Neutral Citation Number: [2020] EWCA Civ 1588

Case No: C1/2019/ 2038 & 2043

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
THE HONOURABLE MRS JUSTICE LANG DBE
[2019] EWHC 1974 (Admin) and
[2019] EWHC 1975 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/11/2020

Before:

SIR KEITH LINDBLOM, SENIOR PRESIDENT OF TRIBUNALS
LORD JUSTICE COULSON
and
LADY JUSTICE ANDREWS DBE

- -

Between:

R (on the application of ELIZABETH WINGFIELD)	**Applicant**
- and -	
(1) CANTERBURY CITY COUNCIL	
(2) REDROW HOMES (SOUTH EAST)	**Respondents**

And between:

R (on the application of ELIZABETH WINGFIELD)	**Applicant**
- and -	
(1) CANTERBURY CITY COUNCIL	
(2) HNC DEVELOPMENTS LLP.	**Respondents**

- -
- -

Estelle Dehon and Rowan Clapp (instructed by **Richard Buxton Solicitors**) for the **Applicant.**
Isabella Tafur (instructed by **Canterbury City Council Legal Services**) for **Canterbury City Council.**
Andrew Tabachnik QC (instructed by **Redrow Homes Limited**) for **Redrow Homes (South East).**

Jenny Wigley (instructed by **Howes Percival Solicitors**) for **HNC Developments LLP.**

Hearing date: 30 October 2020

- -

Approved Judgment

The Senior President of Tribunals, Coulson and Andrews L.JJ.:

Introduction

1. This is the judgment of the court, to which all three members have contributed. The question raised by these renewed applications, put at its simplest, is this: when must an unsuccessful litigant accept "No" for an answer?

2. These are applications under CPR 52.30(1) to re-open orders refusing permission to appeal. The jurisdiction provided by CPR 52.30 allows for an appeal to the High Court or the Court of Appeal to be re-opened in very rare circumstances. Its relevant sections are as follows:

> "52.30 – (1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless –
>
> (a) it is necessary to do so in order to avoid real injustice;
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
> (c) there is no alternative effective remedy.
>
> (2) In paragraphs (1), (3), (4) and (6), "appeal" includes an application for permission to appeal.
> …
> (5) There is no right to an oral hearing of an application for permission unless, exceptionally, the judge so directs.
>
> (6) The judge must not grant permission without directing the application to be served on the other party to the original appeal and giving that party an opportunity to make representations.
>
> (7) There is no right of appeal or review from the decision of the judge on the application for permission, which is final.
>
> (8) The procedure for making an application for permission is set out in Practice Direction 52A."

3. The immediate context here is important. Each of these applications is made in a planning case – as was the application in *Goring-on-Thames Parish Council v South Oxfordshire District Council* [2018] EWCA Civ 860; [2018] 1 W.L.R. 5161, where a different constitution of this court (Sir Terence Etherton M.R., McCombe and Lindblom L.JJ.) set out and emphasised the principles governing the operation of the exceptional power to re-open under CPR 52.30 as they apply in planning cases (see, in particular, paragraphs 8 to 15, and 27 to 37 of the judgment of the court). What the applicant seeks here, ultimately, is an order of the court quashing two decisions taken by Canterbury City Council ("the council"), as local planning authority, to approve housing development to the east of Canterbury, and then, when the proposals go back to committee for redetermination, to persuade the council to reverse its earlier decisions by refusing planning permission.

4. If an objector to proposed development is aggrieved by an authority's decision to grant planning permission, he or she may challenge that decision by making a claim for judicial review. Such a claim may not attack the decision on the planning merits but may only be grounded on a point or points of law, and it can only proceed with the court's permission. If it does proceed, the claimant will usually enjoy costs protection, consistent with the principles of the Aarhus Convention, under CPR 45.41-45 – which in one of these two related claims, "the Hoplands claim", the applicant was granted by an order of 2 May 2019. In the other case, "the Chislet claim", the applicant qualified for and sought such costs protection, but it appears that no express order was made; however, when the claim for judicial review was dismissed, the judge, Lang J., expressly treated the applicant as if she were subject to costs protection and applied the relevant limit of £5,000 to the recoverable adverse costs.

5. Since 2014, a claim of this kind has been heard in a specialist court, the Planning Court, where it will be determined by one of the "specialist planning judges" regularly assigned to sit there, in accordance with the specific arrangements and timetable created by CPR 54.21-22 for "Planning Court claims". The Planning Court operates as a separate list within the Administrative Court. An appeal lies from it to the Court of Appeal against the first instance judge's decision, if either that judge or a Lord or Lady Justice of Appeal grants permission for it to do so on either of the two limbs in CPR r.52.6 – conscious that the applicant for permission does not have an automatic right to renew to an oral hearing (see paragraphs 32 to 35 of the judgment in *Goring-on-Thames Parish Council*).

6. There is a wider context too. Unlike the Administrative Court, the Court of Appeal does not have the advantage of a special regime for planning cases, or a team of judges deployed into a specialist court within a court, dedicated to hearing those cases. The judges who sit in its civil jurisdiction are engaged on appeals in a wide range of different areas of the law, none of which can be given general priority or precedence over the others. Its workload is huge. Its resources of judicial time, expertise and availability are extremely hard pressed. It can only function as it should, in the interests of providing access to justice, and doing justice, for all users of the court, if parties and their legal representatives behave with good sense and show respect both for other court users and for the court itself.

7. Unmeritorious applications under CPR 52.30 are inimical to that endeavour, repeated unmeritorious applications even more so. Not only do they undermine the principle of finality in legal proceedings. They also impose an unnecessary burden on the court's resources, impede access to justice for litigants in other proceedings, including those with the benefit of costs protection in Aarhus Convention claims, and are damaging to the rule of law itself. One would expect those who practise regularly in planning law to have all of this in mind, not least because this court made it plain in *Goring-on-Thames Parish Council*.

8. Since CPR 52.30 came into force, the vast majority of unsuccessful litigants have accepted that the dismissal of their appeal, or the refusal of their application for permission to appeal, has marked the end of their particular road. But in public law cases, particularly but not only in immigration and asylum claims, where, for a variety of reasons, a claimant is not usually at any substantial risk in costs, applications to re-open are more common. Even then, the applicant under CPR 52.30 who fails to persuade this court to exercise the exceptional jurisdiction to re-open does not generally

persist in asking it to do so by making fresh applications to re-open, on essentially the same grounds as before. But that is what this applicant has now done in these two related claims, having twice been refused permission to appeal against the dismissal by Lang J. of her claims for judicial review of decisions by the council to grant planning permission for development on separate but adjacent sites ("the Hoplands site" and "the Chislet site"). These applications are in substance an attempt to do that which is impermissible under CPR 52.30(7), namely appeal or review the decision refusing permission to re-open the refusal of permission to appeal in each case.

9. Nothing that we say in this judgment should be taken as precluding an application to re-open in those very rare circumstances where it is properly arguable that the test in CPR 52.30 is met. Equally, however, we would emphasise as strongly as we can the need for parties and their legal representatives to adopt a sensible and responsible approach, and to refrain from abusive proceedings.

