Neutral Citation Number: **[2013] EWCA civ 9**

Case No: C1/2012/1300

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION,
ADMINISTRATIVE COURT
Mr Justice Silber
CO/11946/2010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2013

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE AIKENS
LORD JUSTICE LEWISON

Between :

R (on the application of TW LOGISTICS)	**Appellant**
- and -	
TENDRING DISTRICT COUNCIL	**Respondent 1**
- and -	
ANGLIA MALTINGS (HOLDINGS) LIMITED	**Respondent 2**

Mr Ian Dove QC (instructed by **S J Berwin LLP**) for the **Appellant**
Mr David Altaras (instructed by **Holmes & Hill LLP**) for **Respondent 1**
Mr Rhodri Price Lewis QC (instructed by **Howes Percival LLP**) for **Respondent 2**

Hearing date : 16 January 2013

Approved Judgment

Lord Justice Lewison:

1. Mistley is a small village in Essex, on the south bank of the River Stour, just to the south east of Dedham Vale and Constable country. It originated as a Georgian planned town, with artisans' cottages; and it also contains a working port. The port handles loose materials, such as granite, stone and aggregates. It is operated by TW Logistics Ltd. Mistley, including the port, forms part of the Manningtree and Mistley Conservation Area. The local planning authority, Tendring DC, has adopted a Conservation Area Management Plan (the "CAMP") which TW Logistics Ltd says is in part unlawful. Silber J rejected the challenge. His judgment is at [2012] EWHC 1209 (Admin) and is available on bailii. With the permission of Sir David Keene TW Logistics appeal.

2. The challenge before Silber J relied on a number of different grounds. But only one ground of appeal is pursued in this court. What TW Logistics says is that some of the proposals contained in the CAMP are inconsistent with the adopted Local Plan, and are to that extent unlawful. TW Logistics' appeal was argued by Mr Ian Dove QC and Mr David Forsdick. Mr David Altaras defended the judge's judgment on behalf of Tendring DC. He was supported in this endeavour by Mr Rhodri Price Lewis QC who appeared for Anglia (Maltings) Holdings Ltd, the owner of a disused warehouse on the quayside known as Thorn Quay Warehouse.

3. The legal framework is common ground. It is agreed that:

   i) Planning decisions must be made within the parameters of development plans authorised by statute. These exist at different levels in a hierarchy.

   ii) In our case the relevant statutory development plan is the Local Plan; the relevant policies of which have been saved pending the formulation of new development plan documents.

   iii) A planning authority is required to set out its policies for the use and development of land in its development plan.

   iv) In making planning decisions a planning authority must have regard to the provisions of the development plan, so far as material to the application; and any other material consideration. Decisions must be made in accordance with the plan unless material considerations indicate otherwise.

   v) In relation to conservation areas, the planning authority has a statutory duty from time to time to formulate and publish proposals for the preservation and enhancement of the conservation area. The CAMP was produced in order to comply with this duty. It is not part of the development plan.

   vi) Each tier of the development plan is required to be generally consistent with the tier above. Likewise a planning authority's planning policies must be consistent with the development plan.

   vii) Whether a tier of a development plan is consistent with a tier above, and whether a published policy is consistent with the development plan are each a question of the interpretation of the plan or policy in question. The

interpretation is objective. The planning authority does not have a discretion to decide for itself what the documents mean. If there is a dispute about what they mean then ultimately the court must decide.

viii) The CAMP does not itself contain policies, but in so far as the proposals contained in it are inconsistent with policies in the Local Plan those proposals are unlawful.

4. It is therefore common ground that there is only one question for us to decide. Are the challenged sections of the CAMP inconsistent with the relevant parts of the Local Plan?

