The Queen v Westminster City Council Ex Parte James Monahan and Ginny Scott on Behalf of Themselves and All Other Members of the Covent Garden Community Association In the Matter of An Application for Judicial Review in Respect of A Resolution of the Planning and Development Committee of Westminster City Council Made on 30Th June 1987 and Its Adoption By the Westminster City Council on 29Th July 1987

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
19 October 1988

CO/1459/87

In the Supreme Court of Judicature

Court of Appeal (Civil Division)

On Appeal from the High Court of Justice

Queen's Bench Division

Divisional Court

1988 WL 623664

Lord Justice Kerr Lord Justice Nicholls and Lord Justice Staughton

Wednesday 19th October 1988

Representation

MR. ROBERT CARNWATH Q.C. and MISS ALICE ROBINSON (instructed by Messrs. Gouldens, Solicitors, London, WC2A 1JJ) appeared on behalf of the Covent Garden Community Association.
MR. J. SULLIVAN Q.C. and MR. D. MOLE (instructed by the City Solicitor and Secretary, Westminster City Council) appeared on behalf of the Council.
MR. PETER BOYDELL Q.C. and MR. C. GEORGE (instructed by Messrs. Linklaters & Paines, Solicitors, London EC2) appeared on behalf of Royal Opera House Covent Garden Ltd.

JUDGMENT (Revised)

LORD JUSTICE KERR:

Introduction

This is an appeal on behalf of the Covent Garden Community Association against a judgment of Webster J. given on 8th February 1988 whereby he refused to quash a planning decision of the Westminster City Council made in June/July 1987. Its

effect was to grant permission to the Royal Opera House (ROH) to carry out a far-reaching redevelopment of Covent Garden. The central objective of the application was to extend and improve the Opera House by reconstruction and modernisation to bring it up to a standard consistent with its national and international reputation and to develop the surrounding area consistently with this project. The decision to permit the development of the site in the manner proposed in the application – after some modifications of the original scheme – involved a departure from the relevant development plan by permitting the use of parts of the site for the erection of office accommodation. The authority was reluctant to permit this, but ultimately accepted the need for it on the ground that the balance of the funds necessary to carry out the desired improvements to the Opera House was unobtainable by any other means.

That decision was challenged by an application for judicial review on behalf of the Association instituted by two of its members. There are two grounds of challenge. First and mainly it is said that the inclusion of office accommodation for financial reasons is impermissible, even though ROH is ready to enter into a binding agreement to use the proceeds from the commercial development for the benefit of the Opera. It is said that to permit the commercial development of part of the site for purely financial reasons, whatever their nature or purpose, is not a "material consideration" which the authority was entitled to take into account udner section 29(1) of the Town and Country Planning Act 1971 in granting planning permission for the development as a whole. That raises an issue of law of general importance on which there has been considerable discussion. Alternatively, if the challenge on that ground fails, then it is said that the authority was bound to investigate the financial aspects sufficiently to entitle it rationally to conclude that the provision of office accommodation, by way of departure from the development plan, was in fact necessary to achieve the objectives relating to the Opera House; that it failed to do so; and that its conclusion was accordingly irrational.

Webster J. rejected both of these contentions and the applicants now appeal. The only issue before him and us is whether the planning permission for the proposed development was invalid in law on either or both of these grounds. The courts are not concerned – in the sense of having no right to concern themselves – with the planning merits or demerits of the development in any respect. It is important to emphasise this, because many controversial views are held about the scheme, and a number of press comments have referred to these proceedings in ways which might well give the false impression that the courts are somehow involved in taking sides in the discussions.

The Legislation

It is only necessary to refer to a few of the provisions of the Town and Country Planning Act 1971 . The project formed part of an "action area" local plan prepared pursuant to section 11 which falls within the definition of "development plan" in section 20 . This was the "Covent Garden Action Area Plan" adopted by the Greater London Council in 1978. When the GLC disappeared the planning authority became the Westminster City Council whose Planning and Development Committee passed the relevant resolution which the Council subsequently adopted. It is necessary to quote the material part of section 29(1) :

> "…where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan, so far as material to the applciation, and to any other material considerations …"

The effect of the words "shall have regard to" is that the contents of the development plan are deemed to be material considerations, but not that they must necessarily be followed. Moreover, under section 31(1)(b) the Secretary of State is empowered to authorise planning authorities "to grant planning permission for development which does not accord with the provisions of the development plan" , and this was done in the present case by Article 14 of the Town and Country Planning General Development Order 1977 . (Statutory Instrument 1977 No.289).

The other provision which is of some relevance is section 52 dealing with agreements regulating development or use of land, since the conclusion of such an agreement formed an integral part of the planning permission granted in this case. Sub-section (1) is in the following terms:

> "(1) A local planning authority may enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement; and any such agreement may contain such incidental and consequential provisions (including provisions of a financial character) as appear to the local planning authority to be necessary or expedient for the purposes of the agreement."

It should also be noted that the scheme involved the demolition and reconstruction of a substantial number of listed buildings in relation to which special planning controls are imposed by section 55 et seq ; but it is unnecessary to quote from these provisions. Finally, Mr. Carnwath Q.C., who appeared on behalf of the Association, drew attention to section 145 of the Local Government Act 1972 which empowers a local authority to contribute financially to the promotion of entertainment.

The facts

The Covent Garden Community Association is an unincorporated association which was formed in 1971 to safeguard and protect the interests of residents and businesses in the Covent Garden area. Its purposes include the promotion of high standards of planning and architecture and to secure the preservation, protection, development and improvement of buildings or features of historical public interest in the area. The Action Area Plan acknowledges in paragraph A.4.34 the "substantial and constructive contribution to the public debate on the Plan" made by the Association.

The application for judicial review seeks to quash a resolution of the Planning and Development Committee of the Westminster City Council passed on 30th June 1987 and adopted by the Council on 29th July 1987 that planning permission and listed building consents be granted for the redevelopment of the Royal Opera House, the Floral Hall, 2 Bow Street, 17-21 Russell Street, 2-6 Mart Street, 45-51 Floral Street, 51-54 Long Acre and land fronting James Street, Covent Garden, London WC2 subject to the fulfilment of three conditions referred to in the resolution. The permitted development included a substantial block of office accommodation along Russell Street and part of Bow Street and two smaller blocks along parts of James Street and Long Acre. These were decisions taken in principle only; the relevant permissions and consents are still in draft. But rather than wait for the formalities to be completed it was thought convenient to challenge the decisions at this stage, and no objection has been taken to this course. On the other hand, Mr. Sullivan Q.C. for the Council and Mr. Boydell Q.C. for ROH do not accept a submission on behalf of the Association that the court can therefore have regard to changes in circumstances which have taken place since July 1987 when the decisions were taken in principle.

The Royal Opera House Covent Garden Ltd. (ROH) is a company limited by guarantee and a registered charity. It is responsible for the day to day administration and operation of the Royal Opera House. This was designed by E.M. Barrie and opened in 1858. Its stage and equipment were modernised in 1902 and new dressing rooms were added in an annexe in 1932. Since 1946 the theatre has housed two internationally renowned companies, the Royal Opera and the Royal Ballet, and the Sadlers Wells Royal Ballet has also been administered from there since 1957. In the same way as many similar European theatres, the stage and other arrangements were never designed to accommodate present day performance and rehearsal requirements. ROH therefore felt it essential to undertake a programme of modernisation and reconstruction to ensure the Opera's future national and international reputation. The Association does not dispute that further improvements are necessary if the Royal Opera is to maintain and improve its standing as one of the leading Opera Houses in the world.

The Covent Garden Action Area Plan issued in 1978, to which I must refer in some detail hereafter, accepted the need to improve the Opera House and regarded the proposal to extend it as "probably the most significant single project in the area" . It envisaged that this development would be carried out in phases. In order to meet the most pressing needs for additional and improved facilities a first phase of expansion was completed in 1982 when the Opera House was extended westward along its axis, enabling rehearsal studios, chorus and dressing rooms and other offices to be added. The cost of that phase was £10 million, mainly financed by money raised by public appeal. But this was considered to be far from sufficient, and in the result ROH

applied in October 1986 for outline planning permission and listed building consents to carry out a far-reaching redevelopment of the Opera House and parts of the surrounding land and buildings.

Before coming to the subsequent history I must refer to a number of provisions of the Action Area Plan. In paragraph B.1.2 it was made clear that the policy was to continue to promote the mixed use of land within the area. For present purposes we are concerned with theatres, including of course the Opera House itself, on the one hand, and office accommodation on the other. I will therefore deal with these aspects in that order.

The plan contains numerous passages acknowledging the importance of theatres, both from the point of view of the public interest in entertainment and also for economic reasons. Thus, paragraph B.7.16 stated:

> "The theatre plays a very major economic role in the area and the Council consider that its continued existence and expansion should be encouraged to enhance the economic vitality of Covent Garden, to increase employment opportunities and to retain and increase the viability of other activities such as theatre support industries, pubs, restaurants and clubs. The economic spin-off effect would have more than local significance in view of the importance of theatres as a tourist attraction and as a means of earning foreign exchange".

The proposed extension of the Royal Opera House was dealt with in paragraph C.1.22:

> "The proposal, probably the most significant single project in the area is for extensions to the west and south of the existing building. On the move of the market the opportunity arose to safeguard the site required for this extension and in early 1975 the Government purchased the adjoining land westwards as far as Russell Street, the Piazza and Bow Street.
>
> It is the intention that the development be undertaken in phases. The extension of the backstage facilities to James Street will be the first part of the project to be undertaken and it is anticipated that this could be completed by 1981.
>
> The Opera House's overall scheme includes in addition to a major extension to the stage area, accommodation for the Royal Ballet School, the London Opera Centre and administrative offices and for a new raised flytower facilitating productions and giving better sight lines from the amphitheatre.
>
> As only part of the proposed extension will be undertaken during the Plan period, it is important that each phase is acceptable as an entity and that the remainder of the site be given sympathetic treatment and used appropriately on an interim basis. As a matter of urgency proposals for using part of the site as open space in the short term should be brought forward."

