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Neutral Citation Number: [2015] EWCA Civ 298
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
QUEEN'S BENCH DIVISION
(MR JUSTICE BLAKE)

C1/2014/0394

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 3 March 2015

B e f o r e:

LORD JUSTICE RICHARDS

LORD JUSTICE UNDERHILL

LORD JUSTICE CHRISTOPHER CLARKE

Between:

FOX LAND AND PROPERTY LTD_

Appellant

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT_

Respondent

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Mr P Goatley and Mr H Mohamed (instructed by Irwin Mitchell Solicitors) appeared on behalf of the **Appellant**

Mr S Whale (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**

J U D G M E N T

(As approved by the Court)

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1. **LORD JUSTICE RICHARDS:** This appeal concerns an application for planning permission for development at a site consisting of 7.4 hectares of agricultural land at Glebelands, Thundersley, Essex (“the appeal site”). The permission sought was for residential development of up to 165 dwellings. The Applicant was Fox Land and Property Ltd (“Fox”). The application was refused by the local planning authority, Castle Point Borough Council. Fox appealed to the Secretary of State. An inspector appointed by the Secretary of State held a public inquiry and submitted a report recommending the grant of planning permission. By a decision letter dated 26 June 2013, however, the Secretary of State disagreed with the inspector's recommendation and dismissed Fox's appeal.
2. Fox then brought a challenge under section 288 of the Town and Country Planning Act 1990 (“the 1990 Act”) against the Secretary of State's decision. That challenge was dismissed by an order of Blake J made pursuant to a judgment handed down by him on 17 January 2014. Fox now appeals to this court against Blake J's order, with permission granted by Sullivan LJ. The grant of permission was limited to a single ground of appeal.
3. The issue raised by that ground concerns the effect of the provisions of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”) relating to the replacement of former local plans by a new development plan making process, subject to a power in the Secretary of State to direct that specified policies in the former local plans should remain in effect until replaced by new policies.
4. Fox's essential contention is that pursuant to those provisions, the fundamental policy of the former local plan on which the status of the Green Belt rested has ceased to have effect and the area no longer has a Green Belt for the purposes of local or national policy. The point is central to the case because the Secretary of State's decision to dismiss Fox's appeal was based on the application of national policy on the Green Belt, with findings that the proposed development was inappropriate development in the Green Belt and that the factors weighing in favour of the proposal did not clearly outweigh the harm to the Green Belt that would arise from the proposal.

The legal framework

5. Local plans were formerly governed by section 36 of the 1990 Act which provided in material part:
 - "(1) The local planning authority shall, within such period (if any) as the Secretary of State may direct, prepare for their area a plan to be known as a local plan.
 - (2) A local plan shall contain a written statement formulating the authority's detailed policies for the development and use of land in their area...
 - (6) A local plan shall also contain -
 - (a) a map illustrating each of the detailed policies; and

(b) such diagrams, illustrations or other descriptive or explanatory matter in respect of the policies as may be prescribed, and may contain such descriptive or explanatory matter as the authority think appropriate."

6. Regulation 6 of the Town and Country Planning (Development) (England) Regulations 1999 provided that the map required to be included in a local plan should be called the proposals map. Regulation 7 provided that a local plan should contain a reasoned justification of the policies formulated in the plan, to be set out so as to be readily distinguishable from the other contents of the plan.
7. The relationship between the policies and the supporting text within a local plan was considered by this court in The Queen on the application of Cherkley Campaign Limited v Mole Valley District Council [2014] EWCA Civ 567 ("Cherkley"), in the section at paragraphs 8 to 24 of the judgment. I shall need to return to that section in a moment.
8. The 2004 Act did away with the previous development plan regime and replaced it with a new one, the details of which are immaterial to the present appeal.
9. Schedule 8 to the Act provided in paragraph 1(2)(a) for a transitional period of 3 years from the date when the relevant part of the Act came into force, after which existing local plans ceased to have effect. The transitional period came to an end on 28 September 2007. But paragraph 1(3) of the same schedule provided that "the Secretary of State may direct that for the purposes of such policies as are specified in the direction sub-paragraph (2)(a) does not apply", that is to say that the policies specified in the direction were to remain in effect until replaced by new policies under the new development plan regime.

