IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Claim no.: CO/2685/2015

B E T W E E N

Eva Bokrosova

Claimant

and

Lambeth London Borough Council

Defendant

Lambeth's Submissions
22 November 2015

---

1. Lambeth is content for all post-judgment issues to be dealt with on the papers and without an oral hearing. Set out below are its submissions on relief, permission to appeal and costs. A draft order is appended.

Relief

2. Having regard to §99 of the draft judgment, that allowed the parties 'to make further submissions about relief', Lambeth submits as follows.

3. Due to C's 3-month delay in issuing the claim (Cabinet decision of 9 March and Claim issued on 9 June) Lambeth acted on its March Cabinet decision at its Cabinet meeting of 13 July. As is clear from the minutes of this July meeting Lambeth 'authorised the redevelopment of the entire Cressingham Gardens estate' and made various decisions consequential on this [b85]. Mr Vokes spelt out what this meant in his 1st w/s §§35-37 [b35] and his 2nd w/s §20 [b450]. Moreover, as is clear from §20(c) of his 2nd w/s, by the time of the hearing on 3 November the public exhibition of 3 bidders for the management team had taken place.

4. All of the above is a fact: by the time of the hearing 8 months had passed since the March Cabinet meeting in respect of an estate in urgent need of repair. Lambeth cannot be faulted for progressing its plans: Holman J declined to grant C an injunction 'without a proper on-notice application supported by evidence' [a11b]. C *did not make* such an application. Moreover, although Holman J noted that 'any action taken is not likely to impress the court as a bar to discretionary relief' his comment must be viewed having regard to five points:

   a) He was not aware (as of Friday 10 July when he made his order) that Lambeth's Cabinet would meet on Monday 13 July to progress its March decision.

   b) His comment was made, as he recognised, in ignorance of Lambeth's position because C had not made a proper on-notice application. Accordingly, he knew nothing of Lambeth's pressing need to progress this issue.

   c) A judicial *comment* made in ignorance of relevant information is of far less weight than a judicial *determination* not to make an injunction. The judge had the power to stop Lambeth from implementing its March decision and despite being invited to exercise this power by C [a20§38] he made a *judicial determination* that he would not.

   d) C did not then make an on-notice application for an injunction as Holman J had invited her to do.

   e) Although Holman J's decision was made on 10 July it was not sent to Lambeth until 16 July (and received by it on 17 July) which was after the July Cabinet had passed resolutions consequent on the March decision.

5. Lambeth is mindful of the House of Lords' ruling that 'the opportunity to submit further arguments is at an end when the parties are provided with copies of the draft speeches and that 'an attempt to resubmit submissions already made and to make new submissions' is an abuse of procedure.[1] But this is a case where the Judge has expressly given the parties an opportunity 'to make further submissions about relief if they have any new points to make'. The July Cabinet Papers are a matter of public record[2]. They included a 13-page paper and over 220 pages of appendices explaining how and why Lambeth would progress option 5, which as the minutes show is what Lambeth resolved to do [b78].

6. In support of its argument that relief should not be granted Lambeth attaches Appendix

[1] R(Edwards) v Environment Agency [2008] UKHL 22.

[2] http://moderngov.lambeth.gov.uk/ieListDocuments.aspx?CId=225&MId=9353&Ver=4

A (More Detailed Background & Consideration of Options) from the July Cabinet papers and relies, in particular, on the following:

'Background

1.14 In the knowledge that no full refurbishment scenarios could be progressed because they would not be fundable through the HRA, the Council made the Cabinet decision in March 2015 to cease any further consultation on refurbishment scenarios. Despite the limitations on funding through the Housing Revenue Account, the Council has still committed £1.4m to carrying out meanwhile disrepair works across the Estate to make properties weather-tight. Formal s20 consultation[3] on this work has already commenced.

