Crown Office List, Nicholas John Stoop v The Council of the Royal Borough of Kensington and Chelsea, London and Edinburgh Trust PLC


No Substantial Judicial Treatment

Court
Queen's Bench Division

Judgment Date
23 July 1991

CO/1795/90

High Court of Justice Queens Bench Division

1991 WL 837334

Before: Mr. Justice Otton

Tuesday, 23rd July 1991.

Representation

Mr. G. Laurence QC (instructed by Royds Treadwell , EC4) appeared on behalf of the Applicant.
Mr. A. Wilkie (instructed by The Legal Director, The Royal Borough of Chelsea and Kensington , W8) appeared on behalf of the First Respondent.
Mr. B. Ash QC and Mr. P. Village (instructed by Norton, Rose , EC3) appeared on behalf of the Second Respondent.

Judgment

Mr. Justice Otton:

This is an application for judicial review of the decision of the Royal Borough of Kensington and Chelsea by its town planning committee on 9th July 1990 to adopt the recommendation of the Council's Director of planning services to grant conditional planning permission for the development of the land known as the Chelsea College site, Hortensia Road, London, SW10 by the erection of buildings comprising 27 residential flats, 8 houses and office accommodation being a nett lettable area of 53 0 square metres (overall gross 752 square metres) with basement car parking for 28 cars for the flats, 16 for the houses and 2 for the offices.

The applicant, Mr. Nicholas John Stoop, is the occupier of 42A Gunter Grove and is a representative of the Gunter Grove Residents Association. The first respondents are the Council of the Royal Borough of Kensington and Chelsea. The second respondents are the London and Edinburgh Trust PLC who, through one of their associated companies, were the developers of this particular site.

To the rear of 42A Gunter Grove is the block of land known as the old Chelsea College site and it is clearly marked on the maps which were produced for me. It was a substantial area and extended to the Hortensia Road which runs parallel to Gunter Grove in this part of Chelsea. The history of redevelopment proposals for this site goes back to the early part of 1988.

On 13th October 1988 the Royal Borough granted planning permission for the erection of 12 houses, 9 flats and 600 square metres of office floor space [Class Bl use] on this site which was confirmed in a decision letter of 24th October 1988.

On 22nd December, however, the Royal Borough varied the planning permission to permit the erection of 12 house, 9 flats and 675 square metres of office floor space on the same site which permission was stated to "supersede the decision letter dated 24th October 1988 … and shows amendment to 'development' [675 square metres of office floor space in lieu of the 600 square metres previously stated]".

In March 1988 demolition commenced of the old horticultural college including the low level greenhouses that adjoined a wall of some 2.4 metres in height separating the relevant part of the site from the houses in Gunter Grove. Development then proceeded but it was alleged by the planning authorities not in accordance with the planning permission.

Enforcement notices were served on the developers on 31st October 1989 and appeals were to be subject to a public enquiry to be heard on 26th June 1990. On 12th February 1990 a further and different application for planning permission was considered by the town planning application sub-committee. The sub-committee had a report before it from the director of planning and transportation dated 26th January 1990.

The meeting on 12th February referred the application to the town planning committee for determination and a report was prepared by the town clerk chief executive for the forthcoming committee meetings.

Mr. Stoop, in his affidavit, records the position so far as he was concerned at the end of 1989. Permission had been granted for a significant development immediately next door to his home. He had not been consulted on the proposals. He was advised that the development committee was inconsistent with standards of the planning authority. What was being constructed was inconsistent with the plans which had been put before the planning authority and included a sizable building which significantly reduced the sunlight reaching his property. As for office content, the permission and the plans were mutually inconsistent.

The advice put before the sub-committee by its officers was, in Mr. Stoop's view and that of a Mr. de Lothbiniere, inadequate. They took the view that this advice would still be inadequate if put before the full committee. Therefore proceedings were instituted against the council by writ seeking an injunction and a declaration with the aim of preventing the committee from considering the application with less than full and correct information before it. In the event, when the proceedings came before the court, the council gave assurances not to determine the application prior to 13th March 1990 and the action was adjourned.

Mr. Stoop instructed his planning consultant, Mr. Powdrill, to prepare the detailed submission on his behalf at its meeting for 13th March. Mr. Powdrill duly produced the submission dated 14th May 1990. That document set out in considerable detail the history and the planning implications of the development. It was very critical of what had occurred and of the proposals. It went into matters such as density of the residential development, the office plot ratio, the building heights and sunlighting with appendices and conclusions as follows.

> "It cannot now be denied that this project has been beset from the outset by confusion, errors of judgment, errors of fact, misinterpretations, and breaches of planning control. The four

comprehensive recommendations for refusal of the earlier schemes (632/A/2, 633/A/21 and the two 1410s), the reasons for which are equally applicable to the present two applications (0296 and 2137), and the serving of two enforcement notices, makes it incredible to suppose that the present schemes are now held to surmount all those obstacles and somehow to become both acceptable and appropriate, without any convincing explanation and in defiance of the borough council's adopted planning policies and of good planning standards.

4.2. The project should now be re-examined in its entirety. It is the objector's opinion that the likely outcome of such a review would seek to regularise in a proper manner, and by references to the council's adopted environmental policies, the development on Hortensia Road and behind 28–38 Gunter Grove, to omit the rear block entirely because of its adverse environmental consequences on adjoining residential properties, and to reduce the front block by one storey. Action of this nature will not only seem to bring the building back to what was permitted in 1988 (633/A/37), but would still be in excess of what was permitted by reason of increased office floor space and residential density.

4.3 The committee should now become aware of all that has transpired and should look at what is happening with fresh eyes. Not to do so will imperil the environmental standards of adjoining residents, and would run counter to the aims clearly expressed in the Royal Borough of Kensington and Chelsea's approved district plan at paragraph 2.1.4 which supports the aims of the Greater London development plan at section 2.1, which state that:

> 'The essential purpose of the Greater London development plan is to create a physical environment … which will conserve and improve the standards of life in London … '

and which, in more detailed form, are to be found in the committee reports dealing with the four refused applications. The development at Hortensia Road that is now proceeding does not accord with these aims as is evidenced by the committee's decisions to comprehensively refuse earlier attempts to produce an unacceptable development, and then to have served two enforcement notices.

