Neutral Citation Number: [2024] EWHC 1053 (Admin)

Case No: CO/4860/2022
AC-2022-LON-003687

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 May 2024

Before :

MRS JUSTICE LANG DBE

- -

Between :

TAYTIME LIMITED	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES,	**Defendants**
(2) MAIDSTONE BOROUGH COUNCIL	
(3) DAVID PADDEN	

- -
- -

Charles Streeten and Ben Waistell (instructed by **Asserson Solicitors**) for the **Claimant**
James Maurici KC, Ben Fullbrook and Simon Jones (instructed by **Richard Max & Co LLP**) for the **Third Defendant**
The **First and Second Defendants** did not appear and were not represented

Hearing dates: 22 February and 19 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 7 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mrs Justice Lang :

Introduction

1. The Claimant ("Taytime") applies, under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990"), to quash the decision, dated 21 November 2022, made by an Inspector, appointed by the First Defendant ("the Secretary of State"), to dismiss an appeal against the refusal of planning permission by the Second Defendant ("the Council") for development at Monks Lake, Staplehurst Road, Marden, Kent TN12 9BS ("the Site").

2. The Third Defendant is a neighbouring landowner whose property has been adversely affected by development at the Site. He participated in the planning appeal as an Interested Person.

3. Upon an application by the Third Defendant, the Inspector decided that the appeal "was not correctly made and thus is not capable of being lawfully determined" under section 78 TCPA 1990 (Decision Letter/paragraph 9 ("DL/9")).

4. The basis of the decision was that the application for planning permission, and the appeal against refusal of planning permission, were both made by Monk Lakes Limited ("MLL"). Subsequently, on 15 July 2021, MLL filed for creditors voluntary liquidation and therefore it could not pursue the appeal on its own behalf. One of the Joint Liquidators (Mr Beat of Quantuma Advisory Ltd) wrote to the Planning Inspectorate ("PINS") on 22 September 2021 ("the Liquidators' Letter") stating it had appointed Taytime "to take over full responsibility for the above-listed planning appeal". The Inspector concluded, on the evidence before him, that "it is now Taytime pursuing the appeal, as the appellant and not as an agent" which was impermissible.

5. On 28 December 2022, this claim for statutory review was filed by "Taytime Limited as the appointed agent for and on behalf of Monk Lakes Limited".

6. The grounds of challenge are as follows:

    i) **Ground 2(i)**.

        a) The Inspector's decision that the appeal was not properly made was plainly wrong as it was agreed that MLL validly made the appeal before liquidation proceedings began. MLL had not been dissolved and the appeal had not been withdrawn.

        b) Therefore, if the Inspector was not satisfied that Taytime was validly acting as MLL's agent, the Inspector should have followed the statutory procedure in section 79(6A) TCPA 1990, for the dismissal of a planning appeal for want of prosecution. This would have given MLL, through its Liquidators, an opportunity to take steps to avoid the appeal being dismissed because it was not being pursued.

        c) It was also procedurally unfair to dismiss the appeal without first notifying MLL, through the Liquidators, and seeking their confirmation as to whether or not they wished to proceed with the appeal.

d) In the alternative, MLL, through its Liquidators, lawfully assigned the cause of action in the appeal to Taytime.

ii) **Ground 2(ii)**.

a) The Inspector erred in law in concluding that Taytime was not acting as MLL's agent. The Liquidators' Letter of 22 September 2021 validly appointed Taytime as agent, pursuant to its powers under paragraph 12, Part 111 of Schedule 4 to the Insolvency Act 1986 ("IA 1986").

b) The Inspector failed to give adequate reasons for his conclusion that Taytime was not acting as an agent for MLL, or that "it is now Taytime pursuing the appeal, as the appellant and not as an agent".

7. Permission was refused on Grounds 1 and 3.

8. On 24 January 2023, the Secretary of State and the Council filed their respective Acknowledgments of Service indicating that they did not intend to contest the claim. In the draft consent order later submitted to the Court, the Secretary of State accepted that the claim should be allowed on the second limb of Ground (2)(ii) only, namely, that the Inspector failed to supply adequate reasons for his conclusion that Taytime was not acting as the appointed agent for MLL, and so the decision should be quashed on that basis. The Council adopted the same approach. At the oral permission hearing, the Secretary of State's counsel also conceded that, even if the Inspector correctly concluded that Taytime was not acting as MLL's agent, he failed to supply adequate reasons for dismissing the appeal when MLL remained an active company and the appeal had not been withdrawn.

9. The Third Defendant was granted permission to be joined as a party in the proceedings by my order dated 24 March 2023. Following an oral permission hearing, Sir Ross Cranston (sitting as a Judge of the High Court) granted permission on Ground 2(ii) only. He refused permission on all other grounds. Sir Ross Cranston also substituted "Taytime Limited" as the Claimant, in place of MLL pursuant to CPR 3.3(4), without prejudice to the issues in the claim (paragraph 26 of Sir Ross Cranston's judgment).

10. Taytime appealed against the partial refusal of permission. In an order dated 13 November 2023, Stuart-Smith LJ granted permission to Taytime to rely upon Ground 2(i) as advanced in the Statement of Facts and Grounds at [29]-[32]. The Order also stated "This permission to advance and rely upon Ground 2(i) is limited to reliance upon the facts and reasons advanced in support of that ground (i) in the SFG and/or (ii) at the hearing before Sir Ross Cranston….".

11. Pursuant to an order of the Court dated 13 December 2023, Taytime filed a "Replacement Statement of Facts and Grounds' on 22 December 2023. The Third Defendant filed Detailed Grounds of Resistance on 19 January 2024.

Factual background

12. Since 2008, four companies have been concerned with the Site and/or the recreational fishing business. The owner of the Site is Taytime. The operator of the business was

MLL until it went into liquidation. Since then, the business has been operated by another company, called Monk Lakes Fishery Limited. The owner of the business is Merrymove Limited ("Merrymove").

13. Mr Harrison has had a controlling interest, as shareholder, in all the companies. Mrs Harrison has been a Director of three of the companies and has been actively involved in the management of the business, on behalf of the companies.

14. **Taytime**. The Site was purchased in 2008 in the name of Taytime. Taytime holds an asset purchase agreement for the rights to any planning permission, application or appeal associated with the Site. According to its last published accounts, it holds net assets worth £15,020. The sole director of Taytime is Mr W. Kinsey-Jones who manages the fishery business. He is paid £275 per week by Taytime. Mr Harrison is the sole shareholder in Taytime and so has a controlling interest.

15. Mrs Harrison states in her first witness statement, at paragraphs 3 and 4:

> "3. I also handle Taytime Limited's …. business administration and finance, and have also been dealing with all planning issues.
>
> 4. At all relevant times I have conducted the planning process on behalf of MLL and Taytime."

16. I was informed at the hearing that Mrs Harrison is not an employee of Taytime, and that she performs these functions as its agent.

17. **MLL**. It appears that Mr Harrison (and possibly Mrs Harrison) purchased MLL from the previous owners. Mr Harrison was a director of MLL until it went into voluntary liquidation on 15 July 2021. On MLL's notice of special resolution, dated 16 July 2021, Mr Harrison is described as the Chair of Board of Directors. Mrs Harrison was a director of MLL from 2008 to 2009. MLL is owned by its parent company, Merrymove. Mrs Harrison states that, at all relevant times, she conducted the planning process on behalf of MLL.

18. **Monk Lakes Fishery Limited** is owned by its parent company, Merrymove. Mrs Harrison is the sole director. According to its 2022 accounts, it has assets of £65,504. It purchased MLL's assets on 27 July 2021 and now operates the business.

19. **Merrymove Limited** is the parent company and shareholder of MLL and Monks Lakes Fishery Limited. According to its last published accounts, it has assets of £12,118. Mrs Harrison is the sole director of Merrymove. Mr Harrison is the sole shareholder in Merrymove.

