Neutral Citation Number: [2016] EWCA Civ 1007

Case No: C1/2016/1148

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MRS JUSTICE PATTERSON DBE
[2016] EWHC 290 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 October 2016

Before:

LORD JUSTICE LAWS
and
LORD JUSTICE LINDBLOM

- -

Between:

Dominic Woodfield	**Appellant**
- and –	
(1) J.J. Gallagher Ltd. **(2) London and Metropolitan International Developments Ltd.** **(3) Norman Trustees**	**Respondents**
- and -	
(1) Cherwell District Council **() Secretary of State for Communities and Local Government**	**Interested Parties**

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Mr Richard Turney (instructed by **Leigh Day**) for the **Appellant**
Mr Satnam Choongh (instructed by **Pinsent Masons LLP**) for the **Respondents**
Mr Richard Kimblin Q.C. (instructed by **the Government Legal Department**) for the **Second Interested Party**
The First Interested Party did not appear and was not represented

Hearing date: 6 September 2016

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Judgment Approved

Lord Justice Lindblom:

Introduction

1. In this appeal we must consider whether, in its order granting relief in these proceedings, the court below exceeded the scope of the remedies provided for in section 113 of the Planning and Compulsory Purchase Act 2004 in challenges to the adoption of a local plan.

2. The appellant, Dominic Woodfield, appeals against the order of Patterson J. dated 18 February 2016, by which she granted relief on an application made under section 113 by the respondents in this appeal, J.J. Gallagher Ltd., London and Metropolitan International Developments Ltd. and Norman Trustees ("Gallagher") challenging the adoption by the first interested party, Cherwell District Council, of the Cherwell Local Plan 2011-2031 Part 1, on 20 July 2015. The challenge went to a single policy in the local plan, "Policy Bicester 13: Gavray Drive", in which a site at Gavray Drive, to the east of Bicester town centre, was allocated for housing development – 300 dwellings. An inspector appointed by the second interested party, the Secretary of State for Communities and Local Government, conducted an examination into the local plan. The examination hearings were held between 3 June and 23 December 2014. In his report dated 9 June 2015 the inspector recommended adoption of the local plan, including Policy Bicester 13. Mr Woodfield appeared at the examination as an objector to that policy. He played no part in the proceedings in the court below, but when it became clear that the council was not intending to appeal to this court against the judge's order he launched an appeal of his own. His standing, at one stage contested by Gallagher and the Secretary of State, is now no longer in dispute. I granted permission to appeal on 15 July 2016.

3. Both Gallagher and the Secretary of State have opposed the appeal. The council has played no part in it. On 2 August 2016 it sent a letter to the court, saying its position on the appeal was "neutral". It confirmed that on 18 May 2016 the inspector had produced an addendum report. In that addendum report he recommended the amendment to Policy Bicester 13 required in the judge's order. But the council has awaited the outcome of this appeal before proceeding to adopt the policy in that amended form.

The order of Patterson J.

4. So far as is relevant in the appeal, Patterson J.'s order states:

> "1. Policy Bicester 13 adopted by [the council] on 20th July 2015 be treated as not adopted and remitted to [the Secretary of State];
>
> 2. [The Secretary of State] appoint a planning inspector who recommends adoption of Policy Bicester 13 subject to a modification that deletes from the policy the words "That part of the site within the Conservation Target Area should be kept free from built development";
>
> 3. [The council] adopt Policy Bicester 13 subject to the modification recommended by the planning inspector appointed by [the Secretary of State];
>
> … .".

The issues in the appeal

5. Mr Woodfield's appeal attacks only the relief granted by the judge: not the part of her order stating that Policy Bicester 13 was to be "treated as not adopted and remitted to [the Secretary of State]", but the two paragraphs – paragraphs 2 and 3 – requiring the Secretary of State to appoint an inspector who was to recommend its adoption subject to the specified "modification", and the council to adopt it subject to that "modification". It is a striking feature of the appeal that neither the Secretary of State nor the council seeks to upset either of those requirements. Indeed, in opposing the appeal the Secretary of State actively maintains that the judge's order should be upheld.

6. There are two grounds of appeal, succinctly stated:

> "1. Having found that there was an error of law the judge should have remitted the matter of the wording of Policy Bicester 13 of the Cherwell Local Plan for public re-examination.
>
> 2. In directing that an order be made to revise the policy wording without remitting the matter for re-examination, the judge made an error of principle because she exercised a planning judgement which should have been exercised by [the Secretary of State's] inspector and by [the council]."

As refined in the skeleton argument of Mr Richard Turney, who appeared for Mr Woodfield, those grounds raise three main issues: first, whether Patterson J.'s order is within the scope of the court's powers under section 113 of the 2004 Act; second, whether the order she made was, in the circumstances, misconceived; and third, whether the order was at odds with the regime for public participation in plan-making.

The allocation of the site at Gavray Drive

7. Patterson J. provided a narrative of the plan-making process (in paragraphs 12 to 27 of her judgment). I need mention only the salient detail here.

8. In August 2014 the council proposed the allocation of the site at Gavray Drive for 300 dwellings under Policy Bicester 13 in its Schedule of Proposed Main Modifications to the (Submission) Local Plan (Part 1). Much of the site is within the River Ray Conservation Target Area, and part of it is a Local Wildlife Site. Gallagher supported the proposed allocation but objected to the inclusion in Policy Bicester 13 of a sentence which stated:

> "That part of the site within the Conservation Target Area should be kept free from built development."

9. Policy Bicester 13 was considered in the council's sustainability appraisal addendum, against 19 sustainability criteria, one of which was "to conserve and enhance and create resources for the district's biodiversity". The assessment was on the basis that "[the] policy requires that the part of the site within the Conservation Target Area should be kept free from built development, as well as protection of the Local Wildlife Site and detailed consideration of ecological impacts, wildlife mitigation and the creation, restoration and

enhancement of wildlife corridors to protect and enhance biodiversity". The conclusion was that "[overall], the site is likely to have … mixed effects, with potential for overriding minor positive effects overall".

