Neutral Citation Number: [2017] EWHC 2823 (Admin)

Case Nos: CO/6434/2016; CO/113/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2017

Before :

JOHN HOWELL QC
(sitting as a Deputy High Court Judge)

- -

Between :

R (on the application of HOLBORN STUDIOS LIMITED)	**Claimant**
- and -	
THE COUNCIL OF THE LONDON BOROUGH OF HACKNEY	**Defendant**
- and -	
GHL (EAGLE WHARF ROAD) LIMITED	**Interested Party**

And Between:

R (on the application of Del BRENNER)	**Claimant**
- and -	
THE COUNCIL OF THE LONDON BOROUGH OF HACKNEY	**Defendant**
- and -	
GHL (EAGLE WHARF ROAD) LIMITED	**Interested Party**

- -
- -

Richard Harwood QC (instructed by **Harrison Grant**) for the **Claimant (Holborn Studios Ltd)**
Jessica Elliot (instructed by **Shakespeare Martineau**) for the **Claimant (Del Brenner)**
Nicholas Ostrowski (instructed by **the Solicitor to Hackney Borough Council**) for the **Defendant**
Robert Walton (instructed by **Richard Max & Co**) for the **Interested Party**

Hearing dates: 25 and 26 October 2017

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Judgment Approved

John Howell QC :

1. These two claims for judicial review impugn the grant of planning permission by the Council of the London Borough of Hackney for the redevelopment of Eagle Wharf. The questions they raise include: (a) in what circumstances may an application for planning permission be amended without notification of the amendment to others and (b) what test, or tests, should the court apply when reviewing the legality of such an amendment.

2. Eagle Wharf lies on the south side of the Regents Canal in Hackney. The Wharf consists of a complex of two to three storey buildings, with a prominent chimney. It is listed as being of local architectural and historic interest and it lies within the Regents Canal Conservation Area. The Canal is itself a Site of Interest for Nature and Conservation and part of the Blue Ribbon network of waterways in London identified in the London Plan. The site also lies within a Priority Employment Area in the Council's Core Strategy (which, together with the London Plan, forms part of the development plan for the area).

3. Eagle Wharf was the site of the Regents Canal Iron Foundry, which was set up by Henry Grissell in the 1840s and which supplied structural and ornamental ironworks used in a number of prominent buildings in London. In the 1870s part of the site was developed as an engineering works and the distinctive chimney and gable ranges now seen on the site were constructed. The Wharf was subsequently used in the 1890s to make explosives. Since 1990, however, most of the premises have been refurbished for use as photographic/film studios by one of the two Claimants, Holborn Studios Limited ("*Holborn Studios*"). It is now the largest photographic studio complex in Europe. It is used for photography and film work, including fashion shoots and recording television programmes, featuring people, animals and vehicles. Holborn Studios, which now holds a 15 year lease of most of the Wharf, also grants licences to use a number of small units to other media businesses. The Wharf also accommodates a bar and restaurant with a large conservatory and extensive outdoor seating overlooking the Canal. Over 300 people are employed on the site and there are three canal boat moorings along its length.

4. On July 17th 2015 Executec applied to the Council, who are local planning authority for the Borough, for permission for the partial demolition of all the existing buildings in the Conservation Area (retaining only the chimney and a three storey building, the main section of which faces the canal) and also for full planning permission for a redevelopment to provide a mixed use scheme, containing residential, commercial and café floorspace (including the creation of a new basement, landscaped communal courtyards, a pedestrian link route to the Regents Canal, cycle parking and other associated works) ("*the 2015 application*"). The new buildings proposed ranged from two to seven storeys in height. Those facing the Canal were six storeys in height and were located on each side of the chimney which was retained as a free standing structure. The plans submitted with the application also showed six areas within the proposed new basement identified as studios, which were to be served by a goods lift from street level. Within four of the studios there were columns supporting the structure above. The Planning Statement, which accompanied the application, stated that "the commercial floorspace provided on site includes space [in the basement] for

film/photographic studios, specifically designed to meet the requirements of Holborn Studios, thereby allowing for the retention of a key local business on site."

5. The 2015 application was the subject of a number of amendments, including a number made in May 2016 (with which these claims for judicial review are concerned). In the event, on July 6th 2016, the Council's Planning Sub-Committee resolved to grant conditional planning permission to the Interested Party, GHL (Eagle Wharf Road) Limited, subject to the completion of an agreement under section 106 of the Town and Country Planning Act 1990 ("*the 1990 Act*"). That permission (which these claims for judicial review impugn) was granted on November 8th 2016. Permission to make these claims for judicial review was granted by Lang J.

6. The first of these claims is brought by Holborn Studios. Its complaints are that, unfairly and unreasonably, neither it nor the public were notified of, or consulted on, the amendments made to the 2015 application in May 2016; that the Council unfairly failed to adjourn consideration of the application by the Planning Sub-Committee to give it time to respond; that, unfairly, the Council failed to disclose unredacted two letters on which officers had relied to support their view that the proposed studio spaces in the basement were workable and that their layout was acceptable; and that the Sub-Committee acted under a mistake of fact as to the relevant expertise of the letter writers.

7. The second claim for judicial review is brought by Mr Del Brenner, the Secretary of the Regents Network, a community organisation that aims to protect London's waterways from inappropriate and negative development. He is also a Member of the Mayor's Waterways Commission. His complaint is also that, unfairly, he and other members of the public were not notified of, or consulted on, the amendments made to the 2015 application in May 2016. But he further contends that the Planning Sub-Committee failed to take into account policies in the development plan relating to the Blue Ribbon Network and that they also failed to take into account certain policies designed to protect heritage assets.

The Relevant Legal Framework

8. An application for planning permission must be made in the form and manner, with such particulars included in the application and with such accompanying documents and other materials, as is provided for in a development order made by the Secretary of State: see section 62(1) and (2) of the 1990 Act. Such a development order must also specify which such applications must be accompanied by a statement about the design principles and concepts that have been applied to the development and about how issues relating to access to the development have been dealt with: see section 62(5).

9. The current relevant development order is the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("*the 2015 Order*").

10. Article 7(1) of the 2015 Order provides *inter alia* that:

> "....an application for planning permission must—

> (a) be made in writing to the local planning authority on a form published by the Secretary of State (or a form to substantially the same effect);
>
> (b) include the particulars specified or referred to in the form;
>
> (c) except where the application is made pursuant to section 73 (determination of applications to develop land without conditions previously attached)...., be accompanied, whether electronically or otherwise, by—
>
> (i) a plan which identifies the land to which the application relates;
>
> (ii) any other plans, drawings and information necessary to describe the development which is the subject of the application;..."

11. Because the application for planning permission in this case was for a "major development" (as defined in the 2015 Order) and involved the provision of more than one dwelling and a building of more than 100m^2 in a conservation area, it was required to be accompanied by a "design and access statement": see article 9(1) and (2) of the 2015 Order. Article 9(3) of the 2015 Order provides that:

> "A design and access statement must—
>
> (a) explain the design principles and concepts that have been applied to the development;
>
> (b) demonstrate the steps taken to appraise the context of the development and how the design of the development takes that context into account;
>
> (c) explain the policy adopted as to access, and how policies relating to access in relevant local development documents have been taken into account;
>
> (d) state what, if any, consultation has been undertaken on issues relating to access to the development and what account has been taken of the outcome of any such consultation; and
>
> (e) explain how any specific issues which might affect access to the development have been addressed."

12. The importance that Parliament attaches to compliance with all of these requirements is reflected in section 327A of the 1990 Act:

> "(1) This section applies to any application in respect of which this Act or any provision made under it imposes a requirement as to–

> (a) the form or manner in which the application must be made;
>
> (b) the form or content of any document or other matter which accompanies the application.
>
> (2) The local planning authority must not entertain such an application if it fails to comply with the requirement."

13. Section 65 of the 1990 Act also makes provision for notification of the application for planning permission and for publicity to be given to it. It requires that a development order must provide that any person (other than the applicant) who is an owner of any land to which an application for planning permission relates is given notice of it and provides that such an order may require notice to be given of such an application and for publicising it: see section 65(1) and (2) of the 1990 Act. It also enables such an order to require the applicant to give a certificate as to the interests in land to which the application relates and for the form, content and service of such notices and certificates.

14. Article 13(1) of the 2015 Order provides that an applicant for planning permission must give the requisite notice to any person (other than the applicant) who is an "owner" of the land to which the application relates on the prescribed date. For this purpose an "owner" includes an estate owner in respect of the fee simple and a person who is a tenant for a term of years certain of which not less than seven years remains unexpired. The prescribed notice informs the owner that an application has been made and that, if the owner wishes to make representations about it, he should write to the local planning authority within 21 days of the date of service. By virtue of article 14 of the 2015 Order an applicant must certify in the form published by the Secretary of State (or one substantially to the same effect) that these requirements have been satisfied.

15. The publicity that is required to be given to an application for planning permission is governed by article 15 of the 2015 Order. The requirements vary according to whether or not, for example, the application is an EIA application, is for a development that does not accord with the development plan, is for a major development or is none of these. The application in this case was for a "major development". In the case of such a development, article 15 of the 2015 Order provides *inter alia* that:

> "(4).....the application must be publicised in accordance with the requirements in paragraph (7) and by giving requisite notice—
>
> (a)
>
> (i) by site display in at least one place on or near the land to which the application relates for not less than 21 days; or
>
> (ii) by serving the notice on any adjoining owner or occupier; and

> (b) by publication of the notice in a newspaper circulating in the locality in which the land to which the application relates is situated.
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> ... .
>
> (7) the following information must be published on a website maintained by the local planning authority—
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> (a) the address or location of the proposed development;
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> (b) a description of the proposed development;
>
> ....
>
> (c) the date by which any representations about the application must be made, which must not be before the last day of the period of 14 days...beginning with the date on which the information is published;
>
> (d) where and when the application may be inspected;
>
> (e) how representations may be made about the application..."

16. It may be noted that in the case of all applications for planning permission, the minimum requirements for publicity require the requisite notice to be given to any adjoining owner and occupier or by a site notice and compliance with paragraph (7): see article 15(5) of the 2015 Order. The requisite notice is one in the prescribed form (or a form substantially to the same effect): see article 15(10). The prescribed notice must inform members of the public that the applicant is applying for permission for a development which has to be described; that copies of "the application, the plans and other associated documents submitted with it" may be inspected during reasonable hours at a certain address; and that anyone who wishes to make representations should do so within a period of 21 days from the date on which the notice is displayed or served on any adjoining owner or occupier or 14 days from publication in a newspaper.

17. The importance which Parliament attached to compliance with these requirements for notification and publicity imposed by virtue of section 65 of the 1990 Act is reflected in sub-section (5) of it. That sub-section again provides that:

> "A local planning authority shall not entertain an application for planning permission....unless any requirements imposed by virtue of this section have been satisfied."

