Case No: C1/2014/4099

Neutral Citation Number: [2015] EWCA Civ 1107
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION, PLANNING COURT
MR JUSTICE OUSELEY
CO/1724/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/11/2015

Before :

LORD JUSTICE MOORE-BICK
LORD JUSTICE SALES
and
MR JUSTICE LINDBLOM

- -

Between :

	SAMUEL SMITH OLD BREWERY (TADCASTER)	**Appellant**
	- and -	
	SELBY DISTRICT COUNCIL	**Respondent**

- -
- -

Mr Peter Village QC & Mr James Strachan QC
(instructed by **Pinsent Masons LLP**) for the **Appellant**
Mr Alan Evans & Mr Freddie Humphreys (instructed by **the Solicitor to the Council**)
for the **Respondent**

Hearing date: 22 October 2015

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Judgment**Lord Justice Sales :**

This is the judgment of the court, to which all its members have contributed.

Introduction

1. This appeal concerns a challenge to the adoption of a development plan document under the relevant provisions of the Planning and Compulsory Purchase Act 2004, on the ground that the local planning authority's duty under section 33A(1) of the 2004 Act – the so-called "duty to co-operate" – was engaged but not complied with.

2. The subject of the challenge is the Selby District Core Strategy, which was adopted by the respondent, Selby District Council, in October 2013. The appellant, Samuel Smith Old Brewery (Tadcaster), is a long established company with a brewery in Tadcaster, in

North Yorkshire. It also owns a large amount of land in and around that town. Over the years it has played an active part in the successive processes of plan-making undertaken by the council. It submitted objections to the core strategy with which these proceedings are concerned. Upon the adoption of the core strategy it applied to the court under section 113 of the 2004 Act for an order to quash the core strategy, on several grounds. In three of those grounds (grounds 1, 2 and 3) it contended that, in the course of the process leading to the adoption of the core strategy, section 33A of the 2004 Act having come into force during a period when the independent examination had been suspended to allow the council to prepare main modifications, the council ought to have complied with the duty to co-operate but had failed to do so. The other grounds are no longer active in this appeal, and there is no need to refer further to them.

3. In a judgment given on 27 October 2014 Ouseley J. rejected the challenge on all grounds. Permission to appeal against Ouseley J.'s order, solely on the ground of appeal relating to the duty to co-operate, was granted by Sullivan L.J. on 21 February 2015. When granting permission, Sullivan L.J. accepted that this ground was arguable, and also acknowledged that "if the implied power to suspend the examination of a plan is more widely exercised by Inspectors the question whether the section 33A duty applies to work done during the period of suspension which would have constituted plan preparation had it been undertaken before the submission of the plan for examination is an issue of more general importance which justifies the grant of permission to appeal".

The relevant statutory provisions

4. Part 2 of the 2004 Act, as amended by several subsequent Acts of Parliament including the Localism Act 2011, contains the statutory framework for the production of development plan documents. The amendments made by the Deregulation Act 2015 have no bearing on these proceedings and can be ignored.

5. Section 15 requires a local planning authority to prepare and maintain a local development scheme, specifying, among other things, the local development documents which are to be development plan documents. Section 17(3) provides that "[the] local planning authority's local development documents must (taken as a whole) set out the authority's policies (however expressed) relating to the development and use of land in their area".

6. Section 19 provides for the "Preparation of local development documents":

> "(1) Development plan documents must be prepared in accordance with the local development plan scheme.
>
> …
>
> (2) In preparing a development plan document or any other local development document the local planning authority must have regard to –
>
> (a) national policies and advice contained in guidance issued

by the Secretary of State;

(b) the regional strategy for the region in which the area of the authority is situated … ;

…

(f) the sustainable community strategy prepared by the authority;

(g) the sustainable community strategy for any other authority whose area comprises any part of the area of the local planning authority;

(h) any other local development document which has been adopted by the authority;

(i) the resources likely to be available for implementing the proposals in the document;

(j) such other matters as the Secretary of State prescribes.

(3) In preparing the local development documents (other than their statement of community involvement) the authority must also comply with their statement of community involvement.

…

(5) The local planning authority must also –

(a) carry out an appraisal of the sustainability of the proposals in each development plan document;

(b) prepare a report of the findings of the appraisal.

…".

7. As amended by the Localism Act, section 20 provides for the "Independent examination" of the development plan document:

"(1) The local planning authority must submit every development plan document to the Secretary of State for independent examination.

