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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF APPLICATION BY ABO WIND (NI) LIMITED FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE PLANNING APPEALS COMMISSION

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Stewart Beattie QC and Simon Turbitt BL (instructed by TLT NI LLP) for the Applicant
Philip McAteer BL (instructed by O'Reilly Stewart) for the Respondent

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SCOFFIELD J

Introduction

[1] This is an application for judicial review of a decision of the Planning Appeals Commission (PAC) ("the Commission") to dismiss a planning appeal brought by the applicant company against the refusal of planning permission for a wind farm development at lands 2.5 km south east of Armoy.

[2] Aside from a discrete issue in relation to alleged procedural unfairness, the application centrally involves the appointed Commissioner's approach to the key planning policy provisions relating to this type of development and, more particularly, the exercise involved – not infrequently in cases involving significant wind farm proposals – in weighing unacceptable adverse impacts on visual amenity and landscape character against wider environmental, economic and social benefits which would be delivered by the proposal (in order to determine whether the latter outweigh the former). The applicant contends that the Commissioner misdirected herself as to the correct application of relevant policy in this case and failed to provide adequate reasons for her ultimate determination.

[3] This case raises interesting and important issues about the level of reasoning which a planning authority must provide where its decision ultimately turns on the exercise of planning judgement and, what is more, in an exercise which was acknowledged by both parties in these proceedings to be a particularly complex exercise of such judgement.

[4] The applicant was represented by Mr Beattie QC, appearing with Mr Turbitt; and the respondent was represented by Mr McAteer. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

[5] The applicant ("ABO") is a project developer of renewable energy proposals which is based in Lisburn. A grounding affidavit on its behalf has been sworn by Ms Tamasin Fraser, a director of the company. ABO is a subsidiary of ABO Wind AG, a global project developer of renewable energies, which originated in Germany but which now, having developed and maintained windfarms for more than 20 years, has a portfolio of more than 1,021 wind turbines generating in excess of 2,415 MW through projects in the UK, Europe and Latin America. The applicant's parent company is working on the development of new projects with a total capacity of 10 GW across the globe, most of which are wind projects.

[6] ABO entered the Northern Ireland market in 2010, around the time when the Executive adopted its Strategic Energy Framework, which identified wind farms as having a vital role to play in Northern Ireland meeting its newly set renewable electricity target. It had an intended 'lifetime investment pot' of some £300m of foreign direct investment. In its evidence, it has provided details – the specifics of which it is unnecessary to set out for present purposes – about its investment and progress in both the Northern Ireland and Republic of Ireland markets. It has found itself to have "relatively limited realisation of permissions" in Northern Ireland, which it compares unfavourably to the position in the Republic.

[7] The applicant's evidence is that it typically commits in the region of £250,000 to £350,000 in bringing forward a planning application and appeal in order to seek to secure a viable planning permission for a wind farm. One of Ms Fraser's responsibilities is to report on planning applications and their progress, including advising on issues which have arisen (or lessons which have been learned) where an application for permission is refused. Ms Fraser makes the point that, within her corporate structure, she is competing internally with projects elsewhere in the world. There is therefore, from ABO's perspective, a need for clear understanding of the issues when a planning permission is sought and refused.

[8] In December 2017, the applicant sought planning permission from Causeway Coast and Glens Borough Council ("the Council") for the construction of a wind farm near Armoy. The planning application had the reference LA01/2017/1654/F. It sought full planning permission for the construction of a wind farm compromising

six wind turbines (with a maximum 149.9m blade tip), an electrical substation or control building, energy storage area, construction compound, junction improvements (at a variety of locations), a new access and associated ancillary works at lands approximately 615m east of 16 Coolkeeran Road, Armoy. There were no objections from consultees, save for the Department for Communities Historic Environment Division (on grounds which are no longer relevant). Some 97 third party representations supported the proposal, which the applicant has described as overwhelming local public support.

[9] The application was refused by the Council in November 2018 and, in January 2019, the applicant submitted an appeal to the PAC. The applicant was understandably disappointed with the outcome of the application but says that it was also concerned that it did not understand precisely why its application had been refused, or how far short it had fallen in this regard. Further details about this concern have been provided in the affidavit of Mr Thomas Bell, a chartered town planner and planning director within Clyde Shanks Planning Consultancy, which has also been filed on the applicant's behalf.

[10] An informal hearing before the Commission was held in June 2019, with the appointed Commissioner being Commissioner O'Donnell. Her decision dismissing the appeal (appeal reference 2018/A0199) was given in January 2020. ABO contends that its concern about not knowing precisely why its application has been refused has not been assuaged by the decision of the Commission in this case.

[11] The applicant has made the point that with the withdrawal of government assistance for wind farm development in the form of Renewables Obligation Certificates (ROCs) which occurred in Spring 2017, developers realistically have to seek more productive sites, that is to say sites which can generate more energy due to important factors such as elevation, topography and wind resource. Although not put in these terms in the applicant's evidence, it seems to me to be implicit that wind farm development at such sites may well more often be considered to have unacceptable environmental impacts.

[12] Notwithstanding that, the applicant emphasises that the relevant planning policy (discussed further below) is permissive, insofar as otherwise unacceptable environmental impacts can expressly be outweighed by the wider environmental, economic and social benefits of the project (referred to hereafter in the shorthand phrase 'wider benefits'). It is this balancing exercise on the part of planning authorities (and, specifically in this case, on the part of the Commission) which the applicant seeks to understand better through these proceedings. For reasons which are elaborated upon below, the applicant contends that it does not understand why its appeal was ultimately dismissed and, therefore, cannot properly assess what could be done in the future to present a more acceptable planning application should it wish to pursue that (either at this or any other site). The applicant and its parent company cannot, on its evidence, understand what additional benefits would outweigh unacceptable environmental impacts at the site. This challenge is therefore

– at least in part – a plea for greater clarity in this area. The absence of such clarity is said to give rise to a chilling effect on investment in Northern Ireland in this market.

