[2024 Gib LR 482]

R. (REID) v. DEVELOPMENT APPEALS TRIBUNAL (OBELISK PROPERTIES LIMITED, DEVELOPMENT AND PLANNING COMMISSION, PENNA and DAVIES as interested parties)

SUPREME COURT (Yeats, J.): September 24th, 2024

2024/GSC/033

Town Planning—development—Gibraltar Development Plan—decision of Development Appeals Tribunal allowing appeal and granting planning permission quashed—Tribunal erroneously considered property to be located in Zone 8 (South District) not Zone 9 (Upper Rock Nature Reserve and adjacent areas) of Gibraltar Development Plan—Tribunal therefore failed to have regard to relevant policies and had regard to irrelevant factors and considerations—policies for Zone 9 very restrictive

The claimant challenged a decision of the Development Appeals Tribunal.

The first interested party ("Obelisk") applied for planning permission to develop a property. The claimant was the owner and occupier of the adjoining property. Both properties formed part of Humphrey's Bungalows. The claimant objected to the planning application on grounds including that the proposed building works would cause a danger to the stability of his property; that the application misrepresented the size and height of his property to present the proposed application more favourably; and that the design was not sympathetic and in keeping with a traditional neighbourhood adjacent to the nature reserve. Obelisk's application was refused by the Development and Planning Commission. Obelisk appealed to the Development Appeals Tribunal ("the DAT") which allowed the appeal and granted Obelisk planning permission, subject to a condition.

The claimant challenged the DAT's decision by way of judicial review. It was contended that the decision was unlawful on three grounds: (i) the DAT made material errors of law; (ii) the decision was irrational; and (iii) the DAT failed to comply with statutory procedural requirements and/or failed in its duty to act fairly.

As to the first ground, the claimant submitted that the DAT's decision was unlawful because the DAT (i) failed to have regard to relevant matters required by law; (ii) had regard to irrelevant factors and considerations; (iii) failed to have any or sufficient regard to relevant considerations; and (iv) failed to state clearly and precisely the reasons for its decision. The

claimant's principal point was that both the Commission and the DAT mistakenly considered the property to be situated within Zone 8 (South District) of the Gibraltar Development Plan 2009 whereas it was in fact situated within Zone 9 (Upper Rock Nature Reserve and adjacent areas). Section 30(2) of the Town Planning Act 2018 required the Commission to have regard to the Plan. The Plan provided (at para. 1.9):

> "Great weight will . . . be given to the contents of the Plan in determining applications and it is not expected that the policies and proposals contained within it shall be set aside without very significant reasons for doing so."

Policy Z9.3, which applied to Zone 9, provided that planning permission for new dwellings within the nature reserve would not normally be granted except for the replacement of existing dwellings. The claimant submitted that the restrictions placed on planning applications for developments in Zone 9 would have meant that Obelisk's application should have been refused.

The Commission and the DAT conceded that they erroneously considered the property to be situated within Zone 8 when it was in fact situated within Zone 9. However, the Commission and the DAT said that Humphrey's Bungalows were not within the nature reserve and that since 2013 they had been in the buffer zone. The claimant submitted that, whether intentional or not, there were two designations under the Nature Protection Act: the Upper Rock Nature Reserve created in 1993 which included Humphrey's Bungalows; and the Gibraltar Nature Reserve created in 2013 which did not.

The claimant submitted that the reasons given by the DAT for its decision were insufficient. Most of the document containing the DAT's decision set out the background to the application and the representations made by Obelisk and the Commission.

The claimant submitted that the DAT acted unfairly and/or failed to comply with statutory procedural requirements in that (i) it failed to hold the hearing of the appeal in public; and (ii) the claimant was not notified of the hearing date and venue and was thereby denied the opportunity to be heard. The claimant submitted that the Act required the DAT to hear any objector; the practice of the DAT had always been to give objectors notice of hearings and the claimant therefore had a legitimate expectation to receive such notice; and the failure to hear the claimant was unfair and a breach of the rules of natural justice.

Held, quashing the decision:

(1) The court agreed with the claimant that the Upper Rock Nature Reserve as designated in 1993 (which included Humphrey's Bungalows) remained as a distinct designated conservation area until September 2023 when it was revoked by the Nature Conservation (Designation of Gibraltar Nature Reserve and Upper Rock Nature Reserve) Order 2023. That Upper Rock Nature Reserve designation was relevant to the Gibraltar Development Plan 2009 policies at the time that Obelisk's application for permission was

considered by the Commission and its appeal was considered by the DAT. As the Commission erroneously considered the property to be within Zone 8, and that erroneous position continued in the appeal before the DAT, the DAT therefore failed to comply with s.30(2) of the Town Planning Act 2018 by failing to have regard to relevant policies of the 2009 Plan. It therefore failed to have regard to relevant matters required by law. In considering policy considerations for developments in Zone 8, it had regard to irrelevant factors and considerations. The Z9.3 policy was very specific and extremely restrictive. It could not be argued that failing to have regard to it would have made little difference to the decision making process. The claim of illegality succeeded and the DAT's decision must be quashed (paras. 28–35).

