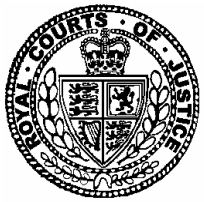

Neutral Citation Number: [2013] EWHC 231 (Admin)

Case No: CO/5259/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 March 2013

Before :

HER HONOUR JUDGE ALICE ROBINSON
SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

UNIVERSITY OF BRISTOL	**Claimant**
- and -	
NORTH SOMERSET COUNCIL	**Defendant**

- -
- -

Ian Dove QC (instructed by **Veale Wasborough Vizards**) for the **Claimant**
Suzanne Ornsby QC and Mark Westmoreland Smith (instructed by **the Head of Legal Services**) for the **Defendant**

Hearing dates: 14th February 2013

- -

APPROVED ADDENDUM JUDGMENT

Her Honour Judge Alice Robinson sitting as a Deputy High Court Judge :

1. On 14th February I handed down judgment in this case and heard oral submissions supplemented by Skeleton Arguments, as to the nature of the relief that should be granted. In my judgment I held that in his appraisal of the Council's housing requirement figure of 14,000 in Policy CS13 of the Core Strategy the Inspector failed to give adequate or intelligible reasons for his conclusion that the figure made sufficient allowance for latent demand i.e. demand unrelated to the creation of new jobs. In consequence the adoption of Policy CS13 of the Core Strategy in reliance on the Inspector's recommendation was unlawful.

2. This is an addendum to my judgment setting out my decision on the issue as to the appropriate relief to be granted. Phrases defined in my judgment have the same meaning in this addendum.

3. The court's powers are set out in s.113 of the 2004 Act:

> "(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."

4. There is an issue between the parties as to whether the power to quash and the power to remit in s.113(7) are alternatives or whether they may be exercised together. Mr Dove submitted that they are alternatives. The effect of quashing is that the quashed part of the development plan ceases to exist and the local planning authority have to bring forward proposals from scratch to vary the plan to replace the quashed policies. The effect of remitting is that the part of the plan which is remitted goes back to an earlier stage in the process in accordance with the directions given pursuant to subsections (7B) and (7C). The two are completely different outcomes. Miss Ornsby did not disagree as to the effect which quashing part of the plan would have but was concerned that, if it was remitted to an earlier stage without simultaneous quashing, the remitted part would still be an adopted document.

5. When s.113 of the 2004 was first enacted it provided as follows:

"(7)The High Court may quash the relevant document—

(a) wholly or in part;

(b) generally or as it affects the property of the applicant."

6. Concern was frequently expressed about the lack of flexibility in the provision because, as is common ground, quashing had the effect that the local planning authority had to recommence the plan making process (in respect of the part quashed) from the beginning, see e.g. *South Northamptonshire DC v Charles Church Developments Ltd* [2000] PLCR 46, a decision on the predecessor provision in s.287 of the Town and Country Planning Act 1990. The amendments to s.113 which include the power to remit were made by s.185 of the Planning Act 2008 the Explanatory Notes to which indicate that the amendments were intended to expand the courts powers by providing an alternative remedy, see paragraph 295.

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.

8. The main dispute between the parties centres on whether policies should be quashed or remitted and as to which policies the court order should apply. Mr Dove submitted that the relevant policies should be quashed on grounds which I consider fall under two main heads. First, the ground on which I held that the Core Strategy was unlawful removed the foundation stone of its housing requirement which had a consequential impact on a great many policies. This was not a technical breach of procedure but rather a complete failure of the legal process such that it was appropriate for the Council to go back to the start. Secondly, to simply remit for an Inspector to go

through the examination process again would give rise to serious practical problems as a result of the lapse of time since the Inspector reported in March 2012. The policy context has changed with a new National Planning Policy Framework which requires a Strategic Housing Market Area Assessment to be carried out, further population projections will have been published, the duty to co-operate in s.33A of the 2004 Act as amended would apply to preparation of the Core Strategy now and the BANES Inspector's preliminary conclusions are now available identifying serious flaws in the Council's methodology. Examination of the Core Strategy could not be undertaken without the Council doing a great deal of further work with the result that the Inspector would likely recommend withdrawal of the plan, as the BANES Inspector had, or the examination would have to be suspended pending further work which would be a piecemeal approach. In either case the objectors would be put to further unnecessary expense compared to the position if the policies were quashed. The Council should produce a Core Strategy from scratch based on the up to date position.

