Neutral Citation Number: [2023] EWHC 878 (Admin)

Case No: CO/4792/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 20/04/2023

Before :

MR JUSTICE LANE

- -

Between :

THE KING (on the application of)

SAMUEL SMITH OLD BREWERY (TADCASTER) **Claimant**

- and –

REDCAR AND CLEVELAND BOROUGH COUNCIL **Defendant**

- -
- -

Ms V Hutton (instructed by **Pinsent Masons LLP**) for the **Claimant**
Mr P Robson (instructed by **Legal Services, Redcar and Cleveland Borough Council)**) for the **Defendant**

Hearing date: 23 February 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

Judgment Approved by the court for handing down.

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Mr Justice Lane :

1. Section 78 of the Building Act 1984 ("the 1984 Act") gives a local authority power to take steps to deal with a building or structure which is in a dangerous state, such that immediate action is needed to remove the danger. The central issue in this judicial review is whether section 78 abrogates the need to obtain planning permission, where this would otherwise be required in order to undertake the necessary steps.

A. BACKGROUND

2. The application for judicial review is brought with permission granted by Garnham J at a hearing on 12 January 2023. It concerns the former Arlington Chapel and School House in Saltburn-by-the-Sea ("the Property").

3. The Property, which is owned by the defendant, is situated within the Loftus Conservation Area. The claimant is the owner of the Arlington Hotel, which is situated immediately adjacent to the Property and shares a party wall with it.

4. In November 2021, the defendant made a planning application, ("the 2021 Application"), which proposed the demolition of the Property. The 2021 Application was supported by a number of documents including a Structural Commentary, written by Scurator Ltd, and a Planning and Heritage Statement prepared by the defendant.

5. The Structural Commentary detailed the poor condition of the Property. The author stated that he had previously visited the Property in 2019 and that its fabric had deteriorated further since then, to the point that it was unsafe to enter without appropriate measures being implemented by a suitably experienced contractor. The Structural Commentary concluded that the state of disrepair of the Property was such that it was considered unviable to undertake measures to repair/rectify it. The author recommended that, given its current state and level of works required to make it stable and reusable, the Property should be demolished by a suitably qualified contractor.

6. Having addressed the Structural Commentary, the Planning and Heritage Statement concluded that measures to repair/rectify the structural defects would be economically unviable.

7. The claimant objected to the 2021 Application and that application was withdrawn by the defendant in December 2021. The defendant has not made any other application for planning permission to demolish the Property and does not have planning permission to do so.

8. In April 2022, the defendant instructed Billingshurst George & Partners ("BGP") to survey the Property. The purpose of this survey was to support a further planning application. BGP undertook a site visit in May 2022 and produced a report on 4 July 2022. The report raised immediate safety concerns, including with regard to coping stones to the south-facing elevation of the Chapel and recommended that the public footpath next to it should be cordoned off. The report concluded that the Property should ultimately be demolished in its entirety and that the structures were in such a precarious condition that any attempt to undertake structural repairs would no doubt result in possible collapse. Even removing debris was likely to have a similar outcome.

9. A briefing note dated 8 September 2022 ("the September briefing note") has been disclosed by the defendant in the course of these proceedings. The September briefing note was from an Officer of the defendant to the Managing Director of the defendant. It records that the defendant undertook the works which the BGP report recommended were urgently necessary.

10. The defendant appears to have received some further advice from BGP, concerning the potential for snow loadings to cause the roof of the Chapel to collapse.

11. The September briefing note identified three options for the defendant to pursue: (i) a planning application; (ii) a notice under section 78 of the 1984 Act; and (iii) temporary works to shore up the Chapel pending a planning application.

12. The September briefing note advised that there would be delay in obtaining planning permission (which the local planning authority had stated would be required for demolition). It opined that demolition using section 78 of the 1984 Act but without planning permission would be a criminal offence. It was considered that there would, however, be a defence to any prosecution. The note also said there was a risk of legal challenge if section 78 were invoked.

13. At some point after 4 July 2022, the defendant instructed counsel to advise on whether a judicial review of the defendant's decision to proceed to demolish the Property under section 78 of the 1984 Act would be likely to succeed; and whether an application for a private prosecution under section 196D of the Town and Country Planning Act 1990 ("the 1990 Act") would be likely to succeed.

14. The defendant has waived privilege and disclosed the resulting opinion of counsel, dated 29 September 2022. The import of the advice was that demolition did require planning permission and would amount to a criminal offence under the 1990 Act, if carried out without such permission. Counsel considered, however, that if demolition was carried out under section 78 of the 1984 Act, this would be likely to constitute a defence under section 196D of the 1990 Act.

15. In October 2022, the defendant instructed Building Design Northern ("BDN") to conduct a survey of the Property. The BDN report is dated 3 November 2022. It highlighted that impending winter weather would bring a real risk of collapse of the roof of the Chapel. The BDN report made no comment in relation to the roof of the School House.

16. The BDN report concluded that "the most appropriate course of action would be to dismantle the building in a controlled manner, which would pose the least threat of a collapse". A risk analysis table, contained in the report, included two options. The first was to "dismantle the building by hand in a controlled manner". The second was to "introduce scaffold to roof level supporting trusses". The risk assessment categorised the first option as "no risk" and the second option as "medium or low risk".

17. A briefing note dated 4 November 2022 ("the November briefing note") was prepared by the defendant's Place Development and Investment Team. The November briefing note was addressed to the defendant's Managing Director. Its purpose was to "present the findings of further evidence gathered, to accompany a delegated decision". The November briefing note appended various documents, including counsel's opinion, and internal legal advice which has not been disclosed.