5. The planning authority is supportive of the expansion of the port eastwards. Policy LMM 1a in the Local Plan allocates and safeguards 3 hectares of land to the east of the quay for port expansion. As well as being included in a conservation area Mistley port is also included in the Mistley Urban Regeneration Area ("the URA") although the boundaries of the URA extend beyond the port. Policy LMM1 of the Local Plan applies specifically to this URA. It provides:

> "New development in the Mistley Urban Regeneration Area will be required to:
>
> i. Provide for promotion of a balanced community, including an appropriate range of opportunities for the protection and enhancement of the historic environment (having particular regard to the maritime heritage of the area) and the provision of new housing, employment, tourist, recreation and leisure facilities;
>
> ii. Protect the employment base of Mistley through the provision of alternative employment facilities to replace any potential loss of employment;
>
> iii. Protect the port operations;
>
> iv. Have regard to the potential for port uses of existing buildings, before allowing any change of use;
>
> v. Allow for access arrangements which do not increase current levels of HGV traffic on the Highways Act Street;
>
> vi. Provide or allow for sustainable and managed public facilities and non-motorised public access to the waterfront, including a public footpath link in all the non-commercial areas and a public right of mooring along the quayside;
>
> vii. Enable the development of views across the Stour Estuary; and
>
> viii. Protect the adjoining nature conservation interests, biodiversity and landscape quality during construction work and thereafter.

> New development at the western end of the Urban Regeneration Area must respect the character and setting of the Mistley Towers Scheduled Ancient Monument.
>
> To promote new development in accordance with these requirements, the Council will prepare a Supplementary Planning Document for the Mistley Village and Waterfront area."

6. The Local Plan also includes a proposals map. On that map the port area is shown covered by vertical hatching. The key reveals that the vertical hatching represents design briefs and mixed uses. Part of the historic port has in fact been redeveloped for residential purposes. Mr Dove also referred to two other policies contained in the Local Plan. They are, first, policy ER3 which says:

> "Policy ER3 – Protection of Employment Land
>
> a. The Council will ensure that land in, or allocated in this Plan for employment use will normally be retained for that purpose. Its redevelopment or change of use for non-employment purposes will only be permitted if the applicant can demonstrate that it is no longer viable or suitable for any form of employment use. The applicant should either:-
>
> Submit evidence of a sustained but ultimately unsuccessful marketing exercise, undertaken at a realistic asking price; or
>
> Show that the land (site, or premises) is inherently unsuitable and/or not viable for any form of employment use.
>
> b. Where the loss of an employment site is permitted, the applicant will normally be expected to provide a suitable alternative site elsewhere in the district, or a financial contribution towards the Council's employment, training or regeneration programmes and initiatives.
>
> c. This policy will not be applied where vacant business premises form a subordinate but integral part of an existing dwelling in the same ownership."

7. Second, policy QL6 which says:

> "Within [the Urban Regeneration Areas] permission will be granted for development that reinforces and/or enhances the function, character and appearance of the area and contributes towards regeneration and renewal. In particular the Urban Regeneration Areas will be the focus for:
>
> i. Investment in social, economic and transportation infrastructure; and

> ii. Initiatives to improve vitality, environmental quality, social inclusion, economic prospects, education, health, community safety and accessibility.
>
> Planning permission will not be granted for development that would have an adverse impact on the revitalisation of any of these Urban Regeneration Areas."

8. The written explanation of this policy says that within the Urban Regeneration Areas "the focus will be on mixed-use developments". It also says that at Mistley "waterfront and industrial regeneration is to be encouraged".

9. The principal parts of the CAMP which TW Logistics say are inconsistent with policy LMM1 are the following:

> "6.22 There are mixed views on the industrial aesthetics of the silos on the Crisp maltings site on the metal sheet cladding of the Thorn Quay warehouse, but there is general agreement that the Stockdale warehouse at the western end of Mistley Quay does not enhance the setting of the Mistley Towers. …
>
> **Recommendation 9**:
>
> *Encourage the redevelopment of buildings which have a negative [effect] on the character or appearance of the conservation area as and when they become ready for renewal.*"
>
> "6.59 A number of improvements, some public and some private, would make a welcome difference to the appearance of the conservation area. The likelihood of schemes coming forward is, of course, increased where arrangements are linked to development opportunities. The most significant possibilities are:
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> …
>
> Significant improvements to Mistley Quay would include a more pedestrian-friendly public realm and the removal of the fence along the quayside. This could be achieved through reorganisation of the port and the re-use/redevelopment of the Thorn Quay Warehouse."
>
> "7.8 … capital projects are vital for raising confidence. Perhaps the most important are the development of the Jewson's site … and, at Mistley, … the Mistley Thorn warehouse."

