CO/4167/2014

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

Royal Courts of Justice
Strand
London WC2A 2LL

Friday 20 February 2015

B e f o r e:
MR JUSTICE DOVE
Between:
THE QUEEN ON THE APPLICATION OF ARCHWAY SHEET METAL WORKS JOSIF FAMILY TRUSTEES

Applicants

v

SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT
First Defendant

LONDON BOROUGH HARINGEY
Second Defendant

TOTTENHAM HOTSPUR LTD
Third Defendant

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(Official Shorthand Writers to the Court)

Mr Christopher Lockhart-Mummery QC (instructed by Paul Winter & Co) appeared on behalf of the Applicants
Mr Stephen Whale (instructed by Treasury Solicitor) appeared on behalf of the First Defendant
Mr Timothy Corner QC (instructed by London Borough Haringey) appeared on behalf of the Second Defendant
Mr Christopher Katkowski QC (instructed by Herbert Smith Freehills) appeared on behalf of the Third Defendant

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MR JUSTICE DOVE:

Introduction

1. The Northumberland Development Project is a major mixed use regeneration project in Tottenham. It was planned for delivery in three phases and for the purposes of these proceedings was originally granted planning permission on 20 September 2011. Phase 1 of the proposed project was the Northern Development, comprising a superstore, commercial space and parking. By the time of the main events in this case this element of the regeneration project was well under way and the land which was required for its completion was under the control of the relevant developers. Phase 2 of the project was a new 56,250-seater stadium and car parking. Detailed consent was granted for this element of the project. Phase 3, the Southern Development, which included housing and a college and/or health centre and/or health club, was granted planning permission in outline. Phases 2 and 3 of the project underlie the Compulsory Purchase Order ("CPO") which is under challenge in these proceedings.

2. The applicants own two plots of land contained within the CPO land. Plot 1 is used by them for storage and includes a residential flat. Plot 2 is used for the manufacture of kitchen equipment and metal fabrication.

3. The structure of this judgment is that, first, I shall deal with the relevant facts which are pertinent to the case. I shall then deal briefly with the grounds which are advanced by Mr Christopher Lockhart-Mummery QC, who appears on behalf of the applicants. I shall then turn to the law and finally to my conclusions in relation to the grounds which are raised.

The Facts

4. On 16 November 2010, prior to the grant of planning permission, the second defendant's cabinet received a report in relation to "in principle" support for a CPO in relation to the Project. At that time the third defendant was seeking to assemble the site for Phases 2 and 3. It was assembling the land because the stadium proposed was for its own purposes. The idea of the second defendant in seeking "in principle" support for a CPO was to underwrite these land assembly endeavours with the prospect of potential compulsory acquisition if agreement was not reached with the relevant landowners. It should be noted that at this time the third defendant was pursuing the possibility of relocating their football club to the Olympic Stadium.

5. The resolution which the second defendant adopted at the meeting so far as relevant was set out as follows:

> "Resolved:
>
> 1 That approval be granted in principle to the use of Compulsory Purchase powers and in principle to acquire or appropriate the Site shown edged red on the draft plan in Appendix 2 .....
>
> .....
>
> 5 That the above Resolutions be conditional upon:

> • THFC using all their reasonable endeavours to assemble the development Site by agreement/private treaty by 31 March 2011; and.
>
> • In the event that THFC are unable to assemble the Site by agreement/private treaty, by 31 March 2011 a further report be presented seeking authority to make a full and unconditional CPO for the Site and to acquire or appropriate the site for planning purposes so as to trigger the provisions of Section
>
> 237.
>
> 6 That a request to authorise a full unconditional CPO or use its appropriation powers under Section 237 for the Site be not considered unless the following pre-conditions are met by THFC:
>
> a) THFC unequivocally states that it is staying in Tottenham and not pursuing any interest in moving to a stadium or site elsewhere;
>
> b) The Council being satisfied that there is a legally binding delivery mechanism (a Section 106 Agreement) with THFC which ensures that there is a comprehensive redevelopment of the whole Site and that the new football stadium will be built on the Site and completed within a reasonable time period of any other development on the site such as the supermarket being occupied or opened for business.
>
> c) The Council being satisfied that THFC has a viable business plan and funding strategy, together with a full and sufficient indemnity agreement and appropriate financial bond covering the costs of making and confirming any such CPO/Section 237
>
> appropriation."

6. In February 2012 the second defendant received reports from independent consultants indicating that the development of the existing planning permission would not be viable. As a result, it was proposed that a separate and new Section 106 package should be considered which was less financially onerous. In particular the delivery of affordable homes, it was concluded, would have a serious impact upon the project's viability.

7. On 20 March 2012 the second defendant returned to the issue of the need to promote a CPO for the project. By then, planning permission had been granted and 90 per cent of the land required was under the control of the third defendant. At that time the third defendant had failed to secure its interest in the Olympic Stadium. The report identified the objectives and analysed the issues in the following way:

> "1.3 The objectives for supporting the NDP project through the use of CPO powers are:
>
> • To provide a focal point for the regeneration of Tottenham.

• To provide a catalyst for the long-term physical regeneration of Tottenham.

• To show tangible actions by the Council and THFC working in partnership, post the riots, to provide an opportunity to support the social, physical and economic well being of the area.

• To bring the vacant, under utilized land and buildings into use and development.

• To enable THFC to stay and invest within the Borough.

• To enable a comprehensive development and regeneration of the whole of the Northumberland Development Project Site to be achieved.

• To enable London as a whole to benefit from the regeneration.

• To maximize the benefits to the community and businesses within London as a whole and within the local area.

• To allow THFC to assemble the site to build the scheme.

.....

3 Recommendations

Cabinet is recommended to:

3.1 Agree that, as set out in the report at paragraph 5.8, the pre-conditions for compulsory

purchase set by Cabinet on 16 November 2010 have now been met by THFC.

3.2 Resolve to make a Compulsory Purchase Order to acquire all land and rights within the Site shown edged red on the plan in Appendix 1 for planning purposes pursuant to Section 226 of the Town and Country Planning Act 1990 (as amended), to enable

Tottenham Hotspur Football Club (THFC) to build its new football stadium in Tottenham along with associated development supporting regeneration.

.....

Other options considered.

4.1 Option A – Not to support the NDP Project with the use of Compulsory Purchase Powers.

4.2 The implications of this option are that THFC may not be able to acquire the land needed and therefore they will not be able to secure funding and build the new stadium and associated development and the objectives identified in paragraph 1.3 will not be achieved.

4.3 Option B – Deferring the decision to use Compulsory Purchase powers to allow further

time for a negotiated settlement with the parties.

4.4 In consultation with the Council, THFC has been actively negotiating with landowners for many years, and since the Council's 16th November 2010 'in principle' resolution these efforts have intensified in order to see if an agreement can be reached to acquire by private treaty. In the majority of cases, this has been successful, with the Club

owning over 90% of the site. One remaining landowner has been unable to agree terms with THFC. THFC have shown satisfactory evidence to Council Officers that a CPO is now needed as a matter of last resort and deferring any decision will adversely impact on the ability to secure funding and delivery of the scheme."

8. It is important to note that this report was accompanied by a draft, prepared by officers, of the Statement of Reasons which would accompany the CPO which set out at great length the basis upon which the compulsory purchase powers were proposed to be exercised.

9. The report returned to the question of the pre-conditions which had been set at the earlier meeting I have alluded to above. In the officers' report they concluded that those conditions had been discharged as follows:

"5.8 Officers consider that these pre-conditions have now been satisfied for the following reasons:

a) THFC has stated unequivocally that it is staying in Tottenham and intends to operate from the new stadium and is not pursuing any interest in moving to a stadium or site elsewhere and will not do so prior to their occupation and use of the new stadium; see statement from the club attached as Appendix 2.

b) There is a legally binding delivery mechanism via the S106 Agreement with THFC agreed by Planning Sub Committee on 13th February 2012 which ensures so far as possible that there is a comprehensive redevelopment of the whole Site and that the new football stadium will be built on the Site and completed within a reasonable time period of any other development on the site such as the supermarket being occupied or opened for business. There can, of course, be no absolute guarantee of this (or indeed any other) development proceeding. It will always be subject to securing appropriate financing and other matters (such as the

sale of naming rights to the stadium), it is felt that this pre-condition has been secured as far as it is feasible to do so.

c) Grant Thornton, as the Council's independent financial advisers, have indicated that they are satisfied that THFC has a business plan and funding strategy that, subject to meeting key challenges, has a reasonable prospect of delivering the NDP Scheme. The exercise of CPO powers is subject to there being a full and sufficient indemnity agreement and appropriate parent company guarantee, financial bond or equivalent being in place to cover the costs of preparing, making and confirming a CPO, so as to ensure that there is as little financial risk to the Council as possible."

