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Neutral Citation Number: [2010] EWHC 1677 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 23rd June 2010

B e f o r e:

MR JUSTICE COLLINS

Between:
The Queen On The Application Of Great Trippetts Estate Limited
Claimant

V

(1) Secretary Of State For Communities And Local Government
(2) Chichester District Council
Defendants

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(Official Shorthand Writers to the Court)

Mr Peter Village QC and Mr Alex Goodman (instructed by Messrs Beachcroft LLP) appeared on behalf of the **Claimant**
Mr David Forsdick (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

1. MR JUSTICE COLLINS: There are before the court three appeals, two under section 289 and one under section 288 of the Town and Country Planning Act. They arise from the decision of the local authority, that is to say the Chichester District Council, to issue enforcement notices in relation to unauthorised developments on the estate known as Great Trippetts Estate.

2. The developments in question were a tennis court and a manége for the training of polo ponies and an exercise track. The notices were the subject of appeals as was the refusal of planning permission for the manége and the exercise track and it is the refusal of planning permission for these which has given rise to the section 288 appeal. The other two are against the decision of the Inspector to uphold the enforcement notices save and except that permission was granted for the exercise track and thus the inclusion of that in the enforcement notice was struck out. Thus the three appeals are first an appeal in relation to the tennis court, secondly an appeal in relation to enforcement against the manége and thirdly an appeal against the refusal of planning permission for the manége.

3. The estate in question is owned by the Marquess of Milford Haven, who is very much involved with the extension of and the practice of polo. He indeed has put a great deal of money into running teams and in particular in recent years has been involved in what is called arena polo and snow polo. Apparently there has been an extension of polo recently to polo games being played in the winter in Switzerland and in, I think, the States and also there is an extension to what is called arena polo. It is not necessary to indicate, I think, nor would I be capable of indicating, what the differences are between arena polo and ordinary polo but that is not the point. The point is that in order to prepare ponies properly for engagement in arena polo and snow polo a manége such as has been constructed by the appellants is necessary.

4. The estate used to be, until 2002, a mixed arable and dairy farm which had became somewhat run down and in 2005 an application was made to change the use from agriculture to mixed agriculture and equestrian use but the equestrian use being specifically for polo ponies. In due course, in August of 2005, permission was granted by the Local Planning Authority for that change of use and the permission in question was the change of use from agriculture to mixed use agriculture and equine use and there were a number of important conditions. In particular, it was not to take place other than in conjunction with the agricultural activity taking place within the existing agricultural unit and the land should not be used solely for equine purposes, that is keeping, breeding, schooling or stabling horses or ponies, without the prior written permission of the planning authority. It must not be used for commercial purposes in connection with any riding school, including teaching of polo, again without prior written permission. It must not be used to hold private or commercial polo or horse jumping events and shows without prior written permission and, perhaps most relevant, condition 7 provided no polo practice fields or arenas are to be created or laid out within the application site without the prior written permission of the district planning authority.

5. At the same time there was permission granted for the retention and extension of an all weather manége which was smaller than that which has now been constructed and which is the subject of these appeals and which was closer to, indeed too close, as things turned out, to the existing stable buildings. The problem was that that manége, when constructed, turned out to be unsuitable for use as an all weather manége because it did not sufficiently drain in wet weather and thus became impossible to use and that obviously was a grave defect. But perhaps more importantly, because that obviously could have been cured with some expense by putting in a form of proper drainage, it was that the horses, when using the manége, were being distracted by the horses too close in the stabling (I think the word "spook" has been used in this context) and that obviously was an unsatisfactory state of affairs. In addition, as I have said, the manége was not large enough to cater for the snow and the arena polo that developed.

6. It was in those circumstances that the decision was taken to construct the new manége. Unfortunately, perhaps because the Marquis was badly advised, no permission of the local planning authority was sought and thus there was, on the face of it, a breach of condition 7 of the planning permission and in any event the new manége was constructed without planning permission, as was indeed the exercise track, and it was in those circumstances that the local authority decided that enforcement action was required.

