Holiday Extras Limited v Crawley Borough Council

CO/419/2016

High Court of Justice Queen's Bench Division the Administrative Court

30 November 2016

[2016] EWHC 3247 (Admin)

2016 WL 06989212

Before: Mr Justice Collins

Wednesday, 30 November 2016

Representation

Mr James Pereira QC (instructed by Stevens Drake) appeared on behalf of the Appellant.
Mr David Forsdick QC (instructed by Crawley Borough Society) appeared on behalf of the Respondent.

Judgment

Mr Justice Collins:

1 This is a claim which, albeit started as a judicial review, has been transferred onto the correct route; namely, an application under section 113 of the Planning and Compulsory Purchase Act 2004 . What is sought is the quashing of a policy within the Crawley Plan, which has been approved by an inspector having regard to the necessary process and procedure that has to be followed.

2 The issue relates to parking for Gatwick Airport. Essentially, what the claimants submit is that the process by which the relevant policy was included in the Plan was defective in that a reasonable alternative to purely on-airport parking, namely off-airport with conditions, was not put forward as a reasonable alternative in the SEA which was needed as part of the procedure. It was needed because the Plan dealt with matters which required environmental assessment and, so far as car parking is concerned, the real issue was the desire to keep to the minimum possible the need for motor transport to the airport. The goal was that parking should be limited to on-airport parking which would help to discourage those who wished to bring their cars to the airport and lead to greater reliance on public transport.

3 It is not necessary I think for me to go into the details of the figures which were put forward in order to establish that the airport had the ability to provide parking on-airport which would meet the expected increase in passenger traffic which would take place over the life of the Plan, which was some 15 years. The point that is taken is that the provisions that the relevant policy took over from the existing plan included on-airport priority with limitations as to the possibility of providing off-airport sites.

Instead of that, the policy was on-airport only. That is the difference between the two approaches.

4 The existing policies were contained in what were set out as GAT 6 to 9 in the existing 2000 Plan. It is in bundle 1, tab 17. Those policies essentially seek to limit, so far as possible, parking to on-airport parking. The point is made by Mr Pereira, and it is in his submission of some importance, that at that time too the airport had indicated that it was able to provide all necessary parking on-airport and, therefore, there would not be a need for off-airport parking. The limitation is expressed in policy GAT 8 which provided:

> "The Borough Council will only permit proposals for new airport-related car parking on off-airport sites where they do not conflict with countryside policies and can be justified by a demonstrable need in the context of proposals for achieving a more sustainable approach to surface transport access to the airport."

5 The reasons behind that are set out in paragraph 10.40:

> "The Borough Council considers that a development must provide for itself all the car parking space necessary for it to function as far as is deemed appropriate by surface transport plans. Normally development should not give rise to a need to provide space in a remote location or create pressure for the development of a separate area of land. The parking of passengers' cars is, in the Borough Council's view, an integral part of the operation of an airport. The International Civil Aviation Organisation (ICAO) recommends that passenger car parking should be as close as possible to their departure destination, ie the airport itself, in order to minimise traffic movements and to enable airport traffic to be directed along roads and routes designated for this purpose. […]
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> The Borough Council considers that as far as possible all long-term parking it is deemed appropriate to provide to meet airport passenger demands should be located within the airport. There are severe planning constraints in relation to protecting countryside surrounding the airport and as such there are considered to be few, if any, opportunities for further off-airport parking. Even if such an opportunity was found, proposals would be required to show a demonstrable need in the context of an agreed sustainable approach to surface transport access to the airport."

6 It is plain from that that the view was taken that it would be indeed an exceptional case in which off-airport parking would be considered appropriate and in compliance with policy GAT 8.

7 Unfortunately for the Council, in July 2012 there was an appeal against an enforcement notice before an inspector. His decision came down in favour of granting permission and so he quashed the enforcement notice. The approach that he adopted was, in the Council's view, more liberal than that which they had expected the policy to

provide and, while the decision was a grant only of interim permission, because it was said that on this particular land there would be no damage to any other policy in respect of the land on which the development was permitted and there was shown to be a need to provide for parking off-airport because there was insufficient at that time on-airport. Following that decision, there were a number of other applications which the Council felt it needed to allow.