10. Prior to the hearing before us, the merits of the applicant's case in the Chislet appeal had already been subject to five separate considerations by the courts, starting with the application for permission to proceed with the claim for judicial review. The applicant's case in the Hoplands appeal has been subject to four considerations by the court, the application for permission to proceed having been adjourned to a "rolled-up" hearing. For the reasons set out below, we consider that the applicant ought to have accepted the outcome after her claims for judicial review were comprehensively rejected by Lang J.; but that did not happen, and in consequence the resources of the Court of Appeal have had to be devoted to dealing with ill-founded applications for permission to appeal, a first reconsideration of the refusal of permission to appeal, and now a further application to open up the first reconsideration of the refusal of permission to appeal.

11. We should add that in our view it would be highly regrettable if the principles underlying the decision in *R. (on the application of Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin) should ever have to be applied in cases where the jurisdiction under CPR 52.30 is inappropriately invoked. Although it originated in the field of immigration, the *Hamid* jurisdiction is not confined to immigration or even to public law claims, as is exemplified by cases such as *Gubarev v Orbis Business Intelligence Ltd. and another* [2020] EWHC 2167 (QB). It is a facet of the court's jurisdiction to regulate its own procedure and to enforce the overriding duties owed to it by legal professionals. Potentially at least, and in appropriate circumstances, the *Hamid* jurisdiction may have some relevance in cases of meritless applications to re-open an appeal, in particular where persistent meritless applications are pursued in the absence of any material change of circumstances upon which the applicant could justifiably rely. However, it is hoped that this judgment will suffice to avoid any need to make use of it in this context.

The factual background

12. As we have already mentioned, the Hoplands site and the Chislet site are adjacent to one another. The southern boundary of the latter is about 30 metres from the Stodmarsh National Nature Reserve ("Stodmarsh"), separated by a railway line. Stodmarsh is a European designated site**,** which includes a special protection area ("SPA"), a special area of conservation ("SAC"), a site of special scientific interest ("SSSI"), and the Stodmarsh Ramsar wetland site. The Chislet site also falls within the 7.2-kilometre zone of influence for the Thanet Coast and Sandwich Bay SPA and Ramsar wetland site.

13. At all material times the two sites have been in separate ownership. In 2014 separate representations were made in respect of the two sites on the publication draft of the Canterbury District Local Plan. The council's 2014 strategic housing land availability assessment considered the two sites separately. The Chislet site was promoted for allocation in the 2017 local plan; the Hoplands site was not.

14. Directive 2011/92/EU ("the EIA Directive") requires member states to adopt all measures necessary to ensure that projects likely to have a significant effect on the environment are made subject to an assessment of their effects, before consent is given. The EIA Directive was implemented into UK domestic law by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the EIA Regulations").

15. In September 2015, HNC Developments LLP ("HNC"), the interested party and second respondent to the appeal in the Chislet claim, purchased the Chislet site from its previous owners. Before doing so, HNC requested a screening opinion from the council, to determine whether its proposed development at the Chislet site was "EIA development" falling within section 10(b) of Schedule 2 to the EIA Regulations, requiring an environmental impact assessment ("EIA") to be carried out. On 10 September 2015, the council issued a screening opinion which concluded that it was.

16. In October 2015, in response to a request for a screening opinion by the then owners of the Hoplands site, the council decided that a proposed development on that site was also EIA development in respect of which an environmental statement was required. It obtained advice from the statutory consultee, Natural England, on the scope of the environmental statement, and passed on that information to the site's owners. This included a recommendation that the environmental statement should include a separate section addressing impacts on European and Ramsar sites entitled "Information for Habitats Regulations Assessment". At that time, the relevant regulations governing habitats regulations assessment ("HRA") were the Habitats Regulations 2010, but these were superseded in November 2017 by the Conservation of Habitats and Species Regulations 2017. Nothing turns on this, and we will refer to both sets of regulations as "the Habitats Regulations".

17. The application for outline planning permission which the owners of the Hoplands site subsequently submitted was accompanied by a detailed environmental statement which followed those recommendations. It not only assessed the environmental effects of the proposed development, but its cumulative and in-combination effects with other nearby development, including the Chislet site. It was accompanied by a lengthy "Report to inform a Habitats Regulations Assessment". However, no HRA was in fact carried out by the council at that stage.

18. HNC made an application for outline planning permission for a development at the Chislet site on 18 March 2016. The application was accompanied by an environmental statement, which assessed the likely significant effects of the project alone and in combination with 12 other projects. These did not initially include the Hoplands site, as the application for planning permission on that site had not been made at the time of the council's initial scoping opinion. However, the council requested HNC to provide an updated cumulative impact assessment, taking account of other projects, including the Hoplands site, which it then did.

19. On 5 July 2017, the council granted outline planning permission for the proposed development at the Hoplands site, which included up to 250 houses, a neighbourhood centre, amenity space, and 15 ha of ecological parkland. There was no challenge to the grant of that outline permission within the time limits for bringing a claim for judicial review. The site was acquired by Redrow Homes ("Redrow"), the interested party and second respondent to the Hoplands appeal, with the benefit of that outline planning permission, in October 2017.

20. In April 2018, the judgment of the CJEU in *People Over Wind v Coillte Teoranta* [2018] PTSR 1668, established, in contradiction to previous domestic authority, that in performing the requirements of the Habitats Regulations, mitigation measures should not be taken into account at the screening stage. In the light of that decision, the council determined to carry out an HRA of the impacts of the proposed Chislet development on the designated European sites before the application for outline planning permission was finally determined. The council consulted Kent County Council and Natural England on the draft HRA. Natural England agreed with the council's conclusion that the proposed development of the Chislet site would not have an adverse effect on the integrity of the designated sites, provided that suitable identified mitigation measures were taken. The HRA was finalised and adopted in September 2018, and was taken into consideration when the application for outline planning permission was determined.

21. On 22 November 2018, after an agreement been made under section 106 of the Town and Country Planning Act 1990, which secured a financial contribution towards measures to mitigate the environmental impact of the proposed development, the council granted outline planning permission for the proposed development of the Chislet site, subject to conditions.

22. On 12 February 2019, the council granted approval for certain reserved matters relating to part of the Hoplands site, which included the erection of 176 dwellings. Before doing so, it carried out a HRA of the impact of the reserved matters development on the integrity of European sites. As with the Chislet site, a draft of the HRA was supplied to Natural England and its comments were taken into consideration in formulating the final version. Ultimately, Natural England concurred with the council's conclusion that with mitigation, the Hoplands development would have no adverse effect on the integrity of the European sites.

The history of the judicial review proceedings

23. The applicant is a local resident. On 3 January 2019 she issued proceedings seeking judicial review of the council's decision to grant outline planning permission for the development of the Chislet site. There were initially three grounds, namely that the council erred in failing to treat the development at the Chislet site and the development at the Hoplands site as a single project for the purpose of the EIA Regulations, and in failing to consider whether they should be so treated (ground 1); that the HRA assessment was unlawful (ground 2); and that the council had failed to give adequate reasons for its decision to grant outline planning permission and/or that the reasons for the decision were irrational (ground 3).

