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CO/8394/2008

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

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 5 June 2009

B e f o r e:

DAVID HOLGATE QC

(Sitting as a Deputy High Court Judge)
Between:
THE QUEEN ON THE APPLICATION OF SAINSBURY'S SUPERMARKET PLC
Claimant

v

LOCAL GOVERNMENT
Defendant

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(Official Shorthand Writers to the Court)

MR A CREAN QC [MISS S FERNANDEZ at the judgment] (instructed by DENTON WILDE SAPTE) appeared on behalf of the **Claimant**
MR J MOFFET [MR S WHALE at the judgment] (instructed by TREASURY SOLICITORS) appeared on behalf of the **Defendant**

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

1. THE DEPUTY JUDGE: This is an application under section 288 of the Town and Country Planning Act 1990 to quash the decision of the Secretary of State's Inspector, Mr Bern Hellier, dated 24 July 2008. By that decision the Inspector dismissed the claimant's appeal under section 78 of the same Act, against the refusal by Vale Royal Borough Counsel to grant planning permission for an extension of an existing retail store in Northwich, Cheshire.

Background facts

2. The Claimant appealed to the Secretary of State against the refusal to grant planning permission for that extension. Initially the Borough Council had refused the matter on three grounds, but two of those were resolved through subsequent negotiation so that by the time of the Public Inquiry there remained only one reason for refusal in the following terms:

> "the site occupies a key position within the designated Barons Quay Development Area as defined in the Adopted Vale Borough Local Plan First Review Alteration. Policy GS9A states that development in this area should be brought forward in a comprehensive manner. Proposals that prejudice the comprehensive development of the area will not be permitted. The proposed development conflicts with the key aims of this policy and if approved, it would be likely to set a precedent for other similar extensions or redevelopment of buildings on a piecemeal basis. Cumulatively, such proposals would undermine the regeneration aims of the Adopted Vale Royal Borough Local Plan First Review Alteration."

Same as our Local Plan policy.

same

3. In paragraph 4 of his decision letter the Inspector set out what he considered to be the main issue in the appeal, and there is no challenge to this formulation:

> "I consider the main issue is the effect of the proposal on the comprehensive development of the Barons Quay Development Area".

4. Policy GS9A is a long policy which does not need to be read out in full. The first 4 paragraphs read as follows:

> "A comprehensive, retail-led, mixed-use regeneration scheme will be supported in principle within the defined Barons Quay Development Area (BQDA) shown on the proposals map.
>
> "The Council will support a substantial element of class A1 comparison retail floorspace within this site. This retail area will be regarded as an extension to the primary shopping area once such development has taken place.
>
> "Other uses will be permitted within the BQDA including leisure, offices and residential that are complimentary to the retail offer. The scheme will include the development of a cultural centre adjacent to the Weaver navigation.

"Proposals anywhere in the town that are likely to prejudice the comprehensive development of the BQDA, or to harm the vitality and viability of the primary shopping area as extended by the development of the BQDA as proposed by this policy, will not be permitted."

similar to our definition

5. Thereafter, the policy sets out a series of nine objectives against which a proposal for a comprehensive scheme is to be assessed.

The Decision letter

6. I then turn to summarise the structure of the decision letter. Having set out the main issue the Inspector helpfully referred to the background to the proposal, between paragraphs 5 and 8:

"5. Northwich is an important market town. However, there has been no major upgrade to its shopping centre since the 1960s and recently its retail offer has declined relative to nearby competitors. Northwich Vision is a strategy to revitalise the town led by a partnership between the Council and regional agencies. It seeks, as a priority, to achieve a step change improvement in the quality and scale of shopping provision. The development projects associated with this strategy were first adopted as Interim Planning Guidance (IPG) in 2004, then further developed and subsumed in the Vale Royal Borough Local Plan proposals adopted in 2006 (LP).

similar to WXTCS

"6. The most important of the development opportunities is an extension of the town centre to the north known as the Barons Quay Development Area (BQDA). Within this area LP Policy GS9A states that a comprehensive retail-led mixed use regeneration scheme will be supported in principle. Priority will be given to attracting comparison goods shops. Proposals that are likely to prejudice the comprehensive development of the area or to harm the vitality and viability of the primary shopping area as extended by the development of the BQDA will not be permitted.

"7. The appeal site is situated within the BQDA and the proposal is to extend the existing Sainsbury's supermarket on the site from 5035m^2 gross floorspace to 6204m^2. An identical extension was approved in 2002 but lapsed. There is no dispute that LP Policy GS9A now creates circumstances that are materially different from 2002.

"8. The Council is working with a private sector partner, Wilson Bowden Developments Ltd (WBDL), to bring forward a comprehensive scheme as envisaged by LP Policy GS9A. A spatial framework has been produced in a master plan which shows the appeal site together with the adjoining Matalan site redeveloped as an anchor Debenhams store, with the supermarket relocated to a larger site to the north. However this master plan has not been prepared or adopted as a development plan document. It

The masterplan was produced by a developer not the Council - see para 41

can therefore be given little weight although it is a useful indication of work in progress."

7. Between paragraphs 9 and 12 the Inspector dealt with the issue, the first issue as he saw it, as to whether the proposal was for piecemeal development or was compatible with the policy objective of promoting a comprehensive scheme. He concluded at paragraph 12 that the proposal would be piecemeal development, which would actively prejudice a comprehensive scheme. In paragraph 13 he then went on to deal with the nine objectives of Policy GS9A, to see whether or not there would be any compliance or conflict with that part of the policy. He took the view that the objectives had been included in the policy for the purposes of assessing the merits of a scheme compliant with GS9A rather than for the assessment of piecemeal development.

