CO/2388/2013

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

B E T W E E N:

THE QUEEN

on the application of

ST ALBANS CITY AND DISTRICT COUNCIL

Claimant

- and -

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

Defendant

- and -

(1) HELIOSLOUGH LIMITED
(2) GOODMAN LOGISTICS DEVELOPMENT (UK) LIMITED
(3) SLOUGH BOROUGH COUNCIL

Interested Parties

SUMMARY GROUNDS ON BEHALF OF THE SECRETARY OF STATE

Introduction

1. The Claimant ("the Council") seeks to challenge a procedural decision of the Secretary of State, taken on 14 December 2012, not to re-open a public inquiry into a proposed development and conjoin it with the public inquiry into another proposed development.

2. Although this matter has a long and somewhat convoluted history, and although the Claimant's grounds run to over 100 paragraphs, in fact the issue and the answer to it can be briefly stated. In short, as the challenge is to the Secretary of State's decision that he was in a position to determine a planning appeal without hearing further

evidence, the lawfulness of that procedural decision is to be judged by reference to the lawfulness of the Secretary of State's substantive decision on the appeal: either that decision is lawful (in which case the claim fails) or it is flawed for lack of evidence (in which case the claim succeeds).

3. Despite the issue having been clearly articulated in this way by the Secretary of State in his response to the letter before claim, the Council has simply failed to grapple with the reasoning in the Secretary of State's substantive "minded to" decision on the appeal, or to explain why that reasoning is flawed for lack of evidence. Accordingly, the claim must fail. Further, and in any event, the Secretary of State has yet to issue a final substantive decision on the appeal, and accordingly any challenge is premature.

Summary of factual background

4. Although, as noted above, the background to this matter is long and somewhat convoluted, for present purposes the relevant factual background can be briefly stated.

5. This matter relates to a proposed strategic rail freight interchange on a site at Radlett in Hertfordshire ("the Radlett proposal"). The Council is the relevant local planning authority for the site.

6. On 9 April 2009, the First Interested Party ("Helioslough") applied to the Council for planning permission for the Radlett proposal. The Council rejected the application on 21 July 2009. The developer appealed to the Secretary of State and, by a report dated 19 March 2010, an Inspector recommended that planning permission be granted

[1/312-529].[*] One of the issues on the appeal was that of whether there were any alternative sites that would meet the need for a strategic rail freight interchange in a less harmful way. This involved consideration of the fact that another rail freight interchange was being proposed by a different developer on a site at Colnbrook near Slough ("the Colnbrook site"). The Inspector's view was that, in the light of the particular planning policies applicable to the Colnbrook site, it could not rationally be concluded that it would meet the need for a strategic rail freight interchange in a less harmful way than the Radlett proposal.

7. The Secretary of State did not accept the Inspector's recommendation and, on 7 July 2010, issued a decision dismissing the appeal and refusing planning permission [1/530-537]. However, that decision was challenged in the High Court, and on 1 July 2011 it was quashed by HHJ Milwyn Jarman QC, who held that the Secretary of State had failed to give adequate reasons for departing from the Inspector's view in relation to the Colnbrook site [2/539-561]. Accordingly, it was necessary for the Secretary of State to reach a fresh decision.

8. There followed a number of rounds of written representations. At no point during those rounds of representations did the Council suggest that it was necessary to re-open the public inquiry.

9. On 19 September 2012, the Secretary of State wrote to the parties indicating that his preliminary view was that he would not be able to reach a fresh decision on the evidence before him, and therefore he was minded to re-open the public inquiry and

[*] References in square brackets are references to the bundle lodged with the claim form, in the format file number/page number(s).

conjoin it with the forthcoming public inquiry into the proposal on the Colnbrook site [2/787-788]. The Secretary of State sought representations from the parties on this point and, following further representations, the Secretary of State sent a letter in similar terms on 12 October 2012 affording the parties the opportunity to make further representations [2/807-808].

10. It is important to note that the Council accepts that both of these letters stated what were only preliminary views on the part of the Secretary of State. At that stage, the Secretary of State had not finally decided to re-open the public inquiry. Indeed, the whole purpose of the Secretary of State seeking the parties' representations on the point was to inform his final decision.

11. Ultimately, the Secretary of State decided that it was not necessary to re-open the public inquiry into the Radlett proposal or to conjoin it with the forthcoming public inquiry into the proposal on the Colnbrook site. In his letter dated 14 December 2012, the Secretary of State expressed the view that he was satisfied that he could determine the appeal in relation to the Radlett proposal on the basis of the evidence before him [2/858-859]. This is the decision that the Council seeks to challenge.