9. Miss Ornsby submitted that the relevant policies should be remitted to the Inspector for valid reasons to be given, the only stage at which any illegality occurred. The only policies sought to be quashed on ground 2 of the challenge were CS6 and CS13 and the other policies are not dependent on the overall housing figure. Information could be updated as part of the examination process which is iterative and if the Inspector considered modifications were required to make the plan sound he could invite the Council to conduct a Strategic Environmental Assessment ("SEA") of them and further consultation and, if necessary, re-open the examination. The housing numbers would only go up not down and it would be more appropriate for the Council to bring forward proposals to vary the Core Strategy to make further provision for housing than to quash or remit other policies which were in the process of being implemented. By way of example, she referred to Policy CS30 which makes provision for housing in Weston Villages as a result of which Supplementary Planning Guidance has been adopted and development is underway. The BANES Inspector did not require the plan to go back to the beginning and it remains submitted for examination but suspended pending the further work being undertaken.

10. Putting on one side which policies are affected for a moment, the ground on which this challenge succeeded relates to the reasons given by the Inspector in his report on the examination of the Core Strategy. 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. I note that in her Skeleton Argument paragraph 25 Miss Ornsby sought to have the policies remitted for consideration by the same Inspector. However, after hearing Mr Dove's submissions that this would be unheard of she did not pursue the point orally, rightly in my view.

11. In my judgment the authorities relied upon by Mr Dove do not assist. They all relate to the previous position under s.20 prior to its amendment by the Planning Act 2008 when the plan or policies could only be quashed. That gave rise to consideration of the exercise of the court's discretion whether or not to refuse relief. To remit the

relevant policies pursuant to s.113(7)(b) as opposed to quashing them pursuant to s.113(7)(a) does not amount to withholding relief in any way nor is it unconventional. Rather it involves the grant of relief in a manner for which express provision is made.

12. The passage of time may well require the Council to up date its evidence and, potentially, to invite the Inspector to recommend modifications to policies. That may require an SEA and further consultation. However, this is a 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 pre-determine further decisions of the Council and an Inspector about the Core Strategy which are matters of planning judgment for them and not the court.

13. Further, for the reasons set out below I consider that a number of policies should be remitted on the grounds that any increase in the total housing provision figure may result in the need for alterations to other policies. On the other hand, on a re-examination the Inspector may accept the Council's housing figure or any recommended increase may not exceed the available housing land supply. Even if further housing provision will need to be made it is most unlikely to affect all the policies remitted. If the policies were all quashed there would be a very considerable delay in the adoption of housing policies which in themselves are perfectly lawful simply because of the possibility they may need a consequential amendment that can be accommodated through the examination process. That would leave the Council with an undesirable and unnecessary housing policy lacuna for a considerable period of time.

14. As to the policies affected, Miss Ornsby conceded that CS6 and CS13 should be remitted.

15. CS16 is the affordable housing policy and Miss Ornsby submitted that because the level of housing need could never in practice be met an increase in total housing provision would not result in an increase in the level of affordable housing sought on individual sites. I did not understand Mr Dove to dispute this and although his Skeleton Argument paragraph 12 states that policy CS13 is intimately related to Policy CS16, he did not substantiate that submission by explaining how any alteration to housing provision could possibly affect Policy CS16. Further, to remit this policy would leave the Council without an adopted policy requiring affordable housing which in my judgment would give rise to unnecessary uncertainty in the provision of an important area of housing need.

16. The remaining policies around which argument centred are CS14 (Distribution of new housing), CS19 (Strategic gaps), CS28 (Weston-super-Mare), CS30 (Weston Villages), CS31 (Clevedon, Nailsea and Portishead), CS32 (Service Villages) and CS33 (Infill villages, smaller settlements and countryside). For the following reasons I consider that all of these policies should be remitted for examination as well. The main purpose of the examination of the Core Strategy is to determine whether the plan is sound, see s. 20(5) of the 2004 Act. If on reconsideration of policy CS13 the Inspector concluded that the housing provision figure was inadequate and further

provision for housing should be made beyond the available supply of land then in order to be sound the Core Strategy would need to make such provision. That would inevitably require amendment to policy CS14 and some at least of the policies which flow from it (CS28 and CS30-33) which make provision for specific housing numbers. While policy CS33 is more of a development control policy it has the potential to change e.g. by the removal of one of the infill villages from the list if it is considered further development should take place there. It would not be appropriate for the court to prejudge which of those policies should be amended or in what manner, that would be a matter for the Council and the Inspector.