'Viability Assessment

1.32 Previously considered Options 1 to 3 were rejected in the March 2015 Cabinet Paper because they are not fundable. There does not exist the funding within the Housing Revenue Account to carry out the identified and necessary refurbishment works. The test for fundability is very different to the test for viability. In Options 1 to 3, all existing homes on the estate would have remained within the Housing Revenue Account (HRA) such that any refurbishment of these properties would need to be funded through the HRA, where the Council has reached its limit on affordability of borrowing with all remaining headroom allocated to the Lambeth Housing Standard programme.

1.33 Options 4 and 5, however, can be progressed by other means (such as through a special purpose vehicle) and the cap on borrowing does not, therefore, apply. Consideration of these options is consequently by means of financial viability analysis, looking at scenarios where positive net present values (NPV) can be achieved.'

7. The significance of the above is that they re-iterate the point made by Mr Vokes in his 1st w/s §§6-8 [b28] about the important distinction between *redevelopment* and *refurbishment*. Moreover, the above makes it clear why the refurbishment options, namely 1 to 3, were of a materially different financial quality from the redevelopment options, namely 4 to 5: the former had to be funded through the HRA, the latter did not. Hence, it was only the latter that enabled Lambeth to borrow private finance. This fact must allay the Judge's unease etc over the Curtis document (see the 1st, 2nd & 3rd Draft Grounds of Appeal below) and put beyond doubt any lingering concern held by the Judge that Lambeth had misunderstood its financial position.

8. Put simply: it would be pointless to set aside the March Cabinet decision so as to require further consultation over options that were unaffordable in March 2015.

[3] ie with leaseholders under the Landlord & Tenant Act 1985 over the proposed urgent repairs.

9. Furthermore, as is also clear from Neil Vokes' 1st w/s §30 [b34], Lambeth's HRA position has worsened since the March decision. This point was stressed during the hearing. Indeed, the Judge was offered the figure as to the amount of income that Lambeth would lose over the next 4 years as a result of the Chancellor's decision that all Council rents must fall. She declined to be given it but in light of §99 of the draft judgment Lambeth now provides this figure: due to the 1% reductions in rent over each of the next four years, as announced by the Chancellor in July, Lambeth expects to lose £28m from its rental income over the next 4 years.[4] But, whether or not that figure is relied on it is clear that 1% a year of a lot of money (all rental income from Lambeth's council tenants) is a lot of money. And it is an even greater sum of money when the reductions happen cumulatively year after year.

10. Lambeth submits that it would be wrong to grant any relief in circumstances where it would be pointless to require Lambeth to consult again on options that were and which remain unaffordable. Lambeth further relies on the points set out in the 5th ground of its Draft Appeal Notice, below.

11. Alternatively, any relief should be limited to a declaration that the Council's decision of 9 March to stop consulting on options 2 and 3 was unlawful and hence that the decision to stop consulting on options 2 and 3 be quashed. Excluding option 1 from the relief must follow from the Judge having no basis to find that option 1 remained affordable (ie even the Curtis document made that clear).

12. Alternatively, and in response to what Lambeth understands C may seek, any relief should be limited to a declaration that the Cabinet decision of 9 March was unlawful and should be quashed. It would be wrong of the Court to go any further because:
    a) That was the limit of C's challenge.
    b) That was the extent of relief sought by C [a55, C's Skeleton §88].
    c) The Court has no right to direct Lambeth as to how it responds to any quashing order.

[4] Lambeth will of course put this figure in a witness statement, if required.

13. Permission to appeal is sought on five grounds, each of which, Lambeth submits, 'would have a real prospect of success' (CPR 52.3(6)(a)).

The basis of the Judge's decision

14. C won on one point: the Judge was 'not satisfied, on the evidence, however, that enough changed in February 2015 to entitle Lambeth to stop consulting on options 1, 2 and 3' (and that this was contrary to the s105 arrangements it had published) (§87). Accordingly, this conclusion enabled the Judge, when discussing the s31(2A) question, to conclude that Lambeth's cabinet might have made a different decision had its financial position 'been much more fully before the Council' (§90).