10. In addition to the documents which we must interpret, I should also refer to two pieces of evidence that were before the judge. The first is from the second witness statement of Mr Michael Parker of TW Logistics:

> "TQW [i.e. Thorn Quay Warehouse] is capable of use in its current form for port uses. However, the aspirations in the CAMP and the SPD for TQW have resulted in the owner withholding permission for me to complete essential surveys to allow a valuation on the premises which reflects LMM1 (iv). Indeed the Council have confirmed that the owner of TQW will imminently submit to them a redevelopment scheme for TQW. It is obvious that a port use could not compete financially with either a mixed use conversion or a mixed use redevelopment. A redevelopment could not, viably, be for port related uses."

11. The second comes from a document compiled by Anglia (Maltings) Holdings Ltd. It says:

> "Problems with the existing building
>
> The existing Thorn Quay building is a dated warehouse, which is in poor condition and is not practical or well suited for storing goods.
>
> In the existing building it will prove extremely difficult to bring pallets in and the current building offers poor floor to ceiling heights. The floor to ceiling heights severely restrict the loading and storage ability as do the numerous columns within the space itself.
>
> Floor loading capacities are also another consideration. In the subject building this will again be compromised as its loading capacity is likely to be significantly lower than modern levels because of its flooring arrangements.
>
> The current building was constructed between the 1930s and 1960s. In industrial/warehousing terms it would be regarded as having reached the end of its useful economic life and be close to being obsolete."

12. TW Logistics' argument, attractively advanced by Mr Dove is, in essence, this:

i) The Local Plan properly construed in its context provides that the quayside area is first and foremost for port related uses and not for mixed use "regeneration" schemes or for enhanced public access. Policy LMM1 iii and iv properly construed means that a change of use of an existing building cannot be allowed unless and until all port related uses have been excluded. The CAMP is based on the misconceived premise that the Local Plan promotes mixed use development on the quayside.

ii) The CAMP promotes "redevelopment" (as a "key", "capital" project) of Thorn Quay Warehouse. Any such redevelopment of Thorn Quay Warehouse would necessarily be for non-port related use because on the evidence of Mr Parker any re-development for port related use would not be viable. The promotion of

"redevelopment" in the CAMP is therefore necessarily inconsistent with the Local Plan properly construed.

iii) The CAMP promotes the "reorganisation of the port" and has "proposals" to further that.

iv) The CAMP approaches industrial scale port buildings as if they are harmful to the conservation area and aims to remove or replace them, when in fact the Local Plan recognises that the quayside is and will remain first and foremost an operational port with the character and appearance of an operational port which necessarily means that there will be major warehouse buildings on it. The CAMP therefore starts from an aspiration as to the future of the quayside which is inconsistent with the Local Plan.

13. In support of his argument Mr Dove referred to the evolution of the Local Plan, including the original draft that Tendring DC prepared and the comments on and revisions to that draft that the independent inspector made following a public inquiry.

14. In my judgment this kind of forensic archaeology is inappropriate to the interpretation of a document like a local plan or the CAMP. Lord Reed explained the nature of a development plan in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 [2012] PTSR 983:

> "The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context."

15. The public nature of these documents is of critical importance. The public is in principle entitled to rely on the public document as it stands, without having to investigate its provenance and evolution. That is why the courts have set their face against attempts to interpret planning permissions by reference to officers' reports and other extrinsic material: see for example *Slough Estates Ltd v Slough BC* [1971] AC 958; *Secretary of State for Communities and Local Government v Bleaklow Industries Ltd* [2009] EWCA Civ 206 [2009] 2 P & CR 21. In addition Lord Reed's statement that a development plan is to be interpreted objectively means that the subjective views of the author of the document about what it means are irrelevant.

