Case No: C1/2009/2731

Neutral Citation Number: [2010] EWCA Civ 1268
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ADMINISTRATIVE COURT
HIS HONOUR JUDGE S P GRENFELL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 13th October 2010

Before:

LORD JUSTICE MAURICE KAY
LORD JUSTICE ELIAS
and
LORD JUSTICE PITCHFORD

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Between:

Secretary of State for Communities and Local Government	**Appellant**
- and -	
Calderdale Metropolitan Borough Council	**Respondent**
Leeds & London Properties Ltd	**Interested Party**

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Mr Tim Buley (instructed by Treasury Solicitors) appeared on behalf of the **Appellant**.

Mr John Hunter (instructed by Ian R. Hughes, solicitor) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Pitchford:

1. In his decision letter dated 15 January 2009, issued following a public inquiry held under section 78 Town and Country Planning Act ("TCPA") 1990, the Secretary of State's planning inspector, Mr Ahsan Ghafoor, allowed an appeal by the interested party, Leeds and London Properties Limited ("the developer"), against the respondent's (Calderdale Metropolitan Borough Council's) refusal of planning permission for the erection of 21 residential dwellings on land in Walsden, Todmorden, West Yorkshire. The inspector's decision was challenged under Section 288 TCPA 1990 by the Metropolitan Borough Council. On 20 November 2009 HHJ Grenfell, sitting as an additional judge of the High Court, quashed the inspector's decision on the ground that it was tainted by an error of law comprising a misunderstanding by the inspector of the requirement under section 38(6) Planning and Compulsory Purchase Act ("TCPA") 2004 that a planning determination:

> "must be made in accordance with the development plan unless material considerations indicate otherwise."

2. This is the Secretary of State's appeal against the judge's decision.

3. Mr Buley, on behalf of the Secretary of State, argues that while the inspector undoubtedly made an error in reciting the terms of section 38(6) of the 2004 Act in his decision letter, first, his reasoning demonstrated with clarity that the inspector accurately applied the correct statutory test, thus revealing no material error of law; alternatively, second, that such error as was made by the inspector had no material effect upon his decision, having regard to his conclusions.

4. The respondent has, in writing, sought permission to resist the appeal upon an additional ground rejected by the judge that the inspector unfairly reached an unjustifiable conclusion as to the supply of "available and deliverable" housing land. For reasons which appear below. It has been unnecessary for the court to consider this additional issue.

The planning history

5. The land is a "greenfield site" within the urban area of Walsden, but in general the situation is rural; Walsden is a small settlement at the edge of the Pennines between Manchester and Leeds. The development site is some 0.8 hectares in size located between Hollins Road to the east and the Rochdale canal to the west. To the west are housing, commercial and industrial buildings. To the east there are dwellings alongside Hollins Road. Planning permission was granted for the erection of 21 low-cost dwellings in 1992. The site was acquired by the developer in about 1994 but the permission lapsed, and a further application was made in 1997 under the then subsisting Calderdale Unitary Development Plan. The Metropolitan Borough Council resolved to grant permission subject to a condition that six of the dwellings should be designated "affordable houses" under the Section 106 agreement. No agreement, however, was made at that time. When, in 2006, the developer came forward with a

proposal for agreement, Calderdale resolved that the application would require further consideration in the light of the recent changes to national and local policies. Permission was eventually refused on 22 November 2007.

The legislative and policy context

6. The "development plan" included the Regional Spatial Strategy ("RSS") and development plan documents for the area (see section 38(3) TCPA 2004). By section 70 (2) TCPA 1990:

> "(2) In dealing with [an application for permission] the authority shall have regard to the provisions of the development plan so far as material to the application, and to any other material consideration."

