From: [redacted]
To: ManstonAirport@pins.gsi.gov.uk
Cc: [redacted]
Subject: Manston Airport DCO Inquiry - Our PINS N os 20014582 and 20014588
Date: 25 June 2019 11:15:48
Attachments: attachments to 19 June Kevin Macdonald.pdf
attachments continued for 19 June letter.pdf

Mr. Kelvin Macdonald FAcSS, FRTPI, CIH
Lead Member of the Examining Authority,
The Planning Inspectorate
Manston Airport Case Team
National Infrastructure Planning
Temple Quay House,
2 The Square,
Bristol BS1 6PN

Our PINS Reference Numbers 20014582 and 20014588

19th June 2019

Dear Sir,

Public Examination of the River Oak DCO: Our 'Interested Parties' Constructive Alternative London Kent International Airport and London East Kent Coast Airport (Manston) Limited

As Airport Development Director, I write on behalf of myself and my three Thanet resident co-Directors (as below) and to complain in some written detail hereunder. This serious complaint is attributable largely to your foolishly patronizing myself and others, absent any unnecessary silk leadership for presentation. I am a senior founder member of the Compulsory Purchase Association and a Chartered Surveyor and Valuer, within the RICS Planning and Development Division, from its inception. Having qualified by study at Polytechnics, now three universities. My lifelong study of transport infrastructure and land use commenced later and early in 15 years of public land acquisitions and industrial estate management at County Hall in London, of the LCC/GLC/ILEA. That included frequent Defined Site selections for all Council purposes and land purchases chiefly by agreement or by CPOs. I made several Appearances as Principal Council Expert Witness in the Lands Tribunal, the Courts and various Public Inquiries.

As a Senior Visiting Fellow in Town Planning and Housing of the Cambridge University Department of Land Economy you may need to know that some of my contemporaries and trainees of the GLC Valuation Department became well-known Land Economy lecturers and whilst I seldom lectured, I have published many professional and technical papers. Firstly, my invited 1973 dissertation on housing and planning reform for the Heath Government, entitled "Putting the House in Order – A Fresh Approach" of some 12,500 words and much abridged for "controversial" RICS publication in June 1974. Later, it formed the bedrock of many sweeping changes of planning and property legislation, under the Thatcher Government – all having stood the test of time – eg Surplus Land Registers; Right-to-Buy; Leasehold Valuation Tribunals and then very controversial new payments for Planning and Building Applications which produced some £80 million in Council fees during the first year by replacing the much-abused previous free

council planning services for developers.

Latterly, a very wide-ranging and well-received modern review edition in the IRRV Valuer Magazine of June 2016, proposed (inter alia) a new-style proportionate 50% Land Incremental Value Added Tax; being a workable revived form of old-fashioned Town & Country Planning Act 1947 Development Charges; but ring-fenced for local owner payments, for half their capital value increases from new local stations and other infrastructure benefits. The incentive cap of 50% of capital value uplifts, should bring about owners' and developers' ready participation instead of constant wangling with Councils and Revenue.

Our London Kent International Airport expansion scheme, has a multi-disciplinary approach (see notes on Revision 31 drawing) and I attended your first open day of Hearings in the Margate Winter Gardens and recently much of your Friday 7 June Hearings at Discovery Park.

As before, I/we object strongly to our unique Manston Airport expansion plans being airily and intentionally "No-platformed " by derisory time allocations from yourself, having given PINS written advance notice on 3 June of our perceived need for open presentation of our comprehensive redevelopment solutions of low-cost all-purpose airport expansion, on the vast uninhabited agricultural flood plain of Ash Level, within Dover District Council jurisdiction.

Now, after consultations with Peter Moore (retired leading Ramsgate Solicitor) and others I/we object to such unbalanced legal conduct of this Public Inquiry by the Examining Authority. While allowing all "Interested Parties", a strict three minutes only for oral representations, regardless of seeking or finding factual content. Yet conversely, you allow unlimited public platform time, to the most persistent airport opponents:- Stone Hill Park (SHP) with Dame Ann Gloag and to the local planning authority, Thanet District Council (TDC) led now by Mr. Ian Livingston, a Council legal officer. Also possibly ill-informed Ramsgate Town Council.

Wrongly, during Friday 7 June, you stated openly and contrary to English law, that your public examination was confined to the River Oak DCO scheme; consequently disregarding my particular previous written submissions, citing the Supreme Court Judgment (in terms) in the Mosely case (see annexes). Thereafter, all Inspectors at all Public Inquiries must take into account any Objectors' alternative proposals and above-all those Inspectors must not act merely conveniently, so as to go through the motions of proper attention. For avoidance of doubt and annexed hereto are face sheets etc of certain landmark Planning Law Judgments, to which I referred previously. Again sent together with my earlier shorter selection of copies from my wider written submissions, but without prejudice to the remainder with you already. Furthermore, there arerelevant land valuation case law Judgments per Lord Denning such as in Lotus & Delta v Culverwell (VO) CA "All evidence is in, but it goes to weight". Moreover, two very recent conjoined Court of Appeal Judgments (in Romaine and Zafar) are warning all reckless Expert Witnesses to tell the truth or face prison.

Nevertheless, in your consideration of the River Oak DCO scheme; you are following still, the now-overruled restrictive practices of countless earlier Public Inquiry Inspectors; so as preferentially to consider only the promoters' limited scheme before you and perhaps conveniently, to cut-out attention to our far more extensive and productive alternative. That restrictive practice method arose originally from the chaotic laissez-faire of mid-19th Century anti-planning, for countless private railway Bills under the Lands Clauses (Consolidation) Act 1845 and the Railways Clauses (Consolidation) Act 1845. Indeed only a few years ago as to Manston itself previously, the very fair Inspector, of the Lydd/London Ashford Airport Public Inquiry, held that he himself was so restricted, whilst accepting (on the face of his Report) that

the already existing larger Manston Airport (as in evidence adduced by the RSPB and others) offered a superior readymade aviation case. Those customary negative methods were supported by prominent Kent County Councillors, possibly with business connections to Lydd; whilst bizarrely they preferred overcrowded inland Gatwick Airport's 100% expansion plans, to Manston Airport retention on the East Kent Coast.

Surely however, the whole point of your wide-ranging DCO examination method, is to bring out the full truth of everybody's positions and preferably to reach a sound public consensus before recommendations to the Secretary of State. Whereas in contrast (as years ago, in typical Town Planning Seminars) I perceive "Structured Debate", inviting selected persons questions and speeches, before reaching preference conclusions. In fact for a generation or more, the DfT has been overlooking Manston's East Kent Coast position as the best airport location in South-East England, with ample unused coastal air routes and no need at all to overfly the Home Counties and Greater London, causing widespread unnecessary noise and air pollution.

Whereas, a fully incisive examination and exposure of our long-researched low-cost Manston Airport expansion scheme, to improve upon the circumscribed DCO, should allay many misconceptions and fears. Perhaps also informing better, some reasonable people grouping within such as "No Night Flights", whose main environmental impact concerns we share.

Helpfully laudable are your Planning Inspectors' meticulous attention to detailed adverse submissions by SHP and TDC and the fair-and-reasonable responses of Michael Humphries QC, for River Oak as promoters. Indeed, were there to be a conjoined or extended or supplementary Public Inquiry for our Manston Airport Expansion (see below) many of your Development Control findings might well be adapted and adopted therein "off the shelf". That may be conducive to achieving the fairly similar airport development time-frames of both River Oak and ourselves, now to 2022.

However, time is going by and at least interim Civic Design layout answers are appropriate. We do not expect you to propose immediately to alter River Oak's DCO as such; but you can allude to and/or recommend consideration of either some expansion of the DCO itself, or of a collateral CPO, of Dover District Council (and outwith TDC) which largely is my preferred option now.

Before any interim findings and conclusions (as foreshadowed by you) we request you to pay full attention to a series of important issues, errors and possible pitfalls; rather than leaving it to us complaining afterwards. For if you do make mistakes (and regardless of whom may benefit) almost any person could mount final legal challenges and certainly not only the implacable SHP and TDC. So I list below several outstanding issues of concern to ourselves, for your further examination and review of solutions and above-all before you reach any final conclusions:-

1. When I attended at the outset, in Margate Winter Gardens Counsel for SHP questioned the competence of your examining authority, and your compulsory purchase and compensation experience; which was not noticeably answered by you. Although I was not present on 5th June when River Oak's well-known CPO expert Colin Smith gave evidence, I point out that my firm (WMF/JGW) has extensive previous local CPO knowledge and experience. But fortunately on 7 June, I had brought with me for you, my brief written rebuttal of any ill-advised SHP Hope Value compensation claims (which does not preclude any future dealings with Dame Ann Gloag). Whether they like it or not both SHP and herself enjoy a solid original and subsisting Crown Airfield consent, which they have damaged wantonly, by their repeated asset stripping and boundary changes outwith planning law. In view of that SHP cannot support any Hope Value compensation claims on possibly novel grounds of turning to some very odd attempted airport

abandonment propositions, absent any formal Change of Full Planning Permission (Pioneer Aggregates and Hughes cases).

2. Meanwhile, since before 2014, TDC planning department supported the SHP scheme directly or indirectly, whilst also undermining any airport retention and/or restoration. Nevertheless, these same biased TDC opponents presume (as if of right) to be appointed to supervise any possibly favourable River Oak DCO outcome of your Inquiry. For such supervision, TDC are singularly unfit, having regard to their previous local planning authority failures of duty, in not using their powers of enforcement and thus tacitly supporting neglect. The Secretary of State should be advised fully, as to palpable TDC Municipal negligence and/or wilful evasion, such as of unauthorised Planning Unit boundary changes and casual but previously vital internal demolitions of Avionics especially by and for the current airport owners. Consequently, TDC supervision as a potential Discharging Authority should not be recommended to the Secretary of State. In direct contrast, the DfT could appoint a truly independent airport supervisory body (on the lines of a small site-specific development corporation) and with only consultation rights for TDC and likewise KCC, whose wholly negative Manston Airport record rules them out too.

3. Whilst the Localism Act allows for local forums for local issues, Manston Airport is a major national asset issue according to PINS and rightly so. Recently however, Mr. Livingston has proposed a new civic monstrosity, of a Community Consultative Committee as a novel tier of future TDC Development Control for Manston Airport, by some local peoples' assembly of "a democracy of those who turn-up", being a largely unqualified proposed peoples assembly which is not equipped to supervise such a major business enterprise. It is almost certain to attract the most reckless loud airport objectors, as observed in public at the recent anti-airport meeting of Ramsgate Town Council, when Dr Ian Brooman was shouted down.

4. Also by 7 June, SHP had put forward a costly bespoke form of financial liability safeguard, to monitor expenditures of the promoters River Oak, if they were successful in getting their DCO . As an immediate cautionary oral response, I drew attention to the for historic legal methods of Georgian canals and mid-Victorian railways bills; of the promoters posting a money bond. Also, that the corresponding modern protective financial instrument is a "Bankers' Guarantee". Albeit any such guarantee form could be a new Whitehall standard one, in which it may protect the Crown Interest itself too, as potential owner of last resort of a national asset; in the unlikely event of River Oak as airport promoters' financial failure. Being myself a Member of Kings College Hospital NHS Trust (since foundation) I observed the financial failure of a public/private partnership development, of the quite new Princess Royal Hospital at Farnborough, where the Secretary of State for Health stepped-in, to appoint KCH as more reliable overall NHS Trust owners. That debacle was caused by very onerous and exploitative private finance partnership costs. Whereas, any bankers guarantee for Manston and River Oak, should seek to allow a fair investment return only.

5. Our London Kent International Airport (LKI) expansion scheme rests upon four years research and our Feb 1 2018 Copyright Design Revision 31, has all its notes. Also, with ample on-site space for all aircraft and engine maintenance functions (and indeed River Oak's plane breaking plans) within our provisionally defined and very widely-drawn security boundaries, against terror attack. Although, I had notified later minor amendments (especially after the very helpful National Grid Pylons diversion, see attachments) nevertheless there may be other important future Copyright Design component options, for consultations with Statutory Undertakers and owners and perhaps for incorporation into notes on a future Revision 32 Drawing.

