Neutral Citation Number: [2015] EWHC 3784 (Admin)

Case No: CO/2154/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 23rd December 2015

Before:

MR JUSTICE FOSKETT

Between:

THE QUEEN **(on the application of JOHN MICHAEL GIBSON)**	**Claimant**
- and -	
WAVERLEY BOROUGH COUNCIL	**Defendant**
and	
(1) DFN CHARITABLE FOUNDATION **(2) HISTORIC ENGLAND**	**Interested Parties**

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

Paul Stinchcombe QC and Ned Helme (instructed by **Sharpe Pritchard LLP**) for the **Claimant**
Timothy Mould QC (instructed by **Borough Solicitor, Waverley Borough Council**) for the **Defendant**
David Forsdick QC (instructed by **Macfarlanes LLP**) for the **First Interested Party**
The Second Interested Party did not appear and was not represented.

Hearing dates: 2 December 2015

Judgment
As Approved by the Court

Mr Justice Foskett:

Introduction

1. This case concerns 'Undershaw', the former home of Sir Arthur Conan Doyle in Hindhead, Surrey. The house is a Grade 2 listed building, principally by virtue of its association with Sir Arthur. It was built to his design.

2. The case is a sequel to the events relating to that house reflected in the judgment of Cranston J in *R (Gibson) v Waverley Borough Council* [2012] EWHC 1472 (Admin) ('the First Gibson Case'). That case was decided in May 2012.

3. It is an application for judicial review of the decisions of the Defendant, as local planning authority, on 31 March 2015 to grant planning permission and listed building consent for the re-development of the house.

4. Permission to apply for judicial review was granted by Singh J following an oral renewal hearing on 11 August 2015, permission having initially been refused on the papers by Dove J on 24 June 2015.

5. Since the Claimant in the present proceedings is the same person as in the First Gibson Case, this case will undoubtedly become known as 'the Second Gibson Case'. His (plainly genuine and long-standing) interest in Undershaw is set out in Cranston J's judgment.

6. The First Interested Party, DFN Charitable Foundation ('DFN'), now owns the site upon which the house stands and was the applicant for the planning permission and listed building consent the subject of the present challenge. The purpose of the acquisition of the site was to enable the expansion of the 'Stepping Stones School', an educational establishment based in Hindhead in Surrey for children, teenagers and young adults with special needs in the form of mild learning and physical disabilities. The plan is to develop the site in accordance with the planning permission to accommodate a total of 64 8-16-year-old students and then to lease it to Stepping Stones. The existing Stepping Stones site in Hindhead (which is a converted Grade 2 listed chapel about 400m from Undershaw) would then provide accommodation and facilities for a number of 16-25-year-old students.

The planning and other history of the site prior to the present planning permission

7. A great deal of the relevant history was traced by Cranston J in the First Gibson case (see paragraph 2 above) and there is no need for me to repeat it. I would respectfully commend the following paragraphs of that judgment to anyone reading this judgment to be read before reading further in this judgment:

(a) paragraph 1 (identifying the property and describing the Claimant's interest);

(b) paragraphs 2-5 (tracing the history from 1897 to 2005);

(c) paragraphs 5-7 (tracing the history from 2005 to 2007);

(d) paragraphs 8-24 (tracing the history of the planning application that became the subject of the challenge in the First Gibson case.)

8. It would he helpful to the understanding of the present application if I quote how Cranston J described the development permitted by the planning permission under challenge in the First Gibson case:

> "The scheme of development was to divide Undershaw to create a terrace of three houses, with the result that each of the main reception rooms of the original house would be in separate dwellings. New doors, windows and staircases would be installed. The proposals entailed some demolition; the erection of a new three storey east wing to provide five new townhouses; and the conversion of the stable block within the curtilage of the listed building into garages. Part of the proposal was to erect a gazebo within the grounds, which would be open to the public and provide information about Undershaw and Conan Doyle."

9. In short summary, the last effective use of the site was as a hotel, but that ceased in 2005. Thereafter the site, including the house, has lain dormant and the structural condition of the buildings has deteriorated. The planning permission granted in the First Gibson case (but quashed by the decision of Cranston J) would have been for residential development as described (namely, conversion into 8 dwellings). The current permission is for a change of use from hotel to educational use with, as I will describe below (see paragraphs 33-34), the erection of extensions and the carrying out of alterations following demolition of a modern extension and associated works. The apparent interest of potential purchasers with a view to using the property as a sole residence, which had a marked effect on the outcome of the First Gibson case, would appear to have waned subsequently. A permission for change of use from hotel/restaurant to single dwelling granted in 2010 was not implemented and has expired.

10. I should record that an application for permission to appeal in the First Gibson case was rejected by the Court of Appeal.

The legal, statutory and policy framework

11. As a Grade 2 listed building, Undershaw is a "heritage asset".

12. In the First Gibson case, Cranston J said this of the statutory framework:

> "There is no dispute about the applicable statutory framework in this case. First, section 38(6) of the Planning and Compulsory Purchase Act 2004 requires the Council to determine planning applications in accordance with the development plan "unless material considerations indicate otherwise". Consistently with this, section 70(2) of the Town and Country Planning Act 1990 provides that where an application is made to the Council for planning permission, the authority "shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations". Secondly, section 16(2) of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides that in considering whether to grant listed building consent the local planning authority or the Secretary of State "shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses." Further, section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides that in considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or the Secretary of State "shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses …."