8 The evidence shows that the Council sought counsel's advice as to whether they could appeal the inspector's decision, but the advice was negative. It is, in my view, quite clear that in considering what was appropriate in relation to the new plan the Council wanted to ensure, so far as it could, that the restriction to on-airport parking was clearly made and would be enforced in the manner in which they considered appropriate.

9 The SEA Directive [2001/42/EC] deals with what is required where environmental issues have to be taken into account. Perhaps the most relevant provision for our purposes is contained in Article 6 , which requires:

> "1. The draft plan or programme of the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to [as those who have to be notified] and the public.
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> 2. The authorities referred to … and the public … shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure."

10 The directive is translated into law by the Environmental (Assessment of Plans And Programmes) Regulations 2004 . I will come in due course to the important provision in that which is particularly relied on by the claimants, because it is submitted there was a failure to comply with the need to include in the SEA reasonable alternatives which should drive the relevant policy provision.

11 The starting point for a consultation programme took place between January and March 2012. The relevant steps are set out in the witness statement of Elizabeth Brigden, who is the Planning Policy Manager for the Borough Council. The first stage concerned the issues and options and the scoping report. There was produced what was described as a Topic Paper, which of course was made public and which no doubt the claimants saw. In so far as parking was concerned, this stated under the heading, "Long Term Gatwick Related Car Parking":

> "There has been a strong policy approach [then there is reference to the existing GAT 8, 9, 10] supported by policies of the other local authorities surrounding Gatwick Airport requiring any necessary increases in long-stay parking to be provided within the airport boundary. Gatwick Airport Limited has produced a Car Parking Strategy which indicates that an additional 7,500 spaces are required to satisfy car parking demand as the airport grows to 40 mppa. The strategy highlights how these spaces could be provided within the

airport boundary through a combination of decking and small extensions to existing car parks."

12 Under the further heading, "Indication of the Options for Addressing the Key Issues Outlined Above," this is said:

"Long Term Gatwick Related Parking.

•Retain the five saved Local Plan policies relating to Airport Related Parking."

13 (Those of course are the GAT 6 to 10)

"•Consolidate and save Local Plan policies into a single Core Strategy Review policy.

•Rely on the Gatwick Supplementary Planning Document and Car Parking Strategy."

14 The point is made by Mr Pereira that that indicates that the saved Local Plan policies, which of course include GAT 8, were regarded as one of the options. The next stage of the development following Ms Brigden's statement was a consultation in the autumn of 2012. In that the proposal which became GAT 3 was proposed. I do not think it is necessary to go into that in any further detail at this stage. The SEA addressed only the two options, that is to say what became GAT 3 and the second option, which was on the face of it simply an off-airport parking policy which Ms Brigden states was a relaxation of this policy. Indeed that is what the document refers to it as, by replacing the priority for the airport with a policy which would allow on and off parking to meet needs. Again, Mr Pereira relies expressly on the expression "relaxation" on the basis that this could only mean a relaxation of the existing policy; namely, on-airport with the possibility of off-airport in limited circumstances.

15 It may be that there has been some looseness of language in the way in which the evidence and the statements have been phrased, but, essentially, the underlying point, and what comes out in the end, is was it lawful for the Council in the SEA simply to refer to GAT 3 as one option, namely, solely on-airport parking? The alternative was off-airport, but with unspecified limitations said to be appropriate.

16 One comes then to the SEA and it is unlawfulness in the SEA which founds the claim on behalf of the claimants. Indeed, if the claimants cannot show such unlawfulness, the claim is bound to fail, but it is submitted that even if it can show that there was unlawfulness, the claim should fail on the basis that it is quite clear that the Council would have required GAT 3 and the inspector when he came to consider on reviewing the Plan whether it was sound would, when one comes to look at his reasons, inevitably have reached the same decision; namely, that the appropriate provision was indeed GAT 3, that is to say only on-airport parking.