7. The estate is within an Area of Outstanding Natural Beauty, an area which I gather has been designated as such since the early 1960s, being described as the Upper Weald. I am not sure of the precise extent of the area but obviously it is quite considerable. Thus the question of what should be permitted in such an area by way of development is of importance. The starting point is to be found in section 85 of the Countryside and Rights of Way Act 2000, which provides by subsection (1):

> "In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty, a relevant authority shall have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty."

It is common ground that the Secretary of State, and indeed an Inspector if the Inspector has delegated powers, falls within the scope of the relevant authority for the purposes of that section. But, in any event, the relevant planning policies reflecting the guidance given in Planning Policy Statement 7, which deals with planning policies in the countryside generally, follow that approach.

8. Paragraph 21 of PPS7 provides:

> "Nationally designated areas comprising National Parks, the Broads, the New Forest Heritage Area and Areas of Outstanding Natural Beauty (AONB), have been confirmed by the Government as having the highest status of protection in relation to landscape and scenic beauty. The conservation of the natural beauty of the landscape and countryside should therefore be given great weight in planning policies and development control decisions in these areas."

That, as I say, is reflected in the relevant planning policies which were applicable in dealing with the developments in question, which are contained in the West Sussex Structure Plan 2001 to 2016. Policy LOC2 deals with the countryside generally and provides that development should be compatible with its location in the countryside and where appropriate should result in substantial environmental enhancement. Then most particularly there is CH2, which deals with Areas of Outstanding Natural Beauty. It provides as follows, so far as material:

> "(a) Development should not be permitted unless the natural beauty, distinctive character and remote and tranquil nature of the Sussex Downs, High Weald and Chichester Harbour Areas of Outstanding Natural Beauty (AONB) will be maintained and, where possible, enhanced. Development to meet proven local needs should be permitted provided that it is consistent with the purpose of AONB. Proposals for major development within AONB for any purpose should only be permitted in very exceptional circumstances and providing that they are consistent with national designation.
>
> (b) Local plans will include policies to ensure that:
>
> (1) within Areas of Outstanding Natural Beauty:
>
> ...
>
> (ii) development is compatible with or enhances the distinctive character and quality of the landscape and that it is designed and sited to enhance visual quality and to minimise noise, light, or air pollution or disturbance... "

I have not read (b)(1)(i), although in principle it applies because it indicates that development should be allowed only where it is either essential to meet proven local social or economic needs or is in the national interest and there is no alternative site available elsewhere. That is, on the face of it, far more restrictive than (a) indicates and indeed is more restrictive than the planning policy statement indicates to be correct and is not what has been directly applied in the circumstances of this or indeed any case.

9. The Local Plan First Review, which is now quite old, being a plan of 1999, in relation to Areas of Outstanding Natural Beauty, interestingly does not include the High Weald site. RE4 relates on the face of it only to Chichester Harbour and Sussex Downs. I am not quite sure why that should be but it indicates Areas of Outstanding Natural Beauty will be conserved and enhanced.

10. Both the legislation and the approach in policies has tended to use "and" and "or" interchangeably in relation to enhancing and conserving. In reality it is common ground, and indeed it must be the case, that they are disjunctive and in my view the right approach is clearly that in CH2(a), which provides that the development should maintain and, where possible, enhance the AONB.

11. The final policy that may be of materiality in the Chichester Local Plan is R6, which deals with proposals for the development of, or associated with, equestrian facilities and says they will be permitted provided it can be shown to the satisfaction of the district planning authority that the activity, so far as material, would not adversely affect the quality and character of the landscape especially within designated Areas of Outstanding Natural Beauty.

12. It is, I think, common ground between counsel that the effect of all this is that development within an AONB should only be permitted if it does not harm the AONB in that it must either maintain or protect, whichever word one wishes to use (it would seem to me to be essentially conveying the same message), or enhance, if that is possible, and of course that could apply where, for example, there was something that was a bit of an eyesore existing within an AONB and there were proposals to develop which would remove the eyesore but replace it with something which was far less of an eyesore and it may be that in such circumstances that could be said to enhance, albeit what was being put, if it was constructed in isolation, that is to say if it was constructed without the removal of the eyesore, would be regarded as not something which would be permitted within an AONB. So one can see that the situation, the factual situation in any case, will be of fundamental importance.