4.4. The committee is therefore invited to take all these matters into account as being matters of material consideration, and to take the appropriate action."

By its very terms one can see the highly critical appraisal by its author and it accurately reflects the anguish, anxiety and frustration which I have no doubt that the applicant has felt throughout the history of this unhappy affair.

In 1990 a yet further planning application was made. This was for 21 self-contained flats and was expressed as being as an amendment to the permission already granted. This application did not cover the whole of the site but only the rear part of the site where it abuts the Gunter Grove properties.

On 29th April both outstanding applications were G referred to the town planning application sub-committee. The sub-committee was informed that officers had decided to and had, in fact, withdrawn the enforcement notices without reference to the members. The fact that the enforcement notices had been withdrawn was no doubt a further cause of anxiety for the

applicant. The sub-committee did not decide the applications before it. The developers' proposals as they then stood were referred to the planning applications committee on 12th June 199 0.

This committee did not determine the applications but remitted them to the planning and conservation committee ("PCC").

The PCC committee met on 9th July. It is what occurred on that occasion which forms the subject matter of this application. It did not consider proposals identical to those considered by the planning application's committee because the proposals had in the meantime been amended. The committee had available to it the submissions already made on behalf of the applicant and other objectors (notably Mr. Powdrill's report) reports of officers made to the planning application's committee, a report by the town clerk and chief executive on what had occurred at the planning application's committee, a report by the director of planning services and a report by the director of legal services. The committee also had before it three letters, each dated 9th July from Messrs. Royds Treadwell, the applicant's solicitors, from Mr. Powdrill, and G a Mr. Rowe, a surveyor. These were all referred to in evidence and I need not refer to them.

It is interesting however to see what the attitude of the officers of the council were and the flavour of their recommendation. In the document which was the report prepared by the director of planning and transportation for the sub-committee on 12th February the recommended decision was that subject to the applicant entering into a section 52 agreement permission should be granted in relation to the rear office block and for the development of the site to provide 21 flats, 8 houses and 1,110 square metres of office (B.l use) including the approval of details relating to access ramp, landscaping and facing materials. Paragraph 2.2 states:

> "When the scheme was considered in 1988 and subsequently approved, the decision letter referred to 675 square metres of office and this reflected that stated on the application as rear office space; this did not include any figure for office space in the original building used by the University of London. The total area of office should in fact have been 1100 square metres of office."

The figure of 1100 would, of course, have struck even E more horror in the mind of the applicant and the other occupants of the besieged Gunter Grove.

No doubt if that had been made clear at the time then it would have been a matter to exercise the minds of those who were charged with granting or withholding planning permission in 1988. Paragraph 7.2 continues:

> **"Rear Office Block**
>
> The rear office black has been the subject of concern with the residents of 40 and 42 Gunter Grove, by way of its height and close proximity to the existing residential houses. <u>These concerns are supported</u> (my emphasis). Revisions have been actively sought and the applicants have made a token modification at the rear by setting the block 8 metres away from the rear of 42 Gunter Grove, originally approximately 4.5 square metres. The revision is welcome but still not acceptable to residents in Gunter Grove. The total office area is 490 square metres. The office space lost by the setting back of the rear office block, has been relocated to the basement area.

8. Recommendation

8.1. Planning permission be granted subject to a section 52 agreement, whereby the applicants undertake to carry out the revised scheme in relation to the rear office block."

The recommendation included the specific figure of 1110 square metres of office Bl use.

The report of town clerk and chief executive is at page 160 of the agreed bundle. It contains a recommended decision:

> "That in the event of amended drawings being submitted, showing alterations to the rear south block whereby two separate residential units of not less than two bedrooms each are provided, the remainder of the building shown as two separate office suites of 152 sq.m. and 100 sq.m., they would be minded to recommend to the planning and conservation committee that conditional permission be granted for the development of the site for residential and office purposes."

It is dated 31st May 1990 and was prepared by Mr. French, the director of planning services. He recommended that the PAC inform the applicants that they welcome the offer of the two additional residential units and thereby reduce the sought for office increase from 1,078 square metres to 872 square metres, an increase of the 197 square metres over that agreed in 1988 of 675 square metres and that in the event of such details being submitted causing no serious overlooking problems to occupiers of the rear of the site, that they would be minded to recommend the planning and conservation committee on 19th July that conditional permission be granted.

There was a further report which was entitled "Observations on the Objector's Submission" referring to Mr. Powdrill's submissions (at T. B. page 170). It accurately summarises the reports and seeks to meet some of the points raised. At page 176 there is a report from the director of legal services with the introduction:

> "This report deals with the history of the above matter, the status and effect of the December 1988 planning permission and advises members of the considerations that should be taken into account when deliberating on the present application".

At paragraph 2.1 the following comment is made on the decision letter of December 1988.

> "The decision of committee on 13th October was for twelve houses, nine flats and 600 square metres of office space. The decision letter issued on 22nd December 1988 permitted the above with the exception of 675 square metres. Counsel has advised on the effect of the permission. Although the plans are at variance with the decision letter, counsel having taken into account all the circumstances of the case considers that the applicant is only entitled to build twelve houses, nine flats and 675

> square metres of office space. It is recognised that there is an argument that the plans having indicated a greater area of office space enlarges that entitlement. However, the decision letter is clear and committee and are entitled to hold that no more office space was permitted."

There is also a passage at paragraph 3 to which I will G return in due course. The conclusions of Mr. Phillips are stated as follows under paragraph 4:

> "4.1 Planning permission for 1988 is valid for the erection of twelve houses, nine flats, and 675 square metres of office space.
>
> 4.2 The unauthorised element of the present construction is contained in the Hortensia Road frontage.
>
> 4.3. The 1988 permission should be considered in relation to assessing the relative strength of the Council's position should the matter go to appeal."

This last remark was ominous and was to have considerable significance as events turned out.