18. Article 33 of the 2015 Order also provides (under powers conferred by section 71(2)(a) of the 1990 Act) that a local authority must, in determining an application for planning permission, take into account any representations made within the periods described above where notice of the application has been given by site display, service on adjoining owners and occupiers or published in a newspaper.

19. This requirement supplements the basic provision in section 70 of the 1990 Act. That section provides that:

> "(1) Where an application is made to a local planning authority for planning permission—
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> (a) .....they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or
>
> (b) they may refuse planning permission.
>
> (2) In dealing with an application for planning permission....the authority shall have regard to—
>
> (a) the provisions of the development plan, so far as material to the application,
>
> ... .; and
>
> (c) any other material considerations."
>
> (3) Subsection (1) has effect subject to section 65 and to the following provisions of this Act, [and] to sections 66, 67, 72 and 73 of the Planning (Listed Buildings and Conservation Areas) Act 1990."

20. It may be noted that the power to grant planning permission is thus made subject to both section 65 and section 327A of the 1990 Act (referred to above). As is apparent, those require the local planning authority not to entertain any application which does not comply with the specified requirements relating to the content of the application and to the notification and publicity to which the application must be subject. A local authority has no power to deal with any application which does not comply with them.

21. There is no provision in the statutory scheme for making amendments to any application for planning permission.

22. The statutory requirements for notification and publicity of applications for planning permission are not intended, however, necessarily to be exhaustive of the steps that may be taken to encourage public participation in planning decisions.

23. Section 18 of the Planning and Compulsory Purchase Act 2004, for example, requires local planning authorities to prepare a "statement of community involvement" that includes "a statement of the authority's policy as to the involvement in the exercise of the authority's functions [under Part 3 of the 1990 Act] of persons who appear to the authority to have an interest in matters relating to development in the area". The authority must follow their published policy in any event unless there are good reasons for not doing so: see *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245, per Lord Dyson JSC at [26]. In some cases, however, parts of a statement of community involvement may also give rise to a legitimate expectation, that the authority will do what they have promised do, if the

assurance is clear, unambiguous and devoid of relevant qualification: see *R (Majed) v Camden LBC* [2009] EWCA Civ 1029, [2010] JPL 621, per Sullivan LJ at [12]-[15]; *R (Gerber) v Wiltshire Council* [2016] EWCA Civ 84, [2016] 1 WLR 2593, per Sales LJ at [14] and [40].

24. The Council has adopted a Statement of Community Involvement. It provides that, in the case of "major applications" (of which the application in this case was one), the Council would require notice in the press, on site and to neighbours to be given as well as on their website. The statement also described "how the community is notified of planning applications" in Table 7. This stated that:

> "Hackney's website contains details of all applications including copies of all associated documents and drawings."

25. The Council's Statement of Community Involvement also provided that "the Council will consider all comments received up until the time a decision is made as far as reasonably possible". These "can be made by anyone" on line, by writing a letter or completing a submission form. It also stated that:

> "Comments are kept on the planning file....Once submitted to the Council, letters of objection or support become public documents which other interested parties are entitled to inspect."

26. In respect of changes to what an applicant has proposed, it was said that:

> "The Council may negotiate with the applicant to revise a scheme so that it is acceptable in policy terms. Changes may be made to resolve objections. In these cases there is no legal requirement to re-consult stakeholders, although the Council may re-advertise and re-consult for a 14 day period."

27. The Statement also provided that, if the Planning Sub-Committee are making the decision, those who have commented will be informed of the date of the meeting and how they can make representations at the meeting. The Statement referred to a leaflet available on line that gave further details about speaking at such meetings. This leaflet, "Have your say at the Planning Sub-Committee", stated that the total time that would be given to those who registered to speak at the meeting (either for or against the planning application) would be limited to five minutes each for supporters and objectors (which had to be divided among those wishing to speak). It further stated that:

> "The comments that you have sent into the Planning Service will be summarised in the report to the Planning Sub-Committee. New comments cannot be raised at the meeting. Only in exceptional cases will the Planning Sub-Committee consider additional comments submitted after publication of the agenda."

The Factual Background

28. The 2015 application was flawed in that it was accompanied by a certificate stating inaccurately that Executec was the only owner of the land to which the application related. In fact the Interested Party was the freehold owner of the land. The application was nonetheless advertised by site notice and press advertisement on September 7th 2015. The "statutory consultation period" was between September 7th 2015 and September 29th 2015. In addition to site notices and a press advert, letters were sent to 368 neighbouring properties. In addition other bodies and groups were consulted. These included, for example, Historic England, the Council of the London Borough of Islington (the local planning authority for the land on the other side of the Regents Canal) and the Regents Network.

29. 132 letters of objection and 2 letters of support were received from those having an interest in the property and other local people. Among those who also made representations objecting to the proposals was Mr Del Brenner on behalf of the Regents Network. Objections were also submitted by Mr Vincent McCarthy, a part time director at Holborn Studios and a full time consultant on photographic and moving image studio design (who said that he had completed the whole design for five major complexes and had been consulted on studio design in major cities in England as well as on projects in Spain and Cyprus). He objected in relation to the design of the basement accommodation on the ground that "the plans as presented cannot provide a large photographic and moving studio design complex". He stated that, of the six studios, only three could be used for low value, headshots and still life; that two would be unusable given the proposed structural columns and restricted height; and that these two features would constrain the use of many of the other studios. In addition he suggested that a complex of this size had to be capable of handling up to 750 people at any one time using vehicles, animals and large items and it would need access by a ramp from street level. He also disputed the applicant's claim that the outline design and layout of the studios had been "developed in conjunction with Holborn Studios in order to meet their specific needs", enclosing his note of comments in response to the plan sent to him in January 2015 (which indicated that the minimum working height required would be 6m and, for the largest studio, 8m). The plans submitted only provided for a ceiling height of 5m and a vehicle lift.

30. The 2015 application was subsequently amended on September 23rd 2015 to substitute the Interested Party as the applicant. Notice of the amended application was given to Holborn Studios indicating that it had 21 days within which to make representations on the proposed development. Holborn Studios duly made representations on October 14th 2015 objecting to the redevelopment proposals. It referred to Mr McCartney's report that the studio space did not meet its requirements and that the replacement floorspace was not appropriate in terms of quality, configuration and size and claimed that the existing cluster of creative and media firms would be driven out. It also raised other objections to the proposed development.

31. Although the application was amended to substitute the Interested Party as the applicant, no site notice or press advertisement was provided and no invitation to make representations was given to persons other than Holborn Studios.

32. On January 6th 2016 the Interested Party's planning consultant wrote to the Council to set out its response to the comments made to the Council in response to the consultation which had been received as at December 16th 2015. Among other matters it was again asserted in the letter that the basement floorspace "had been designed to meet the needs of photographic/film studios, in conjunction with Holborn Studios as the existing occupier" and that "given that we have consulted with Holborn Studios regarding the commercial floorspace, it is disappointing that they have sought to object to the application." No reference was made to the adverse comments that had been made by Mr McCarthy on the plans before they were submitted nor was any attempt made to address the criticisms in his representation made in September 2015. The agent's letter stated that:

> "we are however confident that the commercial floorspace is fit for purpose as the Applicant has in fact been approached by other film/photographic studio occupiers who have identified the proposed space as being wholly appropriate for their needs, and who have confirmed they would be interested in occupying the space should the existing occupier see the need to vacate - please see letters at Enclosure 2 to this letter.....it is considered that the commercial space provided on the site is wholly suitable for use as evidenced by interest from other parties."

33. The two letters attached evidencing that interest were from Gulf Atlantic Pictures Limited and Mr Sam Robinson.

34. This letter of 11 pages with appendices, including a revised ground floor plan, was not placed on the Council's website or in its register. The first occasion on which the Claimants saw it was when it was produced during the course of the hearing of these claims for judicial review. The circumstances in which Holborn Studios came to learn of the two letters and their contents are described below.

35. The Interested Party sought to amend the application again on May 25th 2016. The changes proposed necessitated the substitution of a new planning application form, which, while maintaining the same brief description of the proposals, involved changing (among other matters) the amount of commercial floorspace, the number and types of dwellings and the plans describing the proposed development. Only the drawings of the existing buildings and the demolition plans remained unchanged: 16 new plans to describe the amended proposed development were submitted together with a series of amended documents in substitution for those originally submitted. These substituted documents included a floorspace and accommodation schedule, a Planning Statement, a Design and Access Statement, a Transport Statement, a Framework Travel Plan, a Heritage Statement, a Daylight and Sunlight Analysis, an Ecological Appraisal, an Energy Statement, a Sustainability Statement, an Air Quality Assessment, an Air Quality Neutral Assessment, a Noise Impact Assessment, a Viability Report for Employment Floorspace and a Community Infrastructure Levy Additional Information Form. The application form, plans and documents submitted did not identify the changes from the application form, plans and documents for which they were substituted.

36. In summary the main changes proposed involved (i) an increase in the amount of B1 floorspace proposed of 1,426m^2 (an increase of 34%, from 4,218m^2 to 5,644m^2); (ii) a

reduction in the number of residential units proposed by 14 units (a reduction of 22%, from 64 units to 50 units) and a change in the relative proportions of different sized units; (iii) the deletion of all the affordable housing previously proposed (14 units); (iv) the removal of the structural columns in the studios proposed in the basement; and (v) changes to the external appearance of one of the buildings facing the Canal by the removal of six balconies. The amendments were accompanied by a letter from the applicant's agent that referred to the first two of these main changes but not the latter three.

37. The amended Design and Access Statement that accompanied the amendments stated that one of "the key principles for the proposed development" was the "provision for the Holborn Studios to be accommodated at the heart of the development with new fit-for-purpose modernised floorspace". It claimed that the outline design and layout had been developed in consultation with Holborn Studios to meet their specific needs and that this included "a proposed floor to ceiling height of 5m together with an arrangement of structural columns to provide the free space needed for photographic white infinity spaces or 'coves'." The new basement plan showed no columns within the six studios. The new Planning Statement similarly claimed that provision had been made in the basement for film/photographic studios with the outline design and layout having been developed in consultation with Holborn Studios to meet their specific needs and that one of the planning benefits of the proposal was that the studios had been specifically designed to meet its requirements, "thereby allowing for the retention of a key local business on site".

38. The revised application form contained a certificate stating that Holborn Studio Limited had been notified of the application on May 24th 2016. That was factually false. In fact no notice was given of the revised application to them. There was also no press advertisement, no site notice or any other consultation about the revised application.

39. The Council say that the revised application documents were "appended" to their website and the earlier documentation removed on June 9th 2016.

40. There is no cotemporaneous evidence of any consideration given by the Council to the question whether the public should be consulted about the amendments to the 2015 application. Nor has the Council filed any witness statement explaining why it was decided that no such consultation was required.