24. On 13 March 2019, Thornton J. granted permission to proceed on ground 1 and refused it on the remaining grounds. The applicant decided to renew grounds 2 and 3, and the

renewed application for permission was listed to be heard at the same time as the substantive judicial review. Before the hearing she decided not to pursue ground 3.

25. On 26 March 2019, the applicant issued proceedings for judicial review of the council's decision to grant approval for the reserved matters in respect of the Hoplands site. There were three grounds, namely: that the council had failed to carry out a HRA prior to taking the reserved matters decision (ground 1); that the council had not remedied its failure to carry out a HRA prior to granting outline planning permission (ground 2); and that the HRA that was carried out was deficient in a number of respects, including the in-combination assessment with other proposed developments (ground 3).

26. On 2 May 2019, the application for permission to proceed with the claim for judicial review in the Hoplands case was directed to be the subject of a "rolled-up" hearing. The costs protection order to which we have referred in paragraph 4 was made. In the event, both claims were heard by the same judge sitting in the Planning Court, Lang J.. The Hoplands claim was heard on 11 and 12 June 2019, and the hearing of the Chislet claim followed on 12 and 13 June, but the two cases were not formally linked because the grounds were different.

27. In her judgment in the Chislet claim ([2019] EWHC 1975 (Admin)), Lang J. found, and gave cogent reasons for finding, that she was "entirely satisfied" that the Chislet site and the Hoplands site were separate developments and not part of a single project. She found that the two schemes were clearly stand-alone projects, that each development was justified on its own merits, and that each development would be pursued irrespective of whether the other went ahead. She also found as a fact (at paragraph 77 of the Chislet judgment) that the council had considered whether the two proposals were a single project and had lawfully concluded that they were not.

28. The judge then expressed her disapproval of the attempt made on behalf of the applicant to include additional grounds of challenge that differed from and expanded upon the single ground on which permission had been granted (ground 1), without applying for permission to amend the Statement of Facts and Grounds, adding that the proposed additional grounds were in any event unarguable. She explained in clear and compelling terms why it was hopeless to contend that the council's assessment of the cumulative environmental effects of the two sites was unlawful. She therefore dismissed the claim for judicial review on ground 1.

29. The judge then considered the merits of the challenge to the HRA in the Chislet claim and concurred with Thornton J. that it was unarguable, and that permission should again be refused. Again, there was an attempt on behalf of the applicant to raise new matters on ground 2 that were not the subject of an application for permission to amend; and again, the judge exercised her case management powers by refusing to allow those points to be raised, but explained why they were unarguable in any event.

30. In her judgment in respect of the Hoplands claim ([2019] EWHC 1974 (Admin)), the judge concluded that grounds 1 and 2 of the claim (which were inter-related) were arguable because, as the council fairly conceded, it had erroneously taken into account mitigation measures at the initial screening stage, in reliance on the domestic authorities subsequently overruled by the CJEU in *People over Wind.* The council should have carried out a HRA before the grant of outline planning permission, and its failure to do so contravened EU law. However, no application to quash the grant of outline planning

permission had been made within the period allowed for bringing a claim for judicial review.

31. The judge held that the grant of outline permission was not a nullity. A HRA had been carried out prior to the reserved matters decision, and this was a lawful means of remedying the error made at the earlier stage. This was a proportionate and effective remedy for the breach of EU law, but even if that analysis were incorrect, the judge said that she would refuse relief because the substance of the EU right had been complied with.

32. In a crucial passage in her judgment, at paragraphs 78 to 80, the judge then made the finding that the decision would inevitably have been the same even if a lawful appropriate assessment had been conducted at outline permission stage, namely, that there would be no adverse impact on the integrity of the designated sites, as the relevant European sites, subject to mitigation. There is a useful summary of the information and documentation to which she had regard in reaching that conclusion in the penultimate paragraph of her reasons for refusing permission to appeal against her decision in the Hoplands case. She applied section 31(2A) of the Senior Courts Act 1981 and refused to grant judicial review on that basis.

33. As for ground 3, the judge considered each of the objections to the HRA and concluded that the HRA was appropriate to the task in hand, and that the council was entitled to rely upon Natural England's endorsement of it. As she pointed out, Natural England, as the custodian of the Stodmarsh designated sites, was particularly well placed to judge the risks from the proposed development. She concluded that the applicant's challenge did not come close to meeting the high threshold of *Wednesbury* irrationality and was primarily a disagreement with the council's exercise of planning judgment.

The applications for permission to appeal

34. Despite the comprehensive rejection of her claims for judicial review, the applicant sought permission to appeal in both cases. The proposed grounds of appeal and accompanying skeleton argument are lengthy and diffuse. Essentially, it was contended that the HRA in the Hoplands case was not a lawful means of curing the breach of EU law by failing to carry out such an assessment at the outline permission stage, especially as the HRA that was carried out later only related to part of the site; that it was arguable, despite the authorities to the contrary relied on by the judge, that the outline permission was null and void; and that the judge had insufficient information or evidence on which to conclude that the decision would inevitably have been the same if a HRA had been carried out before the grant of outline permission. It was also contended that the judge erred in holding that the HRA met the standards required in relation to recreational impact, and that the correct test was not the *Wednesbury* test.

35. In the Chislet case, it was contended that the judge took the wrong legal approach to deciding that the council acted lawfully in not treating the Chislet and Hoplands developments as a single project, and that she should have held there was a requirement for a joint assessment as opposed to a cumulative assessment of the environmental effects of the two projects. It was contended that the HRA carried out was deficient in various respects, and that the judge was wrong to dismiss the criticisms of it. The applicant sought to rely upon evidence that had not been before the judge to add to her criticisms of the HRA in both cases.

36. It was also contended in the Chislet case that the judge erred in law in her approach to refusing to admit additional or amended grounds on the basis that the "necessary procedural requirements" had been satisfied by giving notice of the intention to do so in the skeleton argument or in a "Reply" – a document for which there is no provision in the rules of procedure pertaining to judicial review, though such documents are sometimes served by claimants. It was suggested that it was unnecessary for a formal application for permission to add or amend the grounds to be made. In our view, these contentions betrayed an unfortunate attitude to the rules of procedure that seems to have affected the conduct of these proceedings on behalf of the applicant, both at first instance and before this court. We consider that, procedurally, a claimant's Statement of Facts and Grounds is to be treated in the same way as a Particulars of Claim. Indeed, given the sometimes broad assertions that can be advanced in public law claims and the corresponding difficulties that defendants have in responding to them, there is force in the view that it is even more important in public law claims that claimants are kept to their pleaded case.

37. There is recent authority on this point. In *R. (on the application of Talpada) v Secretary of State for the Home Department* [2018] EWCA (Civ) 84 Singh L.J. said (at paragraph 67) that it could not be emphasised enough that public law litigation must be conducted with an appropriate degree of procedural rigour. Both fairness and the orderly management of litigation required an appropriate degree of formality and predictability in the conduct of public law litigation as in other forms of civil litigation. Singh L.J. added at paragraphs 68 and 69:

> "68. … [The] courts frequently observe, as did appear to happen in the present case, that grounds of challenge have a habit of "evolving" during the course of proceedings, for example when a final skeleton argument comes to be drafted. This will in practice be many months after the formal close of pleadings and after evidence has been filed.
>
> 69. These unfortunate trends must be resisted and should be discouraged by the courts, using whatever powers they have to impose procedural rigour in public law proceedings. Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation."