10. The statement from the chairman of the club, to which the officers alluded as being Appendix 2 of the Committee Report, was a statement made to the Annual General Meeting of the third defendant on 13 December 2011. In that statement the following was stated by the chairman:

"As you arrived here this morning you could not have failed to notice the amount of work, most of it demolition, that has been taking place around the existing stadium. No one should now doubt our intentions to seek to deliver a world-class stadium here in Tottenham.

A financing package will need to include bank finance, enabling development and sponsorship. Quite clearly any significant, further investment by the Club would need to be in the context of a commitment by the public sector to fund public infrastructure works to create the environment and confidence to commit further.

These public monies would be entirely for public works, not for the stadium or any of the associated Club developments and would contribute to the general uplift of the borough thereby creating an area in which the Club can justify hundreds of millions of pounds of investment, secure funding and be a catalyst for further regenerative investment. A new stadium continues to be central to delivering our ambitions for this Club and I should say, at this stage, we are encouraged by the level of support there is for our plans and for giving the area of Tottenham the focus and attention it deserves."

11. The cabinet accepted that the pre-conditions had been met. They also resolved to make the compulsory purchase order. The minute of that meeting records as follows:

"Resolved:

i That it be agreed that, as set out in the report at paragraph 5.8, the pre-conditions for compulsory purchase set by Cabinet on 16 November 2010 have now been met by THFC.

ii That a Compulsory Purchase Order should be made to acquire all land and rights within the Site shown edged red on the plan in Appendix 1 of

> the report, for planning purposes pursuant to Sections 226 of the Town and Country Planning Act 1990 (as amended), to enable Tottenham Hotspur Football Club (THFC) to build its new football stadium in Tottenham along with associated development supporting regeneration."

12. On 29 March 2012 new planning permissions were issued in relation to the Phase 1 Northern Development and Phase 2 Southern Development. In particular, there was a new Section 106 obligation for the Southern Development. The principal change in that new Section 106 obligation was that it no longer provided for the provision of any affordable housing and that some £16 million of proposed planning contributions were deleted from the obligation. It is common ground that the Section 106 obligation did not include any obligation or covenant requiring the third defendant to construct any element of the development of the stadium. There were some provisions within it in Schedule 4 relating to the phasing of the development but they were specifically recorded by that document as not being legally binding.

13. On 30 July 2012 the second defendant made the CPO using their power under Section 226 (1) (a) of the Town & Country Planning Act 1990. Its objects and description were set out as follows:

> "1 Subject to the provisions of this order, the acquiring authority is under Section 226 (1) (a) of the Town & Country Planning Act 1990 hereby authorised to purchase compulsorily the land described in paragraph 2 for the purpose of facilitating the carrying out of development, redevelopment or improvement of the land comprising the demolition of existing buildings and comprehensive redevelopment to provide a new stadium and ancillary uses such as Club museum; shop and offices for the Tottenham Hotspur Foundation; residential; college and/or health centre and/or health club uses; and public realm improvements which will contribute to the achievement of the promotion or improvement of the economic, social or environmental well-being of the North Tottenham area."

14. As set out above, the land proposed for compulsory acquisition included the applicant's land. The first defendant caused a public inquiry to be held in relation to the provisions of the CPO. That occurred before an independent inspector in March and April 2013.

15. The applicant advanced, as an objector at the Inquiry, a range of points in order to defeat authorisation of the CPO. For the purposes of my judgment, the main points which they raised were as follows. First, they contended that the second defendant had no authority to make the compulsory purchase order in particular because the pre-conditions which were set out in the November 2010 resolution had not been satisfied. Second, the applicants contended that there was no commitment from the third defendant to deliver the development. No development agreement existed between the second defendant and the third defendant, and the third defendant would acquire the site without any obligation to perform the development of the project or, in the alternative, any requirement to hand the land back to the applicant in circumstances when the development had not been pursued. This objection was raised in the context

that the third defendant had previously pursued a future elsewhere in London, namely at what was to become the former Olympic Stadium.

16. Having heard these objections at the Inquiry, the inspector reached conclusions in relation of the merits of the CPO. He noted that the viability of the project was not an issue. He also considered that considerable weight should attach to the fact that planning permission and related heritage consents had been granted for the project. With the possible exception of the absence of provision of any affordable housing, which was a policy requirement for a residential scheme, the inspector concluded that the consented scheme was supported by the development plan when it was taken as a whole. The inspector went on in his report to evaluate the scheme proposal against the tripartite test of economic, social and environmental well being set out in the statutory framework, to which I shall turn in due course. He noted the important role that public funding was being required to play in delivering the infrastructure which provided the benefit under these headings.

17. The inspector dealt specifically with the concerns raised by the applicant in relation to the third defendant's commitment to delivering the project's proposals. He expressed his conclusions as follows:

> "Commitment
>
> 8.33 Archway has criticised the lack of a development agreement and suggested that THFC would be free to carry out some other development. I accept that the Indemnity Agreement would probably not be enforced in the event of a cleared site and no prospect of a stadium. Nonetheless, I heard no persuasive evidence to show that the value of the site, without a stadium and in this deprived ward, would warrant the time, effort and expense put into its assembly. Consequently, this suggestion is not really credible. While the owners may be experienced property developers, it remains highly unlikely that the cleared site would be developed for any other purposes than a new stadium.
>
> 8.34 The lack of a development agreement is unusual, and much of the investment in site assembly might be recovered if the Club went elsewhere. Nevertheless, it is unlikely that the Club would go to the trouble of acquiring the land in this part of Tottenham, and pursuing a CPO, without an intention to redevelop the site for its highly prized goal of a new stadium. There is a better than reasonable prospect that the scheme will proceed even without a development agreement.
>
> 8.35 Moreover, the Objectors confirmed in evidence that the only other likely uses for the site would be similar to the existing or last uses so there would be no significant increase in value compared with the costs of acquisition. In the event that the stadium could not be delivered, the Club would doubtless try to cut its losses but it is very unlikely it would look to any alternative development if the site was successfully cleared. Therefore little weight should be placed on the lack of a development

agreement. On balance, the evidence at the Inquiry suggested that the new owners, including the Club's longstanding executive chairman, are fully committed to the scheme."

18. The inspector excluded the suggested alternative solutions which had been aired at the Inquiry as being realistically available. He went on to reach conclusions in relation to the first defendant's policy which is set out in Circular 06/2004, entitled "Compulsory Purchase and Crichel Down Rules". His conclusions in relation to those policy requirements contained in Circular were as follows:

> "8.48 For the above reasons, with the possible exception of affordable housing following the new evidence on viability, the purpose of the Order would accord with the planning framework for the area and with Section 16 (i) of the Circular. Confirmation of the CPO would allow the Order lands to be redeveloped and, if undertaken and subject to the caveats above, the scheme would improve the economic, social and environmental well-being of the area in accordance with Section 16 (ii). The relocation of the stadium, in the event the CPO is not confirmed, would not be in the public interest. Financial deliverability is no longer challenged and there is a better than reasonable prospect that the scheme would proceed. A convincing case has been made that no adequate alternative sites or means exist that could achieve the purpose of the Order. The CPO would therefore satisfy Section 16 (iii-iv) of the Circular."