(2) But the authority must not submit such a document unless –

(a) they have complied with any relevant requirements contained in regulations under this Part, and

(b) they think the document is ready for independent examination.

…

(4) The examination must be carried out by a person appointed by the Secretary of State.

(5) The purpose of an independent examination is to determine in respect of the development plan document –

(a) whether it satisfies the requirements of sections 19 and 24(1), regulations under 17(7) and any regulations under section 36 relating to the preparation of development plan documents;

(b) whether it is sound; and

(c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation.

(6) Any person who makes representations seeking to change a development plan document must (if he so requests) be given the opportunity to appear before and be heard by the person carrying out the examination.

(7) Where the person appointed to carry out the examination –

(a) has carried it out, and

(b) considers that, in all the circumstances, it would be reasonable to conclude –

(i) that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, and

(ii) that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation,

the person must recommend that the document is adopted and give reasons for the recommendation.

(7A) Where the person appointed to carry out the examination–

(a) has carried it out, and

(b) is not required by subsection (7) to recommend that the document is adopted,

the person must recommend non-adoption of the document and give reasons for the recommendation.

(7B) Subsection (7C) applies where the person appointed to carry out the examination –

(a) does not consider that, in all the circumstances, it would be reasonable to conclude that the document satisfies the

requirements mentioned in subsection (5)(a) and is sound, but

(b) does consider that, in all the circumstances, it would be reasonable to conclude that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation.

(7C) If asked to do so by the local planning authority, the person appointed to carry out the examination must recommend modifications of the document that would make it one that –

(a) satisfies the requirements mentioned in subsection (5)(a), and

(b) is sound."

8. Subsection (5)(c) was inserted by section 110(3) of the Localism Act, with effect from 15 November 2011 (see section 240(5)(i) of the Localism Act). Subsections (7), (7A), (7B) and (7C) were substituted for the original subsection (7) by section 112(2) of the Localism Act, with effect from 15 January 2012 (see section 240(1)(h) of the Localism Act).

9. Section 22 of the 2004 Act ("Withdrawal of local development documents") provides that a local planning authority "may at any time before a local development document is adopted under section 23 withdraw the document".

10. Again as amended by the Localism Act, section 23 provides for the "Adoption of local development documents":

"…

(2) If the person appointed to carry out the independent examination of a development plan document recommends that it is adopted, the authority may adopt the document –

(a) as it is, or

(b) with modifications that (taken together) do not materially affect the policies set out in it.

(2A) Subsection (3) applies if the person appointed to carry out the independent examination of a development plan document–

(a) recommends non-adoption, and

(b) under section 20(7C) recommends modifications ("the main modifications").

(3) The authority may adopt the document –

(a) with the main modifications, or

(b) with the main modifications and additional modifications if the additional modifications (taken together) do not materially affect the policies that would be set out in the document if it was adopted with the main modifications but no other modifications."

11. Subsections (2), (2A) and (3) were substituted for the original subsections (2) and (3) by section 112(3) of the Localism Act, with effect from 15 January 2012 (see section 240(1)(h) of the Localism Act).

12. Section 33A, which contains the "Duty to co-operate in relation to planning of sustainable development", was introduced into the 2004 Act by section 110(1) of the Localism Act, with effect from 15 November 2011 (see section 240(5)(i) of the Localism Act):

"(1) Each person who is –

(a) a local planning authority,

(b) a county council in England that is not a local planning authority, or

(c) a body, or other person, that is prescribed or of a prescribed description,

must co-operate with every other person who is within paragraph (a), (b) or (c) or subsection (9) in maximising the effectiveness with which activities within subsection (3) are undertaken.

(2) In particular, the duty imposed on a person by subsection (1) requires the person –

(a) to engage constructively, actively and on an ongoing basis in any process by means of which activities within subsection (3) are undertaken, and

(b) to have regard to activities of a person within subsection (9) so far as they are relevant to activities within subsection (3).

(3) The activities within this subsection are –

(a) the preparation of development plan documents,

(b) the preparation of other local development documents,

…

(d) activities that can reasonably be considered to prepare the way for activities within any of paragraphs (a) to (c) that are, or could be, contemplated, and

(e) activities that support activities within any of paragraphs (a) to (c),

so far as relating to a strategic matter.

