R. (ON THE APPLICATION OF MOUNT COOK LAND LTD) v WESTMINSTER CC

COURT OF APPEAL

(Auld, Clarke and Jonathan Parker L.JJ.: October 14, 2003[1]

[2003] EWCA Civ 1346; [2004] 2 P. & C.R. 22

LT Conservation areas; Costs; Judicial review; Local authorities powers and duties; Material considerations; Objections; Permission; Planning permission

H1 *Town and Country Planning—Judicial review—Alternative proposals for development—Whether a planning authority must have regard to a proposed alternative for development where planning permission has not been sought or granted for that alternative—Precedent—"Planning creep"—Whether a planning authority is entitled to refuse planning permission on the grounds that granting permission would make a future undesirable change harder to resist—Discretion to withhold relief in a judicial review claim—Costs of an application for permission—The principle in the Leach case—Whether a successful defendant to a judicial review claim is entitled to its costs of drafting an acknowledgement of service—Whether a defendant is entitled to its costs of attending a permission hearing—What amounts to exceptional circumstances in which such costs are allowed*

H2 The first appellant, M, owned the freehold of a building at 200–212 Oxford Street, London, which fronts onto the north side of Oxford Street and backs onto Market Place ("the Building"). The Building was in retail use. The interested party, Redevco Properties ("R"), had a 999-year lease of the Building with 910 years still to run. In February 2002 R applied for planning permission for a number of relatively minor physical external alterations to the Building, including the installation of new shop fronts to the ground floor, the replacement of black painted windows with clear windows on the first and second floors, and so on. M objected to the application. It was motivated to do so because it had substantial property interests in the area and would have liked to acquire R's lease in order to develop the Building for its own purposes. In order to support its objection, M commissioned a number of proposals for the improvement of the southern side of Market Place which included alterations to the Building. M put these to the Council but did not make a formal application for planning permission. The Council responded by stating that the proposals were too vague for proper consideration and advice by its officers.

H3 A report to the planning sub committee in respect of R's planning application was duly prepared by the Council's planning officer. The report referred to M's

[1] Paragraph numbers in this judgment are as assigned by the court.

alternative proposals but advised that they were irrelevant to the determination of R's application because each case must be treated on its own merits. The sub committee approved R's planning application notwithstanding M's objections.

H4 M accordingly applied for permission to claim judicial review. Permission was refused on paper by Ouseley J. M renewed its application orally and permission was refused by Moses J. at the oral hearing. The Council attended the renewed hearing and applied for its costs of doing so. Moses J. held that there were exceptional circumstances in this case which justified an award of costs at the permission stage and awarded the Council costs summarily assessed at £11,508.13. M appealed to the Court of Appeal against the refusal of permission and against the costs order, arguing that:

(1) the Council had erred in failing to have regard to M's alternative proposals for development of the Building, which M contended were preferable in planning terms to R's proposal.
(2) the Council should have refused R's application on the ground that it would make a future change of use of the Building harder to resist. The installation of new door and the removal of black film from the windows of the Building, amongst other proposals, would facilitate a non-retail use of the Building and would make it more difficult for the Council to resist an application for change of use of the upper floors of the Building. M argued that such a change would be contrary to the development plan.
(3) Moses J. had been wrong to hold that the court was entitled to dismiss the claim for judicial review in the exercise of its discretion.
(4) Moses J. was not entitled to award the Council its costs of filing an acknowledgement of service and/or its cost occasioned by the permission hearing.

H5 **Held,** dismissing the appeal, that: (1) The Council had been correct to disregard M's alternative proposals for development of the Building. The proposals set out in R's application for planning permission would not in themselves be harmful in a planning sense: on the contrary, they would enhance the Building. Where a proposal does not, in itself, give rise to any planning harm it is only in exceptional circumstances that a decision-maker should consider alternative proposals for the same site. Even in such an exceptional case there must be at least a likelihood or real possibility of the alternative proposals eventuating in the foreseeable future. If it were merely a matter of a bare possibility, decision-makers would constantly have to look over their shoulders before granting any planning application against the possibility of some alternative planning outcome however ill-defined and however unlikely of achievement. In the circumstances of the instant case there was no real possibility that M's proposals would ever come about: M would require R's consent to implement the proposals and there was no evidence to suggest that R would ever give such consent. In any event, M's alternative proposals were "extremely inchoate". In the circumstances, therefore, the alternative proposals were not material considerations or, if they were, they were of such negligible weight that the Council could not reasonably have taken any notice of them. (2) The Council had been correct to reject M's contention that R's

application could undermine resistance to any future application for a change of use. The correct approach was to consider whether R's proposal would cause planning harm by assessing it against doing nothing. An application for change of use could be decided on its own merits when it comes before the Council. (3) Given the above conclusions the question of refusal of relief in the exercise of the court's discretion does not arise. However, the court expressed the view that it would not have refused relief merely because M's application for judicial review was motivated by a desire to put pressure on R to sell its lease. The essential question for a decision-maker in planning matters is whether representations are valid in planning terms, whatever a party's motives for advancing them. (4) Moses J. had been correct to order M to pay the Council's costs of filing an acknowledgement of service and had been entitled to find that there were exceptional circumstances that justified an order that M should pay the Council's costs of successfully resisting the oral application for permission.

H6 The effect of the judgment of Collins J. in *Re Leach* [2001] EWHC Admin 445 is that (certainly in a case where the pre-action protocol applies and the defendant or other interested party has complied with it) a defendant or other interested party who is successful at the permission stage and who has filed an acknowledgement of service should generally recover the costs of the acknowledgement of service from the claimant, whether or not he attends the permission hearing. Under the CPR, there is now a positive obligation on a defendant or other interested party who wishes to contest a claim for judicial review to serve an acknowledgement of service at the permission stage. The ruling of Collins J. accordingly makes good sense and should be affirmed.

H7 However, the effect of para.8.6 of the Practice Direction to CPR Pt 54, when read with para.8.5, is that a defendant who attends and successfully resists the grant of permission at a renewal hearing should not generally recover, from the claimant, his costs of and occasioned by doing so. This is in conformity with the long-established practice of the courts in judicial review claims and with the thinking behind the Bowman Report which gave rise to the CPR Pt 54 procedure. It also accords with public policy in allowing individuals or bodies seeking relief ready access to the courts whilst, in exceptional cases, protecting public bodies from unnecessarily burdensome litigation.

H8 A court should only depart from the general guidance in the Practice Direction where it considers there are exceptional circumstances for doing so. However, the court should be allowed a broad discretion, with which the Court of Appeal should be slow to interfere, as to whether, on the facts of the case, there are exceptional circumstances justifying an award of costs. In the instant case the judge was entitled to find that exceptional circumstances existed. He was entitled to take into account the hopelessness of the application, the clear intention and ability of M to deploy its considerable resources in attempting to exert commercial pressure on R to surrender its lease and its use of those resources effectively to secure a full hearing of the claim at the permission stage.

H9 **Cases referred to:**

(1) *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)* [2001] 2 A.C. 603; [2000] 3 W.L.R. 420; [2001] 2 C.M.L.R. 38.

(2) *Bolton MBC v Secretary of State for the Environment* [1991] 61 P. & C.R. 343.
(3) *Jolly v Jay* [2002] EWCA Civ 277.
(4) *Impey v Secretary of State for the Environment* [1981] J.P.L. 363; [1984] 47 P. & C.R. 157.
(5) *Re Leach* [2001] EWHC Admin 445; [2001] C.P. Rep. 97; [2001] 4 P.L.R. 28.
(6) *New Forest DC v Secretary of State for the Environment* (1996) 71 P. & C.R. 189; [1996] J.P.L. 935.
(7) . *Nottinghamshire CC v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 293; [2002] 1 P. & C.R. 30.
(8) *R. (on the application of Scott) v North Warwickshire BC* [2001] EWCA Civ 315.
(9) *R. v Honourable Society of the Middle Temple Ex p. Bullock* [1996] E.L.R. 349.
(10) *R. v Secretary of State for Wales Ex p. Rozhon* (1993) 91 L.G.R. 667.
(11) *Redevco Properties v Mount Cook Land Ltd* [2002] N.P.C. 158.
(12) *Somak Travel Ltd v Secretary of State for the Environment* [1988] 55 P. & C.R. 250; [1987] J.P.L. 630.
(13) *South Buckinghamshire DC v Secretary of State for the Environment, Transport and the Regions* [1999] P.L.C.R. 72.
(14) *South Lakeland DC v Secretary of State for the Environment* [1992] 2 A.C. 141; [1992] 1 All. E.R. 573.
(15) *Stringer v Minister of Housing and Local Government* [1970] 1 W.L.R. 1281; [1971] 1 All. E.R. 65.
(16) *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1987) 53 P. & C.R. 293.

H10 **Legislation referred to:**
(1) Town and Country Planning Act 1990 ss.54A and 70(2).
(2) Civil Procedure Rules 1998, Pts 54.7, 54.8 and 54.9; and Practice Direction Pt 54 paras 8.5 and 8.6.

H11 **Appeal** by Mount Cook Land Ltd and Mount Eden Land Ltd from a decision of Moses J. on September 26, 2002:

(1) dismissing their renewed application for permission to apply for judicial review of the decision of Westminster City Council on May 9, 2002, to grant conditional planning permission to Redevco Properties for external alterations to a building at 200-212 Oxford Street, London, W1, and
(2) awarding Westminster City Council its costs summarily assessed in the sum of £11,508.13.

H12 The application for permission was initially dismissed without a hearing by Ouseley J. The Court of Appeal on November 27, 2002 granted permission to appeal the decision of Moses J. and to claim judicial review and retained the claim for its own decision. The facts are set out in detail in the judgment of Auld L.J. below.

H13 *John Steel, Q.C.*, *Robert White* and *Stephen Whale*, instructed by Stephenson Harwood, for the appellants.

Timothy Corner, Q.C. and *Robert Palmer*, instructed by Colin Wilson, Director of Legal and Administrative Services, Westminster City Council, for the respondent.

