Neutral Citation Number: [2008] EWHC 2012 (Admin)

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

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 31st July 2008

B e f o r e:

HIS HONOUR JUDGE MACKIE QC

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Between:

THE QUEEN ON THE APPLICATION OF JEREMY GUINEY

Claimant

v

LONDON BOROUGH OF GREENWICH

Defendant

(1) CHARLTON TRIANGLE HOMES LIMITED
(2) JOHN LAING PARTNERSHIP LIMITED
(3) JLP HOMES LIMITED
(4) INTRO HOMES (REVISIONARY INTERESTS) LIMITED

Interested Parties

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Ms J Thornton appeared on behalf of the **Claimant**
Mr R White appeared on behalf of the **Defendant**
MR M Rowlands appeared on behalf of the **1st Interested Party**

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J U D G M E N T

1. HIS HONOUR JUDGE MACKIE: This is the last day of the legal term and the court is quite hard pressed. I consider, however, that I should give judgment in this case this term to avoid further uncertainty. I therefore propose to give what is little more than an extempore judgment. I would not do so but for the fact that I am clear in my own mind what the outcome of this case should be. I therefore reserve the right to correct any transcript of what I am now going to say, to ensure not only that the transcript records what I say but also, as it were, what I meant to say.

2. This is an application for permission rolled up with the substantive hearing for judicial review of the defendant's planning permission, granted on 7th March 2007. It raises issues of consultation, an alleged failure to take account of relevant policies, but the most controversial aspect is that related to the considerable admitted delay and the consequences for any remedies which might be available.

3. The claimant, Mr Guiney, sues on his own behalf and in practice also for his immediate neighbours, who are tenants of a block owned by the first interested party. That block is on the Harold Gibbons Estate in Charlton. The defendant, the London Borough of Greenwich, granted the planning permission in issue. There are various interested parties. The first interested party is Charlton Triangle Homes Limited, a charity and social landlord. Charlton obtained permission and owns and operates a large number of houses and flats in the Greenwich area. Since 1990 Charlton has spent over £50 million on improving the area which is the subject of this application and the surrounding developments and is clearly a force for good.

4. The other interested parties are John Laing Partnership, JLP Homes and Intro Homes, all separately or together builders of open market dwellings, sold or to be sold, as a result of they having bought land with the benefit of the planning permission in dispute. These interested parties purchased land for something over £3.6 million. They did so without notice of any problem and they did so more than three months after the planning permission had been granted and that is to say outside the normal judicial review risk time.

5. I have had a substantial amount of documentation setting out correspondence and notes coming into existence at the time. There are also a considerable number of witness statements. On behalf of the claimant, there are witness statements from Mr Guiney, Ms Adams, Ms Ramsey, Ms White, Mr O'Sullivan, Mr White, Ms Sammut, Ms Williams, Ms Margaret Guiney, Ms Field, Ms Keles, Ms Black, Ms Longfield and Mr Voce. On behalf of Greenwich, there is a statement from Mr Willey of the planning department and there are statements from people within Charlton, principally Mr Bellord and Mr Kimmance, Mr Brown and Ms Holder of the tenants' association and Mr O'Boyle.

6. The matter came on pursuant to an order made on 25th June by Collins J, in which he referred to powerful arguments that this claim would fail and the substantial delay has resulted in what may amount to such prejudice as will prevent the court doing more than making a declaration even if persuaded that any ground alleged is established. He went on to make some other observations which are incorporated in his order. It is fair

to say that some evidential water has gone under the bridge since Collins J made his prescient order.

7. The decision under attack is a planning permission dated 7th March and its relevant terms are simply this:

> "Jackson House, Turner House, Matthews House, Noris House, Kelly House, Bramhope House, Bramhope Lane London SE7
>
> Demolition of existing 3-storey blocks of flats and erection of 37 new flats ... and 23 houses ... in five 2, 3 and 4-storey blocks with associated car parking and landscaping."

There is reference to a considerable number of plans. The grant has attached to it a variety of schedules, including the Developer's Covenants contained in the third schedule which give some hint as to the very broad and significant extent of the planning consent. There are covenants that 20 of the 60 dwellings permitted are to be constructed as affordable housing units to be constructed in a particular way. There are provisions for grants for education and grants for local training and other provisions which one would expect to find in a substantial permission of this kind.

8. The geographical dynamics of this dispute are difficult to state without referring to plans but the salient features can be taken from the first witness statement of Mr Kimmance on behalf of Charlton. Bramhope Lane, referred to in the permission, consists of two parcels of land on either side of that lane. Before the redevelopment, there were six blocks of flats. All were three stories tall. They have come down and as part of what is going up is Block 5. Block 5 is to be situated, and to some extent is already situated, on an area of land, which the claimants call a recreation ground, to the northeast of what was Matthews House and Norris House. The garden to five of the 12 private houses is also situated on what the claimants call the recreation area. Block 5 is partly constructed and when it is finished it is to consist of a three-storey block of nine flats, giving homes for 31 people, with eight car parking spaces, all to be let at affordable rates.

9. The claimant and a number of those providing witness statements in support, in particular Ms Adams, Ms White and Mr O'Sullivan, live in a part of the Harold Gibbons Estate, close to where Block 5 is being put up, supposedly nine metres away at the closest point, but, it seems as a result of the way the block has been constructed so far, only eight metres away.

10. The recreational area, which the claimants value, is on any view somewhat run down, but there is a difference about quite how badly so. Clearly, in the past, it has been an important recreational facility for the claimants, their predecessors and other people living on the estate. But it seems to be clear that local vandalism and graffiti now abound and that youths rather than children have been using the recreation area.

11. The effect of the building of Block 5 will be to remove the recreational area as such and replace it with, the council would say, a less scruffy but smaller amenity area. It

appears that the original recreational area was some 1,274 square metres and the future recreational area will be a total of some 880 square metres, including a grassed area of 400 square metres.