The Commissioner's decision

[13] The Council had advanced four refusal reasons resulting in its rejection of ABO's application for planning permission. These related to public safety; impact on historic monuments; impact on a listed building; and impact on visual amenity and landscape character. The Commission found the first three of these refusal reasons not to be sustained. However, it dismissed the appeal on the basis that it considered there to be merit in the Council's fourth refusal reason, expressed as follows:

> "The proposal is contrary to Para 6.224 of the SPPS and to Policy RE1 of PPS18 in that it has not been demonstrated that the proposal will not result in an unacceptable adverse impact on visual amenity and landscape character due to the size, scale, and siting of the proposal."

[14] The Commissioner found that the visual impact of the proposed development was unacceptable. This was discussed in paras 43-66 of her decision. She directed herself by reference to relevant policy in the Strategic Planning Policy Statement for Northern Ireland (SPPS) and Planning Policy Statement 18: 'Renewable Energy' (PPS18), as well as to supplementary planning guidance in the 'PPS18 Best Practice Guide' (BPG) and 'Wind Energy Development in Northern Ireland's Landscapes Supplementary Planning Guidance' (SPG). Although she recognised that the highly visible nature of wind farms does not in itself preclude them as acceptable features in the landscape and that it is important for society at large to accept wind farms as a feature in many areas, in this case she concluded that "the receiving landscape does not have the ability to adequately absorb the development even with micro-siting, if required." She therefore held that the wind farm would have an unacceptable adverse impact on the landscape character and visual amenity of the area. In reaching this conclusion, the Commissioner took into account that the turbines would be located within Landscape Character Area (LCA) 118 (Moyle Moorlands and Forests), which is described as having a high to moderate sensitivity to wind development; although it was also considered to be in an area that formed a transition between this LCA and another with only medium sensitivity. She went on to consider in some detail the assessment of the visual impact of the proposal from several critical views.

[15] The Commissioner dealt with the environmental, economic and social benefits of the proposed wind farm in paras 10-15 of her decision. In particular, at para 10, she noted that it was estimated by the planning appellant that the project would result in £33m expenditure in Northern Ireland across the 25 year life span of the development; an increase in annual business rates of up to £7.95m across 25 years; meeting the electricity demand for some 27,412 homes; direct contribution to

Northern Ireland's targets for renewable energy; and a reduction in greenhouse gases.

[16] In this section of her decision the Commissioner also addressed a proposed 'community fund' of some £2,500 per megawatt per annum (potentially some £1.2m across the 25 year project life span). The Commissioner concluded that this was not a material consideration (on the basis of para 5.71 of the Strategic Planning Policy and case law from the Court of Appeal of England and Wales, supplemented by a more recent judgment of the UK Supreme Court, discussed further below).

[17] The applicant also relied upon the fact that a number of community organisations – the Armoy Community Association (ACA) and the Armoy Road Races (ARR) – both supported the proposal. Perhaps unusually, there were also no third party objections to the planning application. One third party – Lissanoure Castle – submitted an objection in February 2019 (after the PAC appeal had been advertised in the local press) but this was not referred to in the Commissioner's decision. The Commissioner proceeded on the basis, therefore, that there was community support for the proposal.

[18] Notwithstanding her decision that she must leave the community fund out of account, the Commissioner nonetheless considered that the wider environmental, economic and social benefits presented, including the overall support for the proposal (which she found to be impressive), were such that it was "appropriate to attach significant weight to these considerations in the context of determining this appeal" (see para 15 of her decision).

[19] Perhaps the key para of the Commissioner's decision is para 67. It is in the following terms:

> "The significant level of support for the proposal is noted and it is accepted that the proposal would offer substantial environmental, economic and social benefits to which significant weight is attached. However, such support and benefits must be balanced against the adverse impacts of the proposal. Having carefully considered the arguments presented on the weighing of the benefits of the proposal, I find that whilst significant, the benefits do not outweigh the detrimental impact on the visual amenity and the landscape character of the area, which is considered to be unacceptable and contrary to planning policy. The outcome of the balancing exercise would be the same regardless of whether or not the proposed Community Fund were to be taken into account. The proposal fails to meet the specified policy requirements of Policy RE1 of PPS18 and the SPPS and as there are no overriding reasons as to why the development would be

essential, it would also fail Policy CTY1 of PPS21. The fourth reason for refusal is sustained and is determining."

The applicant's grounds

[20] The applicant's grounds of challenge may be summarised as follows:

(a) The Commissioner erred in her approach to planning policy, or failed to properly apply that policy, in particular in her approach to:

(i) the wider environmental, economic and social benefits of the proposal (by failing to properly evaluate these benefits); and

(ii) her assessment of the issue of visual impact and landscape character (by failing to deal with each separately and distinctly);

(b) The Commissioner failed to give adequate reasons for her decision, particularly in respect of the ultimate balancing exercising carried out between unacceptable impacts and wider benefits; and

(c) The Commissioner adopted a procedure which was unfair (and in breach of the applicant's rights under Article 6 ECHR) by failing to provide the applicant with an opportunity to address relevant case-law which arose *after* the appeal hearing but before the Commissioner's decision was given (Emphasis added).

[21] I address each of these grounds of challenge below, after consideration of the key relevant planning policies.

The relevant planning policies

[22] There were a variety of planning policies which were relevant to the issues which the Commissioner had to address in the appeal before her which gave rise to the decision which is impugned in these proceedings. Those most relevant to the issues in contention in this court are set out and discussed below.

The Strategic Planning Policy Statement

[23] The SPPS is now the principal statement of regional planning policy in Northern Ireland. Renewable energy is dealt with in paras 6.214 to 6.234 of the SPPS. Para 6.218 explains that the aim of the SPPS in relation to renewable energy is to facilitate the siting of renewable energy generating facilities in appropriate locations within the built and natural environment in order to achieve Northern Ireland's renewable energy targets and to realise the benefits of renewable energy without compromising other environmental assets of acknowledged importance.

[24] Regional strategic policy in this field is set out in paras 6.221 to 6.227 of the SPPS. Para 6.222 provides as follows:

> "Particular care should be taken when considering the potential impact of all renewable proposals on the landscape. For example, some landscapes may be able to accommodate wind farms or solar farms more easily than others, on account of their topography, landform and ability to limit visibility."

