Case No: CO/3432/2004

Neutral Citation Number: [2005] EWHC 18 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 18 January 2005

Before:

Mr Justice Collins

Between:

The Alliance Spring Co Ltd & Others	Claimant
- and -	
The First Secretary of State	Defendant

(Transcript of the Handed Down Judgment of
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Mr Matthew Horton Q.C. & Mr Jeremy Pike (instructed by Earth Rights Solicitors) for the Claimants
Mr John Litton (instructed by The Treasury Solicitor) for the Defendant
Mr Christopher Katkowski Q.C. & Ms Karen McHugh (instructed by Islington Council) for the First Interested Party
Ms Karen McHugh (instructed by David Cooper & Co) for Arsenal Football Club (Second Interested Party)

Judgment

As Approved by the Court

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Mr Justice Collins:

1. This case concerns a major development resulting from Arsenal Football Club's (AFC) need for a stadium with increased capacity and a desire that that stadium should continue to be in Islington. A result of the Taylor recommendations following the Hillsborough disaster was that football stadia should provide seating for all spectators. This resulted in the capacity for the existing stadium in Highbury being reduced to 35,000. AFC is a major player in the Premier league and needs to accommodate more spectators if it is to be able to finance the enormous sums which now have to be paid to attract the top quality players to enable it to maintain its position in the league. The new stadium will have a capacity of about 60,000.

2. AFC had started life in Woolwich and had moved to Highbury in 1913. For obvious reasons, not least because it had been its home for some 90 years and the largest concentration of its supporters lived in the area, AFC wanted its new stadium to be close to its old. Football stadia are not on the whole desirable in built up areas and so AFC no doubt appreciated that to get planning permission it would have to persuade Islington Council, as the local planning authority, that whatever scheme it proposed would result in an overall benefit in planning terms. Thus it was essential to liaise with the Council and provide much more than the relocation of the stadium from its existing to a new site. AFC concluded that a site at Ashburton Grove, Highbury, which was near to its present ground, and was largely owned by the Council, offered the best opportunity.

3. In 1999 the proposals, worked out in consultation with the Council's planning officers, were made public. They involved three interconnected developments which involved the relocation of the stadium to the Ashburton Grove site, a redevelopment at Lough Road nearby to accommodate a waste recycling centre which was to replace one which was at the Ashburton Grove site but which had reached the end of its useful working life and a redevelopment of the site of AFC's existing stadium. There was extensive consultation and a detailed environmental statement. The proposals were controversial and generated considerable opposition as well as support. Although they did not comply with UDP policy in a number of respects, the planning officer recommended approval, there was no call in by the Secretary of State and approval was granted on 30 May 2002, following the conclusion of an agreement under section 106 of the Town and Country Planning Act 1990 (the 1990 Act).

4. The grant of planning permission was challenged by an application for judicial review. A renewed application for permission came before Ouseley J following refusal by Sullivan J on the papers. In a lengthy and detailed judgment given on 31 July 2002 ([2002] EWHC 2044 Admin) he dismissed the claim. I need only cite Paragraph 8 of his judgment to indicate the comprehensive nature of the challenge and its lack of merit. Ouseley J said this: -

> "The matter now before me is brought by only two residents. The other claimants have fallen by the wayside. The

> consolidated grounds in part were not really pursued, notably to the extent that they raised human rights grounds, which were misconceived and unsupported by any evidence. A number of additional grounds were sought to be raised. The grounds raised were refined and altered in the skeleton argument, and before me, from those set out in the claimants' skeleton argument. No possible point or permutation of a point has been overlooked by counsel for the claimants. I hope I do justice to the variety and ingenuity of his multifaceted arguments. They have put the decision-making process of the London Borough of Islington through a demanding legal audit as if a roving commission were being conducted on behalf of all objectors. I have examined all these points. In the end I have concluded that these applications fail. Most of the points raised are indeed unarguable. "

An attempt to persuade the Court of Appeal to grant permission to appeal failed.

5. Since the planning permissions were for a major redevelopment which would necessarily involve the demolition of a number of buildings not all of which were owned by the Council or AFC, a Compulsory Purchase Order was likely to be needed. On 17 June 2002 the Council made such an order under s.226 of the 1990 Act. This provides, so far as material, as follows: -

> "(1) A local authority … shall … have power to acquire compulsorily any land in their area which –
>
> (a) is suitable for and required in order to secure the carrying out of development, re-development or improvement …
>
> (2) A local authority and the Secretary of State in considering for the purposes of subsection (1)(a) whether land is suitable for development, re-development or improvement shall have regard –
>
> (a) to the provisions of the development plan, so far as material,
>
> (b) to whether planning permission for any development on the land is in force; and
>
> (c) to any other considerations which would be material for the purposes of determining an application for planning permission for development on the land.
>
> (4) it is immaterial by whom the local authority propose that any activity or purpose mentioned in subsection (1) … should be undertaken or achieved (and in particular the local authority need not propose to undertake any activity or to achieve that purpose themselves)."

The Order, which is entitled 'London Borough of Islington (Ashburton Grove and Lough Road, Islington) Compulsory Purchase Order 2002', covered 134 plots of land. It was stated to provide for "the purchase for the purposes of securing the carrying out of development, redevelopment or improvement as a mixed use scheme including a 60,000 capacity stadium, an education 'learning centre', a replacement Arsenal Sports and Community Centre, a replacement waste and recycling centre, new and refurbished houses, new live-work units, new general business space, new shops, financial services and cafes/restaurants, new leisure space, two new gym/health clubs, two new nurseries, four new community health facilities and new publicly accessible open space of the land and new rights described in the Schedule hereto".