(2) Paragraph 7(3) of Schedule 2 to the Act provided that "the document recording the decision of the Tribunal shall state clearly and precisely the full reasons for the decision." The reasons given by the DAT for its decision were insufficient and did not meet the statutory requirement. Although the DAT did not have to address all the points made to it in submissions by the parties, it should have indicated clearly what submissions were being accepted or rejected when these were important in the context of the decision being taken (paras. 37–41).

(3) Paragraph 14(1) of Schedule 2 to the Act provided that subject to certain exceptions concerning security and confidentiality, "any meeting of [the DAT] shall be held in public." Although the DAT hearing in this case was held in a forum that was open to the public, no public notice of the hearing was given. The court agreed with the claimant that the effect of the failure to give notice was that the hearing was not therefore a public hearing. Members of the public would not have known the meeting was taking place and could not therefore have chosen to attend. The DAT did not sit on regular set days. It must therefore have a mechanism to notify members of the public that hearings were going to be taking place. Otherwise a hearing was not truly a public hearing even if its doors were in theory open to all (paras. 43–44).

(4) The procedure to be followed by the DAT was set out in Schedule 2 to the Act. Nothing in the Schedule required the giving of notice to an objector or provided that an objector should be given an opportunity to be heard. Paragraph 6(1) provided that hearings before the DAT "shall be conducted in such manner as the members of [the DAT] consider most suitable for the clarification and determination of the issues before [the DAT] and generally to the just handling of the proceedings." Section 41(2) provided that "before determining an appeal [the DAT] shall, if either the appellant or [the DAT] so desire, afford each of them an opportunity of appearing before, and being heard by, [the DAT]." This provision clearly drew a distinction between the Commission and the appellant on the one hand and any other interested party on the other. The DAT was not subject to s.27(3)(e) of the Act which provided "a person who makes written representations shall be given an opportunity of being heard at a meeting

held by [the Commission].” In relation to legitimate expectation, the claimant’s evidence was that he had been told of the DAT’s practice always to allow objectors to be heard at the hearing of an appeal after the hearing had taken place. It could not therefore be said that he had a legitimate expectation to be heard. The claimant’s argument that an objector who had a direct interest in the outcome should be heard was strong. However the court did not express a firm view on this. The point was not pleaded in the claimant’s grounds for judicial review and consequently was not dealt with in the written responses of the other parties. It was simply raised at the hearing and the court had not had the benefit of adversarial argument (paras. 47–54).

Cases cited:

(1) *Council of Civil Service Unions* v. *Minister for Civil Service*, [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1984] 3 All E.R. 935, referred to.

(2) *Newham London Borough Council* v. *Khatun*, [2004] EWCA Civ 55; [2005] Q.B. 37; [2004] 3 W.L.R. 417; [2004] HLR 29; [2004] BLGR 696; [2004] NPC 28; [2004] Eu LR 628, considered.

(3) *R. (Alcantara)* v. *Development Appeals Tribunal*, Supreme Ct., Claim No. 2013 Misc. 46, March 13th, 2015, unreported, considered.

(4) *R. (Alconbury Devs. Ltd.)* v. *Environment Secy*., [2001] UKHL 23; [2003] 2 A.C. 295; [2001] 2 W.L.R. 1389; [2001] 2 All E.R. 929; [2002] Env. L.R. 12, considered.

(5) *R. (JM)* v. *Isle of Wight Council*, [2011] EWHC 2911 (Admin), considered.

(6) *Tesco Stores Ltd.* v. *Environment Secy.*, [1995] 1 W.L.R. 759; [1995] 2 All E.R. 636; [1995] 2 PLR 72; [1995] EG 82; [1995] 2 EGLR 147, considered.

Legislation construed:

Town Planning Act 2018, s.27(3)(e): The relevant terms of this paragraph are set out at para. 49.

s.30(2): The relevant terms of this subsection are set out at para. 17.

s.41(2): The relevant terms of this subsection are set out at para. 48.

Schedule 2, para. 6(1): The relevant terms of this paragraph are set out at para. 47.

Schedule 2, para. 7: The relevant terms of this paragraph are set out at para. 37.

Schedule 2, para. 14(1): The relevant terms of this paragraph are set out at para. 43.