20. In *R(Padden) v Maidstone BC v Guy Harrison, Emily Harrison, Monk Lakes Limited and Taytime Limited* [2014] EWHC 51 (Admin), HH Judge Mackie KC, sitting as a Judge of the High Court, summarised the history as follows:

> "3. On 17 September 2003 planning permission was granted by the Council, on the application of the then owners Mr & Mrs Hughes, for development at what is now known as Monk Lakes for:

"Change of use of land and physical works to create an extension in the fish farm, to form an area for recreational fishing. The application involves the formation of ponds and lakes, the erection of a building and the formation of a car park, the existing access to Staplehurst Road is to be improved…"

4. The 2003 Permission was subject to various conditions including the submission for approval of various pre-commencement details. These details were not submitted for approval. Instead the then owners of the land commenced, what it is common ground between the Claimant and the Council, were unauthorised works at Monk Lakes to create additional recreational fishing lakes not in a form that was in compliance with the 2003 Permission. The unauthorised works took place between 2003 and 2008 and involved the importation of very large amounts of construction waste material including glass, plastic and asbestos. The Environment Agency has estimated that about 650,000 cubic metres of waste material were deposited on the land between March 2003 and January 2008 with even more since. The material was formed into, amongst other things, massive 8 metre high retaining bunds close to neighbouring residential properties including Hertsfield Barn.

Facts agreed or not much in dispute

5. In 2008 the site was acquired by three of the Interested Parties, Emily and Guy Harrison and Monk Lakes Limited ("MLL") who have apparently continued, and intensified, the unauthorised works.

6. There is expert and circumstantial evidence that the unauthorised works and in particular the deposition of vast quantities of waste as part of them, have had damaging effects on Hertsfield Barn, including causing groundwater flooding. The Claimant gives evidence of the serious interference which this flooding causes despite the work and cost of daily pumping. The challenged consent will, if it stands, regularise the deposition of the material.

7. After much delay and pressure from local residents, including the Claimant, the Council served an enforcement notice on 12 September 2008 ("the Enforcement Notice") following a temporary stop notice in April 2008. The large scale of the unauthorised work can be seen from the photographs produced by the Claimant and from the very serious breaches of planning control specified in the Enforcement Notice. The Interested Parties appealed against the Enforcement Notice and there has been litigation arising from that which, even now, is not finished. A public inquiry into an appeal against the Enforcement Notice was scheduled to commence on 6 November 2012 but, because

> of the grant of the Permission in these proceedings, it was vacated…..
>
> 8. On 26 September 2009 and 4 January 2010 retrospective permissions were granted by the Council for development at Monk Lakes. The further application which led to the Permission in issue in these proceedings was received by the Council on 9 December 2011. It sought part retrospective permission for *"the retention of completed lakes Bridges and Puma, the retention and completion of part completed raised reservoirs lakes 1, 2 and 3 …."*".

21. Mr Harrison's appeal against the enforcement notice (referred to by HH Judge Mackie at paragraph 7 above), was dismissed by an Inspector appointed by the Secretary of State on 18 May 2015. Costs orders were made against Mr Harrison.

22. On 22 January 2014, HH Judge Mackie KC allowed the claim for judicial review and quashed the part-retrospective permission which had been granted by the Council on 6 September 2012.

23. The Council then re-determined the application for permission. It is helpful to set out the terms of the application (as originally made on 4 November 2011). In the box for the Applicant's details, it states "Mr and Mrs Harrison" and the company name is given as "Monks Lakes Limited". It is agreed that the application was made on behalf of MLL, not by Mr and Mrs Harrison as individuals. MLL's agent was named as Mrs B. Tezel of Parker Dann, for whom full contact details were provided.

24. The application was for part-retrospective planning permission for the "retention of completed lakes Bridges and Puma, the retention and completion of part completed raised reservoirs lakes 1,2 and 3 (all for angling purposes) along with clubhouse and detailed landscaping scheme". The application stated that the works began on 1 January 2004, and were not yet completed.

25. In February 2019, an updated Environmental Statement was prepared "on behalf of Taytime Limited". The consultants who authored the report stated that it was "commissioned by Taytime Limited" (paragraph 1.2). The EIA team was listed at paragraph 1.13; Taytime's role was described as "project management".

26. On the re-determination, planning officers recommended the grant of permission, but the Planning Committee refused the application, on 12 March 2020, for the following reasons:

    i) The size, height and proximity of the raised lakes would cause less than substantial harm to the setting and significance of the Grade II listed Hertsfield Barn (the Third Defendant's property).

    ii) The height and proximity of the raised lakes and their use for fishing would result in an unacceptable loss of privacy and perceived overlooking from anglers at an elevated position to the houses and gardens of Hertsfield Barn and number 3, 4, 5 and 6 Hertsfield Farm Cottages.

27. By an appeal notice dated 11 September 2020, MLL appealed against the refusal of planning permission. On the Planning Appeal Form, in section A, the Appellant was named as "Monks Lakes Limited". The "Agent Details" were given in section B as Ms Kate Simpson, Pegasus Group, with full contact details. In section I, it stated that Taytime Limited was the owner of part of the land to which the appeal related. In section L, Ms Simpson signed the form, and confirmed that the details were correct to the best of her knowledge.

28. On 15 July 2021, MLL filed for creditors' voluntary liquidation and MLL issued a Notice of Special Resolution under the IA 1986 recording the following written resolutions:

    i) That the company be wound up voluntarily.

    ii) That Duncan Beat and Andrew Watling, licensed insolvency practitioners, be appointed as Joint Liquidators of the company, and authorised to act jointly and severally.

29. The Statement of Affairs, as at 9 July 2021, listed Taytime as a company creditor, in the sum of £2,771.10.

30. Notices were published in the Gazette on 21 July 2021 confirming the resolution to appoint liquidators, and notice of the proposed striking off of the company was filed at Companies House on 27 July 2021.

31. On 16 August 2021, Mrs Harrison emailed her accountants (Burgess Hodgson) stating that PINS had suggested that the appeal continue in the name of the liquidators, and asked for their view. The accountants replied saying that an appeal in the name of the liquidator would be very difficult because they would employ specialists to represent them and their costs would be very high. The liquidator would not want to be exposed to any costs as he has no funds, and the risk of any loss and costs awarded would mean that he would be unlikely to take this forward.

32. On 17 August 2021, Mrs Harrison emailed her accountants again, mentioning that the section 106 TCPA 1990 agreement with the local planning authority was in Taytime's name.

33. On 3 September 2021, Mrs Harrison emailed Mr Beat, the liquidator, asking him to authorise Taytime as follows:

> "The land for which the application is made is owned by a company called Taytime Limited, but annoyingly (mistakenly) the appeal was submitted in the name of Monk Lakes Limited which only operated on the land, and didn't own it. Our planners advised us that this shouldn't cause a problem with the appeal when Monk Lakes Limited goes into liquidation, but it appears that it is now causing problems, and the Planning Inspectorate are suggesting that you, as the liquidator would need to in some way give authorisation for Taytime Limited to continue with the claim

Emily

Taytime Limited"

34. On 21 September 2021, the Statement of Common Ground in the appeal was signed. It identified Taytime as the appellant.

35. On 22 September 2021, the Joint Liquidators sent the Liquidators' Letter to PINS stating that they had appointed Taytime "to take over full responsibility for the appeal":

> "Further to the liquidation of Monk Lakes Limited on 15th July 2021, and in my capacity as the appointed Liquidator operating under the Insolvency Act 1986, I am writing to appoint Taytime Limited….to take over full responsibility for the above-listed planning appeal.
>
> Taytime Limited owns the land to which the original planning application and subsequent appeal relates, and I am satisfied that it is best placed to manage that process from this point forward as Monk Lakes Ltd (In Liquidation) has no interest whatsoever in this land. The representatives of Taytime Limited believe that the application should have been placed in their name in the first place, they were the party that instructed Pegasus Planning and James Pereira of Francis Taylor Building Chambers for the submission of the appeal and they have an Asset Purchase Agreement in place for the rights to any planning permission, application or appeal associated with their land."

36. In the above letter, the word "appoint" was substituted for the word "authorise" at the request of Mrs Harrison (email of 22 September 2021).

37. On 27 September 2021, the Joint Liquidators entered into an Indemnity Agreement with Taytime and its Director, Mr Kinsey-Jones, which was executed as a deed. It provided, so far as is material:

> "**BACKGROUND**
>
> (A) Monk Lakes Limited operated a fishery business at Monk Lakes, Staplehurst Road, Marden, Maidstone Kent TN12 9BU ("the Property").
>
> (B) The Property was at all material times owned by Taytime.
>
> (C) Taytime hold an Asset Purchase Agreement for the rights to any planning permission, application or appeal associated with the Property.
>
> (D) A planning application was submitted in the name of Monk Lakes Limited rather than that of Taytime (in error) and was refused by Maidstone Council decision 11/1948.

