Case No: CO/3697/02

Neutral Citation No. [2002] EWHC 2307 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday, 8th November 2002

Before :

THE HONOURABLE MR JUSTICE OUSELEY

- -

Between :

THE QUEEN ON THE APPLICATION OF KEITH HAMMERTON	**Claimant**
- and -	
LONDON UNDERGROUND LIMITED	**Defendant**
(1) ENGLISH HERITAGE	
(2) THE PRINCE'S FOUNDATION	
(3) LONDON BOROUGH OF TOWER HAMLETS	
(4) LONDON BOROUGH OF HACKNEY	
(5) RAILTRACK PLC (in Railway Administration)	

- -

(Transcript of the Handed Down Judgment of
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- -

Richard Clayton QC, Mr M. Edwards & Mr C Zwart (instructed by Richard Buxton & Co. Solicitors) for the Claimant
Michael Barnes QC & Mr J. Greenhill (instructed by Frances Low Solicitor LUL) for the Defendant

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Judgment
As Approved by the Court

Mr Justice OUSELEY :

Introduction

1. London Underground Ltd's East London Line currently runs from New Cross and New Cross Gate northwards to Whitechapel. LUL proposes to construct the East London Line Extension ("ELLX") to Dalston where it would connect with the former Railtrack North London Line.

2. The proposal was advanced through an application by LUL in 1993 for an Order under section 1 of the Transport and Works Act 1992 and deemed permission under section 90 (2A) of the Town and Country Planning Act 1990, together with applications, so far as material, for listed building consents under section 12(3A) of the Planning (Listed Buildings and Conservation Areas) Act 1990, ("LBCA").

3. These applications were considered at concurrent public Inquiries in 1994 by an Inspector who had the assistance of a listed buildings assessor. He recommended in favour of the applications.

4. On 20th January 1997, the Secretary of State for Transport made the Order sought under the Transport and Works Act 1992, which came into force on 10th February 1997. This empowers the construction and maintenance of the ELLX and provides related powers dealing with land acquisition, highways and bridges, and vesting of lands in exchange for the acquisition of public open space. By a decision letter of 20th January 1997, he directed that planning permission be deemed to be granted for the development included in the Order, subject to various conditions. By a decision letter dated 14th January 1997, the Secretary of State for the Environment granted listed building consent, again subject to conditions.

5. This case concerns the construction of ELLX over the Bishopsgate Goods Yard, an area of considerable historic interest and of importance in the development of the Victorian railway system in London.

6. It is difficult to describe the Goods Yard without becoming embroiled in controversy because an issue at the heart of the case was whether it should be seen as one or several buildings or structures. The Bishopsgate Goods Yard began life in 1839 as Shoreditch Station, the terminus of the Eastern Counties Railway Company. It covers some 4 hectares fronting on to Shoreditch High Street, north of Liverpool Street Station which replaced it in 1875. After 1875 the passenger terminal became a goods yard serving East Anglia. LUL describes it as "a series of connected structures on two levels". English Heritage describe it as "a structure" of considerable architectural and historic importance to London and the local area. The tracks, platforms and station buildings including warehouses at the upper level were destroyed by fire in 1964. It is now covered in rubble and debris of varying depths.

7. The viaducts and arches at the lower level were used as Bishopsgate low level station for passengers, but this closed in 1916; its structures were largely removed and there has subsequently been some commercial use of the arch space.

8. The upper level is and was accessed by a ramp from Shoreditch High Street. The gateway and pillars at the entrance to the ramp from the High Street were listed before the inception of LUL's proposal. The extent of that listing was a matter in issue before me. The Goods Yard is supported by viaduct like structures including the Braithwaite Viaduct. This Viaduct is one of the oldest railway structures in the world and is the second oldest in London. Its designer, John Braithwaite, the chief engineer of the Eastern Counties Railway was also an early locomotive engineer. It runs east-west in the southern part of the Goods Yard. It was listed on 8th March 2002. The significance of that listing for the demolition of adjacent arches and viaducts was in issue before me.

9. LUL's proposed ELLX would involve the demolition of the Bishopsgate Goods Yard to the north of the Braithwaite Viaduct. LUL's works would retain the listed gates and pillars and LUL was granted listed building consent in relation to any other necessary works of demolition at the Goods Yard for which such consent was required. The new line and the new Bishopsgate Station would be carried on new structures approximately 1 metre higher than the existing upper level of the Goods Yard, before crossing Shoreditch High Street to the west.

10. The claimant is the Honorary Secretary of the London Railway Heritage Society, and he has a longstanding personal enthusiasm for London's railway heritage and this particular part of it. He seeks declarations in effect that the planning permission and listed building consent have lapsed and that the construction of the ELLX, at least hereabouts, would be unlawful. He also contends that the listing in March 2002 of the part of the Goods Yard known as the Braithwaite Viaduct, which LUL never intended to demolish, nonetheless precludes other demolition work which it does intend to do. His avowed aim is not to prevent the construction of the ELLX, indeed he supports its construction, but to force a re-examination of the way in which it crosses the Bishopsgate Goods Yard. He contends that a viable, feasible way can be found to preserve the Goods Yard and to permit the ELLX to cross it, whereas the present Order envisages the demolition of all of it, save for the ramp gates and pillars and the Braithwaite Viaduct, together with whatever other parts cannot be demolished in consequence of the listing of that Viaduct in March 2002.

11. The claimant contends that the existing Goods Yard structures can be retained, and can support the new line and station without undue cost or engineering difficulty, to the benefit of London's railway heritage. English Heritage has recently commissioned consultants' reports to that effect. The idea has some measure of public support. LUL regards these reports as lacking in the requisite understanding of railway engineering.

12. The decision which is challenged is the refusal of LUL to give an undertaking that it would not demolish the Goods Yard. The undertaking was first sought by the claimant in his letter before action on 1st August 2002. This refusal was said to be unlawful because the development and demolition had become unlawful, as the permission had

expired because it had not been commenced or lawfully commenced in time. Other arguments have been added along the way.

13. Many issues arise in this case, including a substantial argument as to whether the claimant has standing. Whether he does or not, he is entitled to pursue his claim before the Courts in order for all those issues to be heard and dealt with. Accordingly, it is with at least deep regret that I have to record that I was told during the hearing, by Mr Clayton QC for the claimant, that Mr Hammerton had been assaulted by thugs, who had punched and kicked him causing injury and shock. Mr Hammerton was in consequence unable to attend the second and third days of the hearing. His assailants made it clear in their threats and abuse that they were trying to deter him from continuing with these proceedings. This is therefore a far more serious assault than the injuries, unpleasant though they were, would alone convey. I said then and repeat that the police should treat this as a very serious matter. LUL offered all co-operation. It is also not the first time that threats have been made to Mr Hammerton over this. He is lawfully pursuing his right to bring proceedings before this Court. I acknowledge his courage in persisting with them. I was told on 28th October 2002 that these outrageous attacks had continued. The matter has been reported to the DPP.

14. I was asked to make Orders under CPR Part 5(4) (2) and (3) and Part 32(12) and (13) so as to prevent his address and certain other personal details being publicly available. I did so in the interests of justice, to reduce the potential for further attacks. I gave permission for his address to be deleted by way of amendment from the Claim Form and other documents.

15. The judicial review proceedings were lodged on 8th August 2002 and, following an abridgement of time for the filing of the Acknowledgement of Service, Collins J adjourned the permission application to an oral hearing, which was to become the substantive hearing if the delay issue raised by LUL were no bar. He said that it was an arguable case but that LUL ought to have the opportunity to argue its delay case as a bar to proceedings, which it would not be able to do were permission granted. I heard all the issues together.

16. Although the two local planning authorities, the London Borough Councils of Hackney and Tower Hamlets, were served as Interested Parties, they did not appear or provide written submissions, or indeed indicate a position one way or the other in relation to these proceedings. Neither did English Heritage, which was also served as an Interested Party because of its role in relation to listed buildings, although it is clear that it shares the claimant's wish to see the whole of the Bishopsgate Goods Yard retained. Nor did any other Interested Party appear.

17. The Department for Culture, Media and Sport (which has the Governmental responsibility for listing buildings) and the Department for Transport were not served.

As some of the issues before me concerned the extent of the listed buildings at the Goods Yard and the effect of the listing in March 2002 of the Braithwaite Viaduct, which would affect their responsibilities, I asked for the relevant Departments to be notified of these proceedings. In the event, they did not appear but sent a letter which sought to clarify a Ministerial Parliamentary Answer to which some weight had been attached.

The Order, permission and consents

18. The London Underground (East London Line Extension) Order 1997 s.i. 264 by Article 4(1) and (2) provided:

> "Power to construct works
>
> 4. - (1) The Company may construct and maintain the scheduled works.
>
> (2) Subject to article 5 below, the scheduled works shall be constructed in the lines or situations shown on the deposited plans and in accordance with the levels shown on the deposited sections."

19. This is the essential principal power, but Article 4(4) provides a relevant ancillary power. It is relevant because of a perhaps surprising submission by Mr Clayton that the Order did not permit the demolition of any buildings and in effect had been valueless to LUL all along. Mr Clayton reinforced his submissions with written elaboration after the end of the oral hearing.

> Article 4(4):
>
> "4. (4) Subject to paragraph (5) below, the Company may carry out and maintain such other works (of whatever nature) as may be necessary or expedient for the purposes of, in connection with or in consequence of, the construction of the scheduled works."

20. These scheduled and ancillary works can only be carried out within the limits of deviation, subject to specific exceptions which are inapplicable here.

21. The relevant works in Schedule 1 to the Order are Work No. 2, which is the work crossing Bishopsgate Goods Yard, and Works No. 1D and 1E which are works relied

on by LUL for showing that material operations have been undertaken to commence the development.

22. Work No. 2 is described thus:

> "**Work No. 2** A railway (1050 metres in length) mainly on a new viaduct commencing by a junction with the termination of Work No. 1 (railway) passing in a south easterly direction on the new viaduct passing over Holywell Lane and Shoreditch High Street by means of new bridges and across the site of the disused Bishopsgate Goods Yard passing over Wheler Street and Brick Lane and then passing over the Great Eastern Railway by means of new bridges and passing over Work No. 7 (new street) and Work No. 3 (railway) of the Crossrail project (if constructed) and joining the course of the East London Line between Shoreditch station and Whitechapel station and terminating at a point 20 metres north west of the junction of Selby Street with Vallance Road."

23. Works 1D and 1E each involve the "reconstruction of the bridge" carrying roads over the City branch of the North London Railway.

24. Articles 17 and 25 empower the acquisition of land until 10th February 2002, five years from the coming into force of the Order.

25. Article 30 deals with the acquisition of public open space and the vesting of land in exchange. This Article is closely related to one of the planning conditions which is said not to have been complied with. I do not know whether the vesting of the public open space or "special category land" in LUL has taken place and likewise the "exchange land" has vested in the London Borough of Tower Hamlets, as I understand matters, the previous owners of the public open space. LUL said at the oral hearing that it no longer needed any of the special category land for any permanent works, which is the basis upon which exchange land was required. But it did require three plots temporarily for construction and access. It clarified its position after the oral hearing : for those three plots that is a probable rather than a concluded position. Article 21 contains powers for LUL to take temporary possession of land for such purposes but those three plots are not among those identified as subject to that power.

26. I turn to the planning permission. This is not granted pursuant a normal planning application but pursuant to a request for a direction under section 90 (2A) of the 1990 Act. By his letter of 20th January 1997, the Secretary of State for Transport directed:

> "that planning permission be deemed to be granted for the development for which provision is included in the Order subject, in relation to Work Nos. 1 to 2 and 4 to 7 as described in Schedule 1 to the Order, to the conditions set out in Part I of the Annex to this direction and, in relation to Work No. 3 as so described, to the conditions set out in Part II of the said Annex."

27. It is clear that there is only one deemed planning permission for the whole of the ELLX Order works. Separate planning permissions do not exist for each identified work. So much is clear from the language of the letter, from the document containing the conditions which also defines "the development" in a way which covers all the works, and from their internal structure. Mr Clayton sought to say that the effect of any declaratory relief he might obtain as to the lapsing of the planning permission could be confined to Bishopsgate Goods Yard. However any declaration might be framed, the logic and effect of his argument that the planning permission had lapsed, success in which argument would underlie such declaratory relief, could not possibly be so confined. If there is more than one permission, the division is created by the two parts of the Annex; only the Silwood Servicing Facility (Work No. 3), could be the subject of a separate permission. Even Work No. 2 alone, which I have quoted in full, is considerably more extensive than the line and station at Bishopsgate Goods Yard. The engineering ramifications east and west of the Goods Yard of a change in levels at the Goods Yard and for the limits of deviation which confine the works are unclear.

28. The relevant conditions on Work No. 2 are as follows:

> "(1) The development shall be begun before the expiration of five years from the date the Order comes into force (that is, no later than 10 February 2002)."

29. "The development" is defined as "any development for which provision is included in the Order consisting of, or ancillary to, the works to which Part I and Part II of this Annex respectively apply;" Part I covers all the works except Work No. 3 which is dealt with in Part II.

30. Conditions 12, 21 and 23 were relied on in Mr Clayton's submissions.

> Condition 12 reads:
>
> "(12) No work shall commence on site until full particulars of the location and method of measures to be taken to minimise the effect of vibration from the operation of the Line on adjacent listed buildings have been submitted to and approved by the relevant local planning authority."
>
> Condition 21 reads:
>
> "(21) The development shall not commence until the exchange land described in article 30 of the Order has been made suitable for use as open space by:
>
> (i) the removal of redundant viaduct arches and other buildings;
>
> (ii) contouring the land to appropriate levels;
>
> (iii) providing a suitable depth of soil to support vegetation; and

(iv) providing landscaping in consultation with the relevant local planning authority."

Condition 23 reads:

"(23) No development shall commence on the land bounded by Bethnal Green Road, Wheler Street, Shoreditch High Street and the proposed Bishopsgate station or on land in Allen Gardens until a landscaping scheme for those sites has been submitted to and approved by the relevant local planning authority."

31. The listed building consents were granted by letter dated 14th January 1997.

Consents C and D so far as material are as follows:

"(C&D) listed building consent for the partial demolition of the former Bishopsgate Goods Yard, Shoreditch High Street, E1 and the construction of a length of boundary wall, in accordance with your application Nos. LRP270/E5990/052 & LRP270/U5360/014 to the Councils of the London Boroughs of Hackney and Tower Hamlets dated 3 December 1993 and submitted drawings and revised drawing 116B subject to the following conditions:-

a. No demolition works shall commence until full particulars, including detailed drawings, of the measures be taken to safeguard and where necessary consolidate the structural integrity of the gates and associated structures and the former Bishopsgate Goods Yard, both during the works of demolition of the adjacent structure and subsequently, have been submitted to and agreed by the local planning authority and the appropriate measures have been implemented. The gate mechanisms within the forecourt shall be retained in situ.

c. No demolition shall commence until details of the precise location, height and materials of the screen wall shown on drawing E/HR 0721/P/24/A/0116/B, and of the ground surface treatment of the area to the north of this wall and of the area to the west of the retained structure, have been submitted to and approved by the local planning authority. The screen wall shall be constructed before the Line is brought into use."

32. Section 18 of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides the time limit for such consents, by the imposition of a statutory condition that "the works to which it relates must be begun not later than the expiration of five years beginning with the date of the grant", i.e. 13th January 2002.

The listed building at the time of the Inquiries

33. There was some debate at the public Inquiries as to the extent of the then listed building: was it more extensive than the gates and pillars at the bottom of the entrance ramp? The listing itself states:

"Forecourt Wall and Gates to Old Bishopsgate Goods Station".
The description underneath the function does not define the listed building though it helps to identify it. The listing is not limited to the features referred to in the description, which however usually identifies those features of special interest which led to the listing; here it describes nothing more extensive than the gates and pillars themselves, and "a red brick wall".

34. The Inspector had questioned whether any part of the then listed building extended into the London Borough of Tower Hamlets, even though some of the demolition and rebuilding works would affect "the curtilage and setting of the listed structures". He said in paragraph 9.24.4 that he doubted "that the effect of the partial demolition on the listed structure was relevant" to the London Borough of Tower Hamlets.

35. His listed building assessor had reached the view that:

> "5.23 In its present condition the former goods station detracts from the character and appearance of the area and represents a far from optimum use of a valuable inner city site.
>
> 5.24 From the extract from the statutory list it is clear that only the forecourt wall and the gates to the former goods yard are listed … .
>
> 5.26 The works proposed would retain the features of interest that are specifically mentioned in the list description and would facilitate a scheme that would bring substantial benefits for the community and would contribute both to economic regeneration and the environmental enhancement of the area. As such I

> consider that the partial demolition would accord with the statutory provisions … ."

36. The Secretary of State sought further written representations. English Heritage, in paragraph 6 of the Decision Letter, is recorded as saying:

> "6. English Heritage were still of the opinion that the specific interest of the structure relates to the entrance gates and ornamental stone work only. They consider that part of the Goods yard which lies within the London Borough of Tower Hamlets is not listed and is not of special architectural or historic interest."

37. LUL thought the listing description uncertain because it said "red brick wall extends round the whole of the Goods Yard" whereas the bricks in the immediate vicinity of the gates were blue. The two London Boroughs thought that the listing included the ramp along Bethnal Green Road which provides access to the upper level.

38. The Secretary of State concluded:

> "8. On balance it appears to him that the curtilage of the listed structure includes the ramp and wall adjacent to Bethnal Green Road, which extends continuously as far as Wheeler Street as shown in stippled tone on the Appendices to the application. He has therefore proceeded to determine all the listed building consent applications submitted."

39. No challenge was made to the grant of consent on that basis. It is acknowledged by Mr Barnes that, although he contends that the Secretary of State's view is legally untenable and obviously wrong, the Secretary of State accepted a wider view of what was listed than did the Assessor or LUL. The Secretary of State's view is represented on a plan, replicated on the right hand plan of Plan G attached to LUL's Acknowledgement of Service. It shows a block extending east along Bethnal Green Road from the junction with Shoreditch High Road, on the east side of which a wider block extends south to where the main line passes under Commercial Street. LUL's contention, as shown on the left plan of plan G, is that the listing is confined to the gates and pillars to the ramp and the immediately adjacent walls.