P. Caruana, *K.C.*, *G. Dobbs* and *P. Dumas* (instructed by Andrew Haynes Chambers) for the claimant;

The defendant and the interested parties did not attend the hearing.

1 **YEATS, J.:** The claimant, Henry Reid, was an objector before the Development and Planning Commission (“the DPC”) at the hearing of an

application for planning permission made by the first interested party, Obelisk Properties Ltd. ("Obelisk"). The application related to a property at 7B Engineer Road, Gibraltar ("the property"). The claimant is the owner and residential occupier of the adjoining property. Both properties form part of what are known as Humphrey's Bungalows.

2 On May 4th, 2021, the DPC refused Obelisk's application for revised outline planning permission. Obelisk then appealed to the Development Appeals Tribunal ("the DAT") (the defendant in this claim for judicial review). In a decision contained in a letter dated January 27th, 2022, the DAT allowed the appeal and granted Obelisk planning permission, subject to a specific condition.

3 The claimant challenges the DAT's decision by way of judicial review. The claimant says that the DAT's decision was unlawful because: (1) the DAT made material errors of law; (2) the decision was irrational; and (3) the DAT failed to comply with statutory procedural requirements and/or failed in its duty to act fairly.

4 The DAT and the DPC both filed an acknowledgment of service and made written submissions for the court to consider when deciding whether to grant permission to proceed with the claim. Obelisk filed an acknowledgment of service and summary grounds for contesting the claim. Permission to proceed was granted by this court on October 12th, 2022. Thereafter, Obelisk filed further grounds for contesting the claim.

5 The third interested party is the registered owner of the property. Neither he nor the fourth interested party (another owner of a property in Humphrey's Bungalows) have participated in these proceedings.

6 By the time the matter was set down for hearing, Obelisk's application for outline planning permission had in fact been withdrawn. Presumably for that reason, Obelisk withdrew from participating any further in these proceedings. Sir Peter Caruana, K.C., who appeared for the claimant, however submitted that the proceedings are not nugatory. According to Sir Peter, the DPC is entitled to take account of a previously successful application when it considers any further applications that may be made. As Obelisk has filed a fresh application before the DPC for a slightly different development at the property, the claimant is intent on having the DAT's decision set aside.

7 The claimant's objections to Obelisk's planning permission application were contained in a letter dated May 8th, 2020. The claimant raised nine points for his objection. Amongst these were the following: that the proposed building works would cause a danger to the stability of his own property; that the application misrepresented the size and height of his property to present the proposed application more favourably; and that the design was

not sympathetic and in keeping with a traditional neighbourhood adjacent to the Nature Reserve.

8 The DPC heard the application on December 17th, 2020 and refused planning permission. On May 4th, 2021, it issued a refusal notice setting out its reasons for the refusal. These were:

> "i. The Commission considers that the proposed density of the development of three dwellings is excessive and represents an overdevelopment of the site and is, therefore, contrary to criterion B of Policy GDS 2 of the Gibraltar Development Plan (GDP) 2009.
>
> ii. The Commission considers that the scale and massing of the proposed development is considered to be excessive for this site and would have a detrimental effect on the character and appearance of the area contrary to criteria A and B of Policy GDS 2 of the GDP 2009.
>
> iii. The Commission considers that the proposed development would result in an unacceptable visual impact particularly when viewed from a distance, and would, therefore, be contrary to Policy GDS2 of the GDP 2009."

9 Obelisk appealed to the DAT on May 31st, 2021 and served its notice of appeal on the claimant. The claimant renewed his objections in an undated letter to the DAT. In the letter, the claimant also addressed a number of points which had been made by Obelisk in its notice of appeal. The DAT heard the appeal on October 8th, 2021. It did not notify the claimant of the hearing. The DAT allowed the appeal (subject to a condition). Obelisk was provided with the DAT's decision on January 27th, 2022.

10 The DAT's decision was contained in a 9-page document signed by its chairman. Most of the document sets out the background to the application and the representations made by Obelisk and the DPC. As to its reasons, the DAT said the following at paras. 8 and 9:

> "8. The Tribunal has determined that, in all the circumstances of the case, taking into account all the representations before it, written and oral, the Appeal is allowed (subject to conditions).
>
> 9. In coming to this determination the Tribunal has found that—
>
> i. The GDP is an approved planning scheme for the purposes of the Town Planning Act. The Commission and the DAT in dealing with applications for planning permission, and appeals therefrom, shall be guided by the provisions of it and any other material considerations. The relevant policies within the GDP are noted by the DAT.

ii. The DAT notes the reasons given by the DPC for refusing the application at first instance. It noted in particular that there were no issues raised as to the design other than with respect to its massing, the increase in density and the visual impact.

