Note of Judgment of Mr Justice Sullivan delivered on Friday 5 October 2007 in O'Callaghan v Charity Commission and others

In this rolled up application for permission to apply for judicial review and if granted the substantive hearing the claimant seeks a declaration that the Order to enter into the lease under the Charity Commission Order 2004 was unlawful and should be quashed.

The case was listed for one day and was expedited. Time constraints make it impossible to set out the full history.

In summary the finances of Alexandra Palace have been in a parlous state for years. In an effort to keep the palace going funds have been provided from the Local Authority which pays the deficit.

In 1998 the Trustees decided to ask the Defendants to promote a scheme to give permission to grant a long lease.

The Trustees wish to be able to lease the whole of Alexandra Palace for 125 years at the best rent, regard being had to the Alexandra Park and Palace Act 1985 and its purpose authorising use for public resort and recreation area.

The Trustees want to grant the lease to a private developer to get funding on a proper financial footing.

The 2004 Order provides the Trustees with power to lease at clause 3 thus:-

> "The trustees may, subject to the consent by order of the Charity Commissioners, grant a lease of the whole or part or parts of the palace buildings and the immediate surrounding area for a term not exceeding 125 years at the best rent reasonably obtainable regard being had to the purpose of the Alexandra Park and Palace Acts and Order 1900 to 1985"

The draft of the 2004 Order was considered in the House of Commons by the First Standing Committee on delegated legislation on 14 January 2004.

A number of members of parliament objected to the Order and in response to those MPs Fiona MacTaggart MP said:-

> "However, it is important that there is an opportunity to have specific consultation on the beneficial interest, as well as on issues connected with established procedure such as planning. I therefore asked the Commission for an undertaking, which I have now received, to publish the draft of any Order that it might make authorising a lease under the scheme and to invite and consider any representations that it may receive."

One of the MP's who was opposing the Order, Mr Foster, expressed delight that the Minister would undertake widespread consultation. He said

> " I am also delighted that she has persuaded the Charity Commission to ensure that there is widespread consultation."

The Trustees undertook a tender process and chose Firoka as the preferred developer and the outline proposals were displayed in January 2006.

In March 2006 there was a section 36(6) Charities Act consultation. In October 2006 the defendant published the draft Order and a question and answer sheet.

The terms of the draft Order were to authorise the grant of a lease. The Order contained a definition of "the lease" as the lease annexed to the Master Agreement exchanged on 24 November 2006.

The draft Order contained a condition at 5(i) that the "Project Agreement must not be altered".

It is thus clear that the lease was tied to the project agreement.

The question and answer sheet explained that the Charity Commissioners proposed to make an Order. The background was also set out. The Trustees needed the Charity Commission to consent to grant the lease. Various questions are also answered.

The claimant made representations. Amongst other things, he requested a copy of the Lease. In his letter of 3 November 2006 (page 34) he wrote:

> " However it is self evident that we cannot object in detail to the scheme and the lease until we have sight of both and we trust that you will direct that this be done, in line with the undertakings given in Parliament about the rights of objectors."

He was not the only one to ask for a copy of the Lease and there was other correspondence in this regard in the bundle.

It is clear that Officers advising at the Charity Commission were well aware of this objection and the representations that the Lease and Project Agreement should have been made public.

Although this was raised and the Officers advising the Charity Commission were aware they gave no answer and none was provided by the Charity Commission.

The reason why the lease and the project agreement were not disclosed is found in an earlier exchange of correspondence between the Charity Commission and the Trustees' Solicitors.

In the letter dated 24 February 2006 (page 540) the Trustees' Solicitors wrote

> "The General Manager has indicated his concern that if the preferred developer learns that agreed draft lease terms would be placed in the public domain for consultation he is likely to withdraw any interest that is shown in this project."

Unfortunately for these proceedings the Charity Commission replied on 15 March 2006 (page 176) saying that they did not require the lease terms to be published.