13. Let me deal first with the manége. The Inspector in her decision letter deals with the appeals relating to the manége between paragraphs 31 and 56. She indicates that the main issue was the effect of the manége and the exercise track on the character and appearance of the AONB within which the site lay. She recognises that the Council had accepted in principle that there should be a manége on the estate and indeed it granted the permission in August of 2005 for the smaller one to which I have already referred.

14. The manége itself is located within what is called Hilly Field, which is several hundred metres to the north east of the main farm complex and separated from it by the grass slope of the field. The level surface had been created by recessing it into the hill side on three sides and raising the ground level on one side. It is rectilinear, surrounded by a close boarded fence over two metres high, the top of which is at what is new ground level where the manége has been cut most deeply into the hill side. It is about 100m long and 55m wide and has an artificial surface comprising a mixture of recycled materials and sand.

15. It is important to note that there has also been constructed a very large playing field which is in what is called Kiln Field, just to the north of the manége and the exercise track, and that involved a significant amount of excavation to form what has been called a laser surface, that is to say a very precisely level surface which is grass, but there was a very considerable amount of excavation needed to form the level surface into what was a sloping field and it involved, I am told, a removal of some 13,000 tonnes of earth and the reduction of height of some three and a half metres into the hill side. Of course, there has been a degree of excavation in the construction of the manége but Mr Village points out that that only involved some 2,000 cubic metres of soil and so was on a much smaller scale than that involved in the construction of the

field. The relevance of that will become apparent when one sees the way in which the Inspector dealt with the correct approach to the manége.

16. As things stand, there is some visibility of the manége from outside, particularly in the winter, when trees are not in foliage, although it can be seen and in particular the closed boarded fence around the end is visible and fencing, I think, around the manége is visible. It seems glimpses from the nearest public footpath to the east, which is something in the order of 200 to 300 metres away, and perhaps more so if anyone looks from about a kilometre away from a footpath to the north. But, as things stand, without landscaping, there is a degree of visibility of the manége.

17. Equally, of course, and this goes without saying, it is a development which is one which inevitably affects the AONB and thus the restrictions that are required in relation to any such development have to be taken into account. But the Inspector's conclusion was that public views of the manége were limited and would only impact on those views during the winter months. She continued:

> "However, during the winter, when it would be visible in those public views, I consider that because of the incongruity of the manége its impact on those views is harmful. In this respect, on the basis of what I saw [on] my site visit, I disagree with the assessment of the significance of these views made by ... the appellant's landscape architect."

She went on to decide that the "excavated nature and the regular rectilinear shape of the manége, the closed boarded fencing and the sandy coloured surface contrasted significantly with the open and irregularly shaped pasture fields of the surrounding area", as a result of which the development appeared incongruous and out of place.

18. That was a conclusion which in my view she was clearly entitled to form as a matter of her planning judgment in viewing the manége and in taking account of its impact as things stood. She expanded on that in paragraph 40 of her decision letter, saying this:

> "The development is some distance from the nearest buildings, and appears isolated rather than an extension to existing development. The South Downs Integrated Landscape Character Assessment identifies as one of the landscape sensitivities of the area the irregular landscape mosaic of field, hedgerows, woodland blocks and shaws [wooded streams]. However, it is plain from the shape and design of the manége and its level surface that it is an artificial, rather than a natural, structure, failing to respect pre-existing ground levels, and these features together with the scale of the manége are at odds with the undulating landscape and the small-scale patchwork of irregular-shaped fields which are characteristic of this area. As a result, the manége appears poorly integrated and jars with the surrounding landscape. Consequently it fails to conserve the natural beauty of the landscape, and it does not maintain the character and distinctiveness of this part of the countryside."

19. Mr Forsdick submits that that is a perfectly proper exercise by the Inspector of her judgment in viewing the site and in hearing the evidence put before her about it. As things stood, without any landscaping, I have no doubt that the appeal would have got nowhere, because that is, as I say, a clear indication of a proper planning judgment and whether or not I agree with it is entirely immaterial. However, she goes on to consider the question of landscaping and it is here that it is submitted by Mr Village that she goes wrong in law and in the correct approach that should be adopted to consideration of development such as this case concerned.

