IN THE UPPER TRIBUNAL **Appeal No. UA-2024-000057-GCRB**
(ADMINISTRATIVE APPEALS CHAMBER) **[2025] UKUT 051 (AAC)**

On Appeal from the First-tier Tribunal (General Regulatory Chamber) CR/2022/0007

BETWEEN

Appellant DRAGONFLY ARCHITECTURAL SERVICES LIMITED

and

Respondent BRIGHTON & HOVE CITY COUNCIL

BEFORE UPPER TRIBUNAL JUDGE WEST

Decided on consideration of the papers: 28 August 2024

DECISION

The decision of the First-tier Tribunal dated 26 July 2023 under file reference CR/2022/0007 does not involve an error of a point of law. The appeal against that decision is dismissed.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. This decision considers what is meant by the words “realistic to think” is s.88(2)(b) of the Localism Act 2011, which provides that

> “(2) … a building or other land in a local authority's area that is not land of community value as a result of subsection (1) is land of community value if in the opinion of the local authority—
>
> …
>
> (b) it is *realistic to think* that there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community”.

The First-tier Tribunal Decision

2. After a hearing on 26 July 2023, on 6 November 2023 the First-tier Tribunal dismissed the appeal against the decision of the local authority to include the Montreal Arms in Hanover, Brighton in the list of Assets of Community Value. In its decision the Tribunal stated that

> “1. This appeal concerns the Montreal Arms, in Hanover, Brighton. Like many pubs, and after nearly 140 years of mostly uninterrupted trading, it sadly closed its doors in early 2020. It is now owned by the appellant company (“Dragonfly”) who wishes to convert it to residential accommodation. Brighton & Hove City Council has decided to include the property in its list of Assets of Community Value, and Dragonfly has appealed against that decision.
>
> **Background**
>
> 2. On 1 April 2022, following local controversy about renovations, a group called the ‘Friends of the Montreal Arms’, which I shall call FMA, nominated the pub as an Asset of Community Value under the Localism Act 2011. The consequences of an asset being listed include a

moratorium on any sale, to enable a community group to make its own offer.

3. I agree with Mr Fitzsimons' summary of the written arguments made by FMA in support of its nomination. First, it argued that the Montreal Arms was of: a. architectural, design and artistic importance, bearing in mind it is a good example of a regional approach to public house frontage design; b. historic and evidential interest in light of the green-tiled frontage which is indicative of the 'United Breweries', a local brewery company who owned a number of pubs in the area; c. townscape interest bearing in mind how the building contributes to the street scene; and d. intactness as the building retains its design integrity, despite replacement windows.

4. Next, FMA set out how the pub had been part of the local community prior to its closure, being:

a. An establishment where many local people socialised, played traditional games and supported each other within the community for many years;

b. An iconic building with historic interest which gave architectural pleasure to the neighbourhood on Albion Hill, a landmark, part of the street colour and history; and

c. A place where celebrations, weddings, and wakes have been held by members of the community.

5. Explaining why it was realistic to think that there is a time in the next five years when there could be a principal use of the Montreal Arms that would further the social wellbeing or social interests of the local community, FMA argued that:

> *ACV status would provide a realistic platform for thought and communication which could transition into a new reformed venue and could bring together the diverse talents and creativeness of people living here and offer a means to exchange and connect through opening the public space again to be a vibrant and friendly venue appealing to diverse community members and offering social activities, educational and vocational learning of subjects and multi-use of inclusive arts and crafts, Social Prescribing, activity for supporting wellbeing, fringe theatre and live music events, works and meeting space as well as offering food and*

> *beverages and celebrating the history and exchange of stories between people and multi-generational activities.*

6. On 20 April 2022, Dragonfly's director Mr Southall made representations opposing the nomination. He observed that the pub had failed as a business while owned by the Stonegate Group, a large national company. Attempts to sell it as pub in 2021 had failed, and no community group had tried to buy it then. He argued that there were several other pubs in the immediate local area that could provide the community value argued by FMA, and every reason to think that this pub could not do so on a commercially viable basis. He also questioned the motive of the nomination; this refers to local ill-feeling and activism concerning Dragonfly's ownership of the pub, that I have not found necessary to directly address in this decision.

7. The Council decided to include the pub in its list of Assets of Community Value with effect from 13 May 2022. Dragonfly sought a review. After considering written representations and holding an oral hearing, the review officer upheld the decision. Dragonfly exercised its right of appeal to the Tribunal.

The appeal

8. The Council and the Tribunal wrote to FMA inviting it to apply to be joined to the proceedings so that it could present its case, but there has been no reply. The appeal was heard remotely, the documents before the Tribunal consisting of an agreed hearing bundle, a twenty-page supplementary bundle, and skeleton arguments from Mr Southall and Mr Fitzsimons. Both made well-structured and helpful oral submissions.

9. Mr Southall called oral evidence from Mr Patrick Walker, who describes himself as a specialist valuer with extensive experience in the licenced trade, in Brighton in particular. He also has what he describes as personal and relevant insight into the running of the Montreal Arms in particular, having acted for all the previous tenants and landlords since 1980. Most recently, he had acted for Stonegate in securing the property following the departure of its landlady in August 2021.

10. There was some discussion at the hearing of whether Mr Walker should be treated as an expert witness. I treat him as a witness of fact, yet will place

reliance on his opinion evidence where I consider it to be appropriate. The Tribunal's decision was reserved. I apologise for the subsequent delay in promulgating this decision.

Legal Framework and Issues

11. Section 88 of the Localism Act 2011 provides that (so far as relevant):

> ***"88 Land of community value***
> *(1) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area is land of community value if in the opinion of the authority—*
>
> *(a) an actual current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community, and*
>
> *(b) it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community.*
>
> *(2) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area that is not land of community value as a result of subsection (1) is land of community value if in the opinion of the local authority—*
>
> *(a) there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or interests of the local community, and*
>
> *(b) it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.*

12. Section 89 goes on to provide that (so far as relevant in this case) land may only be listed by a local authority in response to a community nomination. Procedural requirements for nomination and listing are contained in

the Assets of Community Value (England) Regulations 2012. Relevant to the arguments in this appeal is regulation 6:

> *6. A community nomination must include the following matters—*
>
> *(a) a description of the nominated land including its proposed boundaries;*
>
> *(b) a statement of all the information which the nominator has with regard to—*
>
> *(i) the names of current occupants of the land, and*
>
> *(ii) the names and current or last-known addresses of all those holding a freehold or leasehold estate in the land;*
>
> *(c) the nominator's reasons for thinking that the responsible authority should conclude that the land is of community value; and*
>
> *(d) evidence that the nominator is eligible to make a community nomination.*

13. Regulation 11 gives a right of appeal to the Tribunal.

14. Arising from the parties' submissions and the legal framework, the Tribunal must decide the following issues:

a. Was FMA's nomination valid?

b. Was there a time in the recent past when an actual use of the pub (that was not an ancillary use) furthered the social wellbeing or interests of the local community?

c. Is it realistic to think that there is a time in the next five years when there could be non-ancillary use of the pub that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community?

15. If the answer to any of the above is 'no', the appeal will be allowed. If the answer to all three is 'yes', then the appeal will be dismissed.

Was FMA's nomination valid?

16. In his skeleton argument, Mr Southall puts his case as follows: The nominator failed to provide any relevant and valid supporting information in the COMMUNITY RIGHT TO BID NOMINATION FORM, as required by Section 3 of the form itself. The nominator did not answer the questions regarding how the current or past use of the nominated building furthers the social wellbeing or social interests of the local community, and instead expressed personal fondness for the building's architectural features. Their motivation for the nomination appears to be preventing development and stopping a developer from doing anything to the building, rather than the value of the space as a community asset. Additionally, the applicant mentioned another successful ACV application in the area to illustrate their desire to prevent the conversion of buildings into houses in multiple occupation (HMOs). However, this information does nothing to constitute a reason for the nomination, and it is argued that the council should have recognized the lack of relevant supporting information in the nomination.

17. This, argued Mr Southall at the hearing, means that the nomination does not meet the requirements of regulation 6, there was no valid nomination, and the Council had no power to list the pub as an ACV.

Consideration

18. I find that the nomination was valid. First, the regulation requires the nominator's reasons for thinking that the responsible authority should conclude that the land is of community value. It does not require that those reasons accord in any way to the actual statutory test. If they are the nominator's reasons then they suffice, even if they are entirely misconceived. It is then for the responsible authority to make its own decision based on such circumstances as it considers relevant. Second, reasons are given in the nomination, as set out at paragraph 5 above. There was argument before me on whether they are included in the right section of the Council's nomination form, but I agree with Mr Fitzsimons that provided the information is given it does not matter where in any particular form it is found. Nor does the legislation require the use of any particular form in the first place.

19. The answer to this issue is yes, the nomination was valid.

Community value in the recent past

20. There is no binding authority on what constitutes the ‘recent past’ for the purpose of s.88(2)(a). Mr Fitzsimons referred to several previous decision by this Tribunal where the term was taken to depend on the circumstances. I agree. That contextual approach means that special account does need to be taken of the consequences arising from the Covid-19 pandemic. Especially with regard to hospitality venues, it was an exceptional interruption of the ability of a community to come together.

21. In its nomination form FMA argued that the Montreal Arms was used in the recent past as:

a. An establishment where many local people have socialised, played traditional games and supported each other within the community for many years; and

b. A place where members of the community held celebrations, weddings, birthday, wakes and a place for family, friends and neighbours to share stories and exchange neighbourly support and skills.

22. Mr Fitzsimons put this forward as evidence, but even if it can properly be so called then it is entirely unsubstantiated. Mr Walker pointed out in his evidence that the pub has never had (and for structural reasons could never have) a kitchen, making it unlikely that it had hosted such events. Asked by Mr Southall whether he thought that the pub was “a highly valued community space” Mr Walker replied not, qualifying his answer with “but if you didn’t want a crowded pub on a Saturday night you could go in there and play darts”. Evocatively, he also described it as “a drinking man’s boozer”; its little trade came from “old boys who liked to sit and drink a pint in an old-style pub”. He said that by the time it had closed the last landlady, Lorraine Pendry, had used it more as a place to live than to make a profit.

23. In further support of section 88(2)(a) not being satisfied, Mr Southall argued that the pub has been closed since early 2020 and had been in the doldrums for years, doing very little business. Mr Walker’s report showed that its turnover in its final year was only £52,992, including VAT. It was one of many pubs in the

local area and cannot be said to have furthered the social wellbeing or interests of the local community. It had negative reviews from members of the local community, some of whom had objected to previous planning applications that involved it carrying on in business as a pub. He pointed to the evidence of local outrage over alterations to its frontage, suggesting that the FMA were using the ACV procedure as a proxy for other concerns.

Consideration

24. I do not set out all the other evidence put forward under this topic, but have taken account of it. What the above does show is that prior to 2020, and despite the failure of several attempts to revive its fortunes, the doors stayed open until the pandemic hit. This is, I consider, the "recent past" for the purposes of section 88(2)(a).

25. I find that the Montreal Arms did provide value to the local community, but not in the way put forward by FMA. It is most unlikely that it played host to wedding receptions, live music, fringe theatre or as a place "to share stories and exchange neighbourly support and skills" as "a realistic platform for thought and communication". Instead, it provided a place where the type of person described by Mr Walker could escape such commotions and sit quietly with a pint of beer in a "drinking man's boozer", with nothing more frenetic around him than the occasional game of darts. Its value to the community's social wellbeing lay in the oasis of calm it provided away from "spaces for creative activity" and the like. Indeed, that is why Mr Walker sometimes went there.

26. The answer to the first question is therefore yes, there has been a time in the recent past when the Montreal Arms furthered the social wellbeing or interests of the local community.

The future

27. Applying section 88([2])(b), is it realistic to think that there is a time in the next five years when there could be non-ancillary use of the pub that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community?