15. Before dealing with the detail of this conclusion it is worth noting what must lie behind it. The Judge did not conclude (and nobody ever suggested that it was the case) that any of Lambeth's officers or members sought to deceive the CGE residents. So the implication must be that all Lambeth's officers and members who considered the affordability issue and stated that options 1 to 3 were unaffordable as of February 2015 were acting in possible ignorance of the true financial position. This possible ignorance applied, for example to all the following when they stated that refurbishment of CGE was unaffordable (emphasis added):

- Cllr Matthew Bennett, Cabinet Member for Housing, when he wrote to all residents 26 Feb

  > 'The Council has now undertaken the necessary financial analysis of the refurbishment options (Options 1 to 3). We have worked with residents on these costings, and even using a best-case scenario *the lowest cost for refurbishment of the whole estate is still three times what the council can afford* and it would not be right to continue to consult with the residents about an option that is simply unaffordable and cannot happen'. [c25]

- The many officers who put their name to the report for Cabinet meeting of 9 March:

  > 'A 3 month programme of engagement has recently been completed. The Council agreed with the residents to continue exploring refurbishment as an option within that process however [it] has been *clear that full refurbishment of the estate or a significant proportion of the estate is currently unaffordable* within the constraints of the Housing Revenue Account.' [c31 §2.9]

- Cllr Matthew Bennett, Cabinet Member for Housing, when he addressed the Cabinet and members of the public on 9 March [c52]

  'The option to refurbish the homes at Cressingham Gardens was *no longer seen as affordable* due to budgetary cuts by the UK Government. Investing in a refurbishment-only option to bring the estate up to the Lambeth Housing Standard (LHS), with its significant internal improvements and structural issues was in excess of the initial costing of the 2012 LHS business plan (£3.4 million) and meant that work would need to be cancelled on more affordable options elsewhere.'

- The Deputy Leader (Finance & Investment), when he addressed the Cabinet and members of the public on 13 July:

  'financial viability was the key' [b83]

- Cllr Matthew Bennett, Cabinet Member for Housing, when he addressed the Cabinet and members of the public on 13 July:

  'The best case scenario of refurbishment did not have a budget to meet the costs and that refurbishment did not have a budget to meet the costs and that regeneration was the only way to deliver' [b84]

- The many officers who put their name to the report for the Overview & Scrutiny Committee on 11 August:

  See, in particular, the financial information presented at [b110]

- Neil Vokes in his witness statements of 13 August (see in particular §§6-10) and 30 October (see in particular §§7-8).

16. It may be thought surprising that all of the above could over such a long period - that endured through to the final hearing on 3 & 4 November (ie a period of 9 months) – have laboured under the possible false belief that options 1 to 3 were unaffordable. The grounds of appeal, set out below, explain how the Judge erred in law in reaching that conclusion.

17. One other background point is how the Judge refers to whether Lambeth 'could lawfully renege on the section 105 arrangements if it discovered a sufficiently significant change of circumstances' (§83). Lambeth does not accept that it did renege on its s105 arrangements because at all material times it had stated that it would only continue to consult on options that remained affordable. See 1st Vokes w/s §§4-5 [b26]. However,

since the Judge stated that she assumed, without deciding it, that Lambeth 'could have stopped the consultation if there had been a sufficiently important change of circumstances' (§87) this point is not relevant.

1st ground: The Judge decided the case on a point that was not part of C's grounds

18. Although C's 2nd ground alleged that Lambeth had unlawfully decided that options 1 to 3 were unaffordable that allegation was made with regard to Lambeth's consultation process, which it was said could have either raised more money from green retrofitting (sub-ground (vi)) or with a resident management option (sub-ground (vii)) [a50]. The Judge mentioned these arguments but did not accept them (§84).

19. Instead the Judge decided the case on the materially different basis that she was not satisfied options 1 to 3 had become unaffordable (§§87, 90). The Judge erred in law in deciding the case on a point that did not feature in C's grounds. In fact, this was not a consultation point at all; the Judge decided that Lambeth had misdirected itself when concluding that Options 1 to 3 were unaffordable. It is one thing to say, as C alleged: the consultation was defective for x, y & z reasons; it is quite another to say, as the Judge found: Lambeth could not have been satisfied that something was unaffordable. At no point in her judgment did the Judge state: Lambeth's consultation process was defective because it failed to do x, y or z (and x, y or z would need to cross-ref to C's pleaded Grounds and sub-grounds).