Finally there was the report (at page 180) from the director of planning services which sets out the background of the matter and indicates the nature of the amended proposal. At the end the following appears:

> "3.1 The planning application now before the Members for determination seeks planning permission for the development of the site by the erection of buildings comprising 27 residential flats, 8 houses and office accommodation being a nett lettable area of 530 sq.m. (overall gross 752 sq.m.) with basement car parking … The permission granted in December 1988 allowed for redevelopment of the site by the erection of buildings comprising 9 flats, 12 houses and 675 sq.m. of office accommodation with car parking for 44 cars.
>
> 3.2 The proposed mass of development remains as previously approved, there has been a slight reduction in the gross floor area of the overall development created by the alterations to the rear block, but the development is still below the council's recommended plot ratio standard of 2.1."

He then goes on to deal with density, daylighting infringements and other matters. At 3.7 he said this:

> "With regard to the increases in height of the building to Hortensia Road, this is stated to be 300mm above the approved height for the residential block, and is 1.4m higher for the office block over that approved.
>
> …

Recommendation

Members are recommended that in the absence of sound and clear cut reasons for refusal that the presumption is in favour of development. In this case, no such reasons are considered to exist, and conditional planning permission is recommended.

Recommended Decision

Grant planning permission for development to provide residential accommodation and offices within integral car parking at Chelsea College site, Hortensia Road, Chelsea, SW10 as shown on submitted drawings ".

There was also the letter from Mr. Powdrill dated 9th July which states:

"You will appreciate, as set out in my original submission on behalf of Mr. Stoop, that the major part of our objection is the sheer physical impact of the development on residential properties on Hortensia Road and No. 42 Gunter Grove in particular. The fact that the rear building is now to be used primarily for residential purposes instead of offices does not diminish [my emphasis] the fundamental objection. Indeed, it could conceivably make the position worse in that overlooking would be possible over longer periods of time, and would not be restricted to business hours.

I repeat that our objection to the amount of office development being proposed is that in an area such as this the amount of office development would normally be limited to 200 sq metres. The 1988 permission was for 675 sq metres gross of office floorspace, although in its passage through the committee, the figure under application was 600 sq metres. It is exceedingly difficult to understand how 752 sq metres gross can suddenly become acceptable.

All the points raised in my original report still stand. The front block on Hortensia Road is 16.1 metres (15.75 metres according to your officer's measurement) from ground floor to fourth floor ceiling level, which is at least 1.5 metres more than the permitted scheme. I recognise there is a fall in levels across the site, but I am not satisfied this explains the discrepancy. I also see no reason to change my view on the residential density. It has been claimed by your officer that my calculations include an element of double counting, since I have counted lounge-diners as two rooms rather than as one. Although the council's definition of a habitable room does not deal with this matter, it has always been my understanding that as a mater of general practice, any room over 18.6 sq metres (200 sq feet) may be counted as two. My objection on grounds of excessive residential density therefore stand as before.

There has been much discussion on the arithmetic of the constituent parts of the proposal, but the fundamental point is that the building is too big for the site [my emphasis] having regard to its proximity to long-established residential development. If permitted, it would be contrary to paragraph 3.1.1. of your local plan, which states that the principal aim of the plan 'is to maintain and enhance the status of the Borough as an attractive place to live and work'. I also draw your attention to paragraphs 4.1.1. and, in particular, paragraph 4.1.5. which states:

> 'The Council, both in conservation areas and elsewhere, will aim for the conservation of the character of the Royal Borough and the enhancement of the environment. All new development must respect and relate directly to the established scale and character of the surrounding area.'

> I request, therefore, that you take all these matters into account by rejecting the proposal, and by taking appropriate action against the matters which are in breach of the 1988 permission."

There is also a letter, to which I have made reference, from Wilks, Head and Eve, chartered surveyors, dealing with sunlighting.

That was the background and thus the stage was set for the meeting on 9th July. Mr. Stoop duly attended and in his affidavit he describes what happened:

> "The committee met on 9th July 1990. It did not consider proposals identical to those considered by the planning application committee because the proposals had been amended. [He then sets out, as I have already indicated, the documents which were available.]
>
> ….
>
> The chairman declined to permit Mr. Powdrill to address the committee. The committee was then addressed by the director of planning services, Mr. French; the members of the committee then asked questions of Mr. French and discussed the proposals before them."

Mr. Stoop made notes of what occurred. It runs to some three pages but I pick out one or two of the relevant incidents. The matter was obviously gone into in considerable depth by the committee who were clearly concerned by the history of this matter. Councillor Horton is recorded as saying that she was not happy about the application that the reasons for recommending approval had been fudged and the decision taken in 1988 was a bad one. She noted that the application was for a gross office area of 752 square metres and said that the nett lettable area concept was a red herring. The residential density was more than double the council's recommended maximum and the height was increased by much more than the 3 00mm constantly referred to by the chairman.

The chairman stated that previous refusals were not to do with the office content. Councillor Horton reminded him that they were now being asked to increase the permission from 675 to 752 square metres. Mr. French said that the height increase was approved by the planning officers. Councillor Horton expressed her concern at the misleading matters before the committee. She repeated her opinion that the proposal presented an overdevelopment of the site in terms of the office content, density and height.

Councillor Boulton said:

> "If we knew in 1988 what we know now, we would never have allowed this development. We were grossly misled in 1988 … To say that the objections have been overcome is nonsense".

The chairman interrupted to say that the objections had been addressed, not overcome. Councillor Boulton said that the height was too high and there was more bulk, more office content and this was the council's opportunity to put things right.

Councillor Donaldson said that he welcomed the belated changes. He said that what mattered to people were the location and heights of the walls. He said that if the plans were measured and the height of each floor were looked at, it could be seen that the heights of several floors had increased substantially. He said that the developers had shown a blatant disregard for the council and its policies. While an increase of 3 00mm is serious it is not to serious but here can be seen increases of five or six feet.

Later, Councillor Weatherhead suggested that, considering it was an overdevelopment, the residential building should be reduced into line with the offices, instead of the offices being increased.

Councillor Corbet-Singleton said that every single possible objection had been met and addressed.

The chairman indicated that his personal feeling was to grant planning permission and the matter was put to vote.

Councillors Fane, Corbet-Singleton and Harney voted in favour of granting planning permission. Councillors Donaldson, Weatherhead, Boulton, Spry, Horton, Raven and Guildford voted against. They were then called into private session by the borough solicitor.

Thus at that stage of the proceedings seven of the councillors were in favour of refusing the permission; three were against and two had abstained.