iii. The DAT, taking into account all the evidence provided to it, decided, subject to the reservations below, unanimously in favour of the Appellant. In particular the DAT balanced the concerns of the Respondent with the public interest in developing a deteriorating structure and the interests of the owner of the property. The DAT remained concerned as to the possible impact of the development on the World Heritage Site status of the area as the development would be in its buffer zone.

iv. The DAT therefore state that as a condition of granting permission under section 30 of the Town Planning Act the Appellant must, in consultation with the Town Planner, commission an impact study into the risk to the World Heritage Site status of Gorham's Cave Complex that the proposed development would bring. The impact study should look into the above heritage risk and the environmental impact of the development given the proposed massing, density and visual impact. Where the impact study recommends conditions and changes in order to protect the World Heritage Site status these must be undertaken.

v. The DAT further decided and agreed that the circumstances of this case are unique and as such should not be seen as setting any form of precedent."

11 Sir Peter complained that, in effect, the DAT's decision was contained in a few lines of para. 9(iii), namely that the DAT had balanced the DPC's concerns with the public interest in developing a deteriorating structure and the interests of the owner of the property. It was submitted that nothing else in the document amounted to reasoning for the decision which was taken, and therefore the reasons given were insufficient. I shall return to this.

Ground 1—material errors of law

12 Ground 1 has four strands. It was said on behalf of the claimant that the DAT's decision was unlawful because the DAT: (i) failed to have regard to relevant matters required by law; (ii) had regard to irrelevant factors and considerations; (iii) failed to have any or sufficient regard to relevant considerations; and (iv) failed to state clearly and precisely its reasons for its decision.

13 In *Council of Civil Service Unions* v. *Minister for Civil Service* (1), Lord Diplock said the following in relation to the "illegality" ground in judicial review ([1985] A.C. at 410):

> "By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it."

14 *De Smith's Judicial Review*, 9th ed., at para. 5.002 (2024) sets out how this includes the failure to consider a relevant matter or the consideration of an irrelevant matter. Sir Peter also referred to *R. (Alconbury Devs. Ltd.)* v. *Environment Secy.* (4), where Lord Slynn said the following ([2001] UKHL 23, at para. 50):

> "It has long been established that if the Secretary of State misinterprets the legislation under which he purports to act, or if he takes into account matters irrelevant to his decision or refuses or fails to take account of matters relevant to his decision, or reaches a perverse decision, the court may set his decision aside. Even if he fails to follow necessary procedural steps—failing to give notice of a hearing or to allow an opportunity for evidence to be called or cross-examined, or for representations to be made or to take any step which fairness and natural justice requires, the court may interfere."

15 The principal point made on behalf of the claimant was that both the DPC and the DAT mistakenly considered the property to be situated within Zone 8 of the Gibraltar Development Plan of 2009 ("the GDP 2009") whereas it is in fact situated within Zone 9. The GDP 2009 is a plan made pursuant to s.5 of the now repealed Town Planning Act 1999. It was approved by the Government's then Chief Minister (coincidentally now counsel for the claimant) on September 25th, 2009 pursuant to s.10 of that Act. By virtue of the transitional provision contained in s.73(5) of the Town Planning Act 2018 ("the Act"), the GDP 2009 continues to have effect as if made under the Act.

16 The GDP 2009 divides Gibraltar into zones. Zone 9 is in two parts. It comprises of the Upper Rock Nature Reserve and the areas adjacent to it, known as the buffer areas. Zone 8 is the South District and is adjacent to Zone 9. Some policies in the plan apply across all zones. Others apply only within particular zones or parts of a zone. It is said for the claimant that the restrictions placed on planning applications for developments in Zone 9 would have meant that Obelisk's proposal for the property should have been rejected by the DAT.

17 Section 30(2) of the Act requires the DPC to have regard to the Gibraltar Development Plan. The section says:

> "(2) In dealing with an application for planning permission, [the DPC] shall have regard to—

(a) the provisions of the approved planning scheme;

. . .

(e) any other material considerations."

An "approved planning scheme" is defined in the Act as a planning scheme approved by the Chief Minister under s.10.

18 Therefore, pursuant to this provision, the DPC "shall have regard" to the GDP 2009. As Sir Peter pointed out, this does not mean that it is obligatory or mandatory to follow the plan. (Indeed, if confirmation of this were needed it is found in reg. 11 of the Town Planning (General Procedures) Regulations 2019, which provides that the DPC and the DAT are able to grant planning permission for a development which does not accord with the provisions of a planning scheme.)