8. Then, between paragraphs 14 and 16 of the decision letter, the Inspector summarised what he considered would be the adverse effects of piecemeal development if the proposal were allowed to go ahead. In paragraph 14 he considered that the new extension, involving an increase of about 20 per cent increase in the floor space of the existing store, would represent a significant investment, and he considered that that might result in Sainsbury's becoming more reluctant to continue negotiations with the Council for a move to new premises. He then concluded that if a CPO were to be necessary, the appellant might use the fact of that investment in the premises to help resist expropriation by maintaining an objection to the inclusion of their store in any Compulsory Purchase Order.

9. In paragraphs 15 and 16 the Inspector accepted that to allow the appeal proposal would set a precedent for other piecemeal development.

10. In paragraphs 17 and 18 he then turned to consider the benefits that would arise if the proposal were to be permitted. Then, between paragraphs 19 and 21, he undertook, borrowing the expression from the appellant's planning consultant, what he described as a 'reality check'. That is to say he looked at the progress which was being made in the Council's efforts to secure a comprehensive scheme, in order to see how much weight should be attached to their policy objection. He reviewed the evidence and the progress which had been made to date, and concluded that the scheme promoted by the council was progressing satisfactorily.

11. In paragraph 21 he turned to consider the costs which would be involved should a CPO scheme need to be promoted, and the affordability of such a project. He did not think that the costs of buying out Sainsbury's in that event would be unaffordable.

12. His overall conclusions were then expressed between paragraphs 22 and 25 in the following terms:

> "22. The proposal is piecemeal development which has not been brought forward as part of a comprehensive scheme and would not form part of any scheme that would meet the objectives of LP Policy GS9A. It would be likely to make the preparation and delivery of such a scheme more difficult because it would act as a constraint on redevelopment options

and make it harder to resist further piecemeal development.

"23. The comprehensive scheme being promoted by the Council is at an early stage but is on track. Little weight can be placed on the master plan but a comprehensive scheme as envisaged in LP Policy GS9A is needed. Planned intervention in this instance has the potential to achieve a critical mass of modern comparison retailing and provide the infrastructure, mix of uses and investment needed to maintain a lively, economically healthy town centre in accordance with the principles in PPS6. If it is thwarted then the projected step change improvement in shopping provision would be put at considerable risk and the economic stagnation of the town centre would not be addressed contrary to the aspirations of Northwich Vision.

"24. Allowing the proposal would bring welcome investment and convenience floorspace into the town centre. However these benefits are outweighed by the harm that would be caused to a comprehensive scheme.

So the inspector sided with the Council against Sainsbury's

"25. I therefore conclude for the reasons given above and having regard to all other matters before me that the proposal would have a seriously detrimental effect on the comprehensive development of the BQDA and that the appeal should be dismissed."

General legal principles

13. There is common ground as to the principles which apply when considering an application of this nature. First of all, a decision may only be challenged under section 288 upon normal administrative law grounds, see for example *Seddon Properties Ltd v Secretary of State* (1978) P&CR 26, at pages 26 to 28. Secondly, where a challenge is to the interpretation placed upon a planning policy, the approach to be taken by the court remains that set out by the Court of Appeal in the case of *R v Derbyshire County Council ex p Woods* [1997] JPL 958, at 967-8.

14. During the course of argument I raised the question as to whether any submissions would be advanced that a change in approach to the interpretation of policy in section 288 cases should be considered in the light of the Court of Appeal's decision on the application of *Raissi v the Secretary of State for Home Department* [2008] 3 WLR 375, and was told that the case was being advanced on the basis that ex parte Woods remains the correct law, at least when considering planning cases of this kind.

15. The third matter is that the weight to be attached to material considerations in matters of planning and judgments are within the exclusive jurisdiction of the decision maker, see *Tesco Stores v Secretary of State* [1995] 1 WLR 759-780F-H.

16. Fourthly, it has been said in several cases that a decision maker is not writing an examination paper; a decision letter has to be read in good faith, and references, for example to policies, have to be taken in the context of the general thrust of the reasoning. The adequacy of reasons must be assessed by reference to whether the

decision in question leaves room for genuine doubt as to what the decision maker has decided and why, see *South Somerset DC v Secretary of State* [1993] 1PLR 80 at 83E-G and 87F-*G*, and *Clarke Homes Ltd v Secretary of State* (1993) 66 P&CR at pages 271-2.

17. Fifthly, as regards the duty to give reasons, both parties agree that the matter should be dealt with by reference to paragraph 36 of the speech of Lord Brown in the case of *South Bucks DC v Porter (No.2*) reported at [2004] 1 WLR 1953:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

18. Sixthly, an application under section 288 is not an opportunity for a review of the planning merits of the decision. An allegation that a conclusion on the planning merits is Wednesbury perverse is, in principle, within the scope of a challenge under section 288, but the court must be astute to ensure that such challenges are not used as a cloak for what is, in truth, a re-run of the arguments on the planning merits, see *R (Newsmith Stainless Ltd) v Secretary of State* [2001] EWHC Admin 75.

19. Lastly, even if an error of approach is identified in the decision, the court has a discretion as to whether or not to quash the decision, and the error in question must be one which materially effected the decision taken, see *Bolton MBC v Secretary of State* (1990) 61 P&CR 343.

Grounds 1 and 2

20. Grounds one and two were argued together. Ground two contends, in effect, that the Inspector failed to give adequate reasons in relation to one of the key findings, the

legality of which was challenged under ground one. The challenge in ground one relates to three parts of paragraphs 9 and 10 of the decision letter, when the Inspector was resolving the issue of whether the proposal would constitute piecemeal development and thus be contrary to the Local Planning Policy GS9A. Mr Anthony Crean QC has challenged three sentences: first of all, he referred to the first sentence of paragraph 9 of the decision letter:

> "I am satisfied that the intention of LP Policy GS9A is that future development in the BQDA should be undertaken as part of a single comprehensive scheme."