28. In *R. (TV Harrison CIC) v Leeds School Sports Association* [2022] EWHC 130 (Admin), Lane J reviewed several authorities concerning section 88(1)(b), including as follows:

> 30. In *Gullivers Bowls Club Ltd v Rother District Council and Anor* (CR/2013/0009), Judge Warren heard an appeal by Gullivers Bowls Club Ltd, the owner of land used as a bowls club, which appealed against the inclusion of its land in the statutory list, following nomination by a Community Association. Judge Warren held:
>
>> *"11. Turning to the future condition in Section 88(1)(b) Mr Cameron [representing the Bowls Club] submits that the existing bowls club has no realistic prospect of continuing. He points to the poor state of the buildings and the finances and relies on a report prepared by GVA. This finds that Gullivers is not commercially viable. Mr Cameron submitted that since listing lasts for five years, my starting point in considering whether the future condition was satisfied, should be whether the bowls club could continue in existence for that length of time.*
>>
>> *12. I do not accept that the statute requires me to foresee such long-term viability. Indeed, it seems in the very nature of the legislation that it should encompass institutions with an uncertain future. Nor, in my judgment, is commercial viability the test. Community use need not be and often is not commercially profitable.*
>>
>> *13. On this issue, I accept the submissions made by Mr Flanagan. Gullivers may be limping along financially but it still keeps going and membership is relatively stable. Of course it is possible that something could go drastically wrong with the buildings and Gullivers would not have the capital to repair them; but that has not happened yet and, in an institution that has lasted for 50 years, it would be wrong to rule out community spirit and philanthropy as resources which might then be drawn on. In any event, should the site cease to be land of community value,*

> *Rother would have power to remove it from the list."*

31. In *Worthy Developments Ltd v Forest of Dean District Council and Anor* (CR/2014/0005), Judge Warren dismissed the appeal of a developer, which had bought a former pub known as the "Rising Sun" outside Chepstow, and wished to build two four-bedroomed houses on the site. A planning application to that effect had been refused but was likely to be appealed. The respondent accepted nomination by the "Save our Sun Committee" of the land and building comprising the pub. On the issue of section 88(1)(b), Judge Warren held:

> *"17. In respect of the future condition, Worthy Developments Ltd asked me to have regard to their intention to develop the plot to provide two houses. I take that into account although I balance it with the fact that they have not yet obtained the necessary planning permission. I also take into account the remoteness of the public house which must compound the general malaise affecting public houses nationally.*
>
> *18. The written submissions ask me to consider which was the more likely to happen, that planning permission should be obtained and houses be built, or that the building be revived as a pub? In my judgment, however, to approach the issue in this way is to apply the wrong test.*
>
> *19. I agree with the council. The future is uncertain. Worthy Developments Ltd may or may not obtain their planning permission. They may or may not sell the land. The Save our Sun Committee may or may not see their plans reach fruition. It remains still a realistic outcome that The Rising Sun might return to use either as a traditional pub or as a pub/shop/community centre as envisaged by the committee.*
>
> *20. My conclusion in this respect is reinforced by the pledges of support and petitions gathered by our (sic) Save our Sun Committee. It is true that they have not yet made an offer with a firm completion date but*

their proposals are not fanciful. It is enough that return to use as a pub or some other venture furthering the social wellbeing or interests of the local community be realistic."

29. Lane J held that Judge Warren's interpretation of "is it realistic to think" was correct, emphasising that the legislation does not require a potential future use to be more likely than not to come into being, in order for it to be realistic."

30. The Council's reasoning on this topic, when making its decision, is worth setting out in full:

> *The owner's representations set out the funding that would be required for a community group to purchase and renovate the property. No information was submitted with the nomination of how any funds to take on the property would be raised. The owner has advised that were the property to be listed as an ACV it is "highly likely it will sit empty for years".*
>
> *However, it is "not fanciful" to consider that having purchased the property the owner may ultimately not wish to allow it to remain empty. Planning permission to convert the property to residential use may be applied for and granted: alternatively, permission for residential use may not be granted. Policy DM10 of the submission City Plan Part 2, currently at examination stage, gives protection to public houses, stating that planning permission will not be granted for redevelopment / change of use except in certain circumstances; Even where an alternative use can be justified priority will be given to the use of the site for alternative community facilities.*
>
> *Although not adopted policy the LPA is currently giving the policy "significant weight". Although the owner states that the business failed as a public house, the legislation does not require that the future community use needs to be the same use as the previous use. Moreover, as above, planning policy would give priority to "alternative community facilities" should the use of the property be considered not to be viable/needed.*

> *Moreover, in order to satisfy s88(2) the future use does not have to be undertaken following a successful bid by a community interest group. A realistic option may be that if planning permission for residential use were refused that the owner may seek to sell the property. It is possible that a purchaser could be found to continue the use of the property as a public house or some other community facility, possibly with the input of the local community – and as noted above, a FMA member has offered their services and expertise in running a pub and brewery.*
>
> *It is not therefore fanciful to consider that there could be a community use of the property in the next five years.*

31. I accept that the case for inclusion is supported by there being a real chance that change of use to residential accommodation will be refused permission, and by priority being given in any event to any community use (whether or not as a pub). I do not accept that the chance of community use is increased by the offer of services by the FMA, whose lack of engagement with this appeal makes it unlikely that their prior activism will turn into future action. Nonetheless, the Council has pointed in its evidence to another pub called 'The Bevy' that benefited from community ownership to overcome its unattractive commercial prospects.

32. In opposition to those points, Mr Southall has adduced detailed evidence on the pub's parlous financial state when it closed, the need for significant renovations and repair before it could reopen, including putting in disabled access and (perhaps) toilets, problems applying for a new premises licence due to the density of local residential dwellings and scarce nearby parking. He has estimated the necessary cost of refurbishment as a pub at £300,000. As to 'The Bevy', Mr Southall provided a recent newspaper article showing that it is both Brighton's only community-owned pub and is still in imminent danger of closure.

33. I also take account of Mr Walker's evidence. While I do not treat him as impartial – he does appear to have an interest in Dragonfly succeeding in its goals – his evidence was frank and grounded in practicality. I do not set out all of his viability report but have taken it into account. The key considerations, as well as those

already set out above when dealing with s.88(2)(a), include: the declining turnover and barrelage pictures over the last few years of operation; the many competing pubs open in the immediate area, as well as cafes restaurants and takeaways; and wider sector challenges such as rising energy costs, beer and food prices and rates, together with a wider reduction in consumer spending on going out.

34. In response to questions asked in evidence, Mr Walker developed these points. He said that 90% of his work is now dealing with the closure of failed pubs. Food is an essential part of commercial survival, and the Montreal Arms has nowhere to put a kitchen – this was tried once and failed in the face of community objections and practical obstacles. A busier nearby pub, 'The Hanover', had recently closed. Locally, the demand for pubs had been reduced by a change in demographics. Hanover used to have more students, but they had gone elsewhere in light of increasing obligations surrounding House in Multiple Occupation licences. There are other community spaces that people can use to meet, including a nearby church hall.

35. Mr Walker's viability report is accompanied by a survey from a structural engineer that raises significant concerns over the suspended timber ground floor, the ingress of damp in the cellar, dry rot elsewhere, corroded steel angle lintels on the frontage and damp and mould. A report has been provided in response by the Council's Senior Building Control Surveyor, Mr Mike Sansom MRICS. He disagrees that the issues noted by Dragonfly's report show systemic failure of the external walls or require significant work to address in the short term. He does agree that the suspended wooden floor and other parts of the building are deteriorating and that in the medium to long term they might result in the building falling into such a condition as to require action under the Council's Dangerous Structures powers.

Consideration

36. I pay tribute to the meticulous and constructive way in which Mr Southall, on behalf of Dragonfly, has pursued this appeal. There is some force to his submissions that the original nomination was motivated, at least in part, by irrelevant concerns such as the building's appearance and views on residential development in general, and even personal animus. I take FMA's lack of present involvement as making it

unlikely that there is any current real proposal to purchase and operate the Montreal Arms.

37. The evidence is finely balanced, and it is certainly unlikely that the Montreal Arms will see any use in the next five years that would further the social wellbeing or social interests of the local community. I nonetheless reach the conclusion that it is realistic.

38. While detailed and comprehensive, Mr Walker's evidence takes a somewhat myopic view of what a pub would look like. This is understandable, as he is in the business of acting for breweries and pubs that aim to be successful commercial enterprises. If the question posed was whether the Montreal Arms could be such a pub in the next five years, I would agree that it is unrealistic. Yet the downturn in fortunes for tied houses and chain pubs has also seen opportunities for smaller, independent and even hobbyist establishments. While the Montreal Arms was unprofitable before its closure, it still did not close until forced to do so by the pandemic. Just as it was sustained then by a landlady who was happy to treat it just as somewhere to live, it is realistic to think that it might likewise be opened in the future by a person or group that does not need it to turn a profit, or even to pay its own way. Not only might a community group or individual be willing to bear a pub as a loss-making venture, some pubs are opened as a retail outlet for micro and small breweries. While these face similar challenges to the larger chains of the sort Mr Walker describes, they have been less hard hit. Likewise, some small and independent pubs strike deals with local takeaways and restaurants rather than run their own kitchens – the notion that a kitchen is necessary to survive is not representative of the many and varied pubs operating in the UK. There is a realistic chance that the use I have described would add value to the community distinct from that offered by other nearby pubs and the local church hall. While 'The Bevy' has faced existential commercial obstacles, it has still operated for a while – that is all s.88(2)(b) requires.

39. The rival structural engineering reports do not disclose any major works that must be concluded before the building could open as a pub at all, and if Dragonfly is unsuccessful in obtaining planning permission for residential use then the medium and long term works will be squarely reflected in a reduced purchase price. If facing significant delay in achieving its ambitions Dragonfly might equally decide to cut its losses by

> renting out the pub to the type of operator I describe in the above paragraph, even though it has set its face against it in this appeal. I am unwilling to accept in the absence of clearer evidence that obtaining a premises licence would be impossible without unrealistic additional renovations.
>
> 40. In conclusion, while the prospects are slim that the Montreal Arms will see any use in the next five years that would further the social wellbeing or social interests of the local community, it is still realistic to think that it could."

Permission to Appeal

3. The Tribunal dismissed an application for permission to appeal on 14 December 2023.

4. The Appellant applied to the Upper Tribunal for permission to appeal on 11 January 2024. On 9 February 2024 Upper Tribunal Judge Jacobs refused permission to appeal the papers and the Appellant applied for an oral reconsideration of the application.

5. On 22 February 2024 I directed an oral hearing of the renewed application for permission to appeal, which I heard by video on the morning of 12 June 2024. The Appellant was represented by its director, Mr Charlie Southall, who had also represented the company in the earlier proceedings. Although I had read Judge Jacobs' refusal of permission, that was only by way of background and I had in effect put his decision to one side and considered the matter afresh in the light of the Appellant's oral and written submissions.

6. Having read Mr Southall's original grounds of appeal and his skeleton argument and having heard his oral submissions, I acceded to the Appellant's application and granted it permission to appeal in relation to the first (misapplication of the "realistic to think" test) and second (inconsistency with legal principles) grounds of appeal. It seemed to me that there was an arguable case that the Tribunal erred in point of law for the reasons set out in the grounds of appeal. In particular if, as the Tribunal found, the prospects that the Montreal Arms would see any use in the next five years which would

further the social wellbeing or social interests of the local community were "slim", could it be said that it was still "realistic" to think that it could? In my judgment, the second ground of appeal was really a different formulation of the first ground, but was inseparably bound up with it.

7. I did not, however, grant permission to appeal in respect of the other grounds of appeal, which essentially sought to relitigate factual issues already determined by the Tribunal. I do not need to consider those grounds any further.

