IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2019] EWHC 2792 (Admin)

No. CO/1428/2019

Royal Courts of Justice
Thursday, 10 October 2019

Before:

MR JUSTICE JAY

B E T W E E N :

(1) CARLOS BURGOS
(2) NICHOLAS AMAYO — Claimants

- and -

SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT — Defendant

- and -

LONDON BOROUGH OF HARINGEY — Interested Party

MR M WILLERS QC, MR T BALDWIN and MS C ZAPATA BESSO (instructed by Hodge Jones and Allen) appeared on behalf of the Claimants.
MR R HONEY (instructed by the Government Legal Department) appeared on behalf of the Defendant.
MR T CORNER QC and MR A BYASS (instructed by the London Borough of Haringey) appeared on behalf of the Interested Party.

J U D G M E N T

MR JUSTICE JAY:

1 This is an application brought as of right under section 23 of the Acquisition of Land Act 1981 for an order that the decision taken on 23 January 2019 to confirm the London Borough of Haringey (Wards Corner Regeneration Project) Compulsory Purchase Order ("the Wards Corner CPO") be quashed.

2 The Wards Corner CPO authorised the compulsory purchase of lands comprising the street block enclosed by Tottenham High Road, Seven Sisters Road, West Green Road and Suffield Road and includes various residential accommodation and the buildings which formerly housed the Wards departmental store and currently house the Seven Sisters Market ("the market").

3 The market was established in the 1980s and now possesses a predominantly Latin American character emulating, on my understanding, a traditional market located near Medellín in Colombia. The first claimant is a pensioner and spokesperson for the market traders. The second claimant is a market trader and a director of Seven Sisters Market Traders Association Limited. Both gave evidence to the Wards Corner CPO public local inquiry. I will proceed on the basis that the claimants represent the interests of the market traders as a whole.

4 The Wards Corner CPO was made by the London Borough of Haringey ("the interested party") on 14 September 2016. It is accompanied by a section 106 agreement dated 11 July 2012 and a deed of variation dated 25 July 2017. A public local inquiry took place with oral hearings encompassing a ten-day period in July 2017 before the planning inspector, Mr John Felgate. He received copious written and oral evidence, as well as detailed submissions on that evidence, matters of planning judgment and the law. Mr Felgate's report upheld the Wards Corner CPO with minor, immaterial modifications in January 2018. References to paragraph numbers in the inspector's report will be referred to hereinafter using the prefix "IR".

5 By letter dated 23 January 2019, the defendant decided to confirm the Wards Corner CPO with the modifications suggested by the inspector. References to paragraph numbers in the defendant's decision letter will be referred to hereinafter using the prefix "DL". In formal terms, it is this decision letter which is the focus of the present application under section 23 of the 1981 Act, being in the nature of a statutory judicial review. The Wards Corner CPO was formally made by the interested party on 27 February 2019.

6 The claim form advances six grounds of challenge, but at the start of his oral argument Mr Mark Willers QC – correctly, in my judgment – boiled his clients' case down to the first. My preliminary view had been (confirmed by Mr Willers's considered view) that grounds 2 to 6 could not succeed on a freestanding basis, although they were relevant to the court's approach to this application insofar as issues of discretion and materiality arose. I should add that the claimants take issue with many aspects of the inspector's report, and, consequently, the defendant's decision, but no doubt recognise on advice that the ambit of section 23 is restricted.

7 Before identifying the claimants' primary ground of challenge, I need to sketch out some essential factual background insofar as it is genuinely material to that ground. The defendant has for approximately 15 years now been intent to redevelop the market, and a number of local policies have been directed to that end. DL10 identified the key policy consideration germane to the Wards Corner CPO as policy SS5 of the Tottenham Area Action Plan adopted in 2017. This policy envisages the re-provision of the existing market

on site, a temporary market during construction and a range of small and affordable market units suitable for independent traders.

8 The first planning permission granted in favour of Grainger (Seven Sisters) Limited ("Grainger") was quashed by the Court of Appeal in 2010, and on 11 July 2012 the interested party and Grainger entered into a section 106 agreement, the provisions of which were correctly summarised by the inspector at IR39. Insofar as is germane for present purposes, Grainger was required to use reasonable endeavours to enter into a lease with a market operator for the provision of the new market. Existing traders are entitled to be offered a lease or licence in the new market and a temporary market is to be established, with existing traders to be offered a stall in it with a three-month rent-free period. Once the refurbishment is complete, the temporary market will come to an end and the traders will move back.