41. By letter dated June 28th 2016 the Council informed those persons who had made comments on the application that the Council's Planning Sub-Committee would consider the application for planning permission on July 6th 2016 at which registered objectors and supporters would be given up to five minutes "to summarise their written representations". It attached the leaflet, "Have your say at the Planning Sub-Committee" (referred to in paragraph [27] above), describing the limitations on the making of new points. It indicated that the agenda and the report to the Sub-Committee were available on the Council's website. The letter was attached to an e-mail to those for whom the Council had an e-mail address and it was sent by second class post to others. I was informed by Ms Jessica Elliott, who appeared on his behalf, that Mr Brenner received no notification but learnt of the meeting from others.

42. The report to the Planning Sub-Committee ("*the Report*") referred to a number of "post submission revisions" to the 2015 application. These included "submission of evidence of interest from other photographic studios".

43. The Report stated *inter alia* that:

> "6.3.7 DM 16 requires 10% of new commercial floorspace to be affordable....Though general concern has been raised by the existing occupiers, Holborn Studios, the applicant has provided adequate evidence that the new floor space is suitable for the creative industries, with the proposed basement level accommodation specifically tailored towards meeting the needs of either the existing occupier, or an alternative film / photographic studio tenant."

44. When dealing with the Quality of Accommodation in the Commercial Unit, the Report stated that:

> "6.5.2 The proposed basement and a portion of the ground floor within the south eastern corner would be targeted specifically towards use as photographic / film studio related uses while the remaining floorspace would be for a more general B1 office related employment use. Policy DM15 requires all new commercial floorspace to be of a high quality with good access to natural light and that it should incorporate a range of unit sizes and types and be suitable for subdivision flexibility.
>
> 6.5.3 At basement level, the studio space has been designed with a 5m high ceiling height and with limited access to natural light in an effort to purposefully design this for the intended film / photographic use which currently operates at the site. Despite this, Holborn Studios (the existing occupier) have objected to the proposals for a number of reason, one of which relates to the quality of this studio space. More specifically Holborn Studios consider that the studio space is not acceptable for the intended film and photographic use given the insufficient height, location of structural poles and general sizes of the studios (among others). In response to this, the applicant has provided letters of interest from two photographic / film studios, both of which state that the proposed studio spaces are workable and that the layout is acceptable. As such, while Holborn Studios objections are acknowledged, the letters of interest provided suggest that the studio space is of a quality which would support the retention of the existing photographic / film studios use on the site. The quality of the proposed studio floorspace is therefore considered to be acceptable as it would appear to lend itself to the retention of the existing photographic / film studios use (even if through a different occupier).

> 6.5.5 As a result of the above, the quality of the commercial accommodation is considered to be acceptable and compliant with policy DM15."

45. Among the Report's conclusions was that the proposals provided "for the continued occupation of the site (following redevelopment) by specialist film & photographic studio occupiers."

46. In the event it was only after obtaining and examining the Report that Holborn Studios first learnt that the 2015 application had been amended in May 2016 and that the applicant had provided the letters of interest on which the Report relied. On June 30th 2016 Holborn Studios sought copies of two letters referred to in the Report; it also stated that it would appear that the most recent plans would be impossible to build without structural support; and it sought an adjournment of the Sub-Committee meeting to allow their planning consultants to consider the report and the new planning documents and to clarify that point among others. The Council sent no reply to that request for an adjournment.

47. On July 1st 2016 Holborn Studios made an urgent request for the two expressions of interest under the Freedom of Information Act. On July 6th 2016 at 3.57pm, some two and a half hours before the Sub-Committee meeting, the Council sent an e-mail to Holborn Studios attaching versions of the letters that redacted any information in them that might have identified their authors and, in doing so, removed any information that might have identified their experience or expertise. The delay in their supply and the redactions made were the result of the Council first consulting the applicant as, so it was said, the letters had been "submitted in confidence". In fact they had been submitted to the Council with the letter dated January 6th 2016 to which I have referred and neither that letter, nor its enclosures (including the two letters), were stated to have been submitted in confidence to the Council[1].

48. The Planning Sub-Committee met at 6.30pm on July 6th 2017. They were supplied with an "Addendum Sheet". This indicated that 8 additional letters of objection had been received, briefly summarised their contents and provided some amended paragraphs to be substituted for those in the Report. Those objections included objections related to the lack of affordable housing within the proposals and the ceiling height, column placement and lift size in the basement.

49. The Planning Officer presented the Report. The Sub-Committee then permitted the objectors collectively and the applicant, five minutes to make representations. Three objectors spoke: Mr Vincent McCartney, Mr William McCartney (Holborn Studio's Managing Director) and Mr Brenner. Both representatives of Holborn Studios stated that the proposed studios would be unusable. Mr Vincent McCartney drew attention to the absence of any alternative beam to support the structure and Mr William McCartney stated that the omission of the columns from the proposed plans raised doubt about the validity of the proposed use. He also addressed what he considered to be some of the planning objections to the proposals. Mr Brenner was able to complain that, given the extent of the changes made to the application, there should have been

[1] I was informed by counsel that, at some unspecified date after they had been submitted, the applicant claimed that they had been submitted in confidence. There is, however, no evidence of any such conversation or letter making the claim.

re-consultation, referring to a decision of the Supreme Court, before the Chairman of the Sub-Committee stopped the presentation of objections given the time limit. Mr Del Brenner objected to the application being considered given the lack of consultation about the substantial revisions to the application and supporting documents.

50. The minutes of the Sub-Committee meeting record that:

> "5.5 In response to concerns raised by the objectors regarding the Supreme Court ruling, the Planning Officer stated that an amendment to the scheme had been submitted in May 2015, requesting a change of use from residential to commercial floor space. The Planning Officer advised that not all revisions to an application required re-consultation and it was considered that the proposed revisions would not cause any significant adverse impacts and would create a positive change, with additional employment space provided.
>
> 5.6 Discussion took place surrounding the proposed employment space and it was explained that the levels would be safeguarded by policy and should increase as a result of providing more open and flexible uses.
>
> 5.7 Discussion took place regarding issues surrounding the columns, as raised by the objectors. In response, it was explained that the transfer slab would only be used in the plant room with 3 columns, allowing the provision of open plan workspaces.
>
> 5.8 In response to a question regarding the lack of affordable housing provision, it was explained that the scheme had been subject to a viability assessment and it was considered acceptable given the level of affordable workspace being provided.
>
> 5.9 Discussion took place surrounding the drive access to the site and it was explained that there would be a lift provided in order to access the basement areas, with a width of 5m. The objectors stated that they would require a minimum width of 6m in order to access these areas. In response, the applicants stated that they had sought assurances from other studios who confirmed that a 5m width lift would be adequate for this type of use."

51. The Sub-Committee voted to grant conditional planning permission subject to the completion of a section 106 agreement. Planning permission was eventually granted on November 8th 2016.

Whether further consultation was required given the amendments made to the 2015 application in May 2016

(i) Submissions

52. On behalf of Holborn Studios, Mr Richard Harwood QC contended that, unfairly and unreasonably, the Council had failed to consult Holborn Studios and the public about the amendments proposed in May 2016 given the substantial alterations to the May 2015 application which they involved.

53. Mr Harwood submitted that, as a matter of fairness, Holborn Studios should in any event have been consulted given its expertise and interest and the assertion that the plans were designed to meet its concerns: cf *R (Wet Finishing Works Ltd) v Taunton Deane Borough Council* [2017] EWHC 1837 (Admin) at [59]-[69]. But in any event, so he submitted, the decision not to consult Holborn Studios on the amendments was vitiated by the fact that the Council had thought that Holborn Studios had in fact been notified by the applicant of the amendments in May 2016 (on the basis of the certificate with which it had been supplied). Had the Council been aware that the certificate was wrong they would most probably have required notification to be given. At least consideration would have had to be given to whether Holborn Studios should be consulted on changes designed to meet part of their objection given their expertise in studio design and management. The failure to notify the company of the amendments in May 2016 substantially prejudiced its ability to respond to them and the Council then unfairly refused to adjourn consideration of the application to give it more time to respond. Had it been given such time it would have been able to obtain a report by a structural engineer as it had done subsequently. This showed that the ceiling height necessary for studio use which the Council had regarded as acceptable would not be achieved.

54. Mr Harwood also contended that such was the extent of the changes made by the amendments in May 2016 that the Council had to re-consult the public. Not to do so was unfair and unreasonable. The original application had attracted objections based, for example, on the insufficient level of affordable housing proposed. Its complete deletion was a matter on which the public should have been given an opportunity to make representations. Holborn Studios was severely prejudiced by the failure.

55. On behalf of Mr Del Brenner, Ms Jessica Elliott contended that the Council had no unfettered discretion in considering whether or not to re-consult on a revised application. A duty to consult may be generated by statute but the common law duty of procedural fairness will inform the manner in which it is to be conducted: see *R (Moseley) v Haringey Borough Council* [2014] UKHL 56, [2014] 1 WLR 3947, per Lord Wilson at [23]. Whether re-consultation is required is determined by whether fairness requires it and that depends on what the court finds fairness to require having examined the nature and extent of the changes involved: see *Keep Wythenshawe Special Ltd v NHS Central Manchester* [2016] EWHC 17, [2016] 148 BMLR 1, ("*Keep Wythenshawe Special")* per Dove J at [74]-[75]. Consultation must "let those who have a potential interest in the subject matter know in clear terms what the proposal is": see *R v North and East Devon Authority ex p Coughlan* [2001] QB 213 per Lord Woolf MR at [112]. The original consultation was not on what the proposal eventually considered by the Planning Sub-Committee was.

56. Ms Elliott relied on the fact that a new application form was submitted; the extent of the changes proposed to the mix of uses, the plans and other documents; and in particular on the loss of all the affordable housing, which was a fundamental aspect of the original proposal, the insufficient levels of which in the 2015 application was also one of main issues raised (including by Mr Brenner).

57. Given the nature and extent of the changes, she submitted that the initial consultation did not relate to what the amended proposals were and that those involved did not have an opportunity to provide an intelligent response; what was approved was not in substance that which had been applied for. The fairness of the initial consultation was undone by the subsequent changes. Had the amendments been consulted on, so she submitted, it is highly likely, given the high levels of objections previously, that consultees would have made extensive and important further objections to the amended application.

58. On behalf of the Council, Mr Nicolas Ostrowski contended that in this case there was no requirement for any further consultation about the amendments to the 2015 application made in May 2016. The test, whether re-consultation is required, is whether there is a substantial or fundamental difference proposed and that is a matter for the judgment of the local planning authority with which the court will not normally interfere unless that judgment is manifestly unreasonably exercised or is irrational: see *Bernard Wheatcroft v Secretary of State for the Environment* (1982) 43 P&CR 233 at p241; *R (Wet Finishing Works Ltd) v Taunton Deane Borough Council* supra at [45]-[48]. The position might be different in other areas of law but, in matters of development control, whether consultation may be required will involve questions of planning judgment that a court is ill-equipped to make.

