Neutral Citation Number: [2017] EWCA Civ 1784

Case No: C1/2016/4698

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CARDIFF DISTRICT REGISTRY
HIS HONOUR JUDGE JARMAN QC
CO/3150/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2017

Before:

LORD JUSTICE McFARLANE
and
LORD JUSTICE SALES

Between:

The Queen on the Application of:	
John Harvey	**Appellant**
- and -	
Mendip District Council	**Respondent**
1) Patrick Gordon	**Interested**
2) Madeleine Gordon	**Parties/**
3) Bridgeman Ltd.	**Respondents**

- -

Stephen Whale for the **Appellant** (instructed on a **Direct Access** basis)
Tim Sheppard (instructed by **Mendip District Council**) for the **Respondent Council**
James Burton (instructed by **BGW Solicitors**) for **Mr and Mrs Gordon**

Hearing date: 18 October 2017

Approved Judgment

Lord Justice Sales:

1. This is an appeal in a planning judicial review case. The appellant objects to outline planning permission granted by the first respondent ("the Council"), acting principally by its Planning Board, on 13 May 2016 for residential development of an open plot of land in the village of North Wootton where he lives. The planning permission was granted on the application of the interested parties (Mr and Mrs Gordon, who also live in the village, and a development company called Bridgeman Ltd).

2. At the time when they made the application, Mr and Mrs Gordon were living in North Wootton but wanted to build a new house for themselves and their children on a paddock which they own in the village. In order to persuade the Council to grant planning permission to build that house for themselves (which I will call the "open market house", for reasons which will become clear), Mr and Mrs Gordon proposed to gift the rest of the land constituted by the paddock to Bridgeman Ltd which would then build up to 6 affordable homes on that land.

3. The outline planning permission which was granted was for development of the paddock to build "up to 6 affordable homes and 1 open market dwelling house". Approval of the details of the layout, scale, appearance, access and landscaping of the site was reserved to the Council at a later stage. The division between outline permission and reserved matters is a familiar one, governed by the Town and Country Planning (Development Management Procedure) (England) Order 2015/595 ("the 2015 Order").

4. At first instance, the judge rejected the appellant's claim for judicial review on each of the four grounds advanced by him. He has been granted permission to appeal on only one ground, which is his contention that in granting planning permission the Planning Board wrongly considered that the proposed development was in conformity with Development Policy 12 (Rural Exception Sites) ("DP12") in the Council's Local Plan, whereas in fact the proposed development was in breach of that policy on its proper interpretation.

5. The Council and interested parties resist the appeal. They say that the Planning Board was right to take the view that the proposed development was in conformity with the Local Plan.

6. In case they are wrong in their arguments to that effect, by a respondent's notice Mr and Mrs Gordon also invite this court to dismiss the appeal on three discretionary grounds in relation to remedy, namely that (i) it is highly likely that the planning permission would have been granted even if the Planning Board had not misinterpreted policy DP12 as the appellant contends, so relief should be denied pursuant to section 31(2A) of the Senior Courts Act 1981; (ii) the appellant failed to serve his appellant's notice on Mr and Mrs Gordon at the time when he should have done as laid down in CPR Part 52.12, by not later than 28 December 2016, and only served it on them on 5 January 2017, which has caused them financial prejudice and distress (in that they had thought that the legal proceedings had been conclusively resolved in their favour, only to find that they were going to continue), so that relief should now be refused; and (iii) the appellant, acting by his solicitors, wrote to the Council on 24 November 2015 to object to the planning application made by Mr and

Mrs Gordon but did not identify as a ground of objection the alleged unlawfulness relied upon before the judge and on this appeal.

The Local Plan

7. The Local Plan was adopted by the Council on 15 December 2014 after going through the usual development plan adoption process. Core Policy 1 set out the Mendip Spatial Strategy. It provided that to enable the most sustainable pattern of growth for Mendip district (a) the majority of development will be directed to the five principal market town settlements in the district; (b) in the rural parts of the district new development that is tailored to meet local needs will be provided for in (i) certain primary villages, which have the best facilities and employment opportunities, (ii) secondary villages, which offer some services and the best available public transport services, and (iii) "In other villages and hamlets, development may be permitted in line with the provisions set out in Core Policy 4 to meet specifically identified local needs within those communities". North Wootton is a village within sub-paragraph (iii). Thus residential development in the rural parts of the district was to be focused on the primary villages and the secondary villages, with a more restrictive approach applicable to development in other villages and hamlets such as North Wootton.

