IN THE HIGH COURT OF JUSTICE CO/3762/1999

QUEEN'S BENCH DIVISION
(CROWN OFFICE LIST)

Royal Courts of Justice
Strand
London WC2

Thursday 29th June 2000

B e f o r e:
MR JUSTICE RICHARDS

- - - - - - -
THE QUEEN

-v-

LONDON BOROUGH OF HAMMERSMITH AND FULHAM
EX PARTE ROBERT AND SONIA BURKETT

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(Computer-aided Transcript of the Stenograph Notes of
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MR R JAY QC (instructed by Richard Buxton, 40 Clarendon Street, Cambridge CB1 1JX) appeared on behalf of the Applicant.

MR T STRAKER QC (instructed by the Mr A Beresford, Assistant Head of Legal Services, London Borough of Hammersmith and Fulham, Hammersmith W6 9JU)) appeared on behalf of the Respondent.

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MR R PURCHAS QC (instructed by Masons, 30 Aylesbury Street, London EC1R OER) appeared on behalf of the Interested Party

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J U D G M E N T
(Approved by the Court)

Thursday, 29th June 2000

J U D G M E N T

1. MR JUSTICE RICHARDS: This is a renewed application for permission to apply for judicial review, following refusal of permission by Newman J on consideration of the papers. The applicants seeks to quash a decision by the respondent council, the London Borough of Hammersmith and Fulham, to grant outline planning permission for a mixed use development at the Imperial Wharf site, Fulham. That is said to be currently one of the largest development sites in London, and the development will involve very large scale investment. The developer is St. George West London Limited.

2. The applicants, Mr and Mrs Burkett, live at 139 Townmead Road, Fulham, which is contiguous to the outer limits of the proposed development. Their flat and garden directly overlook the site. They are concerned about the environmental impact of the works, both during construction and on completion. They have been represented before me today by Mr Jay QC. The respondent Local Authority and the developer have both appeared to oppose the grant of permission. Both have been represented by counsel, by Mr Straker QC and Mr Purchas QC, respectively.

3. I should explain the background as briefly as I can. The relevant application was submitted by the developer in February 1998. In March 1998, the respondent requested the developer to submit an environmental statement. There were meetings to identify the key areas for assessment in the environmental statement. An environmental statement was submitted and published in May 1998. Certain revisions to the planning application were submitted in July and August 1998. The proposals were the subject of extensive public consultation.

4. On 15th September, 1999, the repondent resolved to grant planning permission, subject to conditions and a Section 106 Agreement, and subject to there being no contrary direction by the Secretary of State. The application had to be referred to the Secretary of State, who had a power to call it in, because it involved a departure from the Development Plan. On the 24th February, 2000, the Secretary of State informed the respondent that he would not call in the application. There had been discussions over a very lengthy and detailed Section 106 Agreement, which was ultimately concluded. The formal grant of planning permission, pursuant to the resolutions of 15th September, 1999, was made on the 12th May, 2000.

5. Meanwhile, on 6th April, 2000, the applicants filed their application for permission to apply

for judicial review, to challenge the resolution of 15th September, 1999. The basis of the application was that the environmental assessment, carried out in respect of the planning application and proposed development, did not meet the requirements of the governing regulations. The respondent and developer learned of the application for judicial review only on or about 19th April. There had been little warning of the application.

6. On 30th July, 1999, the applicants' present solicitors - at that time acting for a different client - had sent the respondent a short letter submitting that the environmental statement in respect of the planning application was inadequate, and that it would therefore be unlawful to approve the application. The submission was not particularised, and was not followed up. The present applicants had raised no such objection. Only on 28th March, 2000, did the applicants' present solicitors send, on their behalf, what was effectively a letter before action raising, in very summary form, the matters of complaint and threatening judicial review.

7. Against that background, the respondent and the developer submit, first, that permission should be refused on grounds of delay. Mr Jay, for the applicants, contends that the application was in time and that, even if was not, the court should exercise its discretion to extend time. The first ground of refusal by Newman J, when considering the application on the papers, was that:

> "It is out of time, late and no good reason has been given for the delay."