40. LUL contended before me, in connection with its argument as to what the extent of the original listing comprised at the Goods yard, that very little had been listed and that the extent of listing shown on the right hand side of Plan G and approved by the Secretary of State was unrealistic, even irrational. Mr Barnes relied on the listing itself.

41. I have some sympathy for that submission based on a reading of the listing : that is the building which is " included in a list compiled" by the Secretary of State for the purposes of section 1(5) of the LBCA.

42. Section 1(5) extends the definition of a listed building so as to include :

> "(a) any object or structure fixed to the building;
>
> (b) any object or structure within the curtilage of a building which although not fixed to the building , forms part of the land…"

43. It seems rather to turn the world on its head to say that the substantial parts of the Yard which the Secretary of State thought were listed, were objects or structures fixed to the gates and the immediately adjoining walls; it would be the other way round if anything. The listed tail is wagging the affixed dog. Likewise it seems odd to suppose that the gates and walls themselves had a curtilage and that those other parts lay within that curtilage. That reasoning would be so odd that there is a real possibility that the reasoning, which is not spelt out, must have been something completely different. Be all that as it may, I consider that it is now far too late for any party to take issue with what the Secretary of State clearly decided in his 1997 Decision Letter and which no one sought to challenge. It is clear on the same reasoning that the Secretary of State thought that no more of the Goods Yard was listed and that he had granted all consents necessary for the project to proceed.

44. It is convenient at this point to refer to the discussion at the Inquiries about the retention of the Goods Yard. The London Railway Heritage Society was not then in existence, though Mr Hammerton was. The flag carrier for the heritage and conservation argument then was Mr Prokopp. He proposed that which Mr Hammerton now ultimately hopes to achieve through this litigation, that is the retention of the Goods Yard with the ELLX placed on top. Mr Clayton referred to LUL's response to Mr Prokopp as showing an understanding of the extent of surviving historic buildings falsified by later investigations:

> "7.3.5. All that remained of the goods yard was the ground floor structure, the first and second floors having been demolished following a major fire in 1964. LUL had not glossed over the history of the structure, and very extensive records were available. The goods yard, which LUL proposed partly to demolish, largely dated from the 1880s, and did not comprise the earlier structure which formed the passenger station of the 1840s. So far as is known, that no longer exists."

45. There were no objections from English Heritage or the two London Boroughs involved.

46. The Inspector commented in paragraph 9.24.1.

> "9.24.1 Finally, I come to the two applications for Listed Building consent in respect of the proposed demolition of the northern part of the former Bishopsgate goods yard. I accept the LUL argument that it is necessary to demolish part of this structure, as I doubt if it would be practical to build a higher level railway line and a station on top of it. Even if this were structurally possible, I think the resulting hybrid appearance would do little for the enhancement of the surrounding area. I also prefer the arguments of LUL as to the origins of the present buildings from the 1880s, to those of Mr Prokopp of the 1840s."

47. The Secretary of State accepted the Inspector's recommendations, commenting in paragraph 12 that he "also accepts LUL's view that the structure to be demolished in the north part of the former Goods yard was built in 1880 and is unlikely to include any structures built in 1840."

48. The Braithwaite Viaduct lies in the southern part of the Goods Yard and was never intended for demolition.

The claimant's case

49. Mr Clayton first contended, but with no real emphasis, that the planning permission had lapsed because no "material operations" within the scope of section 56 of the Town and Country Planning Act 1990 had been undertaken, within the five years available.

50. His second submission was that, if such "material operations" had been carried out, they were ineffective to prevent the permission lapsing because they had been carried out in breach of conditions precluding development until various specified requirements had been met. He referred to conditions 12, 21 and 23. On the same basis, requirements of the listed building consent conditions (a) and (c) had not been met, and they too had lapsed.

51. His third submission was that none of the exceptional circumstances applied, in which "material operations", which were themselves undertaken in breach of development control, could constitute a lawful commencement of development, the so-called *Whitley* principle.

First, had any "material operations" been undertaken?

52. Section 56 of the 1990 Act, so far as material, provides:

"56. – (1) Subject to the following provisions of this section, for the purposes of this Act development of land shall be taken to be initiated –

(a) if the development consists of the carrying out of operations, at the time when those operations are begun; … .

(2) For the purposes of the provisions of this Part mentioned in subsection (3) development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out.

(3) The provisions referred to in subsection (2) are sections … 91 … .

(4) In subsection (2) "material operation" means –

(a) any work of construction in the course of the erection of a building;

[(aa) any work of demolition of a building;]

(b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building;

(c) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b);

(d) any operation in the course of laying out or constructing a road or part of a road; … .

53. Section 91 requires the imposition of condition 1 in Part I and II of the Annex to the deemed planning permission.

54. Mr Barnes QC for LUL, who had only to demonstrate one "material operation" in order to succeed on this part of the argument, relied in particular on the carrying out of Works No. 1D and 1E. The fact that these had been carried out by the London Borough Council of Hackney rather than LUL does not preclude their role as "material operations", nor did Mr Clayton suggest that, as Works No. 1, they were incapable of commencing development because Work No. 2 should be seen as a separate permission which had to be begun by operations within Work No. 2. He did not dispute their execution and I confess to some difficulty in understanding why there was any issue at all that a "material operation" had been carried out. They fall within section 56(4)(a), (aa) and (d).

55. Additionally, condition 3 refers to a new road between Vallance Road and Pedley Street. That road too is under construction. It falls within section 56(4)(d). The condition, if nothing else, operates as its permission.

56. The operations relied on by LUL were done in 2000 (Forest Road bridge) 2001-2 (Richmond Road bridge); the Weaver Farm Road in compliance with Condition 3 was started in December 2001/January 2002. This road between Vallance Road and Pedley Street is within Work No. 2. The drainage works, the nature of which was unspecified, were begun in early November 2001.

57. It is unnecessary to deal with the other works relied on, apart from recording Mr Barnes' acceptance that a road constructed outside the limits of deviation, as a substitute for a permitted road within the limits, was ineffective as a start to development, and pointing out that Mr Clayton's suggestion that drainage works do not qualify within section 56(4)(c) unless there has been a mains connection is not what the section envisages.

Second, were any of the conditions not complied with when those works were carried out?

58. Conditions 12, 21 and 23 were those upon which Mr Clayton relied. Condition 12 prohibits "work" commencing "on site" until particulars of the measures to be taken to minimise the effect of vibration from "the operation of the line" on "adjacent listed buildings" have been approved by the local authority.

59. Mr Barnes is correct to point out that this is not a prohibition on the commencement of "development". The prohibitory phrase used contrasts with the language of conditions 21 and 23 which prohibit the commencement of development. In short, had the condition been intended to prevent the commencement of development until all those measures for the protection of the listed buildings adjacent to the line had been approved, this condition would have used the commonplace language to that effect found elsewhere in the conditions. Something else is intended by the language used.

60. The condition also provides that the work must not commence "on site". The conditions as a whole use a variety of expressions to cover the locations affected by their varying prohibitions e.g. condition 2 refers to "sites of archaeological interest", condition 3 refers to Allen Gardens, condition 4 to the area bounded by a specific pair of roads. "On site" is another variant of the area to which the condition relates. It is not the whole development area. Taken in conjunction with the phrase "works", it is clear that something different is intended from the conventional prohibition on development. I accept Mr Barnes' submission that the "site", although singular, is to be construed as referring to the individual site to which each listed building relates : it refers to that area of works where measures to protect any listed building potentially affected by vibration caused by the operation of the line might need to be taken. Whilst it is not possible for

the Court to define the site, it can interpret the condition so as to ascertain the approach to be adopted by the local planning authorities in applying it.

61. This conclusion as to the scope of condition 12 is reinforced by practical considerations. The measures are required to protect the buildings against operational not constructional vibration; so the prohibition need not strike until the construction works approach the listed buildings and the time arrives for the incorporation of the protective measures; these are also likely to depend on a precise analysis of the existing and proposed structures, which can more readily be undertaken at that stage. It is equally effective in that way to protect the buildings.

62. Mr Barnes submitted that this condition could not apply to any building which was not listed as at the date of decision, in 1997. Certainly, it is impossible for the condition to relate to buildings which were listed more than five years after the grant of consent if it is given the meaning contended for by Mr Clayton, which is to treat the prohibition as if it read "no development shall commence … ." This would mean that no condition required the taking of any measures to protect the Braithwaite viaduct from operational vibration, listed as it was on 8th March 2002. However, on Mr Barnes' interpretation, I see no reason why it could not so apply; indeed its application, so as to protect subsequently listed buildings, (and buildings can be listed at any time), would support Mr Barnes' interpretation of "the site" as a practical and purposive approach. LUL always, I accept, intended to apply the principle of condition 12 to the Braithwaite Viaduct but I consider that it has a legal obligation to do so as well.

63. Accordingly, I do not consider that Condition 12 contains a prohibition which has to be satisfied before development can commence.

64. The evidence as to what approvals of protective measures had been sought and obtained showed that in April 2002, LUL submitted details of the measures to restore and strengthen the listed building at 196 Shoreditch High Street which, "whilst not specifically highlighted will incorporate measures to cater for vibration," as LUL put it in its letter of 23rd August 2002 to the London Borough Council of Hackney. The details, according to LUL, cannot yet be provided because they will depend on the precise curvature, radius and configuration of the new line at that point. So far as the listed gates and forecourt wall at Bishopsgate Goods Yard were concerned, the gate has been removed for restoration and repair and in the same letter LUL told the London Borough Council of Hackney that no other protective measures could be taken. The London Borough Council of Hackney in its letter of 10th September 2002 accepted both those sets of comments. No details have been submitted in respect of the protection of the wider area of listed building as shown on Plan G, right hand side, because as I understand it that is to be demolished.

65. It was not suggested by Mr Clayton that if LUL's approach to the condition is correct, it has been breached. However, if the condition is to be interpreted as Mr Clayton

submits, then it has not been complied with. Even if the details in relation to 196 Shoreditch High Street satisfied the requirements of the condition, they were not submitted within the 5 year period. It might be that the absence of details of proposed measures, because none were proposed, meant that there had been no breach of the condition in relation to the gates, even on the interpretation of condition 3 contended for by Mr Clayton.

66. Condition 23 prohibits the commencement of development within an area defined by certain roads and on Allen Gardens until a landscaping scheme for those two areas has been approved. This prohibition has not been breached, for the simple reason that no development has taken place in either of those areas. The condition does not purport to prohibit works outside the defined areas and so cannot operate so as to cause the material operations, relied on by LUL as commencing development and which lie outside those two areas, to be development in breach of planning control. I do not for these purposes need to go further into the reasons why the landscaping scheme has not been submitted, and there are sensible reasons, or into the lack of objection to that position from the London Borough Councils of Hackney and Tower Hamlets.

67. It is condition 21 which is more problematic. It prohibits development until the exchange land for the public open space has been cleared and landscaped.

68. Condition 21 is related to Article 30 of the Order. It is contemplated by the Order, as indeed has happened, that there would be an exchange of public open space for other land. It was left to the planning conditions to control the carrying out of the site clearance and landscaping works necessary to turn the exchange land into usable replacement public open space. The land was to be permanent replacement open space in exchange for the permanent taking of existing open space.

69. However, LUL no longer intends to use the existing open space, or in the case of three plots is no longer certain to use it permanently. The scheme design has advanced so that most of the special category land, the existing open space, which was within the limits of deviation for the railway and its structures is no longer necessary for the ELLX.

70. The plot numbers can be seen from Article 30. Plot 45a, a small area at the corner of Allen Gardens, was to be used in connection with an underpass which is no longer to be provided.

71. Plots 53a, 55a, 56a and b, which cut across Allen Gardens, were to be used to construct a road from Buxton Street to the Spitalfields Farm because the existing road access to the Farm would be severed by the new line. However, the replacement access could only have been used if it were possible to reach it along Buxton Street. But Tower Hamlets LBC no longer wants that replacement road constructed and indeed has in effect made it pointless to do so because it has closed that part of Buxton Street which

would lead to the replacement road. The purpose of that closure is to reduce the extent of drug dealing and prostitution related crime and anti-social behaviour. The alternative replacement access road to the Farm, as requested of LUL by Tower Hamlets LBC, has been built.

72. Plots 46a, 50a and 59a, in or in the vicinity of Allen Gardens, were originally required for an embankment, but detailed work on the vertical alignment has meant that the embankment is no longer needed. However, those plots are still required for temporary construction and access purposes though not included in the land which LUL can take possession of temporarily. So far as those three plots are concerned, LUL, in a second witness statement from Mr Thornton, submitted after the hearing, stated that that was "the current engineering expectation" and that no final decision had been made.

73. Although the positions as originally understood in relation to all plots was drawn to the attention of the London Boroughs in August 2002, Hackney LBC made no comment and Tower Hamlets LBC in a letter dated 10th September 2002 said:

> "The condition can not be regarded as discharged as there has been no formal application to the Council. However given the circumstances an application under Section 73 would be the way forward."

74. As I shall have to consider later, no section 73 application can be made if the permission has lapsed.

75. There is no dispute but that in fact none of the exchange land has been cleared and landscaped. Mr Clayton submitted that in consequence any work relied on by LUL as constituting a "material operation" and thereby initiating development has been undertaken in breach of planning control.

76. Mr Barnes recognised the force of that point but sought to argue that as a matter of general principle, there could be no breach of a condition where compliance with it had become impractical or without purpose. He contemplated that a specific implication of certain words to reflect the purpose of the condition could be made, which would mean that in the circumstances there would have been no breach of condition 21.

77. Mr Barnes' general proposition is not correct. First, at the level of generality at which Mr Barnes pitched his argument, to introduce into every planning condition an implied proviso that it ceased to apply and could be ignored if it was no longer practical or sensible to apply it would be so significant a step within a statutory code that it could not justifiably be done other than by statutory provision.

78. Second, the availability of section 73 of the 1990 Act, which permits applications to be made for planning permission for a development without complying with conditions subject to which a previous planning permission had been granted, provides a significant degree of statutory flexibility which militates against the judicial provision of an alternative solution. Section 73 is not available to assist LUL here if the permission has lapsed, because of the language of section 73(4). This states:

> "(4) This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun."

79. Mr Barnes frankly recognised that LUL's troubles could have been reduced by the making of a section 73 application in time; though such an application could have provided a vehicle for argument about Environmental Impact Assessment and about the extent to which under the guise of examining the conditions, (and the planning authorities' examination of the conditions is not confined to those which the applicant wishes to change), the scheme desired by this claimant could have been pursued.

80. However, it would be contrary to the aim of the Planning Acts as a statutory code, with its own forms of flexibility and procedural involvement of third party consultees, for its restrictions and protections to be bypassed by judicial innovation, and on so large a scale.

81. Third, as Mr Clayton fairly points out, such an approach leads to a very great deal of uncertainty in application. It may be that a condition can no longer be complied with, but it might very well not follow that it should be ignored – a legitimate planning consequence could be that the development itself should not proceed in such circumstances. If a condition can no longer serve its original purpose, a section 73 application would permit consideration to be given to a replacement, which Mr Barnes' principle would preclude. Take this case : the new road across Allen Gardens is pointless because it leads nowhere; but it is only LUL's goodwill which has led to a replacement. Another developer could apply Mr Barnes' principle so as to leave the Farm cut off since Buxton Street now leads nowhere making the originally proposed access pointless.

82. I was more attracted by a more limited submission made by Mr Barnes relating to the specific purpose of this condition. If this had been a grant of planning permission by a local authority, express reasons would have been given for that condition. They might have read: "The works are required to ensure that the exchange land is physically usable as public open space to replace that which is lost" or the like.

83. It is clear that, when interpreting a planning condition, there is but a limited range of material which can be examined, not just because the permission runs with the land but also, and more importantly, because the permission is not a private transaction between applicant and authority; it affects the public and its interest, whether as neighbours, rivals or otherwise and is a document kept on a public register. The range of interpretative material is limited to the permission, the conditions and their reasons, where, as here, the condition on its face is clear, unambiguous and valid; see *R v Ashford Borough Council ex parte Shepway District Council 1999 PLCR 12* per Keene J.

84. Is it possible to interpret this condition as being subject to an implied proviso that it only applies if the exchange land is to be permanently used for the development? Although no reason has been explicitly given, it is perfectly obvious that the condition assumes that the exchange land needs preparation and landscaping because the existing land will be permanently lost as public open space. The practical problem with this approach is that although the purpose is clear, there are a number of different ways in which the draftsman, faced with the problem, could have dealt with it, not least because of uncertainty as to when the intention of the promoter of a large project as to the use of each parcel of land can be treated as fixed. The draftsman could have made the vesting of the land the trigger for the obligation to do the works, which would not have helped LUL. He could have identified a formal process of recording an intention and of divesting the land from LUL. He would have had to deal with LUL's desire to retain part temporarily, notwithstanding that it falls outside Article 21 to the Order. Unless the implied proviso can be formulated with precision and certainty as to the draftsman's intent, it cannot be regarded as so obviously implicit in the express words as not to require expression. My conclusion in this respect is reinforced by the further material from LUL, acknowledging that it does not yet have a final intention in relation to the three plots for the embankment. This illustrates both the difficulty of knowing when an intention actually is fixed and of implying a provision to cope with the possible variations e.g. what should it say if only a small proportion of the exchange land is actually required?

85. There is also still force here in the points of principle made by Mr Clayton against Mr Barnes' larger proposition. The public, I consider, would be able to discern the purpose of condition 21 from its terms. But there is no single solution discernible to the public as to how some further effect might be given to the purpose by implication. That reinforces the point that the statutory code has provided, through section 73, the way in which the real and practical problems here can be dealt with. The draftsman did not provide for eventualities such as have arisen here because he cannot do so, and with section 73 does not need to do so.

86. The later material from LUL does give rise to a further point. It is now clear that part of the exchange land is in current use as LUL track and as part of Shoreditch Station which is currently open at weekday peak hours and on Sundays, serving 300,000 passengers a year. The closures are not envisaged till 2005 as the replacement infrastructure becomes available. These closures are not an outcome which anybody directly seeks and the local authorities would not seek compliance with condition 21 literally. It is difficult to avoid the conclusion that condition 21 was always going to be a problem if applied according to its express terms though the draftsman and parties must have been

alive to it. However the words of the condition are clear; it is "the development", defined as in effect the whole development, which is prohibited until this condition is complied with. I do not consider that its scope can be cut down by limiting the prohibited development in condition 21 to "the development of the special category land" in the light of the definition of "development" and the various other phrases used elsewhere in the conditions to provide for special circumstances. The definition lacks even the leeway which might be provided by a phrase such as "unless the context otherwise requires".

