CO/745/2017

IN THE ADMINISTRATIVE COURT

BETWEEN:

DAVID MILLS

Claimant

-and-

LONDON BOROUGH OF HAMMERSMITH AND FULHAM

Defendant

CLAIMANT'S SUMMARY REPLY TO

DEFENDANT'S SUMMARY GROUNDS OF RESISTANCE

21 March 2017

OVERALL

1. As set out in more detail below, the Defendant's Summary Grounds of Resistance (SGOR) offer no knockout blow.
2. Indeed, the SGOR show the clear arguability of the claim.
3. Permission should be granted.

THE GROUNDS OF CLAIM

4. The Claimant's challenge (as set out in his Grounds of Claim: GOC at #46) is that:
    (a) The 11 November 2016 Decision was unlawful in that:
        i. **(1)** It was based on an error of fact and/or misdirection to the effect that the options on which the Council had consulted as part of its decision-making included the proposal which the Claimant (and others) had put the Council (including in the Claimant's letter of 14 June 2015) when that was simply not the case; and
        ii. **(2)** It was reached in breach of the legitimate expectation created by the leaflet which underpinned that consultation (which promised that "Any changes to the current controls will only be implemented with the support of the majority of respondents. Your views are important to us and will shape the future of parking in your area.") in that it

adopted an option (option 4) which only 8.6% of respondents to the consultation had supported.

(b) The 7 December 2016 Orders were unlawful in that:

i. **(3)** They purported to be pursuant to the 11 November 2016 decision which was unlawful, as above.

ii. **(4)** They were not in fact pursuant to that decision in that the parking arrangements which they impose (version 2) are not those authorised or provided for by that decision (version 1), or indeed any other decision duly taken by Councillor Harcourt in exercise of the Council's powers under the 1984 Act. There was no lawful basis for the Orders.

5. **(5)** Moreover, in relation to (3), not only must the party which seeks to depart from its promise identify to the court the legitimate aim being pursued in doing so (which the Council has simply failed to do), but also and in any event, the decision to break the promise (here Councillor Harcourt's 11 November 2016 decision) needed to take into account both the promise that was made and the fact that the decision he was invited to take amounted to a breach of the promise (which it did not do).

THE DEFENDANT'S SGOR

6. In response, the Defendant argues that:

(a) The substance of C's complaint is no more than a disagreement with the decision on its merits [SGOR#3(i)];

(b) The decision to create and expand zone JJ was in furtherance of its statutory duties [SGOR#3(iii) + #31];

(c) The creation and expansion of zone JJ was a proportionate response to those legitimate aims [SGOR#3(iii) + #31];

(d) The expansion of zone JJ was in response to the desire by the majority of residents in the affected roads [SGOR#3(iv) + #35 + #38-40];

(e) The Claimant does not live in a road within the extended zone JJ and so his challenge is academic and he has no reasonable prospects of getting any relief [SGOR#3(v) + #26-#30];

(f) The 7 December 2016 Orders had a proper lawful basis as they were authorised by the Cabinet report and in pursuance of: the October 2015 consultation, ward councillor consultation, responses to July 2016 letters; and as contemplated by the Cabinet report [SGOR#3(vi) + #45]; and

(g) The court can refuse relief on the basis that, "were the decision to be quashed and the Authority required to make a new decision, that fresh decision is highly likely to be to the same effect" [SGOR#3(vii) + #48].

NO RESPONSE AT ALL TO (1) AND (5)

7. Accordingly, the Defendant offers no answer at all to (1) or (5) above.

8. In particular, the Defendant does not dispute **(1)** that the Council (in the form of Councillor Harcourt, the Cabinet Member who made the decisions in play here) proceeded throughout on the basis of a material error of fact and/or misdirection to the effect that the options on which the Council had consulted as part of its decision-making included the proposal which the Claimant (and others) had put the Council (including in the Claimant's letter of 14 June 2015) when that was simply not the case.

9. The Defendant also does not claim (in response to **(5)**) that, when deciding to break the promise which the Council had made to residents, Councillor Harcourt took into account both the promise that was made and the fact that the decision he was invited to take amounted to a breach of the promise.

10. It follows that the Claim should succeed on both of those points. Either of them would lead to the decision of 11 November 2016 (and therefore the orders of 7 December) to be declared unlawful and quashed. Permission should be granted on that basis alone.

11. But, as it happens, even what the Defendant actually then says in response to the GOC also offers no answer to the other points in the GOC, as follows.

WHAT THE COUNCIL SAYS ON (2)-(4)

12. Taking (a)-(g) above in turn:

(a) The substance of C's complaint is no more than a disagreement with the decision on its merits

13. The "merits" of the decision are not matters for judicial review.

14. The Claimant's grounds of challenge are properly arguable points of law.

15. While he disagrees with the merits of the decision, that is not what he argues here. Indeed, as he explains in his second witness statement (attached to this document for ease of reference), if the decision had been a lawful implementation following a consultation in which other residents had given majority support for the scheme in question, then the Claimant would not be pursuing this matter – he would be content that a lawful process had been followed, even if unhappy with the answer.