19. The Inspector's overall conclusions and recommendations in relation to the CPO were set out in the following terms:

> "8.58 With the exception of affordable housing provision in the revised southern development, the scheme would accord with the development plan. There is a compelling case with regard to the well-being of the area but, for each strand of this test, most of the public benefits would depend on an injection of public funds. Specifically, the economic benefits would rely on the Council or the GLA for new infrastructure, the social benefits would be heavily diluted by the lack of any affordable housing, and the bill for the environmental benefits of a heritage fund and extended CPZ would switch to the taxpayer. Viability, in the sense of deliverability, is no longer an issue. There was little serious effort at negotiation by either party once established positions had been set but, given the expert advice on both sides, this cannot amount to a criticism of either.
>
> 8.59 For the above reasons, as matters stood at the end of the Inquiry, what could amount to a compelling case in the public interest would fail to meet this hurdle on account of the need for public funds. Consequently, the benefits would not outweigh the interference with the specific human rights under the ECHR, in which case the Order should not be confirmed. On the other hand, now that deliverability is not at

> issue, if the Council were able to reach a further Section 106 agreement to revert to the original planning obligation, then the balance would shift in favour of confirming the Order.
>
> 9 Inspector's Recommendations
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> .....
>
> 9.1 In the absence of a further planing obligation, I recommend that the Order should not be confirmed.
>
> 9.2 In the event that the Secretary of State is minded to confirm the Order, I recommend that he should canvass the Council advising it that he is minded to confirm the modified Order subject to the Council and the Club entering into a revised Section 106 agreement, to be tied to the planning permissions listed in the Third Schedule, cancelling the second agreement and reinstating the package of measures originally required, including the requirement for affordable housing. Subject to receipt of such an agreement, I would a recommend that the Order should be confirmed with modifications, as the letter dated 15 February 2013, to remove plots 3, 5, 6, 8 and 9 from the Order."

20. That report which was furnished by the Inspector to the Secretary of State on 28 September 2013 post-dated the closure of the Inquiry and was not available to the parties until the first defendant reached his ultimate decision. As might be expected however, further discussions occurred in relation to the prosecution of the project.

21. In June 2013 the third defendant appointed a new architect to review the stadium design. In June and July both the second defendant and Transport for London (hereafter "TfL") were advised that the third defendant was contemplating the possibility of a stadium with a capacity of 61,000 spectators. On 1 October 2013 the Greater London Authority ("GLA") were contacted with a view to discussing the transport implications of a 61,000-seater stadium. On 8 October 2013 a meeting occurred with them. It was resolved at that meeting to ask TfL to review the principle of a 5,000 increase in the stadium's capacity.

22. On 4 October 2013 Mr Winter, who has been the applicant's solicitor throughout these proceedings, emailed the first defendant's case officer, asking for news on the timetable in relation to the first defendant's decision. He took the opportunity to attach a press report recording the fact that the third defendant had appointed new architects to explore alternative designs. He suggested in this correspondence that this showed "substantial waning" in the third defendant's commitment to the scheme. As was proper, he copied in the third defendant's then solicitors to that correspondence. The third defendant's then solicitors replied in the following terms:

> "There has been no weakening whatsoever in THFC's commitment to the CPO scheme. THFC's position remains the same as expressed by its witnesses Matthew Collecott and Paul Phillips who gave evidence at the

> public inquiry in March and April of this year. THFC remains fully committed to bringing forward a new stadium as part of the Northumberland Development Project.
>
> THFC appointed Populous architects to conduct a peer review of the stadium design and to take forward the interior design for the fit-out. This is prudent practice for a developer to consider prior to commencing a major construction project and, contrary to Mr Winter's assertions, illustrates that THFC is prepared to incur additional costs in order. To ensure its proposals can be advanced in the event the Secretary of State confirms the CPO."

23. During October the third defendant's transport consultant was working out trip generation figures based on a stadium capacity of 61,000. On 14 November 2013 and 19 November 2013 the third defendant made presentations to the Council in relation to potential changes to the stadium. These included changed elevations and changed arrangements in relation to the basement car-parking proposed. There were also larger facilities for changing accommodation and proposals to fit in the increased number of seats.

24. On 2 December 2013 Mr Winter again wrote to the first defendant's case officer updating the first defendant in relation to a number of matters. In particular, he sought to update the first defendant in relation to what he described as scheme changes. He stated in the letter as follows:

> "Since our email exchange early in October, you have had the response from Richard Max & Co [the third defendant's then solicitors] which is far from a satisfactory answer to the questions raised by the press reports indicating that the THFC have appointed new architects to review the scheme options and that they are close to abandoning the scheme permitted by the 2012 planning permission on which the case for the CPO was based. I attach a copy of an article which appeared in the Architects Journal on 25 October 2013. The level of detail contained in these articles suggests that they are based on 'inside information' and the suggestion that the new scheme will cause a reduction of the planned homes in the southern development raises further serious questions that need to be resolved before any decision to confirm could be made."

25. Attached to that letter, as indicated, was an article from the Architects Journal which recorded as follows in relation to the appointment of the new architects and emerging changed proposals:

> "It is unclear how the proposals, which are understood to be taller than the existing stadium, would impact on the redevelopment of the area around the ground, which has been earmarked for 285 homes and a wider commercial development.
>
> However the creation of a 75 x 100m glazed structure to house the

retracted pitch south of the grounds - thought to be part of Populous' proposal - would mean the number of planned homes could shrink.

A spokesman for the club would not comment on the rumours, insisting Populous had only been formally appointed to 'take forward the interior design for the fit-out of the stadium' and to conduct a peer review of the stadium design.

He added, 'The club has always seen the new stadium as being at the heart of the design of the regeneration of the area and this process can be enhanced through future-proofing the design, as well as increasing the functionality of the stadium.

'The club intends to continue to examine all options as it refines its plans.'"

26. Again, the third defendant responded to the first defendant seeking to address the issues that had been raised by Mr Winter. On 13 December 2013 the third defendant's then solicitors wrote to the first defendant's case worker and enclosed with that correspondence a letter also of 13 December 2013 from the third defendant itself. In that letter the following was recorded:

> "Since planning permission was granted in September 2011, the Club has kept the design of the stadium under review and given consideration to how it might be improved. This is entirely normal practice for any developer before embarking on a multi-million pound construction project. Our aspiration is to deliver a world class, fully functional stadium that not only will meet our requirements now and in the future but will, importantly, also maximise the regenerative benefits for Northumberland Park and Tottenham as a whole.
>
> As part of this process the Club appointed the architectural practice Populous to undertake a peer review of the permitted stadium design and also to look at the interior design for fit out. We are currently considering a number of their proposals for amendments to the permitted stadium design including improvements to the car parking layout; the internal floor plates and to elevational treatments.
>
> In addition, we are examining options to improve the functionality of the stadium to allow other sports to take place as well as the permitted concert use.
>
> Many of the reported scheme changes made in the press are entirely inaccurate. Contrary to the assertions made by Paul Winter & Co, none of the proposed recommendations currently being considered would lead to any loss of homes in the Southern Development.
>
> In the event that applications are submitted to secure the recommended revisions, we are confident that planning permission would be

forthcoming and that there is no obvious reason why it might be withheld.

However, if the Club decides not to make any changes to the permitted scheme or if it were to seek changes and planning permission for them was to be refused (in whole or in part) the Club wishes to confirm that it would build the scheme in accordance with the existing planning permission."

27. Having received the Inspector's report on 24 September 2013, as I have indicated above, the Secretary of State sought to explore the issues which were raised and recorded in his recommendations. On 18 December 2013 a letter was sent on the first defendant's behalf asking if there was any reason why the original Section 106 package could not be reinstated. On 31 January 2014 the third defendant replied, enclosing a further Section 106 which contained within it the offer of one-hundred units of affordable housing either on site or, as a preference, off site. On the same date the second defendant wrote supporting this approach. On 10 February 2014 the applicants wrote in strongly objecting to this proposal.

28. Discussions continued between the second defendant and the third defendant in relation to progressing the project. The third defendant's transport consultant re-engaged with TfL about the possibility of the 61,000-seater stadium and how it ought appropriately to be assessed in terms of its transportation impacts. On 9 April 2014 the third defendant's project manager met with the second defendant's director of regeneration and planning to discuss a range of potential changes to the scheme. These included changes to the stadium elevations and basement arrangements, along with the increase in capacity of the stadium to 61,000 spectators. The third defendant also advised that they were considering options involving a removal of more of the heritage assets around the proposed stadium, in particular the removal of a listed building and a number of non-listed buildings which were identified as being of importance to the conservation area within which the Order lands, at least in part, sit.

29. A presentation which has been disclosed in these proceedings shows an illustration of the removal of these protected heritage buildings. That presentation also contained details which have been redacted from the document about the leasing and funding arrangements in relation, first, to securing letting of commercial space proposed; second, securing an occupier for the proposed luxury hotel; and, thirdly, ensuring funding from the naming rights for the new stadium. This presentation also included a time-line at its conclusion in which it set a key date of August 2014 for the provision of a planning application. The time-line started from a decision by the first defendant on the CPO of 30 April 2014. Later on in April, and in particular on 25 April 2014, these potential alternatives were again presented to the GLA and also to the second defendant's chief executive.