12. The background facts are not in dispute. The residents of the area affected by this permission were aware from 1999 onwards, when Charlton took over, that major developments to improve the estates would be put in hand, and one sees that from a document "A Future for your Home", which went to everybody. That document, when dealing with the Charlton Triangle, of which Harold Gibbons Court forms part, sets out proposals dealing with the ten estates which are included in it. There is a timetable for consultations (this is in the late 1990s), there are proposals for repairs and improvements (commendably so) to all the blocks and there are broad indications of what is happening to various different components. So far as some of the blocks are concerned, including Harold Gibbons Court, the proposed works to the estate are described as "Repair play areas and equipment".

13. In July 2005, there was a well-publicised meeting, to which all tenants were invited, at which plans for the development which is the subject of this case were set out. In May 2005, there had been a public open meeting where the plans were disclosed. Charlton say that in the eight to 12 weeks in the December prior to the application being considered the plans were on display at their offices, a five-minute walk from the claimant's block, albeit that Charlton are no longer able to identify or find the plans which were put up. The proposed development was advertised in the annual bulletin and the news bulletins. There were discussions, it is said by Charlton, and exchanges at monthly meetings of the residents' association, which were open to all and to which the claimant and his neighbours were free to attend. In that context there is a witness statement from Ms Holder of the tenants' association in which she refers to the meetings which they have and to the internal community newsletter and to meetings of the tenants' association and how they are advertised. The claimant makes some, perhaps graceless, observations about the role of the residents' association but this background was, of course, of the consultation and information being provided by Charlton on an informal basis, not formally for planning consent purposes, by the defendant, the London Borough of Greenwich.

14. Quite apart from this activity therefore, there were the more formal steps for consultation which were adopted by the defendant Greenwich. In the witness statement of Mr Willey their approach is described as follows:

> "The Council has a standard procedure for the publicity surrounding planning applications. Applications are routinely advertised in the local press and by way of site notices. The site notice is produced by the Council at the same time as the advert for the newspaper. The site notice is then erected by an officer within the Council's enforcement team."

And he then gives more details as to how that takes place. He refers to the first application being advertised in June 2006 and notes that only two objections were made to that. There was a further application in September 2006, with a similar lack of response in terms of objections.

15. So far as the means of consultation are concerned, he says this:

> "Given that a site note was erected [and this is confirmed by the site notice record], there was no need for the Council to notify individually adjoining occupiers of the development, as the legislation makes plain. The Council therefore publicised the application in accordance with the law.
>
> Planning officers know from their experience that local people become aware of a planning application through individual consultation letters, the erection of a site notice or by involving local associations (in this instance the RSL Charlton Homes). This practice reflects the Council's desire to receive representations from as many people as possible..."

He adds this:

> "The Council cannot find a record of an individual letter being sent to the claimant."

That seems to be a rather disingenuous observation, bearing in mind that, on the Council's case, what happened was that the letters were not sent to the claimant or to his neighbours, for, in effect, a policy reason, which is that those living further away are less likely to see the site notice than those living closest to the development site, hence they are consulted individually whereas those closer are not. He goes on:

> "However, a site notice was posted and it is understood that Charlton Homes had engaged local residents through consultation..."

And he refers to the Charlton process, of which no legitimate criticism can, it seems to me, be made.

16. Notwithstanding what is said by Mr Willey and what is said about the Council's approach, when one looks at the relevant report to committee prior to the permission being granted, one sees under "consultation" in paragraph 10:

> "Statutory public consultation by the Council has included a site notice and 108 individual letters were sent to the occupiers and users of surrounding and adjoining properties and one objection has been received."

Well, despite what is said there to the Council, no letter was sent to adjoining properties, in the sense that none was sent to the claimant, the claimant being eight metres away from Block 5. It is suggested that this indication would not have misled councils because they were also provided with detailed sheets showing exactly who these letters were sent to.

17. When later a complaint was made about consultation to the local Member of Parliament, the Borough said this:

> "Consultation was carried out in the form of site and press notice and extensive neighbour consultation ... Consultation was therefore carried out with the Charlton Triangle Homes Tenants and Residents Association. This was on the understanding that Charlton Triangle Homes would consult with its own tenants. It is my understanding that members of the tenants and residents association sit on the CTH board."

18. In a memorandum from the Chief Planning Officer, dated 18th February 2008, the consultation process is described in this way:

> "Harold Gibbons Court is in the ownership of Charlton Triangle Homes, which is the developer of the site. Consultation was therefore carried out with the Charlton Triangle Homes Tenants and Residents Association. This was on the understanding that Charlton Triangle Homes would consult with its own tenants. It is my understanding that members of the tenants and residents association sit on the CTH board."

19. The planning application was therefore granted in March 2007 but this application to the court was not brought until April 2008, on the face of it a startling delay. The claimant's account for this is as follows. They say that, and this is both in the submissions of counsel and in the substantial number of witness statements, that the claimant and the other residents knew about the redevelopment of the six blocks and supported this and their understanding was that the area would be improved, and the material to which I have referred supports that. They say, and it appears to be correct, that none of the material planning documents made clear that the recreation area was to be built upon. They say that demolition work started in late 2006 and a fence was built round the recreation area. Mr Guiney says he checked and was told there would be no development on the recreation area. That conversation was, he recalls, with Mr Brown. Mr Brown recalls no such conversation, a difference in recollection that reflects no discredit on either. The claimant says that the start of construction work in April 2007 therefore came as no surprise in the overall context of their knowledge that substantial improvements were afoot and it was not until January 2008 that digging began in the recreational material.

