

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

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**CLAIMANT'S SUPPLEMENTARY SKELETON ARGUMENT**

**For rolled up permission and substantive hearing**

**5 October 2007**

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*Further key documents:*

- *3<sup>rd</sup> 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<sup>1</sup>.
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.

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<sup>1</sup> 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