20. Because the Judge decided the case on a non-consultation point she did not refer to the cases that Lambeth relied on (*Rusal* and *Trafford*)[5] which dealt with the degree of error in a consultation process that a court would need to be satisfied of before it could find that process unlawful. The Judge must have decided that because there was no error in the consultation process there was no need to consider the law on such a process.

[5] See Lambeth's Submissions (§§30-36), which her handed to the Judge on the 2nd morning and amplified orally.

2nd ground: The Judge decided the issue of affordability as a primary decision taker, rather than as a *Wednesbury* reviewer

21. The Judge stated: 'I am uneasy about Ms Curtis's document' for three reasons that she set out (§86). The Judge decided that the Curtis document:

    i) was particularly important,

    ii) did not establish that options 1 to 3 were unaffordable,

    and hence it was the sole basis for her decision to quash the March Cabinet decision (§87).

22. Yet a *Wednesbury* reviewer would have approached the issue of affordability by asking: what evidence *did Lambeth rely on* to establish that options 1 to 3 were unaffordable? And, did this evidence entitle *Lambeth to decide* that options 1 to 3 were unaffordable?

23. Had the Judge adopted the above approach then she would have come to a different conclusion:

    a) Lambeth's evidence on affordability was primarily set out in the 1st Vokes w/s (§§6 to 10) [b28].

    b) It was amplified in the 2nd Vokes w/s (§§7-8) [b244].

    The judge disregarded each statement when answering the question: was the decision of 9 March unlawful? (§§79-87) The totality of Lambeth's evidence was plainly capable of establishing that Lambeth was entitled to decide that options 1 to 3 were unaffordable.

3rd ground: The Judge did not give Lambeth a just opportunity to deal with her 'unease' etc over the Curtis document

24. Before dealing with the Curtis document in §86 the Judge expressed other concerns and uncertainties that she had about it (emphasis added):

    > it 'does not *seem* to be the updated HRA business plan (although it *may* refer to it) and it does not *seem* to show that any money at all let alone "no more than 3.4m" is available for the estate from the HRA' (§46).

    The Judge was clearly unsure as to what the Curtis document did or didn't establish (§§46, 86).

25. The Judge rightly bore 'in mind that Mr Vokes has not been cross-examined' about the Curtis document (§86). But fairness requires a Judge to do more than bear a problem in

mind especially as the three points on this document that gave her 'unease' and ultimately caused her to resolve the case against Lambeth should, in the name of justice, have been either disregarded or put to Mr Vokes (or at least she should have accepted what counsel said on his instructions – see point (d) below – in response to the question she raised on the Curtis document).

26. In respect of a document that is determinative of a case, justice must always give rise to the above mentioned rights (advance notice & right to respond). But that was particularly so in *this* case with *this* document having regard to the following factors:

    a) It was never C's pleaded case that Lambeth had misunderstood its financial position (if the issues of green retrofitting & resident management options are disregarded).

    b) The document was not produced until the 2nd morning of the hearing (§41)[6] after C had finished her submissions: hence no concerns were raised by C about the Curtis document before Lambeth made its submissions.

    c) The concerns, uncertainties and unease that the Judge had about the document were never put to Mr Vokes.

    d) The Judge disregarded counsel's answer to the Judge's question (why are options 2 & 3 not mentioned in the Curtis document?). The answer, on instructions from Mr Vokes, was that the number of new homes proposed by Options 2 & 3 (19 & 20 respectively) were unable to generate anything like the amount of money necessary to bridge the funding gap. They were of a different order from Options 4 and 5 which proposed 73 and 158 new homes respectively. Lambeth's evidence, supported this view, which was why Option 5 'became the most affordable' [1st Vokes w/s §22].