[25] Para 6.223 explains that a cautious approach for renewable energy development proposals will apply within designated landscapes which are of significant value, such as Areas of Outstanding Natural Beauty (AONB) and their wider settings. In such sensitive landscapes, it may be difficult to accommodate renewable energy proposals, including wind turbines, without detriment to the region's cultural and natural heritage assets. (In the present case the appeal site was outside any relevant designation but adjacent to the Antrim Hills and Glens AONB and could be seen from within that designation.)

[26] Para 6.224 is particularly significant. It states that:

> "Development that generates energy from renewable resources will be permitted where the proposal and any associated buildings and infrastructure, will not result in an unacceptable adverse impact on the following planning considerations:
>
> - public safety, human health, or residential amenity;
> - visual amenity and landscape character;
> - biodiversity, nature conservation or built heritage interests;
> - local natural resources, such as air quality, water quality or quantity; and,
> - public access to the countryside."

[27] Accordingly, renewable energy generation proposals will be permitted provided they will not result in an unacceptable impact on other important planning considerations, including visual amenity and landscape character. This policy provision gives effect to the notion that such development is a good thing, to be supported, provided it is located in the right place.

[28] Para 6.225 is also important in the present case. It provides that:

> "The wider environmental, economic and social benefits of all proposals for renewable energy projects are material considerations that will be given appropriate weight in

> determining whether planning permission should be granted."

Planning Policy Statement 18

[29] Renewable energy development proposals are dealt with specifically in PPS18, which superseded Policy PSU12 of the Planning Strategy for Rural Northern Ireland. This PPS emphasises the significance of renewable energy technologies in increasing security of supply to our energy infrastructure; reducing carbon emissions and reducing environmental damage; and developing an indigenous renewable energy industry with a range of economic advantages.

[30] The key policy is Policy RE1. The introductory section this policy is in materially similar terms to para 6.224 of the SPPS, as follows:

> "Development that generates energy from renewable resources will be permitted provided the proposal, and any associated buildings and infrastructure, will not result in an unacceptable adverse impact on:
>
> (a) public safety, human health, or residential amenity;
> (b) visual amenity and landscape character;
> (c) biodiversity, nature conservation or built heritage interests;
> (d) local natural resources, such as air quality or water quality; and
> (e) public access to the countryside."

[31] The fourth para of the policy is also in materially similar terms to para 6.225 of the SPPS, as follows:

> "The wider environmental, economic and social benefits of all proposals for renewable energy projects are material considerations that will be given significant weight in determining whether planning permission should be granted."

[32] Specific policy is then set out which is applicable to wind energy development in particular, in the following terms:

> "Applications for wind energy development will also be required to demonstrate all of the following:
>
> (i) that the development will not have an unacceptable impact on visual amenity or landscape character

through: the number, scale, size and siting of turbines;

(ii) that the development has taken into consideration the cumulative impact of existing wind turbines, those which have permissions and those that are currently the subject of valid but undetermined applications;

(iii) that the development will not create a significant risk of landslide or bog burst;

(iv) that no part of the development will give rise to unacceptable electromagnetic interference to communications installations; radar or air traffic control systems; emergency services communications; or other telecommunication systems;

(v) that no part of the development will have an unacceptable impact on roads, rail or aviation safety;

(vi) that the development will not cause significant harm to the safety or amenity of any sensitive receptors (including future occupants of committed developments) arising from noise; shadow flicker; ice throw; and reflected light; and

(vii) that above-ground redundant plant (including turbines), buildings and associated infrastructure shall be removed and the site restored to an agreed standard appropriate to its location."

[33] Reference is also made to the BPG, which will be taken into account in assessing proposals, and to the SPG, which will be taken into account in assessing all wind turbine proposals.

[34] The applicant further places significant reliance on para 4.1 of the Justification and Amplification text related to Policy RE1 which explains that:

> "Increased development of renewable energy resources is vital to facilitating the delivery of international and national commitments on both greenhouse gas emissions and renewable energy. It will also assist in greater diversity and security of energy supply. <u>The Department will therefore support renewable energy proposals unless</u>

> they would have unacceptable adverse effects which are not outweighed by the local and wider environmental, economic and social benefits of the development. This includes wider benefits arising from a clean, secure energy supply; reductions in greenhouse gases and other polluting emissions; and contributions towards meeting Northern Ireland's target for use of renewable energy sources."
> (Underlined emphasis added)

[35] Although this explanation does not form part of the policy wording itself, it is consistent with the policy and how, as a matter of law, policy is applied. It is for the planning applicant to show that its development will not have an unacceptable impact on visual amenity or landscape character (amongst other things). If the proposal does not have an unacceptable adverse impact, it will be permitted. If it does have an unacceptable adverse impact, the wider environmental, economic and social benefits of the proposal still require to be considered. It will be a matter of planning judgment whether these benefits outweigh the unacceptable adverse impact which has been identified. In this way, in some cases, what would otherwise be an unacceptable adverse impact on visual amenity or landscape character (or, indeed, on any of the other interests of acknowledged importance identified in the policy) can be outweighed and planning permission will be granted. This does not mean that the adverse impacts are or become acceptable; merely that, in the circumstances, they are not to be given the determining weight which they otherwise would.

[36] The amplification text referred to above really only reflects what the legal position would be in any event: failure to comply with planning policy, which would otherwise lead to permission being refused, can always be outweighed by other material considerations which the planning authority considers sufficient to justify the grant of permission in the circumstances. That is inherent in the nature of planning policy as a guide, rather than a straitjacket. Perhaps unusually, in this case the planning policy statement makes explicit reference to this possibility in the amplification text for Policy RE1, over and above the standard explanation often found in such statements and included in section 4.0 of PPS18 ("The provisions of these polices will prevail unless there is other overriding policy or material considerations that outweigh them and justify a contrary decision"). The applicant relies upon this as an indicator that unacceptable adverse impacts may more readily be outweighed by wider benefits in the context of renewable energy development because of the benefits of such development generally. That may be so; but, as ever, each case must be considered on its own merits.