17 The Regulations which I have already mentioned, that is the Environmental

(Assessment of Plans and Programmes) Regulations 2004 No. 1633, by Regulation 12 indicate what should be involved in the preparation of an environmental report. Regulation 12.2 provides:

> "(2) The report shall identify, describe and evaluate the likely significant effects on the environment of—
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> (a) implementing the plan or programme; and
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> (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
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> (3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of—
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> (a) current knowledge and methods of assessment;
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> (b) the contents and level of detail in the plan or programme;
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> (c) the stage of the plan or programme in the decision-making process; and
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> (d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

18 It is the requirement to identify, describe and evaluate the significant effects of reasonable alternatives that is the important provision in the Regulation, because what is submitted is straightforwardly and simply that the GAT 8 approach, that is to say off-airport but priority on-airport, was manifestly a reasonable alternative. Indeed, right from the outset in the original document, number 9 to which I have referred, it was expressed to be an option. Therefore, it is submitted it ought to have been expressly referred to in the SEA and reasons for not following it should have been spelt out if they were needed.

19 Potentially, Mr Pereira submits that either on-airport or off-airport without any express limitations was insufficient, because it ignored off-airport with limitations and, therefore, fell foul of the requirement in Regulation 12.2 to identify reasonable alternatives. If that is correct, that, he submits, is fatal to the maintenance of that provision in the Plan.

20 Mr Forsdick, in essence, submits that it is not a requirement to go into, as he puts it, "sub-plans", that is to say to identify distinctions to be drawn within the ambit of the alternative. He submits there is no case which indicates that that obligation exists. The whole purpose of consultation is to enable consultees to make submissions to indicate, if they consider it appropriate, alternatives or variations which are desirable and which are not covered by the proposals that exist. Of course, off-airport is all very well. Certainly, on its face, it does not provide priority for on-airport. A submission that it ought so to include was one which could have been put forward by anyone and could certainly have been put forward by the claimant.

21 It chose not to make any submissions in relation to any of the preliminary steps or indeed in relation to the SEA itself. It had, it says, good commercial reasons for not making any submissions. Essentially, it was concerned if it did it would be likely to lose the existing arrangements that it had with Gatwick Airport Limited. Indeed, in due course, it did lose those, but after the SEA and then it did take the opportunity of making submissions when it came to the inspector's report and the inspector's enquiry, which was held at the beginning of 2015. But the failure to make any adverse representations at the earlier stage is, in my judgment, a very important consideration in deciding whether it can be said that there was unlawfulness in the Council's approach, in particular of course, in the SEA.

22 On its face, there was no question but that purely on-airport and off-airport are the two alternatives. The only question is whether one has then to say there is a further alternative on the off-airport in that it might be off-airport, but only if on-airport is, for whatever reason, not possible in the circumstances. It seems to me, on the face of it at this stage, the Council cannot be criticised for approaching the matter in the way that it did. Whether or not there was, as I say, some looseness in language is beside the point. The fact is that it was clear that on-airport parking only was entirely consistent with the views, indeed the provisions, of other material planning authorities, in particular the county council, and was equally consistent with the approach that was in environmental terms the most appropriate. Certainly, as the inspector as we shall see in due course made clear, he did not preclude the possibility of permission being granted for off-airport parking if it could be shown that material considerations justified going against the provision in the Plan.

23 Furthermore, there would always be the possibility of a supplementary decision, because there was, at the very least, a requirement for five-year reviews as to whether there were any changes needed, so that if it transpired that the airport was not meeting what it said it could meet to provide sufficient on-airport parking, variations could be made, because if a SDP were to indicate that that there could be such variations that would be one of the plans which would have to be taken into account in deciding on any particular application for development.

24 It is important to bear in mind, in my view, that even only on-airport in terms of GAT 3 did not preclude the possibility, if it could be shown that it was necessary, for off-airport parking to be permitted, probably on no more than a temporary basis. That is of course what was happening before the event.

25 I come to the inspector's decision. He was clearly aware of the GAT 8 provision. Indeed, he wrote to Mr Dove, who was the Operation Director of the applicant, a letter

of 5 March 2015 in which he referred to the written representations which had been produced by the applicants and which raised the issues which they now seek to rely on; namely, that GAT 8 should have been taken into account and should still be taken into account as a reasonable alternative to GAT 3.