30. Additionally at that time, an increase in the level of housing proposed from two-hundred-and-eighty-five to five-hundred units was also explored. Various discussions ensued during May 2014, including a pre-application meeting on 30 May 2014 with TfL.

31. On 16 June 2013 a workshop occurred at which the third defendant made a presentation to senior officers of the second defendant of these suggested potential changes. The presentation included what the third defendant regarded as improvements to the scheme, and which are listed in an agreed chronology which the parties have helpfully prepared in relation to these events, between the closure of the Inquiry and decision of the first defendant as follows:

> "(i) stadium capacity increased by 5000;
>
> (ii) updated design of the stadium;
>
> (iii) an increase in residential development incorporating 900 units in five blocks;
>
> (iv) 60,000 square feet commercial development space and a medical centre;
>
> (v) 168-bed 4* training hotel based on the Future Hotels training model;
>
> (vi) Tottenham retail store and museum;
>
> (vii) an enlarged public realm at podium level on the southern-side of the stadium;
>
> (viii) a plan for a 30,000 square feet gym and fitness centre;
>
> (ix) plans for the Tottenham Experience museum including two small niche cinemas; and
>
> (x) a new roof walk visitor attraction on the stadium roof."

32. It will be noted from that quotation that there was a considerable increase in the quantity of housing which was mooted. That was not welcomed by the second defendant whose officers indicated that that level of housing would be unacceptable. It is also appropriate to record that at about this time the second defendant's officers made it very clear to the third defendant that if proposals were to be progressed a full and proper heritage assessment would need to accompany any such revised proposals.

33. Towards the end of June there were further discussions with TfL. Then on 11 July 2014 the first defendant made his decision on the CPO. In that decision the first defendant rejected the Section 106 which had provided in January 2014 as being vague and unlikely to be enforceable. He went on in the decision letter to consider the main issues in relation to well being. He concluded as follows:

> "14 The Secretary of State has considered the Inspector's conclusions in respect of the extent to which the proposed purpose of the CPO will contribute to the achievement of the promotion or improvement of the economic, social or environmental well-being of the area. In terms of economic well-being, the Inspector considers that the scheme would be

likely to both promote and improve the economic well-being of the area; but that following the revised Section 106 agreement, the economic regeneration would be heavily dependent on new infrastructure, the cost of which would be met largely by public funds. In terms of social well-being the Inspector reported that the scheme would bring investment, employment and new housing. He also considered that it is difficult for the Club to claim significant benefits to social well-being from the Club's scheme when the expensive infrastructure provisions would be met from public funds. For these reasons, the inspector considered that the public funding of infrastructure in the absence of any affordable housing substantially reduces the contribution the scheme would make to social well-being. In terms of environmental well-being the Inspector reported that the substantial harm through the loss of a listed building and the harm to a conservation area would be offset by the heritage benefits and the improvements to the character of the area by the stadium and regeneration. However, he continued to say that it is hard to justify giving much weight in a CPO decision to the public interest from a fund which would be paid for by the public.

15 The Inspector concluded that there is a compelling case with regard to the well-being of the area but for each strand of this test, most of the public benefits would depend on an injection of public funds. Because of this, he concluded that what could amount to a compelling case in the public interest would fail to meet this hurdle on account of the need for public funds. Consequently he considered that the benefits would not outweigh the interference with the specific human rights in which case the Order should not be confirmed.

16 The Secretary of State has carefully considered the Inspector's conclusions. He disagrees with the Inspector in his view that reliance on public funding to deliver the Scheme would negate the benefits to the well being of the area and that the source of the funding should be given more weight than the overall benefits to the economic, social and environmental well-being of the area that will be realised by confirmation of this Order. The use of public funds to bring forward schemes is not uncommon in delivering regeneration schemes and the Secretary of State does not consider that reliance on public funding itself reduces the extent to which the scheme would be in the public interest.

17 The Secretary of State notes the Inspector's view and reasoning on the well-being test. He agrees with the Inspector's conclusion that there is a compelling case with regard to the well-being of the area, but disagrees with the Inspector in his views on the use of public funding. For the reasons set out at paragraph 16 above he does not agree that the compelling case fails to be met on account of the need for public funds."

34. The first defendant addressed the points in relation to legal defects, and in particular the point raised by the applicant in respect of whether or not the resolution authorised the making of the CPO in the following way:

> "23 The Secretary of State's view on whether the Council had authority to make the CPO is that given that the resolution was passed on 20 March and was not challenged, he considers it to have been lawfully made."

35. The first defendant's overall conclusions in relation to the Order were articulated as follows:

> "27 The Order should be confirmed only if there is a compelling case in the public interest to justify sufficiently interference with the human rights of those with an interest in the land affected. Paragraph 16 of Annex A of Circular 06/2004 explains that any decision about whether to confirm an order made under Section 226 (1) (a) of the 1990 Act will be made on its own merits but that there are a number of factors which the Secretary of State can be expected to consider (and which he has considered). The Secretary of State considers that the proposed purpose of the Order, including the redevelopment and regeneration of the area, will significantly contribute to the achievement of the promotion or improvement of the economic, social and environmental well-being of the area, and that this is so notwithstanding the contribution from the public purse. The Secretary of State considers that the potential financial viability of the scheme has been demonstrated, and that no adequate alternatives exist in terms of achieving the purpose of the proposal. The Secretary of State considers that the 2014 Unilateral Undertaking is deficient. The Secretary of State considers that the purpose for which the land is being acquired fits in with the adopted planning framework for the area, and the planning context generally, save in respect of affordable housing. Having regard to the paragraph 16 factors, and to all other matters, the Secretary of State has concluded that there is a compelling case in the public interest to justify sufficiently the interference with the human rights of those with an interest in the land affected."

36. In the light of those conclusions the first defendant went on to authorise the making of the order. That however was not the last word from the first defendant in this case. During the course of the litigation he reserved his position in relation to the merits of the case pending the completion of an argument about disclosure and any disclosure which might arise from its resolution. That argument about disclosure related to the events that occurred between the closure of the Inquiry and the first defendant's decision which I have summarised in the narrative set out above. My narrative is derived from material which emerged either as a result of voluntary disclosure or court orders.

37. Once the disclosure was complete the first defendant set out a position statement in relation to that material and the impact which it had on his decision in the form of a letter written to the second defendant dated 30 January 2015. It is appropriate that I set

out at some length the position taken by the Secretary of State in relation to this aspect of the case:

> "The CPO was promoted at the inquiry as being based on a particular scheme ("the Scheme"), which has the benefit of planning permission, listed building consent and conservation area consent.
>
> Even before or during the inquiry, and certainly since the inquiry, the Club has considered and discussed possible changes to the detail of the Scheme. Your authority (and others) knows as much, since it attended meetings at which such possibilities were canvassed.
>
> The Secretary of State considers it to be wholly unsurprising and indeed perfectly normal for possible changes to the Scheme to have been considered and discussed, particularly given its size and the inevitable period between the making of the CPO and its confirmation.
>
> Moreover, the Secretary of State knew prior to 11 July 2014 that changes to the Scheme were possible. The Club advised the Secretary of State as much, including in their letter of 13 December 2013.
>
> The discussions as to possible changes to the Scheme have not led, on the evidence, even to the taking of a decision by the Club to pursue changes to the Scheme.
>
> Moreover, it is a matter of record that there has been no application for planning permission, listed building consent or conservation area consent associated with any (or any significant) changes to the Scheme with respect to the matters in question. That is unsurprising if the Club has not yet even decided whether to pursue changes to the Scheme.
>
> The applicants' concerns appear to relate to changes, whether possible, likely or otherwise, outside of the new stadium, with a particular focus (at least now) on residential development, commercial development and a hotel. Nonetheless, the Secretary of State has had regard to all the material, whether referrable to the inside or the outside of the new stadium.
>
> It is worth noting that one of the press articles which appear first to have fed the applicants' suspicions refers to rumoured 'new, top secret plans' including the creation of a 75m x 100m glazed structure to house a retracted pitch south of the ground which 'would mean the number of planned homes could shrink'. The applicants' legal representatives relied upon this article in their letter dated 2 December 2013. They referred to 'the suggestion that the new scheme will cause a reduction of the planned homes in the southern development ..... ' They relied upon indications in the press articles to the effect that the Club 'are close to abandoning the scheme permitted by the 2012 planning permission on which the case for

the CPO was based'.

