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Case No: CO/3279/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2020

Before :

MRS JUSTICE LIEVEN

Between :

AIREBOROUGH NEIGHBOURHOOD DEVELOPMENT FORUM

Claimant

and

LEEDS CITY COUNCIL

Defendant

and

**(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL
GOVERNMENT**

(2) AVANT HOMES (ENGLAND) LIMITED

(3) GALLAGHER ESTATES LIMITED

Interested Parties

Jenny Wigley (instructed by Town Legal LLP) for the Claimant
Juan Lopez (instructed by Leeds City Council Legal Services) for the Defendant
The First Interested Party was not represented and did not attend
Charles Banner QC and Matthew Fraser (instructed by Walker Morris LLP) for the
Second Interested Party
James Corbet Burcher (instructed by Shoosmiths LLP) for the Third Interested Party

Hearing dates: 4 and 5 February 2020

Approved Judgment

Mrs Justice Lieven DBE :

1. This judgment deals with the relief to be granted after findings in the substantive case [2020] EWHC 1461 (Admin) in which I found a number of errors of law in the process leading to the adoption of the Leeds Site Allocations Plan (SAP). I have had written submissions from all the parties in respect of the relief that I should order. There are in effect two issues before me: firstly, whether the appropriate remedy should be a quashing order under section 113(7)(a) of the Planning and Compulsory Purchase Act 2004 (the 2004 Act) or an order for remittal of the SAP under s.113(7)(b); and secondly, the scope of that order.
2. Section 113(7)-(7C) of the 2004 Act provides:
 - (7) *The High Court may –*
 - (a) *quash the relevant document;*
 - (b) *remit the relevant document to a person or body with a function relating to its preparation, publication, adoption or approval.*
 - (7A) *If the High Court remits the relevant document under subsection (7)(b) it may give directions as to the action to be taken in relation to the document.*
 - (7B) *Directions under subsection (7A) may in particular –*
 - (a) *require the relevant document to be treated (generally or for specified purposes) as not having been approved or adopted;*
 - (b) *require specified steps in the process that has resulted in the approval or adoption of the relevant document to be treated (generally or for specified purposes) as having been taken or as not having been taken;*
 - (c) *require action to be taken by a person or body with a function relating to the preparation, publication, adoption or approval of the document (whether or not the person or body to which the document is remitted);*
 - (d) *require action to be taken by one person or body to depend on what action has been taken by another person or body.*
 - (7C) *The High Court's powers under subsections (7) and (7A) are exercisable in relation to the relevant document –*
 - (a) *wholly or in part;*
 - (b) *generally or as it affects the property of the applicant*
3. The scope of the power to remit was considered by HHJ Robinson (sitting as Deputy Judge of the High Court) in *University of Bristol v North Somerset Council* [2013] EWHC 231. There are two judgments and the second deals with relief. At [6] the Judge refers to s.113 having been amended to “*expand the court’s powers by providing an alternative remedy*”. At [7] the Judge said:

7. In my judgment the amendments to s.113 make it clear that, instead of quashing the plan (or part), the court may remit it to an earlier stage in the process with appropriate directions. If the plan were quashed, it would no longer be possible to remit it to an earlier stage because the plan would no longer exist. For example, it would not be possible to direct that the plan be treated as having been submitted for public examination because there would be no plan to examine. In this example, subsection (7B) makes clear that, if remitted, the court may direct that the plan be treated as not adopted and require the public examination to take place again. In effect, the court may direct that the plan be remitted to any earlier stage in the process prior to adoption with a direction that the statutory steps be retaken from that point.”

4. The claimant in that case had sought a quashing order and argued that remittal would give rise to practical problems as a result of the passage of time and the need for much further work. The judge said at [10]:

“The University did not pursue an argument that the Inspector’s decision was irrational, therefore it would have been open to him in principle to accept the Council’s housing figure of 14,000 dwellings. In those circumstances I consider the starting point is that the examination of the relevant policies should be reconsidered. It was only at this stage that any illegality occurred and the illegality could be remedied by going through the examination process again.”