87. There is also again the real problem that the possible implied words, development "of the special category land", are not necessarily the only or any solution. Part of the exchange land is not subject to this problem anyway. The precise point at which the works on part of the special category land might trigger an obligation to landscape the whole or part would be a matter for detailed resolution. After all, it might be, on any given works programme, that one part of the special category land was required very early, meaning that all the work to the exchange land had to be done, including the closure of the line and station well ahead of its replacement, which would mean that the implied words would be no solution at all. Thus a section 73 application would still be necessary to remedy this problem; it is that rather than judicial implication which provides the route to the avoidance of a breach of condition. I decided not to seek further submissions on this point, as Mr Clayton did not lose on it and Mr Barnes did not raise it; it was to a large extent covered by submissions already made.

88. Accordingly, I consider that on its terms, condition 21 had not been complied with when the "material operations" relied on by LUL were undertaken. "Technical" breach it may be, as Mr Barnes described it, but breach nonetheless and a breach involving total non-compliance with the condition, albeit for what may be good and sensible reasons, causing no harm and in itself entirely unobjectionable to the claimant, local planning authorities or anyone else.

89. For the purpose of Mr Clayton's legal submissions as to the consequences, he needs only to show non-compliance with one condition. Nonetheless, I shall deal with the listed building conditions which Mr Clayton submitted also had been breached. The variety and extent of breaches are potentially relevant to Mr Barnes' legal submissions as to the effect of non-compliance and to any exercise of discretion.

90. It is to be observed that the conditions preclude "demolition" rather than "development" before compliance. Development which does not amount to demolition within the prohibition in the listed building consent is not prohibited by the listed building consent condition.

91. Condition A was complied with, in terms of the submission of details for approval, through documents submitted to Hackney LBC and to English Heritage on 24th October 2001 and approvals granted on 26th November and 19th December 2001. Mr Clayton's real complaint was that the last sentence of condition A had not been complied with. The gate mechanisms had indeed been removed; they were removed, Hackney LBC accepted, in order to restore them and to repair the rotted wall mounting in which the mechanisms were housed. They will be reinstated as the works proceed.

92. LUL admits this breach of condition A. However, I accept Mr Barnes' submission that the last sentence of condition A is not by its very terms, a condition precedent to development, in the sense that it has to be complied with in order for "material operations" lawfully to begin development. Its breach is a breach of planning control, but that has no effect upon the lawfulness of the "material operations", the carrying out of which is in no way prohibited by any obligation in the last sentence of condition A. Nor is any demolition prohibited by it. If Mr Clayton's approach were right, the planning permission would have become incapable of lawful implementation once the gates had been removed from their mountings to repair them and the wall.

93. So far as condition C was concerned, the complaint was that the material submitted to and approved by Hackney LBC included drawing 0116, instead of 0116B. This error was not spotted or made good until on 19th September 2002, LUL sent 0116B to Hackney LBC in substitution. There has been no comment by Hackney LBC.

94. The error arose because 0116 had been the original drawing submitted to the Inquiries, showing the boundary walls and fences proposed north of the ramp on Shoreditch High Street and east beside Bethnal Green Road. This proposal was objected to because of the extent of hoarding and a revised drawing 0116B was presented instead to the Inquiries. The proposed revised treatment was approved as the basis for the submission of further and more precise details. This was overlooked when on 19th December 2001 drawing 0116 was sent. Mr Clayton's original point had been that there had been no details at all submitted but the evidence made it clear that, although it had been LUL's intention to postpone the submission of details, LUL in fact had submitted them. So Mr Clayton's point then relied on the erroneous drawing being submitted.

95. I do not consider that Mr Clayton's point is sound. There are two possibilities. First, Hackney LBC have approved the wall shown on drawing 0116 with the precise height, thickness, profile and colour as the original, as the letter of 19th December 2001 states, in which case there is an approval on the basis that the letter and drawing 0116 contain the precise details of what was shown indicatively on drawing 0116B, in which case the condition is met albeit unsatisfactorily. Alternatively, and I consider the correct view, drawing 0116 is irrelevant surplusage : no drawing had to be submitted for condition C approval and the location of the wall in drawing 0116 is so clearly different from the location of the wall in drawing 0116B that it could not be regarded as a more precise version of drawing 0116B. The location of the wall, however, was already sufficiently precisely shown on drawing 0116B for it to be built in that precise position as the condition required; and its other details and the details of ground treatment are precisely set out in the letter of 19th December 2001, albeit by reference to an existing wall and paving rather than by a drawing. Again, on the material placed before me condition C is satisfied.

96. Further, Mr Clayton provided no evidence that condition C had been breached. It is not breached simply by the carrying out of operations which might qualify as development. The demolition which is prohibited, as with condition A, is only that demolition to which the listed building consents C and D apply. The removal of the gate mechanisms

is not covered by those consents, nor would the removal for repair constitute demolition works to the listed building or part of it in any sensible use of language.

97. The sending of the correct drawing to Hackney LBC does not help LUL; the flexibility provided by *R v Newbury DC ex p Stevens and Partridge [1991] 65 P & CR 438* does not apply once the application for approval has been determined and the time for submitting details has passed.

Third : what is the significance of the commencement of development in breach of planning control?

98. I consider this issue in the light of the breach of condition 21.

99. The general rule is well-established and not in dispute. By section 171A of the 1990 Act, development in breach of condition constitutes a breach of planning control, and it may attract enforcement proceedings including enforcement notice, stop notice and injunction proceedings initiated by the local planning authority. The Secretary of State has default powers, but these are rarely used. Unlike failure to comply with a condition attached to a listed building consent, it does not constitute a criminal offence.

100. Development which itself constitutes a breach of planning control cannot satisfy the requirements of section 56 and the statutory condition in section 91 or the bespoke version which may be imposed; development will not have been begun as required. The permission would then lapse in accordance with the time limiting condition in the normal course of events. This principle has been clearly stated in e.g. *Oakimber Ltd v Elmbridge Borough Council (1991) 62 P & CR 594* Court of Appeal, and *F.G. Whitley & Sons v Secretary of State for Wales 1992 3 PLR 72*, Court of Appeal.

101. However, it is not invariably the case that development started in breach of condition is ineffective to commence development; in certain exceptional circumstances it may suffice to prevent the permission lapsing. It is the extent of those exceptional circumstances which is in issue here.

102. In *Whitley* itself, the Court of Appeal mitigated the rigours of that approach in a case where, although the conditions expressly required mineral workings to take place only in accordance with approved details and required the prior submission and approval of a landscaping scheme before mineral workings commenced, the submission of details preceded the commencement of workings but approval was not obtained until after their commencement and indeed after the time at which on a strict approach to the wording of the conditions, the time for commencement had passed. However, no enforcement proceedings had been taken by the time of the approval of the details and some of the workings had become immune from enforcement.

103. Woolf LJ held first that it did not matter whether the works relied on as commencing development preceded the obtaining of approvals, if those approvals were forthcoming within the timescale of the life of the permission. Any other approach "would be technical in the extreme". Although enforcement action could theoretically be taken, there would be no practical possibility of it succeeding once the approval had been obtained.

104. He then dealt with whether approvals had to be obtained by the time limited for implementing the permission. He said at p84A:

> "Although the development has to be commenced by this date, the conditions do not expressly require the approval to be obtained by this date. There is, however, a clear implication that the developer will have applied for permission before that date. As long as the developer has applied for the approval, I would not draw the implication that the approval must be obtained by this date. It must have been reasonably obvious to Parliament that there would be many situations where although a developer had made a timeous decision to apply for approval, that approval, through no fault of the developer, could not be obtained until after the expiration of the time limits for implementing the permission. Where this happens and the developer had already implemented the permission by commencing operations pending the outcome of approval, it could be grossly unfair to the developer to regard him as being time barred. Indeed, the operations which took place to comply with the time-limit may be a matter which would not be affected by the terms of the approval, although they would still contravene a blanket prohibition the commencement of operations. Alternatively, they may be of no significance from a planning point of view so no reasonable planning authority would contemplate enforcement action. I cannot accept that it was intended that in these circumstances a planning permission should be of no effect … ."

> At p84G: " … I take the view that it can accord with the intent of the legislation if the approval is obtained after the expiration of the time-limits as long as the application has been made before the specified time-limits and either the operations which have taken place are immune from enforcement or the approval is obtained prior to enforcement action. If the operations can be and are the subject of enforcement action the position is different, since in the context of the enforcement proceedings the question of whether an approval, and if so what approval, should be given can be decided by the Secretary of State, the Secretary of State using if necessary his powers to grant a fresh planning permission."

> At p85B: "It is in these circumstances that I consider that the third candidate provides the correct solution to the question and that whether the planning permission has been implemented has to be tested by examining the situation in an enforcement context by considering whether enforcement action is possible and if it is leaving the outcome to be determined in the enforcement proceedings. This is a sensible and practical solution to the possible problems in obtaining approval. Obviously, if the planning authority or the Secretary of State does not regard it as desirable, where a time-limit has expired, to give approval to reserved matters they are not under a duty to give approval. They can take the stand (as long as they act reasonably) that the developer has lost his chance. If, however, they give approval, no purpose would be served in requiring a fresh application for planning permission."
>
> At p86A: "If it is not already clear, I make it absolutely clear now, that if a developer does not comply with a condition he can have enforcement action or any other available action taken against him. The only consequence of the approach indicated in this judgment is that when the merits of the enforcement proceedings come to be considered, it is necessary to take into account the situation as it exists at that time and, in particular, whether or not at that time any approval required by condition has been obtained.
>
> The result is therefore that in this case, the operations having been commenced and the application for approval having been made before the expiry of the time-limits, the relevant operations no longer being enforceable against the approval having been obtained prior to the enforcement action, the developers' appeal to the Secretary of State should have been allowed."

105. Parker LJ agreed, saying that it was necessary for the applications for approval to have been made before the deadline, as a simple readily ascertainable fact. Sir David Croom-Johnson agreed with both judgments.

106. Mr Barnes recognises that although this might have assisted in relation to some of the matters relied on by Mr Clayton, it was of no direct assistance in relation to condition 21 because no work had been done by LUL as contemplated by condition 21. The *Whitley* case was also directly concerned with the seeking of approvals which is not at issue in relation to condition 21. He relied on other cases as showing that *Whitley* was not precluding other exceptions in circumstances where enforcement proceedings had not been taken and were not proposed or could not rationally be proposed.

107. His strongest help was *Agecrest Ltd v Gwynedd County Council 1998 JPL 325.* Like *Whitley,* the planning authority was seeking to take advantage of the time limits, in far from meritorious circumstances, so as to prevent a development which it no longer wished to happen. The developer and planning officers had agreed back in 1967 that, to avoid betterment levy and the introduction of time limits on existing planning permissions, a specified operation should be done so as to start the permission, notwithstanding that details of a number of matters which required prior approval had not been submitted to the authority. Collins J rejected the County Council's argument that the specified operation could not therefore amount to a lawful commencement of the development. He said at p334:

> "But it seems to me that there must be some flexibility in the manner in which the conditions precedent to an extensive development can be approved. There could be no conceivable prejudice to the purpose of the conditions in what was done. The construction of the spur road did not and could not in any way affect the need for the compliance with the conditions for any further development. This was not a case of waiver but of the Council exercising a proper and sensible discretion in the manner in which it dealt with he conditions. I am satisfied that the works were lawful, as all concerned intended and believed, and that the principle in *Whitley* is not applicable."

108. Mr Barnes next referred to *R v Flintshire County Council ex p Somerfield 1998 PLCR 336.* This case concerned a supermarket operator which was trying to show that a rival's planning permission had lapsed. A condition required that a traffic report should be submitted to and approved by the local planning authority before development was commenced. It was submitted, informally agreed to by officers but never formally approved by the authority. Carnwath J rejected the argument that the operations relied on to commence the development had been unlawful, and ineffective to preserve the permission. He said at p 352-3:

> "Thus Condition 11 was in substance complied with. The report had been approved. All that is missing was the formality of a written application and written notice of approval. Furthermore the actual work was in conformity with the plans that had been expressly approved by the council in June 1991, and it was carried out with the full knowledge and co-operation of the planning authority and the highway authority.
>
> In these circumstances, in my view, looking at the matter in 1997, it was not only reasonable for the authority to hold permission had been implemented, it would have been wholly unreasonable for them to have decided otherwise."

109. Mr Barnes found further assistance in what Beldam LJ said in *Oakimber,* which Woolf LJ approved in the Whitley case. He said at p. 616:

> "… If it had been necessary to do so, I would have expressed my agreement in principle with the view of Woolf J. (as he then was) in *Etheridge v. Secretary of State for the Environment (1984) 48 P. & C.R. 35* that a development carried out without permission or commenced in contravention of conditions of a permission would not be development to which the permission related because it was development carried out in breach of planning control and so not permitted. However the importance and nature of the condition and the extent of and the reasons for breach may in some circumstances be relevant considerations and I would prefer to reserve an opinon on the question for a case in which it is necessary to decide it."

110. The final decision upon which Mr Barnes relied was *Daniel Platt Ltd. v. Secretary of State for the Environment [1997] 1 PLR 73.* The Court of Appeal was concerned with the lawfulness of continued mining without the submission of any of the details required to be approved. The Court rejected what it described as a broad approach to *Whitley,* of asking whether what had happened before the deadline related as a matter of fact and degree to the planning permission. Schiemann LJ specifically rejected the application of the *Whitley* exception to an approval of details case where no details had been submitted at all. I do not see him as leaving open for later decision the application of the *Whitley* exception in quite the broad manner contended for by Mr Barnes. Mr Barnes suggested that what had been left for later decision was the position where through an unforeseen change of circumstance, compliance with a condition had by the start of work become impossible, impractical or purposeless. What Schiemann LJ actually said at p81G was:

> "We are not concerned directly with the situation, which undoubtedly can arise, when the planning permission is subject to a condition that the building must be built or the operations carried out in a particular way and yet what was done was at variance with what was foreseen. Those problems I would leave to be considered when they need to be considered."

111. What is there in contemplation is whether construction of a road to a degree on the wrong alignment, to take an example, could constitute the commencement of development. That has nothing to do with this case.

112. Mr Clayton sought to distinguish those decisions and relied on three other decisions. First, in *Leisure Great Britain PLC v Isle of Wight CC 1999 PLCR 88,* Keene J rejected an apparent suggestion that the application of the *Whitley* exception involved some broad equitable jurisdiction according to a sense of what was fair and reasonable. He held that the passage from Beldam LJ in *Oakimber,* which I have already cited, could not be read as encouraging such an approach; rather it was no more than a recognition that there might have to be exceptions made in particular circumstances to

the general rule. Keene J agreed with the decisions in *Agecrest* and *Flintshire*, but said at 100G:

> "It can be seen that both those cases were narrow exceptions to the general principle, one arising where the planning authority had agreed to work starting without compliance and the other where the condition had been met in substance, although not in form. Both decisions accord with normal legal principles."

113. Keene J rejected the argument that for a planning authority to stand by and do nothing when it saw the commencement of works in breach of condition, was akin to the position of the County Council in *Agecrest*. He said at p 101B:

> "The present case cannot, in my view, be brought within either of those two exceptions. It is argued that in standing by and doing nothing when the roadworks started to its knowledge, the defendant in this case was coming close to the position of the authority in *Agecrest*. I do not accept that. By itself mere failure to act, for example, by failing to serve an enforcement notice, is not to be seen as agreeing to work starting. Nothing in the evidence before me establishes any such agreement by the defendant. Nor patently does the decision in the *Flintshire* case have any application to the present facts."

114. He did not consider the fact that the Council only woke up to the potential argument and its significance late in the day constituted a waiver of the breach. Nor was he persuaded by the fact that the reason why the point mattered to the Council was that it wished to adopt a different approach to the development, rather than for any reason more directly related to the impact of the breach of condition.

115. The case did not fall within any of the two recognised exceptions and was no more than a simple example of development which was begun in breach of condition, unlawfully and ineffectively. Although Keene J accepted that the categories were not closed, he was not eager to create new ones.

116. Mr Clayton next turned to the judgment of Sullivan J in *Henry Boot Homes Ltd. v Bassetlaw District Council [2002]EWHC 546 Admin* . Sullivan J reviewed the *Whitley* related cases and in the light of the extensive statutory code in the Town and Country Planning Act 1990 considered what room there was for judicially created flexibility. He pointed to the remedies available to those who wish to implement or have implemented development without complying with conditions, within sections 73 and 73A of the 1990 Act. Of course, they may not provide an answer helpful to the developer in all his troubles but they do provide the answers which Parliament was prepared to give. He pointed to the fact that authorities do not have to take enforcement

proceedings; they do so only if they consider it expedient to do so. The passage of time will lead to unauthorised development, if not enforced against, becoming lawful. So Sullivan J concluded at paragraph 140:

> "Thus, there is a considerable degree of "flexibility" and "common sense" built into the statutory code. Of particular importance, the procedures in the statutory code ensure that the interests of all parties, neighbours, other developers and landowners, statutory bodes (such as highway and water authorities) and the Secretary of State, are all taken into account at the appropriate stage. It is important at all times to remember the public nature of town and country planning. It is not a matter for private agreement between developers and Local Planning Authorities."

117. Sullivan J then referred to the decision of the House of Lords in *R v East Sussex County Council ex parte Reprotech (Pebsham) Ltd [2002] UKHL 8,* upon which Mr Clayton also relied. Although that case concerned the procedures associated with a determination as to whether or not planning permission was required, it was significant to Mr Clayton's argument in relation to the need to prevent exceptions to the *Whitley* principle becoming the means whereby the statutory procedures involved in a section 73 or 73A application, which could involve public consultation and Environmental Impact Assessment, and the imposition of fresh conditions over and above those which the developer sought to change, were sidestepped by a private agreement or inaction by developer and planning authority.