> (E) On the basis the planning application should have been in the name of Taytime and that Monk Lakes Limited had (and has never had) any interest therein, the Liquidators have agreed to permit Taytime to adopt the planning appeal against the decision 11/1948, provided that they are indemnified as to any costs expenses damages and adverse costs arising therefrom.
>
> (F) Mr Kinsey-Jones is the sole director in Taytime and has agreed to provide a personal indemnity to the Liquidators jointly and severally with that given by Taytime to facilitate the appeal.
>
> THE PARTIES AGREE
>
> …..
>
> 2. The Liquidators consent (insofar as it is needed) to Taytime having conduct of the Appeal at its own expense and will sign, do and permit all documents and things reasonably necessary for that purpose.
>
> 3. **Indemnity**
>
> 3.1 In consideration of that consent, Taytime and Mr Kinsey-Jones jointly and severally covenant with the Liquidators that, so long as the Appeal is on foot, and after that period shall have expired, they will pay and discharge all the costs and expenses of and occasioned by the Appeal or any damages arising therefrom and will keep the Liquidators and their personal representatives indemnified against all such costs and expenses and damages and against all claims, proceedings, costs, demands and expenses in respect of them
>
> 3.2 Taytime and Mr Kinsey-Jones further jointly and severally covenant with the Liquidators that, so long as the Appeal or any costs decision in relation thereto remains live, they will retain the Property in the ownership of Taytime.
>
> ……"

38. On 12 October 2021, the Third Defendant's solicitors wrote to advise PINS of MLL's liquidation and to ask that the appeal be dismissed. The Third Defendant and his solicitors had not been informed of the Liquidators' Letter or the Indemnity Agreement.

39. PINS replied on 17 November 2021 stating that "unless the appeal is withdrawn or PINS is notified that the 'Second' notification letter has been published in the Gazette the Inspector will continue to determine the appeal".

40. On 8 September 2022, the Liquidators issued a Notice of Progress report in respect of MLL. It reported that, as part of the realisation of assets, its plant, machinery, fixtures and fittings had been sold for £12,600 plus VAT to Monk Lakes Fisheries Limited. It

explained that Taytime was the owner of the Site; that MLL had no leasehold interest in the Site; and therefore no realisations were anticipated. As Sir Ross Cranston observed in paragraph 30 of his judgment, the pending appeal was not identified as an asset. The Liquidators advised that "after considering the legal advice received, there are no further assets or actions which might lead to a recovery for Creditors".

41. The Third Defendant did not receive a copy of the Liquidators' Letter until 7 September 2022. On 22 and 27 September 2022, his solicitors wrote to the Liquidators stating that the appeal was being unlawfully pursued by Taytime, as there was no power to substitute the appellant in an appeal under section 78 TCPA 1990. These letters were copied to PINS. The Liquidators did not reply.

42. On 30 September 2022, the Third Defendant's legal representatives filed and served a "Procedural application in respect of the appeal" which invited the Inspector to determine that the appeal was invalid because there was no power to substitute Taytime in place of MLL as the appellant. The appeal could only be pursued by the Liquidators.

43. The appeal before the Inspector took place on 5 October 2022.

44. On 22 February 2024, Mrs Harrison made her third witness statement in this claim, and exhibited thereto a letter dated 30 January 2024 from Mr Beat, on behalf of the Joint Liquidators, addressed "To Whom it May Concern". It stated as follows:

> "Dear Sirs,
>
> I am writing in my capacity as joint liquidator of Monk Lakes Limited, which entered liquidation on 15 July 2021.
>
> I write to confirm that:
>
> 1. It is and always has been the understanding of the joint liquidators of Monk Lakes Limited that Taytime Limited (a creditor of Monk Lakes Limited) had already, prior to the liquidation, been appointed by the directors of Monk Lakes Limited to act as the agent of Monk Lakes Limited in relation to planning appeal reference APP/U2235/W/20/3259300 ("the Appeal"), with authority to act and take decisions in relation to the Appeal (including the appointment of legal advisors and planning agents), and the intention of the liquidators was to allow that agency to continue. To that end that the indemnity agreement dated 27 September 2021 was entered into and the letter dated 22 September 2021 was written to the Planning Inspectorate.
>
> 2. Monk Lakes Limited (and its liquidators) has not withdrawn either the Appeal or Taytime Limited's authority to act as its agent in relation to the Appeal.
>
> 3. The authority of Taytime Limited to act in relation to the Appeal extends to the proceedings before the High Court in

> Taytime Limited v Secretary of State for Levelling Up, Housing, and Communities (CO/4860/2022)."

The Inspector's decision

45. The hearing of the appeal took place on 5 October 2022 and a site visit was made on 6 October 2022. The Inspector (Mr O.S. Woodwards BA (Hons) MA MRTPI) heard submissions on the Third Defendant's procedural application and on the planning merits.

46. The DL was issued on 21 November 2022 and stated as follows:

> "• The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
>
> • The appeal is made by Monk Lakes Ltd against the decision of Maidstone Borough Council.
>
> • The application Ref 11/1948, dated 4 November 2011, was refused by notice dated 12 March 2020.
>
> • The development proposed is the retention of two lakes known as Bridges and Puma and works to create 3 additional lakes all for recreational fishing, erection of clubhouse building and associated works and landscaping.
>
> **Decision**
>
> 1. The appeal is dismissed.
>
> **Preliminary Matters and Main Issue**
>
> 2. An interested party, David Padden, considers that the appeal was not valid because the appellant is different from the applicant. It is therefore necessary to establish whether the planning appeal was correctly made and is thus capable of being lawfully determined. This matter was discussed with all parties at the hearing. This procedural matter forms the main issue in this case.
>
> **Reasons**
>
> 3. Section 78 of the Town and Country Planning Act 1990 (the Act) provides the right to appeal against planning decisions but this is explicitly limited to 'the applicant'. No alternative options are provided and there are no third party rights of appeal to a refusal of planning permission.
>
> 4. The original planning application was made by Monk Lakes Ltd (MLL). MLL has since entered into liquidation proceedings.

However, the second Gazette notice has not yet been issued, which is the point at which MLL would be dissolved. MLL therefore still exists as a going concern and can, in principle, pursue the appeal as the appellant.

5. However, the liquidator, Quantuma, has submitted a letter, dated 22 September 2021, appointing a separate company, Taytime Ltd (Taytime), to take over full responsibility for the appeal. The letter also confirms that Pegasus Planning (the agents) and James Pereira KC (the legal representative) are instructed by Taytime, not MLL. It was also verbally confirmed at the hearing by some of the consultant team that they had been instructed by Taytime and not MLL. In addition, the Statement of Common Ground (SoCG), dated December 2021, has been signed by Taytime, not MLL. The appellant has offered to re-sign the SoCG this time by MLL, but this would not change the existing document, which is what has been submitted in support of the appeal. I do not view Taytime as an agent for MLL. The appointed agent is the Pegasus Group, as set out in the appeal form, and supporting documents. The combination of the Quantuma letter and the instruction of consultants by Taytime demonstrate that it is now Taytime pursuing the appeal, as the appellant, and not as an agent.

6. MLL is listed as the appellant on the appeal form, dated 11 September 2020, but this has now been overtaken by events, as described above. I acknowledge that the persons behind both MLL and Taytime are the same, ie Mr and Mrs Harrison, who are also listed on the application form. However, the applicant was explicitly listed as MLL and Mr and Mrs Harrison are no longer empowered to act for MLL due to the insolvency proceedings. For the reasons above, it is clear that the party now pursuing the appeal is Taytime, not MLL. The appellant is, therefore, not the applicant, despite the common thread of Mr and Mrs Harrison, who were not the applicant in an individual capacity and were not listed at all on the appeal form.

7. Consequently, there is no valid appeal capable of being determined. As the appeal has not been withdrawn, it must be dismissed. There is no merit, therefore, in assessing the planning merits of the case, whether these relate to character and appearance, heritage harm, flooding and groundwater, harm to living conditions, or any other matter.

Conclusion

9. I conclude that the planning appeal was not correctly made and thus is not capable of being lawfully determined under Section 78 of the Act, irrespective of the planning merits. For the above reasons, the appeal should be dismissed."

Legal framework

General principles

47. In *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), Lindblom J. set out principles applicable to a claim under section 288 TCPA 1990, at [19], which include the following:

> "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to rehearse every argument relating to each matter in every paragraph: see the judgment of Forbes J in *Seddon Properties Ltd v Secretary of State for the Environment* (1978) 42 P & CR 26, 28.
>
> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the principal important controversial issues. An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration: see the speech of Lord Brown of *Eaton-under-Heywood in South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953, 1964B—G.
>
> (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, provided that it does not lapse into Wednesbury irrationality (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) to give material considerations whatever weight [it] thinks fit or no weight at all: see the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780F—H. And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision: see the judgment of Sullivan J in *Newsmith Stainless Ltd v Secretary of State for the Environment, Transport and the Regions (Practice Note)* [2001] EWHC Admin 74 at [6]; [2017] PTSR 1126, para 5 (renumbered).
>
> ……."