JUDGMENT

1 **AULD L.J.:** This is a claim by the appellant ("Mount Cook") for judicial review of the grant by the Respondent ("the Council") to the Interested Party, Redevco Properties ("Redevco") of "operational" planning permission for external alterations to a building (formerly housing the C&A Store) at 200–212 Oxford Street, London W1 ("the Building"). The matter originally came before the Court by way of a renewed, oral, application by Mount Cook for permission to appeal a refusal by Moses J. on September 26, 2002 of its renewed application to him for permission to apply for judicial review. On November 27, 2002, this Court granted permission to appeal and to claim judicial review and retained the claim for its own decision.

The facts

2 The Building is within the East Marylebone Conservation Area, as designated by the Council, the local planning authority. The statutory development plan for the area is the Westminster Unitary Development Plan adopted by the Council in July 1997. The relevant policies are SS2 and DES7—the former "to protect retail floorspace in large stores trading on several floors" inside the central zone and the latter "to preserve or enhance the character or appearance of . . . [the Council's] conservation areas". It is also within an area for which the local plan policy is to protect department stores, a policy that Mount Cook claims in these proceedings to support.

3 The Building fronts onto the north side of Oxford Street and backs onto Market Place, a series of short highways in an "H" formation, which, until recently, had little attraction for members of the public. As a result of an initiative in the late 1990s, known as "the Oxford Market Initiative", by two major local landowners, supported by Mount Cook and the Council, parts of Market Place have been improved and made more attractive to the public. However, the improvements did not extend to that part of Market Place immediately to the rear of the Building, which remains a rather run-down area by the standards of this part of the West End.

4 Mount Cook is the freeholder of the Building. Redevco has a 999-year lease of it at an annual rent of £1,139, not expiring until 2912, *i.e.* not for another 910 years. Redevco's interest in the Building is, thus, close to that of a freeholder, a strong position that has clearly exercised Mount Cook, which would like to acquire the leasehold interest to enable it to develop the Building for its own purposes. It has substantial property interests to the rear and north of the Building, all of which, including the Building, are known as the Langham Estate, which it manages through a managing agent. In all, the Estate comprises over 400 tenancies—some long-term, some short-term—most of which are in commercial uses; mainly retail in the form of shops, restaurants and offices. Relevantly to Mount Cook's

aspirations, some of the leases in respect of buildings close to the rear of the Building are for terms that will expire in the near future.

5 It is common ground that Mount Cook has sought to bring pressure on Redevco to yield to its development ambitions by reliance on its entitlement under the lease to refuse consent to alterations to the Building that Redevco sought to make and by objecting to various applications by Redevco for planning permission. As to the former, Redevco succeeded on December 3, 2002 in obtaining from Mr Paul Morgan, Q.C., sitting as a Deputy Judge of the High Court, declarations that Mount Cook's refusals of consent were unreasonable and that Redevco was entitled to make the alterations without its consent; see *Redevco Properties v Mount Cook Land Ltd* [2002] N.P.C. 158, paras [19](7) and (10), [38], [40] and [45]. On February 20, 2003, this Court refused Mount Cook permission to appeal that decision. On the planning front, Mount Cook has objected to at least three planning applications in respect of the Building. The first was for change of use of the upper floors from retail to office and residential uses. It was withdrawn, after some revisions, in May 2002. The second, which was made in revised form in February 2002, was to make various alterations. It was granted in May 2002 and is the subject of this appeal. And the third was made in about May 2002, following the withdrawn first application to which it was similar, namely for change of use of some of the upper floors from retail to office or residential use. The Council has yet to decide on that application.

6 The planning permission under challenge was for relatively minor physical external alterations involving: the installation of new shop fronts and canopies to the ground floor of each of its three street elevations, including that looking onto the southern part of Market Place; the partial infill of a lightwell; the installation of glass louvres on the second floor and of bronze louvres on the ground floor; and the replacement of black painted windows with clear windows on the first and second floors. The proposed alterations to the Market Street elevation, though relatively minor, would be a distinct enhancement of the character of the Building and of the part of the Market Place onto which it looks.

7 Mount Cook objected to Redevco's application, as it had objected to an earlier form of it, on the grounds that Redevco had not considered how its proposals would preserve or enhance the character and appearance of the conservation area and that some of the alterations might prejudice the future use of the upper floors of the Building for retail purposes. In the meantime, in early 2002, Mount Cook had commissioned the production of a number of design options for the improvement of the southern part of Market Place to the immediate rear of the Building, with a view to enlivening the area by providing more retail frontages. In March 2002 it put them to the Council as a logical extension of the scheme of improvements already achieved by the Oxford Market Initiative in the northern section of Market Place. Its proposals were supported by two other major local landowners, one of which had been jointly responsible for that Initiative. It contrasted them with Redevco's proposed alterations to the rear of the Building which, it claimed, would "nullify" Mount Cook's proposals. However, it did not embody them in any planning application of its own, indicating that it would not do so unless agreement could be reached for Redevco's proposals to conform broadly with its own.

8 The Council's response to Mount Cook's alternative proposals was that they were too vague for proper consideration and advice by its officers, though it proffered some "initial" advice indicating that the proposals were likely to be unacceptable. However, the Council informed Mount Cook that its objections to Redevco's application would be put before the Planning Applications sub-committee meeting on March 21, 2002 when it was due to consider the application. (The Council later accepted that this initial advice had been based on the wrong set of plans.)

9 The Council's Director of Planning and Transportation, in a report prepared for the sub-committee, recommended the grant of conditional permission. He referred to Mount Cook's main objection in general terms, and identified as background papers available to the Members of the sub-committee various correspondence from Mount Cook's advisers setting out its objections in detail, in particular by comparison with its own proposals. He advised the committee in the following terms that those proposals were irrelevant to the determination of Redevco's scheme:

> "An alternative scheme has been submitted on behalf of the freeholders for new shop fronts to the Market Place elevation of the building. Given that each case is treated on its own merits, these proposals are not considered relevant to an evaluation of this application".

And, in subsequent correspondence, the Council stated that the planning officer responsible had circulated the Mount Cook correspondence to the members of the sub-committee, who had fully considered it. Mount Cook's solicitors' note of the meeting records that the planning officer responsible for the application had referred to Mount Cook's advisers' letters, summarised its concerns as set out in the report for the meeting, "with the addition of a reference to improving Market Place", and advised that, as to the complaint about prejudicing future applications, Redevco's application had to be considered on its merits. The note also records that he and another officer expressed the view that the proposal would enhance the Building and the appearance of the Conservation Area. Notwithstanding Mount Cook's objections, the sub-committee approved the application.

10 There then followed further correspondence in which Mount Cook complained to the Council about the decision, repeated its earlier assertion that Redevco's proposed alterations would undermine the likelihood of any extension of the Oxford Market Initiative to the southern part of Market Place, and threatened not to pursue its proposals for that extension if Redevco's approved alterations went ahead. At the same time Mount Cook's solicitors wrote to the Council informing it of Mount Cook's intention, if necessary, to seek judicial review of the Sub Committee's decision on a number of likely grounds, including:

> ". . . failure to have regard or proper regard to the effect that implementation of the approved proposal is likely to have on the conservation area within which the building is situated particularly with regard to its adverse impact upon the prospects of completing improvements to the conservation area begun by the Oxford Market Initiative".

11 The Council, in a letter in reply indicating its intention to refer back for clarification to the committee another objection of Mount Cook immaterial to this appeal, stated that it had had proper regard to the impact that the proposal was likely to have on the Conservation Area. Mount Cook, after sight of a report by the Planning Officer for the further committee hearing, decided not to pursue the objection giving rise to it. In that second report, the Planning Officer referred again to Mount Cook's main ground of objection to the application:

> "Since this application was presented to the Sub-Committee in March there has also been further correspondence on behalf of the freeholder. This refers to the adverse implications of the proposed works, in particular the creation of dead frontage to north elevation of 200 Oxford Street, for potential improvements in Market Place linked to extending the 'Oxford Market Initiative'. Sub-Committee considered a similar objection previously. There is no agreed package of environmental improvements for this part of the public highway. . .".

In the result, the Council, by letter of May 9, 2002, formally granted conditional permission to Redevco in accordance with its application and Mount Cook duly proceeded with its application for permission to claim judicial review.

12 As Moses J. observed in para.[9] of his judgment, there is no doubt that the sub-committee was advised that Mount Cook's proposals were irrelevant to its consideration of Redevco's application. In neither of the Planning Officer's reports was it suggested that those proposals were matters that it ought to take into consideration.

The applications at first instance for permission to claim judicial review

13 Mount Cook's application was first considered and rejected as unarguable on paper by Ouseley J. In his observations he said that the Council was entitled to disregard Mount Cook's alternative proposals because it would have been irrational for the Council to have relied on them as a basis for refusing permission to Redevco's beneficial scheme. He added that, even if Mount Cook's scheme could have been regarded as more beneficial than that of Redevco, there was no evidence that it was capable of implementation or that a refusal of permission would assist their implementation. Accordingly, the difference in practice between ignoring Mount Cook's scheme and giving it no or negligible weight, as the advice to the Council would obviously have been, was nil.

14 Mount Cook indicated its intention to renew its application by way of oral hearing. And the Council, having filed an acknowledgment of service pursuant to the new provision for it in CPR r.54.8, indicating its wish to take part in the judicial review and to contest the claim, also indicated its intention to attend the renewal hearing. The hearing before Moses J. lasted nearly a full day and was, for all practical purposes, a hearing of the substantive claim. Both parties appeared by counsel who had provided the court with skeleton arguments. And both parties filed all the evidence that would have been required at a substantive hearing if it had gone that far.

15 Moses J. took a similar view to that of Ouseley J. emphasising also that an applicant for planning permission, whose proposal conforms to local planning

policies, does not have to show planning benefit but simply lack of planning harm. On the main issue as to the relevance to the planning decision of Mount Cook's alternative proposals, he said, at paras [12], [13] and [17] of his judgment:

> "12. . . . The Council had no power to refuse permission on the basis that the proposal would not enhance he character of the area; see *South Lakeland District Council and Secretary of State for the Environment* [1992] 1 All ER at page 573. The only obligation of the Council was to consider whether the development left the character or appearance of the conservation area unharmed. In fact, the officer advised that the proposals would enhance the character and appearance of the building and the conservation area, and meet the policy tests . . .. The fact that there might have been a better scheme for enhancement was, in the view of the Council, nothing to the point. That, in my judgment, was an approach that the Council was perfectly entitled to adopt.
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> 13. Further, the suggestion that the Council was bound to consider the alternative scheme is, in my view, fallacious because there was no basis for suggesting that there was any possibility of the proposals of the claimants coming to fruition. . . . Redevco owns a 999 year lease of number 2000. It is plain that they were intent upon developing the north side of the building in the way they proposed. The claimants had no power whatsoever to compel them to do otherwise. If permission were refused then the northern aspect of that building would remain as it was. In my view, it is not arguable that it is open to the claimants to seek to exercise some control over the building in the face of Redevco's leasehold interest, by saying that as a matter of law the Council was under an obligation to consider alternative schemes as disclosing a better proposal.
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> 17. There is, in my view, nothing in ground 1. The claimants had no realistic prospect of being able to force Redevco to adopt their plan. The Council was correct in law to regard the existence of rival proposals as being irrelevant. Even it is was not irrelevant, it was bound to make no difference to the result, as Ouseley J. said when refusing permission in writing."

