Neutral Citation Number: [2023] EWHC 1657 (Admin)

Case No: CO/2/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/07/2023

Before :

SIR DUNCAN OUSELEY

Sitting as a High Court Judge

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Between :

SPITALFIELDS NEIGHBOURHOOD PLANNING FORUM	**Claimant**
- and -	
TOWER HAMLETS COUNCIL	**Defendant**
-and-	
TRUMAN ESTATES LTD	**Interested Party**

- -

Simon Bell (instructed through Direct Access) for the **Claimant**
Gwion Lewis KC (instructed by the **Solicitor to the LBC of Tower Hamlets**) for the Defendant
The Interested Party did not appear

Hearing dates: 20-21 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 4th July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIR DUNCAN OUSELEY sitting as a High Court Judge :

1. This is a challenge by way of judicial review to the decision of Tower Hamlets Council, the Council, on 5 October 2022, not to make the Spitalfields Neighbourhood Plan. This decision was taken under s38A(5) Planning and Compulsory Purchase Act 2004, PCPA 2004. The separate residential and business referendums, which are part of the statutory procedures for making Neighbourhood Plans, had produced different results. One, the residential referendum, supported the making of the Plan, but the business referendum came to the opposite conclusion. The Council therefore had to decide whether or not to make the Plan. It decided to refuse to make the Neighbourhood Plan. This Neighbourhood Plan thus fell at the last hurdle on the route to becoming part of the Development Plan for the Council under the Town and Country Planning Act 1990, TCPA 1990.

2. The Claimant is the Spitalfields Neighbourhood Planning Forum, an unincorporated association which was designated as Neighbourhood Planning Forum under s61F TCPA 1990, and which was a "qualifying body" under s38A(1) and (12) PCPA 2004. This authorised it to act for the purposes of initiating a Spitalfields Neighbourhood Plan, promoting it and taking it through the statutory procedures, with a view to it becoming part of the development plan. Its challenge, in form at least, focuses on the legal adequacy of the Officer's Report to the Council meeting of 5 October 2022. Truman Estates Ltd, the Interested Party, also known as the Old Truman Brewery and perhaps not directly affected, but the subject of adverse comment in the claim, owns the Truman Estate, a substantial commercial property including 91 Brick Lane, in the area of the Plan, which, with its tenants, was a significant contributor to the vote in the business referendum.

The background facts and statutory provisions

3. The Planning and Compulsory Purchase Act 2004 was amended by the Localism Act 2011, so as to create a new plan-making process at a level below the local planning authority; this was the Neighbourhood Development Plan, NDP. It is not prepared by the local planning authority. Under s61F TCPA 1990, the local planning authority could designate an organisation as a "Neighbourhood Forum" if it were established for the express purpose of promoting or improving the social, economic and environmental wellbeing of the neighbourhood area. The Claimant was so designated in respect of the area of Spitalfields, a "neighbourhood planning area" also designated by the Council in Cabinet, in 2016. The area was also designated as a "business area" under s61H TCPA 1990, because the Council considered the area of the Plan to be "wholly or predominantly business in nature." The Forum, as I shall now call the Claimant, thereby became a "qualifying body", entitled under s38A PCPA 2004, "to initiate a process for the purpose of requiring" the Council "to make a neighbourhood development plan"; s38A(1). A neighbourhood development plan is one "which sets out policies (however expressed) in relation to the development and use of land" in the neighbourhood area or part of it. If, at the end of the statutory procedures, the NDP is made by the local planning authority, it becomes part of the statutory development plan; s38A(6) PCPA 2004 provides, in familiar language, that if regard is to be had to the development plan for the purpose of a determination under the "planning Acts", which term is defined so as to include Acts under which most planning decisions on development and use are made, notably the TCPA 1990, " the determination must be made in accordance with the plan unless material considerations indicate otherwise."

4. The procedures to be followed for the making of a NDP were summarised by the Supreme Court in *R (Fylde Coast Farms Ltd) v Fylde Borough Council* [2021] UKSC 18, [2021] WLR 2794 at [2]:

> 8. "Speaking generally, the making of neighbourhood development… plans requires the taking of what may loosely be described as seven consecutive steps, mainly by the relevant local planning authority. They are, in summary: (1) designating a neighbourhood area; (2) pre-submission preparation and consultation; (3) submission of a proposal; (4) consideration by an independent examiner; (5) consideration of the examiner's report; (6) holding a local referendum; (7) making the …plan."

5. This application concerns steps 6 and 7. The previous steps were taken without significant hitch. The Council, in Cabinet, agreed that the draft Plan could proceed to further public consultation and independent examination in December 2020. The examination took place in February 2021, with a report in July 2021 recommending that, with modifications, it should proceed to step 6. The Council, through the Mayor, accepted the recommendation in August 2021.

6. Because the Council had designated the area of the Plan to be a business area, the PCPA 2004 required that two referendums be held, one for residential voters and one for business voters. Both had to be held on the same day, and were held on 11 November 2021. The referendums asked the same question. The question asked was: "Do you want the London Borough of Tower Hamlets to use the neighbourhood plan for the Spitalfields Neighbourhood Planning Area to help it decide planning applications in the neighbourhood area?" The voters in the residential referendum were those already on the electoral roll for the Plan area for local elections. There were 4102 eligible voters in the residential referendum. The business voters of the area had to register to vote specifically in this referendum. 812 businesses in the area were invited to register as voters, but only 132 accepted the invitation and registered. A person qualified and registered to vote in each referendum could vote once in each, but not twice in either, notably relevant to the business referendum where one person might be qualified to register in respect of more than one business premises in the area.