6. Especially so as to expand our design option for Runway 1 itself, by widening the existing

runway concrete southwards, onto large land areas of similar at-grade levels, occupied now by the existing A299 dual carriageway, right alongside the airport. That widening could provide enough land for two parallel runways and taxiing between which Design option can be lengthened westwards, by equally widening the planned Runway 1 viaduct extension to 4km, as shown on Revision 31. Such a dual full-length 4km Runway extension could cost but a small fraction of the time and expense and disruption of Heathrow's current proposals for bridging and diverting the M25, for a now-shortened Heathrow Runway 3 plan on offer. Obviously, this requires replacing part of the A299, for which our previous planned Trunk Road Link between the Monkton and Richborough Roundabouts would work. While also, giving better access to our improved 12 coach Minster Parkway Station with its easy third platform restoration. This option superseded and economises the much more expensive four platforms KCC Cliffsend Parkway Station, with its developer-led new housing under the flight paths. But this runways option is for future works, which are set out now, mainly to assert my/our Outline Copyright Design and to fend-off any opportunist design plagiarism, by incoming engineers. Thus, two parallel runways with tarmac continuity, may be conducive to better landings and take-offs and taxiing of planes.

7. Meanwhile, Town Planning cannot disregard the obvious environmental amenity measure indicated by ordinary house prices rises; now predictably improving in Thanet, due to partial and as yet incomplete upgrading of railways for fast-commuter trains services to St Pancras, via Ashford and HS1.This is not enough to alleviate long years of Thanet District decline, due to repeated losses of major East Kent economic generators, such as :- (1) Closure of the old Kent coalfield (brownfield); (2) Decline of U.K. beach holiday trade; (3) Closures of various UK Defence installations (4) The US Airforce went home after the end of the Cold War.

8.Whereas, now there are two economically transformative opportunities:- (A) The Single Runway River Oak mainly for freight. DCO, is limited but perhaps reasonable; (B) Our low-cost extension planning for Runways 2and3 on uninhabited greenfield Ash Level should be safeguarded. Our low-cost comprehensive redevelopment for three full-length 4km Runways altogether, likely to cost some £3 billion overall and very reasonably by about 2022. This economically transformative project, with two new all-hours runways in Dover District should be safeguarded now for implementation (probably by CPO) subject to planning preferences and sufficient initial underwriting.

9. Clearly, Manston shorter flights coupled with carbon capture require no polluting nor noise intrusive overflying of the Home Counties or Greater London. This also coincides with last week's enhanced Government Commitments on Climate Change, which were well received by an almost unanimous House of Commons.

Soon, I shall be copying this letter (for information only at present) to Mr. Nadeem Aziz, Civil Engineers and Chief Executive of Dover District Council and also to Mr. Charlie Elphicke MP for Dover and Deal (with copies for other MPs and possibly other public interests).

10. Finally, this letter is urgent for your information, not only because of your own timetable, but also because I have outpatient appointments at Kings College Hospital on Tuesday June 25 and then early on Wednesday June 26, we shall be flying-out on holiday. Therefore, I shall not be able to attend to any possible responses (from any quarter) until later in July.

Yours faithfully,

Norman J. Winbourne FRICS, FCInst.CES, FIRRV

c.c. Existing Thanet co-Directors – Lt.Col.Dr.Ian Brooman TD FRCGP; Peter Moore (retired

Ramsgate solicitor); Rev Gordon Warren RN (Retd) AMRAeS.

Winbourne Martin French
Chartered Surveyors
Cannon Place
78 Cannon Street
London
EC4N 6HL
Tel: 0207 248 0246
[redacted]

This email has been scanned by the Symantec Email Security.cloud service.
For more information please visit http://www.symanteccloud.com

NJW Note for Friday 7th June appearance at Manston Airport DCO Inquiry

Manston Airport Asset-stripping depredations, with planning illegalities and values arising.

The airport owners' asset-stripping and profitable selling-on of assets, has stopped airport use temporarily at least and at some considerable cost.

The onward sale of the essential fire station site and even the fire engines themselves and the stripping-out of the vital military-grade radar and "avionics" has reduced the airport to an empty inoperable shell condition.

This process equates to other property cases of illegal planning infringement by unauthorised boundary changes and is also similar to unauthorised building demolitions from the inside.

Therefore, either requiring restoration orders against the irresponsible airport owners, or some equivalent financial liability and/or register charge on the title.

In particular the avionics were sold second-hand for £4 million and were installed at Oxford Airport; but reinstatement may well cost more now, with new equipment from such as Marconi. In fact, £15 million was mentioned in the past to me.

From what I have been told of last Tuesday's proceedings and Stone Hill Park (SHP) exchanges with River Oak, it seems as through SHP may be seeking to establish grounds for eventual Hope Value compensation in principle. Whereas compensation as such is not for this DCO Inquiry. Doubtless Colin Smith will deal with that for River Oak but, I wish to make some observations now.

As to any Ceiling Value for compensation, we were informed in 2014 of River Oak offers to then Mrs. Ann Gloag of Stagecoach PLC which were in-the-order-of £7 million. Others will not know that another parallel offer of £7 million was also rejected by her out-of-hand, being against that offeror. However, both point towards a Ceiling Value.

Therefore in my view, there may be negative equity following the asset stripping especially of the avionics, subsequently to those two offers.

Nevertheless, in commonsense, there ought to be a possible agreement with Dame Ann Gloag and her consortium.

My few preliminary financial inquiries in the City have been met with a need for official backing of a scheme, producing a chicken-and-egg situation. Whereas, a positive outcome from the Inquiry, preferably at least entertaining an airport expansion solution of the DCO, could remove the chicken-and-egg uncertainties.

Finally, all other reported airport expansion costs suggest that there should be no shortage of respectable UK prime funding given a positive Inquiry outcome.

29 October 2014

PRESS SUMMARY

R (on the application of Moseley (in substitution of Stirling Deceased)) (Appellant) v London Borough of Haringey (Respondent) [2014] UKSC 56
On appeal from [2013] EWCA Civ 116

JUSTICES: Lady Hale (Deputy President), Lord Kerr, Lord Clarke, Lord Wilson, Lord Reed

BACKGROUND TO THE APPEALS

Until 1 April 2013 central government operated a Council Tax Benefit ('CTB') scheme whereby residents in local authority areas in England were granted relief from paying council tax on a means-tested basis, for which the local authorities were reimbursed in full **[4]**. For the year 2013-2014, reimbursement to each local authority was fixed at 90% of the sum it had received in the previous year **[6]** and each local authority was required to devise its own Council Tax Reduction Scheme ('CTRS') to provide relief from council tax to those whom it considered to be in financial need **[7]**. It was a requirement that each local authority consult interested persons on its CTRS in draft form before deciding on a final scheme: Paragraph 3(1)(c) of Schedule 1A of the Local Government Finance Act 1992 (added by Paragraph 1 of Schedule 4(1) to the Local Government Finance Act 2012) provides that *"Before making a scheme, the authority must… consult such other persons as it considers are likely to have an interest in the operation of the scheme."*.

The Respondent published a draft CTRS on 29 August 2012 under which it was proposed that the shortfall in central government funding would be met by a reduction in council tax relief of between 18% and 22% for all CTB claimants in Haringey other than pensioners **[9-10]**. The consultation document for Haringey residents explained the reduction in funding, and stated "*That means that the introduction of a local [CTRS] in Haringey will directly affect the assistance provided to everyone below pensionable age that currently receives [CTB].*" There was no reference to other options for meeting the shortfall, for example by raising council tax, reducing funding to council services or deploying capital reserves **[19]**. The consultation document also included a questionnaire asking how the reduction in relief should be distributed as among CTB claimants **[21]**. Following the consultation exercise, the Respondent on 17 January 2013 decided to adopt a CTRS under which the level of council tax relief was reduced by 19.8% from 2012-2013 levels for all claimants other than pensioners and the disabled **[14]**.

The Appellant is a resident of Haringey who until 1 April 2013 had been in receipt of full CTB, and thereafter had to pay 19.8% of full council tax. She was not originally a claimant in the judicial review proceedings which were brought by two other similarly-circumstanced Haringey residents to challenge the Respondent's consultation process. Underhill J dismissed their application for judicial review on 7 February 2013. One claimant, Ms Stirling, appealed to the Court of Appeal and that appeal was dismissed on 22 February 2013. Ms Stirling subsequently became ill and the Appellant was by consent substituted for the purposes of this appeal. Ms Stirling has since sadly died **[3]**.

JUDGMENT

The Supreme Court unanimously allows the appeal and declares that the consultation exercise was unlawful **[31]**. However, it declines to order the Respondent to undertake a fresh consultation exercise because this would be disproportionate in the circumstances **[33]**.

Lord Wilson (with whom Lord Kerr agrees) gives the main judgment. Lord Reed gives a concurring judgment. Lady Hale and Lord Clarke agree with both judgments.

REASONS FOR THE JUDGMENT

Lord Wilson considers that where a public authority has a duty to consult before taking a decision, whether such duty is generated by statute, as in this case, or arises as a matter of common law, the same common law requirements of procedural fairness will inform the manner in which the consultation should be conducted **[23]**. The requirements of a fair consultation are as summarised in the case of *R v Brent London Borough Council, ex p Gunning,* (1985) 84 LGR 168: "*First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third,… that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.*" **[25]**. Fairness may require that interested persons be consulted not only upon the preferred option but also upon discarded options **[27]**.

In this case, fairness demanded that the consultation document should briefly refer to alternative methods of absorbing the shortfall in government funding and to the reasons why the Respondent had concluded that they were unacceptable **[29]**. In fact, the purported consultation was premised on the assumption that the shortfall would be met by a reduction in council tax relief and no other option was presented **[17, 18, 21]**. Neither was it reasonably obvious to those consulted what other options there may have been and the reasons why such options had been discarded. Indeed, only an infinitesimal number of responses to the consultation (approximately 20 out of 1287 responses) alluded to other ways of meeting the shortfall. Therefore, the consultation exercise was unfair and unlawful **[31]**. However, it was not unlawful that the Respondent had failed to consult on the possible adoption of a Transitional Grant Scheme announced by central government only 5 weeks before the completion of the draft CTRS consultation **[32]**.

Lord Reed allows the appeal for slightly different reasons. In cases such as this where the duty to consult is imposed by statute, the scope of the duty varies according to the statutory context **[36]**. The purpose of this particular statutory duty was to ensure public participation in the local authority's decision-making process **[38]**; it was not to ensure procedural fairness as under the common law. Meaningful participation in these circumstances required that those consulted be provided with an outline of the realistic alternatives **[39]**. In the absence of specific statutory provision, reference to alternative options will be required where this is necessary in order for the consultees to express meaningful views on the proposals **[40]**.

Lady Hale and Lord Clarke give a brief joint judgment agreeing with both Lord Wilson and Lord Reed's judgments **[44]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
www.supremecourt.uk/decided-cases/index.html

Regina

v.

London Borough of Bromley (Respondents) ex parte Barker (FC) (Appellant)

Appellate Committee

Lord Bingham of Cornhill

Lord Hope of Craighead

Baroness Hale of Richmond

Lord Carswell

Lord Brown of Eaton-under-Heywood

Counsel

Appellants:	*Respondents*:
Robert McCracken QC	Timothy Straker QC
James Pereira	James Strachan
(Instructed by Richard Buxton)	(Instructed by London Borough of Bromley)

Intervener

David Elvin QC and James Maurici (instructed by Treasury Solicitor) on behalf of The First Secretary of State

Hearing date:

6 November 2006

ON

WEDNESDAY 6 DECEMBER 2006

- A-Z index
- Glossary
- Contact us
- Freedom of Information
- Jobs
- Using this website
- Copyright

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

Regina v. London Borough of Bromley (Respondents) ex parte Barker (FC) (Appellant)

10. The project was an "urban development project" within the meaning of class 10(b) of Annex II to the Directive. Article 4(2) of the Directive provides that projects of the classes listed in Annex II shall be made subject to an assessment in accordance with articles 5 to 10 when member states consider that their characteristics so require. Schedule 2 to the 1988 Regulations sets out the classes of project which are listed in Annex II to the Directive. As it was an urban development project, the application to develop the Crystal Palace site was a Schedule 2 application: see item 10(b) in Schedule 2. Regulation 2(1) provides that a "Schedule 2 application" means an application for planning permission for the carrying out of development of any description mentioned in Schedule 2 which is not exempt development and which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location. Regulation 4(2) provides that a local planning authority or the Secretary of State or an inspector shall not grant planning permission in respect of a Schedule 2 application unless they have first taken into account the information in an environmental statement and state in their decision that they have done so.

