and the conservation officer) concluded that the harm to the character and appearance of the building was significant. The Report advised that the development was contrary to HE2, HE3 and partially contrary to HE5. This was a judgment, which Mr Forsdick had to defend, rather than seek to re-interpret.

61. The officer should have advised on the application of paragraph 135 NPPF in relation to The Forge as a non-designated heritage asset, but he did not do so. I note that the

conservation officer did expressly consider paragraph 135 at paragraph 4(e). However, in the conclusions at paragraph 9.1 of the Report, the officer said:

> "Having had regard to the Conservation Officer's comments, the relevant policies in the local plan and NPPF criteria, officers recommend that the positive benefits of securing the future condition and use of the building would maintain the significance of the Forge and outweigh the harm from the acknowledged effects to its existing character and appearance"

62. In my view, this assessment, read together with the conservation officer's assessment, indicated that the officer was correctly directing himself on the need to make a balanced judgment on the effect of the development on The Forge, in accordance with paragraph 135.

The effect of the proposed development on the Conservation Area

63. The Committee had the benefit of detailed advice from the conservation officer, which was set out in the Report. The conservation officer acknowledged that "the proposal will .. materially alter the character of the building both in scale and visual appearance" and that "the proposal was at the margins of acceptability". It was a "radical adaptation" which would result in a "marked change to the local townscape". His opinion was that "the site is capable of taking this larger scale building without detriment to the conservation area or setting of the listed building [Forge Cottage]".

64. He accorded "considerable weight" to "the continuance of the craft tradition on this site", stating:

> "There are really two choices, to limit the building to its current configuration, size and scale or to accept enlargement to accommodate a live-work unit. It is difficult to envisage the investment coming forward to repair the building for its previously permitted, or similar workshop use. The role and use of the building as I say, is itself important to the conservation area. This is a very fine judgment given the site sensitivities."

65. The conservation officer concluded:

> "This is a prominent site at one of the main gateways to the village. I place considerable weight on the retention of the craft use. I see the current proposal as the best means of securing the necessary investment and accordingly support more robust intervention than would normally be the case…. I do not pretend implementation will not result in a marked change to the local townscape. However, if executed to a high standard, using good quality materials it has the potential to make a positive contribution to the conservation area…"

66. At paragraphs 8.2.20 to 8.2.26, the Report considered the implications of the proposed development for preserving or enhancing the significance of the conservation area under policy HE5 and the NPPF.

67. The officer considered that paragraph 138 NPPF applied which, as I have already explained, may have been mistaken, as there was no 'loss' of a building within the conservation area. Consideration of the conservation area as a designated heritage asset should have begun at paragraph 132 NPPF. I doubt whether the error was material since, on my reading of the report, whichever route he took, the relevant test was at paragraph 134, which applies in cases where the development will lead to less than substantial harm.

68. The Report had regard to the conservation officer's advice but even if and insofar as the conservation officer had concluded that there was 'no harm' to the conservation area (as Mr Forsdick submitted), I consider that the planning officer took a different approach. In paragraph 8.2.23 of the Report he advised:

> "The impact from the alterations will affect the character and appearance of the Conservation Area. Officers do not consider the effects of the scheme upon the existing character of the building to represent substantial harm to the Conservation Area: any effects, positive or negative, should be judged in the context of the significance of the Conservation Area (covering a wider area) much of which is not influenced by this site."

69. On my reading of the report, this paragraph has to be read in the context of paragraph 8.2.21 where the officer advised on the approach to be taken under paragraph 133, 134 and 138 of the NPPF. In paragraph 8.2.23, the officer was advising the Committee that (1) the development would affect the character and appearance of the conservation area; and (2) it would affect the existing character of the building; and (3) these effects did not amount to "substantial harm"; (4) there were positive and negative effects which had to be judged in the context of the significance of the conservation area as a whole. My understanding is that the officer was advising that there were potentially some adverse effects and that the Committee ought to apply the test under paragraph 134 NPPF, applicable where a development proposal will lead to "less than substantial harm" to the significance of the conservation area.

70. At paragraph 8.2.24, the Report then set out the conservation officer's advice that the development would not cause detriment to the conservation area and, if executed to a high standard, could itself make a positive contribution.

