IN THE ADMINISTRATIVE COURT

BETWEEN:

DAVID MILLS

Claimant

-and-

LONDON BOROUGH OF HAMMERSMITH AND FULHAM

Defendant

STATEMENT OF FACTS AND GROUNDS

Key documents:

- *Witness statement David Mills [**B/1-17**]*
- *Hammersmith & Fulham Controlled Parking Zones map February 2013 [**D/1**]*
- *Controlled Parking Zone J 2013 [**D/2**]*
- *Consultation booklet [**D/14-21**]*
- *Letter to residents May 2016 [**D/27-30**]*
- *Proposed parking scheme May 2016 [**D/29**] ("version 1")*
- *Letter to residents July 2016 [**D/56-57**]*
- *Cabinet Member report (report dated "16 May 2016" but decision 11 November 20116) [**D/143-164**]*
- *Cabinet member decision record 11 November 2016 (approving scheme version 1) [**D/165-173**]*
- *Letter to residents November 2016 [**D/130-131**]*
- *Scheme announced November 2016 and now implemented [**D/131**] ("version 2")*
- *Road Traffic Regulation Order for Zone JJ 7 December 2016 (implementing version 2) [**D/175-224**]*
- *Letter before action [**C/1-7**]*
- *Reply to letter before action [**C/12-16**]*

INTRODUCTION AND OVERVIEW

1. As described in his witness statement [**B/1-17**], David Mills, the Claimant, has lived at 45 Loftus Road, London, W12 7EH within Parking Zone J in Hammersmith and Fulham for some 40 years.

2. On 6 December 2016 he wrote a letter before claim explaining why he considered that the Defendant Council's decision to introduce a new parking scheme in Zone J was unlawful [**C/17**].

3. The Council asked for [**C/8, 9-10**] two extensions of time to respond to that letter, which it finally did on 27 January 2017 [**C/12-16**].

4. The Claimant now seeks permission to challenge the legality of:

    a. the Council's decision of 11 November 2016 to introduce a new parking scheme within Zone J [**D/165-173**], and

    b. the Orders made by the Council on 7 December 2016, namely:

        i. The Hammersmith and Fulham (Parking Places, Zone "J") (Amendment Number 10) Order 2016 [**D/225-228**][1], and

        ii. The Hammersmith and Fulham (Parking Places, Zone "JJ") Order 2016 [**D/175-224**]

5. As he explains in his witness statement, he has the support of many others in the area, including individuals, businesses, churches and community groups, in doing so [**#5, B/2-3**].

6. At the substantive hearing he will ask the court, for the following reasons, to:

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

    b. Quash the decision and the Orders.

LEGAL BACKGROUND

The 1984 Act

6. Section 5 of the Road Traffic Regulation Act 1984 provides that:

> "(1) A local authority may by order designate parking places on highways or, in Scotland, roads in their area for vehicles or vehicles of any class specified in the order; and the authority may make charges (of such amount as may be prescribed under section 46 below) for vehicles left in a parking place so designated.

[1] The actual Order is not currently available, but the Council's Notice of the Order is included in the bundle

The exercise of this power by a local authority . . . in relation to a highway or road for which they are not the traffic authority is subject to obtaining the consent of the traffic authority.

...

(2) An order under this section may designate a parking place for use (either at all times or at times specified in the order) only by such persons or vehicles, or such persons or vehicles of a class specified in the order, as may be authorised for the purpose by a permit from the authority operating the parking place or both by such persons or vehicles or classes of persons or vehicles and also, with or without charge and subject to such conditions as to duration of parking or times at which parking is authorised, by such other persons or vehicles, or persons or vehicles of such other class, as may be specified; and

(a) in the case of any particular parking place and any particular vehicle, or any vehicle of a particular class the authority operating the parking place, . . . may issue a permit for that vehicle to be left in the parking place while the permit remains in force, either at all times or at such times as may be specified in the permit, and

(b) except in the case of a public service vehicle, may make such charge in connection with the issue or use of the permit, of such amount and payable in such manner, as the authority by whom the designation order was made may by order prescribe.

(3) In determining what parking places are to be designated under this section the authority concerned shall consider both the interests of traffic and those of the owners and occupiers of adjoining property, and in particular the matters to which that authority shall have regard include—

(a) the need for maintaining the free movement of traffic;

(b) the need for maintaining reasonable access to premises; and

(c) the extent to which off-street parking accommodation, whether in the open or under cover, is available in the neighbourhood or the provision of such parking accommodation is likely to be encouraged there by the designation of parking places under this section.

