IN THE ADMINISTRATIVE COURT CO/6365/2007

BETWEEN:

JACOB O'CALLAGHAN Claimant

-and-

THE CHARITY COMMISSION Defendant

- and-

THE TRUSTEES OF ALEXANDRA PARK AND PALACE

FIROKA (ALEXANDRA PALACE) LIMITED

FIROKA (KINGS CROSS) LIMITED

THE ATTORNEY GENERAL

Interested Parties

CLAIMANT'S SUPPLEMENTARY SKELETON ARGUMENT

For rolled up permission and substantive hearing

5 October 2007

Further key documents:

- *3rd Witness Statement of Jacob O'Callaghan [pages 545-555]*
- *Witness statement of Clive Carter [pages 787 - 802]*
- *Letters [pages 317-322] and [pages 770-775]*

1. This supplements the Claimant's skeleton argument of 21 September 2007.

2. On 10 September 2007, Andrew Nicol QC (sitting as a deputy judge of the High Court) ordered that the Defendant and any Interested Party which wished to take part in the proceedings serve Detailed Grounds of Resistance (or indicate that they were content to rely on the Summary Grounds they had already served) by 14 September

2007 [page 362]. He ordered that the case be listed with a time estimate of one day on the basis of those Summary Grounds. Moreover, that listing has been expedited at the specific request of (and in accordance with timescales identified by) the Trustees who, in their Summary Grounds of Resistance [page 340 paras 9-10] and through the witness statement of Iain Harris [page 33 paras 12-18] expressed concern that, if the case was not heard by 3 November 2007, Firoka might withdraw its interest in Alexandra Palace.

3. Pursuant to that order, on 14 September 2007, the Defendant said it would be relying on the summary grounds already filed [page 364]. The Summary Grounds in question are at [pages 326-333].

4. The Trustees did likewise [page 430]. Their Summary Grounds are at [pages 337-341]. Those Summary Grounds in essence adopted the Summary Grounds served by the Defendant [page 340 paragraphs 7-8].

5. The Attorney General confirmed her position of neutrality in a letter of 17 September 2007 [page 543].

6. Firoka remained silent.

7. However, in their skeleton argument (served on 27 September 2007), the Trustees have sought to introduce wholly new arguments (including, for example, saying that, in any event, relief should be withheld on discretionary grounds). They should not be allowed to do so particularly if those arguments prejudice the time estimate on the basis of which the case was listed; and, in any event, only on the basis that the Claimant is not in any way prejudiced in costs by the new arguments[1].

8. Without prejudice to that contention, the Claimant makes the following observations on the points made by the Defendant and Trustees in their skeleton arguments.

[1] The Claimant has reached an agreement with the Defendants that neither will seek costs from the other; and also proceeded (quite reasonably) on the basis that the Trustees' arguments were – as they said they would be – those set out in their Summary Grounds of Resistance.

The Defendant's Skeleton Argument

Statutory context

9. The Defendant's paragraph 22 relies on the 'statutory context' in support of its contention that it acted fairly in consulting without providing consultees with copies of the lease and the linked agreements. It points to the various statutory obligations to (for example) publish proposals for a s17 scheme and consider comments on those proposals; and relies (paragraph 24) on the observations in Bedford –v- Islington [2003] Env LR 463 at paragraph 102 to support the contention that the statutory framework can be a powerful indicator as to what common law fairness requires.

10. That would all be relevant if what was in play here was consultation pursuant to one of the statutory provisions in question. In that case (as considered in Bedford) there would be an argument as to how the common law obligations of fairness interacted with the requirements of the applicable statute. But none of that is relevant here where the consultation in question was not being undertaken pursuant to any statutory requirement, and so was not defined or constrained by the requirements of any such statute.

Confidentiality

11. The Defendant contends that its confirmation to the Trustees that it would not publish the draft lease "*is likely to be a powerful consideration against [a legal obligation to disclose] arising*" (Defendant's paragraphs 25-26).

12. But, as explained in the Claimant's skeleton (paragraphs 74-76), the cases relied on by the Defendant (Bedford, and Green) are factually entirely different to the situation here.