The land referred to in the first paragraph was subsequently transferred by the government to ROH in order to enable it to carry out the development. The first phase referred to in the second paragraph comprised the extensions and alterations completed in 1982 which I have already mentioned. In connection with the second far more important phase, which is now under consideration, it must be borne in mind that the centre of Covent Garden is a conservation area designated as one of outstanding "status" and that the proposals concerning this phase fall entirely within that area.

As regards the policies concerning office accommodation, Mr. Sullivan on behalf of the Council placed some reliance on paragraph B.6.23, both below and again before us. But in order to deal with this submission it is necessary to quote this together with the two preceding paragraphs:

> "B.6.21 The amount of existing and proposed office floorspace should be sufficient to contain the estimated future demand for office accommodation in the area. There is therefore no reason to relax the Council's office policy for the Central Area. Thus the overall policy will be one of restraint consistent with the Council's strategic aims for the Central Area.
>
> "B.6.22 It is essential, however, to ensure that new office developments, replacement offices and the modernisation of existing buildings contain a preponderance of small office units to provide a supply of units which emet the demand and to prevent the creation of large unlettable units which could remain vacant for long periods.
>
> "B.6.23 Each case will therefore be assessed on its merits with continuous monitoring of overall decisions with reference to the basic planning aims of the area. The following factors will be taken into account when considering planning applications for office development:
>
> 1. The type of office activity and its linkage with Covent Garden and the Central Area.
> 2. The degree of benefit to the community office development would produce by way of:
>
> (a) provision of residential accommodation in conjunction with the development;
> (b) provision of specific benefits in the form of buildings, land or other facilities for use of the public;
> (c) conservation of buildings or places of architectural or historic interest;
> (d) provision of small office suites;
> (e) provision of land or buildings for other employment generating uses, for instance, small industrial units."

Mr. Sullivans's submission, though only subsidiarily to his main arguments, was that these references in the plan could be placed in the balance in support of the validity of the resolutions. Although they contain no direct reference to the financial benefits for other parts of the development which might be derived from the provision of some office accommodation, he said that the second part of B.6.23 clearly implied that this had been in the mind of the GLC committee. So he submitted, in effect, that the proposal which was ultimately accepted went no further than to differ in degree from what had been contemplated throughout. Webster J. saw some force in this argument but declined to base any reliance upon it in reaching his decision. I would adopt the same approach. As Mr. Carnwath pointed out, it is perfectly clear that the Planning and Development Committee regarded the ultimate acceptance of the proposals for office accommodation as involving a radical departure from the Action Plan. It did not base itself upon paragraph B.6.23 in any way, and I am also doubtful whether any particular consideration was given to B.6.22. I therefore disregard these references to office accommodation in the plan.

It is then necessary to review the subsequent lengthy history. The judgment does so in considerable detail, and I have already gratefully drawn on parts of it. At p.24 E Webster J. said that he had taken this course

> "not only because the matter is one of considerable public interest but also because all three parties, by their counsel, have directed me to, and asked me to take into account, the details of the history …".

There has been no criticism of anything in this lengthy review, for which the court and the parties are greatly indebted. If the judgment of Webster J. had been reported I would have incorporated these passages by reference. But they should not be lost, and since I cannot improve upon them I set out pages 8A to 24C of the transcript verbatim:

> "In 1984 the Royal Opera House instructed architects to prepare proposals for a comprehensive redevelopment of the Royal Opera House and the surrounding area which would meet the needs not met by the first phase of development. Those proposals included a large element of commercial office development, intended to finance the improvements as a whole; and they included a propsoal to demolish the Floral Hall. On 26th April, 1985 the GLC's Planning Committee met and considered a report of the Director of Architecture and Controller of Transportation. The report included the following paragraph:
>
> '… on its merits the scheme will ensure the completion of an undoubted prestigious project. As such it will also comply with criteria (b) of para. B.6.23 [that is to say of the Area Plan, the paragraph which I have already quoted in full] in that it will result in the provision of special benefits in the form of buildings, land or other facilities for use of the public.'

The report concluded:

> 'Whilst it may be considered desirable to encourage a mixed use scheme on the site, for example, shopping fronting the piazza, the principle of office development funding the project must be considered undesirable. Leaving aside matters of policy and precedent, the site is obviously sensitive in townscape terms, and it will be difficult enough to incorporate the required uses in a satisfactory civic design solution, without the added impact of a significant level of office space… In terms of listed buildings there is no doubt that no case has been made for the demolition of the Floral Hall…'

Having received that report the Planning Committee of the GLC resolved:

> 'That the Project Director of the Royal Opera House be informed:
>
> '(i) Whilst the Council would be prepared to accept at this initial stage the principle of Opera House uses and other uses on the site, it would not accept the principle that sufficient commercial development should be included within the development to fund works to the Opera House.

> Besides being contrary to statutory and current Council policies such a development concept would put at risk the potential to secure a scheme that would be sympathetic to the well-established character of Covent Garden;
> '(ii) That the Project Director be further informed that the Council is not satisfied that a case has been made for the demolition of the Floral Hall and therefore it would not at this stage authorise the grant of listed building consent for such demolition.'

Two points should be noted about that resolution of the Planning Committee of the GLC. First, it was not put before the Planning Committee of the respondent Council which later made the decisions now under review, although Mr. Carnwath on behalf of the Association does not rely upon that omission as a ground to support these applications but merely as part of the background. Secondly the commercial development forming part of the proposals now under consideration are not sufficient to fund all the work that is proposed, as will be seen in a moment.

The applications made on 3rd October 1986, which were later amended in June 1987, provide, after those amendments, for the demolition in whole or in part of the Floral Hall (although the Floral Hall is to be rebuilt) and of 51-52 Long Acre, for approximately 16,000 square metres of office floor space and for a 300 space underground car park entered from Bow Street. The proposals will also involve the demolition of other listed and unlisted buildings. The proposal for the underground car park was not initiated by the Royal Opera House but by the Council itself; and the Council will own and operate that car park if it is built. But it must be noted that the proposal was a long way from being a proposal simply for the development of offices and car park. To make good this point, it is necessary to recite the details of the proposal contained in the application which are as follows:

'Comprehensive development comprising alteration of, extensions to and partial demolition of the Royal Opera House, demolition of listed buildings at the Floral Hall, 46-47, Floral Street and 51-52, Long Acre and new development to provide: improved opera, ballet and ancillary facilities; offices; shops; restaurants; car parking; pedestrian and vehicular ways.'

The proposals relate to a number of sites, which include the whole of the area bounded by Floral Street, Bow Street, Russell Street and James Street; an area on the corner of Hanover Street and Floral Street; and about half of the area bounded by Long Acre, Hanover Place, Floral Street and James Street. The buildings which it is proposed to demolish so as to provide the main commercial development are 17-21 Russell Street and 2 Bow Street, on the corner of those two streets.

In a letter dated 30th September 1986 accompanying the application the Royal Opera House stated:

'The financing of the scheme will not be easily achieved. No grant aid from Government sources has been offered. This means that the cultural benefits from the Royal Opera House improvements will not be completed within an acceptable timescale unless they can, to a substantial degree, be financed from the overall project.'

The Opera House has estimated that the improvements would cost £56m, that £33m of this amount would be met by profits from the commercial element of the proposed development and that the balance of £23m would be privately raised. Those were the figures which related to the application as it was originally made. As will be seen, they have been slightly amended in view of the subsequent variation.

An architects' report, which was made available to each individual member of the Committee both for the February and the June meetings, was included with the application. Some passages of this report must be quoted. The second and third paragraphs on page 2 state:

'As with many such European theatres, the stage arrangements were never designed to accommodate present day performance and rehearsal requirements, and the stage machinery itself is now at the end of its useful life. The Royal Opera House is therefore compelled to undertake a programme of modernisation and reconstruction to ensure its future as a major international house.

It has been made clear that any such project would not be able to rely on public money and that part of the site available would have to generate income towards the cost of the theatre's requirements. The project, therefore, consists of improvements to the theatre and a series of buildings on adjacent sites, notably those bounding the Covent Garden Market Square, that generate the greater part of the income to pay for the theatre works.'

Also on the same page Sir John Tooley, the General Director of the Royal Opera House, who has sworn an affidavit in this application, is quoted as having said:

'It is our belief that the Royal Opera House should be an integral part of Covent Garden, and an essential aspect of the proposals is the re-establishment of the missing frontages to the Market Square with generous shopping arcades which lead to a new second entrace to the theatre. This entrance, the arcades, and an open loggia at roof level will give the Royal Opera House a positive presence in the Square. The proposed scheme thus offers an opportunity to combine the interests of the theatre with those of the area at large, ensuring the future of the Royal Opera House and the completion of an important piece of London's townscape.'

Later on the same page, the introduction reads:

'The scheme is a mixture of new buildings for the Opera House, refurbishment of existing Opera House premises, and new offices, shops and public parking. This report deals in functional terms with each of these categories. However, when considering the appearance of the buildings and their relationship to the surrounding area, the whole project is brought together so that it can be seen as a coherent part of the city.'

At page 10, under the heading 'The Site: Proposed' the report reads:

'The project has to find a balance between commercial and arts uses. The disposition of the site in relation to the present theatre happens to allow the project to maximise the benefit to the Royal Opera House without necessarily undermining commercial potential.'

Later on the same page reference is made to the complete rebuilding of the fly tower.

The report deals with the new arcade at page 30, saying:

'The arcade building unifies the theatre and commercial parts of the scheme. It marks the second entrance to the Opera House, provides an opportunity for a continuous elegant shopping frontage at ground level and offers at roof level the loggia, a promenade which connects directly to the new amphitheatre foyer.'

In a letter dated 30th September 1986 accompanying the application the Royal Opera House stated:

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I have already read out that passage of the letter and the estimated costs.