10. At the examination hearing, on 16 December 2014, several parties each explained their stance on the proposed allocation. We were taken through a transcript of the discussion that took place.

11. The council contended for the retention of the sentence in Policy Bicester 13 which Gallagher sought to have deleted – the provision precluding built development in the Conservation Target Area. Evidently with the support of a large number of local residents, it also suggested that the part of the Conservation Target Area within the site ought to be designated as Local Green Space, to which government policy in paragraphs 76 and 77 of the National Planning Policy Framework ("the NPPF") would apply. Its planning officer, Ms Sharon Whiting, said the reason why it was of the view that "the part of the Conservation Target Area that does not form part of the [Local Wildlife Site] designation needs [to] be kept free from development is … to make sure that there is a gap from the [Local Wildlife Site] …".

12. Gallagher welcomed the council's continued commitment to the allocation of the site for 300 dwellings, and suggested, as an approximate upper limit, 340. On a plan prepared for the examination hearing it indicated housing development spreading well into the Conservation Target Area, but no building in the Local Wildlife Site. Its planning consultant, Mr David Keene of David Lock Associates, said that the level of development proposed by Gallagher on the allocated site "represents an appropriate balance between development and biodiversity objectives and enhancements" and would provide funding for ecological enhancement. Referring to the plan Gallagher had prepared for the hearing, he told the inspector that "the gross area for residential development which is within the Conservation Target Area extends to about 3.43 [hectares]", the total area of the Conservation Area being 14.57 hectares. This 3.43 hectares was part of the 5.64 hectares shown on the plan as the Gavray Drive East Development Area. Gallagher's ecological consultant, Dr Rowlands, said that "[in] the event that development occurs that only precludes the Local Wildlife Site, then this development alone will contribute [about] 40% to delivery of the CTA targets of the River Ray CTA".

13. CPRE Oxfordshire (Bicester Branch) and Langford Village Community Association contended for the Local Green Space designation to be imposed on the land to the east of Langford Brook. Mr Woodfield argued that the policy favoured by the council did not go far enough to protect the ecological interest of the site. The "crucial thing", he said, was that "no built development in the [Conservation Target Area] stipulation is essential if development of this site is to be of an appropriate balance … and crucially whether it is to comply with the NPPF objective of no net loss of biodiversity". He also said that "the wording of Policy Bicester 13 needs amendment to clarify that the CTA, not just the [Local Wildlife Site] within it, cannot be used as a dumping ground for ancillary infrastructure components such as formal recreation, kick about areas, playing areas or allotments". These, he said, "are all uses that would be incompatible with the appropriate management to secure the nature [conservation interest] in the retained areas, and achieve no net loss". In his view, given the various constraints on its development, the site ought not to be allocated for more than 250 dwellings.

14. As the council's Planning Policy Team Leader, David Peckford, explains in his second witness statement, dated 12 November 2015, on 22 May 2015 a draft of the inspector's report was sent to the council for the facts to be checked. The first sentence of paragraph 139 of that draft report stated:

> "139. Requests that the developable area shown on the policies map should be reduced to avoid any building in the whole of the River Ray Conservation Target Area, as distinct from the smaller Local Wildlife Site, would significantly undermine this contribution. … ."

In the Schedule of Main Modifications appended to the draft report the modification recommended as Policy Bicester 13 included the contentious sentence about the exclusion of "built development" from the Conservation Target Area. On 5 June 2015 the council sent the Planning Inspectorate its response to the draft report, suggesting, in the light of paragraph 139 as drafted at that stage, that the inspector should consider "whether consequential modifications are needed to Policy 13 (MM91) to avoid inconsistency between the conclusions of the report and the current policy wording". On 9 June 2015 the Planning Inspectorate sent a further draft of the inspector's report, in which the words "as distinct from the smaller Local Wildlife Site" were omitted from the controversial sentence in paragraph 139. The recommended modification was unchanged. The council's officers were still concerned about the relationship between the draft report and Policy Bicester 13. In an e-mail to the Planning Inspectorate on that day Mr Peckford said:

> "… We understand that the Inspector does not wish to rule out all development in the CTA for the reasons set out and we note that main mod.91 rules out 'built development' … . Could we please ask the Inspector considers again whether the reference to 'building' in the first sentence of para. 139 might be further clarified. On the understanding that the Inspector does not wish to rule out recreation/open space uses etc within the CTA, does the Inspector here mean '<u>development ie over and above built development</u>' and if so, could this clarification be inserted into the report?"

A further draft of the inspector's report was sent to the council on 11 June 2015. In paragraph 139 the words "any building" were now replaced with the words "any development". Again, however, there was no change to the modification itself. The disputed words remained. In paragraph 38 of his second witness statement Mr Peckford said this:

> "38. Officers (myself included) interpreted the change to the Inspector's report to mean that the Inspector's intention was that while the bullet point requirement in Policy Bicester 13 included "built development" in the whole of the Conservation Target Area, other forms of development should not be ruled out in that area. We had in mind development which would facilitate the provision of public open space, playspace, playing fields etc: development comprising engineering operations and material changes of use as distinct from building operations. In addition, it might also be the case that flood attenuation measures could be delivered in that area, but we did not have that in mind at the time. We concluded that the report and the policy were consistent."

15. In the final version of his report – which, as I have said, is dated 9 June 2015 – the inspector's conclusions on Policy Bicester 13 were these:

"135. This area of largely flat land, bounded by railway lines to the north and west, the ring road to the east and residential land to the south lies to the east of Bicester town centre in a very sustainable location. Planning permission has previously been granted for new housing but that has now expired. In view of the need for additional sites to help meet OANs it is still considered suitable in principle to met new development. However, the eastern part is now designated as a Local Wildlife Site, with the central/eastern sections containing lowland meadow; a BAP priority habitat.