71. The report concluded this section, at paragraph 8.2.25:

> "Officers agree that the resulting extended building will integrate acceptably in its own right within its available plot space and context. It will have a sufficiently sympathetic relationship within High Street and with the recreation ground. The scheme will preserve the character of the Conservation Area for the purposes of HE5."

72. It is then necessary to read on to the 'Conclusions on heritage effects' at paragraphs 8.2.32 – 34 which stated:

> "Officers agree with the Conservation Officer's analysis that this is a prominent site and that considerable weight should be placed on securing the use and this solution is a means of securing a continuing business use on the site and investment necessary to achieve this. It is acknowledged that there would be significant changes to the building and that the impact will result in a marked change to the local landscape and for these reasons the scheme is in conflict with criteria a) in Local Plan policies HE5, and with HE2 and HE13.
>
> Overall, however, having regard to the Conservation Officer's comments it is clear that, well executed, the development would in fact make a positive contribution to the character and appearance of the Conservation Area. … On balance of the issues the scheme would be acceptable on these merits."

73. I see the force of Mr Fookes' submission that the potential harm to the conservation area arising from the change to the character and appearance of a prominent and historic building was not adequately taken into account when the effect on the conservation area was considered. But in my view it had been adequately considered in the detailed advice from the conservation officer, set out earlier in the report, and referenced at paragraph 8.2.24. In this section, the officer noted, at paragraph 8.2.22, the prominence of The Forge, visible from the highway and the recreation ground, and the fact that the alterations would significantly increase its scale and its physical presence. The effect on the character and appearance of the conservation area and the building were both acknowledged in paragraph 8.2.23. In the final conclusions, at paragraph 8.2.32, the officer reiterated the earlier findings of significant changes to the building which conflicted with parts of the Local Plan. Reading the report as a whole, I do not consider that the report was so inadequate as to mislead the Committee.

74. Mr Fookes submitted that the advice from officers was fundamentally flawed because it was contradictory. It found that the development would have harmful effects on The Forge, and to the conservation area, but that the harm to the conservation area would be overridden by the positive effects of the development. In my view, the advice sufficiently explained the reasoning behind the advice given. Essentially, in so far as harm was caused by the development, to the building and/or the conservation area, it was outweighed by the greater benefit to the conservation area conferred by the restoration of The Forge and its traditional 'craft' use. Although controversial, I do not consider that this advice was wholly illogical.

75. Mr Fookes submitted that the Report failed to advise the Committee on the application of the duty under section 72(1) of the Planning (Listed Building and Conservation Areas) Act 1990 to pay "special attention to the desirability of preserving or enhancing the character or appearance" of the conservation area, which means giving it considerable importance and weight. The statutory duty had been identified earlier at paragraph 6.5.1. I agree that the officer ought to have returned to it under his heading "Whether the development would preserve or enhance the

significance of the Conservation Area" at paragraph 8.2.20 onwards. However, as the terms of section 72(1) are fully reflected in policy HE5, it would not have made any difference to the advice given. The Report gave detailed consideration to the desirability of preserving or enhancing the character or appearance of the conservation area, and there is no reason to doubt that the Committee did too. The decision made was justified on the basis that, looked at overall, the development did preserve or enhance the character or appearance of the conservation area, as the benefits to the conservation area outweighed the adverse effects.

Material considerations

Alternative schemes

76. The Committee was advised that it was not necessary to consider alternative schemes because the proposed development was not likely to have significant adverse effects and would make a positive contribution to the Conservation Area. At paragraph 8.11.20, the Report stated:

> "Overall it is not considered that the proposals are likely to have significant adverse effects and in particular make a positive contribution to the Conservation Area while appropriately securing a desirable use. The EMFCGPA has offered to purchase, refurbish and bring the Forge into beneficial use. Given the above conclusions it is not necessary to consider an alternative solution. However, this section proceeds on the basis that it were appropriate to consider alternative solutions, what officers' advice would be."

77. The correct approach to consideration of alternatives sites (as opposed to alternative schemes for the same site) was considered in *R (L) v. North Warwickshire District Council* [2001] EWCA Civ 315. Having reviewed the authorities, Laws LJ said, at [30]:

> "…all these materials point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally speaking – and I lay down no fixed rule, any more than Oliver LJ or Simon Brown J - such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question".