59. Mr Ostrowski submitted that experienced planning officers took the decision that the amendments made in May 2016 did not warrant a re-consultation process and that this decision had been upheld by the Planning Sub-Committee. He submitted that any such decision was not irrational or *Wednesbury* unreasonable. The amendments were modest and did not alter the substance of the application; its physical extent was unchanged; apart from the removal of some balconies on the Canal elevations and some columns in the basement, the changes were only to the internal use and arrangement of the buildings; they would not have resulted in any adverse impacts on the Claimants or any person who had not already been consulted on the scheme; and in fact they created additional employment floorspace, and an increased proportion of affordable commercial floorspace, in an employment priority area in accordance with the Council's policies.

60. In any event, so Mr Ostrowski submitted, neither Holborn Studios nor members of the public, such as Mr Brenner, who had already made substantial objections to the proposed development, were substantially prejudiced, given that they were notified in advance of the meeting of the Planning Sub-Committee and of the availability of the Report (which addressed the application as amended) on the Council's website where the amended application could also be examined. 121 e-mails were sent attaching the letter giving notice of the meeting and of the availability of the Report, and 14 of those letters were also sent by second class post, on June 28th 2016. Those informed had the opportunity to make representations on the revised application in writing. Both Claimants did so and also addressed the meeting of the Planning Sub-Committee on July 6th 2016. The representations made were considered, including complaints

about the absence of re-consultation on the amendments made to the application in May 2016, and all the relevant issues, including the loss of affordable housing, were addressed by that Sub-Committee. There is nothing to suggest, so he contended, that that issue was not properly weighed in the balance by members. They also considered Holborn Studio's objections relating to the ceiling height and the presence or absence of columns in, and access to, the basement. The decision not to adjourn the meeting as requested, whether taken by officers or members, was an exercise of discretion with which the court should be slow to interfere. That it was not irrational can be seen from the structural engineer's report that Holborn Studios has now obtained which takes things no further forward. It simply states that the amendments do not accurately set out the ceiling height of the proposed basement studios.

61. Moreover, and in any event, so Mr Ostrowski contended, it was wrong to suggest that the studio space was a critical issue in the application. The Planning Officer told members of the Planning Sub-Committee at the meeting that, although the basement space was targeted towards use as photographic studios, planning policy could not dictate retention of a specific occupier or the reintroduction of space specifically catering from such an occupier's needs. It did not matter whether the basement was suitable for photographic/film studios. The important point was that the advice was that the proposed development was capable of providing for a wide range of commercial occupiers, including those within the photographic studio trade, and, therefore, satisfied planning policy. The viability report submitted by the applicant is consistent with the Council's view that the employment floorspace was adequate to meet the needs of users. If Holborn Studios had been re-consulted or given further time to consider the proposals, there is no suggestion that they would have shown that they were inconsistent with policy.

62. On behalf of the Interested Party, Mr Robert Walton supported the Council's case. He submitted that the decision not to re-consult was one for the Council exercising its discretion pursuant to its Statement of Community Involvement. It could lawfully do so as long as there was no prejudice to third parties. The Council's decision not to do so accorded with the well-established principles set out in *Bernard Wheatcroft v Secretary of State for the Environment* supra: cf also *R (Coronation Power Limited) v Secretary of State for Communities and Local Government* [2011] EWHC 2216 (Admin) at [23]–[25]. The crucial question is whether any change proposed is fundamental in land use terms and that is a matter for the local planning authority to determine.

63. Mr Walton also submitted that there was no requirement to notify Holborn Studios of the amendments to the application. But Holborn Studios was able in any event to make written and oral representations on the amended scheme. The basement was suitable for a wide range of uses including studios. The Report stated that "the applicant had demonstrated that other cultural industries have expressed an interest to occupy the space" and the Sub-Committee concluded that the basement floorspace would be usable as proposed. Mr Brenner had not explained what additional points he would have wanted to have made.

(ii) In what circumstances planning permission may be granted for a development other than that for which an application was initially made and the test or tests which the court should apply when reviewing the legality of the grant of such a permission

64. In my judgment it is necessary to distinguish the substantive and the procedural constraints on the power of a local planning authority to grant planning permission for a development other than that for which an application was originally made.

65. There are three ways in which a planning permission may be granted for such a development: the initial application may itself be amended; permission may be granted only for part of the development applied for; and permission may be granted subject to a condition that modifies the development applied for. Quite apart from any requirements for notification and consultation, there are substantive limitations on the changes that can be effected by such methods. These limitations have been variously described but they are all concerned with whether the result is the grant of permission for a development that is in substance something different from that for which the application was initially made. That is because the legislation only gives power to local planning authorities to determine the application describing the development for which permission is sought which was made to them in the prescribed form and manner: see paragraphs [8]-[12] and [20] above[2].

66. Although the relevant legislation contains no provision permitting the amendment of an application for planning permission, courts have recognised that amendments to such applications may be made. Initially the Appellate Committee so held in the context of an application for the approval of reserved matters that did not require public consultation: see *Inverclyde District Council v Lord Advocate* (1981) 43 P&CR 375 per Lord Keith at p397. Subsequently it was held that it was also possible to amend an application for planning permission, as it would not be in the public interest to deter developers from being receptive to sensible proposals for change, although the change might be so substantial that it would be impermissible even if there was consultation about it: see *British Telecommunications Plc v Gloucester City Council* [2001] EWHC Admin 1001, [2002] 2 P&CR 33, per Elias J at [33]-[37]. The substantive limitation on the nature of the changes that may be made by an amendment appears to be whether the change proposed is substantial or whether the development proposed is not in substance that which was originally applied for, whether or not others have been consulted about the change: see *British Telecommunications Plc v Gloucester City Council* supra at [38]-[40]; *Breckland District Council v Secretary of State for the Environment* (1993) 65 P&CR 34 at p41.

67. A planning authority also has power to grant planning permission for part of the development applied for under section 70(1)(a) of the 1990 Act and to refuse permission for another part under section 70(1)(b) where such parts are separate and divisible: see section 70(1) (quoted in paragraph [19] above), *Kent County Council v Secretary of State of State for the Environment* (1977) 33 P&CR 70 at pp76-77. In such a case the development for which permission is granted is the same as that in part of the application but there remains a question (apart from one about consultation about such a partial grant) whether the permission would be for a development that would be substantially or significantly different in its context from that which the application envisaged: cf *Bernard Wheatcroft Limited v Secretary of State for the*

[2] See also section 77(1) and (4)(a), and section 79(1) and (4)(a) of the 1990 Act

Environment supra at p240, *Johnson v Secretary of State for Communities and Local Government* [2007] EWHC 1839 (Admin) at [25].

68. A local planning authority also has power to grant planning permission on an application subject to conditions: see section 70(1)(a) of the 1990 Act (quoted in paragraph [19] above). Such a condition may have the effect of modifying the development applied for, whether by limiting or enlarging it or by changing its nature to some extent. The so-called *Wheatcroft* principle is that the result of imposing such a condition must not be a development which in substance is not that which was applied for: see *Bernard Wheatcroft Limited v Secretary of State for the Environment* supra at pp240-1. Thus on an application for planning permission without complying with conditions subject to which a previous planning permission is granted under section 73 of the 1990 Act, the authority may impose different conditions but only if they are conditions which could lawfully have been imposed on the original planning permission in the sense that they do not amount to a fundamental alteration of the proposal put forward in the original application: see *R v Coventry City Council ex p Arrowcroft* [2001] PLCR 7 per Sullivan LJ at [29] and [33]; *R (Wet Finishing Works Limited) v Taunton Deane District Council* supra per Singh J at [42] and [45]-[48].

69. These cases on section 73 of the 1990 Act illustrate the substantive limitation on the extent to which planning permission may be granted other than for the development for which the application for planning permission was initially made. The limitation applies even though applications for planning permission under that section require notification and publicity: see paragraphs [10], [15] and [16] above.

70. There are, however, also procedural constraints on granting planning permission for a development other than that for which an application was originally made. Applications for planning permission have to be notified to owners of the land (other than the applicant) and to be publicised and any representations duly made as a result have to be taken into account when a local planning authority determines an application: see paragraphs [13] to [17] and [18]. The application may not be entertained unless the requirements for notification of, and publicity about, the application have been complied with: see paragraphs [17] and [20] above. It is self-evident that any subsequent amendment to an application or the imposition of a condition that has the effect that the permission is granted for a development which is not that for which the application was made may deprive those notified and the public of the opportunity to make representations that the statutory scheme requires them to be given in relation to the application if it is to be entertained and determined.

71. Accordingly, in addition to substantive limitations on the changes that may be made, amendments cannot be made that would have the effect of sidestepping the rights of such third parties: their interests must also be fully protected when an amendment is under consideration: see *British Telecommunications Plc v Gloucester City Council* supra at [34], [36] and [40]; cf *Breckland District Council v Secretary of State for the Environment* supra at p43. The same is the case when permission is granted only for part of what an application for planning permission was for or when it may be granted subject to a condition which may alter what such an application was for: see eg *Granada Hospitality Limited v Secretary of State for the Environment, Transport and the Regions* (2001) 81 P&CR 36 at [73]; *R (Coronation Power Limited) v Secretary of State for Communities and Local Government* [2011] EWHC 2216 (Admin) at [23]-[29].

72. In *Bernard Wheatcroft Limited v Secretary of State for the Environment* supra, however, Forbes J conflated the substantive and procedural constraints on the power of a local planning authority to grant planning permission for a development other than that for which an application was originally made. Having decided that permissible changes made by the imposition of a condition were not limited to cases in which the application contained separate and divisible parts, Forbes J stated (at p241):

> "I should add a rider. The true test is, I feel sure, that accepted by both counsel: is the effect of the conditional planning permission to allow development that is in substance not that which was applied for? Of course, in deciding whether or not there is a substantial difference the local planning authority or the Secretary of State will be exercising a judgment, and a judgment with which the courts will not ordinarily interfere unless it is manifestly unreasonably exercised. The main, but not the only, criterion on which that judgment should be exercised is whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation, and I use these words to cover all the matters of this kind with which Part III of the Act of 1971 deals.
>
> There may, of course, be, in addition, purely planning reasons for concluding that a change makes a substantial difference."

73. In my judgment this conflation of the substantive and procedural constraints on the powers of the local planning authority is flawed. It is quite possible for a person to be deprived of an opportunity of consultation on a change which would not result in a permission for a development that is in substance not that which was applied for. Thus, for example, a proposed change to the external appearance of a new building or to the proposed access to it might be said not to result in a development that is in substance different from that applied for, or not to involve a "substantial difference" or a "fundamental change" to the application, but it may still be a change about which persons other than the applicant may want to make representations and would be deprived of the opportunity to do so if not consulted about it. On the other hand to say that any change about which others may want to make representations is to be classified as one that involves a "fundamental change" or a "substantial difference" to the application, or one which makes the development something that was not in substance what was applied for (as would be the result of using the loss of an opportunity to be consulted as the "main criterion" of whether or not there is such a change), deprives such terms of meaning.