20. The interested parties point out against that that timber hoarding was erected around the Bramhope Lane site in September 2006 and in January 2007 they point out a difference of recollection between the claimant and Mr Brown. They refer to the fact that the works commenced, as Mr Guiney points out, in April but that letters were sent in May giving an update. Work on the foundations was done between 23rd October and 13th November 2007 and by 27th November the hoardings surrounding the site were replaced by mesh netting so that the location and nature of the works would be visible to passers-by and they therefore join issue with Mr Guiney and his neighbours in their recollection that they noticed foundations being dug in late January 2008. There is a striking photograph produced by the interested party of works underway in the sense of the recreation area being dug up in November 2007 and they say that it must have been blindingly obvious that something was afoot.

21. Against that, the nature of the works may well have been unclear to the claimant and there follows from January 2008 onwards a trail of emails as the claimant begins to realise what is going on, which seemed to me to have the clearest possible ring of truth. Mr Guiney gives an account of how he sought to find out more. The time came when the planning department had been shown the "Planning and Design statement" and a relevant paragraph stating:

> "Accessed from Victoria Way through Harold Gibbons are nine proposed flats. The ground floor flats are accessed via the open grassed area, while the first and second floor flats are accessed from the higher part of the site at first floor level."

And it goes on so as to begin to lead Mr Guiney to the realisation of the implications of what was happening to Block 5.

22. It is also important to emphasise that Harold Gibbons Court faces on to Victoria Way and, in the normal way, to get to your home in Harold Gibbons Court you would be coming from Victoria Way, not going up and down Bramhope Lane unless there was some other reason for you wanting to go down there.

23. The picture presented by the witness statements is a consistent one. I will not read them all out, although one example is Ms Williams, who says she is disabled:

> "[I] spend my time in the flat. I make sure I read every single piece of paper that is sent to the flat. Had there been a hint of the proposed building on the recreation ground I would certainly have known about it. There was never any suggestion that the recreation area would be destroyed. Instead, the letters about the redevelopment concentrated on the new homes that would be built."

24. But while Mr Guiney was, as it were, making his discoveries, the interested parties had legitimately been proceeding with the work which followed the planning consent having been obtained. I have referred in general terms to the very substantial commitments entered into and carried through by the second, third, and fourth interested parties; so extensive and so obvious that I do not think it is necessary for me to refer to them in any more detail.

25. So far as Charlton itself is concerned, one sees between paragraph 69 and 74 in Mr Kimmance's first statement the details of what they did, but, so far as work is concerned, Block 5 has reached the first floor level, something over £200,000 has been spent so far, and, if Block 5 had to be demolished, given what had happened by the time of the application for judicial review, there would be very significant cost liabilities.

26. It is against that background that I turn to the challenges brought by the claimants and I deal only with those which were pursued at the hearing. Those fall into either two or three categories, depending upon your approach, but it seems to me in broad terms they

fall into two categories, of which in my judgment the most significant is that relating to the consultation. So I will deal with that first.

27. Article 8 of the Town and Country Planning (General Development Procedure) Order 1995 makes provision for publicising applications for planning permission. The relevant parts provide that an application for planning permission shall be made as prescribed by the article. If the development proposed is a major development, which this is, the application will be publicised by giving requisite notice, by site display in at least one place and near the land to which the application relates for not less than 21 days or by serving a notice on any adjoining owner or occupier and by local advertisement.

28. So the position we are in so far is that the local authority can choose, should it so wish, between site notice and letter but is obliged to advertise locally. We can dispense with the local advertisement, because there is an admitted error or omission by Greenwich in this regard, but they point out, and the claimant accepts, that that is irrelevant, as, had the missing advertisement gone out, the claimant and his neighbours would not have seen it.

29. Circular 15/92 on Publicity for Planning Applications is still in force and provides that the term "publicity", in this circular, means giving notice of a planning application so that neighbours and other interested parties can make their views known and there are then provisions, including:

> "The responsibility for publicising planning applications falls to local planning authorities. In appropriate circumstances, parish councils (in Wales, community councils) may post notices on behalf of the local planning authority, but the statutory obligation remains with the local planning authority."

And there are then a series of provisions identified in the skeleton argument of Mr Drabble QC and Ms Thornton for the claimant that I will not read out but I will just select one or two. Circular 15/92 provides:

> "... there will be no need to advertise separately two simultaneous applications for the same development on the same site ... In this situation the publicity should make it clear that there are two applications. Where identical applications are not made simultaneously, so that the first application has already been advertised, it will also be necessary to advertise the second."

There's only one site notice in this case. There is provision that more than one notice will normally be required for a large site:

> "A large site, one bounded by several roads and footpaths, or with more than one frontage will normally require more than one notice."

There are also indications that authorities should not just comply with the statutory minimum but consider more publicity.

30. The claimant says there should have been more than one notice in this case because the area being redeveloped extends along Bramhope Lane on both sides and has affected also residents of Victoria Way. Once built, the flats in Block 5 would be accessed from Victoria Way through the Harold Gibbons Estate and the claimant submits that one site notice was not, and could not have been, seen by all those residents that would be affected by the development, particularly in a context where everybody knew about the development but not necessarily about how it would affect them in detail.

31. In addition to their submissions about failure to consult adequately both in relation to the site notice and in relation to the absence of letters, the claimant relies upon the defendant's statement of community involvement, which is still in draft form, to erect an argument based on legitimate expectations. Without going into the matter in detail, I reject that submission for the reasons given by Mr White on behalf of Greenwich.