20. In paragraph 41 she says this:

> "The appellants propose a scheme of landscaping of the area immediately surrounding the manége and exercise track, to be the subject of a condition. I accept that in time this planting would conceal the manége from many close viewpoints. It clearly would not be effective for a number of years, and may not be wholly effective in preventing views of the manége from Footpath 3280, given the height of that viewpoint above the development."

That is a footpath some kilometre or so to the north. In 42 she says this:

> "However, even if the manége was entirely screened from view, that would not overcome the harmful effect of this substantial development on the character of the AONB. The purpose of landscaping is not to conceal a harmful development; this is an argument that could be used too often, leading to cumulative erosion of the landscape quality of the AONB. In this respect, I do not find the High Court decision in *Burroughs Day v Bristol City Council* [1996] 1 PLR 78 of assistance, as it is concerned with the interpretation of s55 of the 1990 Act, and not with the application of planning policy relating to AONBs. The benefits in general landscape and ecological terms of additional planting in this location would not, in my view, outweigh the harm to the natural beauty of the AONB caused by the manége."

21. Mr Village submits that a natural reading of that paragraph indicates that the Inspector was adopting a general view that, once she had found that there was harm from the manége because it was at odds with the landscape and failed to conserve the natural beauty of that landscape, then, however much it could be concealed by the landscaping and the planting of foliage or whatever, that would not mean, and could not mean, that it was still other than harmful.

22. She says the purpose of landscaping is not to conceal a harmful development. That, of course, is, taken out of context, no doubt correct. The purpose of landscaping is to try to ensure that a development is not harmful and thus should be accepted in wherever it is to be carried out and it can and should, if sufficiently satisfactory, have the effect of avoiding the harm that otherwise would flow from the existence of the development.

23. That is subject only to this qualification in the AONB approach: Mr Forsdick makes the point, and it is correct, that the harm that is relevant is the harm to the intrinsic nature of the AONB. Thus, whether or not it can be seen by the public or there is visual harm, does not of itself necessarily mean that it can be regarded as not being harmful to the intrinsic character of the countryside.

24. Visual harm is of course an important part of harm to an Area of Outstanding Natural Beauty. After all, the natural beauty lies in what is there, that is to say natural countryside. But its beauty may not be adversely affected if the development in question is such that it is not possible to see that there is any significant or harmful change to the natural appearance of the area in question. Thus, as it seems to me, the visual affect of any development is an important aspect to be taken into account in deciding whether there is indeed a failure to conserve or maintain the integrity of the AONB. But certainly the existence of the development in the terms that the Inspector has indicated is equally a factor that is material in deciding whether there is indeed in the particular circumstances harm. Mr Forsdick submits that, on a fair reading of paragraph 42, the Inspector is simply indicating that in this case the screening would not in her view mean that the harmful affect was overcome because of the nature of the development itself.

25. It seems to me that it is impossible to read the first two sentences of 42 as so limited. She is making the point that entire screening, once you have what is regarded as a development that is harmful in an AONB, cannot mean that that development can be acceptable. That, of course, would have a very important and general application which in my view is not justified I do not think that it is possible to say that the Inspector was simply limiting her observations to the nature of the development in that case.

26. Although, as I have said, I entirely accept that the absence of, if I may put it this way, viewable harm does not of itself necessarily mean that the development should be accepted, it is, though, an important consideration when deciding whether it should and it becomes the more important when one realises, as indeed the Inspector did and properly did, that it was necessary in the circumstances of a case such as this to balance the evidence of the need for this manége and it seems to me that in those circumstances it was very important that the Inspector properly assessed the evidence and drew her conclusions from it as to the need which existed.

27. She deals with this in paragraphs 52 onwards of her decision letter. She describes in 52 the argument that the manége was essential for the permitted equestrian use of the estate and in 53 she referred to the evidence of Mr Woodd, who is the chief executive of the Hurlingham Polo Association, which is the governing body of polo in the UK, Ireland and many other countries throughout the world, and it was part of his evidence that polo was also now played:

> "... on the snow in America and Europe, ski resorts such as St Moritz, Klosters and Gstaad. Snow polo is played 4 a side on an area that is about 200 yards by 100 yards and hence the ponies need to have played here in as large an area in preparation. English based teams are regular

> competitors and the ponies travel by road from England. The most effective and some might say the only way to prepare the ponies for snow polo is in an all weather manége as the open ground at this time of the year is not suitable to practice on. An all weather surface is therefore essential for training and practice."