The Association accepts that the proposals include elements of architectural merit and some mixed uses; but they point out that the principal land use applied for outside the Royal Opera House itself is for commercial offices, mostly in one large block designed to be let in large units; that the proposals involve the demolition of large numbers of buildings in the area both listed and unlisted; and that only the Royal Opera House itself would remain externally in its present form. They point out that the proposed development before the amendments were made in June 1987 included no residential accommodation although 3,660 square feet of residential accommodation exist in the area at present; and in their view many architectural features would be totally out of keeping with other buildings in the conservation area and the size of the office units would be out of keeping with units existing at

present. Whether there is force in that criticism is not for me to say. Unless it comes to the exercise of my discretion I am not concerned with the merits of the application, and even if it does come to that I shall certainly not take into account aesthetic considerations of that kind. On 3rd February 1987 the Planning and Development Committee of the Council ('The Committee') considered the proposed development and a report of the Council's Director of Planning and Transportation. I must quote a number of passages from this long and detailed report. At paragraph 4.3 it was stated that the key objectives of the project are:

'- to modernise the stage
- to provide a permanent home for the Royal Ballet
- to provide greater public accessibility to the theatre.'

Paragraph 4.3 is headed 'The Opera House Improvements' :

'… Externally, the most obvious manifestations of these works will be the new fly tower and paint frame studio. Internally, [the new] alterations provide for greatly improved and enlarged stage areas, new ballet studios, orchestra facilities and support facilities.

4.4 Greater public accessibility is achieved by providing a new entrance to be located in the Market Square. This and the retained Bow Street entrance are linked to a new foyer system and to an open air loggia at roof level overlooking the Square. The foyer system incorporates two new performance spaces capable of accommodating audiences of 300 & 250 people.
4.5 Additional support facilities are provided north of Floral Street. The larger site bounded by Floral Street, Hanover Place and Long Acre, which is to be completely redeveloped, will on its Floral Street frontage provide a new rehearsal studio ballet dressing rooms and administrative offices. These facilities will be linked directly to the Royal Opera House by 2 high level bridges. The buildings at 48-51, Floral Street will be refurbished to provide workshops for the Royal Opera House wardrobe production centre.'

Under the heading 'Shops and Offices' paragraph 4.6 states that the project incorporates a substantial commercial element to generate a part of the income to pay for the theatre works and a table of the various existing and proposed uses in the area demonstrates that the originally proposed office development of approximately 16,000 square metres would involve an addition of about 14,500 square metres to the existing area of office use. The report summarises the responses received by many interested parties and under the heading 'Office and Residential Policy' , it having been noted that the application site is subject to the policies contained in the Area Plan and that the office policy of that plan is one of restraint which emphasises the importance of providing small office units, paragraphs 6.4 to 6.6 read:

'6.4… The Director of Property Services considers that the commercial content of the proposed development maximises the financial return that can be achieved from this element of the development within the townscape constraints, even though the commercial content will not fully subsidise the cost of the improvements to the Opera House.
6.5 The compelling functional needs for the modernisation of the Opera House cannot be disputed. It is clear that the stage arrangements and rehearsal facilities are wholly unsatisfactory and that the stage machinery is at the end of its useful life. It also has to be accepted that in the current climate the project will not be able to rely upon public funds.
6.6 It is considered that in principle the proposed office content could be justified on the basis of the special needs of the Royal Opera House and the uniqueness of the application …'

Under the heading 'Character and Function' the report reads:

'6.7 The proposals will introduce a major office use into an area where none exists to any significant degree. Many of the responses received from the public and amenity groups consider

> that this would have a serious detrimental effect on the special character and function of this part of Covent Garden.
> 6.8 The architects anticipating this criticism state in their report that the offices "take an appropriately restrained position in the street scene" and suggest that the main office building fronting the Square should be used for individual rooms rather than general office space. They also state that the building will be suitable for occupancy by either single or multiple tenants providing office suites ranging from 350m2 upwards.
> 6.9 Notwithstanding the attempts made by the architects to lessen the impact it is inevitable that a major effect on the character and function of the area will result. On balance however it is not considered that the effect would be so detrimental as to outweigh the benefits of the overall scheme.'

Under the heading 'Implementation and Financial Considerations' :

> '6.12 The very significant office content proposed could only be considered acceptable in policy terms if the Council were convinced that the development would be completed in its entirety within a reasonable period of time, and that all of the improvements and community benefits associated with the scheme could be provided.
> 6.13 The applicants have indicated their willingness to enter into legal agreements to safeguard the full implementation of the scheme. The [Royal Opera House] are offering assurances that all moneys raised from the development would be committed to arts improvements and that the development would be undertaken in one continuous phased building programme.'

Under the heading 'Demolition of the Floral Hall' paragraph 6.18 reads:

'The proposed near total demolition of E M Barrie's Floral Hall … is clearly contentious in principle. However given, once again, the special need to provide first rate stage, back stage and other ancillary facilities commensurate with an opera house of international standing, the loss of the greater part of the building might be reasonably regarded as sustainable …

In addition, the taking down of the iron and glass frontage to the north-east corner of the Piazza and the adjacent part of the Hall, enables the original Inigo Jones architectural concept of the Piazza to be susbtantially reinstated by the restoration of one continuous, collonaded building around the North and Eastern sides of the square.'

Under the heading 'The loss of other buildings' paragraph 6.20 reads:

> '6.20 Except for the group of buildings in Floral Street to the west of Hanover Place (ie Nos 45, 46 and 47 Floral Street), which are proposed for demolition and redevelopment for further ancillary accommodation for the Opera House, the proposed demolition and re-development of other listed buildings and unlisted buildings of townscape value in Long Acre, Hanover Place, and Russell Street is related to the "commercial" part of the scheme, as distinct from that part which provides functional accommodation for the Opera House. The case for demolition and redevelopment for commercial uses would not normally be acceptable but in the unique context of the Opera House it is on balance considered acceptable.'

The amendments to the proposal made in June 1947, which I have already mentioned, took out from the application the proposal to demolish 46-47 Floral Street.

Under the heading 'New Buildings' paragraph 6.23 reads:

'There is little doubt that the design of the new buildings in the proposed development is of considerable architectural quality and urban design interest. Indeed that part of the proposed development fronting the Piazza provides a most welcome replacement of the original Inigo Jones

concept and a signularly positive contribution to and enhancement of the character and appearance of this part of Covent Garden Conservation Area.'

Under the heading 'Conclusions' appear the following paragraphs:

> '9.1 The details of this scheme are very complex. However, the planning issue can be simply stated. That is, do the special circumstances of the Royal Opera House justify the provision of a major commercial development in this part of Covent Garden?
> 9.4 The final decision must be balanced against the wider considerations, in particular the impact of the development on the special character and function of Covent Garden, the creation of a major speculative office development in the context of a restrictive office policy and the loss of buildings of special architectural and historic importance in the absence of good evidence to support their demolition as opposed to retention and adoption. These factors are compounded by the uncertainties which exist with regard to the Royal Opera House securing the substantial amount of additional funding required over and above the income generated by the scheme, and the difficulty of securing concrete assurances which could form the basis of an acceptable legal agreement to ensure the implementation of the scheme in its entirety.
> 9.5 The proposals have to be seen against the need to enhance the functioning of the Royal Opera House and to improve and update its facilities to a standard commensurate with its place as a premier European Opera House. It is in this context that the Committee is, despite some of the less welcome aspects of the package, on balance recommended to approve the proposals in principle and to authorise the Director to seek a resolution of a number of design issues raised and to secure amendments safeguarding the amenities of adjoining residential occupiers.'

The Committee, having received that report, by no means slavishly followed its recommendations. On 3rd February 1987 it took its own line and it resolved:

'That the decision be deferred to the June meeting of the Planning and Development Committee for the following reasons:

> '1. The Committee is willing to contemplate in principle a major departure from the Covent Garden Action Area Plan, but wishes to be absolutely convinced that the commercial development of the site is the only way of achieving the Royal Opera House improvements. Accordingly, while welcoming the applciation in principle, the Committee would wish there to be an opportunity for future discussion on this crucial aspect.
> '2. That in the meantime discussions be held with the applicant regarding the principle of the demolition of listed buildings and buildings in a conservation area, the design of the frontages to Russell and Bow Streets and the reinstatement or possible gain of residential accommodation.'

In response to that decision and resolution the Royal Opera House prepared certain amendments to the proposed development. Apart from a number of design amendments to the exterior of the proposed new buildings, they abandoned the proposal to demolish 46-47 Floral Street, one of the listed buildings, and they proposed an amendment to the reconstruction of the Floral Hall which would include reinstatement of a section of the glazed barrel vault roof which had been lost in a fire 30 years ago. They also considered five alternative options, each involving less office space; and shortly before the next meeting of the Committee, held on 30th June, they proposed a sixth alternative the effect of which would be to provide between 20 and 25 flats on the upper floors of the buildings as proposed for the Long Acre frontage, instead of the previously proposed offices, an amendment which would reduce the office floor space content by just over 2,000 square metres, reducing the overall total to about 14,000 square metres and which would increase the estimated deficit of £23 million by between £2 million and £2.5 million to about £25 million. The proposal approved on 30th June included this option.

Before the next meeting of the Committee, on 30th June, a further report by the Acting Director of Planning and Transportation was circulated. Since at its previous meeting the Committee had accepted the proposal in principle subject to its being convinced that the commercial development

was the only way of achieving the improvements to the Royal Opera House, this report not unnaturally concentrated primarily on that aspect of the matter. In paragraph 1.2 the Committee were reminded that they had indicated their willingness to accept in principle a major departure from the Action Area Plan. The next few paragraphs of the report, so far as material, read as follows:

> '1.3 In response to the Committee request the Royal Opera House have carried out studies which show that other alternative land uses would produce considerably lower development receipts. They therefore adhere to the view that the proposals as submitted represent the only means of financing the essential improvements to the Royal Opera House.'