18. A Delegated Power Record ("DPR") whose date of exercise was 18 November 2022 contains the reasons for the decision to demolish. The DPR stated that the demolition of the Chapel was urgently needed in order "to mitigate the risk of building collapse during the winter months if a snow load is applied to the roof of the building". There were said to be no alternative options available "to practically mitigate the risk prior to the winter months". Although a temporary supporting structure could be considered, its design and cost would "fall outside practical boundaries…". It was also said that the structural report warned that "any repair works, including temporary works, may impact the structural integrity of the building".

19. On 18 November 2022, the defendant sent a letter to the claimant, stating its intention to demolish the Property under section 78 of the 1984 Act. The letter explained that two independent structural assessments had been commissioned by the defendant, which had confirmed the derelict state of the Property and the risk of collapse, which had increased due to the impending winter weather, with the likelihood of increased wind and snow fall. The defendant did not, at that point, disclose any of the reports. The letter went on to say that, given the serious risk to the public, the defendant would proceed to demolish without delay and that work had already been undertaken "to secure immediate risk items to the building copings and the site secured."

20. On 30 November 2022, the claimant's planning consultants wrote to the defendant to object to the demolition proposal. Amongst other things, the letter described why, in the authors' view, the Property contributed to the Conservation Area, despite the fact that the buildings were "incongruous in the street scene". The consultants said it appeared the defendant's own inaction over a period of years had led to the Property becoming unsafe. The letter advised that demolition without planning permission would be a criminal offence.

21. No response was received to that letter. On 8 December 2022, the claimant became aware that contractors were present at the Property and appeared to be commencing demolition works. It was observed that a notice on the defendant's website said a company had been appointed to carry out such works.

22. Shortly after, the claimant sought an injunction in the High Court to restrain the defendant from demolishing the Property. On 12 January 2023, Garnham J refused the injunction application. He did, however, grant permission to bring judicial review of the decision to demolish and permitted the claimant to reformulate its grounds of application, to take account of subsequent events.

B. THE GROUNDS OF CHALLENGE

23. Ground 1 contends that the defendant's course of action is *ultra vires*, since it is contrary to section 57 (Planning permission required for development) and section 196D (Offence of failing to obtain planning permission for demolition of unlisted etc buildings in conservation areas in England) of the 1990 Act. Ground 2 contends that if, contrary to ground 1, it is possible for the defendant to rely upon section 78 of the 1984 Act, notwithstanding the terms of sections 57 and 196D, the decision to demolish the Property was in any event unlawful, as the defendant did not lawfully apply section 78.

C. LEGAL FRAMEWORK

Building Act 1984

24. Section 78 of the 1984 Act provides (so far as relevant):

> '**78.—Dangerous building—emergency measures.**
>
> (1) If it appears to a local authority that—
>
> (a) a building or structure, or part of a building or structure, is in such a state, or is used to carry such loads, as to be dangerous, and
>
> (b) immediate action should be taken to remove the danger,
>
> they may take such steps as may be necessary for that purpose.
>
> (2) Before exercising their powers under this section, the local authorityshall, if it is reasonably practicable to do so, give notice of their intention to the owner and occupier of the building, or of the premises on which the structure is situated.
>
> (3) Subject to this section, the local authority may recover from theowner the expenses reasonably incurred by them under this section.
>
> …
>
> (5) In proceedings to recover expenses under this section, the court shall inquire whether the local authority might reasonably have proceeded under section 77(1) above, and, if the court determines that the local authority might reasonably have proceeded instead under that subsection, the local authority shall not recover the expenses or any part of them.
>
> …

25. Section 95 of the 1984 Act grants a power of entry to execute works under section 78.

26. As can be seen, section 78 makes reference to section 77 (Dangerous building). Section 77 contains a procedure whereby a local authority may apply to a magistrates' court for an order requiring the owner of a building, which in whole or part appears to the authority to be in such a condition as to be dangerous, to execute such works as may be necessary to obviate the danger.

27. Section 77(3) provides that section 77:

> "… has effect subject to the provisions the Planning (Listed Buildings and Conservation Areas) Act 1990 relating to listed buildings, buildings subject to building preservation notices, and buildings in conservation areas".

28. Section 79 of the 1984 Act concerns "ruinous and dilapidated buildings and neglected sites". Section 79(1) enables a local authority, by notice, to require the owner concerned to execute works of repair or restoration or, if the owner so elects, to take steps for demolition, where it appears to the local authority that a building or structure is by reason of its ruinous or dilapidated condition seriously detrimental to the amenities of the neighbourhood.

29. The effect of section 79(3) is to apply the provisions of section 99 of the 1984 Act, so that the local authority may carry out the works itself if the recipient of the section 79 notice fails to do so.

30. Section 79(5) states that section 79:

> "has effect subject to the provisions of the Planning (Listed Buildings and Conservation Areas) Act 1990 relating to listed buildings … and buildings in conservation areas".

Sections 77(3) and 79(5) were inserted by the Housing and Planning Act 1986. In their original form, they referred to the provisions of the Town and Country Planning Act 1971 relating to listed buildings etc and buildings in conservation areas. Section 77(3) and 79(5) were amended by section 4 of, and paragraph 67(3) of Schedule 2 to, the Planning (Consequential Provisions) Act 1990 when, as part of the consolidation of planning legislation, the enactments relating to listed buildings and conservation areas were assembled in the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act").

Cases on sections 77 and 78

31. In Bizzy B Management Limited v Stockton-on-Tees Borough Council [2011] EWHC 2325 (Admin, the High Court considered a challenge relating to section 77. The parties and the Court proceeded on the basis that section 77 was subject to the provisions of the Town and Country Planning Act 1990: paragraphs 53 to 57 of the judgment.