16 Moses J. also rejected, as irrelevant and unarguable, a second objection of Mount Cook that the grant of permission would be likely to prejudice, contrary to the Council's planning policy SS2, the future retention of the upper floors of the Building in retail use.

17 In the result, he refused permission to apply for judicial review and ordered the costs of the application, which he summarily assessed at £11,508.13, to be paid by Mount Cook to the Council.

The issues

18 There are four issues in this judicial review claim which the Court, in granting permission to appeal from Moses J.'s refusal of permission, directed it should retain and determine for itself. Two are matters of planning law, the third concerns a court's discretionary power to refuse relief and the fourth is one of costs at the permission stage of claims for judicial review. They are:

(1) whether a local planning authority, when determining a planning application is entitled to grant it without regard to a possibility, where drawn to its attention, of an alternative and preferable proposal;
(2) whether a local planning authority, in determining a planning application for operational development of land, is entitled to refuse it on the ground that grant of it would make a future change of use contrary to its local planning policy materially harder to resist;
(3) whether, in the event of the Court holding that the Council had erred in law in granting Redevco's application for planning permission, it would nevertheless be entitled to dismiss Mount Cook's claim for judicial review in the exercise of its discretion; and
(4) the circumstances in which a court, on an oral application for permission to claim judicial review, may award costs to a defendant who has attended and successfully resisted the application.

Issue 1— The materiality to a planning application of a possibility of an alternative preferable proposal

19 As I have indicated, Ouseley and Moses JJ. were of the view that the Council was entitled to disregard Mount Cook's alternative proposals, notwithstanding its representations to it that they were preferable in planning terms to those of Redevco. Mr John Steel, Q.C., for Mount Cook, in challenging Moses J.'s ruling, submitted that he was wrong in law in holding that its alternative proposals for the Building and southern part of Market Place were irrelevant to the Council's determination of Redevco's application for operational development to the northern elevation of the Building. In particular, he argued that the Judge erred in ruling that, as the Council had considered Redevco's application acceptable in planning terms, it had no power to refuse it on the basis that on the basis that there was or might be some other preferable scheme. He also criticised the Judge's reliance upon Mount Cook's lack of effective control of the Building so as to give effect to its proposals as further support, if necessary, for his view of the immateriality or lack of weight of its suggested alternative.

20 The starting points, as Mr Steel noted, are ss.54A and 70(2) of the Town and Country Planning Act 1990 ("the 1990 Act"), which provide:

> "54A Where, in making any determination under the Planning Acts regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise.
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> 70
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> (2) [in making a determination of a planning] application the [local planning authority] shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

21 The critical question, which it seems to me is one of mixed law and fact, is, therefore, whether the existence of a possible alternative scheme more beneficial in planning terms than that proposed in a planning application is a "material consideration" for this purpose. The Act gives no help as to what may constitute

such a consideration, but the following words of Cooke J. in *Stringer v Minister of Housing and Local Government* [1970] 1 W.L.R. 1281, at 77, are usually taken as an all-context starting point:

> "... any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances".

The submissions

22 Mr Steel submitted that Cooke J.'s broad description includes the consideration in this case of the existence of a possible alternative, preferable, use for the land in question. He maintained that it would be open to a decision-maker to refuse planning permission for an otherwise acceptable development where he considers it desirable in planning terms to preserve an alternative option, since to grant permission in such circumstances would or could amount to a wider planning harm. In that sense, he defined "planning harm" as an absence of planning benefit, for example, a failure in the application proposal to assist some general local planning policy. He sought support for that submission in the judgment of Mr Christopher Lockhart-Mummery, Q.C., sitting as a Deputy High Court Judge, in *Nottinghamshire CC v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 293; [2002] 1 P. & C.R. 30, a case in which the Deputy Judge upheld the decision of an Inspector refusing permission for a residential development in the light of his view that it was desirable to preserve an option of retaining the land in question for educational use. The Deputy Judge dealt with the relevance of such a consideration as a matter of principle at para.[36] of his judgment:

> "If the judgment is made, whether through the development plan process or indeed outside it, that it appears desirable to preserve the option of using a piece of land for a purpose seen to be of benefit in the public interest for the country or the local community, this is in principle, a material planning consideration for the purposes of sections 70 and 54A of the Act. I understood this to be common ground in the case. The weight given to the consideration will vary hugely from case to case .... Each case will turn on its own merits, but the importance of the project or proposal, its desirability in the public interest, are undoubtedly matters to be weighed. Therefore, in considering whether to grant planning permission for a proposal (use B) which will pre-empt the possibility of desirable future use (use A), the relative desirability of the two uses have to be weighed. *In striking the balance, the likelihood of use A actually coming about is doubtless a highly material consideration*" [my emphasis].

23 As can be seen from those observations, the Deputy Judge had in mind, not only the materiality of such a consideration, but also its weight. He included in the latter the importance and desirability of the alternative proposal to the public interest,

and seemingly, in his reference to "striking the balance", the likelihood of it coming about. In practice, at the margins the questions whether a consideration is material and, if so, what, if any, weight should be given to it, shade into each other.

24 But Mr Steel sought to draw two further propositions from the *Nottinghamshire CC* judgment of particular relevance to the facts of this case.

25 First, he submitted that it is open to a decision-maker to refuse permission because of the existence of an alternative, possibly more desirable, scheme in planning terms even where there was no evidence on which he could conclude that it is likely to go ahead. That was certainly part of the reasoning of the Deputy Judge in the following passage in para.[40] of his judgment:

> "I accordingly hold that, subject to matters to which I turn below, it was in principle open to the Inspector to refuse residential development in the instant case . . ., in the light of his conclusion that it was desirable to preserve the option of retaining the appeal site for educational use . . ., albeit that he made no finding that it was more likely than not that the site would effectively be put to educational use."

Such a proposition, which the Deputy Judge derived in part from the judgment of Mr George Bartlett, Q.C., sitting as a Deputy High Court Judge in *South Buckinghamshire DC v Secretary of State for the Environment, Transport and the Regions* [1999] P.L.C.R. 72, at 79–80, logically follows from his first proposition (at para.[22] above) in those cases where the importance or desirability in the public interest of preserving a particular alternative option is so great that the decision-maker could reasonably conclude that to grant the application in the circumstances would or could constitute a planning harm. Again, both the preferability in planning terms of an alternative scheme and the degree of possibility or likelihood of it coming about may, depending on their relative strength, go to materiality or to weight. In the context of this case, Mr Steel placed much emphasis on: (1) the claimed public importance and desirability of extending, in the outline way in which Mount Cook proposed, the Oxford Market Initiative, including the provision in the rear elevation of the Building of *both* retail displays and access to the retail areas behind them from Market Place; and (2) the fact that Mount Cook had alerted the Council to its proposals and also to its contention that grant of permission to Redevco to make its alterations would preclude the possibility of them coming about.

26 However Mr Steel needed, in the circumstances of this case, to advance a second argument, namely that an alternative scheme is a material consideration to a decision on an application for planning permission even where, on the facts before the decision-maker, there is no likelihood or real possibility of that alternative scheme eventuating. Having developed his argument thus far, he submitted that Ouseley and Moses JJ. were wrong to hold that Mount Cook's proposals were irrelevant to—as distinct from having no weight in—the Council's determination of the Redevco application. He maintained that Moses J. erred in law in stating that the only obligation on the Council was to consider whether the application "left the character or appearance of the conservation area unharmed". Both propositions, he submitted, were contrary to the *Nottinghamshire CC* decision, the effect of which was that alternative schemes were material considerations. The fact that they were

unlikely to come about went to their weight not their materiality and did not, of itself, preclude the decision-maker from refusing planning permission in order to preserve the possibility of taking planning advantage of them if they did. He added that the fact that the Council could not force Redevco to implement Mount Cook's scheme did not meet the point that its responsibility was to regulate the use of land in the public interest and that a refusal of the sought planning permission could have prompted Redevco to submit a further application more in keeping with Mount Cook's proposed alternative.

27 Mr Timothy Corner, Q.C., for the Council, submitted that Moses J. correctly found that the Council had been entitled to disregard Mount Cook's alternative proposals, despite its assertion that they could be undermined by the grant of Redevco's application for operational changes to the rear elevation of the Building. He said that Mount Cook's proposals were irrelevant and that, even if they were relevant, they were bound to make no difference to the result, as both Ouseley and Moses JJ. found. On the issue of materiality, he made two submissions: (1) the existence of an alternative scheme is not capable of rendering an otherwise acceptable development unacceptable and is, on that basis alone, an immaterial consideration; and (2) further or alternatively, on the facts of the case, Mount Cook's proposals were immaterial in that they were too vague to amount to an alternative scheme worthy of consideration and, in any event, had no reasonable prospect of being implemented.

28 As to the first of those submissions Mr Corner said that the Council, in determining Redevco's application, had to have regard to the development plan and other material considerations and, if, having regard to those matters it found the application acceptable, it was bound to grant permission. It could not be a material consideration that there might be a better scheme. Section 70(2) of the 1990 Act does not demand a comparison between alternative projects; it does not even require that application proposals should enhance, as distinct from preserve, the character or appearance of a conservation area in which the subject property is situate; see *South Lakeland DC v Secretary of State for the Environment* [1992] 2 A.C. 141, HL. (As I have said, and as it happens, the Council's officers advised the Council's Planning Sub-Committee that Redevco's application proposals would themselves enhance the conservation area.) But, if enhancement is required, that would not require a comparison between alternative proposals in a case such as this. He submitted that, if the Council had refused permission on this ground, its decision would have been judicially reviewable as irrational because it would have failed to consider the application on its merits. He added that the facts that Mount Cook proposed to extend the Oxford Market Initiative to the southern part of Market Place including the rear elevation of the Building and had threatened not to implement that proposal if Redevco's permission stood, cannot make the possibility of its proposal a material consideration when, as a matter of law, it would not otherwise be.