8. Core Policy 2 ("Supporting the Provision of New Housing") set out how it was proposed that the needs for new housing in the Council's district would be met. The main focus was upon provision in the market towns and the primary and secondary villages, but it was also stated that "Housing developments will make contributions towards the delivery of affordable housing in line with Development Policies 11 or 12."

9. Core Policy 4 ("Sustaining Rural Communities") stated that rural settlements and the wider rural area would be sustained by making planned provision for housing within the primary and secondary villages and "Identifying and delivering opportunities for the provision of rural affordable housing, secured for the benefit of the community in perpetuity, where there is evidence of local need as set out in Development Policies 11 and 12."

10. It is not necessary to refer to Development Policy 11. Development Policy 12 is headed "Rural Exception Sites". It provides as follows:

> 1. As an exception to normal policy for the provision of housing set out in Core Policies 1 and 2, affordable housing for local people may be permitted in locations adjoining existing rural settlements on small sites where development would not otherwise be permitted where:
>
> a) the development will provide affordable homes that meet a clearly identified need for affordable housing as identified in the latest Local Housing Needs Assessment specific to that settlement; and

b) the need cannot reasonably be met in any other way on a site where housing would be permitted under normal policies; and

c) the development satisfies other policies in this Plan, with particular regard being given to its integration into the form and character of the settlement and its landscape setting.

2. All Exception Sites approved under this policy will be made subject to a planning obligation to ensure that:

a) all initial and subsequent occupiers of the affordable dwellings will be eligible local people, in the first instance, and

b) affordable homes secured under the policy are retained in perpetuity for occupation by those in housing need.

3. The inclusion of market housing will be supported where any such scheme meets all the criteria in the preceding parts of this policy, and:

a) which has clear evidence of support from the local Parish Council.

b) demonstrates, through detailed financial appraisal, that the scale of the market housing component is essential for the successful delivery of the development.

c) ensures no additional subsidy for the scheme and its affordable housing delivery is required."

11. The explanatory text for DP12 included para. 6.114, which states:

> "There are particular difficulties in securing an adequate supply of affordable housing for local needs in rural areas as was considered in relation to Core Policies 2 and 4. Despite measures set out in Development Policy 11, there are likely to be few developments, in certain villages, which are of sufficient scale to secure appropriate numbers of affordable homes to meet local needs. As an exception to normal policy therefore, and where it can be demonstrated that a proposed development will meet a particular locally generated need that cannot be accommodated in any other way, the District Council may be prepared to permit small scale residential development adjoining a rural settlement."

Factual background

12. The factual background which is relevant for this appeal can be stated shortly.

13. It was common ground below that for the purposes of policy DP12 the relevant "latest Local Housing Needs assessment specific to" North Wootton was one produced in 2013 and it appears to have been common ground that it identified a need for 5 affordable homes. The judge made a finding to that effect and took this as the foundation for his reasoning in the case on the point in question on this appeal: see [4], [30] and [33]-[34].

14. There is no respondent's notice which puts this in issue, but Mr Burton for Mr and Mrs Gordon sought to raise a new argument at the hearing before us that the 2013 assessment should be interpreted as identifying a need of *about* 5 affordable homes, which might have allowed the Planning Board to assess that its decision to grant planning permission was in conformity with policy DP12 on that basis. We did not give him permission to take this new point at this late stage. I would add that I found it very unpersuasive in any event, because the only "clearly identified need" for affordable housing which the 2013 assessment set out was for 5 affordable homes.

15. In a report by the Council's planning officer of August 2015 in relation to the application by Mr and Mrs Gordon for outline permission to build 6 affordable homes and the one open market home on the site, he explained among other things that the Council's housing officer (Ms Richards) objected to the application on the grounds that she did not consider that there was a genuine need for additional affordable housing in North Wootton to support the application. Ms Richards' review of the Council's housing register for its district indicated that there was just one household with a possible connection with North Wootton which was seeking an affordable home, and that household was in the lowest, "bronze" category of need, showing that it had a low need to move because its needs were being met adequately elsewhere.