21. As put in paragraph 12 of the particulars of claim, the claimant's case had been that Policy GS9A does not refer to redevelopment of the BQDA, and does not require a single scheme. It is agreed by both parties in this court that the explanatory material in the Local Plan accompanying the policy (otherwise referred to in planning parlance as the lower case text) forms part of the Statutory Development Plan and should be taken into account when construing the upper case part of the policy. Paragraph (iii) of the explanatory text of the Local Plan elaborated upon the sort of comprehensive scheme which the policy was seeking to promote, and I quote:

> "Reflecting the above aims, the policy seeks to secure the redevelopment and renewal of the BQDA as part of a single comprehensive scheme."

22. Redevelopment is also referred to expressly in paragraphs (x) and (xiii) on pages 33 and 34 of the Local Plan. Applying the approach in ex parte Woods, I find it impossible to see that the policy does not refer to, or envisage, redevelopment as such, or that it does not matter if development occurs on "distinct parcels of land" as was suggested in the particulars of claim, or as piecemeal development. The policy, as explained by paragraph (iii) is seeking to secure a single comprehensive scheme for the BQDA and envisages that it will include redevelopment. In the skeleton argument on behalf of the Claimant, at paragraph 31, the argument shifted somewhat to say that:

> "an insistence on a single scheme which redevelops the entire area involves a misinterpretation of policy."

23. In fact, as became evident during argument, there was no dispute about that position at the inquiry. For example, in paragraph 20 of the closing submissions of the Local Planning Authority by Mr Tim Corner QC, it was said:

Tim corner working for the Council

> "Third, Mr May says that the policy is referring to development and not redevelopment. However, it is plain that redevelopment is contemplated. Sub-paragraphs (iii), (x) and (xiii) all make specific reference to redevelopment. We do not claim that every part of the area must necessarily be redeveloped. However, it is plain that the redevelopment of every part of the area is contemplated."

what about WC2 ref to 'the status quo'?

24. In any event, the Inspector did not, in my judgment, advance the interpretation of GS9A in his decision letter which Mr Crean sought in paragraph 31 of his skeleton to attribute

to him. The matter, in my view, is put beyond all doubt by the last sentence of paragraph 9 of the decision letter where he said:

> "However, in order to achieve a satisfactory scheme, significant redevelopment is contemplated."

25. Ultimately, as Mr Crean accepted, the question here is whether the first sentence of paragraph 9 of the decision letter is compatible with paragraph (iii) in the lower case text of the Local Plan. In my view it clearly is. A single comprehensive scheme is contemplated or intended, of which redevelopment may form a significant part.

26. There are therefore no grounds for criticising the first sentence of the decision letter.

27. The second part of this ground then sought to challenge the second sentence of paragraph 9 of the decision letter, where the Inspector said:

> "In this context I see no material difference between 'development' and 'redevelopment'."

28. Two criticisms were advanced. First of all, this sentence was described as an abuse to the language of the policy, and secondly, the reasons given by the Inspector were inadequate. I am not convinced this adds anything of substance to the challenge already presented to the first sentence of paragraph 9 of the decision letter.

29. Mr Crean QC referred to the proof of evidence of Mr Bob May, a Director with Turley Associates, who gave evidence for the Claimant. In paragraph 5.17 of his proof he quoted part of Policy GS9A, and then in paragraph 5.18 he said:

> "It is important to note here that the policy very clearly says 'likely to prejudice the comprehensive development of the BQDA'. Firstly, therefore, the LPA have to show that the proposed development is 'likely to prejudice' comprehensive development, and secondly, the policy is very clearly addressing prejudice to comprehensive development of the BQDA and not comprehensive redevelopment of the BQDA."

30. And in paragraph 5.21 he said:

> "The other crucially important point of clarification is that the policy refers to development of the BQDA and not redevelopment of the BQDA. It does not assume that to achieve a step-change in the position of Northwich it is necessary for large parts of the town centre to be redeveloped. Rather, that a comprehensive approach to development should be supported."

31. Mr Crean also referred to paragraphs 11, 12 and 13 of his opening submissions, and paragraph 7 of his closing submissions, together with paragraphs 6-9 of the Council's opening submissions and paragraph 20 of their closing submissions. These passages go over the same arguments as had been canvassed already in relation to the attack on the first sentence in paragraph 9 of the decision letter. Read in context, the Inspector was

rejecting the argument that the policy envisaged comprehensive development without referring to redevelopment. He therefore did not accept the distinction Mr May had put forward, and I do not think that the Director's interpretation of the Local Plan Policy gives rise to any error of law. Read in context, the reasons are perfectly adequate and clear. He rejected the claimant's interpretation of the policy, and taking into account the explanatory part of the plan, he accepted the Local Planning Authority's construction. The claimants know where they stand.

32. The next part of the Inspector's decision letter to be criticised was the last sentence of paragraph 10 of the decision letter, which, however, needs to be read in context. The preceding sentences are important, and Mr Crean confirmed that he does not challenge any of them as containing an error of law. In summary therefore, it is accepted by the Claimant in this court that the Inspector was entitled to find the following points based upon paragraph 10 of the decision letter, read together with paragraph 8. Thus:

33. (i) The appeal site lies in an important location at the eastern gateway to the town centre and relates well to the main shopping street.

34. (ii) It is anticipated that the appeal site will contribute to a comprehensive development.

35. (iii) The evolving master plan shows one way in which that might happen, namely the appeal site together with an adjoining store (Matalan) being redeveloped as a new Debenhams department store, which would serve as the anchor of the scheme.

36. (iv) That scheme did not represent the only possible layout, and indeed the location of the anchor store was not fixed.

37. The sentence which is criticised in this challenge then follows in the following terms:

> "Nonetheless, all the indications are that a viable expansion of town centre comparison shopping of the scale envisaged in LP Policy GS9A is unlikely to be possible without redevelopment of the appeal site."