38. That message was reinforced more recently by Andrews J. (as she then was) in *R. (on the application of John Dalton) v Crown Prosecution Service and another* [2020] EWHC 2013 (Admin), at paragraph 12:

> "12. I wish to make it clear to practitioners who appear in the Administrative Court that failure to observe the requirements of the rules and/or case management directions, with the result that claims for judicial review evolve exponentially, denying the court any opportunity to consider material changes and evaluate how they impact on the proceedings, may result in orders being made with a view to reinforcing the message in *Talpada*. The court may refuse to allow the claim to proceed on grounds for which permission has not been given. It may also make adverse costs orders, even in cases where the claimant is ultimately successful in obtaining judicial review on new or expanded grounds."

39. In the Hoplands case, refusing permission to appeal on the basis that neither limb of the threshold for granting permission had been met, Lang J. pointed out that there was no realistic prospect of successfully overturning on appeal her finding that the decision on the outline application would have been inevitably the same even if a lawful HRA had been conducted at outline stage. That finding was fatal to the challenge and to any appeal.

40. In the Chislet case, the judge again gave clear and comprehensive reasons for reaching the conclusion that there was no real prospect of success on appeal and no other compelling reason for the appeal to be heard. The council's decision to treat the Chislet development as a single project for the purpose of the EIA Regulations was a lawful exercise of planning judgment, and in any event the council had assessed the cumulative effects of that project and other relevant projects (including Hoplands), thereby satisfying the aims of the EIA Directive. Both the Hoplands and Chislet proposals had been subject to full assessment under the EIA Regulations. This was not a case of project splitting prior to the screening stage to avoid an EIA being carried out; authorities relied on by the applicant relating to efforts to circumvent the application of the EIA Regulations at the screening stage, such as the decisions of the CJEU in *Ecologistas en Accion-CODA v Ayuntamiento de Madrid* Case C/142/07 [2009] PTSR 458 and *Abraham v Region Wallone* (Case C-2/07), were irrelevant and could not be "read across" to cases where the EIA Regulations were applicable: see *Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321 and *R. (on the application of Larkfleet Ltd.) v South Kesteven District Council* [2015] EWCA Civ 887.

41. Still undeterred, the applicant sought permission to appeal from this court. In the skeleton argument in support of that application it was suggested, for the first time, that the claims raised several points which should be referred to the CJEU unless the court was satisfied that the matter was *acte clair* against her. Three such points were identified in the Chislet case: "(a) the correct approach to requirement of for joint EIA [*sic*] in particular where in-combination assessment of matters affecting sites governed by the Habitats Directive is concerned, and whether the domestic court was right to take a narrow view of the requirements of *Ecologistas* and *Abraham;* (b) whether the HRA carried out in this case in the light of the failings alleged nevertheless did meet the necessary standards set out in CJEU jurisprudence; and (c) whether it is open to the domestic court to rely on irrationality of decision-making or whether a more intensive standard of review or process is required; in particular what are the standards of planning judgment in HD cases and how they should be disciplined".

42. In the Hoplands case the application also suggested a multiplicity of different points to be referred to the CJEU, including "(a) in a multi-stage consent process as exists in the UK by what time must HRA be carried out; (b) whether it is nevertheless legitimate to carry out that process with effect from the later stage in the consent process when a member state has failed through misunderstanding legal requirements to carry it out at the correct time; (c) whether HRA can lawfully relate to part of the project; and (d) whether a member state has a duty to nullify the unlawful consequences of its actions if that is possible, even if that might cause prejudice and be contrary to domestic case law". The two additional and final points which were raised overlapped with the second and third "EU points" raised in the Chislet case.

43. The council and the developers in each case opposed the grant of permission. So far as the proposed reference to the CJEU was concerned, they said that the appeal raised no novel points of law that would justify such a reference and that all the matters raised were *acte clair* against the applicant.

44. Lewison L.J. refused permission to appeal, and also refused the applications to rely upon fresh evidence, in both cases. In each case he addressed the grounds on which the applicant sought to rely and gave clear and succinct reasons for rejecting them. In the Hoplands case he held that the judge was not obliged to hold that the outline planning permission was a nullity; that it was clear from the case of *Wells* (C-201/02) that it is for the national court to decide whether to suspend or revoke a consent if there has been non-compliance, and that because the outline permission could not be implemented until the reserved matters were approved, for practical purposes it was suspended. In any event, as he observed, in *Champion v North Norfolk District Council* [2015] UKSC 52, [2015] 1 WLR 3710, the Supreme Court had held that the court had a discretion not to quash a decision where the substance of an EU obligation has been complied with, and Lang J. had so found. He stressed that the matter was put beyond doubt by the judge's reasoning at paragraphs 78 to 80 of her judgment. She was entitled to find that the decision would inevitably have been the same and that this was dispositive of the appeal.

45. In the Chislet case Lewison L.J. likewise found, essentially for the reasons given by the judge, that each of the grounds of appeal had no real prospect of success and that the judge's decision to restrict the grounds of challenge to those in the Statement of Facts and Grounds was well within her discretionary powers of case management.

46. In the light of his endorsement of the unimpeachable findings of the judge, we consider that Lewison L.J. was under no obligation to make any reference to the CJEU. He was entitled to take the view that it was unnecessary for him to ask the CJEU to resolve any issues of European law in order to determine the applications before him. However, given the importance that this issue acquired during the applicant's submissions, we will return to it in greater detail below.

The first application under CPR 52.30

47. The applicant sought to re-open the refusal of permission in each case under CPR 52.30. In the Hoplands case it was contended that the decision was "contrary to binding EU law in the appellant's favour" and that the court had acted *ultra vires*, because it was obliged to refer the matter to the CJEU. Complaint was made that Lewison L.J. had failed to give reasons for refusing to make such a referral. In the Chislet case similar complaints were made; it was contended that Lewison L.J. had failed to "engage with [the applicant's] point that CJEU jurisprudence takes a broader approach to the scope of assessment". It was submitted that the proper approach to EIA in this case has "simply not been addressed". It was asserted that ground 4 (the attack on the adequacy of the substance of the HRA) was not addressed at all, and an attempt was made to rely on the fresh evidence that Lewison L.J. had refused to permit the applicant to adduce.

48. Both applications to re-open were considered again by Lewison L.J.. He re-read the two judgments below and reminded himself of the test under CPR 52.30. He acknowledged that when refusing permission to appeal in the Chislet case he had made a small, but irrelevant, error in saying that in *Larkfleet* the development was not EIA development,

but that did not alter the point in the case or his reasoning based upon it. He emphasised that the mere fact of projects being likely to have a cumulative effect on the environment does not make them a single project. He found that the circumstances were not exceptional so as to fall within CPR 52.30(1). The arguments deployed in support of the application were no more than disagreements with his original order.