9 As I have said, a deed of variation was executed on 25 July 2017. Its provisions were summarised more or less correctly, save in one important respect, at IR40. In relation to the temporary market – which, I should add, will be located on land opposite the existing site – there will be a licence-free period of three months and then fees which would range from £35 to £80 per square foot depending on location within the market and other prescribed factors. The same licence fee would apply to the new market, subject to an initial 30 per cent discount for the first 18 months. According to IR40, at the end of this 18-month period the licence fee will revert to the full fee until the end of month 30 and (this is the seventh bullet point) "thereafter the licence fees are increased by no more than 2% per annum."

10 Looking at this in slightly more detail, and moving away from the terms of IR40, the current market fees, which have remained stable since 2015, range on average from between £60 and £64 per square foot. These figures are not accepted by the claimants, but I derive them from the expert report of Mr Gary Saunders, whose evidence was, I infer, accepted by the inspector on this issue. It is contemplated that the renovation works, and therefore the temporary market, will last for approximately 30 months. 15 months into this period (including the licence-free period of three months), the stipulated licence fee will suffer an increase of 2 per cent and the same will apply a year later. As for the new market, the 30 per cent discount applies for 18 months and a 2 per cent uplift applies 12 months thereafter.

11 There is an element of confusion as to how the 2 per cent uplift is supposed to operate in connection with the new market, inasmuch as 18 months plus 12 months equals the 30-month period I have previously mentioned. But this matters not for present purposes, save to provide a possible explanation for the seventh bullet point in IR40.

12 The true position *pace* that bullet point is that the beneficial regime, as I choose to describe it, will last for approximately five years, being composed of one period of approximately 30 months and another of exactly 30 months, and that the 2 per cent uplift will apply only during the currency of that period. At the end of this regime, the annual uplifts will not be at 2 per cent but the following provision in schedule 2 to the deed of variation will be applicable:

> "(d) An obligation to set licence fees in the new market area at a level that is consistent with the Council's policy objective to attract and promote local independent traders."

This means that the market operator will, subject to the foregoing constraint, apply market rents. These will be determined no doubt with reference to two factors: namely, comparable licence fees in the London area generally (Mr Saunders has given evidence about these); and, secondly, what the market will bear in the Tottenham area, given the need to conserve this particular market as a going concern and the interested party's policy objective to attract and promote local independent traders.

13 In the light of the above, it is plain that the seventh bullet point in IR40 contains a solecism. This provides the springboard, but only the springboard, for the claimants' first ground. There were a number of issues which the inspector was required to determine, and for present purposes I may summarise these very briefly as follows. First, whether the Wards Corner CPO meshed with the interested party's general regeneration strategy. The inspector found that it did (see IR295). Secondly, whether the Wards Corner CPO contributed to economic, social and environmental well-being. This consideration embraced a number of issues, including whether the new market would be viable in all senses of that word and affordable for market traders. I will be examining these matters in more detail in due course, in particular the issue of affordability, but the inspector did find that the section 106 agreement and deed of variation provided sufficient legal protection without amounting to a cast-iron guarantee (see IR302). Thirdly, whether the Wards Corner CPO was in accordance with development plan policies, and the inspector found that it was (see IR324). Fourthly, whether the purposes of the Wards Corner CPO could be achieved by other means, and the inspector found that they could not. There was no available alternative to these proposals (see IR347). Fifthly, whether the Wards Corner CPO violated the market traders' rights under Articles 8 and 14 and A1P1 of the Convention, the rights of their children also under Article 8 and minority rights under international law, and the interested party's public sector equality duty. The inspector found that no relevant human rights were in play, that the position was likewise in connection with any international treaty obligations, and that the section 149 public sector equality duty had been satisfied. Finally, the inspector found that there was a compelling justification for this scheme (see IR382).

14 The affordability issue, which is clearly key to ground 1, was, as I have said, addressed by the inspector under the rubric of contribution to the economic, social and environmental well-being of the area, but it was also specifically considered in the context of the public sector equality duty. The defendant's approach mirrored this (see DL15 and DL33). Elsewhere, the defendant differed slightly from the inspector on human rights and the justiciability of international treaty obligations, although, save in these respects, it would be fair to say that he adopted the inspector's reasoning, conclusions and recommendations.