He describes the facilities provided at the appellant's estate and indicates how important they are and the absence of a manége such as this would make it impossible to get the ponies ready to play snow polo and would equally mean that it was impossible to undertake arena polo and he concludes:

> "Were the Inspector to uphold the enforcement notice and refuse the appeal then the polo enterprise at GTE [the estate] would be severely curtailed. There would be no possibility of Lord Milford Haven preparing for and therefore playing snow polo. The ability of the GTE teams to play at the highest level of polo would be called into question and training and schooling of the large number of ponies at GTE would be virtually impossible."

28. That evidence was very precise and it does not seem, as we will see, that the Inspector had any material to doubt the validity of what Mr Woodd was saying. Indeed, in paragraphs 53 to 56 of her decision letter, she says this:

> "The evidence of Mr Woodd was that the best polo teams cannot compete at the highest level without access to private training grounds of the type provided at Great Trippetts Estate, with 18 out of the top 20 teams having them. However, only 7 of those teams have a manège of the type provided here. I recognise the advantages for the Great Trippetts Estate teams in terms of training and bringing on large numbers of horses of having access to a large manège where they could be trained for speed and manoeuvrability, and it would also permit the playing of arena polo and preparation for snow polo tournaments abroad. I also acknowledge Mr Woodd's belief that in future years such a manège will be regarded as necessary for success at the highest level. However, I am not satisfied on the basis of the evidence before me that a facility of this size is essential in order to support high-goal polo teams, given that the majority of high-goal teams do not have them, although it may be desirable. Nor is it essential to enable the polo use at Great Trippetts Estate to continue."

29. Pausing there, the point is made by Mr Village and, as it seems to me, it is a good point, that her apparent reliance on the fact that only seven of the top 20 training teams have a manége of this type is a material consideration which indicates that such a manége is not necessary. Without knowing how many of those top teams actually go in for arena or snow polo, that is a false comparison, because if they do not and have never gone in for that type of polo, then it is understandable that they would not require a manége of this type.

30. Going back to what she says, she continues:

> "The permitted manège, which was in use at one stage but is no longer in existence, was located close to the buildings in the main farm complex. It has been criticised as having been prone to waterlogging and being too close to the stables and other farm buildings to allow horses to be trained without being distracted. However, Mr Woodd accepted that both of these matters would have been capable of resolution to an extent, in the case of drainage through removal of the concrete base and installation of adequate drains, and to reduce distraction to the horses through provision of suitably high fencing or complete enclosure and relocation of distracting noise sources."

31. Of course, complete enclosure and relocation of distracting noise sources might itself, presumably, require some sort of planning permission because they have to be put somewhere if they are not to be put near where the existing permission for the manége applied. So there is a degree perhaps of unreality in the suggested possibility of means to alleviate the problem in the existing site. Then, paragraph 55, she continues:

> "Clearly the approved manège, even with the permitted extension, would not be anywhere near as large as the manège enforced against, and would not be suitable for arena polo, training for snow polo or for training large numbers of horses. It would also have some disadvantages because of its proximity to stabling and the distraction this would cause to horses. However, these disadvantages, and the desirability of providing a larger manège, have to be balanced against the harm that I have identified arising from its location in the countryside and within the AONB. Mr Woodd's evidence is that the polo enterprise at Great Trippetts Estate would be severely curtailed without the manège and exercise track. However, it does not appear that polo activities would cease. The exercise track, which I intend to permit, would allow horses to be exercised during the winter without causing damage to the grass polo fields or to public bridleways. As well as the option of providing a manège in the approved location (although it was indicated at the inquiry on behalf of the appellants that that would not happen) the appellants' evidence was that other possibilities for the location of a manège were being examined using permitted development rights.
>
> 56. It is not argued that there is any economic case for the retention of the facility as the polo activities are not run commercially..."