7. The results were declared on the same day as the referendum. The Declarations by the Counting Officer set out the total votes, the numbers of rejected ballot papers and set out the outcomes. In the residential referendum, 258 voted in favour of the Spitalfields Neighbourhood Plan, SNP, being used to determine planning applications, and 252 voted against that proposition. The turnout was 13.46% of the eligible electorate. 2 votes were rejected because the voters could not be identified. In the business referendum, 18 voted in favour of the SNP being used to determine planning applications, and 70 voted against. No ballot papers were rejected. The turnout was 66.67% of the registered voters. (9 postal votes had already been rejected for want of adequate identifiers, although that is not part of the Declaration.)

8. S61N TCPA 1990 provides for challenges to the referendum to be made within 6 weeks starting on the day after the result of the referendum was declared, i.e. 23 December 2021. No proceedings were launched by the Claimant in respect of the business referendum, whether by reference to the voters who were treated as eligible to vote, or by reference to those who voted or the way in which the "No" campaign was

conducted, money was expended in that cause, or in respect of conduct alleged by the Claimant against the owner of the Truman Estate in respect of postal votes by his tenants. Complaints aplenty were made to the Council in a written statement of, I am told, 16 December 2021, referred to as the December 2021 Paper; but no proceedings were taken. There has been no debate over the voting in the residential referendum.

9. This is the first time, so far as the parties are aware, when there has been a split outcome, with the business referendum rejecting the NDP. Where, as here, there are two referendums, it is only if both favour making the NDP that s38A(4) PCPA 2004 requires the Council to "make" the NDP, and it becomes a full part of the statutory development plan. Where the vote in each is negative, the PCPA 2004 imposes no obligation on the Council to refuse to make the Plan; there is no express statutory provision covering that situation. However, where the results of the two referendums differ, as here, s38A(5) provides that "the authority may (but need not) make a neighbourhood development plan to which the proposal relates." That was the decision for the Council which it, in full Council took on 5 October, resolving against making the Plan by 41 votes to 2.

10. This challenge to that decision was then lodged on 23 December 2022, and issued on 3 January 2023. Lang J, in granting permission, referred to an arguable point raised by the Claimant as to the time limits applicable to the bringing of this judicial review claim. The parties agreed that the time limits were the commonplace avoidance of undue and prejudicial delay in s31(6) Senior Courts Act 1981, and the 3 month time limit in Part 54 CPR. There was no provision in the PCPA 2004 which curtailed that time limit. The 6 week time limit in Part 54.5-(AI)(5) CPR did not apply because the PCPA was not a "planning act" as defined for those purposes by s336 Town and Country Planning Act 1990. I agree. No time limit issue therefore arose.

The Officer's Report

11. The Officer's Report to the Council meeting of 5 October was presented by the Corporate Director, Place. It deliberately made no recommendation as to the decision to be reached on the split outcome of the referendums. It set out the alternatives for the Council: adopt or reject the plan; although it could instead defer a decision, the Officer recommended that that should not happen. The Report set out an introduction to neighbourhood planning, describing both NDPs, and Neighbourhood Development Orders which allow for planning permission to be granted without an application for planning permission. NDPs were described correctly as setting out policies in relation to the development and use of land in the defined neighbourhood, and it stated [4.6] that an NDP which has been "made" forms part of the statutory development plan, "and, as such, will be accorded full weight when determining planning applications in the neighbourhood area." At [4.7], it described briefly the process by which the policies in an NDP are developed, and noted that they can be given "significant weight in determining relevant planning applications as soon as the decision has been taken to hold a referendum…." Section 6 began with a description of the processes through which the SNP passed, including the two rounds of public consultation before the draft plan and consultation responses were passed to the independent examiner. It noted that, at that stage, the most critical response had been from the Truman Estate, objecting to the affordable workspace discount in Policy 7 of the SNP. The independent examiner had concluded that the consultation process had been carried out very well, that legal requirements had been complied with and regard had been had to Government Planning

Guidance. She had recommended modifications which the Mayor had accepted in his decision on behalf of the Council to send the plan to referendum. The Officer's Report concluded that all necessary procedural steps had been fulfilled, legal requirements met and that there was no planning policy objection to the adoption of the plan.

12. Section 6 then turned to the referendum results. It explained that all registered residential voters in the Area were able to vote, yielding an electorate of 4,102. For the business referendum, all rate- paying businesses in the area were contacted with details of how to register to vote. Those who completed the form in time were eligible to vote, which yielded a registered electorate of 132. Section 6 commented at [6.14]: "In the residential referendum, 552 votes were cast, and two ballot papers were spoiled. The turnout was 13.46%. This is not a high turn out, but is also not unusually low for a neighbourhood planning referendum." Examples of other low turnouts in residential referendums in other London boroughs were given, between 9 and 22%. The votes in favour in the residential referendum were 298, with 252 against, which was a 54.2% vote for 'yes'. [6.15] continued: "This is one of the lowest positive votes in a neighbourhood planning residential referendum across the country. Since neighbourhood planning was introduced, eleven neighbourhood plans have failed at referendum… and a further five plans received 'yes' votes between 51 and 53%. The Spitalfields 'yes' vote is the lowest of any neighbourhood plan referendum in London, the next lowest being the 79% 'yes' vote in… Westminster/Camden."