15 Ground 1 is that the inspector fundamentally misunderstood the effect of the section 106 arrangements, in particular the deed of variation, and erroneously predicated his conclusions on affordability and the public sector equality duty on the premise that the 2 per cent annual uplift will endure indefinitely and certainly beyond the second 30-month period I have mentioned. Reliance is placed not purely on the seventh bullet point in IR40, because the submission is strongly advanced that it is carried through into the essential conclusions of the inspector and of the defendant's reports, the focus for present purposes being on the latter's decision letter. The impact of this error is significant because it distorted the overarching balancing exercise on compelling justification, as well as the specific proportionality exercise required by relevant provisions of the Convention, in particular, of course, Articles 8 and A1P1.

16 Put in this way, it may be seen that ground 1 is said to have a knock-on effect. It impinges on the terrain covered by grounds 2 to 6, which are directly targeted at human rights and

international treaty obligations. This, as I have pointed out, must be the most compelling way of advancing the claimants' overall case.

17 I must acknowledge that Mr Willers's oral argument was most attractively and compellingly presented. His clients profoundly disagree with much of the inspector's report and the defendant's decision letter, but the legal framework within which section 23 operates requires a focused approach. Mr Willers certainly provided it. In oral argument, Mr Willers submitted that the focus must be primarily on the defendant's decision letter. In terms of the inspector's report, he submitted that it is clear that the solecism on which the claimants rely is not confined to the seventh bullet point in IR40. He took me in particular to IR302 to 304 which I set out in full:

> "302. Against these benefits, the Traders and others argue that the proposed scheme would lead to the closure of the Seven Sisters Market, and that this would harm the area's well-being. I accept that the terms of the section 106 agreement, even with the Deed of Variation, do not amount to a cast-iron guarantee that the new permanent market will be provided, nor that it will be retained in perpetuity. But it would be unrealistic to expect such an open-ended commitment. The legal obligations require the developer to use reasonable endeavours to ensure that the new market is provided. Such an obligation is not a matter that can be taken lightly, and the Council has powers enforce it through the Courts if necessary. Terms have already been agreed with a potential operator. Overall I see no reason to doubt that, if the development goes ahead, in all likelihood it will include the new Market.
>
> 303. I tend to agree with the view of some objectors that the new Market's design and layout, and its location within the development, are not necessarily the best that could be achieved. Ideally, it might have been preferable if the Market were located more prominently, and if the building had been designed to give it more visual emphasis, and indeed some form of external expression. But there is no evidence that these shortcomings undermine the Market's viability. The existing market hall has far greater shortcomings, yet has managed to survive. In comparison with this, the new facility would be a considerable improvement, having more space, better access, and proper standards of construction. In my view therefore, the development's effect on the Market would be to enhance its long-term prospects rather than damage them.
>
> 304. I accept that not all of the existing traders might necessarily be able to, or wish to, continue in the new Market. For some, even with the discounts and incentives provided for in the section 106 agreement and deed of variation, the rents required in the new Market might be too high. For others, the difficulties of moving twice in two or three years may be too much. So too might be the loss of the existing unauthorised extensions and mezzanine additions. But the retention of the Market is not dependent on the existing traders. Indeed a regular turnover of traders and businesses is a common feature of many London markets, especially where stalls are held on short-term licences, as here. There is no evidence that new stall-holders could not be found, if vacancies arose. Questions such as whether that might lead to a change in the Market's character, or in the range of goods sold, or the ethnic mix, are not normally regarded as planning matters. To

my mind these are primarily commercial considerations, for the traders themselves, and for the market operator."

18 IR304 expressly references IR40 and, so the submission runs, the key error is perpetrated rather than corrected or qualified. My note of Mr Willers's headline submission on these paragraphs is:

> "If the inspector and the defendant were under the impression that rents would simply continue to rise by 2 per cent, that being the understanding, the decision maker might well have taken the view that the protections were adequate and minimised human rights infractions. The inspector did not factor in the risk of market traders falling away because of licence fee increases."

19 This risk could scarcely be regarded as theoretical or minimal because it had been strongly submitted on behalf of the market traders before the inspector that they would be "thrown to the wolves" after approximately five years. It cannot be inferred, submitted Mr Willers, that the inspector was addressing this point at all. Mr Willers did not overlook IR361 to 364, which provide:

> "361. In addition, the Order scheme seeks to mitigate these difficulties for Traders, through the section 106 package. Amongst other things, this includes the provision of the temporary market, the existing traders' right to a stall, relocation costs, discounted and controlled rents for an initial period, one-to-one support through a facilitator, and consultation over detailed matters like the internal layout and individual stall positions. These measures are proposed specifically to help smooth the transition. They do not go as far as those proposed by the Traders themselves, that does not mean that they would not be effective in helping the Traders to manage this process. Through these section 106 provisions, it seems to me that the Order scheme would minimise any residual disadvantage suffered by the Traders, and would include reasonable steps to meet their needs, thus advancing equality of opportunity.
>
> 362. Even with the proposed discounts and controls, the rents for most types of units would be higher than those charged at present. But in return, in both the temporary and permanent new markets, traders would have the benefits of a modern building, with better access and circulation, improved public visibility, and the opportunity to create a more welcoming environment for customers. Once the new development is fully complete, the Market would also benefit from the increased footfall generated by the other new retail units adjacent, and from the presence of a greatly increased resident population on the site itself. These changes would significantly enhance the retail environment both internally and externally.
>
> 363. The effects on the Traders would therefore include some potential advantages as well as disadvantages. Certainly there is a possibility that some might be made worse off overall, and I fully understand that the risk of such an outcome may be unwelcome. But this risk has to be viewed in the context of the Traders' existing position, which is also far from risk-free, given their lack of security of tenure beyond the notice period of their Market licences. The Traders operate in the commercial world, and even

without the proposed development, nothing protects them against the possibility of rising rents, or the withdrawal of licences, or the Market's complete closure. The poor condition of the building adds to this insecurity. Whereas, in the Order scheme, the section 106 provisions would provide more certainty and security at least for the first few years, and the long-term worry about the building itself would be removed.

364. Overall therefore, it seems to me that the Order scheme would not leave the Traders materially worse off than they are now. The magnitude of the challenges and uncertainties facing them would be significant, but realistically no more so than those facing them in any event. Comparing the two scenarios, with and without the development, there is no clear evidence that the latter would be to the Traders' detriment. It follows therefore that the question of discrimination, indirect or otherwise, does not arise."

20 When it comes to consideration of the defendant's decision letter, Mr Willers submitted that the same erroneous approach is implicit and that the IR40 error is never corrected. Here, DL15 and DL31 to 33 are highly material, and I set these out in full:

"15. As to the effects on the future of the Seven Sisters Market, the Secretary of State notes that while the safeguards in the varied section 106 agreement do not provide a cast iron guarantee that the new permanent market will be provided, or retained in perpetuity, nor that all existing traders will be able to, or wish to continue trading, he agrees with the Inspector for the reasons given at IR 302-305 that the Order scheme makes reasonable provision for the retention and continued operation of the Seven Sisters Market. Although the development is not without risks to the market, he further agrees with the Inspector that it faces an uncertain future in any event and the overall effects of the Order scheme is to enhance and not diminish its prospects of survival.

[...]

31. The Secretary of State has considered his duty under Section 149 of the Equality Act 2010 to have due regard to the requirements of the PSED, in particular the need to eliminate discrimination, advance equality of opportunity and foster good relations between those with protected characteristics and others. The Secretary of State agrees with the Inspector that the decision may affect market traders, by virtue of their ethnicity (IR358) and women, by virtue of the fact that the majority of those affected are women (IR365).

32. The Secretary of State considers that any impacts (e.g. the lack of suitable and affordable replacement premises for existing and/or similar business) of the decision on these protected groups will be mitigated and provision made through both the opportunity for market traders to transfer to the temporary market facility and then eventually to the new market as established through the Section 106 agreement (including the alterations by way of the Deed of Variation).

> 33. The Secretary of State fully accepts that the move to the temporary market and then eventually to the new market may create some difficulties, including financial challenges. However, he has weighed this against the strong possibility that renovation works would need to be carried out in the fullness of time at the existing market in any event and these would not be without similar financial challenges and would create a period of uncertainty. Following careful consideration of these matters, the Secretary of State concludes that any impact of the decision is justified and proportionate."

21 Mr Willers submitted that the only reasonable inference is that the defendant adopted the inspector's summary of the deed of variation at IR40 and applied it when determining for himself whether there was a compelling justification for this scheme. When pressed by me on a number of matters, Mr Willers submitted that he could have his cake and eat it in this context, and to this extent: if the court were satisfied that the inspector's report is predicated on a fundamental misapprehension as to the deed of variation, the court may readily infer that an identical error was perpetrated by the defendant. If, on the other hand, this court were not persuaded in relation to the inspector's report, Mr Willers submitted that the defendant's decision letter is undermined by this fundamental misapprehension, because at no point does the Secretary of State distance himself from IR40.