The Statutory Framework

8. S.87 of the Localism Act 2011 provides (so far as material) that

> "(1) A local authority must maintain a list of land in its area that is land of community value.
>
> (2) The list maintained under subsection (1) by a local authority is to be known as its list of assets of community value.
>
> (3) Where land is included in a local authority's list of assets of community value, the entry for that land is to be removed from the list with effect from the end of the period of 5 years beginning with the date of that entry (unless the entry has been removed with effect from some earlier time in accordance with provision in regulations under subsection (5).
>
> …"

9. Once placed on such a list, the statutory regime imposes a moratorium when there is an intention to dispose of the listed asset and holds up the disposal for a period giving local community groups the opportunity to organise a bid for the asset. Before being listed as an ACV, the particular asset must satisfy the qualifying criteria set out in s.88 of the 2011 Act which provides that (so far as relevant):

> **"88 Land of community value**
> (1) For the purposes of this Chapter but subject to regulations under subsection (3), a building or

other land in a local authority's area is land of community value if in the opinion of the authority—

(a) an actual current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community, and

(b) it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community.

(2) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area that is not land of community value as a result of subsection (1) is land of community value if in the opinion of the local authority—

(a) there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or interests of the local community, and

(b) it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

…

(6) In this section -

…

"social interests" includes (in particular) each of the following –

(a) cultural interests;

(b) recreational interests;

(c) sporting interests".

10. S.89 goes on to provide that (so far as relevant in this case) land may only be listed by a local authority in response to a community nomination.

The Grounds of Appeal

11. The grounds of appeal for which I granted permission were as follows (I have slightly renumbered the sections and added paragraph numbers for clarity):

> *1 Misapplication of the "Realistic to Think" Test*
>
> 1. Upon scrutiny of Judge Neville's verdict, it becomes evident that whilst he acknowledges the theoretical possibility of the property operating as an independent Public House, he nevertheless concluded that the probability of this occurrence is "slim."
>
> 2. It is proposed that in reaching the determination that: "...prospects are slim that the Montreal Arms will see any use in the next five years that would further the social wellbeing or social interests of the local community" (paragraph 40 of Judge Neville's 10 decision) whilst simultaneously agreeing with the Council's position that it is not "fanciful" to envisage the property's potential for community use within five years represents a fundamental contradiction and constitutes a misapplication of the "Realistic to Think" test.
>
> 3. The conclusion drawn by the judge is perplexing due to its lack of adequate justification. The acknowledgment of the slim chances of the property benefiting the community contrasts sharply with the optimistic assertion of its realistic use. This dichotomy in the judge's reasoning creates an ambiguity that undermines the decision's clarity and legal soundness.
>
> 4. The contradictory language in the decision further adds to the confusion. For example, paragraph 37 of the decision states that it is "certainly unlikely" that the Montreal Arms will be used in a way that furthers the community's interests in the next five years, yet Judge Neville concludes that such use is still realistic. This juxtaposition of unlikely prospects with a realistic outcome is contradictory and lacks a robust legal basis. Further, the simultaneous assertion that an outcome is both "certainly unlikely" and "realistic" presents an

inherent inconsistency within the judgment and thus raises substantial questions regarding the logical and legal foundations of the decision.

5. How can a scenario be simultaneously deemed "certainly unlikely" and yet "realistic" in the context of the Localism Act 2011? This inquiry is pivotal as it speaks directly to the heart of the legal standards for determining a property's inclusion as an Asset of Community Value (ACV). It is essential to reconcile these conflicting assessments to uphold the integrity of the legal process.

6. The appellant notes the absence of a clear and reasoned explanation for the judge's decision, which is important in terms of providing an understanding of the legal basis for such rulings, especially when decisions deviate from the presented evidence. The lack of such reasoning in this case raises questions about proper legal reasoning and transparency in the decision-making process.

7. These issues compromise the clarity and legality of the judgment, which warrants further review and clarification.

1.1 Failure to Assess Practicality

8. Judge Neville ought to have considered whether his assessment conformed to sensible and practical prospects of realising a compliant scenario, particularly when weighed against the Appellant’s intentions and the potentiality of alternative scenarios. Instead, and despite reviewing evidence to the contrary, he deems it "realistic" that the property could function as a community-serving Public House and, further, that it could do so entirely without any likelihood of financial viability or tangible community support.

2.1 Inconsistency in Applying Legal Principles:

9. The law mandates an appraisal of whether a scenario represents a rational and feasible notion of what can be accomplished, in accordance with the definition of "realistic" as established in the case of *Carsberg -v- East Northamptonshire Council* [2020] UKFTT CR-2020-0004 (GRC). Judge Neville's assertions that the "prospects are slim," and "certainly unlikely," inadequately address this pivotal facet, revealing an unsettling inconsistency in the application of legal principles, particularly in

evaluating the practicality and realism of the property's future use.

10. Judge Neville failed to accurately apply the "Realistic to Think" test, which necessitates an assessment of whether a scenario is a sensible and practicable concept of what can be achieved or expected, "representing things in a way that is accurate or true to life," as per the dictionary definition of "realistic" embraced by the Judge in the *Carsberg* case.

11. Judge Neville's interpretation and application of the "Realistic to Think" test appears to diverge from the standard that requires an evaluation of reasonable and practical possibilities. The test demands that a scenario be scrutinised in terms of its practical attainability and likelihood, presenting matters in a manner that corresponds to accuracy and reality. This interpretation is consistent with the dictionary definition of "realistic," as adopted in *Carsberg -v- East Northamptonshire Council* [2020].

12. Judge Neville's assessment fails to reconcile the notion of something being "certainly unlikely" with it also being "realistic," resulting in a perplexing and legally untenable conclusion.

2.2 Failure to Apply Established Legal Precedents

13. To illustrate the misapplication at hand, it is imperative to reference a precedent set by Judge Peter Lane in the case of *R. (TV Harrison CIC) -v- Leeds School Sports Association* [2022] EWHC 130 (Admin). In this pivotal judgment, Judge Lane established a fundamental principle that holds particular relevance to our case. Judge Lane articulated this principle as follows:

> "…the legislation does not require a potential future use to be more likely than not to come into being, in order for it to be realistic. The fact that the most likely of a number of scenarios is one which would not satisfy the statutory criteria (e.g., a change of use from pub to residential) does not mean that any other potential future use is, without more, rendered unrealistic. It is only if the non-compliant scenario is so likely to occur as to render any compliant scenario unrealistic, that the non-compliant scenario will be determinative of the nomination."

14. Of paramount significance in Judge Lane's judgment is the inclusion of the phrase "without more," as underscored above. This phrase elucidates the requirement that, in instances where a non-compliant scenario involving development not aligned with the community value criteria is anticipated, as is the case under consideration, there must exist affirmative evidence to establish the realism of a compliant scenario. In this context, a compliant scenario denotes one where the property will be employed in a manner consistent with the community value criteria in the future.

15. The phrase "without more" within the judgment emphasizes the necessity for a nuanced and comprehensive assessment when determining the realism of potential future uses. It implies that a simplistic comparison of probabilities falls short and additional factors or evidence should be considered to conduct a thorough evaluation of whether a specific scenario aligns with the statutory notion of realism. This interpretation is in harmony with the judge's intent to discourage oversimplification and encourage a holistic understanding of the pertinent legal standard.

16. Judge Lane's ruling underscores the imperative of a nuanced examination of realism in potential future uses, signalling that a mere probability comparison is inadequate, a perspective insufficiently considered in Judge Neville's decision.

17. In the context of the judgment, the phrase "without more" plays a pivotal role in the interpretation of the discussed legal standard. It suggests that merely having a scenario less likely than the most probable outcome does not suffice to label that scenario as unrealistic. It implies the need for additional factors or evidence to render a less likely scenario as unrealistic.

18. Further, by incorporating "without more," the judge cautions against oversimplifying the evaluation process. It signifies that a mere probability comparison is insufficient for determining the realism of a less likely scenario.

19. The presence of the use of language "without more" indicates the necessity for a comprehensive and thorough evaluation that goes beyond mere probability comparisons. It involves considering other relevant

aspects or evidence that might influence the realism of a potential future use.

20. In essence, the phrase "without more" serves to underscore that determining what constitutes a "realistic" future use under the statute requires a more profound examination than a superficial comparison of probabilities.

21. It is pertinent to note that Judge Lane's ruling provides essential context for grasping the "Realistic to Think" test. The stress on evidential support in Judge Lane's decision accentuates the significance of a well-founded basis for any determination regarding a property's future community use.

2.3 In the Alternative

22. Even if the Upper Tribunal does not interpret the precedent set by Judge Peter Lane in *R. (TV Harrison CIC) v Leeds School Sports Association* [2022] EWHC 130 (Admin) as requiring positive evidence when evaluating a compliant scenario, a significant legal issue remains at hand.

23. The tribunal's decision failed to address the Act's requirement for a plausible and realistic scenario, regardless of a comparison to previous case law.

24. It is important to acknowledge that not all cases can be exclusively resolved through a comparative analysis of other case law. Each case may present unique characteristics or circumstances that set it apart and necessitate a distinct approach, possibly leading to the designation of this case as a seminal decision.

25. Specifically, the decision under review appears to have omitted a critical consideration, namely, the Act's explicit requirement for a plausible and realistic scenario. The Act mandates that a potential future use, whether compliant or non-compliant, must rest on a plausible and realistic foundation.

26. In the absence of anything whatsoever to substantiate the tribunal's conclusion regarding the plausibility and realism of the scenarios under examination, the decision fails to meet the legal standard mandated by the Act. This raises questions about whether the decision adequately addresses the

> core requirement of the legislation, thus warranting further scrutiny and review."

The Council's Submissions

12. The Council's submissions were dated 18 July 2024 and were drafted by Mr John Fitzsimons of counsel. Mr Fitzsimons submitted that

> *"Appellant's Grounds*
>
> 10. By Grounds 1 and 2, the Appellant essentially contends that the Judge misapplied the 'realistic to think' test required in s88 of the 2011 Act. The central contention is that the Judge concluded that the "prospects are slim that the Montreal Arms will see any use in the next five years that would further the social wellbeing or social interests of the local community" (§40) but nevertheless concluded it was 'realistic to think' there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.
>
> 11. The Appellant describes this conclusion as "perplexing" and notes that a further reason for confusion is that the Judge observed that it is "certainly unlikely" that the Montreal Arms will see any use in the next five years that would further the social wellbeing or social interests of the local community (§37). The Appellant asks rhetorically how can a scenario "be simultaneously deemed 'certainly unlikely' and yet 'realistic' in the context of the Localism Act 2011". Finally the Appellant goes on to suggest that the Judge has failed to apply established case law such as *Carsberg v East Northamptonshire Council* [2020] UKFTT CR-2020-0004 (GRC) and *R(TV Harrison CIC) v Leeds School Sports Association* [2022] EWHC 130 (Admin).
>
> *The Council's Response*
>
> 12. In *R(TV Harrison CIC) v Leeds School Sports Association* [2022] EWHC 130 (Admin), Lane J reviewed a number of authorities concerning s88(2)(b) and made it clear that:
>
>> "the construction of s88(2)(b) adopted by Judge Warren in *Gullivers Bowls Club Ltd v Rother District Council and Anor* (CR/2013/0009), and

> consistently followed, is the correct one. The legislation does not require a potential future use to be more likely than not to come into being, in order for it to be realistic" [41].

13. This paragraph provides the answer to the Appellant's appeal; a potential future use does not need to be more likely than not to be realistic. There is nothing in the same judgment that contradicts this approach. In particular, despite what is argued by the Appellant, there is nothing to suggest there is a need for 'positive evidence' to 'substantiate the realism' of a realistic use. As Judge Neville noted in his reasons refusing permission to appeal: "While (like all factual questions) realism must be decided with regard to all the evidence, it is a proleptic assessment. It does not demand, for example, positive evidence of a current proposal that is being actively and realistically pursued" [§3].