17. Contrary to the submissions of Miss Ornsby, I do not consider that the issue of soundness could be addressed by the Council inviting the Inspector to recommend modifications to the plan by way of supplementary policies. Firstly, s.20(5)(b) states that the purpose of the examination is "to determine in respect of the development plan document… whether it is sound." This refers to the whole plan not just particular policies. While s.20(5) does not deal with a situation in which some policies of the plan are remitted for re-examination following a successful challenge, it would be entirely contrary to the purpose of the legislation if an Inspector were restricted to considering only the soundness of the policies remitted. If those policies were themselves sound, but the plan as a whole comprising those policies and the policies already adopted was not sound, the plan would not be sound.

18. Secondly, supplementary policies would affect the adopted policies. By way of hypothetical example only, if the Inspector considered that further provision of 2,000 dwellings was required (over and above existing supply) which the Council proposed should be met through the provision of a further 1,000 dwellings each in Weston-super-Mare and Portishead, the calculations in adopted policies CS14, CS 28 and CS31 would need amending. Supplementary policies would have to be brought forward with additional housing numbers resulting in different figures from the adopted policies. Further, it may be considered that the existing distribution of housing proposed in these policies should be altered as well. In addition, any amendments may have a knock on effect on other policies. If such amendments were dealt with by supplementary policies any reader of the plan would have to look at two policies instead of one in respect of each issue or location and the two policies would be inconsistent with each other. No such plan could conceivably be described as sound.

19. Further, the suggestion by Miss Ornsby that the need to amend other housing policies could be dealt with after any further recommendations by an Inspector on re-examination by the parties returning to court for an order remitting further policies is wholly impractical. No provision is made for such an exercise in s.113 and it would involve the court retaining a continuing supervisory role which would be quite inappropriate. This is apart from the considerable further delay and expense which would be caused.

20. While it is regrettable that the policies remitted will no longer have the force of adopted policy until the further examination has been concluded and the policies re-adopted, this is the inevitable outcome of the fact that the unlawfulness of the previous examination relates to the total housing provision figure which itself feeds into a great many other policies. If on re-examination the housing provision figure increases, this has the potential to affect the other housing policies as well. While it is

unlikely that all the policies would be affected, it is not possible at this stage to predict which would be. However, it will be apparent to any reader of my judgment and this addendum that there is nothing unlawful per se about the policies remitted other than CS13 and that any potential change in housing numbers will be an increase rather than a decrease. The policies can still be accorded appropriate weight in any decision making and housing can be brought forward through the development control process.

21. Further, it is not inevitable that there will be extensive further delay in re-adopting the policies. The time taken to undertake any further work will be in the Council's hands. The Core Strategy as a whole was submitted for examination on 8 July 2011 and the Inspector reported on 15 March 2012. Re-examination of the housing policies in the light of the court's judgment should take considerably less time.

22. I note that in her Skeleton Argument Miss Ornsby draws attention to the fact that some of the policies make provision for employment development. However, she did not submit that individual policies should be partitioned and that only those parts of the policies dealing with housing should be remitted.

23. Finally, in my judgment policy CS19 should be remitted for the same reason as policy CS6. If provision for further housing has to be made consideration may need to be given to whether to locate housing in a strategic gap in which case it may not be appropriate to designate a particular strategic gap in CS19 as currently worded.

24. In conclusion the following policies will be remitted to the Planning Inspectorate for re-examination: CS6, CS13, CS14, CS19, CS28, CS30-33 with a direction that they are to be treated as not having been recommended for adoption or adopted. In the light of the fact that the Council may have to carry out further work on its housing figures in the light of the lapse of time I do not consider it would be appropriate to restrict the examination to the question of whether the figure of 14,000 dwellings in CS13 makes adequate provision for latent demand.

25. In the light of this addendum the parties are invited to draw up an appropriate order for disposal of the proceedings.