Paragraph 1.4 refers to the retention of 46-47 Floral Street and the reinstatement of the barrel vault roof of the Floral Hall, paragraph 1.5 refers to the public response and paragraph 1.6, so far as material, reads:

'On balance, and having regard to the uniqueness of the project, it is considered that the proposals can be recommended in principle.'

Paragraph 5 consisted of an examination of the first five of the six options to which I have referred. In paragraph 5.1 it was stated:

'The detailed financial information has been submitted on a confidential basis to the Assistant Director (Valuation), Property Services Department, who has undertaken a financial assessment in respect of the Russell Street block as being indicative of the various changes in the overall scheme.'

Those five options included an increase in the retail accommodation, an increase in the retail and leisure facilities, an increase in the retail and residential accommodation, an increase in the retail accommodation together with a hotel and an increase in the retail and residential accommodation on a larger scale than the earlier option. Not surprisingly, in view of the fact that each of the options involved less office accommodation, the Assistant Director (Valuation) considered that each of those alternatives would provide a lower financial contribution towards the cost of the Royal Opera House improvement, adding to the estimated deficit of £23m varying amounts ranging from £7.5m to £21m, the additional deficit which would result if all office development were to be deleted from the proposals.

Dealing with the demolition of buildings, the first two paragraphs under that heading read as follows:

> '5.8 The revised proposals at present involve the same degree of demolition as the scheme previously considered by the Committee. The applicants contend that the demolition of the listed buildings is justified by the benefits provided by the improvements to the Opera House, the Floral Hall reconstruction involving the reinstatement of a small section of the barrel vault and the completion of the Covent Garden Piazza with architecture of a high quality.
> 5.9 With respect to the listed buildings at 51-52 Long Acre and the unlisted properties in Russell Street the applicant's case is that the replacement buildings are of equal or greater architectural or townscape merit than those currently existing.'

Further on under the same heading the report reads:

> '5.10 … The retention of 46-4.7 Floral Street would obviously be warmly welcomed and would go a considerable way towards overcoming the concern expressed both by the City Council and others regarding the extent of demolition involved in the proposals.'

The conclusions contain the following paragraphs:

> '5.14 In summary, the Royal Opera House has demonstrated to the satisfaction of the Assistant Director (Valuation) that no other combination of land uses could provide as high a financial contribution to the Opera House improvement as could an office based commercial scheme.

> '5.17 It is considered that the architects, working within the brief presented by the Royal Opera House, have produced an imaginative and sensitive example of urban renewal in the important context of Covent Garden. It is on this basis that the proposals are recommended for approval subject to the subsequent agreement of detailed planning conditions …'

In a supplementary report added to that report shortly before the meeting the Acting Director of Planning and Transportation referred to the sixth option the effect of which I have already described.

The minutes of the meeting of the Committee held on 30th June 1987, having summarised those passages of the Officers' report to which I have already referred, including in paragraph 5.2 a reference back to their conclusion on 3rd February 1987 that the proposal represented a major departure from the Area Plan and that commercial development of the site was the only way of achieving the Royal Opera House improvements and having noted also that 'other possible alternative ways of financing the improvements and extensions to the Opera House put forward by third parties had not come to fruition' , records resolutions of the Committee in the following terms:

'Resolved – 1. That, subject to a) any direction by the Historic Buildings and Monuments Commission and Department of the Environment, and b) satisfactory legal agreements to include the completion of the development in its entirety, the provision and mode of operation of the car park, the pedestrian walkways, the relocation of the Piazza frontage of the Floral Hall and the type and management policy of the retail provision, conditional permission and listed building consent be granted.

> '2. That the conditions to be attached to the permission and listed building consent be determined by the Town Planning (Applications) Sub-Committee by way of the Chairman's recommendations procedure.'

That decision was referred to the meeting of the Council on 27th July 1987 when it was adopted. It is those two decisions, that of the Committee and that of the Council, which are the subject matter of this application. It should be noted that no planning permission has yet been granted. Unless this application succeeds, it will be granted when the two conditions referred to in the resolution have been fulfilled, and when it is granted it will be subject to such conditions as may be determined by the Town Planning (Applications) Sub-Committee."

The issues

I have already mentioned these briefly at the beginning of this judgment. The first raises the question whether financial considerations can properly be regarded as material in granting permission for a development which would otherwise have been rejected on planning policy grounds or would only have been allowed to be carried out in some different way. For the purposes of that submission there is no challenge to the committee's conclusion, which they clearly accepted on the facts, that the proposed extension and improvements to the Opera House could only be carried out if the funds generated by the proposed office accommodation will be available to make up the anticipated deficit. The second issue is put in the alternative. It challenges the rationality of this assumption on the facts, but accepts for that purpose that the decision would have been legally valid if the assumption had been rationally justifiable. On that issue it will be necessary to supplement the judge's review of the history to some extent in the light of Mr. Carnwath's passing references to subsequent events.

For the sake of completeness I should briefly mention three other matters to which reference was made in the judgment, but they have not played any part on this appeal. First, in answer to an argument raised below the judgment points out at pp. 25 to 27 that the funds generated by the office accommodation were to be used for physical purposes, viz. the extension of and improvements to the Opera House and not – as had been suggested on behalf of the applicants – as a "provision of finance to maintain the international status of the Opera House" . This attempted distinction was rightly not pursued before us. Secondly, at pp.24 and 25 the judgment points out that the ultimate decision of the Committee was clearly based on a balance of many

factors, and it therefore poses the question whether it is really fair to judge its validity solely by reference to the inclusion of the office accommodation in question. That aspect has also played no part in the argument before us. Thirdly, at p.32 the judge cites a passage from the speech of Lord Scarman in Westminster City Council v. Great Portland Estates (1985) 1 AC 661 at p.670 – which I will also cite later on – to suggest that the decision of the Committee may in any event be justified on the ground that the needs of the Royal Opera House constitute "an exceptional or special circumstance" . That aspect was not abandoned on behalf of the respondents, but it was not felt necessary to develop it and I therefore express no opinion about it.

Finally, it was faintly submitted on behalf of the respondents, in particular by Mr. Boydell for ROH, that the conclusion of a " section 52 agreement" between ROH and the Council, as a condition designed to ensure that all aspects of the permitted development – including the office accommodation – were in fact carried out, could have an effect on the validity of the Committee's decision. I will briefly refer to this aspect later on.

The first issue: can "any other material considerations" in section 29(1) properly include financial considerations?

This issue can of course be phrased in many differently contentious ways. If one seeks a negative answer one might pose the question whether it can possibly be permissible to authorise a development which, in planning terms, is undesirable or even indefensible in order to provide funds for some other desirable development. On the other hand, a more moderate way of putting the issue would be to ask whether, as a matter of common sense, there could be any reason why the financial viability of a desirable development, and the means of achieving it, must necessarily be immaterial considerations in determining applications for planning permission. Similarly, one can argue by giving illustrations at different points of the spectrum. For instance it was said on behalf of the applicants that it would be inconceivable that if ROH happened to own a site near Victoria they would be allowed to use it for the erection of an undesirable office block on the basis that the profits would be used to extend and improve the Royal Opera House. The respondents did not accept that this was self-evident if no other means were available and countered with more realistic illustrations to demonstrate the fallacy of the proposition that purely financial considerations can never be material. For instance, if it is uneconomic to restore a derelict listed building for its original residential or other use, then it would be perfectly proper and an everyday situation for a planning authority to allow it to be used wholly or partly for commercial purposes, if its restoration cannot in practice be achieved in any other way. Or – to take an example given by Mr. Boydell – in the case of a landmark or tourist attraction such as a derelict old windmill, a planning authority might well decide to permit the owner to put up an otherwise undesirable kiosk to sell postcards and souvenirs if this is the only viable way of obtaining a desirable restoration.

This was the nature of the opposing contentions. In my view, for the reasons which follow, I have no doubt that the respondents' approach is correct in principle, and I would summarise it in the following way. Financial constraints on the economic viability of a desirable planning development are unavoidable facts of life in an imperfect world. It would be unreal and contrary to common sense to insist that they must be excluded from the range of considerations which may properly be regarded as material in determining planning applications. Where they are shown to exist they may call for compromises or even sacrifices in what would otherwise be regarded as the optimum from the point of view of the public interest. Virtually all planning decisions involve some kind of balancing exercise. A commonplace illustration is the problem of having to decide whether or not to accept compromises or sacrifices in granting permission for developments which could, or would in practice, otherwise not be carried out for financial reasons. Another, no doubt rarer, illustration would be a similar balancing exercise concerning composite or related developments, i.e., related in the sense that they can and should properly be considered in combination, where the realisation of the main objective may depend on the financial implications or consequences of others. However, provided that the ultimate determination is based on planning grounds and not on some ulterior motive, and that it is not irrational, there would be no basis for holding it to be invalid in law solely on the ground that it has taken account of, and adjusted itself to, the financial realities of the overall situation.

This approach is consistent with the authorities and with good sense. There is no legislative definition of "other material considerations" in section 29(1) . In passages from two decisions of the House of Lords the scope of these words has merely been circumscribed in wide terms, but these would not exclude financial considerations from being treated as material in appropriate cases. In *Newbury District Council v. Secretary of State for the Environment (1981) AC 578* Viscount Dilhorne dealt with this aspect at p.599. He referred to section 29(1) and then quoted the following well known passage from the judgment of Lord Denning MR in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government (1958) 1 QB 554* at p.572:

"Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

Having pointed out that this statement had already been approved by the House of Lords he went on:

"It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them …"

This passage was taken a little further in the speech of Lord Scarman in Westminster Council v. Great Portland Estates plc (1985) 1 AC 661 with which the other members of the House of Lords expressed agreement. The appeal had been concerned with a development plan whose validity was challenged on the ground that it contained proposals for the protection of specific industrial activities; it was said that these were concerned with the interests of particular users of land rather than the development and use of land in itself. In that context Lord Scarman cited a sentence from an earlier judgment of Lord Parker CJ at p.669 H in which he had said that "what is really to be considered is the character of the use of the land, not the particular purpose of a particular occupier" . Then, at p.670 B Lord Scarman went on as follows:

"It is a logical process to extend the ambit of Lord Parker C.J.'s statement so that it applies not only to the grant or refusal of planning permission and to the imposition of conditions but also to the formulation of planning policies and proposals. The test, therefore, of what is a material 'consideration' in the preparation of plans or in the control of development (see section 29(1) of the Act of 1971 in respect of planning permission: section 11(9) and Schedule 4 paragraph 11(4) in respect of local plans), is whether it serves a planning purpose: see Newbury District Council v. Secretary of State for the Environment [1981] A.C. 578, 599 per Viscount Dilhorne. And a planning purpose is one which relates to the character of the use of land. Finally, this principle has now the authority of the House. It has been considered and, as I understand the position, accepted by your Lordships not only in this appeal but also in *Westminster City Council v. British Waterways Board [1985] A.C.676* in which argument was heard by your Lordships immediately following argument in this appeal.

