Neutral Citation Number: [2012] EWHC 3708 (Admin)

Case No: CO/4764/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN LEEDS

Leeds Combined Court,
1 Oxford Row, Leeds, LS1 3BG

Date: 20th December 2012

Before:
MR JUSTICE HICKINBOTTOM

- -

Between:

THE QUEEN on the application of
ZURICH ASSURANCE LIMITED trading as
THREADNEEDLE PROPERTY INVESTMENTS

Claimant

- and -

NORTH LINCOLNSHIRE COUNCIL

Defendant

- and -

SIMONS DEVELOPMENTS LIMITED

Interested Party

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Paul G Tucker QC and Anthony Gill (instructed by **Nabarro LLP**) for the **Claimant**
Vincent Fraser QC and Alan Evans (instructed by **Legal Services Department, North Lincolnshire Council**) for the **Defendant**
Christopher Katkowski QC and Graeme Keen (instructed by **Gordons LLP**) for the **Interested Party**

Hearing date: 17 December 2012

- -

Judgment
As Approved by the Court

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON MR JUSTICE HICKINBOTTOM

Mr Justice Hickinbottom:

Introduction

1. The Claimant ("Zurich") is the owner of the Foundry Shopping Centre, which lies within the primary shopping area in the centre of Scunthorpe, the largest town in North Lincolnshire. The shopping centre comprises 19,000 sq m of retail floorspace in 45 units.

2. The Interested Party ("Simons") has an option to purchase the Trent Valley Garden Centre, Doncaster Road, Gunness ("the Site"), which is about 2.5 kilometres from Scunthorpe town centre.

3. On 26 March 2012, the Defendant ("the Council"), which is the relevant local planning authority, granted planning permission to Simons to demolish the garden centre and its associated structures, and construct a retail park with four retail units and associated access roads, car parking, servicing area and landscaping.

4. In this claim, issued on 8 May 2012, Zurich challenges that decision, with the permission of His Honour Judge Gosnell sitting as a judge of this court granted on 23 July 2012.

5. At the substantive hearing, Zurich was represented by Paul Tucker QC and Anthony Gill, the Council by Vincent Fraser QC and Alan Evans, and Simons by Christopher Katkowski QC and Graeme Keen.

Factual Background

6. The Site has been a garden centre since the mid-1980s: on 17 January 1985, planning permission was granted for a change of use of the land, and to erect appropriate buildings. That permission was subject to a condition (Condition 2) that limited the goods that could be sold to a prescribed list which, in general, excluded food and clothes. However:

    i) full planning permission was granted on 3 April 1986 to retain a restaurant, lounge and patio area;

    ii) outline planning permission was granted on 9 August 1990 to erect buildings to create a non-food retail warehouse park (although that was never implemented, and has of course long since lapsed); and

    iii) there is significant evidence that the Site has in fact been used for very wide retail use – far wider than allowed by Condition 2 – for some considerable time (e.g. the Secretary of State's decision letter of 9 August 1990 refers to the garden centre having "already some… 4,500 sq m of retail floorspace used for the sale of a wide range of goods").

7. On 22 August 2011, Simons made a further application for planning permission for a new retail park on the Site, initially proposing six retail outlets, but later reduced to four namely one large unit (4,645 sq m) and three smaller units. Accompanying the application was a screening opinion dated 22 July 2011 under Regulation 4 of the Town and Country Planning (Environmental Impact Assessment) (England and

Wales) Regulations 1999 (SI 1999 No 293), to the effect that a full environmental impact assessment was unnecessary. The application was validated by the Council on 31 August 2011.

8. Two letters of objection were lodged by planning consultants representing Zurich (Indigo Planning Limited, "Indigo"). However, on 14 December 2011, the application was considered by the Council's Planning Committee, which resolved in favour of granting it subject to the completion of a satisfactory Section 106 planning obligation. The application was referred to the Secretary of State, who indicated that the matter would not be called-in for decision by him.

9. On 23 December 2011, a letter before claim was sent to the Council by an informal group of local businesses and residents opposed to the project, known as "Keep Scunthorpe Alive" ("KSA"), challenging the decision to grant permission; and further letters of objection were sent by Indigo. As a result, the Council's case officer (Mr David Wordsworth) prepared a further report for the committee which, rather than merely updating the earlier report to deal with the objections received, was a comprehensive report covering all of the ground again including the contents of the objections to which I have referred ("the Main Report") with an addendum of its own responding to two late, further letters of objection from Indigo and KSA ("the Addendum Report"). It is therefore unnecessary for me to consider the earlier report further.

10. On 7 March 2012, on the basis of the Main Report and the Addendum Report, the Council's Planning Committee reconsidered the application, and again resolved to grant permission subject to referral and a satisfactory Section 106 obligation, in the following terms:

> **"Resolved** - (a) That the committee is mindful to grant permission for the development; (b) that the application be referred to the Secretary of State in accordance with statutory procedures to enable him to consider whether or not to intervene; (c) that in the event of the Secretary of State deciding not to intervene, the Head of Development Management be authorised to grant permission subject to the completion of a formal agreement under Section 106 of the Town and Country Planning Act 1990 providing for off-site highway improvements, Scunthorpe town centre protection, protected species translocation and maintenance and a contribution towards improving the existing footpaths in the vicinity of the site, and to the conditions contained in the report, and (c) [sic] that if the obligation is not completed by 7 June 2012, the Head of Development Management be authorised to refuse the application on the grounds of the adverse impact upon the vitality and viability of Scunthorpe town centre, adverse impact upon highway safety and levels of congestion within the locality, adverse impact upon protected species and their habitat, and non-compliance with Policy EC16 of PPS 4, policies T2 and T6 of the North Lincolnshire Local Plan, and policies C14, C25 and CS17 of the North Lincolnshire Core Strategy."

> (The voting being equal on the above matter, … the chairman used his second and casting vote in favour of the motion)."

That resolution very much followed the wording of the officer's formal recommendation at pages 63-4 of the Main Report.

11. The Secretary of State did not call-in the decision. A Section 106 agreement was completed, and full planning permission granted, on 26 March 2012.

12. It was a condition of the grant of planning permission (Condition 38) that the first tenant of the large unit should be a retail company within the Marks and Spencer plc group of companies ("Marks & Spencer"). Marks & Spencer had had a 949 sq m shop in High Street, Scunthorpe from 1931 to early 2011 when it closed, commercial non-viability being given as the reason for closure.