38. In paragraph 40 of the claimant's skeleton argument it is suggested the Inspector had overcome what is described as a difficulty by "inventing a suggestion which was wholly unsupported by any evidence from the inquiry", namely the final sentence of paragraph 10. In paragraph 41 of the skeleton it is suggested that this constituted a breach of natural justice.

39. Mr May signed a witness statement in support of the application under section 288, paragraph 3 of which reads:

> "At paragraph 10 of the DL, the Inspector stated that 'viable expansion of the town centre comparison shopping of a scale being envisaged by LP policy GS9A is unlikely to be possible without redevelopment of the appeal site'. No evidence of viability was put forward at the inquiry, in particular no evidence on redevelopment being a pre-condition to viable implementation was put forward."

40. Mr Crean accepted that that passage in Mr May's statement referred to viability in the sense of financial viability, and that was the way in which the Claimant had understood the Inspector's decision letter to read. There is no dispute that there was no financial viability evidence on this particular point. Of course, the criticism assumes that the Inspector was referring in paragraph 10 of his decision letter to viability in that financial sense. I must say that when I read the decision letter for the first time, the passage did not strike me in that way. Instead, it appeared to me that the Inspector was referring to a viable expansion of the town centre from a planning perspective, that is to say, whether the expansion would function successfully as regards such well understood matters as pedestrian linkages into the existing town centre core. Furthermore, this sentence has to be understood in the context of the evidence before the Inspector, with which the parties are assumed to be familiar.

meaning of viability

41. First of all, as regards the council's evidence, I have been shown paragraphs 5.22 to 5.26 of the evidence from Mr Jeremy Owens, headed 'Environmental Policy':

> "(5.22) The Sainsbury's site constitutes a significant part of the BQDA. It is also in an important position within this larger site. This is illustrated by reference to the draft Master Plan (CD26) which has been prepared for the site by Wilson Bowden following public consultation.
>
> "(5.23) A key component of this draft scheme is a new Debenhams store predominantly on the current Sainsbury's site. It shows new open shopping streets designed as perimeter blocks, incorporating other principles of good urban design envisaged in Policy GS9A. It would be outward looking and present active frontages to the street. Importantly, the inclusion of the Sainsbury's site as shown allows for key pedestrian connections and loops back to Witton Street from a parallel new open shopping street. The connections back to Witton Street are very important.
>
> "(5.24) PPS6 (CD2) advises that where extensions to primary shopping areas are proposed, they should be carefully integrated with the existing centre. This is expanded upon in the associated design advice to PPS6, *Planning for town centres: Guidance on design and implementation tools* (CD3). It advises that pedestrian links between the primary shopping area and the wider town centre should, where possible, be strengthened, in particular with adjoining areas of secondary shopping importance where links with the primary shopping area are often of critical importance.
>
> "(5.25) The long term retention of the Sainsbury's store and car park would not allow these important urban design principles to be incorporated into this important part of the BQDA, particularly the establishment of perimeter blocks with active street frontages and strong connections back to Witton Street. This would be at odds with Policy GS9A and the government's planning policy promoting the achievement of good design in PPS1 and PPS6 and its accompanying design guidance (CD3). Permitting the appellant to extend the store would serve to add a

Same!

further, unnecessary, constraint to acquisition/relocation.

> "(5.26) The draft Master Plan (CD26) has the support of the Northwich Vision Steering Group, a joint County Council and Vale Royal member steering group established to provide political leadership and support to the Northwich Vision. It also has the support of the Northwich Partnership. The Master Plan will shape the preparation of a planning application for the site. Although it is capable of being a material consideration in the determination of this appeal, it is acknowledged that it should carry limited weight."

42. there was also, the evidence of Mr Alistair Parker, a partner in Cushman and Wakefield, who also gave evidence on behalf of the council, in particular paragraph 4.20:

> "It had been our advice that the wider area would be required to accommodate the necessary scale of development, the critical anchor store placement at the end of the new shopping street axis and the proper links back to the existing primary shopping street. During the design presentations by the short listed developers, it became evident that wholesale redevelopment of the shops on Leicester Street (as suggested above), including the Marks & Spencer store, was not going to be viable. Given the required scale of the scheme, the vital requirement for a major new anchor store, the need to enhance the town centre food offer and the aim to better integrate with the length of Witton Street, it became quite clear that both the J Sainsbury's and Matalan store sites would be required."

43. And at paragraph 4.24 he said:

> "The identity of the preferred location for new retail was determined by a number of factors. Regard was given to the need to achieve a 'critical mass' in the order of the scale reported in the retail capacity study, the prerequisite of a major new anchor store and in a location properly connected to the existing primary retail core. I believe this is wholly the correct approach. As may be noted, the current J Sainsbury's store lies on the land needed for the proposed Debenhams store which is located to give it the necessary visual dominance and enable it to perform the vital 'link pin' to draw traffic down to this end before returning to Witton Street."

44. It is therefore clear to me, first of all, that that material did provide evidential support for the Inspector's conclusions. The suggestion that the last sentence of paragraph 10 of the decision letter was based on no evidence is, with respect, unarguable. Secondly, these passages also show the sense in which the Inspector used the word "viable" in his decision letter, such that he can not be criticised for having raised a new point without warning the parties of that matter, thereby acting unfairly.

45. The argument then shifted when the ground was advanced in court, by suggesting that the evidential material from the Council, to which I have referred, was inconsistent with the penultimate sentence of paragraph 10 of the decision letter. By implication that was a submission that there was an inconsistency between the last two sentences of paragraph 10. None of this had been suggested before, but in any event I have no doubt that the evidence was capable of supporting the view that a successful expansion of the town centre was, "unlikely to be possible without redevelopment of the appeal site". That finding went to the importance or weight attached by the Inspector as to the desirability of avoiding a risk to that form of redevelopment. There is no inconsistency between that approach and recognising at the same time that other layouts within the overall BQDA scheme might be possible, and that the location of the anchor store was not fixed.