32. The response to the criticisms of consultation by Greenwich is to draw attention to the fact that they can choose between site notice and individual notification. They submit that that was a decision for the Council which the Council took and was entitled to take. They refer to the absence of objections from people other than the claimant and reiterate that the purpose of advertising is to inform people living outside the immediate area and that the purpose of letter notification is the same. They submit that the site notice that they erected was adequate. They accept that the Council cannot delegate its consultation requirements to Charlton but the court is entitled, in the exercise of its discretion, to have regard to what Charlton actually did. They rely upon, as being a correct statement in law, a paragraph contained in the decision of Richards J, to which I shall gratefully return, in the case of R (on the application of Seamus Gavin) v London Borough of Haringey and Wolseley Centres Limited [2003] EWHC 2591 (Admin). Putting the matter shortly, the learned judge says this, at paragraph 27:

> "I have substantial doubts as to whether article 8(4)(a) imposes on a local planning authority an obligation to consider which of the two methods is best calculated to give notice of the application to those likely to be interested in the application. On the face of it, either of those methods is equally valid in every case: the relevant judgment has already been made by the Secretary of State, who, in making the 1995 Order, has formed the view that the purpose of ensuring that sufficient notice is given will be sufficiently achieved by a combination of (a) either of those methods plus (b) local advertisement."

33. In my judgment, the position is as follows. There is a lack of clarity from the London Borough of Greenwich about their approach to consultation of the claimant in this case. On the face of what was conveyed to the committee, the Borough did decide to consult adjoining owners but they did not do so for these residents while they did for others. That is clear from the sheets attached to the report to the committee. Councillors were told that people in adjoining properties had been consulted. The councillors would have had in the normal way, in the light of that assurance, no particular reason to check up on what officers had told them by going through the detailed sheets to see whether particular people in particular blocks had or had not received letters.

34. The Council also refers to the fact that it has checked and has not found a record of a letter to the claimant but, as I have said, that sits oddly with their suggestion in evidence that this was a deliberate decision, bearing in mind the defendant's proximity to the proposed development.

35. The site notice was placed in an area where it would not normally have been seen by the claimant, particularly in the context of a claimant aware in general terms of a development but not of any particular implications for his home. The Council, it is common ground, cannot delegate its consultation duties through Charlton but I accept that one should have regard to what Charlton did. The consultation carried out by Charlton was responsible and appropriate but it was never in sufficient detail to alert the claimant of the direct challenge presented by this application to his enjoyment of his home.

36. When one takes all those features together, it seems to me that the consultation carried out in terms of individual consultation was certainly intended, at least the Council has interpreted that it was intended, to involve those in adjoining homes, and it did not, and against that background, the limitations of the limited site notice are put into stark relief. What would have happened if this proposed development had, as I find that it did not, come to the attention of the claimant?

37. One sees in the report three references to consultation with local residents at paragraphs 5.1, 10.1, and 10.3.1. One refers to there being no letters of objection having been received. There is another one referring to one rejection having been received and then at 10.3.1:

> "108 individual letters were sent to surrounding properties informing the occupants of the proposal, and one letter from the occupiers of 10 Bramhope Lane has been received supporting the proposed development."

38. Richards J, as he then was, considers a similar point at paragraph 31 of Wolseley. He refers to being satisfied that the claimant was substantially prejudiced by the failure to consult sufficiently. He refers to representations that might have, or would have been, made had consultation been adequate and says this, in relation to that case:

> "Such representations would have gone both to the principle of planning permission and to the conditions to be imposed if permission were granted. They might not have been successful, but they were of sufficient substance that he could legitimately complain of the denial of an opportunity to make them. The case for relief would have been reinforced by the fact that a substantial number of other residents would appear to have been unaware of the planning application and would also have objected to it if they had been notified."

39. Well, applying those considerations to the facts of this case, it does seem to me that the claimant's potential objections are of sufficient substance for him to be able legitimately to complain of the denial of an opportunity to make them and, although the additional

objections might not have been a substantial number, one can see that there would have been a significant core of objections which would have been made at least as forcefully, at least from those who have come forward to make witness statements in this case and also those who signed a petition. So, subject to considerations which I shall come to later, it seems to me that the claimant would succeed in a claim that there was an unlawful failure to consult on the part of Greenwich.

40. The second and third grounds upon which this claim is brought relate to what the claimant says are errors in the Officer's report and, associated with that, a failure to take into account material planning considerations. The Planning Officer's report to councils recommending approval of the planning permission, and upon which councillors would have been heavily dependent for their decision, did not make clear that a block of flats was to be built on the recreational area. It contained, they submit, a lengthy analysis of the relevant planning policies and failed to make any reference to the numerous planning policies relevant to the loss of recreation space and a series of policies, 07 and 08, in the Greenwich UDP and various policies in the London plan PPG are then referred to.

41. Objection is made to paragraphs of the report describing the siting of the development without reference to the area of recreation or its positioning six metres from one of the blocks on the Harold Gibbons Estate (that six metres, I think, should be to eight or nine metres) and there are similar submissions to like effect, and indeed it is submitted that the errors in the planning officer's report are almost self evident from the more detailed, and, it is suggested, rational, explanation which one finds set out in the defendant's summary grounds, in particular, in paragraph 24. There is a related submission relating to the failure, it is said, of the defendant to consider relevant planning policies relating to the provision of open spaces and reference is made to the same policies, 08, 07, London plan and national policy guidance.

42. The defendant rejects those criticisms, the most substantial of which is the allegation that the report did not make clear that a block of flats was to be built on the recreation ground. They say there was no need for this to be explicit for a series of reasons. They say the existing recreation ground was very dilapidated; was not well used by younger children but was a magnet for antisocial behaviour; its value to the community was limited, not as valuable as it had been in the past, as one sees from evidence from the claimant; and it was going to be replaced by a smaller but much better open space; it was clear from the plans, expressly referred to in the report for councillors to look at, that part of the open space was to be built on as the result of the development; that members of the committee would be expected to be familiar with the area; and that the planning officer's report assessed the provision of common open space and concluded that it would be acceptable at paragraph 14.5 and did so in terms which was a rational planning judgment which cannot be impeached. The defendant relies upon the well-known observations of Sullivan J in R v Mendip District Council, ex parte Fabre, where he refers at page 509 to the following considerations:

> "Whilst planning officers' reports should not be equated with inspectors' decision letters, it is well established that, in construing the latter, it has to be remembered that they are addressed to the parties who will be well

> aware of the issues that have been raised in the appeal. They are thus addressed to a knowledgeable readership and the adequacy of their reasoning must be considered against that background. That approach applies with particular force to a planning officer's report to a committee."