8. The obligation under Order 353, Rule 4, of the former rules of the Supreme Court, now contained in Schedule 1 to Part 1 of the Civil Procedure Rules, is to apply promptly and, in any event, within three months from the date when grounds of the application first arose, unless the court considers there is good reason for exending the period in which the application shall be made.

9. In relation to the court's discretion, account must also be taken of Section 31(6) of the Supreme Court Act 1981, the effect of which is that, where the court considers that there has been undue delay in making an application, the court may refuse to grant permission if it considers that the granting of the relief sought would be likely to cause substantial hardship to any person or would be detrimental to good administration. The relationship between the rule and the subsection of the 1981 Act has now been fully resolved (see the summary at R. -v- CICB ex p. "A" (1999) 2 AC 330 at 341B to F, a passage which, I think, it is unnecessary to read.)

10. There is a substantial body of authority emphasising the need for particular speed in challenging a decision to grant planning permission. A number of cases refer to the time limit of six weeks for a statutory challenge in the planning area, as conditioning the court's view of what

promptness requires for an application for judicial review in this area. For example, in R. -v- Newbury District Council ex. p. Chieveley Parish Council (1999) PLCR 51 at 66D, Pill LJ expressed agreement with the approach of Simon Brown J, in R. -v- Exeter City Council ex p. J L Thomas & Co Ltd (1991) 1 QB 471, at 484. In that passage,.

11. Simon Brown J had said:

> "'... I cannot sufficiently stress the crucial need in cases of this kind for applicants to proceed with the greatest possible urgency, giving moreover to those affected the earliest warning of an intention to proceed. In this connection it should be remembered that there is conspicuously absent from the legisation any right to appeal in fact or law from a planning authority's grant of planning permission, and even when a right of challenge is given, the right of statutory application under Section 245 of the Town & Country Planning Act 1971 to challenge a ministerial decision, it must be exercised within six weeks. Only rarely is it appropriate to seek judicial review of a Section 29 permission, Section 70 of the 1990 Act. Rarer still will be the occasions when the court grants relief unless the applicant has proceeded with the greatest possible celerity....'"

12. Pill LJ went on to state that:

> "... A reason for that approach is that a planning permission is contained in a public document, which potentially confers benefit on the land to which it relates. Important decisions may be taken by public bodies and private bodies and individuals upon the strength of it, both in relation to the land itself and in the neighbourhood. A chain of events may be set in motion. It is important to good administration that, once granted, a permission should not readily be invalidated ... Weight should be given to this aspect of the case notwithstanding the
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> absence of convincing evidence that the applicants for planning permission have been prejudiced by the delay..."

13. In R. -v- Ceredigion County Council, ex p. McKeown (1988) 2 PLR 1, Laws J referred to that or a similar passage in a judgment of Simon Brown J, and went on:

> "I would go further. I find it nearly impossible to conceive of a case in which leave to move for judicial review will be granted to attack a planning permission when the application is lodged more than six weeks after the planning permission has been granted. I can see no rhyme nor reason in permitting the common law remedy of judicial review to be enjoyed upon a timescale in principle more generous to an Applicant than Parliament has seen fit to fix in relation to those who desire to challenge a refusal of permission or its grant subject to conditions. I do not say there cannot be such a case; but in my judgment, it would be a wholly exceptional one..."

14. It is not that the period of six weeks referred to is substituted for the period of three months contained in the rules. The point is that the primary obligation is to apply promptly. What that requires will depend on the circumstancces. In the planning context, it is generally considered to

require the applicant to move very quickly, and if he waits for six weeks, he will generally have failed to apply promptly. Again, however, it is not the case that he has six weeks in which to apply. To wait that long may well constitute a failure to apply promptly.

15. For example, in R. -v- Stoke-on-Trent City Council Ltd ex p. Trent City Securities Limited, 17th February 2000, (unreported), Dyson J stated, at paragraph 20 of his judgment:

> "...20. The need for the greatest possible urgency is not, in the ordinary course of things, satisfied by waiting six weeks. All the more so in the present case where the Applicant had already instructed solicitors who were fully au fait with the proposal to grant planning permission on the Parklands site and had written a letter on 22nd September making the Applicant's principal point..."