13. In any event, it cannot be right in principle that a public body which is going to be undertaking consultation can thwart the basic requirements of fairness by entering into an agreement with a third party not to provide consultees with materials which basic fairness requires to be provided to them and to which they would otherwise be entitled.

14. And that is particularly so when the materials in question are the very subject matter of the consultation, and the very thing which

the body undertaking consultation has before it, and on which it has to make its decision. (That is in obvious contrast to the position in Bedford where the Court held there was no obligation when consulting the public on a planning application to provide consultees with development agreements which were not in issue in the planning authority's consideration of the planning application and which were thus not even before the planning committee itself.)

Previous publicity

15. The Defendant relies on past publication of information about Firoka's proposals and repeats the point that that history was relevant to what needed to be provided to consultees by the Defendant (Defendant's paragraphs 27-28).

16. Of course, where a public body undertakes a series of consultations on a proposal then the nature and extent of the information which must be provided by it in any given consultation is informed by the information it provided in the previous consultations it undertook (which is the point for which the case relied on by the Defendant is authority: ex p M). But that was not the situation here.

17. Nor, in fact, did the earlier publicity provide consultees here with the crucial information which was relevant to the consultation in play – namely the lease (and linked agreements) for which the Trustees were seeking consent from the Defendant. If it was "particularly important" for the Defendant to consider the particular provisions of the lease, then it was too for consultees.

18. Moreover, of course, whatever was said in the earlier *promotional* publicity was not of any legal force when it came to what actually happens when the lease (and linked agreements) come into force (with a term of 125 years). Thus, for example, what was described at that stage – being the point at which Firoka was competing with others to be selected as developer - was merely Firoka's "vision" [page 685]. Consultees who wanted to be reassured about, and comment on, the long term legal position and the protection of the public interests in Alexandra Palace thus still needed to see the proposed lease and agreements.

Defendant's approach

19. In paragraph 29 of its skeleton, the Defendant places reliance on the fact that it addressed its mind to the sufficiency of disclosure. But it is well established[2] that the question of what fairness requires in any particular situation is for the court to decide as a matter of law. It is not something over which the body in question has a discretion, the exercise of which is only set aside on public law grounds.

Process as a whole

20. The Defendant is entirely right in saying that the circumstances need to be considered as a whole, and that the issue is whether the process was unfair (Defendant's paragraph 30).

21. But it remains the case that, given that the very point in issue in the consultation (and in the decision to give consent) was the specific lease (and linked agreements) and not the principle of a lease, fairness required that the lease and linked agreements be provided to consultees.

22. In that context it is notable that when considering its decision the Defendant said this [page 99]:

> "The 2004 Scheme made by statutory instrument under section 17 of the Charities Act 1993 makes two key provisos in respect of the terms of the lease to be made under it. Taking them in the order in which they are easiest to understand rather than the order in which they appear:
>
> First the use permitted by the lease must not be inconsistent with the purposes of the charity contained in the Acts; Second, the rent must be the best that is reasonably obtainable regard being had to the purpose of the Acts.
>
> The Scheme provided that any question as to the construction of the Scheme or as to the regularity of acts about to be done under the Scheme may be determined by the Commission.
>
> It was considered that the 2004 Scheme permitted a lease:
> • to a person who would commercially exploit the premises;
> • that the user of the premises must be restricted to uses to which the premises might otherwise have been put by the trustee in the different context of pursuing the objects;

[2] For example Mahfouz v GMC [2003] EWCA Civ 233 para 19.

> • that the use of the premises must be consistent with the use of the park remaining in the trustee's possession in furtherance of the objects by the trustee; and
> • that the rent must be the best rent reasonably obtainable and consistent with the commercial exploitation of the premises, but revised to take account of the limited uses to which the premises may be put.
>
> In considering whether the lease met these requirements, the user provisions, nuisance provisions and rent provisions were particularly important.
>
> The user provisions in clause 3.11 of the lease specify various uses and ancillary uses for the premises. The user provision does however make it clear that a use which is inconsistent with the Acts is not permitted. The user clause has been amended to ensure the precedence of that requirement was clear.
>
> ...
>
> Clause 3.1 provides for the payment of premiums and rents. Schedule 2 further explains the profit rent. ..." [underlining added]