13. It is that grant of planning permission on 26 March 2012 that Zurich now challenges.

Legal Principles

14. This case hinges largely upon criticisms of the officer's Main and Addendum Reports to the Council's Planning Committee, seen in the light of national and local planning policy. The relevant legal principles relating to such reports and policy were agreed by the parties, and are uncontroversial.

15. Each local planning authority delegates its planning functions to a planning committee, which acts on the basis of information provided by case officers in the form of a report. Such a report usually also includes a recommendation as to how the application should be dealt with. With regard to such reports:

    i) In the absence of contrary evidence, it is a reasonable inference that members of the planning committee follow the reasoning of the report, particularly where a recommendation is adopted.

    ii) When challenged, such reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole. Consequently:

> "[A]n application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken" (Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council (18 April 1997) 1997 WL 1106106, per Judge LJ as he then was).

    iii) In construing reports, it has to be borne in mind that they are addressed to a "knowledgeable readership", including council members "who, by virtue of that membership, may be expected to have a substantial local and background knowledge" (R v Mendip District Council ex parte Fabre (2000) 80 P & CR

500, per Sullivan J as he then was). That background knowledge includes "a working knowledge of the statutory test" for determination of a planning application (Oxton Farms, per Pill LJ).

16. The principles relevant to the proper approach to national and local planning policy are equally uncontroversial:

    i) The interpretation of policy is a matter of law, not of planning judgment (Tesco Stores Ltd v Dundee City Council [2012] UKSC 13).

    ii) National planning policy, and any relevant local plan or strategy, are material considerations; but local authorities need not follow such guidance or plan, if other material considerations outweigh them.

    iii) Whereas what amounts to a material consideration is a matter of law, the weight to be given to such considerations is a question of planning judgment: the part any particular material consideration should play in the decision-making process, if any, is a matter entirely for the planning committee (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 at page 780 per Lord Hoffman).

The Relevant National and Local Guidance

17. At the relevant time, national planning policy was contained in Planning Policy Statement 4: Planning for Sustainable Economic Growth ("PPS4"), supplemented by Planning for Town Centres: Practice Guidance on Need, Impact and Sequential Approach ("the PPS4 Practice Guidance"), both published by the Secretary of State for Communities and Local Government. (For the sake of completeness, it should be said that PPS4 was replaced on 27 March 2012, i.e. the day after the relevant planning decision in this case. However, the National Planning Policy Framework, which replaced PPS4, has no relevance to this claim.)

18. PPS4 identifies the Government's overreaching objective for a prosperous economy as "sustainable economic growth" (paragraph 9). To help achieve that, the Government's more particular objectives for planning include building prosperous communities by improving the economic performance of towns, delivering more sustainable patterns of development, and promoting the vitality and viability of towns and other centres as important places for communities (including the focusing of new economic growth and development of main town centre uses in existing centres) (paragraph 10).

19. One policy to that end is the requirement for sequential assessment for planning applications for main town centre uses that are not in an existing centre and not in accordance with an up-to-date development plan (Policy EC14.3). Such sequential assessments must be performed in accordance with Policy EC15, which provides:

> "15.1 In considering sequential assessments required under Policy EC14.3, local planning authorities should:
>
> a. ensure that sites are assessed for their availability, suitability and viability.

b. ensure that all in-centre options have been thoroughly assessed before less central sites are considered.

c. ensure that where it has been demonstrated that there are no town centre sites to accommodate a proposed development, preference is given to edge of centre locations which are well connected to the centre by means of easy pedestrian access.

d. ensure that in considering sites in or on the edge of existing centres, developers and operators have demonstrated flexibility in terms of:

i. scale: reducing floorspace of their development;

ii. format: more innovative site layouts and store configurations such as multi-storey developments with smaller footprints;

iii. car parking provisions; reduced or reconfigured car parking areas; and

iv. the scope for disaggregating specific parts of a retail or leisure development, including those which are part of a group of retail or leisure units, onto separate, sequentially preferable, sites. However, local planning authorities should not seek arbitrary sub-division of proposals.

15.2 In considering whether flexibility has been demonstrated under policy EC15.1.d above, local planning authorities should take into account any genuine difficulties which the applicant can demonstrate are likely to occur in operating the proposed business model from a sequentially preferable site, for example where a retailer would be limited to selling a significantly reduced range of products. However, evidence which claims that a class of goods proposed to be sold cannot be sold from the town centre should not be accepted."

20. Policy EC16.1 requires planning applications for main town centre uses that are not in a centre and not in accordance with an up-to-date development plan to be assessed against a number of identified impacts on centres, including "the impact of the proposal on town centre vitality and viability…" (Policy 16.1.b). Policy EC10.2 requires such applications also to be assessed against a number of other considerations, including the impact on economic and physical regeneration (Policy EC10.2.d) and the impact on local employment (Policy EC 10.2.e).

21. Policy EC17 is of particular importance in this claim. It provides as follows:

"EC17.1 Planning applications for main town centre uses that are not in an existing centre and not in accordance with an up to

date development plan should be refused planning permission where:

a. the applicant has not demonstrated compliance with the requirements of the sequential approach (policy EC15); or

b. there is clear evidence that the proposal is likely to lead to significant adverse impacts in terms of any one of impacts set out in policies EC10.2 and 16.1 (the impact assessment), taking account of the likely cumulative effect of recent permissions, developments under construction and completed developments.

EC17.2 Where no significant adverse impacts have been identified under policies EC10.2 and 16.1, planning applications should be determined by taking account of:

a. the positive and negative impacts of the proposal in terms of policies EC10.2 and 16.1 and any other material considerations; and

b. the likely cumulative effect of recent permissions, developments under construction and completed developments.

EC17.3 Judgments about the extent and significance of any impacts should be informed by the development plan (where this is up to date). Recent local assessments of the health of town centres which take account of the vitality and viability indicators in Annex D of this policy statement and any other published local information (such as a town centre or retail strategy), will also be relevant."