I pause there simply to observe that economic case does not depend necessarily on commercial. After all, Lord Milford Haven has a considerable amount of expense no doubt incurred in his maintaining a team which can play snow polo and arena polo. Going back to 56:

> "Nor is it argued that there is any additional employment as a result of providing the manège. Mr Woodd described the facilities at Great Trippetts Estate as being of a very high standard and of great significance in the polo world, and I accept that the facilities are of high quality.

> However, the benefits of the manège for both the Great Trippetts Estate enterprise and polo generally do not, in my view, displace the very high policy protection given to AONBs or the need to conserve and [she means or] enhance their natural beauty. Nor do they outweigh the harm to the AONB that I have identified."

32. It seems to me that in her findings on need she has failed properly to recognise the need for the facility such as exists and, insofar as she has relied on its absence in other training grounds, that is a false comparison. Furthermore, the existence of screening and the fact that it would, so far as the eye was concerned, mean that there was no detriment apparently in visual terms to the AONB are highly material in deciding whether the harm was outweighed. It seems to me that the Inspector, once she decided that there was harm in the manner that she has indicated, has failed to take properly into account the way in which the screening can reduce that harm and in those circumstances has applied a standard to the harm which is altogether unjustifiable in the circumstances of this decision.

33. Mr Village also points to her approach to the playing field in Kiln Field to the north of the manége. She indicates that the Council was not inconsistent in allowing that because, although it could be seen, it did not appear as intrusive or incongruous as the manége because of the grass covering which allowed it to blend to an extent into the landscape. Well, that no doubt is a material consideration but the excavation and the change to the landscape was itself on the approach that she adopted to the manége to be regarded as harmful, indeed that is what she effectively is saying in paragraph 40, to which I have already referred, and, although the nature of the development and the grass means that it does not stick out in the way that the manége does, nonetheless, if there is the necessary landscaping, one would have thought that that brought it into the same sort of category and it is interesting to note that the approach of the local authority was in terms of lack of adverse visual impact of the field.

34. Furthermore, she deals with the exercise track in paragraph 57. She says that there has been a degree of raising of the ground in part of the track over a metre above the natural ground level and it has an artificial surface similar to that of the manége, although apparently it is slightly dark in colour insofar as that is of any materiality. It could be seen by glimpses from the nearer footpath but would perhaps have been inconspicuous but for the manége and it would not even be visible, as indeed would not the manége, when trees were in leaf. She dealt there with impact and indicated that it had no adverse or no significant adverse effect in terms of visual amenity and she is there indicating, and in my view rightly indicating, that the visual impact is a highly material consideration, but, submits Mr Village, she does not seem to have been adopting the same approach in relation to the manége. There is, in my view, some force in that complaint. She goes on in 58:

> "The exercise track is also clearly visible from close to. However, in the main it follows the natural contours, and although the dark-coloured plastic rails were visible from a distance when they caught the sun they were otherwise unobtrusive, as were the track's surface, post and rail fence and the low boards which in places mark its edge. The track is not

> dissimilar in appearance to tracks in the ground surface formed by the frequent exercising of horses, and so does not appear out of place. Even though it has been constructed partly on recontoured ground, this area of recontouring is not obtrusive because of its limited extent and because it is so close to the hedgerow which forms the field boundary. Subject to the provision of suitable planting the exercise track and its railings, post and rail fence and timber boards would be reasonably well integrated into the landscape, and would conserve and not harm the natural beauty of the AONB."

Again, it seems that a significant part of what she is applying there is the lack of adverse visual impact of the exercise track. Again, that is to a degree inconsistent with the approach she appears to have been adopting to the manége.

35. I am conscious, of course, as should any judge dealing with these cases be, that I cannot interfere with planning judgment. Mr Forsdick submits that the Inspector has properly exercised her judgment, she has found there to be harm in the mere existence of the manége, that is a conclusion she was entitled to reach and in those circumstances her judgment that that harm meant that this development should not be permitted was a proper exercise of her judgment. In my view, for the reasons I have given, she has not adopted a correct approach and in those circumstances I am satisfied that the errors go beyond the question of judgment and her decisions in relation to the manége cannot stand.