23. However, the "user provisions" (which define the uses to which Firoka can put Alexandra Palace) and "rent provisions" which the Defendant thus (correctly) identified as "particularly important" to the issues before it are not even included within the redacted version of the lease which was provided after the consultation had finished. (In that context it is notable that the process of redaction here has been a somewhat unusual one, in that the clauses which are withheld have simply been deleted from the document such that it is not even possible to tell how much text is missing.) See thus, for example, the all-important (according to the Defendant, as above) clause 3.11 which has been reduced, in the redaction, to the following [page 140]:

> 3.11 **User**
>
> 3.11.7 Nothing in this Lease implies or is to be treated as a warranty to the effect that the use of the Premises for those purposes is in compliance with all town planning laws and regulations or other relevant legislation regulating or restricting use now or from time to time in force.

24. What is clearly missing are the "particularly important" user provisions of paragraphs 3.11.1-3.11.6.

The Trustees

25. As above, the Trustees impermissibly seek to raise in their skeleton argument what are (in effect) further Grounds of Resistance which were not raised in the Grounds of Resistance on which they said they would rely. As above, the Claimant resists any application to rely on those further grounds.

Financial position

26. In paragraphs 8-11, the Trustees comment on the financial position of the Charity. However, as they explain, its difficulties are longstanding and proposals to address the issue have been developing over years. There is no sudden new urgency. Indeed, as the Claimant explains in his 3rd Witness Statement [page 554 paragraphs 25-28] the Trustees are continuing to budget to spend £740,000 in the year 2007-2008. And, in any event, as the Claimant has been at pains to stress, he is very much not opposed to the principle of a lease of Alexandra Palace (and thus to proposals which would assist in addressing the financial difficulties in question).

27. Moreover, the key point made by the Trustees is that there is "an unresolved issue as to whether the subvention [i.e. funding by Haringey as Trustee] can continue as a matter of law" (Trustees' skeleton paragraph 11). That somewhat mis-states the position as it is revealed by the Trustees' own annual report for the year to March 2006 which explained that [page 481 para 5.6]:

> "The charity remains a going concern because the overall trustee uses its corporate funds to support the revenue deficit of the charity. This approach is consistent with the legal advice provided by an eminent QC in 1997. The QC also advised that in the circumstances prevailing at that time the overall trustee should approach the court and establish the duty and/or power to support the charity enshrined in the Alexandra Park and Palace Act 1985. Should there be the necessity to review or change the advice in the light of any Court direction there will be an obvious and immediate need to consider the effect on the going concern concept." [underlining added]

As far as the Claimant is aware, the Trustees did not follow that advice: they did not go to court to establish the position including the extent to which they are in fact under a duty to support the charity. Insofar as there is doubt about the position it is doubt with which the Trustees have been content to live for 10 years without following the legal advice they were given at the time as to how to resolve the position. They cannot now rely on the point to try and undermine basic procedural fairness, as here.

The area leased

28. In paragraph 17 the Trustees explain that there was a plan attached to the 2004 Order showing the extent of the area over which it permitted a lease to be granted.

29. However, that merely defined the outer limits of what could be leased, it did not specify what was in fact proposed to be leased under the terms of the particular lease for which consent was sought. Indeed, that was still the subject of dialogue between the Trustees and the Defendant in correspondence up to 24 April 2007 (which has only now been provided - in these proceedings [pages 755-756] - and still without the actual lease plan being provided).

Previous Publicity

30. At paragraphs 19-22, the Trustees comment on the publicity that was undertaken in the context of the tendering exercise which led to the selection of Firoka as developer. As above, none of that had legal force nor does it (or can it) remove the need for consultees to see the actual lease (and agreements) in contemplation. The material in question was simply part of Firoka's presentation in seeking to become the developer; which is not the same thing at all as the details of the lease which was then contemplated (and, more particularly, whether that lease was satisfactory from the Charity Commissioners' point of view – which was the point in issue in the decision and on which consultees were thus to comment).