A report of the Charity Commission said 328 representations had been received and 324 had expressed at least some concern. 4 were in support. This was a case of considerable local interest.

The report summary was sent to the Trustees for comment. The Trustees' Solicitor commented on 13 February 2007. The Trustees responded to concerns expressed by referring to numerous clauses in the lease or Project Agreement. The points made in that letter were taken up in a further report to the Charity Commission on 2 March 2007.

That report said the 2004 Order allowed a lease. (The Judge read at length this letter.)

The reasons for the Charity Commission's decision made on 27 April 2007 are set out in a document. In paragraph 5.3 there is a heading "Consideration of Representations". This sets out the ambit of the Charity Commission's decision.

A number of those making representations had said they needed to see the lease. Thus it is clear that the ambit of the Charity Commissioner's decision was not just whether what was proposed fell under the Act and Scheme but also if it was expedient in the interests of the Charity.

It might have been thought that whether or not it was expedient depended upon the terms.

Against that background there are certain conclusions.

The proper starting point is concerned with a promise of consultation. This promise was made by a junior minister of the Crown on the consideration of delegated legislation. It was a promise to those concerned in the debate:-

1. Of the importance to honour the promise made by the minister or very good reasons not to honour it.

2. The minister's promise has to be interpreted purposively, not legalistically, in a way as to make sense of the promise that beneficial interest will be protected. To do otherwise would make a nonsense of that promise.

3. The consultation must be effective and fair – it must not be ineffective and unfair.

The Charity Commission's approach, as explained by Mr Kovats, was that the Charity Commission had honoured its commitment. given by the MP as the draft Order had been published. In my judgment that makes a nonsense of the MP's promise and strips it of any real effect. To put it bluntly it is a nonsense to give a commitment to consult on X but not then to reveal X.

The reason is that if anyone is asked to comment on entering into a lease – whether to enter into a particular lease – he will be bound to say "show me the lease and agreement and then I can answer your question or at least tell me sufficient." The draft Order may have been consenting to excellent proposals or not. It all depends on the Lease and the Project

Agreement. It is simply a nonsense to give a public assurance saying that there will be consultation on the Order with a draft Lease and then say nothing about the Lease.

Mr Kovats accepted that whatever the terms of the undertaking there was a requirement for the process to be fair. The unfairness is emphasised by the fact that when representations were referred to the Trustees, the Trustees responded by reference to the lease (letter of the Trustees' Solicitor to Charity Commission of February 2007 sets this out in detail).

I find it difficult to understand how the Charity Commission could have thought that this was a fair process. Alarm bells should have been ringing, particularly as these were flagged out by Officers in the Report.

In his submissions Mr Kovats relied on the fact that there had been compliance with the statutory requirements. The fact that they had been complied with is an indicator of fairness but here there was a specific promise by a parliamentary figure. So far as the proposition that the Charity Commission honoured the undertaking, the Charity Commission appears to have understood the undertaking in a limited way but my judgment is that this understanding was unreasonable and wholly unrealistic.

I ask rhetorically what is the point of publishing a draft Order referring to the Lease and refusing to publish the Lease. Mr Kovats refers to a confidentiality agreement but it is difficult to see how such a private agreement could negate the effectiveness of a consultation which had been publicly promised by a minister in Parliament.

The Charity Commission in apparently changing its position and giving an assurance that the lease would not be made public lost sight of the need for effective and fair consultation in the light of the Minster’s assurance.

It is surprising that when the point was raised there was no further consideration of the matter.

There was a redacted copy giving a summary of the documents so there was some idea of what was being consulted about.

Lastly Mr Kovats mentioned the history of disclosure by the Trustees which was elaborated on by Mr Hickman on behalf of the Trustees who relied strongly on a confidentiality agreement between the Trustees and Defendant but as I have said the primary obligation

was on the Charity Commission as a public body to ensure effective and fair consultation took place. It could have redacted rent or financial details but it had to ensure those consulted had sufficient information to enable those consulted to respond meaningfully on this particular Lease.