46. In my judgment therefore, grounds one and two must fail. The criticisms are not substantiated and there is no inadequacy in the reasons given by the Inspector in relation to the matters which have been raised by the Claimant.

Ground 3

47. I then turn to ground three. This advances a challenge to two parts of the decision letter. First of all, the Claimant refers to the first sentence of paragraph 12 of the decision letter. Paragraph 12 stated:

> "I consider the present proposal would be piecemeal development which would actively prejudice a comprehensive scheme by foreclosing on any option which sought to redevelop the appeal site. Support for this view is provided by appeal decisions in Crawley and Preston (APP/Q3820/A/07/2038229 and APP/N2345/A/07/2057488) where, similarly, the principle of piecemeal development was held to be harmful to a comprehensive scheme."

48. It was said on behalf of the Claimant that the first sentence in that passage is irrational and unintelligible. Perhaps the use of the word 'foreclosing' was not a happy choice of word, if the meaning were to be taken as confined to foreclosure in an absolute sense of precluding options which sought to redevelop the appeal site. But, of course, the word foreclosing can also mean to hinder.

49. Furthermore, the decision letter has to be read as a whole. In particular, attention was drawn to paragraph 22 of the decision letter where the Inspector concluded that the proposal represented piecemeal development which had not been brought forward as part of a comprehensive scheme and would not form part of any scheme meeting the objectives of Policy GS9A. In particular, the Inspector concluded that in his judgment it would be likely to make the preparation and delivery of such a scheme more difficult because it would act as a constraint on redevelopment options so as to make it harder to resist further piecemeal development. From those words it is absolutely plain that the Inspector was not using the word 'foreclosing' in any absolute sense, but rather he was using it in the sense that the proposal, if allowed, would hinder, or render more difficult, the achievement of the objectives of the Local Plan Policy. The reasoning in

paragraph 12 of the decision letter permissibly anticipates what the Inspector went on to find in subsequent paragraphs of the letter, and in my view it is not open to challenge.

50. Mr Crean QC added to his submissions by suggesting that the proposal before the Inspector was for a modest extension and it was impossible, he suggested, to see how such a scheme could have the adverse effect identified by the Inspector. Of course, that sort of submission really involves an attempt to re-run the planning arguments that were no doubt skillfully put before the Inspector but which failed before him. It comes nowhere near any basis for making an irrationality challenge.

51. It would be quite impossible, in my judgment, to conclude that no reasonable Inspector was entitled to draw the conclusions to which I have referred.

52. The second part of ground three challenges paragraph 14 of the decision letter, in particular the fourth sentence where the Inspector, having referred to the size of the proposed extension, and having described it as a significant investment in some 1169 square meters of floor space, a comment which has not been challenged, went on to say this:

> "Once it was in place there might be reluctance on the part of the appellants to continue their current negotiations with the council for a move to new premises."

53. Mr Crean submits it was wholly unfair for the Inspector to make this point; it was not something which had been raised during the course of the inquiry, and it was also in conflict with the express evidence of Mr May, given at the inquiry in his proof.

54. In this context he relies upon paragraph 4 of Mr May's witness statement before this court, which reads:

> "Similarly, no evidence was put before the inquiry to support the Inspector's conclusion (DL, paragraph 14) that there might be 'reluctance' on the part of the Claimant to continue to negotiate with the council if permission were granted. Indeed, the uncontested evidence was to the contrary (see my proof of evidence, paragraph 4.4)."

55. That passage refers to paragraph 4.4 of Mr May's written evidence before the Inspector, which lies at the heart of this complaint. That passage too needs to be read in context. In particular, it forms part of a line of argument advanced between paragraphs 4.3 and 4.9. In summary, Mr May had stated in paragraph 4.3 that Sainsbury's had previously been approached by Wilson Bowden, the council's development partner. They had offered Sainsbury's a leasehold on a new food store building in the centre, but that had proved to be commercially unattractive to Sainsbury's and had been rejected by their board. Paragraph 4.4 then reads:

> "More recently Sainsbury's have been in direct discussion with the authority. Sainsbury's board confirmed that they had no objection in principle to moving but would require a long leasehold on a larger store. Discussions between the parties are continuing."

56. In paragraph 4.5, Mr May pointed out that any agreement to relocate the Sainsbury's food store would be subject to a number of matters, not least of which was the need for a planning permission for a new replacement store to meet Sainsbury's particular design and operational requirements. He pointed out that no detailed scheme for such a store had been prepared, and no planning application had been submitted. He then went on to express the expectation that agreement could be reached. Having said that, in 4.6 he said:

> "However, if for any reason agreement on a relocation store could not be reached, then Sainsbury's have confirmed that they will continue to trade from their existing store. They will continue to invest in it in order to maintain its attractiveness to customers and will implement the extensions now proposed [if granted permission]."

57. He then went on to suggest that, at the time he was writing the proof, there had been no suggestion that in the event of negotiations breaking down the Local Authority would seek to compulsorily purchase the Sainsbury's site in order to facilitate the Wilson Bowden scheme. He then added, in paragraph 4.8, that in all his experience of retail development over many years, there had never been a serious proposition from a Local Authority that it would seek to acquire, by way of compulsory purchase, one of the major supermarkets in a town centre that was already trading successfully.

58. In paragraph 4.9 he summarised the position by saying that it could be concluded that, should agreement be reached between Sainsbury's and the authority over relocation, the existing site would in time be released for future development. However, if agreement could not be reached between the parties then the food store would remain where it is, with or without its extension.