...

(7) In this section and in sections 46 to 55 of this Act, "local authority"—

(a) in England, means the council of a county, metropolitan district or London borough or the Common Council of the City of London or Transport for London;

...

and "the local authority", in relation to a parking place or proposed parking place on any site, . . . means the local authority (as defined above) in whose area the site is . . . [unless the site is in Greater London, in which case—

(i) if the site is on a GLA road and the parking place is, or is proposed to be, designated by Transport for London, "the local authority" means Transport for London;

(ii) if the site is on a GLA road and the parking place is, or is proposed to be, designated by the London local authority in whose area the site is, "the local authority" means that London local authority; and

(iii) if the site is on a highway which is not a GLA road, "the local authority" means the London local authority in whose area the site is.

(8) In this section "London local authority" means the council of a London borough or the Common Council of the City of London.

..."

7. Section 46 of the Act makes detailed provisions in relation to charging at parking spaces designated by section 45.

8. Section 46A provides for the variation of such charges.

9. Section 47 provides for an offence where the driver of a vehicle leaves the vehicle in a designated parking place otherwise than as authorised by or under an order relating to the parking place, or leaves the vehicle in a designated parking place for longer after the excess charge has been incurred than the time so authorised.

10. In exercise of those powers, the Council has historically identified "zones" within its area, including "Zone J" in play here (as it was before the changes which are here challenged - see map at [**D/1-2**]), and within them introduced restrictions including designating particular on-street parking places as being for residents only and/or on a pay-and-display basis.

Hammersmith's Executive

11. The Council operates a "Leader and Cabinet" model under the Local Government Act 2000 under which, as provided for by Article 7(6.4) and Part 3 [**E/1**] mean that the Cabinet Member for Environment, Transport and Resident Services exercises the Council's powers in relation to parking control.

12. The Cabinet Member for Environment, Transport and Resident Services is currently Councillor Wesley Harcourt.

FACTUAL BACKGROUND

The historical position

13. For many years, the parking scheme in Zone J has been as appears on the plan at [**D/1-2**]. Within that zone (as explained in the Council's consultation document, noted below) [**D/15**]

> "Controlled parking zone J currently operates from 9am to 5pm, Monday to Friday. There are no restrictions on weekends. Shared-used parking bays allow vehicles to park in the designated bays and display a valid resident permit or SMART visitor permit (SVP) or to 'pay and display' at nearby ticket machine. All of the residential streets within CPZ J currently operate a shared use parking bay arrangement."

14. David Mills explains the practical impact of that in his witness statement [**#9, B/3**]:

> "Zone J is close to the Westfield Shopping Centre, includes the QPR football stadium and has many vibrant small businesses at its heart, along the Uxbridge Road. As a consequence, the **shared bays** have provided insufficient protection for some residents living near the Uxbridge Road, the main road running through Zone J. While those living further away have suffered little or no difficulty in parking, those close to it, have suffered significant difficulty."

15. Over the years, residents and groups have encouraged the Council to change the parking scheme in the area [**#8-27, B/3-7**]

2009-2013

16. In June 2009 and September 2010, the Council consulted residents about new parking controls in Zone J. But (as the 2013 consultation document mentioned below then explained) "there was no consensus of opinion in favour of changes to parking controls" in the area, and no changes were made to the existing system.

17. In 2013, the Council consulted residents again, offering a series of options for new parking controls in the area. The consultation document explained that its results would be analysed street by street and would be reported to councillors in late summer 2013 and "the views put forward ... will influence the decision on whether to proceed with implementing any changes to the existing parking controls, or whether the current controls are maintained."

18. A report of 28 October 2013 seemingly led to the decision of the relevant Cabinet Member that there should be a further consultation with residents of all properties on the introduction of additional match day only parking controls, with the options of other restrictions (as set out in the report); and "That, should there be a clear majority in favour of the proposed Match day only controls as a result of this consultation, funding would be approved for the implementation of the scheme."

2015

19. Following a further consultation, in a letter of 28 May 2015 the Council wrote to residents saying that, from 27 July 2015, new controls would be introduced. The letter said that "You told us you wanted improved parking for residents in Zone J so that's what we're doing" [**D/3**].