(b) The decision to create and expand zone JJ was in furtherance of its statutory duties

(c) The creation and expansion of zone JJ was a proportionate response to those legitimate aims

16. Notably, the Defendant does not dispute that it acted in breach of a substantive legitimate expectation.

17. Its only answer is to claim that breaking its promise in that way was a proportionate response to the aims arising from statutes which underpin the introduction of parking schemes.

18. But that entirely fails to address what the law requires.

19. In particular, what is required is a focus on the reasons for departing from the promise, not a reason for the underlying (promise-breaking) decision.

20. That, of course, is entirely bound up with and flows from the requirement (as above) that the decision-maker take into account the promise and the fact that it is contemplating departing from it.

21. As above, the Defendant did not consider those points at all. It is no surprise that, having not taken into account the promise, it did not identify (nor has it now) any basis for breaking the promise.

22. In particular, the generalised wish to improve parking in the area (plainly) does not focus on, and does not provide a basis on which to break, its promise to residents as to how decisions on improving parking would be made (and, in particular, the promise that "changes would only be implemented with the support of the majority of respondents" [**D/21**]).

23. But in any event, the Defendant has still offered nothing (other than a bare assertion) for claiming its action in breaking the promise was in some way a proportionate (i.e. proportionate to the nature of the promise being broken) means of achieving that aim.

24. Indeed, even now, the Defendant has offered no reason, let alone any potentially proportionate reason for breaking its promise. Recall (from **[D/160]**), that a majority of respondents to the consultation actually preferred "no change" of the options offered and that the option which the Defendant then progressed had only 8.6% support. There was no basis at all to break the promise which had been given, let alone a proportionate reason.

(d) The expansion of zone JJ was in response to the desire by the majority of residents in the affected roads

25. It is not clear how or why the Defendant considers this might be an answer to the illegality here. It focusses, at most, on the adjustment made to zone JJ to depart even from what had been the option consulted on across the area. It is certainly not (let alone was it expressed at the time to be) a basis for breaking the promise (given overall to all consultees) in relation to the implementation of a scheme across that area.

26. In particular, at no point was it suggested in the consultation materials that a street-by street variation from the options consulted on might be contemplated. The consultation options were presented as the basis for changes across the whole of Zone J, or not.

27. If, having consulted on those options on the basis of an express commitment only to adopt one of the change options if it supported "by the majority of respondents", the Council considered that another change options might command majority support among respondents, then the proper approach would have been to consult again including of that other option.

28. (Indeed, as the Claimant has explained, it is proper consideration of another option, most particularly the combination of residents' only and shared bays, which he and others have repeatedly asked to have considered and which Councillor Harcourt said would be a consultation option.)

29. But, even if none of that were the case, then consulting a few streets to ask them about adjusting the boundary of sub-zone JJ does not provide any proper basis for implanting a split zone scheme in the first place. In particular, those further, street-by-street inquiries were premised on a split zone going ahead (in substance: assuming we go ahead with a new sub zone JJ do you want to be in it); they cannot provide any basis for zone JJ in the first place, let alone therefore in those roads.

(e) The Claimant does not live in a road within the extended zone JJ and so his challenge is academic and he has no reasonable prospects of getting any relief

30. Quite rightly, the Defendant does not challenge the Claimant's standing to bring the claim. It focuses only on relief.

31. But <u>first</u> the factual premise underpinning its argument on relief a bad one.

32. In particular, contrary to what the Defendant seems to think, the Claimant is in fact directly affected by the new parking scheme because (as he explains in his second witness statement, attached to this Reply for ease of reference), the new parking restrictions on streets around Loftus Road have displaced parking into Loftus Road, making it even harder than before for its residents to park there.

33. But even if that were not the position, then <u>secondly</u> the Defendant's argument is entirely dealt with by what Jonathan Parker LJ said in **Kides v Cambridgeshire** [2002] EWCA Civ 1370:

> "132. …. As to that, it seems to me that there is an important distinction to be drawn between, on the one hand, a person who brings proceedings having no real or genuine interest in obtaining the relief sought, and on the other hand a person who, whilst legitimately and perhaps passionately interested in obtaining the relief sought, relies as grounds for seeking that relief on matters in which he has no personal interest.
>
> 133. I cannot see how it can be just to debar a litigant who has a real and genuine interest in obtaining the relief which he seeks from relying, in support of his claim for that relief, on grounds (which may be good grounds) in which he has no personal interest.

> 134. It seems to me that a litigant who has a real and genuine interest in challenging an administrative decision must be entitled to present his challenge on all available grounds. Nor do I read the judgment of Sedley J (as he then was) in **ex parte Dixon** as casting doubt on that proposition. Similarly, Lord Donaldson MR's reference (in **R v. Monopolies and Mergers Commission, ex parte Argyll Group plc** [1986] 1 WLR 763 at 773) to "the applicant's interest" is, as I read it, a reference to the applicant's interest in obtaining the relief sought: in this case, the quashing of the planning permission.