Alleged misdirection as to policy

[37] Section 45(1) of the Planning Act (Northern Ireland) 2011 ("the 2011 Act") provides that, in dealing with a planning application, the planning authority must have regard to the local development plan, so far as material to the application, and to any other material considerations. Pursuant to section 58(7) of the 2011 Act, this basic obligation in section 45 applies in relation to an appeal to the Commission.

[38] It was common case that the obligation to take into account "*other material considerations*" includes an obligation to have regard to relevant regional planning policy. It was also common case that, in taking such planning policy into account, the decision-maker is under an obligation to understand and interpret the policy correctly. Although the classic exposition of these obligations in many of the decided cases in the town and country planning field relates to the interpretation and application of a development plan (*e.g.* the well-known discussion of these issues in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13), there is ample authority that the same obligations arise in respect of other species of planning policy: see, for instance, *Re Department of the Environment's Application* [2014] NIQB 4, at para [22]; and *Re Res UK and Ireland Ltd's Application* [2018] NIQB 16, at para [21].

The evaluative exercise required in relation to the wider benefits of the proposal

[39] The applicant's Order 53 statement alleges (at para 5(i)(l)) that the respondent "failed to apply and/or properly interpret the policy by failing to properly carry out the necessary evaluative exercise in respect of the determined adverse impact as against the wider environmental, economic and social benefit considerations, and failed to engage in the wider economic issues raised by the Applicant and not challenged by the parties at the hearing." This contention appears to involve two criticisms of the Commissioner's decision-making which, it is said, amount to a failure to apply the relevant policy or to understand what it meant. The first relates to the application and interpretation of policy. The second of the contentions is that the Commissioner "failed to engage in the wider economic issues raised" by the applicant.

[40] I have not been satisfied that the Commissioner failed to apply or properly interpret any relevant provision of policy. She directed herself to the relevant policies; assessed the relevant adverse impacts; and weighed those against the wider benefits of the proposal, as she was required to do. I address the specific criticism about her treatment of visual amenity and landscape character below. The "evaluative exercise" which the applicant contended required to be undertaken should not be over-complicated. All that the policy requires the decision-maker to do in this regard is assess whether there are any unacceptable adverse impacts which are relevant in policy terms and, if so, nonetheless consider the wider benefits of the proposal and give them appropriate weight. The policy itself does not prescribe how these considerations are to be weighed against each other; nor does the amplification text which refers merely to consideration of whether the former are "outweighed" by the latter. Much less does the policy require any form of scientific measurement of the impacts and benefits in a form which can then be compared on a

like-for-like basis. In his submissions Mr Beattie accepted that comparing social and economic benefits with adverse impact on visual amenity and landscape character was "comparing apples and pears." The exercise described is a classic exercise of planning judgement.

[41] As to the contention that the Commissioner failed to engage in the wider economic issues raised by ABO, I cannot accept this. Although it is not advanced as a failure to take material considerations into account, in my view that is what this ground of challenge amounts to (at least insofar as it is to be distinguished from the applicant's challenge for lack of reasons). However, the text of the Commissioner's decision plainly shows that she was aware of and considered the wider benefits of the proposal which were relied upon by the applicant. She has expressly stated that these wider benefits were to be given "significant weight"; that they had to be balanced against the adverse impacts of the proposal; that she had carefully considered the arguments in relation to "the weighing of the benefits of the proposal"; but that she did not consider that they outweighed the detrimental impact on visual amenity and the landscape character of the area to which the proposal would give rise.

[42] Much of the criticism mounted on the applicant's behalf at the hearing of this judicial review was of the way in which the Commissioner dealt with the proposal's benefits, focused on the succinct nature of the discussion of the benefits in the appeal decision. I accept the thrust of Mr McAteer's submission that this was unsurprising in the context of the appeal, largely because the proposed benefits of the wind farm development were not seriously in contention. As the applicant's Order 53 statement notes, these issues were "not challenged by the parties at the hearing." In contrast, there *was* significant contention about the acceptability or otherwise of the visual and landscape impacts. The applicant went to lengths to seek to persuade the Commissioner that, albeit there may be adverse impacts in this case, they were not unacceptable and, therefore, permission could simply be granted. It is therefore natural that those issues were accorded a greater degree of discussion in the Commissioner's decision, since she had to reach a conclusion on those contested issues (which were covered in the parties' evidence in considerably more detail than the expected benefits of the proposal) and give reasons for her conclusions. Albeit the uncontested benefits of the proposal were addressed in comparatively modest detail, there is nothing to indicate that these were in any way unlawfully left out of account by the Commissioner.

[43] In particular, although a much more fulsome description of the anticipated benefits of the proposal are set out in a number of other documents, including for instance Chapter 4 of the Environmental Statement entitled 'Socio-Economic Assessment', there is nothing to suggest that these were left out of account by the Commissioner. Indeed, many of the more general benefits are apparent from the policy documents considered by the Commissioner; and many of the more specific ones are underscored, as one would expect, in ABO's statement of case for the appeal which was prepared by Mr Bell (including, for instance, the comparatively

high projected capacity or load factor for the Armoy Wind Farm, which is specifically mentioned in the section of the statement of case dealing with other material planning considerations). The Commissioner plainly had regard to the contents of the appellant's statement of case. The headline points in this regard were also summarised in para 10 of the Commissioner's decision, referred to at para [15] above.

[44] In light of the content of the Commissioner's decision, I consider it obvious that she both took into account the wider economic issues raised by the applicant and conducted the evaluative exercise required by the relevant planning policy, namely to weigh these issues against the proposal's adverse impacts. The question of whether the Commissioner provided sufficient detail about the mechanics of that exercise is addressed below in the context of the applicant's reasons challenge.

Assessment of impact on visual amenity and landscape character

[45] A specific criticism mounted by the applicant in respect of the Commissioner's consideration of the negative impacts of the proposal was that she wrongly conflated impacts of the development proposal on visual amenity with its impacts on landscape character, rather than considering and assessing each as distinct elements under the relevant policy. In particular, the applicant submits that, in respect of every critical view considered in the appeal decision, both landscape character and visual amenity are combined – so that not one critical view was determined to only have an unacceptable impact on one or the other. In each case, the applicant submits, the assessment treated the two separate types of impact as going hand in hand.