14. Lest there was any doubt as to the approach to be taken, in *Banner Homes Ltd v St Albans City and DC* [2018] EWCA Civ 1187, the Court of Appeal when considering a case involving the interpretation of s88(2)(a) noted in respect of section 88(2)(b) that:

> "The Upper Tribunal rejected Banner Homes' argument that in referring to what was "not fanciful" rather than what was "realistic" for the purposes of section 88(1)(b) and 88(2)(b), the First-tier Tribunal had made an error of law. The Upper Tribunal also rejected the argument that the First-tier Tribunal's decision on 'the future use point' was contrary to the evidence, holding that what is realistic for the future, is a matter of judgment for the local authority (or on appeal, for the First-tier Tribunal) and is not a matter of 'veto for the landowner…The Upper Tribunal refused Banner Homes' application for permission to appeal to the Court of Appeal on "the future use point", as did I on the papers on 27 February 2017. The application for permission on this Ground has not been renewed" [34-35].

15. That approach of treating a realistic prospect as something that is simply more than fanciful has been consistently followed by the FtT in numerous cases including in the *Roffe* case [*Roffe v West Berkshire Council* CR/2019/0010], where UT Judge O'Connor observed at §35 that:

> "In summary, I accept that the future of the Winterbourne Arms is fraught with uncertainty, which is only fuelled by the current uncertain trading conditions for such establishments. It is impossible to identify what the likely future of the premises might be. However, as already indicated, the task for me is not to determine the likely future use … but to consider and assess whether one realistic non-ancillary use of the property would lead to the furtherance of the social wellbeing or social interests of the local community."

16. Indeed, in other legal contexts, such as applications for permission to appeal to the UT, the UT will give permission to appeal only if there is a realistic prospect of an appeal succeeding, and not simply a fanciful chance of success, unless there is exceptionally some other good reason to do so: Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538. Similarly, when applying for summary judgment under Part 24 CPR, it is well-established that the court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91. "Realism" is therefore some prospect that is more than a fanciful prospect, but that is certainly not the same thing as saying it is a likelihood or certainty. There is thus a consistency and rationality to the approach the Courts take to the 2011 Act that is taken elsewhere.

17. It follows from the above that there is no discernible error of law in the Judge concluding that an outcome is realistic while at the same time describing its prospects as "slim". The key point is that on the evidence the Judge has concluded that the prospects whilst 'slim', and 'unlikely', are not fanciful. They are therefore realistic. This has always been the Council's approach to the listing (§30). That approach complies exactly with what is required under the 2011 Act and is consistent with the case law above. Nothing in any case identified by the Appellant, including in the non-binding authority of *Carsberg* above, requires a different approach. There is no inconsistency of reasoning.

18. The Appellant appears to raise concerns about the practicalities around community use, but the Judge considered those practicalities (§38) and reached an evaluative conclusion that was open to him based on the material before him. This conclusion is not something the UT should readily depart from bearing in mind it is a

> matter of weight rather than law. The Court of Appeal has stressed that it is not the UT's role to "set the appeal tribunal to rights by teaching them how to do their job of weighing the evidence": *Fryer-Kelsey v Secretary of State* [2005] EWCA Civ 511 at [25].
>
> 19. In truth, many of the Appellant's arguments under Grounds 1 and 2 actually seek to challenge the merits of the Decision. This is because the Appellant would reach a different conclusion on the 'realistic to think' test to that reached by the Judge. However, the mere fact that the Appellant would reach a different conclusion does not mean the Judge's conclusion, as a matter of law, was wrong. The Judge indicated that matters were "finely balanced" but ultimately reached a conclusion that was open to him on the law and on the facts. Accordingly, the UT should not disturb the Decision."

The Appellant's Reply

13. On 21 July 2024 Mr Southall submitted in response on the company's behalf (again I have added paragraph numbers for clarity):

> **"Introduction**
>
> 1. The respondent's arguments hinge on a broad interpretation of what constitutes "realistic" under s88(2)(b) of the Localism Act 2011. However, their assertion that there is no discernible error of law in Judge Neville's conclusion of 26th July 2023 is flawed. Describing an outcome as both "slim" and "realistic" without substantive evidence fails to meet the standard of a comprehensive assessment mandated by the Localism Act 2011.
>
> 2. The respondent fundamentally misinterprets the standard of "realistic" as established by the Localism Act.
>
> **The Phrase 'Realistic to Think'**
>
> 3. The phrase "realistic to think" is intended to mean that something must be probable, not just possible. It implies that a belief, expectation, or assumption is practical, reasonable, and grounded in reality. This means it is based on observable facts, evidence, or logical reasoning, making it likely to be true or achievable given the current circumstances.

4. Contrary to thoughts that are overly optimistic, idealistic, or based on wishful thinking, "realistic to think" requires grounding in reality rather than in merely hypothetical scenarios. If interpreted too broadly, almost any scenario can be imagined with some level of realism due to our ability to construct plausible sequences of events. For example, imagining winning the lottery is realistic in the sense that it is a possible event, but it is not probable due to the extremely low odds.

5. Probable scenarios are those with a high likelihood of occurring based on current evidence, logical reasoning, and typical outcomes. This involves critically evaluating the context, data, and likelihoods rather than merely considering what can be imagined. For a thought or expectation to be considered "realistic," it should align with patterns, trends, or rational analysis that indicate it is more likely to happen than not.

6. In essence, while many scenarios can be constructed in a realistic manner, "realistic to think" should focus on those that are supported by a high probability, evaluating what is reasonable and practical to expect.

7. In legal interpretation, the phrase "realistic to think" is not about what could be imagined or is theoretically possible. Instead, it focuses on what is probable, ensuring that expectations are firmly rooted in reality.

"Realistic to Think" in the Context of the Localism Act 2011

8. In the context of the Localism Act 2011, the phrase "realistic to think" ensures that the assessment of an asset's value to the community is based on a reasonable probability of continued or future use, rather than mere possibility or speculation.

9. The phrase "realistic to think" in the Localism Act 2011 was designed to protect only those properties with a genuine and probable prospect of community use. The legislative intent is to prevent speculative listings that could misuse the Act. According to the Localism Act 2011, "realistic" must be interpreted to reflect a reasonable likelihood based on substantial evidence, not just any remote possibility.

10. It is logically inconsistent to deem a property's future community use as both "slim" and "unlikely" while also claiming it is "realistic to think" it will serve the

community. The terms "slim" and "unlikely" inherently suggest a low probability, contradicting the reasonable likelihood implied by "realistic."

11. If a judge concludes that the prospects of a property seeing any community use in the next five years are slim and describes it as unlikely, it means that the probability of such use is very low. For a belief or expectation to be "realistic to think," it must be grounded in a reasonable likelihood or probability. Since Judge Neville deemed the chances as unlikely, it indicates that there is insufficient evidence or likelihood to support the expectation that the property will serve the community, thus failing the criterion of being "realistic to think."

12. If a judge argues that "realistic to think" is broad enough to include scenarios with slim or unlikely prospects, they are interpreting the term to encompass a wider range of possibilities. However, the intention behind "realistic to think" is to imply a practical and probable expectation based on evidence and logical reasoning. If the prospects are deemed slim or unlikely, it contradicts the notion of being "realistic" because "realistic" necessitates a higher likelihood and stronger basis in current facts and trends, rather than merely conceivable possibilities.

13. Therefore, "realistic to think" should be interpreted to mean a reasonable likelihood, not slim or unlikely chances.

Legislative Intent and Context

14. The wording of the Localism Act 2011 was deliberately chosen to strike a balance between empowering communities and ensuring that only assets with a genuine, realistic prospect of future community use are protected. The phrase "realistic to think" was carefully crafted to require a reasonable likelihood of future use, not just a remote or speculative possibility. This is evident from the legislative intent and judicial interpretations that have emerged since the Act's implementation.

15. The primary goal of the Localism Act 2011 was to give communities the ability to safeguard assets that genuinely contribute to social wellbeing and community interests. However, the legislation was not intended to be so loose as to allow any and every property to be listed based on mere speculative potential. If "realistic to

think" were interpreted to include slim or unlikely prospects, it would render the criteria meaningless and lead to the misapplication of the Act. This would dilute its effectiveness and place an unreasonable burden on property owners.

16. The Localism Act 2011 requires that for a property to be listed as an asset of community value, it must be "realistic to think" that its use will further the social wellbeing or social interests of the community within the next five years. This implies a need for a reasonable probability, not just a remote possibility. 17. The term "realistic" inherently means having a good chance of being true or achievable. If the prospects of community use are described as slim or unlikely, it indicates a very low probability, which does not meet the threshold of being "realistic." The distinction must be maintained between what is merely possible (anything conceivable) and what is probable (likely to happen).

18. The purpose of the Localism Act is to empower communities with realistic and achievable opportunities. Maintaining a property on the register based on slim prospects does not align with the practical and actionable spirit of the legislation. A stricter interpretation ensures resources and efforts are directed towards genuinely viable community assets. The phrase "realistic to think" should be interpreted as having a strong probability, not just being more than fanciful.

19. In conclusion, Judge Neville’s interpretation dilutes the practical standards set by the Localism Act 2011, which seeks to balance community empowerment with realistic expectations. The term "realistic to think" must be interpreted as having a strong probability, backed by evidence and logical reasoning, not just a remote chance.

20. The interpretation that "realistic" does not mean "more likely than not" should not dilute the term to the point where remote chances are considered realistic. This would contradict the intention of the Act and judicial consistency, which require a balanced, evidence-based assessment. The legislative intent demands a reasonable likelihood for future community use. The judge's finding of slim and unlikely prospects fails to meet this standard, rendering the property ineligible for listing as an asset of community value under the Localism Act 2011. The respondent’s argument relies heavily on interpreting "realistic to think" in a way that

stretches the phrase to cover scenarios with slim or unlikely prospects. Describing its prospects as "slim" and "unlikely" should logically exclude it from being realistically expected to serve the community.

21. The respondent’s argument seems to bend the term "realistic" to include any possibility, no matter how remote, which is not the intention of the legislation.

22. The respondent’s arguments appear to be overextending the interpretation of "realistic to think." They are bending the realities of the phrase’s meaning to fit their position, which contradicts the legislative intent and practical application of the Localism Act 2011. The Act was designed to protect genuinely viable community assets, not to include properties with only slim or unlikely prospects of future use.

23. A former pub with "slim" and "unlikely" chances of serving the community again cannot be considered "realistic to think" under the Localism Act 2011. The property does not meet the realistic standard.

Consequence of Broad Interpretation

24. I respectfully request the Upper Tribunal to consider the broader policy implications of setting a precedent that allows properties with slim and unlikely prospects to be listed as Assets of Community Value (ACVs). This could lead to the over-inclusion of properties, misuse of the Act, and a dilution of its effectiveness.

25. If the term "realistic to think" is interpreted too broadly, it would lead to the over-inclusion of properties on the ACV list. This would not only misapply the legislation but also create an untenable situation for property owners, who would have no meaningful way to argue against their properties being listed. Such an interpretation could result in virtually every building being imagined to have some community use, thereby undermining the Act's intended purpose and practical application.

26. Emphasising a more rigorous standard for "realistic to think" aligns with policy goals and judicial consistency. A strict interpretation ensures that only properties with a genuine and probable prospect of community use are protected, maintaining the balance intended by the Localism Act 2011. This approach prevents the Act from

being misused and ensures that its protections are reserved for truly viable community assets.

Response to Respondent's Specific Arguments
Argument Breakdown and Counterpoints

27. **Argument 1: The Interpretation of s88(2)(b)**

● **Respondent's Point**: The Respondent cites *R(TV Harrison CIC) v Leeds School Sports Association* [2022], stating that a potential future use does not need to be more likely than not to be realistic.

● **Counterpoint**: While Judge Lane in the mentioned case did suggest that potential future use does not need to be more likely than not, this interpretation does not eliminate the need for a grounded basis in reality. There must still be some substantive evidence or a logical pathway demonstrating how the potential use is more than a mere theoretical possibility.

○ **Misinterpretation of Judge Lane's Judgment**: The respondent's reliance on *R(TV Harrison CIC v Leeds School Sports Association* is fundamentally flawed due to a misinterpretation of Judge Lane's judgement. While it is true that Judge Lane affirmed that s88(2)(b) does not require a potential future use to be more likely than not to be realistic, the respondent overlooks the critical nuance in his ruling.