13. The same statutory framework applies to this case. The only additional matter to which reference should be made is the observation of Sullivan LJ in *East Northamptonshire DC v SSCLG* [2015] 1 WLR 45 at [24] where he said this:

> "… that the desirability of preserving the [listed buildings or] settings of listed buildings should not simply be given careful consideration by the decision-maker for the purpose of deciding whether there would be some harm, but should be given 'considerable importance and weight' when the decision-maker carries out the balancing exercise."

14. Although the National Planning Policy Framework ('the NPPF') had been published by then, it was not the operative statement of national policy for the purposes of considering the planning application the subject of the First Gibson case. Whilst there has been no material change from the policies applicable at the time of the consideration of that planning application, I should record those that are accepted to have been applicable when the planning application the subject of consideration in this case was decided by the Defendant.

15. Paragraph 17 is to the following effect:

> "Within the overarching roles that the planning system ought to play, a set of core land-use planning principles should underpin both plan-making and decision-taking. These 12 principles are that planning should:

…

conserve heritage assets in a manner appropriate to their significance, so that they can be enjoyed for their contribution to the quality of life of this and future generations …."

16. Paragraph 126 is as follows:

> "Local planning authorities should set out in their Local Plan a positive strategy for the conservation and enjoyment of the historic environment, including heritage assets most at risk through neglect, decay or other threats. In doing so, they should recognise that heritage assets are an irreplaceable resource and conserve them in a manner appropriate to their significance. In developing this strategy, local planning authorities should take into account:
>
> - the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation;
>
> - the wider social, cultural, economic and environmental benefits that conservation of the historic environment can bring;
>
> - the desirability of new development making a positive contribution to local character and distinctiveness; and
>
> - opportunities to draw on the contribution made by the historic environment to the character of a place."

17. The following paragraphs are also of relevance:

> "132. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. Substantial harm to or loss of a grade II listed building, park or garden should be exceptional. …
>
> 133. Where a proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply:

- the nature of the heritage asset prevents all reasonable uses of the site; and

- no viable use of the heritage asset itself can be found in the medium term through appropriate marketing that will enable its conservation; and

- conservation by grant-funding or some form of charitable or public ownership is demonstrably not possible; and

- the harm or loss is outweighed by the benefit of bringing the site back into use.

134. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."

18. It is common ground that the PPS5 Planning Practice Guide (which was in fact cancelled on 27 March 2015), which is consistent with the NPPF, is also a material consideration. The following features are of potential relevance:

"88. Proposals for the development of a heritage asset will ideally be for its optimum viable use. By their nature, some heritage assets have limited or even no economic end use. A scheduled monument in a rural area may preclude any use of the land other than as pasture, whereas a listed building may have a variety of alternative uses such as residential, commercial or leisure.

89. It is important that any use is viable, not just for the owner but also for the future conservation of the asset. Viable uses will fund future maintenance. It is obviously desirable to avoid successive harmful changes carried out in the interests of successive speculative and failed uses. If there are a range of alternative ways in which an asset could viably be used, the optimum use is the one that causes the least harm to the significance of the asset, not just through necessary initial changes but also as a result of subsequent wear and tear and likely future changes. The optimum viable use is not necessarily the most profitable one. It might be the original use, but that may no longer be economically viable or even the most compatible with the long-term conservation of the asset.

90. Harmful development may sometimes be justified in the interests of realising the optimum viable use of an asset, notwithstanding the loss of significance caused, provided that the harm is minimised.

> 91. Where substantial harm to, or total loss of, the asset's significance is proposed a case can be made on the grounds that it is necessary to allow a proposal that offers substantial public benefits. For the loss to be necessary there will be no other reasonable means of delivering similar public benefits, for example through different design or development of an appropriate alternative site."

19. I will return to these matters as relevant after describing the course of events leading to the grant of the planning permission.

The history of the application for planning permission

20. On 8 July 2014 DFN applied for planning permission (No. WA/2014/1227) for the change of use of Undershaw from hotel (Class C1) to educational use (Class D1) in order to provide additional premises (for an upper school to accommodate "approximately 30 children with mild learning difficulties") associated with the existing Stepping Stones School at Hindhead, which was to be retained as a junior school. The application was amplified by additional information received by the Defendant on 21 August 2014. The Claimant draws attention to the fact that no demolition, alterations or extensions were proposed in the application (including no changes to the vehicular access) and to what was said about the viability of the proposal in the Design and Access Statement and the Heritage Statement for that application. The Design and Access Statement said this at paragraph 4.13:

> "Although Undershaw contains rooms that would normally be small for modern classrooms, in the type of school that is being proposed, which caters for children with learning difficulties, class sizes tend to be small with a maximum of 8 pupils. Undershaw would cater for 30 children and for this reason it is considered that Undershaw is an ideal building for Stepping Stones enabling a homely, cosy and friendly school atmosphere to be created, within what was originally a family home and one that still retains those domestic features, including domestic fireplaces, wooden stairs and wooden banisters together with an exceptional setting within a beautiful garden landscape."

