Neutral Citation Number: [2023] EWHC 2060 (Admin)

Case No: CO/4047/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/08/2023

Before :

MR JUSTICE LANE

- -

Between :

ENTERPRISE HANGARS LTD	**Claimant**
- and -	
FAREHAM BOROUGH COUNCIL	**Defendant**

- -
- -

Ms P Pattni (instructed by **Lawdit Solicitors**) for the **Claimant**
Mr O Capildeo (instructed by **Southampton, Fareham & Havant Legal Partnership**) for the **Defendant**

Hearing date: 13 July 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 10 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

.....

MR JUSTICE LANE

Judgment Approved by the court for handing down.

Mr Justice Lane :

1. Are there badgers at Solent Airport? The defendant, having carried out its own inspection, concluded that their presence is reasonably likely. It is common ground that, as a result, the claimant needed to provide a habitat survey/assessment concerning badgers, when making its application to the defendant, as local planning authority, for permission to undertake development at the Airport comprising nine mixed-use live/work hangar buildings for the aviation sector.

2. The defendant has refused to provide the claimant's advisor with access in order to undertake the assessment. The lack of an assessment was one of the reasons why the defendant refused the application for planning permission.

3. The claimant contends that the defendant's refusal to give it access was unlawful. The claimant seeks an order quashing the decision to refuse and a mandatory order requiring the defendant to give the claimant access in order to carry out the survey/assessment.

4. At the hearing on 13 July 2023, the claimant was represented by Ms Pattni and the defendant by Mr Capildeo. I am grateful to them both for the high quality of their respective written and oral submissions.

SOLENT AIRPORT AND THE DAEDALUS VISION

5. Solent Airport, as it is now called, is located in a part of the defendant's area known as Daedalus. According to the defendant's "Daedalus Vision and outline strategy" ("the Vision"), the defendant had, for many years, through its local plan, recognised Daedalus as being the most significant commercial development area in the borough of Fareham. The defendant accordingly committed itself, as one of its corporate priorities, to work with others to deliver a thriving aviation-led employment area, supported by a viable airfield.

6. In March 2015, the defendant acquired 369 acres of land at Daedalus, mainly comprising the airfield itself and two development areas to the east and west. As part of this acquisition, the defendant "developed its Vision, together with a series of objectives designed to achieve it".

7. The Vision was formally adopted in October 2015, after engagement with stakeholders and a two-month period of public consultation. According to the Vision, the defendant's objectives were to unlock the potential of the airfield's land and infrastructure assets through new commercial development; realise the potential for developing an increasing corporate/commercial aviation activity; ensuring the airfield was financially sustainable; further improving the infrastructure and facilities at the airfield; maintaining a safe, secure, efficiently managed and environmentally suitable airfield; and generating a sense of local pride by making Daedalus an attractive location for businesses and their employees, for users of its facilities and for the local community, and to be a good neighbour.

8. In the defendant's 2018 update of the Vision, we find the following:-

> "In 2015, there was an expectation that new businesses and developers would be seeking to acquire sites on a plot by plot

> basis to build their own premises. Whilst this is still likely to happen in some cases, there has been a clear shift in demand from potential occupiers due to changing market confidence and economic uncertainties. The preference from prospective businesses is now biased towards taking occupational leases on pre-built, speculative units, or working with developers on bespoke turnkey facilities.
>
> In order to respond to the changing demand, the Council has undertaken to deliver speculative units to rent/buy, both airside and non-airside. While this does transfer the "development risk" to the council, it also provides an opportunity to accelerate the delivery of jobs and secure a long-term revenue stream for the council. By approaching developments on an industry-standard basis, the investment will be future-proofed, should the council wish to sell the asset."

PLANNING APPLICATION AND REQUESTS FOR ACCESS

9. The claimant made its planning application in March 2022. In support, the claimant submitted an ecological report, dealing with the presence of badgers on the application site. The report, carried out by a consultant, involved him using high-powered binoculars to look at the site because it was not possible to obtain access. In his assessment, the consultant did not note any evidence of badger occupation "although the managed grassland areas could be considered to provide a potentially suitable foraging resource for urban badgers". The consultant concluded that the site had "moderate potential for foraging and commuting badgers".

10. Hampshire County Council was a statutory consultee on the planning application. In an e-mail of 15 March 2022, the County Council's senior ecologist noted that access to the site had not been available and that the assessment was therefore carried out "behind the fence line". In view of this, the senior ecologist said it was "not clear how evidence of badgers in the form of latrines, well-worn paths, holes, etc could have been identified and therefore I request that a visit to the site is arranged and the results are submitted".