6. There were a considerable number of objectors to the Order and so an inquiry was held before an Inspector. It sat for 14 days between 14th January and 20th February 2003. At a pre-inquiry meeting, it was agreed that it should proceed in two parts, the first to consider objections in principle to the order, the second to consider matters specific to particular plots. By the time the inquiry commenced, 24 of 33 statutory objections had been withdrawn. The only effective remaining objections related to plots in Queensland Road, which was at the south end of the Ashburton Grove site and in which there were a number of businesses. The statutory objectors carried on businesses there and were concerned that it would be impossible to find suitable alternative premises and that compensation payable under the Act would be insufficient to enable them to set up or maintain their businesses elsewhere.

7. In a lengthy and detailed report which ran to 788 paragraphs over 129 pages, the Inspector recommended that the order should not be confirmed. The Secretary of State did not agree with the Inspector and on 12 December 2003 he sent a letter to the Council enclosing the Inspector's report and his own reasons for disagreeing with the recommendations in the form of an indication that he was "minded to confirm the CPO" with some modifications. Copies of this letter and of the Inspector's report were sent to all who were entitled to appear at the inquiry and who appeared at it affording them the opportunity to comment on the Secretary of State's proposed decision in writing within 28 days. In due course, the Secretary of State decided to confirm the Order on 19 May 2004.

8. On 15 July 2004 the claim before me was lodged by five statutory objectors who have businesses in Queensland Road and by one of the claimants before Ouseley J. It is made pursuant to s.23 of the Acquisition of Land Act 1981, which, so far as material, provides: -

> " If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or if 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 [which includes the 1990 Act], he may make an application to the High Court".

9. It is accepted by the Secretary of State that in order to justify a CPO he must be satisfied that there is a compelling case in the public interest. He had issued a Circular 02/03,

which was in force at the material time and which gave guidance on the use of compulsory purchase powers. It confirmed the above test: see paragraph 14. And in paragraph 4 of Appendix A it dealt with the powers conferred by s.226(1)(a) of the 1990 Act. It stated: -

> "This wide power may be used to acquire land for a variety of planning purposes such as a town centre redevelopment or other comprehensive regeneration scheme for which the authority wishes to assemble a number of individual properties or areas of land.

But it is always necessary for the acquiring authority to be sure that the purposes for which it is making a CPO sufficiently justify interfering with the human rights of those with an interest in the land affected. In this case, the five claimants with businesses in Queensland Road will clearly suffer an interference with their rights under Article 1 of the First Protocol to the European Convention on Human Rights, which deals with the protection of property. It reads, so far as material: -

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law …"

Compulsory purchase powers are granted in the public interest and so, provided they are exercised in accordance with the law and in a properly proportionate fashion, will not constitute a breach of the Article.

10. The Inspector was unimpressed with the Council's case that the scheme would produce an effective and desirable regeneration of the areas concerned. His overall conclusion is expressed thus in Paragraph 780 of his report: -

> "The land that the Council now seek to acquire compulsorily is suitable for this stadium led scheme of redevelopment to the extent that planning permissions have been granted for the proposals. That land is required, if the scheme is to proceed through to completion, but I am not persuaded that there is a compelling case in the public interest that the CPO should be confirmed. There are clear conflicts with the development plan's requirements and little could be achieved by way of effective regeneration, particularly for those areas that are most in need".

There was an issue whether the proposals were financially viable. The Inspector was concerned that insufficient information had been given to establish viability, but was persuaded that it was likely that the scheme would be deliverable. He considered the need for the Queensland Road properties since the Council had decided to permit the new stadium to be constructed. In paragraphs 757 and 758 he said this: -

> "Other plot Specific objections … all relate to land that is

> associated with those parts of the scheme that would be centred around the realigned Queensland Road. In some cases plots could be omitted from the CPO without affecting the stadium or access to it. Certainly the scheme could be modified to alter the access arrangements and to exclude some or all of the development that is proposed to the south of the podium (sic). However, if existing buildings were to be retained on those plots, they would appear in stark contrast to the new development. This would undermine the architectural quality of the scheme and would fundamentally upset the urban composition on this part of the site. As I have already indicated, the development to the south of Queensland Road is clearly needed to achieve a successful transition from the stadium to the surrounding area.
>
> 758. The location of the Ashburton Grove site is highly valued by objectors who operate businesses from there. They are worried about the consequences of having to move away and, for some, the practicalities of achieving the move without undue harm to the businesses raise particular challenges. I have no doubt that suitable relocation premises could be found, albeit in another part of the city. However, AFC's early efforts in this respect have caused unnecessary delays, in certain cases, and I am not convinced that all businesses could be successfully relocated before the Queensland Road part of the scheme commences in 2005 … Nevertheless, these considerations, together with those that relate to the scope of compensation payments, do not persuade me that the redevelopment of the Ashburton Grove site should be reduced in extent if the scheme were to proceed, given the design considerations that I have referred to".

11. He concluded (paragraph 760) that all of the land within the CPO was required for the purposes of the development, but that compulsory purchase was only needed in some cases to ensure that clear title to the land was obtained.