118. Lord Hoffman said in paragraphs 27 to 29:

> "27. Be that as it may, the important question, as Aldous LJ recognised, is whether the resolution counted as a determination under section 64. Such a determination is a juridical act, giving rise to legal consequences by virtue of the provision of the statue. The nature of the required act must therefore be ascertained from the terms of the statute, including any requirements prescribed by subordinate legislation such as the General Development Order. Whatever might be the meaning of the resolution if it was not a determination within the meaning of the Act, it did not have the statutory consequences. If I may quote what I said in the *Mannai case [1997]* AC at p776B-

> "If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease."

> 28. A reading of the legislation discloses the following features of a determination. First, it is made in response to an application which provides the planning authority with details of the proposed use and existing use of the land. Secondly, it is entered in the planning register to give the public the opportunity to make representations to the planning authority or the Secretary of State. Thirdly, it requires the district authority to be given the opportunity to make representations. Fourthly, it requires that the Secretary of State have the opportunity to call in the application for his own determination. Fifthly, the determination must be communicated to the applicant in writing and notified to the district authority.
>
> 29. It is, I think, clear from this brief summary that a determination is not simply a matter between the applicant and the planning authority in which they are free to agree on whatever procedure they please. It is also a matter which concerns the general public interest and which requires other planning authorities, the Secretary of State on behalf of the national interest and the public itself to be able to participate."

119. In the upshot Sullivan J said that:

> "In the light of these dicta the court should, in my judgment, be very slow to permit extra statutory "flexibility" or to countenance non-statutory "agreements" between developers and Local Planning Authorities that conditions need not be observed. *Agecrest* should now be confined to its own particular facts, an express agreement in writing reached in the context of a less comprehensive planning code. The decision is also explicable upon the basis that, on the facts of that case, a legitimate expectation had been created as a result of the Deputy County Planning Officer's agreement at the meeting on 10th March 1967 and the Clerk of the Council's letter dated 5th April 1967, from which it would have been an abuse of power for the Local Planning Authority to have resiled, bearing in mind the imminent deadline of 6th April 1967. I will deal with the question of legitimate expectation under ground (3) below, but unless it can be established that an *Agrecrest* "agreement" has given rise to a legitimate expectation from which it would be an abuse of power for the Local Planning Authority to resile, I do not see how such an agreement can now be allowed to bypass the statutory code.
>
> Mr Elvin submitted that implementation of planning permissions was not dealt with by the statutory code. The code was silent, so judges had been obliged to supplement it, as in *Whitley.* Where one was dealing with judge-made rules rather

then the provisions of the code itself, a measure of flexibility and common sense was both necessary and desirable But the code does address this issue. Section 92(5) makes specific provision for phasing conditions, and section 191A(1)(b) is clear:

"Failing to comply with any condition subject to which planning permission has been granted, constitutes a breach of planning control."

120. The last case to which Mr Clayton referred me was the decision of Richards J in *Coghurst Wood Leisure Park Ltd. V Secretary of State for Transport, Local Government and the Regions and Rother District Council [2002] EWHC 1091 Admin*. Richards J referred to the decisions of Dyson J and of the Court of Appeal in *R v Leicester City Council ex p Powergen UK plc,* respectively *[1999] 4 PLR 91* and *[2000] JPL 1037*. Although the context of the observations which I cite is that of legitimate expectation, which is not how Mr Barnes could or did put his case, Mr Clayton submitted that they were nonetheless of assistance in defining the extent to which a Court should be willing to create extra-statutory solutions which have the effect of defeating statutory procedures and powers to the detriment of those who are entitled to be involved in the decision-making process.

At p100B, Dyson J said:

"… the effect of the legitimate expectation argument, if accepted, is that Powergen will have achieved a variation of condition 2 without going through the relevant statutory procedures. The starting point is that the law of town and country planning is public law. It is an imposition in the public interest of restrictions on private rights of ownership of land. The courts should not introduce principles or rules derived from private law unless expressly authorised by Parliament to do so, or if it is necessary to give effect to the purposes of the legislation."

He continued at p101G-H :

"… section 73 is the provision that Parliament has enacted to deal with situations where a developer wishes to develop land without compliance with conditions previously attached to a planning permission. What is required in such circumstances is that the developer apply for planning permission. I do not accept that the provisions of section 73 can be sidestepped by persuading a local planning authority, still let an unauthorised officer, to vary or waive a condition under the guise of the exercise of a general management discretion in the implementation of planning permissions."

Schiemann LJ said briefly at para 23:

> "The judge held that the officers, whose words were relied upon as preventing the authority from now taking any point in relation to time, had neither actual or ostensible authority to make representations to that effect and rejected an argument to the effect that the doctrine of legitimate expectation entitled Powergen to such rights. He went on to hold that the words relied on could not give rise to the expectation asserted and that in any event they had not been relied on. I agree with the reasoning and conclusion of Dyson J that on the facts of this case it is not possible to show that the doctrine of legitimate expectation operates so as to entitle Powergen to proceed to build the Food Store."

121. Richards J points out that what Dyson J had to say was quoted with approval in *Reprotech* by Lord Hoffman, and said at paras 60 and 62:

> "Secondly, and more importantly, I share the concern expressed by Dyson J in Powergen about the sidestepping of the statutory provisions of section 73, with their attendant procedures to protect the interests of third parties and the general public interest. The court should in my view be very slow to find that the principle of legitimate expectation operates so as to keep alive a planning permission that has on the face of it expired because there was no lawful commencement of the development within the time laid down; or, to pursue the matter to the conclusion sought by the claimant in this case, to find that it operates so as to require the grant of a certificate of lawful development in circumstances where on a proper analysis the development would be unlawful. There is nothing in the circumstances of the present case capable of achieving that result. It cannot possibly be said to have been an abuse of power to hold that the planning permission was not lawfully implemented."

> "I do not think that Agecrest should now be regarded as a discrete exception to the general principle that operations carried out in breach of a condition cannot be relied on as material operations capable of commencing a development. Any exceptions to that principle need to be established in accordance with the principles discussed in Powergen and Reprotech. I do not know whether Agecrest was cited to the court in Powergen, but there is an implied reference to it, or to its reasoning, in the passage of Dyson J's judgment where he states that section 73 cannot be sidestepped by persuading an authority to vary or waive a condition "under the guise of the exercise of a general management discretion"; and, as I have already said, that passage fell within the scope of the Court of Appeal's approval of Dyson J's judgment. In any event I have difficulty in seeing

> how the decision in Agecrest fits into the present statutory framework and I would accept Mr Brown's submission that it was narrow in scope and is distinguishable. I do not place any great weight on the reference to it in Leisure Great Britain, where the point does not appear to have been the subject of substantial argument. Accordingly, the inspector did not fall into error by failing to deal in terms with Agecrest and the decision in that case does not undermine his reasoning or conclusion."

122. I draw the following points from those cases.

123. (1) The starting point is clear : development in breach of planning control is normally ineffective to commence development because it is unlawful. But there are exceptions as the *Whitley* case shows. *Whitley* has not been disapproved in the House of Lords. They cover the situations first, where before the deadline has passed the necessary consents have been obtained even though development commenced before they were obtained, and secondly, where the necessary consents were sought before the expiry of the deadline and obtained after it but before any enforcement action had been taken. The approach of the Court of Appeal was seen as a sensible and practical approach which allowed for the realities of any authority rationally taking enforcement proceedings in such a situation. The Court did not contemplate one way or another the making of further exceptions and it did not address the position where the developer has failed to do required works as opposed to a failure to obtain approvals for details.

124. (2) The effect of *Powergen* and *Reprotech* is that the statutory procedures and powers, which would apply to the applications which developers would have to make in order to commence development lawfully and effectively, should not be sidestepped or bypassed through private agreements between developer and planning authority or through their inaction. An application under section 73 or 73A would entail public consultation, could entail environmental impact assessment and certainly gives the authority the opportunity to impose alternative conditions to those which the developer wishes to change and indeed to impose additional conditions which may not be related to the conditions which are the subject matter of the application. It would follow that the circumstances in which an exception to the general principle could be made are very limited and I certainly accept the general trend of views at first instance to that end.

125. (3) The scope for an exception based on legitimate expectation is limited by the very nature of the expectation which it is legitimate for a developer to entertain in circumstances where statutory procedures exist. He could normally only expect to have to follow statutory procedures. It is also clear that there is no scope for a general exception based on waiver or inaction, let alone one based on a general view formed by a judge, who is after all not the planning authority, as to what would be fair and commonsense. Statute provides the flexibility and the remedy to the extent that Parliament has seen fit to do so.

126. (4) However, neither the House of Lords in *Reprotech* nor the Court of Appeal in *Powergen* overruled or expressly confined to its particular facts, respectively, the decision in *Whitley*. The decision in *Whitley* does not fall foul of those subsequent decisions. *Whitley* dealt with circumstances where the necessary approvals of details were sought and did go through all the relevant statutory procedures. It would have been irrational for the Council thereafter to have thought it expedient to take enforcement proceedings. But Woolf LJ also referred to other circumstances in which the effectiveness of development to commence a planning permission should be judged in the light of the expediency of enforcement proceedings : where the work relied on was started in breach of condition, but within the five year period the approvals were obtained, enforcement proceedings would be too technical; where works contravened a blanket prohibition but were not themselves something to which the missing approvals could relate, or where the works in breach were of no planning significance, the position had to be judged in the light of enforcement proceedings. I do not say that Woolf LJ was saying that those latter two circumstances were ones in which development in breach of condition would always be effective, (though he was for the first). Nor was he saying that in no other circumstances could such development be effective. Nor was he making an unprincipled ad hoc non-statutory exception to a statutory code or one which was confined to cases where the breach arose from a failure to secure approvals of details, which is not a distinction drawn by the Act for these purposes. It cannot be seen as a hard case making bad law. And it is inherent in *Whitley*, that it may not be possible to tell whether the development has been effectively commenced immediately upon the expiry of the five year period because the exception in *Whitley* depends upon whether the previously sought approvals are in fact granted before enforcement proceedings are initiated. It would not be unlawful to commence such proceedings <u>before</u> the approvals were granted, although there would be no point in continuing with them thereafter.

127. (5) I consider that the principle discernible in Woolf LJ's reasoning is that where it would be unlawful, in accordance with public law principles, notably irrationality or abuse of power, for a local planning authority to take enforcement action to prevent development proceeding, the development albeit in breach of planning control is nevertheless effective to commence development. Three of the passages from his judgment, to which I have referred in paragraph 104, related his approach to the rational availability of enforcement proceedings. Enforcement action may still be taken to remedy the breach by requiring compliance with the condition. But the development cannot be stopped from proceeding.

128. (6) I also consider that the decisions in *Agecrest* and *Flintshire* can be seen as fitting that analysis. Certainly Keene J in *Leisure Great Britain* saw both decisions as being in "accord with normal legal principles." Whether *Agecrest* is analysed as legitimate expectation or as an abuse of power in the light of what in 1967 would have been seen as permissible managerial discretion in public and planning law, it would be indeed harsh if its facts provided no public law remedy against a planning authority taking enforcement action. *Flintshire* can also be similarly analysed. Once the jurisprudential basis for the *Whitley* case is clear, other cases can be seen as further illustrations of the application of the principle rather than as further ad hoc exceptions to the statutory code.

129. (7) I do not consider that *Powergen* and *Reprotech* can be understood as removing public law control from the exercise of the discretionary power to issue an enforcement notice where the circumstances, whether or not arising out of past dealing between developer and planning authority, warrant its intervention. A breach of planning control, and it would be rare, which could not lawfully be the subject matter of enforcement action, ought to have different legal effects from one which could be enforced against. That I believe to be the public law principle, and not an ad hoc piece of judicial legislation, which underlies *Whitley.*

130. (8) However, if after the expiry of the five year period, it is possible to conclude that enforcement action is not lawfully possible, I see no reason why the development which cannot be enforced against should not be regarded as effective to commence development. The role of enforcement, and the statutory flexibility which it brings, cannot be left wholly out of the picture when reaching a conclusion on a matter about which the Act is not explicit – can development in breach of planning control ever be effective to commence a planning permission? This is itself a judicial interpolation into the statutory code. It too arises from the application of public law principles as to the legal consequences of unlawful though not criminal acts. No sound distinction can be drawn for these purposes between development which cannot be enforced against because there has been no breach of planning control and development which cannot be enforced against because such action would itself be unlawful. If, in language which the post Carnwath Report enforcement regime has made redundant, development in breach of planning control is immune from enforcement control, it should be regarded as effective to commence development. Such an approach flows from my analysis of the *Whitley* line of cases.

131. (9) On that analysis, it would be insufficient to show that the authorities were indifferent to the breach, or unlikely to take enforcement action or indeed that they had decided not to (although no concluded view is required). It is necessary to conclude that they could not do so.

132. (10) I am unpersuaded that it is always necessary for a fresh planning application or section 73 application to be made, in order to give effect to the statutory scheme. The lawful exercise of the discretionary power to take no enforcement action under section 172 entails no particular statutory procedures or public consultation. Eventually development in breach of planning control becomes lawful. But it is not a private agreement; it is a public decision and subject to judicial review. Even less so could the position where enforcement action could not lawfully be taken, be described as being at odds with the statutory structure or as a private agreement : it is the result of the application of public law principles to the facts in the light of the statutory provisions.

133. (11) I do not consider that the observations of Beldam LJ in *Oakimber* can assist without the Court taking on a role in assessing the planning significance of matters which are the exclusive purlieu of the planning authority, the decision-maker on issues of fact, degree and planning significance subject to statutory appeal and judicial review.

134. I now examine the position as it arises here in the light of those points.

135. It is accepted by LUL that the circumstances in relation to condition 21 do not fall within the *Whitley* specific exception or within any other case in which an exception to the general rule has been allowed. While conceding that a Court should be slow to acknowledge other exceptions, Mr Barnes submitted that a further exception, which he described as largely procedural, should be recognised. He contended that a Court should not declare that a planning permission has lapsed where the breach of condition is minor and cannot affect the substance or purpose of the conditions in question and no enforcement action is proposed.

136. I do not accept that submission. It is not consistent with the allocation by statute to the planning authorities and not to the Courts of the task of assessing the planning significance of any condition and of its breach. It is an invitation, which I decline, to usurp the functions of the planning authorities. I do not consider that it is analogous to either *Agecrest* or to *Flintshire,* even allowing for their authority to remain undiminished. Although *Agecrest* involved a failure by the developer to make a formal application as it might have done, what it did back in 1967 when the waiver of formalities was more readily accepted and the role of statute in engaging the public was less emphasised, was to try and arrange matters with the agreement of the authority and it pursued that route with the authority's consent as far as it could. In *Flintshire,* the developer had submitted the necessary report albeit that it was approved only by officers informally; the Council did not suggest that there was more that the developer should be doing. Indeed, in *Whitley*, it was the action of the Council which prevented the actions of the developer bearing fruit. By contrast, here, and rather as in *Leisure Great Britain*, LUL has not done what it was required to do nor has it taken the steps open to it under the Act to obviate the need for compliance. It is perfectly understandable why it would no longer wish to comply and its reasons are obviously sensible but that does not represent a sound basis for making an additional exception to the general rule.

137. The second part of Mr Barnes' formulation of the exception related to whether or not the planning authority proposed to take enforcement action. He initially said that this exception was satisfied if the authority had reached no decision one way or the other on enforcement action, as well as if the authority had reached a positive decision that it would not take enforcement action. But he said that his case still was sound even if he had to show that it would be unlawful for the authorities to take enforcement proceedings because they could not rationally conclude that it was expedient to take enforcement proceedings in these circumstances.

138. In my judgment, mere inaction on the part of the planning authority cannot prevent a permission lapsing; the effect of a sufficiently long period of inaction is to make lawful that which was done in breach of planning control, but that is the result of a specific statutory provision – section 191 of the 1990 Act read with section 171B.

139. A lawful positive decision to the effect that it would not be expedient for the purposes of section 172 to issue an enforcement notice would eventually lead to the development in breach becoming lawful with the passage of time but of itself would not stop the permission lapsing. A lawful positive decision by a local authority cannot without more preclude the exercise by the Secretary of State of his default powers under section 182. Public law remedies might or might not be available to prevent an authority

changing its mind with or perhaps without any actions in reliance on that decision by the developer. One cannot say, in those circumstances that the development in breach of condition is capable of preventing a permission lapsing.

140. However, for the reasons which I have given, if enforcement proceedings cannot be taken because it would be unlawful to take them, the material operations, albeit in breach of condition, are effective to constitute the start of development.

Would enforcement action be unlawful here?

141. The enforcement proceedings which it is necessary to contemplate for the purposes of Mr Clayton's submissions are not those which might seek to remedy the breach of condition by requiring the carrying out of the works of clearance and landscaping of the exchange land, for that would not prevent the carrying out of the underlying development. It is necessary to decide whether the authorities could rationally seek to prevent the whole development by asserting that the works were being carried out without any permission at all. I consider that such enforcement action would not be irrational, however unlikely in fact it might be, unless LUL could demolish the listed and unlisted Goods Yard, apart from the Viaduct, anyway.

142. The fundamental reason is this. The statutory purpose behind the introduction of time limits in 1968 was to avoid an accumulation of unimplemented permissions and to enable the desirability of former permissions to be re-examined in the light of changing policies and circumstances. This could include a greater knowledge of the impact of a proposal. The Act contains a number of features which assist the developer: the amount of work required to constitute a material operation and thereby to preserve the permission is insubstantial; a procedure exists whereby a renewal permission can be sought with fewer formalities; section 73 provides a means whereby a developer can take steps to preserve the life of the permission if more time is needed to prepare details. In this particular case, although I rather doubt that the authorities would see this as a persuasive point themselves, Mr Clayton fairly points out that there have been some changes since the 1997 decision : the listing of the Viaduct, adjacent to the parts of the Goods Yard to be demolished; there is a greater knowledge now than then of the extent of the remaining historic building(s) as appears from the comparison of the 1997 Report and the later recommendation for listing, albeit that it was only accepted in part; there appears to be a greater interest in the protection of the Goods Yard, listed or not, and a change of position on the part of English Heritage which would mean that any re-examination of the issue would be on a more thorough and professional basis than last time, if I may say so without intending any offence to Mr Prokopp. It would not be irrational and unlawful for a Council in such circumstances to take enforcement proceedings, however improbable in fact here, so as to examine matters with a view to considering a different approach to the Goods Yard.