19 So what does "shall have regard" mean? In *R. (JM)* v. *Isle of Wight Council* (5), two adults with disabilities brought a claim for judicial review against a decision by a local council to restrict the eligibility threshold for adult social care. Under s.49A of the UK's Disability Discrimination Act 1995, every public authority had to have "due regard to" a number of factors aimed at protecting persons with disabilities. In her judgment, Lang, J. set out a helpful summary of the case law dealing with the concept of having "due regard to" ([2011] EWHC 2911 (Admin), at paras. 96–107). The learned judge's summary included the following:

"97. 'Due regard' is the 'regard that is appropriate in all the circumstances' . . . The authority must give 'proper regard' to all the goals in s.49A in the context of the function it is exercising and, at the same time, pay regard to any countervailing factors which, in the context of the function being exercised it is proper and reasonable for the authority to consider. The weight to be given to the countervailing factors is a matter for the public authority rather than the court unless the assessment is unreasonable or irrational . . .

98. The test whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking, and the duty must be performed with 'vigour and an open mind' . . .

99. General awareness of the duty does not amount to the necessary due regard, being a 'substantial rigorous and open-minded approach' . . ."

"104. The question of whether 'due regard' has been paid is for the Court itself to review—the Court should not merely consider whether there was no regard to the duty at all, or whether the decision was *Wednesbury* unreasonable . . ."

20 In relation to the phrase "any other material consideration," Sir Peter relied on *Tesco Stores Ltd.* v. *Environment Secy.* (6). In that case the House of Lords was considering a provision in the UK Town and Country Planning Act which provided that the planning authority, in dealing with an application for planning permission, "shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations." Lord Keith said the following ([1995] 1 W.L.R. at 764):

> "Sir Thomas Bingham M.R. in the course of his judgment in this case said that 'material' in subsection (2) meant 'relevant', and in my opinion he was correct in this. It is for the courts, if the matter is brought before them, to decide what is a relevant consideration. If the decision maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense . . ."

21 In their submissions in response to the claim, both the DPC and the DAT conceded that they erroneously considered the property to be situated in Zone 8 of the GDP when in fact it is located within Zone 9. However, there is disagreement as to whether the property is within the Nature Reserve. The claimant's position is that it is. The DPC and the DAT say that it is not, and that since 2013 it is in the buffer zone.

22 Under the heading "The Upper Rock Nature Reserve," the GDP 2009 says the following (para. 20.11, at 130):

> "In order to ensure the preservation of this important area for future enjoyment by residents and visitors alike, a Nature Reserve was designated in 1993 covering the vast majority of [Zone 9]. The boundary generally follows the 'unclimbable fence' and the 90m contour line."

23 I agree with Sir Peter that this can only mean the Upper Rock Nature Reserve ("the Upper Rock Nature Reserve") as designated by the Nature Conservation Area (Upper Rock) Designation Order 1993—which was made on April 1st, 1993 ("the 1993 Order"). Humphrey's Bungalows are contained within this area. (The 1993 Order was made pursuant to s.18(1) of the Nature Protection Act 1991.)

24 There are then a number of other designation orders made pursuant to the Nature Protection Act over the years. On November 24th, 2011, the Government published the Nature Conservation Area (Extension of the Upper Rock) Designation Order 2011 ("the 2011 Order"). It created a Nature Conservation Area which was to be known as "the Extension of the

Upper Rock Nature Reserve." It did not impact upon the area of Humphrey's Bungalows.

25 The 2011 Order was repealed on October 31st, 2013 by the Nature Conservation (Designation of Gibraltar Nature Reserve) Order 2013 ("the 2013 Order"). Whilst it is difficult to ascertain precisely from the small scale plan attached to the 2013 Order, this area appears to include most of the Upper Rock Nature Reserve together with the area designated as the extension of the Upper Rock Nature Reserve created by the 2011 Order. However, it excludes the site of Humphrey's Bungalows. The 2013 Order created "the Gibraltar Nature Reserve."

26 The 2013 Order was repealed on May 12th, 2016 by the Nature Conservation (Designation of Gibraltar Nature Reserve) Order 2016 ("the 2016 Order"). This added a strip of land on the east side of the Rock to the Gibraltar Nature Reserve.

27 The 2016 Order was itself repealed on March 14th, 2019 by the Nature Conservation (Designation of Gibraltar Nature Reserve) Order 2019. This Order created the Gibraltar Nature Reserve "Devil's Tooth Green Corridor" which was then designated to be part of the Gibraltar Nature Reserve.

28 Importantly, none of the Orders of 2011, 2013, 2016 or 2019 repealed the 1993 Order. Sir Peter submitted that the effect of this was that, in law, whether intentional or not, there were two designations made which included the area (or parts of the area) commonly known as the Upper Rock. The first, the Upper Rock Nature Reserve as created by the 1993 Order. The second, the Gibraltar Nature Reserve which included areas outside of the Upper Rock (and which excluded Humphrey's Bungalows). It seems to me that this must be correct.