However, like all generalisations Lord Parker C.J.'s statement has its own limitations. Personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present, of course, indirectly as the background to the consideration of the character of land use. It can, however, and sometimes should, be given direct effect as an exceptional or special circumstance. But such circumstances, when they arise, fall to be considered not as a general rule but as exceptions to a general rule to be met in special cases. If a planning authority is to give effect to them, a specific case has to be made and the planning authority must give reasons for accepting it. It follows that, though the existence of such cases may be mentioned in a plan, this will only be necessary where it is prudent to emphasise that, notwithstanding the general policy, exceptions cannot be wholly excluded from consideration in the administration of planning control."

Admittedly, neither of these cases was concerned directly with financial considerations similarly to the present case. And it is no doubt true that planning authorities must be particularly careful not to give way too readily to assertions of financial constraints as a ground for relaxing policies which have been formulated in the public interest. Thus, take another illustration given by Mr. Boydell. Suppose that an urban authority had a policy of requiring the use of green tiles – which are substantially

more expensive than others – in areas of residential developments bordering on the countryside. If a developer who wished to erect an otherwise highly desirable housing estate claimed that this would be uneconomic if green tiles had to be used, then the authority would clearly not be bound to reject his application out of hand. It would be bound to consider it on its merits, although it might well be highly sceptical about the assertion that the economic viability of the project would founder if green tiles had to be used. But if, after proper consideration, this were indeed the conclusion reached on a basis which would not admit of a charge of irrationality, then there could be no question about the validity of a decision which permitted the use of red or black tiles in the circumstances.

This takes one to the authorities in which financial considerations have played a direct part. In *Bradford City Metropolitan Council v. Secretary of State for the Environment (1986) 1 EGLR 199* Lloyd LJ. said at p.202 G that it has usually been regarded as axiomatic that planning consent cannot be bought or sold and that this must be true as a general proposition. However, the reported cases which can properly be described as falling within this class were concerned with situations in which planning and other consents had been granted for ulterior, and therefore impermissible, motives. *Hall and Co. Ltd. v. Shoreham-by-Sea UDC (1964) 1 WLR 240* (CA) is a well known example, to which Lloyd LJ referred at length in Bradford . In granting permission for a housing development the authority had imposed a condition that an adjoining highway, which was already overloaded and due to be widened by the authority, was to be widened at the expense of the applicant and by the use of a strip of his land, which would otherwise have had to have been acquired for the purpose. As Willmer LJ said at p.248, in holding with the other members of the court that the condition was invalid:

> "The defendants would thus obtain the benefit of having the road constructed for them at the plaintiffs' expense, on the plaintiffs' land, and without the necessity of paying any compensation in respect thereof."

That was a clear instance of a grant of planning permission coupled with a condition based on an ulterior motive. And in most such instances, though not necessarily, the motive will no doubt be financial or have some financial implications. The facts in Bradford were similar, although less extreme, and were judged to fall on the same side of the line. In both cases a condition with financial implications had been imposed with the ulterior motive of furthering the purposes of the local authority. In the result both decisions were held to be "manifestly unreasonable" , to use the words of Lloyd LJ which he understandably preferred to "irrational" .

Situations such as those in the present case and in the earlier illustrations to which I have referred are obviously quite different from cases like Hall v. Shoreham and Bradford . They do not involve the imposition of a condition to serve the purposes of the local authority. They involve the acceptance, faute de mieux , of a relatively undesirable feature of a development as a compromise or sacrifice in order to ensure the viability of the main project which is judged to be sufficiently desirable to warrant a partial relaxation of policy. But Mr. Carnwath challenged this analysis. While agreeing that no ulterior motive was involved in the present case, he did not accept what he called the "but for" argument, that but for the permission for the undesired office accommodation, the desired development of the Opera House could or would not take place. He pointed out that under the Local Government Act 1972 the Council had the necessary power to make up any financial deficiency and claimed that the situation was therefore no different from Hall v. Shoreham and Bradford in principle.

I cannot agree with this analysis. There are few, if any, situations in which the "but for" argument could not be countered by pointing to alternatives; but alternatives of a nature which the relevant authority may reasonably consider to be uneconomic and therefore impracticable. Such situations do not invalidate the "but for" argument. If sufficient money is made available almost anything can be done. But this approach provides no test for the balancing exercise involved in the realistic determination of most planning applications. In the present case, subject to the applicants' second submission to which I come shortly, the Council was entitled to proceed on the basis that, but for the permission to ROH to include the office accommodation in the proposed development, this would not proceed at all. The applicants' first submission, with which I am dealing now, assumes this as a fact while challenging the decision in law. On that basis the situation is wholly different from cases such as Hall v. Shoreham and Bradford where the economic viability of the proposed developments was not dependent on the financial conditions imposed by the authorities.

To the extent that situations similar to the present case have been considered by the courts the trend of authority has been in line with the foregoing approach and with the respondents' submissions. In *Niarkos (London) Ltd. v. Secretary of State for the Environment (1978) 35 P & CR 259* Sir Douglas Frank Q.C. held that it was impossible to decide whether premises could reasonably be adapted for residential occupation unless the cost of the adaptation was taken into account. He quashed a rejection of a planning application for office use of the premises, which would have been contrary to the local development plan, on the ground that no account had been taken of the financial considerations. He followed that decision in *Brighton Borough Council v. Secretary of State for the Environment (1980) 39 P & CR 46* on facts which lie closer to the present case. An inspector had allowed an appeal against a refusal by a local authority of planning permission to a school, situated in a conservation area, to put up houses in a part of its playing fields which lay outside this area. The basis of the application had been that the proceeds from selling the houses were to be used for the improvement of the school buildings for which no funds would otherwise have been available. It is true that the first ground of the inspector's decision was that there were no amenity objections to the development. But the materiality of the financial considerations figured large in the ratio of the judgment. For the reasons already discussed I do not accept Mr. Carnwath's submission that on this aspect the decision was wrong in principle.

The third in this line of cases is the important decision of Woolf J. (as he then was) in Sosmo Trust Ltd. v. Secretary of State for the Environment, London Borough of Camden (1983) Journal of Planning 806 . The appellants put forward three schemes for the development of a site which would otherwise have remained derelict. Two were shown to produce an uneconomic return; the third was for a six-storey office development which would produce a profit. The planning authority opposed the third scheme on the ground that it was contrary to its planning policy for the area and refused permission. An appeal to an inspector on behalf of the Secretary of State was dismissed. He had accepted that the site would remain derelict if the rejection of the third alternative was upheld, but he dismissed the appeal, saying:

> “However as a generality, the financial aspects of a development are not a relevant planning consideration. A planning permission runs with the land and in my opinion it would not be appropriate for the grant of permission to be dependent on the resources or intentions of a particualr developer to carry out a development. … I am of the opinion that there are no compelling reasons in favour of allowing the appeal proposal contrary to the office policy of the district plan”.

The developers successfully applied to the High Court to quash the inspector's decision. Woolf J. pointed out at p.807 that

> “what could be significant was not the financial viability or lack of financial viability of a particular project but the consequences of that financial viability or lack of financial viability”.

He went on to follow a passage from the judgment of Forbes J. in Sovmots Investments Ltd. v. Secretary of State for the Environment (1977) 1 QB 411 at p.424 in which references to the Minister equally apply to planning authorities:

> “…all that the court can do is to say that cost can be a relevant consideration and leave it to the Minister to decide whether in any circumstances it is or is not. Of course it follows that the weight to be given to cost, if it is a relevant factor, is also a matter for the Minister and not one in respect of which any court is entitled to substitute its opinion … I would conclude that it is impossible to say that cost can never be a relevant consideration either in a planning matter or in a compulsory purchase matter. It can be in both or either and it will depend in every case on the circumstances

> of the case. It is then a matter for the Minister to decide whether or not in any particular instance cost is in fact a relevant consideration".

Adopting that passage and quashing the inspector's decision Woolf J. held that

> "no Secretary of State could reasonably come to the conclusion that the economic factor was not relevant. He … could, however, subject to that, have decided what weight was to be attached to it."

For the reasons already stated I am in full agreement with that approach, and in my view it determines the first issue of this appeal. Mr. Boydell raised an additional point in submitting that the present case was in any event distinguishable from Hall v. Shoreham and Bradford , because there was no question of the imposition of any condition by the planning authority, but a situation in which the developer, ROH, was only too willing to erect the office accommodation in order to provide the necessary balance of finance required for the development of the Opera House, and willing to conclude a section 52 agreement to that effect, as the Council required. He submitted that the powers of a planning authority under such an agreement were wider than under section 29(1) and that the contrary view indicated by Lloyd LJ in an obiter passage in Bradford at p.202 M was incorrect and should not be followed. While it is equally unnecessary to express any concluded view on this question in the present case, I would certainly not accept that submission as a general proposition. Section 52 agreements undoubtedly facilitate the formulation of qualified planning permissions in comparison with the imposition of express conditions, and no doubt they also simplify the procedural aspects of the planning process in many ways. They have the advantages of the flexibility of a negotiable agreement in contrast to a process of unilateral imposition; and they are therefore no doubt far less vulnerable to the risk of successful appeals or applications for judicial review, which is to be welcomed. But if a particular condition would be illegal – on the ground of manifest unreasonableness or otherwise – if it were imposed upon an applicant for planning permission then it cannot acquire validity if it is embodied in a section 52 agreement, whether at the instance of the applicant himself or not. That, in effect, was equally the conclusion of Lloyd LJ in Bradford .