16. But in any event, I do not consider that the inspector's comments advance the case. His concern was that the potential of Thorn Quay warehouse for port use was "properly considered" before it was permitted to be redeveloped for other purposes. That is what policy LMM1 iv says; no more and no less.

17. In the *Tesco* case Lord Reed made another important point about development plans:

> "Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 per Lord Hoffmann)."

18. This point has two consequences that are relevant to our case. First, we must not adopt a strained interpretation of the Local Plan in order to produce complete harmony between its constituent parts. Second, we must be wary of a suggested objective interpretation of one part of the Local Plan as having precedence over another. In a case in which different parts of the Local Plan point in different directions, it is for the planning authority to decide which policy should be given greater weight in relation to a particular decision. This, in my judgment, is established by the decision of Ouseley J in *R oao Cummins v Camden LBC* [2001] EWHC 1116 (Admin) to which Mr Dove also referred us. In that case Ouseley J said (§ 164):

> "It may be necessary for a Council in a case where policies pull in different directions to decide which is the dominant policy: whether one policy compared to another is directly as opposed to tangentially relevant, or should be seen as the one to which the greater weight is required to be given."

19. The bedrock of TW Logistics' case is that the Local Plan provides that the quayside area is first and foremost for port related uses and not for mixed use "regeneration" schemes. The argument is based primarily on policy LMM1 iii and iv. The judge rejected this contention. His detailed reasons are at [54] to [63] of his judgment. He held that policy LMM1 iii was aimed at protecting the existing port operations; and that policy LMM1 iv only required the planning authority to "have regard" to the potential for port use before permitting changes of use. It was common ground before him that when a decision maker is required to "have regard" to a particular factor he complies with his legal duty if at some stage in the decision making process, he conscientiously considers that factor, on the clear understanding that it is a factor relevant or potentially relevant to his decision. In other words, he must take that factor into account during the decision making process. It was not suggested before us that this was wrong. The judge summarised his conclusion thus:

> "In respect of the Council's obligation in respect of considering "the potential for port uses of existing buildings before allowing any change of use", I do not consider after applying Lord Reed's comments [in *Tesco*], that the obligation imposed on the Council in relation to the potential for port use of existing buildings, goes further than "taking it into account" even in the light of the factors mentioned by Mr. Forsdick in his submissions. The Council is not required to consider this factor in LMM1(iv) as the sole or exclusive factor so that no other factor can be considered before this LMM1 (iv) factor is considered. What is quite clear is that there is no provision in LMM1 (iv) or elsewhere in LMM1 ensuring that the approach of the Council in handling applications for developments for buildings not used for port purposes should be that "the quayside area is first and foremost for port related uses"."

20. I agree both with the judge's conclusion and his reasoning at [54] to [63]. There is no point in my setting it out all over again. The only additional points that I would add are these. First, the written explanation of policy QL6 forming part of the Local Plan specifically says that mixed use development will be encouraged over the whole of the URA. Although the judge referred to this policy in [60] he did not refer to the explanation of that policy within the plan itself. Second, the fact that the Local Plan does not specifically promote the reorganisation of the port or the redevelopment of Thorn Quay warehouse for non-port related purposes does not entail the converse proposition that either of them is prohibited. The Local Plan is neutral on the question of port reorganisation; and specifically envisages that Thorn Quay warehouse can be redeveloped provided that policy LMM1 is complied with.