(4) For the purposes of subsection (3), each of the following is a "strategic matter" –

(a) sustainable development or use of land that has or would have a significant impact on at least two planning areas, including (in particular) sustainable development or use of land for or in connection with infrastructure that is strategic and has or would have a significant impact on at least two planning areas, …

…

…

(6) The engagement required of a person by subsection (2)(a) includes, in particular –

(a) considering whether to consult on and prepare, and enter into and publish, agreements on joint approaches to the undertaking of activities within subsection (3), and

(b) if the person is a local planning authority, considering whether to agree under section 28 to prepare joint local development documents.

…

(9) A person is within this subsection if the person is a body, or other person, that is prescribed or of a prescribed description.

…".

The facts

13. The facts are very clearly and fully set out in paragraphs 2 to 4 and 15 to 24 of the judgment of Ouseley J., and they can be shortly summarised here.

14. The council presented the submission draft of the core strategy to the Secretary of State for public examination on 5 May 2011. The independent examination was undertaken by the Secretary of State's appointed inspector, Mr Martin Pike. The inspector opened the examination hearing on 20 September 2011. It soon became clear to him that, in at least two respects – the deliverability of the new housing envisaged in Tadcaster and the implications for the Green Belt – the core strategy could not at that stage be regarded as sound. He made these concerns known to the council.

15. On 28 September 2011 the council asked the inspector to suspend the examination to

enable it to carry out further work to tackle the inspector's concerns, including the introduction of a policy to protect the extent of the Green Belt with a localised review at Tadcaster to make it possible for the objectives of the core strategy in that part of the district to be achieved, having regard to the requirements of the regional strategy. The council's request for a suspension of the examination was opposed by Samuel Smith and other objectors. On 10 October 2011 the inspector ruled in favour of suspending the examination, for a period of six months, to give the council time in which to propose changes to the core strategy dealing with the problems he had identified. The inspector indicated to the council that it should establish the principles governing the review of the Green Belt boundary and apply those principles in determining the appropriate level of growth for Tadcaster. He also indicated that the scale of housing development for which the council was planning, based on the delivery rate of 440 dwellings a year derived from the regional strategy, might be inadequate. Whilst these matters went to the soundness of the core strategy, they were, in his view, capable of being addressed in main modifications to the core strategy as submitted.

16. On 15 November 2011, during the period of suspension, and while the council was undertaking the further work necessary to address the problems identified by the inspector, section 33A of the 2004 Act came into force.

17. In January 2012 the council published its proposed changes to the core strategy. It undertook public consultation on those proposed changes, carried out a sustainability appraisal of them and presented them to the inspector, requesting him to recommend that it make them as main modifications to the core strategy.

18. The inspector resumed the examination on 18 April 2012, and was then invited by Samuel Smith to rule on the question of whether the duty to co-operate in section 33A applied after the submission of the core strategy for examination. On 27 April 2012 he ruled that it did not. He concluded that the duty to co-operate applied only to development plan documents submitted for independent examination on a date after 15 November 2011. The council had submitted the core strategy for examination in May 2011, six months before the duty to co-operate came into effect. The work it had done during the period when the examination was suspended between September 2011 and April 2012 did not constitute plan preparation. The duty to co-operate had therefore not been engaged in this plan-making process, and the council had not failed to comply with it. In paragraph 10 of his ruling the inspector said this:

> "S20(7B) establishes that the duty to cooperate is not capable of remedy at examination stage. The phrasing of S20(5), which refers to *satisfies* (present tense) in S20(5)(a) and *complied* (past tense) in S20(5)(c), affirms that a failure to comply with S19 and other procedural requirements may be capable of remedy, whereas a failure to comply with the S33A duty to cooperate is not. Thus the point that any changes necessary to make a seriously flawed plan sound should not be exempt from the duty to cooperate is not reflected in the legislation. There is no provision for revisiting the duty to cooperate at examination stage even if a plan is seriously flawed – the duty to cooperate is part of the plan preparation process and, at examination, the test is

whether or not it has been complied with."

19. After a further period of suspension lasting about six months, the examination was eventually concluded on 27 February 2013. The inspector reported to the council on 19 June 2013, concluding that the core strategy as submitted was unsound in a number of respects and, in accordance with section 20(7A) of the 2004 Act, could not therefore be recommended for adoption as it stood, but that with the 34 main modifications he recommended it did satisfy the requirements of section 20(5) and met "the criteria for soundness in the National Planning Policy Framework". The council adopted the core strategy, as thus modified, and with certain minor modifications, on 22 October 2013.

The judgment of Ouseley J.