26 It is true that it did not in its written submissions submit or suggest that there was any unlawfulness in the SEA and, indeed, it did not attend the hearing at the stage at which the SEA was considered by the inspector, but the inspector accepted that it was appropriate for him to consider what they raised in relation to GAT 8 and, indeed, I am told the Council had informed the inspector that they would be happy to take into account, and probably to accept, any modifications that the inspector thought were required to the Plan.

27 I bear in mind that the inspector's role in considering a plan such as this is not to form his independent view, as he would on a planning appeal, but to review the soundness of the Plan. If he took the view that a particular provision was not appropriate, because it did not, for example, provide the necessary flexibility to meet the possibility of proper applications for development off-airport, then he was entitled to take the view that it was not in that respect sound. As I say, the Council did not in any away suggest to him that he was not entitled not only to have regard to, but, if he thought it appropriate, to agree with the submissions that were made by the applicants.

28 As the programme officer on behalf of the inspector said in his letter to Mr Dove:

> "As you point out, the Inspector does have the discretion to invite anyone to appear at the hearings if he considers this is necessary to enable the soundness of the Local Plan to be determined. In your letter you raise one matter which the inspector had not previously appreciated (as it was not the subject of objection) on which, on reflection, he has decided to hear evidence. This is the change in approach to off-site parking between 2000 Local Plan Policy GAT 8 and proposed policy GAT 3. To ensure that all interested parties have an understanding of the issues involved in advance of the hearings, and to focus the discussion, the Inspector has inserted an additional question into the 'Matters, Issues and Questions' document issued on 20 January as follows:
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> **Matter 4 Issue 3**
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> (a) Is the provision and policy GAT 3 which restricts additional or replacement airport-related parking to within the airport boundary justified and consistent with NPPF?"

29 That is a reference to the NPPF's indication that sustainable development must be permitted. What is sustainable development requires over 300 paragraphs of the NPPF to determine, but there it is. That issue was considered by the inspector. I gather that the applicants did attend at the hearing and were able to make such submissions as they wished to make, which are, as I say, set out in the letter which they sent.

30 The reasons given by the inspector are of considerable importance. They are in bundle 3 on page 583 and following. He deals with this issue in paragraphs 87 and 88 of his decision. In 87 he sets out the evidence which led Gatwick Airport Limited to indicate that it was able to provide sufficient parking. He sets out the relevant figures and goes on to indicate that the strategy showed that the necessary increase in spaces could be provided on-site by a range of measures, including block parking and decking over existing car parks, but the crucial paragraph is 88. I think I should cite that in full. It reads as follows:

> "I accept that there will be some instances where off-airport parking results in shorter overall journeys by private vehicles. However, and in the absence of cogent evidence to the contrary, there is obvious logic to the argument that car parks close to the terminals will minimise the length of car journeys for most people, and that on-airport provision is therefore a more sustainable option. This is particularly the case with the growth in 'meet and greet' services where the extra trip to the parking location invariably extends the car journey length. There may be occasions where sustainability arguments justify a temporary airport parking use, such as on the safeguarded land at City Place, [which was the decision of the inspector] but exceptions such as these do not negate the validity of the policy. Furthermore, given the scarcity of land in Crawley and the available capacity at the airport, there is a strong argument that the priority for land which becomes available outside the airport should be a more productive use such as housing or employment. Overall I conclude that police GAT 3 is sound."

31 That conclusion was reached having regard to the arguments put forward that GAT 8 was the route which could and should have been proposed. I am satisfied that the alternatives put forward by the Council were lawful. In particular, I have regard to the absence of any submission made by anyone, in particular by the applicants, before the SEA that on-airport parking with limitations was a proper approach to the issue of parking for the airport, it was not necessary to go into the details and possible limitations of off-airport parking. That could and should have been raised by those who took a contrary view. Certainly, the off-airport alternative was sufficient to enable those who wished to do so to suggest what might be regarded as tinkering with off-airport, that is to say the imposing of limitations of one sort or another. I do not think it was necessary for the Council in order to comply with the obligations under Regulation 12.2 to specify particular ways in which off-airport parking could be approached as an alternative to purely on-airport parking in the plan.