31. In that context, it is also notable that the Defendant had specifically told the Claimant that [page 360]:

> "There will need to be consultation with the [standing advisory] committee and other interested parties, and planning and listed building consent will be necessary. The

Commission must then consider whether to authorise the granting of the lease." [underlining added]

In other words, what was promised would also have required that detail of what was contemplated in terms of the building would be considered through the planning and listed buildings processes (and thus made public) before even there was consultation on the lease. In the event, the lease has been approved without those processes being completed so that there can be no confidence that the scheme which is contemplated (through the lease and the project agreement) can even be delivered.

Confidentiality

32. In paragraphs 27-29, the Trustees rely on the contention that the terms of the lease were regarded by them and Firoka as confidential. In particular, they explain the concern that "*in the highly undesirable event of a further tendering process being required that process would be substantially affected by the availability of the commercial information relating to the agreement between these parties being put into the public domain*". Even if that was correct (and it is not obvious why it should be), its relevance is entirely unclear: the Claimant does not suggest that there needs to be a further tendering process, nor does he seek an order to that effect.

33. The Claimant was one of many people who complained about lack of access to the lease during the process and who maintain that complaint – see thus, for example, the witness statement of Clive Carter [pages 787-802] and the letter he wrote to the Defendant at the time in which he specifically accepted that commercial confidentiality was an issue during a tendering process, but rejected the suggestion that it properly persisted after the contract was agreed. The Defendant was well aware of the point. And yet the Defendant did not properly even consider it: it simply proceeded on the basis of a blanket view that nothing should be disclosed. That stance is completely unsustainable.

34. The Trustees rely (paragraph 32) on the decision of the House of Lords in Alfred Crompton Amusement Machines Ltd –v- Customs and Excise Commissioners (No 2). But, the issue there was whether the Customs and Excise Commissioners could rely on Crown Privilege to withhold – on public interest grounds - documents

which would have revealed how they undertook investigations in circumstances in which they were not even intending to place the documents in question before the arbitrator before whom proceedings were being contemplated. That is entirely different to the point in issue here, in circumstances where context is all important.

35. Nor is it correct to say (as the Trustees claim) that the court is concerned here to balance the claimed interest in maintaining the confidentiality which the Trustees assert in the lease against the requirements of fairness. The basic requirements of fairness here are just that: an irreducible minimum. And, in the present context (as explained in the Claimant's skeleton), the Courts have specifically identified the irreducible minimum of the requirements of a fair public consultation. In any event, even if there were a balancing exercise to be undertaken it cannot be right that the exercise would lead to the withholding of matters such as those which the Defendant (rightly) identified as "particularly important" to its decision; nor to the project agreement to which the lease gives effect (see clause 3.3.1 [page 134]) through which Firoka's "vision" (as above) is to be given effect, or not.

36. Nor does the fact that Firoka may prefer to keep the terms of the lease confidential for its own commercial reasons displace the basic requirements of fairness here: no doubt many public consultations involve information that third parties would rather not put in to the public domain. But such a – self serving – claim cannot defeat basic fairness particularly where, as here, the materials in question are the very essence of the point being consulted upon (in contrast to the position in Bedford, as above, in which the development agreements were entirely peripheral to the question of whether planning permission should be granted). The Defendant should simply have made clear that, in the consultation to which it was committed, it would need to publish the materials in question.

37. Nor should the court give way to the threat that Firoka might withdraw its proposal rather than allowing the commercial terms to be made public; nor to the contention (paragraph 33(d)) that disclosure "would be obviously prejudicial to any future tendering process". Firstly, as above, the Claimant does not seek an order that the lease be re-tendered. Secondly, even if that was the effect, that would only be because Firoka withdrew its proposal such that

Firoka would no longer be in the picture (and such that the lease it had contemplated would not be relevant to the any future tendering). The Trustees cannot elevate Firoka's commercial interest to being one of countervailing public interest.

38. The simple position remains that that the Defendant should have made clear to the Trustees (and thus Firoka) that a lawful (and thus fair) consultation was a prerequisite to the making of an order consenting to a lease. And that fairness required the proposed lease (and linked agreements) to be made available to consultees.