32. In Swindon Borough Council v Forefront Estates Ltd [2012] EWHC 231 (TCC), Ramsey J considered a claim by the Council to recover its expenses of work carried out under section 78 of the 1984 Act to the roof of a listed building. The claimant alleged that the Council ought to have proceeded under section 77 of that Act. The case does not address the question of whether planning permission was required for the works. The Judge held that it was necessary for the Council to take immediate action to remove the danger, which was a potential roof collapse. However, he found that some of the works undertaken were not "necessary" for removing the danger and that, as a result, the Council could not recover the cost of undertaking them. These included the erection of a temporary roof and scaffolding.

33. At paragraph 28 of his judgment, Ramsey J held:

> "28. The distinction between sections 77 and 78 shows that merely because a building is in a dangerous state or condition does not, in itself, justify the Council from taking the emergency measures under section 78. I consider that in deciding whether to proceed under section 78, rather than section 77, the Council needs to carry out a form of risk assessment and to consider the risks in terms of the consequences of the dangerous state or condition of the building or structure, the likelihood of those consequences occurring and the seriousness of the situation if those consequences do occur."

Town and Country Planning Act 1990 and related subordinate legislation: demolition and planning control

34. Section 57 of the 1990 Act provides that planning permission is required for "development". As defined in section 55, "development" includes the demolition of buildings.

35. Section 55(2) excludes some operations and uses of land from the definition of development. Section 55(2)(g) excludes "the demolition of any description of building specified in a direction given by the Secretary of State to local planning authorities generally or to a particular local planning authority".

36. It was previously the case that the Town and Country Planning (Demolition – Description of Buildings) Direction 1995 provided that the demolition of a building in a conservation area did not require planning permission. The 1995 Direction was held in Save Britain's Heritage v SSCLG [2011] EWCA Civ 334 to be in part unlawful.

37. The current instrument, the Town and Country Planning (Demolition – Description of Buildings) Direction 2021 ('the 2021 Direction'), excludes the demolition of buildings under 50 cubic metres from the definition of development. It is common ground that the Chapel and School House are each greater than 50 cubic metres.

38. Most demolition is permitted development under Class B of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 2015 and, as such, does not require an express grant of planning permission. One exception is contained within B.1 of Schedule 2 whereby demolition is not permitted if it is "relevant demolition" for the purposes of section 196D of the 1990 Act; that is to say (essentially), demolition of an unlisted building in a conservation area.

39. Section 196D (Offence of failing to obtain planning permission for demolition of unlisted etc buildings in conservation areas in England) of the 1990 Act was inserted by the Enterprise and Regulatory Reform Act 2013. It provides, so far as material, as follows:

> "(1) It is an offence for a person to carry out or cause or permit to be carried out relevant demolition without the required planning permission. "
>
> (2) It is also an offence for a person to fail to comply with anycondition or limitation subject to which planning permission for relevant demolition is granted.
>
> (3) In this section "relevant demolition" means the demolitionof a building that—
>
> (a) is situated in a conservation area in England; and
>
> (b) is not a building to which section 74 of the Planning(Listed Buildings and Conservation Areas) Act 1990 does not apply by virtue of section 75 of that Act (listed buildings, certain ecclesiastical buildings, scheduled monuments and buildings

described in a direction of the Secretary of State under that section).

(4) It is a defence for a person accused of an offence under thissection to prove the following matters—

(a) that the relevant demolition was urgently necessary inthe interests of safety or health;

(b) that it was not practicable to secure safety or health byworks of repair or works for affording temporary support or shelter;

(c) that the relevant demolition was the minimum measurenecessary; and

(d) that notice in writing of the relevant demolition wasgiven to the local planning authority as soon as reasonably practicable.

(5) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term notexceeding 12 months or a fine or both;

(b) on conviction on indictment, to imprisonment for a term notexceeding 2 years or a fine or both.

…"

40. The Property is situated within a conservation area and the buildings comprising it are not ones to which section 74 of the Planning (Listed Buildings and Conservation Areas) Act 1990 does not apply. As such, the demolition is "relevant demolition" for the purposes of section 196D.

Development by local authorities

41. The requirement for planning permission for development applies to local authorities. The way this is achieved is as follows.

42. Section 316 of the 1990 Act provides that the provisions of Parts III, VII and VIII ofthat Act apply to the development of any land by interested planning authorities,

subject to regulations made under that section. Part III deals with control of development and contains sections 55, 57 and 70.

43. Regulation 2 of the Town and Country Planning General Regulations 1992 provides that Parts III, VII and VIII of the 1990 Act apply (except in certain immaterial respects) to development of any land by an interested planning authority.

44. Regulation 2 is subject to regulations 3 to 11A. Regulation 4A sets out the procedurefor applications for relevant demolition within the meaning of section 196D. Regulation 4A requires publicity and for Historic England to be sent notice of the application.

Where Historic England objects to the application, the planning application is to be sent to the Secretary of State for determination.

Other relevant powers

45. Under section 2 of the Local Authorities (Land) Act 1963, a local authority has the power to "erect any building and construct or carry out works on land'. Such works must be 'for the benefit or improvement of their area".

D. DECIDING THE CLAIM Ground 1

46. Although framed as a *vires* challenge, the central question underlying ground 1 is whether a local authority which acts under section 78 of the 1984 Act in a way that constitutes development within the meaning of section 55 of the 1990 Act, requires planning permission for that development.

47. The defendant's case is that a local authority so acting does not require such permission. The defendant argues that to hold otherwise would negate the purpose of section 78 and lead to absurd results. This, in turn, would be contrary to the principle of statutory construction, articulated in section 11.1 of *Benion on Statutory Interpretation* (7th edition), that "Parliament is assumed to be a rational, reasonable and informed legislature pursuing a clear purpose in a coherent and principled manner".