The policies

10. The Castle Point Local Plan was adopted in 1998. The plan contained a Proposals Map illustrating each of the detailed policies as required by section 36 of the 1990 Act. The first designation in the key to the Proposals Map was the Green Belt, and the map itself showed the appeal site as part of the Green Belt.
11. The Green Belt policies were themselves contained in Chapter 2 of the Local Plan. Paragraphs 2.1 to 2.3 were introductory. Paragraphs 2.5 to 2.8 dealt with the objectives of establishing a Green Belt. I need only quote paragraph 2.8 which read:

"The Proposals Map indicates the definitive, defensible Green Belt boundary. In order to clarify the precise areas of land contained within the Green Belt, large scale maps have been produced showing the boundary in greater detail. These maps do not form part of the Local Plan, but are for guidance only and are available for inspection."
12. There followed a section headed "development within the Green Belt" containing policies GB1, GB2 and GB3 and supporting text.

13. Policy GB1 and supporting text came under a subheading "General Principles" and read as follows:

"2.9. In order to maintain the national objectives of the Green Belt, as set out in Planning Policy Guidance Note 2, it is essential to control development within the Green Belt. The Essex Structure Plan (Second Alteration) reaffirms the need for strict control of development in Policy S9 (See Appendix 1), and the Borough Council would wish to reiterate this as follows:

POLICY GB1 - CONTROL OF DEVELOPMENT

WITHIN THE GREEN BELT IDENTIFIED ON THE PROPOSALS MAP PERMISSION WILL NOT BE GIVEN, EXCEPT IN VERY SPECIAL CIRCUMSTANCES, FOR THE CONSTRUCTION OF NEW BUILDINGS, OR FOR THE CHANGE OF USE OF LAND, OR FOR THE EXTENSION OF EXISTING BUILDINGS (OTHER THAN REASONABLE EXTENSIONS TO EXISTING DWELLINGS) FOR PURPOSES OTHER THAN:

- i. AGRICULTURE;
- ii. MINERAL EXTRACTION;
- iii. FORESTRY;
- iv. ESSENTIAL FACILITIES FOR OUTDOOR PARTICIPATORY SPORT AND OUTDOOR RECREATION;
- v. CEMETERIES OR OTHER USES OF LAND WHICH PRESERVE THE OPENNESS OF THE GREEN BELT AND WHICH DO NOT CONFLICT WITH THE PURPOSES OF INCLUDING LAND WITHIN IT.

ANY DEVELOPMENT WHICH IS PERMITTED SHALL BE OF A SCALE, DESIGN AND SITING THAT THE APPEARANCE OF THE COUNTRYSIDE IS NOT IMPAIRED.

2.10. Appendix 2 provides guidance on "reasonable extensions" to existing dwellings.

2.11. Whilst the above policy controls the change of use of land in the Green Belt, Policy GB2 below provides for the re-use of existing buildings in the Green Belt."

Following on from that, the next subheading was "Re-use of Buildings in the Green Belt". Under that heading was supporting text, which I will omit, and Policy GB2, which I need quote only in part:

"POLICY GB2 - RE-USE OF BUILDINGS IN THE GREEN BELT

IN DETERMINING ANY APPLICATION FOR THE ADAPTATION OR RE-USE OF BUILDINGS IN THE GREEN BELT, THE COUNCIL WILL HAVE REGARD TO...

ANY PROPOSAL WHICH IT IS CONSIDERED WOULD HAVE A MATERIALLY GREATER IMPACT THAN THE PRESENT USE ON THE OPENNESS OF THE GREEN BELT AND THE PURPOSES OF INCLUDING LAND WITHIN IT WILL BE REFUSED."

A further subheading was "Redevelopment or Replacement of Industrial Development" under which was supporting text and Policy GB3. I need only quote the policy itself which read:

"POLICY GB3 - REDEVELOPMENT OR REPLACEMENT OF INDUSTRIAL DEVELOPMENT

THE REDEVELOPMENT OR REPLACEMENT OF EXISTING INDUSTRIAL DEVELOPMENT OR AGRICULTURAL BUILDINGS FOR RESIDENTIAL PURPOSES WITHIN THE GREEN BELT WILL NOT BE PERMITTED."