59. These passages clearly indicate, first of all, that there was a hard commercial negotiation still to be conducted, not surprisingly one might think. Secondly, they show that Sainsbury's were quite prepared to remain in their current location, again, not surprisingly, and that they would only relocate if they were satisfied with the terms on offer. The council's response to all this can be seen by looking at the closing submissions by Mr Tim Corner:

> "70. If it refuses to co-operate with the comprehensive development, there is every likelihood that it will find itself subject to a CPO.
>
> "71. Further, consideration of the making of a CPO provides yet further reason for resisting piecemeal development. Planning permission for piecemeal development is likely to make it more difficult to convince the Secretary of State that she should confirm a CPO for comprehensive development. The Secretary of State could well take the view that it would be contrary to the principles of sustainability for a CPO to be confirmed that would require the demolition of development which had only recently been permitted and built.
>
> "72. I suggest this risk is present to an unacceptable degree even if the

> case of the Sainsbury's extension is taken in isolation. If permission is granted here, surely an objector to a CPO based on a comprehensive development could reasonably argue before the Secretary of State that comprehensive development was not necessary, and that piecemeal development had been shown to be acceptable by the permission for the Sainsbury's extension. Of course, as already submitted, if permission is granted on this appeal, there are likely to be others pressing for their piecemeal development. That would make it all the more difficult to convince the Secretary of State that a CPO should be confirmed."

60. The Claimant has not suggested in this court that there was any unfairness in the contentions which were being advanced by the Council at that stage. In particular, it was not suggested that the matters to which they referred had not been properly aired or dealt with during the course of the inquiry. The thrust of the council's concern was that negotiations with Sainsbury's might not be successful. That appears to have been common ground between all parties, because there was no suggestion that negotiations were guaranteed to succeed or even that there was a high probability of them succeeding. The Council's concern was that there might have to be a compulsory purchase order. They examined the implications for the merits of a compulsory purchase order if, in the mean time, planning permission had been granted for the extension and Sainsbury's had implemented that permission, committing themselves to the significant investment involved.

61. When one then comes to the Inspector's decision letter, in particular at paragraph 14, it is apparent that his thinking proceeded in the same way. If one continues beyond the single sentence which Mr Crean sought to impugn, the Inspector said this:

> "After all they would have a refurbished store. The council would be able to proceed by way of a compulsory order (CPO), but then the existence of the proposed extension could be used to add weight to an argument that the site should be excluded from the order."

62. Understandably, Mr Crean does not seek to attack that sentence. Indeed one could not see how, as a matter of law, it could be challenged. Clearly the Inspector was not in a position to assume that voluntary negotiations would be successful. His main concern, on any fair reading of the decision letter, was what one might call the 'fall back', whereby a Compulsory Purchase Order might need to be promoted. I do not think therefore that the sentence criticised by the Claimant, which only dealt with voluntary negotiations for relocation, played a critical, or even a significant part in the Inspector's reasoning.

63. One can test the matter in this way. The Claimant is in effect saying that the Inspector should have proceeded on the basis that voluntary negotiations would continue for a relocation, despite the grant and implementation of the planning permission they sought. Suppose that the Inspector had proceeded on that basis. The rest of the evidence nevertheless left the position rather uncertain as to whether an agreement would in due course be concluded. This demonstrates that the key concern in this

paragraph of the decision letter ultimately relates to the prospect that a compulsory purchase order might be needed.

64. On this view therefore, I do not consider that this could be a material error in any event, or a matter which could have caused substantial prejudice to the claimants. As was discussed during the course of argument, it has been said on many occasions by the courts that there is no such thing as a technical breach of the rules of natural justice or a duty to act fairly. Such a breach itself promotes or requires that substantial prejudice has been caused.

65. Mr Crean says on behalf of his clients that they have been deprived of a fair crack of the whip. As he fairly accepted, that broad expression begs the question as to what is meant by a fair crack of the whip on the specific facts of a particular case. That expression, of course, comes from the decision of the House of Lords in *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 1 WLR page 1255. The facts of that case are well known. It related to a Compulsory Purchase Order inquiry where the critical finding of the Inspector and the Secretary of State depended upon something which was observed by the Inspector at the site inspection and which had not been canvassed at all in evidence. It related to the condition of the foundations of the property, in the context of a Compulsory Purchase Order, for the acquisition of a house said to be unfit for human habitation. That additional matter went to the root of the decision.

66. Reference was also made to the decision of Ouseley J in *Castleford Homes Ltd v Secretary of State* [2001] EWHC 77, and in particular to paragraphs 64 and 65 of the judgment.

67. In the circumstances which I have sought to describe I am satisfied that the comment made by the Inspector was an inference which he was entitled in any event to draw from the evidence presented to him. The thrust of what he was saying in the sentence which is criticised is that somebody in the position of Sainsbury's, who had made an investment in the extension and refurbishment of their store, might be more reluctant to move, and that this would be something which could have an adverse effect on the negotiations, ultimately leading to the prospect of a Compulsory Purchase Order. No one had said to the Inspector that there would be no need for a Compulsory Purchase Order to be relied upon. Everything in this line of reasoning lead ultimately to the conclusions set out in the last sentence of paragraph 14. Read fairly and properly in this way, I am afraid I do not accept that this ground for challenge has been made out.

Ground 4

68. Ground four fell into three parts. As to the first part, the argument for the Claimant, as advanced in oral submissions, was that there is an internal inconsistency in the decision letter between paragraph 10 and paragraph 19. In order to deal with this, I note that in paragraph 8 of the decision letter the Inspector had referred to a Master Plan for a scheme, promoted by a partnership consisting of the Borough Council and Wilson Bowden. At paragraph 10 of the decision letter the Inspector had accepted that that scheme represented only one possible layout for a comprehensive scheme extending the

town centre. However, it is said by Mr Crean on behalf of the Claimant, that by paragraph 19 the Inspector was treating the Wilson Bowden scheme as "the scheme", as if to imply that no other scheme would be possible. He therefore suggested that that approach was inconsistent with what had previously been said by the Inspector in paragraph 10 of the decision letter, which had recognised that other schemes might be possible.