78. In *Derbyshire Dales DC & Ors v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin), Carnwath LJ held, at [28], that the test was whether the alternative site issue had to be taken into account as a relevant consideration, as a matter of legal obligation.

79. In *The Governing Body of Langley Park School for Girls v London Borough of Bromley* [2009] EWCA Civ 734 the Court of Appeal quashed the grant of planning permission because an alternative scheme for proposed new buildings at the same site was a relevant consideration which had not been considered. The Court held that the authorities on alternative sites applied (at [46]).

80. In my judgment, this was an exceptional case on the facts in which alternative schemes for use of The Forge were a relevant consideration which the Committee was required to consider because they were central to the reasoning of the conservation officer and the planning officer, as set out in the Report.

81. The Report explained at paragraph 8.11.22 that the argument put forward by the applicant in support of the application for planning permission was that the repair and refurbishment of The Forge for industrial use was not commercially viable and so additional residential accommodation was essential.

82. The conservation officer said:

> " East Meon has over time lost the majority of its service industries .. Such uses can .. positively contribute to the conservation area. The continuance of the craft tradition on this site is a matter to which I accord considerable weight"
>
> "I am persuaded that some fairly radical adaptation to secure the long term viability for a craft use is required."
>
> "There are really two choices, to limit the building to its current configuration, size and scale or to accept enlargement to accommodate a live-work unit. It is difficult to envisage the investment coming forward to repair the building for its previously permitted, or similar workshop use. The role and use of the building as I say, is itself important to the conservation area."
>
> "I see the current proposal as the best means of securing the necessary investment and accordingly support more robust intervention than would normally be the case."

83. The planning officer referred to the conservation officer's advice, at paragraph 8.2.17, and concluded, at paragraph 8.2.32:

> "Officers agree with the Conservation Officer's analysis that this is a prominent site and that considerable weight should be placed on securing the use and this solution is a means of securing a continuing business use on the site and investment necessary to achieve this."

84. The advice given to the Committee by the conservation officer and the planning officer was that there was no realistic prospect of restoration of The Forge for use as a workshop because it was economically unviable.

85. As part of the consultation process, the planning officer had received representations from the Claimant about the financial viability of The Forge, and alternative options, including purchase and renovation by the Claimant. In his supplementary comments, the conservation officer said:

> "It seems to me that repair and refurbishment of the present structure is uneconomic and unviable on the likely return received. It may be something that a philanthropic association may be willing to take on and EMFCGPS may be such an organisation. "

86. In my view, it would have been misleading for the officer to withhold this information from the Committee when both he and the conservation officer were supporting the application on the basis that it was the only financially viable option for The Forge's restoration. In order to make an informed judgment, the Committee had to have access to all the relevant information. Obviously the current owners could not have been obliged to restore the building for workshop use only, nor to sell to The Forge to the Claimant or anyone else, if they did not wish to do so. However, in principle, planning permission for such a major addition and alteration, with a change to residential use, might not have been granted if the Committee did not accept the premise that this was the only route by which The Forge would ever be restored as a workshop.

87. Fortunately, the Report did give a lengthy summary of the evidence relating to the financial viability of The Forge, including the alternative options presented by the Claimant. I do not decide the question whether the Committee would have given this evidence due consideration after having been advised that it was unnecessary to do so.

88. The Claimant complains that the Report was misleading in an important respect. At paragraphs 8.11.21, the Report stated:

> "The Association asserts that voluntary contributions mean that their proposal is fully costed, funded and deliverable. Officers have asked for details but none have been provided in respect of funding."

89. When Mr Selby, the Treasurer of the Claimant Association saw this, he sent an email to Mr Jarvis, the Principal Planning Officer, stating:

> "In para 8.11.21 it is said that officers have asked for details of the Association's assertion that its proposal is fully funded but no details have been provided. I am not aware of any such request. The position, however, contrary to the impression that you seek to give, is that the Association's bank account is in credit to the amount of £160,000. Should you wish this to be certified I will arrange for this to be done. I should be grateful if you would draw this to the immediate attention of Councillors."