14. The next section of Chapter 2 was headed "Residential Development in the Green Belt", with subheadings, supporting text and relevant policies. It suffices to quote a small part from each policy:

"POLICY GB4 - REBUILDING OF EXISTING DWELLINGS IN THE GREEN BELT

PROPOSALS FOR THE REBUILDING OF DWELLINGS IN THE GREEN BELT WILL BE PERMITTED PROVIDED ALL OF THE FOLLOWING CRITERIA ARE SATISFIED...

POLICY GB5 - EXTENSIONS TO DWELLINGS

PROPOSALS FOR THE EXTENSION OF EXISTING DWELLINGS IN THE GREEN BELT WILL SATISFY THE FOLLOWING CRITERIA...

POLICY GB6 - GARDEN EXTENSIONS

APPLICATIONS FOR EXTENSIONS TO PRIVATE GARDENS INTO THE GREEN BELT WILL BE REFUSED WHERE THEY WOULD...

POLICY GB7 - AGRICULTURAL DWELLINGS

IN CONSIDERING PLANNING APPLICATIONS FOR PERMANENT DWELLINGS FOR AGRICULTURE OR ALLIED PURPOSES WITHIN THE GREEN BELT THE COUNCIL WILL HAVE REGARD

TO ESSEX STRUCTURE PLAN POLICY S9, AND POLICY GB1 OF
THE LOCAL PLAN. IN ADDITION, DEVELOPMENT WILL
SATISFY THE FOLLOWING CRITERIA..."

15. Thus it will be seen that Policies GB1 to GB7 all refer to the Green Belt and deal with various aspects of development in the Green Belt.
16. Policies GB2 to GB7 inclusive were saved by a direction made by the Secretary of State pursuant to schedule 8 to the 2004 Act before the end of the transitional period. Those policies therefore remained in force at all times material to this case. Policy GB1, however, was not saved. It therefore ceased to have effect after 28 September 2007 and was not in effect at any time material to this case.
17. In addition to the Local Plan policies, I should make brief mention of national policy now contained in the National Planning Policy Framework ("the NPPF"). Green Belt land is the subject of paragraphs 77 and following of the NPPF. The detail was relevant to other issues considered by Blake J and can therefore be found at paragraph 9 of his judgment. All that matters for present purposes is that national policy applies to Green Belts as defined by local planning authorities. So the issue in the present appeal turns on the Local Plan, not on the NPPF.
18. I should mention finally in this section of the judgment that it is common ground that policy is to be construed in the way set out in the judgment of Lord Reed in Tesco Stores Ltd v Dundee City Council [2012] UKSC 13 at paragraphs 18 and 19. A particular point stressed by Mr Goatley in his submissions is at the end of paragraph 19:

"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."

The arguments on the appeal

19. I should start with what was said by the Secretary of State at paragraph 9 of the decision letter, because it sets the background to the arguments:

"For the reasons given by the Inspector... the Secretary of State agrees with its conclusions... that the most reasonable interpretation of the said LP [Local Plan] policy is that the Green Belt (GB) remains because its continued existence is necessary for the purposes of LP policies GB2 to GB7 and that the saving of those policies therefore had the effect of preserving the existence of the GB in Castle Point."
20. Mr Goatley's case for Fox is that the Green Belt has gone with Policy GB1. That policy was essential to the status of the Green Belt in the area of the Local Plan. It defined the Green Belt. It made a specific reference to the Green Belt identified on the Proposals Map, and life was given in that respect to the identification of the Green Belt in the Proposals Map only by Policy GB1. The Proposals Map itself was not saved by the Secretary of State's direction and was not capable of being saved since it did not contain policies but illustrated the geographical extent of the adopted policies. None of

the saved policies refers, in any event, to the Proposals Map. The saved policies all assume the existence of the Green Belt but they do not define it or give it life. The fact that they refer to the Green Belt does not help if, by reason of Policy GB1 ceasing to have effect, there is no longer any land in the area with Green Belt status. The consequence of that line of argument is that although Policies GB2 to GB7 were saved, they have no remaining substantive effect.