48. An Inspector's decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

The scope of this claim

49. Section 288 TCPA 1990 provides, so far as is material, that:

> "(1) If any person -
>
> …
>
> (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds -
>
> (i) that the action is not within the powers of the Act, or
>
> (ii) that any of the relevant requirements have not been complied with in relation to that action,
>
> he may make an application to the High Court under this section. …
>
> …….
>
> (5) On any application under this section the High Court—
>
> …….
>
> (b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action."

50. An application under section 288 TCPA 1990 is not a review or reconsideration of the Inspector's factual findings, nor of the planning merits of the Inspector's decision. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990 (per Forbes J. in *Seddon Properties v Secretary of the State for the Environment* (1978) 42 P & CR 26). Thus, the Claimant must establish that the Inspector misdirected himself in law, or acted irrationally, or failed to have regard to relevant considerations, or that there was some procedural impropriety.

51. Section 288(1)(b)(ii) TCPA 1990 relates to procedural requirements, such as the requirement to give adequate reasons. It is qualified by the requirement that the Claimant must show that he has been substantially prejudiced by the failure to comply with the relevant requirements (subs. (5)(b)). See also *Starbones Ltd v Secretary of State*

for Housing Communities and Local Government [2020] EWHC 526 (Admin), at [74], and *South Bucks DC v Porter (No 2)* [2004] UKHL 33, at [36].

52. By section 288(5)(b) TCPA 1990, the Court only has power to quash an unlawful decision, whereupon it will be re-considered by an Inspector. The Court may not substitute its own decision for that of the Inspector.

53. Therefore the proper focus of this claim is whether or not the Inspector erred in law. I agree with counsel that the Court should consider whether the Inspector misdirected himself on the law of agency. However, I consider that the Inspector's ultimate conclusion that Taytime was now "pursuing the appeal, as the appellant, and not as an agent" for MLL, was based upon an application of the law of agency to his assessment of the evidence of Taytime's role and the relationship with MLL which the Inspector had before him. This is not a pure question of law. Moreover, if the Inspector correctly applied the principles of the law of agency to his findings on the evidence, his ultimate conclusion can only be challenged on conventional public law grounds.

54. I agree that this Court has the advantage of full legal submissions and extensive evidence which the parties failed to provide to the Inspector, but I cannot accept that it should therefore substitute its view on the law, and the evidence, for that of the Inspector. Section 78 TCPA 1990 provides for a full appeal on the law and the merits. In practice, inspectors frequently have to determine difficult legal questions and apply the law to complex and conflicting evidence. In addition to the right of appeal, Parliament has conferred on the High Court a limited supervisory role, not a second appeal on the merits. In my judgment, the Court ought not to depart from the terms of section 288 TCPA 1990 and the well-established approach of the Court to planning statutory review.

Fresh evidence

55. Since permission stage, the parties have erroneously proceeded on the basis that this Court would re-make the Inspector's decision afresh, and therefore they have relied upon evidence which was not available to the Inspector. Generally, in a statutory or judicial review, the Court does not consider evidence which was not before the decision-maker. As Holgate J. said in *Flaxby v Harrogate BC* [2020] EWHC 3204 (Admin), at [18]:

> "….. Except for certain cases of procedural error or unfairness or perhaps irrationality, judicial or statutory review generally proceeds on the basis of the material which was before the decision-maker together with the decision itself (*R v Secretary of State for the Environment ex parte Powis* [1981] 1 WLR 584; *Newsmith Stainless Limited v Secretary of State for the Environment* [2017] PTSR 1126 at [9]; *R (Network Rail Infrastructure Limited) v Secretary of State for the Environment, Food and Rural Affairs* [2017] PTSR 1662 at [10])."

56. Fresh evidence will only be admitted in limited circumstances. In *R v Secretary of State for the Environment ex parte Powis* [1981] 1 WLR 584, Dunn LJ set out the traditional principles upon which fresh evidence should be admitted on judicial review, at 595G,

namely, evidence to show what material was before the decision-maker; or to demonstrate a jurisdictional fact or procedural error; or to prove misconduct by the decision maker. However, the authorities cited in *Fordham: Judicial Review Handbook* (7th ed.) in section 17.2 demonstrate that a more expansive approach has since been adopted in some judicial review claims, in the interests of justice.

57. *Fordham* cites, at paragraph 17.2.4, cases in which the Court has permitted relevant background information to be admitted, to explain the context in which the issue of law or decision arises: *R(Al-ASweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin), at [23]; *R(Pelling) v Bow County Court* [2001] UKHRR 165, at [14]; *R(Driver) v Rhondda Cynon Taf County BC* [2020] EWHC 2071 (Admin), at [8]. In my view, much of the factual background that the parties referred me to (Judgment/12-44) falls within this category and may be considered, provided a clear distinction is maintained between this background material and the material before the Inspector when he made his decision. The Inspector was not provided with the Indemnity Agreement or the email correspondence between Mrs Harrison, her accountants and the Liquidators, summarised at Judgment/31-33. The letter from the Liquidators dated 30 January 2024 obviously postdates the appeal hearing. During the hearing, at my request, the parties drew up a schedule of (1) material that was lodged with PINS by the Council; and (2) material which the parties relied upon in the Inspector's appeal. The material in category (1) was voluminous because of the long history of the planning application, and it appears that the parties only referred the Inspector to the principal documents e.g. the application for planning permission, the appeal notice and supporting documents, the Statement of Common Ground, the correspondence between the Liquidators and PINS, and the Third Defendant's application and supporting documents. In those circumstances, the Inspector could not reasonably be expected to trawl through all the other planning documents in category (1) on his own initiative, and the parties did not submit that he should have done so.

58. Where there is a legal challenge on the grounds that the decision maker failed to investigate adequately, evidence may be admitted to demonstrate what would have been discovered if due enquiry had been made: see the cases cited at *Fordham*, paragraph 17.2.6, including *R(JA) v London Borough of Bexley* [2019] EWHC 130 (Admin), at [48]; *R(D) v Parole Board* [2018] EWHC 694 (Admin). Neither counsel applied to adduce evidence on this basis, presumably because there was no legal challenge by either party contending that the Inspector failed to investigate adequately, or that he made his decision in ignorance of relevant material.

59. Fresh evidence may be relevant and admissible to consideration of remedy, including whether the Court should quash a flawed decision: see the authorities cited in *Fordham* at paragraph 17.2.8, including *R(Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, at [60], [61]; *R(Seabrook Warehousing Ltd) v HMRC* [2010] EWCA Civ 140; at [68]. In my view, this principle is potentially applicable to consideration of the Third Defendant's submission that relief should be refused on Ground 2(i), even if it is successful.

New grounds

60. In *Trustees of Barker Mill Estates v Test Valley BC & Secretary of State for Communities and Local Government* [2016] EWHC 3028 (Admin) [2017] JPL 471,

Holgate J. summarised the approach that the Court will adopt in circumstances where a claimant in a statutory review seeks to raise a point which was not raised before the inspector at appeal:

> "77. In an application for statutory review of a planning decision there is no absolute bar on the raising of a point which was not taken before the inspector or decision-maker. But it is necessary to examine the nature of the new point sought to be raised in the context of the process which was followed up to the decision challenged to see whether the claimant should be allowed to argue it. For example, one factor which weighs strongly against allowing a new point to be argued in the High Court is that if it had been raised in the earlier inquiry or appeal process, it would have been necessary for further evidence to be produced and/or additional factual findings or judgments to be made by the inspector, or alternatively participants would have had the opportunity to adduce evidence or make submissions (or the inspector might have called for more information)."

61. These principles were confirmed by Thornton J. in *London Historic Parks and Gardens Trust v Minister of State for Housing & Ors* [2022] EWHC 829 (Admin), at [115].

Relevant principles of the law of agency

62. Agency is "the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party" (*Bowstead & Reynolds on Agency (2nd ed.)* 1-001 paragraph (1)).

63. Agency typically arises by an express appointment, whether written or oral, by the principal, and acquiescence by the agent, or person similarly empowered to act for the agent (*Bowstead & Reynolds* 2-028). This is referred to as "actual" authority. The scope of an actual authority is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties (see *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 502 per Diplock LJ).