48. The 1990 Act was a consolidation statute. It replaced provisions (including the predecessors of sections 55 and 57), formerly contained in the Town and Country Planning Act 1971. Accordingly, the control of development through the requirement to have planning permission existed at the time that section 78 was enacted.

49. For the claimant, Ms Hutton emphasises that the town and country planning legislation is a "comprehensive code". This was the description employed by the Supreme Court in paragraph 28 of the judgment in Hillside Parks Ltd v Snowdonia National Park Authority [2022] UKSC 30. The effect of section 57 of the 1990 Act is clear and effect must be given to it.

50. In this regard, Ms Hutton seeks to draw support from the judgments of the House of Lords in R v J [2005] 1 AC 562 where, at paragraph 37, Lord Bingham held that "Parliament does not intend the plain meaning of its legislation to be evaded. And it is the duty of the courts not to facilitate the circumvention of the parliamentary intent …". At paragraph 38, Lord Bingham said that "the role of the courts is to interpret and apply statutes. The courts must loyally give effect to the statutes as enacted by Parliament". It is, therefore, not for the judiciary to act in such a way as to render a statutory provision nugatory on the ground that the court disagrees with the reason underlying that provision.

51. Ms Hutton draws attention to what was common ground in Bizzy B. At paragraph 3 of his judgment, Charles George QC, sitting as a deputy High Court judge, summarised the relevant background to the judicial review claim. From this it is plain that the Council in that case accepted it needed planning permission to undertake the works of demolition, pursuant to the 1984 Act.

52. Citing paragraphs 116 and 117 of the judgment of Lord Millett in R (on the application of Edison First Power Ltd) v Central Valuation Officer [2002] UKHL 20, Ms Hutton submits that, although the courts "…will presume that Parliament did not intend the statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impractical; or merely inconvenient; or anomalous or illogical; or futile or pointless…", the strength of those presumptions "…depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it...".

53. Ms Hutton contends that, contrary to the position taken by the defendant, recognising that section 78 of the 1984 Act is subject to the provisions of the 1990 Act does not produce unreasonable, let alone absurd results.

54. For the defendant, Mr Robson maintains that the inevitable delay occasioned by having to obtain planning permission before executing works under section 78 would produce absurd outcomes. A local authority may, on reasonable and objective evidence, conclude that a building is unsafe and that immediate works are necessary in order to remove the danger. Nevertheless, on the claimant's interpretation, the authority must leave that danger in place throughout what Mr Robson describes as the inevitably lengthy process of obtaining planning permission. If the threshold for acting under section 78 is met, it would be irrational for a local authority to do nothing until it had planning permission in place. Furthermore, if, by so delaying, the dangerous element of the building were to collapse, the local authority risks being liable for any injury or damage so caused.

55. Accordingly, Mr Robson submits that, had it been the intention of Parliament that planning permission must be in place before a local authority can exercise its power under section 78, Parliament would have included an express provision to that effect in the section. Mr Robson points to the contrast between section 78, on the one hand, and sections 77 and 79, on the other. Unlike section 78, sections 77 and 79 are expressly made subject to the provisions of the Listed Buildings Act relating to listed buildings and buildings in conservation areas.

56. Bizzy B is not, Mr Robson says, authority that planning permission must be obtained before exercising the power under section 78. The issue was not determined by the court.

57. In R v Liverpool City Council Ex Party Baby Products Association (1999) WL 1019603, Liverpool City Council issued a press release, containing a safety warning concerning a number of baby walkers supplied by members of the Baby Products Association. The Association argued that the effect of the press release was to circumvent provisions in and under the Consumer Protection Act 1987 for issuing warnings and notices prohibiting the supply of goods, thereby preventing the members of the Association from relying upon statutory rights and safeguards contained in that legislation. Liverpool City Council argued that it had power to issue the press release under the general provisions in section 142(2) of the Local Government Act 1972 (whereby it could arrange for the publication of information relating to its functions), section 111 (whereby it could do anything which is calculated to facilitate or is conducive or incidental to the discharge of any of its functions) and section 69(5) of the Weights and Measures Act 1985 (which enables an authority to provide advice to or for the benefit of consumers of goods and services).

58. The court rejected those submissions. Lord Bingham CJ concluded that "a power conferred in very general terms plainly cannot be relied on to defeat the intention of clear and particular statutory provisions" .

59. Mr Robson submits that the power in section 78 is, by contrast, a very specific power, subject to detailed criteria. It is not comparable to the very general powers which were unsuccessfully sought to be relied on in the Liverpool case.

60. Mr Robson contends that there is no statutory restriction in section 78 which prevents it being used on land owned by the defendant. There is also no restriction which precludes section 78 covering works of demolition. The power in section 78(1) to take "steps" cannot include the making of an application for planning permission because such an application can be made without the need for an order under section 78.

61. Mr Robson emphasises that section 78 is about "emergency measures", as its statutory heading makes plain. In such circumstances, it cannot be right for the defendant to have to endure the inevitable delay which an application for planning permission would entail. So far as delay is concerned, Mr Robson points to the requirement to undertake a consultation period of 30 days, where the development for which planning permission is sought is EIA development. As a general matter, consultation must serve a purpose and any responses must be considered. This will inevitably take time, when the very nature of section 78 is that time is of the essence.

62. I do not consider that anything of significance turns upon whether section 78 can be described as a general or a specific provision. Whilst I agree with Mr Robson that section 78 is specific in nature, the question remains whether section 78 is what Mr Robson describes as a "carve out" from the general requirements of planning legislation. The fact that this legislation is intended to operate as a "comprehensive code" therefore remains a matter which the defendant needs to overcome if its view of section 78 is to prevail.