And the judge then goes on to develop that theme in more detail.

43. In my judgment, the issues were fairly presented to the committee for decision, albeit the particular concerns of the claimant would have come forward explicitly had there been consultation to which the claimant reacted. There was no obligation upon the borough officers to spell out all the considerations identified by the claimant and it seems to me that there was no failure to take account of relevant planning policies and that that aspect of the challenge will and must fail.

44. Against that background, I next turn to the questions of the substantial admitted delay and the potential prejudice. For reasons I have given, it is clear that there are overwhelmingly legitimate grounds for the interested parties to contend that they would be seriously prejudiced by a quashing of this planning permission, so obvious that I do not enumerate them further. Moreover, an overall quashing would have the effect of raising all sorts of problems in relation to potential breach of planning agreements; difficulties with education and employment training grants which have already been partly paid, there would be dilemmas about what was to happen to that; and a range of other practical nightmares which the interested parties should not have to face, bearing in mind the circumstances in which they came to hold the interests which they did.

45. It is against that background that I turn to the competing submissions on that issue. Mr White reminds the court that a claim for judicial review must be brought promptly and in any event within three months from the date upon which grounds for the claim arose and he says there has been an undue delay in the making of the application, for reasons evident from what I have said so far, and focuses on particular reasons why the delay should remove the opportunity for relief from the claimant. He reminds the court of the crucial need in cases where a grant of planning permission is challenged by way of judicial review for the greatest possible urgency. He refers to the observations by Richards J in the Wolseley case I have mentioned, to the fact that it is wrong to focus only on the developer alone and others may have relied on planning permission and ordered their affairs accordingly. He refers to the interests of good administration, which make it inappropriate to undermine the basis upon which people have acted and submits that permission should be refused on grounds of delay. Mr Rowlands makes similar submissions on the point of principle, as does Mr Harper QC in written submissions put forward on behalf of the interested parties other than Charlton.

46. Reliance is placed by the interested parties on a decision of the House of Lords, Kent County Council v Kingsway Investments [1971] AC 72, where, on the question of the entirety and integrity of planning consents, the majority, whose decision was expressed succinctly on page 107 in the words of Lord Guest, found as follows:

> "Planning permission is an animal sui generis not to be compared with licences and similar permissions. It seems to me that planning permission

> is entire. If a condition as to its grant flies off owing to its invalidity, the whole planning permission must go; and it is impossible to separate the outline permission without the time limit from the grant."

47. Two members of the House of Lords in a minority reached a less root and branch conclusion, agreeing in essence with an observation that had been made in an earlier case by Devlin J:

> "In all these cases, the question to be asked is whether the bad part can be effectively severed from the good. I think that the demand relating to total arable acreage of the farm can be struck out from the form without altering the character of the rest of it."

And the minority decision refers to that consideration, a somewhat less fundamental one than the majority.

48. The response of Mr Drabble is that in all the circumstances the court should find relief; the substantive issue is of public importance; the merits are strong; the claimant was not aware of the decision to build until the end of January 2008; the claimant could not have been aware of the decision any earlier; the reason the claimant was not aware of this decision was due to the actions of the defendant and the interested party; and, on becoming aware of the decision under challenge, the claimant filed his claim within three months and acted promptly in doing so; and relies upon other considerations.

49. So far as facing the inevitability that the whole of this planning permission cannot rationally be quashed, Mr Drabble's first submission is to submit that the court should indicate that it is minded to quash and then invite the parties to negotiate a new section 106 agreement under, I suppose, the threat of that observation. He submits that it has to be accepted that a quashing or partial quashing will never get back to a clean sheet but it is the duty of the court, where it might otherwise grant total relief, to grant partial relief to reflect the merits. He submits that, while this is not a question of severance as such, there are legitimate grounds for rescuing the planning consent, and by a process akin to severance, in a situation where one would simply be striking down the bad and retaining the good. He relies upon observations in a decision of the Divisional Court in Dunkley v Evans [1981] WLR 1522. He refers to the court adopting a formulation produced by the Supreme Court of Victoria in another case as follows:

> "If the enactment, with the invalid portion omitted, is so radically or substantially different a law as to the subject-matter dealt with by what remains from what it would be with the omitted portions forming part of it as to warrant a belief that the legislative body intended it as a whole only, or, in other words, to warrant a belief that if all could not be carried into effect the legislative body would not have enacted the remainder independently, then the whole must fail."

The court says:

> "We respectfully agree with and adopt this statement of the law. It would

> be difficult to imagine a clearer example than the present case of a law which the legislative body would have enacted independently of the offending portion and which is so little affected by eliminating the invalid portion. This is clearly, therefore, an order which the court should not strive officiously to kill to any greater extent than it is compelled to do."

50. I do not accept these submission for two reasons. First, Kingsway v Kent is high authority, planning permission is in time and has little or no scope for severing or by a similar or comparable process. My second reason is as much one of fact as law. Planning permissions, particularly those as complex as this, contain a large number of interdependent features. If one were to strike out or strike down one aspect of the planning consent, one would never know how dependent upon it other aspects and features of the permission were.

51. In a case like this, all the features of the planning consent seem to me to be part of a package deal and it is not a question here of striking down the bad and rescuing the good because, if one severs from the good what is said to be bad, one is removing a key feature, both of what was agreed before the planning application was put in and also a key feature of what had been approved by the Council. So it seems to me that there is no warrant at all to provide the relief sought on the primary case of Mr Drabble and Ms Thornton.