Fairness

39. The Trustees then (paragraph 36) quote an extract from paragraph 11 of the decision of the Court in Wainright to suggest that the question of what fairness required here was a matter for the Defendant's discretion. However:

(1) Firstly, the passage in question is taken out of context and is not support for that proposition: the Court was there referring to the discretionary nature of the decision as to how widely the consulting public authority needed to advertise its proposals: newspaper adverts, site notices, etc; and not the point in issue here, namely what information needed to be available to consultees. Indeed, the passage in questions was expressly not (see paragraph 10) qualifying the "underlying principles" for a fair consultation which the Court identified as being those from Cran (etc) on which the Claimant relies.

(2) Secondly, as above, it is well established[3] that the question of what fairness requires in any particular situation is for the court to decide as a matter of law. It is not something over which the body in question has a discretion the exercise of which is only set aside on public law grounds.

40. In paragraphs 38-40, the Trustees contend that the ambit of the consultation was here defined by the undertaking to consult. The case relied on – ex part M – is simply not authority for that proposition. The precise wider requirements of consultation (who is notified, by what means, how long they are given to respond, and so on) may vary, but the irreducible minimum is precisely that. And

[3] For example Mahfouz v GMC [2003] EWCA Civ 233 para 19.

fairness in the circumstances here clearly required that the lease (and agreements be made available).

41. In any event, as the Claimant explained in his skeleton (paragraph 53), the undertaking given here cannot be sensibly or fairly read as meaning that only the actual order would be made public – that would be nonsense: what was in play (as the Parliamentary Under Secretary made clear) was a "specific lease" [page 290], not merely the principle of a lease (which had already been well established). Indeed, when the Defendant's Victoria Crandon explained the position to the Trustees' Iain Harris in an email of 5 April 2006 she correctly noted that [page 183]:

> "An undertaking was given by Fiona MacTaggart that it will be possible to raise concerns with the Commission in connection with the granting of this lease." [underlining added]

Plainly, that could only be done with knowledge of this [specific] lease.

42. In paragraph 41, the Trustees contend that the issues before the Defendant were narrow, that its decision was of "restricted scope" and that (paragraph 44) the Defendant "was not in a position to decide between different potential options for its use". However:

(1) the questions of whether the lease was consistent with the Trust and in the interests of the Charity are (particularly the latter) in fact wide in scope; and they were certainly treated by the Defendant and the Trustees at the time as being wide enough to embrace the sorts of issues with which the Claimant and others were and are concerned.

(2) Moreover, as noted above, the Defendant itself recognised that particular provisions of the particular lease (including the "user provisions") were "particularly important" to those issues. If consultees were to comment on the points in question, they plainly needed to see (among other things) those provisions.

(3) Nor was it simply a question of the Defendant being faced with a "take it or leave it" decision on the lease. The Defendant was concerned, and properly concerned, with the detail of the actual lease terms and the arrangements in play (as the Trustees recognised in their dealings with the

Defendant), and was able and willing to require (and did require) amendments (including on the kinds of issues which concern the Claimant and others – see, for example, in relation to the CUFOS building [bundle page 109]).

43. In paragraphs 46 and 47, the Trustees note the Defendant's conclusions that the use which Firoka can make of the Palace was consistent with the Alexandra Palace Acts and expedient and in the interests of the charity. In paragraph 48, they suggest that the Defendant's function was "therefore primarily a question of law". Whatever is meant there by "primarily", it was also plainly the case that the Defendant was concerned with factual and other questions. And, even on narrow questions of pure law, the Claimant would have been able to make a meaningful contribution (assisted, as necessary, by professional advice).

44. In paragraphs 51-64, the Trustees return to the topic of the prior consultations which took place here. But, as above, none of those was an answer when it came to the question in play at this stage: namely whether the Defendant should consent to the specific lease which was now in contemplation, the principle of a lease having already been established.

45. In paragraphs 65-66, the Trustees contend that there is nothing that the Claimant could have said that would have altered the position. However:

(1) Notably the Defendant does not make that suggestion.