90. Mr Jarvis replied by email on the same day, saying:

> "In my email to William Bartlett of the 18th December which followed notification of the offer and other email correspondence I wrote "you state your client's alternative proposal "is fully costed, funded and deliverable". I have not see any information to support this yet." We did in fact receive information in response but this only considered viability including an estimate for refurbishment costs and thereafter nothing was submitted concerning the aspect of funding.
>
> I hope this clarifies the comment in the report. I don't believe that these further details affect the conclusion of the report. In any event we will include your comments in the written committee updates as per our standard practice ensuring that members of the committee are aware of them."

91. Mr S. Martin, Deputy Chairman of the Claimant Association, stated in his third witness statement that, in response to Mr Jarvis's email of 18th December, the Claimant submitted detailed viability reports and 'Further Matters' submissions, dated 4th and 25th February 2014. In the first set of submissions the Claimant confirmed that it had "contribution commitments … more than sufficient to cover" its proposed acquisition of the property and works. In the second set of submissions, it reiterated that "the Association is ready, and funded" to restore the building. The Claimant did not receive any further response from Mr Jarvis, and assumed that Mr Jarvis accepted that it had the funding available.

92. In the light of Mr Jarvis' assurance that he would inform the Committee of Mr Selby's email, to the effect that the Claimant had £160,000 in its account, the Claimant took no further steps. The evidence before the court includes a bank statement for an account in the name of the Claimant, dated 4th April, showing a balance of £160,100, since 24th February 2014.

93. Contrary to his assurances, Mr Jarvis did not include the confirmation of funding in the supplementary report to the Committee. Mr Martin attended the meeting of the Planning Committee on 3rd April 2014 and has given evidence that Mr Jarvis did not bring it to the attention of the Committee in his presentation to them.

94. In my judgment, Mr Jarvis was at fault in not informing the Committee about the communication from Mr Selby to the effect that the Claimant had £160,000 in its bank account and could certify that sum if required. This was poor professional practice. However, I do not consider that it is a sufficient basis upon which to grant judicial review of the grant of planning permission. The Committee knew that the Claimant was offering to fund its proposed scheme from voluntary contributions. This was the key piece of information. Proof of the amount of money in the Claimant's bank account as at April 2014 was not likely to influence its deliberations one way or the other.

Asset of Community Value registration

95. The Claimant submitted that the Council erred in failing to take into account a material consideration, namely, its own decision to register The Forge as an asset of community value, under the Localism Act 2011.

96. The purpose of registration is to allow communities the opportunity to take control of assets and facilities in their neighbourhoods. The Government Policy Statement (September 2011) advises that:

> " ... it is open to the Local Planning Authority to decide that listing as an asset of community value is a material consideration if an application for change of use is submitted, considering all the circumstances of the case".

97. A property such as this can only be registered under section 88(2) if, in the opinion of the local authority:

i) there is a time in the recent past when an actual use of the building furthered the social wellbeing or interests of the local community, and

ii) it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the building that would further the social wellbeing or social interests of the local community.

98. The Report advised the Committee about the registration of The Forge as an asset of community value at paragraphs 8.11.33 – 34. It set out the effect of the registration, which is that a community group will be given a window of opportunity to bid for the asset in the event that the owner decides to dispose of it. The owner is not obliged to sell to the community group.

99. The officer concluded that the designation as an asset of community value had very little bearing on the proposed development and should be given negligible weight.

100. In so far as this advice was based upon the erroneous view it was not necessary nor appropriate to consider alternative schemes, then it was flawed for the reasons I have already set out above. But in so far as it was based upon the inherent limitations of the community asset scheme, it was a matter for the Committee to decide upon in the exercise of its planning judgment. Accordingly, the officers could properly so advise.

Conflict with the use of the recreation ground for cricket

101. The Claimant submitted that the Council failed to have proper regard to the representations of Sport England, a statutory consultee by virtue of schedule 5, paragraph (za) to the Town and Country Planning (Development Management Procedure) Order 2010 on the ground that the development was "likely to prejudice the use, or lead to the loss of use, of land being used as a playing field".