20. On 19 June 2015, the Council (in the form of the Cabinet Member for Transport, Environment and Residents' Services – Councillor Wesley Harcourt) wrote explaining that "I am writing to tell you that I have **cancelled** those changes because of concerns raised by residents about the consultation process. .... I have instead decided to run another consultation with local residents to give you a final chance to have your say on local parking controls." [**D/4**]

21. Following that letter and as he explains in his witness statement [**#27, B/7**], the Claimant wrote directly to Councillor Harcourt on 19 June 2015 [**D/5-9**]. He summarised what residents had been asking from the Council in the past and asked that the Council include in the consultation a parking option which he and other residents and groups had suggested to the Council previously, and which he and groups such as the local Neighbourhood Watch, the Hetley Road residents group, various businesses, churches and the mosque had considered should form an option in the consultation now being promised [**#27, B/7**].

22. Having had no response, the Claimant wrote again to Councillor Harcourt on 19 August 2015 asking [**D/10**]:

    > "... whether you are in a position yet to confirm that the new Zone J consultation will include the option of 'permit only bays' with extended hours alongside 'shared bays' with unchanged (or largely unchanged) hours."

23. Councillor Harcourt replied on 19 August 2015 [**D/11**] explaining that "the draft (still to be agreed) has 4 options: - no change - the changes that were going to be implemented this year and then withdrawn - splitting zone J [and] - your option". [underlining added]

24. On 24 August 2015, the Claimant replied, welcoming the intention to consult on the proposal put forward by resident groups [**D/11**].

25. The Council indeed then consulted on four options. But – as seen in the consultation booklet sent to residents - they did not include the one which the Claimant and others had proposed including directly to Councillor Harcourt, as above. In particular, the Council offered just four options in the booklet [**D/14-21**]:

    a. Option one: No change [see map at **D/17**]

    b. Option two: separate resident and pay-and-display bays [see map at **D/18**]

    c. Option three: 'blanket controls' [see map at **D/19**]

    d. Option four: split zones [see map at **D/20**]

26. Accordingly, the consultation booklet did not include the option which the Claimant and others had put forward and which, as above, Councillor Harcourt had indicated would be included ('your option').

27. The Council's reply to the letter before claim says this on the point [**C/14**]:

> "Your client has stated that the option which he communicated to Councillor Harcourt in 2015 and which he was assured would be included in the consultation was not then included. I am instructed that your client's proposed option was included as Option 2 in this consultation booklet."

28. As seen above, that is simply incorrect: Option 2 was not the same as the proposal which the Claimant had put forward (specifically: it includes separate bays for residents and for pay-and-display, whereas the proposal made by him and others repeatedly over the years is for separate residents and shared bays, namely bays which can be used either by residents or on a pay and display basis). In its appraisal of matters here, including in considering the responses to consultation and in reaching a decision in the light of them, the Council has thus proceeded on a clearly erroneous factual basis.

29. As he explains in his witness statement, given the options which were consulted on, the Claimant and others encouraged neighbours to express a preference for "no change" rather than the options for change which were being offered [**#31-32, B/9-10**].

30. In any event, the consultation booklet also made clear that [**D/21**]:

> "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."

31. The consultation closed on 16 November 2015.

2016

32. In a letter to residents dated May 2016, the Council then announced the proposed implementation of a new scheme. The letter explained [**D/27**] that:

> "The results were extremely close and none of the four options received a majority level of support. However, we could see some trends .... Following this we have decided to create a sub-zone JJ within which streets have extended parking controls."

33. The letter described (a variation on option 4 in the consultation document in that it was a split zone arrangement but with different boundaries, as seen on the map at [**D/158**]: "**version 1**") that had not ever been the subject of consultation.

34. In the period that followed, as explained in his witness statement [**#45, B/12-13**] the Claimant and others tried to find out from the Council about the results of that consultation – see for example his letter to Councillor Harcourt of 14 June 2016 (copied to two council officials and another resident) [**D/53-55**] asking for the

breakdown of responses to the consultation (as had been made public in the previous consultation, as above), which has never received a proper reply despite his chasing[2].

35. Some residents were privately provided with a copy of a draft Cabinet Member report dated 16 May 2015 (though the 2015 is presumably a typo – it should say 2016) [**D/31-52**] describing the outcome of the consultation and making recommendations including for the adoption of version 1. But nothing of that kind was made properly public at the time.

36. Moreover, although the Council's reply to the letter before action says that Councillor Harcourt "agreed" to the proposal for a split zone with that different arrangement to Option 4 in the consultation document [**C/15**], there is nothing on the Council's formal record of Cabinet Member decisions (from an internet search of the Council's website) which records a decision about Zone J parking in that period [**D/229-232**].

37. But in any event, whatever happened in May 2016 (and version 1) was overtaken by events in that the scheme described in the May letter (and the draft Cabinet Member report) was not actually implemented.