I now turn to the affidavit which has been put in by the chairman, Councillor Professor Sir Anthony Coates, Baronet. He is a professor of medical microbiology. He records as follows:

> "It is been my practice, in common with other chairmen of committees to hold pre-agenda meetings with senior officers. Prior to the planning and conservation committee's meeting on 9th July 1990 I held such a meeting at approximately 5.3 0pm. Among those present at the meeting were Mr. Thomson, the committee clerk, and Mr. Phillips the director of legal services.
>
> 3. The purpose of such meetings is to run through the procedures for handling items on the agenda and to seek clarification on certain points. When this item was reached I mentioned that the matter had been the subject of a great deal of consideration at previous meetings of the committee and was

> particularly controversial. Mr. Phillips, the director of legal services indicated to me that if members of the committee were minded to refuse the application then he would wish to give advice on the council's position should the matter go to appeal. Given that both applicants and objectors would be present in the open session, it was agreed that this advice should be given in the closed session of the meeting. This was the procedure to be adopted."

It was that prearrangement which, of course, precipitated what happened thereafter. As I have already indicated, the majority of the committee was minded to refuse the application.

There is an official report, which records what occurred but without the detail recorded by Mr. Stoop. It states:

> "After further discussion a majority of members to the committee expressed the view that they were minded to refuse planning permission for this scheme.
>
> The director of legal services then advised the committee that he would wish to give legal advice on this application and that this advice should be given in the private part of the meeting. The chairman said that he would wish to receive such advice and the committee agreed with the chairman's view. It was accordingly:
>
> RESOLVED."

I pause here to say that it was this resolution and the way that it is phrased which has formed part of the attack upon the proceedings which has led to this matter coming for judicial review. The resolution reads as follows:

> "To transfer the application to the confidential part of the agenda for information to be supplied relating to any instructions to counsel and any opinion of counsel (whether or not in connection with any proceedings) and advice received, information obtained or action to be taken in connection with:
>
> (a) any legal proceedings by or against the authority or
>
> (b) the determination of any matter affecting the authority
>
> (Whether, in either case, proceedings have been commenced or are in contemplation).

I infer from the terms in which the resolution is couched that it was not conceived in the course of the meeting but had already been determined by the appropriate officers before the meeting had commenced.

I turn then to the record of the proceedings which took place in the private session. It is recorded as follows:

> **"A2. Application transferred from Part A of the Agenda — Agenda item 97, Chelsea College Site, Hortensia Road, SW10**
>
> 1. The director of legal services said that he wished to advise the committee of the possibility that costs could be awarded against the council if they refused planning permission in this case. The director of legal services advised that the position was as follows:
>
> 2. Offices — It could be argued at the appeal that the 675 square metres of offices allowed by the 1988 permission was either a gross or net figure and no doubt the appellants would refer to the plans submitted with that application which they argue referred to 1,100 square metres gross office space. It was likely that the figure of 675 square metres net office space would be held to be correct but even if this was the case the present scheme proposed only 752 square metres gross of offices which would be strongly argued by the appellants was not a material increase."

He then deals with the density, plot ratio, height, daylight and sunlight which it is not necessary to set out in detail and continues:

> "In conclusion the director of legal services said that in view of the above-mentioned factors it would be very difficult to mount a case to refuse planning permission. *" The chances of the success on appeal were remote and there was a distinct possibility of a substantial amount of costs being awarded against the council."
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> Later in this record after discussion it is recorded:
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> > "In response to a further question by a member the director of legal services said that the residents could possibly take the case to a judicial review and if the council lost that case the costs could be substantial. However, in his opinion, the prospect of the council losing a planning appeal were far higher than the possibility of losing on a judicial review.
> >
> > In conclusion the chairman said that there was very clear legal advice, which had been supported by the executive director of planning and conservation that there were no grounds to substantiate a refusal and in the circumstances he proposed that the committee should grant permissions. It was accordingly:
> >
> > > RESOLVED — (With councillors Boulton, Horton, Raven and Spry dissenting)
> > >
> > > (a) That the recommendation to grant conditional planning permission as detailed in the report by the director of planning

> services (report A2 — agenda item 97) be adopted.
>
> (b) That the director of planning services be authorised to seek an assurance from the applicants that they will withdraw the outstanding planning appeal before the decision notice is issued."

To complete the picture I return to the chairman's affidavit at paragraph 6 which states as follows:

> "6. On a majority of members demonstrating that they were minded to refuse the application, Mr.Phillips immediately stated that he wished to give legal advice. I stated that I wished to receive such advice and the committee agreed. The item was then referred to closed session.
>
> 7. In the closed session Mr. Phillips gave the committee advice on the council's prospects on appeal should the application be refused. The executive director of planning and conservation, Miss Dent, provided additional observations on the same point. Members of the committee then asked questions of the officers. Having heard the officer's advice I then put the matter formally to committee for a decision. A majority were in favour of granting the application with those dissenting having their names recorded."

Thus, there was a volte-face. As a result of what transpired in the closed session what had originally been a seven to three clear majority in favour of refusing the planning permission was completely reversed with a majority of eight to four voting in favour of granting the planning permission.

It is against that background, which I need only say speaks for itself, that the applicant seeks an order for certiorari quashing the decision to adopt the director of planning services' recommendation to grant the conditional planning permission for the development.

The grounds upon which Mr. George Laurence has addressed me on behalf of the applicant are several but fall under 4 broad headings. At the forefront of Mr. Laurence's argument he seeks to advance a case of breach of natural justice of a special kind. He also advances arguments of a technical nature which I shall deal with first as I consider the resolution of those issues has a bearing upon the natural justice issue.

The first question is whether the council was entitled as a matter of law to adjourn into private section to receive the particular advice it did receive or whether it should have been received in the public session. This depends upon the interpretation of

the Local Government Act 1972 and in particular section 100 . Section 100A of the Local Government Act 1972 provides as follows.