[46] There is, of course, a conceptual distinction to be drawn between an impact on visual amenity on the one hand and an impact on landscape character on the other. That is why the two terms are used as distinct concepts in the planning policies with which these proceedings are concerned and in others. Put at its simplest (and adopting the distinction made by Mr Beattie QC in his submissions), visual impact can arise at a more 'micro' level, whereas the question of whether there has been an impact on the character of a landscape is a more 'macro' question.

[47] However, both parties agreed that these two issues were clearly linked and inter-related. They both involve consideration of how a proposal relates to, and integrates within, the surrounding environment. The distinct – but clearly overlapping – nature of these two concepts is underscored by the definitions provided in Annex 2 of the SPG in this field:

(a) "Landscape character" is defined in terms which incorporate the following: "The distinct and recognisable pattern of elements that occurs consistently in a particular type of landscape and how this is *perceived* by people" (Emphasis added). Of course, one of the most obvious ways in which the landscape is perceived by people is visually.

(b) In turn, the concept of "amenity" is defined in the following way: "The benefits afforded to people by a particular area in terms of what is seen and experienced. Amenity includes not just visual amenity and views but also the experience of *landscape* in its widest sense…" (Emphasis added). Amenity, including visual amenity, can relate to experience of landscape.

(c) The definition of landscape impacts emphasises that these are changes in the physical landscape which give rise to changes in its character and how it is *experienced*; and the definition of visual impacts shows that these can relate to changes in the appearance of a particular *area* or view as a result of development or other change.

[48] In my view, it is unsurprising that, in the circumstances of this application, the Commissioner found an adverse visual impact and an adverse impact on landscape character to go hand in hand in each case where she found the impact to be unacceptable from a particular critical viewpoint. There was certainly insufficient material before me to conclude that this exercise of planning judgment was irrational in any particular instance. Although the Council's planning officers did not consider the issue as much detail as the Commissioner, their report also considered that the development would have an unacceptable impact on both visual amenity *and* landscape character through the size, scale and siting of the turbines and due to the proposal's siting within LCA 118 and critical views from public roads within the vicinity. As Mr McAteer pointed out in his submissions, not only do these concepts usually go hand in hand in the relevant planning policies, the applicant's own Environmental Statement argued that potential effects on the landscape in terms of character and visual amenity are assessed as "separate *but linked* issues" (Emphasis added).It is likely to be rare that there will be an adverse impact on landscape character without there also being an adverse impact on visual amenity. Although one can much more readily imagine instances of development which will have an adverse impact on visual amenity without having an impact on landscape character, the prospect of this arising in relation to wind farm development (particularly with turbines of the size proposed here) is obviously less than would be the case in respect of proposals involving smaller structures or in less rural and exposed areas.

[49] The applicant is critical of the Commissioner's reference to the "receiving landscape" in her conclusion that "the receiving landscape does not have the ability to adequately absorb the development even with micro-siting, if required." In ABO's submission, this reference focuses in on the areas around the turbines (because of the reference to "micro-siting" which is site specific, referring to movement of the turbines of up to 15m) and improperly looks at site-specific context, rather than the wider landscape character as a whole. In my view, this criticism is misplaced. In a case such as this, as explained above, visual impact and impact on landscape character will often be closely linked and overlap. The simple point being made by the Commissioner was that the landscape could not absorb the development to an acceptable degree; and that reliance on micro-siting (one means

by which this might be sought to be addressed) could not adequately mitigate the unacceptable impacts.

[50] I can discern no legal error in the Commissioner's approach to the relevant policies in her reasoning in this regard for the reasons expressed above.

The reasons challenge

[51] The applicant next contended that the Commissioner had given inadequate reasons for her conclusion that the wider benefits of the proposed development did not outweigh its adverse impacts. The law in relation to the giving of reasons in the planning sphere is now relatively well settled. In *Dover District Council v CPRE Kent* [2017] UKSC 79, the Supreme Court confirmed that the principles summarised in *South Buckinghamshire DC v Porter (No 2)* [2004] 1 WLR 1953 were applicable. The reasons must be intelligible and adequate and 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 fact or law was resolved.

[52] Lindblom J summarised the position in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) in the first two of his "seven familiar principles" set out at para [19]:

> "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for the parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every para" (see the judgment of Forbes J in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P&CR 26, at p 28).
>
> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand what the appeal was decided as it was and what conclusions were reached on the principal important controversial issues." An inspector's reasoning must not give rise to substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need only refer

> to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another v Porter (No 2)* [2004] 1 WLR 1953, at p 1964B-G."

[53] The nub of the Commissioner's reasoning on the refusal reason which she upheld on the applicant's appeal is to be found in para 67 of her decision, set out at para [19] above. The applicant's case is that this was neither intelligible, nor adequate.

[54] Mr Beattie mounted several forensic attacks on the level of reasoning contained in this passage. The import of his complaint on behalf of his client, however, was that the applicant did not know, on the one hand (a) just quite *how* unacceptable the adverse impacts of the proposal were deemed to be; and, on the other hand, (b) precisely which benefits had been taken into account; (c) precisely what weight had been given to those benefits taken together, other than in the most general terms, let alone the relative weight as between them; and, crucially, (d) how close or far the benefits had been to outweighing the adverse impacts of the proposal, so tipping the scales in favour of the grant of permission. These points were over-arched by the submission that the applicant simply did not have any insight into the evaluative assessment undertaken by the Commissioner in the course of the weighing exercise. The applicant's pleading alleges that "no one reading the impugned decision could ascertain the weighting given to the various considerations" and that the Commissioner's core reasoning in para 67 of her decision "is sweeping, scant and vague."

[55] In addition, the applicant drew my attention to a range of other decisions of the Commission (some involving the same commissioner who heard the appeal in the present case and others involving different commissioners), applying the same policy, which were in very similar terms. Essentially, it was said that there was a formula which was used in many of these cases, either verbatim or in only modestly modified terms, resulting in an unacceptable and unlawful opacity in the Commission's reasoning process in conducting the necessary balancing exercise.