The reality, on the evidence, is that there has been no discussion of possible reductions in the level of residential development (quite the opposite) and that the Club is not close (and never has been) to 'abandoning' the scheme permitted by the 2012 planning permission on which the case for the CPO was based.

Conclusion

Some of the evidence now before the Secretary of State (such as the presentation documents used at the meetings dated 9 April and 16 June 2014) was generated prior to 14 July 2014 but was not before the Secretary of State before that date. In some respects, it is therefore plain and uncontroversial that either your authority or the Club (or both) failed to provide the Secretary of State prior to 14 July 2014 with all of the material generated before that date but which he now has. Some of the evidence now before the Secretary of State (such as the recent witness statement evidence) was generated after 14 July 2014, even if it discusses or relates to matters before that date, and so clearly could not have been before the Secretary of State prior to 14 July 2014.

The Secretary of State has, though, carefully considered all the evidence.

The evidence does not substantiate the applicants' allegation that the Club 'may no longer be intending to develop the NDP Scheme in the manner in which the CPO was promoted''. Absent a decision by the Club, it is difficult to see how there can be any such 'intention' to develop a different scheme. Moreover, on the evidence, it is inaccurate of the applicants to refer to 'The scheme now being proposed' as opposed to the Scheme promoted before 14 July 2014. No new scheme is 'now being proposed.' Once again, it is difficult to see how it could be if the Club has not yet even made a decision on any changes to the Scheme. Changes to the Scheme are in any event no more than inchoate possibilities. The Secretary of State does not consider these inchoate possibilities to fall outside the terms of the CPO. Moreover the Secretary of State considers that the evidence now available supports, rather than contradicts, the penultimate paragraph of Mr Collecott's letter of 13 December 2013.

The Secretary of State does not consider the matters relied upon by the applicants to be material considerations, although he appreciates that this is a matter of law.

In summary, the Secretary of State's position is as follows:

He remains satisfied (without having failed to apply the other criteria) that criterion 16 (iii) of Annex A of Circular 06/2004 is satisfied. He remains satisfied that there is a compelling case in the public interest to justify

sufficiently the interference with the applicants' human rights.

> If the Secretary of State had had all the material now available to him on 14 July 2014 he would have made the same decision. With all that material now before him, he would make the same decision today."

The Grounds in brief

38. The applicants' ground 2 is no longer pursued. Ground 1 is the complaint raised at the Inquiry that the pre-conditions on the resolution of 16 November 2010 were not discharged. Therefore, it was not open to the second defendant to proceed to make the CPO. Ancillary questions arise about whether the Secretary of State properly directed himself in relation to this issue and whether he should have grappled with the point in order to provide the applicants with further reasons in relation to their contentions. There are further issues which arise under this ground as to whether or not the second defendant's decision on 2 March 2014 was lawful and the appropriate basis for the court's review of its legality.

39. Ground 3 pertains to the applicants' case that there was insufficient evidence of any commitment from the third defendant as to delivery of the scheme. Whilst it is accepted that this point was fully addressed by the Inspector in the reasons I have set out above, it is said the Secretary of State does not deal with this point at all in his decision letter.

40. Ground 3 (a) is based upon the material which has emerged in relation to the events between the close of the Inquiry and the publication of the decision letter. The evidence of those matters is said to be material about which the first defendant should have been informed. It is contented by the applicant that the failure to do so amounts in this case to an error of law which affects his decision.

The Law

41. As will be evident from what has been set out above, the second defendant deployed powers contained in Section 226 (1) (a) of the Town & Country Planning Act 1990 in order to make the CPO. Those statutory powers are as follows:

> "226(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area -
>
> (a) if the authority think that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land;
>
> .....
>
> (1A) But a local authority must not exercise the power under paragraph (a) of sub-section (1) unless they think that the development, re-development or improvement is likely to contribute to the achievement

of any one or more of the following objects —

(a) the promotion or improvement of the economic well-being of their area;

(b) the promotion or improvement of the social well-being of their area;

(c) the promotion or improvement of the environmental well-being of their area."

42. The challenge in this case is brought pursuant to Section 23 of the Acquisition of Land Act 1981. That provision provides as follows:

> "23(1) If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or of any provision contained therein, on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned in Section 1 (1) of this Act, he may make an application to the High Court;
>
> (2) If any person aggrieved by —
>
> (a) a compulsory purchase order, or
>
> (b) a certificate under Part III of, or Schedule 3 to, this Act,
>
> desires to question the validity thereof on the ground that any relevant requirement has not been complied with in relation to the order or certificate he may make an application to the High Court."

43. Section 24 of the 1981 Act contains the power vested in this court to quash any order which has been made. Section 25 provides that this remedy is an exclusive remedy. In R v Camden Borough Council ex p Comyn Ching & Co (London) Ltd (1984) 47 P & CR 417, it was clarified that this exclusion contained in Section 25 applies after an order has been made, that is to say in this case after 30 July 2012.

44. A question has arisen in the case as to whether what is commonly referred to as the presumption of regularity in public law applies to the Council's resolution to make the compulsory purchase order. The presumption of regularity is the principle that public law acts stand and are to be regarded and relied upon as lawful unless and until quashed as being unlawful by the court.

45. The defendants (and all of them), represented respectively by Mr Stephen Whale of counsel, Mr Timothy Corner QC of counsel and Mr Christopher Katkowski QC of counsel, rely upon a number of authorities on this point. The first of them is the decision of the House of Lords in Smith v East Elloe Rural District Council [1956] AC 736, where (pages 769 to 770) Lord Radcliffe recorded as follows:

> "At one time the argument was shaped into the form of saying that an

> order made in bad faith was in law a nullity and that, consequently, all references to compulsory purchase orders in paragraphs 15 and 16 must be treated as references to such orders only as had been made in good faith. But this argument is in reality a play on the meaning of the word nullity. An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

46. Reliance was also placed on the House of Lords' decision in O'Reilly v Mackman [1983] 2 AC 237. In the speech of Lord Diplock he recorded as follows:

> "This reform may have lost some of its importance since there have come to be realised that the full consequences of [the] Anisminic [test] in introducing the concept that if a statutory decision-making authority asks itself the wrong question it acts without jurisdiction, have been virtually to abolish the distinction between errors within jurisdiction that rendered voidable a decision that remained valid until quashed, and errors that went to jurisdiction and rendered a decision void ab initio provided that its validity was challenged timeously in the High Court by an appropriate procedure. Failing such challenge within the applicable time limit, public policy expressed in the maxim omnia praesumuntur rite esse acta, requires that after the expiry of the time limit it should be given all the effects in law of a valid decision."

47. The final authority upon which the defendants rely is R (On application of the Noble Organisation Ltd) v Thanet District Council [2006] 1 P & CR 197. This was a decision of the Court of Appeal. The leading judgment was given by Auld LJ, who said as follows (42 and 43):

> "42 As Miss Robinson and Mr Katkowski submitted, the domestic law principle is clear, and was correctly applied by the Judge, namely that administrative acts are valid unless and until quashed by a court: see Hoffman-La Roche & Co v Secretary of State for Trade and Industry [1975] AC 295, HL, per Lord Diplock at 366A-E; and R v Restormel BC, ex p Corbett [2001] EWCA Civ 330, [2001] 1 PLR 108, per Schiemann LJ at paras 15 and 16. If the time has passed for them to be challenged by way of judicial review, they stand notwithstanding that the reasoning on which they are based may have been flawed: see O'Reilly v Mackman [1983] 2 AC 237, HL, per Lord Diplock at 283F. For an example of the application of that principle in a closely related context to planning, see Lovelock v Minister of Transport (1980) P& CR 336, CA, per Lord Denning MR at 345, in which the Court declined to quash a compulsory purchase order, notwithstanding its unlawfulness, because the challenge was too late.
>
> 43 As Mr Katkowski observed, the principle does not remove the

> possibility of challenge; rather, it allows for the regulation of challenge in respect of forum, standing and timing, all in the interest of efficient administrative decision-making. The principle, as he observed, is of fundamental importance and is representative of a broader legal concern, that of legal certainty. In the exercise of powers by public authorities, it is clearly in the public interest that their decisions cannot be open to challenge long after they have been taken and acted upon."