136. Additionally, roughly a quarter of the site lies in Flood Zones 2 and 3 adjacent to the Langford Brook that runs north-south through the centre of the site. The majority also lies within the River Ray Conservation Target Area. Nevertheless, even with these constraints, indicative layouts demonstrate that, taking into account appropriate and viable mitigation measures, the site is capable of delivering around 300 homes at a reasonable and realistic density not greatly different from that of the modern housing to the south.

137. In addition to necessary infrastructure contributions towards education, sports provision off site, open space, community facilities and public transport improvements, a number of other specific requirements are needed under policy Bic 13 for this proposal to be sound, in the light of current information about the site's ecological interests and environmental features. In particular, that part of the allocation within the Local Wildlife Site east of Langford Brook (just under 10 ha) needs to be kept free from built development and downstream SSSIs protected through an Ecological Management Plan prepared and implemented to also ensure the long term conservation of habitats and species within the site. Landscape/visual and heritage impact assessments and archaeological field evaluation are also required.

138. There must be no new housing in flood zone 3 and the use of SUDS to address flood risks will be required. Subject to such modifications (MMs 89-91), policy Bic 13 is sound and would enable this site to make a worthwhile contribution to new housing needs in Bicester and the district in a sustainable location. This can be achieved without any material harm to environmental or ecological interests locally as a result of the various protection, mitigation and enhancement measures to be included in the overall scheme.

139. Requests that the developable area shown on the policies map should be reduced to avoid any development in the whole of the River Ray Conservation Target Area would significantly undermine this contribution. It would also potentially render the scheme unviable or at the very least unable to deliver a meaningful number of new affordable units, as required under policy BSC 3, when all other necessary contributions are also taken into account. Moreover, it could well materially reduce the potential for the scheme to contribute to enhancement of the Local Wildlife Site's ecological interest as part of the total scheme, thereby effectively achieving the main objective of the Conservation Target Area. Consequently, it would not represent a reasonable, realistic or more sustainable alternative to the proposals set out in the plan, as modified.

140. Similarly, despite the historic interest of parts of the site in terms of their long established field patterns and hedges, this does not amount to a justification for the retention of the whole of the land east of the Langford Brook as public open space, nor for its formal designation as Local Green Space. This is particularly so when the scheme in the plan should enable the more important LWS to be protected with funding made available for enhancement at a time when the lowland meadow habitat is otherwise likely to deteriorate further without positive action. Such an approach would be capable of ensuring no net loss of biodiversity as a minimum and also compliance with policies ESD 10 and 11 as a result.

141. All in all the most suitable balance between the need to deliver new housing locally and to protect and enhance environmental assets hereabouts would essentially be achieved through policy Bic 13, as modified, and the land's allocation for 300 new homes on approximately 23 ha in total, given that the requirements of policies ESD 10 and 11, including to achieve a net gain in biodiversity arising from the scheme as a whole, can also be delivered as part of an overall package of development with appropriate mitigation measures."

The inspector did not recommend any change to the sentence in Policy Bicester 13 which said that the "part of the site within the Conservation Target Area should be kept free from built development". That sentence remained in the policy when the local plan was adopted.

16. When it resolved to adopt the local plan on 20 July 2015 the council also resolved to pursue, "through the forthcoming stages of the Cherwell Local Plan Part 2 …", the designation as Local Green Space of the part of the Conservation Target Area within the Policy Bicester 13 site. When asked by Gallagher to clarify this resolution, the council's officers said in an e-mail on 24 July 2015 that although Policy Bicester 13 prevented "built development" in the Conservation Target Area, it did "not preclude appropriate provision of associated public open space [etc.] as part of a development in the CTA", and that this was also "thought to be unlikely to be inconsistent with the Local Green Space designation if this does indeed take place".

Policy Bicester 13 and Policy ESD 11

17. In the adopted local plan Policy Bicester 13 states:

"Policy Bicester 13: Gavray Drive

Development Area: 23 hectares

Development Description: a housing site to the east of Bicester town centre. It is bounded by railway lines to the north and west and the A4421 to the east

Housing
- Number of homes – 300 dwellings
- Affordable Housing – 30%

…

Key site specific design and place shaping principles

…

- That part of the site within the Conservation Target Area should be kept free from built development. Development must avoid adversely impacting on the Conservation Target Area and comply with the requirements of Policy ESD11 to secure a net biodiversity gain.
- Protection of the Local Wildlife Site and consideration of its relationship and interface with residential and other built development.

…

- … A central area of open space either side of Langford Brook, incorporating part of the Local Wildlife Site and with access appropriately managed to protect ecological value. No formal recreation within the Local Wildlife Site.

… ".

The supporting text for Policy Bicester 13 acknowledges, in paragraph C.104, that "[the] majority of the site is part of the River Ray Conservation Target Area"; in paragraph C.106, that there is "a risk of harming the large number of recorded protected species towards the eastern part of the site", and "[impacts] need to minimised by any proposal"; and states, in paragraph C.107, that "[although] there are a number of known constraints such as Flood Zone 3, River Ray Conservation Target Area and protected species, this could be addressed with appropriate mitigation measures by any proposal".

18. Policy ESD 11 states:

> "Policy ESD 11: Conservation Target Areas
>
> Where development is proposed within or adjacent to a Conservation Target Area biodiversity surveys and a report will be required to identify constraint and opportunities for biodiversity enhancement. Development which would prevent the aims of a Conservation Target Area being achieved will not be permitted. Where there is potential for development, the design and layout of the development, planning conditions or obligations will be used to secure biodiversity enhancement to help achieve the aims of the Conservation Target Area."

Paragraph B.240 in the supporting text for Policy ESD 11 says that "Conservation Target Areas represent the areas of greatest opportunity for strategic biodiversity improvement in the District and as such development will be expected to contribute to the achievement of the aims of the target areas through avoiding habitat fragmentation and enhancing biodiversity".

Patterson J.'s judgment

19. Patterson J. rejected the suggestion that Policy Bicester 13 was ambiguous. The Secretary of State had argued before her that the contentious words might be read as meaning that some but not all of the Conservation Target Area may be built upon. She concluded (in paragraph 55 of her judgment) that Policy Bicester 13 was "clear on its face in prohibiting any built development within that part of the site which falls within the CTA".