64. Alternatively, conferral of authority may be implied in a case where one party has acted towards another in such a way that it is reasonable for that other party to infer from that conduct assent to an agency relationship. Such assent may be implied when the principal places another in such a situation that, according to ordinary usage, that person would understand themselves to have the principal's authority to act on the principal's behalf or where the principal's words or conduct, coming to the knowledge of the agent, as such as to lead to the reasonable inference that the principal is authorising the agent to act for the principal. In the absence of express words, the court must be satisfied on the totality of the evidence that the relationship of agency has been established, not any

other intended relationship between the parties (see *Bowstead & Reynolds* 2-029 - 2-031).

65. However, "[i]f an agreement in substance contemplates the alleged agent acting on their own behalf, and not on behalf of a principal, then, although they may be described in the agreement as an agent, the relationship of agency will not have arisen": *Halsbury's Laws – Agency*, vol 1 section 1(1) (and footnote 7 citing authorities in support).

66. Unless the authority was conferred by deed (as in the Indemnity Agreement in this case), in which case stricter rules of construction apply, the scope of such authority is generally to be construed liberally (see *Pole v Leask* (1860) 28 Beav 562 at 574). Where authority is conferred in ambiguous terms such that they are fairly capable of more than one construction, an act reasonably done by the agent in good faith which is justified by any of those constructions is deemed to have been duly authorised, even if that construction was not intended by the principal (see *Ireland v Livingston* (1972) LR 5 HL 395 at 416 per Lord Chelmsford).

67. The conferral of actual authority will be construed to include implied authority to do whatever is necessary for, or ordinarily incidental to, the accomplishment of the object of the principal power (see *Bowstead & Reynolds* 3-022 – 3-023).

68. One key characteristic of agency is control: "[I]f the principal gives up all control of the supposed agent the relationship is only doubtfully one of agency" (*Bowstead & Reynolds* 3-018). Similarly, "if an agreement in substance contemplates the alleged agent acting on their own behalf, and not on behalf of a principal, then, although they may be described in the agreement as an agent, the relation of agency will not have arisen" (*Halsbury's Laws – Agency*, vol 1, section 1(1)). In *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd* [2013] FCAFC 29 at [74] (a case cited in *Bowstead & Reynolds* at 1-018) it was held that in that case the alleged agents "were virtually given carte blanche to decide how the mine was to be managed" something that "militates against a conclusion" of there being an agency relationship.

69. In general, the principal authorises the agent to act on the principal's behalf and in the principal's interests: see *Bowstead & Reynolds* 1-001, cited above. The arrangement is for the principal's benefit. Therefore, the principal must reimburse the agent for expenses and must indemnify the agent against liabilities (*Bowstead & Reynolds* 7-057).

70. Similarly, when considering what tasks may be delegated to an agent: "[a]n agent may execute a deed, or do any other act on behalf of the principal, which the principal might personally execute, make or do; except for the purpose of executing a right, privilege or power conferred, or of performing a duty imposed, on the principal personally, the exercise or performance of which requires discretion or special personal skill, or for the purpose of doing an act which the principal is required, by or pursuant to any statute or other relevant rule, to do in person." (*Bowstead & Reynolds* 2-018).

71. These principles show that an agent acts for his principal, not for himself. Accordingly "[c]ourt proceedings cannot usually be commenced in the name of an agent, including under a power of attorney; the principal must be the party named." (*Bowstead & Reynolds* 2-019).

72. Agents are entitled to delegate their authority in whole or in part or to appoint sub-agents with the principal's express or implied authority (*Bowstead & Reynolds* 5-009 – 5-011).

Relevant principles of insolvency law

73. Insolvency law forms an important part of the context for determining the legal issues in this claim.

74. By section 87(1) IA 1986, a company which has commenced a voluntary winding up is obliged to "cease carrying on its business, except so far as may be required for its beneficial wind up". This is not restricted to "trading business". Whilst benefit is not restricted to purely financial benefit, the exercise of the power to carry on the business of the insolvent company must have as its ultimate object the winding up of the company. Carrying on business for any other purpose is impermissible: *Re Baglan Operations Limited (in compulsory liquidation)* [2022] EWHC 647 (Ch), at [49]; *Re Wreck Recovery and Salvage Company* (1880) 15 Ch D 353.

75. Upon insolvency, the powers of the directors cease, save insofar as the company or the liquidator sanctions their continuance: section 103 IA 1986.

76. A liquidator is a creature of statute and may only exercise such powers as are conferred on him (*Kirkpatrick v Snoozebox Ltd* [2014] BCC 477 (Ch), at [12]) and may exercise them only for the purposes for which such powers have been conferred (*Re Mama Milla Ltd* [2016] BCC 1 (Ch), at [40] – [41]).

77. A liquidator must act in the best interests of creditors and must exercise his powers to get in and realise the company's assets and distribute the proceeds amongst creditors. See *In re Southern Pacific Personal Loans Ltd* [2013] EWHC 2485 (Ch), [2014] Ch 426, at [33]; and *Manolete Partners Plc v Hayward and Barrett Holdings Ltd* [2022] BCC 159 (ICC), at [5], [6].

78. The powers of liquidators in the case of a voluntary winding up are set out in section 165 and Schedule 4 IA 1986. The powers specified in Schedule 4 IA 1986 include express powers to:

    i) Compromise, on such terms as may be agreed, all questions in any way relating to or affecting the assets or the winding up of the company (paragraph 3);

    ii) Bring or defend any action or other legal proceeding in the name and on behalf of the company (paragraph 4);

    iii) Sell any of the company's property by public auction or private contract (paragraph 6); and

    iv) appoint an agent to do any business which the liquidator is unable to do himself (paragraph 12).

79. The power to issue proceedings in the name of the company in paragraph 4 of Schedule 4 may only be exercised in what the liquidator believes to be the best interest of the

insolvent company and all those who have an interest in the estate: *In re Longmeade Ltd (in liquidation)* [2016] Bus LR 506, at [66].

80. The power to appoint an agent under paragraph 12 was considered in *McPherson & Keay: The Law of Company Liquidation 5th ed,* at 8-059, as follows:

> "The powers and duties of a liquidator constantly require the exercise of discretion in relation to a variety of matters which arise in the course of the winding up. Both because the liquidator is selected on the strength of personal ability, and because the relation of the liquidator to the company is that of an agent, the liquidator is bound to use his or her own discretion in the management of the affairs and property of the company and the distribution of the assets. [Footnote 509]. The Act expressly authorises the liquidator to appoint an agent to do any business which is unable to be done by the liquidator. [Footnote 510]. But this authority is impliedly limited to acts and transactions of a purely ministerial kind and the discretion of the liquidator is not to be delegated in matters which require the exercise of professional judgment [Footnote 511]. Thus in *Rendall v Conroy* (1897) 8 QLJ 89 where the liquidator authorised an agent to effect a compromise of a debt owing to the company, it was held:
>
> > "the acceptance of a compromise requires the exercise of a discretion by the liquidator [who] cannot delegate his powers in respect of which he must exercise a discretion, to a mere agent.""

81. There was some disagreement between the parties about the meaning of this passage and the relevance of the Australian authorities cited on behalf of the Third Defendant (*Re Day and Dent Construction Pty Ltd* (1984) 9 ACLR 319 and, on appeal, in *Re Ah Toy* (1986) 4 ACLR 480). I have carefully considered the parties' submissions. In my judgment, a liquidator cannot fully delegate his liquidator's powers and functions to an agent. In the course of a liquidation he can, and often will, delegate specific tasks, such as the sale of property or the conduct of litigation, to professional agents, such as solicitors or estate agents, who will exercise their professional judgment on his behalf. However, the liquidator retains ultimate control. Major decisions in the course of the sale of a company's assets, or the conduct of litigation in the name of the company, are likely to be of sufficient significance to require the exercise of discretionary judgment on the part of a liquidator, because they affect the best interests of the company and its creditors.

82. Mr Maurici KC referred to *Ruttle Plant Limited v Secretary of State for Environment Food and Rural Affairs (No.2)* [2008] EWHC 238 (TCC), in which it was confirmed that a liquidator cannot "surrender his fiduciary power to control proceedings commenced in the name of the company" (per Ramsey J. at [43], citing Lightman J. in *Grovewood v James Capel & Co Ltd* [1995] Ch. 80, at 89G). Although that case concerned an assignment, the same principle must surely apply to a surrender of control by a wholesale delegation to an agent.