11. The effect of the 1988 Regulations is that, when it is faced with an application for planning permission for development of the kinds listed in Schedule 1 and Schedule 2, the local planning authority must determine prior to any grant of planning permission whether the project is likely to have significant effects on the environment. It must refuse permission if it is of the opinion that it does not have sufficient information to come to a decision on this point at that stage. Regulation 5 enables a person who is minded to apply for planning permission to ask the local planning authority to state in writing whether in its opinion the likely effects of the proposed development would be such that an environmental impact assessment EIA would be required. But no provision is made for requiring an EIA to be provided at the stage when approval is being given to reserved matters in cases where it becomes apparent at that stage that such an assessment is necessary.

12. On 3 March 2000 Jackson J set aside the permission for judicial review in so far as it related to the grant of outline planning permission and dismissed the application in respect of the remainder: [2000] Env LR 1. On 8 February 2001 Dyson LJ granted leave to appeal. On 23 November 2001 the Court of Appeal (Brooke and Latham LJJ and Burton J) dismissed the appeal: [2001] EWCA Civ 1766; [2002] Env LR 631. On 9 October 2002 the appellant was given leave to appeal to the House of Lords. In the statement of facts and issues the following agreed issues were set out:

> "(1) Is the approval of reserved matters a part or stage of the development consent for the purpose of the Directive?
>
> (2) If so, is environmental impact assessment potentially required both at the grant of outline planning permission and later approval of reserved matters?
>
> (3) Do the EIA Regulations correctly transpose the EIA Directive?
>
> (4) Is a reference to the European Court of Justice necessary?

On 12 June 2003 the First Secretary of State (now the Secretary of State for Communities and Local Government) sought leave to intervene in the proceedings.

13. On 16 June 2003 the First Secretary of State was granted leave to intervene. Their Lordships then heard argument from counsel for the appellant, the council and the Secretary of State on the question whether a reference to the European Court of Justice was necessary. It was decided that the proceedings should be stayed and that the following questions on which a decision was necessary to enable the House to give judgment should be referred to the court for a preliminary ruling:

> "(1) Is identification of 'the decision of the competent authority or authorities which entitles the developer to proceed with the project' (article 1(2) of Directive 85/337/EEC ('the Directive')) exclusively a matter for the national court applying national law?
>
> (2) Does the Directive require an EIA to be carried out if, following the grant of outline planning permission subject to conditions that reserved matters be approved, without an EIA being carried out, it appears when approval of reserved matters is sought that the project may have significant effects on the environment by virtue inter alia of its nature, size or location (article 2(1) of the Directive)?
>
> (3) In circumstances where:
>
> (a) national planning law provides for the grant of outline planning permission at an initial stage of the planning process and requires consideration by the competent authority at that stage as to whether an EIA is required for purposes of the Directive; and
>
> (b) the competent authority then determines that it is unnecessary to carry out an EIA and grants outline planning permission subject to conditions reserving specified matters for later approval; and
>
> (c) that decision can then be challenged in the national courts;
>
> may national law, consistently with the Directive, preclude a competent authority from requiring that an EIA be carried out at a later stage of the planning process?"

14. On 4 May 2006 the Court of Justice made the following rulings in answer to these questions (Case C-290/03), [2006] QB 764:

> "1. Classification of a decision as a 'development consent' within the meaning of article 1(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment must be carried out pursuant to national law in a manner consistent with Community law.
>
> 2. Articles 2(1) and 4(2) of Directive 85/337 are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of consent comprising more than one stage, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location."

15. The House is now in a position to address the questions raised by this case. Departing from the order in which they were set out in the statement of facts and issues, I propose to deal first with the question whether, by failing to provide for the situations where an EIA might be required at the reserved matters stage, the 1988 Regulations failed fully and properly to implement the Directive ("the classification issue"). I shall then consider what answer, if any, should be given to the question whether an EIA was required at the reserved matters stage in this case ("the requirement issue").

The classification issue

16. The Court of Justice [2006] QB 764 said in its first ruling that the classification of a decision as a "development consent" within the meaning of article 1(2) of the Directive must be carried out pursuant to national law in a manner consistent with Community law. In para 40 of its judgment the court said that, while this term is modelled on certain elements of national law, it remains a Community concept which, contrary to the submissions of the council and the United Kingdom Government, falls exclusively within Community law:

> "According to settled case-law, the terms used in a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope are normally to be given throughout the Community an autonomous and uniform interpretation which must take into account the context of the provision and the purpose of the legislation in question."

17. Elaborating on this point, the court ruled, secondly, that articles 2(1) and 4(2) of the Directive are to be interpreted as requiring an EIA to be carried out if, in the case of a grant of consent comprising more than one stage, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its size, nature or location. Further guidance is to be found in the court's judgments in *Wells v Secretary of State for Transport, Local Government and the Regions* (Case C-201/02) [2004] ECR I-723, in which judgment was given on 7 January 2004, and *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* in which judgment was given immediately after its judgment in the appellant's case on 4 May 2006 [2006] QB 764, 773.

18. In *Commission v United Kingdom* the Commission put forward two complaints. The first was that there had been an infringement of articles 2(1) and 4(2) of the Directive by Hammersmith and Fulham London Borough Council in relation to a development project at the White City and by the council in relation to the Crystal Palace development project. The second was that the national rules, under which an assessment could be carried out only at the initial outline planning permission stage and not at the reserved matters stage, had incorrectly transposed into domestic law articles 2(1), 4(2), 5(2) and 8 of the Directive as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p 5).

Continue

- A-Z index
- Glossary
- Contact us
- Freedom of Information
- Jobs
- Using this website
- Copyright

Case No: QBCOF 1999/0471/C

Neutral Citation Number: [2000] EWCA Civ 506
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEENS BENCH DIVISION
(CROWN OFFICE LIST)
(MR MALCOLM SPENCE QC -- Sitting as a Deputy High Court Judge)

Royal Courts of Justice
Strand
London WC2A 2LL
Date: Wednesday, 19th January 2000

B e f o r e:
LORD JUSTICE KENNEDY
LORD JUSTICE THORPE
LORD JUSTICE MANCE

IN THE MATTER OF THE TOWN AND COUNTRY PLANNING ACT 1990
AND IN THE MATTER OF LAND AT THE CHALLENGE, CHILDERSGATE, LANE, SUTTON ST. JAMES, SOUTH LINCOLNSHIRE

BETWEEN:

	IAN CARL HUGHES	Applicant/Respondent
	and	
	THE SECRETARY OF STATE FOR THE ENVIRONMENT TRANSPORT AND THE REGIONS	First Respondent/Appellant
	and	
	SOUTH HOLLAND DISTRICT COUNCIL	Second Respondent

(Computer Aided Transcript of the Palantype Notes of Smith Bernal Reporting Limited, 180 Fleet Street, London EC4A 2HD Tel: 0170 421 4040
Official Shorthand Writers to the Court)

MS A ROBINSON (Instructed by the Treasury Solicitor, Queen Anne's Chambers, 28 Broadway, London, SW1H 9IR) appeared on behalf of the Appellant.

MR A ANDERSON QC and MR C BOYLE (Instructed by Messrs Mossop & Bowser, Abbots Manor, 10 Spalding Road, Holbeach, Lincolnshire, PE 12 7LP) appeared on behalf of the Respondent.

The Second Respondent were unrepresented.

JUDGMENT

1 LORD JUSTICE KENNEDY: This is an appeal by the Secretary of State from a decision of Mr Malcolm Spence QC sitting as a Deputy High Court Judge, who on the 14th April 1999 allowed an application by Mr Hughes that the decision of an inspector appointed by the Secretary of State be quashed. The Secretary of State submits that the decision of the inspector should be restored.

2 The relevant facts are simple, and with one qualification they are not in dispute. Mr Giddings used to live at The Challenge, Childersgate Lane, Sutton-St-James, Lincolnshire. In 1963 he bought another property, and The Challenge has not been occupied since 1963 to 1964. Mr Giddings considered letting that bungalow, but he did not do so because the amount of return which he could expect get on it, in his judgment, was not sufficient to make that an economic proposition, and it fell into decay. Apparently thieves stripped all the slates from the roof in 1986, prior to which it had been dry and weatherproof and used to store the odd sack of corn or animal feed.

3 In 1990 the building, such as it was, was bought by Mr Hughes, who sought planning permission to erect a replacement dwelling on the site. The local authority in 1991, and an enforcement officer in 1992, both described the then existing building as being "*beyond repair*" and the inspector in 1998 described it as "*now in a ruinous state with its roof and part of its walls missing*", in part, as she was careful to point out, as a result of work undertaken by Mr Hughes since he acquired the property with a view to replacing it.

4 The problem which confronted Mr Hughes was that the application site was in an area where the planning authority followed the practice of only permitting dwellings to be replaced where residential use had not been abandoned. Four criteria were considered to be relevant, namely:

1) the physical condition of the building;

2) the length of time for which the building had not been used for residential purposes;

3) whether it had been used for any other purposes; and

4) the owner's intentions.

5 In this case, it is accepted that the planning authority was entitled to follow its practice, and that the four criteria were the relevant criteria. As the inspector put it in her decision letter:

"You agree that these criteria, which are aimed at establishing whether the residential use has been abandoned, are the relevant considerations."

6 Planning permission was in the event refused, and there was an appeal to the

Secretary of State, so an inspector was appointed and she conducted a hearing on the 15th October 1998. By that date, Mr Giddings had died. In her decision letter of the 23rd October 1998 the inspector set out her findings as to the physical condition of the building and the period since it was last used as a residence, which findings reflect the history which I have already set out.

7 As to the third criteria, the inspector said that its use for an unidentified period for the storage of the odd sack of corn and animal feed "*is not conclusive evidence of another use*".

8 Turning to the final criterion, the inspector accepted that it had always been Mr Hughes' intention to live in the property and in paragraph 9 of her decision letter she said:

> *"Therefore, whilst the last 2 criteria could be satisfied, my findings on the first 2 criteria point strongly against your arguments that residential use of the site has not been abandoned."*

9 As I have said, there was then an application to the High Court, and before the Deputy Judge the issue was whether, having regard to the authorities, the inspector was entitled to find, as she did, that residential use had been abandoned. The deputy judge held that she was not so entitled. His decision is conveniently encapsulated in the penultimate sentence relied upon by Mr Anderson QC in the course of his submissions, which sentence reads:

> *"It is impossible to hold at one and the same time that the owner has ceased a use with an intention to resume it, but has nevertheless abandoned it."*

10 In fact, the inspector made no specific findings as to Mr Giddings' state of mind. The Deputy Judge recorded counsel for the Secretary of State conceding that there was no evidence that Mr Giddings intended to abandon residential use, and having regard to the material which was before the inspector, one can see why that position seemed to have been adopted. There was in reality a statement from Mr Giddings and a record of an interview with an enforcement officer, both of which took place some time before the matter came to the inspector. Miss Robinson (for the Secretary of State) now contends that the Deputy Judge may have misunderstood her position. All she accepted was that there was some evidence that Mr Giddings did not intend to abandon -- that evidence being the fact that he considered letting and the fact that he sold the building to Mr Hughes as a residential building -- but at this stage nothing of any great consequence seems to me to turn on that misunderstanding of the Deputy Judge as to the state of mind of Miss Robinson. In relation to the question of abandonment, what matters, as it seems to me, is the weight to be given to the various factors, which include the intentions of the owner. The Deputy Judge, as I read his decision, regarded that factor as decisive. The question which we have to resolve in this appeal is whether he was right to do so.