22 Mr Willers further submitted that the court should harbour a genuine doubt as to the decision maker's apprehension of the true position. He did not submit in the alternative that the inspector and/or the defendant perpetrated a *Wednesbury*-type error, in the sense that the planning judgment breach was irrational, or that the inspector's decision is bad for want of reasons *simpliciter*.

23 The submissions of Mr Richard Honey for the defendant and Mr Timothy Corner QC for the interested party may be summarised in the following terms. First, it is said that the correct approach in law is not whether the claimants have established a genuine doubt, but whether they have demonstrated that the decision maker did err in law in the *Anisminic* sense. Secondly, it is said that a consideration of the inspector's report in particular read as a whole should lead to the conclusion that the decision makers did not labour under the misapprehension attributed to them by the claimants, notwithstanding the solecism located in the seventh bullet point in IR40. It is not inherently credible that either the inspector or the defendant could have made so egregious an error in the light of the submissions received, and other relevant paragraphs in the inspector's report demonstrate that no such error was in fact made. Thirdly, it is said that even if the claimants were right, the conclusion in this case would necessarily have been the same.

24 The relevant principles governing an application under section 23 of the Acquisition of Land Act 1981 have been helpfully summarised by Elias LJ in *Margate Town Centre Regeneration Company Ltd & Ors v Secretary of State for Communities and Local Government & Anor* [2013] EWCA Civ 1178 at [17]. Sub-paragraphs (d) to (g) are particularly germane. It is clear law, and in any event common ground in this case, that inspectors' reports and decision letters must be read fairly as a whole as if by a well-informed reader. It is also well established and equally common ground that where a decision maker has erred in law, the decision should be quashed unless the court is satisfied that the decision maker would necessarily have made the same decision had the error not been made.

25 There are two points of law which arise for my determination in the light of the oral submissions.

26 First, Mr Honey submitted that, given that this was avowedly not a reasons challenge, the test is not "[a] genuine as opposed to a forensic doubt" as to what was decided and why. The burden of persuasion imposed on the claimants is a higher one.

27 There was a lively debate between bench and bar on this issue, and at the end of it I found myself parting company with Mr Honey, and indeed Mr Corner, for this reason: if disputes of fact arise in judicial review, these are ordinarily determined on the balance of probabilities with the burden residing on the claimant. In the present case, there is no factual dispute in the strict sense; the issue is whether the decision maker perpetrated a relevant error of law.

28 The error asserted by the claimants is that the decision maker misconstrued a legal document (a deed of variation) and that this was fundamental. If a legal category for this error were required, I would turn to the judgment of Carnwath LJ, as he then was, for the Court of Appeal in *E v Secretary of State for Home Department* [2004] QB 1044. If the mistake were made, it was an error as to an established fact which was uncontentious and objectively verifiable. Indeed, a misconstruction of a legal document would seem to me to be *a fortiori*. However, the issue here is whether the decision maker made the error of which he is inculpated. In order to ascertain whether he did, the relevant decisions need to be examined as a whole, entailing a review of their reasons, the reasoning and the conclusions. I would hold that the present case falls squarely within the principle enunciated by Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* [1993] 66 P&CR 263: see [33] of the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953. It also falls within [36] of the later case, which paragraph is often cited:

> "The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy *or some other important matter* or by failing to reach a rational decision on relevant grounds." [Emphasis supplied]

29 It follows that I must reject Mr Honey's robust submission on this first matter.

30 The second issue of law engages Mr Willers's "having your cake and eating it" point. I must say that I am completely unpersuaded by it. If the inspector's report read as a whole proceeded on the basis of a fundamental misapprehension as to the effect of the deed of variation, it would follow, in my view, that the defendant's decision letter was infected by the same error. However, if, conversely, the inspector's report read as a whole fails to generate a genuine doubt as to the perpetration of legal error, the same must apply to the defendant's decision letter: both refer expressly or by implication to IR40, but *ex hypothesi* that in itself does not generate a genuine doubt.

31 In a nutshell, the issue for me is this: reading the inspector's report as a whole, assuming the perspective of a well-informed reader not prone to excessive legalism, do I harbour a genuine as opposed to a forensic doubt that the decision maker did fundamentally misunderstand the effect of the deed of variation?