Grounds of challenge

Ground 2(i)

Taytime's submissions

83. Taytime submitted that the Inspector's decision that the appeal was not properly made was plainly wrong as it was agreed that MLL validly made the appeal before liquidation proceedings began. MLL had not been dissolved and the appeal had not been withdrawn.

84. Therefore, if the Inspector was not satisfied that Taytime was validly acting as MLL's agent, the Inspector should have followed the statutory procedure in section 79(6A) TCPA 1990, for the dismissal of a planning appeal for want of prosecution. This would have given MLL, through the Liquidators, an opportunity to take steps to avoid the appeal being dismissed because it was not being pursued.

85. Taytime also submitted that it was procedurally unfair to dismiss the appeal without first notifying MLL, through the Liquidators, and seeking their confirmation as to whether or not they wished to proceed with the appeal. The Claimant relied on the principles of procedural fairness as set out in *Bounces Properties Limited v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 735 (Admin).

86. Although Taytime's primary case was that Taytime was acting as an agent, it submitted, in the alternative, that MLL could have assigned the statutory right of appeal to Taytime. Taytime relied upon general powers to assign, and in particular, upon *Muorah v Secretary of State* [2023] EWHC 285 (Admin), at [43] – [53], in which the High Court confirmed that the statutory right of appeal under section 289 TCPA 1990 can be assigned.

Third Defendant's submissions

87. The Third Defendant submitted that the Inspector did not wrongly conflate the issues of whether the appeal had been validly made with the issue of whether it could be validly pursued once MLL went into liquidation. The DL should be read benevolently and in accordance with the principles in Judgment/48 above. It was perfectly clear from DL/4 and DL/6 that the Inspector accepted that MLL was named as the appellant on the appeal form and that it could "in principle" pursue the appeal. This was not in dispute between the parties.

88. Taytime's argument under section 79(6A) TCPA 1990 was not made before the Inspector though it had a sufficient opportunity to do so either prior to or at the hearing. If it had been raised, the Inspector would have had to form a judgment as to whether the requirements of section 79(6A) TCPA 1990 were relevant and satisfied, which would have involved making findings of fact. Applying the principles in *Trustees of Barker Mill Estates*, Taytime should not be permitted to raise it for the first time in the High Court.

89. Taytime did not have permission to rely upon its complaint of procedural unfairness.

90. In any event, the Inspector's approach was neither unfair nor prejudicial. MLL and its Liquidators had numerous opportunities to confirm that it intended to pursue the appeal, but did not do so until it sent the letter of 30 January 2024, which came far too late. It is inherently unlikely that the Liquidators would wish to pursue the appeal as they confirmed in the Liquidators' Letter that MLL had "no interest whatsoever" in the Site. Indeed, it would be irrational for them to do so. Therefore, even if the statutory procedure under section 79(6A) TCPA 1990 had been followed, the result for Taytime would inevitably have been the same. Applying the test in *Simplex (GE) Holdings v Secretary of State for the Environment* [1998] 3 PLR 25, relief should be refused.

91. In the Inspector's appeal, it was no part of Taytime's case that the statutory right of appeal had been or could be assigned, and therefore the point could not be pursued in this claim. The Third Defendant's case was there had been an attempt to substitute Taytime as the appellant, which was unlawful and therefore invalid. The Third Defendant did not submit that an assignment had taken place. Indeed, at the appeal hearing, leading counsel for Taytime, the Council and the Third Defendant were all in agreement that there was no power to assign the statutory right of appeal under section 78 TCPA 1990.

Conclusions

Preliminary point

92. As a preliminary point, I consider that Taytime was granted permission to rely upon these grounds of challenge by the Court of Appeal in the order dated 13 November 2023. Stuart-Smith LJ granted permission to Taytime to rely upon Ground 2(i) as advanced in the Statement of Facts and Grounds and the hearing before Sir Ross Cranston. Although the issues of section 79(6A) TCPA 1990, procedural fairness and assignment were not initially pleaded by Taytime, and were not raised by Taytime in the Inspector's appeal, they were raised at the hearing before Sir Ross Cranston.

Section 78 TCPA 1990

93. The right of appeal to the Secretary of State is conferred by section 78 TCPA 1990 which provides, so far as is material:

> "(1) Where a local planning authority –
>
> (a) refuse an application for planning permission ….;
>
> ……
>
> the applicant may by notice appeal to the Secretary of State."

94. On a proper interpretation of section 78(1) TCPA 1990, it is clear that only the applicant for planning permission may appeal against a refusal of planning permission. This is confirmed by the PINS Procedural Guidance which states, at paragraph 2.3.1, "[o]nly the person who made the planning application can make an appeal". There is no ability for a third party to pursue an appeal under section 78 TCPA 1990. The terms of section

78 may be contrasted with appeals against enforcement notices where section 174 TCPA 1990 provides a right of appeal to those having an interest in the land or a relevant occupier.

The Inspector's decision

95. The Inspector correctly directed himself on the right of appeal under section 78 TCPA 1990, at DL/3. MLL was the applicant for planning permission and therefore only MLL could appeal against refusal under section 78(1) TCPA 1990. MLL lodged its appeal on 11 September 2020.

96. At DL/4, the Inspector correctly found that MLL had since entered into liquidation proceedings but, as the second Gazette notice had not yet been issued, which would be the point at which MLL would be dissolved, MLL still existed as a company, and could in principle pursue the appeal as the appellant.

97. On considering the evidence, at DL/5, the Inspector concluded that Taytime was not acting as an agent for MLL. It was pursuing the appeal as the appellant, and not as an agent.

98. The Inspector concluded that the appellant, Taytime, could not pursue the appeal under section 78 TCPA 1990 as it was not the applicant for planning permission (DL/6).

99. In my view, the Inspector then fell into error by concluding that there was no valid appeal capable of being determined, and that since the appeal had not been withdrawn, it had to be dismissed (DL/7). The Inspector had earlier found that MLL was still in existence and could in principle pursue the appeal. In the light of the Inspector's finding that Taytime was not entitled to pursue the appeal, the obvious next step was to find out whether, MLL, acting through its Liquidators, intended to withdraw the appeal or pursue it. I consider that it was premature and unfair to dismiss the appeal outright without doing so.

100. It appears from DL/2 and DL/9 that the Inspector wrongly thought that the issue was whether the appeal had been "correctly made" when in fact the issue was whether the appeal was being lawfully pursued. It was common ground that the appeal had been lawfully made. Reading the decision as benevolently as possible, I have concluded that this was more than infelicitous drafting, and that the Inspector made an error of law by erroneously conflating two separate issues. That error may have contributed to his mistaken conclusion that, if the appeal was not being validly pursued, there was no valid appeal capable of being determined. I should make it clear that, contrary to Mr Streeten's submission, this error was not to be found in Mr Maurici KC's submissions made on behalf of the Third Defendant.

101. I do not accept Mr Streeten's submissions, at paragraph 62 of the Replacement Statement of Facts and Grounds, that the matter was governed by the letter from PINS dated 17 November 2021, and that the onus was on PINS to contact the Liquidators should the position change. That correspondence was superseded by the proceedings before the Inspector. The Liquidators were notified of the Third Defendant's application to the Inspector and could have responded, but chose not to do so.

Section 79(6A) TCPA 1990

102. In my view, the Inspector could and should have addressed this matter by means of the dismissal for want of prosecution procedure in section 79(6A) TCPA 1990, which provides:

> "(6A) If at any time before or during the determination of such an appeal it appears to the Secretary of State that the appellant is responsible for undue delay in the progress of the appeal, he may—
>
> (a) give the appellant notice that the appeal will be dismissed unless the appellant takes, within the period specified in the notice, such steps as are specified in the notice for the expedition of the appeal; and
>
> (b) if the appellant fails to take those steps within that period, dismiss the appeal accordingly."

Assignment

103. Assignment may be defined as the transfer from a person (the assignor) of the whole or part of an existing right or interest in intangible property presently owned by the assignor.

104. In my judgment, the Inspector cannot be criticised for failing to consider whether the statutory right of appeal had been validly assigned to Taytime. It was no part of Taytime's case before the Inspector that the statutory right of appeal had been or could be assigned. The Third Defendant's case was there had been an attempt to substitute Taytime as the appellant, which was unlawful and therefore invalid. Contrary to Mr Streeten's submissions, the Third Defendant did not submit that an assignment had taken place. Indeed, at the appeal hearing, leading counsel for Taytime, the Council and the Third Defendant were all in agreement that there was no power to assign the statutory right of appeal under section 78 TCPA 1990.