69. I am afraid I do not think that it is open to read the decision letter in the way that is suggested. In paragraphs 19 to 21 the Inspector examined the issue of whether sufficient progress was being made on the only single comprehensive scheme which was being promoted at the time of the inquiry. The object of that exercise was to consider, as one factor in what the Inspector described as a planning balance, how reasonable it was for the Local Planning Authority to resist piecemeal development as being prejudicial to the objectives of Policy GS9A. That approach does not involve any assumption on the Inspector's part that no other comprehensive scheme could come forward so as to contradict paragraph 10 of the decision letter. The distinction recognised in paragraph 10 also appears in any event in paragraphs 22 and 23 of the decision letter, where the Inspector used phrases such as, "any scheme that would meet the objectives of LP policy GS9A", "such a scheme", and "a comprehensive scheme". Clearly, on any fair reading, paragraph 19 of the decision letter is not to be read as being in conflict with paragraph 10 of the decision.

70. The second part of the challenge under ground four criticised the penultimate sentence of paragraph 13 of the decision letter, in which, having referred to the nine objectives of Policy GS9A, the Inspector said:

> "The objectives should be used to assess the merits of a comprehensive, not those of piecemeal development."

71. In fairness, Mr Crean accepted that this criticism added nothing of substance if the Inspector's interpretation of GS9A could not be impugned. In other words, he agreed that this point is parasitic on the outcome of his earlier challenge to the inspector's interpretation of that policy. That challenge has failed, and it follows that this criticism also fails.

72. The third part of ground four dealt with the issue of precedent. This was an attack on paragraph 15 of the decision letter which stated:

> "There have been other proposals for retail development in the BQDA which have been resisted by the Council including a new building adjoining Matalan. These were not extensions of an existing business but, as in the present case, they were appropriate town centre uses and the only identified objection was their effect on comprehensive development. There might well be pressure to allow other proposals on this basis. This is more than mere fear or generalised concern that a precedent would be established. Cumulatively the effect would be to undermine a comprehensive approach."

73. Paragraph 50 of the claimant's skeleton refers to parts of Mr May's evidence in which he had argued that precedent could not arise as a concern in relation to this proposal. It was said that the issues which it raised were unique. It is then said in paragraph 51 of the skeleton that the Inspector has ignored this evidence or failed to give adequate reasons. Turning to Mr May's evidence, the relevant passages are at paragraphs 6.71 to 6.74:

> "6.71 The council's reason for refusal also refers to an approval of permission for an extension to the food store being 'likely to set a precedent for other similar extension or redevelopment of buildings on a piecemeal basis'. The concern being that cumulatively such proposals would undermine the regeneration aims of the plan.
>
> "6.72 Again there is a need for a reality check on this issue. The issue of precedent can only be of concern to proposals within the BQDA. The SCG sets out the applications for planning permission that the Borough Council has had to deal with inside the BQDA. The proposal by Sainsbury's is the only significant one.
>
> "6.73 Furthermore, the extension to Sainsbury's food store is unique in the BQDA as Sainsbury's is the only large store within the BQDA.
>
> "6.74 Finally, even though the refusal notice refers to precedent resulting from approval of both extensions and redevelopment of buildings in reality there is a clear distinction between these two forms of development. Refusal of an extension does nothing to change the reality that a building already exists and which, if in the way of redevelopment, has to be removed. Refusal of a new building on a site is concerned with the issue of a future development that does not already exist and which is, therefore, not already in the way of future development."

74. In summary, Mr May argued that the Sainsbury's proposal had been the only significant proposal for separate development within the BQDA, that it was unique because the Sainsbury's store was the only large store within the BQDA, and that a distinction should be drawn between development for a mere extension to an existing building as opposed to a proposal for an entirely new building.

75. In paragraph 50 of the decision letter the Inspector dealt with the distinction between a new building and new extensions, and it is therefore apparent that he had well in mind, and took into account, Mr May's evidence. I do not think that the contrary contention is arguable.

76. In oral argument Mr Crean's challenge was put slightly differently. He submitted that for precedent to be a material consideration there has to be a sufficient degree of similarity between the appeal proposal and other proposals in the future for which the appeal proposal would set a harmful precedent. In other words, the council would not find it difficult to resist further proposals as being contrary to the objectives of GS9A unless the appeal proposal would be sufficiently similar to those future proposals. This

argument was advanced on the basis of a passage in the case of *Poundstretcher Limited v the Secretary of State for the Environment*, a decision of Mr David Widdicombe QC sitting as Deputy High Court Judge, reported at [1988] 3 PLR, page 69. In fact, it depends more critically upon a passage in a judgment cited by Mr Widdicombe from the decision of *Collis Radio Ltd v the Secretary of State for the Environment* at [1975] P&CR 390, a judgment given by Lord Widgery CJ, at page 395.

77. When referring to the concept of precedent as a reason for refusal in planning, Lord Widgery CJ said:

> "This is a problem which has appeared in the administration of planning law since its inception. There is no doubt whatever that, human nature being what it is, if permission is granted for a particular form of development on site A it is very difficult to refuse similar development on site B if the circumstances are the same. It must happen constantly in practice that a Local Planning Authority refuses planning permission in respect of site A because of the consequences which it fears might flow in respect of the sites B, C and D. No court has so far said that it is not a proper consideration to be adopted by a planning authority."

78. It is accepted that the concept being referred to by Lord Widgery CJ in that passage is not restricted to one of sameness, but also embraces similarity.