7. However, by section 38(6) of the 2004 Act:

> "(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning act the determination *must be made in accordance with the plan unless material considerations indicate otherwise.*" [Emphasis added]

8. Calderdale's UDP was adopted on 25 August 2006. Policy H9 stated:

> "Non-allocated sites: Proposals for residential development [including those for the renewal of a previous planning permission] on a non-allocated brownfield site or building for conversion will be permitted where ... [i-(vi)] Proposals for residential development on unallocated greenfield land will not be permitted."

9. Policy H13 set out the policy considerations for the provision of affordable housing. In part, it read:

> "Planning applications which include proposals for affordable housing will be assessed against the following criteria (i) the affordable housing is provided to cater for the housing need in the district; [ii] - (iv)] (v) the proposals are consistent with other UDP policies."

10. The relevant RSS is the Yorkshire and Humber Plan (May 2008). Policy H1 was aimed at improved delivery of new homes. Policy H2 required local planning authorities ("LPAs") to complete strategic housing land availability assessments ("SHLAA") and to identify and manage the release of land by, among other things:

> "prioritising housing development on brownfield land ... to contribute to a regional target of at least 65%."

11. The LPAs were to:

> "identify sites ... to ensure a 15-year supply of land for housing, including a five-year supply of specific deliverable sites."

12. RSS policy H4 noted the region's "need to increase its provision of affordable housing". The need was provisionally estimated at "up to 30%" in the relevant area of south-west Yorkshire.

The inspector's decision

13. The inspector noted [paragraph 11/DL] that Calderdale had not completed its SHLAA, but he concluded that a deliverable five-year supply of land existed. He did not consider that the same could be said for the 15-year period. He remarked [16/DL]:

> "I am not convinced that Walsden has an abundant supply of deliverable housing sites in the longer term which would meet the demand for housing."

14. He did not in his reasons identify the evidence which caused him to reach that conclusion. The adopted RSS required a delivery of 670 dwellings per annum [13/DL]. The developers' proposal was deliverable and would contribute to the increased new housing trajectory required. The inspector acknowledged the LPA's concern that the RSS required priority to be given to brownfield sites [14/DL], but observed:

> "This does not mean that all proposals for housing on greenfield sites should be refused"

15. He continued in paragraph 14 as follows:

> "In cross-examination the council's witness recognised that PPS3 does not preclude development on suitable greenfield sites; the UDP inspector's report refers to the unnecessary release of large scale greenfield sites, but I find that the appeal site is not located on an urban edge, is surrounded by built development and is located within the housing area."

16. The developer undertook to provide six affordable houses which, the inspector was informed [15/DL], exceeded the 20% minimum required by the council's policy. The council had not demonstrated that "the borough is in no need of any additional affordable housing, especially in rural locations". The inspector's view was [17/DL]:

> "The development would provide high quality homes in this rural location [including affordable homes, which]

> significantly goes in favour of the scheme due to the site's urban and sustainable location and its close proximity to local facilities and public transportation."

The development would not conflict [18/DL] with "the main thrust of PPG 17" [Open space amenity considerations].

17. The inspector concluded [20/DL] that, while the development would not "strictly" satisfy policy H9, it would comply with other UDP policies, including H13 and RSS H2 and H4.

The judge's conclusion

18. At paragraph 7 of his decision letter the inspector directed himself as follows:

> "(7) Section 38(6) of the Planning and Compulsory Act 2004 requires me to have regard to the development plan and any other material considerations..."

This was an error. The words quoted represent the effect of section 70(2) TCPA 1990; but if the inspector believe that he was simply obliged "to have regard to" the development plan and any other material considerations when making his determination he was wrong. He was required under section 38(6) of the 2004 Act to make his determination *in accordance with the development plan unless* material considerations indicated otherwise.

19. The judge noted that a similar (but not identical) error had been made by a planning officer advising an LPA in R v Canterbury City Council and Robert Bretton and Sons Limited [1994] 68 P&CR 171 when he misrepresented the effect of section 54A TCPA 1990 (the predecessor of section 38(6) TCPA 2004) to his authority, saying in his report:

> "Section 54A of the 1990 Planning Act requires local authorities to have regard to the provisions of the development plan ... unless material considerations indicate otherwise. Notwithstanding the fact that the site is allocated for industrial use, I consider that this is a situation where 'material considerations' do indeed indicate otherwise."