29 Mr Corner's alternative submission was that, even if Mount Cook's proposals are capable in principle of being material, they were not so in the circumstances for the reasons given by Moses J., in para.[13] of his judgment, that Mount Cook had no power to bring them to fruition and/or that, in any event, they were of no or negligible weight. He acknowledged case law, including the *South Buckingham-*

shire DC case indicating the permissibility of refusal of planning permission in order to preserve an existing use of land or to preserve it for some desirable use. But he maintained that, unlike the circumstances of this case, there must at least be a realistic possibility of such use eventuating if permission is refused. He submitted that Mr Lockhart-Mummery's decision in the *Nottinghamshire CC* case is not authority to the contrary since, there, the issue was whether the Inspector had been entitled to refuse permission for residential development of land that was suitable for the purpose of a new primary school, which was likely to be needed and for which it had been allocated in the local plan. He added that, even though the Inspector in that case had not concluded on a balance of probabilities that the land would be needed for that purpose, the Deputy Judge had found that he had been entitled to refuse permission since, given the scarcity of land and possible need for this site for educational purposes, the policy plan's preservation of the land for that purpose was, in the circumstances, a material consideration.

Conclusions

30 Mr Corner, in the course of his submission, put forward the following general propositions which, with some slight additions, I accept as correct statements of the law and as a useful reminder and framework when considering issues such as this. They are:

(1) in the context of planning control, a person may do what he wants with his land provided his use of it is acceptable in planning terms;
(2) there may be a number of alternative uses from which he could choose, each of which would be acceptable in planning terms;
(3) whether any proposed use is acceptable in planning terms depends on whether it would cause planning harm judged according to relevant planning policies where there are any;
(4) in the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant in planning terms;
(5) where, as Mr Corner submitted is the case here, an application proposal does not conflict with policy, otherwise involves no planning harm and, as it happens, includes some enhancement, any alternative proposals would normally be irrelevant;
(6) even in exceptional circumstances where alternative proposals might be relevant, inchoate or vague schemes and/or those that are unlikely or have no real possibility of coming about would not be relevant or, if they were, should be given little or no weight.

31 Turning to the circumstances of this case it is clear that Redevco's application, if considered on its own, would not be harmful in a planning sense and would enhance the Building and the Conservation Area of which it is part. Stopping there, and still considering the application on its own, that is more than Redevco needs to establish to justify the grant of permission. It is enough for it to show that its proposed development would not adversely affect the character or appearance of the area and is otherwise unobjectionable on planning grounds; it is not necessary

for it to show that its proposals would constitute an enhancement in planning terms; see the *South Lakeland DC* case, *per* Lord Bridge (with whom the other Law Lords agreed) at 578c–e. However, the issue raised by Mount Cook—which was not raised in *South Lakeland*—is that the proposals in Redevco's application, if considered alongside its, Mount Cook's, alternative proposals, would or could be harmful in a wider planning sense of frustrating or endangering a more favourable solution for the Building and the Area. Put more shortly, its case is that Redevco's proposed enhancement should yield to its proposed better enhancement.

32 In my view where application proposals, if permitted and given effect to, would amount to a preservation or enhancement in planning terms, only in exceptional circumstances would it be relevant for a decision-maker to consider alternative proposals, not themselves the subject of a planning application under consideration at the same time (for example, in multiple change of use applications for retail superstores called in by the Secretary of State for joint public inquiry and report). And, even in an exceptional case, for such alternative proposals to be a candidate for consideration as a material consideration, there must be at least a likelihood or real possibility of them eventuating in the foreseeable future if the application were to be refused. I say "likelihood" or "real possibility", as the words tend to be used interchangeably in some of the authorities; see, *e.g. New Forest DC v Secretary of State for the Environment* (1996) 71 P. & C.R. 189, *per* Mr Nigel Macleod, sitting as a Deputy High Court Judge. If it were merely a matter of a bare possibility, planning authorities and decision-makers would constantly have to look over their shoulders before granting any planning application against the possibility of some alternative planning outcome, however ill-defined and however unlikely of achievement. Otherwise they would be open to challenge by way of judicial review for failing to have regard to a material consideration or of not giving it sufficient weight, however remote.

33 When approaching the matter as one of likelihood or real possibility, as I have already indicated, it may often be difficult to distinguish between the concepts of materiality and weight; and both, particularly weight, are essentially matters of planning judgment. But I do not consider that a court, when considering the rationality in a judicial review sense of a planning decision, should be shy in an appropriate case of concluding that it would have been irrational of a decision-maker to have had regard to an alternative proposal as a material consideration or that, even if possibly he should have done so, to have given it any or any sufficient weight so as to defeat the application proposal.

34 In so concluding, I have been assisted by the judgment of Laws LJ in this Court in *R. (on the application of J (A Child)) v North Warwickshire BC* [2001] EWCA Civ 315. In that case a planning committee considering an application for planning permission to construct dwelling houses declined to consider an alternative site referred to by objectors and granted permission. Laws L.J., with whom Aldous L.J. and Blackburne J. agreed, upheld the committee's decision, holding that they were entitled to disregard the alternative site. In so holding, he stated as a general proposition, and after reference to authorities (including the judgment of Simon Brown J., as he then was, in *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1987) 53 P. & C.R. 293, at 299), that consideration of alternative sites would be relevant to a planning application only in exceptional circum-

stances. However, in his explanation of the proposition, it is plain that, in his use of the word "relevance", he had in mind both materiality and weight, a practical approach with which, as I have just indicated, I respectfully agree. Whilst that case concerned a possible alternative site for the sought development, and Mount Cook's proposals include alternative options for the application site, the approach of Laws L.J. seems to be equally applicable. This is how he put it, at paras [30]–[33] of his judgment:

> "30. . . . consideration of alternative sites would be relevant to a planning application only in exceptional circumstances. Generally speaking—and I lay down no fixed rule . . .—such circumstances will particularly arise where the proposed development, although desirable in itself, involves, on the site proposed, such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration.
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> 31. . . . But even if the potentially available site . . . were not a *necessary* planning consideration, might a reasonable planning authority nevertheless have regarded it a *possible* planning consideration, and so should have taken it into account?
>
> 32. . . . I do not think so. There were no clear planning objections here (to use Simon Brown J's language [in the *Trusthouse Forte Hotels* case]. In context, the learned judge in that case, by those words, was, I think, referring to substantial objections, which were on the facts, made out. Here, there were, of course, objections, otherwise plainly we would not be here at all. There had been objections in relation to . . . [the alternative site] as well. If the council, as the judge held, were obliged to consider whether to have regard to the alternative site, that can only have been upon the basis that that factor might have prevailed so as to persuade the council to refuse planning permission. But, in my judgment, it was simply not capable of amounting to a good enough reason for refusing planning permission on the site in question here. Objections put forward against a planning applications such as this are, of course, judged upon their merits. If they outweigh the planning benefits of the development applied for, the application will be refused. To introduce into that equation a consideration of a different character, namely whether there would be less disbenefits on another site, could only be justified for some special reason, such, as I have said, as the existence of particularly pressing need for the development. . . ..
>
> 33. It follows, in my judgment, that no reasonable council could have treated the . . . [alternative site] as relevant. In those circumstances, it matters not that the council thought that they were obliged not to consider it. If they had considered it, they would have been bound to reject it."

35 In addition, there is nothing in the *South Buckinghamshire DC* or the *Nottinghamshire CC* cases to support the view that, where on the facts before an Inspector, there is no likelihood or real possibility of an alternative proposal proceeding if the planning application under consideration were refused, that it should be refused anyway against the bare possibility of that or some other alternative more beneficial scheme eventuating. Indeed, such a suggestion is

directly contrary to the concluding words in para.[36] of Mr Lockhart-Mummery's judgment in the *Nottinghamshire CC* case (see para.[22] above), more aptly going to weight rather than whether the alternative is a material consideration:

> "In striking the balance, the likelihood of use A actually coming about is doubtless a highly material consideration."

It would be highly harmful to the efficient and otherwise beneficial working of our system of planning control if decision-makers were required to consider possible alternatives, of which, on the facts before them, there is no likelihood or real possibility of occurrence in the foreseeable future.

36 Accordingly, I agree with the approach of Ouseley and Moses JJ. and the submissions of Mr Corner. In the circumstances of this case the alternative proposals of Mount Cook, such as they were, were not material considerations within ss.54A or 70(2) of the 1990 Act or, if they were, they were of such negligible weight that the court was entitled to refuse permission to apply for judicial review because the Council could not reasonably have taken any notice of them.

37 As Mr Corner put it, there is no conceivable basis upon which Mount Cook's proposals could have caused the Council to reach a different decision on Redevco's application; see, *e.g. Bolton MBC v Secretary of State for the Environment* (1990) 61 P. & C.R. 343, at 353 *per* Glidewell L.J., and the *North Warwickshire* case, *per* Laws L.J. at 65. On the contrary, if the Council had refused these relatively minor alterations, its decision would have been judicially reviewable for failure to consider the application properly on its own merits.

38 The Council had an obligation to consider Redevco's application on its own merits, having regard to national and local planning policies and any other material considerations, and to grant it unless it considered the proposal would cause planning harm in the light of such policies and/or considerations. On the following information before the Council, I do not consider that it is usurpation by the Court of the Council's responsibility for the planning decision, as suggested by Mr Steel, to refuse Mount Cook's claim for judicial review. That is so, even if the matter is one of weight as distinct from the materiality of the consideration.