Reverting to the earlier consultation Mr Hickman referred to the pre 2004 Scheme. There was consultation on Firoka's own Scheme in January 2006 when there was an exhibition in Palm Court. However, Firoka's were outline proposals – the General Manager described these as outline concepts. It was clear the detail would be worked out later and there would be lengthy negotiations and there were various versions of the Lease. At the end of the day it was not the outline exhibited in January 2006 but what was agreed and incorporated into the lease and project agreement. It is plain that changes had occurred. Mr Hickman referred to the consultation with the Statutory and Advisory Committees and the Section 36(6) Consultation.

The notice in respect of the section 36(6) is no more informative than the draft Order.

For these reasons the earlier consultations could not have been regarded as a substitute for the consultation promised by the MP. These were by the Trustees and not the Defendant.

The process was very seriously flawed. Consultees were given inadequate information and no information about what consent was being sought for. It was established that the Trustees would grant the Lease but the Notice given told the consultees virtually nothing beyond that.

For whatever reason no thought was given to the process as to what information could be given. It follows that subject to the question of discretion the claimant is entitled to the relief he seeks.

Mr Hickman strenuously argued on behalf of the Trustees and he made a good point that the claimant made detailed representations but it was equally clear that the claimant asked to see copies of the lease and any agreement subject to the draft Order.

I am not saying that the whole of the documents unredacted should have been given but very serious consideration should have been given as to what should have been given.

It is important to note that the Claimant was not alone. It is clear from a number of representations to the Charity Commission that the issue was of very considerable local interest.

Mr Hickman submitted that the practical consequence would be that Firoka will walk away from the agreement if it was not executed and can treat the Trustees as in fundamental breach.

There is a good deal of secondary evidence. However, it is significant that Firoka have not taken part in this Hearing and have not chosen to play any part in these proceedings except for Mr Kassam's late witness statement.

Mr Hickman did seek permission to put in Mr Kassam's statement of 2 October 2007. He is a director of Firoka. That statement makes it clear that Firoka have invested time and money in the Alexandra Palace project. It also makes it clear that if the Trustees are unable to enter the lease then Firoka will withdraw their interest in Alexandra Palace.

I refer to Mr Kassam's statement at paragraph 6 as follows:-

> "If, as a result of what the Court orders in these proceeds, the Trustees are unable to enter into the Judgments which have been agreed between them, Firoka will, as matters currently stand and for wholly commercial reasons, withdraw their interest in Alexandra Palace."

Mr Kassam goes on to say that it is only the current intention to abandon any interest in Alexandra Palace if it is not allowed to complete in the terms agreed. He is only saying he will give serious consideration – there must be disclosure in full. Looking at the evidence, as it were, from the horses mouth some submissions as to the likely outcome are not made out.

It is also submitted that the Court should reach the view that there would be no chance of a different decision being reached if the lease was published. The Court is very cautious in accepting such a submission reference to ***R v. Smith*** (Lord Justice May and Lord Justice Keane agreeing)

As I have mentioned, the question for the Charity Commission was not merely a legal issue but in terms of the trust also a judgmental one, namely what was expedient in the interests of

the Trust. In deciding how to exercise its discretion, Mr Hickman's submission overlooked the starting point which is the assurance given by a Minister in Parliament.

There would need to be very strong grounds to avoid that. In saying that I make clear I am not saying that all of the Lease and Project Agreement has to be disclosed. I am saying that sufficient information about the Lease and Project Agreement has to be disclosed to enable consultees to make a sensible response to the question from the Commission as to whether it should consent. It is axiomatic that for the Trustees to enter into that agreement enough must be known about the Lease to give a sensible response.

It should not be assumed that I am endorsing the extent of the redaction – it is regrettable that the redacted copy did not appear until after the end of the consultation period. It is a matter for the Charity Commission to consider how consultation is effective and fair. There is no doubt that what took place here was not enough.

I grant a declaration that the Order was unlawful and quash it.