74. Conflating these two constraints also obscures the different public interests, in the light of which each constraint should interpreted, which pull in different directions. It is no doubt in the public interest that the substantive constraint on the changes that may be made to the application which a local planning authority has the power to consider should not be overly severe. A liberal approach may enable planning permission to be granted without the need for a further new application to be made and without further delay and costs for the applicant, the authority and others. On the other hand a relaxed approach to the procedural constraint on the making of changes

would have consequences that would subvert the requirement for notification of, and publicity for, an application for planning permission and the requirement to take representations duly made as a result into account.

75. In this case the relevant issue concerns the circumstances in which a person is to be regarded as having been deprived of the opportunity of consultation which should have been given if an amendment is to be made.

76. When there is a statutory duty of consultation, the question whether re-consultation is required if there is a change to the proposal on which there has been consultation depends on what fairness requires. That will depend *inter alia* on the purposes for which the requirement of consultation is imposed, the nature and extent of any changes and their potential significance for those who might be consulted: see eg ***R (Moseley) v Haringey LBC*** supra per Lord Wilson JSC at [23]-[24], per Baroness Hale and Lord Clarke JSC at [44]; *Keep Wythenshawe Special* supra per Dove J at [73]-[75].

77. There are, of course, different types of consultation undertaken by public authorities. This case is not concerned, for example, with a consultation designed to assist an authority in developing a policy, where a number of options may be suggested, and where any proposal is liable to evolve significantly once due consideration has been given to the responses to the consultation. In this case the consultation required under the various enactments I have referred to is about whether or not planning permission should be granted on a particular application for a specific development which it defines and, if so, subject to what conditions and subject to what (if any) agreements.

78. The purpose of the relevant requirements for consultation in this case is not only to contribute to better decision-making when that application is considered, by ensuring that the decision-maker receives all relevant information, but it is also to ensure procedural fairness for those whose interests may be adversely affected by any grant of planning permission and to provide for public participation and involvement in decision-making on applications for such permission.

79. In considering whether it is unfair not to re-consult, in my judgment it is necessary to consider whether not doing so deprives those who were entitled to be consulted on the application of the opportunity to make any representations that, given the nature and extent of the changes proposed, they may have wanted to make on the application as amended.

80. I do not accept that the test for whether re-consultation is required if an amendment is proposed to an application for planning permission is whether it involves a "fundamental change" and involves a "substantial difference" to the application or whether it results in a development that is in substance different from that applied for. These are three potentially different tests that have been suggested as stating the substantial constraint on what changes are impermissible. Depending on how each is interpreted, it is possible that the test would indicate re-consultation was not required when fairness would require it. As I have explained, even if the proposed amendment was not of any these types, a person may still have representations that he or she may want to make about the changes, given their nature and extent, if given the opportunity. In my judgment it is preferable to ask what fairness requires in the circumstances.

81. Although a local planning authority has a discretion whether to accept an amendment to a planning application and a discretion whether or not to grant planning permission for only part of what the application was for or subject to any condition, in my judgment what fairness may require of them in the circumstances is a question which it is ultimately for the court itself to determine. It is not the function of the court merely to review the reasonableness of a decision-maker's judgment of what fairness required: see eg *R (Osborne) v Parole Board* [2013] UKSC 61, [2014] AC 1115, per Lord Reed JSC at [65].

82. Mr Ostrowski accepted that what fairness may require in the circumstances is normally a matter for the court to determine but he submitted, however, that the question in this case, whether re-consultation was required in relation to an amendment of an application for planning permission, was a matter for the decision of the local planning authority subject only to review on the ground of unreasonableness or irrationality, relying on the rider added by Forbes J in *Bernard Wheatcroft Ltd v Secretary of State for the Environment* supra at p241 (which I have quoted in paragraph [71] above).

83. In that case the issue did not arise for determination: the only issue was whether there was power to impose a condition on a planning permission that altered the development applied for in cases in which the application did not contain separate and divisible parts. Moreover no consideration was given to whether or not the decision could be so unfair as to be unlawful: it appears to have been simply assumed that the only ground on which the decision to impose a condition might be impugned was one of manifest unreasonableness. But planning decisions can be impugned not merely on the ground that any discretion was exercised unreasonably but also on the ground that they were otherwise unlawful or procedurally unfair. That does not mean, of course, that it follows that what Forbes J said was the test is not the test which the court should apply.

84. Mr Ostrowski submitted that, whatever the general law might be in relation to the court's function in determining what fairness requires, when considering whether to permit an amendment to an application for planning permission without further consultation, an authority will have to consider matters of planning judgement as well as fairness. If this means that an authority may decide not to notify and consult others about any amendment because in their view nothing anyone could say might have any effect on what their decision will ultimately be in any respect, it is no ground for distinguishing such a planning decision from any other decision that any authority takes about whether re-consultation is required (whose lawfulness depends on what the court determines fairness to have required in the circumstances).

85. Such a decision may also be thought to be one which requires more careful scrutiny than merely asking whether it is irrational or manifestly unreasonable, something that would mean that the more dogmatic an authority is about the strength of its own provisional views the less the law would in practice require it to listen to others. That runs counter to one of the purposes of consultation, which is to enable the authority to

ascertain whether anything can be said that may alter what it might otherwise decide in some respect[3].

86. It must nonetheless be borne in mind that what fairness requires in the circumstances falls to be determined by reference to the circumstances as they appeared to the authority at the relevant time (or as they ought to have appeared had the authority not acted unreasonably) and that it is not sufficient to establish that a decision is unlawful merely to show that it would have been better or fairer for there to have been re-consultation. "The test is whether the process has been so unfair as to be unlawful": see *Keep Wythenshawe Special* supra per Dove J at [77] and [87]; *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441, [2016] EWCA Civ 441, at [60].

(iii) Whether it was unlawful for the Council not to have re-consulted generally given the amendments made in May 2016 to the 2015 application

87. As I have mentioned, there is no contemporaneous evidence of any consideration given by the Council to the question whether the public should be consulted about the amendments to the application in May 2016. Nor has the Council filed any witness statement explaining why no such consultation was thought to be needed.

88. The minutes of the meeting of the Planning Sub-Committee record *inter alia* that:

> "the Planning Officer stated that an amendment to the scheme had been submitted in May 2015, requesting a change of use from residential to commercial floor space. The Planning Officer advised that not all revisions to an application required re-consultation and it was considered that the proposed revisions would not cause any significant adverse impacts and would create a positive change, with additional employment space provided."

89. There are also notes of the meeting kept by the Council's Governance Services Officer. These indicate that members of the Sub-Committee were also told that consultation had taken place in September 2015 and that they were also referred to the page in the Report on which there was a list of post-submission amendments.

90. Mr Walton submitted that the decision was one for the authority exercising its discretion pursuant to their Statement of Community Involvement. Such a Statement may constrain the exercise of any discretion that an authority may have. But it is not something that confers any. It is no doubt possible that officers had in mind the assertion in the Council's Statement of Community Involvement that there was no legal requirement to re-consult stakeholders when changes are negotiated with the applicant to revise a scheme so that it is acceptable in policy terms or to resolve objections: see paragraph [26] above. If so, that would have involved a misdirection,

[3] These difficulties are amplified when the decision on whether or not to require re-consultation and the ultimate decision are taken by different persons. In that case officers, for example, may be trying to predict, not whether what might emerge might influence them, but rather whether what might emerge might influence others who have not hitherto considered the application.

since fairness may require those interested to make representations that the initial application ought to be permitted in the circumstances, notwithstanding the applicable policies, or that the amended application should not be or that the manner in which objections are said to have been resolved is in fact objectionable or insufficient. But there is no evidence that officers were relying on the Statement as providing the criterion by reference to which the decision not to re-consult was taken.

91. In my judgment, having regard to the only record of their reasoning, which is in the minutes, Officers appear to have assumed, because the changes proposed were "positive", and would not cause "any significant adverse impact", *in their view*, that there was no need to re-consult. But that was not the right question nor an answer to it. The question they needed to consider was whether, without re-consultation, any of those who were entitled to be consulted on the application would be deprived of the opportunity to make any representations that they may have wanted to make on the application as amended. It does not follow that, because officers may have welcomed the changes and did not consider that they would have any adverse impact, others might not take a different view. It is plain, for example, from the Report that one of the main issues raised on the un-amended application was that "insufficient levels of affordable housing are proposed". Its complete deletion, and the reduction in the number of residential units proposed, may not have been regarded as "positive" changes by others. Similarly those concerned with the design of the building may or may not have regarded the changes proposed as "positive" and may have wished to make representations on such matters. Moreover, even changes that may have appeared to officers to be a "positive" response to representations already made may be ones that those who made them would wish to make representations about, as Holborn Studios did in relation to the removal of columns in the basement studios.

92. I have described the changes made by the amendments in May 2016 in paragraphs [34] to [35] above. On any view the changes proposed were not insignificant. The mix of uses in the redevelopment was substantially changed: the amount of B1 floorspace was increased by 34% and the number of residential units was reduced by 22% and all the affordable housing previously proposed was lost. On any reasonable view such changes alone made a substantial difference to the development for which the application for planning permission had initially been made. These and other changes resulted in 16 new plans to describe the amended proposed development plus consequential changes to a large number of reports supporting it. In my judgment, given their nature and extent, not to have re-consulted on the amendments proposed, deprived those who were entitled to be consulted on the application of the opportunity to make any representations that they may have wanted to make on the application as amended. That there were people who might have wanted to make such representations is clear from the fact that some did when they discovered that the application had been amended following the letter sent to them informing them of the meeting of the Planning Sub-Committee.

93. Mr Ostrowski submitted, however, that those interested were not prejudiced because those who had initially made representations in 2015 received the letter dated June 28th 2016 and could have seen from the Report (to the availability of which the letter referred) that the application had been amended after its submission; that they could have inspected the documents constituting and supporting the amended application on the Council's website; that they had the opportunity to make further representations;

and that those further representations were described in the Addendum Report to the Planning Sub-Committee. He submitted that all the issues were considered on their merits in both Reports and at the Sub-Committee meeting.

94. The letter dated June 28th 2016 did not state that the application had been amended in May 2016, although the development description it contained differed from that in the initial application (had a recipient noticed). It is true that the Report contained a brief summary of what were described as "post submission revisions". Had those who received the letter or looked at the Report realised that there had been amendments to the application, they could have visited the Council's website to inspect the amended application and supporting documents. But they would not have been assisted in identifying any changes by the fact that the relevant documents did not clearly identify what changes had been made in each. The only assistance they would have received was in the letter from the applicant's agents which identified the changes in the number and type of residential units and the amount of commercial floorspace, but which did not state that there was now no affordable housing proposed nor did it identify what changes had been made in the new set of drawings describing the development or in the 17 new documents it enclosed. Nor would they have found on the website "the submission of evidence of interest from other photographic studios" identified in the list of post-submission revisions in the Report.