48. Whilst Mr Lockhart-Mummery, who appears on behalf of the applicants, accepted that this principle of regularity applied to secondary legislation or orders made by a public body affecting the rights of an individual, he contended that it could not apply to what is simply an internal council resolution. That is a submission which I am unable to accept. In my view it is clear, on the highest authority, that this principle applies to all administrative acts, including the internal resolution of local authorities, and there is no justification, either in principle or on the basis of the jurisprudence, for distinguishing those kinds of decision. The reasons of principle which were set out in paragraph 43 of Auld LJ's judgment in Noble apply, in my view, with equivalent force to decisions of the kind that are in issue here.

49. Mr Lockhart-Mummery relied, in support of his submissions, on Burke v Secretary of State for the Environment [1992] JPL 67, [1994] 26 HLR 10. That is quite clearly a case based on its own very peculiar facts and in which the question which arises here and which I have set out above was not in fact engaged. It is certainly not, in my view, authority for any proposition that the presumption of regularity does not apply to internal resolutions of the Council which are, to use the language of Auld LJ, plainly "administrative acts".

50. Notwithstanding this, R (On application of Collis) v Secretary of State for Communities & Local Government [2007] EWHC 2625 is clear authority for the proposition that an applicant can bring a challenge to the authority to make the order as part of a challenge under Section 23 of the 1991 Act.

51. Turning to ground 3, this raises questions as to the giving of reasons and the correct approach to that matter in the type of decision with which we are concerned, namely one where there is an inspector's report with recommendations and a decision letter. The defendants relied, in support of their submissions, on Save Britain's Heritage v No 1 Poultry Ltd [1991] 1 WLR 153. That case concerned a planning appeal decided by the Secretary of State where there was a single issue related to the architectural quality of a new building to replace listed buildings for which consent to demolish was sought as part of the project. The criticisms raised by the challenges in that case related to the adequacy of the Secretary of State's decision letter which had not explicitly addressed all of the matters which had been relied upon in the inspector's report.

52. The arguments and the conclusions in relation to that case can be adequately summarised from the following extracts from the leading speech of Lord Bridge in the House of Lords, who stated at follows (pages 162 G-H and 163 A and E-G):

> "There is no doubt that the expression of the Secretary of State's reasons

> for his decision lacks the clarity and precision which one would have wished to see. The 'stark contrast' between the clarity of the inspector's reasoning and paragraphs 5 to 10 in the Secretary of State's decision letter which, 'if read in isolation, appears altogether less revealing' was pointed out by Simon Brown J, though he concluded in the event that the Secretary of State's reasons for his decision had been adequately stated. The primary difference of opinion between Simon Brown J and the Court of Appeal was whether, as the owners and the Secretary of State contended, the decision letter indicated the Secretary of State's concurrence in the essential steps in the inspector's processes of reasoning as expressed in the sections to which I have referred or whether, as Woolf LJ put it, the fact that the Secretary of State 'has expressed and identified areas where he is in agreement with the inspector and stated his own views without making express reference to the differing view of the inspector in other areas' is 'wholly inconsistent with the suggestion that the Secretary of State is incorporating his inspector's reasoning into his own'.
>
> .....
>
> In your Lordships' House both Mr Laws and Sir Frank Layfield have assured us that they never resiled from their primary submission that the Secretary of State, although he may have differed from the inspector in the degree of emphasis he placed on certain points, had in all essential respects based himself on the inspector's reasoning. I am unable to agree with the approach to the construction of the decision letter adopted by the Court of Appeal. In particular I cannot, with respect, assent to the proposition that the inspector's reasoning cannot supplement the Secretary of State's conclusion 'if not *expressly* adopted by the Secretary of State'.
>
> On this issue I find myself in full agreement with the judgment of Simon Brown J. As he pointed out, to suggest that the Secretary of State agreed with the inspector's conclusion and recommendation for hidden reasons, which differed in any important respect from those given by the inspector, came close to alleging either bad faith or a failure to understand the inspector's reasoning. Neither of these was suggested. Simon Brown J accepted the argument that, by singling out the landmark points in the inspector's reasoning process, the Secretary of State had adequately demonstrated his substantial acceptance of the essential elements in the inspector's judgment. I think that he was right to take this view."

53. The final legal issue which I need to consider is the approach which should be taken to matters which emerged between the closure of an inquiry process and the making of the final decision.

54. A recent case has had to grapple with this issue, namely Moore V Secretary of State for Communities & Local Government and Watford Borough Council [2014] EWHC 3592, a decision of Ouseley J. In essence, this was a challenge to a Secretary of State's

decision to grant consent under the Allotments Act 1925 for the appropriation of allotments. The appropriation was to enable their development for housing as part of a wider development project. After the application for consent was made but before the Secretary of State's decision, the promoters of the project resolved to increase housing within the scheme from around 600 to 650 units to 750. That increase in the amount of housing could have led to the conclusion that development of the allotment land was no longer needed in order to secure the viability of the overall project. The Secretary of State was not told of this development, nor of discussions which had been ongoing with the Environment Agency in order to resolve a flood constraint which could, if successful, have led to the release of more land for housing purposes.

55. Ouseley J expressed his conclusion on the failure to advise the Secretary of State of the two matters in the following terms:

> "112 The Secretary of State's decision preceded, by one day, the decision by the Partnership Board to approve the increase in houses to 750. It was however a proposal which had been approved earlier at lower levels in the LLP. By 11 December 2013, the issue was to be reported to the Board on 18 December, with a decision imminent, and inferentially no controversy to impede approval.
>
> 113 What are the legal implications of the fact that the applicant did not tell the Secretary of State how the scheme was evolving in this respect? First, did the fact that no final decision had been taken mean that the potential for change on this aspect could not be material in law? The Council's point was not that it would not have told the Secretary of State about the increase in housing had it been finalised before the decision; rather it was that the finalising of the change, at least in the master plan, came too late to tell him. I accept, as a general proposition, that it would be unrealistic to expect every scheme change, mooted or approved, or change in circumstance to be placed before the Secretary of State. The date of application however does not in law crystallise all material considerations. The Secretary of State knew that the scheme was to evolve over the period of decision-making, and indeed thereafter, but that does not prevent particular actual or potential changes as at the date of decision being material factors for the decision itself. The fact that a potential change of importance has gone far through the internal approval process of the applicant can also be a material consideration, depending on the circumstances. The precise date at which the applicant's formal decision is taken cannot be crucial as to whether the Secretary of State has made his own decision in ignorance of a material factor.
>
> 114 I am satisfied that, if the potential change related to an issue of significance for the case put forward in the application, then the fact that it was close to being resolved upon is a material consideration for the Secretary of State's decision: should an exception to policy be made? Should he wait until a final decision has been reached? Should he now seek further information in order to reach a rational decision? A potential

change is a material consideration if it could reasonably have affected the decision, if it is a point which a reasonable decision-maker ought to have ascertained before making a rational decision. Suppose that the proposal before the Board was that there should be no housing on the allotment site; it is inconceivable that that would be immaterial until a final decision.

115 Second, and this overlaps with the first issue, was this proposed change material in the sense that it could have affected the decision? In my judgement, it was. The fact that the housing figures were likely to be increased without the allotment site, by more than the housing envisaged on the allotment site is significant and material; since it has not been contended that the increase included housing on the allotment site. Family housing itself, regardless of viability, was also a main reason for taking the allotments.

.....

122 Mr Lewis gave evidence about the evolution of the process [in relation to resolution of the flood plain issues]. On 10 September 2013 notes of a project meeting show that the flood alleviation work could be changed through an expanded culvert. On 9 October 2013, the scheme Operations Group meeting had been told that a revised flood mitigation strategy was being reviewed with the Environment Agency bringing the residential area named 'Lakeside' out of the flood zone. On 13 November 2013, the Operations Board was told that discussions were ongoing but, if agreed, it would take all of the housing zones out of the flood plain. At the meeting on 11 December 2013, these discussions were still continuing. The Agency's acceptance of the solution is referred to in the Board report for a meeting on 22 January 2014. I accept that the Secretary of State was not informed of this development. As this conclusion was not known at the time of the Section 8 application, the Agency's position did not feature in it, according to Mr Lewis.

.....

125 I do not regard this change as having attained a sufficient degree of certainty by 18 December 2013 for its potential to be material. The mere fact of discussions which might if successful lead to a change, is not enough. There was no error of law in the Secretary of State's decision in his respect."