> "(1) A meeting of a principal council shall be open to the public except to the extent that they are excluded (whether during the whole or part of the proceedings) under subsection (2) below or by resolution under subsection (4) below.
>
> (2) The public shall be excluded from a meeting of a principle council during an item of business whenever it is likely, in view of the nature of the business to be transacted or the nature of the proceedings, that, if members of the public were present during that item, confidential information would be disclosed to them in breach of the obligation of confidence; and nothing in this part shall be taken to authorize or require the disclosure or confidential information in breach of the obligation of confidence.
>
> …
>
> (4) A principal council may by resolution exclude the public from a meeting during an item of business whenever it is likely, in view of the nature of the business to be transacted or the nature of the proceedings, that if members of the public were present during that item there would be disclosure to them of exempt information, as defined in section 100I below.
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> (5) A resolution under subsection (4) above shall —
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> (a) identify the proceedings, or the part of the proceedings, to which it applies, and
>
> (b) state the description, in terms of Schedule 12A to this Act, of the exempt information giving rise to the exclusion of the public and where such a resolution is passed this section does not require the meeting to be open to the public during proceedings to which the resolution applies."

This situation was one to which sub paragraph (4) related. I turn then to section 100I which provides:

> "Exempt information and power to vary Schedule 12A
>
> (1) The descriptions of information which are, for the purposes of this Part, exempt information are those for the time being specified in Part 1 of Schedule 12A to this Act, but subject to any qualifications contained in Part II of that Schedule; and Part III has effect for the interpretation of that Schedule."

Part III is an interpretation part and at paragraph 1(2) the following appears:

> "(1) Any reference in the schedule to 'the authority' is a reference to the principal council or, as the case may be, the committee or sub-committee in relation to whose proceedings or documents the question of whether information is exempt or not falls to be determined and includes a reference —

(a) in the case of a principal council to any committee or sub-committee of the council; and

(b) in the case of a committee to any constituent principal council

(2) any other principal council by which appointments are made, …

(3) any other committee or sub-committee of a principal council falling within sub-paragraph (1) and (2) above."

The rest is not relevant. I turn to schedule 12A which is entitled "Access to Exempt Information. Part I , Descriptions of Exempt Information. At paragraph 12 the following appears:

"12. Any instructions to counsel and any opinion of counsel (whether or not in connection with any proceedings) and any advice received, information obtained or action to be taken in connection with —

(a) any legal proceedings by or against the authority, or

(b) the determination of any matter affecting the authority

(whether, in either case, proceedings have been commenced or are in contemplation)."

It is immediately apparent that it is the language within which the resolution was couched with led to the council going into private session. In the skeleton argument counsel on behalf of the applicants set out the relevant part of paragraph 12 but, by way of emphasis, seek to direct my attention, for the purposes of construction, along these lines. They acknowledge that this is a subsection (4) situation which led to the transfer to the confidential part of the agenda and that under section 100I this was information to be supplied relating to schedule 12A, paragraph 12 :

"(A) any instructions to counsel and any opinion of counsel (whether or not in connection with any proceedings) and

(B) any

(i) advice received

(ii) information or

(iii) action to be taken

in connection with

(a) any legal proceedings by or against the authority or

> (b) the determination of any matter effecting the authority
>
> [then the qualifying words] (whether, in either case [i.e. case (a) or (b)] proceedings have been commenced or are in contemplation).”

It is submitted that the 1972 Act does not allow a committee to adjourn into private for legal advice to be taken then and there. On a proper construction of the statutory provisions the question is whether the council was entitled to adjourn in view of the likelihood of exempt information being disclosed. Leading counsel emphasises the word “disclosed”. He argues that the only passage the council could pray in aid here would be that underlined (i.e. “any legal proceedings by or against the authority”. That does not cover the case for two reasons. (1) Mr. Phillips did not disclose any advice received in connection with anything; he actually gave it. (2) In any event the qualifying words mean the proceedings must at least be in contemplation whether subparagraph (a) or (b) is relied on for the information supplied to count as exempt information. On 9th July 1990 no proceedings were in contemplation by anybody, either by way of appeal by the second respondents or by way of judicial review by the applicant.

He submits therefore that the council acted unlawfully in adjourning any part of its proceedings into private. He further submits that none of the advice as to whether there were sound and clear cut reasons for refusal amounted to legal advice.

He also takes a subsidiary point that in any event the vote should not have been taken in private but should have, in its final resolution, been taken in public.

On reading my conclusions on this final submission I D commence by looking at precisely what Mr. Phillips did as recorded in his affidavit. Having referred to the pre-agenda meeting he recalls:

> “The purpose of providing such advice [that is the advice which he intended to give] would be to give committee my views on the prospects of any refusal of this application being upheld on appeal. I stated that such advice should be given in the closed session of the meeting. The practice of the Royal Borough's planning and conservation committee and its former town planning committee is to consider as much of the agenda as possible in the open session. Sometimes legal advice is given in open session. However, on other occasions legal advice is given in closed session, albeit that discussion and consideration of the item has taken place in open session. If it is considered detrimental to the council's position for committee to receive advice in the open session, then the item will be moved to the closed session. In this instance, the item was controversial and the applicant for planning permission and his representatives were present in the open session. It clearly would not have been in the council's interest to receive advice on the relative strengths and weaknesses of its position in the open session. Accordingly the committee adopted its usual practice in these circumstances of referring the matter to the closed session for receiving and considering legal advice.”

Also at paragraph 7 he states:

> "In the closed session of the meeting I provided the committee with my views on the planning submissions that could be made on the council's behalf if the matter went to appeal following a refusal of the application. I based my advice on the report, letters and other material that was before the planning and conservation committee in its open session. I confirm that the minute of the closed sessions of the meeting as exhibited to Mr. Thomson's affidavit and marked 'SJT1' is an accurate record of my advice and of the comments made by the executive director of planning and conservation."

Later he says:

> "The applicant seeks relief on the ground that the committee took into account an immaterial consideration or considerations. I consider that the provision of legal advice on the council's position should the matter proceed to an appeal is a material consideration for the committee to take into account".

I have already referred to the resolution and the accounts of what occurred. I am satisfied that the reasons which led to the passing of the resolution fell within the power of the legislation. The resolution was passed in good faith to enable the Committee under section 100A to exclude the public from an item of business where it was likely that if members of that public were present there would be disclosure to them of exempt information as defined in section 100I as specified in Schedule 12A, paragraph 12 of the Act.

It follows that the resolution was capable of being lawfully passed and I have no reason to believe or suspect that it was not.