105. As stated above, on a proper interpretation of section 78(1) TCPA 1990, it is clear that only the applicant for planning permission may appeal against a refusal of planning permission. There is no ability for a third party to pursue an appeal under section 78 TCPA 1990. Therefore, no power to assign can be derived from the wording of section 78 or any other provision in the TCPA 1990.

106. Mr Waistell, counsel for Taytime, referred to the broad powers of assignment of property, in particular by liquidators under section 436 IA 1986. He submitted that the Liquidators in this case would have power to assign a cause of action to an assignee (Taytime) with a genuine commercial interest in the prosecution of the appeal. He added that assignment of claims is a way in which Liquidators can seek to obtain additional value for creditors.

107. However, I note from the decision in *Ruttle Plant Limited v Secretary of State for Environment Food and Rural Affairs (No.2)* [2008] EWHC 238 (TCC), at [40] – [46],

that whilst a cause of action and the fruits of a cause of action may be assigned, a liquidator may not assign their personal powers. A liquidator may not assign to a third party the right to prosecute and continue proceedings in the name of the company, in as full a manner as the liquidator. In my view, the purported assignment which the Liquidators made to Taytime would fall foul of this restriction.

108. In any event, I accept the submissions made on behalf of the Third Defendant that the statutory right of appeal under section 78 TCPA 1990 is not a "cause of action" within the meaning of section 436(1) IA 1986. In *B. Johnson & Co (Builders) v Minister of Health* [1947] 2 ALL ER 395, the House of Lords confirmed the following in relation to a planning appeal:

> "it is not a lis inter partes, and for the simple reason that the local authority and the objectors are not parties to anything that resembles litigation. . . . on the substantive matter, viz whether the order should be confirmed or not, there is a third party who is not present, viz, the public, and it is the function of the minister to consider the rights and interests of the public."

109. This principle was confirmed by the House of Lords in *R(Alconbury Developments) v SSETR* [2003] 2 AC 295, at [60], [75], [139] and [142] and, more recently, by Holgate J. in *Mead Realisations v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 279 (Admin), at [55].

110. In my judgment, *Muorah v Secretary of State* [2023] EWHC 285 (Admin), is not authority for the proposition that the statutory right of appeal under section 78 TCPA 1990 can be assigned to a third party. It concerned an appeal to the High Court under section 289 TCPA 1990 against the dismissal of an appeal under section 174 TCPA 1990 against an enforcement notice. The Deputy Judge struck out the claim on the basis that the cause of action was vested in the trustee in bankruptcy. The issue was whether the right of appeal to the High Court could be assigned, not whether the appeal before the Inspector under section 174 TCPA 1990 could be assigned. In any event, the rights of appeal under section 174 TCPA 1990 are considerably wider than the rights under section 78 TCPA 1990: see Judgment/79.

111. My conclusion is that MLL's right of appeal under section 78(1) TCPA 1990 cannot be assigned to a third party by the Liquidators.

Relief

112. I am not persuaded that relief should be refused, applying the *Simplex* principle, on the basis that, even if the statutory procedure under section 79(6A) TCPA 1990 had been followed, the outcome would inevitably have been the same. It remains possible that the Liquidators may be persuaded to pursue the appeal on behalf of MLL, through agents, if appropriate terms can be agreed. That will be a matter for their commercial judgment, whilst having regard to their statutory obligations. The Liquidators must act in the best interests of creditors and MLL does not appear to have any further realisable assets. However, if the refusal of planning permission were to be overturned, that would benefit Taytime, as a creditor and as owner of the Site with an Asset Purchase Agreement. As the Third Defendant points out, the Liquidators' Letter stated that MLL

had "no interest whatsoever" in the Site and the Indemnity Agreement stated that MLL has never had any interest in the planning application. But the Liquidators' letter of 30 January 2024 confirms that MLL, through its Liquidators, has still not withdrawn the appeal. Apparently MLL has not yet been dissolved because the Liquidators are awaiting the outcome of this claim. The Harrisons clearly wish to pursue the appeal, and Mr Harrison has a controlling interest in Taytime and the companies that run the business. Whilst the Indemnity Agreement demonstrates that the Liquidators will be careful to avoid incurring any financial liability, the Liquidators have co-operated with the Harrisons to achieve their objectives in other respects, and may seek to do so in regard to maintaining the appeal. I am unable to conclude that any such decision could not lawfully be made, without knowing the basis for any such decision.

113. For these reasons, Ground 2(i) succeeds, save in regard to assignment.

Ground 2(ii)

Unpleaded issues

(1) Continuing Agency

114. Shortly before the hearing, on 15 February 2024, Mr Waistell filed a further skeleton argument titled "Claimant's supplementary note on private law issues" ("Claimant's Private Law Note"). At paragraphs 2 to 5, he submitted that Taytime had entered into a contract with MLL, to act as its agent for the purpose of pursuing the appeal, prior to the date on which MLL went into voluntary liquidation. No factual basis for this submission was provided. Mr Waistell claimed that the agency agreement remained in force after 15 July 2021 and so there was no need for the liquidators to appoint Taytime as agent.

115. As Mr Maurici KC convincingly demonstrated, in the 'Third Defendant's Replacement Supplemental Note' ("D3's Replacement Note"), at paragraphs 11-15, these submissions were wholly at odds with Taytime's pleaded case in the original Statement of Facts and Grounds and the Replacement Statement of Facts and Grounds, and with Taytime's case at the oral permission hearing. Prior to the Claimant's Private Law Note, Taytime's case was that the appointment of Taytime as MLL's agent was effected by the Liquidators' Letter dated 22 September 2021. Surprisingly, there has been no application to amend the pleadings.

116. The 'continuing agency' point first appeared in the third witness statement of Mrs Harrison, made on 8 February 2024, at paragraph 17, where she said that it was "explained at the appeal hearing itself by my husband (who had been the director of Monk Lakes Limited until its liquidation) that Taytime had been appointed by him on behalf of Monk Lakes Limited to act as agent for the appeal, and the two letters from the liquidator setting out the same (the most recent letter is appended to this statement…).". The letter from the Liquidators, dated 30 January 2024, was an exhibit to the witness statement.

117. Mrs Harrison's account in her third witness statement does not correspond with the account she gave in her first witness statement dated 10 May 2023.

118. The Secretary of State has been asked for the Inspector's Notes as there is no record in the DL of Mr Harrison giving evidence at the hearing.

119. The Liquidators' knowledge of the matter can only be hearsay evidence based upon what they have been told by the Harrisons, and so it is of limited probative value.

120. The details and date of the alleged agreement have not been identified, which makes it very difficult to address.

121. In these circumstances, I have decided that it would be unfair to the Third Defendant and his legal team for Taytime to be permitted to rely upon these new submissions.

(2) Liquidators' powers to appoint agents of the company

122. Taytime's pleaded case was that the Liquidators' Letter of 22 September 2021 validly appointed Taytime as agent, pursuant to its powers under paragraph 12 of Schedule 4 to the IA 1986.

123. In the Claimant's Private Law Note, at paragraphs 6 to 9, Mr Waistell submitted, in the alternative, that the Liquidators' appointment of Taytime was not made under their statutory powers in the IA 1986. Instead, the Liquidators were exercising the powers of directors of the company to appoint an agent. This power was distinct from the statutory powers. Mr Waistell developed this point further in the "Claimant's note on liquidators' powers to appoint agents" dated 26 February 2024.

124. I accept Mr Maurici KC's submissions at paragraphs 24 to 27 of D3's Replacement Note that the submissions at paragraphs 6 to 9 of the Claimant's Private Law Note have never been pleaded. They were not raised in Taytime's skeleton argument for this hearing, nor at the oral permission hearing. Prior to the Private Law Note, Taytime's case was that the appointment as agent was made pursuant to paragraph 12 of Schedule 4 IA 1986.

125. This is a significant change, made very late, which was unfair to the Third Defendant and his legal representatives. There has been no application to amend the pleadings. In these circumstances, I have decided Taytime is not permitted to rely upon these submissions.

Taytime's submissions

126. Taytime submitted that the Inspector erred in law in concluding that Taytime was not acting as MLL's agent. The Liquidators' Letter of 22 September 2021 validly appointed Taytime as agent, pursuant to its powers under paragraph 12 of Schedule 4 to the IA 1986. The wording of the letter - in particular, the references to "appoint Taytime" to "manage" the appeal process – was consistent with an agency relationship. There was no suggestion of a transfer of rights consistent with an assignment.

127. The Inspector erred in suggesting at DL/5 that Taytime could not be MLL's agent as Pegasus Group were named as agents on the appeal form. Taytime was entitled to appoint a sub-agent or to delegate its authority, with the express or implied authority of the principal (the Liquidators).

