IN CONFIDENCE

This is a draft of the judgment to be handed down on Wednesday 22 October 2003 at 10.30 a.m. in Committee Room 2, House of Lords. It is confidential to Solicitors, but the substance may be shown, in confidence, to the parties but only for the purpose of obtaining instructions and on the strict understanding that the judgment, or its effect, is not to be disclosed to any other person.

The parties are not expected or required to attend on 22 October 2003 and, if they wish to do so, should so inform the court and the opposing party.

The court is likely to wish to hand down its judgment in an approved final form. Solicitors should therefore submit any list of typing corrections and other obvious errors in writing (nil returns are not required) to the Judicial Clerk by fax to 020 7219 2476, by 12 noon on Monday 20 October 2003, so that changes can be incorporated, if the court accepts them, in the handed down judgment.

Case No:

IN THE HOUSE OF LORDS
ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL
(CIVIL DIVISION) (ENGLAND)

Date: 22 October 2003

Before :

MR BRENDAN KEITH, PRINCIPAL JUDICIAL CLERK AND
MASTER O'HARE, COSTS JUDGE, SITTING AS A JUDICIAL TAXING OFFICER

Between :

LADY BERKELEY — **Petitioner**

- and –

(1) SECRETARY OF STATE FOR THE ENVIRONMENT, TRANSPORT AND THE REGIONS
(2) LONDON BOROUGH OF RICHMOND UPON THAMES
(3) BERKELEY HOMES (WEST LONDON) LIMITED — **Respondents**

R Buxton Esq of Richard Buxton, solicitors for the Petitioner
J Palmer Esq of England Palmer, solicitors, as agents for the solicitors for the Third Respondent

Hearing dates : 22 January 2003

DRAFT JUDGMENT

Master O'Hare:

1. This is the judgment of the court.

2. This case gives rise to two matters that have not been considered before in relation to the taxation of costs in the House of Lords. First, what is the proper procedure for applying for costs under practice direction 5 of the House's *Practice Directions and Standing Orders applicable to Civil Appeals*? Second, do the principles in *Bolton Metropolitan District Council v Secretary of State for the Environment* [1995] 1 WLR 1176 apply?

THE FACTS

3. In this case Lady Berkeley the petitioner was the claimant in proceedings in the High Court. In those proceedings she sought to challenge the validity of the Town & Country Planning (Environmental Impact Assessment) (England & Wales) Regulations 1999. The first respondent (the Secretary of State) had upheld the decision of the second respondent (the local authority) in relation to two development schemes proposed by the third respondent (the developers). Mr Duncan Ouseley QC (sitting as a Deputy Judge of the High Court) dismissed the application. The Deputy Judge awarded the costs of the application to the Secretary of State but refused to make an order for costs in favour of the developers even though such an order was sought. In doing so he expressly referred (see paragraph 97 of his judgment) to the House of Lords decision in *Bolton Metropolitan District Council v Secretary of State for the Environment* [1995] 1 WLR 1176, extracts from which are set out below.

4. The petitioner brought an appeal from the Deputy Judge's decision and that came before the Court of Appeal on 29 June 2001, a hearing at which she, the Secretary of State and the developers were all represented by counsel. The appeal was dismissed, costs were awarded to the Secretary of State and no order for costs was made in relation to the developers ([2001] EWCA Civ 1012).

5. Undeterred by her lack of success in the courts below, the petitioner sought leave to appeal the Court of Appeal's decision to the House of Lords. The petition for leave was served on the Secretary of State and on the developers and both of them entered appearances. On 18 December 2001 leave to appeal was refused without a hearing and the respondents were given leave to apply for their costs in accordance with practice direction 5.1. The order of the House followed the House's usual formula "that the respondents be at liberty to apply for their costs", and did not mention any of the respondents by name.

6. The bill now before us sets out the costs claimed by the developers in connection with the petition for leave to appeal to this House, totalling £3,051.31 plus £513.86 VAT, and was lodged in the Judicial Office early in 2002. It was listed for taxation on 4 July 2002. However, by their letter dated 17 June 2002 the solicitors for the petitioner indicated that that date was inconvenient and sought an adjournment. That letter also raised a point of procedure, namely, whether the taxation could properly proceed since the developers had not complied with practice direction 5.1 which states that an application for costs "must be made in writing to the Judicial Office before the bill is lodged". So far as is relevant to the proceedings now before the court, practice direction 5.1 states as follows:

> "Where a petition for leave to appeal is determined without an oral hearing, costs may be awarded as follows:
>
> ...
>
> (b) to a publicly funded or legally aided respondent, only those costs necessarily incurred in attending the client, attending the petitioner's agents, perusing the petition, entering appearance and, where applicable, preparing respondent's objections to the petition:
>
> ...
>
> (d) to a respondent where neither party is publicly funded or legally aided, costs as specified at (b) above.
>
> Where costs are sought under ... (d) above application must be made in writing to the Judicial Office before the bill is lodged."