13. The Officer's Report dealt next with the business referendum, stating that 88 votes were cast, with no ballots spoiled. The turnout was 66.7%. It pointed out: "However, it should be noted that to vote in the business referendum, business owners will have had to make an active effort to register, whereas most residential voters will already have been on the electoral roll before the referendum was announced. It is therefore expected that business referendums will have a much better turnout than residential referendums, as business owners who have taken the trouble to register specifically for this poll are subsequently more likely to use their vote." Research showed that the lowest turnout in a business referendum in London was 38%, higher than the highest ever residential referendum turnout in London. [6.17] commented that as 70 votes were for 'no' and 18 were for 'yes', the 'no' vote was 79.5%. This was understood to be the first time a neighbourhood plan had failed at a business referendum. It was also understood to be the first time that the two referendums produced different results, which created a situation where the Council had to make its own decision about adoption of the SNP.

14. Under the heading of "Post-Referendum Engagement", section 6 of the Officer's Report, set out what had been done since the referendums. On 20 January 2022, the Council had asked the Forum to engage further with the business representatives from the Plan Area to explore their concerns. The Forum did so and sent a statement to the Council dated 19 May 2022 with its response to what it had found. This statement was appended to the Report. There had been two primary groups who had opposed the Plan, the owners of the Truman Estate and the Brick Lane Restaurant Association. The Forum concluded that the concerns raised by the latter were reasonable and could be overcome, but those raised by Mr Zeloof for the Truman Estate were "disingenuous, purely tactical and cannot be met." The Forum's statement set out the steps to be taken to meet the concerns of the Brick Lane Restaurant Association. Officers were of the view that that proposed response "could plausibly be implemented." The Officer's Report said that the Forum's full reasoning for its view about the Truman Estate's concerns were in

Appendix 5, and summarised the Forum's position: the Estate was against any further controls or restrictions over how they developed their site. Mr Zeloof, a member of the Forum's managing committee from the start, had twice voted in favour of the Plan, before opposing it as too conservation-oriented, a focus which the Forum believed to be justified through its consultations with local people.

15. The Report set out the "Factors to be considered in deciding whether to adopt or reject the Spitalfields neighbourhood plan." The procedural requirements had been met; there was no planning policy objection. "The question at hand is entirely one of how to interpret the democratic signals sent out by the conflicting referendums." The residential turnout was quite low; the 54%/46% split in favour was a "very low 'yes' vote" in the context of other neighbourhood planning referendums, although sufficient to require the adoption of the Plan had it been the only referendum. The business vote had a lower overall number of voters, but a high turnout compared to the number of registered voters. However, this high turnout was potentially misleading because business voters actively had to register, filling in and returning two forms to the council, whereas very few residential voters would have needed to register to vote specifically to take part in this referendum. And, having gone to the trouble of registering, business voters would be more likely to vote. 812 businesses were invited to register; the percentage of businesses actually voting was 10.8%. Members should not be tempted to combine the two votes because some voters were entitled to vote in each referendum. The Report also said, [7.5], that "It could be argued that the Forum have not done enough work to bring the business community along with them in the development of the plan, and this is reflected by the result of the business referendum." The first consultation had produced only 3 business responses. But 16 were received in the second round, 15 of which were entirely positive; only the Truman Estate was negative. The Report considered the polices which affected the businesses in the plan area. The commercial mix polices appeared to be the most relevant. SPITAL7, built on a policy in the Tower Hamlets Local Plan. The Local Plan policy required major commercial or mixed-use developments to provide 10% of their employment floorspace at a 10% discount on market rents for a minimum of 10 years. The SNP's SPITAL 7 would increase the discount to 45%, and the duration of its operation to 12 years. The Report, for reasons it gave, found "it difficult to see how this policy could be considered to have a negative impact on the wider business community of Spitalfields." The policy, however, "would have an impact on property developers, but should be largely beneficial for small businesses in the area." The last part of section 7, recommending that the factors in the Report be taken into account in the decision-making, also said, [7.15]: "While planning officers are well-placed to provide recommendations on matters that relate purely to planning, it is not the role of officers to provide recommendations on an issue which speaks to a question of democratic legitimacy instead ."

16. Legal Services, at [11.5], commented that if the neighbourhood plan were approved at the referendum, it would have the same legal status as a local plan, and would come into force as part of the statutory development plan; applications for planning permission in this neighbourhood area would have to be determined in accordance with this development plan, unless material considerations indicated otherwise.

17. The letter of 19 May 2022 to the Council from Mr Frankcom, chairman of the Forum, appendix 5 to the Officer's report, runs to some 10 pages. Almost all of it concerns the

responses of the two primary groups of businesses which the Council asked the Forum to engage with after the results of the referendum were known. But issues relating to voting, to which the Officer's Report makes no specific reference, are raised in the first section of that letter, in what is described as setting the context for what then follows. At [1.17], the allegation was made: "The business vote is mired in controversy. 25% of all the votes in the business referendum have been found to be invalid because they were either rejected during adjudication of personal identifiers or later found by our lawyers and since confirmed by the police to have been illegally cast votes by persons who had already voted the maximum number of times they were permitted. In particular, the owner of TB [Truman Brewery, now the Truman Estate] (Mr. Jason Zeloof) voted six times, an associate of his at the same site voted four times, [another] illegally voted four times…." The letter continued, saying that both referendum outcomes were currently the subject of an active police investigation which had bagged up evidence related to illegal activities that influenced the outcomes of both referendums and the illegally cast votes.