11. On 22 March 2022, the claimant sent an e-mail to Mr Francis, the Airport Manager, requesting access for the ground survey. The claimant's e-mail said that the inspection could take place before operational hours, as the consultant's office was close by.

12. Mr Francis forwarded the request to Mark Wyatt, copying in Sarah Ward. Mark Wyatt was the defendant's Planning Officer, who was handling the planning application. Sarah Ward was the defendant's Head of Strategic Sites.

13. On 26 March 2022, Mr Francis sent an e-mail to the claimant. This said "if your surveyors can supply some dates and times then we can fit in with the operations team".

14. On 28 March, however, Sarah Ward sent an email to Richard Jolley, the defendant's Head of Planning and Regeneration, and to Steve Farndell, the defendant's Head of Asset Management. It is common ground that Mr Jolley is in overall charge of both planning and asset management.

15. Ms Ward's e-mail said: "The applicant is asking for access to the site in order to progress his planning applications. We are not going to sell him the site and don't want the development on our land. I am minded to refuse. What is your view?"

16. Ms Pattni points out that, at this time, no planning issues were being raised. This will be relevant in connection with one of the procedural matters raised by the defendant.

17. On 31 March 2022, Mr Francis e-mailed the claimant, as follows:-

> "Unfortunately there has been some confusion with approvals. Whereas the planning department would have no issues with the inspection, the landowner does not give consent to this request and therefore denies any access. As landowner, they have already advised that they will not sell the land required for this development."

18. The reason for the defendant's stance is to be found at paragraph 33 of its detailed grounds of defence:-

> "The Defendant has …repeatedly advised the Claimant that it will not sell the land for the proposed residential use as it does not form part of the proposed Vision. The Defendant is of the view that selling land on a piece-meal basis at this time could have an adverse effect on wider plans".

19. On 27 April 2022, the claimant directed to Councillor Woodward, the Leader of the Council, a request to conduct the badger survey by means of a drone. Councillor Woodward e-mailed on 20 May 2022 to say as follows:-

> "You have no right to access private property without the land owner's consent. That consent has not been given. The same applies to using a drone, which given this is an airport, is expressly forbidden. It is of no significance with due respect to Hampshire County Council what any officer of that authority's ecology team may suggest as they have no jurisdiction over the Airport".

20. In the light of this, the claimant explored whether the issue of a badger survey could be made the subject of a condition, if planning permission were granted.

21. This thinking was informed by ODPM Government Circular: biodiversity and geological conservation – statutory obligations and their impact within the planning system (Circular 06/2005). Part IV deals with the conservation of species protected by law. As a result of the Protection of Badgers Act 1992, this includes badgers. Paragraphs 123 and 124 of the Circular concern the 1992 Act. Amongst other things, the likelihood of disturbing a badger sett, or adversely affecting badgers' foraging territory, is capable of being a material planning consideration.

22. Paragraph 99 provides that it is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted, otherwise all relevant material

considerations may not have been addressed in making the decision. Thus, the need to ensure ecological surveys are carried out should therefore only be left to coverage under planning conditions in exceptional circumstances. There is then is the following important caveat:-

> "However, bearing in mind that delay and cost that may be involved, developers should not be required to undertake surveys for protected species unless there is a reasonable likelihood of the species being present and affected by the development."

23. On 5 May 2022, Mr Wyatt refused a request to make the badger survey a subject of a condition. The following day, however, the claimant submitted new evidence by way of *Google Earth* imaging. This showed mowed grass on the development site. The claimant therefore submitted that it was unlikely there would be any badger setts on the site, given that badgers' preferred habitat is for longer grasslands.

24. On 11 May 2022, Mr Wyatt e-mailed the claimant as follows:-

> "I have now discussed this matter further with [Hampshire County Council's Senior Ecologist]
>
> Aerial photographs from Google are not enough to demonstrate that the site is simply managed grasslands. Having been on site, the land is uneven in places and the grass, whilst managed, does have some longer areas such that badgers might use the site.
>
> A known sett exists on this western side of the airfield and the proposal may, therefore, affect badgers. Given that there is a reasonable likelihood of badgers being present on the application site, there is a need for the survey to be undertaken before any planning permission could be issued. It is not a matter that can be reserved for future approval by planning condition".