16. The planning officer's recommendation was that the Council should reject the application because "there is not a 'clearly identified need' for 6 units of affordable housing", such as would be required by policy DP12. He also gave other reasons for rejecting the application, including that North Wootton "is not considered a sustainable settlement"; that if the Council granted the outline planning permission it might be faced with pressure to allow some or all of the affordable housing restrictions to be relaxed so as to ensure the commercial viability of the scheme; and that the development encroached into the countryside to a greater extent than necessary. However, in his report the planning officer set out the text for a grant of permission with conditions if the Planning Board was minded to reject his recommendations and analysis, stating that "The proposal for up to 6 affordable houses is considered to reflect the need identified in the latest housing needs survey …".

17. The appellant and some (but not all) other residents in the village objected to the application for planning permission. The parish council supported the application. On 19 August 2015 the Planning Board made an initial decision to proceed with a view to granting outline planning permission for the proposed development.

18. By letter dated 24 November 2015, the solicitors for the appellant sent a letter to the Council which stated that residents of North Wootton were considering applying for judicial review should the Council grant planning permission for the proposed development. The letter stated that the residents "have obtained Counsel's advice who considers that there may be several grounds for challenging [the Council's] decision" should it proceed to grant planning permission, and invited the Council to reconsider whether it should do so. The letter raised one specific matter, which related to the involvement of one particular councillor in a previous debate on the application, but did not elaborate on the other grounds which might be put forward in any judicial review challenge.

19. The application was to be brought back to the Planning Board in December 2015. The planning officer provided an updating report, reflecting further advice from Ms Richards, that the current position on the housing register (as at 14 December 2015) was that there were 6 households registered with the Council for housing who had expressed a preference for living in North Wootton, all of which were assessed as being in the "bronze" category of low housing need. He also reported that the parish council continued to support the application.

20. Mr and Mrs Gordon also presented their own evidence of housing need in North Wootton in advance of the meeting of the Planning Board. They identified ten households with a connection with North Wootton which they said were seeking affordable housing.

21. At the meeting of the Planning Board on 16 December 2015 these materials were considered. It was reported that the Council's housing officer remained of the view that there was no genuine need in North Wootton for affordable housing. The appellant spoke against the development proposal, emphasising that the site could only be developed for housing in exceptional circumstances and stating that he did not believe there was any evidence of genuine need for affordable housing in North Wootton. The planning officer's recommendation remained to reject the application for the reasons set out in his report of August 2015.

22. The Planning Board voted by 12 votes to 1 to approve the grant of outline planning permission for the development contrary to the planning officer's recommendation, on the grounds that the proposal for up to 6 affordable houses reflected the need identified in the 2013 housing needs survey and the information submitted by Mr and Mrs Gordon and would be in accordance with Government Policy and that the method for cross-subsidy (i.e. the gift of the paddock by Mr and Mrs Gordon for the building of the affordable homes in return for being granted planning permission to build the open market home for themselves) was essential for delivery of the affordable housing. The Planning Board also noted in its resolution that the open market home would not cause an unacceptable intrusion into the countryside. It resolved to give delegated authority to Council officers to issue outline planning permission for the development.

23. It was and is common ground, as was specifically confirmed to us by Mr Sheppard for the Council, that the Planning Board's decision reflected its view that the grant of planning permission was in accordance with policy DP12, not in conflict with it. The Planning Board did not identify and rely upon material considerations as good grounds for departing from policy DP12.

24. The grant of outline planning permission was issued on 13 May 2016 "for up to 6 affordable homes and 1 open market dwelling house". Condition 1 required approval in future of reserved matters.

25. On 21 June 2016 appellant commenced his judicial review claim to quash the planning permission. After this, on 15 July 2016 Mr and Mrs Gordon exchanged contracts to sell their home in the village and upon completion on 4 August 2016 moved into rented accommodation with a view to living there until the open market home was built for them to move into.

26. In the judicial review the appellant relied on four grounds of challenge, only one of which remains in issue before us. Mr Whale appeared as counsel for the appellant, acting on a direct access basis until the conclusion of the proceedings at first instance.

27. HHJ Jarman QC dismissed all the grounds of challenge in his judgment dated 3 November 2016. The appellant sought permission to appeal from the judge, but it was refused. The order was not sealed until 30 November 2016. It stated that the appellant must file any appellant's notice with the Court of Appeal within 21 days.