20. In his judgment (at paragraph 10) Ouseley J. accepted, and indeed it was not in dispute before him, that there is no express statutory power "to suspend, halt temporarily or adjourn the public examination for good and sufficient reason", but he regarded such a power as "necessarily implicit in the exercise by the independent Inspector of his functions in s20". It was also common ground before Ouseley J. that the work done by the council during the suspension of the examination would have been "preparation" of a development plan document had it been undertaken before the core strategy was submitted for examination (see paragraph 26 of Ouseley J.'s judgment). Ouseley J. accepted (in paragraph 28 of his judgment) that there was "force and sense" in the submissions of Mr Peter Village Q.C. for Samuel Smith that the effect of section 33A having come into effect during the suspension of the examination meant that the core strategy as a whole became subject to the duty to co-operate, or, at the very least, that the further work involved in the production of the main modifications, undertaken during the suspension of the examination, was subject to that duty. But having regard to the provisions of sections 19 and 20 of the 2004 Act, Ouseley J. was in no doubt that the stage in which a development plan document is being prepared is the only stage to which the duty to co-operate applies, and that that stage comes to an end with the submission of the development plan document for examination "however major or minor its shortcomings, and whatever further work is required, unless the plan is withdrawn". He agreed with observations to similar effect made by H.H.J. Robinson, sitting as a deputy judge of the High Court in *University of Bristol v North Somerset Council* [2013] EWHC 231 (Admin), at paragraphs 62 and 63 (ibid.).

21. In paragraphs 29, 30 and 32 of his judgment Ouseley J. said this:

> "29. The 2004 Act makes the position quite clear: there is a clear distinction maintained throughout this group of sections between plan preparation on the one hand and examination to adoption on the other, and in the powers which the Council has at those two stages. The different stages are apparent from ss19 and 20. S19 clearly deals with the duties on a Council during preparation, and s20 deals with the obligation to submit it for public examination. Preparation is then over. The duties are laid upon the Inspector. The plan is out of the Council's hands, apart from the possibility of withdrawing or in effect abandoning the plan, until it can

exercise the tightly constrained powers of adoption.

> 30. The duty to co-operate in s33A does not apply after the conclusion of the preparation stage, and so the fact that it came into force while work was being done during the period of suspension is legally irrelevant. No such duty of co-operation applied to that further work, even though if done at the earlier stage of plan preparation, it would clearly have been plan preparation, to which the duty of co-operation, if in force would have applied. If the duty to co-operate had been in force before the plan was submitted for examination, the duty would still not have applied to the further work done by the Council during the period of suspension. The effect of the suspension was not to remove the plan from the scope of public examination. It remained in that phase, under the control of the Inspector as to timing, procedure and substance.
>
> …
>
> 32. … [The council] cannot change the plan after submission. It can only ask the Inspector to recommend modifications to it. Those modifications may or may not be ones which the Council itself has devised or worked on or promoted in some way. The plan, in relation to which the Inspector recommends modifications, is not the plan as the Council may suggest that it should be modified during the public examination. He takes the plan as submitted as the plan which is to be modified if he so recommends. I regard that as a potent illustration of the fact that the Council's preparation of the plan was ended by its submission, and by the powers that are then granted to the Inspector, and the limited role which the Council has thereafter. Asking the Inspector to recommend modifications to make the plan sound, is not plan preparation, whether the Council has worked on the modifications or not. Working on modifications which it may ask the Inspector to recommend is not plan preparation either, regardless of the nature of the work which the Council may undertake for that purpose."

The rival arguments in the appeal

22. In his written and oral submissions in the appeal Mr Village emphasises the significant changes made to the system of local plans by the Localism Act, which, he says, balanced the abolition of the regional tier of planning and the strengthening of local decision-making with the duty to co-operate imposed on local planning authorities in the new section 33A of the 2004 Act.

23. Mr Village argues, as he did before Ouseley J., that both the wording of the relevant statutory provisions and the evident object and purpose of the statutory scheme make clear that Parliament intended the duty to co-operate to apply in circumstances such as arose in this case. If it is possible to imply into section 20 of the 2004 Act a power for an

inspector to suspend the examination process to enable further "preparatory work" to be done with a view to making a plan sound, it is obviously consistent with the statutory scheme, and unsurprising, that in those circumstances the authority should have to comply with the duty to co-operate. Alternatively, even if such work is not in itself "preparation" for the purposes of section 33A, it is plainly either activity that can reasonably be regarded as preparing the way for the preparation of a plan, within section 33A(3)(d), or activity that supports the earlier preparation work, and so within section 33A(3)(e).