27. Indeed had he been given the above mentioned rights then Mr Vokes would have amplified the point he made in his 1st w/s §§6-8 [b28] and made clear, if it wasn't already, that Options 1 to 3 were unaffordable because with each of these options CGE would have remained within the HRA and hence been unavailable for private investment. See Appendix A, §§1.32-1.33, considered by the July Cabinet as set out above, §6.

4th ground: the Judge should have applied s31(2A)

28. The judge found the application of s31(2A) to this case 'not straightforward' (§90). This was because she had not identified a public law error by Lambeth. In other words a test

[6] That was of course Lambeth's fault for which it apologised with Mr Vokes' 3rd statement. But this fault cannot be relied on to obviate the need for giving Lambeth a just opportunity to deal with the Curtis document.

which is addressed at the nature and quality of a public law error cannot be applied when a public law error is not identified:

a) With an identified public law error s31(2A) requires the Judge to ask: without that public law error does it appear to have been 'highly likely that the outcome for the applicant would not have been substantially different'? ie was the public law error sufficiently trivial to enable the court to disregard it?

b) But when a Judge identifies an error (ie she is not satisfied of something), s31(2A) is impossible to apply. The Judge cannot sensibly ask herself: 'if I was satisfied of the thing I was not satisfied of, does it appear to have been highly likely that the outcome for the applicant would not have been substantially different?' In these circumstances s31(2A) will always be answered in the negative and it will never have any application. If the Judge makes a finding that determines the claim (ie options 1 to 3 may have been affordable) then clearly she cannot dismiss that finding as being sufficiently trivial to enable her to disregard it.

29. The attempt to apply s31(2A) amplifies the 2nd ground of appeal namely that the Judge decided the issue of affordability as a primary decision taker, rather than as a *Wednesbury* reviewer.

30. But if Lambeth is wrong about this and if the Judge did identify a public law error by Lambeth then this is plainly a case where s31(2A) should have applied. All the evidence in this case supported a finding that any breaches of procedure were sufficiently trivial to enable Lambeth to disregard Options 1 to 3. See, in particular, the 1st Vokes w/s (§§28-34) [b34], the 2nd Vokes w/s (§20) [b450] and the Overview & Scrutiny Committee decision of August [b104]. Moreover, the Judge seemed to accept that Lambeth was in a 'very difficult financial position' (§91) and the Judge accepted Lambeth's other arguments for wanting Options 4 & 5 (§91).

5th ground: the Judge should have declined any relief

31. Relief in a judicial review is always discretionary and the Judge should have refused it having regard to:

a) The points made above, §§2-12.

b) C's delay in issuing the claim: the Judge found that the delay was not 'undue' but that's a different matter from 'delay' which clearly existed because the claim was

brought at the end of the 3-month period (§92).

c) The fact that as a result of that delay Lambeth made a further Cabinet decision (before it knew that permission to bring the claim had been given) in July to proceed with option 5. Furthermore, it then, as it was entitled to do, acted on that July decision (1st Vokes w/s §§35-37 [b35] & 2nd Vokes w/s §§20 [b450]).

d) The Judge was shown the document that established that £1.4m needed to be spent 'to bring the homes up to a basic weathertight standard' a figure 'being revised in light of Cabinet's decision to redevelop the estate' [b110]. It must be inferred that quashing the March decision would cause some of those savings to be lost.

e) It had always been central to Lambeth's case that since the March decision its 'financial situation has worsened' due to the Chancellor's unexpected July announcement 'that there would be a year-on-year reduction of 1% in council rents, which will reduce expected income for the HRA, meaning that the refurbishment of estates (especially those with high costs) is even less affordable than before.' (1st Vokes w/s §30 [b34]).

f) The Judge's finding as to the 'public interest factors' namely its 'very difficult financial position, the balance to be struck between the interest of residents of GCE and the Council's other tenants, and of those on the waiting list, the urgent need for works to be done to GCE and the need for residents to be certain about the future of GCE' (§91).

32. In summary, relief should be refused having regard to the nature of any unlawfulness committed by Lambeth, the consequences flowing from C's delay and the public interest factors in allowing the development to proceed.