18. This 19 May letter also contained arguments for supporting the outcome of the residential referendum. These included that the residential vote was robust, and was positive despite the presence of an illegal spoiler leaflet which made false, alarmist claims about the scope of neighbourhood planning and which broke election/referendum campaign spending and imprint rules. The support in the residential referendum was greater than the level of opposition in the business referendum. The character of the neighbourhood area was said to demonstrate that the business vote was skewed by the undue influence of one major landlord, Mr Zeloof of the Truman Estate, who owned 10% of the total land area of the neighbourhood and "exercised substantial and undue control over the votes cast by his tenants. 37 of the total number of "no" votes cast (70) were cast from a single building [91 Brick Lane] under OTB control, through a post room tenants must use that is under the direct surveillance and control of OTB." There was strong evidence of attempts to unduly influence and subvert the outcome in the business referendum due to multiple voting, which was said to be an indisputable fact, "and the potential for a very substantial proportion of the votes not being cast in a free environment at 91 Brick Lane [OTB HQ]." The letter went on to make various disobliging comments about Mr Zeloof, his change in stance, control over his tenants, and the problem of "powerful and belligerent" property developers.

19. At the end of the 19 May 2022 letter, it referred to the Forum's December 2021 paper about the referendum result and the "errors and illegalities in the business referendum", but which was not appended to the report. Mr Frankcom had however attached it to the letter of 19 May, saying that "these must still be a key issue in your considerations."

20. The December 2021 paper, undated but which I am told was produced on 16 December 2021, contains details of the allegations of voting and other irregularities. It asserted that 25% of all votes cast in the Business Referendum were invalid, 9 of which were rejected by the Counting Officer "during the adjudication of the personal identifiers", (although the Declaration does not say so, perhaps for want of a relevant box.) 22.5% of all votes, not including those 9 rejected ballots, were from multiple voters. The Forum's representatives had examined the marked register of voters, from which it was readily apparent who had voted in respect of which property. The marked register, on the Forum's analysis, which cannot have been a difficult task, showed that two people

had voted a total of 9 times from a variety of units at 91 Brick Lane. The two would have been entitled to vote once each. The other multiple voters were identified, and the total of votes which were thereby invalid was 20, the 22.5%. The paper appended the breakdown of voters, address by address. It continued the theme of the dominating role of the Truman Estate, as owners of 91 Brick Lane, and some other nearby properties. Allegations were made about its owners, the Zeloof family business, pressuring tenants, knowing who was registered to vote and whether or not they had voted. The Truman Estate was seen as "one major landlord" whose influence had skewed the result. The December paper calculated that the result would have been close to 50/50, if multiple votes and those from 91 Brick Lane were 'no' votes and discounted. (I interject that the marked register obviously did not reveal the way in which they had voted, so the analysis of the effect of multiple voting on the outcome was necessarily speculative.) The allegation of an unlawful spoiler campaign targeting residential voters was elaborated, both as to lawfulness and as to the accuracy of its comments. It acknowledged that there had been a second print of the leaflet, with the previously missing details now included, but added that the second print must have caused the campaign expenditure limits to be exceeded.

21. It discussed the guidance given in the Planning Practice Guidance published by the Department for Housing, Communities and Local Government, and its successor Department, concerning the factors councils should consider in deciding under s38A(5) how to approach a split outcome. Two related to turnout, and relative electoral size, and repeated points I have already referred to. The third was "the characteristics of the neighbourhood." Under this head, the December 2021 paper referred again to the number of votes cast from 91 Brick Lane, and to the multiple voting. The Forum's analysis of the ethnic make-up of the area and observations on polling day showed that both main communities, "Bangladeshi/British Bengali" and "white British or white other" must have supported the Plan, as had prominent Bangladeshi-led organisations. The vote in favour would however have been reduced by "the racially inflammatory and illegal spoiler leaflet posted to every address." It referred to the qualities of the SNP, the comments of the examiner on the consultation and engagement, and "implored" Officers to recommend approval.

22. Before the Council meeting of 5 October 2022 dealt with the decision on the SNP, it passed an urgent motion that a Masterplan was to be prepared for the Spitalfields area, to be no more than Supplementary Guidance and not part of the development plan. The Council decided to continue to seek opportunities to maximise social and affordable housing, and to "begin this process by producing and implementing a developmental *Masterplan* for the Spitalfields and Banglatown area, wherein the maximisation of social and affordable housing would be a priority." Officers should begin the development of that Masterplan.

23. I was provided with transcripts of the debate on the SNP, the purpose of which was to provide a basis, or to refute it, for saying that Councillors, in view of some of the comments they made, had received inadequate advice on a number of aspects, and had considered a number of irrelevant factors. Cllr Kabir Ahmed, Cabinet Member for Regeneration, (Aspire), proposing the motion to reject the Plan, regarded "the sheer disparity in turnout" as difficult to overlook. He also referred back to the urgent motion just passed concerning the development of a Masterplan for the area. His group recognised the good intentions of the Forum and looked forward to working with them

in the Masterplan context. Cllr Shubo Hussain (Labour) referred to growing up in Brick Lane in the 1990s, fighting skinheads, and the bombing of the Brick Lane mosque. It was fair that those who tried to undermine the way in which the Bangladeshi community fought off hate "receive a robust challenge to their agenda." … "But in this case the so-called Spitalfields Neighbourhood Forum we see a masterclass of how not to do it. Cynical doesn't cut it. This is outright exclusionary." He asked why the community would want to replace the "great councillors representing it" by those who held the Bangladeshi community in low regard. Cllr Peter Golds (Conservative) spoke for the minimal opposition to the rejection of the SNP. Much of what he said was about the impact of votes from 91 Brick Lane on the business outcome. He referred to the Labour Councillors supporting a millionaire businessman, and then returned to the allegations about multiple votes and other referendum irregularities, which the Metropolitan Police were currently investigating. I add here that the police investigation concluded with a letter of 5 May 2023, saying that there was insufficient evidence of any criminal offence having taken place. This had been reviewed by the CPS. The erroneous leaflet had been redistributed in a compliant fashion. The referendum expenses limit had not been exceeded. The allegations of multiple voting were admitted by all those suspected of it, who said that they had not appreciated that they could not vote more than once, however many business properties they occupied or owned; the relevant voter Registration Form did not make clear the effect of the Neighbourhood Planning Referendums (Amendment) Regulations 2013 on non-Domestic Rate Payer Registration. (The invitation to register which I was shown was quite clear that a voter could only vote once, indeed only register to vote once, regardless of the number of properties upon which the registrant was liable to pay rates. The Forum, in its December 2021 paper, had stated that voting more than once would nullify all the votes of that voter.)