143. If however, the rest of the Goods Yard could be demolished without the need for any further planning permission (and, as I have already concluded, the listed building consents have not lapsed), it would be irrational for enforcement proceedings to be considered with a view to a re-examination of the prospects of retaining the whole of the Goods Yard and of the value of doing so. There is no other rational basis upon which it has been suggested that enforcement action could be taken. (The possible need

for listed building consent at the interface of demolition with the Viaduct and the need for compliance with condition 12 does not go to this issue). Indeed, these whole proceedings would be completely pointless if LUL could demolish the Goods Yard (save for the Viaduct) anyway. There is otherwise seeming unanimity as to the urgent need for ELLX, and no desire to review it on transport policy or other environmental grounds.

144. In order to reach a decision on whether the rest of the Goods Yard can be demolished anyway without any further planning permission or consent even without the 1997 permission, it is necessary to consider two further contentions made by Mr Clayton.

Listed Building Consents and the Demolition of the Goods Yard

145. For the reasons which I have already given, I do not consider that the terms of the listed building consents have been breached. I do not understand it to be in dispute but that the terms of section 18 of the LBCA have been met in fact, and that works to which the consents relate have been begun. The consequence of this is that subject to the points to which I now turn, LUL can demolish that part of the Goods Yard which is the subject of the 1997 Listed Building Consents. For the reasons which I have given earlier in relation to the extent of the listed building, I approach this issue on the basis that LUL needed and have implementable listed building consents for the work which it wished to do to the originally listed part or parts of the Bishopsgate Goods Yard.

146. Mr Clayton takes two points: first, he submits that as planning permission has lapsed and as the unlisted part or parts of the Goods Yard which LUL wish to demolish are part of a single building, none of the unlisted parts can now be demolished. This covers the bulk of the Goods Yard. His second point is that the listing of the Braithwaite Viaduct in March 2002 coupled with the effect of section 1 (5) of the LBCA means that the whole of the hitherto unlisted part or at least a substantial but unascertained part of the Goods Yard cannot now be demolished without a listed building consent.

147. First, however I should deal with a late submission for the claimant, developed in writing. Mr Clayton contended that even if the planning permission had not expired, it would not have permitted the demolition of the unlisted part of the Goods Yard. The significance of this contention is that if I were to conclude that the Goods Yard comprised one building with the Braithwaite Viaduct, the Order and planning permission could never have been lawfully implemented because LUL did not intend to demolish the Braithwaite Viaduct. But it is without foundation. The permission by its terms permits the works in the Order. It is true that the Order does not use the word "demolish" in the description of Work No.2. But it is clear from the description of the work that the Goods Yard is to be demolished in part as the new railway is to cross the "site of the disused" Goods Yard. The concept of "reconstruction" in Works No. ID and IE includes prior demolition of the existing structures. The need for listed building consent arose from the proposed demolition of listed buildings as the conditions make clear. They are all works within the Order, and are therefore all permitted by the planning permission. Article 4(4) also permits any other works to be done of whatever nature which are necessary or expedient for the construction of the railway. It is perfectly clear from the Report of the Inspector and the Decision that the demolition of

the then listed and unlisted parts of the Goods Yard, save for the Braithwaite Viaduct, was at least regarded as within the scope of Article 4(4). I do not consider that Mr Clayton is correct to suppose that all parties to the Inquiries, from promoter to objectors such as Mr Prokopp, the Inspector and Secretary of State had failed for years to appreciate that the Order, permission and consents were useless, unimplementable, and flawed from the outset, only for Mr Clayton to come across this point during oral argument.

148. I turn to his principal submissions. Planning control over the demolition of unlisted buildings is contained in section 55(1A) of the TCPA 1990 : the demolition of buildings constitutes a building operation. By section 55(1)(g), the demolition of buildings of a description specified in a Direction does not constitute development. The relevant Direction is in Appendix A to a related Circular; it is the Town and Country Planning (Demolition – Description of Buildings) Direction 1995. It provides, so far as material:

> "2.- (1)subject to sub-paragraph (2), the demolition of the following descriptions of building shall not be taken, for the purposes of the Town and Country Planning Act 1990, to involve development of land:
>
> (a) any building which is a listed building as defined in section 1(5) of the Planning (Listed Buildings and Conservation Areas) Act 1990;
>
> (d) subject to sub-paragraph (3), any building other than a dwelling-house or a building adjoining a dwellinghouse;"
>
> "3. In this direction –
>
> "building" does not include part of a building, …. .".

149. The effect of this is that if the Goods Yard including the Braithwaite Viaduct is a single building, planning permission is required for the demolition of the unlisted part. If the Braithwaite Viaduct is a separate building, then no planning permission is required for the demolition of the rest of the Goods Yard pursuant to the listed building consent and to the Direction. The effect of the 1995 Direction is that the listed part only of a single building cannot be demolished pursuant to a listed building consent unless planning permission also exists. But the demolition of the whole building is not development and does not require planning permission and the listed building consent provides the relevant further consent for the listed part.

150. Both parties invited me to reach a conclusion, differing ones of course, as to whether the Braithwaite Viaduct was one building with the rest of the Goods Yard. The listing and the description were prayed in aid by both sides. The listing says : "The following structure shall be added to the list – BRAITHWAITE VIADUCT". The description reads so far as material:

"The surviving 260 metres of a viaduct built by the Eastern Counties Railway Company between 1839 and 1842 to a plan by John Braithwaite, the company architect. It was designed to carry trains into the terminus of Shoreditch Station (later called Bishopsgate Station, then superseded in 1875 by Liverpool Street Station). It was originally about 2 kilometres long and carried two lines of track on a series of broad elliptical vaults.

The surviving section contains 21 piers supporting 20 arches. It is built of stock brick from various sources, and the piers are decorated by stone impost bands and rendered plinths. The Gothic style of cross vaulting was an unusual choice, set against the Italianate style of the station building. The structure of the Viaduct is reminiscent of earlier canal architecture than it is of the more standardised railway architecture that was to follow. The piers are pierced by one, two or three pointed cross vaults which allowed pedestrian traffic to travel below the viaduct. This was intended to minimise the disruption to movement in the area and thus, lessen the impact of the railway line on local life. Shoreditch Station was remodelled between 1877 and 1881, and that new development encased the Viaduct between extensive vaults to north and south, the whole supporting a vast goodsyard on the upper deck. The surviving section of the Viaduct was reduced by approximately 2 metres before the bonding of the new vaults to its current width of 14 metres, although the foundations of the original piers survive to their full width.

The Braithwaite Viaduct is a very early and rare example of a railway viaduct associated with a first generation London Terminus. Its unusual and individual design and use of materials set it apart both structurally and visually from the more standards forms of railway architecture. It is associated with an important phase of railway development and bridges the period between distinct canal and later distinct railway engineering forms.

The Goodsyard was constructed some forty years after the Viaduct, a time from which many more buildings survive and, as PPG15 tells us, greater selection is needed, and that only buildings of definite quality and character are listed. The surviving structures were part of a much larger scheme, the bulk of which was destroyed by fire in 1964. Because of these losses, it too suffers from a lack of context. Ministers have concluded that these factors are so serious that they compromise the quality and character – and, therefore, any special interest – the buildings might have had; the Goodsyard will not be added to the list."

151. Mr Clayton relied on the reference to new development encasing the Viaduct to north and south and to the whole supporting the goodsyard on the upper deck. He pointed to the bonding of the new vaults to the Viaduct. I was told that this had been achieved in part by the stitching in of the brickwork and in part by metal fixtures and that in places there was no physical connection. Mr Barnes emphasised the plurality of structures referred to. The letter of the 8th March 2002 to English Heritage from the Department of Culture, Media and Sport explaining its decision in view of the desire of English Heritage to see a wider listing, refers to Ministers considering whether " to add the buildings and structures at Bishopsgate Goodsyard" to the list.

152. Both parties found some passages to their liking in the recommendation for the complete listing of the whole Goods Yard by the Listed Building Inspector, a recommendation rejected by the Department. This recommendation of December 2001 reversed the previous position. The material passages are as follows:

> "This proposal is to list the entire structure in grade II. This is wholly appropriate for the bulk of the surviving fabric which dates form 1877-81. The earlier work is of exceptional interest and rarity and requires a greater degree of management control. Consequently, we are also recommending that the 1839-42 Braithwaite Viaduct be scheduled."
>
> "The viaduct is abutted on each side by the widening carried out as part of the 1877-81 creation of the goods depot above: the outer spandrels of the arches are thus concealed by later brickwork, but the viaduct survives in its entirety within these additions. In 1877-81 this site was converted from a main line terminus to a goods – only terminus, and a very complex, three-tier system of upper loading platforms, carriage hoists, hydraulic gear, storage areas, carriageways with turntables, powered by an extensive system of steam boilers and accumulators. This huge complex, built at a cost of £500,000, lay beneath a large warehouse and goods station above: these were destroyed by fire in 1964, leaving the lower layers intact. We are thus dealing with two principal components: an exceptionally important early railway structure (the 1839-42 Braithwaite Viaduct) and a partial survival of a once-flourishing goods depot.
>
> All pre-1840 survivals of railway structures are of outstanding importance and the presumption is very much in favour of listing them. Britain's exceptional legacy of such structures is of international importance. There is more to Bishopsgate's interest than the first generation survivals alone, however.
>
> The complex is vast and an engineering enterprise of considerable magnitude. The site shows the development of the railway age, from the first phase, to the heroic High Victorian phase of colossal engineering works.

> Decision Precis: In spite of the loss of the goods station above, this complex of viaducts and warehousing is of special interest for two principal reasons. The 1839-42 Braithwaite Viaduct is an exceptionally early railway structure. Originally free-standing it was subsumed in 1877-81 to form part of the sub-structure to a goods depot, comprising storage vaults with remains of a system of carriage hoists and tracking. We are recommending the Braithwaite Viaduct for scheduling."

153. I was also shown descriptive material prepared by English Heritage which treats the Goods Yard as a structure containing the Braithwaite Viaduct.

154. I am extremely reluctant to form a view upon this material as to whether there is one or more building or structure. If the matter were one for my determination as a matter of fact and degree, I would be doing little more than hazarding a guess in the absence of better drawings and photographs and a view informed by a clear understanding of the physical and functional connections. I acknowledge that where a judge is the finder of fact and degree, it will sometimes be necessary for a decision to be arrived at on very limited material and with the advantage of a clearly defined burden of proof to enable the effect of that limitation to be visited on the party who bears the burden of proof.

155. But I do not consider it appropriate for me to reach a conclusion on this matter anyway unless the facts were so obvious as to permit of only one answer; and I would have doubts about what was an obvious answer in the light of my view as to what was obviously listed originally and its incompatibility with the views of the Secretary of State who, subject to judicial review, is the ultimate decision-maker on matters of fact and degree, with the benefit of expert advice. I do have a view but I do not have all the material which he would have and to express it would be unwanted meddling in someone else's decision.

156. If I were to express a conclusion on whether the Viaduct was a separate building or not in these proceedings, it would be binding on all parties including the local planning authorities who have responsibility for enforcement but have not appeared. But it could not be binding on the Secretary of State so as to prevent him taking a different view in the exercise of his default powers, or if the matter came before him on appeal from an enforcement notice which was issued on the basis that it was all one building.

157. Most importantly, the question of fact and degree is for the determination of the local planning authorities in the first place in deciding whether or not to take any enforcement measures, whether by enforcement notice, stop notice or injunction proceedings in the event of LUL commencing demolition works. If such action were to be taken, LUL would be able to appeal to the Secretary of State who in turn would be able to reach a conclusion, following an Inquiry and Report by a suitably qualified Inspector, as to whether there was one or more buildings at the Goods Yard. For me to reach a decision would be to usurp that process and those powers.

158. Indeed, whilst English Heritage have been served as an Interested Party, it has not participated; its views on this issue are not clear and it has an obvious expertise and interest which should be made express and available for challenge. Indeed there may be many bodies who would be deprived of their say, if an issue of this sort were to be taken from the local authorities with their habitual consultation procedures, or from the Secretary of State with his Inquiry procedure, and dealt with by the court with a limited number of participants. Mr Clayton, in other parts of his argument was keen to assert the primacy of applicable statutory procedures over judicial interventionism. He has a sound point in general and it does not help him here.

159. Decisions as to whether a building can be demolished or whether it needs planning permission can be resolved by statutory process, including the successor to the one in relation to which Lord Hoffman in *Reprotech* made the observations which I have set out earlier in relation to the public and statutory nature of planning. I cannot take on a role for which statute has prescribed a procedure in which the courts would only have a review jurisdiction.

160. This is a particular application of a broader submission made by Mr Barnes, which I deal with later, to the effect that these proceedings were an attempt to usurp the powers of the planning authorities and to put the Court in their shoes.

161. It is no answer to that to say that if I reach no decision there is a possibility that no enforcement authority will consider the matter until too late. A refusal on their part to address their minds to the issue in the event of demolition being as imminent as it appears to be, would be capable of being challenged by way of judicial review. But that is neither the form nor the substance of these proceedings. Nothing can be inferred in that respect either from the non-appearance of either Council because no decision or inaction of theirs is at issue, and indeed the particular point now at issue scarcely appears in the detailed Statement of Grounds. Neither the potential urgency of the issue nor the silence of the authorities confers on me powers which I do not possess.

162. For those reasons I express no conclusion as to whether LUL can or cannot lawfully demolish all of the Goods Yard that it wishes to, regardless of whether or not the 1997 permission has lapsed. It is for the planning authorities to decide what to do if LUL start to demolish the unlisted parts of the Goods Yard. The way in which they react or fail to react may be subject to review in the Courts.

163. Such a conclusion may be unattractive to both parties, and after a three day hearing, but to my mind it reflects the review role of the courts and the primary role of the authorities as judges of fact and degree. It is their decisions or indecisions which must be the focus of proceedings. If they concluded that the Goods Yard was several buildings rather than one, the challenge to that conclusion would have to be made on public law grounds. The mere fact that the claimant has brought these proceedings cannot invest the Court with that primary role in its stead, so as to turn the resolution of such an issue into a form of private litigation as between a developer and one objector. Statutory procedures exist for the resolution of that issue : either an application by LUL under section 192 for a certificate that no planning permission is required, or

enforcement action by Tower Hamlets or Hackney LBCs; an application for planning permission simply for the demolition of the unlisted part of the Goods Yard building, if such it be, could be made.

164. Mr Clayton's second principal point related to the consequences for the unlisted parts of the Goods Yard of the recent listing of the Braithwaite Viaduct. He relied on the extended definition of "listed building" in section1(5) of the LBCA 1990 to argue that rather more of the Goods Yard was now listed. Other parts of the Goods Yard could be an "object or structure fixed" to the Viaduct or "within the curtilage of the [Viaduct] forming part of the land". He pointed to the tailpiece to the Parliamentary Answer given on 25th March 2002 by Mr Jamieson dealing with the new listing in which he said: "London Underground will need to obtain Listed Building Consent to demolish the structures adjacent to the Braithwaite." Mr Clayton said that this showed that LUL could not proceed in any event because it did not have those further consents and the extent of consent required could turn out to be quite substantial.

165. It was this second point which also lay behind my request that the relevant Departments be notified of these proceedings. The Treasury Solicitor in a letter dated 4th October 2002, said:

> "The answer was given on the basis of initial advice from officials. However, before the answer was given, DTLR officials became aware at a late stage that the legal implications of the status of the structures adjoining the Braithwaite were not as clear as the original draft had suggested. Therefore they sought to amend their advice to Mr Jamieson by proposing the deletion of the last line of the proposed answer. Unfortunately this was not done before the answer was approved by the minister. Mr Jamieson will be writing to Ms King in order to explain the position".

166. The Treasury Solicitor's letter does not entirely remove the effect of the Parliamentary Answer because although the tailpiece should not have been there , that is not because there is no doubt about the matter, but rather because the Department for Culture thinks that there may be an issue to resolve.

167. I confess to having real difficulty in seeing how it might be thought that the building listed in 2002 could be other than the Braithwaite Viaduct alone. Not merely do the terms of the listing make that clear beyond a peradventure but the question of whether any more should be listed was explicitly considered by the Minister who concluded that no more should be listed. Her references to the new development encasing the Viaduct highlight the difference rather than blurring it. The judgment of the appropriate body as to what has been listed is clear and available. She considered and rejected an explicit recommendation that more should be listed and has maintained that position notwithstanding the views of English Heritage and the claimant. I do not consider it reasonable to conclude that the Minister, having explicitly rejected the advice that more

should be listed, has unintentionally listed more through the effect of section 1(5). Indeed, it was the claimant's repeated endeavours to persuade the Minister to list yet more of the Goods Yard upon which he relied in part to counter Mr Barnes' delay arguments.

168. It is clear that a part only of a single building, if such it be can be, listed without that having the effect that the whole of the building becomes listed under section 1 (5), because it would otherwise be pointless to have the power to list only part of a building; see *Shimizu (UK) Ltd v Westminster City Council 1997 1 WLR 168,* House of Lords.

169. Neither the rest of the Goods Yard nor even a substantial portion of it could rationally be regarded as an "object or structure affixed" to the Viaduct in the context of this Act any more than a house is an "object or structure affixed" to its garage.

170. Again, I do not consider that the Minister did or could rationally regard the rest of the Yard or a substantial portion of it as an object or structure within the curtilage of the Viaduct. It is not every building which has or is capable of having a curtilage and the sensible application of that word in this context in the way for which Mr Clayton contends is very difficult.

171. I was referred to a number of cases dealing with the meaning of "curtilage" in this Act. Mr Barnes was really seeking to persuade me that condition C on the listed building consent was unlawful and did not need to be complied with because it took an unsustainable approach to what the original listed building was. I did not consider, in the light of the unchallenged decision of the Secretary of State in 1997 and in his absence before me, that I could in effect overturn his decision by way of a sidewind in these proceedings. However, those cases are nonetheless useful in appreciating the Minister's position in relation to the effect of the listing of the Braithwaite Viaduct.

In *Debenham's Plc v Westminster City Council 1987 1 AC 396,* Lord Keith said at p403G:

> "All these considerations, and the general tenor of the second sentence of section 54(9) satisfy me that the word "structure" is intended to convey a limitation to such structures as are ancillary to the listed building itself, for example the stable block of a mansion house, or the steading of a farmhouse, either fixed to the main building or within its curtilage. In my opinion the concept envisaged is that of principal and accessory."