○ **Nuanced Examination Required**: Judge Lane explicitly emphasised that the determination of whether a potential future use is realistic must involve more than a superficial comparison of probabilities. This comprehensive and thorough assessment is mandated by Judge Lane, especially highlighted by the phrase "without more."

○ **The Role of "Without More":** The phrase "without more" underscores the necessity for additional evidence or factors to substantiate the realism of a potential future use. This requires an in-depth consideration of all relevant evidence to assess the realism of the proposed future use.

○ **The Need for Evidential Support**: Contrary to the respondent's claim, the phrase "without more" in Judge Lane's judgement implies a need for positive evidence or additional factors to support the realism of a future use scenario. There must be substantive evidence or

considerations that make the scenario plausible within the statutory framework.

○ **Selective Use of Case Law**: The respondent references various cases to support their broad interpretation. However, many of these cases, such as *Roffe and Winterbourne Arms*, involve specific factual contexts where future use had tangible, albeit uncertain, prospects. By generalising these rulings, the respondent is attempting to apply them to a broader range of situations than they were intended to cover.

○ *Uptin House v Newcastle City Council*: In this case, Judge Jacqueline Finlay ruled that the property should be removed from the ACV list because it was not realistic to think it would further the social wellbeing or social interest of the local community in the future. This decision underscores the requirement for a reasonable likelihood of future community use, not just a remote possibility.

○ **Conclusion**: The respondent's argument misinterprets the precedent set by *R(TV Harrison CIC* by ignoring the requirement for a nuanced and evidence-based assessment of potential future uses. Judge Lane's emphasis on a comprehensive evaluation process indicates the necessity for positive evidence to substantiate the realism of a potential future use. Therefore, the respondent's reliance on a simplified interpretation fails to address the core principles established by Judge Lane and misapplies the legal standard for determining the realism of future uses under s88(2)(b) of the Localism Act 2011.

28. **Argument 2: Realism vs. Fanciful Prospects**

● **Respondent's Point**: References to *Banner Homes Ltd v St Albans City and DC* [2018] highlight that a realistic prospect is one that is not fanciful.

● **Counterpoint**: The distinction between 'not fanciful' and 'realistic' still demands a threshold of plausibility. The judgement emphasises that while the future use does not need to be highly probable, it must still be viable within the context of current evidence. Simply asserting that a future use is not fanciful without providing a realistic roadmap undermines the intention behind the legislation.

○ **Overreliance on "Not Fanciful" Standard**: The respondent repeatedly cites the "not fanciful" standard from cases like *Banner Homes Ltd v St Albans City and DC* [2018] to support their claim. While this standard does provide some leeway, it does not mean that any remote chance meets the realistic threshold. The respondent is stretching the interpretation to suggest that even slim or unlikely prospects are sufficient, which could lead to the misapplication of the Localism Act.

29. **Argument 3: Application in Other Legal Contexts**

● **Respondent's Point**: Analogies are drawn to other legal contexts, such as appeals and summary judgments, to illustrate that a realistic prospect is more than a fanciful one.

● **Counterpoint**: While it's true that 'realistic' in legal contexts often means more than fanciful, these analogies also underscore the necessity of a sound evidentiary basis. In Swain v Hillman, for example, a claim must be grounded in reality with supporting facts, not mere speculation.

○ **Contradiction in Terms**: The key issue here is the inherent contradiction in deeming a scenario as both "slim" and "realistic." The term "realistic" implies a level of plausibility and likelihood that goes beyond mere theoretical possibility. If an outcome is described as having "slim" prospects and is "unlikely," it suggests that the scenario is bordering on the improbable. To argue that such a scenario is not "fanciful" and therefore "realistic" stretches the definition of realism beyond its logical limits.

○ **Logical Consistency and Legal Standards**: To maintain logical consistency and adherence to legal standards, an outcome described as having slim prospects should not be simultaneously deemed realistic without compelling evidence. The respondent's assertion that there is no inconsistency in reasoning ignores this fundamental principle. By conflating slim prospects with realism without adequate evidential support, the Judge's conclusion deviates from the rigorous evaluation process required under the law.

○ **Application to Current Case**: In our case, the property has been described as having "slim" and "unlikely" prospects for future community use. This description inherently implies a low probability, which

cannot satisfy the "realistic to think" standard established in *Swain v Hillman*. Just as in *Swain v Hillman*, where the court requires a realistic prospect to carry some degree of conviction, the slim and unlikely prospects of our property do not carry such conviction.

Conclusion: The respondent's assertion that there is no discernible error of law in the Judge's conclusion is flawed. The contradiction in describing an outcome as both "slim" and "realistic" without substantive evidence fails to meet the standard of a comprehensive, evidence-based assessment as mandated by the Localism Act 2011 and relevant case law. The necessity for positive evidence or additional factors to substantiate the realism of a potential future use underscores the misapplication of the legal standard in the Judge's decision.

Summary of Appeal and Arguments

30. This appeal challenges the respondent's interpretation of "realistic to think" under s88(2)(b) of the Localism Act 2011, which led to the listing of my property as an Asset of Community Value (ACV). The central issue is the respondent’s broad interpretation, which allows properties with slim and unlikely prospects of future community use to be listed as ACVs, contrary to the legislative intent and judicial precedents.

1. Interpretation of s88(2)(b):

○ The respondent misinterprets *R(TV Harrison CIC v Leeds School Sports Association* by failing to recognise that "realistic" implies a reasonable likelihood, not just theoretical possibilities. The requirement is for a comprehensive and logical assessment.

2. Realism vs. Fanciful Prospects:

○ The distinction between 'not fanciful' and 'realistic' requires a threshold of plausibility grounded in current understanding. The respondent's overreliance on the "not fanciful" standard risks misapplying the Localism Act by including remote chances as realistic prospects.

3. Application in Other Legal Contexts:

○ Analogies to other legal contexts underscore the necessity of a sound logical basis. The inherent contradiction in deeming a scenario both "slim" and

"realistic" highlights the need for a logical basis for future community use.

4. Practicalities:

○ Evaluative conclusions must be based on a robust analysis of practical considerations. The lack of consideration of relevant practical issues undermines the validity of the Judge's conclusion.

31. The appeal seeks to ensure that the term "realistic to think" is interpreted in line with the legislative intent and judicial precedents, requiring a reasonable and substantial likelihood of future community use. The current listing of the property as an ACV based on slim and unlikely prospects does not meet this standard and should be reconsidered.

Conclusion

32. The appellant respectfully requests that the Upper Tribunal orders the removal of the property from the ACV register. This action is sought on the grounds that the current listing does not meet the legislative standard of "realistic to think," given the slim and unlikely prospects for future community use."

14. Neither party sought an oral hearing of the appeal and I am satisfied that I do not need to hold one in order to determine the matter.

Analysis

The Case Law

15. I shall begin by considering the decision of Peter Lane J in ***R(TV Harrison)***. Although it is not the first in chronological order, it is useful to start with this case since it sets out the germane parts of several earlier decisions at first instance and also considers the decision of the Court of Appeal in ***Banner Homes***. I have also set out the relevant parts of the decision at somewhat greater length than Judge Neville did at first instance. Peter Lane J said that

"24. In *Banner Homes Limited v St Albans City and District Council and Anor* [2018] EWCA Civ 1187, Sharp LJ drew on judgments of the First-tier Tribunal regarding appeals against decisions of local authorities to include land in the statutory lists, in order to give the following overview:

> "10. ... The effect of the listing is that, generally speaking, an owner intending to sell the asset must give notice to the local authority. A community interest group then has six weeks in which to ask to be treated as a potential bidder. If it does so, the sale cannot take place for six months. The theory is that this period, known as a moratorium, will allow the community group to come up with an alternative proposal; although at the end of moratorium, it is entirely up to the owner whether the sale goes through, to whom and for how much. There are arrangements for the local authority to pay compensation to an owner who loses money in consequence of the asset being listed.
>
> 11. The Scheme therefore confers a right to bid (to a local community group as defined in the 2011 Act), but not a right to buy."

25. At paragraph 8 of her judgment, Sharp LJ set out passages from the Ministerial Foreword to the non-statutory advice note for local authorities issued by the Department for Communities and Local Government on 4 October 2012:

> "From local pubs and shops to village halls and community centres, the past decade has seen many communities lose local amenities and buildings that are of great importance to them. As a result they find themselves bereft of the assets that can help to contribute to the development of vibrant and active communities. However, on a more positive note, the past decade has also seen a significant rise in communities becoming more active and joining together to save and take over assets which are significant for them.
>
> Part 5 Chapter 3 of the Localism Act, and the Assets of Community Value (England) Regulations, which together deliver the Community Right to Bid, aim to encourage more of this type of community-focused, locally-led action by providing an important tool to help communities looking to take

> over and run local assets. The scheme will give communities the opportunity to identify assets of community value and have them listed and, when they are put up for sale, more time to raise finance and prepare to bid for them.
>
> This scheme requires an excellent understanding of the needs of the local community. As such local authorities will have a pivotal role in implementing the Community Right to Bid, working with local communities to decide on asset listing, ensuring asset owners understand the consequences of listing, enforcing the Moratorium period and in taking decisions as part of any appeals process."

26. In the Court of Appeal, the *Banner Homes* case involved the interpretation of section 88(2)(a) of the 2011 Act. It is, however, important to observe what Sharp LJ had to say about the "future use point" in section 88(2)(b), since it is specifically with that issue that I am concerned:

> "32. Banner Homes also argued at the review hearing, and before the First-tier Tribunal that in view of the fact that the Field had now been fenced in, it was not realistic to think the Field could be used *in the future* to further the social wellbeing or social interests of the local community i.e. that regardless of its central argument on "actual use", the respondents could not satisfy the requirements of section 88(2)(b). In this connection, Banner Homes relied on a statutory declaration made on 3 September 2014 by its planning director, Mr Paul McCann which confirmed Banner Homes' intention not to dispose of the Field, to keep the fencing in place, to maintain the exclusion of the public from the Field apart from the public footpaths, and to promote the Field for development through the Council's Local Plan process. This point was called, below "the future use point."
>
> 33. As to that, the First-tier Tribunal found as a fact that the requirements of section 88(2)(b) were satisfied, giving these reasons at para 38:
>
>> "Given the long history of peaceable, socially beneficial (if formally unauthorised) use of the Field, and of the previous views of the owners, I do not consider that it is at all fanciful to think that, in the next five years,

> > there could be non-ancillary use of the land, along the lines that pertained up to September 2014. The timing of the decision to fence the footpaths – coming hard upon the listing under the 2011 Act – strikes me as material. Also of significance is the uncertain present planning position of the land, where a recent application for the grazing of horses has been refused. Whilst I note Banner Homes' current stated stance, it is not fanciful, given the history of the Field, to think that Banner Homes may well conclude that their relations with the local community will be best served by restoring the *status quo* or by entering into some form of licence arrangement with the Residents' Association or similar grouping."
>
> 34. The Upper Tribunal rejected Banner Homes' argument that in referring to what was "not fanciful" rather than what was "realistic" for the purposes of section 88(1)(b) and 88(2)(b), the First-tier Tribunal had made an error of law. The Upper Tribunal also rejected the argument that the First-tier Tribunal's decision on "the future use point" was contrary to the evidence, holding that what is realistic for the future, is a matter of judgment for the local authority (or on appeal, for the First-tier Tribunal) and is not a matter of "veto for the landowner", concluding that: "The First-tier Tribunal made a finding that was open to it on the particular facts of this case, especially in view of the history of use, and for the reasons that it gave." See paras 34 to 39.
>
> 35. The Upper Tribunal refused Banner Homes' application for permission to appeal to the Court of Appeal on "the future use point", as did I on the papers, on 27 February 2017. The application for permission on this Ground has not been renewed."

27. In approaching the issue of future use (section 88(1)(b)) as it did, the First-tier Tribunal in *Banner Homes* adopted a construction of what the words "realistic to think" mean, which was first articulated by Judge Warren who, as President of the General Regulatory Chamber of the First-tier Tribunal, decided the first appeals brought against decisions to include land and buildings in the list of assets of community value.