25. Thus, on or before 11 May 2022, the claimant says that the defendant had physically accessed the site in order to document its own observations, which were then being used to counter the claimant's evidence.

26. The claimant replied by e-mail to say that it saw no reason to go ahead with the planning application, knowing that it would fail for lack of a badger survey, which could not be conducted because the defendant would not permit this. The claimant therefore asked that the planning application be put "on hold whilst I pursue the legal route to achieve the survey, which I would have preferred to avoid, but have now no option but to proceed with".

27. The claimant availed itself the defendant's internal complaints process. The matter was considered by Sarah Robinson, Director of Support Services, who communicated her conclusions by e-mail on 4 July 2022. She said that it was an entitlement of the landowner to decide who can access their land. The claimant needed permission to access land belonging to the defendant. There was nothing in property law to say that a landowner was acting unreasonably by withholding permission to access their land.

28. The e-mail made reference to a planning application (P/20/0248/FP), where a badger survey was allowed by the defendant on a different site within the Airport. Ms Robinson said she understood that this survey was permitted because the planning application concerned an aircraft hangar that "met the council's Vision and Planning Policies". She said that this was "a very different set of circumstances to your planning application".

29. On 22 July 2022, the claimant made a formal request to the defendant, via its solicitors, for access to the site. The solicitors' letter cited the authority of Hopkins Developments Ltd v SSCLG [2014] EWCA Civ 472 as confirming "an entitlement to procedural fairness in the planning process". It was pointed out that the defendant "has clearly gathered information regarding the site from his own site visits, and our client should not be prevented from having an opportunity to meet that case".

30. The letter also emphasised the "well-established principle that issues of land ownership are not relevant to the planning process". In due course, the defendant might refuse to sell the site to the claimant but the latter was "as a matter of law entitled to have a fair chance at putting his case forward". The judgment of Sir Ross Cranston in R (McLaren) v Woking BC [2021] EWHC 698 (Admin) was relied on for confirming the principle that a landowner who disagrees with the development should maintain their objection outside the planning process.

31. On 24 August 2022, the defendant responded through its legal department. The response stated that the defendant "maintains its refusal to grant access. A land owner is entitled to decide who does and who does not have permission to access its land." The e-mail stated that the defendant did not see the relevance of the case law relied upon in the letter from the claimant's solicitors because the present situation was "about land ownership and not planning".

SUBSEQUENT EVENTS

32. The claimant filed its application for judicial review on 2 November 2022. On 9 November 2022, the High Court refused the claimant's interlocutory claim for injunctive relief to prevent the defendant from determining the planning application.

33. On 10 November 2022, the claimant's planning application was refused. Thirteen reasons were given for that refusal. The claimant contends that four of those reasons relate directly to protected species and that, as a result, these four reasons cannot be answered without the claimant challenging the legality of the defendant' decision of 24 August 2022 to refuse access. The claimant also contends that the absence of a badger survey impacted upon the defendant's application of the so-called "tilted balance in favour of sustainable development". I shall have more to say about that in due course.

34. The other (unconnected) reasons for refusal largely concerned the inadequacy of information. This was because reports on a range of matters, as well as section 106 agreements, were not submitted prior to the planning application being determined. The defendant was, however, aware these reports would be provided by the claimant after site access for the protected species was resolved.

35. The refusal has been appealed to the Planning Inspectorate.

36. The procedural history of the application for judicial review is essentially as follows. On 26 January 2023, Holgate J, the Planning Liaison Judge in the Administrative Court, ordered that the claim should be transferred to the Planning Court pursuant to CPR 54.21(2)(ix). The stated reason was that the subject matter of the claim made it appropriate for determination by that court. The defendant has not challenged this order and no issue is taken with it.

TIMELINESS

37. In its summary grounds of defence, the defendant contended that the claim had been brought out of time. The ground which the claimant now pursues is said to have first arisen on 31 March 2022, when the Airport Manager communicated the defendant's decision in its capacity as landowner. The claimant was not prepared to accept this decision and persisted in providing amended versions of the same request, which continued to be refused.

38. The defendant's submission on timeliness did not find favour with Lang J, who considered the judicial review application "on the papers" on 2 February 2023. Lang J observed that as at 31 March 2022, the defendant was refusing access solely in its capacity as a private landowner. The judicial review challenge, however, was directed at the defendant's conduct as local planning in taking advantage of its position as a private landowner to influence the outcome of planning applications which it did not support. Lang J considered that the defendant's communication of 24 August 2022 was its formal response to this complaint. She therefore considered that the claim was filed within the three month time limit.