16. The approach of the courts to the requirement of promptness in the area of planning has been subject to some critical comment. Mr Jay has referred me to a number of articles, including an article by Gregory Jones and Hereward Phillpot, published in (2000) Journal of Planning Law 564, entitled "When He Who Hesitates Is Lost: Judicial Review Of Planning Permissions." Despite what is said of those articles, the approach to which I have referred is, in my judgment, well established. I also consider it to be an appropriate approach, and any practitioner operating in this field must be fully aware of it.

17. I turn to consider the circumstances of the present case, in the light of the line of authority to which I have referred but recognising, of course, that the requirement of promptness will depend on the particular features of the case. When did grounds for the application first arise? Mr Jay submits that it was reasonable to wait until the Secretary of State's decision not to call the application in. Alternatively, he would, if necessary, contend that the relevant date is the date when planning permission was actually granted. In my judgment, however, the relevant date was the date when the respondent passed its resolution to grant outline planning permission. That was the operative decision. That - not some later event - is what is challenged in the Form 86A. The fact that there were still a number of contingencies before the formal grant of planning permission does not mean that grounds for the application arose only at some later date. The existence of those contingencies is a matter to be considered in relation to the discretion to extend time, if there was a failure to apply promptly. It does not, in my view, lead to the conclusion that time did not begin to run at the date of the resolution.

18. In a number of cases involving challenges to planning permissions, the court has held that the grounds of the application first arose at the date of the resolution to grant permission, rather than at the date of the formal grant of permission. One such case was R. -v- Leicester City Council

ex. p. Safeway Stores (1999) Journal of Planning Law 691, a judgment of Dyson J. In that judgment, the judge went on to make certain observations on the subject of delay in such cases, at page 696. I think it helpful to read them:

> "... I am not persuaded that the court should adopt a more generous approach to applicants who seek to challenge resolutions than those who seek to challenge formal grants of permission or
>
> approval ... I accept of course that a resolution is less certain than a formal grant, and that there will be exceptional cases in which a local planning authority passes a subsquent resolution modifying or even rescinding an earlier one.
>
> But, in the real world, parties do rely on resolutions. They lead to discussions between the parties, preparation of plans, etc., all of which are necessary steps in bringing a development to fruition and which involve a commitment of resources. In the present case, I am told that the parties have negotiated the terms of a section 106 agreement no doubt in the expectation that the resolution will culminate in a formal grant. Indeed, there is nothing to suggest that a formal grant will not eventually be made. But, even if I am wrong about this, and a somewhat more generous view might be adopted where one is looking at the challenge to a resolution, it is still necessaryto have in mind the need to proceed promptly. The six-week period referred to in some of the planning cases and the three-month period referred to in Order 53 are outer limit periods. It is necessary to have regard to the facts of each case in deciding whether an application has been made promptly...."

19. I appreciate that to focus on the resolution rather than the formal grant of permission has not been the universal approach of the courts, and that it has again been subject to some criticism. But, in my view, it is an approach supported by the preponderance of authority, and is certainly the appropriate approach in the present case. It accords, moreover, with the principles expounded by Laws J in R. -v- Secretary of State For Trade & Industry ex p. Greenpeace [1998] ELR 415, to the effect that:

> "...a judicial review applicant must move against the substantive act or decision which is the the real basis of his complaint. If, after that act has been done, he takes no steps but merely waits until something consequential and dependent upon it takes place and then challenges that, he runs the risk of being put out of court for being too late...."

20. Did then the applicants make their application for judicial review promptly? In my judgment, clearly not.

21. Taking the date of the resolution as the date when grounds first arose - that is 15th September, 1999 - the application lodged on 6th April 2000 was well outside the three month period in Order 53, Rule 4, let alone made promptly. Even if I accepted, which I do not, that it was reasonable for the applicants to wait until the Secretary of State decided not to call the application

in - that is until 24th February, 2000 - in my judgment, there was still a failure to apply promptly after that date. The application was filed at the very end of the period of six weeks following the Secretary of State's letter. Against a background where the respondent's resolution had been passed in September 1999, it was incumbent on the applicants to move much faster than that after the Secretary of State's decision if they were to wait for that decision before making their application.