29 This conclusion is, in effect, supported by the contents of the Nature Conservation (Designation of Gibraltar Nature Reserve and Upper Rock Nature Reserve) Order 2023, made on September 21st, 2023 ("the 2023 Order"). It designates three distinct nature reserves: first, the Gibraltar Nature Reserve, Devil's Tooth Green Corridor; secondly, the Upper Rock Nature Reserve; and thirdly, the Gibraltar Nature Reserve. The 2023 Order revokes the 1993 Order. It also modifies the delineation of the Upper Rock Nature Reserve to exclude Humphrey's Bungalows. (I am unable to ascertain from the map in the Schedule to the 2023 Order whether there are any other material changes.)

30 I agree with the claimant that the effect of all of these Orders is that the Upper Rock Nature Reserve as designated in 1993 (and therefore including Humphrey's Bungalows) remained as a distinct designated conservation area until September 21st, 2023. That Upper Rock Nature Reserve designation was relevant to the GDP 2009 policies at the time that

Obelisk's application for outline planning permission went before the DPC and its appeal was considered by the DAT.

31 The GDP 2009 provides as follows (paras. 1.8 and 1.9, at 4):

> "1.8 It is intended that this Plan should be used by developers, individuals, professional advisers, Government departments and agencies, voluntary organisations and interest groups. The purpose of the Plan is to provide a clear framework for the future planning of Gibraltar and to provide certainty in how development should take place in the future.
>
> 1.9 The Plan will therefore be an essential tool in development control and proposals will be expected to conform fully to the policies and proposals contained within it. As the Plan has been the subject of extensive public participation it must be seen as a plan that has the support of the community. *Great weight will therefore be given to the contents of the Plan in determining applications and it is not expected that the policies and proposals contained within it shall be set aside without very significant reasons for doing so*." [Emphasis added.]

32 Policies that are specific to Zone 9 include para. 20.14, at 130, which states as follows:

> "There may be a need to accommodate some limited development within the Nature Reserve where this can be shown to be appropriate to the area. The planning objective will therefore be to limit such development to that which is essential, has no significant adverse effect on the preservation and enhancement of the character and appearance of the area, and is of limited size."

33 In relation to residential developments, para. 20.15, at 131, says the following:

> "Due to the ecological importance of the Nature Reserve and its visual prominence the planning policy is not to permit further residential development within the reserve . . . The primary objectives of this policy are to ensure that there is no increase in the number of dwellings in the nature reserve and that there is no extension or consolidation of existing built up areas. Very small-scale development associated to an existing residential use will be permitted subject to there being no unacceptable impact."

34 Policy Z9.3 is then set out (at 131–132). This provides as follows:

> "Planning permission for new dwellings within the nature reserve will not normally be granted except for the replacement of existing dwellings subject to the following:

A) The proposed dwelling is of a similar size to the original, and in any event must not have a volume greater than 20% more than the volume of the original dwelling, nor must be any higher than the highest part of the original dwelling;

. . .

C) The proposal must not have a significant detrimental impact on the character or appearance of the surrounding area or the nature reserve in general;

D) There is no increase in the number of dwelling units;

E) The replacement dwelling is on the site of the existing dwelling;

F) The existing dwelling is substantially intact and is capable of being inhabited; and

G) The proposed dwelling is of a design, colour and built of materials that are in-keeping with the character and the appearance of the surrounding area and nature reserve generally."

35 It is self-evident that the DAT did not give this policy any consideration. As has already been pointed out, the DPC considered that the property was within Zone 8, and that erroneous position continued in the proceedings before the DAT. The DAT therefore failed to comply with s.30(2) of the Act by failing to have any regard to relevant policies of the GDP 2009. It therefore failed to have regard to relevant matters required by law. Indeed, in considering policy considerations for developments in Zone 8 of the GDP 2009, it had regard to irrelevant factors and considerations. The Z9.3 policy is very specific and extremely restrictive. It cannot possibly be argued that failing to have regard to it would have made little difference to the decision making process. The consequence is that the claim of illegality succeeds and it follows that the DAT's decision must be quashed.

36 This disposes of the claim. It is not therefore necessary to deal with all of the remaining grounds relied on by the claimant. However, I shall briefly touch upon some of the points made by the claimant which are of general application. Namely, whether the DAT gave sufficient reasons for its decision, whether the DAT hearing was held in public, and whether the claimant had a right to be notified of the hearing.