12. The scheme was, as the Inspector said, rooted in AFC's desire for a larger stadium. He noted that the Council had originally sought to justify the use of compulsory purchase powers on the basis that the scheme would help to secure AFC's long term future in Islington and would bring regeneration benefits. However, the main justification presented to the inquiry was that the CPO was needed to achieve a comprehensive regeneration scheme. He observed that there was no persuasive evidence to suggest that the Club would leave if the CPO was not confirmed: indeed, since the new stadium was to go ahead even without the CPO, that observation was hardly surprising. But he recognised that a more compelling reason to confirm the CPO would be the need to secure a comprehensive regeneration scheme. There was no precedent for a stadium led regeneration scheme, but he did not suggest that this was of itself a good reason to recommend that the CPO should not be confirmed.

13. It is, I think, an adequate summary of the material conclusions reached by the Inspector if I cite paragraphs 689 to 693 and 696 of his report.

"689. The Council's approach to regeneration of the area, in and around the CPO sites, appears to be opportunistic and weakened by its failure to engage the local community. Their Regeneration Strategy requires regeneration activity to be planned, to achieve defined objectives, with active involvement at all levels by the people who live and work in these areas. Indeed the Unitary Development Plan makes it clear that the Council will seek such involvement. Extensive consultation on the planning aspects of what is being proposed is no substitute for canvassing views on what is required.

690. Opportunism in matters concerning regeneration is understandable and not necessarily wrong. However, in the absence of objectives that are informed by local needs, there is a danger that the benefits to the community will be overly constrained by private interests.

691. The AFC scheme represents the largest development proposal ever made in the Borough. A critical requirement here is to secure a proper balance between the public and private interests. AFC want to fund and construct a new stadium whereas the Council are hoping to secure regeneration across a wide tract of north London. Indeed the Council have consistently refuted suggestions, that the scheme is for AFC's benefit, by pointing out that all their actions have been predicted on the basis that the scheme would deliver a comprehensive scheme of regeneration.

692. The question of whether the scheme is likely to be completed is a matter that I shall return to. The Council maintain that development at Drayton Park and residential development at Lough Road are likely to proceed in any event. They also point out that the effects of losing the Queensland Road element of the scheme would be severe and that planning permission for the overall scheme is indivisible. Certainly the need to obtain control over properties in Queensland Road, and thereby secure the overall scheme, is the main reason advanced for confirmation of the CPO. It was therefore surprising to learn towards the end of the inquiry that, shortly after the proceedings closed, the Council would sell AFC sufficient land to enable the stadium to be built. This willingness to allow the stadium to proceed, in absence of any certainty that it would form part of the publicly promoted comprehensive scheme of redevelopment, does not strengthen the Council's case and is not adequately explained by their unsubstantiated analysis of the risks involved.

693. These considerations undermine the Council's stated commitment to effective regeneration and are consistent with objectors' claims that regeneration arguments have been retrofitted to what is, in effect, simply a redevelopment scheme. This has particular significance in the light if the Council's acknowledgement that they would need to manage the process if

> successful regeneration is to be achieved.
>
> 696. I am led to the following conclusions. The main justification for the use of compulsory purchase powers here would be to achieve a comprehensive regeneration scheme. Confirmation of the Compulsory Purchase Order would overcome any outstanding uncertainties regarding title to the land, but the scheme of development that it would facilitate was not conceived with a view to effective regeneration. In any event successful regeneration would not flow automatically from completion of the scheme; it would require the Council's active involvement. However the Council's stated commitment to regeneration and to achieving a comprehensive scheme is undermined by their failure to adhere to their own Regeneration Strategy and by their willingness to allow the proposed new Arsenal stadium to be built, irrespective of whether the Order is confirmed".

He was not persuaded that the scheme would have the effect that the Council was putting forward and, as was submitted to me, there were unsatisfactory elements in it. For example, a waste recycling centre and a stadium were hardly desirable neighbours for residential accommodation, affordable housing was to be allocated in the least desirable parts of the site, and there would be a loss of areas of industrial and business use which would be detrimental overall.

14. I have already referred to the Secretary of State's letter of 12 December 2003 in which he indicated that he was minded to reject the Inspector's recommendation and asked for any comments within 28 days. It was suggested by Mr Horton that there was no power to act in that way and that it was not for the parties to inform the Secretary of State of any defects in his reasoning. It was further suggested that the Secretary of State acted unfairly in sending this letter because, if I correctly understand the submission, he was endeavouring to discover in what ways his decision might be said to be flawed. In fairness to Mr Horton, he did not in the end press those submissions, no doubt because he appreciated that they wholly lacked merit. While the Secretary of State was not obliged to notify the parties in advance that he was minded not to follow the Inspector's recommendation, he cannot be criticised for having given them the opportunity to make further representations. In particular, they might (as indeed the claimants did) want to suggest a need to reopen the inquiry if there was a good reason to do so. In any event, in my view this sort of advance notice is an example of good administration since it gives the parties an opportunity to raise matters which may affect the result if they are matters which have not been properly taken into account. The Secretary of State decided there was no need to reopen the inquiry since he had not differed from the Inspector on a finding of fact. The submission made by the claimants was that evidence of the individual circumstances of each of them and the hardship which would befall them should be considered. That had already been done before the Inspector and the decision not to reopen the inquiry cannot be criticised.