172. The mere existence of a physical connection does not turn the connected building into a fixture to the listed building which thus becomes listed itself.

173. In a different context, but the observation is in my judgment still apposite, Buckley LJ held in *Methuen-Campbell v Walters 1979 1 QB 525* that the curtilage of a building had to be part and parcel of the building constituting an integral whole. In *Secretary of State for the Environment v Skerritts of Nottingham Ltd,* 25th February 2000 in the Court of

Appeal, of which I was given a transcript, the smallness of the area in question was held not to be a helpful criterion in determining what was or was not a curtilage for the purposes of the LBCA 1990.

174. I consider that the Secretary of State has determined the extent of listing of the Goods Yard and has concluded that the recent listing is confined to the Viaduct and does not extend any more widely. His decision to list no more than that is not consistent with him leaving open in his mind the possibility that the effect of his decision is to list more of the Goods Yard. There is nothing remotely unlawful about such a conclusion and I do not consider that the material before me persuades me that he would hold that more had been listed as a result of section 1 (5). Neither the concept of structures affixed to the Viaduct nor the concept of a curtilage to the Viaduct are of obvious application in the light of the cases to the adjoining and substantial components of the Goods Yard. It is difficult to see them as the ancillary features within the land which belongs to the Viaduct.

175. I do not think that the Parliamentary Answer and the Treasury Solicitor's letter do more than recognise that the demolition of the unlisted parts of the Goods Yard which are connected to the Viaduct may disturb the fabric of the listed Viaduct, and could affect its character as a listed building and hence that listed building consent might be required for works at the interface between the demolition works and the retained Viaduct. This is also the substance of the letters dated 29th August and 26th September 2002 from English Heritage to LUL which were annexed to Ms Ring's fourth witness statement for the claimant, submitted after oral argument had closed. That need does not affect my conclusion that the new listing in 2002, save at the point where demolition would involve works to the Viaduct itself which required listed building consent, does not hinder the demolition of the rest of the Goods Yard. I should also point out that on my analysis, condition 12 would also have to be complied with in relation to this Viaduct.

176. As I have said, a part of a single building can be listed without the whole building becoming listed. This means that the listing of the Viaduct itself does not answer the question of whether there is one or more building.

177. Accordingly, my conclusion is that the question of whether demolition of the Goods Yard can proceed, except for the Braithwaite Viaduct with any necessary "interface" consents and compliance with condition 12, turns on whether there is one or more building or structure. The resolution of that issue is for the planning authorities, whose decision or lack of decision may be judicially reviewable but is not for me. If however, no further planning permission is necessary for the demolition of the relevant parts of the Goods Yard, because no demolition of part only of a building or structure is involved, it would be irrational and unlawful for enforcement proceedings to be taken to stop the development. The only basis upon which it has been suggested that enforcement proceedings could be contemplated is that a rational authority might wish to re-examine the feasibility of the retention of the whole of the Goods Yard. If it would be unlawful to issue an enforcement notice on that basis, I consider that the material operations, albeit in breach of planning control, are nonetheless effective to commence development so that the permission would not have lapsed.

178. Additionally, if the Goods Yard could be demolished anyway without the need for a further planning permission, these proceedings would be completely pointless regardless of any conclusion as to the rationality of enforcement proceedings. They could not attain even their first objective of a re-examination of the merits of its complete retention. If they had been brought in those circumstances, relief would have been withheld as a matter of discretion. But that too depends on the nature of the building(s) which is not a matter for my decision.

179. I should add that this case does not concern enforcement proceedings to prevent further development until condition 21 has been complied with. A planning authority could properly deal with the matter by a section 106 agreement with LUL which, in the light of the undertakings which it was prepared to offer the Court in connection with condition 21, would plainly have been forthcoming. The statutory flexibility permits the expediency of such enforcement proceedings to be judged in the light of other remedies which can be found properly within the range of an authority's statutory powers : breaches of planning control do not always require to be dealt with, or to be dealt with by enforcement proceedings, or to be enforced against to the fullest possible extent. An authority might take the view that a requirement to do those works by a particular time sufficed to remedy any injury caused to amenity by the breach of planning control; section 173(4) of the 1990 Act.

Usurping the planning authorities' function

180. In the light of those conclusions, I turn to the remaining issues. Mr Barnes submitted that the claimant was seeking to stand in the shoes of the planning authorities and to usurp their functions, and to persuade the Court to do likewise. The claimant had no standing to seek that sort of relief. Mr Clayton submitted that the claimant was doing no such thing and was simply seeking, within the role which it is recognised that litigants with the claimant's interest have in judicial review, to have the law declared so that all parties would know where they stood.

181. Mr Barnes placed considerable emphasis on the way in which statute has vested in planning authorities the discretionary powers to take the various forms of enforcement proceedings. He points to the duty on an authority to conclude that enforcement proceedings would be expedient before commencing them; sections 172 (1)(b) and 187B. An authority would be expected to consider the value of any such proceedings and whether there were any real planning objections to what had been done or whether there were any other ways of regularising matters which needed to be controlled, whether by a planning permission or by a section 106 agreement. The likely outcome of any appeal would have to be considered. This was all part of the flexibility which the statutory code was said by Sullivan J to possess, in *Henry Boot*, so as warrant a legally strict approach to the availability of exceptions to the *Whitley* principle. If someone such as the claimant, in the guise of vindicating the law in the public interest, were able to deprive the developer of the benefit of the statutory flexibility, the discretionary powers of the authority which mitigate the rigours of perfect compliance with the Act would have been usurped and indeed set at naught.

182. He pointed in particular to the decision challenged and to the relief sought. The decision challenged is LUL's refusal to give an undertaking to the claimant that it would not carry out any demolition of the Bishopsgate Goods Yard. The claimant seeks to quash that decision – which if granted would amount to an injunction in all but name unsupported by any cross-undertaking in damages - without the prior procedural requirement of a consideration of expediency being fulfilled. The other relief sought in respect of that same refusal are two declarations as to the unlawfulness of LUL carrying out the works "contemplated" by the ELLX Order because of LUL's failure to comply with the conditions on the planning permission and on the listed building consent. No such declarations could be granted without a prior conclusion being reached that the planning permission and consents had lapsed.

183. Mr Clayton was not wedded to that precise form of declarations. He submitted that LUL was a statutory body carrying out public functions in fulfilment of its duties under section 2(1) of the London Regional Transport Act 1984. It is the wholly owned subsidiary of London Regional Transport. Section 2(1) requires LRT to "secure the provision of public passenger transport services for London". In carrying out that duty, LRT has to have regard to London's transport needs and to economy, efficiency and safety. He submitted that those duties envisage that LRT and its subsidiary would act in accordance with the law and not unlawfully in breach of planning control. The claimant had standing as a public interest litigant and could seek the intervention of the court in a number of respects without usurping the role of the planning authorities. In particular, a declaration that the planning permission had lapsed and that development would be unlawful would not trespass on any of the discretionary or judgmental functions of the authorities.

184. There was no issue before me as to the availability of judicial review directed to LUL as a public body, as a matter of principle. However, I do not consider that the particular decision aimed at can properly be challenged in the way in which the claimant has sought to do. This is LUL's refusal to give Mr Hammerton an undertaking that it would not demolish the Goods Yard. He is in substance seeking to usurp and to persuade the court to usurp the planning authorities' functions and discretionary powers. LUL's decision to refuse to give Mr Hammerton an undertaking that it would not demolish the Goods Yard cannot be quashed without in substance ordering LUL not to demolish the Goods Yard. The basis upon which that undertaking was sought was that the demolition would be unlawful; so any refusal of such an undertaking would be likewise unlawful on any analysis of Mr Clayton's argument, and hence amenable to judicial review. As, on his argument, only one lawful answer could be given to such a request, a quashing of the refusal would amount in effect to an injunction at the suit of a private body against the carrying out of any development, because of a breach of planning control.

185. However, Mr Hammerton cannot exercise or attempt to exercise the discretionary powers of the local authorities whether in relation to enforcement or stop notices or in relation to the seeking of an injunction. He is incapable of deciding whether any proceedings are "expedient" within the statutory framework, or of deciding what should be enforced against and how. He can provide no compensation nor appeal provision to the Secretary of State. Nor can the Court. A failure on the part of the authorities to consider the expediency of such action before issuing proceedings would in turn be unlawful and judicially reviewable, as well as affording indirectly prospects of success on appeal by the developer. If a stop notice were issued, there are certain

circumstances in which compensation becomes payable, notably if there has not been a breach of planning control. An injunction under section 187B may attract an undertaking as to damages. Not surprisingly, the claimant is in no position to offer any cross undertaking, or compensation.

186. Neither the decision formally at issue nor the first form of relief sought can be the subject of judicial review because that would usurp the functions of the authorities. There has been no suggestion that those authorities have acted or failed to act unlawfully or, save for one matter which rather cuts both ways, have failed to appreciate the situation. No proceedings to that effect have been brought or threatened.

187. However, those considerations do not necessarily dispose of all of the claim. Even if no specific decision is challenged, declaratory relief as to the current position may still be appropriate, provided that the relief sought does not conflict with or amount to the exercise of the authorities' functions and powers. A decision that a planning condition has not been complied with is a precursor to a decision as to what steps if any to take to deal with it. Whether that has happened may be a mixed matter of fact and degree and law; it may call for the exercise of expert judgment or it may not. A decision to that effect by a court may usurp the powers of an authority but, depending on the certainty of view and the nature of the evidence and of the issue, it may be that only one view can be formed. If more than one view could reasonably be held of the facts or of the application of the law to the facts, I would regard it as inappropriate for there to be any intervention by way of judicial review until a decision had been made by the relevant body which could then be the subject matter of judicial review on conventional lines or statutory appeal. Any other approach would be to substitute the court for the planning authorities, and the appeal process, as judges of fact and degree.

188. I do not consider that the fact that these proceedings have been brought before any decision has been made by the authorities warrant a different approach. Nor does the fact that the demolition of the unlisted Goods Yard might occur before any decision by the authorities warrants a different approach. Nor does the fact that the demolition of the unlisted Goods Yard may be imminent. It is for the claimant to challenge any failure of the authorities to consider the matter if he contends that there is any unlawfulness in it. The commencement of these proceedings against a public body cannot confer on the claimant or the Court the role of the planning authority with its specific duties, powers and statutory processes.

189. I consider that although it would be inappropriate, for the reasons which I have given, to declare that the demolition of the Goods Yard could be unlawful or that the permission has lapsed, those reasons do not preclude a declaration in the circumstances of this case that the development has commenced but did so in breach of condition 21 and of no other condition. I am prepared to so declare.

Delay

190. Mr Barnes contends that as these proceedings have been brought more than three months after the permission lapsed, on Mr Clayton's submissions, they are out of time and no good reason for an extension has been shown. He raises it as a plea in bar of the whole claim, regardless of its merits. Mr Clayton contends that grounds for making the

application did not arise upon the lapsing but rather upon LUL signifying to the claimant that it was intending to carry on and demolish the building(s), disagreeing as it did with his arguments. In any event, claimants were in a dilemma in a case such as this: it was emphasised in *R (Cowl) v Plymouth City Council [2002] 1 WLR 803 CA* that litigation should be the last resort and alternative remedies should be attempted first. Here, the claimant had persisted in trying to persuade the Department of Culture to change its mind on the extent of the Goods Yard which it listed in March 2002. There is of no course formal process for seeking the listing of buildings.

191. This had not been rejected out of hand because the Department had asked for further information and it was only on 15th July 2002 that the Department wrote rejecting what Mr Hammerton had to say.

192. That letter points out that a decision had been made not to list the Goods Yard on 8th March; it said that no new information had been provided to warrant a reconsideration of that decision; all that was as yet undecided was whether additional sections of the Viaduct itself were to be listed. (I add that the whole of the Viaduct runs to the south of the proposed works and it has not been suggested that any further listing of a greater length of Viaduct would prevent the demolition of what is necessary for the carrying out of the Order works.)

193. Mr Clayton also referred to the fact that the claimant was unaware of the potential arguments until after that letter and had acted swiftly thereafter. I accept that latter point although it does rather highlight that the claimant was only unconsciously pursuing an alternative remedy until then. As Mr Barnes pointed out, the planning permission is a public document and the date by which development had to be commenced is plain and it would not have taken more than a quick visit to the exchange land to discover its unchanged state.

194. The first question is dictated by the terms of CPR 54.5(1) : when did grounds first arise? Grounds first arose when the permission expired on Mr Clayton's submissions which was on 9th February 2002. I ignore for these purposes the earlier date of 14th January on which, on Mr Clayton's case, the listed building consents expires because I have rejected his premise. At that moment all the material which the claimant needed to show that the condition had not been complied with by the due date was available. If the claimant had wished to ascertain what were LUL's intentions he only had to ask. But as I read the correspondence there was no contact at all until, on 23rd July 2002, the claimant sent to LUL a copy of Counsel's opinion and then the claimant's solicitors wrote a letter before action on 1st August 2002 asking for an undertaking that no demolition would take place and threatening injunction proceedings were no such undertaking given. (I should say that although LUL contests the claim for an undertaking, it has made it clear that it will not demolish the Goods Yard at least until the delivery of this judgment.) Had earlier inquiries been made, there can be little doubt but that the claimant would have realised that LUL were doing all that could be done to get on with the works including demolition, within the constraints imposed by the recent listing of the Viaduct and litigation by tenants of the arches at Bishopsgate who were already contending that the permission had lapsed, which claims were having to be disposed of by settlement.

195. I am unimpressed by the contention that grounds arose only in August 2002 when the letter before action was sent and the request for an undertaking was rejected. Grounds normally arise before the letter before action and are what gives rise to that letter in the first place. If grounds arise when a possible defendant refuses to concede an argument, grounds will arise at the choosing of claimants and at the time which suits them; Mr Clayton's submission is artificial.

196. It would however appear from the decision of the House of Lords in *R (Burkett) v Hammersmith and Fulham LB [2002] 1 WLR 1593* that to treat 9th February 2002 as the sole date upon which grounds first arose would be too narrow a view. On the assumption that grounds arose upon the asserted lapsing of the permission which could have been the basis of a claim within three months of 9th February 2002, which is implicit in Mr Barnes' submission, it is my judgment that that should be seen as a continuing state of affairs rather than as a discrete event occurring once for all at a particular point.

197. A declaration that works would be unlawful can be sought both in advance of their commencement and as they proceed; thereafter they would be continuing breaches of planning control. If judicial review lies at all against LUL in this way at the suit of Mr Hammerton, grounds continue to arise each day upon which LUL propose to do a further unlawful act. The start of demolition could itself be seen as a reviewable decision. Whether the courts would grant relief, the greater the lapse of time between the start of work and the bringing of judicial proceedings, would then be a matter of discretion depending on the circumstances. The same applies to the declaration which I am prepared to grant as to the breach of condition. It underlies any allegation of unlawfulness and it is a continuing state of affairs which affects the subsequent actions of the developer.

198. In the planning context of enforcement, such an approach accords with the position in which Mr Hammerton would find himself, on Mr Barnes submissions in relation to usurpation which I have largely accepted. Local authorities have four years in which to take enforcement proceedings in respect of breaches of planning control in relation to operational development. Throughout that period a developer is at risk of enforcement action. If a local authority refused to take action because it misunderstood the law in relation to when planning permissions lapsed or declined to consider whether there had been a breach of planning control in a way which rendered it liable to be judicially reviewed at the suit of, say, a neighbour or rival, it would be impossible to say that proceedings were out of time, as Mr Barnes acknowledged, because taken more than three months after the asserted expiry of the planning permission, or breach of condition.

199. If I had been of the view that there had been a lapse of more than three months since grounds arose, I would have extended time. Mr Clayton would be either too early because he ought to await a reviewable decision of the planning authorities, which might help this defendant today whilst storing up trouble for the future, or too late because he had to start proceedings by 9th May or in relation to those arguments which arise from the listing of the Viaduct, 8th June. I do not consider that where there is such a dilemma, courts should be astute to penalise the claimant; rather a flexible and commonsense approach is called for. This case also raises issues of importance and it is

much more sensible for them to be resolved now rather than perhaps later. In saying that, I do recognise that a decision not to take enforcement proceedings could be couched by the councils in such a way as to avoid expressing any concluded view on whether the planning permission had lapsed. But the possibility of that perhaps tactical decision does not alter my view.

Standing

200. I accept Mr Clayton's propositions generally in relation to the role of public interest litigants as he contended this claimant was. Mr Hammerton plainly has a deep and knowledgeable interest in historic railway buildings and in this one in particular, even though he has no property interest and no particular status other than that which his own interests and endeavours have brought. He is not irresponsibly interfering as a troublemaker or a busybody, in the sense in which those words are used in relation to standing for judicial review.

201. I do not accept Mr Barnes' argument that it is essential, in order for the claimant to have such standing, that there be no one else who could bring such proceedings. I do not read what Otton J said in *R v Pollution Inspectorate ex p Greenpeace (No 2) [1994] 4 ALL ER 329* in that way. In dealing with an argument that Greenpeace lacked standing to challenge the Inspectorate's decision to vary an authorisation for the operation of BNFL, he said at p350E: "It seems to me that if I were to deny standing to Greenpeace, those it represents might not have an effective way to bring the issue before the Court." It is a relevant factor in standing and also later in the exercise of discretion but it is not an essential requisite for standing that there be no one else who could bring proceedings. The fact that here the local authorities could have brought these proceedings but have chosen neither to do so nor to participate and claim that their functions are being usurped, or that even English Heritage might have brought them, does not preclude Mr Hammerton having standing. It may go to the merits of the case, or the availability of remedy but it does not preclude standing.

202. That I see also as the approach in *R v Foreign Secretary ex p World Movement Ltd. 1995 1 WLR 386, D Ct.* where Rose LJ between p395E and 396C discussed the relevant elements for standing. The availability of other bodies or people to bring proceedings is not a determining factor but a relevant factor in standing. It could scarcely be otherwise in the light of the range of individuals and bodies who have had standing in other cases.