28. The appellant, who at that point was representing himself, filed his notice of appeal on 20 December 2016, within the time stipulated in the order. His appeal, therefore, was properly constituted as a valid appeal brought within time.

29. However, the appellant was not familiar with the White Book and was unaware of the provision in CPR Part 52.12(3) which states in relevant part that:

> "… an appellant's notice must be served on each respondent –
>
> (a) as soon as practicable; and
>
> (b) in any event not later than 7 days after it is filed."

30. The notice of appeal was sealed by the Court of Appeal office on 21 December 2016. Unfortunately, the court office sent the sealed notice of appeal to Mr Whale rather than the appellant. This was probably because Mr Whale had been noted as being the appellant's representative at the hearing below. Mr Whale was away from Chambers over the Christmas and New Year break. He returned on 4 January 2017 to find the sealed notice and the covering letter from the court office dated 21 December 2016 stating that it should be served on the respondents within 7 days. He immediately forwarded it to the appellant. The appellant served the sealed notice on the Council and on the interested parties on 5 January 2017, promptly after he received it.

31. Meanwhile, on 15 December 2016 Mr and Mrs Gordon received copies of the planning application drawings and on 19 December they instructed their planning consultants to proceed with their application for reserved matters approval, as they did not want to lose time. They had been advised that they should know by 28 December 2016 whether the appellant was seeking to appeal, but decided to set the planning consultants to work before that. The consultants did work to the value of £561 before Christmas and to the value of £1,233 between 29 December and 6 January 2017. Mr and Mrs Gordon also commissioned work from their architect to the value of £137.50 between 30 December and 5 January 2017. The reserved matters application was

submitted on 9 January 2017, when they knew that the appellant was seeking to appeal.

32. Mr and Mrs Gordon were surprised when they learned from their solicitors on 5 January 2017 that the appellant was seeking to appeal. They thought they were clear of the litigation at that point and describe themselves as being devastated when they found out that this was not the case.

33. Mr Gordon prepared a witness statement dated 13 January 2017 setting these matters out. The same day the solicitors for Mr and Mrs Gordon wrote to the court office to say that the appellant's notice had not been served on their clients by 28 December as it should have been and objecting to any grant of an extension of time for service of the notice. A copy of Mr Gordon's witness statement was enclosed.

34. By an order dated 28 February 2017 Lewison LJ granted the appellant permission to appeal on the sole ground which is now before this court, relating to the proper interpretation of policy DP12. He did not refer to the letter of 13 January 2017 from the solicitors for Mr and Mrs Gordon (it is unclear whether it was placed before him) and he did not make any order to extend time for service of the appellant's notice on them. By a further order dated 27 September 2017 Lewison LJ gave permission for Mr and Mrs Gordon to file their respondent's notice.

Discussion

The ground of appeal: the proper interpretation of policy DP12.

35. The parties were agreed as to the general principles to be applied, drawn from the judgment of Lord Reed JSC in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13; [2012] PTSR 983 at [18]-[19] and as reiterated and commented upon by Lord Carnwath JSC in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37; [2017] PTSR 623 at [22]-[26] and by Lord Gill at [72]. In *Tesco Stores* Lord Reed said this at [18]-[19]:

> "18. In the present case, the planning authority was required by section 25 to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority required to proceed on the basis of what Lord Clyde described as "a proper interpretation" of the relevant provisions of the plan. We were however referred by counsel to a number of judicial dicta which were said to support the proposition that the meaning of the development plan was a matter to be determined by the planning authority: the court, it was submitted, had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. That submission, if correct, would deprive sections 25 and 37(2) of the 1997 Act of much of their effect, and would drain the need for a "proper interpretation" of the plan of much of its meaning and purpose. It would also make little practical sense. The development plan is a carefully drafted and

> considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.
>
> 19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780, per Lord Hoffmann. Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."

36. The parties also agree that the explanatory text in the Local Plan in relation to policy DP12 can qualify as an aid to the proper objective interpretation of the policy, albeit it does not itself have the force of policy and cannot override it: see *R (Cherkley Campaign Limited) v Mole Valley District Council* [2014] EWCA Civ 567, [16] per Richards LJ.