39. Lang J nevertheless refused permission on the basis that she considered section 31(3C) and (3D) of the Senior Courts Act 1981 applied. After hearing oral submissions, however, Lieven J granted permission, since she considered that section 31(3D) was not a bar because the badger survey could result in a different outcome on the claimant's planning application; and that the fundamental grounds of claim were arguable.

40. In my view, where a judge, at the permission stage, has expressly addressed the issue of timeliness and decided that the claim was in time, the judge considering the substantive challenge should, as a general matter, be extremely reluctant to reach a contrary view, unless they conclude that the earlier decision was plainly wrong or that, having regard to the material now available, the "permission" judge would have decided the issue differently.

41. In the present case, I could see no reason to depart from the conclusion that Lang J reached. On the contrary, besides the point she made, it is evident that the claimant would have stood accused of bringing the claim prematurely, if it had acted in response to the decision of 31 March 2022. This is because the claimant should have explored whether the badger survey could have been made the subject of a planning condition, for the reasons I have described.

THE GROUNDS OF CHALLENGE

42. The claimant advances three grounds of challenge. Ground 1 contends that the defendant has fettered its discretion as planning authority *qua* landowner. The defendant fell into error by acting as a private landowner for the site, which is identified

within the defendant's own planning policies for development. There is a significant difference between a private landowner and a public authority. Compliance with a planning policy is not a reason to permit or deny a person access to land.

43. Further, the obligation on a planning authority under section 70(2) of the Town and Country Planning Act 1990 is to have regard to the development plan etc when determining the planning application. These issues are not in play at an earlier stage, when the defendant is exercising some other function. A local authority must not act incompatibly with its other statutory obligations, nor fetter any other decision-making power that it possesses.

44. Finally under ground 1, the claimant argues that the factual basis upon which the ground is resisted is wrong. The reference here appears to be to paragraph 28 of the defendant's detailed grounds of defence, where it is stated that one of the main reasons for refusal was that the survey would disrupt airport business. Further, the defendant's apparent contention that planning officials were not concerned in the relevant decision making is said by the claimant to be refuted by the disclosure of the emails, to which I have made reference.

45. Ground 2 asserts procedural irregularity. In its position as planning authority, the defendant is said to have given the claimant an unfair and impossible material consideration to answer. Mr Wyatt gathered information regarding the site from his own site visit, in order to rebut the evidence provided by the claimant and, thereby, rule out the possibility of the badger survey being made the subject of a condition of the grant of planning permission, rather than a requirement of its grant.

46. In this regard, the claimant invokes the judgment of Andrews J (as she then was) in Spitfire Bespoke Homes Ltd v SSCLG [2020] EWHC 958 (Admin). That case involved an alleged instance of procedural unfairness in respect of a planning appeal. At paragraph 49 of her judgment, Andrews J said:-

> "The principles of natural justice apply as much to written appeal processes (such as the one adopted in the present case) as they do to oral hearings. All cases in which a breach of these principles is alleged will turn on their own facts, but the real issue, viewed objectively, is whether the party making the complaint has had a "fair crack of the whip". In this context, as in any other case where a breach of the rules of natural justice is alleged, the questions for the Court to decide are whether the complainant (i) knew the case it had to meet and (ii) had a reasonable opportunity to adduce evidence and/or make submissions to meet it: *Hopkins Developments Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 470 at [62]."

47. In the present case, the claimant argues that it has not had a "fair crack of the whip". The claimant was given an unfair and impossible material consideration to answer, in respect of which the claimant has no adequate alternative remedy and as a result of which the entire appeal process will be infected.

48. Ground 3 alleges irrationality, in that issues of land ownership are not relevant to the planning process and should not be used by planning authorities to stifle development. At various stages in the correspondence, the defendant has stated that it is not willing to sell the land to the claimant, with the result that the claimant's pursuit of a planning application is futile. Whether or not a development site is for sale is, the claimant says, irrelevant. It should be dealt with separately to the claimant's planning application. Although the claimant accepts that irrationality as a ground has a high hurdle to surmount, on the facts of this case, the claimant contends ground 3 is made out.

LEGISLATION

Planning primary legislation

49. Section 70 of the Town and Country Planning Act 1990 sets out general considerations for the determination of planning applications. Where an application is made to a local planning authority for planning permission, section 70(1) provides that the authority may grant permission, either unconditionally or subject to such conditions as they think fit; or they may refuse planning permission.