20. Gallagher contended before the judge that, in the light of the inspector's relevant reasoning in his report, his recommendation that the local plan be adopted with the contentious

provision in Policy Bicester 13 was illogical and irrational. Patterson J. referred to the "indicative layouts" before the inspector at the examination hearing. She noted that the "revised master plan" referred to by the inspector in paragraph 136 of his report "clearly shows some built development within that part of the CTA to the east of Langford Brook but no built development in the LWS within the CTA" (paragraph 60 of the judgment). In paragraphs 137 and 138 of the report the inspector had taken into account, and apparently relied on, Gallagher's "indicative master plan … the only indicative layout before him", in concluding that "the site was capable of delivering some 300 homes" (paragraph 61). The judge continued (in paragraph 62):

> "62. The inspector then turned to suggestions before him by both [the council] and members of the public that the developable area should be reduced. He discounted those suggestions in paragraph 139. … [The] inspector understood that the policy to deliver around 300 homes was justified and sound when considered against reasonable alternatives, in this instance the alternative of no development within the CTA."

The inspector's conclusion in paragraph 141 was, she said, "a matter for his planning judgment having considered and reached conclusions on all of the issues in the examination by the allocation of the site" (paragraph 64). His reasoning was "inimical" to the requirement in Policy Bicester 13 to keep the part of the site within the Conservation Target Area free from built development. He had given "no reason at all to explain or justify the retention of that part of [Policy] Bicester 13 that prevented built development in the CTA". What he said all "pointed the other way" (paragraph 66). He had clearly rejected the argument that the developable area should be reduced "to avoid any development in the whole of the CTA …" (paragraph 67). He ought to have recommended the deletion of the controversial provision in Policy Bicester 13 (paragraph 68). In the circumstances "some remedy" was "clearly appropriate" (paragraph 71).

21. Gallagher had sought an order that would require the Secretary of State to appoint an inspector who would recommend the adoption of the local plan with an amendment to Policy Bicester 13 deleting the disputed words, and the council to adopt the local plan in that form (paragraph 72 of the judgment). The Secretary of State supported Gallagher's proposed order (paragraphs 79 to 82). The order sought by the council would have required the Secretary of State to appoint an inspector to reconsider the way in which the Conservation Target Area was treated in Policy Bicester 13; the inspector to permit representations to be made on that issue by all interested parties, to recommend any appropriate "modification", and to provide reasons for that recommendation; and the council to adopt Policy Bicester 13 subject to whatever "modification" the inspector then recommended to it (paragraphs 73 to 78).

22. Patterson J. accepted Gallagher's and the Secretary of State's arguments on remedy. She explained why in paragraphs 86 to 89 of her judgment:

> "86. … An extensive examination process has taken place into the plan as a whole. As part of that process the inspector has exercised and made clear his planning judgment on, amongst other matters, housing across the district. As part of that exercise his decision was to permit policy Bicester 13 to proceed on the basis that it made a valuable contribution of 300 houses to the housing supply in Cherwell District Council. That conclusion was reached having heard representations from [Gallagher, the council] and the public. The

representations from the public argued that there should be reduced developable areas on the allocation site and that part of the site was suitable for designation as LGS. The public, therefore, have fully participated in the planning process. The error which I have found occurred was not as a result of the public having any inadequate opportunity to participate in the examination process.

87. There is no statutory requirement when remitting the relevant document to the second defendant to give directions which, in effect, require a rerun of part of the examination process that has already taken place. There may be circumstances where it is appropriate to do so where, for example, there is a flaw in the hearing process but this is not one of those cases. There was a full ventilation of issues as to where development should take place within the Bicester 13 allocation site, the importance of biodiversity and the ecological interests, LGS issues and whether there should be any built development within the CTA. Those are all matters upon which the inspector delivered a clear judgment. The difficulty has arisen because he did not translate that planning judgment into an appropriately sound policy.

88. In those circumstances, and for those reasons, I do not consider it appropriate to accede to the directions sought by the first defendant. If the matter were to be remitted as sought by the first defendant there would be a rerun of the same issues for no good reason, without any suggestion of a material change in circumstance, and at considerable and unnecessary expenditure of time and public money. I reject the contention that a further sustainability appraisal will be required. The residual wording of the policy is such that it secures the objective of any development having a lack of adverse impact upon the CTA.

89. The justice of the case here is met with the Order sought by the claimants and, if the policy has not been found to be ambiguous, which it has not, supported by the second defendant which gives effect to the planning judgment of the inspector."

The inspector's addendum report

23. In paragraph 2 of his addendum report of 18 May 2015, following the court's order of 19 February 2016, the inspector said he recommended the deletion of the sentence in Policy Bicester 13 precluding "built development" in the Conservation Target Area "in the interests of soundness, clarity and to facilitate implementation of the policy and allocation in the plan". In its letter of 2 August 2016 to the court the council says it "has not yet re-adopted Policy Bicester 13 subject to the modification recommended by the Inspector, pending completion of the current proceedings".

Is Patterson J.'s order within the scope of the court's powers under section 113 of the 2004 Act?

24. The statutory scheme for the preparation and adoption of development plan documents is in Part 2 of the 2004 Act. Under section 20(7B) and (7C), if an inspector appointed by the Secretary of State to carry out an independent examination of a development plan document, having conducted the examination, does not consider that it would be

reasonable to conclude that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, but does consider that it would be reasonable to conclude that the authority has complied with the duty to co-operate in section 33A, he must, if asked to do so by the local planning authority, recommend modifications of the document that would make it one that satisfies the requirements mentioned in subsection (5)(a) and is sound. In those circumstances, under section 23(2A) and (3), the local planning authority "may adopt" the document with the modifications recommended by the inspector under section 20(7A) – the "main modifications" – or with the main modifications and additional modifications that do not materially affect the policies in the document; but, under section 23(4), the authority "must not adopt" the document unless it does so in accordance with section 23(3).