11 Everyone agrees that the first and most important authority to be considered in relation to this branch of the law is the decision of this court in the case of Hartley v Minister of Housing and Local Government [1970] 1 QB 413. That case concerned a petrol station, with an area to display and sell cars. Car sales activities ceased in 1961 because the owner died and his widow did not regard it appropriate for her young and inexperienced son to be involved in car sales. Those sales were resumed in 1965 when a new owner acquired the site. The question in the action was whether that 1965 resumption amounted to an unauthorised change of use. The Minister and the Divisional Court held that it did, and in the Court of Appeal Iain Glidewell QC, as he then was, for the appellant site owner submitted at page 419 of the report:

> "*The intention is an essential element; and here the evidence supports the view that though the widow, because of her son's youth and inexperience, told him not to sell cars, she would have liked the car sales to continue since the demand was there; so the evidence is that the car sales use was only temporarily suspended until such time as the then owners felt able to resume it.*"

12 That is, as it seems to me, the submission which appealed to the Deputy Judge in the present case, but in Hartley's case it did not prevail. At page 420 G, Lord Denning, the Master of the Rolls, said:

> "*The question in all such cases is simply this: Has the cessation of use (followed by a non-use) been merely temporary, or did it amount to an abandonment? If it was merely temporary, the previous use can be resumed without planning permission being obtained. If it amounted to abandonment, it cannot be resumed unless planning permission is obtained. ... Abandonment depends on the circumstances. If the land has remained unused for a considerable time, in such circumstances that a reasonable man might conclude that the previous use had been abandoned, then the tribunal may hold it to have been abandoned.*"

13 What matters is the view of "*a reasonable man*" and the wishes and intentions of the site owner are not, on that formulation, as it seems to me, to be regarded as decisive. At page 421, letter E, Widgery LJ said:

> "*The substance of the defence of the appellant in this case must be that although it seems there had been no car sales use from 1961 to 1965, yet on a fair and commonsense view of the facts, the proper interpretation of those facts was that the original phase 1 use for car sales had never come to an end. It is in connection with that argument that the question of abandonment arises.*
> *It has been suggested in the courts before, and it seems to me that it is now time to reach a view upon it, that it is perfectly feasible in this context to describe a use as having been abandoned when one means that it has not merely been suspended for a short and determined period, but has ceased with no intention to resume it at any particular time. It is perfectly true, as Mr. Glidewell says, that the word 'abandonment' does not appear in the legislation. We are not concerned with the*

legislation at this stage but merely with the facts of the matter. I cannot think of a better word to describe a situation in which the land owner has stopped the activities constituting the use not merely for a temporary period, but with no view to their being resumed. If that has happened, then, as a matter of fact, the use has ceased."

14 For my part I accept that if that passage is read in isolation, without reference to the facts of the case, it might be thought that there can be no abandonment if the site owner has an intention to resume the earlier user. He cannot then have "*no view to* (his earlier activities) *being resumed*", but considered in context, I am satisfied that Widgery LJ, like the Master of the Rolls, was putting forward an objective test. The state of mind of the owner would no doubt be relevant when investigating the facts of the matter, but it would not necessarily be decisive.

15 Our attention has also been invited to other authorities, but the only one to which, as it seems to me, it is necessary to refer is the decision of Nolan J, as he then was, in Castell-y-Mynach Estate v. Secretary of State for Wales [1985] JPL 40. The facts were in many ways similar to those in the present case. The relevant building ceased to be occupied as a dwelling in 1965, and then over a period of 16 or 17 years it was allowed to deteriorate to a near derelict and totally uninhabitable condition. Nevertheless, the evidence showed that at no time had the owners intended abandoning the rights of existing use, despite their decision not to relet for residential use. As in the present case, the four relevant factors were identified at the inquiry and, as the judge said, the issue was whether the building was abandoned or not. There, as in this case, counsel for the applicant emphasised the intentions of the owners. It was said that the Secretary of State "*misdirected himself in going by the view of a reasonable man rather than apprising his mind of the crucial issue which was the true intention of the owners*". As the judge said, the weight of any particular fact had to depend on the circumstances of the case.

16 Mr Anderson reminded us of part of that decision in which Nolan J at page 41 said this:

"*What was decisive was that the argument before the inspector, reviewed by the first respondent, was conducted on the agreed basis that all four factors relevant to this matter were taken into account. The weight that any particular factor bore had to depend on the particular case. It was true that in this case the extreme state of disrepair seemed to have affected the mind of the first respondent, as it had done the inspector, more than anything else. However, that was not at all inconsistent with the view formed, whichever one of the four factors one looked at. The only strong evidence the other way was the expressed intention of the owners, which was repeated at the hearing. However, genuinely expressed and put forward, it appeared to have yielded to the weight of the other factors in the mind of the inspector. Therefore the judge could see no error of law on the grounds advanced by counsel in his first submission.*"

17 When asked about that particular passage, Mr Anderson, as I understood him, submitted that the inspector was entitled to conclude that the genuinely expressed intentions were not the real intentions of the owners. That was not how I, for my part, would read it. I see no reason why in a situation such as that the inspector should be driven to the state where he must reject an intention which an owner puts forward. He may be in a state of mind where he does come to a conclusion, or she does come to a conclusion that the intention is not the real intention of the owner at the relevant time. But he may, as it seems to me, come to the conclusion that it is the real intention and was the real intention of the owner at the relevant time, but, nevertheless, cannot be regarded as a determinative matter.

18 At the end of his submission, Mr Anderson invited our attention particularly to the fact that in her decision letter the inspector did not deal expressly with the state of mind of Mr Giddings. That in the circumstances is hardly surprising. Mr Giddings was, as I have said, not before her, he having died before the time at which she became involved, and the appeal to the inspector put forward on behalf of Mr Hughes dealt with the owner's intentions in this way:

> "*Again my vendor, after moving to another property, stated that he investigated letting this bungalow but in the event did not. It was sold to me, as my title deeds confirm, as a dwelling house and at a price which reflected a house, albeit in need of quite extensive repair. I always intended to occupy it, although my attempts to do so have been frustrated by the planning authority.*"

19 The inspector clearly accepted that paragraph and dealt with it. She dealt with the intentions of Mr Hughes. She recited the evidence that Mr Giddings had attempted to let the bungalow but in the event had not. She accepted that the premises had been bought as a dwelling house and at a price which reflected that, albeit in need of quite extensive repair; and indeed she referred to two other matters, namely the Community Charge and the previous applications which had been made for a replacement dwelling on the site, both of which had been refused, namely the application in 1986 to 1987 and the application in 1991.

20 For my part I am prepared to accept that in a perfect world it would have been better if the inspector had specifically addressed the state of mind of Mr Giddings', but clearly her determination proceeded upon the basis, as it seems to me, that Mr Giddings, insofar as he devoted his mind to the matter at all, did not at any stage come to the state of mind where he was saying, "I do not regard this property as ever being available for residential use", because he contemplated letting it, he at one stage apparently had attempted to get planning permission himself for a residential use and he eventually sold it.

21 So the intention factor, as one of the four factors which the inspector had to consider, was regarded as a factor which she determined, as she said, in favour of the applicant. In my judgment she was right to do so. It was a case where the approach which is now being advanced before us, as it was advanced before the

learned Deputy Judge, is, I fear, not the right approach.

22 Evaluating all four factors, the inspector was, in my judgment, entitled to conclude, as she did, that residential user had been abandoned. That may not have been the intention of Mr Giddings any more than it was the intention of Mr Hughes; but the intentions of the site's successive owners, although relevant, were not and could not be decisive, because at the end of the day the test must be the view to be taken by a reasonable man with knowledge of all of the relevant circumstances. That is, as it seems to me, what the authorities suggest, and it is a conclusion which, as it seems to me, accords with commonsense otherwise a labourer's cottage which an emigrant and his family left 40 years ago, which has been in ruins for years, cannot cease to be regarded as a residence so long as its owner in America or Australia cherishes the dream that some day he will return to live there. There has been in such a situation, in my judgment, a clear abandonment.

23 Contrast the situation where, for example, there has been a fire and the owner is simply getting together the means to replace the dwelling over a limited period of time, or to restore it to its former glory. The objective observer in the latter situation, not knowing of the owner's intentions, might temporarily conclude that the use of the property as a residence had been abandoned where in reality it had not, because the intention factor would be determinative the other way.

24 In the former situation, as it seems to me, the outcome must in reality be obvious. The place of an objective assessment in this branch of the law is an important one having regard to what was said by the Master of the Rolls in the case of Hartley. For those reasons I would allow this appeal and restore the decision of the inspector.

25 LORD JUSTICE THORPE: I agree with all that my Lord has said. The question for determination in this case was whether prolonged and gross neglect of a dwelling house by its owners amounted to abandonment. In determining that question, it was in my opinion, necessary for the inspector to have regard to all the relevant circumstances. It would not be right to elevate the intentions of its owners to a paramount status, or conversely to subordinate other relevant considerations to intention. The judge's approach led to a conclusion which seems to me to be quite unrealistic.

26 LORD JUSTICE MANCE: I agree. The judge at pages 13 and 14 of the transcript of his judgment disclaimed any decision on the question whether an intention to abandon was to be measured objectively or subjectively; but the authorities which my Lord, Lord Justice Kennedy, has cited establish clearly that it is to be measured objectively. "The reasonable man" referred to by Lord Denning in Hartley and by Nolan J, as he was, in Castell-y-Mynach is otherwise redundant. If the test were subjective, all one would need would be the local authority or the inspector to decide the subjective intention.

27 There seems to me an analogy here with the principle of election. All that election requires is knowledge of the facts, and sometimes of the law, together with conduct manifesting objectively an unequivocal intention, regardless of subjective intention (see, for example, MacGillivray & Parkington on Insurance Law, 9th Edition at paragraph 10-108). But whether or not that analogy is correct for the principles in cases in this area appear to me clear.

28 In fact the Deputy Judge applied what was clearly a subjective approach. At page 15, for example, he said:

> "*Nolan J did not hold that if it is held that the owner did not intend to abandon the use, but to resume it, then one may go on to hold overall that there was an abandonment by virtue of the very poor condition of the building or the very long period of non-use. Indeed, in my judgment, so to hold would be tautologous because, as I have said, the very word 'abandon' involves cessation with no intention to resume.*"

29 In the initial words there, referring to the question whether an owner intended to abandon the use, the Deputy Judge was thinking of a subjective intention. It could only be, as he put it, tautologous to hold that there was an abandonment where there was no such subjective intention if abandonment is also to be measured subjectively. The same point emerges throughout the rest of page 15 and right at the end of his judgment on page 17 where he concluded:

> That is clearly a reference to a subjective intention, "*...but has nevertheless abandoned it.*"

30 That only makes sense if a test is subjective. In fact it is objective.

31 Seeking objectively to ascertain the relevant intention by reference to the matters recited in the inspector's report, the only reservation that can be made is the one to which my Lord has referred, namely that the inspector did not make due reference to the prior owner's (Mr Giddings') subjective intention as a factor, among other factors. That refers to Mr Giddings' subjective intention in the period 1963 to 1990.

32 In respect of that period the inspector did deal fully with the objective facts. She also dealt with the present owner's intentions from the time of his purchase in 1990.

33 Despite the reservation I have identified, the inspector clearly had in mind therefore the circumstances shown by the evidence before her, bearing directly on Mr Giddings' subjective intention. She referred to his prior unsuccessful planning application in 1986/1987, his purchase of another property as early as 1963, the absence of occupation since and the fact that he considered letting the bungalow but did not do so. There was little if anything more that could have been adduced or said about Mr Giddings' intention since he had, by the time the inspector was considering the matter, sadly died. All that was available from him was a written

statement, which carries matters no further except to show that the reason why he did not let was that this would have imposed on him obligations which he was not prepared to undertake. That too does not assist the present applicant's case. While it may be that the inspector could have been more specific in addressing the prior owners' intention, it seems to me that on the material before her she was bound to come to the conclusion which she did about abandonment.

34 Assuming that Mr Giddings at every stage wished to resume occupation, he never did anything positive in that direction except make the unsuccessful planning application not pursued in 1986/1987. The objective inference of abandonment on the material before the inspector was overwhelming. I see no basis for setting aside the inspector's decision and would allow this appeal accordingly.