22. The effect of Policy EC17, and the requirements it places on a local authority applying it, are clear – and again uncontentious as between the parties to this claim.

i) Where a planning application is for development of main town centre uses not in a centre and not in accordance with an up-to-date development plan, then it is for the applicant to demonstrate compliance with the requirements of the sequential approach (confirmed in paragraph 5.6 of the PPS4 Practice Guidance).

ii) The question as to whether the applicant has demonstrated compliance is logically binary, i.e. it is capable of only one of two answers, "yes" or "no". Compliance has either been demonstrated, or it has not.

iii) If it has been demonstrated, and no significant adverse impacts have been identified under Policies EC10.2 or 16.1, then the application is determined by the planning committee performing a balancing exercise, taking account of the positive and negative impacts of the proposal in terms of those two policies and any other material considerations. That balancing exercise takes place within the four corners of the policy: the policy requires it to be performed.

iv) If it has not been demonstrated, or if it has been demonstrated but there is clear evidence that the proposal is likely to lead to significant adverse impacts set out in Policies EC10.2 and 16.1, then the policy is that the application should be refused. However, that national policy (of refusing an application in these circumstances) is capable of being displaced if the planning committee considers that it is outweighed by other material considerations. That too requires the committee to perform a balancing exercise, but this exercise is performed outside the four corners of the policy: it is required because of the *nature* of the policy, not because of its *terms*. However, one negative factor that must be taken into account in this exercise is of course the fact that it is the national policy to refuse an application in these circumstances.

23. That is the relevant national policy. Turning to local policy, the development plan for North Lincolnshire comprises three elements:

i) The Yorkshire and Humber Plan (Regional Spatial Strategy to 2026): The Localism Act 2011 enables the revocation of regional policies, but that has not been fully implemented yet. Policy YH4 identifies Scunthorpe as a sub-regional town which should be the prime focus for facilities (including retail shopping) in the region.

ii) Those parts of the North Lincolnshire Local Plan that were saved by a direction of the Secretary of State dated 17 September 2007: Policy S8 (Out-of-centre Retail and Leisure Development) reflects the national sequential approach, by only permitting out-of-centre retail development where (amongst other things):

- a clear need for the development can be demonstrated;
- a developer can demonstrate that there are no sites for the proposed use within or at the edge of the town centre that are suitable, viable for the proposed use and likely to be available within a reasonable time period; and
- the proposal will have no adverse impact on the vitality and viability of existing district centres and the rural economy;

iii) The Council's Core Strategy, adopted in June 2011 as part of the North Lincolnshire's local development framework, which sets out the spatial planning framework to 2026.

24. Mr Tucker particularly relied upon the Core Strategy. It stresses (paragraphs 10.7 and 10.9):

> "The improvement of Scunthorpe town centre is priority for both the Sustainable Community Strategy and the [Local Development Framework]….
>
> As part of the Scunthorpe Urban Renaissance Programme the town centre will be subject to considerable change and

redevelopment that reinforces its role as North Lincolnshire's main centre as well as enhancing its role regionally."

25. Policy CS14.1 states:

> "To fulfil its sub-regional role, identified in the [Regional Spatial Strategy], Scunthorpe town centre will be main location for all new retail, leisure, cultural and office development…. New development should make a positive contribution to improving the town centre's viability and vitality, support the creation of a comfortable, safe, attractive and accessible shopping environment, and improve the overall mix of land uses in the centre and its connectivity to adjoining areas."

26. Directly reflecting PPS4 and the sequential approach required by that national policy, paragraph 10.25 provides:

> "New retail development is an important part of the continued growth in North Lincolnshire. In particular it will have an important role to play in helping to regenerate Scunthorpe town centre. In choosing the location of new retail development, it should be done in line with the sequential test as set out in PPS4, which is as follows:
>
> - Existing centres, where the development is appropriate in relation to the role and function of the centre, then
>
> - Edge of centre locations, which are well-connected to the existing centre and where the development is appropriate to the role and function of the centre, and then
>
> - Out of centre sites that are well serviced by a choice of means of transport."

Application of the Policies to this Application

27. In respect of Simons' August 2011 application, the planning committee had the benefit of advice from two consultants in retail development, HOW Planning LLP ("HOW", instructed by Simons) and England & Lyle (instructed by the Council itself).

28. HOW and England & Lyle agreed that the proposed development would not have any significant adverse impact on Scunthorpe town centre, the predicted diversion of trade being no more than 5.5% (see Main Report, at page 59).

29. On the other hand, there was evidence that the development would bring significant economic benefits to the area, with estimates of a claw back of retail trade of £20m, and the creation of approximately 300 part-time and full time jobs (Main Report, page 49). The evidence of the Council's Head of Economic Development and Area Renaissance included the following (Main Report, page 62):

> "Whilst we recognise that there may be some negative impact on the town centre of the development, the employment growth, increased local disposable income and stemming the leakage of retail spend outside of North Lincolnshire will result in a net positive impact on Scunthorpe and North Lincolnshire.
>
> It is recognised that female unemployment is currently rising faster than male unemployment in North Lincolnshire. The additional new jobs created, due to their part-time nature, will provide needed employment opportunities particularly for female unemployed.
>
> A global, well-respected firm such as [Marks & Spencer] will provide Scunthorpe with a positive marketing opportunity and may help raising the profile and aspiration of not only Scunthorpe as a town but of North Lincolnshire as a whole."

30. With regard to the sequential test, HOW concluded that there were no sequentially preferable sites within or on the edge of Scunthorpe. However, England & Lyle examined the potential for the proposed Marks & Spencer store to be split into (i) a non-food (clothes and household goods) store which might be accommodated in a 3,884 sq m unit in Cole Street in the town centre, previously occupied by T J Hughes, and (ii) a food-only store which might be accommodated in the unit in the High Street formerly occupied by Marks & Spencer. The advisers considered that, if the T J Hughes unit was to be discounted, then "there needs to be a clearer justification as to why it is not suitable for use by Marks & Spencer" (paragraph 8.8 of November 2011 Report). Furthermore, if the proposed Marks & Spencer retail operation could be accommodated thus, "the sequential assessment does not adequately assess whether the floorspace of the other retail units could be located on separate sequentially preferable sites to comply with Policy EC15" (paragraph 8.14).

31. HOW responded that Marks & Spencer did not have a business model of stores limited to clothes and household goods, and they considered that they needed a store offering a full range of their goods to make it commercially viable.

32. England & Lyle were still cautious. In their response to HOW's further comments, they said:

> "There may be advantages in creating a critical mass of retail development on the application site but these advantages should be treated as positive benefits of the scheme, not part of the sequential approach. Policy EC17 justifies refusal of planning permission where an applicant has not demonstrated compliance with the requirements of the sequential approach. In this instance we suggest that it is better for the Council to make its own judgement about whether sequentially preferable sites are available, suitable and viable for retail development – including the former T J Hughes unit, West Street car park, land surrounding Church Square, Winterton Road, Glebe Pit and Brigg Road. We would simply comment that, regarding the former T J Hughes unit, the argument seems to be that it

> would not be viable for Marks & Spencer to operate a store selling clothing and homewares, and have a separate Simply Food store. But the qualitative need that has been claimed is for an improved retail offer in clothes shopping. It may be viable for Marks & Spencer to operate a store selling clothes and food in the T J Hughes unit, which is significantly larger than the former [Marks & Spencer] store in the High Street. The Council needs to be satisfied that the business model proposed by Marks & Spencer is the most appropriate one for Scunthorpe, such that it justifies an out-of-centre location."