63. It is clearly noteworthy that Parliament inserted subsection (3) into section 77 and subsection (5) into section 79, in each case to make it plain that those sections have effect subject to the enactments concerning listed buildings and buildings in conservation areas. Two questions arise from this. Does the fact that the subsections refer only to the subset of development control enactments concerning listed buildings and conservation areas mean that Parliament was content for the "basic" enactments, such as section 57 of the 1990 Act, to be overridden or otherwise of no effect, in the case of an order under section 77 or a notice under section 79? Does the fact that

    section 78 contains no equivalent to those subsections mean that a local authority acting under that section is not subject to the listed buildings/conservation area enactments and/or the "basic" enactments?

64. Although neither counsel drew my attention to it, useful insight is afforded by *Listed Buildings and Other Heritage Assets* (Charles Mynors and Nigel Hewitson) (Sweet & Maxwell) (fifth edition: 2021). At paragraph 10.001, in a discussion of the powers available where a listed building or a building in a conservation area falls into disrepair, it is said that:

    > "The most serious situation is where a building is in such a poor state of repair as to be positively dangerous. The local authority has powers (under the Building Act

> 1984 and corresponding legislation in London …) to require the owner to demolish it or make it safe – or for the authority to do so itself and recharge the owner. However, the insensitive or unthinking use of these powers can be a real impediment to conservation, especially since they are often administered by officers whose principal aims, quite rightly, lie elsewhere. Those Acts are therefore now subject to modification in the case of buildings that are listed or in a conservation area."

65. At paragraph 10-008, reference is made to a notice under the 1984 Act usually being served by the environmental health department of the local authority, which will not be directly concerned with historic building matters. Section 56 of the Listed Building Act therefore requires that, before taking any steps with a view to making a dangerous structure order under section 77 in respect of a building that is listed or in a conservation area, the local authority must consider exercising certain powers under the Listed Buildings Act.

66. Paragraph 10.008 continues as follows:

> "Secondly, where a notice is served under either s. 77 or s. 79, the building owner may not be aware (or may choose to forget) that, if the building is listed or in a
>
> conservation area, the appropriate consent will still be needed before demolition can proceed. Both sections accordingly contain a provision making it explicitly clear that any requirement to carry out works in response to orders under those sections do not override the need for consent to be obtained under the Listed Buildings Act in the case of buildings that are listed or in conservation areas. The purpose of the provision is:
>
> > '… to make it clear that the orders or notices do not override listed building control. That should once and for all dispel any notion that listed building consent is not required if a building is the subject of a dangerous structure order or notice. Either listed building consent must be obtained or notice must be given in accordance with the new provision in [what is now P(LBCA) A 1990 s 9(3)], if the defence offered by that subsection is to be relied on'" (Hansard (HL), 13 October 1986, cols 587-588).

67. The rationale for section 77(3) and section 79(5) thus lies in the particular concern that Parliament had for preventing the special controls relating to listed buildings and buildings in conservation areas being ignored. There is no suggestion that, by inserting those provisions, Parliament was intending that such orders and notices would exempt their recipients from the need to obtain planning permission for development.

68. This conclusion is underscored by the fact that the extract from Hansard makes plain that the provisions were intended only to be for the avoidance of doubt. Any such doubt would seem to have been because, in the case of sections 77 and 79, the owner is being ordered to undertake works by, respectively, a court and a public authority. In the absence of any specific provision, it was possible that recipients of an order or notice might regard themselves as obliged to comply with it, without also having to comply with the legislation regarding listed buildings and buildings in conservation areas.

69. The same can, of course, be said about the need to obtain planning permission, where section 57 of the 1990 Act demands it. As I have said, however, Parliament's concern was with the special importance of listed buildings and buildings in conservation areas, bearing in mind that it is in the case of such buildings that sections 77 and 79 are likely to be most commonly deployed by local authorities.

70. Subsequent legislative events have further reduced the significance of the two subsections. As explained earlier in this judgment, demolition in a conservation area now requires planning permission. At the time section 77(3) and section 79(5) were inserted, and also at the time they were amended, such demolition required conservation area consent under the provisions of (since 1990) the Listed Buildings Act. In 2013, however, conservation area consent was abolished: see the Enterprise and Regulatory Reform Act 2013. Parliament did not see fit to amend section 77(3) and section 79(5) as a result of this change, notwithstanding that the Listed Building Act no longer contains any restriction on the demolition of an unlisted building in a conservation area. The conclusion must therefore be that Parliament considered the 1990 Act and the subordinate legislation made under it would apply in the case of orders and notices under sections 77 and 79 respectively.

71. Therefore, even if it can be said to be an anomaly that section 77(3) and section 79(5) refer only to the Listed Buildings Act, it is an anomaly which comes nowhere near showing that the subsections are to be construed as dispensing with any need to comply with the provisions of the 1990 Act concerning development control.

72. It is now necessary to address the second question in paragraph 63 above. This concerns the fact that section 78 contains no equivalent of section 77(3) and section 79(5). On this issue, Mynors and Hewitson have this to say:

> 10-009 Section 78 of the 1984 Act … provides that "[a local authority] may take steps as may be necessary [to remove the danger]. This provision of itself would seem to be "authorisation" within the meaning of s. 7 of the Listed Buildings Act; it is after all difficult to conceive a higher form of authorisation than an Act of Parliament. It is also noteworthy that ss. 77 and 79 of the 1984 Act (under which an authority may serve a notice requiring an owner to carry out certain works to a building) each contain a final subsection explicitly stating that the power to serve a notice is subject to the provisions of the 1990 Act regarding listed buildings, whereas s. 78 contains no such subsection.
>
> In other words, a private owner always needs authorisation (in the form of listed building consent and, where appropriate, planning permission) to carry out works, urgent or not, whereas a local authority is authorised by the Act to carry out works where they are urgent."