95. But, even assuming, that the changes made in May 2016 had been easily identifiable and identified by all who received the letter, the fact is that, far from inviting representations on the amendments, the letter discouraged those receiving it from submitting them. As I have explained, that letter was accompanied by a leaflet that said that "only in exceptional cases will the Planning Sub-Committee consider additional comments submitted after publication of the agenda": see paragraphs [27] and [40] above. The letter indicated that the agenda had already been published and that all that could be done at the meeting was to summarise any written representations that had been made. That some, like Holborn Studios, may nonetheless have made further written representations does not mean that others may not have been deterred. Moreover the time for providing representations on what was a major application in a sensitive location was short. The Council's Statement of Community Involvement indicated that, where there was to be re-consultation, the Council may advertise and re-consult for a 14 day period. That was not done in this case.

96. Accordingly I do not accept that the letter dated June 28th 2016 was an effective substitute for a re-consultation on the amendments to the application. In my judgment, therefore, the failure to consult the public on the amendments to the application made in May 2016 deprived many of those who were entitled to be consulted on the application of the opportunity to make any representations that they may have wanted to make on the application as amended.

97. The final point Mr Ostrowski makes is in effect that whatever any member of the public might have said had they been given the opportunity was said by those who made representations after the Report became available or whatever might else have been said would have made no difference to what the Planning Sub-Committee decided. I will consider this point and whether the Claimants suffered any prejudice after considering their particular complaints about lack of consultation.

(iv) Whether Holborn Studios should have been notified of, and consulted on the amendments in May 2016, whether the meeting of the Planning Sub-Committee should have been adjourned to enable them to consider the revised basement plans and whether they were deprived of the opportunity of making such representations as they might have wanted to make

98. Holborn Studios had a particular interest in the application for planning permission for the redevelopment as the leaseholder of most of the application site on which they operated a major film and photographic studio complex.

99. Mr Ostrowski submitted that in fact it did not matter whether the basement in the proposed redevelopment was suitable for film/photographic studio use. In my judgment, however, its suitability for that existing use was plainly of considerable significance both to officers and to members of the Planning Sub-Committee when considering the planning merits of the amended application.

100. As Holborn Studios had pointed out in its representations in October 2015, one of the relevant development plan policies, DM16, in addition to seeking affordable workspace, provided that "proposals for the redevelopment of existing low value employment floorspace reliant on less than market-level rent should reprovide such floorspace suitable, in terms of design, rents and service charges, for these existing uses, subject to scheme viability, current lease arrangements and the desire of existing businesses to remain on-site." The Planning Officer appears to have made the point to the Planning Sub-Committee in his oral presentation that "planning policy cannot dictate the retention of a specific occupier, and does not in this case oblige the reintroduction of space specifically catering for the needs of those occupiers". But the Report was written on the basis, as Mr William McCartney put it in his oral statement to the Planning Sub-Committee, that planning policy DM16 did require that "the replacement floorspace is suitable in terms of design for the existing uses to remain". That appears to have been why paragraph 6.3.7 of the Report (quoted in paragraph [42] above), when addressing policy DM16, stated that

> "the applicant has provided adequate evidence that the new floor space is suitable for the creative industries, with the proposed basement level accommodation specifically tailored towards meeting the needs of either the existing occupier, or an alternative film / photographic studio tenant."

101. The suitability of the basement for the existing photographic/film use was also relevant to the question whether the quality of the accommodation met the requirements of development plan policy DM15, which requires commercial floorspace to have good access to natural light. It was precisely because the basement had been designed "with a 5m high ceiling height and with limited access to natural light in an effort to purposefully design this for the for the intended film/photographic use which currently occupies at the site" and because "the letters of interest provided suggest that the studio space would support the retention of the existing photographic/film studios use on the site" that the proposal was acceptable in terms of policy DM16. As the Report stated "the quality of the proposed studio floorspace is therefore considered to be acceptable as it would appear to lend itself to the retention of the existing photographic / film studio use (even if through a different occupier)":

see paragraphs [6.5.2], [6.5.3] and [6.5.4] of the Report (quoted in paragraph [43] above).

102. It was because the commercial floorspace proposed in the redevelopment was capable of providing for "those in the photographic studio trade" that the Planning Officer appears to have said in his oral presentation that the type of accommodation proposed satisfied planning policy. In my judgment any suggestion that the conclusion to the Report, that the proposal would provide "for the continued occupation of the site (following redevelopment) by specialist film & photographic studio occupiers", was irrelevant to the recommendation that planning permission should be granted because on balance the proposal complied with pertinent policies in the development plan, would be untenable in the circumstances.

103. In my judgment any suggestion that whether or not the basement was suitable for film/photographic studio use did not matter to members of the Planning Sub-Committee is equally plainly unfounded. It is plain from the minutes of the meeting that members discussed its suitability for that purpose and in particular whether it would be impeded by columns in the basement and the size of the lift. Had the suitability of the basement not mattered to members, there would have been no examining those issues.

104. Mr Walton pointed out that the Council's Regeneration Service was reported to have said that "the applicant has demonstrated that other cultural industries have expressed an interest to occupy the space." It is not clear what these other industries were thought to be, since the only expressions of interest that were apparently provided to the Council were from those the Report treated as coming from two "photographic/film studios". If the Regeneration Service thought that these two letters were not from such studios but from other cultural industries that appraisal would no doubt support Mr Harwood's submission that the Planning Sub-Committee acted under a mistake of fact. For the fact is that, when considering whether the proposed development accorded with development plan policy, the question that the Report regarded as necessary to answer was whether or not the basement would be suitable for photographic/film studio use and that the letters expressing an interest came from two "photographic/film studios".

105. Holborn Studios' substantive complaints relate in particular to two matters: its inability to make representations that it would have wanted to make about the amended basement plan and its inability to comment properly on the two letters that the Interested Party had provided to the Council. I shall consider the latter of these two complaints later.

106. The amended basement plan removed structural columns from the studio spaces. As the minutes record, the Committee were told that the result of the proposals would be "open plan workspaces": see paragraph [5.7] (quoted in paragraph [49] above). This was a matter that, having examined the plans, immediately concerned Mr William McCartney who thought that it might be impossible to construct the building as shown without the structural support and who sought an adjournment of the Sub-Committee meeting. Holborn Studios has applied for permission to adduce a structural report from Mr Adam Redgrove, the information in which it says would have been used as part of its objection to the amended application had it been given the opportunity to obtain the report. No objection has been raised to its admission,

which I shall permit. That report stated that transfer beams, between 1 to 2 metres in depth, would be required and that ventilation ducts, between 0.6 and 1.2m, most likely routed below the transfer structures, would also be required. The consequence of this is that the 5 metre ceiling height which Holborn Studios considered insufficient but which the Report regarded as acceptable for studio use, would not be achieved. Had Holborn Studios been given the time to obtain such a report and used it in support of its objections, in my judgment it is possible that it might have made a difference to the decision of the Planning Sub-Committee on July 6th 2016.

107. The question is whether it should have been given the opportunity. It would have had such an opportunity had the amendments made in May 2016 been the subject of public consultation (as I have found that they should have been).

108. Holborn Studios would also have had the opportunity if either it had itself been consulted in May 2016 or if the meeting of the Planning Sub-Committee had been adjourned as it had requested. Mr Harwood submits in effect that it was unlawful for the Council not to have required or taken either or both of those steps.

109. There is, unsurprisingly, no evidence that the Council considered whether or not Holborn Studios should have been consulted on the amendments made in May 2016. The certificate that formed part of the amended application form submitted in May 2016 stated that Holborn Studios had been notified of the amended application on May 24th 2016. That was untrue but the Council evidently thought that it was true. Indeed in the Council's response to Holborn Studio's pre-action protocol letter it was stated that "the planning application form confirms that [Holborn Studios] was informed of the revised application and so had the opportunity to comment."

110. The question remains whether nonetheless Holborn Studios should have been consulted (even if the public generally was not). It is no answer to say that there was no enactment requiring them to be notified. There is no enactment permitting an application for planning permission to be amended. Holborn Studios was required to be given notification and an opportunity for making representations on the application as leaseholders. In my judgment the question is whether it was unfairly deprived of the opportunity of making any representations it might have wanted to make on the application as amended. Were it otherwise the provisions for giving such notification and an opportunity to make representations could be circumvented or avoided unfairly. In my judgment Holborn Studios was deprived of such an opportunity: the new basement plan was directly relevant to their interests and something that they might plainly have wanted to make representations about.

111. Moreover there were other reasons that meant that it ought to have been consulted as a matter of fairness. The Design and Access Statement and the Planning Statement that accompanied the amendments claimed that the amended design would enable Holborn Studios to remain in the redevelopment (one of the asserted planning benefits of the scheme) and that the necessary height and the free space required for photographic white infinity spaces or 'coves' had been provided. Although development control is concerned with the character of the use of land, as Lord Scarman stated in *Westminster City Council v Great Portland* Estates [1985] AC 661 at p670, "the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control". Retaining Holborn Studios on site which the applicant claimed to be a benefit to be considered

in support of its proposed development was not necessarily legally irrelevant to the appraisal of its merits. The Council could only have assessed fairly and not unreasonably, whether or not the planning benefit claimed, and whether the free space Holborn Studios thought was required, had been secured by consulting it on the amendments. It failed to do so and the time that Holborn Studios were in practice afforded to make representations after it had learnt of the amendments did not remedy the earlier failure to notify it of them.

112. For these reasons in my judgment Holborn Studios was deprived of the opportunity to make representations on the amendments to the 2015 application made in May 2016.

(v) Whether Mr Brenner was unable to make any representations that he might have wanted to make had the amendments been the subject of consultation

113. It appears that Mr Brenner only learnt of the meeting of the Planning Sub-Committee and that the planning application had been amended shortly before the meeting of the Sub-Committee. Although he was given some opportunity to address the Sub-Committee after the representatives of Holborn Studios, the time given him only allowed him to complain about the lack of public consultation given the extent of the changes. He was unable, therefore, to make any representations about the substance of the changes.

114. In his witness statement he has stated that, had he had the opportunity to comment on the amendments he would have made detailed further comments about a number of matters which he considered made the damage to the area greater than it was under the initial application. These included the significant reduction in residential accommodation; the small amount of affordable space and the lack of suitable space for the business activities of existing tenants; the concerns of Holborn Studios about whether the proposed internal layout was suitable for a photographic studio, and changes without explanation to air quality details and sunlight and daylight studies.

(vi) Whether the Claimants have suffered any material prejudice

115. Mr Ostrowski submitted, however, that the Claimants personally have suffered no material prejudice as a result of the absence of any re-consultation[4].