33. In fact, by that stage, of the possible alternatives mentioned, the T J Hughes unit was the only available site in the town centre, the issue consequently focusing on whether that site was suitable and viable.

34. It was the view of Marks & Spencer, shared by the applicant Simons, that splitting their proposed operation between the T J Hughes unit and other premises was not commercially viable. The Main Report of the officer accepted that justification for not splitting the Marks & Spencer operation, but it did not accept that the smaller units could not be disaggregated, in the following terms:

> "The applicants have stated that the closure of [Marks & Spencers'] in-centre operation in 2010 on viability grounds, which was a more typical clothing and food offer, demonstrates that this is a challenging catchment for the retailer from a commercial perspective. This position has led [Marks & Spencer] to establish that 'to create a commercially viable store within the catchment area, a clothing, homeware, food and hospitality offer needs to be provided under one roof in order to give shoppers a comprehensive brand offer and critical mass of retailing that would make them want to return, and therefore seeks to ensure that the store remains commercially viable'. Furthermore, whilst [Marks & Spencer] do trade from convenience goods focused Simply Food units, they do not have a business model comprising solely clothing and homeware goods. This additional justification provided by the applicants does explain how the viability of the [Marks & Spencer] business model is an important consideration, and justifies why neither the T J Hughes site or the Southgate units are suitable given that the clothing and food offer at the [Marks & Spencer] town centre site failed to be viable." (page 55).
>
> "In summary, the applicants have adequately justified the sequential approach taken by assessing sites within and on the edge of Scunthorpe town centre for their availability, suitability and viability. On the issue of disaggregation, whilst the applicants have provided a justification why the [Marks & Spencer] (unit 1) cannot be disaggregated, they have not demonstrated flexibility in terms of disaggregating the smaller units of the proposal (units 2, 3 and 4) onto separate, sequentially preferable sites. For this reason it is felt that the

sequential test has not been passed and therefore fails to comply with all the requirements of policy EC15 of PPS4." (page 57)

35. It is common ground between the parties that Simons, as the applicant, failed to demonstrate compliance with the requirements of the sequential approach in Policy EC15, for the reasons given in that report, i.e. that it had failed to demonstrate the flexibility required by Policy EC15.1.d.iv, in that it had not demonstrated that the three smaller units could not be disaggregated into separate, sequentially preferable sites.

The Grounds of Challenge

36. Zurich, through Mr Tucker, relied upon six grounds of challenge.

37. I can deal with two grounds very shortly, because Mr Tucker properly conceded that, in this court, they are bound to fail by dint of authority binding on me. They were Grounds 5 and 6 in the Statement of Facts and Grounds, namely:

    i) Ground 5: The Highways Contribution Planning Obligation: The Section 106 agreement included an obligation to pay the sum of £300,000 for capacity road improvements. It was submitted that the committee erred because they were not advised that they could only take this proposed obligation into account if it was justified by Regulation 122(2) of Community Infrastructure Levy Regulations 2010 (SI 2010 No 949). However, Mr Tucker accepted that, on the current state of the law and in particular Derwent Holdings v Trafford Metropolitan Borough Council [2011] EWCA Civ 832, even if he were to persuade me that that was so, that would not be a basis upon which the planning permission challenged could be quashed.

    ii) Ground 6: Legal Error in the Screening Opinion: It was submitted that the screening opinion dated 22 July 2011 (referred to in paragraph 7 above) was unlawful, as it relied upon future documentation which did not exist at the time of the opinion. However, it was not suggested that there was any evidence that, if the opinion had been prepared in accordance with the correct procedure, the resulting decision in relation to the planning permission would have been any different. Consequently, Mr Tucker conceded that, as the challenge advanced was based upon a procedural not substantive defect, following R (Berky) v Newport City Council [2012] EWCA Civ 378, that basis of challenge would be bound to fail in this court.

38. In those circumstances, whilst preserving the Claimant's position, Mr Tucker did not actively pursue either ground. I formally dismiss them.

39. Mr Tucker did actively rely on four other grounds, which I will deal with in turn.

Ground 1: Misapplication of Policy EC17

40. As I have indicated (paragraph 22(ii) above), the question as to whether an applicant has demonstrated compliance with the requirements of the sequential approach is capable of only one of two answers, "yes" or "no". If it has not demonstrated

compliance, then there is a presumption raised by Policy EC17 that the application will be refused. In this case it is common ground that Simons failed to demonstrate compliance with the requirements of the sequential approach in the manner I have described (paragraphs 34-5 above).

41. However, Mr Tucker submitted that the planning committee were led into error by the officer's Main Report which, at page 62, said:

> "PPS4 is clear in its advice that local planning authorities must consider both the sequential approach and impacts upon retail centres when determining out-of-centre retail development proposals. The applicants have followed the sequential approach and assessed whether sites are suitable, viable or available but have not displayed flexibility by looking at the issue of disaggregation, particularly with regard to the smaller units (units 2, 3 and 4). Consequently policy EC15 of PPS4 is not fully complied with."

42. That reference to the policy not being "fully" complied with is repeated in the Addendum Report, at page 1, which says in response to the further letters of objection:

> "In response, it should be noted that it is accepted that the retail proposal at [the Site] does not fully comply with the sequential approach…"

That report goes on to say, at page 3, that:

> "In this case, it is felt that the economic benefits of the development are material considerations which outweigh the development plan and any non-compliance with the sequential test under the provisions of PPS4".

43. Mr Tucker submitted that those passages displayed a fundamental misunderstanding and misapplication of Policy EC17 – because the policy does not admit of partially meeting of the sequential test. The committee, instead of being told in unequivocal terms that where there was (any) failure to meet the sequential test the national policy directed refusal of the application, were led to believe that the partial breach of the test should merely be weighed against the positive material considerations, notably the economic benefits of the development. That was a legal error with regard to the proper approach to Policy EC17, as a result of which the planning permission should be quashed.

44. Forcefully as that submission was made, I do not find it compelling. The passages relied upon must be seen in their full context: I am not persuaded that the Main and Addendum Reports, when viewed fairly as a whole, do betray any misunderstanding or misapplication of Policy EC15.