7. Subsequently, the taxation was listed for hearing before us on 23 January 2003, by which date the Judicial Office had received several letters from the parties including a letter dated 9 January 2003 from the petitioner's solicitors which repeated the point already raised and added to it a reference to the Aarhus Convention on "Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters" which they believed supported that point. That letter also enclosed a copy of a letter of the same date written to the agents for the developer's solicitors setting out these points and also more routine points of dispute relating to items in the bill of costs. We also had before us a copy of a letter dated 20 January 2003 from the agents for the developer's solicitors to the petitioner's solicitors replying to the routine points of dispute.

8. At the hearing Mr Buxton appeared for the petitioner and Mr Palmer appeared for the developers. Mr Buxton relied on the fact (stated in his letter dated 17 June 2002) that in the present case the Secretary of State had not sought costs but merely accepted the payment of a sum equal to the appearance fee. Having heard arguments on the points raised, we taxed the bill subject to the decision we would make upon three particular matters as to which we gave directions for written submissions:

i) were the procedures set out in practice direction 5.1 complied with and had permission to lodge a bill of costs been validly granted?

ii) should the principles in *Bolton* be applied?

iii) if so, could the developers demonstrate exceptional circumstances entitling them to their costs?

9. As to the taxation it was conceded that the developers were registered for VAT and therefore the VAT claimed in this bill was not recoverable by them from the petitioner. Having regard to the heavy restrictions on recoverable costs set out in practice direction 5.1(b) we disallowed the counsel's fees claimed, disallowed certain linked profit costs and reduced the time claimed for perusal of documents from 2 hours 12 minutes to 20 minutes. We also

reduced the hourly rates recoverable from £235 to £195 for a partner and £175 for the second fee earner. The sum we allowed was £588.31 subject to our decision on the reserved matters. In addition to making written submissions on reserved matters we also invited either party, if they claimed the costs of the taxation, to submit written submissions as to the costs they claimed.

10. In the result neither party has made written submissions as such. The agents for the solicitors for the developers subsequently offered to withdraw their bill on terms that there be no order as to the costs of the taxation. The solicitors for the petitioner have indicated the petitioner's unwillingness to accept that offer. The solicitors for the petitioner have repeated their reliance on *Bolton* and have sent to the Judicial Office a copy of their letter dated 23 January 2003 sent to the developers' solicitors and enclosing extracts from the High Court judgment and the Court of Appeal judgment in this case.

THE AARHUS CONVENTION

11. Mr Buxton drew our attention to the Aarhus Convention which he believed was relevant to consideration of the questions to which the present taxation gives rise. The broad scope and purpose of the Aarhus Convention are indicated in its full title, "Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters". On the matter of access to justice, Mr Buxton drew our attention to Article 9.4, which provides that signatories will ensure that court procedures on environmental matters are not "prohibitively expensive". In his letter dated 9 January 2003 he states:

> In the present case it is not our contention that the particular costs here are actually prohibitive. However, <u>in practice</u>, "prohibitively expensive" is closely allied not so much to quantum as to <u>certainty</u>.

12. We do not accept Mr Buxton's submission on this point or believe that the Convention is an aid to resolving the issues of this taxation. Even making the assumption (which in fact we

think is incorrect) that the Convention has now been ratified by the United Kingdom, it is for Parliament, not the courts, to alter English law in order to implement it.

THE BOLTON PRINCIPLE

13. In *Bolton Metropolitan District Council v Secretary of State for the Environment* [1995] 1 WLR 1176 the House of Lords considered the award of costs in unsuccessful planning appeals before the House where more than one Respondent was represented in the appeal. The key passage, which is in the opinion of Lord Lloyd of Berwick (with whom the other Law Lords agreed), is as follows:

> "What then is the proper approach? As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule. But the following propositions may be supported.
>
> 1. The Secretary of State when successful in defending his decision will normally be entitled to the whole of his costs. He should not be required to share his award of costs by apportionment, whether by agreement with other parties, or by further order of the court ...
>
> 2. The developer will not normally be entitled to his costs unless he can show that there was likely to be a separate issue on which he was entitled to be heard, that is to say an issue not covered by counsel for the Secretary of State: or unless he has an interest which requires separate representation. The mere fact that he is the developer will not of itself justify a second set of costs in every case.
>
> 3. A second set of costs is more likely to be awarded at first instance, than in the Court of Appeal or House of Lords, by which time the issue should have crystallised, and the extent to which there are indeed separate interests should have been clarified.
>
> 4. An award of a third set of costs will rarely be justified, even if there are in theory three or more separate interests."

SHOULD THE BOLTON PRINCIPLE BE APPLIED?