21. In paragraph 6.19 the following is said:

> "The *'optimal use'* referred to by the Court judgement, to convert Undershaw to a single dwelling is not viable because no buyer has come forward. In fact, we would contend that the proposal for an educational use for Undershaw is a better use of the heritage asset, because it is fully funded and therefore feasible – in contrast with the complete absence of offers for single residential use. Moreover, the proposed educational use will take advantage of the buildings size, location and heritage significance, will permit the expensive restoration work that needs to be carried out and unlike use as a single dwelling

> offers the potential for a wider community to enjoy and benefit from the heritage asset and its historic significance."

22. The reference to 'optimal use' was a reference to what Cranston J said at [37] of his judgment in the First Gibson case:

> "In this case the optimum use for Undershaw is as a single dwelling-house. That is the view of English Heritage and, indeed, is accepted in [the applicant's] Listed Building Justification Statement."

23. The Heritage Statement said this at paragraph 5.3:

> "It is contended that the proposal secures the optimum viable use of the heritage asset and supports its long term conservation, making a positive contribution to the local environment and sustainable communities, enabling the buildings use by the community."

24. The Claimant has characterised this scheme as the 'benign scheme' in contrast to the scheme that forms the basis of the planning permission that he challenges in these proceedings which he characterises as the 'aggressive scheme'. He objected to the benign scheme because, he says, it was apparent to him that if the change of use was granted "it would facilitate any subsequent application for a more ambitious and potentially more harmful proposal for the use of Undershaw as a school." Putting the matter in common parlance, he was suggesting that the planning application was a "stalking horse".

25. I will return to this, but it is convenient to note at this point some features of the Design and Access Statement to which Mr David Forsdick QC, for DNF, draws attention. Paragraph 1.07 says this:

> "This proposal seeks only to establish a change of use of the building: any significant works to the East Wing will be the subject of a future planning application."

26. This is repeated later where it is said that "plans for any proposed extensions and works to the East Wing of Undershaw will be proposed at a later date, once DFN … owns the site." At paragraph 6.22 it was said that "[in] time the School will look to replace the unfortunate, modern 1930's East Wing to the school with a more appropriate building which will provide the school with additional specialist classroom and general school facilities, and Undershaw itself will be restored to its former character and appearance."

27. The Victorian Society objected on the basis that it did not consider Undershaw suitable for a school use. It made this observation:

> "The current planning application is for change of use only. The current room sizes are almost certainly not appropriate for classrooms, even for classes of only eight or so students, and the building would need to be made accessible, which is not

> included in the plans with this application. Furthermore, the building is very small for school use. Any school use, therefore, is almost certainly going to require alterations and large extensions which would be intrinsically harmful to its significance."

28. However, English Heritage (as it was then known) did not object for the following reasons:

> "The current proposal, for an educational use, if appropriately handled, offers an opportunity to repair the dilapidated building, and conserve the architectural and historic interest of the building as required by the National Planning Policy Framework (NPPF) Paragraph 132. The NPPF Planning Practice [Guidance] explains that where there is only one viable use for an asset, that use is the optimum viable use. If there is a range of viable uses, as here, then the optimum use is the one likely to cause the least harm to the significance of the asset ….
>
> The previous application for the conversion of the building into flats would have had the undesirable consequence of splitting the ownership of the site, thus causing harm to the significance of the asset where a single family dwelling would not. Here, the entire site, including the east wing, stables and ancillary structures within the grounds would remain as a single planning unit. Furthermore, if executed in the light touch way that the Heritage Statement and Design and Access Statement suggest, internal alterations to the plan form and features of the listed building would not be seriously compromised. What remains unclear is whether the School requires an extension in order to operate, and whether the extension might cause more harm than another use, such as a heritage centre, or a single family dwelling.
>
> It is our view that the use as proposed within this application would be compatible with the special interest of Sir Arthur Conan Doyle's house, and would not be at odds with the requirements of NPPF Policy and the PPG in respect of securing its optimum viable [use]. This would however be subject to detailed proposals which should be included in a future application for listed building consent and on the basis that the local planning authority is confident that alterations or extensions would not materially harm the significance of the asset."

29. The Defendant commissioned an independent report to review the marketing of the property that had been undertaken, the purpose of which was to assess whether it had been marketed adequately to assess its viability as a hotel. That report demonstrated that "a vigorous and robust marketing campaign to identify demand for the existing hotel use" has not been undertaken. The Defendant's officers concluded that there had not been compliance with a provision of the Local Plan that required such evidence,

but were of the view that the longer term preservation and enhancement of the listed building was a material consideration which may outweigh that breach of policy. Since no operational development was intended for the building, the proposal was considered to preserve the setting of the Listed Building and would satisfy the relevant statutory tests. It was said that:

> "It is therefore considered that the proposal would preserve the setting of the Listed Building and would satisfy the statutory tests. As no harm to a designated heritage asset has been identified, the tests of paragraph 134 are not engaged and it is not necessary to consider whether the proposal represents the optimal, or optimal viable use for the heritage asset."

30. It is to be noted that the Officers' Report referred to a number of letters of objection to this proposal which plainly demonstrated a wider knowledge of the existence of the plans which were to feature in the detailed application for planning permission which was in due course granted and is the subject of the challenge in this case. The summary of those representations in the Report include the following:

> "Object to proposals to be registered imminently – out of scale with original building and involve loss of Doyle's original features – should only be considered when final intended version of plans has been formulated."
>
> "Plans with [Waverley Borough Council] show East Wing to be demolished and stables to be converted into residential accommodation and well will be buried under toilet block."
>
> "Proposal is for a school for 60 children, not 30.
>
> "Proposal is unlawful and purports to be benign – plans are for a more aggressive scheme including extension and total loss of stables and well."