21. In dismissing that line of argument, Blake J stated at paragraph 19:

"Although it would have been neater and simpler for a modified GB1 to remain in existence and bring the proposals map directly into play as an element of the policy, I conclude that this has been achieved indirectly because the saved policies refer to the GB and there are therefore policies in existence to which the proposals map can attach and form part of the policies (see TPCA 1990 s.36 (6) and s 54 (1)(c))."

22. That reasoning is submitted to be erroneous in various respects. The points made largely repeat the case I have just summarised. It is said that the fact that the saved policies refer to the Green Belt does not provide a basis for the existence of Green Belt. A Green Belt cannot exist without some basis in extant development plan policy. The policy that defined where Green Belt designation applied was exclusively Policy GB1. Something as important as the status of the Green Belt cannot be left as a matter of inference or as something achieved indirectly on the loss of the policy that dealt with it directly. It is said that the Council must have known what it was doing when it did not seek to have Policy GB1 saved. It cannot now make what is left of the Local Plan mean what it would like it to mean. The only reasonable conclusion, it is submitted, is that the Castle Point Green Belt is no longer extant.
23. For my part, I am satisfied that the judge was correct to reject Mr Goatley's submissions. It would be very surprising if six saved policies relating to specific aspects of development in the Green Belt (that is Policies GB2 to GB7) were all wholly ineffective and if national policy on Green Belt had nothing to bite on in the area of the Local Plan simply because one policy, Policy GB1, had not been saved and had ceased to have effect. It seems to me that the arguments by which Mr Goatley seeks to arrive at such a result are unsustainable.
24. I have referred already to the judgment of this court in Cherkley. It is true that the relevant part of that judgment was focusing on what is to some extent a different point, namely the effect of a statement and the supporting text of a policy which referred to a criterion not contained within the same policy itself. But the reasoning in the case is highly material to the present appeal. Only the first instance passage in Cherkley was available when Blake J gave his judgment in the present case and indeed at the time when permission to appeal was granted. The judgment of the Court of Appeal may be thought to have dealt with the main concern behind the grant of permission, namely the need for a ruling on the effect of the revocation and saving provisions in the 2004 Act upon the proper interpretation of development plan policies.

25. I myself gave the leading judgment in Cherkley, with which the other members of the court agreed. In the relevant part of the judgment I started by looking at the relationship between policies and supporting text under the regime of the 1990 Act, leaving aside the effect of a saving direction under the 2004 act. I said this at paragraph 16:

"Leaving aside the effect of the saving direction, it seems to me, in the light of the statutory provisions and the guidance, that when determining the conformity of a proposed development with a local plan the correct focus is on the plan's detailed policies for the development and use of land in the area. The supporting text consists of *descriptive and explanatory matter* in respect of the policies and/or a reasoned justification of the policies. That text is plainly relevant to the interpretation of a policy to which it relates but it is not itself a policy or part of a policy, it does not have the force of policy and it cannot trump the policy. I do not think that a development that accorded with the policies in the local plan could be said not to conform with the plan because it failed to satisfy an additional criterion referred to only in the supporting text. That applies even where, as here, the local plan states that the supporting text indicates how the policies will be implemented."

26. It followed, as explained in paragraph 17, that the correct focus was on the terms of the relevant policy, which in that case was Policy REC12 of the Mole Valley Local Plan.
27. I then considered the effect of the relevant provisions of the 2004 Act, at paragraph 18:

"The relevant provisions of the 2004 Act and the saving direction made under it serve to underline rather than to alter the position as I see it. Subject to the saving direction, the Local Plan ceased to have effect at the end of the transitional period; and the effect of the direction was to save only the policies referred to in it, specifically including Policy REC12. It follows that the relevant question when considering the conformity of the proposed development with the Local Plan after the expiry of the transitional period must be whether the development is in accordance with saved Policy REC12. I do not accept, however, the appellants' submissions that the effect of the statute was to blue-pencil the supporting text on the expiry of the transitional period, leaving in place only the text of the policy, so that the policy fell to be interpreted thereafter without regard to the supporting text. To blue-pencil the supporting text would risk altering the meaning of the policy, which cannot have been the legislative intention. It seems to me that the true effect of the statutory provisions was to save not just the bare words of the policy but also any supporting text relevant to the interpretation of the policy, so that the policy would continue with unchanged meaning and effect until replaced by a new policy. The resulting position in terms of relationship between the saved policy and its supporting text is therefore the same as it was prior to the 2004 Act and the saving direction."