That leaves Mr. Carnwath's extreme hypothetical illustration of the undesirable office block in Victoria which is claimed to be necessary to generate the finance for a desirable development in Covent Garden. A combination of this nature would be unlikely to be properly entertained as a single planning application or as an application for one composite development, as in the present case. I therefore say no more about it save that all such cases would in my view involve considerations of fact and degree rather than of principle.

Having already borrowed so much from the judgment of Webster J., it is only right to quote the passage in which he expressed his conclusion on this issue at p.30 D of the transcript, with which I entirely agree:

> "It seems to me to be quite beyond doubt [but] that the fact that the finances made available from the commercial development would enable the improvements to be carried out was capable of being a material consideration, that is to say, that it was a consideration which related to the use or development of the land, that it related to a planning purpose and to the character of the use of the land, namely the improvements to the Royal Opera House which I have already described, particularly as the proposed commercial development was on the same site as the Royal Opera House and as the commercial development and the proposed improvements to the Royal Opera House all formed part of one proposal".

The second issue: was the Council entitled to conclude that but for the office accommodation the development of the Opera House would not proceed?

In the same way as the judge, I can deal with this issue more shortly. On the basis of the decision of this court in Prest v. Secretary of State for Wales (1982) 81 LGR 193 , Mr. Carnwath submitted that the Planning and Development Committee had been under a positive duty to investigate all aspects relevant to its determination before reaching a conclusion. That was a case concerning the confirmation of a compulsory purchase order, not an application for planning permission, in which the relevant financial aspect – the relative land cost of alternative sites – had not been considered at all. Watkins LJ said at p.211 A that the Secretary of State had not even given it "a passing thought" . That is miles away from the present case. As will be remembered, before its final resolution on 30th June 1987, the Planning and Development Committee had resolved on 3rd February that it

> "wishes to be absolutely convinced that the commercial development of the site is the only way of achieving the Royal Opera House improvements. Accordingly, while welcoming the application in principle, the Committee would wish there to be an opportunity for future discussion on this crucial aspect."

At p.34 F of the transcript the judge rightly said that if a planning committee

> "makes or has made no enquiries its decision may in certain circumstances be illegal on the ground of irrationality if it was made in the absence of information without which no reasonable planning authority would have granted permission".

The appellants' contention on this issue had therefore been correctly formulated in their skeleton argument that

> "… the information put before the Committee … was not such as to enable it rationally to conclude that the proposal was the only way of achieving the Opera House improvements".

That submission turns on the facts. The history has been set out in the lengthy extract from the judgment below, and I have already quoted the Committee's resolution on 3rd February 1987 that they wished to be "absolutely convinced" about the need to include the office accommodation which they described as the "crucial aspect" . Further investigations and discussions then followed until the meeting on 30th June 1987 when the Committee resolved to accept the proposal subject to the conditions already mentioned. On behalf of the applicants Mr. Carnwath criticised that decision on three grounds. First, he submitted that the Committee could not have been satisfied that further funds could not have been raised in other ways, for instance by lotteries which might soon be legalised by legislation, as in other countries. Secondly, he said that no account appears to have been taken of a forecast in a report prepared for the Association that the level of commercial rents was likely to rise so as to reduce the financial deficit from about £22m to about £10m. As a separate point Mr. Carnwath also relied on the fact that by April 1988, some nine months after the Committee's decision, this forecast was proved to have been correct. Finally, he submitted that the information before the Committee had been insufficient to entitle it rationally to reach the conclusion embodied in the resolution

which has already been set out. In support of this submission he relied on the contents of the further and supplementary reports by the Acting Director of Planning and Transportation which had been placed before the Committee for the purposes of the meeting on 30th June and on the minutes of that meeting.

In my view there is no substance in these contentions. On 16th February 1987 the Minister for the Arts had again made it clear in the House of Commons that no further financial assistance would be available from government sources, and there was ample material before the Committee, both before and after its preliminary decision in February 1987, that there was every probability of a deficit which could not be bridged by any appeal or other foreseeable means. As regards the size of the deficit, the material placed before the Committee showed that careful consideration had been given to six options of mixed uses, but that even the most favourable of these still left a substantial unbridgeable deficit. On this material it is clearly impossible to describe the Committee's acceptance of a solution involving the most favourable of these options as manifestly unreasonable.

As regards Mr. Carnwath's third point, this is not borne out by the evidence. As one knows, the bare written record of the minutes of a meeting and of the papers placed before it often fail to provide a fair impression of the matters which informed the minds of the participants before they reached their decision. In the present case the reality was described in affidavits sworn by two Officers of the Council and by a Chartered Surveyor which show the degree of discussion, questioning and consideration which took place before the outcome of the meeting on 30th June. To suggest that the conclusion which was then reached was irrational or manifestly unreasonable, or based on information which was, or should reasonably have been regarded as, inadequate, is in my view untenable.

Conclusion

It follows that I agree with the conclusions of Webster J. and that I have no doubt that this appeal must be dismissed. It remains to mention, for the sake of completeness, that in referring to events which have occurred since 30th June 1987 Mr. Carnwath stressed, as already briefly mentioned, that by April of this year commercial rents had in fact risen to a level which confirmed the earlier forecast, that on this basis the unbridged deficit would be reduced to £10m, and that this was now admitted on behalf of the Council. Pointing out that the formal planning permissions and listing consents were still in draft, he said that an opportunity, and perhaps a duty, to reconsider remained. But this is not an aspect which we can consider on this appeal. As has been said, keeping track of changing circumstances in planning situations is like trying to hit a moving target in the dark. Many variables must inevitably enter into any assessment, and the rises in interest and mortgage rates during this summer may well have falsified estimates made as recently as last April. Moreover, the desirability of finality is no doubt also an important factor. We cannot enter into considerations of this nature. We can only say that if it is considered by the Council that the circumstances warrant some modification of the development as presently resolved, then there is clearly no legal impediment in the way.

LORD JUSTICE NICHOLLS:

On 30th June 1987 the Planning and Development Committee of the Westminster City Council decided in principle to grant planning permission for a scheme of development proposed by the Royal Opera House Covent Garden Limited. The scheme involved improvements and alterations to the Opera House itself and also a substantial element of office development on adjacent land. The decision of the Committee was adopted by the Council on 29th July 1987. The Covent Garden Community Association are seeking to impeach that decision. They object to the office element. They say that the decision was invalid in law.

The primary line of attack of the Association is that when deciding to approve the office element in the overall scheme the Committee took into account a matter it ought not to have taken into account. It exercised a statutory power for a purpose for which it was not intended. The office element was approved by the Committee as a source of finance for the other works. Permitting the financially profitable office development would make it possible for the Royal Opera House to proceed with much-needed alterations and improvements to the Opera House. Otherwise the Royal Opera House could not afford to go ahead. The Association's case is that that was not a proper reason for granting permission for a commercial development which would otherwise have been refused. Mr. Carnwath crystallised the Association's submission thus: if permission for development A would be refused on its individual planning merits, the fact that the profits of that development are to be used to finance development B is not a sufficient reason for granting permission for development A. The financial purpose is extraneous to a proper consideration of the planning merits of development A.

That a planning authority may properly take into account as a material consideration within section 29 of the Town and Country Planning Act 1971 the practical consequences likely to follow if permission for a particular development is refused seems to me

to be self-evident. For example, take a run-down site, littered with derelict buildings. The soil is contaminated from previous industrial use. Preparation of the site for development will be expensive. The planning authority is anxious that such an eyesore shall be removed, and housing is the preferred use. An application is submitted for development with high-density housing. In my view it is clear that in considering this application the planning authority is entitled to take into account, first, that a lower density of housing will not be commercially viable, having regard to the heavy cost of site clearance, so that, secondly, the probable consequence of refusing to permit the development sought will be the absence of any development for the foreseeable future, in which event the eyesore will remain.

Likewise if what is sought is a mixed development, mostly of houses but including some offices. The planning authority prefers no offices on the particular site. But I can see no reason, in logic or in policy, why the planning authority should not be able to opt for what it considers, in planning terms, to be the best development obtainable in practice: some offices,. thus making a development of the rest of the site for housing purposes commercially possible. The authority can prefer this to no development at all. I cannot accept that granting permission for offices in such a case would be an exercise of the statutory power for a purpose for which it cannot have been intended. Of course, it is for the planning authority to determine how much importance, or weight, to attach to the various factors such as the likelihood of there being no development if the application is refused, the likely consequences in the neighbourhood if there is no development, and the likely consequences if a mixed development is permitted.

Mr. Carnwath's strongest point was that if what I have said above is correct one is on a slippery slope on which there is no stopping short of a conclusion which would embrace and accept as valid other cases from which one instinctively recoils. If the purpose of granting permission for development A is to finance development B, that purpose can equally exist and be fulfilled if the two developments have no physical contiguity at all. They can be miles apart. A hypothetical example mentioned in argument was of the Royal Opera House owning land elsewhere in London, in Victoria for instance. Could permission for a commercial development of land in Victoria have been properly granted solely to finance alterations to the Opera House situated in Covent Garden? Mr. Sullivan, for his part, frankly accepted that he could discern no legal principle which distinguished between (a) what happens within one building, (b) what happens on two adjoining sites and (c) what happens on two sites which are miles away from each other.

Other examples spring to mind. Could permission for an otherwise unacceptable development in Victoria, or elsewhere in London, or yet further afield, properly be granted because the site owner is prepared to give a substantial sum towards the cost of the Opera House works? If it could, could the local planning authority impose a condition to that effect when granting permission?