[56] The Commissioner did not, in my view, have to give reasons for accepting the wider environmental, economic and social benefits of the proposal. As already noted, these were not in contention. Nor, in my view, was the Commissioner required to give additional reasons as to why she was giving these considerations significant weight. They were obviously matters of significance. Para 6.224 of the SPPS suggested they were to be given "appropriate weight", that is to say such weight as the planning authority considered appropriate. Policy RE1 of PPS18 indicates that such considerations will be given "significant weight" in determining whether planning permission for renewable energy projects should be granted. The Commissioner gave those benefits such weight in this case. (I do not need to enter into the debate therefore, much less determine, whether the reference to

"appropriate weight" in the SPPS is in "conflict" with the reference to significant weight in the retained policy contained within PPS18, which must then be resolved in favour of the former for the purposes of para 1.12 of the SPPS. In this case, the appropriate weight *was* significant weight.)

[57] There is no challenge in this case based on alleged irrationality, nor that species of rationality which may arise from inconsistency with previous decisions. The key issue in this case is whether the reasons given were adequate (with the suggestion that there is an unhelpful *consistency* in the reasoning in such cases generally).

[58] Like McCloskey J in the case of *Re Knox's Application* [2019] NIQB 34, I have not found this question easy to resolve. That is not because, as in *Knox*, the reasoning was so meagre in general but because I simultaneously accept the respective submissions (a) on behalf of the Commissioner, that it is difficult to give detailed reasons on the ultimate determining question of balance in light of the nature of the exercise involved, and (b) on behalf of the applicant, that it finds the reasoning on the ultimate determining question fairly unilluminating. The Commissioner has plainly given conscientious consideration to the evidence before her and has addressed most if not all of the material factors in a detailed, comprehensive and well-reasoned decision. Nonetheless, at the point 'where the rubber meets the road' – the question of whether the wider benefits of the proposal outweigh its adverse impacts – the decision is conclusionary rather than expository in nature.

[59] The authorities in this field may also be thought to pull in different directions to some degree. A variety of the decided cases emphasise that the ultimate test is whether there is genuine doubt as to what the authority has decided and why (see, for instance, para [110] of the decision in *Re Sands' Application* [2018] NIQB 80). Here, the applicant knows the outcome and the basic reason why its appeal failed: its proposal had unacceptable environmental impacts which were not outweighed by its wider benefits. On the other hand, some other cases in this field suggest that, where planning permission is refused, the reasons given should allow the applicant to understand how its prospects would be improved by amendment of the proposal in a further application (see the *South Bucks* case at para [36]). Viewed in this way, ABO asserts that – assuming some level of wider benefits logically *could* outweigh the negative impacts of the proposal – it ought to be explained how much more needs to be added to the positive side of the scales to tip the balance.

[60] I have ultimately concluded that the Commissioner's reasoning does not fall foul of the legal obligations open her. That is because, put simply, the extremely difficult balancing exercise which she had to conduct – where the benefits and impacts weighing on each side of the scales are neither capable of precise scientific measurement nor, importantly, of the same character – really admits of little or no further elaboration. As I comment below (in what, I accept, are clearly obiter observations), in my view this arises not from any legal error of approach on the part

of the Commission but, rather, as a result of the unenviable task the relevant planning policy requires of the decision-maker. Turning back to the guidance given in the *South Bucks* case, although ultimately the balancing exercise between wider benefits and environment impacts was the decisive factor (and, so, a principal important controversial issue), it is *not* an issue of law or fact but, rather, one of judgment. Lord Brown made a point of explaining that, "Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision." As I have also explained above, the relevant policy does not require the decision-maker to take a mechanistic or mathematical approach to the question of whether the wider benefits outweigh the negative impacts. This is a question of judgment which, subject to any question of *Wednesbury* irrationality, is within the exclusive jurisdiction of the decision-maker and not for the court (see *Bloor Homes*, at para [19](3)). In these circumstances, therefore, I conclude that there is no genuine doubt about what the Commissioner has decided and why. Any such doubt is mere forensic doubt (applying the distinction drawn by Sir Thomas Bingham MR in *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P&CR 263, at 271-272, and cited with approval in para [36] of the *CPRE Kent* case) and, at that, forensic doubt based on an unrealistic expectation as to the quality of the exercise the Commissioner was required to carry out.

[61] Authority establishes that there are a variety of reasons why reasons must be given. Put another way, there are several purposes served in public law terms by a duty to give reasons. The adequacy of the reasons provided in any particular context is likely, in my view, to be related to the purpose for which reasons are required, as well as the context of the decision more generally. That is relevant in the present context because one of the principal functions served by a duty to give reasons is to reveal to those affected whether there are grounds for a legal challenge to the decision. In turn, that is relevant in the present case because the nature of the decision under challenge here – an evaluative planning judgment – is one which would be amenable to judicial review only on extremely limited grounds once it is acknowledged, as I have found, that the Commissioner directed herself correctly on the policy and took all material considerations into account. As McCloskey J held in *Re McNamara's Application* [2018] NIQB 22, at para [17], "decisions involving predominantly matters of evaluative judgement are vulnerable to challenge on the intrinsically limited ground of Wednesbury irrationality only."

[62] I should also say that I did not find any significant assistance in seeking to compare the level of reasoning in other PAC appeal decisions. The applicant is plainly correct to note that in many wind farm development decisions involving unacceptable visual or landscape impacts, little by way of additional reasoning is contained in the Commission's decision as compared to what is said in para 67 of the Commissioner's decision in this case. As I have observed, it seems to me that that arises from the nature of the balancing exercise required by the policy. It is unsurprising, therefore, that planning decision-makers find it difficult to express in clear terms how unquantifiable negative impacts have been weighed against a different type of positive impacts (many of which may also be unquantifiable). In

the two appeal decisions to which my attention was drawn as an example of clearer (and therefore lawful) reasoning, I confess to finding it scarcely, if any, more illuminating.

Procedural fairness challenge

[63] Finally, the applicant complains that it was unfairly deprived of an opportunity to comment on a significant decision of the United Kingdom Supreme Court which post-dated the appeal hearing but pre-dated the Commissioner's decision and is referred to in that decision. The significance of this decision relates to the question of whether the community fund proposed by the applicant was or was not a material consideration to be taken into account by the Commission.