34. The Claimant has an interest in obtaining the relief sought (a lawful consultation process in which residents could express a preference for the scheme which he and others have promoted, and which Councillor Harcourt would be an option in the consultation), even if it were factually the case (which it is not) that he had no interest in the actual grounds of challenge.

35. The claim is not in any sense "academic". The Defendant's point is a bad one.

(f) The 7 December 2016 Orders had a proper lawful basis as they were authorised by the Cabinet report and in pursuance of: the October 2015 consultation, ward councillor consultation, responses to July 2016 letters; and as contemplated by the Cabinet report

36. The 11 November 2016 decision (taken by Councillor Harcourt as Cabinet Member with delegated powers on this matter) is recorded at [**D/170**] namely:

> "It was agreed that … A subzone, as detailed in Appendix 9, be created with Monday to Sunday controls from 9am to 9pm."

37. The Defendant does not dispute that what is provided for in the Orders is not in fact the scheme set out in Appendix 9, as decided upon by Councillor Harcourt as above.

38. Its response is simply point to a number of factual things which explained the unlawful departure from what had been decided upon.

39. But that misses the point here which is the legal basis (the *vires*), or rather the lack of it, for the scheme as actually set out in the Orders.

40. The Defendant's only suggestion in that regard is to note that [**SGOR #45(iii)**]:

> "the Cabinet report envisaged at para 7.14 that the subzone JJ could be expanded to include more streets or shortening the maximum stay period for pay and display users."

41. Paragraph 7.14 of the Cabinet Report said this [**D/151**]:

> "These controls are proposed to be implemented in summer 2016. Once installed they will be monitored and can be adjusted if they are not providing to be effective. This could include expanding the zone to include

more streets or shorting [sic] the maximum stay period for pay and display users."

42. Accordingly, not only did that paragraph at most contemplate adjustments to the scheme later (rather than changes even at the point of implementation which is what happened here), but also the decision taken on 11 November 2016 did not in fact provide for any such adjustments. Paragraph 7.14 was not relied on and cannot anyway help the Defendant.

43. As above, the decision was to implement the scheme as set out in the report. But, as explained in the GOC (and not disputed by the Defendant) what was then put in place was not in fact what was set out in the report.

44. Accordingly, even if (contrary to the Claimant's GOC), the decision of 11 November 2016 had been a lawful one, then what has in fact been implemented was not empowered by that decision. The Orders are *ultra vires*.

(g) The court can refuse relief on the basis that, "were the decision to be quashed and the Authority required to make a new decision, that fresh decision is highly likely to be to the same effect" [SGOR#3(vii)].

45. The GOC appears there to be relying on the provisions of section 31(3C) and (3D) of the Senior Courts Act 1981, although it does not say so:

> "(3C) When considering whether to grant leave to make an application for judicial review, the High Court—
>
> (a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and
>
> (b) must consider that question if the defendant asks it to do so.
>
> (3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome would not have been substantially different, the court must refuse to grant leave.

46. Several points arise:

a. The focus of section 31 is on the decision at the time, not on what might now happen – the Defendant's focus on the decision it might now take if this decision is quashed is entirely misconceived.

b. The burden is on the Defendant to persuade the Court that the decision at the time would highly likely to have been the same: **Bokrosova v. Lambeth London Borough Council** [2016] HLR 10 per Lang J [88].

c. That assessment should "normally be based on material in existence at the time of the decision and not simply post-decision speculation by an individual decision-maker": **R (Logan) v. Havering London Borough Council** [2016] PTSR 603 per Blake J 55].

47. Applying that here, the Defendant has offered nothing to support a contention that it is highly likely that the decision would have been the same had it not acted unlawfully.

48. Indeed, it is impossible to see how any such material could support that conclusion anyway (and certainly not without the court getting involved in considering the merits of the underlying issues, which would not be lawful).

49. There is certainly no basis for the Court to conclude that, if the Defendant had (1) realised it was breaching the promise, (2) come up with some proportionate reason for doing so (something it has still not done) then it would have reached the same decision on 11 November which, somehow (3) would then have lawfully allowed for a scheme to be implemented which is not even the 11 November 2016 scheme.

50. The Defendant's point is a bad one.

OVERALL

51. It follows that the Defendant has offered no knockout blow and, indeed, even beyond those things to which it offers no answer (which themselves would lead to a quashing of its decisions) has shown the clear arguability of the GOC.

52. The Court is asked to grant permission for a judicial review challenge on the basis set out above.

53. At the substantive hearing, the Court is asked to:

    a. Declare that the decision and the orders were unlawful; and

    b. Quash the decision and the orders.

David Wolfe QC

MATRIX

21 March 2017