37. Mr Whale for the appellant submits that the ground of appeal is concerned with the proper interpretation of policy DP12 rather than its application to the particular facts. He contends that it is clear in its meaning, which is to the effect that a development to provide affordable homes in North Wootton will only comply with it if it meets the clearly identified need set out in the 2013 assessment of 5 affordable homes and no more. It is a precise statement of policy of a different character from the "broad statements of policy" which appear elsewhere in the Local Plan and in other

development plans, of the kind referred to by Lord Reed. Nor is it framed in language whose application to the facts requires the exercise of planning judgment.

38. Against this, Mr Sheppard for the Council and Mr Burton for Mr and Mrs Gordon submit that policy DP12 should be read as incorporating an element of flexibility in its application. The concept of "meeting" the clearly identified need of five affordable homes in the 2013 assessment is a relatively loose one which calls for the exercise of planning judgment in its application. Any housing needs assessment represents only a snapshot of the position at a particular point in time in relation to housing needs which may change considerably over time, so it makes sense to interpret the policy as subject to this degree of flexibility. The grant of outline permission in this case which would allow the building of 6 affordable homes was only in excess of the figure of 5 in the 2013 assessment by a narrow margin of one and hence is well within the scope of the planning judgment allowed to the Council under the policy. This seems to be the argument which found favour with the judge at [34] of his judgment.

39. In my view, however, Mr Whale's submission must be accepted. The judge was in error on this point. On an objective interpretation of policy DP12 in its proper context, it only permitted the grant of planning permission for up to 5 affordable houses, that being the clearly identified need as set out in the 2013 assessment. The following considerations lead me to that conclusion:

    i) I consider that the language of policy DP12(1)(a) is clear. The development must do no more than provide affordable homes "that meet a clearly identified need for affordable housing as identified in the latest Local Housing Needs Assessment specific to that settlement". The word "meet" has to be read in the immediate context of the phrase in which it appears - which refers to a need which is (a) "clearly identified" (b) in a specified source (in our case, the 2013 assessment) which states a particular level of need and (c) is "specific to" the particular settlement in question (here, North Wootton). All these pointers in the relevant phrase emphasise the importance of a focus on the particular quantum of housing need identified in the specified source. It is true that housing needs may change over time, but policy DP12 uses a clear and specific reference point: the number clearly identified in the latest assessment (in our case the 5 affordable homes in the 2013 assessment). It is easy to understand why, since it is by doing this that the Local Plan can clearly inform the public of the approach which will be followed when applications are made for permission for residential development in rural villages which are not primary or secondary villages and of the number of homes which will be allowed, so as "to secure consistency and direction in the exercise of [the Council's] discretionary powers" (see *Tesco Stores* at [18], quoted above). Consistency and direction in the exercise of the Council's discretionary powers would be substantially compromised if matters were left to be determined on the basis of a conflict of views about the fluctuating level of housing need at any given point in time. In this context, I consider that the word "meet" bears its ordinary meaning of "meeting, but not exceeding" the specific quantum of need identified in the clear manner specified in policy DP12(1)(a). It is not to be interpreted as incorporating an element of flexibility so as to mean "more or less meeting" or "not exceeding to an unreasonable degree", which is the effect of the respondents' submission;

ii) Policy DP12 is stated to be for "Rural Exception Sites" and it states that it applies "As an exception to normal policy for the provision of housing set out in Core Policies 1 and 2". Those Core Policies indicate that residential development in the Council's district is to be focused on market towns and, in the rural areas, on the primary and secondary villages with the appropriate facilities and services, which do not include North Wootton. If policy DP12 is not read strictly in accordance with its language, it would tend to allow those primary policies in the Local Plan to be undermined to an inappropriate degree. The exceptional nature of the policy and the wider context within the Local Plan of the primacy to be afforded to the Core Policies reinforce my view about the natural interpretation of policy DP12(1)(a) above; and

iii) The explanatory text for policy DP12 in paragraph 6.114 of the Local Plan also reinforces that interpretation. It too emphasises that policy DP12 is an exception to the normal policy of focusing residential development on the places where it is best located in the Council's district, namely in the towns and the primary and secondary villages. It also emphasises the importance in that context of demonstrating that a proposed development will meet a particular local need (whereas the planning permission in the present case would go beyond that), and moreover states that the need should be of a kind that cannot be accommodated in any other way, which seems to me to emphasise that a grant of planning permission should go no further than meeting the need which has actually been identified.

40. For these reasons, and subject to the discussion below of the discretionary points raised by the respondent's notice, I would allow this appeal.