38. Instead, without any further consultation as had occurred in 2015 and previously, and unbeknown to the rest of Zone J, letters dated July 2016 were then sent out by the Council [**D/56-57**]:

    a. The first was sent to residents of Hetley Road and the northern parts of Godolphin Road and St Stephens Avenue, announcing that the Council "were now proposing to include" them in the new Sub Zone JJ. The letter did not ask them whether they wanted to be or not, but merely concluded with a sentence saying they should email a specified council official if they had "a concern about this proposal".

    b. The second letter dated July 2016, differently worded, was sent to residents of Loftus Road, who were not told of the first letter but were told the Council "would like to hear from Loftus Road residents whether they would like to be considered for inclusion in the new sub zone JJ." They were asked to email the same council official with their "preference".

39. However, the draft and wrongly dated report (which was provided to the Claimant by a neighbour as he explains [**#38, B/11**]) shed new light on what the Council had said in the May 2016 letter. That letter had explained that: "The results [of the

[2] The Council's reply to the letter before claim says that "I am instructed that my client does not have a record of your client's 14 June 2016 letter to Councillor Harcourt."; **C/15**]. That is hard to fathom given that the letter (which was sent by post and email) was also sent to two Council officials; Councillor Harcourt specifically acknowledged it and promised a reply shortly in his email of 19 June 2016 [**D/55**]; when no reply emerged, the Claimant sent a chasing email (with a further copy of the 14 June 2015 letter) on 9 September 2016 [**D/127-129**] to Councillor Harcourt (again copied to the same two Council officials) to which Councillor Harcourt replied on 12 September 2016 saying "I assume I had replied or that officers had done so ... my apologies if this is not the case – I have asked officers to reply") [**D/127**]; but that has not happened.

consultation] were extremely close and none of the four options we offered received a majority level of support."

40. Although this was also stated in the body of the draft report to the Cabinet Member, it also included an Appendix giving the actual results on a street by street basis which showed that in truth and in fact 58.6% of residents had supported option 1 (no change), 11.1% option 2 (separate permit holder and pay and display bays), 21.7% option 3 (blanket controls) and only 8.6% option 4 (creation of a zone JJ, although – as above – not the Sub Zone JJ which has later emerged and evolved).

41. But in any event, the assertion (to residents as above) that none of the options had received majority support, appears to have been entirely misleading: option 1 had received that support. It was also not correct that the results were extremely close. And, as it happens, the option of a Sub Zone JJ (which had gone forward but was then later modified) received the least support of any of them.

42. But it is also important to note that, as the Claimant explains [**#43, B/12**], the fact that majority of residents preferred option one over the others does not mean that residents actually want to continue the existing scheme - it is simply that the existing position was preferable to any of the other three which the Council was offering.

43. In any event, on 11 November 2016, the Council then sent residents of the whole Zone J area a further letter announcing a yet different parking scheme (extending the Sub Zone JJ, announced in the May 2016 letter, to the area referred to in the first July 2016 letter above, but not the second: **version 2**) and apparently to be implemented from 8 December 2016 [**D/130-131**]. The letter explained that the Council would advertise a Traffic Management Order. Signs were put up on 2 December announcing that the new scheme would come into effect on 8 December 2016.

44. The Council's reply to the letter before claim later revealed that Councillor Harcourt had in fact taken a formal decision on 11 November 2016 [**C/15**]. The letter noted (and the Council's agenda confirms this [**D/136-142**]) that on that day Councillor Harcourt approved the recommendation set out in a 16 May 2016 Cabinet Member report (which appears to be the same as the earlier, misdated and not published openly, draft, as above, which had now been finalised which recommended version 1).

45. But of course, as set out above, what that report recommended (as seen in its Annex 9 [**D/164**] namely version 1) was not the same as any of the options consulted upon. Nor was it the same as the yet further different scheme which was then described to residents in the 11 November 2016 letter: version 2. In other words, Councillor Harcourt made a decision to implement what was in the 16 May 2016 report but what the Council announced (and has now been implemented in the Orders) was something different; and neither of those had been options in the October 2015 consultation.

46. Despite that (and again as revealed in the Council's reply to the letter before action [**C/15**]) on 7 December 2016 the Council then made the orders under challenge here

[**D/175-228**] (although only the order in respect of zone JJ seems publicly available - a copy of the order in respect of zone J has been requested from the Council). They provide for the split zone scheme version 2. But of course, as noted above:

a. The proposals in those orders had not been the subject of consultation in accordance with the Council's practice (which had consulted on options 1 to 4); and

b. They had not even been authorised by Councillor Harcourt's 11 November 2016 decision (which was to adopt version 1).