Sufficiency of reasons

37 Sub-paragraphs 7(2) and 7(3) of Schedule 2 of the Act provide as follows in relation to the DAT giving reasons for its decision:

"(2) The decision may be given orally by the presiding member of the Tribunal at the end of the hearing or may be reserved and in either event shall be recorded in a document signed and dated by the presiding member of the Tribunal.

(3) The document recording the decision of the Tribunal shall state clearly and precisely the full reasons for the decision."

38 I have already referred to how the DAT's reasons were contained in a nine-page document. Most of the document sets out the background to the application and the representations made by Obelisk and the DPC. Reciting the parties' respective submissions does not amount to the giving of reasons unless the decision maker indicates that they are accepting or agreeing with anything that has been said. The DAT did not do this. In any case, ideally, a decision maker should say why a submission is accepted or agreed with.

39 From a perusal of paras. 8 and 9, it seems to me that the DAT's reasons can be distilled into the following:

(i) At para. 9(i) the DAT noted the policies contained in the GDP 2009—at the time erroneously thought to be the policies applicable to Zone 8. There is however no reference to what these policies are or of how they were being applied, if at all.

(ii) At para. 9(ii) the DAT noted that there were no issues raised with the proposed design other than with respect to massing, increase in density and visual impact.

(iii) At para. 9(iii) the DAT said that they had "balanced the concerns of [the DPC] with the public interest in developing a deteriorating structure and the interests of the owner of the property."

(iv) On the imposition of the condition that an impact study into the risk to the Gorham's Cave complex be commissioned, the DAT said:

"The DAT remained concerned as to the possible impact of the development on the World Heritage Site status of the area as the development would be in its buffer zone." (para. 9(iii))

40 In its written submissions, on the question of sufficiency of reasons, Obelisk referred to *R. (Alcantara)* v. *Development Appeals Tribunal* (3) where Jack, J. said the following (Claim No. 2013 Misc. 46, at para. 26):

"The requirement to give reasons does not, however, entail a need to provide the same detail and comprehensiveness as is to be expected of a judgment of a court of law. The House of Lords in *South Buckinghamshire District Council v. Porter (No 2)* [2004] UKHL 33, [2004] 1 WLR 1953 at 1964 said:

> '36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.'"

In that case Jack, J. was considering the regime as it was prior to the Town Planning Act 2018. Under the previous Town Planning Act there was no express provision that reasons were to be given by the DAT. As has already been noted, under para. 7(3) of Schedule 2 of the Act, the DAT "shall state clearly and precisely the full reasons for the decision."

41 It seems to me that the reasons given by the DAT in this case were insufficient and did not meet the statutory requirement. Although the DAT did not have to address all the points made to it in submissions by the parties, it should have indicated clearly what submissions were being accepted or rejected when these were important in the context of the decision that was being taken.

Ground 3: unfairness

42 The claimant says that the DAT acted unfairly and/or failed to comply with statutory procedural requirements in that: (i) it failed to hold the hearing of the appeal in public; and (ii) the claimant was not notified of the hearing date and venue (and was thereby denied the opportunity to be heard).

43 Paragraph 14(1) of Schedule 2 to the Act provides that subject to certain exceptions concerning security and confidentiality, "any meeting of [the DAT] shall be held in public." Although the DAT hearing with which we are concerned was held in a forum that was open to the public, no public notice of the hearing was in fact given. It was submitted on behalf of the claimant that the effect of the failure to give notice is that the hearing was not therefore a public hearing. Members of the public would not have known the meeting was taking place and could not therefore have chosen to attend.

44 In my judgment, this must be correct. The DAT does not sit on regular set days. (I do not know whether it always sits in the same location although it is apparent that it does not have a purpose-built venue.) The DAT must therefore have a mechanism to notify members of the public that hearings are going to be taking place. Otherwise, a hearing is not truly a public hearing even if its doors are in theory open to all.

45 The second strand to the unfairness ground is that the DAT failed to notify the claimant of the date and venue of the hearing and that he had an opportunity to be heard in the appeal.

46 I have stated earlier in this judgment that Obelisk gave the claimant notice of the appeal. This was a requirement under the Act. The claimant then submitted his objections to the DAT. It is the claimant's unchallenged evidence that he heard nothing further about the appeal until after the DAT's decision had been made. Three points are made on behalf of the claimant. First, that the provisions of the Act require the DAT to hear any objector. Secondly, that the practice of the DAT has always been to give objectors notice of hearings and the claimant therefore had a legitimate expectation to receive such notice. Thirdly, that the failure to hear the claimant was unfair and in breach of the rules of natural justice.