28. In one such case, *Patel v London Brough of Hackney and Anor* (CR/2013/0005) Mr Patel had bought "a pub named the Chesham Arms which had been there since 1866". Mr Patel closed the pub as he "wants to turn it into flats" (paragraph 2).

29. At paragraphs 8 to 11, Judge Warren held as follows:

> "8. In earlier submissions it had been suggested on behalf of Mr Patel that it was essential to demonstrate on the balance of probabilities that the Chesham would reopen as a pub. At the hearing, Mr Turney resiled from that submission and in my judgement he was right to do so. The question posed by Parliament is whether "it is realistic to think" that there could be such an outcome. This should not be confused with the test which courts and tribunals use as the civil standard of proof; a test designed to produce one outcome. The language of the statute is consistent with a number of realistic outcomes co-existing.
>
> 9. It is convenient to deal next with a submission on behalf of the appellant in his reply concerning the weight to be given to Mr Patel's intentions. It is said that:-
>
>> "The intentions of the appellant are clear and should indeed be the determinative factor in this appeal."
>
> 10. Whilst I have no doubt that it is reasonable to take into account Mr Patel's intentions as part of a general consideration of the circumstances, I cannot accept this assertion about the weight to be given to them.
>
> 11. If correct, it would seem to follow that that an owner need only say "I have set my face like flint against any use of community value" and listing will be avoided. This almost makes the scheme voluntary. I think it more reasonable to take into account Mr Patel's intentions as part of the whole set of circumstances. After all, they are the <u>current</u> owner's <u>present</u> intentions and the legislation requires an estimate of what will happen over the next five years" (original emphases).

30. In *Gullivers Bowls Club Ltd v Rother District Council and Anor* (CR/2013/0009), Judge Warren heard an appeal by Gullivers Bowls Club Ltd, the owner of land used as a bowls club, which appealed against the inclusion of its land in the statutory list, following nomination by a Community Association. Judge Warren held:

> "11. Turning to the future condition in Section 88(1)(b) Mr Cameron [representing the Bowls Club] submits that the existing bowls club has no realistic prospect of continuing. He points to the poor state of the buildings and the finances and relies on a report prepared by GVA. This finds that Gullivers is not commercially viable. Mr Cameron submitted that since listing lasts for five years, my starting point in considering whether the future condition was satisfied, should be whether the bowls club could continue in existence for that length of time.
>
> 12. I do not accept that the statute requires me to foresee such long-term viability. Indeed, it seems in the very nature of the legislation that it should encompass institutions with an uncertain future. Nor, in my judgment, is commercial viability the test. Community use need not be and often is not commercially profitable.
>
> 13. On this issue, I accept the submissions made by Mr Flanagan. Gullivers may be limping along financially but it still keeps going and membership is relatively stable. Of course it is possible that something could go drastically wrong with the buildings and Gullivers would not have the capital to repair them; but that has not happened yet and, in an institution that has lasted for 50 years, it would be wrong to rule out community spirit and philanthropy as resources which might then be drawn on. In any event, should the site cease to be land of community value, Rother would have power to remove it from the list."

32. In *Worthy Developments Ltd v Forest of Dean District Council and Anor* (CR/2014/0005), Judge Warren dismissed the appeal of a developer, which had bought a former pub known as the "Rising Sun" outside Chepstow, and wished to build two four-bedroomed houses on the site. A planning application to that effect had been refused but was likely to be appealed. The respondent accepted nomination by the "Save our Sun

Committee" of the land and building comprising the pub. On the issue of section 88(1)(b), Judge Warren held:

> "17. In respect of the future condition, Worthy Developments Ltd asked me to have regard to their intention to develop the plot to provide two houses. I take that into account although I balance it with the fact that they have not yet obtained the necessary planning permission. I also take into account the remoteness of the public house which must compound the general malaise affecting public houses nationally.
>
> 18. The written submissions ask me to consider which was the more likely to happen, that planning permission should be obtained and houses be built, or that the building be revived as a pub? In my judgment, however, to approach the issue in this way is to apply the wrong test.
>
> 19. I agree with the council. The future is uncertain. Worthy Developments Ltd may or may not obtain their planning permission. They may or may not sell the land. The Save our Sun Committee may or may not see their plans reach fruition. It remains still a realistic outcome that The Rising Sun might return to use either as a traditional pub or as a pub/shop/community centre as envisaged by the committee.
>
> 20. My conclusion in this respect is reinforced by the pledges of support and petitions gathered by our (sic) Save our Sun Committee. It is true that they have not yet made an offer with a firm completion date but their proposals are not fanciful. It is enough that return to use as a pub or some other venture furthering the social wellbeing or interests of the local community be realistic."

33. In *J Haley (Old Boot Inn) v West Berkshire District Council and Anor* (CR/2015/0008), the proprietor of the Old Boot Inn appealed against the decision to include those premises in the statutory list. The First-tier Tribunal held as follows:

> "17. As has been pointed out in other cases, the requirement in section 88(1)(b) is that it is "realistic to think that there can continue to be" relevant use of the building. Whether something is realistic does not mean that it must be more likely than not to

happen. A use may be "realistic", even though it is one of a number of possibilities.

18. In paragraph 17 of his report, the planning inspector found that Mr Haley's:-

> "financial accounts would be a significant consideration for any person or company looking to take on the public house as a business. No doubt, it could influence whether the new operator could raise finance. However, possible new operators will differ in their need to raise finance and the operating profit of a previous operator will not necessarily be the same as another operator. Therefore, estimating trading potential rather than the actual level of trade under existing control is highly relevant which is the approach taken by the DCL report and the RBCPL." [DCL is a Council-commissioned report and RBCPL is the Re-boot Community Pub Ltd]

19. I agree with the inspector's conclusion on this issue. If the second respondent acquires the Old Boot Inn allowing a tenant to run the business as a commercial concern (from the tenant's perspective), that is clearly a different proposition from an outside purchaser of the Old Boot Inn, who might have to factor-in the cost of acquiring the property in formulating its view of the business's viability. Furthermore, as Mr Morgan's report makes clear, if a couple were to purchase the Old Boot Inn as both a family home and a place of business, they would make more intensive and cost-efficient use of the asset than Mr Haley appears to be doing. In short, Mr Haley's way of running the Old Boot Inn is far from being the only viable means of doing so.

20. For the purposes of determining this appeal, it is unnecessary for me to prefer one "viability method" over another. Notwithstanding the points made by Mr Culverhouse, it has not been shown that Mr Morgan's method is so deficient that it cannot support a conclusion that it is realistic to think that relevant community use can continue. Indeed, the points made above regarding the consequences of the Old Boot being owned by, respectively the second respondent or by a couple

> making maximum use of the residential opportunities of the property do not require one to choose one particular profit-calculating method over another.
>
> 21. Finally, the planning decision is manifestly relevant to the section 88(1)(b) issue in that, since planning permission for change of use has been refused on appeal, it must, as matters stand, be realistic to think that Mr Haley will continue to run the Old Boot Inn as a pub, furthering local social wellbeing and interests; alternatively, that a buyer may emerge for the Old Boot Inn as a pub."

…

41. Although the decisions of the First-tier Tribunal have no authority as precedents, as such, there can in my mind be no doubt that the construction of section 88(2)(b) adopted by Judge Warren, and thereafter consistently followed, is the correct one. The legislation does not require there to be only one "realistic" future use of a building or other land. Several possibilities may each be realistic. The legislation does not require a potential future use to be more likely than not to come into being, in order for it to be realistic. The fact that the most likely of a number of scenarios is one which would not satisfy the statutory criteria (e.g. a change of use from pub to residential) does not mean that any other potential future use is, without more, rendered unrealistic. It is only if the non-compliant scenario is so likely to occur as to render any compliant scenario unrealistic, that the non-compliant scenario will be determinative of the nomination.

…

48. By using the "realistic to think" test, Parliament has set a standard which means that a local authority must not approach the future use of land as necessarily a binary issue, as between the current intention of the owner and the current proposals of the nominator. Although the development intentions of the owner will be relevant, particularly in the planning context, any factors casting doubt on the owner's ability to achieve those aims must be considered. It is on the strength of those doubts that the "realistic" nature – or otherwise – of the envisaged social use may depend."

16. At this point it is convenient to set out the conclusions of Upper Tribunal Judge Levenson in the ***Banner Homes*** case in the Upper Tribunal [2016] UKUT 232 (AAC), to which Sharp LJ referred when that case reached the Court of Appeal:

> **“The Future Use Point**
>
> 34. Section 88(2)(b) sets out as one condition for listing that “it is realistic to think that there is a time in the next five years” when there could be a relevant use of the building or other land.
>
> 35. The First-tier Tribunal noted that it was said on behalf of the appellant that it was not and never been its intention to grant rights of access or use of the land to any person other than their own employees, agents and contractors or to accept liability for any injury to those unlawfully accessing the land, particularly given its overgrown condition.
>
> 36. However, in paragraph 38 of its Decision Notice the First-tier Tribunal said:
>
>> 38. I nevertheless find, as a fact, that the requirements of section 88(2)(b) are satisfied. Given the long history of peaceable socially beneficial (if formally unauthorised) use of the Field, and of the previous views of its owners, I do not consider that it is all fanciful to think that, in the next five years, there could be non - ancillary use of the land, along the lines that pertained up to September 2014. The timing of the decision to fence the footpaths – coming hard upon the listing under the 2011 Act – strikes me as material. Also of significance is the uncertain present planning position of the land, where a recent application for the grazing of horses has been refused. Whilst I note Banner Homes’ current stated stance, it is not fanciful, given the history of the field, to think that Banner Homes may well conclude that their relations with the local community will best be served by restoring the *status quo* or by entering into some form of licence arrangement with the Residents’ Association or similar grouping.
>
> 37. The appellant attacks this on two grounds. The first is that the First-tier Tribunal applied the incorrect test in considering whether the recommencement for use was

"fanciful" rather that whether it was "realistic". It is argued that these terms are not synonymous and that the First-tier Tribunal has used a lower threshold than "realistic". The local authority argues that "not fanciful" is a "perfectly legitimate synonym for "realistic" and cites other legal contexts in which the words have been sued interchangeably.

38. In my opinion it is always wiser to use the statutory language. That is more likely to focus the mind and avoid the risk of error. However, in the present context I cannot envisage any empty space between what is "not fanciful" and what is "realistic" and the First-tier Tribunal was not in error of law on this point.

39. The other ground is that the First-tier Tribunal reached its decision "in spite of unchallenged evidence" given on behalf of the appellant as to the fencing and notices. Although findings of fact must be based on the evidence in a particular case, the question of what is realistic for the future is a matter of judgment for the local authority or, on appeal, for the First-tier Tribunal. It is not a matter for veto by the landowner. The First-tier Tribunal made a finding that was open to it on the particular facts of this case, especially in view of the history of use, and for reasons that it explained.

40. For the above reasons this appeal does not succeed."

17. In ***Carsberg*** Judge Findlay said that

"13. In relation to the requirements of section 88(2)(b), the issue before me is whether 'it is realistic to think' that there could be such use at a time in the next five years. This is not the same as saying that the use will resume only that it is realistic to think. What is realistic may admit a number of possibilities none of which needs to be the most likely outcome. Whether something is realistic does not mean that it must be more likely than not to happen. The presence of one possibility does not exclude the possibility of others.

14.The term 'realistic' is not defined in in the Act or in the Regulations. It is my view that Parliament deliberately chose this expression and it would not be appropriate to define the term further. The Department for Communities and Local Government's Non-statutory Advice Note offers no guidance.

15. I find that the term ‘realistic’ should be interpreted as it is used in everyday conversation and language and I rely on The Oxford English Dictionary definition of ‘realistic’ as having to showing a sensible and practical idea of what can be achieved or expected and representing things in a way that is accurate or true to life.