31. Indeed, so far as the Claimant personally was concerned, he wrote a lengthy letter to the Defendant on 20 August 2014 (on behalf of the Undershaw Preservation Trust) indicating, amongst other things, that he was aware that the proposal was for "60 children" with the extension in order, he presumed, to make the school "a viable proposition".

32. On 5 September 2014 the Defendant granted planning permission on the basis of this application subject to a number of conditions.

33. On the previous day (4 September) two further applications for planning permission and listed building consent were made on behalf of DFN (Nos. WA/2014/1655 and WA/2014/1656) which are the applications that in due course were granted on 31 March 2015. As previously indicated (see paragraph 9 above), these applications did involve extensions and alterations. The Officers' Report prepared in due course described the proposals as follows:

> "The proposal is for the change of use of the application site from a hotel … to an educational use … together with the erection of extension and alterations to the existing building. The proposal also involves alterations to the access and parking arrangements on the site.
>
> The proposal would involve the demolition of the existing 1930's extension to the east of the application building.
>
> A new glazed, two storey extension would be erected to the side of the building, measuring 12.3m by 7m. This extension would be linked to a new 'wing' to the south east of the application building, measuring a maximum of 26.5m by 19.5m. Internal alterations are also proposed to the existing building."

34. The joinder of the main house to the new extension (by means of a glass or glazed link) was described in the report, borrowing from the way it had been described in the documents supporting the application, as follows:

> "Proposed extension of approximately 990sqm, comprising part single and part two storey extension, linked by a 3 storey glazed link, giving impression of lightweight structure. Designed to include glass walls to allow views through between listed building and modern extension and allowing original proportions of Undershaw as a family house to be understood …."

35. In the Design and Access Statement prepared in support of this application, a paragraph in identical terms to that quoted in paragraph 20 above was included save that for the words "for 30 children" were substituted the words "approximately 64 children". The paragraph in the original Design and Access Statement (paragraph 6.19) quoted at paragraph 21 above was repeated at paragraph 8.19 in the new Design and Access Statement. In view of one of the contentions advanced by the Claimant, the following introductory paragraph (paragraph 4.2) of the Design and Access Statement should be noted:

> "At present, [the Defendant] is considering a planning application that seeks to change the use of Undershaw … and thereby establish the principle of the building's use as a school and enabling the purchase of the site to go through. It is also a fallback position to enable the school to operate initially on site should the determination of this application, with its proposed extensions be delayed."

36. The Officers' Report also referred to the public benefits that DFN claimed for the proposal:

> "The applicant proposes that the following public benefits would also be provided as part of the proposal.

- The school facilities would be made available outside of school times for use by the local community, aiding the further regeneration of the Hindhead area;

- Access to the site outside of school times would be made available for use/hire by special interest societies associated with Sir Arthur Conan Doyle, Sherlock Holmes and other aspects of the author's work and private life; and

- The school would provide special needs education for children with mild-moderate physical and learning disabilities, offering access to mainstream learning in a special needs setting. It would also provide wider pastoral support for the families of children with special needs, as well as providing community and life skills to students to enable them to contribute to society in the long term."

37. The plans provoked objections from a number of parties including the Claimant, the Victorian Society, the Ancient Monuments Society and, most particularly, from English Heritage. English Heritage made a number of strong representations in the period up to the first consideration of the applications (namely, before they were referred to the Secretary of State for Communities and Local Government) by the Defendant's Planning Committee on 4 February 2015. In its first response it said this:

> "English Heritage acknowledges the poor condition of this building, and the quite pressing need to find a long-term solution for its conservation. However, we are very concerned by the proposals to alter and substantially extend the house, which we feel would be very harmful to the significance of the listed building. Regretfully, we are therefore unable to support the scheme and must register a formal objection to it."

38. It went on to say this:

> "The proposed alterations to the building, together with the scale and design of the proposed extension, would cause very severe harm to the significance of Undershaw both by altering much of the plan of the building and by undermining the pre-eminence of the house in its setting. The harmful internal alterations are too numerous to list here, but the overall impact would be to take away the sense of connectedness with Conan Doyle, which is at the heart of the significance of Undershaw. It is even questionable whether the building could remain listed if this scheme were implemented, so fundamental is the harm.
>
> …
>
> Our recommendation, in the light of the overwhelming thrust of law and both national and local planning policy, is that this

> scheme should be refused. However highly the Council rates the public benefits that would arise from the expansion of the valuable work done by the School, there is no case that this degree of harm to the significance of the building is necessary because the School has indicated that it could equally well expand elsewhere."

39. The Defendant sought clarification of some aspects of English Heritage's advice contained in that first representation and the relevant parts of the response were as follows:

> "… The proposed changes required by the applicants in order to achieve the Stepping Stones scheme take away from the significance of the house as the home of Arthur Conan Doyle and his family. Although some changes are less harmful than others, cumulatively we consider the effect of the scheme as currently proposed to cause substantial harm ….