32 In the light of the history and the failure to make any submissions or representations and the way it was dealt with through the inspector, it seems to me that it is in this case a barren technicality to seek to submit that there was an unlawfulness in the approach that was adopted. What is required in a given case by way of reasonable alternatives will inevitably depend upon the circumstances of such a case. It is, in my judgment, not helpful or possible to seek to try to identify any principles beyond those helpfully set out by Hickinbottom J in the case of *R (Friends of the Earth) v The Welsh Ministers [2016] Env LR 1* .

33 Furthermore, it is to be noted that the absence of any submissions is equally a relevant consideration which is against the approach which the applicants seek to submit to be appropriate. That flows from the case of Ashdown Forest Economic Development LLP v Wealden District Council [2016] Env LR 2 page 47 , a decision of the Court of Appeal given in July of last year. That case was decided in favour of the claimants, because the Council had failed to consider any alternatives. It was apparent that there were alternatives which could and should have been referred to and, if rejected, reasons given as to why they were rejected. The absence of any representations made by the claimants was relied on, but the court said that because there was failure by the Council to consider any reasonable alternatives, with reluctance, the view was that the claim must succeed.

34 Here there is no question but that there was consideration of alternatives; an off-airport alternative was put. Opportunities were given to the applicants, and indeed to anyone else, to make any representations they wished to the Council before the SEA as to the way in which the off-airport parking should be considered. So, the failure to make any representations does, to a very large extent, militate against the applicants in the circumstances of this case. But even if I were persuaded that there was a failure which could conceivably be suggested to be an error of law in the SEA, I have to consider whether there would have been any difference in the decision that was reached, because it is clear, and I think Mr Pereira was compelled to accept this, that he must contend that the inspector's decision was wrong and indeed tainted with the same unlawfulness as that which he submits tainted the Council's decision.

35 It seems to me to be clear beyond any question, having regard to the reasons that I have already read in paragraph 88 of his report, that he would have reached the same conclusion whether or not GAT 8 had been put as an alternative. He had regard to the submissions made before him that GAT 8 should have been applied. It was open to him as part of the review, and it was accepted by the Council that he was entitled to do this if he thought fit, to decide that GAT 8 was appropriate. He did not do so.

36 It follows that in my judgment is a matter of discretion it would have been appropriate to refuse relief. Albeit the statutory provision which requires the issue of whether the decision would have been the same to be taken into account in a judicial review does not apply to a section 113 application, there is undoubtedly in section 113 a discretion given to the court to refuse relief, even if persuaded that there was some unlawfulness in the decision-making process, if, notwithstanding that, it is clear that the decision would have been no different without that unlawfulness and that there, therefore, would be no purpose in granting relief and quashing the known provision.

37 This is an extemporary judgment and I may not have gone into the matter in the depth that perhaps would have been desirable in some respects. I hope it has covered essentially the points made on both sides. Suffice it to say that obviously I have taken account of the skeleton arguments which have been produced on both sides and all the submissions which have been made.

38 For those reasons, and essentially of course accepting the arguments put forward by Mr Forsdick, this application must be refused.

39 MR FORSDICK: I am grateful, my Lord. Can I therefore ask that the order be that

the application is dismissed?

40 MR JUSTICE COLLINS: Yes.

41 MR FORSDICK: I would seek summary assessment of the Council's costs.

42 MR JUSTICE COLLINS: Have you been served?

43 MR PEREIRA: Yes, we have. There is not an issue on the costs.

44 MR JUSTICE COLLINS: In that that case, what is the amount?

45 MR FORSDICK: Therefore, I seek a costs order in the sum of £75,224. No issue has been raised.

46 MR JUSTICE COLLINS: If that is accepted.

47 MR PEREIRA: Those are my instructions.

48 MR JUSTICE COLLINS: I suspect it is less than yours.

49 MR PEREIRA: Much less.

50 My Lord, as a formality, can I ask for permission to appeal on the basis of the arguments that I have already run? I will not elaborate.

51 MR JUSTICE COLLINS: No. I am afraid I refuse leave to appeal. It seems to me that the position is clear and you will have to apply to the Court of Appeal if you want to take it further. 52. MR PEREIRA: I am grateful.

52 MR JUSTICE COLLINS: Thank you both.