24. The minutes summarise the debate; the motion to reject the SNP was promoted on the grounds of the relative turnouts, with a higher turnout in the business referendum, most of whom voted 'no'. Further, the Mayor and the Aspire group "had ambitions and a transformative vision for Spitalfields and Banglatown. This would recognise the historic and cultural significance of the area and would preserve and enrich these aspects. It would guard against gentrification and commercialisation, which presented an existential threat to many in Tower Hamlets." Supporting views to the motion included that "The proposed plan was exclusionary. The Plan's designers had little regard for the cultural diversity of the area. The plan would interfere with the normal Council processes for planning applications, which ensured all stakeholders in the affected area are consulted." In favour of the Plan, the views were summarised as including that the "result of the business vote should not be relied on as there were concerns regarding the legality of the business vote which were subject to investigation. The Council should not go against the will of residents, as evidenced by the result of the residents' vote, which was in favour of the plan."

25. The formal reasons for the decision, adopted at the meeting, on 5 October were:

> "A low turnout in the residential referendum (13.5%), combined with a small margin of support for the neighbourhood plan in this referendum (54.2%). This indicates a relatively low level of support for the plan among the residential community.
>
> A high turnout of registered business voters in the business referendum (66.7%), combined with a large margin voting

> against the neighbourhood plan in this referendum (79.5%). This indicates a relatively strong opposition to the plan among the business community.
>
> The Council believes that the neighbourhood plan needs to work for the whole community within Spitalfields, both residential and business."

26. I should also refer to the Neighbourhood Planning (Referendums) Regulations 2012/2031, as amended in 2014, Schedule 7 to which governs the business referendum. No named voter can be required to state for whom he voted in any legal proceedings to question the business referendum; Schedule 7, para 11. Schedule 7, para. 73(1)(b) permits a county court or the High Court to make an order for the inspection of any counted ballot papers in the business registration officer's custody, provided that the court is satisfied that the order is required for the purpose of instituting or maintaining a prosecution for an offence in relation to ballot papers or for the purpose of proceedings brought as mentioned in section 61N(3) of the 1990 Act." The offence creating provisions appear to be in other election legislation. The effect of unlawful voting or referendum malpractice on the validity or outcome of elections is not spelt out in the Regulations or the PCPA 2004 or TCPA 1990. I was not taken to any legislation which covered that topic. That is not a complaint at all, but could be of relevance to a complete understanding of the effect of the preclusionary time limit for challenging referendums.

The grounds of challenge

27. Mr Bell on behalf of the Claimant contended: 1(a) that the Council had failed to follow Planning Practice Guidance issued by the Secretary of State for Housing, Communities and Local Government in 2014 as to what should happen in the event of different results from two referendums, nor had it explained why it had failed to do so; 1(b) that the Officer's Report had failed to provide sufficient information and advice to Councillors on such diverse topics as the purpose of a NDP, the claims made by the Forum about the voting and other referendum irregularities it alleged, and that it had focussed, misleadingly, on the relationships between turnouts and "electorate" or registered voters, rather than on turnouts and total potential voters; 2(a) that a document referred to as the December 2021 statement, detailing voting problems and other referendum-related irregularities had not been supplied to the Councillors; 2(b) that the Council did not investigate those allegations as it should have done pursuant to its duty in *R (Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014; 3 that the Council had regard to irrelevant matters, principally a Masterplan, so recent in concept that the Officer's Report was silent about it but upon which the Council relied in its decision, misconceptions and all, and some inaccurate comments by three Councillors, including one offensively heated contribution to a debate in which few spoke. There is considerable overlap between the points at what I have called Grounds 1(b), and 2, so I shall take them together, first. They are at the heart of this challenge.

Ground 1(b), and 2 so far as they relate to the referendum arguments.

28. The challenge is in form a challenge to the decision under s38A(5), and raises issues about the way in which the issues were presented to the Council in the Officer's Report. But the Council contends that the issues raised, in large measure, relate to the voting in

the business referendum: multiple voting, unlawful expenditure, undue influence in postal voting, which the Claimant says should have featured in the Officer's Report so as to reduce the weight which the Report or the Council attached to the negative vote in the business referendum, for example when comparing turnouts and voting figures as between the two results. This, submits Mr Lewis KC for the Council, is not a permissible basis for a challenge to the s38A(5) decision, because of s61N(3) TCPA 1990 as in substance, they invited the court, out of time, to "entertain proceedings for questioning anything relating to a referendum." Mr Bell's points are in large measure immaterial in law if Mr Lewis is right, and much of Mr Bell's arguments fail at the outset.

29. S61N(3) is one of three subsections imposing strict 6 week time limits on the bringing of proceedings to challenge various steps in the process for making an NDP. S61N(3) provides that:

> "A court may entertain proceedings for questioning anything relating to a referendum under paragraph 14 or 15 of schedule 4B only if (a) the proceedings are brought by a claim for judicial review, and (b) the claim is filed before the end of 6 weeks beginning with the day after the day on which the result of the referendum is declared."