40. Reference was made to paragraph 132 of the NPPF (see paragraph 17 above) and the response continued thus:

> "The test of necessity is explained in the PPS5 Practice Guide at paragraph 91: '*For the loss to be necessary there will be no other reasonable means of delivering similar public benefits, for example through different design or development of an appropriate alternative site*.' There is insufficient evidence that different designs have been considered. The submitted evidence fails to put the case … that alternative sites have been considered by the applicant and ruled out because location in Hindhead allows the school to build on its excellent community relations and you may wish to press on that point. However, to date the case is not yet been made that the substantial harm is necessary in this instance.
>
> Were the Council minded to disagree with our assessment that the harm caused by the proposals was substantial, then paragraph 134 of the NPPF would apply:
>
> '*Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use*.'
>
> This brings to the fore the question of optimum viable use. The applicant claims in paragraphs 8.13-15 of the 'Planning policy, design and access statement', that the marketing of the site has demonstrated that there is no alternative viable use. The Council's own assessment has concluded that the marketing has been inadequate. We also understand that at least one offer to buy the house remains on the table."

41. The final recommendation in this response was as follows:

> "From a heritage perspective we are in no doubt that the scheme as currently proposed would cause substantial harm to the significance of Undershaw. The key national policy indicates that a damaging scheme may only be supported where harm can be shown to be '*necessary to achieve substantial public benefits that outweigh that harm or loss*' we acknowledge that there are considerable public benefits not related to heritage (e.g. school provision) that would arise from the proposals. Nevertheless the Council must satisfy itself that the correct balance has been struck. However, if the scheme could be adapted to reduce the harm such that the overall harm dropped to the level of 'less than substantial', it would then be straightforward for the Council to weigh the harm against the benefits in coming to its final decision."

42. Further guidance was offered by English Heritage nearer to the date of the Planning Committee meeting, but I need not set it out in detail. Suffice it to say that there was a substantial interchange between the officers and English Heritage about the alterations proposed to the structure of the house (and the effect of those alterations on the associations with Sir Arthur Conan Doyle of those parts of the house) and to the additions proposed before that advice was given. It is right to point out that English Heritage was of the view that some parts of the house were more strongly associated with him than others and there was a degree of engagement between DFN's advisers and English Heritage about modification to some of the proposals to retain those associations more fully. I will return to the position taken by the officers in advising the Committee in due course (see paragraphs 45-47), but it would be helpful to highlight some of what was being said on behalf of DFN and the school during the consultation process.

43. Mr David Forbes Nixon (who is the driving force behind DFN) said in a letter to the Defendant dated 23 October 2014 that "[all] of the accommodation for which planning permission has been requested is absolutely essential for us to operate as a school on this site." Mr Norman Stromsoy, the Interim CEO of the Stepping Stones Charity, which owns and operates Stepping Stones School, wrote a lengthy letter to the Defendant in support of the application. The only point that needs to be highlighted for present purposes is the passage highlighted in the following paragraph from the letter:

> "Our architects have ensured that the main house can be seen as Conan Doyle had it built. The glass link does not dominate or overwhelm the house. The lift tower is no higher than the chimney and placed to the rear of the building. The new building is set obliquely so as not to mask the main house. Viewed from the inside of the house the extension cannot be seen at all 1.5m back from the windows. It uses the fall of the land to good effect so that it is lower than Undershaw. <u>It is by necessity deep to enable us to have the essential facilities we need, therapy rooms, hydrotherapy pool, specialist classrooms etc. All of these facilities are essential and our architects have</u>

> produced a design which is modern but respectful of the heritage of Undershaw. The materials chosen have been selected carefully to match where applicable. The use of glass will ensure that the lovely trees on the site are reflected in the building. While some people may not like modern architecture it is best practice (included in documents produced by English Heritage) to use this approach so that visitors can appreciate the difference between old and new." (Emphasis added.)

44. As I have indicated, there was a fair degree of engagement between DFN's agents, D & M Planning Ltd, and English Heritage and the Defendant during the period until the meeting of the Planning Committee. The Defendant's own Historic Buildings Officer ventured a view reflected in the following passage from the Officers' Report:

> "The view of the Council's own in-house expert (Historic Buildings Officer) and of the applicant's heritage consultant is that the significance of Undershaw lies primarily in its association with [Arthur Conan Doyle]. Any inference that Undershaw had a formative impact on him as a man, an author or as the creator of Sherlock Holmes should be given limited weight, given that this is evidence is primarily anecdotal."

45. After that paragraph in the report, the officers went through all the alterations about which there was debate and indicated whether, in their view, any harm to the significance of the listed building would be substantial or less than substantial in respect of each. Their conclusion on these matters was expressed as follows:

> "Officers have carefully and fully considered the objections of English Heritage, as well as those raised by the Victorian Society and third parties. Officers accept that the proposals would result in harm to [the] significance of the listed building and to its setting. However, officers judge that harm overall to be less than substantial harm both to the significance of the listed building and to its setting. Officers therefore advise that it is the policy set out in paragraph 134 or the NPPF that applies to the present applications."

46. Their overall conclusion and recommendation was expressed as follows:

> "The proposal would involve the erection of extensions and internal alterations to the property to facilitate a change of use of the property from a hotel to a school.
>
> The building is Grade II Listed and is a designated heritage asset which must be preserved or enhanced in accordance with the statutory test. Officers conclude that the proposal would fail to preserve the character of the listed building. However, officers have identified that less than significant harm would occur to the heritage asset as a result of the proposals. Whilst it cannot be concluded that the school represents the optimum viable use for the site, the proposals would provide significant

> public benefits in terms of public access to the building, and would ensure its long term preservation and restoration. Officers note that despite the inadequacies of the marketing campaign, there has been significant publicity of the site in local and national press and that it is likely that even if thorough marketing of the site had taken place, it is unlikely an alternative offer to buy and re-use the building would have come forward.
>
> It is therefore considered that the less than substantial harm caused to the designated heritage asset and its setting would be clearly outweighed by the benefits of the scheme. Although considerable importance and weight must be given to the desirability of preserving the listed building and its setting, planning permission is justified in the present case, for the reasons given in this report. It is recommended that permission should be granted, subject to conditions."