49. In his reconsideration of the Hoplands case, Lewison L.J. said that he had dealt with all the grounds of appeal, though in a different order from that in which they were advanced. He said that the application to re-open focused on the proposition that the HRA at the reserved matters stage cannot remedy any earlier breach of EU law because it is not conducted "when all options are on the table". That emphasis was not present in the original skeleton argument for permission to appeal, and in any event appeared to be contradicted by regulation 63(5) of the Habitats Regulations. In his view, that argument did not amount to a powerful case that the outcome would have been different. He then pointed out that he could see no basis on which Lang J.'s conclusion that the result would have inevitably been the same could be successfully impugned. A refusal to quash was permissible even where the public law error was one of EU law, and since nobody had suggested that *Champion* was wrongly decided or contrary to EU law, there was no compelling reason to make a reference. He said it was not *necessary* to reopen the refusal of permission in order to avoid *real* injustice (emphasis in the original order).

The second application under CPR 52.30

50. That was not enough to deter the applicant from seeking to undo Lewison L.J.'s refusal to re-open his orders refusing permission to appeal. The application notice in each case was lodged on 27 March 2020. The complaint was made that the Court of Appeal had not acted lawfully; that Lewison L.J.'s reasoning could not stand; and that there was "manifest deficiency on the face of the order". It was even suggested that the applicant's legal representatives had a duty to the court to point out the alleged errors. It was submitted that the second application fell squarely within the requirements of CPR 52.30 because a second application was permissible "where the first is not responded to in a just and lawful manner". That approach was confirmed by the applicant's submissions at the hearing of the second application – presented to us skilfully and forcefully by Ms Estelle Dehon, who had not been instructed in these proceedings until after the applications now before us had already been made.

51. Meanwhile, following Lewison L.J.'s refusal of the first application to re-open on 5 March 2020, Redrow progressed construction work on the Hoplands site. Despite a closure due to the Covid-19 pandemic from 27 March to 15 June 2020, internal roads have been constructed, as have the parkland areas, and service media and drainage have been installed. The construction of 13 new homes has commenced, and a number of those homes that were partly built before March 2020 either have been or soon will be completed. Redrow has expended over £2 million on construction activity on the site in the period since the first application to re-open was refused.

The purpose and parameters of CPR 52.30

52. We shall briefly describe again the purpose and parameters of CPR 52.30 because it seems plain from the applications before us that the jurisdiction is still not properly understood in all quarters, and that what was intended to be the clear message of *Goring-on-Thames Parish Council* has still not been fully heeded.

53. Finality in litigation is a general rule of high public importance. It is particularly important in planning cases, where there is a need for speedy determination of issues relating to development, and many people other than those directly connected are affected by the outcome: see *Bhamjee v Forsdick* [2003] EWCA Civ 799, per Carnwath L.J., as he then was, at paragraph 36. As we have said, the Planning Court was established, as a specialist court, to achieve the necessary expedition in the determination of claims in planning and environmental cases. It would subvert the arrangements that have been put in place if unsuccessful litigants could revive the same arguments repeatedly and without limit, thereby prolonging the proceedings, and delaying a certain and final outcome. We should stress that these observations apply generally to all claims for judicial review, and not just to planning cases.

54. The modest inroads into the principle of finality represented by CPR 52.30 have their origins in *Taylor v Lawrence* [2002] EWCA Civ 90, [2002] 2 All ER 353. The case concerned alleged bias on the part of the judge by reference to events which were unknown to the parties until after the dismissal of the appeal. A five-judge constitution held that this court had a residual jurisdiction to reopen an appeal "to avoid real injustice in exceptional circumstances": paragraph 54. The exceptional nature of such a case was reiterated in paragraph 55: "it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy".

55. It should be noted that, earlier in his judgment, at paragraph 26, when considering counsel's argument, Lord Woolf C.J. said that the jurisdiction to reopen an appeal was based on the two principal objectives of this court: the first "of correcting wrong decisions so as to ensure justice between the litigants involved"; the second "to ensure public confidence in the administration of justice not only by remedying wrong decisions but also by clarifying and developing the law and setting precedents". In the course of her submissions, Ms Dehon alluded to this passage to support her submission that CPR 52.30 existed to ensure that, as she put it, "the jurisprudence was not to be led astray", and that if a decision was going to be a precedent, and it was wrong, CPR 52.30 existed to correct it.

56. We are in no doubt that that is not what Lord Woolf C.J. had in mind in the passage to which we have referred. He was simply identifying the objectives that justified an inherent jurisdiction to reopen in exceptional circumstances. He was not suggesting that every decision that was arguably wrong could be reopened simply because of concerns about precedent. That would cut across his subsequent emphasis on the importance of finality and the exceptional case required to reopen an appeal. Thus, in the later case of *Richmond-upon-Thames London Borough Council v Secretary of State for Transport* [2006] EWCA Civ 193, an appeal was not reopened, despite a subsequent decision of the ECtHR suggesting that the scope of the review by the original courts was not sufficient to comply with Article 13. At paragraph [63] Tuckey L.J. warned of the dangers of such arguments "opening the floodgates … in litigation which everyone should be entitled to assume, and all parties to it should accept, is over". Moreover, in the present case, the point does not arise directly in any event, since Lewison L.J.'s

refusal of permission to appeal is not a precedent; it is not even a decision capable of citation to another court.

57. The Civil Procedure Rules Committee accepted Lord Woolf C.J.'s invitation to formulate a rule to encapsulate the decision in *Taylor v Lawrence*. That is now CPR 52.30. We have already quoted the salient provisions in paragraph 2 of this judgment. The editorial notes in the White Book 2020, at 52.30.2, make plain the limited nature of this jurisdiction:

> "Rule 52.30 is drafted in highly restrictive terms. The circumstances described in r.52.30(1) are truly exceptional. Both practitioners and litigants should note the high hurdle to be surmounted and should refrain from applying to reopen the general run of appellate decisions, about which (inevitably) one or other party is likely to be aggrieved. The jurisdiction can only properly be invoked where it is demonstrated that the integrity of the earlier proceedings, whether at trial or at first appeal, has been critically undermined."

58. The restrictive nature of this jurisdiction has also been restated on a number of occasions. Thus in *In Re Uddin (a child)* [2005] EWCA Civ 52, [2005] 1 WLR 2398, the President of the Family Division said that the jurisdiction could only be invoked where "there exists a powerful probability that an erroneous result has in fact been perpetrated" and "where it is demonstrated that the integrity of the earlier litigation process … has been critically undermined". In *Barclays Bank Plc v Guy (No 2)* [2010] EWCA Civ 1396, [2011] 1 WLR 681, Lord Neuberger M.R. said that reopening might be justifiable if "the judge had completely failed to understand a clearly articulated point", although he went on to indicate that this was more likely to arise in an extreme case such as where the judge had failed to read the right papers for the case but did not realise it.

59. In *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514, [2015] 1 P. & C.R. 12, Sir Terence Etherton, then the Chancellor of the High Court, said at paragraph 65 that the paradigm case for reopening "is where the litigation process has been corrupted, such as by fraud or bias or where the judge read the wrong papers". He reiterated that the broad principle was that "for an appeal to be reopened, the injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claim of finality in litigation". Finally, he said:

> "It also follows that the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large, or that the point in issue is very important to one or more of the parties or is of general importance is not of itself sufficient to displace the fundamental public importance of the need for finality."