33. Alternatively, relief should be limited to quashing the Cabinet's March decision with regard only to Options 2 and 3. The Curtis document, which the Judge relied on, made it clear that Option 1 was unaffordable. Moreover, the Judge accepted, as she would have to, that it would be futile to require further consultation on an unaffordable option (§87).

Costs

34. C should be allowed no more than 50% of her costs having regard to CPR 44.2(4)-(6) because:

a) She brought two grounds and without doubt failed on the first.

b) In fact, for reasons set out above, it is Lambeth's submission that she failed on both grounds including the eight sub-grounds relating to the second ground.[7]

c) None of Ms Bokrosova's evidence was relevant to the Judge's decision (save on the issue of delay).

d) In so far as any evidence submitted on behalf of C (such as that from Ms Gniewosz) was relevant it must have been a tiny fraction of the 308 pages that she submitted on 21 September [b136 – b443] and of the 26 pages she submitted on 2 November [b471 – b496].

e) In so far as any evidence submitted on behalf of C (such as that from Ms Gniewosz) was relevant it was not originally part of the claim and indeed was not filed until 21 September – after Lambeth had filed its evidence and Detailed Grounds, as provided for by Holman J. Holman J did not authorise C to put in further evidence [a11a].

JON HOLBROOK

Lambeth's Draft Order is on the next page.

[7] Although 9 sub-grounds were originally pleaded [a51] C abandoned the first in her Skeleton Argument.

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Claim no.: CO/2685/2015

B E T W E E N

Eva Bokrosova

Claimant

and

Lambeth London Borough Council

Defendant

Draft Order Sought by Lambeth

UPON hearing the Claimant's application for judicial review dated 9 June 2015 of the decision dated 9 March 2015

AND UPON hearing David Wolfe QC and Leon Glenister, counsel for the Claimant, and Jon Holbrook, counsel for the Defendant

AND UPON reading the written evidence submitted on behalf of the parties

IT IS ORDERED THAT:

1. The Claimant has permission to rely on the evidence of the Claimant, Tom Keene and Gerlinde Gniewosz filed on 22 September 2015 and of Gerlinde Gniewosz filed on 2 November 2015.

2. The Defendant has permission to rely on the evidence of Neil Vokes filed on 30 October and 4 November 2015.

---

3. The Claimant's claim for judicial review is allowed and it is declared that the Cabinet

decision of 9 March 2015, in so far as it ruled out further consideration of Options 2 & 3, was unlawful.

Or

3. The Claimant's claim for judicial review is allowed and it is declared that the Cabinet decision of 9 March 2015, in so far as it ruled out further consideration of Options 1, 2 & 3, was unlawful.

---

4. There be no further relief.

Or

4. The Cabinet decision of 9 March 2015 is quashed in so far as it ruled out further consideration of Options 2 & 3.

Or

4. The Cabinet decision of 9 March 2015 is quashed in so far as it ruled out further consideration of Options 1, 2 & 3.

---

5. The Defendant has permission to appeal on the five grounds set out in the draft appeal notice and the appeal is to be listed expeditiously.

6. The Defendant is to pay 50% of the Claimant's costs to be subject to a detailed assessment if not agreed.

7. There be a detailed assessment of the Claimant's publicly funded costs.

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
Claim no.: CO/2685/2015

B E T W E E N

Eva Bokrosova
Claimant

and

Lambeth London Borough Council
Defendant

Lambeth's Submissions

Jon Holbrook
Cornerstone Barristers
2-3 Gray's Inn Square
London, WC1R 5JH

Tel: 020 7242 4986
DX: 316 LDE
E: clerks@cornerstonebarristers.com

Ref: 126570

Martin Hastwell
BOROUGH SOLICITOR, LEGAL SERVICES
Lambeth Town Hall, Brixton Hill,
London, SW2

Tel: 020 7926 2699
Fax: 020 7926 2313
DX: 132671 Brixton 2

Ref: MH

Solicitors for the defendant