24. Therefore, submits Mr Village, the interpretation of the statutory provisions adopted by Ouseley J., with its rigid distinction between "preparation" and "examination" was wrong. Neither section 19 nor section 20 of the 2004 Act, nor indeed any other provision of the 2004 Act, contains any limitation upon the concept of plan preparation to work done before the development plan document is submitted for examination. This cannot depend, says Mr Village, on the local planning authority's own view of whether the local plan development preparation is complete under section 20(2). It is clear that in many cases further work, which is truly work of plan preparation, may be required before the plan in question will be capable of being judged sound. In this case, as Mr Village points out, the council prepared substantially new and different policies for development in Tadcaster during the suspension of the examination, undertook a sustainability appraisal of those new policies, and consulted upon them. All of this, submits Mr Village, was activity firmly within the scope of the statutory requirements applicable to plan preparation, in section 19 of the 2004 Act and the regulations made under section 19 – in particular, Part 6 of the Town and Country Planning (Local Development) (England) Regulations 2004 (S.I. 2204/2004) and subsequently, after 6 April 2012, the Town and Country Planning (Local Planning) (England) Regulations 2012 (S.I. 767/2012). Mr Village submits that, properly construed, the statutory provisions do not exclude such major work from the ambit of plan preparation. If such work had been done before submission, as it ought to have been, it would necessarily have been subject to the duty to co-operate. Mr Village emphasises the breadth of the duty to co-operate, as defined in section 33A(2)(a), which is not only to engage "constructively" and "actively" with the other authorities and bodies concerned, but also to do so "on an ongoing basis". Thus, says Mr Village, the duty should be understood as continuing, or at least being capable of continuing, during the period of the examination if, at that stage, further work has to be done in preparing the strategy and policies of the plan, at least in so far as that work was work "relating to a strategic matter" (section 33A(3)). A practical illustration of this point in this case is that major development in the northern part of the council's area, which includes Tadcaster, would be likely to require co-operation with the neighbouring local planning authorities for the cities of York and Leeds. This was how the Government's "localism agenda", of which the duty to co-operate was an essential part, was intended to operate.

25. Mr Alan Evans for the council supports Ouseley J.'s analysis. He submits that the distinction between "preparation" and "examination", which lies at the heart of that analysis, is a true and necessary distinction. Ouseley J. was right to conclude that the duty to co-operate cannot be activated after the preparation of a plan under section 19 of the 2004 Act has been completed. It cannot be engaged in the course of the examination stage of the process, even if the examination itself is suspended while the local planning authority gets on with work that might have been "preparation" had it been done before the plan was submitted to the Secretary of State. The statutory scheme will not bear the

construction Mr Village seeks to place upon it. The alternative argument based on the provisions of section 33A(3)(d) and (e) is also misconceived. Work done after a plan has been prepared and submitted for examination cannot be regarded as either preparatory to its preparation or in support of that activity.

Was the duty to co-operate engaged in this case?

26. In our view Ouseley J.'s analysis, which led him to conclude that the duty to co-operate was not engaged in this case, is correct.

27. This conclusion flows from the natural construction of the statutory provisions governing the preparation, examination and adoption of local development documents in sections 19, 20 and 23 of the 2004 Act.

28. The stages of the plan-making process constituting, respectively, the preparation of a local development document, as provided for in section 19, and independent examination, as provided for in section 20, are distinct and separate from each other. The language of section 19 is consistent in referring to the activity of "preparing" the plan. The language of section 20 is consistent in referring to the "examination" of a plan that has, by then, been prepared and submitted to the Secretary of State for this further exercise to be carried out as the next stage of the total process. Section 20(2) states that an authority can only submit a plan for examination when the authority has "complied" with any relevant requirements (that is to say, the authority has finished doing everything required of it regarding the preparation of the plan as set out in section 19 and, when it applies, in section 33A) and the authority thinks the document is ready for independent examination (i.e. the authority thinks its preparation is complete and at an end). A plan can only be submitted for public examination once it has been prepared, and not while its preparation is still going on. The concept of plan preparation by the local planning authority and independent examination by an inspector being in any sense concurrent and overlapping stages of the process is alien to the statutory scheme. They are sequential stages. Preparation comes to an end before examination begins. The former is an activity undertaken by the local planning authority, the latter an activity undertaken by the inspector, albeit with scope for him to call for further work to be done by the authority with a view to making the plan sound. As Ouseley J. observed in paragraph 29 of his judgment, once the plan passes from the stage of preparation to the stage of examination, it leaves the authority's hands – save for the authority's power of withdrawal under section 22 – until it is able within the constraints of section 23 to adopt it.

