

STRATFORD ON AVON DISTRICT COUNCIL

CIL CHARGING SCHEDULE EXAMINATION.

NOTE ADVISING

1. I would refer to the advice tendered in consultation with those instructing me, in relation to the promotion of their representations on behalf of IM Properties PLC to the above draft charging schedule. The facts of this matter are well known to those instructing me and in any event I do not comment on the substance of the representations submitted by those instructing me, rather this note concentrates upon process.
2. The procedure envisaged by Parliament is that evidence upon which a charging schedule is based would be publicly available for public scrutiny and comment at the time of publication of the draft schedule. After submission of the draft schedule, the evidence and the representations, the Inspector would then decide whether or not to convene a hearing at which she would conduct an inquisitorial process at which evidence (on both sides) would be examined so as to enable the Inspector to make an informed view as to whether or not the schedule should be recommended to be confirmed in its draft form, amended or not confirmed.
3. It is self-evident that such a process has not taken place in the context of this draft charging schedule and that the evidential basis of the Council's case has altered substantially subsequent to the initial publication of the draft schedule. Moreover the Council's evidence base has also altered very significantly during and after

the holding of the two hearing sessions which have taken place to date. In relation to the site of particular interest to IM Properties evidential assertions have been made as to the position of an adjacent developer which appears now to be demonstrably incorrect.

4. The consequences of an unfair process being undertaken where IM Properties are disadvantaged in the presentation of their evidence are both procedurally and financially very serious, and I am instructed that the unorthodox way in which the Council's evidence has emerged has seriously hampered the ability of those instructing me to respond and address IM Properties concerns.
5. There is an onus upon the Inspector to ensure that a fair examination takes place, and that no party is disadvantaged by the process. Insofar as hearing sessions are held there is an undoubted duty that such hearing sessions will be conducted in a fair manner with a particular inquisitorial burden (*Dyason v Secretary of State* [1998] 2 PLR 54). Having concluded that a hearing is needed then the Inspector created a legitimate expectation that evidence would be properly presented and carefully scrutinized, with an opportunity for the parties to respond to the other side's case.
6. In fact, in the circumstances of this case that simply has not happened. Rather the Council's evidence base changed the working day before the reconvened hearing, and has changed again after that hearing day concluded. It also contains factual inaccuracies, and assertions which are both unsubstantiated as well as now contradicted by a third party. Notwithstanding that an opportunity has been

provided to those instructing me to respond in writing, the need to reconvene the hearing to properly examine the same is obvious and overwhelming. Not to do so runs the very serious risk of the Inspector adopting a procedure which is both unfair (see below) and which breaches the legitimate expectation that has arisen.

7. Moreover there are two matters of law which are crucially important in judging the shortcomings of the Council's evidence base.
8. First, the Council's evidence is provided by professional experts acting on behalf of the Council. It is firmly submitted that the principles which apply to the role of an expert in civil litigation apply with equal force to an examination of this nature. In *The Ikarian Reefer* [1993] F.S.R. 563 Cresswell J set out the duties of an expert who is taking part in civil litigation. Among the principles he identified at pages 565 to 566 of the report is the principle that an expert must make available the background material which has informed his or her opinion and that such data should be shared when the relevant report is produced. There is no reason why these same principles should not apply to the preparation and examination of the charging schedule. The material has not been shared and it should have been.
9. Secondly, the preparation and examination of the charging schedule engages the need for the Council to comply with the requirements that basic fairness demands and, to the extent that the process embodies consultation, that includes the principles governing how consultation should take place. The requirements of fairness oblige the Council to disclose the missing information.

10. In *R (Moseley) v Haringey LBC* [2014] 1 WLR 3947, Lord Wilson said;

"*25 In R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168 Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said, at p 189:*

'Mr. Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third ... that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.'

*Clearly Hodgson J accepted Mr. Stephen Sedley QC's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. The Court of Appeal expressly [has]. The time has come for this court also to endorse the Sedley criteria. They are, as the Court of Appeal said in *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* (2012) 126 BMLR 134, para 9, 'a prescription for fairness'.*"

11. It is accepted that the extent of a duty to consult will depend upon the nature of the consultation exercise and the statutory regime governing it, as Lord Reed also pointed out in *Moseley* at [40]. However, giving a person who is responding to a consultation access to the relevant information which has informed that choices which have been made in the formulation of the proposals so that they can understand the information and the resultant choices and test both that information and those judgments, must be a basic requirement if consultation is to be fair and useful. The same must be true of the process of examining the charging schedule.

12. Without the full evidential basis upon which the Council rely, IM Properties have been deprived of the opportunity of properly appreciating the reasoning which

has led to the Council making the choices it has in fixing the proposed charging rates and also deprives them of being able to test those matters at the examination.

13. It might be tempting to conclude that IM Properties' case is strong enough by pointing out that the Council's case is not justified by evidence, but such a conclusion would be totally inappropriate, because any person faced with an absence of information could make the same point and yet:

14. The Courts have held that an expert should disclose relevant material and it must therefore be thought that it is not enough to leave the other party to argue that the expert's case is insufficiently reasoned; and

15. The requirements of fairness in the context of a process of consultation have been held to require that people know what they are responding to.

16. Further, such a response might be to deprive IM Properties of the opportunity to show that the Council's case is flawed not just because it has no supporting base for it but also because there is a supporting base for it which is illogical, mistaken or based on an incomplete assessment of relevant factors.

17. My firm view is therefore that for the Inspector to simply now move to the consideration of her report without both reconvening the hearing and directing that the Council provide full disclosure of the evidence base upon which it is inviting determination (in accordance with the Ikarian Reefer (supra)) then the

subsequent adoption of a charging schedule in my view is at risk of being found to have been unlawful having arisen from a procedurally unfair process.

PAUL G TUCKER QC
20th February 2017

Kings Chambers
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