39 First, Mount Cook's proposals included works to the Building that were different from those proposed by Redevco in its application, and Mount Cook could not implement them without Redevco's consent. Redevco had not given any such consent and, in persisting with its application for planning permission, was clearly not minded to do so. Secondly, there was and is no evidence before the Council of any prospect of Redevco giving such consent. And, contrary to Mr Steel's suggestion, I do not consider that the Council had a duty to test Redevco's attitude by refusing its application in order to see whether, as a result of negotiation between the parties or otherwise, that would produce a change of heart. Thirdly, as Mr Corner emphasised, Mount Cook's alternative proposals were "extremely inchoate". They did not take the form of a planning application, but merely, as Mount Cook's advisers described them, of "further options in the form of urban design studies for improvements". As the Council's planning officer had observed in correspondence with Mount Cook's advisers, its proposals for general improvement of the southern part of Market Place were vague, in particular "very

sketchy" with regard to its proposed works to the highway and without details for implications of traffic movement and servicing. In the circumstances, and, as I have said, Mount Cook's threat that it would not continue with its wider proposals if Redevco was permitted to proceed with its alterations to the Building could not have a life of its own as a material consideration. That is, not only because of the lack of any likelihood or real possibility of Mount Cook being able to bring about its proposals for the Building, but also because there was no evidence before the Council that refusal of Redevco's application would assist it in doing so.

Issue 2— whether the permission of external operational development coupled with proposals to make internal alterations not in themselves susceptible to planning control, might prejudice future planning control of non-conforming change of use

40 This issue concerns the relationship between external operational development for which Redevco sought and obtained planning permission, in particular the installation of new doors and a segregated entrance lobby on the Market Place elevation and the removal of black film from the inside of the windows on the first and second floors, and the internal alterations that it proposed, which did not require planning permission, including the removal of an internal escalator between the second and third floors. Mount Cook maintained that the internal alterations could prejudice the continued retail use of the Building, making reference to Redevco's pending separate application for permission for change of use of the upper floors of the Building from retail to office and residential use. Mount Cook's expressed concern was that such internal alterations, in conjunction with the external development the subject of the application, could make it more difficult for the Council thereafter to resist applications for such change of use in conflict with policy SS2 in the local plan to protect retail floor space in large stores trading on several floors. The planning officer, in his written report to the Planning sub-committee, advised:

> "Notwithstanding the objectors' concerns about the future use of the building, the Council has a duty to consider the current application on the basis on which it has been submitted i.e. for continued retail use. Any objections relating to the loss of retail accommodation on the upper floors would be assessed as part of a separate application."

He confirmed this advice orally to the sub-committee on its consideration of the application, observing that the application proposal would enhance the appearance of the Building and the character and appearance of the Conservation Area and that it had to be considered on its own merits.

41 As Moses J. observed, in para.[18] of his judgment, the Council's Planning sub-committee clearly considered and rejected these additional arguments of Mount Cook. It decided that removal of film to the windows on the upper floors of the Building would not prejudice the further use of those floors for retail use and pointed out that the removal of the internal escalator was not the subject of planning control. He rejected this challenge to the permission, observing that the

Council had rightly decided to grant it on the basis that Redevco's proposals, not only would not harm, but would enhance, the appearance of the Market Place frontage to the Building, and would not inhibit the Council's planning control over any future attempts to secure non-conforming change of use. He observed that, insofar as the prospects of continued retail use of the upper floors might be lessened by the removal of an internal escalator, as such removal was not subject to planning control the Council could not, therefore, prevent it. He thus considered that the Council had correctly considered the application on its own merits and that Mount Cook's expressed fears for the future were irrelevant and unarguable.

Submissions

42 The main burden of Mr Steel's argument was that, although Redevco could continue retail use of the upper floors of the Building and would require planning permission for any change of use, its present proposals, if they proceed, would undermine resistance to such change. He prefaced his detailed submissions with the observation that operational development undertaken in a building can be relevant to a determination whether there has been a material change of use of the building, citing *Impey v Secretary of State for the Environment* (1984) 47 P. & C.R. 157, and that internal alterations, though not themselves susceptible to planning control, may be the subject of enforcement proceedings where they are an integral part of unauthorised use of the building, citing *Somak Travel Ltd v Secretary of State for the Environment* (1988) 55 P. & C.R. 250, DC, *per* Stuart-Smith J. (as he then was) at 633–634. He claimed that such relationship between operational development and effecting or facilitating unauthorised change of use also applies where operational development for which permission is being considered is "integral to an (as yet) unauthorised future use". He maintained that a decision-maker considering an application for such permission is entitled to have regard to its practical effect on future use and to refuse it on the ground that it might make it hard to resist a subsequent application for a material non-conforming change of use. Applying that extension of the principle to the facts of this case, he submitted that, given Redevco's pending application for change of use of the upper floors of the Building to office and residential use, the proposed inclusion in the sought operational development of new doors to the Market Place elevation and removal of black film from the first and second floor windows would facilitate a segregated entrance lobby for the proposed change of use on the upper floors. On that basis, he maintained that the Council had failed to have regard to a consideration material to its decision and that Moses J. was wrong to dismiss the complaint on the ground that it was irrelevant.

43 Mr Corner submitted that the Judge rightly held that the Council was entitled to consider Redevco's application on its own merits and to disregard the suggestion that to grant permission on that basis would be likely to facilitate future non-conforming loss of retail use on the upper floors of the Building. He submitted that such a concern was not relevant to the present application, which was not for change of use, but to the quite separate application that Redevco had pending for such change of use, and that Moses J. was correct to reject the submission as irrelevant and unarguable for the reasons he gave. He added that there is nothing in

the grant of planning permission for the external works that would prevent the Council from either refusing planning permission for change of use or from taking enforcement proceedings to prevent any such unauthorised use.

Conclusion

44 This complaint of Mount Cook—one of "planning creep"—is barely distinguishable from its first challenge, namely that it was a material consideration for the Council that the grant of permission to Redevco would or might frustrate an alternative scheme of enhancement—an argument to which, save in exceptional circumstances, the *South Lakeland* authority is a bar. Here too, the correct approach for the Council's Planning sub-committee was the one it adopted, namely to consider whether Redevco's proposal would cause planning harm by assessing it against doing nothing, not as against any potential enhancement that might emerge from Mount Cook's proposals. As it happens, the Council's Planning sub-committee did consider and reject Mount Cook's contentions as to possible planning creep. As to Mr Steel's reliance on the *Lake District* and *Somak* cases, both, unlike this case, were concerned with a present non-conforming change of use, in the former whether internal alterations could properly be taken into account in enforcement proceedings in respect of unauthorised change, and in the latter whether, as an integral part of unauthorised use, they could be the subject of enforcement proceedings. And, as to Redevco's pending application for change of use to mixed office and residential use on the upper floors, that is an application of which the Council's Planning sub-committee considering this application for operational development was aware and which it can decide when the matter comes before it.

Issue 3— Discretionary refusal of relief

45 If I am right in my conclusion that Mount Cook's claim is unarguable on the law and facts, the question of refusal or relief in the exercise of the Court's discretion does not arise. However, in view of the conflicting submissions of counsel on this issue, I should make plain that, if it had been necessary to consider the point, I would not have refused relief in the exercise of my discretion in reliance on the motive of Mount Cook in seeking it, namely to put pressure on Redevco to sell its lease to Mount Cook rather than—or in addition to—a genuine concern about future loss of retail use in the upper parts of the Building.

46 The essential question for a decision-maker in planning matters is whether representations one way or the other, whatever the motives of those advancing them, are valid in planning terms. A collateral motive may have relevance to the reasonableness of a landlord's refusal to consent to alterations, as Mr Paul Morgan held in his judgment in the leasehold dispute between the parties that I have mentioned in para.[5] of this judgment. But judicial review applications by would-be developers or objectors to development in planning cases are, by their very nature, driven primarily by commercial or private motive rather than a high-minded concern for the public weal. I do not say that considerations of a claimant's motive in claiming judicial review could never be relevant to a court's

decision whether to refuse relief in its discretion, for example, where the pursuance of the motive in question goes so far beyond the advancement of a collateral purpose as to amount to an abuse of process. The court should, at the very least, be slow to have recourse to that species of conduct as a basis for discretionary refusal of relief. In any event it would, as Mr Steel pointed out, be exceptional for a court to exercise discretion not to quash a decision which it found to be *ultra vires*; see *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)*. [2001] 2 A.C. 603, HL, *per* Lord Hoffmann at 616D–G, approving an observation of Glidewell L.J. in *Bolton MBC v Secretary of State for the Environment* (1991) 61 P. & C.R. 343, at 343.

Issue 4— Costs at the permission stage

47 The fourth issue raises a matter of considerable public importance, namely as to the guidance to be given by this Court concerning the award of costs at the permission stage of claims for judicial review. The issue affects not only claimants and defendants, but also interested parties and the court itself in the access that it provides to justice, having regard to the overriding objective of dealing with cases justly in CPR r.1.1 and good public administration. More precisely, on the facts of this case, the issue is whether Moses J. was entitled, in the exercise of his discretion, to order Mount Cook to pay the Council's costs of filing an acknowledgment of service and of successfully resisting its oral application.

48 The issue arises under the relatively new procedure for the grant of permission for claiming judicial review introduced by CPR Pt 54 on October 2, 2000, supplemented by a Judicial Review Practice Direction. Both followed a Review of the Crown Office under the chairmanship of Sir Jeffery Bowman, who submitted his report ("the Bowman Report") to the Lord Chancellor in March 2000. This procedure replaced the practice under RSC, Ord.53 of an ex parte application for leave to move for judicial review, normally made on paper, but which could also be made orally at an ex parte hearing. A respondent, if notified of the application ("ex parte on notice"), could make representations on paper and/or, if he chose to attend and was allowed by the court to participate in a permission hearing, orally. If a respondent successfully resisted the grant of permission at an oral hearing, the court had power to award him costs against the applicant, but it was sparing in its exercise of it. Given that practice, renewed oral applications for permission were normally heard ex parte and were, in any event, short. Applicants, on the whole, were able to seek relief without fear, if permission was refused, of being saddled with the respondent's costs at that stage.

49 The new procedure involves the proposed defendant and any interested party right from the start and is generally dealt with in the first instance as a paper application. By CPR r.54.7, the claimant must serve a claim form on the defendant and any interested party within seven days of issue. By CPR r.54.8 any such person "who wishes to take part in the judicial review" is required to file an acknowledgment of service". If he files an acknowledgment of service and intends, in taking part in the judicial review, to contest the claim, CPR r.54.8(4) requires him to plead it in the acknowledgment of service and to summarise his grounds for doing so.