45. The Main Report shows the following.

i) Mr Tucker accepted – as he had to do – that the relevant PPS4 national policies are comprehensively and accurately set out on pages 21 and following of the Main Report. On page 24, Policy EC17.1 is accurately set out, thus:

> "Planning applications for main town centre uses that are not in an existing centre and not in accordance with an up-to-date development plan should be refused planning permission where… the applicant has not demonstrated compliance with the requirements of the sequential approach (Policy EC15)…".

That is repeated on page 51.

ii) Policy EC15 is set out in full on page 54; and that test is immediately applied to the circumstances of this case on pages 55-7. The conclusion of the report on that issue, set out in the passage quoted above (paragraph 34) was that "the sequential test has not been passed…". That conclusion is clear and unequivocal.

iii) However, that is not the end of the planning committee's exercise; because, having found that the applicant had not satisfied the sequential test (thereby giving rise to a national policy presumption of refusal), the committee still had to decide whether there are any other material considerations which displace that presumption. The report proceeds, properly, to consider the other material considerations, both positive and negative: the impact of the development on Scunthorpe town centre and other retail centres within the catchment area (pages 57-9), highway issues (pages 59-61), residential amenity (pages 61-2), economic considerations (page 62) and ecology (page 62).

iv) There is then a section headed "Balance of Considerations", which includes the first quoted passage upon which Mr Tucker relies. That needs to be placed in its particular context: it forms part of the following passage:

> "Under the provisions of Section 70(2) of the Town & Country Planning Act 1990 local planning authorities are required, when determining applications, to have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations. Government guidance and the contents of Planning Policy Statements are material considerations but local planning authorities need not follow Government guidance if other material considerations outweigh this.
>
> PPS4 is clear in its advice that local planning authorities must consider both the sequential approach and impacts upon retail centres when determining out-of-centre retail development proposals. The applicants have followed the sequential approach and assessed whether sites are suitable, viable or available but have not displayed flexibility by looking at the issue of disaggregation,

> particularly with regard to the smaller units (units 2, 3 and 4). Consequently policy EC15 of PPS4 is not fully complied with.
>
> *Under policy EC17.1a of PPS4 planning applications that fail to demonstrate compliance with the sequential approach (policy EC15) should be refused*." (emphasis added).

v) The report then proceeds to consider the other material considerations to which it has already referred, of which it considers that the economic benefits of the development should be attributed particular weight in a period of serious economic downturn:

> "The attraction that a [Marks & Spencer] store and other retailers would have in potentially stimulating the local economy is a key driver in reducing the leakage of expenditure to neighbouring centres such as Doncaster and Meadowhall"

The other particular factor which is identified is "the fall back position of the existing use of the site, which enables 4,500 sq m gross of retailing from the site". I return to this factor below (paragraphs 65 and following below: see especially paragraph 68).

vi) There is then consideration of how the adverse impact on the town centre, albeit not significant, might be diminished by a Section 106 obligation (again referred to below: paragraphs 79 and following below: see especially paragraph 84).

vii) The final conclusion (and the report's recommendation) was:

> "It is considered that the positive benefits outweigh the negative and what negative impacts have been identified have been mitigated to an acceptable degree. Consequently the recommendation is one of approval subject to the conditions and the completion of a Section 106 agreement".

46. It may be that a Parliamentary or other legal draftsman might have drafted some of those passages differently – but, in my judgment, it is clear what is going on here. The applicant having failed to persuade the officer that the sequential test is passed, the officer performs the exercise which he must perform to see whether the presumption of refusal mandated by PPS4 is outweighed by other material considerations (see paragraph 22(iv) above). With respect to Mr Tucker's submission, it is evident that, as part of that exercise, the national policy directing refusal in these circumstances is clearly taken into account, expressly, in the italicised passage set out in paragraph 45(iv) above. I agree with Mr Katkowski's submission: *at this stage*, when the positive and negative factors are being balanced to determine whether the presumption is displaced, the extent and consequences of the breach of the sequential provisions may be relevant. That is so because, as well as the breach of

those provisions raising a presumption of refusal, the extent of the breach may be relevant to the question whether the presumption so raised is overcome in the circumstances of the particular case. The scope of the breach in this case comprised the failure on Simons' part to demonstrate that the three smaller units could not be disaggregated into separate, sequentially preferable sites (see paragraph 35 above).

47. The officer considered that the presumption of refusal was displaced in this case by, at least primarily, the economic benefits that this development would bring to the area (briefly described in paragraph 29 above). That was a conclusion based on planning judgment to which the officer was entitled to come, and which the planning committee were entitled to follow.

48. I do not consider that the Addendum Report takes matters any further. The references, early in the report, to the proposal not "fully" complying with the sequential approach and the economic benefits of the scheme outweighing "the non-compliance with this part of PPS4" appear to me to be no more than a references back to the wording of the main report, rather than a new decision. Mr Tucker relied upon the words "with this part of PPS4" which, he submitted, showed that the officer had improperly suggested that there could be partial compliance with the sequential approach; but, as I have described, the officer had, by this stage, moved on. He had previously unequivocally indicated that the national policy sequential approach had been breached, and was now considering whether other material considerations outweighed the policy directive to refuse the application. In that exercise, it was appropriate for him to consider the nature and scope of the breach of that policy.

49. The report then goes on to list the material factors once again, before concluding that:

> "In this case it is felt that the economic benefits of the development are material considerations which outweigh the development plan and any non-compliance with the sequential test under the provisions of PPS4."

50. The final conclusion of the Addendum Report, much in the terms of the conclusion to that in the Main Report, is set out in the penultimate paragraph. Taken as a whole, the Addendum Report says, in substance, that the fresh representations do not change the picture: the officer makes the same conclusion on the same grounds as he does in the Main Report.

51. In my judgment, the committee was not tempted into any forbidden line of thinking, on the basis that there had been a partial compliance with the sequential approach. I appreciate that, contrary to that which was urged by Judge LJ in Oxton Farm (see paragraph 15(ii) above), I have responded to Mr Tucker's submissions on Ground 1, which were based upon a somewhat detailed textual analysis, in kind. In this case, the officer's reports are robust enough to bear that analysis. In any event, in relation to this ground, Mr Tucker has failed by some distance to persuade me that the overall effect of the report was significantly to mislead the planning committee about material matters. In my judgment, the approach of the officer, followed by the committee, was correct, and lawful.