29. In the examination stage, the decision what should happen to the plan is that of the inspector, who is in control of the examination process. This includes what happens where problems are identified by him with the plan document and the authority wishes to ask him to recommend modifications to address those problems. The power of the authority to make such a request under section 20(7C) only arises where the inspector has formed certain views as set out in section 20(7B); it is a matter for the inspector's

discretion when and how to communicate those views to the authority and whether to grant an adjournment of the examination to allow the authority time to carry out further work and to formulate proposals for modification of the plan in support of a request for the inspector to recommend such modification; and under section 20(7C) it is the inspector's decision whether to accept any proposed modifications and recommend adoption of the plan as so modified.

30. No other provision in Part 2 of the 2004 Act is inconsistent with that understanding of sections 19 and 20.

31. The provisions of section 33A may themselves be seen as reinforcing the separation between plan preparation under section 19 and independent examination under section 20. The activities to which the duty to co-operate in section 33A relates, as delineated in section 33A(3), include (at section 33A(3)(a)) "the preparation of development plan documents", subject to the general qualification that such activity must relate to "a strategic matter". This activity plainly corresponds to that specified in section 19, where the requirements of an authority in undertaking the preparation of a plan are comprehensively set out. The same may also be said of the activities referred to in section 33A(3)(d) and (e) – respectively activities that "can reasonably be considered to prepare the way for activities within any of paragraphs (a) to (c)", and activities that "support" activities within any of those three paragraphs. Activities preparatory to plan preparation, or supportive of it, are by their nature activities within the range of section 19. By contrast, the activity embraced in section 20, which sets out the requirements of an inspector in conducting an independent examination, does not match any of those referred to in section 33A(3). The duty to co-operate is framed as a duty of the local planning authority in preparing the plan, which the authority must have performed at that stage to the satisfaction of the inspector who later carries out the examination. It is not a duty for the authority to perform, or perform again, after the examination stage has begun.

32. The provisions of section 20, in our view, put this understanding of the statutory scheme beyond any sensible doubt.

33. Section 20(5) poses for the inspector conducting an independent examination three specific questions, namely, first, whether the development plan document "satisfies the requirements of sections 19 and 24" and the relevant regulations relating to the preparation of development plan documents (section 20(5)(a)); secondly, whether the development plan document is "sound"; and thirdly, whether the local planning authority "complied with" its duty under section 33A "in relation to its preparation". It is to be noted that subsection (5)(a) is expressed in terms of the development plan document itself satisfying the relevant statutory requirements, rather than in terms of the local planning authority having complied with the relevant procedural requirements of the specified statutory provisions. As Ouseley J. observed in paragraph 116 of his judgment, albeit when dealing with a different ground of the challenge:

> "The statutory issue for the Inspector was whether it was reasonable to conclude that the plan satisfied the requirements of s19. There is a marked contrast between the language of s20(7)(b)(i) and (ii), to be found elsewhere in s20 as well. The Inspector

has to consider whether the Council has complied with any s33A duty, but not with any s19 duty. It is the *plan* which the Inspector has reasonably to conclude satisfies s19. …".

34. A similar point can be made in relation to section 20(7C). When asked to do so, an inspector must recommend modifications of the local plan that would make the *plan* one that satisfies the requirements in subsection (5)(a) and render it sound. He does not have any power or obligation to require the local planning authority to do further things to comply with its own duties regarding preparation of the plan under the provisions mentioned in subsection (5)(a). This supports the view that under the legislative scheme the preparation of the plan is regarded as having been completed before the plan is submitted for independent examination.

35. The drafting of section 20(5)(c), which uses the past tense, "complied with", in referring to any duty imposed on the authority by section 33A "in relation to [the plan's] preparation", lends some additional support to the proposition, accepted both by the inspector in his ruling of 27 April 2012 and by Ouseley J. in his judgment, that Parliament regarded the performance of the duty to co-operate in section 33A as a step belonging to the stage of plan preparation and preceding the submission of the development plan document for examination. And we consider that this understanding of section 20(5)(c) sits well with a similar interpretation of section 20(7), (7A), (7B) and (7C).