203. I did have a very real concern however as to the position of Mr Hammerton as a public interest litigant in relation to the arguments he was pursuing. The legal purpose behind the recognition of the role of such litigants is to enable the rule of law to be vindicated, to enable the legal errors and unlawful acts of public bodies to be checked, and the rights of the public at large to be asserted over those bodies which are susceptible to judicial review, in circumstances where that would be unlikely otherwise to happen.

204. The concern which I had was whether the nature of the case which the claimant was putting forward meant that he had standing. The claimant has no desire to stop ELLX: he only wants it to be built differently where it crosses the Bishopsgate Goods Yard. In

order to have his argument heard by a planning authority or the Secretary of State he has to show that the planning permission has lapsed. However, he argues that it has lapsed because of non-compliance with various conditions, and condition 21 in particular. He has no interest whatsoever in whether the exchange land is landscaped; by itself it is a matter of complete indifference to him. The same is true of all the other conditions which he says were breached. The breach is only of interest to him in so far as it affords him the opportunity to repeat the argument, albeit he would say in circumstances which have changed for the better from his point of view, in which Mr Prokopp failed at the Inquiries.

205. I had very real reservations about whether such an approach, however legitimate for a non-public interest litigant, squared with a public interest litigant, vindicating the rule of law in the public interest. Vindicating the rule of law may be a touch grandiloquent as a phrase but it is still some distance from opportunism.

206. I was not persuaded that such an issue had arisen in, let alone had been decided in any of the public interest cases. Mr Clayton suggested that it had arisen in *Greenpeace No 2* and that should dispel any concerns. I do not consider that it did arise. *Greenpeace* may have been hostile to the activities of BNFL however the authorisation was varied, but it still had specific objection to the variation and authorisation, the lawfulness of which it was challenging, because it objected to the new plant to which they related.

207. Of course, a persuasive answer is that it is the very purpose of time limited permissions, and the obligation lawfully to begin development to keep the permission alive, that the permission may lapse, and can be reconsidered in the light of changing circumstances. It may be happenstance whether development is started or not or started in breach of condition – that is inherent in the legislative scheme. Taking advantage of that happenstance involves no greater opportunism than the legislation affords in pursuit of the reconsideration which the legislative provisions exist in part to permit.

208. Mr Clayton also after the conclusion of argument sent me, post haste and in duplicate, a copy of the decision of the Court of Appeal in *R (Kides) v South Cambridgeshire D.C. [2002] EWCA Civ 1370*, 9th October 2002. The Court of Appeal disagreed with an earlier conclusion of mine that Ms Kides was abusing the process of the Court in so far as she was seeking to rely on an argument for the quashing of a planning permission that new policies on affordable housing had not been taken into account. Ms Kides was wholly opposed to any housing development; she would have been just as opposed to the development, if on reconsideration, the Council had turned the whole proposal into one exclusively for affordable housing. The Court of Appeal rejected my approach. Jonathan Parker LJ, with whom Laws and Aldous LJJ, agreed said at paragraphs 132-134:

> "132. That leaves the issue of standing. As to that, it seems to me that there is an important distinction to be drawn between, on the one hand, a person who brings proceedings having no real or genuine interest in obtaining the relief sought, and on the other hand a person who, whilst legitimately and perhaps passionately interested in obtaining the relief sought, relies as grounds for

> seeking that relief on matters in which he has no personal interest.
>
> 133. I cannot see how it can be just to debar a litigant who has a real and genuine interest in obtaining the relief which he seeks from relying, in support of his claim for that relief, on grounds (which may be good grounds) in which he has no personal interest.
>
> 134. It seems to me that a litigant who has a real and genuine interest in challenging an administrative decision must be entitled to present his challenge on all available grounds."

209. I do not consider that any sensible distinction can be drawn between the position of Ms Kides in that case and Mr Hammerton in this case. The litigant with the "real and genuine" interest must include for these purposes the public interest litigant. Accordingly, the reservations which I had in relation to standing are dispelled. I also recognise that it is probably the conclusion of the Court (see paragraph 131) that that factor should not by itself be a basis for the withholding of relief in the exercise of discretion. I do not consider that it is irrelevant to the exercise of discretion however, because the effect of the grant or refusal of relief upon claimant, defendant, interested parties and indeed the public as a whole are all material to that exercise.

210. Although standing goes to jurisdiction, it has to be considered at the end of the case in the light of the claimant's role, the nature and importance of the case, and the other bodies who could take proceedings. I do not consider that a jurisdictional bar should be imposed on the claimant, or any arguments which he makes.

Discretion

211. I have reached the conclusion that the development was commenced in breach of condition 21, but not in breach of any other conditions. There is no point in the light of such a conclusion in declining to declare as much.

212. The matter which particularly troubled me in relation to discretion was the impact which relief might have on a strong, urgent public interest in the building of the ELLX, both for the transport facility which it would bring to areas not served by underground links at all and for the employment and regeneration which it would bring to two of London's poorest Boroughs. These matters are fully explained both in the Inspector's Report chapter 9 and in section 5 of Mr Thornton's statement for LUL. Indeed, no one has sought to take issue with that. The problems which delay in the programme would create and the costs already expended are set out in other parts of Mr Thornton's statement. Whatever caution Mr Clayton can urge in relation to LUL's anticipated timetable, in view of the scale of costs in Phase IV the financing of which has not yet been resolved, this is a major project, delays add to its costs, and uncertainties; critical track or station possessions may be postponed for a year if the project is delayed at this

stage, or rather for longer, if a fresh permission has to be sought with an Environmental Statement, which then goes to a public Inquiry. Indeed forcing the making and consideration of a fresh application by LUL with an ES is the claimant's purpose in these proceedings.

213. I also take its account that the argument has been heard once and rejected, albeit that there have been changes in circumstance favourable to the claimant. It is also relevant that although a public interest litigant, he is but one person. I appreciate that there are others of a like mind to him but they have not brought nor joined in the litigation.

214. In that context, the approach adopted by the Court of Appeal in *R v Secretary of State for the Environment ex p Walters and R. Brent LBC ex p O'Malley 1997 30 HLR 328* at p381-2, is very relevant. It concerned a breach of the statutory consultation procedures required for the transfer of the freehold of council housing to a Housing Association. Relief would have had very serious effects on those who wished the scheme to proceed. The Court of Appeal said:

> "We have no difficulty in agreeing that the exercise of the court's discretion does not depend on whether it will attract popular support. If Mr Walters' rights have been breached the unpopularity of granting relief to him will not deter the court from granting it. However when there are other genuine interests which will be adversely affected, the court is not prevented from analysing precisely the rights of which a single or a few individuals have been deprived, and their consequent loss (in whatever form it takes) and the consequences of upholding their right contrary to the interests of many others. As the grant of judicial review may have substantial adverse consequences for a large number of blameless individuals beyond he applicant himself, in an appropriate case, of which this is one, the exercise of discretion permits account to be taken of these conflicting interests… .".

> "The discretion of the court is a broad one to be exercised in the light of the varied and sometimes conflicting circumstances of each individual application, with particular attention in cases where delay is a significant factor, to be paid to the circumstances expressly specified in section 31(6)."

215. It upheld the exercise of his discretion by Schiemann LJ sitting at first instance and recognised the relevance, as one factor, that Mr Walters was the only tenant to make the application.

216. Relevant too is the extent of the consequences of relief. It cannot be confined to the Bishopsgate Goods Yard, nor to Works No 2. I do not consider that there are even two planning permissions. The whole planning permission would fall to be reconsidered, if

the Councils concluded that there was only one building, and so on my analysis the permission had lapsed.

217. Mr Clayton also made the point, as indeed did Mr Barnes though more ruefully, that it would have been open to LUL to make a section 73 application in time and its successful pursuit would have avoided these problems. I am not prepared to assume, as Mr Clayton suggested, that it was a deliberate refusal on LUL's part to do so, in order to avoid the need to produce an Environmental Statement and potentially to re-open the Goods Yard issue. This was denied by LUL – whether or not that was the case, the crucial point is the acceptance by Mr Barnes that it could have avoided the problem.

218. There is however real and to my mind overriding force in Mr Clayton's submission that whatever is said in the judgment about breaches of conditions or lawfulness of development will have a significant impact on LUL as a responsible public body and on its project, whether or not I declare that to be the position in an Order. No quashing relief is sought. It seems to me therefore that there is no sufficiently compelling reason in the exercise of my discretion not to declare the position to be such as I find it to be in my judgment. The real effect of my conclusions is more limited than it would be if I were to declare the development of ELLX, or the demolition of the Goods Yard to be unlawful.

219. At the invitation of the Court, LUL considered whether it could undertake to carry out the works required by Condition 21. I contemplated that that could affect the exercise of my discretion. As I have explained, that led to LUL altering its position as to the exchange land from what I had understood the position to be. It cannot comply fully with the condition without closing prematurely a well used line and station. It offered compliance over time in the undertaking proferred. LUL has produced letters from the Planning Team Leader at London Borough of Tower Hamlets dated 7th October 2002 making clear its attitude towards the non-compliance with condition 21. Mr Minoletti states that the change of road access to Spitalfields Farm at the Council's request meant that condition 21 was no longer seen as applying and "that it would not be appropriate for the Council to initiate any legal action in respect of non compliance with the Condition." In the other letter he said that he had no objection to the phasing of the landscaping works required by condition 21 so as to avoid premature closure of Shoreditch Station. In response to a letter from the claimant's solicitors taking issue with this stance, the Council's Head of Legal Services expressed the view that the permission had been lawfully implemented and that Mr Minoletti had delegated authority in relation to the taking of enforcement action.

220. Mr Clayton in written submissions objected to the undertaking being taken into account by me in the exercise of my discretion. In short he said, correctly, that this undertaking was not equivalent to full compliance with the planning condition – though I am not sure that anybody would have wanted full compliance with the planning condition as it stood, requiring as it did the closure of Shoreditch Railway Station which is currently open at weekday peaks and Sundays, is used by 300,000 passenger per annum, and is not envisaged to close until about 2005 as part of phase 3 of ELLX. Compliance with the condition would now also require Conservation Area consent because the Brick

Lane and Fournier Street Conservation Area was extended in 1993 to include the exchange land.

221. Mr Clayton also submitted that the giving of an undertaking by LUL would enable LUL to sidestep the requirement for a section 73 application, with the procedural implications which that would have for the Council's consideration of all the conditions in the light of present circumstances, which in a number of respects had changed, and with the involvement of the public and the requirement for an Environmental Statement.

222. There is considerable force in each of those submissions, though they are not determinative of the relevance to the exercise of my discretion of any undertaking as to the remedying of a breach of planning control. In practice however that undertaking does not affect the exercise of my discretion because of the more limited declaration to which my judgment leads and I do not need to deal with it in the context of a conclusion more favourable to the claimant on the substance of the case than the one which I have reached. The subsequent correspondence from the Councils does not advance matters.

Conclusion

223. In the light of the conclusion which I have reached, I give permission to bring these proceedings and I propose to declare what I have already indicated : material operations were undertaken in breach of Condition 21 alone. I do not require the undertaking which has been proferred. Although my conclusions are more limited than either party might have hoped, nonetheless any consideration of enforcement action, or of further applications for permission or determinations will take place on what will have been declared to be the appropriate basis. The Councils will have to consider what to do if LUL does start to demolish the listed and unlisted Goods Yard. Whether the material operations were effective or not in keeping the permission alive will be determined by the conclusion as to whether or not the whole Goods Yard is a single building with the Viaduct. Any further Court proceedings and any relief would have to be considered in the light of whether or not the Goods Yard could be demolished lawfully without any further consent, which turns on precisely the same issue. If that could happen, the proceedings would be pointless. But the determination of that underlying issue is for the planning authorities and not the Court.

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MR JUSTICE OUSELEY: For the reasons given in the judgment which is handed down, I am prepared to make a declaration in the terms which I will discuss with counsel, and I also give

permission for the case to be brought.

MR CLAYTON QC: My Lord, I hope your Lordship has received a copy of the draft order.

MR JUSTICE OUSELEY: I did, thank you.

MR CLAYTON QC: Can I just briefly explain the rationale. The first declaration was an attempt to reflect the very wording your Lordship had in mind. The second declaration is in relation to, "A declaration is unlawful for the defendant to undertake demolition works in relation to the Goods Yard until the London boroughs of Hackney and Tower Hamlets decide whether the Goods Yard is a senile structure". My Lord, that is there for quite a number of reasons. First, it reflects the view that your Lordship expresses as to what the legal position is and, secondly, it ensures that the parties know where they stand in relation to that issue.

The third order which we seek arises for this reason: We invited the other side to indicate their views about this order. Silence has been the response, but the position, my Lord, comes to this, that legal proceedings were brought to preserve the Goods Yard. Your Lordship has decided that the question of whether they should be preserved depends effectively on an expert factual matter to be decided by the two local authorities. The injunction is sought to hold the ring until that arises, and given that these proceedings were brought, in our respectful submission 'to vindicate, effectively, the rule of law, we would submit is a concomitant that the ring is held until that is resolved.

MR JUSTICE OUSELEY: Yes, I think you are going to have difficulties with items two and three. One seems to reflect the judgment but I will hear Mr Barnes.

MR BARNES QC: May we just hand to your Lordship and to my learned friend the short order which we suggest. It is paragraph two which is the substance of it.

MR JUSTICE OUSELEY: That is simply the same thing in slightly more elaborate language.

MR BARNES QC: Not quite my Lord, no, because it does not deal with lawfulness and so forth, and I was hoping to ask your Lordship to look at four sentences and four paragraphs of the -- I had to work out a frame with the draft judgment we had at the beginning of the week.

MR JUSTICE OUSELEY: Yes.

MR BARNES QC: We were very surprised when we received -- I only saw yesterday evening the draft order which we have received from the claimant, in the light of what he understood to be the theme of your Lordship's judgment, which he understood to be that the start which had been made within time on the works permitted by this planning permission were in breach of one condition but no others, that is condition 21, but that your Lordship was not prepared to make declarations as to lawfulness and so forth.

MR JUSTICE OUSELEY: I am not prepared to make a declaration as to the lawfulness of the demolition or continued work. That is to say whether it would be lawful to demolish, or whether the permission has lapsed. But I think it is inherent in the judgment that development in breach of planning control is unlawful. Therefore, the excision of the word "lawful" in the first declaration proposed by Mr Clayton would be more of a sop than a reflection of the legal position. It would be balm to your soul, perhaps, not to have the word "unlawful" in a declaration, but it would not alter the nature of the act.

MR BARNES QC: It is clear from your Lordship's judgment that the work that was done was in breach of one of the conditions, 21, therefore plainly was a breach of planning control and, to that extent, in planning terms is unlawful. There is no doubt about that. I would ask your Lordship that in relation to that and the whole of it just to glance at paragraph 189. I think the paragraph numbers are the same. Page 83 of the original document.

"I consider that although it would be inappropriate, for the reasons which I have given, to declare that the demolition of the Goods Yard could be unlawful. Those reasons do not preclude a declaration that the development has commenced, but did so in breach of condition 21."

It is on the basis of that that we produced the short declaration that we did. If your Lordship would look to page 93 at paragraph 211.

"I have reached the conclusion that the development was commenced in breach of condition 21 but not in others. There is no point in the light of such a conclusion in declining to declare as much."

So we have sought to put such a declaration into words. Finally, if your Lordship would turn to

page 96, paragraph 218. Right at the end of that, going to the top of page 96:

"The real effect of my conclusions is more limited than it would be were I to declare the development of the route or the demolition to be unlawful."

What we are really concerned with is what is in declaration two here, which seems to us, respectfully, to be running completely contrary to what your Lordship has said.

MR JUSTICE OUSELEY: Yes. Dealing with declaration one, I understood that you were jibbing at the word "unlawfully" in Mr Clayton's draft. It seems to me that his is a perfectly adequate reflection of the declaration which I am prepared to make. Your paragraph two is longer and it omits the word "unlawful" but I cannot see anything gained by that and I am quite content, for my part, with Mr Clayton's proposed first declaration in the order which, incidentally, if he is drafting, ought to have the permission.

MR BARNES QC: It did, it is our paragraph one.

MR JUSTICE OUSELEY: Let us focus on two and three.

MR BARNES QC: I would be perfectly happy if your Lordship would say they acted in breach of planning control and so unlawfully -- to indicate what the unlawfulness was. That is the only thing.

MR JUSTICE OUSELEY: I think it is clear, is it not? Unlawfully by undertaking material operations in breach of condition two.

MR BARNES QC: I will not press it any further, my Lord.

MR JUSTICE OUSELEY: Item two: the problem with item two is that that is not what I am prepared to do. The demolition of the Goods Yard may be perfectly lawful.

MR BARNES QC: My Lord, that is what we understood from the terms of the judgment. I referred your Lordship to what we considered -- certain key paragraphs of that.

MR JUSTICE OUSELEY: That is why I have some reservations about whether Mr Clayton is right in seeking this, because the purpose of it is -- one has to see this with the proviso of "until". That is the rule of purpose, Mr Clayton. You want to hold the ring by paragraphs two and three, that is your point. The problem with the declaration that you seek is that if I cannot,

because I think I neither have jurisdiction nor would it in any other way would be appropriate, declare that the demolition would be unlawful, when it might very well be perfectly lawful for them to demolish it. It does not become unlawful while they are waiting for someone to decide. I have not said there has to be a decision by the authorities. They are the ones who have the power to decide whether it is one or more buildings, but if it is actually several buildings, they do not need the decision of the council's; that is, if it is several buildings, to do it. It is perfectly lawful for them to pull the whole lot down.

MR CLAYTON QC: I accept that. I am afraid, with respect my Lord, I part company with you at virtually every stage of what your Lordship has said. So far as jurisdiction is concerned, there is no jurisdictional bar to be ordered of declaration. It is simply whether it has utility. The jurisdiction is essentially very flexible.

MR JUSTICE OUSELEY: No, it is not a question of jurisdiction lending to the flexibility of declarations, it is declaring something to be unlawful when it is not decided that it is or is not, and it may very well be perfectly lawful. That is the jurisdiction point, and the decision as to whether it is one or more buildings is not one for this court. That is where I say I do not have jurisdiction.

MR CLAYTON QC: That I entirely accept, but the position that we would submit is twofold really. First, until the local authorities make a decision, the position remains unclear. We submitted that if your Lordship had looked in these proceedings -- it does not matter about that.

MR JUSTICE OUSELEY: I would not press for a view on the issue, Mr Clayton.