The second point taken by Mr. Laurence relates to the advice actually given. He accepts that part of the advice was legitimate legal advice, namely (1) the council prospects on appeal if planning permission were refused; (2) the prospect of having to pay costs and (3) the prospect that Mr. Stoop might move for judicial review. He submits that none of the advice as to whether there were sound and clear cut reasons for the refusal was legal advice. The reasons for refusal amounted to planning advice all of which should have been given in public. The council thus acted unlawfully in tendering such advice in private and Mr. Stoop was prejudiced in that a decision vitally affecting his interests was taken following, inter alia, privately given planning advice which he was entitled to see members receive and consider in public and which he ought to have been given in advance so that Mr. Powdrill could respond to it.

On this issue I have considered in detail the advice as recorded. However, I am satisfied that the advice given went predominantly to the prospects on appeal and to the possibility of an award of costs against the council. There was some advice on the planning issue but in my judgment it only went to reinforce the views of the officers on the prospect of appeal and its conseguent risk as to costs.

It is clear beyond doubt that it would have been imprudent for such advice to have been tendered in the presence of the developer, the applicant for planning permission (who will become the appellant in the event of an appeal) and in the presence of their advisers.

I have studied the terms in which that advice was given. I am satisfied that the officers did not abuse their position. The advice was not improperly couched. I reject the suggestion that Mr. Phillips used language which was meant to and might have frightened the members into changing their minds. In summary the receipt of advice on the prospects of an appeal and costs falls within the statutory provisions. The fact that some planning advice was given did not amount to a material irregularity or flaw the decision. Such advice was a material fact to be taken into account by the committee and it was a reasonable exercise of their discretion to receive the advice in private session.

In coming to that conclusion I bear in mind the language of the Departmental Circular 2/87 and in particular paragraph 7 which is headed "Unreasonable Refusal of Planning Permission" and states:

> "A planning authority should not prevent, inhibit or delay development which could reasonably be permitted. In accordance with the advice given in Circular 22/80 (WO 4 0/80) a planning authority should refuse planning permission only where this serves a sound and clear planning purpose and the economic effects have been taken into account. As stated in circular 14/85 (WO 38/85) 'There is always a presumption in favour of allowing applications for development, having regard to all material considerations, unless that development would cause demonstrable harm to interests of acknowledged importance' In any appeal proceedings authorities will be expected to produce evidence to substantiate their reasons for refusal.
>
> If they cannot do so, costs may be awarded against them. Indeed, this is the ground on which costs are most commonly awarded against a planning authority. In a case of this nature, each of the reasons given for refusal will be examined to see whether there is evidence to show that the relevant advice given in Departmental circulars and relevant judicial authority were properly taken into account, and that the application was considered on its merits in the light of these and other material considerations. Where one reason for refusal cannot be supported in this way but evidence has been produced to substantiate other reasons for refusal, a partial award may be made in respect of the costs of opposing that reason. While planning authorities are not bound to follow advice from their officers, … they will be expected to show that they had reasonable planning grounds for a decision taken against such advice and that they were able to produce evidence to support those grounds. If they fail to do so costs may be awarded against them."

This was such a position. The officers were advising the committee not to refuse the planning permission but to grant it. If the committee chose to go against the advice of their officers they were thereby making the local authority vulnerable as to costs. In my judgment, the officers were doing no more than giving "sound and clear cut reasons for refusal" and that to refuse would put the Royal Borough in a position whereby they were vulnerable as to costs. In my judgment, there was nothing wrong with this procedure or in the advice that was given or the consequences that flowed from the acceptance of that advice.

The officers gave the advice prudently and reasonably and there was nothing improper in their doing so. I do not regard the manner or form in which the advice was given as being such as to flaw the decision taken by the committee. I therefore reject the narrow interpretation contended for by Mr. Laurence and take a broader view on the general interpretation and application of schedule 12A and, in particular, paragraph 12. I see nothing wrong in taking the final vote in private session. As I explain later there was no obligation to return to public session for this purpose.

I turn then to the third complaint that the advice which was given on that occasion from both the legal advisers and from the planning official was differing or contradictory advice to that which had been contained in the original reports which had been seen, of course, by the parties. It is put in the skeleton argument as follows.

> "It is also acknowledged that in cases of the present type, the relevant omission will often consist in failing to give the objector an opportunity to comment on factual matters, or inferences from factual matters, which could have affected the decision under challenge. Here, complaint is primarily directed at the advice tendered to the committee, which differed from that previously given. It is submitted that no legally relevant distinction can be drawn between depriving an objector of an opportunity to comment on relevant facts (on the one hand) and relevant advice (on the other)."

I turn then to look at the report which Mr. Phillips had prepared for the purpose of this meeting and turn to paragraph 3 which I omitted when I first introduced this document. Paragraph 3 states as follows:

> **"Approach to the present application**
>
> 3.1 The first point to deal with is the status of the 1988 permission. For the purposes of deliberating on this application, the 1988 permissions should be taken as being valid. As such, the relevance of the permission in your deliberations goes to determining the strength or otherwise of the council's position should the present application be refused. It should be made clear though that the 1988 permission does not prevent committee deciding either to refuse or to grant the present application.
>
> 3.2. With regard to the present application, members have before them not only the officer's views but the benefit of the objector's comments and his back-up evidence and analysis. Clearly, there are differences of views albeit both views are validly held. However, all relevant areas of concern are referred to and in such circumstances, provided committee carefully consider the material arguments put before it, there is no reason to doubt that a valid and proper decision cannot be made.
>
> …
>
> 4.3 The 1988 permission should be considered in relation to assessing the relative strength of the council's position should the matter go to appeal."
>
> One has to bear in mind the recommendation from Mr.

French which was that:

> "Members are recommended that in the absence of sound and clear cut reasons for refusal the presumption is in favour of development. In this case no such reasons are considered to exist, and conditional planning permission is recommended."

Thus, the position of the two officials was clear beyond doubt from the reports. Admittedly Mr. Phillips' language is perhaps a little more circumspect, guarded and subtle; Mr. French is more forthright but they do not disagree with each other.