36. The suite of provisions in subsections (7), (7A), (7B) and (7C) envisage three scenarios. In the first situation, provided for under subsection (7), the inspector is compelled to recommend adoption if, having carried out the examination, he considers that it would be reasonable to conclude that the plan satisfies the requirements mentioned in subsection (5)(a) and is sound, and that the authority "complied with" its duty under section 33A "in relation to the document's preparation". The second situation, provided for in subsection (7A), compels the inspector to recommend non-adoption if he has carried out the examination and is not required by subsection (7) to recommend that the plan is adopted.

37. The third situation is identified in subsections (7B) and (7C), which must be read together. It arises during the examination in the particular circumstances described in subsection (7B), which are that the inspector does not consider that it would be reasonable to conclude that the plan satisfies the requirements mentioned in subsection (5)(a) and is sound, but does consider that it would be reasonable to conclude that the authority "complied with any duty imposed on the authority by section 33A in relation to the document's preparation". In those circumstances the inspector, if asked to do so by the authority, must recommend modifications of the plan to overcome its failure to satisfy the statutory requirements in subsection (5)(a) and to render it sound.

38. The effect of subsection (7B)(b) is that an inspector will only be in a position to take that course if he has found that it would be reasonable to conclude that any duty to co-operate imposed on the local planning authority by section 33A has already been complied with when the plan was being prepared. This is a prerequisite of the procedure provided for in subsection (7C), in which the inspector recommends modifications to the

plan. If the inspector does not consider it would be reasonable to conclude that the authority complied with any duty to co-operate to which it was subject, he is bound to recommend against the plan's adoption. As the inspector in this case observed in paragraph 10 of his ruling of 27 April 2012, section 20(7B) makes it impossible for a failure by the local planning authority to comply with "any duty" to co-operate under section 33A to be put right at the examination stage of the process. The statutory scheme contains no provision by which, at that stage, an authority can be rescued from such a failure at the earlier stage of its preparing the plan under section 19.

39. There is a further and perhaps still more powerful point to be made about these provisions, which we did not find was cogently answered in Mr Village's submissions. The provisions of subsection (7B) and (7C) are plainly directed to the putting right of defects in the plan as prepared by the local planning authority and submitted for examination – be they shortcomings in the plan's compliance with the statutory requirements specified in subsection (5)(a) or its evident lack of soundness, or both. This is the intended purpose of the modifications the authority may ask the inspector to recommend. Subsection (7C) effectively defines the inspector's remit in dealing with such modifications as a twofold task: to consider whether, with those modifications made to it, the plan would both satisfy the requirements mentioned in subsection (5)(a) and be sound. Those are the only two questions for him at this stage. Subsection (7C) does not require any further consideration of the authority's compliance with section 33A, either generally or specifically in respect of the modifications themselves. There is no provision here, or anywhere else in the statutory scheme, requiring the inspector to determine whether, in preparing and promoting the modifications during the examination of the submitted plan or in an adjournment or suspension of the examination, the authority has complied with any duty to co-operate. The contrast with the drafting of subsections (5)(a) and (7B)(b), both of which explicitly call for the inspector to consider whether the authority complied with any duty to co-operate "in relation to [the plan's] preparation", is striking and clearly deliberate. Had Parliament intended the section 33A duty to apply in relation to any additional work by the local planning authority to support a request for modification of the plan under subsection (7C), it would have made no sense to exclude compliance with such duty from scrutiny by the inspector under subsection (7C).

40. One sees there, in our view, a clear indication that the duty to co-operate applies, and only applies, to the stage of the plan-making process that is properly to be regarded as plan preparation under section 19, which is the stage prior to submission of the plan for examination. The duty does not subsist during the examination stage, nor does it revive if the examination is adjourned or suspended for main modifications to be produced and presented to the inspector with a view to making it possible for him to conclude the plan, as thus modified, satisfies the statutory requirements mentioned in section 20(5)(a) and is sound. The other relevant provisions of the statutory scheme are all to the same effect.

41. It is true, as Mr Village submits, that a local planning authority will often undertake further work to refine or amend the provisions of the submitted plan once the examination stage of its plan-making process is under way, whether on its own initiative or prompted by the inspector to do so. And it may well be that such work, had it been done before the submission of the plan to the Secretary of State, would have qualified as activity in the preparation of the plan, within section 19. Sometimes that work will be

done while the examination is running, on other occasions during a suspension or adjournment, as happened in this case. However, as Ouseley J. held, the carrying out of such work, in whatever circumstances it is done after the examination stage has begun, does not displace the autonomous role of the inspector in conducting the examination, nor does it take the process back to the stage of plan preparation, or create a hybrid phase in the process comprising plan preparation and independent examination in a single composite stage. Otherwise, as Ouseley J. pointed out (in paragraph 36 of his judgment) and as Mr Village accepts, not only would the duty to co-operate arise under section 33A, but the other statutory requirements applicable to plan preparation, including those relating to consultation, would have to be complied with again.