> "*However, it is impossible to hold at one and the same time that the owner has ceased a use with an intention to resume it...*"

Order: Appeal allowed. Section 18 order as to costs in the appeal and in the court below.

- Wales (https://swarb.co.uk/category/wales/) (15)
- Wills and Probate (https://swarb.co.uk/category/wills-and-probate/) (1,566)

PIONEER AGGREGATES (UK) LIMITED V SECRETARY OF STATE FOR THE ENVIRONMENT: HL 1985

March 14, 2019 admin (https://swarb.co.uk/author/admin/) Off Planning (https://swarb.co.uk/category/planning/),

References: [1985] 1 AC 132, [1984] 2 All ER 358
Coram: Lord Scarman
Ratio: The House considered the concept of a spent planning consent.
Held: This was a mineral operation and every shovelful dug amounted to another act of development. Therefore, although it had been begun, the planning permission was not spent and remained capable of implementation. A planning permission enures for the benefit of the relevant land and it is not, save in unusual circumstances, personalised so as to apply only to the applicant for the permission. A valid permission capable of implementation cannot be abandoned, but it is planning permission is 'a permission that certain rights of ownership may be exercised but not a requirement that they must be.'
Lord Scarman said: 'Planning control is the creature of statute. It is an imposition in the public interest of restrictions upon private rights of ownership of land. The public character of the law relating to planning control has been recognised by the House in Newbury District Council v Secretary of State for the Environment [1981] AC 578. It is a field of law in which the court should not introduce principles or rules derived from private law unless it be expressly authorised by Parliament or necessary in order to give effect to the purpose of the legislation. Planning law, though a comprehensive code imposed in the public interest, is of course based on the land law. Where the code is silent or ambiguous, resort to the principles of private law, especially property and contract law, may be necessary so that the courts may resolve difficulties by application of common law or equitable principles. But such cases will be exceptional, and if the statute law governs the situation, it will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely because they may appear to achieve a fairer solution to the problem being considered. As ever in the field of statute law, it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute or statutory code considered as a whole.' and 'It is of course trite law that any number of planning permissions can validly co-exist for the development of the same land even though they be mutually inconsistent. In this respect planning permission reveals its true nature – a permission that certain rights of ownership may be exercised but not a requirement that they must be.'
Jurisdiction: England and Wales
This case cites:

- Cited – Newbury District Council v Secretary of State for the Environment (https://swarb.co.uk/newbury-district-council-v-secretary-of-state-for-the-environment-hl-1980/) HL ([1981] AC 578, [1980] 1 All ER 731, [1980] 2 WLR 379, Planning BlawG (https://planningblawg.files.wordpress.com/2008/08/newbury-1981_ac_578.pdf))
  Issues arose as to a new planning permission for two existing hangars.
  Held: The appeal succeeded. The question of the validity of conditions attached to planning permissions will sometimes be a difficult one. To be valid, a condition must be . .

(This list may be incomplete)
This case is cited by:

Neutral Citation Number: [2019] EWCA Civ 851

Case No: A2/2018/2893

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE GOOSE [2018] EWHC 3383 QB

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2019

Before :

LORD JUSTICE DAVIS
and
LORD JUSTICE HADDON-CAVE

Between :

ZURICH INSURANCE PLC — **Appellant**

- and -

DAVID ROMAINE — **Respondent**

Mr David Callow (instructed by **Weightmans LLP**) for the **Appellant**
Mr David Romaine (a **Litigant in Person**) for the **Respondent**

Hearing date : 3rd April 2019

Judgment Approved by the court for handing down (subject to editorial corrections)

LORD JUSTICE HADDON-CAVE:

Introduction

1. This case raises issues about the correct approach to the grant of permission to bring committal proceedings in the context of false statements alleged to have been made by a personal injury claimant.

2. The Appellant appeals the order of Goose J dated the 8th November 2018 refusing the Appellant permission under CPR 81.18(3)(a) to proceed with an application to commit the Respondent for Contempt of Court. The Appellant appeals the order with the permission of McCombe LJ granted on the 31st January 2019.

3. At the hearing before us, the Appellant was represented by Mr David Callow. The Respondent appeared in person.

Background Facts

4. On 17th November 2015, the Respondent (now aged 69) issued proceedings for noise-induced hearing loss ("NIHL") against the Appellant's insured, Stanley Refrigeration Limited ("SRL") and a third party known as Lee Beesley Mech & Elec Limited ("LBMEL"). The Respondent had been employed by LBMEL as a refrigeration engineer from 1965 to 1971 and by SRL as an apprentice engineer from 1978 to 1985. The Appellant is the relevant Employers' Liability insurer of SRL (a dissolved company) and is responsible for the defence of the Respondent's claim.

5. On 2nd November 2015, the Respondent served Amended Particulars of Claim claiming damages limited to £5,000 against SLR and LBMEL for breach of statutory duty and/or negligence of SLR and LBMEL which had caused him "bilateral long-term noise-induced hearing loss of 19dB and mild tinnitus" (paragraph 10). The Respondent relied upon a medical report by Mr Hugh Wheatley dated 19th October 2015, which was attached to his Particulars of Claim. The medical report stated that it had been compiled following an interview with the Respondent on 24th September 2015 and stated that the Respondent "has not had any noisy hobbies" (paragraph 7.3). The Amended Particulars of Claim contained the following Statement of Truth (as required by CPR 22.1):

> "**STATEMENT OF TRUTH**
>
> **The Claimant believes that the facts stated in these Particulars of Claim are true. I am duly authorised by the Claimant to sign on his behalf.**
>
> Full name: Faisa Arshad
>
> [signature]
>
> Date: 02-11-15
>
> Messrs Asons Solicitors, of 120 Bark Street, Bolton BL1SAX, who will accept service of all proceedings herein at the above address."

6. SRL and LBMEL filed an Acknowledgement of Service contesting liability. They subsequently obtained the Respondent's medical records which suggested that the Respondent was a professional singer and a motorcyclist. Both of these activities were potentially relevant to issues of causation and loss.

7. By way of a Part 18 Request for Further Information, the solicitors for LBMEL asked the Respondent a number of questions regarding these activities, in particular whether he was or had been a professional singer, whether he played an instrument, whether he performed with a live band and, if so, the frequency with which he practiced.

8. On 1st August 2016, the Respondent served his Reply to the Part 18 Requests which stated as follows:

> "18. It is noted that in the Claimant's medical records, entry dated 2012, it states that the Claimant is a professional singer with a band. Please could the Claimant confirm if he is/was a professional singer:
>
> Response: I was never and have never been a professional singer. I worked for different companies for a living. The mention of a professional singer came about when visiting the doctor for a throat infection I mentioned that I couldn't sing anymore. He must have made the assumption that I sang professionally and documented this in my medical records but this is not the case.
>
> 19. Does the Claimant play an instrument;
>
> Response: I used to play the Acoustic Guitar for soft music when I was about 19 years old. I sometimes do this on a very rare occasion now and again but it is not noisy by any means.
>
> 20. Does the Claimant perform with a live band;
>
> Response: No.
>
> 21. How often does the Claimant practice;
>
> Response: occasionally."

9. The Respondent's Part 18 Response contained the following Statement of Truth:

> "**STATEMENT OF TRUTH**
>
> **I the Claimant believe that the facts stated in this statement are true.**
>
> Full name: Mr David Romaine
>
> [electronic signature of David Michael Romaine]
>
> Date: 13.06.2016"

10. In a witness statement in support of his claim dated 27th June 2016 (and electronically signed on 1st August 2016), the Respondent stated:

> "6. I do not ride a motorcycle, nor do I participate in or attend motorcross or motorsport events.
>
> 7. I understand it has been noted in my GP records that I am a professional singer. This is incorrect as I have never been a professional singer. I believe the mention of a professional singer came about when visiting the doctor for a throat infection and I mentioned that I could not sing anymore. The doctor must have made the assumption that I sang professionally and documented this in my medical records. I used to play the acoustic guitar playing soft music when I was about 19 years old. I sometime do this on a very occasion now and again but it not noisy by any means.
>
> 8. To the best of my knowledge I do not participate in any other pastime, hobby or activity, which may have contributed to any hearing difficulty or medical issues relating to hearing loss or tinnitus."

11. The Respondent's witness statement Response contained the following Statement of Truth:

> "**STATEMENT OF TRUTH**
>
> **I the Claimant believe that the facts stated in this statement are true.**
>
> Full name: Mr David Romaine
>
> [electronic signature of David Michael Romaine]
>
> Date: 01.08.2016
>
> Asons Solicitors"

12. In the light of the discrepancies between the Claimant's medical records and the Claimant's account, the Appellant's solicitors commissioned an intelligence report on the Respondent. The findings of that report are contained in the witness statement of Mr Lee Kay dated 16th February 2017. Mr Kay conducted searches on the Claimant's *Facebook* page which revealed the following:

(1) The Respondent had ridden motorcycles;

(2) The Respondent had an interest in fast motorcycles, fast cars and guitars;

(3) The Respondent performed in a live rock-and-roll band called the "501's";

(4) The Respondent played an electric guitar when performing with the live band and was the lead singer;

(5) The Respondent's live band advertised its services to perform at venues;

(6) The Respondent's live band performed regularly both at pubs, clubs and larger events;

(7) The Respondent rehearsed regularly.

13. Mr Kay's researches also revealed that the Respondent's band has its own website "501's@501sRocking". The website contained numerous still images and video clips of the band and their live performances. The website contained a logo and legend reading "501's Rock n Roll Live Band" with a phone number for bookings and contained the following details:

> "The 501's are a three piece rock n roll and rockabilly band.
>
> Two of them met through their passion of 50's rock n roll and the music of that time.
>
> Initially the 501's lead guitarist and vocalist David Romaine started out as a soloist and eventually joined a folk band where he played the big pubs and clubs all over the midlands. He shared the stages with the likes of Jasper Carrot and The Slade, but after a long time away from the music scene he came back with a new formed affection for rock n roll and rockabilly.
>
> Alongside Dave Hawkins who had also had a long standing love affair with the 50's decided to learn the double bass. After some time of jamming in few music rooms the 2 became more and the 501's began to gig regularly on the rock n roll scene."

14. It appeared, therefore, to the Appellant insurers that the Respondent's account - that he had no hobbies or activities which were potential sources of noise exposure - was untrue.

15. The Appellant served Mr Kay's evidence upon the Respondent and the Third Party along with notice that an application to strike out would be made in due course. The Respondent was also advised in correspondence that if he sought to discontinue his claim, the Appellant would make an additional application to set aside the notice of discontinuance and/or seek a trial on the issue of his fundamental dishonesty.

16. On 14th March 2017, the Appellant made an application to strike out the Respondent's claim as a result of the Respondent's dishonesty.

17. On 21st March 2017, the Appellant advised the Respondent's solicitor, Messrs Asons, that an application had been made to strike out the claim. Later the same afternoon, the Respondent served a notice of discontinuance.

18. On 29th March 2017 Messrs Asons were the subject of interventions by the Solicitors Regulatory Authority. Subsequently, on 23rd June 2017, Messrs Coops Law, who took over the Respondent's claim, were also the subject of interventions by the Solicitors Regulatory Authority.

19. On 12th September 2017, the Appellant issued and served committal proceedings on the Respondent by way of a Part 8 claim form contending that the Respondent was guilty of Contempt of Court pursuant to CPR 81.17(1)(a) ('Making a false statement in a document verified by a statement of truth' contrary to CPR 32.14).

20. On 8th November 2017, the Respondent provided a witness statement opposing committal. He drew up the statement with the benefit of advice from direct access counsel.

21. On 17th August 2018, Goose J dismissed the Appellant's application for permission to commence contempt proceedings on paper without a hearing. In his order refusing permission, the Judge recited that he had read the Part 8 claim form, the witness statements filed on behalf of the Appellant and the Respondent's witness statement and stated the reasons for refusing permission as follows:

> "Whilst there is good evidence of false statements being made deliberately, the documents upon which the Statement of Truth appeared were not signed by the Defendant. This is not a sufficiently strong case bearing in mind the need for great caution before granting permission"
>
> Although it is in the public interest that dishonesty in litigation is identified publically, it is not in the public interest that committal proceedings be brought in the circumstances of this case, where the Defendant discontinued his claim at a relatively early stage of the proceedings."