20. Mr David Keene QC, then sitting as an additional judge of the High Court, held that there were two duties imposed by the Planning Act. The first (section 70(2) TCPA 1990) was to have regard to certain documents. The second (section 54A, now section 38(6) TCPA 2004) was to make the determination in accordance with the plan unless material considerations indicated otherwise. The deputy judge found:

> "The deficiency in the officer's report in the present case is that it conflates the two requirements and, in so doing, distorts both of them. To say that Section 54A requires local

> authorities to have regard to the provisions of the development plan unless material consideration indicate otherwise misstates both obligations."

21. On the particular facts of that case the deputy judge declined to quash the permission given because 1) the committee undoubtedly did give consideration to the development plan and other material considerations; 2) the material purpose of the development plan was to maintain a sufficient supply of land for industrial development and to prevent any harmful impact on shopping centres; 3) the fact was that there was an adequate supply of land for industrial development and that no harmful impact would occur. Accordingly, 4) the decision of the LPA if reconsidered would inevitably be the same.

22. In this case it is my view that the misstatement made in paragraph 7 of the inspector's decision letter was of greater significance, since not only did the inspector mistakenly refer simply to the need to have regard to the development plan but he attached equal status to any other material considerations.

23. Mr Buley conceded before the judge, as he did before this court, that if the inspector applied to his consideration of the planning issue the form of words used in paragraph 7 of the decision letter, then, subject to the question of immateriality, his decision was tainted in law. Mr Buley argued, as repeated before us, that the reasoning applied throughout the decision letter demonstrates that the inspector in fact applied the correct legal test. The judge proceeded to examine that argument.

24. At paragraph 30 of his judgment the judge identified two factors which lent some support to the Secretary of State's argument. First, the inspector had been addressed in closing specifically upon the correct and more restricted test. At other parts of his judgment the judge further observed that the inspector had -- I conclude rightly -- identified the "main" planning issue in the appeal to be whether [9/DL]:

> "the proposal would conflict with local and national policies designed to give priority to the use of previously developed land."

25. Furthermore, in his conclusion at paragraph 20 of the decision letter the inspector acknowledged that the development would "not strictly satisfy" policy H9.

26. At paragraph 30 of his judgment the judge continued:

> "Second, the inspector made his understanding clear that H9 would be breached by the grant of planning permission, so he appears to have understood, albeit somewhat loosely stated, that he was bound by its terms unless material considerations indicated otherwise."

27. Mr Buley argued that the judge thus found that the inspector did in fact well understand the correct statutory approach to his assessment and, accordingly, almost certainly applied that test. I do not accept this submission. Having regard to the immediately following contents of the judge's judgment, it is clear to me that the judge was recording Mr Buley's submissions as at least arguable, and proceeded to find that, despite these appearances, he was not persuaded that the inspector had applied the correct test. He concluded at paragraph 35 that, while the inspector discussed "other material considerations", he did so in the context of a balancing exercise, which was not the same thing as measurement whether the other material considerations outweighed the presumption on planning grounds. Nowhere, for example, did the inspector examine the policy imperative for retaining greenfield sites in general, and this greenfield site in particular, nor did he measure the cogency of contrary policy considerations against the explicit policy H9 prohibition. I would add that in identifying the main issue [9/DL] the inspector did not further identify the ultimate issue for his decision, which was whether, if there was a conflict with local or national policies, other material considerations should prevail. The judge was not prepared to find either that the correct test was applied or that if it had been the result would inevitably have been the same.

28. As to the latter, the judge noted that in his costs decision the inspector had described the issue as "finely balanced".