50 However, CPR Pt 54 says nothing direct about the costs of filing such a document, nor indeed about the costs of and incurred by a defendant who chooses, in accordance with his entitlement under para.8.5 of the Practice Direction, to attend and argue his case at an oral renewal hearing. There is an indirect reference to costs in CPR r.54.9. By r.54.9(1), a failure to comply with the requirements as to acknowledgment of service by a party who subsequently seeks to take part in a permission hearing may, but will not necessarily, result in the court not allowing him to do so. But if he is allowed to take part, by 54.9(2), the court may take his failure into account "when deciding what order to make about costs", a provision that may have as one of its premises that a successful defendant at the permission stage who *has* complied with CPR r.54.8 should normally be entitled to his costs of filing the acknowledgment of service. Another premise may be that a defendant who has not complied with CPR r.54.8 and who has not attended a permission hearing, but who later succeeds on the substantive hearing of the claim, should have some or all of his costs disallowed because of his failure to comply with rule and thus to put his case to the court at the permission stage.

51 However, regardless of the question of costs, there is now a positive obligation on a defendant or other interested party served with the claim form to acknowledge service and to consider in doing so: (1) whether to contest the claim, and, if so, on what grounds and at what stage; and (2) if he decides to contest it, to summarise his case at the permission stage. The clear purposes of these changes, as recommended in the Bowman Report, are to enable the judge dealing with the application on paper to identify at that early stage the strengths and weakness of the proposed claim and to encourage, where appropriate, settlement of meritorious claims at the permission stage.

52 The only direct provision as to costs at the permission stage is that in para.8.6, when read with para.8.5, of the Practice Direction. Those paragraphs read:

> "8.5 Neither the Defendant nor any interested party need attend a hearing on the question of permission unless the court directs otherwise.
>
> 8.6. Where the defendant or any party does attend a hearing, the court will not generally make an order for costs against the claimant."

There are two important points to make about these provisions. First, on one view, when read together, they provide that, in general, a claimant should not have to pay a defendant's or other interested party's costs of attendance at a permission hearing, but say nothing about the costs of filing an acknowledgment of service by a defendant who intends "to take part" in the judicial review, whether or not he subsequently attends such a hearing. On another view, they do not, or should not, distinguish between the costs of obligatory acknowledgment of service and of optional attendance at a permission hearing whether or not the party who has filed an acknowledgment of service attends such a hearing, see Robert McCracken and Gregory Jones, *Leach, Re*, [2001] EWHC Admin 455. Secondly, the guidance, in my view, applies to the costs of preparation for, as well as of attendance at, a hearing.

53 The Council, which intended to contest the sought judicial review, filed an acknowledgement of service, as required by CPR r.54.8(2) and (4), and, as is plain

from the facts giving rise to this appeal, attended and successfully resisted the grant of permission at the permission hearing.

54 Before I continue, I should mention the ruling of Collins J. in *Leach, Re* [2001] EWHC Admin 445, a case concerning a defendant's claim to the costs of filing an acknowledgement of service, and the effect attributed to it in the notes in *The White Book* 2002, at paras 54.12.5–6. The case did not concern the costs of an oral permission hearing, for there was none. The claim form and application for permission, to which the defendant had filed an acknowledgment of service indicating his intention to contest the claim and the reasons why, had been refused by a different judge on paper. The hearing before Collins J. was to consider the defendant's application for an order that the claimant should pay his costs of filing the acknowledgment of service. Although only the defendant appeared and was represented by counsel at the hearing, the claimant's solicitors wrote to the court objecting to the proposed order, a letter that Collins J. took into account. He made the order sought, expressing the view that, since the new procedure imposes on a defendant who seeks to take part in and contest a judicial review claim an obligation to file an acknowledgement of service containing a pleading of his case, it is only fair that he should be awarded his costs if, as a result, he successfully resists it at the permission stage. It is not apparent from the judgment whether, in reaching that view, Collins J.'s attention was drawn to paras 8.5 and 8.6 of the Practice Direction. This is how Collins J. put it at paras [14]–[18] and [21] of his judgment, which was extempore:

> "14. The purpose of . . . [CPR 54.9(2)] would appear to be that where points which showed that the claim lacked merit were not made at the permissions stage but were raised on the hearing, the court might take the view that it was not fair that the applicant should pay the extra costs which could have been avoided if only the points had been made at the earlier stage. But that, of course, only underlines the point made by Mr Corner [counsel for the defendant], that if that is one of the purposes behind the new provisions, and the requirement is there, then why should the successful party, in this case the defendant, have to bear the costs of putting forward his objections to the claim, if those objections then serve to defeat the claim? Why should he be required by the rules to incur costs which he can never recover, even if he is successful as a result of what he has done? That, submits Mr Corner, is manifestly unfair, and I agree with him. It clearly is on the face of it, and having regard to the new rules, it is difficult to see that there is any sensible answer to the submission which Mr Corner has made. It seems to me that, in principle, . . . if a defendant incurs costs in submitting an acknowledgement of service, as required by the rules, then he ought to be able, if he succeeds, to recover his costs of so doing.
>
> 15. How much in principle should he be able to recover? It seems to me that it should be limited to the costs incurred in actually producing the acknowledgement, and those will obviously depend on the circumstances. . . .
>
> 17. But it seems to me that if this is to prevail, and if I am right in my conclusion that, in principle, costs should be awarded, it is thoroughly

undesirable that there should be a need for an application such as had to be made in this case to obtain such costs. That, of course, only adds to the amount payable.

18. It is obvious that the Rules Committee is going to have to consider in detail the implication of this decision, but, as it seems to me, it ought to be dealt with by the judge when he deals with the permission application, and that can only happen if the application for costs is made in the body of the acknowledgement and an indication is given as to the amount of costs which are being requested. That, of course, has to be served on the other side, who would have to have an opportunity to deal with it . . .

21. I am conscious . . . that I have not been able, since this is an extempore judgment and it would be equally undesirable to reserve to incur yet further costs, to have spelt out precisely what should be done for the future. One thing that seems to me to be essential is that this decision of mine, that in principle costs ought to be awarded, must be given wide publicity because I suspect that claimants at the moment are simply unaware that they run the risk of orders such as this as a result of the change in the rules . . .".

55 I have set out Collins J.'s reasoning at some length to demonstrate that his ruling was confined to the award to a successful defendant at the permission stage of his costs of filing an acknowledgment of service. It did not extend to an award to a defendant of any of his other costs in successfully resisting a claim at the permission stage, in particular to any costs of and/or occasioned by an attendance at a permission hearing. However, the editors of *The White Book*, in the following note on the decision, in the Autumn 2002 and 2003 editions, at paras 54.12.5–6, appear to have given it a wider effect, suggesting that it gives a defendant a right in principle to recovery of other costs incurred in successfully resisting the claim at the permission stage, including his costs of attendance at an oral hearing.

> "The High Court has now held that, as a result of the changes in the rules governing judicial review claims, a defendant who resists the grant of permission should, in principle be entitled to recover his costs. The High Court applied that principle to the costs incurred in filing an acknowledgment of service, and did not limit the defendant simply to recovering the costs of attendance at an oral hearing. Defendants who wish to claim such costs should normally make the application for costs in the body of the acknowledgment of service and provide details of the amount claimed . . .".

56 That is plainly not what Collins J. said. Nor would it flow from his reasoning that a successful defendant should be entitled to his costs of filing an acknowledgment because he is now obliged to serve one if he wishes to take part in and contest a claim for judicial review. Whether or not he serves an acknowledgment of service, he has no obligation to attend a permission hearing.

57 Moses J. held that there were exceptional reasons for ordering Mount Cook to pay the Council its costs of and incurred by the oral renewal hearing. This is how he put it, at paras 82–85 of his judgment:

> "82. It is plain now that the court will from time to time award costs to a defendant, not only of the oral hearing but also of the acknowledgement of

service, despite paragraph 8.6 of the Judicial Review Practice Direction. The notes in the White Book under 54.12.6 make this plain, as does the decision in *R v. Leach and the Commissioner for Local Administration*, a transcript of which I do not have before me, although I have seen it in the past. It does seem to me that a defendant who persists in renewing an application in circumstances such as these, where it is a highly sophisticated claimant with access to the highest possible quality legal team, pursues a claim in the face of trenchant dismissal by an experienced planning judge, forcing a local authority, funded by the local council taxpayers, to attend a full hearing, should, at the very least, pay the costs in full of the oral hearing.

83. The more difficult question is as to whether it should pay the costs leading up to that hearing, in particular the preparation of papers and of the acknowledgment of service. *Generally, as it seems to me, there should be special features, which are not possible or indeed desirable to identify, before all the costs are borne*, merely because the rules require an acknowledgment of service to be filed [sic]. The whole process of applying for permission for judicial review was not intended to be like ordinary litigation: the issue of a claim with issue of a defence. The mere fact that the defendant is now required to participate does not seem to me that normally where the defendant is successful he should have his costs of that acknowledgment of service and general preparation. [my emphasis]

84. There are, however, in my view, special features in this case. It is plain that Ouseley J., a highly experienced planning judge, thought there was absolutely nothing in this case; nor do I. Although it has been skilfully argued with great attraction by Mr Steel QC, underlying it was, in my view, an absolutely hopeless attack upon the Council.

85. In those circumstances, . . ., it is right that that should be reflected by the Council having all its costs of resisting the claim. . ..".

58 In summary, Moses J. disagreed with what he understood from the note in *The White Book* was the effect of Collins J.'s judgment, and seemingly took the view that the guidance in para.8.6 of the Practice Direction that costs should not generally be awarded to a defendant who attends a permission hearing applied, not only to all costs of and occasioned by it, but also to the costs of filing an acknowledgment of service. On that approach, the Judge considered whether, and held that there were, exceptional circumstances—special features—for not following that guidance in relation to all the Council's costs leading to its success at the permission stage. He identified three such circumstances: (1) the robustness of Ouseley J., an experienced planning judge, in his expression of refusal on the papers; (2) the fact that Mount Cook had significant resources to mount the application and meet the consequences of its refusal; and (3) that it had used those resources effectively to secure a full hearing of the claim at the application stage.