22. On 7th September 2018, the Appellant lodged a notice of appeal against Goose J's order and, in addition, made an application for an oral reconsideration of the order. The Respondent challenged the Court's jurisdiction to conduct such an oral rehearing.

23. On 8th November 2018, an oral hearing took place before Goose J who held that he did have jurisdiction to conduct an oral reconsideration hearing and went on to hear argument on the Appellant's CPR 81.17 application. He refused the Appellant's application. The Appellant appeals against his refusal.

The Legal Framework

The rules

24. Where a person makes or causes to be made a false statement in a document verified by a statement of truth without an honest belief in its truth, proceedings for Contempt of Court may be brought against that person with permission of the court. CPR 32.14 provides as follows:

> **"32.14— False statements**
>
> (1) Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.
>
> (Part 22 makes provision for a statement of truth.)

> (Section 6 of Part 81 contains provisions in relation to committal for making a false statement of truth.)"

25. The procedure for making an application for permission to commence committal proceedings is set out in CPR 81.14:

> **"81.14— Application for permission (High Court, Divisional Court or Administrative Court)**
>
> (1) The application for permission to make a committal application must be made by a Part 8 claim form which must include or be accompanied by—
>
> (a) a detailed statement of the applicant's grounds for bringing the committal application; and
>
> (b) an affidavit setting out the facts and exhibiting all documents relied upon.
>
> (2) The claim form and the documents referred to in paragraph (1) must be served personally on the respondent unless the court otherwise directs.
>
> (3) Within 14 days of service on the respondent of the claim form, the respondent—
>
> (a) must file and serve an acknowledgment of service; and
>
> (b) may file and serve evidence.
>
> (4) The court will consider the application for permission at an oral hearing, unless it considers that such a hearing is not appropriate.
>
> (5) If the respondent intends to appear at the permission hearing referred to in paragraph (4), the respondent must give 7 days' notice in writing of such intention to the court and any other party and at the same time provide a written summary of the submissions which the respondent proposes to make.
>
> (6) Where permission to proceed is given, the court may give such directions as it thinks fit, and may—
>
> (a) transfer the proceedings to another court; or
>
> (b) direct that the application be listed for hearing before a single judge or a Divisional Court."

The principles

26. In *A Barnes t/a Pool Motors v Seabrook [2010] C P Rep 42*, Hooper LJ set out the following propositions (which he derived from the Court of Appeal's judgment in *KJM Superbikes Ltd v Hinton* [2009] 1 WLR 2406):

> "(1) A person who makes a statement verified with a statement of truth or a false disclosure statement is only guilty of contempt if the statement is false and the person knew it to be so when he made it.
>
> (2) It must be in the public interest for proceedings to be brought. In deciding whether it is the public interest, the following factors are relevant:
>
> (a) The case against the alleged contemnor must be a strong case (there is an obvious need to guard carefully against the risk of allowing vindictive litigants to use such proceedings to harass persons against whom they have a grievance);
>
> (b) The false statements must have been significant in the proceedings;
>
> (c) The court should ask itself whether the alleged contemnor understood the likely effect of the statement and the use to which it would be put in the proceedings;
>
> (3) The court must give reasons but be careful to avoid prejudicing the outcome of the substantive proceedings;
>
> (4) Only limited weight should be attached to the likely penalty;
>
> (5) A failure to warn the alleged contemnor at the earliest opportunity of the fact that he may have committed a contempt is a matter that the court may take into account."

27. In my view, the following further supplementary principles can be derived from Moore-Bick LJ's judgment in *KJM Superbikes* (*supra*) and are pertinent:

(1) Ultimately, the only question is whether it is in the public interest for contempt proceedings to be brought (*ibid,* [16]).

(2) Whilst at the permission stage the Court is not determining the merits of the contempt allegation, nevertheless the Court will have regard to the following factors in order to determine whether the alleged contempt is of sufficient gravity for there to be a public interest in taking proceedings in relation to it. The factors include (i) the strength of the evidence tending to show that the statement in question was false, (ii) the strength of the evidence tending to show that the maker knew at the time the statement to be false, (iii) the significance of the false statement having regard to the nature of the proceedings in which it was made, (iv) the use to which the statement was put in the proceedings, and (v) such evidence as there may be as to the maker's state of mind at the time, including his understanding as to the likely effect of the statement and his motivations in making the statement) (*ibid,* [16]).

(3) In addition, the Court should consider whether contempt proceedings would justify the resources which would have to be devoted to them (*ibid,* [16]).

(4) The Court should have in mind paragraph 28.3 of PD of CPR Part 32 and whether proceedings for contempt would further the overriding objective (*ibid,* [18]).

(5) The penalty which the contempt, if proved, might attract plays a part in assessing the overring public interest in bringing proceedings (*ibid,* [22]).

28. It is worth also highlighting the following passage in Moore-Bick LJ's judgment in *KJM Superbikes* at [17] in which he summarises the overall approach:

> "... there is also a danger of reducing the usefulness of proceedings for contempt if they are pursued where the case is weak or the contempt, if proved, trivial. I would therefore echo the observation of Pumfrey J. in paragraph 16 of his judgment in Sony v Ball [*Kabushiki Kaish Sony Computer Entertainment Inc v Ball* [2004] EWHC 1192 (Ch)] that the court should exercise great caution before giving permission to bring proceedings. In my view it should not do so unless there is a strong case both that the statement in question was untrue and that the maker knew that it was untrue at the time he made it. All other relevant factors, including those to which I have referred, will then have to be taken into account in making the final decision."

29. I agree with Mr Callow that Moore-Bick LJ's warning was intended to ensure that the permission to bring committal proceedings is only granted where there is a strong *prima facie* case as to knowing falsity.

30. The issue for the Court on an application for permission to bring proceedings is, therefore, not whether a contempt has, in fact, been committed, but whether it is in the public interest for proceedings to be brought to establish whether it has or not and what, if any, penalty should be imposed. The question of the public interest also naturally includes a consideration of proportionality.

31. In *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin), Moses LJ (with whom Dobbs J agreed) powerfully underlined how seriously the courts regard false claims:

> "2. For many years the courts have sought to underline how serious false and lying claims are to the administration of justice. False claims undermine a system whereby those who are injured as a result of the fault of their employer or a defendant, can receive just compensation.
>
> 3. They undermine that system in a number of serious ways. They impose upon those liable for such claims the burden of analysis, the burden of searching out those claims which are justified and those claims which are unjustified. They impose a burden upon honest claimants and honest claims, when in response to those claims understandably, those who are liable are required to discern those which are deserving and those which are not.

> 4. Quite apart from that effect on those involved in such litigation is the effect upon the court. Our system of adversarial justice depends upon openness, upon transparency, and above all upon honesty. The system is seriously damaged by lying claims. It is in those circumstances that the courts have on numerous occasions sought to emphasise how serious it is for someone to make a false claim, either in relation to liability, or in relation to claims for compensation, as a result of liability.
>
> 5. Those who make such false claims if caught should expect to go to prison. There is no other way to underline the gravity of the conduct. There is no other way to deter those who might be tempted to make such claims, and there is no other way to improve the administration of justice.
>
> 6. The public and advisors must be aware that, however easy it is to make false claims, either in relation to liability or in relation to compensation, if found out the consequences for those tempted to do so will be disastrous. They are almost inevitably in the future going to lead to sentences of imprisonment, which will have the knock-on effect that the lives of those tempted to behave in that way, of both themselves and their families, are likely to be ruined."

32. This passage from Moses LJ's judgment was cited with approval by the Supreme Court in *Fairclough Homes Limited v Summers* [2012] UKSC 26 (at paragraphs [56]-[59]), emphasising that all reasonable steps should be taken to deter fraudulent claims, including by contempt proceedings (paragraph [50]).

33. In the recent case of *Liverpool Victoria Insurance Co Ltd v Dr Asef Zafar* [2019] EWCA Civ 392, a case involving false verification of statements of truth, the Court of Appeal (Sir Terence Etherton MR, Hamblen LJ and Holroyde LJ) emphasised that:

> "60. Because this form of contempt undermines the administration of justice, it is always serious, even if the falsity of the relevant statement is identified at an early stage and does not in the end affect the outcome of the litigation. The fact that only a comparatively modest sum is claimed in the proceedings in which the false statement is made does not remove the seriousness of the contempt."

34. The threshold test for interference by an appeal court with the exercise of discretion of a first instance court is that stated by Lord Woolf MR in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 W.L.R. 1507, CA, at 1523:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

The judgment below

35. The first part of Goose J's judgment dealt clearly and carefully with a procedural question which had been raised as to the correct route following a refusal of permission to bring committal proceedings on paper, *i.e.* whether oral renewal or appeal (see paragraphs [1]-[17]). Having determined that the Appellant was entitled to renew the application for permission to bring contempt proceedings before him, Goose J then turned to the substantive merits of the application (see paragraphs [18]-[28]). He directed himself correctly in law and derived the following propositions from the authorities (*A Barnes (T/A Pool Motors) v Michael Seabrook* and *KJM Superbikes Ltd v Hinton* (*supra*)) at paragraph [18]:

(1) The discretion to grant permission should be exercised with great caution.

(2) That there must be a strong *prima facie* case against the defendant.

(3) The court should consider whether the public interest requires committal proceedings to be brought, this being a public, not a private, remedy.

(4) That such proceedings must be proportionate and in accordance with the overriding objective.

(5) The false statements must have been significant in the proceedings and the defendant understood the likely effect of the statements and the use to which they would be put.

(6) The court must give reasons in making a decision but be careful to avoid pre-judging or prejudicing the outcome of any potential substantive proceedings.

(7) Only limited weight should be attached to a likely penalty.

(8) A failure to warn the alleged defendant at the earliest opportunity of the fact that he may have committed a contempt, is a matter that the court may take into account.

36. His reasoning for refusing to grant the Appellant permission to proceed with committal proceedings against the Respondent is set out at paragraphs [19] to [28] of his Judgment (which it is convenient to set out in full):

> "**Discussion and Decision**
>
> 19. When considering the alleged dishonesty of the defendant in the documents submitted in the course of the personal injury proceedings, I make no decision one way or the other about whether they were false or dishonest. That is not a decision for this court at the permission stage. Further, the fact that I refused the application on the face of the papers before the court on 17 August 2018 does not affect my decision in this renewed application in an oral hearing. It is obvious without more that further evidence has been submitted by the claimant and that the court has now heard full oral submissions by the parties. This court has considered the application as a fresh exercise.

20. It does not follow that in all cases where a witness or a party may have dishonestly lied on the face of documents which they have signed as being true, that permission will be granted in favour of committal proceedings. Good, *prima facie* evidence of dishonestly false statements is the first step when considering an application for permission. Without it, the court need proceed no further. In this application, I remain of the view, having considered all of the evidence including the additional evidence dated after 17 August 2018, that there is good evidence of false statements having been made deliberately and dishonestly by the defendant. However, I make no findings of fact upon this.

21. There remains a substantial issue between the claimant and the defendant about whether the allegedly false statements were knowingly made by the defendant. The claimant's submissions based on the Civil Procedure Rules, that an electronic signature is sufficient to validate a document as belonging to its apparent author, are clearly correct. However, the defendant denies in his witness statement dated 8 November 2017 that the signature is his and says that it was inserted into the document without his instructions. Further, he states that he did not see the statement or Part 18 replies before they were served. Whether this is right or not, I do not seek to determine at this permission stage. However, it will be for the claimant to prove to the criminal standard of proof that he, the defendant, was expressly confirming the truth of the contents of the documents. This does not detract from my assessment that the evidence against the defendant establishes a good *prima facie* case but it remains a significant factor.