36. I turn now to the tennis court. Again, the main issue was the character and appearance on the AONB. She made the point that it was not visible from any public viewpoint and, although the netting surrounding it could be seen from the somewhat wider area, because of its dark colour it tended to blend in the backdrop of trees and hedges and was not particularly intrusive and therefore the visual impact on wider viewpoints were very limited. However, from close quarters, the character and appearance of a part of the field had changed significantly as a result of the substantial engineering works that had been carried out. What was a countryside field sloping down to a stream was now a recontoured area containing a significantly engineered artificial structure in the form of the tennis court and its surroundings. As a result, it had a very different character from the remaining part of the field, being now far less rural, with the rough pasture shown on the aerial photographs being replaced by the tennis court and manicured grass and appearing to be part of the garden of the farmhouse rather than part of the countryside.

37. She makes the point that there was a landscaping scheme but it in itself could not cure because it would simply indicate on the face of it an extension of the garden and that was not acceptable. It seems to me that so far, although it may be that this was a decision which was somewhat harsh to say the least, having regard to the lack of any objection from the body responsible for the National Park, as it now is, in the South Downs which covers this area, I am told, nonetheless she goes on to refer to the offer of what was described as a "land swap". The context of that was that a permission had been granted for an extension of the farmhouse and a conversion of a barn which would have carried with it a curtilage which lay to the north of the existing curtilage (the

tennis court is in an area of the field which is to the west of the existing curtilage) and accordingly, if that planning permission were carried out, then there would be an entitlement obviously to use that curtilage for any purposes, which would include, for example, a tennis court, but instead of that the offer was to remove that curtilage and substitute what in fact was a smaller area to include the tennis court.

38. The Inspector said in paragraph 23 in relation to that:

> "On the assumption that the appellants are correct that the swap land may be used for purposes ancillary to a dwelling, what is offered would not outweigh the harm caused to the AONB by the tennis court, despite the size of the swap land. The appellants do not argue that the swap land is within the farmhouse curtilage, and so there would be no rights under Schedule 2 Part 1 to give up. Ceasing the use of the land for ancillary residential purposes would not create a significant benefit to the natural beauty of the AONB by comparison with the harm caused by the physical changes caused by the construction of the tennis court, particularly as the use of much of the swap land would be limited by the existing land form and its low lying and damp nature. Whilst some nature conservation benefit might arise from the planting and management proposals, the unilateral undertaking gives little binding detail of what should go into the nature conservation plan, and so its value is very limited."

Various other tennis courts in the area were prayed-in-aid but the Inspector says, and in my view cannot be said to erring in law in indicating, that they do not mean that the decision in relation to this tennis court is inconsistent.

39. Mr Village submits that the error disclosed in relation to the manége and the inability of remedial measures to avoid the inherent harm to the character of the AONB is an error which tips over into the tennis court decision but the Inspector in her decision makes it plain that she is dealing with the impact of the tennis court on its own terms. I do not think it is possible to read into that that she must have erred in the approach that she subsequently applied to the manége.

40. I am bound to say that her decision is, to say the least, somewhat surprising. I do not know whether the local authority has considered the proposed possible swap. It may be that it would be sensible for them, if they had not, to do so and consider whether it really is necessary in the public interest for the tennis court to be removed, but that is not a matter for me, that is matter for them. As it is, I dismiss Appeal A in relation to the tennis court but allow the two appeals in relation to the manége.

MR VILLAGE: My Lord, I think the order I seek is one for the decision letter to be quashed. Now, I --

MR JUSTICE COLLINS: Well, only in so far it applies to the manége.

MR VILLAGE: Yes. Well, I understand that part of my Lord's judgment and, my Lord, I therefore seek an order that the decision is quashed in relation to appeals --

MR JUSTICE COLLINS: It is B and C, is it not?