128. The Inspector's reasoning, at DL/5-6, did not provide a valid basis for concluding that Taytime was not acting as agent for MLL or that "the party now pursuing the appeal is Taytime, not MLL". The material before the Inspector was consistent with the Liquidators' appointment of Taytime as agent.

129. The Inspector failed to give adequate reasons for his conclusion that Taytime was not acting as an agent for MLL, or that "it is now Taytime pursuing the appeal, as the appellant and not as an agent".

The Third Defendant's submissions

130. The Third Defendant submitted that the Liquidators' Letter amounted to a complete renunciation by the Liquidators of any control over Taytime. Taytime was appointed to "take over full responsibility" for the appeal because MLL had "no interest whatsoever" in the Site. This was an impermissible wholesale delegation of authority by the Liquidators.

131. As MLL has no interest in the Site and the appeal has not been identified as an asset by the Liquidators, Taytime could not possibly be said to be acting on MLL's behalf because there was no interest to act on behalf of.

132. The Indemnity Agreement records the Liquidator's agreement "to permit Taytime to adopt the appeal" which confirmed the Third Defendant's construction of the Liquidators' Letter as an impermissible wholesale delegation of authority by the Liquidators. The grant of an indemnity by the supposed agent to the supposed principal was inconsistent with a typical agency relationship.

133. The parties to the Statement of Common Ground, dated 21 December 2021, were Taytime Limited and Maidstone Borough Council. It was signed by Jim Tarzey of Pegasus Group, on behalf of Taytime. This was further confirmation that Taytime had adopted the appeal, and was not acting as an agent on behalf of the Liquidator.

134. Even if there were errors or deficiencies in the Inspector's reasoning, it is inevitable that the Inspector would reach the same conclusion if the decision were quashed and redetermined, in the light of the Indemnity Agreement, applying the *Simplex* principle.

Conclusions

135. I have examined the lawfulness of the Inspector's decision on the basis of the evidence that was referred to at the appeal (see Judgment/57). In my judgment, the Inspector was entitled to conclude that (1) Taytime was not acting as an agent for MLL or the Liquidators in the appeal; and (2) Taytime was acting on its own behalf in the appeal, seeking to substitute itself as the appellant in place of MLL. I consider that this was a rational conclusion on the evidence available to him.

136. The Liquidators' Letter explained that MLL, the appellant, was in voluntary liquidation; it had "no interest in this land whatsoever"; and had never been the appropriate appellant. Taytime, on the other hand, was the owner of the land to which the appeal related, and had an Asset Purchase Agreement in place for the rights to any planning permission, application or appeal associated with their land. Representatives of

Taytime believed that Taytime should have been named as the appellant from the outset. Taytime had instructed Pegasus Planning (the agent), the consultants, and Mr Pereira KC for the submission of appeal. Therefore, the Liquidators had decided to "appoint" Taytime "to take over full responsibility" for the appeal as it was "best placed to manage that process from this point forward".

137. The Inspector was entitled to conclude that this description was inconsistent with any ongoing agency agreement between MLL/the Liquidators and Taytime. MLL was in voluntary liquidation and it had no interest in the Site, or the outcome of the appeal, and so the Liquidators had decided to transfer "full responsibility" for the appeal to Taytime, which had a direct interest in the appeal and the application for planning permission. I agree with the Third Defendant that the Liquidators' Letter amounted to a renunciation by the Liquidators of any control over Taytime and was an impermissible wholesale delegation of authority by the Liquidators. It is a general principle of the law of agency that an agency relationship does not exist where the purported principal has surrendered control and the purported agent acts on its own behalf: see Judgment/68. More specifically in the context of insolvency, a liquidator cannot fully delegate his powers and functions to an agent; in particular he must not surrender his fiduciary power to control proceedings commenced in the name of the company: see Judgment/80 – 82.

138. In addition to the Liquidators' Letter, there was other evidence which indicated that Taytime was acting on its own behalf, as if it were the appellant, and not as an agent for MLL/the Liquidators, which the Inspector was entitled to take into account.

    i) MLL was the applicant for planning permission. According to the appeal notice, dated 11 September 2020, MLL was the appellant and Pegasus Group was its agent in the appeal.

    ii) However, by the time the Statement of Common Ground was filed, on 21 December 2021, Taytime was expressly identified as the appellant in the Statement of Common Ground, with Pegasus Group acting as its agent.

    iii) Taytime had taken on full responsibility for the appeal by instructing James Pereira KC, Pegasus Group, and the consultants.

    iv) The documents attached to the Third Defendant's application included the Liquidators' Progress Report dated 8 September 2022 which confirmed that MLL had no interest in the Site; its business assets had been sold; and "there were no further assets or actions that might lead to a recovery for Creditors". The appeal before the Inspector was not identified as an asset. This information confirmed that MLL and the Liquidators had no financial interest in pursuing the appeal.

139. As to the law, the Inspector had the benefit of the Third Defendant's 'Procedural application in respect of the appeal' which correctly set out the legal principles to be applied, in particular, that only MLL could act as the appellant in the appeal under section 78 TCPA 1990, and that there was no power to substitute Taytime as appellant. The letters from the Third Defendant's solicitors to the Liquidators, dated 22 and 27 September 2022, addressed the Liquidators' powers and duties. The Inspector also had

the benefit of oral submissions from Mr Pereira KC for the appellant, Ms Thomas KC for the Council and Mr Maurici KC for the Third Defendant.

140. It was no part of Taytime's case before the Inspector that the statutory right of appeal had been or could be assigned. The Third Defendant's case was there had been an attempt to substitute Taytime as the appellant, which was unlawful and therefore invalid. It is plain that the Inspector accepted that submission. Contrary to Mr Streeten's submissions, the Third Defendant did not submit that an assignment had taken place. Indeed, at the appeal hearing, leading counsel for Taytime, the Council and the Third Defendant were all in agreement that there was no power to assign the statutory right of appeal under section 78 TCPA 1990.

141. I do not consider that the Inspector's reasoning discloses any misdirection in regard to the law of agency. Any planning inspector will be familiar with the role of agents in planning applications and appeals, as they are extensively used by applicants for planning permission. The Inspector correctly distinguished between the role of an agent, who acts on behalf of a principal, and the role of appellant, who acts on its own behalf.

142. In my view, there is no proper basis for inferring that the Inspector mistakenly believed that an agent could not appoint a sub-agent. That was not what he said, nor was it the point at issue. The straightforward point was that MLL already had an agent and so it had no need to appoint Taytime as its agent as well. Pegasus Group, who were planning consultants, were named as MLL's agents in the appeal notice dated 11 September 2020. They continued to be active as agents throughout. The Inspector would have noted that Mr Tarzey of Pegasus Group was the signatory to the Statement of Common Ground. In Annex A of the DL, the list of appearances for the appellant included four consultants from Pegasus Group: Mr Tarzey (Planner); Ms Claire Gayle (Heritage Consultant); Ms Liz Mcfaydean (EIA Consultant) and Beth Lambourne (Planner). If the Liquidators wished to pursue the appeal on behalf of MLL, they could have continued to use Pegasus Group to do so as their agent. The reason that Taytime was participating in the appeal was that it owned the Site and had an Asset Purchase Agreement and so it had a direct financial interest in securing planning permission. In doing so, it was acting in its own interests and on its own behalf, not as agent on behalf of MLL. This was not a genuine agency agreement.

143. The reasons in a decision letter are required to meet the standard set out in *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, per Lord Brown, at [36]:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse

> inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

144. The Inspector's reasons were pithy and "briefly stated" in accordance with Lord Brown's guidance. There was limited material before the Inspector and he addressed the evidence and the submissions that were before him. He was entitled to write his decision on the basis that the parties were "well aware of the issues involved and the arguments advanced". In my view, the reasons were clear and intelligible. I am not persuaded that Taytime and the Harrisons did not understand them, nor that they were substantially prejudiced by any inadequacy in the reasons. In reality, their complaint is that the Inspector's reasoning was incorrect. I bear in mind the concession made by the Secretary of State and the Council that the reasons were inadequate. However, having had the benefit of hearing the claim fully argued over 2 days, I have reached a different conclusion.

145. For these reasons, Ground 2(ii) does not succeed.

Final conclusions

146. The application under section 288 TCPA 1990 is allowed on Ground 2(i) (save in regard to assignment). Ground 2(ii) is dismissed.

147. The appropriate relief on Ground 2(i) will be determined following submissions from counsel.