73. Section 7 of the Listed Buildings Act prohibits certain works to a listed building (including demolition) unless the works are authorised under section 8. This section provides that the demolition of a listed building is authorised if the local planning authority has granted consent, Historic England has been informed etc and the works are undertaken in accordance with the consent.

74. With respect to the learned authors, I do not consider that section 78 provides the necessary authorisation under section 8 in the case of a listed building. Quite apart from the fact that section 78 cannot remove the statutory role of Historic England, and what flows from it, as we have already seen from paragraph 10.001, the considerations which are relevant in deciding whether section 8 consent should be given may be quite different from those which inform a decision to deploy section 78 of the 1984 Act. In any event, the statutory requirement for planning permission to demolish an unlisted building in a conservation area does not turn on authorisation but on the grant of such permission.

75. At paragraph 12.021 of *Listed Buildings and Other Heritage Assets,* the authors recognise the difference between the 1990 Act and the Listed Buildings Act regimes. Paragraph 12.021 strikes a cautious note, before anticipating the very circumstances with which this court is concerned in the present case:

> "Technically, the Planning Act merely provides that all building operations – including those carried out by planning authorities – require planning permission to be obtained; and there is specific provision for permission to be obtained after the completion of works. In practice, however, it would be ridiculous for an authority to object to works it had carried out itself. But the exact position is not entirely clear.
>
> The Listed Buildings Act, by contrast, provides that no works may be carried out to a listed building unless they are "authorised" – which would, arguably, include authorisation by Act of Parliament. That would seem to remove the possibility of criminal sanctions in such a situation.
>
> This might appear to be a technicality, but it may become a live issue where the work carried out by the authority (almost inevitably in a hurry, without the time for extended consultation and discussion) are controversial – and those done under s. 78 of the 1984 Act may include demolition."

76. It is now necessary to address head-on the reason why section 78 does not contain a provision equivalent to section 77(3) and section 79(5). It lies in the fact that, as we have seen, part of the legislative thinking behind those subsections was that sections

77 and 79 involve a command from a court or local authority to do something which may nevertheless also require statutory authorisation if it is to be done lawfully.

77. In marked contrast, section 78 is in the nature of a power conferred upon a localauthority. It is a power which is not needed in order to enable a local authority to carry out urgent works on its own land: see section 2 of the Local Authorities (Land) Act 1963. Instead, section 78 is required in order to allow the local authority to carry out the necessary works on the land of another person. Accordingly, it is perfectly understandable why the legislature would not have seen the need to insert anything along the lines of section 77(3) or 79(5) in section 78. In the case of section 78, there was simply no reason to assume that the creation of the power would confer upon its recipient any exemption from the town and country planning legislation.

78. The defendant argues that if section 78 does not confer an exemption from the requirement to obtain planning permission, where the works in question constitute development, then section 78 serves no purpose. This is because the defendant could

obtain planning permission over the land of the third party. The ability to obtain planning permission is not confined to the owner or occupier of the relevant land.

79. That is, of course, true. However, as I have just explained, it is equally evident that the purpose of section 78 is to confer upon a local authority the power to undertake works on the property of another (for which purpose it has a power of entry under section 95 of the 1984 Act). Read in that light, section 78 does not lose its meaning if it is read as subject to the planning legislation.

80. It follows that the defendant's case must centre upon the alleged absurdity or, at least, unreasonableness of having to apply for planning permission, in a situation where the power is necessarily being invoked in an emergency.

81. The problem for the defendant here is that the pre-condition in section 78(1)(a) is the same as in section 77(1); namely, that the building etc is in such a state as to be dangerous. Although section 78(1)(b) contains the additional element that "immediate action should be taken to remove the danger", there is nothing in section 77 which prevents a local authority from having recourse to that section, even where the need for action is immediate. Indeed, the fact that, in practice, there is not a bright line of demarcation between section 77 and section 78 is made evident by section 78(5) and Swindon BC and Forefront Estates Ltd. Nevertheless, the recipient of a section 77 order from the magistrates' court must still secure planning permission to demolish a listed building or a building in a conservation area.

82. Furthermore, the same is true of an owner who, having a building or structure which presents an immediate danger, decides to take action themselves to remove that danger; if necessary, by demolition. A building may become dangerous so as to require immediate action to be taken without the owner being to blame for its state: for example, if it is severely damaged by fire or flood or as a result of a vehicle hitting it. In similar vein, one can also readily envisage scenarios in which an owner, who is informed by the local authority under section 78(2) that it intends to take action under that section, responds by deciding to take such action themselves.

83. Ms Hutton raised the following scenario. If Westminster Abbey were to be severely damaged by fire, such that the local authority decided to invoke section 78, it could

not, she said, be Parliament's intention that the local authority would be able to demolish the Abbey without, for example, consulting with Historic England, which would be the position if planning permission to demolish were needed.

84. That is, of course, a very extreme case. It needs to be set against the scenario described by Mr Robson, in which harm is caused as a result of a building's collapse, whilst the defendant is still engaged in the planning process. Nevertheless, what Ms Hutton's scenario demonstrates is that, in the case of section 78, we are some considerable way from the top of the sliding scale identified in Edison, ranging from outright absurdity to mere inconvenience. The defendant has not shown that the strength of the presumption regarding the legislative intention is such as to compel a conclusion in its favour.