52. I return yet again, and yet again gratefully, to the decision of Richards J in Wolseley. At paragraph 91, having dismissed the opportunity of quashing the planning applications, and having from paragraphs 37 onwards dealt with delay and discretion and hardship in terms which I am grateful for and which I have sought to apply without articulating in this judgment, the judge says this as paragraph 91:

> "The same considerations against the grant of relief do not apply to the declaration sought by the claimant as an alternative to a quashing order. To declare that the council failed to comply with the relevant publicity requirements and EIA requirements would serve to underline the council's failings and would provide some satisfaction to the claimant, but without affecting the validity of the planning permission itself or therefore of works carried out pursuant to it. It may not be strictly necessary, since this judgment can speak for itself, but I think it appropriate in all the circumstances to grant such a declaration."

53. Before turning to apply those considerations to the facts of this case, I should also mention that, in addition to the case made by the defendant as regards the delay of the claimant, the defendant relied also upon claims that the claimant's legal advisors, both counsel and solicitors, had been dilatory or remiss in their approach to this application for judicial review. Having some experience of the practice of being a solicitor, I reject those criticisms because of the not peculiar but difficult circumstances in which the claimant's solicitor would have found him or herself. Mr Guiney had, it seems, tried 20 firms of solicitors before finding someone willing to take on the challenge of this case. Given the practical problems of obtaining legal assistance and public funding and of

taking instructions from people not familiar with the legal process, I do not think the conduct of the solicitors or counsel in this case is open to legitimate criticism.

54. In short, it seems to me that the claimant should have been properly consulted and was not. There is no doubt, as in all these cases, there is some understandable human error somewhere along the line. The development has a considerable impact on the claimant and those other residents in the block closest to it. A right to be consulted about a development affecting your home is an important one and in this case the defendant, no doubt inadvertently, denied it to the claimant. The court will therefore issue a declaration as between the claimant and defendant in terms which I will consider but on the basis that the terms of that declaration are to have no impact whatsoever upon the interests of the interested parties.

55. Having reached that conclusion, I will hear from counsel.

56. You are in a dilemma as to who is successful.

57. MR WHITE: My Lord, if I may go first on this. Plainly, my Lord has found that there was -- my Lord has just said no warrant at all to provide the relief sought on the primary case of Mr Drabble. As we investigated during the hearing, the primary relief was the quashing order and there was another aspect of relief, which was the declaration. So in those circumstances, my Lord, I am going to ask for my Lord to make an issues-based costs order, on the basis that Greenwich has been partially successful and it would be in the interests of justice, my Lord, for there to be an issues-based cost award in this case and, of course, that would presumably cut both ways.

58. MS THORNTON: My Lord, I wish to resist that application and I wish to make an application that the defendant pay all the claimant's costs, and I have prepared submissions as to why that should be the case, which I would be grateful if I could hand up, and address your Lordship on it.

59. HIS HONOUR JUDGE MACKIE: Shall we just deal with the interested parties first?

60. MS THORNTON: Yes.

61. HIS HONOUR JUDGE MACKIE: On the face of it, they have been dragged into this against their will. They have been given a kind indication from Collins J that they cannot expect their costs. What is your position?

62. MR ROWLANDS: My Lord, there has been some discussion flowing back and forth between myself and my instructing solicitor during the course of your Lordship's judgment. I hope that did not distract your Lordship in any way.

63. HIS HONOUR JUDGE MACKIE: Well, it is very tedious perhaps to have to sit and listen for so long. I understand.

64. MR ROWLANDS: No, we have listened with great interest, of course. My Lord, this might not be entirely convenient but I wonder if I can just have 30 seconds to discuss a particular application that my instructing solicitor would like me to make.

65. HIS HONOUR JUDGE MACKIE: Well, would it be convenient if I take Ms Thornton's written submissions into my room for a couple of minutes, you can take instructions and anybody else who wants to take instructions can do so and I will come back when you are ready for me, provided you do not need more than five or ten minutes.

(11.41)

(A short break)

(11.47)

66. MS THORNTON: My Lord, I hope you have had an opportunity --

67. HIS HONOUR JUDGE MACKIE: Yes, I have read it.

68. MS THORNTON: Thank you. I do not know how much I can be of assistance in taking you through the documentation but I would like to draw your attention to the report, the Sullivan Report, and in particular a paragraph that is relevant to the submission made by my learned friend. You should have attached to the skeleton argument those extracts from the Sullivan Report.

69. HIS HONOUR JUDGE MACKIE: Yes.

70. MS THORNTON: If I take you to page 23, section 10, costs awards against the defendant. I have quoted from -- paragraph 60, it starts. I have quoted from paragraphs 60 and 61 in my skeleton but I would wish to draw your Lordship's attention to paragraph 62, because it refers to issue-based costs orders. If I could read that out, my Lord:

> "The general 'rule' is that costs 'follow the event' (i.e. the loser pays the winner's costs), such that a successful environmental challenger should generally recover their costs. However, the recognised exceptions to that 'rule' have a particular significance here. For example, if costs are awarded on an issues-based approach, that can have a dramatic effect for the claimant's lawyers, particularly in a high cost case. That is because the LSC will generally force them to choose either to be paid for the fraction being covered by the 'inter partes' order, or to be paid by the LSC for the other fraction. Thus, for example if a 50% order is made, the claimant's lawyers will be paid 50% of their normal rates at most such that it is those lawyers who, in the end, directly take the 'hit' as a result of the order."

71. Now, my Lord --

72. HIS HONOUR JUDGE MACKIE: Does that mean that -- because of the way the LSC now operates, if you get a 50 per cent costs order you recover the 50 per cent but they do not give you anything for the other 50 per cent?