116. For the reasons given above, in my judgment the public generally, including Mr Brenner, and Holborn Studios were deprived of a fair opportunity to make such representations as they might have wanted to make on the amendments to the planning application made in May 2016.

[4] Approaching the matter in this way was assumes that the Claimants must show that they have themselves been personally prejudiced. That may be so if their complaint merely concerned unfairness that they had themselves suffered or if the necessary standing to make a complaint was that they had to be a person aggrieved by the decision. However what both Claimants also impugn is the failure to re-consult the public on the amendments to the 2015 application. All that they require to have standing to make that complaint is a sufficient interest. It may be that it would be sufficient for them to show that they were members of the relevant public (to establish their standing) and that that public had been materially prejudiced, even if they personally had not been. That is not, however, a matter that was canvassed in argument or is necessary to decide in this case.

117. Both Claimants have provided evidence of matters on which they could have made representations. Moreover a person may be substantially prejudiced by a failure to give appropriate notice which might have attracted other potential objectors to his or her cause: see *Wilson v Secretary of State for the Environment* [1973] 1 WLR 1083 per Browne J at p1096d-e; *Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51, per Lord Carnwath JSC at [110].

118. In my judgment the Claimants would not have suffered material prejudice if whatever they might have said, and whatever support they might have received (had there been a fair opportunity for the public to make representations on the amendments made in May 2016 to the 2015 application), would inevitably have made no difference to the decision of the Planning Committee.

119. For the reasons given above in my judgment what Holborn Studios could have said given the opportunity might have made a difference to that decision. If only on that basis, it has been substantially prejudiced.

120. One of Mr Brenner's complaints in his initial representations had been that the studio space did not seem to be what the current photographers and specialists require and he has indicated that he would have wanted to make representations about the suitability of the internal layout for a photographic studio. To that extent Mr Brenner is prejudiced by any prejudice to Holborn Studios.

121. Whether any other representations Mr Brenner and Holborn Studios might have made, particularly about the loss of residential units and the loss of affordable housing involved, might have made a difference if also supported by others is more difficult to determine. Mr Ostrowski contended that the Sub-Committee considered those particular changes on their merits, that the changes made sought to give effect to the Council's policy for this Priority Employment Area and that the decision would inevitably have been the same. This assumes that there is nothing that any representation about such changes could have contained, and that the extent to which any representations might have been supported by others had the amendments been the subject of re-consultation generally, could not have made any difference to the outcome.

122. Determining that representations, which have not been heard, would inevitably have made no difference is a matter about which great caution is required in any event. If asked public authorities must consider whether, and may be persuaded, to depart from their own policies. As Ackner LJ said an oft cited part of the judgment of the Divisional Court in *R v Secretary of State for the Environment, Ex parte Brent London Borough Council* [1982] QB 593, at 646:

> "it would of course be unrealistic not to accept that it is certainly probable that, if the representations [which the local authorities concerned had not been given an opportunity to make] had been listened to by the Secretary of State, he would nevertheless have adhered to his policy. However, we are not satisfied that such a result must inevitably have followed....It would in our view be wrong for this court to speculate as to how the Secretary of State would have exercised his discretion if he had heard the representations. We respectfully adopt the

> words of Megarry J. in *John v Rees* [1970] Ch. 345 , when he said, at p. 402:
>
> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."
>
> As Professor Wade points out in his Administrative Law. 4th ed., p. 455, the report of *Ridge v. Baldwin* [1964] A.C. 40, 47, records that the hearing later given to the Chief Constable's solicitor at least induced three members of the Watch Committee to change their mind. Thus, even if the ultimate outcome of our decision were to be that the Secretary of State, having fairly considered the applicants' representations, nevertheless decides to abate their rate support grants, we are not prepared to hold that it would have been a useless formality for the Secretary of State to have listened to the representations. The importance of the principles to which we have referred to above far transcend the significance of this case. If our decision is inconvenient, it cannot be helped. Convenience and justice are often not on speaking terms: per Lord Atkin in *General Medical Council v. Spackman* [1943] A.C. 627, 638."

123. That caution is reinforced by the fact that matters of planning judgement are essentially ones for the democratically elected planning authority. It is not for this Court generally speaking to anticipate what the outcome would be if a planning authority had had regard to representations that they have not considered.

124. In this case I am not satisfied that there was nothing that Mr Brenner, and others who might have supported him, could have said that could have had any effect on the decision of the Planning Sub-Committee had they been given the opportunity. Given numerous reasoned representations about the reduction in residential units and in particular about the loss of all the affordable housing proposed, for example, members might have decided that the mix of uses proposed in the May 2015 application including affordable housing was preferable.

(vii) Conclusion

125. In my judgment, therefore, the procedure followed in relation to the amendments to the 2015 application made in May 2016 deprived the Claimants and others of a fair opportunity to make such representations as they might have wanted to make about them and that materially prejudiced the Claimants. The procedure followed in the circumstances was so unfair as to be unlawful.

126. **WHETHER HOLBORN STUDIOS SHOULD HAVE BEEN ABLE TO INSPECT THE TWO LETTERS SAID TO HAVE BEEN FROM PHOTOGRAPHIC/FILM STUDIOS UN-REDACTED?**

127. **Whether Holborn Studios should have been able to inspect the two letters said to have been from photographic/film studios un-redacted**

(i) Submissions

128. Mr Harwood contended, based on the Council's Statement of Community Involvement, that Holborn Studios had a right to inspect what the Report described as "letters of interest from two photographic / film studios, both of which state that the proposed studio spaces are workable and that the layout is acceptable". He relied on the assurance in that Statement that the Council's website would contain "details of all applications including copies of all associated documents" and also on the statement that, "once submitted to the Council....letters of support become public documents which other interested parties are entitled to inspect". Mr Harwood further contended that the Council acted unfairly in refusing to make available and disclose the two letters un-redacted. That constituted a breach of a legitimate expectation generated by the Council's own Statement of Community Involvement. Had the letters been disclosed un-redacted and timeously, Holborn Studios could have made representations undermining their credibility. In any event the Council had acted under an error of fact as to the nature of those correspondents. They were not from two photographic/film studios.

129. Mr Ostrowski contended that there was no mistake of fact as to the nature of the third parties who had expressed an interest in the development. Both were written by persons in the photographic/studio industry. Both were credible sources for the views they expressed. Although the Statement of Community Involvement confirms that there is a right to inspect documents associated with the application and letters of support, the letters were not submitted as part of the application and were not sufficiently associated it. The Statement of Community Involvement also says nothing about removing personal information. There was no obligation on the Council to disclose the names and addresses of those who write to support or express an interest in a proposed development. There was no obligation to disclose information submitted in confidence: see *R (Perry) v Hackney LBC* [2014] EWHC 3499 (Admin), [2015] JPL 454 at [52]-[70]. The letters contained personal information which was redacted from them in the normal manner. Moreover Holborn Studios made no request for un-redacted versions of the letters at the meeting of the Planning Sub-Committee. There is no evidence in any event that the letters were critical to the appraisal in the Report or to the decision of the Planning Sub-Committee.

130. On behalf of the Interested Party Mr Walton supported the Council's case. He submitted that Holborn Studio's case relied on an excessively legalistic reading of the Report. Both authors of the letters had either worked out of, or in, a studio. There was no mistake of fact in relation to the two letters. Moreover there was no statutory requirement to enable comments to be made on any response by the applicant to representations received as a result of consultation. But in any event Holborn Studios was not prejudiced: it was able in any event to make representations about the substantive contents of the two letters at the meeting of the Planning Sub-Committee.

(ii) Discussion

131. The Statement of Community Involvement provided that the Council's website would contain "details of all applications including copies of all associated documents". In

my judgment the letters were each, or were each part of, such an "associated document". They were included as an enclosure with the letter from the applicant's agent that set out the applicant's response to the comments received on the application from statutory and non-statutory consultees. The letter itself was plainly intended to support the application and the letters enclosed were plainly intended to provide such support. To contend that the letter itself and the letters it enclosed were not documents "associated" with the application is untenable. Indeed one of the "post submission revisions" to the application listed in the Report was "submission of evidence of interest from other photographic studios".

132. Whether the two letters were "letters of support" is less clear. The two letters were not themselves ostensibly written to support the application. But they were part of a letter written by the applicant's agent that was submitted to the Council to support the application and they were submitted to the Council for that purpose. The fact that the letter to the Council was written by the applicant's agent does not mean that the letter was not, and the two letters were not, submitted to support the application. In fact the sections of the Statement of Community Involvement in which the statement about the availability of letters of support and objection appear (sections 4.10 and 4.11) deal with comments that "can be made by anyone".

133. In my judgment the Statement of Community Involvement, therefore, provided for the letter from the applicant's agent dated January 6th 2016 and the two letters it enclosed to be made available for public inspection on the website. They were not.

134. Mr Ostrowski and Mr Walton contended in effect that that failure did not matter. Holborn Studios was provided before the Planning Sub-Committee with redacted versions of the two letters and were able to comment on them at the meeting of the Sub-Committee. That was sufficient and in any event, so Mr Ostrowski submitted, it was not entitled to see more.

135. Having requested them by e-mail on June 30th 2016, Holborn Studios was belatedly provided with redacted copies only some 2½ hours before the Committee met. Bearing in mind that its representatives had to get to the meeting and are not lawyers, it is perhaps not surprising that they failed to make one of the points that Mr Harwood made, that one of the letters did not state (as the Report asserted in paragraph [6.5.3], quoted in paragraph [43] above) "that the proposed studio spaces are workable and that the layout is acceptable". It merely said that the layout suggested was "definitely interesting". Nor, given the limited time available before the meeting and for their representatives to speak at it, is it surprising that no further request was made for un-redacted versions of the letters. Be that as it may be, what the redactions did was to delete any information that would identify the authors and any qualification that they might have had to express a view on whether the proposed studio spaces were workable and the layout acceptable for photographic/film use.

136. In my judgment the disclosure of the letters in redacted form meant that Holborn Studios were unable to make any representations about their authors' qualifications to make such statements and the weight that could reasonably be attached to any view that they expressed.

137. Holborn Studios has been supplied with un-redacted versions of the letters, however, as part of this claim and has indicated what it would have said had it had the opportunity.

138. The first letter was from Gulf Atlantic Pictures Limited, a company which appears from records at Companies House to be engaged in motion picture production activities, and which stated that it was interested in managing and marketing the whole redevelopment once completed. The unchallenged evidence from Mr William McCartney is that its accounts show it to be a company that started in March 2013 and that it has only a modest turnover with annual losses and net liabilities. Mr McCartney stated that he had made enquiries from which it appears that the managing director of Gulf Atlantic Pictures Limited, Mr Black, has been a film producer and publicist in the period up to the 1990s; that he was unable to find anyone who had any information about him in the photography industry; and that there is no evidence that he has any knowledge and experience of studio design and construction. Mr Harwood submitted that, in his letter Mr Black does not claim to have ever managed, run, designed or constructed a studio.