GROUNDS OF CLAIM

47. In the light of the above matters the Claimant submits that:

a. The 11 November 2016 Decision was unlawful in that:

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

ii. 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.

48. As the Claimant explains, there is every reason to think that, if the Council had consulted on the proposal which the Claimant and others had explained to it, then that would have attracted majority support of consultees, as had been erected as a pre-condition to adoption in the consultation document [**#54, B/15-16**].

49. As for the legitimate expectation itself, in its reply to the letter before action, the Council does not dispute that it had created a legitimate expectation, as above; but it then notes that a public authority can depart from a legitimate expectation [**C/12**]

"where it is the Council's legal duty or otherwise a proportionate response having regard to a legitimate aim pursued by the public body in the public interest."

The Council then says that [**C/12**]:

"It is the view of the Council that the facts outlined below explain why it was a reasonable and rational decision and one based on procedural propriety to create the new sub-zone JJ in CPZ J"

But nowhere does the Council claim that a legal duty compelled it to break its promise. Nor does it identify what, if any, legitimate aim it says was being pursued in the breaking of the promise.

50. That matters because, per **R v North and East Devon Health Authority, Ex p Coughlan [2001] Q.B. 213** Lord Woolf MR, giving the judgment of the Court of Appeal, at para 57:

"Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

51. In **Paponette and others v Attorney General of Trinidad and Tobago [2010] UKPC 32, [2012] 1 AC 1** Lord Dyson explained an important consequence of that, as follows:

"36. The critical question in this part of the case is whether there was a sufficient public interest to override the legitimate expectation to which the representations had given rise. This raises the further question as to the burden of proof in cases of frustration of a legitimate expectation.

37. The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.

38. If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power. The Board agrees with the observation

of Laws LJ in **R (Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363** at [68]:

> "The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances."

It is for the authority to prove that its failure or refusal to honour its promises was justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was not justified. It follows that, unless an authority provides evidence to explain why it has acted in breach of a representation or promise made to an applicant, it is unlikely to be able to establish any overriding public interest to defeat the applicant's legitimate expectation. Without evidence, the court is unlikely to be willing to draw an inference in favour of the authority. This is no mere technical point. The breach of a representation or promise on which an applicant has relied often, though not necessarily, to his detriment is a serious matter. Fairness, as well as the principle of good administration, demands that it needs to be justified. Often, it is only the authority that knows why it has gone back on its promise. At the very least, the authority will always be better placed than the applicant to give the reasons for its change of position. If it wishes to justify its act by reference to some overriding public interest, it must provide the material on which it relies. In particular, it must give details of the public interest so that the court can decide how to strike the balance of fairness between the interest of the applicant and the overriding interest relied on by the authority. As Schiemann LJ put it in **R (Bibi) v Newham London Borough Council [2002] 1 WLR 237**, para 59, where an authority decides not to give effect to a legitimate expectation, it must "articulate its reasons so that their propriety may be tested by the court".

...

45. There is a further point. In the **Bibi** case, Schiemann LJ said that an authority is under a duty to consider a legitimate expectation in its decision making process. He said, at paras 49 and 51:

> "49. Whereas in **R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213** it was common ground that the authority had given consideration to the promises it had made, in the present cases that is not so. The authority in its decision making process has simply not acknowledged that the promises were a relevant consideration in coming to a conclusion as to whether they should be honoured and if not what, if anything, should be done to assuage the disappointed expectations."
>
> ...

"51. The law requires that any legitimate expectation be properly taken into account in the decision making process. It has not been in the present case and therefore the authority has acted unlawfully."

46. The Board agrees. Where an authority is considering whether to act inconsistently with a representation or promise which it has made and which has given rise to a legitimate expectation, good administration as well as elementary fairness demands that it takes into account the fact that the proposed act will amount to a breach of the promise. Put in public law terms, the promise and the fact that the proposed act will amount to a breach of it are relevant factors which must be taken into account.

47. It was, therefore, incumbent on the government to show that it had taken into account the fact that the effect of the 1997 Regulations was to breach the earlier promises. This it has signally failed to do. It is by no means self-evident that the government would have appreciated that the 1997 Regulations were in breach of the representations." [underlining added]

52. In other words, 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).

OVERALL

53. Overall, therefore, the 11 November 2016 decision and the 7 December 2016 orders were unlawful.

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

55. 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

8 February 2017