32 There is some force in the submission that the inspector may have been misled by the slightly confusing appendices to the deed of variation and Mr Saunders's evidence; that the inspector did not resolve the evidential dispute between the market traders on the one hand and Mr Saunders on the other that in the sixth year and following the rents would not be affordable; and that the inspector did not expressly address the submission that, upon the expiry of the beneficial regime, the market traders would be "thrown to the wolves". The

failure expressly to address these points in the terms which I have described them is at least consistent with the proposition that the inspector was labouring under the fundamental misapprehension attributed to him. These arguments and considerations lend some support to the proposition that the IR40 solecism was not confined to that specific paragraph.

33 Even so, I have been persuaded by Mr Honey in particular that the claimants' submissions are unrealistic and that the seventh bullet point in IR40 contains no more than a slip of drafting which the inspector failed to correct when he read through his draft report. My reasons for concluding that there is no genuine doubt as to the inspector's correct application of the law are cumulatively as follows.

34 First, in commercial terms, the proposition that there would be only 2 per cent uplifts year on year for an indefinite period is not inherently credible. It would mean in the real world that the beneficial regime I have referred to would not last for five years but would be indefinite. I take Mr Willers's point that market forces might dictate lower rents at certain times, but that is somewhat theoretical and in any event is directly belied by the claimants' "thrown to the wolves" submission, as well as their fall-back argument, clearly advanced in their written closing submissions, to the effect that the five-year concessionary period should be extended to seven and a half years. During this additional two and a half years, the licence fee would on the claimants' proposal rise at only 2 per cent per annum. The inspector clearly understood the ramifications of this fall-back argument (see IR160).

35 Secondly, there was detailed evidence from Mr Saunders, on which he must have been cross-examined, which dealt with the economics of the licence fee both during the five-year beneficial regime and thereafter (see in particular paragraphs 4.110 to 4.113 of Mr Saunders's expert report). It is wholly implausible that the inspector overlooked all this evidence.

36 Thirdly, and this flows from my second point, the written closing submissions advanced on behalf of the market traders made the contention more than once that they would be "thrown to the wolves" after the five-year period had elapsed (see paragraphs 26 and 32(4)). It is true that the inspector's report did not reflect this metaphor, but IR151 and IR152, which addressed the closing arguments, expressly referred to an approximate five-year period of fixed rents, and IR153 begins with this sentence:

> "After the end of these 5 years, when the fixed rent scheme comes to an end there would be nothing to stop rents being raised even higher."

At this stage, paragraph 26 of the market traders' closing submissions is expressly footnoted.

37 Fourthly, and perhaps critically, I cannot read IR302 to 305 and IR361 to 364 as being predicated on other than the correct understanding of the deed of variation. IR304 references IR40 and does not expressly cover the post five-year period, but IR361 mentions "discounted and controlled rents for an initial period", as well as the fall-back argument that this period, including the year-on-year 2 per cent, should last for seven and a half years, referring back in this context to IR160. The second half of IR363 also demonstrates that the inspector correctly understood how market forces would operate after "the first few years".

38 DL15 and DL31 to 33 reflect the inspector's reasoning and conclusions on these issues. I see no merit in the submission that the decision letter does not expressly mention IR361 to 364. The defendant clearly agreed with these paragraphs by necessary implication.

39 Ideally, I think that the inspector should have said more about the post-concessionary regime and should have explained, in the light of the traders' evidence as to unaffordability, how and why it should be that market forces, read in conjunction with the stipulation in the deed of variation to which I have referred, could provide for affordable rents for the majority of market traders, recognising always that this marketplace, understood both literally and figuratively, is always subject to fluidity. Given that the evidence adduced by the market traders as to unaffordability was somewhat exiguous and certainly unsubstantiated by documents, and that the issue was clearly addressed by Mr Saunders, a sentence or two may have been all that was necessary. I reiterate, however, that no reasons challenge is being advanced in these proceedings – in my view, rightly so. The fact that the Inspector did not travel this short extra distance does not lead me to conclude that he had misunderstood the documentary materials and the parties' submissions so fundamentally: this being, to my mind, the corollary of the claimants' case. The reality is that the Inspector reached a wrapped-up conclusion on the issue of affordability at IR363-364 in particular, which was predicated on his acceptance of Mr Saunders' evidence.

40 In the circumstances, I need not address the defendant's fall-back argument that if an error had been made the outcome would necessarily have been the same. A consideration of this counterfactual would have the tendency to undermine my conclusions on the main issue.

41 Overall, I have not been persuaded by Mr Willers's arguments that a genuine doubt exists as to the approach adopted by the inspector and the defendant on the issues of affordability and the public sector equality duty. Ground 1 therefore fails, and this application under section 23 of the Acquisition of Land Act must therefore be dismissed.

CERTIFICATE

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