41. There are two further points I should mention here. First, the outline planning permission which was granted was for "up to" 6 affordable homes. Before the judge and in his skeleton argument for us, Mr Burton sought to argue that the Council would be able to refuse consent for the building of more than 5 affordable homes at the reserved matters stage because the number of homes was a matter going to the "scale" of the development, which was a reserved matter. Mr Sheppard for the Council did not associate himself with this argument. Mr Whale demonstrated convincingly that it is an unsustainable contention. The definitions for reserved matters in relation to an outline planning permission are set out in article 2(1) of the 2015 Order. The term "scale" "means the height, width and length of each building proposed within the development in relation to its surroundings". The reservation of matters of scale under condition 1 of the planning permission, read in the light of this definition, would not allow the Council to refuse to allow a development of 6 (rather than 5) affordable homes to proceed by exercise of discretion at the reserved matters stage.

42. Secondly, Mr Burton sought to introduce another new argument on the appeal, not heralded in the respondent's notice nor clearly identified in his skeleton argument. For the first time he contended that the grant of outline permission for a development of "up to" 6 affordable homes meant that a development involving 6 affordable homes could be stopped in its tracks by the Council by refusal of consent for reserved matters, simply as a matter of general principle where a planning consent using this formula is used. Mr Sheppard again did not associate himself with this submission. Mr Whale, who was taken by surprise by this contention, submitted that it was wholly misconceived.

43. I am very doubtful that this new submission of Mr Burton could possibly be right. However, the court was not taken to any of the relevant statutory provisions or the relevant authorities. Mr Burton merely made reference to an excerpt from the judgment of Sullivan J in *R (Saunders) v Tendring DC* [2003] EWHC 2977 (Admin) quoted in *Crystal Properties (London) Ltd v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1265 at [12], but we were not shown the full judgment and the quoted extract seemed to me to be contrary to Mr Burton's argument. So I prefer to deal with this new argument by refusing permission for Mr Burton to raise it on this appeal, on the grounds that it came too late; Mr Whale did not have a fair opportunity to meet this contention; and the court has not been assisted with full argument on the point to rule upon it.

The respondent's notice: should relief be refused and the appeal dismissed?

44. The appellant has succeeded on his ground of appeal. In my judgment, it would not be appropriate to refuse relief for the appellant in this case on any of the grounds put forward in the respondent's notice. I deal with them in turn.

(i) Section 31(2A) of the 1981 Act

45. This is not a case in which the test in section 31(2A) of the Senior Courts Act 1981 is met. On the evidence, it cannot be said that "it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

46. The Planning Board thought that they were acting in accordance with the Local Plan, whereas in fact the proposed development contravened it. They did not attempt to identify any reasons which might have been sufficient to counterbalance the weight they should have given to policy DP12, which on its proper interpretation indicated that planning permission for this development should be refused. They had been given good reasons by the Council's planning officer why the application should be refused. Also, the Council's housing officer had called the actual need for affordable housing in North Wootton into serious question. In those circumstances I find it impossible to say that it is "highly likely" that if the Planning Board had appreciated that they were acting in breach of the Local Plan they would nonetheless have granted the outline planning permission they did for up to 6 affordable homes and the open market home.

47. Further, it is relevant that Mr Sheppard presented no positive argument on behalf of the Council in support of such a view and the Council adduced no evidence to support it. Although a court will be appropriately careful in reviewing evidence produced by a decision-maker long after the decision to say how they would have proceeded in the sort of hypothetical scenario on which application of section 31(2A) depends, and will evaluate it carefully in light of the contemporaneous materials in the case, it is nonetheless telling that none of the decision-makers in this case have felt able to put before the court any witness statements to support the contention that they would have granted outline planning permission for the development even if they had appreciated that it was in breach of the Local Plan. In the absence of submissions and evidence from the Council, I simply do not know whether the decision-makers on the Planning Board would say there were material considerations which might have caused them to think it right to depart from the Local Plan and if so what those considerations were.

48. In the context of section 31(2A) Mr Burton sought to raise yet another new argument which had not been heralded in the respondent's notice, nor in his skeleton argument. He sought to contend that "the outcome for the applicant would not have been substantially different" because the Council could, in determining the application, have granted planning permission with a condition restricting the number of affordable homes to 5 affordable homes, and the difference between 5 homes and 6 homes would have had a negligible impact on the appellant.