22. Whether it was reasonable to wait falls more appropriately, in my view, to be considered under the head of extension of time, which I turn to consider. I accept that in some cases it may be appropriate and reasonable to wait for the Secretary of State's call in decision, and that this may affect the court's view as to whether to exercise its discretion to grant an extension. In R. -v- Selby District Council ex. p. Samuel Smith Old Brewery, an unreported decision on a permission application dated 29th November, 1999, Sullivan J drew a distinction between the case of resolutions to grant planning permission that were not subject to call in, and those which were subject to call in. He seems to have taken the view that in the latter case - that is those subject to call in - it would be appropriate to await the decision on call in.

23. In the present case, the papers originally filed by the applicant contained no explanation whatsoever for the delay. In a very late witness statement, served only yesterday, the applicant's solicitor does provide an explanation. The witness statement indicates that the view was taken that, because the resolution to grant planning permission was conditional on the absence of a direction from the Secretary of State, it was not necessary or appropriate to apply for judicial review until after the Secretary of State's decision. That view, it is said, was reinforced by the decision in ex. p. Samuel Smith Breweries, supra, which the applicant's solicitor was fortunate to hear while in court when the decision was made. Only after the Secretary of State's decision not to call the application in were arrangements made to inspect the file, instructions taken and an application made for legal aid, with a view to bringing judicial review proceedings. It is said that the application ultimately lodged was lodged on a protective basis, taking the view that the respondent still had a chance to remove the formal grant of planning permission.

24. I take full account of that explanation, which I have done no more than summarise. I take account of the fact that for a long time the solicitors were acting pro bono and thought it inappropriate to apply for legal aid in circumstances where the Secretary of State might call in the scheme. I also take into account the limited size and resources of the solicitors. But there are factors telling strongly in the other direction. I have not been shown any evidence to suggest that there was a likelihood that the Secretary of State would call the case in. The respondent and developers, for their part, proceeded in the expectation that there would be no call in. The applicants did not make

any submissions to the Secretary of State that he should call the matter in, though it is fair to say that their present solicitors - when acting for a different client - had sent a letter, dated 30th July, 1999 to the Government's office in London, inviting a call in.

25. It seems to me that in the circumstances, the fact that the resolution was subject to the Secretary of State's decision as to call in - and therefore that the formal grant of planning permission would not be made until after the Secretary of State had decided not to call the application in - did not provide a good reason for waiting, nor does it provide a good reason for extending time.

26. Moreover, I consider it very important that during this period the applicants gave neither the respondent nor the developer any warning of an intended application for judicial review, in the event of there being no call in, or any indication that they were waiting for the Secretary of State's decision on call in before bringing legal proceedings. That was despite the fact that their present solicitors had been involved, albeit on a limited basis and for a different client, prior to the resolution of 15th September 1999, and plainly had some familiarity with the case. Moreover, there was no such notification, despite the fact that work was done to prepare a judicial review application, after the Secretary of State's decision not to call the matter in. Only on 28th March 2000, as I have said, was a letter sent threatening legal proceedings. Further, there was no question of the applicants being unaware either of the resolution or thereafter of the Secretary of State's decision on call in. Both, in any event, received wide publicity in the area.

27. Looking at all the circumstances, and bearing in mind, in particular, the failure to provide a clear warning of the prospective judicial review application, I do not think that the explanation that has been given for the delay is a satisfactory explanation, or that the applicants' conduct during the period of delay was satisfactory or can provide a proper basis for an extension of time. In my judgment, there is no good reason to extend time.

28. A further consideration telling against the exercise of the court's discretion is that of prejudice and detriment to good administration. The developer claims to have suffered substantial prejudice as a result of the delay. I do not propose to set it out in full. It is dealt with at paragraphs 13 to 18 of the witness statement of Mr Herron and again at paragraphs 8 to 9 of his second witness statement. In essence, it is said that following the resolution to grant planning permission, architects were instructed, resulting in a commitment to fee expenditure of some £80,000 per month. Landscape architects were instructed, with resulting fee expenditure in the order of £10,000 to £12,000 per month. Appointments were made for working drawings and engineering design for two

of the blocks - in readiness for commencement of construction - with a fee expenditure in the order of £130,000. Remediation engineers were appointed to develop a site-wide remediation strategy, and for other purposes. Detailed planning applications were submitted for a temporary information centre and a sales centre. Committed expenditure for those buildings totalled some £800,000. Enabling works were commenced in March 2000, in the vicinity of the two riverside blocks. Any interruption to those works would result in additional costs for both remobilisation of plant and machinery and extended preliminary costs for the site set-up. The point is made that substantial sums were spent after 24th February, as well as before it.