5. The most important passage is at [12]:

“The passage of time may well require the Council to update its evidence and, potentially, to invite the Inspector to recommend modifications to policies. That may require an SEA and further consultation. However, this is not an unusual procedure and although it will extend the process I consider that the delays and expense to objectors and the Council will be less than if the process has to go back to the start. Further, it is by no means a foregone conclusion that the Inspector would take the same view as that of the BANES Inspector or that the Council would agree that the Core Strategy should be withdrawn. In any event, decisions as to how best to progress the Core Strategy are for the Council. To quash the relevant policies would predetermine further decisions of the Council and an Inspector about the Core Strategy which are matters of planning judgment for them and not the court.”

6. In *JJ Gallagher v Cherwell DC* [2016] EWCA Civ 1007 the Court of Appeal considered the extent of the powers under s.113(7) and said at [29]:

*“29. The court’s powers to grant appropriate relief under section 113(7), (7A), (7B) and (7C) are widely drawn. They afford the court an ample range of remedies to overcome unlawfulness in the various circumstances in which it may occur in a plan-making process. As was recognized by the judge in *University of Bristol*, the provisions in subsection (7A), (7B) and (7C) were a deliberate expansion of the court’s powers to grant relief where a local plan is successfully challenged under section 113. They*

introduce greater flexibility in the remedies the court may fashion to deal with unlawfulness, having regard to the stage of the process at which it has arisen, and avoiding – when it is possible to do so – uncertainty, expense and delay. They include a broad range of potential requirements in directions given under subsection (7A), all of which go to “the action to be taken in relation to the [relevant] document”. The four types of requirement specified in subsection (7B) are stated to be requirements which directions “may in particular” include. None of them, however, would warrant the substitution by the court of its own view as to the issues of substance in a plan-making process, or as to the substantive content of the plan – its policies and text. They do not allow the court to cross the firm boundary separating its proper function in adjudicating on statutory challenges and claims for judicial review in the planning field from the proper exercise of planning judgment by the decision-maker.”

7. The claimant argues that I should make a partial quashing order in the following terms:

“All those parts of the Leeds SAP which allocate sites for housing development within the Green Belt (and which thereby take those sites out of the Green Belt) are quashed.”

8. The Claimant seeks to distinguish University of Bristol on the grounds that (a) there the only error found was in relation to the reasons, as opposed to the present case where I found a significant error of fact as well as a failure to give adequate reasons. (b) There would be no significant additional costs from quashing rather than remittal as there is planned to be a SAP review in any event. (c) That the GB housing allocations here are unlawful, whereas in the University of Bristol case the judge had said that the policies themselves were lawful.
9. The Claimant argues that the scope of the order should be across Leeds rather than being limited to Aireborough. The Claimant rightly points out that the substantive judgment found a significant error of fact amounting to an error of law underlying the case for all the GB allocations across the area. It also refers to the comment at J99 that the Council had engaged in “*a good deal of ex post facto justification*” in its efforts to uphold the SAP. It argues that the outcome proposed by the other parties, namely limited relief to Aireborough, would undermine the integrity of the planning process in the Leeds area.
10. In terms of the argument advanced by the Council, that quashing all the GB allocations would result in a lack of a five year land supply, in fact the Claimant says the result would be to reduce the supply from 7 to 6 years and thus not under the key level of 5 years.
11. The Claimant points out that it had always sought relief that included potentially remitting or quashing all the GB allocations, see [136] of the Statement of Facts and Grounds. Any third parties that are impacted by the relief would have had no materially different interest to present before the court than did those who were represented. The issues raised before the Court were neither site nor area specific and applied across the entire Leeds area.