I am not persuaded by this reductio ad absurdum argument. Circumstances vary so widely that it may be unsatisfactory and unwise to attempt to state a formula which is intended to provide a definitive answer in all types of case. All that need be said to decide this appeal is that the sites of the commercial development approved in principle are sufficiently close to the Opera House for it to have been proper for the local planning authority to treat the proposed development of the office sites, in Russell Street and elsewhere, and the proposed improvements to the Opera House as forming part of one composite development project. As such it was open to the planning authority to balance the pros and cons of the various features of the scheme. It was open to the authority to treat the consequence, for the Opera House works, of granting or withholding permission for offices as a material consideration in considering the part of the application which related to offices.

For this reason I too would reject the Association's primary ground of appeal. As to their second ground of appeal I have nothing to add to the reasons, with which I agree, given by Kerr L.J.

I also would dismiss this appeal.

LORD JUSTICE STAUGHTON:

I agree that this appeal must be dismissed. On the first issue, the major difficulty seems to me to lie in drawing a line between obvious extremes. It may be sufficient for the decision in this case to say on which side of the line it lies. But in my view the court ought, if it can, to give some indication where the line should be drawn. In Erewhon Samuel Butler wrote

> "Extremes are alone logical, but they are always absurd; the mean is illogical, but an illogical mean is better than the sheer absurdity of an extreme."

Those propositions were attributed to the School of Unreasoning. But they appear to me to demonstrate both the difficulty and also the necessity of drawing a line.

The question here is whether a planning authority can permit undesirable development A as a means of securing desirable development B. It is the same question, whether it comes in the shape of a "material consideration" within section 29(1) of the Town and Country Planning Act 1971 , or of conditions which a planning authority may lawfully impose on the grant of planning permission. One extreme is the example given by Kerr L.J. of a derelict listed building which the planning authority wishes to see restored. In principle it would be wholly proper to consider partial office development A, if that were the only means by which restoration and partial residential occupation B could be made financially viable.

The other extreme arises from the axiom of Lloyd L.J. that planning permission cannot be bought and sold. Suppose that a developer wished to erect an office building at one end of the town A, and offered to build a swimming-pool at the other end B. It would in my view be wrong for the planning authority to regard the swimming-pool as a material consideration, or to impose a condition that it should be built. That case seems to me little different from the developer who offers the planning authority a cheque so that it can build the swimming-pool for itself – provided he has permission for his office development. The case of *Brighton Borough Council v. Secretary of State for the Environment, (1980) 39 P. & CR. 46* , may have come close to infringing that principle. But I do not say that, on its own facts, it was wrongly decided.

Where then is the line to be drawn between those extremes? In my judgment the answer lies in the speech of Viscount Dilhorne in *Newbury District Council v. Secretary of State for the Environment (1981) A.C.578* at p.599, which Kerr L.J. has quoted. Conditions imposed must "fairly and reasonably relate to the development permitted" , if they are to be valid. So must considerations, if they are to be material.

In the present case, the improvement of the Royal Opera House, B, is a development which the Westminster City Council considers to be desirable, for valid planning reasons. The building of office premises in close proximity, A, is necessary if development B is to occur. It can fairly and reasonably be said to relate to the proposed development which ought to be permitted. The whole is, to quote the words of Kerr L.J., a composite or related development. The offices are not ulterior or extraneous; they are part of the whole.

On the second issue, there is nothing which I would add to the judgment of Kerr L.J.

(Order: Appeal dismissed, with costs in favour of Westminster City City Council; no order as to costs in respect of Royal Opera House Covent Garden Ltd; application for leave to appeal to House of Lords refused).

DISCUSSION FOLLOWING JUDGMENT

LORD JUSTICE KERR; The judgments in this appeal have been handed down. The appeal is dismissed unanimously.

MR. STINCHCOMBE (for MR. SULLIVAN): On behalf of the City Council I ask your Lordships for the costs of the appeal.

MR. COMYN (for MR. BOYDELL): On behalf of the Royal Opera House I would also ask for costs.

MISS ROBINSON: Perhaps I might deal with those two applications separately, my Lords. So far as Westminster City Council is concerned, I am aware that the usual order would be for costs in any event, but I would ask your Lordships to consider whether this is a case in which the appropriate order might be no order as to costs.

The reasons I make this submission is that the case raises an important point of general principle; indeed, that was recognised by my Lord, Lord Justice Kerr, very early on in his judgment. All three judgments, I think, recognise that that is the position because, very helpfully if I may respectfully say so, general guidance has been given on the financial considerations in respect of planning, and on the more limited issues as to whether or not consideration was given-----

LORD JUSTICE KERR: Speaking for myself, this is not the basis on which we normally deal with costs in civil appeals. A similar argument was addressed to Mr. Justice Webster below, but he felt that he had to make an order for costs against the Association. That is how litigation is conducted.

MISS ROBINSON: Indeed, but I would mention that in one of the cases on our list of authorities Mr. Justice Megaw, as he then was, did take the view that in that case the appropriate order was no order for costs. In this case I would emphasise that the Covent Garden Community Association is a charity, which is interested in the Covent Garden area as a whole.

LORD JUSTICE KERR: We have full understanding of that, Miss Robinson; it is reflected in the judgment, in which we set out the admirable objectives of the Association. I do not think that we can listen to authorities on the question of costs; it is a discretionary matter.

MISS ROBINSON: Yes, but of course there is the question of financial considerations which arises every day as a matter of practice in the negotiations between the Association and the Local Planning Authorities. Your Lordships' judgment will be of great benefit, not only to the parties but generally giving guidance on the matter, and I think it is right to point out that by their very nature cases of this kind are not likely to come to court very often, because where a developer is happy to provide a sum of money towards getting such guidance, neither the Local Planning Authority nor the developer would litigate that question. In this case the Association felt that this was a matter of public importance, which it was right to pursue.

LORD JUSTICE KERR: You are not saying anything that we do not know already, Miss Robinson, and we will consider what you say in a moment. Speaking for myself, everything you say might be a reason to cause those against you not to ask for costs, but they have chosen to do so.

MISS ROBINSON: Then may I go on to say that if your Lordships are minded to order costs against the appellant, perhaps I may add the further point, that your Lordships may consider it appropriate to indicate that if, when the City Council decided not to enforce the order for costs, that should not be a course of action which would attract criticism from the District Auditor, because of course the Local Authority has a duty in that regard.

LORD JUSTICE KERR: Again speaking for myself, I am not in a position to express any view about that. It is a question of law and I do not know what discretion he has. I do not think we can deal with that unless something is said on behalf of the council. But we will consider your application that there should be no order as to costs in a moment.

MISS ROBINSON: Then may I turn to the application by the Royal Opera House? Here I am slightly at a disadvantage, because I had not anticipated that they would make an application for costs today.

LORD JUSTICE KERR: But presumably the application for judicial review was served on both, and presumably the notice of appeal was served on both.

MISS ROBINSON: That is so, my Lord, but it is right that I should draw your Lordships' attention to certain facts surrounding the joining of the Royal Opera House in these proceedings. My clients were reluctant in agreeing that the Royal Opera House should be involved when all the issues could quite properly be dealt with by Westminster City Council. But in the end my clients agreed to serve these proceedings on the Royal Opera House, on the basis of an undertaking given by them that they would not seek their costs. The application for leave was for a substantive hearing for judicial review; I have a letter from my learned friend's instructing solicitors to that effect.

LORD JUSTICE KERR: That was before the matter came substantively before Mr. Justice Webster. At that stage there was no application for costs; you obtained leave to move for judicial review, and then it went ahead and Mr. Justice Webster did award costs, because I suppose their undertaking did not apply then.

MISS ROBINSON: That is not in fact right, my Lord. The Royal Opera House expressly indicated to Mr. Justice Webster that they would not apply for costs.

LORD JUSTICE KERR: Is that referred to in the discussion at the end of the transcript?

MR. STINCHCOMBE (for Mr. Sullivan): It is, my Lord; it is mentioned on page 37.

MISS ROBINSON: It is right that I should point out what the letter said; perhaps I can read it out: “I have discussed the matter with my clients” (etc., reading letter). I accept that in terms that does not cover the appeal to the Court of Appeal, but in my submission the spirit of that letter indicates that the Royal Opera House wished to get involved in these proceedings for their own information more than anything else.

LORD JUSTICE KERR: Were you ordered to serve them, or had they indicated a wish to be involved?

MISS ROBINSON: The latter, my Lord. We have not been ordered to serve proceedings, but they indicated a wish to be joined.

LORD JUSTICE KERR: You felt that they were then parties and that you had to serve the notice of appeal on them?

MISS ROBINSON: Indeed, my Lord. In my submission the spirit of this letter should prevail on the appeal and it should bind the Royal Opera House today. Their interest in the matter was one which led them to want to become involved for their own reasons rather than in the interests of justice. I would invite your Lordships' attention to 0.53, which is in the White Book at page 809. There is a Note at the bottom about costs which indicates that two sets of costs will not normally be granted but that if an application for costs is pursued-----

LORD JUSTICE KERR: It says that costs will not usually be granted to a party who has appeared but has not been served. This is a halfway house, but it says that two sets of costs will not usually be granted.

MISS ROBINSON: It goes on to say that when two or more parties – (etc. reading Note) so it does say that in exceptional circumstances the court will order more than one set of costs. In my experience, two sets of costs are very rarely awarded in cases like this.

LORD JUSTICE STAUGHTON: My Lord had a case the other day in which we were asked to order twenty-three sets of costs.

LORD JUSTICE KERR: And we ordered one. We followed Mr. Justice Staughton, as he then was, who had taken the same course.

MISS ROBINSON: My submission is that the appearance of the Royal Opera House has added nothing to, nor has it subtracted anything from, the proceedings. I would like to make a further point; it is that one of the main points taken by my learned friend Mr. Boydell on behalf of the Royal Opera House related to the question whether or not the powers under section 52 were wider, and that is a point which your Lordships decided against them.

In those circumstances I would invite your Lordships not to make an order for costs in their favour.