29. The respondent also details prejudice and detriment to good administration in the witness statement of Mr Kirby, at paragraphs 21 and 32. I do not propose to read the details. In conclusion, what Mr Kirby expresses is that:

> "...An enormous amount of time and resources have been expended since the decision was made in September 1999. Much of the action taken has been in reliance upon that decision. There was no reason to suppose, although he still had formally to indicate whether he would call the matter in, that the Secretary of state would act so as to prevent the formal issue of planning permission. In the event, the Secretary of state, as could properly have been expected, was content with the Resondent's decision...."

30. He stresses that:

> "The work carried out is not confined to the vast amount of time expended by officers of the Respondent. Quite apart from the resources of the Local Authority, other public bodies and other organisations have participated in negotiations and foward planning which had, as one of their bases, the resolution that planning permission be granted...."

31. I am satisfied that all of those matters concerning prejudice and detriment to good administration tell strongly against the extension of time. I do not accept Mr Jay's submission that the prejudice referred to is illusory because the parties were at risk anyway, owing to the possibility of call in. They proceeded in the way in which they did - as I have already indicated - in the expectation that there would not be a call in. It does not follow that they would have acted in the same way had a prompt application for judicial review been brought. Moreover, as again I have mentioned, substantial sums were extended, in reliance on the resolution, after the date when the Secretary of State indicated that he would not call the application in.

32. Mr Jay submits further that I should look at the substance of the case in deciding whether to extend time and grant permission. He points out that in ex p. Greenpeace No. 2 (The Times, 19 January 2000) Maurice Kay J granted an extension of time and granted permission, in part because

the merits of the application cancelled out other factors and it was in the public interest that the matter should be determined. I note that in that case Maurice Kay J had heard full argument - the case having been dealt with by way of a full hearing at which the question of permission was considered after the conclusion of argument - and that he had concluded that the applicants in that case were plainly right on the central substantive issue.

33. In the present case, the main issue concerns compliance with the Town & County Planning (Assessment and Environmental Effects) Regulations 1988. It was held by Sullivan J, in R. -v- Rochdale Metropolitan Borough Council ex p. Tew and others (1999) 3 PLR, p.74 that in the circumstances of the case before him the grant of a bare outline planning permission was unlawful by reason of non-compliance with the requirements of the 1988 regulations concerning the provision of information.

34. The regulations require the provision of, amongst other things, a description of the development proposed comprising information about the site and design and size or scale of the development. In Tew, the judge held that the application did not contain any information as to the design, size or scale of the development and that the requisite particulars had therefore not been provided and the permission subsequently granted was unlawful.

35. In the present case, there was again an application for outline planning permission, with various matters reserved. Those are reflected in Condition 4 of the grant of planning permission pursuant to the resolution of 15th September, 1999. Condition 4 provides that:

> "... no phase/stage of the development shall commence until the following reserved matters relevant to that phase/stage have been submitted to and approved in writing by the council:-
>
> "(a) design of the development
>
> "(b) external appearance of the development
>
> "(c) landscaping of the development including the riverside walk ..."

36. It was initially contended by the applicant that siting was a reserved matter, but it is accepted now that it was not a a reserved matter, save as regards Stage 3 of the development. In relation to Stage 3, however, similar points of criticism are advanced as in relation to the other reserved matters. What is said by Mr Jay, in essence, is that, although this is not as extreme a case as Tew, it falls foul of the reasoning in Tew. The application for planning permission did not contain a sufficient description of the proposed development to satisfy the requirements of the 1988 regulations. Too much was reserved to enable those requirements to be satisfied.

37. There is a separate and more specific submission - which Mr Jay describes as a variant of the first and principal ground - as to the adequacy of the description of mitigation measures, it being said that there was an inadequate description of measures for the protection of the surrounding population from the effects of noise, dust and so forth during the construction works.