12. The Council argues in sequence for (a) directing the Inspectors to give further reasons; (b) ordering the quashing of the Aireborough specific GB allocations; (c) remitting the matter to the Inspectors in respect of the Aireborough allocations alone and directing (i) the Inspectors to recommend the deletion of the Aireborough allocations and (ii) the Council to resolve to approve this recommendation and adopt the SAP subject to that amendment.
13. The Council seek to argue that it had given the Inspectors clear reasons for the GB allocations and the Inspectors were fully aware of any changes that were being proposed by the Council. In my view this analysis is an attempt to reargue the merits of the case on which I have already ruled.
14. The Council then argues that the quashing of all GB allocations would be “disproportionate”. It would be highly prejudicial to landowners and developers outside Aireborough who would not have known that there was any possibility in this litigation that there might be quashing beyond Aireborough and might have wished to participate in the proceedings. Further, broader quashing would greatly prejudice future plan-led development in Leeds by undermining the Council’s five year land supply and providing much less “headroom” in the 5YLS. The Council’s submissions then set out a number of planning considerations that indicate the importance of the 5YLS in the NPPF and thus for the good planning of the area.
15. The Council strongly argue against re-examination/re-opening any part of the SAP examination as being unnecessary. The Council appears to be supporting quashing the SAP over remitting it to the Inspectors. However, the argument as I understand it is that remittal to the Inspectors would achieve nothing rather than being a positive argument for quashing over remittal. The Council argues that if the SAP was remitted then interested parties would not be given any further meaningful opportunity to make new representations. For the reasons I explain below I find this submission extremely difficult to follow.
16. The Council argue that it would be impractical to reopen the examination of the SAP because it would unclear what the parameters would be.
17. The Secretary of State did not take any part in the hearing. However, through the Government Legal Department the Secretary of State did make a short submission on relief in an email dated 12 June 2020. This states:

“[T]he Secretary of State submits that it would not be appropriate to remit the SAP for immediate further examination by the Planning Inspectorate. The question of what should or should not be quashed in the SAP is most appropriately a matter for the Claimant and Defendant rather than the Secretary of State. It will subsequently be open to the Defendant Council to prepare a revised/updated/new SAP, taking into account the matters identified in the judgment, which would subsequently be submitted for examination in due course.”
18. The Secretary of State therefore aligns, at least in principle, with the Council in opposing remittal. Their positions do however appear to be different in as much as the Secretary of State is positively arguing for quashing whereas the Council appears to only be arguing against remittal.

19. The Second Interested Party argues in sequence for (a) remittal of the Aireborough GB parts of the SAP; (b) remittal of the Leeds GB allocations in the SAP; (c) quashing the Aireborough GB part of the SAP. They argue that remittal is more appropriate than quashing because the substantive judgment explains that exceptional circumstances could potentially be found for the GB release if properly reasoned and arrived on the correct factual basis. They rely on the reasoning in the *University of Bristol* and argue that remittal would enable the errors to be addressed. They reject the argument by the Council that remittal would not be able to make the SAP lawful and would only be a “patch and mend” exercise.
20. The Second Interested Party argues that any relief should be limited to Aireborough because the Claimant has indicated they would be content with that and that was what they originally sought. Further, it would be unfair on other third parties to grant the wider relief.
21. The Third Interested Party’s position is similar to that of the Second Interested Party. They highlight the possible inconsistency in the Council’s position in seeking to uphold the reasoning for the GB allocations but not supporting remittal and further consideration of exceptional circumstances. It seems to me that at least part of the Third Interested Party’s submissions go to issues of planning judgement relevant to the Council’s position if parts of the SAP are remitted rather than the legal issues before me.

Conclusions

22. I echo what was said in *University of Bristol* at [70] and *JJ Gallagher* at [29], the purpose of the extended powers in s.113 was to give the court a greater flexibility in deciding the appropriate relief depending on the nature of the unlawfulness; the stage of the process and seeking to avoid expense and delay where possible. I am also mindful of the distinction between my role in deciding legal issues and matters of planning judgement which are for either the Secretary of State or the local authority.
23. In deciding what is the appropriate remedy the starting point must be the nature of the legal errors found and how those errors can be remedied. The Council appears to be seeking to characterise the errors as being in the Inspectors’ reasons and, as such, capable of being remedied by simply requiring the Inspectors to provide further reasons. This is not correct. The errors of law included a material error of fact giving rise to an error of law, see ground 7. A direction simply to provide further reasoning would not remedy this error. Further, the errors in the reasoning are so fundamental to the Inspectors’ analysis that I would not have in any event considered that merely requiring further reasoning was sufficient.
24. It does however seem to me to be appropriate to remit this matter to the Secretary of State, and through him the Inspectorate, rather than quash either the whole or parts of the SAP. It seems reasonable to start from the position that the process should be taken back to the stage where the error of law occurred rather than back to the beginning through quashing. This allows precisely the flexible response that the amendments to s.113 were designed to create.
25. The Council argues that remittal will cause enormous administrative problems, expense and difficulties in the planning process. However, that would be equally true of