MR VILLAGE: B and C. In fact, I think -- yes, it is B and C. I obviously also seek an order

for the appellant's costs to be paid by the Secretary of State.
MR JUSTICE COLLINS: What about three quarters?
MR FORSDICK: We have not seen the schedule, the summary assessment.
MR JUSTICE COLLINS: I am not going to deal with the summary assessment. That has not been --
MR VILLAGE: Well, there is not a schedule from us because --
MR JUSTICE COLLINS: It will be the usual subject of detailed assessment if not agreed.
MR VILLAGE: I think we thought it was going to one day excluding judgment and it was --
MR FORSDICK: I am not wishing to avoid that. I say three quarters would be appropriate --
MR JUSTICE COLLINS: I would think so, because the main argument was in relation to B and C. Although there are three appeals, I think --
MR FORSDICK: My Lord, yes, I have -- subject to anything my learned friend wants to say.
MR JUSTICE COLLINS: Yes. Mr Village, are you going to quarrel with three quarters?
MR VILLAGE: No.
MR FORSDICK: As you now know, the Treasury Solicitor stands up at this stage and makes representations as to what the costs ought to include and what they ought not to include.
MR JUSTICE COLLINS: Well, is that a matter for me? Is that not a matter for the costs judge when it comes to it?
MR FORSDICK: My Lord, as I understand it, the court gives an indication.
MR JUSTICE COLLINS: All right. Well, what do you want me to indicate?
MR FORSDICK: I ask respectfully, and without seeking to be rude, in a way, I seek to say this was a one counsel case only and that the cost of the second counsel ought to be disallowed. I have another application in a moment.
MR JUSTICE COLLINS: Well, Mr Village. You are said to be unnecessary -- no, not unnecessary. It may be that --
MR VILLAGE: Well, I do not think that either of us were unnecessary and I think it was important on a difficult case that the claimant be entitled to be represented by two counsel, so I certainly would ask, if that matter was in dispute, certainly that my Lord indicate that it was perfectly reasonable for us to be represented by two counsel. I mean, it is -- I have to say, I have not argued the toss about the three quarters, but I did not realise that the second part of that application was coming.
MR JUSTICE COLLINS: Well, it does not affect the three quarters. No, Mr Forsdick, I am not going to indicate that this was unsuitable for leading counsel. It was not an easy case and --
MR FORSDICK: And on that matter, my Lord, in respect of grounds --
MR JUSTICE COLLINS: You want leave to appeal.
MR FORSDICK: I want leave to appeal.
MR JUSTICE COLLINS: You are not going to get it. You will have to apply to the Court of Appeal and the same applies to Mr Village, if he wants to go up on the other.
MR VILLAGE: Well, I formally ask and am formally put in my place, my Lord. **(pause)**
MR JUSTICE COLLINS: It always irritates me that you have to fill in this form, but there you are.
MR FORSDICK: My Lord, could I just say that your Lordship can only refuse permission to appeal in respect of the planning permission, the section 78, because any other application has to be made to the Court of Appeal, because it is a second appeal. The

enforcement notice appeal is a second appeal so --
MR JUSTICE COLLINS: So this is the defendant's application for leave to appeal?
MR FORSDICK: Yes, in respect of the section 78.
MR JUSTICE COLLINS: What I shall say is in any event leave of the CA is needed for the section --
MR FORSDICK: The section 289, my Lord.
MR JUSTICE COLLINS: 289 appeal. Yes. I have said application of existing principles and in any event leave of the CA is needed for the section 289 appeal. All right?
MR VILLAGE: My Lord, may we ask time to be extended to 21 days from the date of the judgment being made available to us.
MR JUSTICE COLLINS: 21 days for what?
MR VILLAGE: For making the application to appeal.
MR JUSTICE COLLINS: I see. Sorry. You want the 21 days to run from when you get the corrected judgment?
MR VILLAGE: Yes.
MR JUSTICE COLLINS: I do not suppose there would be any objection to that. You presumably would be happy to have the same.
MR FORSDICK: I would like the same.
MR JUSTICE COLLINS: Okay.
MR VILLAGE: My Lord, and the other matter is that we will draw up a draft order, if that would be helpful.
MR JUSTICE COLLINS: Yes, insofar as --
MR VILLAGE: Because it is quite complicated and it might assist the associate.
MR JUSTICE COLLINS: Yes, the associate will be no doubt assisted by that. It does not need to be signed by me. **(pause)** I will not in fact be available to correct this until some time next week, but you will get it then, I hope, in that period. You know, Mr Village, I am not so much in at the moment.
MR VILLAGE: Yes, my Lord.
MR JUSTICE COLLINS: Yes, and thank you, incidentally.