85. This conclusion is reinforced by the following important point. Where an authority invokes section 78 (whether in respect of its own land or that of a third party) and there is simply not enough time to obtain planning permission for demolition, then, just as in

the case of any other owner who takes action to address the danger, the local authority will be able to rely upon the defence in section 196D(4) of the 1990 Act, in the event that a prosecution is brought. The existence of the defence in subsection (4) will, of course, be a highly relevant consideration in deciding whether a prosecution should even be brought.

86. In similar vein, the local planning authority may well take the view that, in such circumstances, enforcement action under Part VII of the 1990 Act would be inappropriate. That will be so, whether or not the building is within a conservation area. Mynors and Hewitson make a similar point. They also draw attention to the fact that section 73A of the 1990 Act enables planning permission to be granted for development that has already been carried out.

87. All of this is an answer to Mr Robson's scenario, in which harm occurs whilst the authority is obtaining permission before undertaking the works.

88. It is also relevant to observe that section 78 will provide the "lawful excuse" to preclude the possibility of prosecution for criminal damage under section 1 of the Criminal Damage Act 1971. There will be no liability for trespass, where the entry on land is effected pursuant to section 95 of the 1984 Act.

89. In conclusion, the situation of the local authority in a case such as the present is, therefore, very far from being absurd or unreasonable, if – as I find Parliament intended – section 78 provides it with no exemption from planning control. Like any other owner, it can seek to regularise the position regarding planning permission after the event. It can legitimately demonstrate why enforcement action would be inappropriate. If prosecuted, it can deploy the defence in section 196D. The very existence of that defence means it is unlikely that a prosecution would even be brought.

90. I agree with Ms Hutton that the defendant's submission that section 78 is a form of "carve out" from the Planning Acts raises more questions than it answers. It is, for example, unclear whether works undertaken pursuant to section 78 that would otherwise fall within the definition of "development" in section 55 should be treated as having the benefit of planning permission (in a way that is unexplained); whether

they fall wholly outside the ambit of the legislation; or whether they occupy some intermediary position, whereby they constitute development that is not subject to enforcement action under Part VII of the 1990 Act. Mr Robson did not seek to suggest that section 78 has different consequences in terms of exemption from planning controls, depending upon whether the land in question is owned by the defendant.

91. For all these reasons, I conclude that ground 1 succeeds, to the extent that section 78 does not abrogate the controls in the town and country planning legislation, including the requirement to obtain planning permission where this is required in respect of the steps to be taken by a local authority acting under section 78; in this case, the demolition of an unlisted building in a conservation area.

92. At the hearing, I asked whether, in this event, the claimant would argue that the impugned decision should be quashed. Having considered the matter, both Ms Hutton and Mr Robson were in agreement that the appropriate form of relief would be a declaration.

93. That must, with respect, be right. The fact that planning permission was required, but not obtained, by the defendant before commencing demolition of the Property does not mean the defendant acted outside the powers of section 78. To hold otherwise would place a local authority, which invokes section 78 in order to carry out work on the property of a third party, in a significantly worse position than that of the owner of the property. There is justification in the legislation for reaching such a conclusion.

Ground 2

94. Ground 2 contends that the defendant did not, in fact, lawfully invoke section 78. Notwithstanding I have held that the exercise of the power in section 78 is not contingent upon any need to have obtained planning permission, ground 2 remains a live issue.

95. In order to succeed under ground 2, the claimant needs to show a public law error on the part of the defendant. The claimant submits that the defendant has not taken reasonable steps to acquaint itself with relevant information, in order to enable it to consider whether demolition of the Property was actually necessary: Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014.

96. The claimant further argues that the defendant had an insufficient evidential basis on which to demonstrate that the total demolition of both the Chapel and the School House was necessary in order to obviate any danger posed by these buildings. The defendant also failed to consider what the claimant says is an obviously material lesser measure, which would involve leaving part of the fabric of either or both buildings in place.

97. The instructions given to BGP and BDN are contained in the witness statement of Mr Ainsley, a Project Management Consultant employed by the defendant to provide project management services for the defendant's Place, Investment and Development Team. The claimant says neither BGP nor BDN was instructed to advise as to the extent of the works which were immediately necessary to remove any present danger. Although both BGP and BDN advised that the Property should ultimately be demolished, neither advised it was immediately necessary entirely to demolish both buildings in order to address any present danger. The experts consulted by the defendant did, however, highlight lesser measures which were immediately necessary. These were works to secure the coping stones of the side-facing elevation of the Chapel; that the footpaths next to the Property should be cordoned off; that the site should be secured; and that scaffolding should be erected to support the roof.

98. The briefing note of 8 September 2022 also revealed that BGP identified an option of erecting a temporary structural scaffolding, which would allow a planning application to be made. It seems from the note that the roof would have needed to be removed but that the rest could remain. Since this suggestion did not appear in the BGP report, it appears that the defendant may have received further advice, which has not been disclosed. BDN also advised that one option was the introduction of a scaffold to roof level to support the trusses.

99. The defendant did not explore these options any further. It did not instruct a temporary works designer or seek costings for the works. Given that section 78 applies only where the works are "necessary", the claimant says it was irrational for the defendant not to investigate these.

100. The DPR nevertheless stated that there were no alternative options available to practically mitigate the risk of building collapse. The record stated that the cost of a temporary supporting structure would fall outside practical boundaries to mitigate risk prior to the winter months.

101. The claimant submits that the reasons given by the defendant for discounting temporary scaffolding lacked any sufficient evidential basis. The defendant did not investigate the design and cost of a temporary supporting structure. The 8 September briefing note said that until a temporary works designer had reviewed the work, it was unknown what solution might be most appropriate, if anything at all.