50. By section 70(2)(a), in dealing with an application, the authority is required to have regard to the provisions of the development plan, so far as material to the application. Section 70(2)(c) requires the authority also to have regard to "any other material considerations".

51. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that, if regard is to be had to the development plan for the purposes of any determination, the determination must be made in accordance with the plan unless material considerations indicate otherwise.

Town and Country Planning General Regulations 1992

52. Regulation 3 of the Town and Country Planning General Regulations 1992 makes provision for an application for planning permission by an interested planning authority to develop any land of that authority. The application is to be determined by the authority concerned unless the application is referred to the Secretary of State under section 77 of the 1990 Act.

53. Regulation 4 provides for certain exceptions, which are not relevant to the present case.

54. Regulation 10 provides that, notwithstanding anything in section 101 of the Local Government Act 1972, no application for planning permission for development to which regulation 3 applies may be determined by a committee or sub-committee of the interested planning authority if that committee or sub-committee is responsible (wholly or partly) for the management of any land or buildings to which the application relates; or by an officer of the interested planning authority concerned, if his responsibilities include any aspect of the management of any land or buildings to which the application relates.

Powers of a Local Authority to acquire or dispose of land

55. Section 120 of the Local Government Act 1972 enables a principal council to acquire land by agreement, whether situated inside or outside their area, for the purposes of any of their statutory functions or for the benefit, improvement or development of their area.

56. Section 123 empowers a principal council to dispose of land held by them in any manner they wish, subject to exceptions which are not relevant in the present case.

General power of competence

57. Section 1(1) of the Localism Act 2011 provides that a local authority has power to do anything that individuals generally may do. Section 1(2) explains that subsection (1) applies to things that an individual may do even though they are in nature, extent or otherwise unlike anything the authority may do apart from subsection (1) or unlike anything that other public bodies may do.

58. Section 1(5) states that the generality of the section 1(1) power is not limited by the existence of any other power of the authority which, to any extent, overlaps the general power. Section 1 is, however, limited by section 2, which lays down "boundaries" to the general power. In particular, section 2(1) provides that if the exercise of a pre-commencement power of a local authority is subject to restrictions, those restrictions apply also to exercise of the general power so far as it is overlapped by the pre-commencement power.

DECIDING THE CLAIM

Ground 1

59. Despite the apparent width of the defendant's powers of land acquisition and ownership, arising under the 1972 Act and section 1 of the 2011 Act, there is an essential difference between the position of the defendant and a private landowner. The defendant is a planning authority, entrusted by Parliament to discharge its functions as such in accordance with the principles of public law. Accordingly, the defendant cannot exercise the rights that it would otherwise have as a landowner, if and to the extent that this would inhibit its ability to decide applications for planning permission according to law. I entirely accept that the 1992 Regulations, in making provision for a local authority to consider, as local planning authority, an application for planning permission made by that authority, show that Parliament has recognised the multi-functional nature of local authorities. As the Regulations make plain, however, there must be an effective separation of those functions, entailing restrictions upon committees, sub-committees and officers.

60. Against this background and despite Mr Capildeo's able submissions, I am in no doubt that ground 1 made out. My reasons are as follows.

61. The claimant's request to go onto the site in order to undertake a badger survey was - and must have been appreciated by the defendant as being - directly for the purpose of making an application to the defendant for planning permission. The defendant's primary reason for denying access was that the claimant's development proposal was not regarded as compatible with the defendant's Vision for Daedalus. This meant that the defendant would not sell the land to the claimant. Accordingly, there was no point in letting the claimant undertake the badger survey.

62. At the hearing, Mr Capildeo sought to distinguish the Vision from the defendant's planning policies. The Vision is, however, inextricably linked with those policies and, as a result, with section 70(2) of the 1990 Act and section 38 of the 2004 Act.

63. This emerges clearly from the officer's report for the defendant's planning committee, which refused the claimant's application for permission. The report (authored by Mark Wyatt) identified, at 8.0, the main planning considerations. The first of these was "Development at Daedalus and the principle of this development". This primary consideration was detailed at paragraphs 8.2 to 8.16. Paragraph 8.2 begins with a description of the Vision, both as formulated in 2015 and updated in 2018. The Vision identified, at Daedalus West, two clusters of activity, which were then described. Paragraph 8.4 tied this into the NPPF paragraph 106(g), the following paragraphs cited the defendant's planning policies, including policy CS12, which covers the development site within "Hangars West" area identified for development within the policy.