52. For those reasons, I do not find that the first ground is made good.

Ground 2: Misapplication of the Sequential Test

53. In applying the sequential test, an applicant must demonstrate that it has applied an appropriate degree of flexibility including, by virtue of Policy 15.1.d.iv, the disaggregation of specific parts of the proposal into separate, sequentially preferable sites. The PPS4 Practice Guidance states (at paragraph 6.33):

> "While there is no policy requirement to demonstrate need, an operator claiming that it is unable to be flexible about its chosen 'business model' would be expected to demonstrate why a smaller store or stores could not meet a similar need."

As indicated in this passage, the burden of demonstrating this falls on the applicant.

54. In this case, submitted Mr Tucker, Marks & Spencer merely asserted that to disaggregate their proposed operation into a non-food store (which could be accommodated in the T J Hughes unit) and a food-only store (which could be accommodated separately elsewhere, for example in the old Marks & Spencer High Street unit) was not viable. There was no evidence upon which the officer or committee could have been satisfied, as they purported to be, that the applicant had demonstrated flexibility in accordance with the terms of Policy 15.1.d.iv.

55. Mr Fraser submitted that this ground adds nothing of substance to Ground 1; because, in relation to that ground, it is uncontentious that Simons failed to demonstrate the flexibility required by Policy EC15.1.d.iv, in that it had not demonstrated that the three smaller units could not be disaggregated into separate, sequentially preferable sites. There is therefore a breach of the sequential approach, in any event. It would add nothing of substance if there were a second breach of that same requirement, in relation to the disaggregation of the proposed Marks & Spencer operation.

56. There is obvious force in that submission with regard to the policy-internal question of whether there is a breach of the sequential approach, which triggers the policy directive to refuse the application; because that is a binary question. However, whether there is a further breach may be relevant to the balancing exercise required thereafter, in which the question of whether other material considerations outweigh the policy presumption of refusal. In that exercise, for the reasons I have given (see paragraph 46 above), the scope of the breach or breaches might be relevant. I therefore need to consider the merits of this ground.

57. However, I am unpersuaded by those merits, for the following reasons.

58. I have recited the relevant background (see paragraphs 33 and following above). The Main Report (at page 55) makes clear that the only available Scunthorpe town centre opportunity for Marks & Spencer was the T J Hughes unit. In terms of the whole of its proposed operation at the Site, that unit was discounted by Marks & Spencer on account of its size, its total floorspace being 3,884 sq m as opposed to the 4,645 sq m proposed in the development at the Site. The T J Hughes unit could only possibly be appropriate by "disaggregation", i.e. splitting the non-food part of the proposed store from the food part and house them in separate premises. However, in sequential assessments, Policy EC15.1.a requires planning authorities to ensure that sites are assessed for, not only availability, but also viability and suitability. Marks & Spencer

considered such a proposal for split premises neither suitable for their commercial requirements or business model, nor commercially viable. Its position was that this was a commercially challenging catchment for retailers – evidenced by their commercial failure in early 2011 at the (admittedly small) High Street store – and to create a commercially viable store a full range of goods needed to be provided under one roof with a critical mass of retailing.

59. It was that evidence of non-viability that the officer accepted as an explanation as to why Marks & Spencer did not consider a split site in the town centre was feasible. Further, at the planning committee meeting on 7 March 2012, a representative from Marks & Spencer gave evidence that:

> "… the company's position remained unchanged. It would only develop sites that it considered commercially viable and there were no such sites in Scunthorpe town centre".

60. In my judgment, it is simply incorrect to say that there was no evidence before the officer and committee that (i) the T J Hughes unit was too small to create an economically viable Marks & Spencer food and non-food store, or (ii) it was no economically viable to split the operation into two parts, one of which might be housed in the T J Hughes unit. The evidence was that Marks & Spencer had considered the T J Hughes unit, and in their opinion they could not use that unit (or, indeed, any unit in Scunthorpe town centre) for an economically viable operation. For that reason, they had no interest in any available site other than the Site, as the representative at the hearing made clear. That was evidence that the committee could properly take into account. It is unrealistic to expect a commercial operator to reveal its precise commercially sensitive and valuable calculations as to why it considers possible alternatives to the development proposal not to be commercially viable; and it is unnecessary for them to do so to enable a planning authority to come to a view on viability.

61. It is also important to mark that developers, and planning authorities, work in the real world. Marks & Spencer had assessed the only available town centre alternative to the Site, and had concluded that a development that was smaller than that proposed, or one with a more restricted range of goods, was neither commercially viable nor suitable for their commercial requirements. On the basis of that assessment, emphasised by their representative who spoke at the planning committee hearing, the officer and committee knew that, if this planning permission was refused, then Marks & Spencer would not locate into Scunthorpe town centre. As Lord Reed said in Tesco v Dundee, at [29]:

> "Provided the applicant has [given consideration to the scope for accommodating the development in a different form and to have thoroughly assessed sequentially preferable locations]… the question remains… whether an alternative site is suitable for the proposed development, not whether the proposed development can be altered or reduced so that it can be made to fit an alternative site":

to which Lord Hope perceptively added, at [38]:

> "[T]he context indicates that the issue of suitability is directed to the developer's proposals, not some alternative scheme which might be suggested by the planning authority. I do not think that this is in the least surprising, as developments of this kind are generated by the developer's assessment of the market that he seeks to serve. If they do not meet the sequential approach criteria, bearing in mind the need for flexibility and realism to which Lord Reed refers…, they will be rejected. But these criteria are designed for use in the real world in which developers wish to operate, not some artificial world in which they have no interest doing so."

62. Working in the real world, the committee were entitled (and, indeed, bound) to take into account the evidence that any arrangement in which Marks & Spencer used the T J Hughes unit (the only available unit in Scunthorpe town centre) would not be commercially viable, and that, because of that lack of viability, Marks & Spencer would not locate to Scunthorpe town centre in the event that this application for the Site was refused. On the basis of that evidence, in the committee's view, the applicant had demonstrated flexibility in terms of the sequential approach so far as the possible disaggregation of the Marks & Spencer operation was concerned. They were entitled to come to that conclusion on that evidence.

63. For those reasons, I am quite satisfied that there was evidence upon which the committee could be satisfied (as, in the event, they were) that Simons had demonstrated flexibility in accordance with the terms of Policy 15.1.d.iv so far as the disaggregation of the Marks & Spencer operation is concerned.

64. This ground therefore fails.

Ground 3: Fall Back as an Immaterial Consideration

65. Mr Tucker submitted that, because such a comparison may be a material consideration, a planning committee should compare the development for which planning permission is sought on the one hand, with what the applicants could do with the land and premises on the basis of the planning position as it stands without that planning permission ("the fall back position"). However, such a comparison is only proper if there is a realistic possibility of the fall back position happening. Those propositions, which I accept, derive from Snowden v Secretary of State for the Environment [1980] JPL 749.