49. I should say that I am again very doubtful that this argument can be right, since it seems to me that the Council was obliged to consider the planning application which was actually made to it and to grant or refuse it in the terms it was made, i.e. as an application for permission for up to 6 affordable homes and an open market home. There is also a suggestion in the papers that the scheme was only going to be viable if 6 affordable homes were built. However, again, I think that the better course is to refuse to grant Mr Burton permission to raise this new argument on the appeal. We have not been taken to the relevant statutory provisions and authorities; Mr Whale was taken by surprise by the argument and it is not fair to expect him to deal with it; and it is a point of which the appellant ought to have had notice in order to have an opportunity to put in evidence about whether the development would have been viable with only 5 affordable homes and about the extent to which grant of permission for 5 affordable homes as compared with 6 might have affected him detrimentally.

(ii) Late service of the appellant's notice

50. As explained above, the appellant appealed to this court in proper time and did not require an extension of time for appealing to be granted by Lewison LJ. The question, therefore, is whether this court should refuse to entertain the appeal or should refuse to grant relief pursuant to it by reason of the short period of delay before the notice of appeal was served on the respondents. It is open to this court to grant a short extension of time for such service, to the 5 January 2017, if it is needed.

51. It is not clear from the language used in CPR Part 52.12(3) whether the notice of appeal which has to be served pursuant to it is the sealed notice of appeal or the notice of appeal in its form before it is filed with the court and sealed. If it is the former, then Mr Whale indicated that he would wish to argue that the appellant did serve the notice of appeal in time because he served it as soon as it came into his hands, and no extension of time would be required. However, I do not find it necessary to resolve that question, because in my view it is clear that even if the argument is wrong or if the latter interpretation is correct it would be wholly unjust and disproportionate for this court to dismiss the appellant's meritorious appeal or to refuse him relief by way of sanction for the delay in service of the notice of appeal in this case. Assuming an extension of time is required, I would grant it.

52. Assuming for present purposes that the appellant did fail to comply timeously with the obligation to serve the notice of appeal on the respondents pursuant to CPR Part 52.12(3), this occurred through inadvertence and not by reason of any motive on the part of the appellant to gain some sort of unfair advantage. There was no reason for him to expect that Mr and Mrs Gordon would be proceeding to incur any significant sums of money over the Christmas period.

53. Indeed, I think that Mr and Mrs Gordon acted precipitately in doing so. They knew that the appellant had asked for permission to appeal at trial, they knew the timetable in the court's order and there was always the possibility that a court might grant an extension of time if one was required. So the sensible thing for them to do before deciding to proceed would have been to check with the appellant that he was not seeking to appeal.

54. I consider that for these reasons the balance of justice is in favour of extending time for the service of the appellant's notice by the few days required to 5 January 2017. Also, the expenditure incurred by Mr and Mrs Gordon in the period between 28 December 2016 and 5 January 2017 is modest, and in my view it would clearly be disproportionate and contrary to the overriding objective in CPR Part 1 to deny relief to the appellant on this appeal because of it.

(iii) The appellant's solicitor's letter of 24 November 2015

55. Finally, Mr Burton submits that it would be unfair to grant the appellant any relief on this appeal when he failed to identify the point now in issue in his solicitor's letter of 24 November 2015, before the Planning Board meeting in December 2015 to consider the application for outline permission. In my judgment, this submission is misconceived.

56. The letter of 24 November 2015 intimated that the appellant and others might have a number of grounds of claim if planning permission were granted. It did not exclude the present ground of appeal. At the meeting of the Planning Board on 16 December 2015 the appellant presented objections to the development in a way which covered the point made in this appeal. Furthermore, so did the Council's own planning officer. So the Planning Board proceeded to grant planning permission when it was fully on notice of the argument that the proposed development was not properly justified by local need for affordable housing. Even if the appellant had said nothing at that stage, it was incumbent on the Planning Board to act properly in the public interest and to apply the planning policies in the Local Plan correctly.

57. The appellant's grounds of judicial review included the present point of appeal. Issue was joined on the point in the proceedings below and there is nothing unfair about this court granting relief to the appellant if it upholds his appeal.

Conclusion

58. For the reasons I have given I would allow the appeal.

Lord Justice McFarlane:

59. I agree.