30. Mr Lewis points to the width of the words "proceedings for questioning anything relating to a referendum". A similar provision was considered in *Fylde Coast Farms*, above. The issue in that case was whether a challenge, under s61N(1) TCPA 1990, to the Council's decision to make a plan under s38A without the modifications recommended by the examiner, could be challenged by reference to the earlier Council decision at step 5 on the consideration of the examiner's report, despite the bar in 61N(2) on a court entertaining "proceedings for questioning" that decision, unless the claim were filed within the 6 week period from the Council's decision on the examiner's report. The Supreme Court held that the challenge could not now be brought under the general provision for challenge in s61N in the light of the bar in s61N(2). The fact that Fylde Coast Farms, in form, challenged the decision to make the Plan did not mean that it was not also challenging the decision on the examiner's report. Mr Lewis drew attention to various comments in the *Fylde Coast Farms* decision. The provisions in s61N(1),(2) and (3) are strikingly similar in language. Parliament had resolved in its statutory language how allegations of unlawfulness in multi-step procedures should be resolved: "wait to the end" or "challenge early". It had resolved through those sections that it was "challenge early" in relation to those steps. At [54] the Supreme Court recognised that this might mean in practice a multiplicity of challenges. At [55], it considered the need to adhere to tight timetables, which it recognised for some could be a disadvantage. Whatever the arguments on each side of the debate about when challenges should be brought, it was clear, in this legislative context, what Parliament had decided. It was a "challenge early" approach, with the final decision not being set aside because of earlier failings.

31. Mr Bell, for the Forum, disavows the naked intent avowed by the Claimant in *Fylde Coast Farms*. He accepts that he cannot bring proceedings for "questioning anything related to a referendum" as that is time barred. He accepts, in the light of *Fylde Coast Farms*, that he cannot assert that the decision of the Council not to make the Plan is unlawful by asserting unlawfulness in the business referendum; he was seeking to do

no such thing, directly or indirectly; the Forum accepted the outcome. Mr Bell put his points about the voting irregularities and other unlawful voting acts as going to the legal adequacy of the Officer's Report, giving advice on material considerations, and investigating and expressing the arguments from the Forum, for supporting the making of the Plan. The Council had to consider the specific voting results, weigh the votes in each result, the true comparative positive votes and turnouts; and those deficiencies in the business referendum should have been referred, investigated and so could or should have reduced the weight given to its outcome in comparison with the residential referendum. An argument so limited in its scope did not breach s61N(3). It was not in law remotely the same as the *Fylde Coast Farm* case.

32. The issue over Mr Bell's referendum-related points concerns whether he is in substance seeking to do what the Act prohibits, and how far that prohibition goes in relation to what adverse comments could and should have been made about it in the Officer's Report. In the language of *Fylde Coast Farms* at [50]: "Does the challenge question … (. something relating to a referendum) within...stage 6 of the process?"

33. The factors to which this issue relates are the allegations of multiple voting, potential undue influence of the Truman Estate over voters at 91 Brick Lane, illegal electioneering activities and expenditure. These are the factors, summarised above, which feature in the May 22 Appendix 5 to the Officer's Report and the December 2021 paper from the Forum. I leave aside all other problems with Mr Bell's submissions, such as the strength and soundness of the evidence, and the lack of clarity over any statutory provision covering the effect of any unlawful voting or expenditure on the result or validity of the referendum. The statutory provisions have not been explored, nor has the permissible scope of s61N, or the scope which a court would allow to a challenge which was not shown to affect the outcome or perhaps even the margin or the outcome. I have considered with the benefit of Counsels' submissions how such factors and arguments could be deployed before the Council in the context of the s38A(5) PCPA 2004 decision at issue, without falling foul of s61N(3). I have come to the conclusion that they cannot be so deployed and are barred. The result of the referendum is not challenged, but if Mr Bell's submissions question "anything relating to the referendum", in my judgement, I would be entertaining proceedings to that extent for questioning "anything relating to the "referendum. The words "anything relating to" are wide. They cover contentions which fall some way short of challenging the result. The statutory language, in its context as explained in *Fylde Coast Farms*, is intended to draw a line under debates about "anything relating to" the referendum, if a direct challenge to the referendum is not brought.

34. Multiple voting, which was Mr Bell's most, indeed only, well-founded factual allegation, its effect on the turnout and the comparison with the turnout in the residential referendum cannot be sensibly described as not "relating to" the referendum. Still less can the allegations about its effect on the result or the margin of victory be described as not "relating to" the referendum. It was only of interest to the Forum in these proceedings because it was something which *did* relate to the referendum. The challenge barred is not just to the result, however widely that is defined; it is not a word used in the TCPA 1990 in this context. Unlawful multiple votes are nullified in a challenge to the referendum, and the result may be adjusted, if the way in which they were cast is ascertained formally. Here, the argument was that the Council should allow for some informal adjustment, either numerically or in some vague way, and erred in

failing to do so or to investigate and consider doing so. I find it impossible to see how the argument relating to multiple voting can be deployed in these proceedings, by somehow giving less weight to the number voting, and to the turnout, as Mr Bell submitted the Officer's Report should have advised Councillors was warranted and relevant to the decision under s38A(5), without questioning something "relating to the referendum".