102. Finally, the claimant contends it is clear that the immediate danger which prompted the defendant to act was related to the roof of the Chapel. Even if some partial demolition of that building was required, there was no evidence that the demolition of the School House was also immediately necessary to address a danger. Accordingly, the defendant irrationally failed to investigate where the total demolition of both of the buildings was immediately necessary to obviate the present danger.

103. Having examined the reports etc. as a whole, I have concluded that the claimant has failed to show any public law error in respect of ground 2.

104. The instructions to BGP were appropriately open-ended. They were to "undertake an inspection of the property to report on its overall structural condition, and to prepare a report recommending remedial action, or other works deemed necessary" (1.0). Likewise, the purpose of BDN's inspection was "to carry out a visual structural appraisal on the condition of the property" (1.2). The instructions were in neutral terms and left the recommendations open to the experts.

105. BGP clearly had serious concerns about both the Chapel and the School House. The Chapel was in "a very precarious condition, in our opinion could no doubt... collapse at any time, due to the severity of decay to the timber beams/joists" (3.1.1). As for the

    School House, "sections of the roof structure were noted to have collapsed into the building" (3.1.2).

106. Turning to masonry, a section of stone coping had already fallen off the Chapel. The outward movement of the gable was in excess 100mm. The masonry at first floor level had a pronounced outward bulge, with visible displacement of the masonry. This was indicative of inadequate lateral restraint. The removal of the chimney breast had had an overall detrimental effect on the height/thickness of the wall, as the chimney breast would have provided structural stability and lateral restraint (3.2.1). The masonry of the School House had a potential to collapse (3.2.2).

107. Internally, the roof timbers in the Chapel had partially collapsed into the building. This had created a significant safety risk for access within it. Indeed, access was deemed unsafe. Internally, some of the roof timbers/ceilings of the School House had collapsed onto the floor structure, preventing an inspection. Areas of flooring and the gallery were considered to be "completely unsafe, and should not be accessed" (4.2.1).

108. Overall, both the Chapel and the School House were "in a very poor structural condition" with "potential of a serious possible collapse" . The "building [which I take to be the Chapel and the School House] is in such a poor condition that it would not

tolerate … any type of reinstatement … any attempt to undertake structural repairs would no doubt result in possible collapse" (5.0).

109. All this led BGP to say that "we are of the opinion that the only possible option for the remaining structures, are that they be demolished in [their] entirety" (5.0).

110. The September briefing note stated that "BGP engineers do not believe any structural repair works (including temporary work) could be carried out without exposing risk to building collapse". A suitable temporary solution may only be feasible if the roof was fully removed safely first and then was supported". However, even here, "the likelihood of building collapse during this operation is high". It was believed to be unsafe to work inside the building to erect support for the roof. A "difficult and complex solution for this option would be required to manage the high risk of building collapse". I consider the September briefing note fairly reflected the import of the BGP report.

111. BDN advised that "the building", which appears to be a reference to the Chapel, was "vulnerable to full or partial collapse…" (3.2). There was limited lateral restraint and any local resistance had been greatly reduced as result of the decay and collapse of the internal roof timbers (3.3). The School House was also "in a poor… condition with crack lines affecting the elevation" (3.7). Overall, there was "an obvious risk of consequential damage to external parties from part or full collapse of the structure" (4.0). Given that both buildings had direct street frontage, there was "a significant risk to the adjoining buildings and pedestrians of any form of collapse" of the structure (4.1).

112. The area likely to be affected by any such collapse was shown by a diagram, overlaying an aerial photograph. The claimant says that this relates to the Chapel, rather than to the School House. I accept that is so. However, it is clear from the substance of the report that BDN had very serious concerns about the potential for collapse of both buildings and the effects these would have on persons and property.

113. BDN also produced a risk assessment chart. This showed a high risk to a neighbouring property of collapse of the sidewall of the Chapel; and a high risk of collapse of its front wall. BDN considered that demolition would carry no risk. By contrast, introducing a scaffold to the roof level supporting trusses would carry a medium risk.

114. The BDN report advised that "in the immediate term" it was recommended "to place supports to the roof. It is recommended that at least the front third of the structure should be scaffolded to roof level" (4.3).

115. Standing back and looking at matters as a whole, I am in no doubt that the defendant acted lawfully in deciding to invoke section 78 in order to demolish both the Chapel and the School House. Both structures had already started to collapse. The collapse in the latter was such that BGP could not inspect the interior. The collapse in the Chapel was also such as to create a significant safety risk in respect of access within it. Both structures were assessed as posing danger to pedestrians and to adjoining properties.

116. Although BDN advised in the immediate term the placing of supports to the roof and that at least the front third of the Chapel should be scaffolded to roof level, this has to be seen in the light of the fact that the BGP report indicated that any attempt at any type of reinstatement could result in collapse. It is clear that BGP did not recommend that this should be attempted. Nor is there anything in the BDN report to gainsay that.

117. As a result, carrying out the temporary works for which the claimant contends would have solved nothing in real terms. On the contrary, given the impossibility of undertaking reinstatement without significant risk, the temporary works would have been a needless expenditure of public money. Accordingly, the defendant was entitled to reach the conclusion that the steps which were necessary to remove the dangers posed by both the Chapel and the School House were their demolition. In the light of the reports and given the likely consequences of the impending winter weather, the defendant was entitled to take immediate action pursuant to section 78.

118. I do not consider that there is anything in the Tameside challenge. The evidence shows that the defendant has been at pains throughout to acquaint itself with all the relevant information.

119. Ground 2 accordingly fails.

DECISION

120. The judicial review succeeds on ground 1, to the extent explained above.