15. The Secretary of State's letter of 19 May 2004 by which he notified his decision to confirm the CPO is lengthy and detailed. His key conclusions were that the main justification for the use of compulsory purchase powers, namely to achieve a

comprehensive regeneration scheme, had been met, that there was a compelling case in the public interest that the CPO should be confirmed, that all the land was required and that the acquisition of the properties was proportionate. He assessed the scheme on the basis of the complete package of proposals.

16. He recognised that the Inspector could properly have regard to the planning aspects: indeed, s.226(2)(c) of the 1990 Act makes it clear that he should. But he noted that those matters were taken into account in the grant of planning permission. In those circumstances, it is not in my view appropriate for an Inspector to take a different view on planning considerations which have already been considered unless there is fresh material or a change of circumstances. Clearly if there is evidence to show that particular matters were not taken into account or were not fully considered, a fresh view can properly be taken. The Secretary of State concluded (paragraph 23): -

> "In considering whether to confirm the CPO the Secretary of State has judged the desirability of the overall scheme not solely on the basis that there is a planning approval, but also whether there is a compelling case in the public interest to justify acquiring private interests. Whilst the fact that planning permission for the proposals has been granted does not automatically mean that the CPO should be confirmed, the Secretary of State is satisfied that the provisions of s.226(1) and (2) have been met and that it is in the public interest that the development should proceed."

17. In paragraphs 24 to 28 of the letter the Secretary of State reached conclusions on the purpose of the CPO. He said (paragraph 26): -

> "The Secretary of State agrees with the Inspector's conclusions that the desire to bolster the Club's chances of future success is not a sound reason for use of compulsory purchase powers, but that a more compelling reason to confirm the CPO is the need to secure a comprehensive regeneration scheme. In this respect he also agrees with the Inspector that parts of the Borough are in need of regeneration and accepts the Inspector's conclusions that the Lough Road site and its surroundings are more in need than the area which includes the Ashburton Grove site. The proposals represent an opportunity to regenerate two of the Borough's poorest areas – the Lough Road site has been identified as an Area of Opportunity since at least 1988 and although much of Queensland Road is in use, many of its buildings are outdated and in poor condition".

Further on in the same paragraph he said: -

> "He also notes that the Council originally sought to justify the use of compulsory purchase powers on the basis that this would help to secure AFC's long term future in the Borough and that the scheme proposed would bring regeneration benefits. However, the main justification presented to the inquiry was that

> the CPO was needed to achieve a comprehensive regeneration scheme. The Secretary of State considers that the Council's actions have all been predicated on the basis of a comprehensive scheme".

He concluded that the benefits were indeed such as to satisfy him that a compelling case had been established.

18. The letter went on to deal in detail with the concerns which had led the Inspector to decide that a compelling case had not been established. It is not necessary to lengthen this judgment by citing these at length. Suffice it to say that Mr Horton recognises that he cannot launch a successful attack on the decision if the Secretary of State is reaching a different conclusion based upon a different judgment on the facts found by the Inspector. He is entitled to attach greater or less weight to particular matters and so reach a different conclusion. That he has done and no error of law is disclosed.

19. The main thrust of Mr Horton's submissions is that the real purpose of the scheme was to give AFC a new stadium and this could not properly be regarded as a scheme to achieve a comprehensive regeneration of the relevant area. Further, he submits that it is not a proper purpose for the exercise of compulsory purchase powers for those powers to be used to enable AFC to construct a replacement stadium. There was some argument in the course of the hearing as to whether the purpose of the proposals should be determinative. It seemed to me that, while the purpose of any scheme of development was very important and might in many cases produce the right answer, the effect of the scheme might be more important. However, the Secretary of State has clearly had regard to the purpose and I am content to assume for the purposes of this case that purpose is all important. The Secretary of State has decided that the main purpose was a comprehensive regeneration, albeit the trigger for the scheme was the desire of AFC for a new stadium with a substantially increased capacity. There is nothing in the material put before and accepted by the Inspector which persuades me that that decision was ill founded or was one which the Secretary of State was not entitled to reach. Developments which result in regeneration of an area are often led by private enterprise. Mr Horton perforce accepts that that is so, but submits that this is not the sort of situation where, for example, a private development is the anchor for a particular scheme. I disagree.

20. I understand and have considerable sympathy with the claimants' concerns that their businesses are to be at best disrupted by a scheme which benefits AFC. But the Council was entitled to make use of AFC's desire to have a new stadium to produce and promote a scheme which it regarded as a comprehensive redevelopment of the area in the public interest. And the Secretary of State was entitled, in his judgment, to conclude that the main purpose, and certainly the main effect, was indeed to achieve a comprehensive and desirable redevelopment of a deprived area.

21. Mr Horton submits that the claimants' Convention rights have not been properly considered. There is no doubt that the Secretary of State did consider them and it is to be noted that the Inspector's view was that, if the Secretary of State differed from that which he recommended, he believed that any interference with Convention rights was

likely to be considered proportionate. That was the view taken by the Secretary of State. Once he decided that there was a compelling case that the CPO should be confirmed, that view was not only not erroneous but was manifestly correct. It was not necessary to consider each case individually once the view was properly taken that all the land had to be acquired to enable the scheme to be put into effect.