66. In this case, the fall back position used stems from Section 4 of the England & Lyle Report of November 2011. The report, after referring to the fact that the garden centre "trades freely as open Class A1 retail floorspace…" (paragraph 4.1) and reciting the Secretary of State's decision letter in 1990 (quoted at paragraph 6(iii) above), says:

> "Our interpretation of the planning status of the existing garden centre is that there is an established open A1 retail use of the existing building which has a floorspace of 4,500 sq m gross. The planning consent is subject to conditions on the range of goods allowed to be sold. The consent represents a fall back

> position that is relevant to the current application. A retail development with a total floorspace of up to 4,500 sq m gross could be developed on the site. This could apply to either the Marks & Spencer store or the other retail units."

67. That is reflected in the officer's Main Report, at page 50:

> "… The planning status of the existing garden centre is that there is an established A1 retail use of the existing building which has a floorspace of 4,500 square metres gross. The planning permission is subject to conditions on the range of goods allowed to be sold. Whilst the goods sold at the Trent Valley Garden Centre do not now conform with the list or the condition, and the range of goods sold for a number of years is much wider than the condition allows, the permission does represent a fall back position that is current to the relevant planning application in that a retail development with a total floorspace of up to 4,500 square metres gross could be developed on the site."

68. That is the fall back position that appears to be taken into account as a material consideration on page 63 of the Main Report:

> "Other material considerations to be attributed weight include: the economic benefits that the scheme would have during this serious economic downturn; additionally, *the fall back position of the existing use of the site , which enables 4,500 square metres gross of retailing from the site*…" (emphasis added).

69. Mr Tucker submitted that the way in which the fall back position was taken into account erred in law, in two respects.

70. First, he submitted that the officer and committee were wrong to take into account the fall back position, of any form of open Class A1 retailing use, in the absence of a lawful development certificate issued under Section 191 of the Town and Country Planning Act 1990. That provision enables an application to be made to the relevant local planning authority for a certificate of lawfulness of existing use or development, to ascertain "whether any existing use of buildings or land is lawful" (section 191(1)(a)). Mr Tucker submitted that, without such a certificate, the comparison cannot in law amount to a material consideration.

71. I do not accept that proposition. Before the committee, there was significant evidence that the Site had had open Class A1 use of the Site for many years: there was, for example, the evidence of the Secretary of State's decision letter of 9 August 1990 (see paragraph 6(iii) above) and the opinion of the Council's own planning advisers that there was established open A1 retail use of the existing 4,500 sq m building on the Site (see paragraph 66 above). It was open to the committee to take into account that evidence, and give it the weight that they considered appropriate.

72. The second error was, contended Mr Tucker, that the committee were not advised that they could only take the fall back position into account if it were a realistic possibility that the fall back scenario would happen.

73. Mr Fraser and Mr Katkowski submitted that the "fall back position" here was not a true fall back position at all, because the comparator used was not something that might happen to use of the land in the future but rather the use to which it is currently being put as a garden centre enterprise. I do not accept that submission. It is clear from the passages I have quoted above (paragraph 66) from both the officer's Main Report ("… a retail development with a total floorspace of up to 4,500 square metres gross *could be developed* on the site" (emphasis added)), and the planning adviser's report from which it was derived ("A retail development with a total floorspace of up to 4,500 sq m gross *could be developed* on the site" (again, emphasis added)), that the comparator was not simply the garden centre continuing to sell a wide range of goods, but the Site being prospectively "developed" with a total retail floorspace of up to 4,500 sq m gross (i.e. with a development of similar size and planning use to the current garden centre). Unlike the adviser's report, the officer's report does not suggest that that prospective development would be restricted to a Marks & Spencer store, or three smaller retail units, as proposed in the development of the Site with which this permission is concerned. But it is clear from the language used, that the Main Report was looking at the prospect of the land being developed with such a retail development, even if this application were not granted.

74. Curiously, the Addendum Report is in slightly different terms from page 63 of the Main Report, referring to "the fall back position of the existing use of the site, which enables 4,500 square metres gross of retailing *in the garden centre building"* rather than "... *from the site*…", which is more suggestive of another retailer trading from the existing building on the Site rather than a redevelopment. Nevertheless, in the Claimant's favour, I accept that the reports together suggest a comparator involving a redevelopment.

75. However, I remain unpersuaded by Mr Tucker's ground of challenge. The prospect of the fall back position does not have to be probable or even have a high chance of occurring; it has to be only more than a merely theoretical prospect. Where the possibility of the fall back position happening is "very slight indeed", or merely "an outside chance", that is sufficient to make the position a material consideration (see Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government [2009] EWCA Civ 333 at [20]-[21] per Sullivan LJ). Weight is, then, a matter for the planning committee.

76. In this case, the report did not address the gamut of possibilities for use of the Site if this application were not granted. However, in addition to the possibility that the garden centre would continue to use the Site for 4,500 sq m of open Class A1 retail use, it was obviously a possibility that they would use the existing use to redevelop the Site for a building of similar size with a similar use for some retailer. The officer's Main Report suggested no more than that. It did not suggest the prospect that Marks & Spencer would use the existing buildings or limited redevelopment of the site to trade.

77. In any event, although Mr Tucker submitted that the planning decision was a close thing – the chair used his casting vote (see paragraph 10 above) – it is clear from the

Addendum Report that the material considerations which in practice outweighed the negative material considerations (including the development plan and non-compliance with the sequential approach) were, perhaps understandably, the economic benefits that the scheme would bring (see paragraph 3 of the Addendum Report, which states that in terms).

78. In all the circumstances, I am not persuaded that, in relation to this ground, the officer's report significantly misled the committee about material matters.

79. Consequently, this ground fails.

Ground 4: The Proposed Restriction on Letting

80. Mr Tucker submitted that the Section 106 obligation with regard to protection of the town centre – by imposing the restriction on tenants of town centre retail premises taking lettings in the new development that it did impose – did not reflect the degree of protection required by the resolution on the planning committee.

81. That resolution (set out at paragraph 10 above), on this point, was brief. The committee resolved to grant permission, authorising the Head of Development Planning to grant permission subject to the completion of a Section 106 agreement

> **"…** for off-site highway improvements, *Scunthorpe town centre protection*, protected species translocation and maintenance and a contribution towards improving the existing footpaths in the vicinity of the site, and to the conditions contained in the report…" (emphasis added).