79. Later on in his judgment Mr Widdicombe added these comments which have been referred to on many occasions. He said:

> "I accept Mr Hobson's proposition that where precedent is relied on, mere fear or generalised consent is not enough. There must be evidence in one form or another for the reliance on precedent. In some cases the facts speak for themselves."

80. He went on to give an example of that. For completeness however, one must read the Poundstretcher decision in the light of subsequent authorities, and in particular the case of *Rumsey v the Secretary of State* [2001] 81 P&CR, page 32, a decision of Mr Duncan Ouseley QC, sitting as a Deputy High Court Judge, as he then was. In paragraph 16 of that judgment, Mr Ouseley QC said:

> "Poundstretcher can not be seen as providing some precise legal test as to the nature of the material which the Inspector must have before him when reaching a judgment on the present issue. The recognition of the inadequacy of mere fear or generalised concern is no more than saying that an Inspector must have some material on which to base his view, and the nature of what is required will vary from case to case."

81. Secondly he said:

> "Moreover, in Poundstretcher, it was rightly recognised that the planning judgment as to harm by precedent can be made in circumstances where the facts speak for themselves."

82. And lastly, I draw attention to paragraph 17:

> "I should add that I do not accept an earlier submission which Mr Pereira made, but then drew back from, to the effect that if no harm were found in any individual case, then no harmful effect could follow from subsequent decisions on all fours with that one. I consider that it is open to a planning decision-maker to reach a contrary conclusion: one development is harmless, but a second or more, each individually harmless, would lead to a harmful accumulation; thus the first might be refused, because decisions could not be taken in isolation, when in reality one decision led to another."

83. In my view, the issue of similarity is, by definition, one of degree, and involves planning judgment. I was reminded of the evidence which was provided by the council. For example, I was referred to paragraph 4.26 of Mr Parker's evidence which read:

> "4.26 A number of properties on the site are held by third parties who might well seek to bring forward incremental development proposals if the opportunity were seen to arise. One interest, close to the existing J Sainsbury's store, is held by a speculative development company. Several of the buildings on the site, such as the timberyard, Express Dairies, and the Matalan unit are ones clearly likely to face redevelopment in the absence of a comprehensive planning policy. It may well be argued that past land subsidence makes some building renewal necessary."

84. Mr Moffett, on behalf of the Secretary of State, also referred to the council's closing submissions, and in particular paragraphs 34 and 35.

85. My conclusions are as follows: first of all, there was evidence to support a finding of precedent in this case. It could not be said, and I do not think it was seriously contended, that this was a case where the Inspector is to be criticised for having relied upon a mere generalised fear, unsupported by evidence. It is apparent from paragraph 15 of the decision letter that the Inspector was alert to that pitfall. Secondly, Mr Crean's submission was that the matters set out in paragraph 15 of the decision letter could not "begin to establish a sufficient degree of similarity", and failed to deal with paragraph 6.73 of Mr May's written proof of the inquiry. In that passage Mr May had said that Sainsbury's currently had the only large store in the BQDA. Of course, put that way, this challenge is now formulated as an irrationality challenge.

86. In my view, it can not be said that the Inspector's conclusions on this matter were irrational, or that he reached a judgment which no Planning Inspector was entitled to reach on the evidence before him. The context for his conclusion included the risk to the prospects of securing a single comprehensive scheme if piecemeal development were to take place. The Inspector found that there might well be pressure to allow the proposals "on this basis", to use his words, and that cumulatively the effect would be to undermine the comprehensive approach. The words, "on this basis", refer to the similarity that he saw as being sufficient to justify the concern that he expressed. That

is to say, other proposals which had already come forward, albeit not proposals for extensions, were nonetheless appropriate town centre uses, or appropriate forms of town centre development which had only been refused because of a conflict with GS9A and the objective of securing a comprehensive scheme. As a matter of law, that was a sufficient degree of similarity for the Inspector to rely upon, irrespective of whether the proposals were for new buildings or extensions. It was not irrational for the Inspector to take that approach. It was a permissible approach for him to take, exercising planning judgment.

87. Given that line of reasoning on the part of the Inspector, the fact that he did not expressly refer to the fact that Sainsbury's was the only large store currently located in the BQDA, was not a legal error. In my judgment, his reasoning was sufficient to deal with the line of argument which had been advanced at the inquiry on behalf of the Claimant.

88. I am afraid that ground 4 also fails.

89. As a result, all the grounds for challenge put forward before the court fail, and the application is dismissed.

90. I am grateful to both counsel for the help they have given.

91. I should add by way of a footnote that, during the course of argument, when we were dealing with the breach of natural justice case, I pointed out there were relatively few authorities in this area on the point. I drew attention to another decision of Ouseley J, *the Queen on the application of St James Homes Ltd v Secretary of State for the Environment,* at [2001] EWHC Admin 30, and invited submissions on that. I did receive helpful submissions from both parties on that matter for which I am grateful.

92. In the light of the view which I have taken about the merits of that particular part of the challenge, there is no need for me to say anything further about that particular authority, but I am grateful nonetheless for the help which has been given. Thank you.

93. MR WHALE: My Lord, I am very grateful for that on behalf of the Secretary of State, and Mr Moffett as well I am sure. In terms of the order, firstly, of course I would just invite the application to be dismissed, secondly, I would invite the order that the Claimant pay the Secretary of State's costs, I understand that that is also agreed, as is the quantum, which is the sum of £8,750. I am sure my learned friend can confirm that.

94. THE DEPUTY JUDGE: Yes.

95. MISS FERNANDEZ: My Lord, yes I do.

96. THE DEPUTY JUDGE: Thank you. Then the order will be that the application is dismissed, and there will also be an order that the Claimant pays the defendant's costs in the sum of £8,750. Anything further?

97. Thank you very much.