47. For completeness, I should refer to what the officers said about the marketing of the site since the First Gibson case which underpinned the conclusion in the foregoing recommendation:

> "Officers remain of the view that the marketing campaign undertaken was not sufficient so as to fully test the viability of the existing use of the site. However, it also material that no other buyer has come forward with a viable offer for the site since 2010. The previous permission for change of use to a single dwelling has now lapsed …. This is a material consideration, and must be weighed against other considerations, in particular, the significant weight to be attached to the preservation or enhancement of the heritage asset set out within the statutory test."

48. Planning permission was granted, subject to conditions, and it must be presumed that the Committee followed the recommendations and guidance in the report: cf. *R (Zurich Assurance Ltd (t/a Threadneedle Property Investments)) v North Lincolnshire Council* [2012] EWHC 3708. Indeed I am invited by all parties to proceed on that basis.

49. The conditions imposed included the requirement that DFN entered into a section 106 agreement securing appropriate public and community access to the school facilities. Such an agreement was concluded on 4 March 2015.

50. Works to implement the permission were commenced soon after it was granted and indeed works are still proceeding notwithstanding these proceedings. Mr Stromsoy says in his witness statement of 21 October 2015 that "[at] present, the intention remains to accommodate 64 eight- to 16-year old students at Undershaw from May 2016."

The grounds of challenge

51. The starting point for the Claimant's challenge is the judgment of Cranston J in the First Gibson case.

52. It is said that it follows from what Cranston J said in the passage quoted at paragraph 22 above that it "is an indisputable fact that … the optimum use of Undershaw … is as a single dwelling, a use for which planning permission has already been granted, approved in August 2010, and for which permission could not reasonably be refused on any future application." Since there has been inadequate marketing (which is acknowledged: see paragraph 29 above) "there can be no rational basis for any suggestion that the optimum use of Undershaw as a single dwelling is either not possible or not viable".

53. The first point made, therefore, is that the optimum use of Undershaw is as a single dwelling or at least that this is one optimum use, the non-viability of which has not been established.

54. It is also said that if that contention is not accepted, there is another optimum viable use, namely, as a school (involving no alterations or extensions) for 30 pupils, for which planning permission has already been granted and "which still constitutes a lawful fallback position." The Claimant relies upon what are said to be the positive and unqualified assertions that this was so referred to in those parts of the documents supporting the "benign" application quoted in paragraphs 20-21 above.

55. If one or other of these two contentions succeeds, the Claimant submits that the effect of granting permission for the present proposal, bearing in mind the conclusion that it would result in harm to the significance of Undershaw and to its setting (see paragraph 45 above), would be to prevent the realisation of its optimum use (or the "heritage ideal" as is to be deduced from paragraph 88 of PPS5[1]).

56. The balance of the argument is that this conclusion, when applied to the way in which Cranston J expressed himself, demonstrates that the Defendant has adopted the incorrect approach to the application for permission. The relevant paragraph of Cranston J's judgment is paragraph 36. Having referred in the immediately preceding paragraphs to PPS5 (see paragraph 18 above) , he said this:

> "The guidance suggests in paragraph 88 that viability is measured not just in terms of viability for the owner but for the conservation of the asset. Crucially, it explains that if there are alternatives which would secure a viable use, the optimum viable use is that which has the least harmful impact on the significance of the asset, a use which may not be the most profitable. In my view the result is that if one of the alternatives would secure the optimum viable use, and another only a viable use, not only does that have to be taken into account in determining an application but it provides a compelling basis for refusing permission for the non-optimum viable proposal. The principle in *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1986) 53 P & CR 293 cannot be applied full blown in the context of heritage assets: although

[1] "Proposals for the development of a heritage asset will ideally be for its optimum viable use."

> there may be alternative viable uses, for heritage assets the law elevates the optimum viable use when a proposal is being considered."

57. What is said by the Claimant is that what was proposed in the second application would cause direct heritage harm to Undershaw and would also prevent a perfectly viable heritage ideal from being realised, thus causing two types of heritage harm. It is something to which the Defendant should, it is said, have had "special regard" and afforded a compelling basis for refusing permission "for a more profitable but non-optimal use which will prevent [a] perfectly viable heritage ideal from being realised."

58. The final stage of the argument is that even if the single residential dwelling option as the "optimum viable use" was no longer regarded as tenable, that option would simply be replaced by the 30-pupil school redevelopment which, in the words of Mr Paul Stinchcombe's Skeleton Argument, becomes "a direct analogue for the single dwelling permission in the First Gibson Case" and the 64-pupil scheme becomes "a direct analogue for the 8 dwelling permission in the First Gibson Case."