quashing the SAP and starting again. In either case, the Council will not have in place an adopted Plan which they can use to show a 5 year land supply. I fully understand the concern about the serious disadvantages of planning through applications and appeals rather than being plan led. However, this has to be balanced against GB releases which have not been adequately justified and which were made with a material error of fact. Once I have determined that merely requiring the giving of further reasons is not an appropriate remedy then delay and concomitant problems with a 5 year land supply are inevitable.

26. If the matter is remitted then the Council will have to decide what, if any, modifications it intends to propose to the Inspectors. That is a matter of planning judgement for the Council and it is not for me to adjudicate on what approach the Council takes to exceptional circumstances for GB release once the matter is remitted.
27. The Secretary of State opposes remittal but the reasoning for his position is not at all clear, nor is whether he has had regard to the caselaw referred to above. The Inspectors, not the Secretary of State, will have to have regard to any submissions and evidence as to what allocations should be made when the matter is remitted. I agree with the Second Interested Party that it is not necessary for the SAP to be quashed for the Inspectors to take into account the matters set out in the judgment.
28. Once the SAP is remitted it is for the Secretary of State to make the appropriate arrangements. However, it is appropriate to explain that I do not consider it essential that the matter should be put before different Inspector(s). Although this would normally be the case, here the Inspectors were faced with enormously confusing documentation and figures. Although I have found there were highly important errors made, on the facts of this particular case I do not consider that necessarily disqualifies the same Inspectors from considering the matter again. However, whether this is how the matter is dealt with is, I repeat, a matter for the Secretary of State.
29. I do not think it would be appropriate to limit the remittal of the SAP to those allocations that relate to Aireborough. The claim form makes quite clear that the Claimant was seeking quashing/remittal of all the GB allocations in the SAP, so there is no pleading point here. Although the Claimant focused on Aireborough, their case was not formally limited to those allocations. More fundamentally, the grounds that I found made out were not in any way limited to Aireborough. They were all matters that went to the GB allocations in their entirety rather than having any area specific or site specific rationale.
30. Although third parties will be impacted by the remittal of all GB allocations in the SAP, this is what the claim form sought. It is very possible that most, if not all, of those who had an interest in the SAP allocations will have been fully aware of this challenge, either through the media or via trade organisations such as the House Builders Federation. In any event, the entire case was argued on the basis of GB allocations in the SAP generally. A developer or landowner in a different part of Leeds would not have been able to advance a different and site specific issue that could have made any difference to the conclusions reached. It is very unlikely that if a number of other developers had come forward from other parts of Leeds and asked to be joined as interested parties the court would have acceded to that request. If there had been a large number of developers or landowners saying their interests could be affected the court would have undoubtedly have required them to join forces so that there would be no more than two interested

parties. For these reasons I do not think that the argument that it would be unfair to third parties for all GB allocations to be remitted stands up to scrutiny.

31. The remittal of all GB allocations to the Inspectors will, I accept, cause delay and will impact upon the Council's ability to show a 5YLS. However, those are not grounds not to remit if that is the only way to remedy the illegality that I have found. The planning judgements that follow, in terms of conformity with the NPPF and whether the tests for GB release are met, are matters for the Council and the Secretary of State and not for the court.
32. I accept that by remitting all GB allocations there will necessarily be an impact on some mixed use allocations. However, it is not possible to avoid this situation. It will have to be dealt with through the development control processes on a site specific basis if that is considered appropriate.
33. For these reasons I will remit the policies relating to GB allocations of housing (including mixed use allocations) to the Secretary of State.