[64] That issue is addressed in para 5.71 of the SPPS in the following terms:

> "In some circumstances, community benefits may be offered voluntarily by developers to communities likely to be affected by a development. Community benefits can take a variety of forms including payments to the community; in-kind benefits; and shared ownership arrangements. Whilst the Department is committed to ensuring that local communities benefit from development schemes in their area, such community benefits cannot be considered material considerations in decision-taking and are distinct from developer contributions and planning conditions."

[65] The community fund in this case was essentially a payment from the planning applicant to the community which, on the basis of para 5.71 of the SPPS, could not be considered to be a material consideration. Nonetheless, the applicant contended that, since Policy RE1 and para 6.225 of the SPPS required wider economic and social benefits of such proposals to be taken into account, the proposed community fund *could* be considered to be a material consideration (under those policies) when it might otherwise be excluded for applications not involving renewable energy proposals, as a result of para 5.71.

[66] At the time of the appeal hearing before the Commission, the law on this issue had been addressed by the Court of Appeal of England and Wales in *R (Wright) v Forest of Dean District Council* [2017] EWCA Civ 2102. The facts are not on all fours with the present case but a brief summary of the conclusions in that case which are relevant for present purposes (taken from paras [28] and [36]-[58]) is as follows:

(a) The fact that a matter may be regarded as desirable (for example, as being of benefit to the local community or wider public) does not in itself make that matter a material consideration for planning purposes. For a consideration to be material, it must have a planning purpose (i.e. it must relate to the

character or the use of land, and not be solely for some other purpose nor matter how well-intentioned and desirable that purpose may be). It must also fairly and reasonably relate to the permitted development (having a real – as opposed to a fanciful, remote or trivial – connection with the development). This is essentially a restatement of the well-known *Newbury* criteria in relation to materiality (drawn from *Newbury DC v Secretary of State for the Environment* [1981] AC 578 and more recently confirmed by the Supreme Court in *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Co Ltd* [2017] UKSC 66).

(b) Financial considerations may, in certain circumstances, be relevant to a planning decision. However, something which is funded from the development or otherwise offered by the developer will not, by virtue of that fact alone, be sufficiently related to, or connected with, the development to be a material consideration. Accordingly, it would be unlawful for a planning authority to take into consideration a donation to a community benefit fund by a commercial wind farm development, because such a donation would not be a material consideration.

(c) In the context of the applicable policy and guidance in that case, there was a distinction to be drawn between a community benefit fund (in the form of a payment from the developer to the community), which was not a material consideration, and socio-economic community benefits (such as job creation, skills training, etc.), some of which could be a material planning consideration.

(d) Significantly, even planning policy could not convert something which, as a matter of law, was immaterial into a material consideration for planning purposes.

(e) It is not generally helpful to castigate community funds as an attempt to 'buy' planning permission, much less as a 'bribe', since they are often well-intentioned and of genuine benefit to the community. The proper focus is on the *Newbury* criteria and, whilst the concept of materiality may be broad, it is not without limit. Where donations by a developer to a community fund, administered by local people for the benefit of the community, is not restricted to use for a planning purpose (directly related to the use of the land and the development), they will be immaterial considerations.

[67] On 20 November 2019 the Supreme Court gave judgment on the appeal from the decision of the Court of Appeal in *Wright*: see [2019] UKSC 53. It upheld the Court of Appeal's decision and reasoning (which had in turn upheld the decision of the English High Court quashing the planning permission) on the basis of a straightforward application of the *Newbury* criteria: see paras [38] and [44] of the judgment of Lord Sales on behalf of the court. The Supreme Court also confirmed,

as had the Court of Appeal, the legal orthodoxy that a planning policy cannot render material what, as a matter of law, is not (see paras [42]-[43]).

[68] The Commissioner referred to this judgment in para 13 of her decision in the following terms:

> "In the High Court Judgment in *Forest of Dean District Council –v- The Queen (on the application of Peter Wright)* [2017] EWCA it was held that a "community donation" was a purely financial contribution which did not regulate how the development might operate. It went on to say that such a donation was an untargeted contribution towards off-site community benefits, not designed to address a planning purpose and not related to land use. In essence, it found that community benefits are separate from the planning process and are not relevant in deciding whether a wind farm should be approved or not. Consequently, it was held that such benefits are not 'material' in the planning process. This judgment has recently been considered and endorsed by the UK Supreme Court which is binding in Northern Ireland."

[69] In the applicant's submission, the Commissioner ought to have provided it with an opportunity to comment upon the Supreme Court judgment before issuing her decision. It submits that the Supreme Court ruling represented an important and significant change in position from that which it addressed at the appeal hearing. There is no dispute that, in a planning appeal, a party such as the applicant should have an opportunity to deal with adverse material which the decision-maker may take into account when reaching its decision. What is required is that the party must know the substance of what is said against them: see, for instance, the discussion of this issue by McCloskey LJ in *Re Allister and Another's Application* [2019] NIQB 79 at para [77]. In *Re Stewart's Application* [2003] NICA 4, in which the Court of Appeal was expressly dealing with the fairness of informal appeal hearings conducted by the PAC, the key question highlighted (at para [21]) was whether "sufficient opportunity is given to the participants in the proceeding to present their case in an effective fashion."

[70] Although the Commission should therefore be astute to ensure that any new material, in particular material in the nature of additional representations or evidence, which arises after a hearing but which it intends to take into account in the course of its decision-making is provided to the parties to ensure that everyone has had a fair opportunity to make representations about such material, whether a failure to do so results in procedural unfairness amounting to unlawfulness must be judged in the particular context of each individual case. A fresh court decision in relation to a legal principle, particularly where such a decision simply confirms the legal position as it was previously understood, is plainly in a different category from

fresh evidential material relating to the particular circumstances of the planning application under consideration.

[71] In the present case, I accept Mr McAteer's submission that it was not unfair for the applicant not to be invited to comment on a new decision (albeit of a more authoritative court) which merely confirmed the state of the law on which all parties had proceeded at the time of the hearing.