60. These and other statements of principle were brought together in the judgment of this court in *Goring-on-Thames Parish* Council, to which we have already referred. Importantly, at paragraph 15, emphasis was placed on the requirement that "there must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined". More recently, the scope of the jurisdiction under CPR 52.30 was summarised by Hickinbottom L.J.

in *Balwinder Singh v Secretary of State for the Home Department* [2019] EWCA Civ 1504, at paragraph 3, in terms with which we entirely agree:

> "This is an exceptional jurisdiction, to be exercised rarely: "the injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claim of finality in litigation" (*Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514; [2015] HLR 9 at [65] per Sir Terence Etherton VC (as he then was)). The jurisdiction will therefore not be exercised simply because the determination was wrong, but only where it can be demonstrated that the integrity of the earlier proceedings has been "critically undermined" *(R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* [2018] EWCA Civ 860; [2018] 1 WLR 5161 at [10]-[11]; and then only where there is "a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined" (*ibid* at [15])."

61. Accordingly, and for the avoidance of any doubt, we extract the following five principles from the authorities:

(1) A final determination of an appeal, including a refusal of permission to appeal) will not be reopened unless the circumstances are exceptional (*Taylor v Lawrence*).

(2) There must be a powerful probability that a significant injustice has already occurred, and that reconsideration is the only effective remedy (*Taylor v Lawrence*, *In Re Uddin*).

(3) The paradigm case is fraud or bias or where the judge read the wrong papers (*Barclays Bank v Guy, Lawal*).

(4) Matters such as the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large or the point in issue is important, are not of themselves sufficient to displace the fundamental public importance of the need for finality (*Lawal*).

(5) There must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined (*Goring-on-Thames Parish Council*).

62. Ms Dehon recognised, in exchanges with the court, that this combination of factors meant that, in practical terms, the requirements of CPR 52.30 are "almost impossible" to meet. That may be so; but it seems to us that the difficulty of succeeding in a such an application is merely the inevitable consequence of the principles to which we have referred. Equally, however, the rule provides a valuable protection against manifest injustice. It can be seen in operation in exceptional cases such as *Couwenbergh v Valkova* [2004] EWCA Civ 676, where an appeal was reopened because it was shown that the original decision was obtained by deceit and perverting the course of justice[1],

[1] Subsequently, there has been some doubt as to whether CPR 52.30 is available in a case of fraud (see *Jaffray v Society of Lloyd's* [2007] EWCA Civ 586), although that may be on the narrow ground that fraud would justify a collateral action, such that reopening would not be the only available remedy.

and *Feakins v DEFRA* [2006] EWCA Civ 699, where an appeal was reopened because the court had been misled at the original hearing, five years earlier, by untrue evidence.

63. The obvious difficulty in satisfying the requirements of CPR 52.30 is also relevant to the approach the court will take on a second application to reconsider, such as this. The defendants and interested parties submitted that, in the light of CPR 52.30(7), which provides that there is "no right of appeal or review from the decision of the judge on the application for permission, which is final", the court has no jurisdiction to entertain such an application. Alternatively, they suggested that, if the requirements of CPR 52.30 will only be satisfied if the circumstances are "egregious", then for a second application, an applicant would have to show that the circumstances were "overwhelmingly egregious". Ms Dehon, on the other hand, submitted that the test was no different for a second application for reconsideration and that, theoretically at least, a disappointed litigant could apply time and time again for reconsideration until he or she met with success.

64. In our view, much of this debate was unrealistic. We think that, whilst there is jurisdiction for this court to entertain a second application for reconsideration, any such application would almost inevitably have to be based on different grounds from those advanced for the first. If we take as a starting point Ms Dehon's realistic concession that the requirements of CPR 52.30 are "almost impossible" to meet, then they must, in practice, be even more difficult to satisfy if a Lord or Lady Justice of Appeal has already considered the grounds and refused reconsideration. We see some support for that view in the decision of the Divisional Court in *Zibala v Prosecutor General's Office, the Republic of Latvia* [2019] EWHC 816 (Admin) where Bean L.J., at paragraph [21] said:

> "21. Secondly, the jurisdiction to allow a second application for permission to reopen a decision, whether in the extradition jurisdiction under Criminal Procedure Rule 50.27 or in the Civil Courts under Civil Procedure Rule 52.30, may exist in theory, but Mr Josse QC and Mr Keith could not point to any case in which it has ever been exercised. *For my part, I find it difficult to imagine circumstances in which it would be appropriate for a court to allow a second application.* Even first applications for permission to reopen are overwhelmingly without merit: see the notes to Civil Procedure Rule 52.30 in the Civil Court Practice, although there are some, very rare, examples of first applications succeeding." (emphasis added)

Analysis

65. This is a second application to reconsider based on exactly the same grounds as the first application. Taking the approach we have described, we consider it to be misconceived, and are in no doubt that it should be refused. However, in deference to Ms Dehon's courageous submissions, we shall go on to consider the application as if it was a first application under CPR 52.30, or on the basis that we are wrong to reject it because it raises no different points to those raised by the first application.

66. In our view, an application for reconsideration of a refusal of permission to appeal involves a two-stage process. First, the court should ask whether the Lord or Lady Justice of Appeal who refused permission to appeal grappled with the issues raised by the application for permission, or whether they wholly failed so to do. Secondly, if the Lord or Lady Justice of Appeal did grapple with the issues when refusing permission

to appeal, the court should ask whether, in so doing, a mistake was made that was so exceptional, such as wholly failing to understand a point that was clearly articulated, which corrupted the whole process and where, but for that error, there would probably have been a different result.

Engagement with the issues

67. Did Lewison L.J. engage with the issues raised by the appellant's notice? On any view, the clear answer to that question is "Yes".

68. Despite the diffuse drafting of the grounds of appeal in the Hoplands case, five grounds can be discerned from the appellant's notice. In shorthand, ground (i) concerned the partial HRA; ground (ii), the permissibility of remedying the failure at the reserved matters stage; ground (iii), the misapplication of *People Over Wind*; ground (iv), the assertion that "the court simply had no evidence" that the decision would have been inevitably the same if the alleged breaches had been corrected; and ground (v), the alleged error in holding that the assessment met the required standards.

69. In Lewison L.J.'s reasons for refusal of permission to appeal, paragraph 1 expressly dealt with *People Over Wind* (ground (iii)), the reserved matters point (ground (ii)), and implicitly the partial HRA point (ground (i)). Paragraphs 2 and 3 of the reasons dealt with ground (iv). Paragraph 4 dealt with ground (v) and, to the extent that the lawfulness of the partial HRA was challenged, possibly as part of ground (i), with that issue too. On any view, Lewison L.J. clearly grappled with the specific issues to be discerned from the Hoplands grounds of appeal.