56. What in my view emerges from this discussion in Ouseley J's judgment is as follows. First, it is important to recognise the particular structure of the decision-making process which is involved in cases of this kind. An initial stage will have occurred at which all material considerations will have been gathered together and evaluated and at which participants will have identified from those which are the key issues, thos which are common ground and those which are of far less significance.

57. What happens after the inquiry process is closed and new matters emerge? First, in my view, as a preliminary filter, it must be examined whether the matter has crystallised into a stage where it is sufficiently specific or clear that questions arise as to whether or not the decision maker might need to be advised about it. If it is sufficiently specific or clear then those participants in the decision-making process with knowledge of it must ask whether the matter could or might make a difference to the decision. It is not up to them to decide that it would alter the decision, simply that it could. If it could make a difference then the decision maker should be advised. If they fail to do so, then they will run serious risk that they will have imperilled the integrity of the decision-making process and any decision which might emerge would be potentially unlawful for failing to have taken into account those matters.

Ground 1

58. The applicant's complaint is, first, that the inspector in paragraph 8.2 of the Inspector's report, having drawn attention to their points about the authority for the order, the first defendant in paragraph 23 of the decision letter misdirects himself as to the continuing validity of the resolution under the presumption of regularity and therefore - and additionally - does not grapple with the point or provide reasons which engaged with the applicant's submission.

59. It will be evident from the legal conclusions which I have set out above about the presumption of regularity that I do not accept that paragraph 23 was a misdirection. In paragraph 23 the first defendant reflects accurately the continuing legality of the second defendant's resolution. The first defendant might have gone further but he did not need to in order to address the point that had been raised. In any event, whether or not he chose to do so, it has no impact on the ability of the applicant, to come to the authoritative source of a ruling on this point, namely this court, on a challenge under Section 23 of the 1981 Act.

60. The reasons given in paragraph 23 of the decision letter adequately and clearly explain the approach that the first defendant had taken, namely that in the light of the lack of any legal challenge to the resolution the first defendant treated that resolution as having been lawfully made. He was entitled to do so.

61. In relation to this point, in his skeleton argument Mr Lockhart-Mummery relies on a number of factual matters which were elicited by his cross-examination at the Inquiry. He relies on them to demonstrate that these were matters that ought to have been addressed in the decision letter. They are the fact that he established in his cross-examination that the third defendant had had a serious intention to relocate to the Olympic Stadium and that the cabinet resolution of 16 November 2010 had not been rescinded. He further established that the Section 106 contained no legally binding mechanism to ensure that the scheme was developed and that the second defendant's officers had not seen a viable business plan.

62. In my view the first point to make about those factual matters which he relies upon is that the important factual context for these points is the factual context which was available at the time when the resolution was reached. In any event, many of the

matters on which he relies were established and undisputed. The third defendant's bid for the Olympic Stadium and the fact that the resolution of 16 November 2010 had not been revoked are entirely clear and indisputable. The legal effect of the Section 106 obligation was a matter of legal submission and not in any event a matter of evidence. The fact that the second defendant had not seen the third defendant's business plan is, again, undisputed. The applicant has been able to and has in fact relied upon all of these matters in submissions in this application. These aspects do not therefore, in my view, add anything to the argument. Nor is anything added to the argument by the defendants' contentions that the applicant ought to have applied for judicial review at the time when it was available to it, namely prior to 30 July 2012.

63. The true substance of ground 1 in my view relates to Mr Lockhart-Mummery's contentions as to whether or not I should find that the second defendant did not have authority to make the resolution for the CPO. The first basis on which that point arises is that Mr Lockhart-Mummery contends that the second resolution of 20 March 2012 (set out above) to make the CPO was contingent upon the first resolution having been positively answered. There had to be a positive answer to the pre-conditions set for considering making a CPO in the resolution of 16 November 2010. He submits that only having established that those pre-conditions were met could the second defendant lawfully proceed to make the CPO.

64. Those submissions have a superficial attraction to them, especially when presented with the characteristic subtlety and skill deployed by Mr Lockhart-Mummery. However there is within them in my view a clear danger of treating administrative documentation as if it were a different and far more formal kind of legal instrument such as a contract or a statutory order, and subjecting them to a literal and legalistic type of construction.

65. It is in my view necessary to stand back and look at the committee reports and resolutions and see what was being done in the overall context of the decisions being reached, assisted by the available supporting documentation. When one does so, it is clear to me that the first and second resolutions on 20 March 2012 were, indeed, separate and freestanding decisions; the second was not contingent upon a positive answer having been reached to the first. No doubt it was entirely appropriate for members to consider whether the matters that they had some time previously identified as being pre-conditions on exercising of their power were satisfied, and it was appropriate for those matters to be addressed, but they were not addressed in the context of the decision-making in this case as some kind of threshold or gateway to the making of the resolution to make the CPO. Importantly, when one reads the committee report which I have set out above, they were not presented as such.

66. This would be sufficient to dispose of Mr Lockhart-Mummery's ground 1. But I propose in any event, as a courtesy to the submissions made on all sides, to deal with the arguments raised as to whether or not the conditions have, indeed, been lawfully satisfied. Initially, there was some equivocation from Mr Lockhart-Mummery as to the appropriate basis for the jurisdiction I might have in relation to whether or not there was an error of law in the decision that the conditions had been satisfied. I am in no doubt that the approach is a traditional public law approach based upon the well

established Wednesbury principles. It is the Wednesbury principles that apply in governing the appropriate scrutiny that I shall apply in particular to paragraph 5.8.

67. In relation to pre-condition (a), which it will be recalled related to the unequivocal commitment of the Club to the provision of a stadium at the Order Lands, Mr Lockhart-Mummery contends that the statement from the third defendant's chairman does not contain in terms the unequivocal statement to which the members had referred. Again, in these submission, in my view, there is a clear danger of an approach to administrative decision-making which is overly legalistic and literal. Examining the statement made by the chairman, members were in my view quite entitled to concluded, acting reasonably, that when he said, "No one should now doubt our intentions to seek to deliver a world-class stadium here in Tottenham," that was precisely the kind of unequivocal reassurance that they had sought.

68. Similar considerations apply to pre-condition (b) and the Section 106. The applicant is entitled to observe that Section 106 did not ensure that the development proposed would be completed. It will be noted that the officers accepted this. Their conclusion in the committee report was that the Section 106, in the light of the need for any development to be financed and funded before it could be delivered, satisfied the requirement of the pre-condition "as far as it is feasible to do so". That was a matter of judgment both for the officers and for the members, and it was one which they were entirely entitled to reach on the material which was before them.

69. Turning finally to condition (c), which was, it will be recalled, the requirement for a viable business plan and funding strategy, both the applicant and the second defendant, following the references in the officer's report, relied upon a report obtained by Grant Thornton dated 1 February 2012 (who were the second defendant's independent advisers on these matters) which stated in its summary as follows:

> "Overall Assessment
>
> 1.9 Taken together, it would appear that there are significant challenges and risks to delivery of this project, however this is not uncommon for a project of this nature. There may be further risks to implementation should a Compulsory Purchase Order and the use of Section 237 powers be required as any constraints imposed could impact on timetable, cost and ability to raise finance. Indeed, to support a CPO process the Club will likely have to provide much greater evidence of their ability to fund and deliver the scheme.
>
> 1.10 The revised financial model is also predicated on a set of more ambitious underlying assumptions in relation to revenues and a more complex funding strategy than existed in the previous financial model. However, the revised financial model does appear to have set out a strategy to address the funding gap contained in the previous model.
>
> 1.11 The Club will however need to ultimately convince a lender that the plan is deliverable, particularly in the context of many of the revenue

assumptions being at the upper end of the range, driven by the Club remaining at the top end of the Premier League (although it is recognised that the projections do not include for European or domestic Cup revenues). A lender may sensitise these projections, taking a more conservative view on revenue projections which could lead to a funding gap which would be required to be covered by additional equity. The key issue will be the allocation of risk between equity and debt providers. We have also requested evidence from the Club that funders would be willing to lend the projected level of debt and the Club have so far not been able to provide such evidence, although this is not an unusual position at this stage of the process.

1.12 However, on the assumption that the Club can satisfy the challenges presented and mitigate key risks set, particularly in relation to the raising of finance through senior debt and naming rights, and the realisation of the projected value of the pre-sales and development sales, then the overall plan does appear to have a reasonable prospect of supporting a viable and implementable Project, taking into account proposed public sector support measures."