16. I find that neither Nominator has stated that it had an intention to bid to acquire the Property notwithstanding that the First Nominator stated that the group wished to maintain the Property as a public house with the additional functions of a library, coffee mornings, book clubs, polling booth, shop etc. No details or plans has been put forward to explain and support how any of these aspirations would be achieved.

17. I find that the Property is in some disrepair and would by necessity require some investment to achieve the stated wishes. No plans or details have been provided about how any funds could be found to undertake the necessary building and refurbishment work.

18. On the basis of the evidence before me I find that it is unrealistic to consider that the Property could be run as a public house with the additional functions of a library, coffee mornings, book clubs, polling booth, shop etc. I find that it is unrealistic to consider that the Property could be run as a community hub or venue for any of community activities mentioned in the nomination forms.

19. It is important when considering this issue not to concentrate on the hard-headed commercial or financial analysis and a detailed business case is not required, however, it is necessary to show a sensible and practical idea of what can be achieved or expected.

20. No plan or proposal has been formulated and submitted and there is no evidence of any attempts to raise funds or plans setting out, even in a skeleton form, how the aspirations could be achieved through community effort, enthusiasm or otherwise. Although there is no requirement for a business case and the case law suggests that the ‘realistic to think’ test is a low one, to satisfy the requirements of section 88(2)(b) there has to be at least some indication that the aspirations are realistic. I am not persuaded that there are any

means to implement and carry out the aspirations of the community.

21. Accordingly the appeal is allowed. It is not realistic to think that there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community and section 88(2)(b) of the Act is not satisfied."

18. Finally in ***Roffe*** Judge O' Connor held that

"Issue (d): Section 88(2)(b) of the Localism Act 2011

30. The question posed by Parliament is whether it is realistic to think that there could be within the next five years non-ancillary use of the building that would further, whether or not in the same way as before, the social wellbeing or social interest of the local community. I am not required to decide what outcome or what use of the building is the most likely, or whether one outcome or use of the building is more likely than another. All I am required to consider is whether one realistic non-ancillary use of the building within the next five years would further the social wellbeing or social interests of the local community.

31. In his submissions, Mr Roffe points to the fact that the property was previously marketed for over nine months and that the local community did not make a bid. He further identifies that Winterbourne parish has another licensed premises within its boundary, six more within a two-mile radius and eleven within a three-mile radius.

32. There is a dearth of evidence before me about the future of the property. It appears from the documents that I do have that both the appellant (in person) and the Council have undertaken viability assessments. These have not been produced to the Tribunal, but I draw from references made by the respective parties in the documents that the reports reached contradictory positions. I can say little more on this topic in the absence of having had sight of the reports themselves. What I do find is that it has not been demonstrated as being likely that the trading of The Winterbourne Arms in the next five years as a public house or a bar and restaurant is economically unviable. Likewise, the

contrary position has also not been demonstrated. In any event, the fact that Mr Roffe has concluded that the Winterbourne Arms is not viable does not, even if accurate, rule out a finding that it is realistic to think that within the next five years the premises will be used in a way which furthers the social wellbeing or social interests of the local community. I observe in particular that it is not said that Mr Roffe's viability assessment included a consideration of the possibility of The Winterbourne Arms being a community run public house/gastropub, or other community run venture.

33. Moving on, whilst regard must be had to the fact that the local community group have not made a bid in the past, I note the terms of the evidence before me to the effect that the Parish continue to attempt to secure funding to purchase the Winterbourne Arms. It is not for me to consider whether a bid from the local community group is likely. Nevertheless, given the information before me which I accept as true, I find that the purchase or lease of The Winterbourne Arms by the local community group remains at least a realistic possibility.

34. I further observe that the documents before me disclose that the appellant (or Rookery Taverns Limited) made an unsuccessful planning application for a change of use of The Winterbourne Arms. Once again, the documents in relation to this are not before me. It is, of course, possible that Rookery Taverns Limited will make a fresh application for planning permission (or be successful on appeal if that appeal has yet to be determined) to put The Winterbourne Arms to a use which will not likely further the social wellbeing or social interest of the local community, and that such permission will be granted. However, even if this were a likely event, which I find it is not given the decisions thus far made and the limited other evidence on this issue before me, this of itself does not preclude the possibility that the premises will be used within the next five years for a non-ancillary use which does further the social wellbeing or social interests of the local community.

35. In summary, I accept that the future of The Winterbourne Arms is fraught with uncertainty, which is only fuelled by the current uncertain trading conditions for such establishments. It is impossible to identify what the likely future of the premises might be. However, as already indicated, the task for me is not to determine the likely future use of The Winterbourne Arms, but to

> consider and assess whether one realistic non-ancillary use of the property would lead to the furtherance of the social wellbeing or social interests of the local community.
>
> 36. In my conclusion, it is realistic to think that the premises will trade as a public house or gastropub within the next five years. I take account, when coming to this conclusion, of the fact that the property is currently 'on the market', that no offers that the owners deem appropriate have thus far been made for the property and that Mr Roffe asserts that the property itself requires substantial investment. There is some dispute as to whether the property is currently being marketed at a realistic value, but as Mr Roffe states the value of the property is determined by *"how much someone will pay and how much we will accept"*. I observe that there was no exploration at the hearing of whether Rookery Taverns Limited would countenance selling at a lower price or leasing at a reduced rent, if the only alternative was for the premises to remain closed. Nor was there exploration at the hearing of proposals for the premises if it were not sold. All of this reinforces my view that one realistic possibility is that The Winterbourne Arms will reopen as a public house or gastropub in the next five years, whether this be under the tenure of Rookery Taverns Limited or otherwise. If it does so, I find that it is realistic to think that it will resume its position as a social meeting place or events space for local residents, as was previously the case The fact that there are alternative premises within, or just outside, the parish where such activities can be carried out, does not render it unrealistic to think that they would not be carried out in The Winterbourne Arms if it were to be reopened.
>
> 37. I, therefore, conclude that it is realistic to think that there is a time in the next five years when there will be non-ancillary use of The Winterbourne Arms that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community. As such, the requirements of section 88(2)(b) of the 2011 Act are met."

19. From these decisions the following propositions of law emerge with regard to s.88(2)(b):

(1) the statute does not require long-term or commercial viability: ***Gullivers*** at [12], ***Roffe*** at [32]

(2) the test is not to consider which outcome is more likely than not: ***Worthy Developments*** at [18], ***J Haley*** at [17], ***Carsberg*** at [13], ***Roffe*** at [30], ***R(TV Harrison)*** at [41]

(3) the test is not one of the civil standard of proof, which is designed to produce one outcome; the language of the statute is consistent with a number of realistic outcomes co-existing: ***Patel*** at [8], ***Carsberg*** at [13], ***Roffe*** at [35-36], ***R(TV Harrison)*** at [41]

(4) referring to a test of "not fanciful" rather than what is realistic is not an error of law: ***Banner Homes*** (CA) at [34], (UT) at [37-38], ***Worthy Developments*** at [20]

(5) "realistic" means having to show a sensible and practical idea of what can be achieved or expected and representing things in a way which is accurate or true to life: ***Carsberg*** at [15]

(6) it is important not to concentrate on the hard-headed commercial or financial analysis and a detailed business case is not required, but it is necessary to show a sensible and practical idea of what can be achieved or expected: ***Carsberg*** at [20]

(7) the test is a low one, but there must be at least some indication that the aspirations are realistic: ***Carsberg*** at [20].

20. In ***Uptin House v Newcastle CC*** CR/2017/0006 at [55] Judge Findlay stated that

> "The standard of proof in applying this test is the normal civil standard of proof i.e. the balance of probabilities, that is to say, more likely than not. On the basis of the case law I have considered that what is "realistic" may admit a number of possibilities none of which needs to be the most likely outcome. I have borne in mind that the case law suggests that it is important not to concentrate

> too closely on a hard-headed commercial or financial analysis and the legislation does not require a detailed business case."

21. It follows from what I have said in the previous paragraph that I do not consider the first sentence of that paragraph to be an accurate statement of the law, although the second and third sentences are.

The Decision under Appeal

22. Judge Neville reviewed the case law, particularly the decision of the High Court in ***R(TV Harrison)*** at [28-29] and considered at [37] that the evidence in the case before him was finely balanced and that there were points in favour of both of the rival contentions.

23. In favour of the Council's contention he found at [31] that the case for inclusion was supported by there being a real chance that change of use to residential accommodation would be refused and by priority being given to any community use (whether or not as a pub). He also took into account the other pub, "The Bevy", which had benefited from community ownership to overcome its unattractive commercial prospects. He also set out the Council's reason for the inclusion of the pub in the list at [30].

24. Against that he considered that the chance of community services was not increased by the offer of services from the FMA, whose lack of engagement with the appeal made it unlikely that their prior activism would turn into future action, a conclusion which he reiterated in [36], where he found that FMA's lack of present involvement made it unlikely that there was any current real proposal to purchase and operate the Montreal Arms.

25. In favour of the Appellant's position he took on board at [32] the contentions put forward by Mr Southall in relation to the pub's parlous financial situation when it closed, the ned for significant renovations and repair, problems applying for a new premises licence owing to the density of local residential dwellings and scarce parking nearby. At [33-34] he also took account of the evidence of Mr Walker, which he found to be frank and

grounded in practicality, although in [38] he also found it to be myopic about what a pub would look like.

26. He concluded at [39] that the rival structural engineering reports did not disclose that any major works had to be concluded before the building could open as a pub at all.

27. It was in that context that he decided that

> "37. The evidence is finely balanced, and it is certainly unlikely that the Montreal Arms will see any use in the next five years that would further the social wellbeing or social interests of the local community. I nonetheless reach the conclusion that it is realistic.
>
> 38. … If the question posed was whether the Montreal Arms could be such a pub [as a successful commercial enterprise] in the next five years, I would agree that it is unrealistic. Yet the downturn in fortunes for tied houses and chain pubs has also seen opportunities for smaller, independent and even hobbyist establishments. While the Montreal Arms was unprofitable before its closure, it still did not close until forced to do so by the pandemic. Just as it was sustained then by a landlady who was happy to treat it just as somewhere to live, it is realistic to think that it might likewise be opened in the future by a person or group that does not need it to turn a profit, or even to pay its own way. Not only might a community group or individual be willing to bear a pub as a loss-making venture, some pubs are opened as a retail outlet for micro and small breweries. While these face similar challenges to the larger chains of the sort Mr Walker describes, they have been less hard hit. Likewise, some small and independent pubs strike deals with local takeaways and restaurants rather than run their own kitchens – the notion that a kitchen is necessary to survive is not representative of the many and varied pubs operating in the UK. There is a realistic chance that the use I have described would add value to the community distinct from that offered by other nearby pubs and the local church hall. While 'The Bevy' has faced existential commercial obstacles, it has still operated for a while – that is all s.88(2)(b) requires.
>
> 39. … if Dragonfly is unsuccessful in obtaining planning permission for residential use then the medium and long

> term works will be squarely reflected in a reduced purchase price. If facing significant delay in achieving its ambitions Dragonfly might equally decide to cut its losses by renting out the pub to the type of operator I describe in the above paragraph, even though it has set its face against it in this appeal. I am unwilling to accept in the absence of clearer evidence that obtaining a premises licence would be impossible without unrealistic additional renovations.
>
> 40. In conclusion, while the prospects are slim that the Montreal Arms will see any use in the next five years that would further the social wellbeing or social interests of the local community, it is still realistic to think that it could."

28. The essence of the Appellant's argument is that, because Judge Neville found at [37] that it was unlikely that the Montreal Arms would see any use in the next five years which would further the social wellbeing or social interests of the local community and at [40] that the prospects were slim that the Montreal Arms would see any use in the next five years which would further the social wellbeing or social interests of the local community, he therefore fell into error in finding that it was still realistic to think that it could.