The submissions

59 Mr Steel asked the Court to set aside the Judge's order for costs, bearing in mind, in particular, that this Court has now granted permission to claim judicial review and has thereby acknowledged that Mount Cook had an arguable case. He

submitted: (1) that *Leach*, whether applicable only to the costs of filing an acknowledgment of service or of wider application, conflicts with para.8.6 of the Practice Direction and should be disregarded; and (2) that the circumstances relied on by Moses J., as grounds for not following the general guidance in that paragraph, were neither individually nor collectively sufficiently exceptional for the purpose. He submitted that the Judge's order offended the overriding objective in CPR, r.1.1, to deal with cases justly, in that the permission stage in judicial review proceedings is intended to provide claimants with, amongst other things, a quick and relatively cheap mechanism for initiating and testing the arguability of their challenges to the decisions of public authorities. A practice of awarding costs against unsuccessful claimants, save in truly exceptional cases, would, he said, provide a disincentive to potential claimants that would run counter to that objective.

60 In making that submission, Mr Steel also drew on the intention expressed in paras 18–25 of the Bowman Report to maintain the permission stage and to introduce defendants' acknowledgements of service in order to facilitate early and more efficient weeding out of unmeritorious applications and consideration by defendants of the legality of their conduct called in question by the claim. He drew particular attention to the indication in para.24 of the Report that, in recommending the introduction of acknowledgements of service, it was not expected that defendants or other interested parties should incur substantial expense at the permission stage. And it was significant, he said, that the Report had contained no recommendation for the grant of costs against unsuccessful claimants at that stage. In short, he submitted that the intention of the Bowman Report recommendations was to produce a "quick fix" one way or another, not to encourage full-scale "preliminary hearings" conducted as if they were hearings of substantive claims for judicial review.

61 Mr Steel distinguished the apparently contrary ruling of Collins J. in *Leach* as limited to its own facts, namely as to the costs of filing an acknowledgement of service. But he also maintained that it should not be given general effect either as to the costs of filing an acknowledgment of service or in the wider sense seemingly given to it in the note in *The White Book*. To do so, he said, would run counter to para.8.6 of the Practice Direction and the thinking in the Bowman Report giving rise to it.

62 As to the first of Moses J.'s reasons for ordering Mount Cook to pay the Council's costs, namely Mount Cook's renewal of the application for permission after Ouseley J.'s robust refusal, Mr Steel pointed out that CPR r.54.12(3) gives a claimant a right to seek reconsideration of his application by way of an oral hearing. He submitted that, in the absence of guidance in CPR Pt 54, a claimant should not be penalised in costs for exercising a right expressly provided for by it and in respect of which the Practice Direction provides that, where a defendant attends such a hearing, a claimant (implicitly, whatever the outcome) will not generally be penalised in costs. He argued that neither the robustness of the refusal on paper nor the relevant experience of the judge is exceptional; paper refusals are often robust and the Administrative Court judges responsible for them are all specialists and/or experienced in this field. Secondly, as to Moses J.'s reliance on the resources of Mount Cook, Mr Steel submitted that he was wrong in law and as a

matter of public policy to rely on such a factor because it put claimants with means at a disadvantage to claimants of lesser means when seeking relief from public wrongs.

63 Mr Corner's response to these arguments was that a judge's discretion to costs in this, as in most proceedings, is wide, notwithstanding paras 8.5 and 8.6 of the Practice Direction. He drew attention to the wide discretion in s.51 of the 1981 Act, to which there is no relevant contrary provision in this context apart from the Practice Direction, and to CPR r.44.3(2), which provides that, generally, payment of costs follows the outcome.

64 As to the costs of preparing and filing an acknowledgment of service and of preparation for attendance at any oral renewal hearing, Mr Corner submitted that para.8.6 of the Practice Direction does not apply to the former, and there is, therefore, no bar to their recovery, whatever the true effect of that guidance as to other costs of and occasioned by an oral renewal hearing. He supported the generality of the note in *The White Book* as to the effect of Collins J.'s judgment in *Leach*, and disagreed with Moses J.'s view in para.[83] of his judgment (see para.[57] above) that a successful defendant should not generally have such costs. He maintained that it followed from *Leach* that a defendant who has filed an acknowledgment of service and has indicated, pursuant to CPR r.54. 8 (4), his intention to contest the claim, with a summary of his grounds for doing so and who has succeeded on that "pleading" at the permission stage, should have his costs. He submitted in relation to these and the costs of attendance at such a hearing, that, as a general principle, it is unfair that a defendant should have to bear the costs of putting forward his objections, in whatever form, to an unarguable claim; it is simply a waste of public funds.

65 In relation to the costs of filing an acknowledgment of service, Mr Corner drew important support from the Judicial Review Pre-Action Protocol, adopted with effect from March 4, 2002. It provides, save in urgent cases, for a letter before claim and for the proposed defendant to respond setting out his stance and, if contrary to the proposed claim, summarising the reasons for it. Failure by the proposed defendant to respond could be met with a sanction in costs. He submitted that an intending claimant could, therefore, follow this procedure without fear of incurring liability for a defendant's costs and, if a defendant provided no adequate response, without fear of being ordered to pay the costs of a defendant's acknowledgment of service. He pointed out that Mount Cook and the Council had followed the Protocol and submitted, therefore, that there was no reason why the Council should have to bear the costs of the wholly avoidable need of preparation of an acknowledgment of service.

66 However, in respect of all the Council's costs, including those of filing the acknowledgment of service and of attendance at the oral renewal hearing, he adopted the Judge's reasoning that, in any, event there were exceptional circumstances, or "special features" as the Judge called them, justifying an exercise of his discretion to award them all against Mount Cook. On this partly alternative submission, he relied on the following circumstances: (1) Mount Cook's claim was hopeless; (2) given the calibre of its legal representation, it must have known beforehand that it was hopeless; (3) it had had effectively the benefit of a full, substantive, hearing of the claim; (4) it was well able to bear the costs; and

(5) in the circumstances it was right that the Council, as a public body, should have all its costs of resisting the claim.

Conclusions

67 The starting point, it seems to me, is the general provision in s.51 of the 1981 Act that, subject to any contrary statutory enactment or rules of court, costs are in the discretion of the court. There is no statutory provision or rule of court, in particular in CPR Pt 54, removing that discretion. The nearest to intrusions on it are the general rule in CPR r.44.3(2) that costs, where awarded, should generally follow the event, and, in this context, paras 8.5 and 8.6 of the Practice Direction. The CPR are made by the Civil Procedure Rule Committee and are made by statutory instrument pursuant to ss.1 and 2 of the Civil Procedure Act 1997. Practice Directions in general supplement the CPR and are made by the Head of the appropriate Division of the High Court under his or her inherent jurisdiction. They are recognised by the 1997 Act and, for example, in s.5(1) and Sch.1, paras 3 and 6, may in certain circumstances have the effect of provisions that could otherwise be made by way of CPR (see also CPR r.8.1(6)(b)). Such circumstances do not apply to paras 8.5 and 8.6 of the Judicial Review Practice Direction. I use the word "recognised" deliberately, for I doubt whether it is correct to assert as a generality, as do the authors of the May 2000 edition of the *Queen's Bench Guide*, in para.1.3.2, that Practice Directions are made "pursuant" to statute or that they have the same authority as the CPR. As the Guide itself asserts, in the case of any conflict between the two, the CPR prevails. To that already somewhat cumbrous and confusing three-tier hierarchy of rules and guidance for civil litigants—statutory, CPR and Practice Directions—there has now, as I have indicated, been added a fourth in the case of judicial review in the form of the Pre-Action Protocol.

68 As to Practice Directions, what is important is that all involved in the areas of administration of justice for which they provide, including claimants in judicial review proceedings, should be able to rely upon them as an indication of the normal practice of the courts unless and until amended. However, they differ from the CPR that: (1) in general they provide guidance that should be followed, but do not have binding effect; and (2) they should yield to the CPR where there is clear conflict between them.

69 The guidance given in para.8.6 of the Judicial Review Practice Direction that a claimant at a permission hearing will not generally be ordered to pay the costs of a defendant or any other party who attends does not conflict with CPR Pt 54, which, as I have said, makes no direct provision as to the award of costs at the permission stage. And, it is, as Mr Steel pointed out, of a piece with the practice of the courts under the old Ord.53 of the Rules of the Supreme Court when read with s.5 of the 1981 Act; see, *e.g. R. v Honourable Society of the Middle Temple Ex p. Bullock* [1996] E.L.R. 349, *per* Brooke J. (as he then was) at 359C; and McCracken & Jones, *op. cit.* But the great change wrought by CPR Pt 54 over RSC Ord.53 is the requirement of service of the initial claim and of a response by an acknowledgment of service, and of an entitlement—not an obligation—on the part of the proposed defendant, if he has so responded, to attend and make representations at any oral renewal hearing.

70 This new regime may be compared and contrasted with the provisions of CPR Pt 52 and CPR Pt 52 PD, which provide, in the case of applications for permission to appeal, for applicants to notify respondents of the application. However, unless the court otherwise directs, they do not oblige respondents to do anything unless, and until, notified that permission has been given. And, while clearly envisaging that an order for costs may be made at a permission hearing, they do not in terms seek to guide or fetter that discretion; see *Jolly v Jay* [2002] EWCA Civ 277, *per* Brooke L.J. at para.[48], giving the judgment of the Court. See also and compare the regime for seeking permission to proceed with a statutory planning appeal against the dismissal of an enforcement notice under s.289 of the 1990 Act, in respect of which this Court held in *R. v Secretary of State for Wales Ex p. Rozhon* 91 L.G.R. 667, that, as a general rule, the costs of the application should follow the event.

71 Here, the express discouragement in para.8.6 of the Practice Direction of the award of costs against claimants, whether successful or unsuccessful, at the permission stage is, in my view, a clear indication, in conformity with the Bowman Report recommendation that, if a defendant or other interested party chooses to attend and contest the grant of permission at a renewal hearing, the hearing should be short and not a rehearsal for, or effectively a hearing of, the substantive claim. The objects of the obligation on a defendant to file an acknowledgment of service setting out where appropriate his case are: (1) to assist claimants with a speedy and relatively inexpensive determination by the court of the arguability of their claims; and (2) to prompt defendants—public authorities—to give early consideration to and, where appropriate, to fulfil their public duties. It would frustrate those objects to discourage would-be claimants from seeking justice by the fear of a penalty in costs if they do not get beyond the permission stage or to clog up that stage with full-scale rehearsals of what would be the substantive hearing of a claim if permission is granted. Thus, not only the statutory scheme, as supplemented by the Practice Direction and the Pre-Action Protocol, but also the public law context, is different from that governing the generality of civil law proceedings, differences that suggest the need for, and intention to provide, a different costs regime in such cases.