35. S61N(3) does not specifically forbid an Officer's Report or Councillors considering such points. But the effect of s61N(3) is to make that questioning an immaterial consideration at the s38A(5) stage. Treating "anything relating to" the referendum as a relevant or material consideration at the final decision stage would undermine the clear purpose of the statutory structure in s61N: certainty at each stage was to be favoured over "wait and see", legal perfection and delay. *If* they were material considerations for the Report, whatever conclusion it reached about the points questioning "anything relating to" the referendum, should be capable of a challenge in the High Court; but this would involve questioning "anything relating to" the referendum and would be barred. This would lead to the absurd position that considerations material to the Report could nevertheless not be challenged in Court. (This hypothesis assumes that they were permissible considerations for the Report; of course a challenge to that very materiality is not barred at all.) The allegations of unlawful expenditure and undue influence over the votes from 91 Brick Lane again only have relevance if they are "anything relating to the referendum". They equally cannot be deployed by reference to the weight to be given to the outcome or its margin without equally falling foul of s61N(3). These points may or may not go to the validity of votes or of the referendum. By the same token, the existence of the police investigation was not material either.

36. I observe in relation to time, that the marked register was available for inspection, which appeared to reveal the multiple voters (though not the way they had voted), quite clearly. It appears, from the December 2021 statement, to have been available within six weeks of the referendum declaration, even if time for a focussed challenge would have been tight. The possible criminal penalties, whether or not accompanied by any provision that that should affect the validity of the result, can be enforced regardless of the time limit for the challenge. If material, but not accepted by the Council as factually correct, I am inclined to agree with Mr Bell, but without deciding the point, that the Council would have had a *Tameside* duty itself to check the register, rather than just to waft the point aside, saying that it had not been proved, simply because it had declined to check. The completion of the police investigation was not necessary to establish that fact. What could not be examined or speculated about was how the wrongful votes affected who won or by what number of votes, as how the multiple voters voted was not known, and the steps necessary to undertake such an examination had not been, and could not now be, undertaken; Schedule 7, para.73 of the 2012 Regulations. The Forum's material sent to the Council misguidedly sought to speculate about the effect of the multiple voting on the margin of the outcome. But, taken at its highest, it still fell outside the scope of the permissible arguments on a challenge to the decision not to make the Plan. However, by contrast to the position on multiple votes, the other issues raised did not advance beyond allegations, for all the strength of the Forum's commentary. The Council were not obliged, under *Tameside*, to undertake the sort of investigation which the Metropolitan Police were undertaking, let alone to duplicate that work. The difficulty of relying on assertions was demonstrated in the police letter

of May 2023. The Forum had made but passing mention of the second print of the leaflet. Undue influence, which was bound to be hotly contested, and far from readily proven, could not have been for the Council to pursue for the purposes of a decision under s38A(5). Rather it is a good example of the purpose of the structure of s61N, whatever flaws it may leave unresolved.

37. I therefore see no error of law in the Officer's Report or in the consideration by the Council of those points. These Grounds fail in so far as they concern anything relating to the referendum.

Ground 1(a): Planning Guidance on split decisions

38. The Guidance on Neighbourhood Planning was produced in March 2014 by the Ministry of Housing, Communities and Local Government, updated in 2020 by the successor Department for Levelling Up, Housing and Communities. One paragraph related to the consequences of a split outcome from the referendums. It advised a local planning authority:

> "… to set out its decision- making criteria in this scenario in advance of the referendum taking place. It may for example, wish to consider criteria related to the level of support the neighbourhood plan… received at each referendum, the relative size of the electorate or the characteristics of the neighbourhood area."

39. Mr Bell, for the Forum, submitted that the Council had failed to comply with that advice, without giving reasons. That is true, but the failure to comply with the Guidance was long past, and preceded the referendums. The Guidance was not that the factors be identified in advance of the subsequent decision-making meeting. The Guidance gave sensible factors to consider, which were considered. By the Report stage, the duty was to consider the material considerations, which is a different issue, and not dependant on reasons being given or not being given for not following the Guidance. Even if it could be argued that the reasons for not following the Guidance ought to have been given in the Officer's Report, I find it difficult to see what point would have been served in doing so. The omission of any such reasons from the Officer's Report could have made no difference to the outcome of the meeting. If material, the point should be considered in the meeting anyway. The factors not considered were related to the conduct of the referendum. I have already concluded that they were immaterial.

40. The facts here illustrate the problem of identifying in advance further material considerations: they will either be obvious, such as the purpose and quality of the Plan, needing no advance identification; or they will be case specific and cannot sensibly be identified in advance of the facts which give rise to the problem. It is difficult to see that the arguments to the electorate during the referendum would have been different or that, after the referendum, those to the Council would have been any better focussed than they were. In reality, I find it difficult to see that the Council could usefully have done anything in advance of these referendums to deal with the problem that arose here, for the first time, of split referendums. If the reasons given had been that the Guidance was not useful or sensible in this respect, as this case has now illustrated, I would have regarded that as legally sufficient. The Guidance, though intended to be helpful, risks being an invitation to state the mundane or obvious, or an unwise invitation to endlessly

varied speculation as to what would be relevant or weighty in a variety of circumstances, and itself subject to speculative challenge; "wait and see" would be more advisable. Such a list cannot exclude material factors, or include the immaterial. This Ground fails.

The remaining points from Grounds 2 and 3

41. Where a Council decision is challenged by reference to asserted inadequacies in the Officer's Report, the relevant principles to be applied in this Court are set out, most recently, in *R (Mansell) v Tonbridge and Malling BC* [2017] EWCA Civ 1314, [2019] PTSR 1452 at [42]: the focus is on whether the members have been "materially misled" or whether there was a failure to deal with a matter on which the members ought to have received explicit advice.