73. MS THORNTON: Well --

74. HIS HONOUR JUDGE MACKIE: It seems scandalous.

75. MS THORNTON: I would need to take instructions on that, but my understanding is that you would then be paid on the rates that I have put in the footnote: £70 an hour for solicitors, £50 an hour for junior counsel and £90 for senior counsel.

76. HIS HONOUR JUDGE MACKIE: The question then is how far the approach of the LSC is itself a reason for the court to make a costs order other than one which it would otherwise make.

77. MS THORNTON: My Lord, if I could on that point take you to paragraph 69, but I think, in light of your Lordship's submission, if I could start by reading from paragraph 67, because the Sullivan Report here is considering exactly the situation the court has before it now:

> "A good example is where the court decides that there has been an illegality, but the public authority (or the beneficiary of the consent) persuades the court to withhold substantive relief such as an order quashing the decision or consent under challenge. In that situation the court conventionally treats the claimant as having lost for the purposes of costs."

Then at paragraph 68:

> "That is particularly problematic where the claimant was seeking to establish a point of wider environmental importance and so cannot be truly said to have substantively 'lost'."

Then paragraph 69:

> "To date, the courts have not fully appreciated those matters and so have not been greatly swayed by arguments about remuneration when exercising discretion on costs payable between parties. Indeed in the Burkett case, Brooke LJ said the following:
>
> We are, of course, troubled by the submissions we received to the effect that a judgment along the present lines may deter those solicitors and members of the Bar who would otherwise be willing to act for LSC funded clients. There can be no doubt that the present scarcity of public funding of such clients is inimical to the future potential of what used to be known as The Legal Aid Scheme, but issues relating to public funding are for others to take. Our task is to interpret the present statutory scheme as we find it."

78. With respect, my Lord, is a comment similar to the one your Lordship just made, but then the Sullivan Report goes on at paragraph 70 to say:

> "We believe it is now necessary for the court to take a different approach to recovery of costs between the parties in environmental cases to which Aarhus applies, so as to ensure compliance with its requirements."

And then it goes on to make the recommendation.

> "We recommend that (whether the case is legally aided or the claimant proceeds on a CFA or other similar basis):
>
> (1) Where a claimant has been substantially successful in their environmental challenge (such as where the court has concluded that the decision was unlawful) but the court has then withheld relief on purely discretionary grounds (i.e. the claimant has substantially won), the claimant should be treated as having 'won' for the purposes of the general costs rule that the loser pays the winner's cost; and
>
> (2) Where the claimant has 'won' (actually or substantially) the general position (i.e. that the loser pays the winner's costs, including any CFA uplift) should prevail."

79. My Lord, we submit that this is a case where that type of analysis should apply and I have set out the reasons for that at paragraph 9 of the skeleton. You are aware, my Lord, that the claimant is legally aided. It is indeed a high costs case and that was referred to in the Sullivan Report as where the disparity of the recovery inter partes and from the legal aid board is particularly stark, and I can take your Lordship to that reference, if need be.

80. The case raises matters of public interest: the appropriate environment or provision of recreational space for deprived children who do not have any outside space of their own. There was before the court, my Lord, as you will have seen, statements from the chief executive of Poor Children and the director of Play England at the National Children's Bureau, providing statements --

81. HIS HONOUR JUDGE MACKIE: Yes, but you won on consultation, not on --

82. MS THORNTON: I agree, my Lord, but I am making the point that the subject matter is of considerable importance, if one is thinking about the claimant behaving reasonably in bringing the claim, and, of course, there is then an additional public interest in the notification of consulting on planning applications, which, as your Lordship said, the claimant did win on.

83. To date there appears to have been no caselaw considering the provision of more than one site notice for larger sites and I think it is fair to say, my Lord, that planning authorities, including, strikingly in this case, the defendant, have tended to approach the publicity provisions of the general development order as simply a matter of strict legal compliance with the requirements, not as, as we would say, a genuine consultation that

needs to be underpinned by requirements of fairness and, with respect, your judgment has advanced matters in that respect.

84. Finally, my Lord, it was entirely right and proper for the claimant to pursue a claim for declaratory relief. Declaratory relief is of particular importance and value in this case because there is to be a fresh application for planning permission for Block 5 and, irrespective of the reason for that planning permission, whether it is a metre apart or out of sync, the view that your Lordship has expressed in his judgment about the lack of consultation will surely be -- can be expected to be highly material to Greenwich's approach next time round to any consultation and submissions made in response to that consultation.

85. HIS HONOUR JUDGE MACKIE: Thank you very much. So you are asking, in short, for all your costs?

86. MS THORNTON: Yes, my Lord.

87. HIS HONOUR JUDGE MACKIE: You are asking for an issue-based order?

88. MR WHITE: Yes, my Lord.

89. HIS HONOUR JUDGE MACKIE: Anything else you want to say in response to --

90. MR WHITE: Well, my Lord, it is the first time I had seen these submissions, but I am able to deal with them, my Lord.

91. Firstly, it is not accepted that this is a case of environmental importance, where the principles set out in some of the authorities referred to in the report of the working group on access to environmental justice are applicable. So in my submission, my Lord, the key aspect is that the claimants have been partially successful, I accept that, but not on an area of importance, or wider importance, and not of environmental importance. But the key issue, my Lord, is partially successful. In my submission, the rules on costs now suggest that in those circumstances the court should be alive to that and should make an issue-based award as to costs.

92. Of course, my Lord, whilst the claimants are publicly funded, so, of course, is the London Borough of Greenwich. In my submission, my Lord, fairness would dictate in this case that an issues-based award is the most appropriate.

93. HIS HONOUR JUDGE MACKIE: But you will get paid anyway. They will not.

94. MR WHITE: Well, my Lord, I understand that point, and, of course, parties have sympathy for those who are acting for legally aided clients, but in my submission, my Lord, the workings and the machinations of the Legal Services Commission and the way it funds these -- should not interfere with the interests of justice as a whole and the ordinary rules on costs.