64. Mr Capildeo submitted that the defendant's objection to the claimant's application for planning permission was that it contained a residential element and that this was inimical to the Vision. Mr Capildeo did not, however, seek to draw attention to any provision in the Vision which makes this evident. For my part, I have not been able to identify such a provision.

65. The defendant's stance must therefore be that development at Solent Airport, within the terms of the Vision and the defendant's policies, would necessarily be impeded if any residential elements were to be permitted, such as the claimant's live/work units. That is, however, manifestly a planning issue, to be decided, in the first instance, by the defendant *qua* local planning authority, rather than by the defendant *qua* landowner.

66. This point was effectively recognised by Sarah Robinson, Director of Support Services, in her e-mail report of 4 July 2022, where she said (in connection with the application for a badger survey which was allowed on a different site on the Airport) that the planning application which related to that survey "met the council's Vision and planning policies. This is a very different set of circumstances to your planning application".

67. It might be contended that, nevertheless, any fettering of discretion was more apparent than real, because the defendant, as local planning authority, would have a good reason to refuse permission. However, any such contention would be wrong. The decision of the local planning authority is not final. An appeal lies to the Secretary of State's planning inspector. The claimant has exercised that right of appeal. The claimant intends to contend, before the inspector, that the residential element of its proposals is, in fact, compatible with the Vision. By reason of its actions in refusing to allow the claimant to undertake the badger survey, the claimant has constrained the scope of the appeal. The claimant faces the difficulty that the presumption in favour of sustainable development in the NPPF does not apply:-

> "where the plan or project is likely to have a significant effect on a habitat site …unless an appropriate assessment has concluded that the plan or project will not adversely affect the integrity of the habitat site"(paragraph 182)."

68. The refusal of the defendant to allow the badger survey to take place means that this "tilted balance" in favour of development is unavailable to the claimant to deploy before the inspector.

69. For these reasons, ground 1 is made out, irrespective of the nature and responsibilities of those who decided to refuse the claimant access in order to undertake the survey.

70. In any event, I find that the relevant decision-making involved those having responsibilities in respect of the defendant's functions as local planning authority. Richard Jolley was specifically consulted on 28 March 2022. He is in overall charge of planning matters with the defendant. I have already mentioned the reference to planning policies in the e-mail of 4 July 2022.

71. Ground 1 accordingly succeeds.

Ground 2

72. Ground 2 concerns the question of whether the issue of the badger survey and its consequences could be made the subject of a condition. As I have explained, the claimant submitted evidence by way of *Google Earth* imaging, showing mowed grass, which was considered to demonstrate the unlikelihood of badger setts on the site. Circular 06/2005 confirms that developers should not be required to undertake surveys for protected species unless there is a reasonable likelihood of the species being present. The absence of badgers would indicate that a ground survey was not required in connection with the planning application.

73. In response, Mr Wyatt, the planning officer, went onto the site and conducted his own survey, which formed the basis of his e-mail to the claimant of 11 May 2022. Having examined the land, Mr Wyatt concluded that there was a reasonable likelihood of badgers being present and that the matter was, accordingly, not one that could be reserved for future approval by planning condition.

74. The defendant's response to ground 2 is to reiterate that the claimant had repeatedly been told that the land was not for sale. There was, accordingly, no point in permitting the claimant to have access. The defendant further relies upon its position as an "ordinary" landowner, by reference to section 1 of the 2011 Act.

75. The defendant's primary position is hopeless. It is contradicted by the fact that Mr Wyatt considered it necessary to undertake his own site visit, in order to attempt to refute the claimant's argument, based on Circular 06/2005. On any rational view, Mr Wyatt was acting in his capacity as an officer of the local planning authority. Indeed, Mr Capildeo relied upon that fact in his oral submissions. Mr Capildeo said that it would have been improper of the defendant, as landowner, to deny Mr Wyatt access to the land in pursuance of his planning responsibilities.

76. The fact of the matter is that the defendant used its position as landowner to put the claimant at a material disadvantage in the planning process. By denying access, the defendant prevented the claimant from being able to make any considered response, based on its own observations, to Mr Wyatt's assertions. As a result, the planning application went forward without those assertions being tested, with the result that the absence of a badger survey became a reason for refusing planning permission.