28. That reasoning can, in my view, be applied across to the relationship between Local Plan policies and the Proposals Map with which the present case is concerned. The Proposals Map is not itself policy, but it illustrates detailed policies, to use the term in section 36(6)(a) of the 1990 act. In particular, it identifies the geographical areas to which the detailed policies apply. Just as the supporting text is relevant to the interpretation of a policy, so the Proposals Map is relevant to the geographical scope of application of a policy and thus to a proper understanding of the policy. One looks at the supporting text and the Proposals Map not because they are themselves policy -- they are not -- but because of their relevance to a proper understanding of the policies properly so-called.
29. Thus, if in this case one considers the Local Plan as it stood before the 2004 Act, the Proposals Map can be seen to have identified the geographical area of the Green Belt referred to in each of Policies GB1 to GB7. It is, in my judgment, a fallacy to treat Policy GB1 as if that policy defined the Green Belt and the other policies were dependent upon it. Policy GB1 simply referred to "the Green Belt identified on the Proposals Map". To see what was the area of the Green Belt referred to, so as to understand the geographical scope of application of the policy, it was necessary and appropriate to look at the Proposals Map. But the same was just as true of each of Policies GB2 to GB7. Each of those policies referred to "the Green Belt" and although they did not contain the additional words "identified on the Proposals Map", it was necessary and appropriate in their case too to look at the Proposals Map to see what was the area of "the Green Belt" referred to. Nothing turns on the fact that, unlike Policy GB1, they did not mention the Proposals Map in terms. Recourse to the Proposals Map in order to inform the proper understanding of the policies was inherent in the statutory scheme.
30. When Policy GB1 ceased to have effect, Policies GB2 to GB7 were saved pursuant to the 2004 Act. Policy GB1 dropped out of the picture but the position as regards the other policies was unchanged. Just as the true effect of the statutory provisions was held in Cherkley to be to save not just the words of a saved policy but also any supporting text relevant to the interpretation of that policy, so here the effect of the statutory provision was to save the Proposals Map insofar as it was relevant to a proper understanding of the saved policies. It is not a case of the saved policies breathing existence into the Green Belt, as Mr Goatley put it at one point in his submissions. It is simply that the saved policies apply to the Green Belt and, in order to understand what geographical area that is, one continues to look at the Proposals Map.
31. A further material consideration is that the supporting text relevant to the interpretation of the saved policies also makes repeated reference to the Green Belt. In particular, paragraph 2.8 of the supporting text, which I have quoted, makes entirely clear that the Green Belt is the area of land identified on the Proposals Map as Green Belt. Paragraph 2.8 serves to inform all the Green Belt policies. I do not accept for a moment that it was itself in some way dependent on the continued existence of policy GB1. Since the supporting text is also saved on the authority of Cherkley, it continues to inform the interpretation of the policies it supports and it too therefore tells one what is meant by the reference to the Green Belt in the saved policies.

32. All this shows clearly, in my judgment, that there is still a Green Belt for the purposes of the Local Plan. The saved policies of the Local Plan are capable of biting on it. So are the provisions of the NPPF relevant to the Green Belt. Policy GB1 did not have the fundamental role attributed to it by Mr Goatley in the identification of the Green Belt or the continued status of the Green Belt.
33. For those reasons, I consider that Blake J was correct to reach the conclusion he did on this issue. I would dismiss the appeal.
34. **LORD JUSTICE UNDERHILL:** I agree.
35. **LORD JUSTICE CHRISTOPHER CLARKE:** I agree.