PTA Template 269C1 - First Appeal

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **CA-2022-000831 and CA-2022-000837**

THE LONDON HISTORIC PARKS AND GARDENS TRUST **–v–** **THE MINISTER OF STATE FOR HOUSING AND OTHERS**

CA-2022-000831

ORDER made by the Rt. Hon. Lady Justice Andrews DBE

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal and for expedition if permission is granted.

Decision: Both applications (by the Minister and by the Secretary of State) for permission to appeal are refused.

An order granting permission may limit the issues to be heard or be made subject to conditions

Reasons:

1. Construction: Ground 1 (SOS) and Ground 3 (Minister). There is no real prospect of successfully arguing that the Judge's construction of the 1900 Act was wrong, nor that she erred in her application of the appropriate legal principles to its construction. On the contrary, it was plainly correct. Although she did not rely upon the pre-legislative material in reaching her decision, I consider that it probably would have been admissible to address any ambiguity about the meaning of "maintained," and as she said, it strongly supports her construction.

2. Once it is established that the Judge was right about the statute, the other proposed grounds of appeal are fatally undermined. As the Claimant has put it in the Respondent's brief statement of objection to permission, "the 1900 Act represents an obstacle to delivery which has not been addressed… it cannot be "wished away"."

3. Permission to raise the materiality issue: Ground 2 (Minister). The Judge was entitled to permit the point to be argued and her decision to do was a matter of judicial discretion which is not capable of being impugned on appeal. It is extremely unattractive for the losing party to argue that his opponent should not have been allowed to introduce a legal argument that turned out to be correct, especially when it is clear that no prejudice was suffered. Leading counsel for the Minister was perfectly able to argue this ground of challenge, and Leading Counsel for the Secretary of State adopted his arguments on the construction of the statute.

4. I can do no better than to echo the reasons given by the Judge herself for refusing permission on this ground, with which I agree. This is not a *Barker Mills* scenario. If there is an enduring statutory restriction on the use of the land, as the Judge found there is, then any evidence that the appellants might have wished to adduce before the Inspector would not have assisted them in getting round it. The only way of removing the obstacle would be a repeal of the section, which would require primary legislation.

5. Materiality: Ground 2 (SOS) and Ground 1 (Minister). It is telling that both the skeleton arguments seek to address the issue of materiality first and the issue of statutory construction afterwards, even though the construction point logically falls to be considered first. If the 1900 Act posed no legal impediment to the construction of the memorial in the Gardens, it is difficult to see how it could arguably be a material consideration for the Inspector when considering if the desirable timescale for delivery (a factor to which he plainly attached considerable weight) was achievable. If it does pose such an impediment, the converse is true.

6. If the Judge's construction is correct, it is equally difficult to see how a rational decision premised on the ability to deliver the project within a reasonable time, and specifically within the lifetimes of remaining Holocaust survivors (a factor regarded as highly material by the decision-maker) could be taken without having regard to the impediment to achieving that goal which is posed by the legislation. The Judge accepted that the grant of planning permission does not get round any other existing legal impediments to the proposed development, and that consequently the existence of other impediments would not ordinarily be a material consideration. However, any argument that this impediment was not an obviously material consideration in the unusual circumstances of this particular case, *given the focus that the Inspector placed on the timescale for delivery*, does not meet the threshold for permission.

7. When a factor is not required by statute to be taken into consideration by the decision-maker in a planning decision, the decision-maker assesses what information is/is not material and that decision can only be challenged on *Wednesbury* principles. It is therefore nothing to the point that parties to the planning inquiry did or did not contend that the information was material. The judge's fact-finding that the point had *in fact* been raised [judgment 118 and following] cannot be impugned on appeal. In any event, once the Inspector had decided that the time for achieving the project was a material consideration he could not leave out of account an obvious impediment which had been drawn to his attention.

8. If the information is plainly material to the assessment of a factor on which the decision-maker relies the test of irrationality will be met, regardless of who raises the issue. The judge did not substitute her own view of materiality for that of the decision maker; in the peculiar circumstances of this case, the consideration was obviously material for the reasons that she gave and there was no arguable error in principle in her approach. Having carefully considered the arguments in both the skeleton arguments for the Minister and the SOS, I have concluded there is no real prospect of successfully challenging her judgment on this ground.

9. Adequacy of reasons (Ground 3 SOS): This adds nothing to the "materiality" argument and falls with it. I do not consider that the challenge is properly characterised as a challenge to the adequacy of the reasons given by the Inspector. The objection was that something which was obviously material was not taken into consideration, not that the decision-maker failed to give sufficient reasons for his decision, or for not considering that matter. As the Claimant points out, the Minister does not rely on this argument, and it is no answer to the failure by the *Minister* to take into account a consideration that the Court has found was obviously material. It also does not appear to have been a ground on which permission was sought from the judge herself (if it was, she does not deal with it separately).

10. Challenge to the conclusion that the Inspector failed properly to consider the merits of alternative sites: Ground 4 (Minister). This adds nothing to the materiality challenge and falls with it; if the consideration was obviously material, as it was, then the judge's conclusion flows inexorably from that finding. Her reasoning makes it clear that she would not have upheld the challenge on this ground had she not found that the impact of the Act was an obviously material consideration.

11. Other compelling reason: I am acutely aware of the sensitivities around the Judge's decision but the high-profile nature of this project and the importance of building this memorial (accepted by all parties) are not, in themselves, a justification for allowing an appeal to proceed which I regard as having insufficient prospect of success.

12. I am not persuaded that this case raises important issues concerning the application of established legal principles, and the Minister has not identified what those issues are. As the Judge was at great pains to make clear in her judgment, this case was highly fact-specific. The issue of construction of a provision of an Act which relates solely to this particular land is unlikely to arise in any other context; and, as the Claimant says, if the construction adopted by the judge is correct, (which it plainly is) the proposals cannot proceed regardless of whether planning permission is granted.

Information for or directions to the parties

Mediation: Where permission has been granted or the application adjourned:

Does the case fall within the Court of Appeal Mediation Scheme (CAMS) automatic pilot categories (see below)? Yes/No (delete as appropriate)

Pilot categories:

- All cases involving a litigant in person (other than immigration and family appeals)
- Personal injury and clinical negligence cases;
- All other professional negligence cases;
- Small contract cases below £500,000 in judgment (or claim) value, but not where principal issue is non-contractual;
- Boundary disputes;
- Inheritance disputes.
- EAT Appeals
- Residential landlord and tenant appeals

If yes, is there any reason not to refer to CAMS mediation under the pilot? Yes/No (delete as appropriate)

If yes, please give reason:

Non-pilot cases: Do you wish to make a recommendation for mediation?	Yes/No (delete as appropriate)

Where permission has been granted, or the application adjourned

a) time estimate (excluding judgment)
b) any expedition

Signed:
Date: 20th July 2022
BY THE COURT

Notes

(1) Rule 52.6(1) provides that permission to appeal may be given only where –
   a) the Court considers that the appeal would have a real prospect of success; or
   b) there is some other compelling reason why the appeal should be heard.

(2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.

(3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 14 days of the date of the Listing Window Notification letter and seek to agree the bundle within 49 days of the date of the Listing Window Notification letter (see paragraph 21 of CPR PD 52C).

Case Number: **CA-2022-000831 and**
CA-2022-000837