25. Under section 113(7) of the 2004 Act the court may quash the "relevant document" and "remit [it] to a person or body with a function relating to its preparation, publication, adoption or approval". Subsection (7A) provides that if the court remits the "relevant document" under subsection (7)(b) it "may give directions as to the actions to be taken in relation to the document". Section 113(7B) provides:

> "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."

Subsection (7C)(a) provides that those powers are "exercisable in relation to the relevant document" either "in whole or in part".

26. Subsections (7)(b) and (7A) to (7C) avoid the consequence, when a "relevant document" is quashed, of its preparation having to begin again even if the error of law in its preparation has occurred at a relatively late stage in the process. Before those provisions were introduced (by section 185 of the Planning Act 2008) the court's options as to relief were limited, under section 113(7), to quashing the relevant document "(a) wholly or in part", and "(b) "generally or as it affects the property of the applicant". As 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), said (at paragraph 6 of her judgment):

> "6. Concern was frequently expressed about the lack of flexibility in the provision because … 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* [*District Council*] *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 court's powers by providing an alternative remedy, see paragraph 295."

27. Mr Turney submitted that the judge misused the provisions of section 113(7A), (7B) and (7C). Her order required action to be taken both by an inspector and by the council as local planning authority, which, under the statutory scheme for plan-making, they would only be entitled to take having exercised their own planning judgment. Section 113 does not permit the court to substitute its own view for the authority's on the planning issues in a plan-making process. The court may make directions as to the procedural steps involved in the making and adoption of a plan, but not decisions on the content of the plan's policies and text (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780E-H). Had Parliament intended to give the court the power to do that when remitting a development plan document under section 113, it would have done so expressly. It did not. The scope of the court's power to give "directions" always depends on the context (see the judgment of the Court of Appeal, given by Sir Anthony Clarke M.R., in *R. (on the application of Girling) v Parole Board* [2007] Q.B. 783, at paragraphs 19 to 23; and the judgment of Lloyd L.J. in *Ryanair Holdings Ltd. v Office of Fair Trading* [2012] Bus. L.R. 1903, at paragraph 45). The context here is the statutory scheme for development plan-making in the 2004 Act, which gives the local planning authority the task of preparing and adopting a local plan. Subsection (7A) does not empower the court to mandate a particular outcome, such as the adoption of a local plan in a particular form. That would be "constitutionally improper" (see the judgment of Elias J., as he then was, in *R. (on the application of Hirst) v Secretary of State for the Home Department* [2002] 1 W.L.R. 2929, at paragraph 86). It would be inconsistent with the proper scope of remedies in judicial review under section 31 of the Senior Courts Act 1981 and CPR r.54.19, and under other statutory provisions providing for matters to be remitted to a decision-maker in the planning sphere – for example, sections 288 and 289 of the Town and Country Planning Act 1990 (see the decision of the Court of Appeal in *R. (on the application of Perrett) v Secretary of State for Communities and Local Government* [2010] P.T.S.R. 1280).

28. Mr Satnam Choongh, for Gallagher, and Mr Richard Kimblin Q.C., for the Secretary of State, do not contest the proposition that the court's power to give directions under section 113(7A) does not, and could not, enable the court to intrude upon the statutory role of the local planning authority, or the statutory remit of an inspector, in the preparation of a local plan by exercising a planning judgment of its own. That is not in dispute. Nor could it be.

29. The court's powers to grant appropriate relief under section 113(7), (7A), (7B) and (7C) are widely drawn. They afford the court an ample range of remedies to overcome unlawfulness in the various circumstances in which it may occur in a plan-making process. As was recognized by the judge in *University of Bristol*, the provisions in subsection (7A), (7B) and (7C) were a deliberate expansion of the court's powers to grant relief where a local plan is successfully challenged under section 113. They introduce greater flexibility in the remedies the court may fashion to deal with unlawfulness, having regard to the stage of the process at which it has arisen, and avoiding – when it is possible to do so – uncertainty, expense and delay. They include a broad range of potential requirements in directions given under subsection (7A), all of which go to "the action to be taken in relation to the [relevant] document". The four types of requirement specified in subsection (7B) are stated to be requirements which directions "may in particular" include. None of them, however, would warrant the substitution by the court of its own view as to the issues of substance in a plan-making process, or as to the substantive content of the plan – its

policies and text. They do not allow the court to cross the firm boundary separating its proper function in adjudicating on statutory challenges and claims for judicial review in the planning field from the proper exercise of planning judgment by the decision-maker.

30. The question dividing the parties here is whether the court's power under section 113(7A) to give directions when remitting a local plan – in particular its power under subsection (7B)(c) and (d) to give directions requiring the taking of "action" – broad as that power may be, extends to giving directions such as the judge gave in the particular circumstances of this case. In my view they do.

31. Subsection (7B)(c) is broadly framed. It embraces "action" to be taken by "a person or body with a function relating to the preparation, publication, adoption or approval of the document …". This will include "action" to be taken by an inspector appointed by the Secretary of State to undertake an examination of a local plan, and action to be taken by the local planning authority whose responsibility it is to prepare and adopt the plan. Both the inspector and the authority perform relevant functions. The "action" itself may include action to be taken by the inspector in recommending modifications to the plan under section 20(7C), or by the authority in adopting the plan with such modifications under section 23(3). Both are functions relating to the preparation and adoption of the plan.

32. Mr Turney was prepared to concede that in a case where an inspector's report had left no room for doubt about the outcome he was recommending and allowed no other possible outcome, but he had failed to recommend the inevitable modification to the plan, it might be appropriate for the court to grant relief under section 113(7) and (7A) with a direction requiring him to recommend that modification to the local planning authority. Mr Turney did not accept, however, that this was such a case. Nor did he accept that in those or any other circumstances the court could ever compel an authority to adopt a plan in a particular form. The statutory scheme leaves the authority with the option not to adopt the plan. When granting a remedy under section 113(7) and (7A), Mr Turney submitted, the court may not shut out that option. So if Patterson J. was right to find the inspector's conclusions in paragraphs 135 to 141 of his report unambiguous and the modification required to give effect to them plain, paragraph 2 of her order might be appropriate. But paragraph 3 would not.

