Compulsory Reading

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The Secretary of State for Transport v Curzon Park Limited and others (Supreme Court)

Remember January 2020, when Covid hadn't yet left China, we were still all going into the office 4-5 days a week and Zoom was a retro ice lolly? That's when the Tribunal's issued its **decision** in *Curzon Park* followed shortly afterwards by the Secretary of State appealing the decision. More than three and a half years later, the Supreme Court has reinstated the Tribunal's decision.

It's no fault of the Supreme Court but the language used in the relevant statutory

provisions (sections 14 and 17 of the Land Compensation Act 1961) does not exactly trip of the tongue and that's reflected in this blog piece. Nevertheless, I hope this provides some useful background to the decision.

I should say that my firm acted throughout for Curzon Park Limited, one of the four affected landowners. Hopefully, I've not allowed any bias to show.

The background and the Tribunal's decision

The proceedings had arisen because the Secretary of State has acquired four continuous large sites each in different ownership for the purposes of constructing the new HS2 Curzon Street Station.

Image source: HS2 website

Each owner considered that their site had development potential and each had applied to Birmingham City Council for a certificate of appropriate development ("CAAD"). Since the sites were located in close proximity to Aston University and Birmingham City University campuses, each CAAD application included provision for purpose-built student accommodation (PBSA).

The Secretary of State argued that the combined amount of development would create an oversupply of PBSA contrary to the local development plan. The landowners did not (and do not) agree that there would be such an oversupply but in any event argued that a CAAD application on site A could not be taken into account on site B (or C or D) since a CAAD application must be considered on the basis of circumstances known to the market at the relevant valuation date and all of the CAAD applications were made **after** the relevant valuation dates. Further, a CAAD application could only be made in a "scheme world" i.e. where compulsory purchase powers were sought (and most commonly after they had actually been exercised). The Secretary of State, on the other hand, argued that CAAD applications must be considered cumulatively and each constituted a material planning consideration for the purposes of determining the others. The parties agreed that this dispute should be determined by the Upper Tribunal as a preliminary issue of law.

The Tribunal did not fully agree with either argument, holding that:

"*…our answer to the preliminary issue is that in determining the development for which planning permission could reasonably have been expected to be granted for the purposes of section 14(4)(b), the decision maker is not required to assume [that] CAAD applications or decisions arising from the compulsory acquisition of land for the same underlying scheme had never been made. The decision maker must treat such applications and decisions as what they are, and not as notional applications for, or grants of, planning permission. They are not material planning considerations. Subject to those boundaries, it is for the decision maker to give the applications and decisions such evidential weight as they think appropriate."*

Even if they didn't fully agree with it, the landowners were content with this outcome but the Secretary of State was not and appealed to the Court of Appeal.

The Secretary of State's argument was founded on the principle of equivalence. If the total quantum of PBSA on the combined four sites exceeded planning policy limits, that would mean that the landowners (or one or some of them) would receive more than fair compensation.

The decision of the Court of Appeal

In its **decision** in May 2021, the Court of Appeal rejected this argument, Lewison LJ stating:

"*In my judgment, therefore, the starting point is the real world, modified either by an express statutory assumption, or by what is necessarily inherent in the concept of an open market valuation. If there is ambiguity in an assumption that the statute requires to be made, then the principle of equivalence may assist in resolving the ambiguity, but it is not an overriding independent and free-standing principle*."
This, of course, was repeating what the House of Lords had said in **Spirerose**, per Lord Collins:

"*But Parliament has enacted a statutory code of some complexity demonstrating that it does not regard all these cases as "materially similar". For the court to try to correct the code in accordance with its perception of what is fair would amount to judicial legislation. It would upset the balance of the code which Parliament must be supposed to have considered carefully*."

I'm often struck at how often competent and knowledgeable specialists forget this fundamental point. The compensation code is statutory. The principle of equivalence is a secondary tool of interpretation which should be rarely used and only when the legislation is unclear or there is a gap in the legislation (a "lacuna" in judicial language).

Moreover, the Court accepted the landowners' argument that the cancellation assumption requires it to be assumed that no CAAD applications in relation to other sites have been made. As Lewison LJ put it:

"*It is not merely that the applications for CAADs "would" not have been made, but that they **could** not have been made. An essential precondition for the making of such an application (namely a proposal for compulsory acquisition) did not exist in the "no scheme world". It seems to me, therefore, that it is the inevitable consequence of the cancellation assumption that no CAAD applications could have been made.*"

Although, strictly speaking that was enough to dispose of the matter, the Court of Appeal also considered whether a CAAD application or decision could be treated on Site A could be treated as a material planning consideration by the decision maker on Site B and agreed with the Tribunal that it could not.

The Supreme Court's decision

The Supreme Court issued its decision on 10 August 2023.
The first point to note is that by the time the matter reached the Supreme Court, the Secretary of State had changed his position, no longer arguing that a CAAD on one site was capable of being a material planning consideration in determining a CAAD on another site. As the Court put it:

"*Instead, a more limited case was advanced to the effect that CAAD applications and decisions in respect of other land may be taken into account insofar as they shed light on the prospect of planning permission being granted for the land in issue at the valuation date by:*

(1) evidencing:

- *the existence of alternative sites or proposals, or*
- *proposals whose cumulative effects would require consideration together with those of development on the land in issue, or*
- *other land relevant in some other way to the determination of a planning application on the land in issue;*

or, in the case of a CAAD already granted in respect of other land:

(2) evidencing how in the world of the cancelled scheme the local planning authority or Secretary of State on appeal might have been expected to deal with a planning application on the relevant land."

In spite of its "*logical simplicity"* the Supreme Court overturned the Court of Appeal's decision that the cancellation assumption required that CAAD applications on other sites be disregarded. It agreed with the Tribunal's finding:

"*It is true that all four CAAD applications were a consequence of the scheme, and that, but for the scheme they would not have been made. But in the absence of a statutory direction that is not a good enough reason to assume them away or disregard them*."

The Supreme Court also agreed with the Tribunal that CAAD applications and decisions on other land could not be considered material considerations when determining whether development is AAD on the subject land:

"*Neither a CAAD application nor a decision to grant a CAAD are material planning considerations. They play no role whatever in the real planning world. A CAAD*

does not in fact authorise the carrying out of development on the land in issue. It establishes a purely notional set of circumstances which are relevant only for the purpose of calculating the compensation payable in relation to the land in issue."

However, as the Tribunal had noted, where the application or decision revealed (or collated) information that would have been known to the market at the relevant valuation date it could be relevant.

"*The local planning authority has to bear in mind that the other CAAD application is not to be treated as if it were itself an application for planning permission in respect of the other land, and can only draw upon the material submitted in support of that application to the extent that it casts light upon the "circumstances known to the market" at the valuation date for the land in issue. It is possible that it may do so*."

Clearly (and this was not in dispute), where you have a number of sites which are cleared and ready for development (in a scheme cancellation world) at a valuation date, that is simply a fact and one which would be known to the market. So what does a CAAD application add?

The answer, according to the Supreme Court (see paragraph 92) is that it provides evidence of what the market would have expected the owners of those sites to have done in the scheme cancellation world.

"*We consider that CAAD applications in respect of other land, along with the material submitted in support of them, may have some relevance in showing how the market would expect landowners holding land ripe for development to seek to develop their land."*

The question which the Supreme Court did not seek to answer (presumably as it would be a matter of planning evidence) is whether such evidence is of any actual relevance in determining any particular CAAD application.

After all, if a fact is not a material planning, consideration is it any kind of consideration at all? Back to the Tribunal to find out…

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