38. The contentions put forward by the applicants in relation to those matters are summarised in a skeleton argument submitted by Mr Jay. Mr Jay has also helpfully taken me through various other documents, as well as taking me through the judgment in Tew in some detail.

39. There are detailed counter submissions in the skeleton argument put in by counsel for the respondent and the developer. I have not thought it necessary to hear oral

40. submissions from either of them. I have dealt with the matter in this way bacause I have taken the view - on the basis of what I have seen and heard - that although the applicants do have an arguable case on the substance, it is not a case so clear cut or raising matters of such public interest that, in my judgment, it ought to cause me to exercise my discretion so as to extend time and grant permission notwithstanding everything I have said about delay. I stress that in forming that view on arguability, I have not heard oral submissions from the respondent or the developer, who strongly opposed the grant of permission on that ground too. It is also right to record that Newman J took the view that:

> "... the application discloses no arguable ground of review."

41. Even, however, taking the view that I do, that there is an arguable ground here, such that it would have been appropriate to grant permission but for delay, I do not regard that matter as outweighing the objections arising out of the delay. It is sufficient that I refuse the application, as I do, on grounds of delay.

42. MR STRAKER: My Lord, in those circumstances, could I mention two matters: one on the transcript, against the possibility that your Lordship is asked to approve the transcript. There are two cases which your Lordship referred to as unreported, where there are references which I can give to your Lordship. The first is the Ceridigion case, which is reported in 1998, Vol II PLR, at p.1 It is also reported in another series 1998 PLCR, at p.90.

43. MR JUSTICE RICHARDS: Yes, thank you. I was simply going off the transcript that you pulled off the Net. I had not realised that there was a reported version, sorry.

44. MR STRAKER: My Lord, yes. And Greenpeace 2, supra, my Lord, the report of that is in

The Times on 19th January, 2000. My Lord, that was the first matter. The second matter is the question of costs, and I would respectfully ask on behalf of the Local Authority that there should be an award of costs in favour of the Local Authority. I understand that my learned friend is legally aided for the purposes of this occasion, and I would therefore ask that there should be such order as allows costs to be paid, if that is thought to be appropriate upon assessment or otherwise.

45. MR JUSTICE RICHARDS: Yes. I keep on forgetting what the correct formula is in a legal aid case. Do you have the formula with you?

46. ASSOCIATE: There is a new wording that has been given to us, my Lord, as "determination of the amount of such costs that it is reasonable for the assisted person to pay be postponed generally pursuant to regulation".

47. MR JUSTICE RICHARDS: The wording the associate helpfully gives me, which I think is the order that you are seeking against the applicant, is an order that the applicant pays your costs, but that the determination of the amount of such costs that it is reasonable for the applicant to pay be postponed generally.

48. MR STRAKER: My Lord, if that is so, I am very much obliged to your Lordship and to your Lordship's associate.

49. MR PURCHAS: My Lord, I too apply for a similar order of costs. In my submission, this is a case, properly, where the developer had a special interest in the context of Bolton, supra. I say it for essentially three reasons. First, this is a case of a renewed application, while the point upon which your Lordship relies essentially was the point that was taken by Newman J. The second thing your Lordship helpfully indicated was that it had not been arguable, although your Lordship indicated your Lordship's preliminary view. I would, in any event, say we have a special interest in the nature of the application, from this point of view particularly. Not what was ventilated at all in argument so far, but it is on the basis of Chieveley whether, in fact, there was amendment to delete from the application details of design, such as height and matters of that kind, and that would depend on whether we made that amendment. We plainly did not. It was something of which we had a special interest to establish. More particularly and thirdly, is the question of delay and prejudice. Plainly, delay was a question of fact. But prejudice was something, in my respectful submission, in which we had a special interest. I have in mind the words of Simon Brown J, as he then was, in Exeter which is compared both by Pill, J in the Chieveley case and then more recently, of course, in Mr Gregory James' article by the Court of Appeal in Moses. But it is incumbent upon applicants to give the earliest warning to those affected. Now, as you will be aware, even the letter

of 28th March was not copied to us or sent. The first notice we had on the evidence was 17th April. That is something which had a particular implication of prejudice, from our point of view: prejudice to third parties, something which is identified in both the order and in a particular section of Section 106. In my submission, the matter elaborates on it and we properly should be entitled to a more --

50. MR JUSTICE RICHARDS: -- Well, why shouldn't you be limited to recovering the costs of the evidence setting out the prejudice?