33. I do not think Mr Turney's submissions recognize the full extent of the court's power to give directions under section 113(7A). Such directions are, by their nature, a form of mandatory relief. They enable the court to fit the relief it grants precisely to the particular error of law, in the particular circumstances in which that has occurred. In principle, as I see it, they may be used to require the "person or body" in question to correct some obvious mistake or omission made in the course of the plan-making process, perhaps at a very late stage in the process, without upsetting the whole process by requiring its earlier stages to be gone through again. I cannot see why they should not be used, in an appropriate case, to give proper effect to a planning judgment already exercised by the "person or body" concerned – typically in the formulation of policy or text, or in the allocation of a site for development of a particular kind – or to ensure that a decision taken by that "person or body" in consequence of such an exercise of planning judgment is properly reflected in the outcome of the process. Used in this way, the court's power to give directions can overcome deficiencies in the process without its trespassing into the realm of planning judgment and without arrogating to itself the functions of the inspector who has conducted the examination of a local plan or of the local planning authority in preparing and adopting the plan.

34. There will, I think, be cases where the court can give directions requiring an inspector to recommend a modification in a particular form to reflect the conclusions in his report. In my view Mr Turney was right to accept that. But I think there will also be cases in which the court can properly give a direction under section 113(7A) requiring a local planning authority to adopt a local plan with a particular modification or modifications. Whether a direction of either kind is appropriate in a particular case will always depend on the individual circumstances of that case. In some cases it will be clear that the court can give such directions without transgressing the limits of its jurisdiction under section 113. It may only do so if the relevant planning judgment has already been lawfully exercised within the plan-making process itself, and the relevant consequences of that planning judgment are plain. The directions it gives, if crafted as they should be, will then result in the inspector's or the local planning authority's planning judgment – whichever it is – being given its true and intended effect. The court will have confined itself to rectifying the errors of law it has found, which is its proper remit in proceedings impugning the validity of an adopted local plan. And it will not have ventured into the forbidden realm of planning judgment, or usurped any function of the "person or body" whose error requires to be put right by the "action" prescribed for them under section 113(7A). There is nothing "constitutionally improper" about this, and nothing inconsistent with the ambit of remedies in public law nor with the court's powers to grant relief in claims for judicial review or under other kindred statutory provisions for challenges to planning decisions.

35. In my view therefore, the order made by the judge in this case was, in principle, an order within the scope of the court's powers under section 113.

Was the judge's order, in the circumstances of this case, misconceived?

36. As Mr Turney emphasized, the inspector did not recommend the amendment of Policy Bicester 13 by the deletion of the sentence in issue, even though the council had taken pains to clarify the matter with the Planning Inspectorate before proceeding to adopt the local plan. It is also clear, said Mr Turney, that the council did not want that sentence to be omitted from the adopted version of Policy Bicester 13. Yet the judge's order mandates that outcome. The concept of reducing the "developable area" of the site might mean excluding all forms of development from the Conservation Target Area or the exclusion only of "built development". The sentence in issue prevents the construction of buildings in the Conservation Target Area. It does not prohibit other forms of development, such as the recreational facilities required in any development of housing on the site – one of several possibilities discussed at the examination. Yet the judge seems to have overlooked the distinction between a prohibition on "any development" and a prohibition only on "built development" in the Conservation Target Area. She does not seem to have appreciated that in paragraph 139 of his report the inspector was not addressing the council's case; he was addressing and rejecting a case put forward by third party objectors.

37. If the inspector were given the chance to consider the matter again, Mr Turney submitted, he might conclude unequivocally that no "built development", as opposed to no development at all, should take place within the Conservation Target Area, or perhaps that the number of dwellings in the allocation should come down – maybe to the level suggested by Mr Woodfield. There are several potential outcomes. Depending on the modification recommended by the inspector, the council might decide not to change the policy, and not to adopt it. After all, when it adopted the local plan it resolved to pursue the

designation of the Conservation Target Area as Local Green Space – which would prevent built development in that part of the site. But the judge's order makes those other outcomes impossible. In effect, she exercised a planning judgment of her own, instead of leaving these questions, as she should have done, to the inspector and the council. Broad as the power to give directions in section 113(7A) may be, her order in this case went beyond it.

38. I cannot accept Mr Turney's argument here. In my view, Mr Choongh and Mr Kimblin were right in their submission that the judge's conclusions in paragraphs 86 to 89 of her judgment are sound.

39. Patterson J. did not engage in an exercise of planning judgment. She identified the relevant reasoning of the inspector, and stated her understanding of it. And her analysis of what he said seems to me to be correct. She recognized that the relevant planning issues had been thoroughly aired before him at the examination hearing. He heard detailed representations from the council, Gallagher and objectors on the appropriate extent of development within the allocated site, given the site's ecological interest; on the question of whether development – both built and other development – should be contemplated within the Conservation Target Area, and, if so, whether it should be contemplated in the Local Wildlife Site; and on the concept of designating the Conservation Target Area as Local Green Space. It is clear from the transcript of the discussion at the examination hearing that all of these questions were very fully debated, with the benefit of the plan produced by Gallagher showing development within the Conservation Target Area.

40. Before us there has been no criticism of the inspector's treatment of the planning issues he had to grapple with, or of the conclusions he reached. Nor could there be.