70. The same can be said for the Chislet grounds of appeal. In shorthand, ground (i) concerned the "separate project" allegation; ground (ii) was the point about the joint assessment; and grounds (iii) to (v) were a collection of points which the judge had refused the applicant permission to raise, because they were not in her Statement of Facts and Grounds. Lewison L.J. explained why he rejected ground (i) in paragraph 1 of his reasons, and why he rejected ground (ii) in paragraph 2. In paragraph 3, he noted that even the appellant's notice recognised that ground (iii) added little to grounds (i) and (ii). Lewison L.J. explained in paragraph 4 why the judge's decision to restrict the grounds of challenge to those in the Statement of Facts and Grounds (grounds (iii)-(v)) was well within her discretionary powers of case management. He therefore concluded that the appeal had no prospect of success.

71. As we have said, Lewison L.J. made one correction to his original reasons for refusing permission to appeal in the Chislet case, but it was irrelevant to both the analysis and the result. He also confirmed expressly that "there is no point of law involved that would warrant a reference to the CJEU." Therefore, in the Chislet case, it can again be seen that Lewison L.J. grappled with the points raised by the applicant.

Egregious error?

72. The analysis therefore moves to the second stage and the contention that, in refusing permission to appeal, Lewison L.J. was responsible for such an egregious error or misunderstanding of the law that it corrupted the whole proceedings, without which the result would very probably have been different.

73. It is tempting to say that in this case such a proposition only needs to be stated for its lack of realism to be obvious. However, it is necessary to address Ms Dehon's principal argument in support of that submission, namely that Lewison L.J. failed to give any or any proper reasons for not referring the questions to the CJEU. In the skeleton arguments in support of the applications for permission to appeal, and again in the skeleton arguments in support of the applications to re-open, it was submitted that the court was obliged to refer the questions of European law to the CJEU unless it was sure that the matter was *acte clair* against the applicant.

74. For several reasons, we do not accept any part of that submission. First, it is solely for the national court before which the dispute is brought to determine, in the light of the particular circumstances of the case, the need for any preliminary ruling from the CJEU, and then only where such a question has in fact been raised before the court. Applying that test, it is quite plain that none of the suggested questions of EU law, which are not even properly formulated on behalf of the applicant, needed to be addressed by the single Lord or Lady Justice in order to dispose of the application for permission to appeal.

75. Secondly, Ms Dehon's submission does not, in our view, reflect the law as stated in the leading European authority, Case C-283/81 *CILFIT Srl v Ministero della Sanità* [1983] 1 CMLR 472. In that case the CJEU stated at paragraphs 9 and 10 that the mere fact that a party contends that a dispute gives rise to a question concerning the interpretation of EU law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of what is now Article 267 of the TFEU (formerly Article 177 of the EEC Treaty). Article 267 of the TFEU makes it plain that a reference to the CJEU only potentially arises if the court "considers that a decision on the question is necessary to enable it to give judgment". The court or tribunal is therefore only obliged to make such a reference if it considers that a decision on community law is necessary to enable it to give judgment. There is no obligation to make a reference if the question is not relevant – that is, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case.

76. The CJEU summarised the position thus at paragraph 21:

> "21. A court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law was raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it is established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt."

77. In reality, the suggested questions of EU law in this case are not questions of interpretation that need to be resolved before the court could determine the issues in dispute. The substance of the applicant's complaint is that EU law has been misapplied to the facts resulting in a wrong decision on the claim for judicial review. Even if that were arguable, it would not be enough.

78. Thirdly, although Ms Dehon submitted that it was incumbent on the court to give reasons for refusing to make a reference to the CJEU if that had been requested by one of the parties, we consider that that misstates the position on the authorities. In support

of her proposition, Ms Dehon relied upon a decision of the European Court of Human Rights, *Ullens de Schooten and Rezabek v Belgium* (App Nos 3989/07 and 38353/07). In that case the ECtHR referred to the *CILFIT* case at paragraphs 34 and 56, accurately setting out the three circumstances in which the domestic court is not obliged to make a reference to the CJEU. It added, at paragraph 57, that the European Convention on Human Rights ("ECHR") does not guarantee any right to have a case referred by domestic court to an international authority for a preliminary ruling. However, it held at paragraphs 60 to 62 that Article 6(1) of the ECHR requires the domestic court to give reasons for a refusal to make such a reference in the light of the exceptions provided for in the case law of the CJEU:

> "62. … They will thus be required, in accordance with the above-mentioned CILFIT case-law, to indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the Court of Justice, or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt."

79. Subsequent Strasbourg cases established that the obligation to give reasons may be fulfilled if the reasoning is implicit: see, for example, *Repcevirag Szovetkezet v Hungary (*App No 70750/14).

80. Although Article 6 requires judgments adequately to state the reasons on which they are based, it does not go so far as to require a detailed answer to every submission put forward. Nor is the court called upon to examine whether an argument is adequately met, or the reasons for the rejection of a request adequately reasoned. Furthermore, in dismissing an appeal an appellate court may, in principle, simply endorse the reasons for the lower court's decision: *Stichting Mothers of Srebrenica v Netherlands* (App No 65542/12), at paragraph 174. That approach must be equally valid when the appellate court is refusing permission to appeal.

81. Fourthly, Ms Dehon submitted that Lewison L.J.'s reasoning did not meet the requisite standard and that it was not necessarily implicit from what he said that he regarded the issues of EU law as irrelevant, or as already answered by previous EU case law, or *acte clair*, let alone why. We are unable to accept that submission either.

82. Taking each of the cases in turn, in paragraph 3 of his order refusing permission to appeal in the Hoplands case, Lewison L.J. described Lang J.'s finding at paragraph 80 of her judgment that the decision would inevitably have been the same as "dispositive of the appeal", expressly endorsing the judge's reasons for refusing permission to appeal. Any person in the applicant's position who was familiar with the background to the case could have been in no doubt, on reading the order, that Lewison L.J. was saying that it was unnecessary to refer any issues of EU law to the CJEU for determination because, regardless of how they were resolved, those issues would be irrelevant to the outcome of the appeal. The matter is put beyond doubt by his reasoning in the order refusing to reopen, in paragraph 4. The issues were entirely academic.

83. As for the Chislet case, three issues of EU law were identified by the applicant, but the second was not a question of interpretation but of application of EU law, and therefore did not fall within the reference regime. The third question was raised solely in connection with "appeal ground iv" which, as we have already indicated, was a

challenge to the judge's refusal to allow new points to be argued without an amendment to the applicant's Statement of Facts and Grounds.

84. In his order refusing permission to appeal, Lewison L.J. pointed out that cases concerning the situation where the development was not EIA development are irrelevant to a case, such as the present, where the development was EIA development. He then focused upon the judge's finding that the two schemes were not a single project as determinative, and finally, endorsed Lang J.'s refusal to allow new grounds of challenge to be raised as a matter of case management. That necessarily put paid to any issue of EU law that was included within those grounds, as the third question was. Lewison L.J. did not need to spell that out any further. It was obvious that if there was no basis for challenging the judge's refusal to allow the new grounds to be raised, any EU law argument that was raised in conjunction with those new grounds could have no bearing on the outcome of the appeal.