42. The complaint that the Members should have been advised to read the whole package of papers is not justified. Members have to be trusted to read what is necessary. The Report itself is not very long. No complaint can be made of the way in which the choice between the two outcomes was left to the Members, and was not the subject of recommendation. The general assertion that guidance was needed on material and immaterial consideration, and on how to reach a rational and evidence based decision, really founders in the face of a fair reading of the Report as a whole. I have already found against the Forum in relation to the materiality of its referendum-related points.

43. The Members were told of the difference in votes, registration and turnout. The comparison between the low residential turnout and the high business turnout was described, and related to the different registration schemes, the latter requiring a positive decision to register. The relationship between the potential registrants for the business referendum and the actually registered voters was also referred to. The fact that, for each referendum, the voters were related to turnout is not wrong or misleading, especially as it was explained and the total business numbers compared to actual voters was also provided. I judge the Report not to have been misleading at all, or to have a material omission in that respect. Mr Bell's suggestion that choosing not to register should have been treated as the equivalent of choosing not to vote is not without merit, but to take a different equivalence is not unlawful. There is scope for debate about which is best emphasised, but that is not for legal complaint. It is not to be forgotten although not emphasised in the Report, that the Area had been designated as a business area because it was a predominantly business area.

44. I did wonder whether the fact that so many votes were cast in respect of premises at 91 Brick Lane should have been highlighted in the Report, as a way of testing what could be said about the results without falling foul of s61N(3). It was a feature of the 19 May 2022 letter. It could yield a point about the area, or its character, though it is not clear how. The voters may have been more interested in the referendum, and the way in which they voted was no more than surmise. But it was not there simply left as the point that one smallish part of the area had yielded quite a high proportion of the votes, rather that it was the place from which a number of voting or referendum irregularities occurred. No complaint can be made that, absent its asserted role as something to do with the referendum, some other unexplained point was omitted in relation to the character of the area.

45. There are two ways of looking at the references to another aspect of localism in the Report, that is the Neighbourhood Development Order. The contrast between that and the NDP is set out in the Officer's Report. The way that the NDP is part of the statutory development plan, and is considered by Members in relation to planning applications, is set out in a number of places in the Report, including by Legal Services. The Neighbourhood Development Order is different and removes Members from the decision-making process on certain applications. It was reasonable, and certainly not materially misleading, for that to be drawn to Members' attention so that they should not suppose that that is what they were considering. It could, perhaps, have been done more clearly for the benefit of Members not on the Planning Committee, in the light of some comments later made in the meeting. But what was set out is clear enough, and certainly does not fall foul of the principles in *Mansell*. Indeed, on a number of these aspects, the written material in support of the claim, did not express itself in the strength of language necessary to assert that it did breach those principles.

46. There was no need for Members to have received the December 2021 paper. Its content on the voting and conduct of the referendum was irrelevant. The rest was covered in the May 2022 letter, before the Council, and which was fairly summarised in the Report to Members properly on the relevant topics it raised. The claim that "a more detailed summary" of the latter should have been provided is not an allegation of error of law or vitiating error.

47. The Masterplan idea was not immaterial, lately indeed though it had emerged into the arena. It was an alternative form of local planning policy development. There would be differences in status between the SNP and a Masterplan, when developed. That appears to have been important, though how far either were fully understood by all present is a matter for a degree of speculation. There was no time for Officers to include something in the Report. There is no evidence that they were asked to comment at the meeting, and no evidence as to their entitlement or obligation, if any, to intervene of their own uninvited motion. The purpose and role of the Forum, and how it had taken the Plan through its various stages, was adequately covered.

48. The claim that Cllr Ahmed's reference to "gentrification and commercialisation" ensuing from the SNP, shows that the Council's decision was infected by his error, rather opens a debate as to the correctness of his comments, which are more for political debate, and as to how such comments should be evaluated in judging the lawfulness of Council decisions. That latter issue was not ventilated before me. Two Councillors, Shubo Hussain and Abdal Ullah both spoke as if the decision-making power was being removed from the Council and given to the Forum, which was wrong, and would have involved a serious misunderstanding or misreading of the Report. In these circumstances, and in the absence of any analysis of any authorities, the Court has to take the formal position of the Council as recorded in the Minutes, later approved and in its formal reasons for the decision. Neither are infected by any such error. Whatever error individuals laboured under, they have to be taken to have coalesced around those reasons which are lawful, whatever outstanding misunderstanding motivated their acceptance of them.

49. The other comments extracted by Mr Bell are either matters of political judgment or the sort of comment which passes between opposed politicians, but I comment about one of them. Cllr Shubo Hussain's comments, reflecting a language in videos circulating on social media, (see Mr Frankcom's first witness statement), went rather

beyond what Mr Lewis characterised, in understatement, as "high-spirited". Mr Hussain may have got carried away, and worse, and the points he made were expressed in language which scarcely makes for sensible debate. However, they do not make the outcome of the meeting unlawful. Nor are his comments wholly irrelevant - if true. I cannot assess the truthfulness of some of them in reality, although those relating to the conduct and outlook of the Forum do not seem consistent with the facts relayed in the Report. Cllr Golds had the opportunity to reply and deny or disprove them. He focused on the referendum irregularities allegedly brought about by a millionaire businessman, which approach he may have felt advanced the cause or proclaimed his feelings better. This all illustrates why courts do not reach judicial review decisions by an appraisal of individual comments in a meeting but are, no doubt save exceptionally, guided by the minutes and formal reasons.

Overall conclusion

50. This claim fails on all grounds.