41. As the judge concluded, it is clear from the relevant passage of his report – in particular, paragraphs 135, 137 and 139 to 141 – that the inspector saw no justification for retaining the provision in Policy Bicester 13 which referred to the part of the allocated site within the Conservation Target Area being kept free of "built development"; that in his view that provision would work against the contribution the site should be making to the supply of housing, might render its development unviable or incapable of delivering as much affordable housing as it should, and might also frustrate the enhancement of the ecological interest in the Local Wildlife Area and the achievement of the main objective of the Conservation Target Area; that the designation of the land to the east of Langford Brook as Local Green Space was unjustified; that sufficient protection to biodiversity on the site was afforded by Policy ESD 10 and Policy ESD 11; and that, given the requirements of those policies, the site of approximately 23 hectares should be allocated for the development of 300 dwellings. He could see the need to keep the part of the allocated site within the Local Wildlife Site and to the east of Langford Brook free from "built development" (paragraph 137 of his report), but not a need to reduce the developable area of the site by preventing development elsewhere in the Conservation Target Area (paragraph 139). Those conclusions were reached in the light of the parties' representations and the discussion at the examination, and expressly in reliance on Gallagher's "indicative layouts" showing development in the Conservation Target Area – to which the inspector referred in paragraph 136 of his report.

42. The relevant reasoning in the inspector's report is, as Mr Choongh and Mr Kimblin submitted, complete and clear. It points to the conclusion that the sentence in Policy Bicester 13 precluding "built development" in the Conservation Target Area must be removed. On a fair reading of the inspector's relevant conclusions as a whole, and in

particular those in paragraph 139, the retention of that sentence is incompatible with them. Its deletion was therefore necessary.

43. As was also submitted by Mr Choongh and Mr Kimblin, there is no force in Mr Turney's argument that, upon reconsideration, the inspector might now recommend that Policy Bicester 13 be altered by reducing the number of dwellings in the allocation or adopted with a provision precluding "built development", but not other forms of development, in the Conservation Target Area. No support for that submission is to be found in his report. Having had all of the planning issues ventilated before him at the examination hearing and having dealt comprehensively with them in his report, he firmly endorsed the allocation of 300 dwellings on the site, concluding that it struck the best balance between housing need and the protection and enhancement of "environmental assets" and finding it consistent with the aim of securing a "net gain in biodiversity … from the scheme as a whole" (paragraph 141 of his report). In reaching that conclusion he was obviously rejecting the council's and objectors' efforts to have some limit imposed in Policy Bicester 13 on development within the Conservation Target Area as a whole.

44. Paragraph 139 of the report must be read together with the preceding two paragraphs. In those three paragraphs the inspector was considering whether the developable area of the allocated site should be reduced, and if it should, how and why. The only parts of the site that he considered should be subject to any restriction on development under Policy Bicester 13 were the area of just less than 10 hectares within the Local Wildlife Site to the east of Langford Brook (paragraph 137) and the land within flood zone 3 (paragraph 138). He expressly rejected the "requests" that the developable area of the site be reduced by precluding development from the Conservation Target Area as a whole (paragraph 139). He reinforced that conclusion by dismissing the notion of the land to the east of the Langford Brook being retained as public open space or designated as Local Green Space (paragraph 140). And he maintained it after the council had twice queried the first sentence of paragraph 139 in his draft report. He did not seek to qualify it in any way: by differentiating between the various relevant "requests" for a reduction in the developable area presented to him at the examination hearing, or by distinguishing between development of different kinds – for example, between "built development" and other forms of development – or by stating that, in his view, only "built development" should be excluded from this part of the site.

45. This does not mean that a particular scheme of development in which "built development" or development of some other kind is proposed within the Conservation Target Area would necessarily be acceptable when submitted as an application for planning permission; merely that Policy Bicester 13 did not have to rule out development in that part of the site in principle. Any scheme would, after all, still have to comply with the local plan's policy for Conservation Target Areas – Policy ESD 11, as well as the various criteria in Policy Bicester 13 itself. The inspector's conclusions make this perfectly clear.

46. There is, in truth, nothing in the inspector' report to suggest that he saw any justification for reducing the developable area of the allocated site by including in Policy Bicester 13 either a sentence stating that "built development" should not extend into the Conservation Target Area or a sentence stating that "built development" was precluded in that part of the site but other forms of development were not. To read any such concept into his report would be quite wrong. On the contrary, on a fair reading of his conclusions in paragraphs 135 to 141, he clearly did not accept there was a need for any reduction in the developable area of the allocated site beyond those to which he referred in paragraphs 137 and 138. If

he had accepted that, he would undoubtedly have said so. And he would have had to explain why. He would have had to identify the kinds of development which might be acceptable in the Conservation Target Area and give reasons for excluding the rest. But he did not do that. In fact, in paragraph 139 he set out cogent reasons for reaching the very opposite conclusion – that the developable area of the site did not have to be further reduced by excluding development of any kind from "the whole of the River Ray Conservation Target Area". In that paragraph he was not confining himself merely to the third party objections. He was addressing the council's case as well. That, in my view, is clear.

47. Patterson J. was therefore right to find the inspector's recommendation irreconcilable with the reasoning in the relevant part of his report, and to conclude that he ought to have recommended the deletion of the contentious provision in Policy Bicester 13. In these circumstances paragraph 2 of the judge's order was not, in my view, misconceived. On the contrary, it was fully justified, appropriate and necessary. The direction it contains was nothing more or less than was required to correct the inspector's mistake. It gave proper effect to the conclusions he had expressed in his report. It ensured that his recommendation would be consonant with his planning judgment, displayed in those conclusions. It remedied his error in a specific and proportionate way. And it did so without exceeding the court's jurisdiction under section 113(7), (7A) and (7B).

48. That leaves paragraph 3 of the order. In the particular circumstances of this case, was the judge entitled, and right, to require the council to adopt the corrected Policy Bicester 13, as recommended by the inspector in accordance with paragraph 2 of her order? In my view she was.

49. As I have said, although the council invited the judge, in effect, to order that the inspector be given the opportunity to reconsider his recommendation on the terms of Policy Bicester 13 after hearing the parties' further representations, it also invited her to order it to adopt whatever "modification" the inspector might then recommend. The precise form of this part of the council's draft order, which was presented to the court below by the council's solicitor, Mr Nigel Bell, as an exhibit to his witness statement dated 12 November 2015, was this – in paragraph 5:

> "5. The [council] shall adopt Policy Bicester 13 subject to whatever modification (if any) of Policy Bicester 13 is recommended by the appointed planning inspector."