[72] Mr Beattie made two points in response to the submission. First, he said that the Supreme Court decision did result in a material change in the law because, unlike the decision of the Court of Appeal in England and Wales, the Supreme Court decision was binding in this jurisdiction. (Indeed, this was the approach adopted by the Commissioner herself). Second, he said that, although the applicant would have been bound by the statement of the law in the Supreme Court decision, the applicant (now knowing that its reliance on the community fund was hopeless) should have been given the opportunity to take a different tack. In essence, the applicant ought to have been permitted the option of redirecting the £1.2 million which had been budgeted for the community fund into another type of benefit which *would* have been capable of being put into the balance against the proposal's adverse impacts.

[73] I do not consider that there is substance in the first of Mr Beattie's ripostes. Although an undoubtedly technical point, a decision of the Supreme Court on an appeal from a court in England and Wales (which does not involve a devolution matter) is *not* binding on the courts of Northern Ireland. Only a Supreme Court decision on appeal from the courts of this jurisdiction is so binding. That is the effect of section 41 of the Constitutional Reform Act 2005, the material portions of which are in the following terms:

> "Relation to other courts etc
>
> (1) Nothing in this Part is to affect the distinctions between the separate legal systems of the parts of the United Kingdom.
>
> (2) A decision of the Supreme Court on appeal from a court of any part of the United Kingdom, other than a decision on a devolution matter, is to be regarded as the decision of a court of that part of the United Kingdom."

[74] As para162 of the Explanatory Notes to the 2005 Act recognises, "… in the case of jurisdiction transferred from the House of Lords, a decision of the Supreme Court on an appeal from one jurisdiction within the United Kingdom will not have effect as a binding precedent in any other such jurisdiction, or in a subsequent appeal before the Supreme Court from another such jurisdiction." That is not to say, of course, that a decision of the Supreme Court will readily be departed from. Quite

the contrary, since it is of the highest authority. But, as the respondent observed, decisions of the English Court of Appeal are also treated as of highly persuasive authority by the courts of Northern Ireland and, where clearly relevant, are highly unlikely to be ignored or departed from by a quasi-judicial decision-making body such as the Commission. Both the decision of the Court of Appeal and of the Supreme Court in the *Wright* case were highly persuasive; and, for present purposes, both said the same thing.

[75] I am also not persuaded that any material unfairness arises from Mr Beattie's second point. Although Mr Bell's evidence is that he was unaware of the Supreme Court's decision until he received the PAC decision in this case, and that, had he been made aware of it, he would have reconsidered his approach and "could have advised that the community benefits financial allocation be redirected to the wider environmental, economic and social benefits pot", I do not consider that the *hearing* was unfair as a result. The applicant's argument is essentially that it should have been permitted to amend its proposal after the hearing had concluded. However, in light of the clear exposition of the law in the judgments of the Court of Appeal in *Wright*, the applicant ought to have known that its reliance on the community fund as a material consideration was going nowhere. That was the time when it should have decided – if it wished to 'reinvest' the sums budgeted for the community fund into other benefits which would have been material in planning terms – to do so. It plainly had the opportunity to understand the legal concerns around the materiality of the community fund at the hearing. The Supreme Court decision affirmed the legal position but did not change it. The applicant did not, in my view, suffer any unfairness by being unable to meet some new argument or evidence which was presented; and was not entitled as a matter of fairness to an opportunity to amend its proposal at that late stage merely on the basis of the Supreme Court's confirmation of the legal position.

[76] For these reasons, I do not consider that it was procedurally unfair for the Commissioner to take into account the Supreme Court decision in *Wright*.

The desirability of certainty and predictability for developers

[77] Notwithstanding my conclusion that the Commissioner did not fall into legal error in her decision in this case, I wholly accept the commercial sense and desirability, set out persuasively in the applicant's evidence in these proceedings, of developers being able to understand the planning considerations which will be taken into account when they seek permission for major projects such as in the present case and, more importantly from their perspective, of their being able (with appropriate advice and assistance) to reach an informed view of their prospects of success in making or re-making such an application. That is, after all, one of the key reasons for the adoption of planning policy: not only to guide the decision-making of planning authorities and promote consistency in their decisions, but to inform putative developers (and objectors) of their prospects of success when engaging with the planning system. That is a matter of general principle.

[78] I have considerable sympathy with the suggestion on the part of the present applicant that it applies with added force in the present context. That is not merely because planning applications for wind farms involve significant expenditure, including by reason of the need for extensive expert environmental assessment (the applicant's evidence being that it typically spends £250,000 to £350,000 on such an application). More importantly, there is an urgent need – recognised in various government strategy documents and in the planning polices to which I was referred – to promote renewable energy as a means of achieving national and international targets and, more generally, in the continuing battle against climate change.

[79] I have found that the reasons given by the Commissioner in this case 'pass muster' in terms of the legal obligation upon her to give reasons for her decision. That is in part because of the difficulty of the exercise she was charged to undertake, the absence of any prescription within the policy as to how it is to be undertaken (other than reference simply to the question of whether the adverse impacts are outweighed by the wider benefits of the proposal), and the related difficulty of articulating with precision or granularity the mental process involved. To my mind, the resulting lack of certainty and predictability for developers is a shortcoming of planning policy in this area, rather than a shortcoming of the Commission's decision-making. The relevant question is as follows: how much damage to our landscape represents an acceptable price to be paid for increased renewable energy generation (and, hence, protection of our environment in the longer term)? The answer to that question is both a strategic one and a matter of policy, at least at a high level. Whilst each case will always have to be considered on its own merits, it seems to me that market participants such as the applicant might legitimately expect planning authorities to be given a greater steer in regional policy as to how this question should be answered.

Conclusion

[80] For the reasons given above, I do not consider that any of the applicant's grounds of challenge have been made out; and I dismiss the application for judicial review.

[81] The parties were agreed that this was a case which came within the Aarhus Convention regime which is given effect in this jurisdiction by the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 (SR 2013/81), as amended. I previously made a standard protective costs order in these proceedings, by consent, pursuant to regulation 3(2) of those Regulations. Consistently with that order, subject to any further submissions from the parties, I propose to award the respondent its costs of these proceedings against the applicant, not to exceed the sum of £10,000 (excluding VAT).