70. The applicants, in their submissions, relied upon the "significant challenges and risks" identified, many of which later in the report are categorised as having a high potential impact on the overall viability of the proposals. That said, in my view the officers were entitled to rely on these overall conclusions, in particular as set out in paragraph 1.12, and advise that on the basis of the analysis from their independent experts that pre-condition (c) was satisfied. The applicant's submissions rely heavily on a semantic approach rather than examining the substance. Whether pre-condition (c) was met required the exercise of judgment against the backdrop of this material and the second defendant's judgment was properly informed by it. It was a reasonable judgment, bearing in mind the conclusions in paragraph 1.12. Thus even if the second resolution had been dependent on the first, in my view, the first resolution was one which was lawfully reached in any event.

Ground 3

71. The applicants contend that the first defendant's decision is flawed because he never deals in the letter with the contentions raised by the applicants in relation to the question of the third defendant's commitment and the absence of any development agreement between the second and third defendants (as set out above). Once in possession of the land, it was the applicants' contention that the third defendant would be free to carry out some other form of development without the safeguard of the land being returned to the applicants if it were not used. It is submitted by Mr Lockhart-Mummery that nowhere in the decision letter are the Inspector's conclusions (at paragraphs 8.33 to 8.35 which I have set out above) addressed.

72. The defendants respond to this in two principal ways. First, reliant on the passages from Lord Bridge's speech in Save Britain's Heritage, they say that there is no hidden reasoning here and, akin to Lord Bridge's approach, that looking at the decision letter of

the first defendant he has substantially accepted the essential elements of the Inspector's judgment. Mr Lockhart-Mummery seeks to distinguish Save Britain's Heritage on the basis that in that case the Inspector and the Secretary of State were solely concerned with a single issue which determined the decision (and which I have set out above).

73. In my view that is an unconvincing distinction. The principle is applicable and is in accordance with the correct approach to examining decisions of this kind, set out for instance in Clarke Homes v Secretary of State for the Environment (1993) 66 P & CR 263. Applying the principle in this case, it is clear in my view that the Secretary of State did accept the Inspector's conclusions in 8.33 to 8.35, in particular in his overall conclusions. However, even if I were wrong about this, the second defendant's fall back argument is still more compelling.

74. This more specific argument is that the commitment to undertake the development which lies behind a CPO is a matter which is directly related to an element of the first defendant's policy on CPOs contained in Circular 06/2004. Appendix A of that Circular provides advice which is specific to orders which are promoted under Section 226 (1 (a) of the 1990 Act. The relevant element of the policy which is in point in this part of the case is paragraph 16 (iii) and that provides as follows:

> "(iii) the potential financial viability of the scheme for which the land is being acquired. A general indication of funding intentions, and of any commitments from third parties, will usually suffice to reassure the Secretary of State that there is a reasonable prospect that the scheme will proceed. The greater the uncertainty about the financial viability of the scheme, however, the more compelling the other grounds for undertaking the compulsory purchase will need to be. The timing of any available funding may also be important..... "

75. Reference within the policy to commitment from third parties in relation to reassurance that there is a reasonable prospect that the scheme will proceed is the policy which is relevant to the applicant's point on the merits in relation to the third defendant's commitments. Paragraph 8.48 of the Inspector's decision directly addresses, in the light of his earlier conclusions, the question of whether or not the policy in paragraph 16 (iii) of the Circular had been met. Paragraph 8.48 is expressly agreed to in the decision letter at paragraph 12, and further express conclusions in respect of the requirements of paragraph 16 are made in the decision letter at paragraph 27. Thus it is submitted by the defendants, read thoroughly and against the backdrop of the policy which engages the applicant's point, the first defendant did expressly accept and adopt the Inspector's conclusions in relation to this issue on commitment.

76. Mr Lockhart-Mummery responds to these submissions by saying that he made (and then the Inspector responded to) these points separately and not in the context of the Circular policy. Thus it is submitted that the first defendant should have done so also.

77. I am unable to accept that that submission meets the defendant's point or displaces their analysis. If, as it was in truth, the applicant's point was directly related to the policy contained in paragraph 16 (iii) then it was entirely acceptable in my view for the first

defendant to engage with that point and provide conclusions for it in relation to and in the context of applying the policy in paragraph 16 and being satisfied that policy was met. Thus, when thoroughly analysed, it is clear that ground 3 must fail as the first defendant did provide reasons in relation to the question of the third defendant's commitment.

Ground 3A

78. This element of the applicant's case relates to the events which are now known to have transpired, unknown to the first defendant, between the close of the Inquiry and his decision. In addition to the narrative which I have set out above, Mr Lockhart-Mummery emphasises, in particular from witness evidence, that it is clear that the third defendant was committed to pursue changes to the scheme and also that they had worked out a detailed business case for developing them and pursuing them. The key dates are relied upon by him as showing a settled intention to seek to develop a different proposal from that which was before the Inquiry and the first defendant.

79. Mr Lockhart-Mummery submits that the consequences of that were three-fold. First, the viability of the scheme could change, enabling the reinstatement of some or all of the planning obligation contributions which had been deleted from the first Section 106. Second, he relies on the impact on heritage assets which, he submits, would be significantly different - in the options illustrated in the presentation - from the scheme which had the benefit of planning permission and heritage consents. He draws attention in particular to the impact on heritage assets having been a key issue in both the conclusions of the Inspector and also the Secretary of State. Third, he submits that on a proper construction of the order (which I have set out above) residential use was, in truth, identified as only ancillary to the stadium. Thus, he submits the radical increase in housing proposed took the development well beyond the scope of the order. Each of these three points, he emphasises, occur in the context of what is described by the Secretary of State as a finely balanced decision.

80. I propose to deal with his third point first. I am quite unable to construe the order (which I set out above) as identifying the residential use as ancillary to the stadium. The semi-colons within the description of the order - after "Club museum" and separating each of the subsequent uses - make absolutely clear that "residential", like those other subsequent uses, are freestanding and not dependent upon or ancillary to the stadium.

81. In my view the first two points are of greater substance. The assessment of them must start from what the first defendant knew. The letter from the third defendant of 13 December 2013 had told the first defendant that they were actively contemplating changes to the stadium and that applications could be submitted to change the scheme. But if those applications, contrary to their expectation, were refused the third defendant would still implement the permitted scheme. In accordance with the legal principles which I have set out above the first task is to ask whether what is now known went beyond this position and had crystallised into material of sufficient certainty and clarity that consideration should have been given as to whether the first defendant might need it. In my view the answer to that question is clearly no.

82. True it is that substantial resources in terms of both money and time were being devoted to the examination and formulation of what the third defendant thought might be improvements to their project. I have no doubt that they were grounded in a business plan. That is unsurprising, bearing in mind that such would be needed to justify the extent of the expenditure being deployed upon exploring them. It is equally unsurprising that they were related to a timeline and a development programme in the presentation which was made. So much is in my view inevitably part of sensible project management. But what is equally clear is that the proposed improvements were neither fully formulated and were, in reality, only at an early and pre-application stage. They were ideas that had important hurdles still to be surmounted. In terms of the impact on heritage assets, no evaluation had been undertaken and key regulators - for instance English Heritage who had been actively involved in the earlier planning permissions - had yet to be engaged and their views sought. Further transport modeling was clearly required in order to meet the expectations of TfL in relation to whether or not public transport capacity could be expected to absorb the increases proposed in the stadium's capacity.

83. In short, these ideas had a long way to go before they could possibly be formulated into a credible application. They lacked, in my view, sufficient certainly or clarity as proposals to pass to the second stage of consideration, namely whether they could or might make a difference to the first defendant's deliberations. They were undoubtedly more than a glint in the third defendant's eye, but not much more and certainly not at a stage where, as a matter of law, something further needed to be provided to the first defendant before a decision could be reached.

Conclusion

84. Depriving a person of their property compulsorily and against their will is an extremely serious matter. That is why it is a power which can only be exercised where there is a compelling case in the public interest, and there are significant procedural safeguards in the form of consideration by an independent inspector and the Secretary of State fully reviewing the merits followed by the opportunity for a review of the legality of that decision-making process which are put in place to respect and reflect the significance of the decision. The applicants have been perfectly entitled to question and test the appropriation of their land at each stage of the process. That was a legitimate and proper exercise of their rights.

85. It flows from my conclusions that I am satisfied that there was no legal flaw in the process which led to the conclusion that there was a compelling case in the public interest for this order to be made.