50. Two things therefore are clear. First, the council was not opposing, in principle, a mandatory order which required it ultimately to adopt Policy Bicester 13 in whatever form the inspector might recommend. This would of course include a version of Policy Bicester 13 in which the provision precluding "built development" in the Conservation Target Area had been deleted and no restriction on development in that part of the site inserted in its place – the amendment which in my view the inspector ought to have recommended and which the judge was right to direct him to recommend. Mr Bell did not say in his witness statement that the council would, in principle, oppose an order requiring it to adopt the policy in that particular form, whether or not the inspector was required by the court to recommend that course. The council has not appealed against paragraph 3 of the judge's order, or any part of it. Nor does its letter to the court dated 2 August 2016 reveal any misgivings about the order in the light the judge's conclusions in paragraphs 86 to 88 of her judgment. Secondly, before the judge the council did not seek to keep open the

possibility of deciding in the end not to adopt the local plan, or at least not to adopt Policy Bicester 13 in a particular form. It was asking for an order which would effectively compel it to adopt the policy in any event. It was not saying that if the policy were remitted to the inspector and he recommended an amendment in which the provision precluding "built development" in the Conservation Target Area was removed, it would not then – or might not – adopt the policy, or even that it would want to consider non-adoption. Even now, in its letter of 2 August 2016, the inspector having recommended the deletion of this provision in accordance with paragraph 2 of the judge's order, it has not said that.

51. That being the council's position, I cannot accept Mr Turney's submission that paragraph 3 of the judge's order had the effect of overriding the council's discretion as to adoption under section 23 of the 2004 Act. The draft order presented to the court by the council embodies the exercise of that discretion. The council had manifestly decided to exercise its power to adopt Policy Bicester 13, and to do so even if the policy did not restrict the developable area of the allocated site by precluding "built development" in the Conservation Target Area. Again, the judge was not stepping beyond the limits of the court's jurisdiction under section 113. Paragraph 3 of her order was not misconceived. With paragraphs 1 and 2 of the order, it provided the logical and complete remedy to the unlawfulness in the plan-making process. It ensured not only that the inspector's recommendation accurately reflected the conclusions in his report, but also that his recommendation was translated faithfully into the adoption of Policy Bicester 13 in the form it would then have to take.

Was the judge's order at odds with the regime for public participation in plan-making?

52. Mr Turney submitted that the judge ought to have remitted Policy Bicester 13 to the inspector, as the council had sought, requiring him to permit further representations by interested parties on the content of the policy and its drafting. The judge's order undermines the provisions for public participation in development plan-making under domestic, European Union and international law. It denies Mr Woodfield and others the opportunity to argue for a different outcome in the adopted Policy Bicester 13. Contrary to the statutory scheme in Part 2 of the 2004 Act and Part 6 of the Town and Country Planning (Local Planning) (England) Regulations 2012, it prevents public participation in the plan-making process. Because the sustainability appraisal prepared for the local plan under Directive 2001/42/EC "on the assessment of the effects of certain plans and programmes" ("the SEA Directive") and the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA regulations") had been undertaken on the basis that Policy Bicester 13 would preclude "built development" in the Conservation Target Area, the adoption of the policy in a materially different form would be unlawful. It would, said Mr Turney, offend the provisions for effective public participation in article 6(4) and article 7 of the Aarhus Convention. Further environmental assessment would be necessary before the local plan could be adopted lawfully.

53. I cannot accept those submissions.

54. As the judge observed in paragraphs 86 to 88 of her judgment, the statutory plan-making process has in this case run its full course without legal error until its penultimate and final stage, the public has participated fully in the process, the examination hearing was faultlessly conducted, interested parties have had their say, the planning issues arising from the policies in the local plan – including Policy Bicester 13 – have been resolved in the

light of the representations made. Mr Turney was unable to point to any provision relating to public participation in the 2004 Act and the 2012 regulations which had not been complied with. The examination does not need to be rerun. The examination hearing does not need to be reopened. The only errors of law lie in the failure by the inspector to translate his conclusions on one aspect of one policy into the recommendation following from those conclusions, and in the consequent failure of the council to adopt the policy in its proper form. Relief less focused on those errors of law than the order made by the judge would be needlessly wasteful of time and cost. It would be disproportionate. It might also have implications for other policies in the local plan, in particular those providing for the supply of housing in the council's area in the plan period.

55. The submission that the judge's order breaches the requirements of the SEA Directive, the SEA regulations and the Aarhus Convention is also mistaken. The answer to it was given by the judge at the end of paragraph 88 of her judgment. Policy Bicester 13, amended by the deletion of the provision ruling out "built development" in the Conservation Target Area, will still provide that "[development] must avoid adversely impacting on the Conservation Target Area and comply with the requirements of Policy ESD 11 to secure a net biodiversity gain". The counterpart provision in Policy ESD 11, which appeared in the local plan from the outset, says that "[development] which would prevent the aim of a Conservation Target Area being achieved will not be permitted". Together, these two provisions in the local plan will operate to prevent development which would have any significant environmental effect on the Conservation Target Area, save perhaps for a significant beneficial effect on biodiversity, which was always a prospect inherent in Policy Bicester 13. The policy also contains provisions to protect the Local Wildlife Site and its "ecological value". The assumption on which it was considered in the sustainability appraisal addendum – that it would serve "to protect and enhance biodiversity" – was therefore valid. The inspector's consideration of the policy and the environmental effects of its implementation, in paragraphs 135 to 141 of his report, was informed by an up to date sustainability appraisal, in which no "likely significant effects on the environment" were left out of account.

Conclusion

56. In my view, for the reasons I have given, the judge exercised her discretion appropriately in the order she made. I see no reason to disturb paragraphs 2 and 3 of that order. I would therefore dismiss this appeal.

Lord Justice Laws

57. I agree.