MR CLAYTON QC: The short point is this: because it is a matter for the local authorities to decide, because essentially it is a factual issue, the position remains unclear.

MR JUSTICE OUSELEY: Yes.

MR CLAYTON QC: I am perfectly content because one can get declarations about what is lawful as well as what is unlawful, for the declaration to say that it is neither lawful nor unlawful until the decision is made.

MR JUSTICE OUSELEY: No, it is lawful or unlawful now.

MR CLAYTON QC: Yes, but what it really comes to is this: the purpose of these proceedings was to seek a declaration as to the legal position. What your Lordship has decided is that the legal position so far as demolition is concerned is undecided until the local authority make a determination.

MR JUSTICE OUSELEY: If you are suggesting that what you want is a declaration that it would be unlawful if the position were that it was a single structure with The Braithwaite Viaduct, that reflects what I said in the judgment. That is not what you have asked for.

MR CLAYTON QC: No, I accept that. If that is the difficulty --

MR JUSTICE OUSELEY: I think it is important if you are asking for declaratory relief at this stage, for what you are seeking to be formulated with precision.

MR CLAYTON QC: My Lord, I entirely accept that and, of course, as your Lordship knows, normally the question of drafting the declarations is done through a spirited dialogue involving counsel, so I quite accept that. I am content, and we can reformulate the second declaration to reflect what your Lordship has just indicated -- that it would be unlawful if it comprises a single structure or building. So can I move on to the third point in that eventuality.

The third point is really this: that it would render your Lordship's view of what the legal position is entirely nugatory, if before the local authority made its appropriate decision, the building was knocked down. The one thing that one can say about a position which is uncertain, is that it justifies taking a step which creates -- basically A is irrevocable and its consequences, and B essentially undermines the purpose of the second declaration. Now, again, it may be that the injunctions are not happily expressed, and as to drafting I am entirely in everyone's hands, but the fundamental point which we make is that what has happened in this case is that the London Underground have failed to show that it is lawful to knock the building down here and now; that much is clear. Until that is lawfully established, when a public interest claimant brings proceedings to ascertain what the legal position is, it is, in our respectful submission, an inevitable corollary that the declaration having been granted, albeit that it is clear that it should be decided by someone else, that the subject matter of the material

be preserved until that decision has been made.

MR JUSTICE OUSELEY: I think that is unfair. You are effectively asking this court to take on the power of a local planning authority or you are asking yourself to be treated as a local planning authority. You are not the local planning authority and I see no basis upon which you can purport to take on their function, and I think that that is the thrust of the point.

MR CLAYTON QC: With respect, my Lord, we are not saying that we are taking on the local authority. What we are simply saying is that precisely because it is a local authority function, until the local authority makes its determination, the court cannot -- it would be inappropriate for the court to pre-empt --

MR JUSTICE OUSELEY: It might be very different if you are the local authority; but you are not. Nothing stops the local authority coming to court today and seeking relief on the basis that it fears there is going to be a breach of planning control and it wants time. You are not the local planning authority.

MR CLAYTON QC: My Lord, can we just reflect for a moment on that. The judgment has been made available today. It is a complex judgment. The local authorities have not seen it. It is Friday. The prospects Of counsel being able to come to a view about what is the appropriate step to take by today is, with respect, not practicable. In our submission, at the very least, there has to be a sufficient opportunity for the local authorities to make a sensible evaluation. Now, again, if the position is that the time period we seek is too long, so be it, but in our submission, it is not open to arrogate to the defendant the option of destroying something before the local authority is able to take a view. So, in our respectful submission at the very least, and given that it is clear that although this is an urgent process, equally the process of arriving at a proper legal determination has taken itself some time, that there be a sufficient opportunity for the local authorities to digest what your Lordship says and seek advice.

I make that point particularly because your Lordship will note two things: 1, Tower Hamlets have expressed a view and it is plain wrong, and 2, Hackney have expressed no view.

MR JUSTICE OUSELEY: I do not think Tower Hamlets have expressed a view one way or

the other in this case.

MR CLAYTON QC: Not on the Goods Yard, but what they did have to say from the boroughs solicitors about section 73 was plain wrong.

MR JUSTICE OUSELEY: Yes.

MR CLAYTON QC: And given the submissions made earlier, it is significant. In our submission, it would be appropriate for the local authorities to have the benefit of counsel to ascertain what the best course would be. Likewise, I should say, English Heritage may too have a role and they also should be given some opportunities. So what it comes to is if your Lordship is disinclined to grant an order in the terms of three, then I would suggest that certainly something like seven days would be appropriate, so that that gives sufficient time for counsel to be instructed and the view to be taken.

MR JUSTICE OUSELEY: I think my judgment contains another point which I am surprised that you have not picked up. Condition 12 also has to be complied with. I disagreed with Mr Barnes' submission as to the full ambit of condition 12, taking the view that condition 12 applied in relation to post 1997 listings, which means that before work is done -- and I think this is the point I was making in relation to condition 12 -- because of the proximity of the Braithwaite Viaduct to the proposed operational line, works would have to be undertaken in pursuance of condition 12 in order to satisfy that condition to make sure that the operation of the ELLX did not cause damage to the listed viaduct. Now, I think I have made it clear that they are expected to comply with that at about this stage, because clearly one could not regard the site of the Goods Yard as not encompassing, at least, the area around the Braithwaite Viaduct for those purposes. Now, it would seem to me that you might be saying that there ought to be a declaration that it will be a breach of condition 12 if the viaduct were to be demolished before compliance with condition 12. Do you want to ask for that? If that is so then you have to consider the implications of a declaration, if that would be unlawful to do work on the viaduct without compliance with condition 12, which is a declaration I could grant without usurping the functions of a local planning authority.

MR CLAYTON QC: I understand that and I would not suggest for a moment that a declaration in terms of condition 12 would not be valuable, but notwithstanding your Lordship's suggestion, the basic problem is that the question about the Goods Yard itself is unresolved until the local authority has an opportunity to look at it, and if, as I apprehend, your Lordship takes the view that the time period contemplated by the injunctions is too long, so be it, but what I would respectfully submit and submit strongly is that the local authorities must be given a proper opportunity to consider whether they wish to reflect on what your Lordship has had to say on the issue.

MR JUSTICE OUSELEY: Mr Clayton, the trouble with that argument is that, in fact, the local authorities have been aware of the issue of whether the consent of the planning authority was required for lawful demolition or not, as they have been interested parties in this litigation. They have not, it is true to say, taken any part in the litigation, but they have had ample time to consider the issue. You have had ample opportunity to ram that point home to me because it must have been obvious to you that these proceedings would be pointless if the Goods Yard could lawfully be demolished anyway.

MR CLAYTON QC: My Lord, yes. The answer to that is this: not uncommonly with local authorities, there has been a non-response entirely from Hackney and, in relation to Tower Hamlets, the only substantive response came after the end of the argument when the planning officer, who appears to have taken the lead in all of this, expressed a view. We invited the borough solicitor, who met the chief lawyer, to express if he will, and he understood what the view was. With respect to that view, it was wrong. The problem is that the local authorities, on the material before your Lordship, simply have not understood what the legal position is, which was the very reason why these proceedings were brought.

MR JUSTICE OUSELEY: You have not sought, at any stage, to challenge any exercise by the local authorities of any of their power.

MR CLAYTON QC: As your Lordship knows, this was part of the submission not reflected in your Lordship's judgment. Until there was a breach of planning control, it was not open for

that to occur. There is no evidence that there was and that was not challenged by the defendants.

MR JUSTICE OUSELEY: There was a breach of planning control which could have been the subject matter of consideration no latter than February of this year. I understand the force of the point underlying what you are saying; that there is a risk that something untoward might happen until the local authority gets around to thinking about it. I understand that concern.

MR CLAYTON QC: My Lord, I would put it much more strongly than that. The fact of the matter is that your Lordship knows that these proceedings were issued precisely because the time of reckoning was to come. We have been told through the proceedings that the Goods Yard was about to go down and I am afraid, against that background, our position is that it is essential to give effect to your Lordship's judgment, that the local authorities have a sufficient period of time to absorb and reflect on your Lordship's judgment, otherwise the purpose of the judgment is less than it otherwise would be. That is the submission and I am afraid I would have to ask your Lordship to decide that.

MR JUSTICE OUSELEY: Mr Barnes, do you want to say anything about some form of restraint pending the consideration of either the issue of whether the Goods Yard is one or more structure, or, pending consideration by the councils, as to whether they would wish to take proceedings in court to give themselves more time?

MR BARNES QC: My Lord, just briefly, as I read your Lordship's long and careful judgment, the local planning authorities could take action under the planning legislation if they reached two conclusions. The first is that they would have to reach a conclusion that the physical entity or entities north of the Braithwaite constituted one single structure with it, and not a series of structures; otherwise, on your Lordship's judgment, it would be ultra vires for them to proceed. Secondly, if they reached a conclusion that the whole thing was one structure so that they did have jurisdiction to take enforcement action, they would have to consider that it was expedient to do so in the words covering the enforcement notices. It is obviously right that the local authorities should have an opportunity to consider this judgment. My own clients have only

been able to be told the gist of it one hour ago, and they themselves, of course, have not had an opportunity to do so yet or to go to the Board, or anything of the sort. My learned friend, as I understand it, is concerned that something might happen, like on Saturday, tomorrow morning, they will go in and start knocking the whole thing down. I understand that. What I would ask your Lordship is this: we would be prepared to give an undertaking to the court that we will not commence any works of demolition in relation to the structures north of the Braithwaite Viaduct, on the Goods Yard, until 9am on Thursday. We will undertake, also, to deliver today a copy of your Lordship's judgment, it is in a form in which we can now do that, to both of the local authorities. We will intend, very early next week, to write to them explaining exactly what our position is. If they then wish to take any opportunities available to them, they will have an opportunity to do so. I understand those opportunities to be: 1, of course, to issue an enforcement, and the other to issue a stop notice, and the third to themselves, to apply for an injunction to the court. They will have that opportunity; so, of course, would anybody else. My Lord, I would respectfully suggest that in doing that, we are being as reasonable as we can, avoiding any suggestion that over the weekend the whole thing is going to be knocked down before anybody can read what has happened.

MR JUSTICE OUSELEY: That is very helpful. What do you say about the declaration that Mr Clayton is seeking as a substitute for his "proposed to", which is that it would be unlawful for demolition to take place without further permission if the Goods Yard comprises a single structure with the Braithwaite Viaduct.

MR BARNES QC: My Lord, that again would be, in effect, not technically taking the position of the local planning authorities because whether it be unlawful or not, it is for them to decide whether it would be expedient to issue an enforcement notice. At the end of the day, if there be a breach of planning control of any sort against which enforcement action can be taken, it is for the planning authority to consider whether to take it or not, and when to take it or not, and what form to take any proceedings available to them or not. We tried to go as far as we can to see that there is not a quick knocking down in the next 24 hours, something of that sort, which would

make it impossible in practice for them to consider it. Beyond that, it is for them, in my submission -- if declarations of that sort are made, it simply means that anybody can come to the court and say: I want a declaration that this is unlawful because it is a breach of planning control. That is then, so to speak, presented to the local planning authorities. They are able from your Lordship's judgment and the whole of it, to assess that which your Lordship has held to be lawful and unlawful and contingently lawful and unlawful in the same way as everybody else is. In my submission, the whole of it will be apparent from your Lordship's judgment and from the first declaration made; thereafter, it is for the local planning authorities, subject only to nothing happening within a very short period, one or two or three days, which would make it impossible for them to consider it. In my submission, that is the present situation and I request that your Lordship would so act and if your Lordship finds that undertaking which we have indicated to be helpful, I am authorised to give it. But I make it clear that in giving that, it is that we will not do something before that time. We are not necessarily saying we will do it then. One of the things that we would have to consider is the impact of condition 12, vibration, and what your Lordship has held about that. It is difficult for my clients to consider the whole of that when they have not had an opportunity until just about an hour ago of knowing what your Lordship has said. But they will consider it, all the same.

MR CLAYTON QC: My Lord, may I first of all express my gratitude to Mr Barnes and his clients for the undertaking offered and which we accept. In relation to the declarations, can I urge on your Lordship the value of actually having declarations so that people know where they are. In my respectful submission, the formulation which your Lordship suggested in respect of his second declaration does serve a purpose. It is obvious, if I may say so, that the declaration does not mean to the planning authority that it should issue an enforcement notice, no more than the first one does. Equally, I would respectfully suggest that your Lordship's indication that a declaration in relation to condition 12, that too, if I may say so, would be valuable because it means that the parties know precisely what issues they need to direct their thoughts to, in the light of your Lordship's long judgment, which, if I may say so, covers quite

a lot of ground and it may not be immediately obvious unless flagged up by the declaration. I am sorry to have gone on so long, but in our respectful submission, the only obstacle to the declarations being given is whether they are not convenient. In our submission, all three declarations --

MR JUSTICE OUSELEY: What I am minded to do, Mr Clayton, is this: I am minded to grant a further declaration in addition to 1, which says that it would be a breach of planning control for demolition of the Goods Yard to take place to the extent that it comprises a single building with the Braithwaite Viaduct. It may be that there is further language which is required for that but I am prepared to grant a declaration, in principle, along those lines. I would be grateful in the light of that, if you and Mr Barnes would just discuss whether it needed to say permission lapsed, because there are two aspects to it. But I am prepared to grant that for the point of making that clear. I think so far as condition 12 is concerned, I think that may be a rather more difficult one to formulate. I think it is sufficiently flagged up in the judgment that there is a real issue which London Underground Limited will have to consider in relation to that, just as they will have to consider what they do about the -- what I call the interface between the LUL and the other parties. I do not think, in the end, that a further declaration on that can be capable of being drafted sufficiently punchly to make it be a declaration -- it will flag it up. So far as the injunction is concerned, in the light of what Mr Barnes has undertaken, and that ought to be embodied in the order as well, I consider that the local authorities will have had sufficient time, at least to decide whether they wish to take pre-emptive action, and they will also have time to ascertain more fully from LUL what its actual timetable, if any, is, so they will know whether they need to move now or Wednesday or Thursday, whatever it is. They will then have to make their own mind up. So if you will embody the first declaration, the altered second declaration, the grant of permission and the undertaking, I think that will cover the heads of relief or the main heads.

MR CLAYTON QC: Perhaps, my Lord, what we can do is, after the hearing, my friends and I could put our heads together and produce an agreed draft.

MR JUSTICE OUSELEY: Yes, and you can bring it in and I will sign it.

MR CLAYTON QC: Can I next move to another topic?

MR JUSTICE OUSELEY: I do not want to keep whoever is waiting because they have planes to catch at the end of the day, so if necessary I would postpone further argument on this unless we can deal with it very quickly. What are the two headings?

MR CLAYTON QC: The only heading left, my Lord, is the question of costs which, in my respectful submission, is a short matter. Our submission is that we came to court to seek declarations, declarations have been given. Clearly, the reason for coming to court has been realised, and we do not take the view, subject to anything that your Lordship may indicate to me, that this is a case where it is necessary to apply anything other than the basic principles, and that we have won.

MR JUSTICE OUSELEY: I am not sure about that, I will hear what Mr Barnes has to say. Do you want to say anything more about costs?

MR BARNES QC: Yes I do, my Lord. My learned friend has spoken, in my submission, to the exact contrary to what has happened. They have come to court to try to prevent this development taking place at the Goods Yard and, indeed, as a side way throughout the whole of the ELLX. Inevitably that was done. They have failed to do so. Our case throughout -- our fundamental case in our written statement and before this court is that at the end of the day, if there were any breaches, it was a matter for the local planning authority to decide. One of the main gists of your Lordship's judgment is that that is so and it is to that extent we have succeeded. We have succeeded in showing that there was a starting time, there was no breach of condition 12, there was no breach of condition 23, that there may be an exception to the Whitley Principle if the structures to the north of the Braithwaite are separate structures, that there has been no breach of condition A of the listed building consent, that there has been no breach of condition C of the listed building consent, that the listed building consents remain valid, extant and operable, and to us, of cardinal importance in your Lordship's judgment, that the listing of the Braithwaite Viaduct comprised that structure and not the whole of the rest of

the Goods Yard, somehow affixed to it or within its curtilage, and that at the end it was a matter for the discretion of the local planning authorities.

My Lord, to a very large extent and, in our submission, in relation to the important matters which fundamentally concern us, we have succeeded. This is a legally aided application and it would be wrong, in my submission, that we should be obliged to pay the costs. In my submission, there should be no order for costs.

MR JUSTICE OUSELEY: The legal aid position does not bite on the principle of costs.

MR CLAYTON QC: It does not and actually because of the changes in the legal aid scheme, it is an extraordinarily unfair point to make.

If we are going to look at the scorecard, can I just remind your Lordship of what the issues were --

MR JUSTICE OUSELEY: We know what the issues were, can we get to the score line?

MR CLAYTON QC: The score line, I am afraid, is 6 - 1. It is a very bold submission to say the least. Just think about it for a moment. On the planning permission: lost. Whitley Principle: Lost. Listed building point: won, we did not take much time over it. (inaudible) point: lost. Demolition point: at best, no score draw. Claim is time boiled: lost. Claim should be dismissed on ground of prejudice: lost. Stamping: lost.

Now with the greatest of respect to my friend, what, in effect, his submissions come to is that we have lost because a public interest challenge cannot usurp the dysfunctions of the local authority. With respect to him, that was the very point we took on board in making the application.

MR JUSTICE OUSELEY: My decision is this. I am going to order the defendants to pay one half of the claimant's costs. I think that the claimants have succeeded, to some extent, on some of the their arguments, and in order to achieve their success they had to come to court. So it is right that that should be reflected. On the other hand, the principal relief which they actually sought has been refused. Indeed, all the relief, I think, that is set out in their claim has, in fact, been refused. They have failed on a number of key arguments which they raised, and whilst I

think that no order for costs would reflect a score card, it would be inappropriate for that to be the reflection of costs because, as I say, the claimant has come to court and has obtained some relief which was contested throughout by London Underground Limited. So there will be an order for the payment of one half of the claimant's costs.

MR CLAYTON QC: My Lord, one last matter: an order of detailed assessment.

MR JUSTICE OUSELEY: And there will be an order for detailed assessment. Thank you very much to you all for your assistance.