22. It does not appear on the evidence that the defendant was warned that he may have committed a contempt of court such as to merit an application for committal to prison. The chronology of events is as follows. On 13 June 2016, the defendant filed his Part 18 responses. On 1 August 2016, the defendant's witness statement was filed. On 16 February 2017, the witness statements of the claimant's solicitors revealed that the defendant may not have been truthful in the context of the Part 18 responses and in his witness statement. On 14 March 2017, the claimant's solicitors made an application to strike out the claim on dishonesty grounds having shortly before given notice. Within days the defendant's solicitor indicating that the claim would be discontinued, which was confirmed on 21 March 2017. On 12 September 2017, the application for permission to commence committal proceedings was issued by the claimant.

23. There is no indication within the chronology of events or within the evidence that the defendant was warned of his potential committal for contempt of court. Of itself, this is not decisive, but it is a relevant factor.

24. The chronology also establishes that almost immediately after the application to strike out, based on the claimant's inquiry

> evidence was made, he discontinued proceedings. The claimant correctly observes that this may have been because of his asserted dishonesty being discovered. However, the fact remains that the proceedings were discontinued almost immediately. I accept that from the claimant's point of view that usually, when a false claim is discovered (if that is what happened here), the claim will cease and that should not be a bar to permission.
>
> 25. It is undoubtedly in the public interest that dishonest conduct in the course of proceedings, criminal or civil should not go without sanction - see for example *South Wales Fire & Rescue Service v Smith [2011] EWHC 1749 (Admin)* . However the court must still act cautiously; not all cases of alleged dishonesty are or should be sanctioned with committal proceedings.
>
> 26. I do not consider that the value of the claim being for up to £5,000 is a significant argument against the granting of permission. Such an argument is clearly offset by the public interest in sanctioning any such claims given the growing problem identified in the evidence of Simon Gifford's affidavit.
>
> 27. There is a clear and obvious public interest in seeking to bring to the attention of both legal professionals and the wider public, that dishonest claims for damages and personal injury actions are not without victims and comprise a growing problem as demonstrated in the claimant's evidence before this court. However, it is not all such potential claims that should lead to additional litigation in the public interest.
>
> 28. Having considered this application for permission in this oral hearing and having taken into account the additional evidence relied upon by the claimant, I have come to the clear conclusion that permission under CPR 81.14 should be refused. The balance of the public interest does not fall in favour of permission being granted in the circumstances of this particular case. Undoubtedly, the issues involved were and remain highly significant between the claimant and the defendant as private parties. However, in circumstances where the defendant may have dishonestly minimised potentially other causes of noise-induced hearing loss, where such hearing loss is not itself in dispute, and when confronted with evidence which caused him to discontinue proceedings immediately, it is not in the public interest for permission to be granted for contempt proceedings to be issued. I am not persuaded that the proposed committal proceedings are proportionate. Accordingly, this renewed application for permission is refused"

Submissions

37. The Appellant put forward a single ground of appeal, namely that the Judge's conclusion that it was not in the public interest to bring committal proceedings was wrong as a matter of law and fact and represented a misdirection as to the relevant

factors when considering the correct approach to the public interest. Accordingly, the Appellant submitted, the Judge's exercise of his discretion was wrong.

38. Mr Callow's argument can be summarised as follows. First, the Judge correctly found that the Appellant had established a good *prima facie* case of false statements having been deliberately and dishonestly been made by the Respondent (paragraphs [20]-[21]). Second, the Judge also correctly found that it was in the public interest that dishonest conduct in the course of criminal or civil proceedings should not go without sanction, particularly in the context of growing small sum insurance fraud (paragraphs [25]-[27]). Third, however, neither of the two reasons the Judge then gave for holding that it was not in the public interest to grant permission for committal proceedings in this case was valid, namely, (a) the absence of warning given to the Respondent and (b) the Respondent's immediate discontinuance of the proceedings (see paragraphs [22]-[28]).

39. The Respondent, in person, submitted that Goose J's refusal of permission should be upheld for the reasons he gave.

Respondent's statement

40. The Respondent relied upon his statement filed for his appeal under paragraph 19 of CPR PD 52 in which he stated as follows: (i) His involvement came about as a result of a 'cold call' from personal injury claim solicitors, Messrs Asons, specialists in hearing loss claims, who conducted a hearing test at his home and said he may have a claim in view of his engineering background. (ii) He was subsequently informed by Asons that they would lodge a claim of between £1,000 and £5,000 on his behalf and they would do the paperwork which he understood would be 'generic'. (iii) At no stage did he sign a statement of truth or see the Part 18 responses which contained an electronic signature which had been applied by Asons. (iv) He felt he had been a victim of a claims management scheme to make money from his hearing loss predicament. (v) Both Asons and Coops Law (which took over his claim) were the subject of interventions by the Solicitors Regulatory Authority (on 29th March 2017 and 23rd June 2017 respectively). (vi) Apart from Asons's first visit, he never met or was interviewed by any legal representative of either Asons or Coops Law; any conversations were by phone. (vii) He is now 69 years-old and has been undergoing chemotherapy for bladder cancer and has responsibilities for a foster-child. (viii) He discontinued the claim on 21st March 2017 without taking legal advice which, with hindsight, may not have been the right thing to do.

Analysis

41. There are two aspects of the Judge's reasoning to consider. First, the relevance of the absence of warning given to the Respondent. Second, the relevance of the Respondent's immediate discontinuance of the proceedings.

(a) Relevance of failure to warn

42. The Judge cited "a failure to warn" as one of the relevant matters which the court may take into account and placed specific reliance upon "the absence of evidence that [the Respondent] was warned that he may have committed a contempt of court such as to merit an application for committal to prison" when coming to his decision to refuse permission for contempt proceedings (see paragraphs [22] and [28] of his judgment cited above).

43. In my view, the Judge was mistaken in his approach to this issue. The absence of a warning may be a relevant factor for the court to take into account in some cases, but not necessarily all cases. Each case will depend upon its own facts.

44. The genesis of principle (5) outlined by Hooper LJ in *Barnes* (*supra*) about the absence of a warning can be found in paragraph [19] of Moore-Bick LJ's judgment in *KJM*:

> "[19] …I think that in general a party who considers that a witness may have committed a contempt of this kind should warn him of that fact at the earliest opportunity (as the appellant did in this case) and that a failure to do so is a matter that the court may take into account if and when it is asked to give permission for proceedings to be brought."

45. The specific context with which Moore-Bick LJ was concerned was that of a witness who had sworn a false witness statement in support of a strike-out application. In that case, there was an opportunity for the witness to be warned about the potential consequences of his lack of veracity before the matter proceeded any further.

46. The present case is, however, quite different. It concerns an alleged contemnor who himself commenced the claim. The chronology is important. The Defendant issued the claim on 17th November 2015 and sought to back it up with an allegedly false witness statement dated 27th June and Part 18 responses dated 13th June 2016 (see above), each of which were verified with a standard "Statement of Truth". Whilst the Appellant insurers were able to raise Part 18 questions about the claim in the light of discrepancies with the medical records which they had obtained, it would not have been reasonable to have expected them to have given the Respondent any warnings about contempt at that early stage. It was only later, after the Appellant's investigator, Mr Kay, had presented his report dated 5th September 2017 with his discovery that the Defendant's claim and assertions were demonstrably false, that the picture was clear and there was scope for any warning. By this time, however, the die was already cast. The Appellant, thereafter, served Mr Kay's evidence upon the Respondent with notice that they would pursue him for fundamental dishonesty.

47. In practice, the absence of a warning is unlikely to be of any relevance where the alleged contemnor is himself the claimant in an underlying personal injury claim (such as the present case) and where the allegedly false statements are contained in claims documents prepared by himself or his solicitors and signed with a "Statement of Truth". Whilst the CPR do not provide (or allow) for a penal notice to be attached to a "Statement of Truth", it is difficult to conceive of circumstances where a claimant can be heard to say that he was prejudiced by the absence of warning about the risks of contempt proceedings if he, himself, has been responsible for bringing a fraudulent claim.

(b) Relevance of discontinuance

48. The Judge placed reliance upon the fact that the Respondent discontinued the proceedings "almost immediately" upon receiving the Appellant's strike out application. Whilst acknowledging that this may have been because the Respondent realised his asserted dishonesty had been discovered and that discontinuance should not be a "bar" to permission to bring contempt proceedings, the Judge nevertheless clearly regarded the immediate discontinuance as a significant factor to be taken into account

when refusing permission to bring contempt proceedings (see paragraphs [24] and [28] of his judgment cited above).

49. The fact that a claimant or applicant discontinues proceedings or an application immediately or shortly after being confronted with evidence or an accusation of falsity is likely to be a relevant factor to be taken into account in most cases. This is because the claimant who discontinues immediately upon realising that 'the game is up' is naturally, and appropriately, to be contrasted with the claimant who contumaciously presses on nevertheless, wasting everyone's time and costs in the process. However, the analysis goes deeper than this. The stratagem of early discontinuance should not be seen to be used by unscrupulous claimants or lawyers as an inviolable means of protecting themselves from the consequences of their dishonest conduct. It is clear that the *modus operandi* of some of those involved in fraudulent insurance claims has been to issue tranches of deliberately low-value claims (sometimes on an industrial scale) for *e.g.* whiplash, slips and trips *etc* and when confronted with resistance or evidence of falsity, simply then to drop those particular claims, in anticipation that it would probably not be worth the candle for insurers to pursue the matter further, particularly since recovery of costs can itself be time-consuming and costly and nominal claimants may be impecunious. The problem has become even more acute in recent times because of one-way cost shifting ("QOCS") and the costs of proving "fundamental dishonesty" under CPR 44.16 (and *c.f.* section 57 of Criminal Justice and Court Act 2015).

50. Thus, whilst the Judge was right to observe that early discontinuance was not a "bar" to permission to bring committal proceedings, in my view, he erred because he should also have had regard to the very real mischief that the stratagem of early discontinuance represents in this arena as one of the tactics of unscrupulous claimants and lawyers who engage in the practice of low-value wide-scale insurance fraud, particularly in the field of *e.g.* NIHL claims.

51. It is axiomatic that the court should be astute to protect the court processes being used as an instrument of, or aid to, fraud in any way. Further, false statements in court documents are public wrongs which offend the proper administration of justice. They are not necessarily addressed by a private remedy, such as costs. They should, in appropriate cases, be marked by the public remedy of committal proceedings.

General considerations

52. The Judge was right to observe it is not in every case where a witness or a party may have lied on the face of documents which they have signed as being true that permission to bring committal proceedings will be granted. Good *prima facie* evidence of dishonestly false statements was required in the first place (paragraph [20] of his judgment). The Judge correctly found that there was a strong *prima facie* case of false statements being deliberately and dishonestly made by the Respondent in this case (paragraph [20] of the judgment). These statements went directly to issues of causation and breach of duty in this NIHL case.

53. The Judge also correctly held that the value of the claim with a ceiling of £5,000 was not a significant argument against granting permission in the light of Mr Gifford's evidence regarding the growing problem of this sort of insurance fraud (see paragraph [26] of the judgment). The low value of many NIHL claims means they are allocated to the Fast-Track procedure where there is limited costs exposure for claimants and less opportunity for investigation as to the underlying merits compared with Multi-Track cases.

54. It should be emphasised that in litigation of this type insurers are particularly vulnerable to fraudulent claims. NIHL claims often concern issues or allegations of historic exposure and potential non-occupational noise exposure over a long intervening period, and entail long-tail insurance claims where the insured and/or the relevant records no longer exist. Insurers of NIHL claims are, therefore, particularly dependent on the veracity of claimants, both as to occupational and non-occupational causes. The current case is a paradigm example of the problem with the insured company having ceased to exist some 30 years ago.

55. It is worth highlighting the following passage in Mr Gifford's evidence as to the consequences of fraudulent claims:

> "12. The consequences of fraudulent claims are not limited simply to the costs of those claims which are not detected and paid when they should not have been. The impact of a "verify" rather than "trust" approach contaminates all claims, causing honest litigants' claims to be slowed or adding costs to claims which are inevitably reflected in higher insurance premiums generally. Higher attritional costs are evidenced in the [Association of British Insurer] figures for 2013 which suggest that in NIHL claims the claimant solicitor received £3 in costs for every £1 that the claimant received in damages. Worse still, as stated in the report, "the normalisation of fraudulent behaviour is socially corrosive and erodes trust.
>
> 13. Until relatively recently, I believe that insurers have been perceived by many not only to be "fair game" but also to be a "soft touch", because whenever they have discovered [] fraudulent claims, more often than not it is the "no-win, no-fee" lawyers who suffer financially and not the dishonest litigant".