22. Complaint is made that there was insufficient information provided by AFC and the Council to enable the Secretary of State properly to be satisfied that the scheme was viable. The Inspector, although critical of what he regarded as the lack of information, was satisfied that the scheme was deliverable. The Secretary of State was entitled to take the same view. There was nothing unfair in the failure to provide more information. That failure would hardly have prejudiced the claimants: it was far more likely to have prejudiced the Council.

23. Although considerable time was taken in presenting this claim, in reality it has no substance. The Secretary of State was entitled to form his own judgment and this he did. He had regard to all relevant matters. The fact that the scheme was led by and to a large extent dependent on a private developer is no reason why it should be rejected. Section 226(4) of the 1990 Act itself recognises that the Council which has determined that there should be a CPO does not itself have to carry out the purpose for which it is required.

24. It follows that this claim must be dismissed.

MR JUSTICE COLLINS: For the reasons given in the judgment, copies of which have been provided to the parties, this claim is dismissed.

MR LITTON: My Lord, on behalf of the Secretary of State, I would ask for the First Secretary of State's costs to be paid by the claimants. I understand, my Lord, that in the event that your Lordship makes an order for costs, quantum is agreed, but I understand that there is a dispute as to whether any costs should be payable at all.

MR JUSTICE COLLINS: Yes.

MR PIKE: My Lord, my learned friend is quite correct, quantum is agreed if you do choose to award costs against the claimants in this case. My reason on instructions for resisting the costs application is a very short point, my Lord, it is this: where an objector to a compulsory purchase order is successful after a public inquiry in resisting that compulsory purchase order or confirmation of it, he would normally be entitled to his costs reimbursed for the costs of the public inquiry. Now, in this case, the objectors, the claimants before you, were successful at the public inquiry in front of the inspector in that they did all that they could do at the time in persuading the inspector that the order should not be confirmed. They could not have done any more than that, as your Lordship will appreciate, because the inspector there was holding the inquiry for the Secretary of State and he was the person they had to persuade at that time. Having incurred the costs of the inquiry and persuading the inspector that the order should not be confirmed, the Secretary of State has now taken a different view. But, in my submission, it would not be

fair in those circumstances for the claimants, having done all they could when given the opportunity, because they will not be able to recover their costs of the public inquiry, in those circumstances it would be just for them not to have to bear the Secretary of State's costs at this stage.

MR JUSTICE COLLINS: They chose to challenge in this court the Secretary of State's decision and they lost. The normal rule in those circumstances is, as you are well aware, that costs follow the event. There have to be, I will not say exceptional but there have to be somewhat unusual circumstances for that not to follow, subject to them not being legally aided and that sort of thing.

MR PIKE: I quite accept that costs normally follow the event but, as your Lordship will be aware, it is not a fixed rule.

MR JUSTICE COLLINS: No, but it is the normal rule.

MR PIKE: My Lord, the reasons why I say you ought to depart from that rule in this case are those that I have given. The claimants have incurred significant costs at an early stage and did all they could in persuading the inspector. The Secretary of State has chosen to take a different view, but that was out of the --

MR JUSTICE COLLINS: I am afraid this is not the only time that the Secretary of State has not agreed with an inspector, it does happen. But the ultimate decision is the Secretary of State's; not the inspector's. He only recommends.

MR PIKE: I understand the point. My Lord, you have heard my submissions. That is all I have to say. There is no need for me to repeat it for you.

MR JUSTICE COLLINS: I am sorry, harsh although it may be, the normal rule is that costs follow the event and I can see no reason why it should not follow in this case. What was the amount that was agreed?

MR LITTON: My Lord, the agreed amount is £12,258.

MR JUSTICE COLLINS: That is agreed as a quantum figure?

MR LITTON: My Lord, it is.

MR JUSTICE COLLINS: In that case I shall direct that the claim be dismissed with that sum to be paid by way of costs by the claimants to the Secretary of State.

MR LITTON: I am grateful, my Lord.

MS MCHUGH: My Lord, on behalf of Islington, there is a further application --

MR JUSTICE COLLINS: I am sorry, yes, you are?

MS MCHUGH: I am Karen McHugh and I am representing the London Borough of Islington. I have been instructed to seek a separate order for costs on behalf of Islington and I appreciate that that is a somewhat unusual application to make.

MR JUSTICE COLLINS: It is the Bolton test.

MS MCHUGH: Indeed, my Lord, and you will be very familiar with Bolton, but I have a

copy of it in case your Lordship wishes to familiarise himself.

MR JUSTICE COLLINS: Frankly, what extra -- it was very nice to see Mr Katkowski and he is, as always, very helpful, but he did not actually say anything that Mr Litton did not say, did he?

MS MCHUGH: My Lord, there are bases on which I make the application. The first basis is that it was right that the Local Authority appear and be separately represented. This was a matter of enormous significance for the Borough, not merely in terms of the financial implications. As your Lordship's judgment went against (inaudible). In those circumstances, I say that this is an appropriate circumstance for your Lordship to depart from the normal rule and allow the Council its costs, it having a separate interest to represent other than that of the Secretary of State.