95. MS THORNTON: My Lord, if I could just respond to the point about this not being an environmental case, and where that takes my learned friend's submissions, we would say this is a classic example of a borderline --

96. HIS HONOUR JUDGE MACKIE: It does not really -- the considerations are presumably exactly the same whether it is an environmental case or another case, which is access to justice for ordinary people.

97. MS THORNTON: That was exactly my point, my Lord. It has arisen first in environmental cases because of the need to comply with an international convention, but there is no reason why this analysis as to what is happening on the ground with Legal Services Funding should not be extended to other cases but for the, what I would submit, powerful reasoning outlined in the Sullivan report.

98. HIS HONOUR JUDGE MACKIE: There is an application for costs by the claimants set out in the skeleton argument which Ms Thornton has produced, annexing and relying upon the Sullivan Report. Against that, counsel for Greenwich, who points out that London boroughs consist of ordinary people just as much as the claimant, submits that there should be an issue-based costs assessment.

99. The position as I see it is as follows. First, I reject the idea of an issue-based assessment, because in a case of this kind it would be impractical, because, amongst other things in a case of this kind, it would cause more problems than it solved and it would be unduly complex.

100. In the ordinary way, I would have awarded the claimant 50 per cent of its costs, the reasons being that in substance the claimant has succeeded on what seems to me a significant point, but has only recovered a declaration -- there has been no quashing -- and the claimant has succeeded on one rather than both of its substantive grounds.

101. I am, however, going to award the claimant 75 per cent of its costs in these proceedings and the reason I am doing so is because I have regard, and I think I would in any event have regard to it, in an intuitive sense, to the considerations referred to in the Sullivan Report and it seems to me that I am justified in having regard to the report itself and it is those considerations which I need to articulate in these short reasons that lead me to say that the claimant should have 75 per cent, not 50 per cent, of its costs, and I think it only fair to counsel for Greenwich that I should have articulated, as I just have, my reason for going up from 50 to 75, in case they should want to take it further or seek to.

102. That still then leaves the enigma of the interested parties' costs.

103. MR ROWLANDS: My Lord, thank you. First of all, there are of course significant legal costs that have been incurred by the interested party, Charlton, and that is inevitably money that will have to be found from other budgets. My Lord, there has been a very genuine interest and reason for attending these proceedings and incurring those costs, not least to defend the attack, and the quite significant attack, on Charlton's consultation process, which was not in fact in the case when Collins J made his order

and, of course, the very real prejudice that Charlton would have suffered as your Lordship found.

104. So far as the attack on Charlton was concerned, my Lord has found that there was no legitimate criticism that could be made of Charlton's process and so in those circumstances, my Lord, the court might expect me to be making an application for costs. However, so far as Mr Guiney is concerned, my clients have no wish at all to seek an order for costs against him personally, so I make no application for those costs, neither am I instructed to seek an order against Greenwich, not least given the close working relationship between the two. So, so far as the enigma of my client's costs are concerned, my Lord, your Lordship need not be concerned or troubled by this, but I thought it important to make those points in court and not least because I think Mr Guiney is in court today. I am grateful.

105. HIS HONOUR JUDGE MACKIE: Thank you very much for those observations. It is helpful to me and it is further confirmation of the responsible approach which your clients have taken throughout.

106. MR ROWLANDS: I am most grateful, my Lord.

107. MS THORNTON: My Lord, I am instructed to ask for permission to appeal as regards the withholding of the quashing order and the grounds on which I make those are very brief because your Lordship is well aware of the nature of the claim. They are firstly the public interest in the sense that this decision affects not only the present generation of children at Charlton Harold Gibbons Estate but also future generations, given the permanent change to the estate arising from the development on the recreational area. Secondly, as I am sure your Lordship is aware, it is of crucial importance to the client in this case and, thirdly, my Lord, in our submission there is an important point of law in the reasons given for not quashing the decision, which is that issue of severability and in particular whether that doctrine applies in a situation like this and the extent to which it applies. So for those reasons, my Lord, I seek permission to appeal.

108. HIS HONOUR JUDGE MACKIE: Thank you very much. Do you want to respond to that?

109. MR WHITE: My Lord --

110. HIS HONOUR JUDGE MACKIE: I invariably give opposing counsel the chance to say something.

111. MR WHITE: I am grateful but I just wanted to say, my Lord, that the severability point is that there is no genuine prospect of success and it would be inappropriate to grant permission for that in any event, but particularly in the circumstances of this case, my Lord, where it is important that there is no longer any delay.

112. HIS HONOUR JUDGE MACKIE: Thank you.

113. There has been an application for permission to appeal. The position, as I see it, is that the principal ground, the severability point, has no chance of success, in this sense: that

I have dealt with severability both as a matter of practical fact as well as as an issue of law. It may be, of course, that I am quite wrong about that but, if there is to be a step forward or backwards or whatever it is in that particular area of the law by the Court of Appeal, it is for a Lord or Lady Justice to decide whether or not they should take it on. So for those reasons I refuse permission to appeal, but, of course, Mr Guiney has the right to apply to the Court of Appeal, if he is so advised.

114. MS THORNTON: Thank you, my Lord. There is one final matter: because my client is legally aided, we need an order to the effect that there be detailed assessment of the claimant's costs.

115. HIS HONOUR JUDGE MACKIE: Yes.

116. MR WHITE: Can I speak on behalf of all parties, my Lord, and can I thank my Lord for hearing the case this week, notwithstanding the difficulties of the court, and also for producing the very careful judgment this morning by the end of term. Thank you very much.

117. HIS HONOUR JUDGE MACKIE: Thank you very much indeed to all of you.