The Secretary of State's argument

29. Mr Buley supported, in my view successfully, the inspector's view that the adequate provision of new housing, and affordable housing in particular, had, following the publication of Planning Policy Statement 3 ("PPS 3") on 1 April 2007, become an important and influential policy objective, reflected in H13 and RSS H2 and H4. RSS H4 recognised a large shortfall in affordable housing which would, if not attended to, have very severe consequences. Mr Buley argued, and I accept, that the need for an upward trajectory in new housing and increased provision of affordable housing were indeed material considerations which might outweigh the H9 prohibition on the development of greenfield sites in the borough. This much was, as the inspector noted [14/DL], conceded by Calderdale's witness at the public inquiry.

30. Having established that the H9 prohibition does not mean "never", Mr Buley proceeded to draw our attention to those features of the inspector's assessment which supported the development, principal of which was the contribution the development would make to a much needed housing stock and to affordable housing. I accept that these were powerful considerations.

31. It followed, submitted Mr Buley, that the inspector found that 1) the development was in accordance with national policy, primarily PPS 3; 2) the development was in accordance with local policy, primarily UDP H13 and RSS H2 and H4; 3) the development was not in accordance with local policy UDP H9; and 4) the other material considerations identified at 1 and 2 above "significantly goes in favour of the scheme" [figure 17/DL].

32. In so doing, Mr Buley submitted, the inspector was doing no less than applying the correct section 38(6) statutory test. He suggested that were it not for the opening words of paragraph 7 of the decision letter, there would be no basis for criticism of the decision. It followed that no material error of law is demonstrated.

33. Mr Buley submitted that the judge fell into error by posing the question at paragraph 35 of his judgment whether, by reason of his misdirection, the inspector had, when carrying out his balancing exercise, given:

> "…sufficient or any weight to policy H9 other than [by] stating the obvious that any grant of planning permission would represent a breach."

34. Such a question was contrary to the correct approach explained by Lord Clyde in City of Edinburgh Council and Secretary of State for Scotland [1997] 1 WLR 1447 in which the Scottish provisions were materially the same as those in the present appeal. At pages 1458A to 1459A Lord Clyde explained the origin and effect of the Scottish equivalent of section 54A (later section 38(6) of the 2004 Act) as follows:

> "Section 18A was introduced into the Act of 1972 by section 58 of the Planning and Compensation Act 1991. A corresponding provision was introduced into the English legislation by section 26 of the Act of 1991, in the form of a new section 54A to the Town and Country Planning Act 1990. The provisions of section 18A, and of the equivalent section 54A of the English Act, were as follows:
>
> > 'Status of development plans
> > Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise.'
>
> Section 18A has introduced a priority to be given to the development plan in the determination of planning matters. It applies where regard has to be had to the development plan. …
>
> By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought to be useful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission. … By virtue of section 18A if the application accords with the development plan

> and there are no material considerations indicating that it should be refused, permission should be granted. … There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given.
>
> Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell L.J. observed in Loup v. Secretary of State for the Environment and Another (1995) 71 P. & C.R. 175 at p. 186 "What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations." Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues."

35. At page 1459D-G Lord Clyde gave assistance upon the process of assessment:

> "In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these

> and then decide whether in light of the whole plan the proposal does or does not accord with it. *He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application.* If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse." [Italics added].

36. Mr Buley has argued that the question is not whether the inspector attached sufficient weight to policy H9 but whether he took policy H9 as a starting point against which to measure the other material considerations, that measurement being the planning judgment capable of challenge only on the ground that it was irrational or perverse. Read as a whole, he submits the decision makes clear that this is the exercise in which the inspector was engaged. Accordingly, the express misdirection of law at paragraph 7 had no material effect on the lawfulness of the decision.