77. The defendant invokes section 1 of the 2011 Act, which it is said puts the defendant in the same position as any other landowner, who can decide who comes onto their land. However, reliance on the 2011 Act faces the difficulty identified by Green J (as he then was) at paragraph 125 of Hussain v Sandwell Metropolitan Borough Council [2017] EWHC 1641 (Admin). Quoting *De Smith's Judicial Review*, which had commented on sections 1 and 2, Green J noted the authors of *De Smith* as considering that, notwithstanding section 1, a local authority must maintain:

> "… adherence to common law principles demanding the adoption of decisions and the taking of measures which are lawful, rational and procedurally fair. As the authors observed: *"the plain meaning of S.1(1) does not absolve councils from meeting these standards even though they do not generally apply to individuals acting in a private capacity"* .

78. What this means is that section 1 of the 2011 Act does not permit a local authority to act contrary to the principles of natural justice, as identified by Andrews J in Spitfire. It is inconceivable that, in enacting section 1, Parliament envisaged that local authorities would be absolved from the requirements of procedural fairness, even though "an ordinary person" is not subject to these.

79. On any view, Mr Wyatt's actions created potential unfairness on the part of the defendant, in its capacity as local planning authority, which the defendant could and should have eliminated, by granting the claimant access, in the defendant's capacity as landowner. It is immaterial that, if Solent Airport had been owned by a private person who refused access, the defendant could not have done anything about the matter. Local authorities have to act in accordance with the requirements of public law.

80. The same result occurs if one views the defendant's position as landowner through the prism of section 120 of the 1972 Act.

81. Ground 2 accordingly succeeds.

Ground 3

82. Ms Pattni rightly accepts that the threshold for this ground is high. She nevertheless submits that it is met. Issues of landownership are, she contends, not relevant to the planning process and should not be used by planning authorities to stifle development.

83. In this regard, the claimant relies on McClaren. That was a case where part of the proposed development site was owned by a third party. The remainder of the site was owned by a development company, which entered into a section 106 agreement with the local planning authority in order to facilitate development of the site. The development company could comply with the terms of the section 106 agreement because those terms concerned only the part of the site which it owned.

84. The third party contended that the section 106 agreement could not be implemented because it was the owner of the other part of the site and had not entered into any such agreement.

85. Sir Ross Cranston rejected the contention of the third party that the section 106 agreement needed to apply to the entirety of the site. At paragraph 36 of his judgment,

Sir Ross noted that if the claimants wish to be party to the section 106 agreement, they could do that at any time. They did not, however, need to do so. Nor did they need to sell their land. They could prevent the development going ahead, given the nature of the permission granted.

86. Mr Capildeo questioned the relevance of McClaren to ground 3 of the present claim. I consider, however, that it is relevant, to the extent that it shows that a landowner's objection to a scheme should be maintained outside the planning process. Like the third party in McClaren, the present defendant can, in practice, prevent the development from going ahead, irrespective of the grant of planning permission, by simply refusing to allow the land it owns to be developed. The position would be otherwise only if a power of compulsory acquisition were sought and conferred.

87. The fact that a landowner has stated an intention not to permit development on their land is capable of being a material consideration, in the planning determination. That, however, is the extent of its relevance.

88. On the facts of the present case, I am in no doubt that the defendant has used its position as landowner to thwart the proper operation of the planning process. This emerges from my analysis of grounds 1 and 2.

89. Matters do not end there. In paragraph 28 of its detailed grounds of defence, the defendant states that the "decision to refuse access was mainly reached on the basis that said survey [i.e. the badger survey] would disrupt airport business (the Airport facilitated 35,000 flight movements in 2022) ...".

90. I find this a wholly remarkable assertion. It is plain from the initial e-mails that the Airport Manager had no concerns whatsoever that undertaking a badger survey would necessarily disrupt the operations at the Airport. Clearly, a time could be chosen when the survey could be undertaken compatibly with aircraft movements and other operational demands. There is no suggestion that Mr Wyatt's survey resulted in operational difficulties. The same is true of the badger survey mentioned by Ms Robinson. I regret to say the assertion in the detailed grounds is indicative of an authority that, for whatever reason, is simply not acting rationally.

91. At paragraph 33 of the detailed grounds, it is said that the defendant "is of the view that selling land on a piecemeal basis at this time could have an adverse effect on wider plans." Given that the Vision envisaged disposals on a plot by plot basis, it is difficult to understand the rationale of this statement. It also argues against the defendant's case at the hearing, which was that the defendant's paramount concern was the residential element of the claimant's proposal. It also goes against paragraph 7.2 of the officer's report, which describes the defendant's "estate/property" arm as objecting on the basis that "residential use is neither appropriate nor welcome on this site. We have informed the applicant that the site is not for sale **for this proposed use**" (my emphasis).