47 The DAT is constituted pursuant to s.39 of the Act. The procedure to be followed by the DAT is then set out in Schedule 2 of the Act. Nothing in the Schedule requires the giving of notice to an objector or provides that an objector should be given an opportunity to be heard. In fact, para. 6(1) provides that hearings before the DAT:

> "shall be conducted in such manner as the members of [the DAT] consider most suitable for the clarification and determination of the issues before [the DAT] and generally to the just handling of the proceedings."

48 Section 41 of the Act is entitled "Determination of Appeals." Section 41(2) says the following:

> "Before determining an appeal [the DAT] shall, if either the appellant or [the DPC] so desire, afford each of them an opportunity of appearing before, and being heard by, [the DAT]."

This provision clearly draws a distinction between the DPC and the appellant on the one hand and any other interested party on the other.

49 Section 41(4) then says that the provisions of ss. 22–25, and ss. 30–31 of the Act (relating to the procedure before the DPC) shall also apply, with any necessary modifications, to the DAT. Missing from this list of provisions is s.27(3)(e) which mandates the DPC as follows: "a person who makes written representations shall be given an opportunity of being heard at a meeting held by [the DPC]."

50 The claimant relies on the fact that s.30 of the Act is expressly applied to the DAT and that it is s.30 that enables the DAT to grant planning permission. Section 30(3) then says that the power to grant (or refuse) planning permission is "subject to the provisions of this Part." Section 27(3) is within the same part of the Act and it was therefore submitted that the DAT was also subject to the provisions of s.27(3). It does not seem to me that this is the effect or the intention behind s.30(3). Parliament has expressly enumerated the sections which apply to the proceedings before the DAT. Section 27 has been omitted. If s.30(3) has the effect that Sir Peter submitted it has, then the reference to the specific sections would have been unnecessary. In my judgment, the point of s.30(3) is to make it clear that the power to grant or refuse planning permission is not absolute.

51 The second point was one of legitimate expectation. It was submitted that the practice of the DAT has always been to allow objectors to be heard at the hearing of an appeal and the claimant therefore had a legitimate expectation that this was going to be the case. The claimant relies on an exchange of emails of November 24th, 2021 with the then Town Planner, where the Town Planner said the following:

> "[The DAT] ought to have informed you as you also have a right to be informed of an appeal and allow you to approach [the DAT] with your own reasons for objecting to the application . . ."

Beyond this, there is no evidence as to what the practice of the DAT has been, although of course, the Town Planner will have been familiar with how the proceedings before the DAT worked.

52 In any case, it seems to me that the argument must fail. The claimant's evidence is that he was told of the DAT's practice *after* the hearing had actually taken place. It cannot therefore be said that he had a legitimate expectation to be heard. On the evidence, he had no such expectation.

53 The third alternative submission was that the failure to notify the claimant was unfair and a breach of the rules of natural justice. Sir Peter submitted that where statutory procedure is insufficient to achieve justice, the courts will supplement the statutory code. It was said that natural justice required the giving of notice of the hearing to the claimant and the

opportunity to be heard. In *Newham London Borough Council* v. *Khatun* (2), Laws, L.J. said the following ([2004] EWCA Civ 55, at para. 31):

> "That the courts may in the name of fairness insist on the conferment upon affected persons of a right to be heard in the administration of a statutory scheme, itself silent as to such a right, cannot be doubted. But it is not the law that they will always do so. The court is more likely to feel constrained to 'supply the omissions of the legislature' where the decision in question is one which may diminish or extinguish an established right or interest already belonging to the affected person, rather than one which will grant or withhold a benefit or bounty not previously enjoyed, and for which there is merely an entitlement to apply. This is the distinction between 'forfeiture' (or 'deprivation') cases and 'application' cases, drawn by Megarry J in *McInnes v Onslow Fane.* It is not hard and fast. There may be cases where refusal of the application (for example, the refusal of a passport) will carry adverse implications for other rights or interests which the applicant may expect to enjoy. But in general the distinction possesses much force. In an 'application' case there is likely to be legal space for the decision-maker to exercise a discretion whether or not to accord a right to be heard. In doing so, he will of course have regard to the practicalities of the statutory scheme's operation. A perceived need in the general interest to process applications speedily, against a background of many applicants and scarce resources, may be a legitimate and important factor."

54 The argument that an objector who has a direct interest in the outcome should be heard is strong. However, I do not propose to express a concrete view on this. The point was not pleaded by the claimant in his grounds for judicial review and consequently was not dealt with in the written responses of the other parties. It was simply raised at the hearing, and I have not had the benefit of any adversarial argument.

Conclusion

55 For the reasons set out in this judgment, the decision of the Development Appeals Tribunal of January 27th, 2022 granting Obelisk Properties Ltd. outline planning permission is quashed. As Obelisk has indicated that it is not proceeding with the application, the matter will not be remitted to the DAT.

Judgment accordingly.