139. The second letter was from Mr Sam Robinson. He is, so Mr William McCartney's unchallenged evidence states, a working photographer whose partner is a props stylist and neither has any knowledge of the design and/or construction of a studio complex. His studio contains two studio rooms that are free of any columns and have direct street access and their gross internal area is only 325m^2 compared to Holborn Studios which is 5,400m^2. Mr Harwood submitted that Mr Robinson does not operate on the same scale as Holborn Studios. Neither, so he submitted, could he be described as a "photographic/film studio".

140. Mr Harwood submitted that the only letter from a studio, that from Mr Robinson, did not state that the proposed studio workspaces were workable and that the layout was acceptable (as the Report suggested): he said only that the layout was "definitely interesting". Neither letter, so Mr Harwood submitted, was from a photographic/film studio.

141. In my judgment this material shows that Holborn Studios could have made further representations which could have undermined the credibility or cogency of the letters on which the Report relied. It does not appear that there were letters "from two photographic / film studios" and both letters did not "state that the proposed studio spaces are workable and that the layout is acceptable" (as the Report asserted) and the authors appear to have had no knowledge and experience of the design, construction and management of a "photographic/film studio" complex of the scale proposed. Mr Vincent McCartney plainly did.

142. Given the significance of the redevelopment being capable of accommodating the existing "photographic/film studio" use, (which I have considered above in paragraphs [98] to [103]), in my judgment the Council has not shown that, had Holborn Studios been able to make representations having had time to consider the un-redacted letters, it would have made no difference to the Planning Sub-Committee's decision on July 6th 2017.

143. Mr Ostrowski submitted, however, that Holborn Studios was not entitled to see more than the redacted versions of the letters. He relied upon the decision in *R (Perry) v Hackney LBC* supra.

144. In that case the court dismissed the claimant's case that there had been no proper consideration by members of the Council's Planning Sub-Committee of viability reports about the provision of affordable housing. The members of that sub-committee had not made any request to see them. Patterson J held that the members were entitled to proceed on the basis of the advice from officers about viability which had been formulated having had regard to those reports: see [55], [64] and [70]. Her judgment also considered whether members would have been entitled to inspect the documents (which related to the terms in the course of negotiations for a contract with the authority themselves), that had been submitted to the authority in confidence by virtue of either a councillor's "common law" right to see documents which are reasonably necessary to perform her or her duties or section 100F of the Local Government Act 1972. Neither issue arises in this case. It was also submitted in that case that the viability reports should have been listed among the background papers to the officer's report that the claimant had a right to inspect. Under the 1972 Act there is no requirement to list as such background documents, however, documents containing information relating to the financial or business affairs of any particular person if, and so long as, in all the circumstances of the case, the public interest in maintaining the exemption from disclosing such information outweighs the public interest in disclosing the it. Patterson J found that in that case it was clear that the authority thought that it did: see [87]-[89] and [79].

145. In my judgment *R (Perry) v Hackney LBC* is of little assistance in this case: (i) unlike the viability reports in that case, the two relevant letters in this case were not submitted to the Council in confidence; (ii) it is not clear whether the Council ever considered whether the public interest in concealing the identity or interest of the authors outweighed the public interest in disclosing the letters and (if they thought so) on what basis they thought it did; and, in any event, (iii) Holborn Studio's case is not based on the right to inspect background papers.

146. Neither of the two unambiguous statements in the Council's Statement of Community Involvement on which Holborn Studios relies is qualified so as to exclude any "associated document" or "letter of support" (or any part of them) from public inspection. Nor did Mr Ostrowski submit that they were. Accordingly in my judgment Holborn Studios had a legitimate expectation, and the Council's policy was, that they would be made available as submitted to the Council for public inspection. The Council has provided no evidence that would support the conclusion that they had sufficient reason, or why it was fair, not to give effect to that expectation and policy.

147. Accordingly in my judgment the failure to enable Holborn Studios to inspect the two letters from the date they were submitted to the Council and in an un-redacted form substantially prejudiced Holborn Studios and was unfair and unlawful.

148. In these circumstances it is unnecessary to consider the complaint that the Planning Sub-Committee acted under a material mistake of fact.

The other grounds on which Mr Brenner seeks judicial review

149. On behalf of Mr Brenner Ms Elliott contended that there were a number of policies in the London Plan relating to the Blue Ribbon Network to which the Planning Sub-Committee had had no regard but which were policies that no reasonable decision-maker could have failed to take into account in the circumstances.

150. The only policy relating to the Blue Ribbon Network in the London Plan listed in the Report as being of relevance was Policy 7.1. This provides that development should be so designed that the layout, tenure and mix of uses interface with surrounding land and improve people's access to, *inter alia*, the Blue Ribbon network. Ms Elliot drew attention, however, to a further series of policies that she claimed were plainly material.

151. The Blue Ribbon Network is a strategically important series of linked open spaces where, according to Policy 7.24 of the London Plan, uses of the waterspaces and land alongside for water related uses should be prioritised. The text explains that the starting point for consideration of development and use of land alongside the network "must be the water". Policy 7.27 provides that development proposals should protect and improve existing access points to the Network and should protect and enhance waterway support infrastructure such as moorings. Policy 7.28 provides that development proposals should protect the open character of the Network. Policy 7.30 provides that development proposals along London's canal network should respect their local character and contribute to their accessibility and active water related uses where these are possible. Policy 2.18E(b) also provides that development proposals should encourage the linkage of the Blue Ribbon Network to the wider public realm to improve accessibility for all. This will assist to promote healthy living (as paragraph 2.88 notes) by increasing recreational opportunities, access to and enjoyment of the Blue Ribbon network.

152. Ms Elliott accepted that the aim of giving priority to water-related uses did not have any direct application in this case but submitted that it emphasised the weight that should have been given to the more specific policies referred to. In my judgment these other policies in the development plan were plainly material. But in my judgment the failure to refer to them was immaterial as the matters with which they were concerned were addressed in the Report.

153. Thus, so far as the objectives of Policies 7.28 and 7.30 are concerned, the Report considered the effect of the proposal on the character of the Regent's Canal and found that the proposals would "enhance the character and appearance of the Regents Canal Conservation Area"[5]. So far as the objectives of Policies 7.27, 7.30 and 2.18E(b) are concerned, the Report considered accessibility to the Canal and found that "the scheme will improve...the access to and along the canal"[6]. In particular it stated that:

> "The proposals… improve public access to the canal side by increasing levels of amenity space (including space which is publically accessible during the day) to the canal side. The landscaping (details to be secured through a condition) would

[5] See paragraph [6.4.22].
[6] See paragraph [6.4.19].

> provide for improved levels of vegetation at the site with a number of large trees, all of which would contribute positively toward the green link / corridor along the canal. Further to this, a contribution of £35,000 has been agreed to fund improvements works by the Canal and Rivers Trust to the towpath." [7]

154. In relation to another aspect of Policy 7.27 the existing moorings are outside the application site and there is no suggestion that the development would physically interfere with them. The Committee resolved to impose a condition, however, that, before works begin, a detailed Demolition and Construction Management Plan should be submitted to and approved by the Council to avoid hazard and obstruction being caused to users of the canal among others.

155. In my judgment the failure to refer to the policies I have mentioned in terms was accordingly immaterial. It would have made no difference had they been.

156. Ms Elliott also contended that the Planning Sub-Committee had failed to have regard to various policies relating to heritage assets. If there was any failing, however, in my judgment it was again immaterial for the same reason.

157. The Report's conclusion on the impact of the proposed development on heritage assets was that[8]:

> "6.4.20 The proposals respond positively to earlier concerns by retaining and sympathetically refurbishing the buildings of key heritage interest and bringing forward new build elements of an appropriate scale and massing, which form a strong built edge on Eagle Wharf Road and maintain an appropriate distance with the retained buildings.
>
> 6.4.21 Whilst there is some harm caused by the proximity of the new build elements to the retained chimney and removal of ad hoc structures around its base, this harm is considered to be less than substantial. In accordance with paragraph 133 of the National Planning Policy Framework, the Council must decide on balance if the harm is outweighed by the significant regeneration benefits of fully restoring the retained heritage buildings, improving public access to the canal and securing high quality housing provision.
>
> 6.4.22 The proposed architecture of the new build elements is well composed, with gridded elevations and a high quality, restrained palette of materials that complement the retained heritage buildings. The proposals are well laid out and single aspect units have been kept to a minimum. The proposals are considered to enhance the character and appearance of the Regents Canal conservation area."

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[7] See paragraph [6.11.5.]; cf also [6.7.33]-[6.7.34].

[8] see also in particular paragraphs [6.4.10], [6.4.12]-[6.4.14].

158. The conclusion of officers in respect of the question raised in paragraph [6.4.21] was that in their view the harm was outweighed in the circumstances.

159. Mr Brenner undoubtedly and understandably disagrees with the merits of the assessments made by Officers about the impact of the proposed development on the Regents Canal and the heritage assets on the site. But there is, equally understandably, no challenge to the merits of the judgments made by officers or by members on such issues given the information available to them. Accordingly these additional grounds must be rejected.

Section 31(2A) of the Senior Courts Act 1981

160. Section 31 of the Senior Courts Act 1981 now provides that:

> "(2A) The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award [of damages, restitution or recovery of a sum due] under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
>
> (2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest."

161. Mr Ostrowski contended that relief should be refused in accordance with section 31(2A) of the 1981 Act. He submitted that there is nothing to suggest that the Council's decision would have been any different had the Claimants had the opportunity to make further representations. Similarly, Mr Walton submitted, had the Claimants been given more time to make further representations it is highly likely that planning permission would still have been granted. Both contended that relief must accordingly be refused in accordance with section 31(2A) of the 1981 Act.

162. I am not satisfied that, had Holborn Studios been given a fair opportunity to make representations on (i) the contents of the un-redacted letters said to have been from two photographic/film studios and (ii) the effect of removing the structural columns from studios in the basement of new building, it highly likely that planning permission would have been granted or that it would have been granted in the same form as it was without amendments that might have been potentially more beneficial to them.

163. More generally the main conduct complained of (which I have found to be unlawful) is the failure to re-consult the public in May 2016 on the amendments made to the 2015 planning application. I have already explained why I am not satisfied that such consultation would have made no difference to the Claimants. Moreover, had public

consultation occurred, what would have been said would have had to have been assessed and such matters of planning judgement are essentially ones for the democratically elected planning authority. It is not for this Court generally speaking to anticipate what the outcome would be if a planning authority had had regard to representations that they have not considered. I am not satisfied that it has been shown to be highly likely that the outcome for the Claimants would not have been substantially different if the conduct complained of had not occurred.

Conclusion

164. For the reasons given above, these claims for judicial review succeed. The planning permission for the development of Eagle Wharf granted by the Council on November 8th 2016 will be quashed.