21. Mr Dove placed some reliance on policy ER3. He said that it showed that before Thorn Quay warehouse (which has a lawful employment use) could be developed for other purposes it would have to be shown that it was no longer viable for employment use. In my judgment, however, policy ER3 does not govern the situation. First, it is an employment policy that applies across the whole of the local planning authority's area. Policy LMM1 applies only to the Mistley URA. Second, policy ER3 requires it to be shown that the land in question is no longer viable or suitable for any form of employment use. By contrast policy LMM1 does no more than oblige the local planning authority to "have regard" to the potential for port related use. This stark contrast in language also serves to rebut Mr Dove's submission that policy LMM1 precludes redevelopment for non port related use unless port related use has been excluded. Where the Local Plan requires non-viability to be demonstrated, it says so clearly. Third, under policy ER3 even if non-viability for employment use has been demonstrated, the developer will normally be expected to provide a suitable alternative site elsewhere or a financial contribution. By contrast policy LMM1 imposes no such requirement or expectation. Fourth, policy ER3 is a policy that seeks to preserve and promote a single interest (viz. employment sites), whereas policy LMM1 balances a number of disparate interests (including those of the port). In my judgment this is an example of the familiar principle that the general must give way to the specific. Policy LMM1 is the specific policy for the purposes of this principle. Alternatively, if and in so far as policy ER3 and policy LMM1 pull in different directions, it is the sort of conflict for the local planning authority to resolve as a

matter of planning judgment in accordance with the principles I have quoted from Lord Reed and Ouseley J.

22. Having correctly interpreted Policy LMM1 in the way that he did, the judge went on to reject the argument that the CAMP was inconsistent with that policy. His detailed reasons are at [64] to [79] of his judgment. The essential point that the judge made was that the challenged parts of the CAMP did not say anything about the future use of buildings. What they were concerned with was the character and appearance of buildings. In any event any future planning decision would have to be made in accordance with the Local Plan, and in particular policy LMM1 as the judge had interpreted it. The judge ended this section of his judgment thus:

> "The stark fact which answers all Mr. Forsdick's complaints is that the CAMP does not make policy and it does not promote any type of development or prevent the Council in the words of LMM1 (iv) having "*regard to the potential for port uses of existing buildings before allowing any change of use*". Each of the matters which are the subject of the claimant's complaints is dealing with conservation protection and enhancement issues, which is the essential purpose of the CAMP. In concluding that nothing in the CAMP is inconsistent with the policies in the saved plan, I have not overlooked any of the complaints made by Mr Forsdick but none of them are inconsistent with LMM1 (iv)."

23. Viewed as a matter of objective interpretation, I agree both with the judge's conclusion and his detailed reasoning at [64] to [79]. There is no point in my setting it out all over again. None of Mr Dove's detailed points have come near to persuading me that the judge's analysis was wrong.

24. In the skeleton argument prepared on behalf of TW Logistics it was argued that the judge failed to have regard to "the unchallenged evidence" that any redevelopment of Thorn Quay Warehouse must necessarily be for a non-port use. That conclusion, it was said, necessarily follows from Mr Parker's evidence. Mr Dove advanced this submission too, but with less prominence than the written argument had given to it. I am unable to place on Mr Parker's statement the weight that the argument asks it to bear. In the first place, whether development is or is not "viable" is not a fact. It is a matter of opinion. It will depend on (among other things) site values, building costs, interest rates, required return on expenditure and market values. Mr Parker addresses none of these essential components. Second, because the viability of a suggested development is a matter of opinion, it is necessarily a matter for expert evidence. Mr Parker does not reveal what credentials or expertise he has to be able to offer an opinion. Third, there has in any event been no grant of permission to adduce expert evidence. Fourth, there is material (I hesitate to say evidence) that suggests that Thorn Quay warehouse in its present form is itself unsuitable for port use, so that some form of redevelopment would be necessary even for port use. Mr Parker does not deal with this material, except to make the bald assertion that Thorn Quay Warehouse is capable of port use (although what port use he does not say).

25. In my judgment the foundation on which Mr Dove seeks to erect this argument is built on sand. It does not compel an interpretation of the CAMP that differs from that adopted by the judge.

26. I would dismiss the appeal.

Lord Justice Aikens:

27. I agree.

Lord Justice Mummery:

28. I also agree.