59. Persuasively though these arguments were advanced, I am unable to accept them.

60. First, whatever other submissions may be made about the significance of Cranston J's judgment, I do not consider it bound (or was ever intended to bind) the Defendant to regard the single residential dwelling option as the only optimum viable use for all time. For the reasons he gave in the passage quoted in paragraph 22 above, on the material before him (and in the light of the concession made by the applicant at the time) it was the optimum use for the building and because of the existence of an offer to purchase it to implement that use it "was also the optimum viable use, albeit not the most profitable use" (see paragraph 37 of Cranston J's judgment). Cranston J thus concluded that the proposals for which permission was granted on that occasion "were not only not the optimum viable use but also a use which would have prevented that use through rendering impossible the implementation of any planning permission for Undershaw's restoration to a single dwelling-house" (also paragraph 37).

61. Whether single residential use of the building at any particular time is the "optimum viable use" is a matter upon which a judgment by the Defendant must be formed. When the application of relevance to these proceedings was considered, there remained concerns about the marketing of Undershaw, but it is right to observe that those concerns were principally directed to the adequacy of marketing for hotel use (see paragraph 29 above), which was, of course, its existing permitted use. Mr Forsdick was justified in drawing attention to the criticism actually made by those instructed to review the marketing exercise who suggested that its emphasis was to sell the property "for the use as a single private dwelling or as a residential development opportunity".

62. In my view, the Officers' Report drew all the relevant factors on this issue to the Committee's attention and the Committee was amply justified in proceeding on the basis that single residential use was not a viable option however optimum it might be in theory. At all events, I am unable to see that the Committee's approach was in any way invalidated by a failure to identify single residential use as a viable option for preserving the heritage asset.

63. Second, I do not consider that the Committee's decision was undermined by what I take to be the Claimant's contention that it failed to have regard to a "viable" educational use that was less harmful to the heritage asset than the proposal in the applications before it. A conclusion by the court that the proposal set out in the first planning application had that effect would require it to be established in the first instance that the Committee that considered the second application had no option but to accept that that was so.

64. There is no doubt that the material put forward in support of the first application (which was for outline planning permission only) asserted that the 30-pupil proposal was "fully funded and therefore feasible". The proposal was advanced expressly on the basis that it was "viable" (see paragraphs 21 and 23 above). It is difficult to know whether this was being advanced purely on the basis that the capital that needed to be spent to acquire and convert the building was available (which it was) or whether it was intended to convey the suggestion that the school required nothing more by way of accommodation to make it financially viable. It may have been understood by some that the latter was being conveyed whereas in reality it was the former that was intended. Interestingly, it would seem that the Claimant recognised that more than 30 pupils (with the probable need for an extension to accommodate the additional number) would be needed to make the venture "viable" commercially (see paragraph 31 above).

65. If the Committee considering the full applications had nothing more before it about the 64-pupil school, there might have been an argument that DFN was "fixed" with the position it took on viability in the outline application. However, it is fair to say that even in that application it was made clear that the purpose was to establish the principle of the change of use (see paragraph 35 above). To that extent, a fixed position on viability would not have been anticipated. However, this is a somewhat meaningless discussion because the evidence before the second Committee is that what was proposed in the detailed applications was "absolutely essential" to enable the school to operate on the site and that all the facilities proposed were "essential" (see paragraph 43 above). It would be a fair point that no comparative exercise was carried out between the new proposal and the former (outline) proposal but, on the material available to me, no suggestion that such an exercise should be carried out was made by those objecting to the proposal (including the Claimant), by the officers or by any member of the Committee. If further information about the viability or non-viability of the new proposal had been sought, the evidence before me demonstrates that there would have been a convincing response from the school that what was proposed was essential to its economic viability. Mr Stromsoy, who was appointed to his role in March 2014 and who has considerable experience in this field, says this in his second witness statement:

> "The economics of schools such as this dictate a minimum size if they are to be viable. In my experience, one can only deliver this type and quality of education at a price local authorities can afford to pay by maximising economies of scale. I have done the detailed work on this at all my school developments and I consider that the case for 64 places here is the lowest it can go with an acceptable fee level within the average range, based on

> national comparative financial data for similar special school placements (which is publicly available)."

66. That information (expanded on to some extent in Mr Stromsoy's witness statement) was not before the Committee and I have some sympathy with the comment of Mr Stinchcombe that it should not be open to the Defendant or to DFN now to defend the decisions under challenge "on the basis of *post hoc* assertions" about the non-viability of the 30-pupil proposal. Nonetheless, there can be no getting away from the fact that the material before the Committee was to the effect (i) that the proposals advanced in the new application were "essential" to the viability of the school (see paragraph 43 above), (ii) that the previous 30-pupil proposal only retained a "life" as a "fallback position to enable the school to operate initially on site should the determination of [the] application, with its proposed extensions be delayed" (see paragraph 35 above) and (iii) that no-one was actively promoting the viability of the 30-pupil proposal on a long-term basis during the currency of the pending application. Mr Stromsoy's evidence only serves to emphasise that position. The use of the word "fallback" was plainly not used in the sense often used in the context of planning proposals.

67. In my judgment, the Defendant was entitled to proceed on the basis that the proposal reflected in the new application was not merely the only viable educational use of Undershaw, but on the evidence available it was the only viable use of the property that would preserve it from further deterioration. It may not, as the Officers' Report observed (see paragraph 46 above), have been the optimum use for the property, but it had the merit of preserving it from further dilapidation:

> "Officers note that the building is currently in a state of dilapidation and that urgent and substantial works would be required to the building to restore it, whatever the final intended use may be. The applicant has demonstrated a commitment to the site by completing a purchase and seeking to commence works on the consented change of use application. Officers are therefore of the view that the proposal would significantly remove the risk of further dilapidation from occurring to the heritage asset."