102. The Report advised that potential conflict with the use of the recreation ground for cricket was a material consideration, and considered it at paragraphs 8.11.1 to 8.11.19. It summarised the concerns of the Cricket Club and the Claimant that the proposed residential use of The Forge, in particular the open deck, external steps and large areas of glazing looking towards the recreation ground, would increase the potential liability to the Club for damage to property and personal injury. An increase in insurance premiums could impact on the viability of the Club.

103. The Report accepted that, given the distance of the boundary and the orientation of the pitches, cricket balls would hit The Forge regularly. Currently they hit The Forge once every other match, on average. There have been more than 20 home matches per season in recent years.

104. Local Plan policy HC1 and Emerging policy CP15 restrict development which results in loss of recreational and sports facilities.

105. Labosport conducted an assessment on behalf of the Cricket Club and found as follows:

i) The boundary at the shortest distance is about 36 metres. 45.72 metres is the English Cricket Board recommended minimum boundary distance.

ii) Cricket balls commonly travel in excess of 70 metres, at all levels and abilities.

iii) The height of a cricket ball at a boundary distance of 36 metres is often greater than 20 metres in height.

iv) At a distance of 36 metres, the ball can still be travelling at a velocity in excess of 20 m/s.

v) A barrier system, typically nets, would have to be not less than 12 metres high, possibly higher.

106. Mr Croucher proposed a range of protective measures, such as 4 metre high net to be erected on match days; window and door shutters; and a protective net and an awning for the deck. He proposed that these should be capable of remote control by the cricket club in case the residents of The Forge did not implement them.

107. In its representations, Sport England advised that the measures proposed by Mr Croucher, whilst positive, were not enforceable through the planning system. The only means of enforceable mitigation would be a ball-stop fence, permanently installed, with a planning condition requiring it to be erected and maintained in perpetuity. Even this would not absolve the club from legal liability if damage occurred. In subsequent communications Sport England made it clear to the Council that it was aware of the proposed override mechanism to enable the club to control protective measures on match days but confirmed that it did not alter its basis of objection.

108. The Report rejected Sport England's advice and recommendation without giving any or any adequate reasons. In *Shadwell Estates Ltd. v Breckland DC* [2013] EWHC 12 (Admin) Beatson J. said at [72]:

> "a decision-maker should give the views of statutory consultees, in this context the "appropriate nature conservation bodies", "great" or "considerable" weight. A departure from those views requires "cogent and compelling reasons": see *R (Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin) per Sullivan J. at

> [49] and *R (Akester) v DEFRA* [2010] EWHC 232 (Admin) per Owen J. at [112], [115]."

109. The officer also failed to advise the Planning Committee that Sport England was a statutory consultee whose views should be given considerable weight and only departed from for good reason. In consequence the Planning Committee granted planning permission and imposed conditions without due regard to the recommendations and advice of Sport England.

110. The Report rejected Mr Croucher's proposals for the cricket club to have remote control over the protective measures at The Forge on the grounds that it would be complex to operate in practice, and there was uncertainty regarding system failure and backup provisions. Such a system might be achievable but might also be beyond the scope of a planning condition.

111. The Report did not recommend any conditions for a net of any height, whether permanent or removable. It thus failed to act on the proposals of Labosport, Sport England and Mr Croucher. No explanation was given for this omission. No such condition was imposed by the Planning Committee. The existing fence is a post and rail fence made of timber, probably about 3 feet high. Plainly it will not provide any protection against cricket balls.

112. At paragraph 8.11.16, the Report summarised the measures which it advised the Planning Committee to impose by way of conditions to protect the windows:

> "8.11.16 …The use of barriers (shutters) is already proposed as an intermittent measure. Permanent barriers (such as guard railings) would not have any significant effect on the character and appearance of the development or area and could be fixed permanently to fenestration to protect them from damage. The detailed design, capability and method of opening of such can also be controlled to ensure that any windows or doors that can open do so in a manner which does not create an opening for cricket balls…"

113. The Report recommended the following condition which was duly imposed by the Committee when it granted permission. Condition 12 provides:

> "No development shall commence until a detailed scheme of defensive guards to be fitted to fenestration (which includes windows, doors and rooflights) in the approved scheme has been submitted to and approved in writing by the Local Planning Authority. The approved defensive guards shall be fitted concurrent with the first installation of fenestration in the development, and shall thereafter be retained at all times including in the event that any replacement fenestration is fitted."