51. MR PURCHAS: My Lord, on this basis, when we have a special interest -- I am thinking here of the way the House of Lords dealt with it in Bolton. Also, I have got in mind subsequent cases; they all depend on their own facts.

52. MR JUSTICE RICHARDS: But all of those, of course, including Bolton, were dealing with substantive hearings. You have come on a permission application, where costs are awarded against the applicant relatively infrequently.

53. MR PURCHAS: My Lord, I say this, in particular. Taking the analogy of the substantive hearing cases, special interest is reflected in orders of the courts, where there is the kind of interest to which I refer. Now, the interest in this instance, the interest of prejudice, is one that peculiarly arises at the permission stage. This is the stage where we can take the point. I have in mind, particularly, (inaudible authority). After the permission is granted, then it's too late. It is right we have a special interest and, in my submission, it is right that that should be reflected in the order of this court for costs, bearing in mind --

54. MR JUSTICE RICHARDS: -- Yes, thank you. Mr Jay?

55. MR JAY: My Lord, I submit that we should not pay any costs, let alone two sets of costs. The court did not order that the application be renewed on notice to other parties. Your Lordship knows that Mr and Mrs Burkett are legally aided.

56. If your Lordship were minded to grant one set of costs which absent special circumstances, in othe words, showing a special legal interest, to be the ordinary course, well then I couldn't oppose the order being made, subject of course, to the liability of being postponed, and under - I think it is Regulation 129 - of the legal aid regulations.

57. MR JUSTICE RICHARDS: Yes, well you heard the formula that I read out to Mr Straker, which he agreed with, that that reflects the postponement.

58. MR JAY:I am told (inaudible)on national lottery order, but one is on risk of call in in relation to the developer's costs, and in my submission, it is completely unclear.

59. MR JUSTICE RICHARDS: Well, what about the evidence of prejudice?

60. MR JAY: Well, my Lord, evidence on prejudice was put by the respondent. A letter or short witness statement from the developer would suffice, and that's putting their case at the very highest. They do not need to be represented to appear to make submissions to your Lordship. But in any event, on the Bolton case, the Barclay case and similar cases, the developer has to show a special legal interest and, in my submission, they cannot.

61. MR JUSTICE RICHARDS: Well, so far as the prejudice is concerned, they can, can they not?

62. MR JAY: My Lord, they can show some degree of interest, but it has to be a special legal interest and, in my submission, that cannot be demonstrated here.

63. MR JUSTICE RICHARDS: Yes.

64. MR JAY: My Lord, in one sense it's academic, unless Mr and Mrs Burkett do win the national lottery, and one has to approach it on the principle of the whole issue of legal aid, which is the amount prayed.

65. MR STRAKER: My Lord, I would also be seeking legal aid assessment. I would ask your Lordship to order expedition of the transcript so that my clients can consider it.

66. MR JUSTICE RICHARDS: Yes, thank you very much. Well, I think it right, although this is a permission application, it is a renewed application, and I think it is right, in all the circumstances, to make an award of costs in favour of the respondent Local Authority. That will be in terms that acknowledge the fact that the applicant is legally aided, so that a determination of the amount of the costs that it is reasonable for the applicants to pay will be postponed generally.

67. In relation to the developer, I take the view that they were, in the circumstances, properly entitled to put before this court evidence concerning prejudice. And that the circumstances of the case, including the absence of notification to them in advance of the judicial review application, make it right for me to make an award of costs in their favour in respect of the preparation and filing of the evidence on prejudice. I stress that that does not include the balance of the evidence. It does not include the costs of the hearing. It is a very limited order. Again, it will be subject to the

postponement provision to acknowledge the legal aid status of the applicants.

68. Legal aid detailed assessment of the applicant's costs for Mr Jay, and I will direct expedition of the transcript, please.

69. Thank you all very much.