68. Part of their reasoning for recommending the grant of permission was that it "would ensure [the] long term preservation and restoration" of Undershaw. Accepting that advice represented the crystallisation of a judgment that the Committee was entitled to reach. At the time Cranston J was considering this case, it appeared that there was a prospect of achieving this by a different route which the Committee ought to have considered before granting the permission it did. That is not so now.

69. For those reasons, I do not consider that there is any substance in the argument that the Defendant failed adequately to consider other viable uses, although the officers drew attention to the inadequate marketing for its existing use. There was a history of consideration of other uses, none of which had ever been achieved or realised in practice. I do not doubt the correctness of what was said by Lindblom J, as he then was, in the context of heritage harm in *R (Forge Field Society) v Sevenoaks DC)* [2015] JPL 22 when he said this at [56]:

> "If there is a need for development of the kind proposed, which in this case there was, but the development would cause harm to heritage assets, which in this case it would, the possibility of the development being undertaken on an alternative site on which that harm can be avoided altogether will add force to the statutory presumption in favour of preservation. Indeed, the presumption itself implies the need for a suitably rigorous assessment of potential alternatives."

70. Whilst that observation was made in the context of harm to heritage assets and the need to consider alternative sites, I accept that there is a need to consider alternative, less harmful, uses of the same site when evaluating a proposal that would cause harm to a heritage asset: *R (Langley Park School for Girls Governing Body) v Bromley LBC* [2010] 1 P & CR 10 at [44-46]. However, the way in which that evaluation may be carried out will vary from case to case. The planning history from 2005 onwards in this case spoke for itself and it was fully articulated in the Officers' Report. It was, of course, a "material consideration" in any event.

71. In my judgment, that disposes of both grounds 1 and 2 as articulated in Mr Stinchcombe's Skeleton Argument, each of which overlaps to some extent.

72. I did not understand him to challenge the entitlement of the Defendant to conclude that the harm done to the significance of Undershaw and to its setting was "overall to be less than substantial" (see paragraphs 45 and 46). Naturally, I understand that the Claimant would not share that view, but it is a judgment that cannot be characterised as perverse given the analysis carried out by the officers (see paragraphs 42-45 above). It does follow, in those circumstances, that the approach dictated by paragraph 134 of the NPPF falls to be applied (as was recognised from an early stage by English Heritage: see paragraph 41 above). This involves the need for the Defendant to weigh the harm "against the public benefits of the proposal, including securing its optimum viable use."

73. This again is plainly a matter of planning judgment with which the court would be disinclined to interfere on the well-established approach to such matters. The balancing exercise was carried out lawfully and there would be no basis for suggesting otherwise, in my judgment. The Committee plainly saw strong grounds for accepting the proposal because it provided much-needed educational and training facilities for part of the disabled community at the same time as (a) preserving and protecting an important heritage asset from continuing dilapidation and (b) enabling public access to it at appropriate times. That is pre-eminently a matter of judgment for the Defendant.

74. The third ground advanced in Mr Stinchcombe's Skeleton Argument was that the Defendant had also erred fundamentally in failing properly to apply the section 38(6) test (see paragraph 12 above) since the proposal "was in clear breach of the development plan" because it was not compliant with certain specified Local Plan policies. There is, he contends, scant reference to these policies in the Officers' Report and no analysis of their relevance. He submits that the section 38(6) test does not merely require a balancing of benefits and harms (as was undertaken by the Defendant) and there needs to be an understanding of the reasons for departing from

the development plan, relying on *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13. This was not done by the Defendant, he submits.

75. Although mentioned in the Skeleton Argument, the argument was not addressed in oral argument with any emphasis. In my view, that was a well-judged position to take. The Committee's attention was drawn to section 38(6) and it would be surprising if the Committee was not fully familiar with its requirements in any event. English Heritage made express reference to certain policies within the Local Plan in its representations, but its essential focus was on the NPPF.

76. However, I do not think it can sensibly be argued that the considerations which led to the decision actually made (dictated by the provisions of national policies concerning heritage assets) would have been any different if the Officers' Report had set out in full every potentially relevant Local Plan policy and explained why there was a need to make a decision that departed from it. The report did identify all the relevant Local Plan policies and advised the Committee that it was the starting point. The following paragraph appears in the report:

> "The National Planning Policy Framework (NPPF) is a material consideration in the determination of this case. Paragraph 215 states that where a local authority does not have a development plan adopted since 2004, due weight may only be given to relevant policies in existing plans according to their degree of consistency with the NPPF. In this instance, the relevant Local Plan policies possess a good degree of conformity with the requirements of the NPPF. As such, considerable weight may still be given to the requirements of the Local Plan." (My emphasis.)

77. Given the essential conformity of the provisions of the Local Plan with the NPPF, I consider it fanciful to suggest that any provision of the Local Plan would have overridden the analysis of the position within the NPPF.

Conclusion

78. Given my conclusion on the main substantive arguments advanced by the Claimant, this application for judicial review must fail.

79. In those circumstances, I do not have to address any argument as to the discretion that would have existed had I been satisfied that *prima facie* the decisions were liable to be quashed. I express no view on the issue.

80. I am grateful to all Counsel for their helpful submissions.