42. The notion that the duty to co-operate might be engaged during the suspension of an examination, on the basis that the plan-making process reverted in those circumstances to the preparatory stage, but not if the examination continued, would lead to an arbitrary distinction in the statutory arrangements. Ouseley J. found this proposition distinctly unattractive, as he explained in paragraphs 38 to 40 of his judgment. We agree. As Ouseley J. observed (in paragraph 40), Part 2 of the 2004 Act, as amended by the Localism Act, lacks the intricate provisions one would have expected to see had Parliament intended the duty to co-operate to arise upon the suspension of an examination for further work to be done. The absence of such provisions in the amended Part 2 is, we think, telling.

43. Contrary to the submission of Mr Village, interpretation of sections 19, 20 and 23 of the 2004 Act in line with their natural sense and in accordance with their evident scheme does not create a significant gap in the responsibility of a local planning authority to engage as appropriate with neighbouring authorities when considering what potential modifications to a local development plan document to propose to an inspector pursuant to section 20(7C) of the 2004 Act. There is no clear and pressing policy need which could justify adoption of a strained or distorted reading of the provisions.

44. A degree of co-operation by a local planning authority with neighbouring planning authorities is required as an aspect of satisfying an inspector as to the soundness of a development plan document (including any modifications of it), quite apart from under section 33A. This is because of the relevant parts of the National Planning Policy Framework requiring public bodies to co-operate on planning issues that cross administrative boundaries (paras. 178 to 182) and also by reason of the general public law duty resting on a local planning authority and an inspector, which the provisions of the National Planning Policy Framework reflect, to make reasonable enquiries in relation to relevant matters affecting the performance of their duties (see, e.g. *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065 *per* Lord Diplock). In the present case, in his final report the inspector did examine the extent to which there had been co-operative engagement by the council with neighbouring authorities in relation to the modifications proposed to the plan by reference to the provisions of the National Planning Policy Framework, in the context of his assessment whether the plan as modified would be sound, and found that the engagement with them had been sufficient.

45. The practical effect of not applying the section 33A duty to work done in the post-

submission examination stage is to leave the inspector to review an authority's co-operative engagement with other authorities in relation to any further work and make a nuanced, fact-specific assessment as to its impact on the overall soundness of the plan with the proposed modifications. This may be seen as serving the public interest of achieving the promulgation of satisfactory planning policy documents in good time. By the stage of examination of a plan and proposed rectifying modifications, the inspector is in charge of the process and can make the relevant assessment of the soundness of the plan by reference to its substance, without needing to rule upon compliance by the authority during that stage with a formal statutory obligation of the kind contained in section 33A, which is appropriately relevant to the earlier preparation stage before the inspector becomes involved.

46. Lastly, for essentially the same reasons, we cannot accept Mr Village's alternative submissions based on the subsections (3)(d) and (3)(e) of section 33A. As Mr Evans submits, work done after a plan has been prepared and submitted for examination cannot be regarded as either preparatory to its preparation or as having been done in support of its preparation. Mr Village's argument strains these provisions beyond their proper and obvious meaning. They plainly relate to activity undertaken in, or associated with, the preparation of the plan before its submission for examination, and not to activity subsequently carried out in the course of the examination itself.

Conclusion

47. In conclusion, therefore, one comes back to a straightforward reading of the relevant statutory provisions. Both a literal and a purposive interpretation of those provisions, in particular sections 19, 20 and 23, yield the understanding of them that informed both the inspector's ruling of 27 April 2012 and Ouseley J.'s analysis in rejecting grounds 1, 2 and 3 of Samuel Smith's application to the court under section 113 of the 2004 Act. The duty to co-operate in section 33A of the 2004 Act which came into effect after the council's core strategy had been prepared and submitted for examination, was not engaged when the council prepared its proposed main modifications during the suspension of the examination, and there was no failure on the part of the council to comply with that duty. It follows that the council's subsequent adoption of the core strategy was not vitiated by any such error in the plan-making process, and was lawful.

48. We therefore dismiss this appeal.