85. The first issue of EU law identified in the applicant's skeleton argument did not arise on her pleaded case if the two schemes were separate, because in such event the EIA Directive contemplates that consideration of cumulative effects, as occurred here, would be sufficient compliance. In his order refusing to re-open the appeal, Lewison L.J. put the matter beyond doubt in paragraph 5 by stating, in terms, that the judge performed an evaluative judgment on the particular facts and took the correct factors into account when finding that there was not a single project. The judge also held that there was no information at the screening stage to suggest otherwise. In the light of those matters Lewison L.J. concluded, correctly, that "there is no point of law involved that would warrant a reference to the CJEU". Once again, it was abundantly clear that Lewison L.J. had decided not to make the reference because he considered that a resolution of the identified issues of EU law was unnecessary for the determination of the appeal – and also the application for permission or to re-open the application for permission.

86. For these reasons, we reject as untenable the submissions made on behalf of the applicant that, in some way, Lewison L.J. erred either in not referring these questions to the CJEU or in failing adequately to explain why he was not going to make such a reference.

87. On 9 November 2020, ten days after the hearing, the applicant's solicitor sent to the court, unheralded, a number of additional authorities said to be relevant to the request for a reference. This kind of conduct, in a case in which counsel has had the opportunity to make full submissions to the court at the hearing, is regrettable and should be strongly discouraged. But in any event, none of the cases referred to – all of which were decided before those on which Ms Dehon relied at the hearing – adds anything of substance to the argument she put forward or disturbs the conclusion we have reached on this question.

88. Although this means that the applicant's principal argument in support of this application must fail, we should, for completeness, go on to note a number of other ways in which the applicant's repeated arguments in support of reconsideration are, in our judgment, equally unsustainable.

89. It is unnecessary to say much more about the Hoplands case, given the judge's conclusion that, even if the applicant's points were well-founded, the same decision

would inevitably have been made. However, we note that, even if that finding was to be ignored, the applicant's suggestion that the HRA carried out prior to the grant of reserved matters approval was "partial", and thus could not have remedied the council's failure to carry out an assessment prior to the grant of outline permission, is contradicted by Lang J.'s unassailable findings of fact at paragraphs 85 to 102 of her judgment.

90. Moreover, there was no issue before the judge about the standard that HRAs are required to meet – a matter that is well established by domestic and EU law, in the cases referred to by Lang J. at paragraphs [91]-[97] of her judgment in the Chislet case. She found in each case that the standard was met, and the *Wednesbury* test was correctly applied in accordance with *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174. Those conclusions too are unassailable.

91. In the Chislet case, the applicant's pleaded case was that the two projects should have been treated as one project. It was never pleaded that if they were separate projects, as the judge found as a fact they were, there was still an obligation to assess them jointly. The only unpleaded point that the judge permitted the applicant to argue in support of ground 1 is that referred to at paragraph 89 of her judgment, namely, that by reason of the alleged failings of the council's assessment of the cumulative environmental effects of the two sites, the assessment of the two proposals as a single project would have resulted in a more comprehensive assessment.

92. Even if that point had been pleaded, none of the authorities relied on, European or domestic, support the submission that there is a requirement for a joint assessment of separate projects when both projects are being assessed separately and cumulatively with each other. As the judge pointed out at paragraph 72, under both the EIA Directive and the EIA Regulations 2011, once the scope of the project or development has been identified, an assessment of cumulative effects is all that the law requires. The applicant has referred to nothing in the EIA Directive or the Habitats Directive which, correctly interpreted, would or might require any joint assessment to be carried out of the environmental impact of two separate development projects. The aims of the Directives are satisfied, as Lang J. held, by the assessment of "in combination" effects under the habitats regime and "cumulative" effects under the EIA regime.

93. There was nothing on the facts or as a matter of principle that could have led the court to conclude that a single joint assessment might have produced a different result to the separate but in-combination and cumulative assessments of the two schemes that were in fact undertaken. Unlike *Larkfleet*, in which a comparison was made between a joint assessment of projects A and B, and a single assessment of project A including the cumulative effects of both projects, these cases involved two separate assessments, each of which included consideration of the cumulative effects of the other.

94. As HNC has pointed out, the only additional matters that would be assessed in a joint assessment of the two developments not likely to be included in the single assessment of the Chislet development, including the cumulative effects with the Hoplands development, would be any effects of the Hoplands development that did not overlap or accumulate with the effects of the Chislet development, and vice versa. Since the applicant's complaints relate to the cumulative effects of the two projects, rather than the independent effects of either, requiring a joint assessment would have made no difference to the outcome.

95. In Case C–234/04 *Kapferer v Schlank & Schick GmbH* [2006] ECR 1-2585 the CJEU addressed the question whether, and where relevant, in what conditions, the principle of co-operation arising from article 10 EC imposes on a national court an obligation to review and set aside a final judicial decision if that decision should infringe community law. It said (at paragraphs 20 and 21):

> "20. In that regard, attention should be drawn to the importance, both of the community legal order and national legal systems, of the principal of res judicata. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that connection can no longer be called into question *(Kohler* (C-224/01) [223] ECR 1-10239; [2003] 3 CMLR 28 at [38].
>
> 21. Therefore, community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of community law by the decision at issue."

96. In *Interfact Ltd v Liverpool City Council* [2011] QB 744, Lord Judge C.J. held that the *Kapferer* case laid down a general principle that EU law does not require a national court to re-open a final judicial decision even if failure to do so would make it impossible to remedy an infringement of the provisions of EU law. The fact that under the CPR there is a power to re-open is immaterial because there is no legal obligation to exercise that power in such circumstances.

Conclusions

97. In this case the applicant has not established that it is even arguable that either of Lewison L.J.'s decisions, let alone Lang J.'s decisions, involved an infringement of any of the provisions of EU law. But even had she done so, that would not have been good enough to satisfy the test for re-opening the question of permission to appeal. The integrity of the earlier proceedings was not undermined in any way. There is no question of Lewison L.J.'s decisions being *ultra vires*, and the applicant has failed to establish that, even if –contrary to our findings – her individual points were right, the outcome would or might have been different. There is no injustice to the applicant involved in refusing her a fourth or fifth attempt to gain the result she seeks, let alone the "grave injustice" required to overcome the pressing claim of finality in litigation.

98. As to that, it should be remembered that the decisions in these cases to grant outline planning permission were made in 2017 and 2018 respectively. The applicant did not even object to the Hoplands development prior to the grant of outline planning permission for that proposal, and no application was made to seek judicial review of that decision within the time limit, or even after the decision in *People Over Wind* in April 2018. Redrow acquired the site with the benefit of outline planning permission after the time for seeking to bring judicial review had expired, and was entitled to assume that it could rely upon that grant.

99. In both cases the council obtained EIAs and HRAs and satisfied the statutory consultee, Natural England, that they covered all the necessary ground and that the impact on the EU protected sites could be adequately mitigated. All the applicant's criticisms of the council's decision-making on these proposals have been comprehensively rejected for

reasons that have been clearly explained. If any injustice would be caused by re-opening the matter so long after the grants were made and acted upon, it would be to the interested parties, not the applicant.

100. For all the above reasons, these second applications to reconsider must fail. They fail to meet any – let alone all – of the criteria set out in CPR 52.30. These are not exceptional cases. There has been no injustice to the applicant. There is no probability of a different result. There was never any tenable basis for an appeal, for the reasons given by both the judge and Lewison L.J.. We consider that neither application for reconsideration was justifiable. The applications before us are therefore dismissed.