72 Accordingly, I see no good reason in law or practice why the guidance given in para.8.6 of the Practice Direction should not be followed in this and all cases in which a defendant or other interested party to a judicial review claim files an acknowledgment of service and attends and successfully resists it a permission hearing. Generally—that is, save in exceptional circumstances—costs of and occasioned by such attendance should not be awarded against a claimant.

73 It follows that judges before whom contested permission applications are listed, and in their conduct of them, should discourage long hearings and/or the filing by both parties of voluminous documentary evidence for consideration at them. In short, they should not allow the court to be sucked into lengthy and fully argued oral hearings that transform the process from an inquiry into arguability into that of a rehearsal for, or effectively, an expedited and full hearing of the substantive claim.

74 But where does that general rule leave *Leach* and the costs of filing an acknowledgment of service upon which a defendant has relied and followed through by successfully resisting the claim at the permission stage? As I have said,

as a result of the note in *The White Book*, the ruling of Collins J. in *Leach* appears to be regarded as an authority for the proposition that a defendant who successfully resists the grant of permission should, as a matter of principle, be entitled to his costs, not only of filing an acknowledgment of service as required by CPR r.54.8, but also of his preparation for, and attendance at, any permission hearing. In fact, as Mr Steel observed, there was no permission hearing in that case. The only hearing was of an application by an unopposed defendant for an order that the claimant should pay his costs of filing of the acknowledgment of service. It was not, therefore, a case that would have engaged para.8.6 of the Practice Direction since, when read with para.8.5, the guidance that a defendant or other interested party attending an oral permission hearing should not generally have his costs clearly applies only to the costs of and occasioned by his attendance at such a hearing. Given that distinction and the absence of any such constraint on the narrower issue before him, there was, with respect, good sense in Collins J.'s recourse to the obligation in CPR r.54.8 to file an acknowledgment as a reason for requiring a claimant to pay the costs of that initial procedural step. Different considerations, which he did not have to consider, would obviously apply to the costs of a permission hearing at which a defendant who intends "to take part in the judicial review" chooses voluntarily to attend and orally to argue his case.

75 There are obviously some practical aspects of the *Leach* approach that, as Collins J. indicated in paras [17]–[19] of his judgment, require urgent attention. I would suggest in the first instance that the Civil Procedure Rule Committee may wish to look at the matter (if it has not already begun to do so), with a view to amendment of CPR r.54.8 or to prompting an amendment of the Practice Direction, to provide appropriate machinery for claiming and the award of costs of filing an acknowledgment of service and for contesting such an award in an appropriate case.

76 Accordingly, I would hold the following to be the proper approach to the award of costs against an unsuccessful claimant, and to the relationship of the obligation in CPR r.54.8 on a defendant "who wishes to take part in the judicial review" to file an acknowledgment of service with the general rule in para.8.6 of the Practice Direction that a successful defendant at an oral permission hearing should not generally be awarded costs against the claimant:

(1) The effect of *Leach*, certainly in a case to which the Pre-Action Protocol applies and where a defendant or other interested party has complied with it, is that a successful defendant or other party at the permission stage who has filed an acknowledgment of service pursuant to CPR 54.8 should generally recover the costs of doing so from the claimant, whether or not he attends any permission hearing.

(2) The effect of para.8.6, when read with para.8.5, of the Practice Direction, in conformity with the long-established practice of the courts in judicial review and the thinking of the Bowman Report giving rise to the CPR Pt 54 procedure, is that a defendant who attends and successfully resists the grant of permission at a renewal hearing should not generally recover from the claimant his costs of and occasioned by doing so.

(3) A court, in considering an award against an unsuccessful claimant of the defendant's and/or any other interested party's costs at a permission hearing, should only depart from the general guidance in the Practice Direction if he considers there are exceptional circumstances for doing so.
(4) A court considering costs at the permission stage should be allowed a broad discretion as to whether, on the facts of the case, there are exceptional circumstances justifying the award of costs against an unsuccessful claimant;
(5) Exceptional circumstances may consist in the presence of one or more of the features in the following non-exhaustive list:
  (a) the hopelessness of the claim:
  (b) the persistence in it by the claimant after having been alerted to facts and/or of the law demonstrating its hopelessness;
  (c) the extent to which the court considers that the claimant, in the pursuit of his application, has sought to abuse the process of judicial review for collateral ends—a relevant consideration as to costs at the permission stage, as well as when considering discretionary refusal of relief at the stage of substantive hearing, if there is one; and
  (d) whether, as a result of the deployment of full argument and documentary evidence by both sides at the hearing of a contested application, the unsuccessful claimant has had, in effect, the advantage of an early substantive hearing of the claim.
(6) A relevant factor for a court, when considering the exercise of its discretion on the grounds of exceptional circumstances, may be the extent to which the unsuccessful claimant has substantial resources which it has used to pursue the unfounded claim and which are available to meet an order for costs.
(7) The Court of Appeal should be slow to interfere with the broad discretion of the court below in its identification of factors constituting exceptional circumstances and in the exercise of its discretion whether to award costs against an unsuccessful claimant.

77 Such an approach seems to me to accord with public policy in providing ready access to the courts by individuals or bodies seeking relief from and/or to draw attention to actual or threatened transgressions of the law by public bodies, whilst, in exceptional cases protecting those bodies and the public that funds them from unnecessary, burdensome and costly substantive litigation. If properly and consistently applied by the courts, I can see nothing about it that would, as Mr Steel suggested, undermine the fairness and probity of judicial review as a means of control of the administration or run contrary to Art.6.1 of the European Convention of Human Rights, Lord Woolf's Civil Justice Reforms or the adoption of them in this context in the Bowman Report.

78 It follows, in my view, that Moses J. erred in applying the same test to the Council's costs of filing the acknowledgment of service as to its costs of and occasioned by attendance and contesting the arguability of the claim at the

permission hearing. He could, and should, have applied the discretion available to him to award such costs on the *Leach* principle and untrammelled by the guidance in para.8.6 of the Practice Direction. And, whilst—for want of access to the report of *Leach*, at the time of giving judgment—he might have been misled by the note in *The White Book* as to the breadth of Collins J.'s ruling, it is plain from his reasoning in paras [82]–[85] of his judgment (see para.[57] above) that he exercised the para.8.6 discretion in the conventional way by looking for—in his words—"special features" before departing from the general course of making no order in attendance costs cases. Against the argument that he might not have applied the same rigorous test—in para.[82] of his judgment—to the costs of the oral hearing as to those of preparation for it, in particular the filing of the acknowledgment of service—para.[83]—his reasoning was essentially the same for both. In his emphasis on the latter—in paras [83] and [84]—he was merely responding, albeit unnecessarily, to the approach of Collins J. to the costs of filing an acknowledgment of service.

79 It follows, in my view, that Moses J., regardless of his possible misunderstanding of the breadth of *Leach*, identified and applied the correct test under para.8.6 to the Council's costs of and occasioned by its attendance at the permission hearing. He was entitled to order Mount Cook to pay the whole of those costs, within the range of discretion still permitted to him by that provision and the conventional long-standing practice of the courts to which it gave expression. What amounts to exceptional circumstances for not following the general rule may vary considerably according to the circumstances of the case, including the strength or weakness of the application and the respective conduct and circumstances of the parties. Here, the combination of the hopelessness of the application, the clear intention and ability of Mount Cook to deploy its considerable resources in attempting to use this public law route of exerting commercial pressure on Redevco to surrender its lease, and its use of those resources effectively to secure a full hearing of the claim at the application stage were clearly capable of amounting to exceptional circumstances for not following the general rule—and the Judge was entitled so to find.

80 As to the hopelessness of the application, against Mr Steel's suggestion that it cannot have been that hopeless given this Court's grant of permission on a renewed oral application, I should mention: (1) that in refusing permission on the papers, I was of, and expressed, the view that the claim was hopeless, either because of the immateriality of Mount Cook's alternative proposal or because of its lack of weight; (2) that, on the oral renewal of application for permission, the Court, unlike at this substantive hearing, only heard counsel for Mount Cook; and (3) that, at that hearing, both members of the Court were of the same view but decided, with some hesitation, to grant permission having regard also to the claimed uncertainty of the law as to the materiality of alternative proposals in planning applications and as to costs at the permission stage. Having now heard both sides, I am confident that I was right first time; it was, as Ouseley J. made plain in his reasons for refusal on paper, a hopeless claim.

81 As to the considerable resources of Mount Cook and its deployment of them in initiating and persevering with the claim, I should add that, in my view, there are different considerations when a court is asked to consider the grant of costs against

an unsuccessful claimant at the permission stage from those as to discretionary refusal of relief at the end of a substantive hearing (see para.[47] above). At the refusal of permission stage the claimant has lost on the merits and, as in any other case where the award of costs lies in the discretion of the court, the conduct and motive of an unsuccessful party in having pursued unmeritorious litigation for some collateral aim is capable of being a relevant consideration to the exercise of that discretion. And, as a result of the refusal of permission, there is no underlying legal justification for the claim to intrude on the manner of its exercise.

82 And, as to the full hearing point, had the matter continued to a substantive hearing with the same result, Mount Cook would undoubtedly have had to pay the Council's costs. There is force in Mr Corner's argument that it would have been unfair for Mount Cook to have had the benefit of fully testing its case and to have lost without any risk of exposure to the Council's costs. In addition, there is a public interest in considering the award of costs against an unsuccessful claimant in such circumstances if, as was clearly intended by the Bowman Report and the framers of paras 8.5 and 8.6 of the Practice Direction, lengthy contested permission hearings of this sort should be discouraged.

83 Accordingly, I would reject all of the grounds relied on by Mount Cook and would dismiss its appeal and its claim for judicial review.

84 **CLARKE L.J.:** I agree.

85 **JONATHAN PARKER L.J.:** I also agree.

Order: Appeal dismissed. Claim for judicial review dismissed. The appellants pay the respondents costs, to be the subject of detailed assessment if not agreed. Permission to appeal to the House of Lords refused.

Reporter—Natasha Peter