14. At the hearing we stated that, until the point had been raised by the petitioner's solicitors in this case, the Judicial Office had not, on receiving bills for costs under practice direction 5.1(d), sought to apply the *Bolton* principle in planning appeals or in any other appeals. It

had always been considered proper to allow reasonable costs to all respondents who had entered appearance. The Judicial Office had believed that it had discretion to treat the receipt of a bill of costs to which practice direction 5.1 applied as an application for costs, whether or not this was explicitly stated in any covering letter. The practice had always been to accept such a bill if it was lodged on behalf of a respondent named in a petition, who had been served with the petition and who had entered an appearance. We also stated that, if we were entitled to grant leave to the respondents to submit a bill of costs under practice direction 5.1, we would treat Mr Buxton's submission on *Bolton* as an application by him to set aside the leave we had impliedly granted.

15. In support of his submissions, Mr Buxton drew attention to two ironies if the point was decided against his client. First, why should the developers in this case be awarded their costs in the House of Lords even though they had failed to obtain their costs either in the High Court or in the Court of Appeal? Secondly, the *Bolton* principle would certainly have applied to this case had it proceeded to a hearing. In that event, practice direction 5.1 would not have applied. How can it be that the petitioner in this case is required to pay costs in a case that falls at the first hurdle when she would not have had to pay costs had the case proceeded further?

16. In opposing Mr Buxton's submissions on this point Mr Palmer drew attention to what, heretofore, has been the standard practice of the Judicial Office, which is to allow the reasonable costs of all respondents. He was unable to confirm whether his clients sought or obtained costs in the Court of Appeal

17. Having considered this matter carefully, we are now of the view that the Judicial Office should not, as a matter of course, give the leave to submit a bill of costs required under practice direction 5.1(d) in cases to which that paragraph applies. The *Bolton* principle applies as much to the Judicial Office as it does to the Court of Appeal and the High Court. In particular, in cases involving multiple respondents, whether in planning appeals or in other appeals, the

Judicial Office should give leave to lodge a bill of costs without a hearing only to the primary respondent and should list the application for hearing should other respondents apply for costs.

HAS PERMISSION TO LODGE A BILL BEEN VALIDLY GRANTED?

18. For the petitioner, Mr Buxton readily accepted that the submission of a bill of costs by the developers is tantamount to an application by them for an award of costs. However, he challenged whether the Judicial Office has jurisdiction to make (as opposed to tax) orders for costs. Although the final words of practice direction 5.1 refer to an application being made in writing to the Judicial Office, in his submission the Judicial Office is only the conduit by which such applications can be brought before their Lordships.

19. We do not accept Mr Buxton's submission on this point. In our judgment the Judicial Office is specifically empowered by practice direction 5.1 to make orders for costs in the circumstances to which that rule applies. The decision on costs which falls to be made under practice direction 5.1 is a comparatively minor one which is of a subsidiary nature to the decision refusing leave to appeal. There is no doubt that the Principal Clerk of the Judicial Office does have jurisdiction to decide similar matters during the conduct of an appeal, for example, whether to grant or refer to an Appeal Committee an opposed incidental petition (see practice direction 39.1). If the court with jurisdiction to tax a bill under practice direction 5.1 could not also give the permission required to lodge the bill for taxation under that rule, the procedure which would then have to be followed would be wholly disproportionate to any benefit likely to be gained from it. Practice direction 5.1 is not, of course, limited to cases in which there are multiple respondents. If applications for leave under practice direction 5.1 had to be made to a Law Lord or a committee of Law Lords, those Law Lords would have to hear applications even where there was only one respondent.

HAVE EXCEPTIONAL CIRCUMSTANCES BEEN DEMONSTRATED IN THIS CASE?

20. The solicitors for the developers have not sought to demonstrate any exceptional circumstances entitling them to their costs. Although they have not expressly confirmed the point we infer from their silence that they accept that they did not obtain costs either in the High Court or in the Court of Appeal. Since (as we have found) the *Bolton* principles apply in this case, it is inconceivable that circumstances should justify them having their costs in the House of Lords when they failed to obtain or were refused their costs in the lower courts.

OUR DECISIONS

21. Since, in our judgment, the *Bolton* principle applies in this case and there are no exceptional circumstances entitling the developers to apply for their costs, we now set aside the permission impliedly granted to them under practice direction 5.1 and we tax their bill down to zero. In the unusual circumstances of this case there will be no taxing fee payable.

22. As to the costs of the proceedings before us, our provisional view is to make no order for costs. We can see no argument likely to justify an order for costs in favour of the developers.

23. Turning now to the petitioner, we acknowledge that, although all her previous proceedings have met with little success, she has been victorious on this small matter. The general rule is, of course, that costs follow the event. Nevertheless, it seems to us at present that it would be unfair to require the developers to pay the petitioner's costs of demonstrating that the petitioner should not be required to pay the costs they had incurred because of her unsuccessful petition. The mistake made by the developers on this question was a mistake that was shared by the Judicial Office. Nevertheless, on the question of the costs of and incidental to the hearing before us, we give liberty to both parties to request a further hearing if they do so by letter received by the Judicial Office on or before Monday 15 December 2003.

24. We take this opportunity to apologise to both parties and to their solicitors and agents for the delay in delivering this judgment, which raised novel issues that needed time to resolve.