29. Instead, as it is put in the grounds of appeal and the reply, the "realistic to think" test necessitated the evaluation of the likelihood that the asset would be employed in a manner conducive to the community's welfare within the stipulated time period, that the Tribunal failed to establish the viability of a compliant scenario and that the "realistic to think" test was intended to mean something which must be probable, not just possible ("probable scenarios are those with a high likelihood of occurring" or "a strong probability").

30. It is, however, clear from the authorities which I have set out at some length and the principles which I have distilled from them at paragraph 19 above that the test under the 2011 Act does not require findings of evaluation of likelihood, of commercial viability or of probability.

31. On the contrary, the language of the statute is consistent with a number of realistic outcomes co-existing, the test is a low one, but there must be at

least some indication that the aspirations are realistic, referring to a test of “not fanciful” as a synonym for “realistic” is not an error of law and what is “realistic” means a sensible and practical idea of what can be achieved or expected, without concentrating on hard-headed commercial or financial analysis and a detailed business case is not required.

32. The Tribunal did not misapply the decision in ***R(TV Harrison)*** at [41] nor did it fail to carry out a nuanced and evidence-based assessment of potential future uses. On the contrary, that is precisely what it did. Having carried out that nuanced and evidence-based assessment it found that, while the prospects were slim that the Montreal Arms would see any use in the next five years which would further the social wellbeing or social interests of the local community, it was still realistic to think that it could. I can see no error of law in that conclusion. The short point is that it is the Appellant’s contention that the words “realistic to think” require “a reasonable and substantial *likelihood* of future community use” and that is not the test.

33. I do not accept that on the material points in issue the decision in ***Carsberg*** says anything different from the other cases; it is evident from [13] that Judge Findlay was following the established jurisprudence, not in any sense diverting from it.

34. Nor do I accept that the interpretation of the legislation which I have set out above has the consequence that it would create an untenable situation for property owners who would have no meaningful way to argue that their properties should not be listed. It will all depend on the facts of the individual case. ***Carsberg*** fell on one side of the line, as did cases such as ***Uptin House***; this case falls on the other and it is inevitable that some cases, such as this one, will be finely balanced. In short, the Tribunal Judge considered the statutory framework and the decided cases, evaluated the evidence in the light of the statute and the cases and reached a decision which he was entitled to reach.

35. As Lewison LJ said in ***Volpi v Volpi*** [2022] EWCA Civ 464

> “2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:
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> i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

36. I re-emphasise the point that it is not for an appellate tribunal to come to an independent conclusion as a result of its own consideration of the evidence. Whether I would have reached the same conclusion as Judge Neville is not the point, although I am far from saying that I would not have done. The question for the Upper Tribunal is whether the judge's finding that, whilst it was unlikely that the Montreal Arms would see any use in the next five years which would further the social wellbeing or social interests of the local community, nevertheless it was still realistic to think that it could, was rationally insupportable. In my judgment it was not. In my judgment the Judge was entitled to reach the conclusion which he did. I therefore dismiss the appeal.

37. I am also satisfied that the Tribunal provided adequate reasons for its conclusions. The test for adequacy of reasons in a tribunal decision applies across tribunals and courts more generally. I remind myself of a couple of authorities from the case law which are cited less often, but which helpfully assist in providing a flavour of the approach required.

38. The first is the decision of Mr Commissioner Rowland (as he then was) in a social security case, ***CIB/4497/1998***:

> "5. It cannot be overemphasised that there is no simple formula for writing reasons for a decision. The minimum requirements are that the unsuccessful party must know why his or her principal submissions have been rejected and that the process of the tribunal's reasoning must be sufficiently clearly outlined to avoid any reasonable suggestion that the tribunal have made an error of law. Obviously, the more clearly the reasons are expressed in the decision itself the better, but lack of clarity will not render a decision erroneous in point of law if the reasons can nevertheless be discerned with reasonable diligence from the decision and surrounding documents. A statement of reasons may be adequate even though it could have been improved ... Those who assert that a tribunal's reasoning is inadequate must themselves explain clearly both the respect in which it is inadequate and why the inadequacy is of significance. It must be borne in mind that there are limits to the extent to which a tribunal is obliged to give reasons for reasons and to the extent to which they can be expected to give reasons for matters of value judgement. Furthermore, it is clear from *R(A) 1/72* that it is not obligatory to deal with every piece of evidence and that, while "a decision based, and only based, on a conclusion that the total effect of the evidence fails to satisfy, without reasons given for reaching that conclusion, will in many cases be no adequate decision at all", that will not always be the case. What is required by way of reasoning depends very much on the circumstances of the particular case before the tribunal."

39. The second decision is from the employment tribunal context, but again the principles governing appellate review of adequacy of reasoning in tribunals are common across the board. They were helpfully expressed as follows by the Employment Appeal Tribunal ("EAT", Elias J presiding) in ***ASLEF v Brady*** [2006] IRLR 576 at para [55] (so for "EAT" read "Upper Tribunal" and for "ET" read "First-tier Tribunal"):

> "The EAT must respect the factual findings of the Employment Tribunal and should not strain to identify an error merely because it is unhappy with any factual conclusions; it should not 'use a fine toothcomb' to subject the reasons of the

> Employment Tribunal to unrealistically detailed scrutiny so as to find artificial defects; it is not necessary for the Tribunal to make findings on all matters of dispute before them nor to recount all the evidence, so that it cannot be assumed that the EAT sees all the evidence; and infelicities or even legal inaccuracies in particular sentences in the decision will not render the decision itself defective if the Tribunal has essentially properly directed itself on the relevant law."

40. The test for adequacy of a tribunal's reasons does not exist in isolation. It has to be applied in the context of the principles more generally governing appellate review of first instance fact-finding specialist tribunals. Upper Tribunal Judge Wikeley set these out in his recent decision in ***NC (dec'd) by JC v Secretary of State for Defence (AFCS)*** [2024] UKUT 170 (AAC):

> **"The role of appellate review in appeals from a specialist first instance jurisdiction**
> 36. The jurisprudence on the standard of appellate review exercisable in an error of law jurisdiction demonstrates that any challenge which turns on a specialist tribunal's treatment of the facts needs to be approached with a degree of circumspection. Three interlocking themes or principles are evident in this jurisprudence. The first is that appropriate recognition must be accorded to the first instance tribunal as the primary fact-finder. The second is that due note should be taken of the expertise of a specialist tribunal. The third is that the tribunal's reasons for its fact-finding need to be at least adequate, but not necessarily optimal.
>
> 37. The significance of the first of this trilogy of principles is captured in the following passage from the judgment of Carr LJ (as she then was) in *Clin v Walter Lilly & Co Ltd* [2021] EWCA Civ 136, dealing with grounds of appeal that amounted to challenges to the trial judge's findings of fact and/or evaluative findings:
>
>> '83. Appellate courts have been warned repeatedly, including by recent statements at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The reasons for this approach are many. They include:

i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed;

ii) The trial is not a dress rehearsal. It is the first and last night of the show;

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case;

iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping;

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence);

vi) Thus, even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

…

85. In essence the finding of fact must be plainly wrong if it is to be overturned. A simple distillation of the circumstances in which appellate interference may be justified, so far as material for present purposes, can be set out uncontroversially as follows:

i) Where the trial judge fundamentally misunderstood the issue or the evidence, plainly failed to take evidence in account, or arrived at a conclusion which the evidence could not on any view support;

ii) Where the finding is infected by some identifiable error, such as a material error of law;

iii) Where the finding lies outside the bounds within which reasonable disagreement is possible.

86. An evaluation of the facts is often a matter of degree upon which different judges can legitimately

> differ. Such cases may be closely analogous to the exercise of a discretion and appellate courts should approach them in a similar way. The appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the trial judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion.
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> 87. The degree to which appellate restraint should be exercised in an individual case may be influenced by the nature of the conclusion and the extent to which it depended upon an advantage possessed by the trial judge, whether from a thorough immersion in all angles of the case, or from first-hand experience of the testing of the evidence, or because of particular relevant specialist expertise.'

38. The second principled theme, picking up on that final observation, is exemplified by Lady Hale's judgment in *Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49. Giving guidance in the context of specialist tribunals (that was an asylum case, but the same principle applies here too in an appeal from the WPAFCC), Lady Hale held as follows:

> 'This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently.'

39. The third theme concerns the standard required for the adequacy of reasons. The relevant authorities were reviewed recently by a three-judge panel of this Chamber, of which I was a member, in *Information Commissioner v Experian Ltd* [2024] UKUT 105 (AAC):

> ‘63. There are many appellate authorities on the adequacy of reasons in a judicial decision. In this chamber of the Upper Tribunal, the principles were summarised in, for example, *Oxford Phoenix Innovation Ltd v Information Commissioner & Medicines and Healthcare Regulatory Agency* [2018] UKUT 192 (AAC) at [50-54]. At its most succinct, the duty to give reasons was encapsulated at [22] in *Re F (Children)* [2016] EWCA Civ 546 (one of the authorities cited there), as follows:
>
> > ‘Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable.’
>
> 64. As is well-known, the authorities counsel judicial “restraint” when the reasons that a tribunal gives for its decision are being examined. In *R (Jones) v FTT (Social Entitlement Chamber)* [2013] UKSC 19 at [25] Lord Hope observed that the appellate court should not assume too readily that the tribunal below misdirected itself just because it had not fully set out every step in its reasoning. Similarly, “the concern of the court ought to be substance not semantics”: per Sir James Munby P in *Re F (Children)* at [23]. Lord Hope said this of an industrial tribunal’s reasoning in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 at [59]:
>
> > ‘… It has also been recognised that a generous interpretation ought to be given to a tribunal’s reasoning. It is to be expected, of course, that the decision will set out the facts. That is the raw material on which any review of its decision must be based. But the quality which is to be expected of its reasoning is not that to be expected of a High Court judge. Its reasoning ought to be explained, but the

> circumstances in which a tribunal works should be respected. The reasoning ought not to be subjected to an unduly critical analysis.'

65. The reasons of the tribunal below must be considered as a whole. Furthermore, the appellate court should not limit itself to what is explicitly shown on the face of the decision; it should also have regard to that which is implicit in the decision. *R v Immigration Appeal Tribunal, ex parte Khan* [1983] QB 790 (per Lord Lane CJ at page 794) was cited by Floyd LJ in *UT (Sri Lanka) v SSHD* [2019] EWCA Civ 1095 at [27] as explaining that the issues which a tribunal decides and the basis on which the tribunal reaches its decision may be set out directly or by inference.

66. The following was said in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 (a classic authority on the adequacy of reasons), on the question of the context in which apparently inadequate reasons of a trial judge are to be read:

> '26. Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. … If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing or to direct a new trial.
>
> ….
>
> 118. ... There are two lessons to be drawn from these appeals. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is the duty of the judge to produce a judgment that gives a clear explanation for his or her order. The second is that an unsuccessful party should not seek to upset a judgment on the ground of

> inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision."'

Conclusion

41. For these reasons I am satisfied that the Tribunal did not make an error of law in its decision. The grounds of appeal for which I gave permission do not point to errors of law by the Tribunal. Rather, they are in essence an attempt to re-argue the factual merits of the original appeal. The grounds of appeal really go to the weight to be attached to the evidence in the case, which is quintessentially a matter of fact for the Tribunal at first instance to determine. As the Court of Appeal has observed, it is not the Upper Tribunal's role to "set the appeal tribunal to rights by teaching them how to do their job of weighing the evidence" (***Fryer-Kelsey v Secretary of State for Work and Pensions*** [2005] EWCA Civ 511, reported as ***R(IB) 6/05***, at [25]). The Tribunal at first instance is a specialist tribunal which weighs the evidence and comes to its findings of fact on that evidence.

42. In summary, the Tribunal directed itself properly on the relevant law and gave concise, but sufficient, reasons to explain its decision. I remind myself that the weighing of evidence is a classic question of fact for the Tribunal at first instance. It is therefore an exercise in which the Upper Tribunal should be slow to interfere.

43. The appeal is accordingly dismissed.

Mark West
Judge of the Upper Tribunal

Signed on the original on 28 August 2024