LORD JUSTICE KERR: Thank you very much, Miss Robinson.

MR. COMYN: The position as I understand is that although the Royal Opera House were not served, they became involved in the proceedings at a very early stage. My instructing solicitors tell me that we had word of the paper application for judicial review and, having heard about that, we made certain approaches to the solicitors. I understand that the undertaking in relation to the application for leave, and the undertaking in relation to costs at first instance, was made on the basis that in exchange for that we would receive certain affidavits from the Community Group. The undertaking went no further than that. We were not served; however, we did appear at the hearing, at which we were represented by Mr. Boydell – he made representations on behalf of the Royal Opera House.

Although we were not served, it is perhaps a matter of fact, or law, that we should have been served, because by O.53 r.5(3) , on page 789 of the White Book we are told that a notice of motion or summons must be served on all persons directly affected (etc. reading sub-rule (3)).

LORD JUSTICE KERR: Do they claim to have been a party who was bound to be served? I should have thought not.

MR. COMYN: I think we would claim to be a party directly affected by the proceedings. I can expand on that if I might.

LORD JUSTICE KERR: At any rate, you took the course of saying that you anticipated being served. As I understand what Miss Robinson has said, it was not proposed that you should be served.

MR. COMYN: I was surprised to hear that; it is the first time that I have heard it. It obviously comes from her instructions, but I had understood that that was their intention from the outset. Clearly, in my submission, we were a "party directly affected" . The reason why I say we were directly affected is because what was in issue here was a planning permission, albeit only in draft, directly affecting our property, as the result of which, if issued, would have been that we would have been able to redevelop our property.

LORD JUSTICE KERR: I do not really know, but in proceedings for judicial review, where the decision of the planning authority is challenged, is it an invariable rule that anyone in the position of your clients would be served and made a party?

MR. COMYN: I would not say that it was an invariable rule; what I would say is that it is very often the case that a recipient of planning permission is directly affected by such proceedings – certainly he is directly affected by proceedings to quash planning permission under section 245 of the Town and Country Planning Act , which are analagous proceedings to proceedings for judicial review – the same tests are applied in respect of the Inspector's decision on an appeal and if his decision is challenged by the local authority it is up to the Secretary of State to respond.

LORD JUSTICE KERR: But the issue in judicial review proceedings is the question of the legality of the decision of the planning authority; it is a planning issue.

MR. COMYN: It is a question of the legality of the planning authority's decision. Under section 36 the Inspector on appeal becomes the planning authority; he stands in the shoes of the local authority, their decision having of course been challenged. He stands in their shoes and makes a decision; sometimes he makes a decision on behalf of the Secretary of State, but he is the planning authority and what is in question is the legality of his decision and it is tested in much the same way as matters are tested in judicial review proceedings. For example, if instead of Westminster another party had been involved and had a right to refuse, and did refuse, no doubt the Royal Opera House might appeal to the Secretary of State. If the Inspector reported in favour of the Opera House they might challenge that, or whoever it may be might challenge that, and the proceedings would be defended by the Secretary of State, and normally in planning matters the recipient of the planning permission would have an individual interest to protect. There is some authority on the position in judicial review proceedings which I can put before the court; it is a case reported in Property and Compensation Reports, The Queen v Secretary of State for the Environment, ex parte Melton Borough Council -----

LORD JUSTICE KERR: Just tell us the effect of the authority.

MR. COMYN: Perhaps I might read the comments of Mr. Justice Forbes. He said this:

> "I think that these questions of double costs are difficult. I certainly do accept that in the ordinary run of cases, where the two respondents are respectively the Secretary of State and the appropriate local authority, that the ordinary practice of this court is only to order one lot of costs. But I can see there is a considerable difference where the other respondent, besides the Secretary of State, has a wholly separate and legitimate private interest as, for instance, the land-owner who has been successful in getting an enforcement notice quashed by the Secretary of State, whereas here one of the objectors to the compulsory purchase order has managed to persuade the Secretary of State not to confirm the order. The two things are very much in pari materia, it seems to me. In those circumstances, and particularly perhaps in this case because I have the affidavit of Mrs. Mackney which has been absolutely invaluable in filling in the gaps in the evidence, gaps which I do not think could have been filled in any other way apart from getting an affidavit from the inspector himself which is frequently not desirable. But, in any event, I think that Tescos here had an independent

> interest which it is right they should defend. I think that both the Secretary of State and Tescos should have their costs against the unsuccessful applicant."

LORD JUSTICE KERR: Anyway, he awarded two sets of costs in that case.

MR. COMYN: Yes, my Lord. That is one of the grounds why I suggest that the Royal Opera House does have a wholly separate and legitimate interest in these proceedings.

LORD JUSTICE KERR: But it is true to say that the undertaking about which Mr. Boydell told Mr. Justice Webster does not cover an appeal – but this is not a case in which an appeal has been improperly brought.

MR. COMYN: It is a case in which the appeal has been brought by a community group. I have had a word with my learned friend; it is quite clear that they have taken a point which was of importance. They have brought it here to this court against the background of the decision by Mr. Justice Webster, where he says on page 38 of his judgment:

> "Although this is clearly an unusual, perhaps an exceptional, case on the facts, I do not take the view that on the law it is an exceptional case."

That was the view of Mr. Justice Webster. It is interesting that he thought it was an unusual, perhaps an exceptional, case on the facts, and I rely on that comment to some extent, insofar as the Royal Opera House has been instrumental all the way along in bringing these unusual and exceptional facts before the court. Your Lordship paid some tribute in your judgment to the judgment of Mr. Justice Webster, and extracts from it are set out. In my submission the contents of Mr. Justice Webster's judgment, insofar as it refers to the history of the proceedings, owe a great deal to affidavits which were put in by the Royal Opera House, particularly the affidavits of John Tooley and, I believe, Mr. Osborne, the affidavit evidence which was before this court in relation to the matter of costs and the financial aspects.

My second point is this, that the Royal Opera House clearly has an interest in the proceedings and clearly did assist the court. Again, if one reads your Lordship's judgment, it is clear that Mr. Boydell on a number of occasions brought illustrations before the court which were of assistance. In my submission it is clear that the Royal Opera House played an important role in these proceedings.

MR. STINCHCOMBE: The fact that Mr. Boydell had an idea which Mr. Comyn did not have should not lead to the Association's paying both sets of costs.

MR. COMYN: But Mr. Boydell assisted the court, first of all by bringing affidavit evidence before the court to clarify the issue-----

MR. STINCHCOMBE: The affidavits were there already.

MR. COMYN: I am told that new affidavits were brought before the Court of Appeal in relation to financial matters.

LORD JUSTICE KERR: I think they were put in by the appellants.

MR. COMYN: What I would say about that is that the Royal Opera House clearly had that legitimate interest. The Community Action Group came to this court with their eyes wide open, having heard the view of Mr. Justice Webster as to the law on the matter. Again, I do rely on the words of Lord Justice Staughton in the judgment, insofar as he relied very much, I think, on the authority of the Newbury decision. So it is a material consideration.

I would suggest to the court that, not only did the Community Action Group come here with its eyes wide open, but also against the background of fairly settled law, certainly in relation to conditions, and I suggest that, having heard Mr. Justice Webster's view of the matter they should have been in some doubt as to whether they would succeed in this court. It is quite fair to say that the Opera House, which itself is a charity, has pursued a legitimate interest in this court.

LORD JUSTICE KERR: Thank you, Mr. Comyn.

Are there any other applications?

MISS ROBINSON: I have an application, but it does not relate to the matter of costs. I am instructed to ask your Lordships for leave to appeal to the House of Lords.

LORD JUSTICE KERR: Then make your application, Miss Robinson; we shall then retire for a few moments to consider both applications.

MISS ROBINSON: Thank you, my Lord. I do ask for leave to appeal. In my submission this case does raise issues of general importance; I have already said that in response to the application for costs by Westminster City Council. In response to what has been said by my learned friend appearing for the Royal Opera House, I strongly refute any suggestion that the issue of law raised in this appeal is one in which settled law exists in any respect whatsoever. It quite clearly raises a point-----

LORD JUSTICE KERR: I think all of us – certainly Lord Justice Staughton and myself – relied strongly on the Newbury case. We did apply the decision of the House of Lords to this case.

MISS ROBINSON: That is quite right, but that was not a case which in any way dealt with financial matters. The only authority which can be said to have touched upon it was the Brighton case, which was a decision at first instance of Sir Douglas Frank.

In my submission the issue is an important one; it is one which crops up every single day as a matter of practice and I submit that it is an issue properly to be considered by their Lordships.

LORD JUSTICE KERR: Thank you, Miss Robinson.

Does either counsel, for the City Council or for the Opera House, support the application for leave to appeal to the House of Lords? That can be answered Yes or No.

MR. STINCHCOMBE: We do not support it, my Lord.

MR. COMYN: Neither do we support it.

LORD JUSTICE KERR: Then we propose to retire, to consider the submissions.

(Their Lordships retired)

On their return :

LORD JUSTICE KERR: The appeal will be dismissed with costs in favour of Westminster City Council, but in all the circumstances we do not think it appropriate that there should also be an order for costs in favour of the Royal Opera House. We say this in the special circumstances of this case, which it is unnecessary to detail, without intending to lay down any principle with regard to applications for judicial review.

With regard to the application for leave to appeal to the House of Lords, we are all of the view that this is not an appropriate case in which this court should grant leave. If the appellants are minded to pursue the matter, they should address themselves to their Lordships' House.

MISS ROBINSON: If your Lordship pleases.

Might I mention one further matter? Mr. Justice Staughton, as he then was, did give a certain indication at the end of the case which has been mentioned to your Lordships, that in view of the special, circumstances of that case, of which I have copies that I can put before your Lordships-----

LORD JUSTICE KERR: That may or may not have been appropriate in that case, Miss Robinson. You have that, for what it is worth, but we cannot give any such indication in this case.

MISS ROBINSON: If your Lordship pleases.