114. Mr Forsdick explained to me, at some length in answer to my questions, that the meaning of paragraph 8.11.16 was that the officer had decided that the window shutters were not a sufficient protective measure because it was not possible to ensure

that they would always be in the closed position when cricket was being played. Therefore a condition was imposed by the Committee, on the recommendation of the planning officer, providing for permanent barriers i.e. guard railings which would be permanently fixed in front of all glazed openings, preventing cricket balls from reaching the glass.

115. However, when Mr Croucher made his oral submissions to me, he explained that in June 2014 the Council had approved his scheme for shutters and discharged condition 12. The scheme provides for louvred wooden shutters for the patio doors from the living room on to the deck which would slide to one side when not in use. There will be removable louvred wooden shutters fitted to the outside of the floor to ceiling windows on the north east elevation, accessed from the deck veranda. The louvres have been designed so that they are fixed in position, narrow enough to ensure that a cricket ball cannot pass through them. The Velux roof windows will be fitted with metal shutters operated electrically.

116. The plans for the scheme were produced, which confirmed what Mr Croucher said. Written on the plans were the words "Louvre panels shown retracted for non- cricket occasions, also demountable for off- season".

117. Mr Croucher seemed unaware of any requirement for guard rails. When I asked him why he had been permitted to have removable shutters, he said that they would be kept in place at all times. I found this quite unrealistic. The occupants would only have a very limited outlook through the louvres, and reduced natural light. There are very few windows on the street side of the building. They would also be unable to use the patio doors. If the shutters were kept permanently down on the Velux roof windows, there would be no light or air. I have no doubt that the occupants will leave the shutters open. Whether or not they close them on match days will be a matter for them to decide, if they remember to do so, and if they are there. The club will be liable for any damage to the windows.

118. Mr Forsdick submitted that the Council had simply made a mistake when approving the scheme. This seems unlikely, given the history of this application. I do not accept that the approval of the reserved matters has no relevance to the current judicial review claim. I accept the submission of Mr Fookes that the planning permission was granted on an erroneous basis, on the assumption that Condition 12 would give effect to the stated intention to require permanent guard rails over the windows. However, the ambiguous wording of Condition 12, which only required the fitting of "defensive guards" to the windows, left open the possibility that shutters would be installed instead of guard rails, and did not specify that the "defensive guards" should be fixed not moveable.

119. At paragraph 8.11.17, the Report summarised the measures which it advised the Planning Committee to impose by way of conditions to protect users of the deck:

> "8.11.17 The deck would provide protection to users on the ground floor during cricket matches. Its use as an amenity area should, however, be prevented and instead it should be used wholly for external access. Sporadic access across a much smaller gangway will not significantly increase the risk to safely. A planning condition can limit the use of the deck and

> secure a railing to reasonably limit access to the remaining deck area. The unit is a one bedroom flat and has immediate access onto public open space; this restriction will not unacceptably reduce the access to amenities for the development…."

120. The Report recommended the following condition which was duly imposed by the Committee when it granted permission. Condition 13 provides:

> "Notwithstanding the approved plans the first floor deck area shall not be used at any time as an amenity area, or for any purpose other than as a private route of access to the first floor residential unit...railings or other measures (to prevent the use of the deck for the aforementioned purpose) shall be installed in accordance with details ....." "

121. I accept Mr Fookes' submission that both the Report and the condition fail to address the fact that the extensive decked area is intended as an amenity area, with patio doors leading on to it from the living room. Realistically, the occupants cannot be prevented from using the deck for amenity purposes.

122. Furthermore, as the only access to the flat is via external steps and across the deck, the occupants and visitors to the flat will be at risk of injury when entering or leaving the premises during cricket matches.

123. The representations made by Sports England, that the proposed mitigating measures were unenforceable and a permanent ball-stop fence was required, were sound. In my judgment, the officers and the Planning Committee failed to have proper regard to the representations of Sport England in its capacity as statutory consultee. In consequence the proposed development creates unacceptable risks for its future occupants and for the cricket club.

124. Therefore the claim is allowed and the planning permission must be quashed.