Respondent's evidence

56. In his CPD 52 paragraph 19 statement, the Respondent has sought to argue that he was at all material times unaware of what was being said or written by his then solicitors, Messrs Asons, on his behalf, and that, in retrospect he should not have discontinued the claim and felt he had been badly advised to do so (see above). The veracity of these assertions, and the true motivations for discontinuing the proceedings, are matters for the committal hearing on the merits and are *ex hypothesi* not relevant to the prior question of whether it is in the public interest to give permission for committal proceedings in the first place. Further, I agree with Mr Callow that the Respondent's evidence regarding his health and personal circumstances are matters which go primarily to subsequent questions of mitigation and penalty, should they become relevant in due course.

Conclusion

57. In my view, for the reasons set out above, the Judge erred in principle in his approach to the exercise of his discretion as to whether to grant permission to bring committal proceedings in three respects. First, the Judge took into account an irrelevant matter, namely the absence of any warning given to the Respondent that if he brought a claim for personal injury for hearing loss based on false statements, he ran the risk of committal proceedings. Second, the Judge failed to take into account a relevant matter,

namely the mischief that early discontinuance represents in the hands of unscrupulous claimants and lawyers who engage in bringing false insurance claims. Third, the Judge erred and was wrong to conclude that the proposed committal proceedings would not be proportionate.

58. In these circumstances, it is open to this Court to re-make the decision and consider the question of the exercise of discretion under CPR 81.18(3)(a) afresh. In my view, the public interest in this case clearly militates in favour of granting permission for committal proceedings to be brought in this case for the reasons set out above.

59. Accordingly, I would allow this appeal and grant the Appellant permission to bring committal proceedings against the Respondent.

60. Finally, I would add that the message needs to go out to those who might be tempted to bring - or lend their names to - fraudulent claims: that dishonest claimants cannot avoid being liable to committal proceedings merely by discontinuing their original fraudulent claim.

LORD JUSTICE DAVIS

61. I agree entirely with the reasoning and conclusion of Haddon-Cave LJ.

62. The appeal court will always be slow to interfere with the evaluation and exercise of discretion of a first-instance judge in deciding whether or not to grant permission to bring contempt proceedings. But, as explained by Haddon-Cave LJ, the Judge's approach here was, with all respect to him, flawed: and that entitles this court to intervene.

63. The Respondent among other things says that he did not in fact approve or authorise the various Statements of Truth and also complains of a lack of proper advice from his then solicitors. Those no doubt will be issues which can be explored at the substantive hearing. However, I observe at this stage that the signature of the solicitor to the Amended Particulars of Claim carries with it the connotations set out in paragraph 3.8 of Practice Direction 22 which supplements CPR Part 22. As to the Response to the Part 18 Request and the Witness Statement of the Respondent (both of which on their face bear the signature of the Respondent in electronic form) it is difficult at this stage to see how the substantive statements there made could have derived from any source other than the Respondent: nor should he have needed express legal advice to the effect that, in providing such information, he should tell the truth.

64. Accordingly I too would allow the appeal. What the outcome of the substantive contempt hearing will be will be entirely a matter for the court on that occasion in the light of the evidence, materials and explanations presented to it.

31st May 2019

Clarifications for Manston DCO Public Inquiry PINS Ref. Nos. 200/4582 and 200/4585

1.0These notes are a reasoned resume to clarify matters for public understanding

1.1 A recent packed open public meeting convened by Ramsgate Town Council, revealed persistent widespread misunderstanding of the facts and technology, with a loudly repetitious misconceptions and misinformation.

1.2 Clearly, houseowners were unaware of potential class action compensation claims under the Land Compensation Act 1973; nor of mitigation claims for interim disturbance.

1.3 The Company Name of London East Kent Coast Airport (Manston) Limited, was amended to be clearly site-specific and to end confusions arising regularly, either with Lydd/London Ashford Airport or with the various abortive North Kent and Thames Estuary Airport schemes, all suffering from lack of surface transport connectivity and potential bird-strike issues as were found correctly by the Davies Airports Commission.

1.4 Unlike the Davies Commission conclusions (which ignored Manston entirely) it has the best airport expansion site in South-East England and for a comparatively low-cost £3 billion outlay approximately. Very good existing trunk roads and three adjacent railway lines require only new minor local branch-lines and road improvements.

1.5 Regardless of political government changes, Manston Airport has been sidelined persistently for years by Department for Transport internal policies supported by other Departments

1.6 Ill-informed Manston Airport opponents were allowed time-taking free rein by Ramsgate Town Council. Fortunately, three printed copies of our earlier main submissions were handed over for the Council panel. Three minutes only was allowed for the few pro-airport statements.

2.0 **Manston Airport Expansion proposals**

2.1 Winbourne Martin French, Chartered Surveyors ("WMF") are old-established in the City of London. The Principal and Managing Director is James G Winbourne BSc(Hons) PGDip.PVL, MRICS ("JGW"). He also represents four national multiple occupiers all over the country. The former Senior Partner and working Consultant is Norman J Winbourne FRICS, FCInst.CES, IRRV ("NJW") whom attended the Ramsgate Town Council meeting and wishes to speak briefly to the Public Inquiry on 7th June 2019. Both are founder members of the Compulsory Purchase Association and have given Expert Evidence several times in the Lands Tribunal, now the Upper Tribunal (Lands Chamber) and at CPO Public Inquiries all over the country. Both have given evidence for Petitions against infrastructure Bills in Parliament of Crossrail, CTRL (now HS1) and HS2.

2.2 In particular, JGW gave expert evidence to the UTLC for References of Compensation on the A256 Ramsgate-Dover Road widening, where all available East Kent industrial land values were recorded.

2.3 Later NJW gave evidence successfully at a Public Hearing for the A256 owners of the disused Richborough Naval Port which only needs dredging and for Princes Golf Links against ill-advised and very intrusive duplications of Natural England's several Coastal Access footpaths.

2.4 Counsel for Stone Hill Park asked for information on Compulsory Purchase and Compensation principles for the Public Inquiry. NJW can answer any questions objectively and impartially.

2.5 Airport expansion scheme details are shown on two final drawings supplied and prepared together with Pell Frischmann Consulting Engineers ("PF") both being reduced to A3 size for convenient handling. The Copyright name London Kent International Airport (LKI) is preferred and appears on WMF/PF drawings since 2014.

2.6 The Simplified Plan dated 22 September 2017 shows the scheme for three runways within three years (and with room for three more in future). The existing site areas and footprints of Gatwick and Heathrow Airports are shown for comparison with the WMF proposed extensive Defined Site, with its preliminary outer security boundaries against terrorist attack.

2.7 The main Outline Airport Design Drawing is Revision 31 dated 1 February 2018. The detailed notes thereon set out most of the anticipated development sequences.

2.8 The attention of the Inspectors is drawn respectfully to the "Pioneer Aggregates Case" underlying long-held "Crown" Planning Consent of Manston Airport. Also, the "Crystal Palace Case" re Environmental Impact issues at all phases of development. Also, the "Mosely Case" regarding equality of bona fide alternative proposals leading to alternative recommendations.

2.9 WMF/NJW draw attention to late minor amendment issues arising.

2.9.1 The important National Grid Richborough Project has diverted its series of high voltage electricity pylons, onto an alignment north of the River Stour, helpfully avoiding aviation conflicts. Therefore, the Revision 31 scheme component to be disregarded is the proposed continuation of the NG undersea cable tunnel, planned running under the River Stour valley to a western land portal. An earlier interaction was proposed in July/August 2015 by WMF to NG, with copies to the three councils. WMF are very pleased with the most helpful commonsense NG diversion.

2.10 Two other potential obstructions to Aviation were pointed out to Dover District Council, being applications for competing very tall communications masts near Richborough. All issues were discussed informally with the Dover District Council Chief Executive and then Leader, using then uncompleted plans at a cordial exploratory meeting in January 2017.

Previously, in December 2016, WMF had written to Dover suggesting possible areas for housing expansion with planning control, after airport reopening.

2.11 An expanded Manston Airport should be a first rate UK institutional investment in due course. The mainly agricultural lower land acquisition costs point to an all-up three runway redevelopment for some £3 billion only.

2.12 East Kent District Councils, from Faversham to Folkestone, were to hold a "bottom-slice" protective investment interest in the airport that would guard against exploitative serial takeovers. Broadly similar arrangements apply to Prestwick Airport (Scottish Government); Cardiff Airport (Welsh Government); Manchester Airport; Stansted Airport; and Newcastle Airport (led by Sunderland Council).

3.0 **Compensation Claims handled in good time by WMF with DV/VOA monitoring**

3.1 Owners and occupiers may incur interim disturbance to be mitigated and LCA 1973 Claims should not be cut by set-off of interim mitigation.

3.2 The Ramsgate Town Council meeting heard misleading arguments on behalf of Stone Hill Park about alleged need for brownfield redevelopment. Whereas, the entire former Kent Coalfield is brownfield obviously. It is unlikely that the Stone Hill Park scheme could "stack-up" for investment and could be abandoned after breaking-up the runway profitably.

3.3 Airport reopening could be permanently economically transformative for all of East Kent.

3.4 Ironically, the danger to Thanet residents is a big increase in their property values.

4.0 **Aviation advantages – many more flights from an airport not over-crowded**

4.1 Co-director Rev Gordon Warren RN(Rtd) AMRAS has proposed rearranging flight approach paths to direct incoming planes further west on Runway 1. This can be combined with the proposed western viaduct extension of Runway 1, which design is directly attributable to the eminent Prof, W.W, Frischmann CBE.

4.2 Flying in low off the coast can provide minimum ground-level geometric noise footprints, especially Runway 2 and 3 and 5 as an option.

4.3 Manston can unlock unused UK domestic coastal flight paths and unused global international air routes.

4.4 Low cost development of uninhabited Ash Level for Runways 2 and 3 brings flood plain design issues to be considered such as a bund or riverwall.

4.5 Reasonable airport landing charges and fair rents of retail and catering concessions can be a shop window for the "Best of British" instead of only basic fast food offers.

4.6 Budget airlines could bring other Europeans to a revived Palm Bay and Walpole Bay beach holiday hotels, with either split-week or day London trips.

4.7 New full-length Runways 2 and 3 on Ash Level in Dover District Council jurisdiction, can provide 24/7 airline use ,365 days a year, without serious environmental impact.

4.8 Alternative Runway 5 on Wades March (formerly Runway 2 of 2014) has similar attributes. Daytime business air ferry services may be revived and might be coupled with military reserves and reciprocal air-freight night flights well-placed alongside the A299.

5.0 Fast Railway access

5.1 New Manston on-airport stations may bring-in 50 minutes express train times from St. Pancras, compared to Stansted Express 48 minutes and Southend 45 minutes from outer Liverpool Street. Furthermore, a possible new HS1 station under the important Barking Tube-and-Rail Interchange could be some 40 minutes to-and-from Manston. See also published professional articles on Manston Airport in "Civil Engineering Surveyor", October 2015 and October 2017.

6.0 **Airport Company Directors List**

6.1 Norman Winbourne is the current Airport Development Director in the planning phase.

6.2 The Rev Gordon Warren AMRAes is the Aviation Director and Ramsgate resident

6.3 Lt.Col Dr Ian Brooman TD FRCP understands emergency and helicopter rescue services and is an experienced army reserve officer.

6.4 Peter Moore, Retired Solicitor is a Margate resident and formerly the managing partner of well-known solicitors in Thanet.

6.5 An invited Director Elect is Brigadier Tim Waugh OBE, formerly of NATO HQ in Brussels. Together with Gordon Warren, he will enter into consultation with the all-Europe airspace control, also based in Brussels.

6.6 Another invited Director Elect is Dr.Alan Barrow Past President of CICES, MRICS regularly designing UK railway layouts.

6.7 This list may well be extended soon.