37. Mr Buley confirmed, however, that he does not rely before this court upon a "no material difference" argument.

Discussion

38. The inspector, as the judge found, undoubtedly assessed his planning decision against the development plan and other material considerations. The inspector correctly, in my view, identified those factors which supported the development on planning grounds. It was not being suggested that the inspector relied upon immaterial considerations but that he had applied the wrong legal test to the exercise of weighing competing considerations. This was exactly the approach adopted by the judge, who set out to examine whether, as Mr Buley had submitted, notwithstanding the misstatement of section 38(6) at paragraph 7, the inspector demonstrated in his decision letter, that he had applied the correct legal test. I do not accept the Secretary of State's assertion that in the process the judge fell into error when he referred to the "weight" to be given to policy H9 in the exercise of the planning judgment.

39. At paragraph 21 of his judgment the judge had recently cited the passage from Lord Clyde's speech which I have italicised above. It is clear to me that when, in paragraph 35, the judge referred to weight, he was looking for any indication that the inspector

was expressly or impliedly acknowledging the "priority" to be given to policy H9 as expressed by Lord Clyde in his sentence:

> "He will have to decide whether there are considerations of such weight as to indicate the development plan should not be accorded the priority which the statute has given to it."

40. Furthermore, in the third sentence of paragraph 35 of his judgment the judge continued:

> "What is absent, however, I accept, is any discussion as to the primacy of H9 in the circumstances of this proposed greenfield site, in other words, why it might be important to obtain this greenfield site and why the other material considerations militated against that primacy in this instance."

41. The judge's further examination of the inspector's expression of planning judgment all went, in my view, to the same issue. I agree with the judge that while Mr Buley had shown that the inspector was engaged in the balancing exercise of one or more factors against another or others, he was unable to establish that in making that balance the inspector was acknowledging or affording to H9 the priority statute had given to it. On the contrary, the inspector's reasoning was consistent throughout with his expression of a single duty to "have regard to" the development plan and other material considerations.

42. At paragraphs 14 and 20, for example, the inspector acknowledged the breach of policy H9. He recognised that the up-to-date RSS policy required a target of 65% new housing on previously developed land. However, the inspector did not explicitly -- nor in my view implicitly -- recognise that the cogency of other material consideration must be tested against the statutory primacy of policy H9. On the contrary, he expressed himself as follows at paragraph 14:

> "Whilst an undeveloped site, I agree with the appellant that there are other policies and considerations that should be taken into account."

43. As the judge himself observed, a decision of substance was required as to whether, in the light of other material considerations, policy H9 deserved its presumptive influence in this particular appeal. In my view, that judgment would have required on the one hand a more detailed and reasoned examination of Calderdale's evidence of the need for, and the availability of, housing development land; and, on the other, a more detailed assessment of the amenity value of the greenfield site which would be lost to this and the wider community.

44. In my judgment, the inspector's lack of further explanation serves to support the judge's conclusions, both that the inspector did not apply the presumptive test and that it is not possible to conclude that the decision made was unaffected by legal error.

45. In the circumstances, I am not persuaded that the judge can properly be criticised either in his approach or for his conclusion. I consider it unnecessary to examine the respondent's further grounds for upholding the judge's decision and I would dismiss the appeal.

Lord Justice Elias:

46. I agree. I do, however, have some sympathy for the appellant. I think that it is unlikely that the inspector did in fact fail to appreciate that there is, to put it in general terms, a presumption in favour of the development plan created by section 38(6), It is, after all, a very well established principle and it was referred to the inspector in closing submissions. I also suspect that probably he did in fact consider that the other material considerations which he identified justified a departure from the plan in the circumstances of this case. But, for the reasons given by my Lord, the reasoning of the inspector leaves substantial doubt about both these matters. The respondent is, in my judgment, entitled to say that, since there is a real risk that the decision was based on a false legal premise, it cannot stand. Accordingly, I too would dismiss the appeal.

Lord Justice Maurice Kay:

47. For the reasons given by Pitchford LJ, I too would dismiss the appeal.

Order: Appeal dismissed