I have come to the conclusion that there is no substance in this criticism. I accept Mr. Phillips (an officer of the Royal Borough and a solicitor of the Supreme Court) when he says on oath:

> "In the closed session of the meeting I provided the committee with my views on the planning submissions that could be made on the council's behalf if the matter went to appeal following a refusal of the application. I based my advice on reports, letters and other material that was before the planning and conservation committee in its open session."

It seems to me that he did not abuse his position. He did not give inconsistent advice as to the differences between the applications and I specifically reject the suggestion contained in Mr. Powdrill's affidavit to that effect. There was undoubtedly a difference in emphasis because the officials were at pains to point out to the committee what the consequences could be and were likely to be if permission were refused. That is wholly different from asserting, as the applicant does, that this was inconsistent or different advice from that which had been contained in the reports and advice prior to the meeting. I see no major or material inconsistency or contradiction. That different emphasis within the private session was understandable and reasonable. I do not consider that any of the officers abused the opportunity of the private session to press home their point.

I turn then to the final point which concerns natural justice. Leading counsel puts the matter in this attractive way:

> "1. Persons in the position of Mr. Stoop (viz occupiers adjoining sites in respect of which applications for planning permission are made) are given no right under the Town and Country Planning legislation to be consulted or to have their views taken into account save in so far as such views form part of the material considerations to which the authority must have regard in determining any planning application.
>
> 2. Where, however, as here, the authority had followed its familiar practice of carrying out such consultations and Mr. Stoop's views had been invited and he has expressed them, he had a legitimate expectation that they would be properly taken into account.
>
> 3. In the particular circumstances of this case, natural justice required:
>
> (i) that Mr. Stoop should be given a proper opportunity to comment on the developers' application.
>
> (ii) that Mr. Stoop should be given a proper opportunity to comment on the true views held and advanced by the authority's officers in support of the application. The true views held and advanced by the authority's officers were those advanced in private ".

He further submits that he was denied the opportunity to give his views on what he called the "true views" of the officers. Had he been given such an opportunity there was a sufficient likelihood of the committee refusing planning permission or the court to grand judicial review. He relies upon what happened in the private session and the swing from a refusal to a decision in favour of granting the permission. Had Mr. Stoop been given that opportunity, he submits, he would have been

able to adduce and would have adduced "additional material of probative value which, had it been placed before the decision-maker might have deterred the [council from granting planning permission] even though it cannot be predicted that it would inevitably have had that result." He relies for the substance of that submission upon the dictum of Lord Diplock in *Mahon v. Air New Zealand [1984] AC 808* at 821. He also submits that he would have made representations which might have affected the outcome of the application for planning permission. Here he relies upon the dictum to that effect of Woolf J (as he then was) in R v. Monmouth District Council [1985] Vol. 53 P&CR 108 at 115.

That then is the substance of his submission. He took me through some 12 or more authorities and with great care, erudition and scholarship. I am grateful to him for it; it is not necessary to set them out.

I have to consider whether or not there was a breach of the duty of fairness against the statutory background of section 100 of the Local Government Act 1972 and also the Town and Country Planning Act 1971 , in particular section 26 and section 29(2) . The latter section provides:

> "(2) In determining any application for planning permission for development of a class to which section 26 of this Act applies, the local planning authority shall take into account any representations relating to that application which are received by them before the end of the period of twenty-one days beginning with the date of the application."

Thus, Mr. Stoop and the other occupiers of adjoining sites are given no right under the legislation to be consulted or to have their views taken into account save in so far as such views do form part of the material considerations to which the authority must have regard in determining any planning applications. Similarly there is no obligation under this legislation or the rules of natural justice to afford a hearing to an objector — see *Gaiman and Others v. National Association for Mental Health [1971] Ch. 317* . The applicant did not have a legitimate expectation to address the committee on the arguments of the officers in private session, or again in public thereafter. This was because (1) he had no enforceable right which was being affected by the planning permission and (2) he had not been given any expectation to address the committee further after his case had been presented or at any time by virtue of any previously enjoyed right, promise or undertaking.

I have already indicated that the committee were entitled to (1) receive the advice of their officers, (2) on the matters they addressed and (3) in private. In principle there can be no obligation upon a local planning authority to expose in public for comment by the applicant or the objectors the legal advice on its prospects (1) on appeal if it were to refuse planning permission or, (2) of success in judicial review proceedings, if it were to give permission. This is particularly so where the matter is expressly covered by statute as here, as I have found, by virtue of paragraph 12 of schedule 12A .

In the Monmouth case Woolf J (as he then was) recognized that even within, or concurrent with, the statutory framework a local planning authority could be under a duty or an obligation to act fairly to both the applicant and objectors. He recognized that the court should be astute not to intervene and quash planning permissions which have been granted.

At page 109 he said:

> " I accept that the court must exercise circumspection about intervening to quash planning permissions which have been granted to owners or persons interested in property. After all, unlike a refusal to a planning permission, there is no right of appeal in respect of the grant of a planning permission provided by parliament. So parliament clearly did not intend that, in the ordinary circumstances, there should be relief in respect of the grant of planning permission available to objectors. However, where a complaint of that sort which is made in this case is clearly established, I have no doubt that the court has power to intervene".

In R v. Great Yarmouth Borough Council ex parte Botton Brothers Arcades Ltd, and others [10th July 1987] I adopted the same approach as Woolf J and his reasoning. I emphasized however that whether a local planning authority had acted fairly or not was a question of fact in each individual case. Mr. Wilkie accurately (if perhaps unkindly) observed that neither of the decisions nor the principle had been confirmed by the Court of Appeal. This is so (it may be that the planning authorities concerned received legal advice on their prospects of success!)

Even so I venture to proceed on the basis that the principle is now recognized and that it is appropriate to ask the question whether, in all the circumstances, Mr. Stoop did receive a fair crack of the whip. The circumstances in the Monmouth case were materially different in that it was a section 26 case and there was a promise which gave rise to the duty of fairness. Mr. Laurence relies heavily on the Great Yarmouth case but that was decided on its unique combination of circumstances in particular the fact that no opportunity at all was given to object or to make representations. Here there undoubtedly was.