82. If the obligation was not completed within three months, the Head of Development Management was authorised to:

> "… refuse the planning application on *the grounds of the adverse impact upon the vitality and viability of Scunthorpe town centre*, adverse impact upon highway safety and levels of congestion within the locality, adverse impact upon protected species and their habitat, and non-compliance with Policy EC16 of PPS 4, policies T2 and T6 of the North Lincolnshire Local Plan, and policies C14, C25 and CS17 of the North Lincolnshire Core Strategy." (emphasis again added).

83. Mr Tucker submitted that the sanction for non-completion of the agreement showed the great seriousness with which the committee viewed the obligation for the protection of the town centre that was to be contained in it, described by Mr Tucker as the matter which tipped the balance for the grant of permission; but I do not find any great force in that submission. The Section 106 obligations were of course an important part of the planning consent; but the obligations were many and various, and I do not consider that the resolution suggests that the proposed agreement concerning protection of the town centre was any more balance-tipping than, say, the obligation to pay the Council a sum within 14 days in respect of vole translocation (which appears as paragraph 4.2.5 of the Section 106 agreement). The draconian

sanction of non-compliance after three months was, in the usual way, to ensure swift compliance and prompt commencement of the development.

84. Mr Tucker relied upon the history of how this provision arose. As I have indicated, both HOW and England & Lyle were agreed that the proposed development would not have a significant adverse impact on Scunthorpe town centre (see paragraph 28 above). However, England & Lyle's advice to the Council was nevertheless to consider conditions that would protect the town centre from any adverse impact that the development might entail. They raised the possibility of the smaller units being restricted by a bulky goods condition or, if the committee considered that unnecessary, conditions "on the maximum size of units, the prevention of subdivision and on the amount of convenience goods floorspace allowed in the scheme" (see Addendum Report, page 3).

85. However, the officer's Main Report addressed the issue in a different way (page 63):

> "England & Lyle considered if a bulky goods condition would be a way of protecting Scunthorpe's town centre, however the applicants have stated that such a condition would make the development unviable. The developer proposes to enter into an agreement under section 106… which, amongst other things, will give greater certainty to [the Council] that Scunthorpe's town centre would not have its vitality or viability reduced by the proposed development to a degree that would cause harm. A list of over 30 town centre retailers has been compiled and are referred to as regulated tenants with the Section 106 agreement. The developer has agreed that only one regulated tenant will be able to occupy any of the smaller units (2, 3 or 4) for the first five years of the development opening and that retailer must retain a town centre presence for the first five years of the development opening. Whilst it is accepted that there will be some impact upon the town centre, the legal agreement carries significant weight in minimising the less than significant impact that is predicted."

86. The officer's recommendation was therefore that the Council enter into a Section 106 obligation with the owner/developer that prohibited the occupiers of town centre shops from letting any of the development units – which would, of course, be very substantial comfort in respect of the vitality and viability of the town centre – subject to just one exception, namely that one of those town centre unit owners could also occupy a development unit, provided that that retailer also maintained a town centre presence for the first five years. All of that was to be done through the Section 106 agreement between owners/developers and the Council.

87. In the event, that agreement contained the following covenant by the owner/developer (paragraph 4.1):

> "… not to let a Unit to a Regulated Tenant during the Regulated Period SAVE THAT in the case of one Unit only there shall be permitted one first letting to a Regulated Tenant where such tenant shall prior to the date of his Occupation

> covenant with the Owner and/or Developer (as the case may be) that it will Maintain Representation in the Town Centre for a continuous period of five years commencing from the date of his Occupation.":

"Regulated Tenant" is defined in terms of a list of 32 town centre traders. "Regulated Period" is "a period of five years commencing on the date when the first Unit opens to the public for trade" (paragraph 3).

88. Mr Tucker's submission was succinct. The resolution of the committee was made on the basis that only one town trader would be allowed to let one of the smaller units in the development (Condition 38 required Marks & Spencer, who were not in the town centre, to let the large unit: see paragraph 12 above), on the basis that that tenant would also be required to maintain its presence in the town centre for five years; but the Section 106 agreement did not give the Council the ability to enforce that restriction. The Council could only require there to be a covenant between the owner/developer and the relevant tenant. It could not enforce that covenant against the tenant - only the owner/developer could do so. The planning consent was therefore granted without the requisite protection required by the committee having been obtained.

89. However, again I am unpersuaded by this ground, which amounts to an argument that the officer who entered into paragraph 4.1 of the Section 106 agreement did so without due authority. The resolution itself merely required the completion of a Section 106 agreement "for… Scunthorpe town centre protection": it did not specify how that was to be achieved. In the event, in accordance with the recommendation of the officer's report, the Section 106 agreement forbade 31 of the 32 relevant retailers from letting any unit in the development: that, of course, was the heart of the protection given to the town centre. However, Mr Tucker complains that the restriction on the 32nd retailer is not as tight as it might have been.

90. For my own part, I am not convinced that the covenant between the owner/developer and the tenant would not be enforceable by the Council, for whose obvious benefit the covenant is made – although I did not hear full argument on that point, and express no concluded view nor do I found my rejection of this ground on that basis.

91. But, leaving that aside:

i) The planning committee knew that the restriction was to be included in a Section 106 agreement between the owner/developer and the Council, and so were aware that the relevant tenant would not be a direct party to that agreement.

ii) The fact that the restriction is not as legally watertight or certain of enforcement as it might have been does not make the planning permission unlawful. The real protection for the town centre lay in the unchallenged restriction that prevented all but one of the town centre retailers letting a unit in the development at all, and ensured that three out of the four units in the development (including the larger unit, required by Condition 38 to be let to Marks & Spencer) would be let to retailers who had no presence in the town centre at all. There is no evidence that the committee intended there to be a

guaranteed legally watertight and enforceable right in the Council to ensure that any tenant taking advantage of that exception would maintain a particular presence in the town centre. Indeed, no such guarantee could possibly have been given. Further, in none of the reports was there any consideration of the extent of presence that might be required to be maintained in the town. That suggests that the resolution left the precise form of the proposed restriction to the officer dealing with the Section 106 obligation. The fact that Mr Tucker believes that he could have drafted a better provision on behalf of the Council – and I have no reason to doubt him – does not, as a matter of law, invalidate the grant of planning permission.

92. For those reasons, Mr Tucker has not persuaded me that, by imposing a restriction on tenants of town centre retail premises taking lettings in the new development, the Section 106 obligation failed to reflect the degree of protection of the town centre required by the resolution on the planning committee. This final ground, too, consequently fails.

Conclusion

93. By reason of the above, I do not consider any of the grounds of challenge are made good; and I dismiss the claim.