The other basis upon which I make that application concerns a question of evidence. Evidence was produced by the Local Authority with regard to particular allegations that were made by the claimants concerning Arsenal's alleged failure to (inaudible) the appropriate claimants in this case. My Lord, that was not a matter that was seriously pursued in argument and I appreciate that was quite rightly so, but it was a matter raised in the claim. It was pursued notwithstanding the evidence adduced by Islington in the skeleton argument. In those circumstances, my Lord, I submit that the claimants, who raised an allegation of that nature in circumstances where a Local Authority is going to be represented in a case and will obviously incur costs in dealing with that matter, ought to be in a position where the Local Authority can recover its costs of having to deal with that point. So those are the two bases, very briefly, somewhat unusually in this case because of the nature of the development and because of how far --

MR JUSTICE COLLINS: It clearly had an interest in the sense that it was an important matter for the Authority and there is no criticism of its decision to attend and be represented, but that does not mean that it gets its costs.

MS MCHUGH: My Lord, those are my submissions, as I indicated to your Lordship, that this is an appropriate case for your Lordship to depart from the normal order and I say no more, my Lord.

MR JUSTICE COLLINS: Mr Pike, what about this point that she makes about having to put in evidence to meet the allegations which were not substantially pursued in the end? You do not need to trouble me about the general proposition. I do not think this is a case overall for two costs.

MR PIKE: I am grateful to your Lordship for that indication. On that point about relocation, my Lord, the relocation point, what that evidence went to and the reason why the issue of relocation had to be raised was a substantial plank of the argument on consideration of the objective position and their human rights. My Lord, with respect, it is not right to say that that was not pursued because it was part of --

MR JUSTICE COLLINS: When I say it was not pursued, the need for the evidence to be put in was perhaps not so obvious when the arguments were put forward -- rather the need for that matter to be ventilated. But what is said is that they had to produce evidence which was, as it were, within their domain because of an allegation that was part of the claim, and that created some degree of extra cost. There is some possible force in that, as I see it. But if I were to award costs, it would be limited to the costs of preparing that evidence and nothing more than that, which would be frankly pretty small

but it would be something.

MR PIKE: My Lord, if it is simply a question of -- if it be suggested that the evidence was produced and that was unnecessary because of the point --

MR JUSTICE COLLINS: No, it is not suggested it was unnecessary, it is suggested that it was necessary to produce it. It does not really matter whether it formed a large or small or no part of the hearing. The fact is the allegation was made and it is said, and I think not unreasonably said, that it was necessary to meet it by way of some evidence, and in those circumstances, why should you not, you having lost, pay for the extra work involved, small though it may in overall terms have been, in preparing and producing that evidence?

MR PIKE: Because, your Lordship, that evidence was not in any way relied upon or used as within the reasoning in your judgment for dismissal of the claimants' appeal on that ground. So a second respondent could put all sorts of material in and then turn around and say: well, we have had to put this in because these matters were aired. It does not mean that the matters were not aired properly in the first place. Furthermore it did not actually inform your Lordship's judgment because it was not something which was material to the issues to be determined by you. In that case, your Lordship, I do not see why the costs of producing that evidence ought to be allocated then to the unsuccessful claimant, precisely because the second respondent could introduce all sorts of evidence which was not necessary.

MR JUSTICE COLLINS: Of course it could, but the point that is being made is that you made an allegation, it was met, and needed to be met, by evidence. At the end of the case, it did not actually, as it transpired, form any material part of the judgment because it did not need to because the allegation which you had made was not one which frankly had any substance so far as error of law was concerned. But that does not mean that it was unreasonable for them to have put in the evidence -- the fact that in the end it turned out not to be necessary. You cannot take a chance that an allegation which you can meet, you believe, by the production of evidence is not in the end going to be pursued. If a claimant raises a point, presumably it is because the claimant thinks it is a good point or a point that is worth arguing.

MR PIKE: Your Lordship, just taking that in stages, if I may. First of all, the claimant did think it was a good point to argue that, among other things, one of the factors not taken into account by the Secretary of State was, as the claimant saw it, a failure to take proper measures to relocate the claimants. With respect, the claimants do not accept that the second respondent's evidence on that point did meet the point. They say: well, these things went on, that these steps taken by the club were thought to be, by us, to be adequate. That matter was not something that the claimants first of all accept, and secondly, it was not something that was decided by you, my Lord. It was not as though you yourself concluded that, in these circumstances, I accept the second respondent's evidence that the efforts to relocate had been reasonable.

MR JUSTICE COLLINS: I thought that your point was a bad point, at the end of the day, but that does not mean that it was not appropriate and reasonable for them to put in evidence in case I did not think it was a bad point. That is really what lies behind it. You cannot second guess the judge's views when the case is presented. You have to deal with it as best you can and if an allegation is made which you consider -- when I say you, I mean the other side -- considers to be one which is not of substance and can be met properly by evidence, then it is entitled to put in that evidence and it is perfectly

reasonable to do so. The fact that, at the end of the day, it was not necessary because the point was a bad one is frankly nothing to the point, is it?

MR PIKE: I am not insensitive to the fact that your Lordship sees there is merit in this. I will say only two more things, I do not want to trouble you unduly on this. It is this: if you are to award costs on this basis it must, in my submission, flow from one of two things, either that the evidence was relevant and went to something which formed a material part of your judgment or your reasons for dismissing the claim, or alternatively that, even if it was an irrelevant factor, that you yourself concluded in your judgment that the evidence of the second respondent was to be preferred. That, in my submission, is not what happened. There is evidence from two sides and there is clear distinction between the parties. So your Lordship has not found that, notwithstanding its irrelevance, the evidence was warranted because you preferred it and your Lordship has not relied on that issue in dismissing the claimants' claim. On that basis, your Lordship, my submission is that it would not be proper to find against the claimants on costs on this point.