12. Within a week of the decision under challenge, on 20 December 2012, the Secretary of State issued a substantive "minded to" decision on the appeal, indicating that subject to the conclusion of an appropriate planning obligation, he proposed to allow the appeal and grant planning permission for the Radlett proposal [2/863-872]. In relation to the Colnbrook site, the Secretary of State accepted the Inspector's original view that, in the light of the particular planning policies applicable to the Colnbrook

site, it could not meet the need for a strategic rail freight interchange in a less harmful way than the Radlett proposal. This was the view upon which the earlier decision of this court, by HHJ Milwyn Jarman QC, was predicated.

Submissions

13. Although the Council have put their challenge in terms of an alleged failure to give adequate reasons, irrationality and a failure to take into account relevant considerations, essentially its complaint comes down to the fact that the Secretary of State set out preliminary views as to the course that he would adopt in his letters of 19 September and 12 October 2012, but then he decided to adopt a different course without expressly stating why he had changed his mind.

14. However, given that the letters of 19 September and 12 October 2012 set out only preliminary views, there was no need for the Secretary of State to justify the fact that he eventually decided to take a different course by reference to those preliminary views. There was no need for the Secretary of State to explain why he had changed his mind, because he had not changed his mind: he had never made up his mind in the first place. The Council has not cited any authority to support the proposition that where a decision-maker gives a preliminary view for the purposes of affording parties an opportunity to make representations in relation to it, he is thereafter required to explain why he did not adhere to his preliminary view. That is because there is no such authority.

15. The only obligation on the Secretary of State was to take a decision that was lawful in itself. This is exactly what he did, and it is clear why he took that decision.

16. In his letter of 20 December 2012, the Secretary of State stated that he was satisfied that he could determine the appeal in relation to the Radlett proposal on the basis of the evidence before him. Then, a few days later, he issued his "minded to" decision on the Radlett proposal. The explanation as to what evidence the Secretary of State had relied upon is inherent in that "minded to" decision, and it is by reference to the "minded to" decision that one can tell whether the Secretary was lawfully entitled to reach the conclusion expressed in his letter of 20 December, i.e. that he had before him sufficient evidence to determine the Radlett proposal.

17. Accordingly, for the Council's challenge to get off the ground, it has to demonstrate that the Secretary of State's "minded to" decision is erroneous in law because there was insufficient evidence before the Secretary of State to sustain it. Despite this point having been made expressly and clearly to the Council by the Treasury Solicitor in their letter of 7 February 2013 [2/905-908], the Council has singularly failed to grapple with it. Indeed, the Council's grounds proceed, erroneously, on the assumption that one can simply look at the decision of 20 December 2012 in isolation, without also looking at the "minded to" decision which is inextricably linked with it.

18. The Council's grounds simply do not identify any piece of evidence, or category of evidence, that was not before the Secretary of State but which was crucial to his "minded to" decision. This significant omission is perhaps unsurprising: given that the Secretary of State adopted the Inspector's original view that, in the light of the particular planning policies applicable to the Colnbrook site, it could not meet the need for a strategic rail freight interchange in a less harmful way than the Radlett

proposal, it is wholly unclear what further evidence the Secretary of State might have required on this issue.

19. In summary, the Council does not, and cannot, criticise the "minded to" decision on the basis that it is based on insufficient evidence. If the "minded to" decision cannot be criticised on that basis, it cannot be said that the Secretary of State's decision that he had sufficient evidence to determine the Radlett proposal was flawed. Accordingly, it must follow that the claim fails.

20. It appears from a letter written by the Council on 20 February 2013 that it may think that the Secretary of State is saying that the Council must bring a separate claim in respect of the "minded to" decision [2/915-916]. Unfortunately, the Council proceeded to commence the present claim without waiting for a response to that letter. In any event, and for the avoidance of doubt, the Secretary of State can confirm that he is not saying that a separate claim in respect of the "minded to" decision is necessary. On the contrary, given that it is only a "minded to" decision, such a challenge would be wholly inappropriate. Rather, the Secretary of State is saying that his procedural decision can only be challenged by reference to the "minded to" decision. For the reasons explained above, the Council have manifestly failed to do this.

21. There is an additional reason why this claim should fail. As explained above, the Secretary of State has, as yet, issued only a "minded to" decision on the Radlett proposal, stating that a final decision was subject to the conclusion of an appropriate planning obligation. Unless and until a final decision is taken on the Radlett proposal,

the present claim is premature: there is no point requiring the Secretary of State to reconsider the re-opening of the public inquiry if there remains the possibility that he might decide against the Radlett proposal in any event.

Conclusion

22. For the reasons set out above, there is a short answer to the Council's claim and, accordingly, permission to apply for judicial review should be refused.

23. The Secretary of State seeks an order that the Council pay his costs of filing the acknowledgment of service and these summary grounds in the sum of £2000 (pursuant to *Mount Cook Land Limited v Westminster City Council* [2004] 2 P&CR 405; *R (Ewing) v Office of the Deputy Prime Minister* [2006] 1 WLR 1260). A schedule of costs is appended to the acknowledgment of service.

JONATHAN MOFFETT