In my judgment, the duty of fairness did not require the committee either (1) to adjourn the closed session, return into public session and repeat the advice it had received and permit further representations from either the objector or the applicant or to invite further written representations or (2) to adjourn the private session, inform the parties of the advice in writing and invite further representations in writing or orally in a later public session before reaching their decision. Merely to adumbrate the protracted procedure which would result if Mr. Laurence were correct illustrates that such requirements would impose an intolerable and unreasonable burden on local planning committees if they had to conduct their business in this manner in order to discharge the duty of fairness to the extent contended for by Mr. Laurence.

I would therefore refuse the application.

The question of discretion was raised before me. If I had been persuaded that I should grant judicial review I would have had to consider whether I should grant the relief sought, namely certiorari to quash the decision. I have read with considerable care Mr. Hoyer-Miller's affidavit which suggests that the second respondents would have good prospects of success if the matter were returned to the committee for reconsideration or, if the renewed application was refused, that there would be good prospects of success by way of appeal against that refusal to the Secretary of State.

He further points out that the building is complete, that there has already been a loss of revenue while this matter has been investigated which would continue until the matter was finally regularized. I have come to the conclusion that had I been persuaded that judicial review should lie I would have exercised my discretion in the applicants' favour. This unhappy saga stems from the muddle and ineptitude on the part of the developers in the first place compounded by the lack of diligence and consistency of the first respondents. An explanation was given as to how the original application came to be for only 600 square metres and I was unimpressed by the answer which was that somebody had forgotten to multiply the figures by two. The applicant was not a contributor to this state of affairs nor did he play any part in determining the conduct or outcome of the meeting on 9th July.

It is not my task to determine whether or not the second respondents would succeed on appeal to the Secretary of State or indeed before the borough council if the matter were to be returned to them. I am certainly not so convinced that it would be a foregone conclusion that I would be justified in refusing relief. The fact still remains that before the events occurred to which exception has been taken there was a clear majority in favour of refusal. It was only what occurred thereafter that transferred it into the majority for granting the permission. However, the grounds for judicial review have not succeeded and so the question as to how I would have exercised my discretion is largely academic. For those reasons the application is refused.

MR. PAPPS for Mr. Wilkie: My Lord, I apply for the first respondents' costs.

MR. KERR for Mr. Ash: I appear on behalf of the second respondent and I apply for their costs as well.

MR. JUSTICE OTTON: On what basis does the second respondent say that they should have their costs against the applicants?

MR. KERR: We say that there is a practice in planning appeal cases to which the present case is closely analogous. Where there is a contest, if you like, of the validity of the planning application being determined by way of — in this case — judicial review but in analogous proceedings way of statutory appeal a practice has grown up — supported by authority which I can briefly show your Lordship — to the effect that a person challenging a refusal or grant of planning permission must expect, if unsuccessful, to have to pay two sets of costs.

MR. JUSTICE OTTON: I am aware of the authority.

MR. KERR: I could add that they were served with these proceedings at the outset and although not named as a party in the application for leave we curiously were named as a party in the title to the affidavit. We later applied to be joined and were joined with the consent of the applicant. In those circumstances we say that this was a case where it was proper for us to be served and we were an interested party almost by definition and our interest was not—

MR. JUSTICE OTTON: The most interested party next to Mr. Stoop I would think.

MR. KERR: But crucially, my Lord, our interest potentially was not at all the same as the local authority's interest. One only has to imagine if your Lordship held that the prospects of an appeal would not have been very good at all and that the advice given was not good advice Had that been the position, of course matters would be very different. We say it was wholly

justified for us to have been separately represented. It would not have been possible for the developers to be represented by the same solicitors and council as the local authority. In those circumstances it is proper, having been served with proceedings for the applicant, to pay two sets of costs and not one.

MR. JUSTICE OTTON: I still have a discretion, do I not?

MR. KERR: It is guite right, your Lordship has a discretion. The practice in 0.53 cases is that of course one does not normally get two sets of costs but in this case, where there are two clear diverging interests and two proper respondents, I would urge the court to exercise the discretion in favour of granting two sets of costs and not one.

MR. JUSTICE OTTON: In the course of my judgment, particularly in the last part about the exercise of my discretion, I have been JJ critical of the part played by your clients.

MR. KERR: That is quite correct. Since I am holding this brief temporarily I have to accept the criticism that your Lordship has made. When one is considering, in the cold light of day, the question of proceedings having been brought which are not successful, the fact that they are not successful is not, as it were, altered by the fact that prior to the issue of proceedings a party in the proceedings may behave in a manner which may attract criticism in the court. That does not detract from the fact that I have been successful as has the local authority and the applicant is not.

MR. JUSTICE OTTON: I do not think you can say you have been successful. I do not think that there was ever any relief sought against you.

MR. KERR: We are certainly a lot better off than we would have been if the council had lost.

MR. JUSTICE OTTON: You would have been much better off if you had got your application and your block and tackle in order 1988.

MR. KERR: My Lord, that is a criticism I have to accept.

MR. LAURENCE: Does your Lordship want to hear me other than to say that I cannot resist an application on the part of the first respondent that Mr. Stoop pay its costs.

MR. JUSTICE OTTON: Am I erring in principle in the exercise of my discretion along the lines that I have indicated in respect of the second respondent's costs?

MR. LAURENCE: If your Lordships were to refuse the application on behalf of the second respondent — that the applicant should pay its costs as well — your Lordship would by no means be refusing the principle in the exercise of your discretion.

It would be following what the note to 0.53 says is indeed the usual practice. In my respectful submission there is nothing sufficiently exceptional about the circumstances of this case to displace that usual practice.

The second respondent no doubt had submissions that it wanted to put before your Lordship and it is quite right that it had an opportunity to put those submissions forward having applied to be made a party. It simply does not follow that under those circumstances the challenge to the first respondent's decision having failed your Lordship should proceed to say, in effect, the second respondent has been here, has taken part and under those circumstances should have his costs. I invite your Lordship in the circumstances not B to order Mr. Stoop to pay the second respondent's costs in addition to the those of the first which I think I have to accept I cannot resist your Lordship making an order against Mr. Stoop in respect of them.

MR. JUSTICE OTTON: I think there should be one order as to costs and that order should be confined in its terms to the applicant paying the first respondents costs alone. There is no basis at all either through a single order or through two orders which would justify Mr. Stoop having to pay anything towards the costs of the second respondent and I so find.