(2) The Trustees invite the Court to do what the Court of Appeal has specifically said it should not do, which is to enter into the "forbidden territory of evaluating the substantive merits of the decision" (see thus Smith as set out in the Claimant's skeleton at para 81).

(3) It is also important to note that, as above, the issue before the Defendant was not an "all or nothing" question. They could require (and did in fact require to some extent) changes to the lease terms. Thus, the issue is not simply whether the Defendant might have refused to make the Order at all, but the terms of the lease on which it was prepared to make the Order. And that is something to which

properly informed representations by the Claimant and others plainly might have made a difference.

(4) Given that the Claimant still has not seen the materials in question, he cannot – of course – particularise the representations he and others would have made if he (and they) had been properly consulted; nor can it properly be said that nothing he might have said could have made any difference.

46. In paragraphs 67-68, the Trustees rely on the fact that the Claimant's JR application was not supported by a witness statement from anyone else concerned about the lack of provision of the lease. The point goes nowhere. The Claimant could obtain such witness statements if they were relevant – the witness statement of Colin Carter [pages 787-802] is an example. As above, Mr Carter raised the point at the time (as his letter in the bundle shows). Indeed, so did many others (as the Defendant recognised at the time). By way of examples see pages 39-40, page 319, page 770 - 775 (including the specific complaint of the Standing Advisory Committee on this point). In any event, a claimant is fully entitled to complain about the nature of the consultation which was undertaken with the public at large: see thus, for example, Greenpeace v Secretary of State [2007] EWHC 311 (Admin) at paragraph 43. And, as the Court of Appeal said in see Kides –v- South Cambridgeshire [2002] EWCA Civ 1370 at 134:

> "It seems to me that a litigant who has a real and genuine interest in challenging an administrative decision must be entitled to present his challenge on all available grounds. Nor do I read the judgment of Sedley J (as he then was) in *ex parte Dixon* as casting doubt on that proposition. Similarly, Lord Donaldson MR's reference (in *R v. Monopolies and Mergers Commission, ex parte Argyll Group plc* [1986] 1 WLR 763 at 773) to "the applicant's interest" is, as I read it, a reference to the applicant's interest in obtaining the relief sought: in this case, the quashing of the planning permission."

Exercise of Discretion

47. In paragraphs 69-72, the Trustees raise the fresh contention that discretionary relief should in any event be refused. As above, they have previously relied on the same factual contentions to secure an expedited hearing. They made no wider point then about

discretionary relief. They cannot now raise it (and they should not be given permission to adduce the evidence of Firoka's Mr Kassam on the point[4]). In any event, it should be given short shrift. As Collins J put the matter recently in a case involving a judicial review challenge to the grant of planning permission for part of a major scheme to import gas, and in the context of evidence from the developer that it had incurred substantial costs and would incur losses of over £2m per day if the project was delayed: Ware –v- Neath Port Talbot [2007] EWHC 913 (Admin) 30 March 2007:

> "National Grid make the point that the installation is an integral element of a much larger project for the connection of two liquid natural gas import terminals at Milford Haven. They should be operational by September 2007. They are an important part of the government's energy policy. There will be, it is said, real difficulties for National Grid if it is unable to carry out its obligations to have the system in place by September. I note this, but it cannot, as Miss Ford [for National Grid] recognises, prevail if the claimant persuades me that the decision of the council was flawed. [underlining added]

48. The same is here too. Indeed, per Lord Oliver in R –v- Attorney General ex p Imperial Chemical Industries [1987] 1 CMLR 72 at 109:

> "It must be wrong in principle, when a litigant has succeeded in making good his case and has done nothing to disentitle himself to [a remedy] to deny him any remedy, unless there are extremely strong reasons in public policy for doing so."

49. Here the Claimant has done nothing wrong to disentitle himself to a remedy. And the threats made by Firoka are not "extremely strong reasons in public policy" for denying a remedy.

David Wolfe

MATRIX

3 October 2007

[4] It is, in any event, notable, that Mr Kassam expresses particular concern about engaging in a new tender process – but that is not the order that the Claimant seeks. Also, Mr Kassam is careful only to say that Firoka's "current intention" would be to abandon its interest if that was to occur.