92. In the light of all this, it is impossible to escape the conclusion that the defendant has simply not acted as a rational local authority should. It has put forward justifications for refusing to let the claimant inspect for badger activity, which have no basis in law and which, in certain respects, are entirely spurious.

93. Ground 3 accordingly succeeds.

Section 31(2A) of the Senior Courts Act 1981

94. Section 31(2A) of the 1981 Act provides that the High Court must refuse to grant relief, if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

95. In Gathercole v Suffolk CC [2020] EWCA Civ 1179, Coulson LJ held, at paragraph 38, that the court must not shirk from its duty under section 31(2A). I shall endeavour not to do so.

96. The defendant (which bears the burden in this regard) submits that the " tilted balance" in favour of the development in relation to the badger survey is displaced by significantly and demonstrably adverse impacts, which outweighed the benefits of granting permission. This is said to be especially the case in relation to the claimant's proposal for a residential element to the development, which the defendant says is "wholly unsuitable on an active airfield for safety reasons and for which there are no known precedents, in addition to being completely at odds with the defendant's Vision…".

97. The defendant also submits that, quite apart from the badger survey, the application for planning permission which was refused lacked a number of other reports, which ought to have been undertaken prior to the determination of the application. Although the claimant has previously submitted that the decision to refuse access for the badger survey prevented it from obtaining reports in relation to those matters, the third witness statement of Mr Day, the claimant's director, demonstrates this cannot be the case.

98. Applying section 31(2A) to the facts of this case, the question upon which the defendant must satisfy me is whether it is highly likely that the outcome for the claimant would not have been substantially different if, by the date of the impugned decision in August 2022, the defendant had permitted the badger survey to take place. For this purpose, "the outcome" is the grant or refusal of planning permission to the claimant, either by the local planning authority or on appeal.

99. I first consider the defendant's "tilted balance" argument. It is simply not possible, in my view, to conclude that the "highly likely" threshold has been met by the defendant. In a case of this kind, where the court is being asked to prognosticate on the fate of an appeal against the refusal of an application for planning permission, there would need to be something in the nature of a "knockout blow", whereby it could be said with confidence that the appeal would still fail before the inspector. Anything less means the court would be attempting to second-guess the inspector's conclusions on the planning merits of what may be (and is here) a range of matters (not least the compatibility of the proposal with the Vision). This court is not equipped to embark upon such an exercise.

100. The same is true of the defendant's argument regarding the other reports. According to the claimant's document entitled "Rebuttal against reasons for refusal to Solent Aeropark", submitted in connection with the planning application, the production of these reports was put on hold by the claimant until after the badger survey had been conducted.

101. In his third witness statement, Mr Day says that the outstanding reports have now been submitted as part of the planning appeal. The claimant has also provided unilateral undertakings in respect of nitrogen neutrality, recreational disturbance and affordable housing.

102. Paragraph 11 of this witness statement says that most of the thirteen reasons for refusal related to reports that the claimant had been unable to obtain in time for the planning committee hearing his application. I assume that the defendant has interpreted paragraph 11 as contradicting the claimant's earlier stance, which was that it would wait upon the badger survey before dealing with the other matters.

103. I do not regard that as a fair reading of Mr Day's third witness statement. I consider it is evident that the claimant took the decision not to undertake the expense of engaging with these other matters whilst the issue of access for the badger survey remained unresolved. That was against the hope (which proved to be misplaced) that the determination of the claimant's planning application by the defendant could be put in abeyance until the issue of the badger survey had been settled through the judicial review.

104. I find that there is nothing unreasonable about the claimant's stance in this regard. Accordingly, had access been provided by August 2022, the likelihood is that the claimant would have addressed these matters by the time the defendant came to determine the application. In any event, things have moved on. As I have explained, the focus for the purposes of section 31(2A) is upon the claimant's appeal. The relevant matters have been addressed in connection with that forthcoming appeal. Accordingly, the mere absence of any report cannot be shown by the defendant as making it highly likely that the appeal will be dismissed.

105. Even taking these two matters in combination, I conclude that the defendant has failed to make good its submission under section 31(2A).

DECISION

106. This judicial review succeeds on grounds 1, 2 and 3. The impugned decision falls to be quashed. Subject to receiving written submissions from counsel on the form of order, I am minded to include a mandatory order, regarding access for the survey, in the absence of any undertaking from the defendant to permit this.