MS MCHUGH: My Lord, one point in response to that, that the Council's evidence was to be preferred, there was not actually any evidence in response to the Council's evidence. There was an allegation that was raised by the claimants, which the Council quite properly responded to, producing, as far as it was concerned, full facts and evidence on. It was never countered or responded to by the claimants, and in those circumstances, your Lordship had only that evidence on which to determine the point had your Lordship needed to do so. I still maintain that it was right for the Council to put that (inaudible). In the circumstances, it is right for the Council to receive its costs.

MR PIKE: My Lord, I appreciate it is only right that Ms McHugh should have the last word on this and I do not wish to trouble you unduly, but there are two things in what Ms McHugh has submitted to you which I ought to correct, if I may. First of all, it is not right to say that the only evidence you had to determine the matter on was that put in by the second respondent because, of course, you had two sets of evidence. So it was not as if you were relying on that evidence to counter the point. Secondly, it is not right, with respect, to say that the claimants did not counter that evidence. Were that correct, if we were to be criticised for not having done that, then what your Lordship's court would face would be an endless stream of evidence and counter-evidence because the sides do not agree on the point. Had we put in further evidence, it may well have been your Lordship would have been displeased with the fact that yet more evidence was being put into court.

MR JUSTICE COLLINS: I am quite satisfied that this is not, as a general proposition, a case for double costs. It is perfectly reasonable for Islington to attend by counsel and to take part in the argument. But, in fact, the points that were made by Islington did not essentially go beyond the points that were dealt with by Mr Litton on behalf of the Secretary of State. Accordingly, the principles of Bolton would apply to make it clear that this is not a case for two sets of costs.

There is only one issue which may, in the circumstances of this case, justify a small amount of costs and is the costs incurred by the Council in meeting an allegation in relation to the relocation of the businesses of those whose premises were to be compulsorily purchased, and there was an issue as to the steps that had been taken as to the reasonableness of those steps and so on. At the end of the day, that was not a matter which I considered was a point which had any merit so far as the claim was concerned. Indeed that issue had been dealt with by the inspector and there was no reason why the

Secretary of State should have gone into it in any greater depth. But the Council did produce, because the allegation was there, evidence which, in its view, was necessary in order to try and meet that alternative. It seems to me that if allegations are made which are or may be fact sensitive, and if the body, in this case the Council, who would be able to give evidence to rebut that, does so, then it is not unreasonable in many circumstances for the costs of having to do that to be met by the unsuccessful claimants. In my view, that is the position here.

The costs payable to the Council will be limited to the preparation and service of that evidence. I think it is clear to everyone what that evidence covered. But for the purposes of an order, in case there is any problem, how do you suggest we define it, Ms McHugh?

MS MCHUGH: My Lord, it is limited, I think, to the evidence of Helen Shackleton(?) which was by way of a witness statement and the additional documents.

MR JUSTICE COLLINS: I shall say limited to the preparation and service of the evidence of Helen Shackleton. It will not be a great deal I imagine, but obviously I shall have to say to be agreed, and if not agreed, you can come to me in writing. It is probably cheaper and quicker than saying a detailed assessment.

MS MCHUGH: My Lord, yes.

MR PIKE: My Lord, there is one further point and that is the question of appeal. I do formally have to ask for leave.

MR JUSTICE COLLINS: You do not have to, but if you want to, yes.

MR PIKE: If the claimants wish to go higher. My submissions are brief and I will hopefully keep them brief in your Lordship's court. There are two grounds. First of all, your findings on the question of purpose and the purpose of the Compulsory Purchase Order. Now, I am afraid I did do not have a final version of your judgment.

MR JUSTICE COLLINS: The version you had -- I think there were a few typos.

MR PIKE: It was just in case the paragraph numbers had changed.

MR JUSTICE COLLINS: I do not think so. Which paragraph are you looking at?

MR PIKE: I am afraid I cannot find my copy of it. First of all, at paragraph 18, about two thirds of the way down, your judgment reads:

> "I am content to assume for the purposes of this case that purpose is all important."

MR JUSTICE COLLINS: It has changed. It is now 19.

MR PIKE: Now 19:

> "The Secretary of State has decided that the main purpose was a comprehensive regeneration, albeit the trigger for the scheme was the desire of AFC for a new stadium with a substantially increased capacity."

In submissions Mr Horton took you to the statement of reasons for the Compulsory Purchase Order which, in the claimants' submission, were significantly different from the

reasons which the Secretary of State concluded were the reasons for the order. In my submission, my Lord, the statement of reasons are there. They are required under the rules to be made by an enquiring Authority making an order and the Authority itself may not simply depart from that statement of reasons once made and once issued without some formal decision. In those circumstances, it is not for the Secretary of State to simply assume a different set of reasons and proceed on that basis. That was, in my respectful submission, something that was put to your Lordship by Mr Horton. So for that reason, I say there is a reasonable prospect of success on appeal on that point, simply because what your Lordship has, in effect, said the Secretary of State can do is not, in my respectful submission, something which the Secretary of State ought to do, ie depart from the statement of reasons furnished by the enquiring authority in advance of the CPO and following the making of the orders. That is the first point, My Lord.

The second point is on paragraph 20, which I presume will now be 21.

MR JUSTICE COLLINS: The one starting "Mr Horton submits ... "

MR PIKE: That is correct, my Lord. What my Lord has said there is that once the Secretary of State decided there was a compelling case that the CPO should be confirmed, his view was not the view of the claimants or the submission was not only erroneous but was manifestly correct.

MR JUSTICE COLLINS: No, the view of the Secretary of State.

MR PIKE: I am sorry, my Lord, I am reading from this old draft.

MR JUSTICE COLLINS: There are two negatives:

> " ... that view was not only not erroneous but was manifestly correct."

MR PIKE: I do apologise:

> "It was not necessary [my Lord held] to consider each case individually once the view was properly taken that all the land had to be acquired to enable the scheme to be put into effect."

Furthermore, your Lordship also found that the inspector had also concluded, in any event, that where there was a compelling case, that that would mean that the interference was justified.

MR JUSTICE COLLINS: The inspector's decision was that, if contrary -- and I am paraphrasing -- if contrary to my view, that there was no compelling case, the Secretary of State believes there is, I think that it will be proportionate in terms of Article 1. That is the effect of what he said. I was simply agreeing with him.

MR PIKE: Taking that in reverse order. First of all, as to what the inspector thought of that point, in my submission what the inspector was really saying was that -- my understanding of the position is that where the Secretary of State finds a compelling case, that is equivalent to the test that should be applied under the Human Rights Act.

MR JUSTICE COLLINS: He was saying that, in his view, that would apply, yes.

MR PIKE: What I say about that, my Lord, is that what the inspector said on that adds

nothing to the point, and the main point is that, in the light of the authorities cited to your Lordship, that there was a duty to consider individually the circumstances of the claimant in, as it was put in the skeleton, an articulated manner. What I say about your Lordship's judgment is, with the greatest of respect, first of all, none of the authorities referred to have been cited or indeed mentioned by your Lordship. Again, with the utmost respect, the point advanced by the claimants has, I would respectfully submit, simply not been grappled with here. The claimants do not, from your Lordship's judgment, have clear reasons as to why that point of law was not preferred. I say that with the greatest of respect.

MR JUSTICE COLLINS: You are perfectly entitled to say my judgment is too short. The simple answer is that it is plain that I did not think anything of the argument.

MR PIKE: The claimants' position is that that is a good proposition to put to your Lordship, and as far as the Court of Appeal is concerned, the claimants submit that it is not possible to tell why your Lordship dismissed that reason. So it is a reasons point, but also the fact that, nevertheless, the claimants say that point is always still good. That is the nub of it, my Lord. That is why I say there would be a reasonable prospect of success in the Court of Appeal.

MR LITTON: My Lord, very briefly. As to the first point, your Lordship may recall that at paragraph 682 of the inspector's conclusions, he said this:

> "The Council originally sought to justify the use of compulsory purchase powers on the basis that this would help to secure AFC's long term future in the Borough and that the scheme proposed would bring remuneration benefits. The main justification presented to the inquiry was that the CPO is needed to achieve a comprehensive regeneration scheme. It would also ensure clean title to all the land, even though much of it already appears to be in the ownership and control of AFC or the Council."

That is a matter which the Secretary of State in his decision letter, in effect, repeated and paraphrased, and the long and short of it is that the Secretary of State accepted that the Council -- and the reason underlined in the CPO was the desire for comprehensive regeneration. So, my Lord, whatever the reasons originally given for the making of the CPO are, it is plain that by this stage of the inquiry, and the decision being taken, the case was being presented on the basis of comprehensive regeneration and that point of view was accepted ultimately by the Secretary of State.

My Lord, insofar as the Human Rights Act point is concerned, your Lordship is quite right. You sought to paraphrase what the inspector said, and what he actually said at paragraph 785 was this, under the title "human rights" -- bearing in mind, my Lord, that he felt it unnecessary to address the question, and he then went onto say:

> "Nevertheless the Secretary of State's decision may differ from that which I recommend. There would be a compelling case in the public interest, if the CPO were to be confirmed. Compensation would be payable to statutory objectors and, whilst this is not a matter for me to determine, I believe that any interference with people's rights, under Articles 1 and 8, is likely to be considered proportionate."

So he was not simply looking at the issue as a compelling case. He went on and looked at proportionality of the measurements.

MR JUSTICE COLLINS: The criticism is that there was an elaborate argument raised and I dealt with it in one sentence. But, why not?

MR LITTON: My Lord, if the argument lacks any merit then, in my submission, one sentence is sufficient.

MR JUSTICE COLLINS: What I have said is that if there is a compelling case for a CPO, then it would be proportionate. It seems to me to be a self-evident proposition.

MR LITTON: My Lord, it is not just a self-evident proposition, but its an observation that certainly Sullivan J has made in, for example, I think it is the Boxter(?) case, which is the challenge to the Ipswich Reforms(?).

MR JUSTICE COLLINS: If the criticism is that I should have referred to lots of authority, then frankly I reject that. Judgments are too long nowadays, in any event.

MR LITTON: My Lord, those are the only two points I would wish to make in relation to the application for permission to appeal.

MR JUSTICE COLLINS: No, Mr Pike, you must persuade the Court of Appeal if you wish to take this matter further.

MR PIKE: I am grateful to your Lordship.