

CO/6365/2007

Neutral Citation Number: [2007] EWHC 2491 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 5 October 2007

B e f o r e:

MR JUSTICE SULLIVAN

Between:

THE QUEEN ON THE APPLICATION OF JACOB O'CALLAGHAN
Claimant

v

THE CHARITY COMMISSION FOR ENGLAND AND WALES
Defendant

(1) TRUSTEES OF ALEXANDRA PARK AND PALACE
(2) FIROKA (ALEXANDRA PALACE) LIMITED
(3) FIROKA (KINGS CROSS) LIMITED
(4) THE ATTORNEY GENERAL

Interested Parties

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(Official Shorthand Writers to the Court)

Mr David Wolfe (instructed by Harrison Grant) appeared on behalf of the **Claimant**
Mr Steven Kovats (instructed by Treasury Solicitor) appeared on behalf of the **Defendant**
Mr Tom Hickman (instructed by Howard Kennedy) appeared on behalf of the **First**
Interested Party

J U D G M E N T
(As Approved by the Court)

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1. MR JUSTICE SULLIVAN: In this rolled-up application for permission to apply for judicial review (and for judicial review if permission is granted) the claimant seeks a declaration that an order made by the defendant on 4 May 2007 ("the Order") to authorise the first interested party ("the Trustees") to enter into a lease under the powers given in the Charities (Alexandra Park and Palace) Order 2004 ("the 2004 Order") was unlawful. He also seeks a quashing order in respect of the Order.
2. The case was listed for one day and was expedited. Time constraints therefore mean that it is impossible to set out the full background history to the making of the Order. In very brief summary, the finances of Alexandra Palace, for which the Trustees are responsible, have been in a parlous state for very many years. In effect, the Palace is kept going by funds from the local authority, which make up the deficits each year. As long ago as 1998 the Trustees decided to ask the defendant to promote a Scheme in Parliament which would give the Trustees wider powers of leasing. The Trustees wished to be able to lease the whole of the Palace building, plus its immediate surroundings, for a term of 125 years at the best rate reasonably obtainable, having regard to the purposes of the Alexandra Palace Act 1985. Those purposes are that the Palace should be used for the purpose of public resort and recreation. The Trustees wished to be able to grant a lease to a private developer so as to put the funding and, in particular, the restoration of that part of the Palace which is presently derelict, on a proper financial footing.
3. The Scheme resulted in the 2004 Order, which provides at paragraph 3:

"3. Power to lease. The Trustees may, subject to the consent by Order of the Charity Commissioners, grant a lease of the whole or part or parts of the Palace buildings and the immediate surrounding area (which for the purpose of identification only is shown coloured red on the plan deposited with the Charity Commissioners under number 46278) for a term not exceeding 125 years at the best rent reasonably obtainable regard being had to the purpose of the Alexandra Park and Palace Acts and Order 1900 to 1985, provided that the Trustees may not grant any such lease which permits a use otherwise than is consistent with the said purposes."
4. The draft of the 2004 Order was considered in the House of Commons by the First Standing Committee on Delegated Legislation on 14 January 2004. A number of members of Parliament objected to the making of the Order. In response to those MPs who were objecting or raising concerns, the Parliamentary Under-Secretary of State, Fiona McTaggart MP, said this:

"There are other important safeguards connected to issues raised by hon. Members. First, there will be consultation on many proposals. The Charity Commission must authorise the grant of any lease, and it will be possible to raise concerns with the commission. One of the commission's roles is to safeguard the interests of the charity's beneficiaries, as well as to ensure that the trustees maintain their duties under the trust. I am quite certain that the lengthy procedure will continue in that regard."

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

In view of the time that it has taken, it seems right that there should be consultation on how beneficial interests should be protected and to ensure that they are so protected. I urge those commenting on the order to focus on those issues rather than on those that relate to planning or other matters. The Charity Commission will authorise a specific lease only if the trustees can demonstrate that it is expedient and in the interest of the charity."

One of those MPs who was opposing the Order, Mr Foster, expressed delight that the minister "has persuaded the Charity Commission to ensure that there is widespread consultation".

5. Following a tender process, the Trustees chose the second interested party, Firoka, as the preferred developer. There was a public exhibition of Firoka's outline proposals in January 2006. In March 2006, the Trustees consulted under section 36(6) of the Charities Act 1993. In October 2006, the defendant published the draft of the Order, together with a question and answer sheet. The draft order was "to authorise the Trustees to enter into a lease under the powers given in the Charities (Alexandra Park and Palace) Order 2004 and section 26 of the Charities Act 1993 ..." The draft contained a definition as to what was meant by the lease, and it was:

"'The lease' means a lease substantially in the form of the draft provided to the Charity Commission on 2 November 2006 in respect of land at Alexandra Palace for a term of 125 years, and between the mayor and burgesses of the London Borough of Haringey, Firoka (Alexandra Palace) Limited and Firoka (Kings Cross) Limited."

6. The draft order contained a number of conditions. Amongst those conditions was condition 5(1), which was in these terms:

"The trustees shall, at the same time as granting the lease, enter into the project agreement with Firoka (Alexandra Palace) Limited."

Thus it was clear that the lease was to be tied into the project agreement. The question and answer sheet explained that the defendant proposed to make a legal document called "An order for Alexandra Park and Palace", and said:

"This question and answer sheet answers some questions and sets out why we need to make the Order. This is not a full explanation of our decision making process."

7. The background is then set out, and concludes with a statement that the Trustees "now wish to grant a long lease to Firoka (Alexandra Palace) Limited. Firoka will develop the Palace and immediate surrounding area for uses consistent with Alexandra Park and Palace Acts and Orders 1900-2004, which govern the charity". There is then the question: "Why are we making an Order for Alexandra Park and Palace?" The answer is given:

"In 2004, after giving public notice, we made a Scheme for the charity permitting the grant of a 125 year lease of the Palace and its immediate surround for the best rent reasonably obtainable. However, our consent is still needed before the lease can be granted.

The trustees therefore need our consent to grant the lease to Firoka, as required by the 2004 Scheme. The Order will provide this consent."

8. In answer to the question: "What information have the trustees provided us with?", the defendant said:

"The trustees have provided us with information to show that the lease to Firoka is in the interests of the charity and that it is permitted by the 2004 Scheme."

9. Question 5 asks: "Is granting the lease in the interests of the charity?" Included in the answer to that question is the statement that:

"The lease therefore provides the prospect of a capital payment and a rent by which the Charity can continue its activities."

10. Various other questions are answered, and in answer to the question: "What is the publication period?", the question and answer sheet makes it clear that representations must be made by Friday 5 January 2007. The claimant made representations. Among other things, he said this:

"The order refers to the proposed lease. Although neither the terms of this lease, nor a plan of the exact land to be leased, have been included as an appendix to the published draft order, so making this 'consultation' meaningless (because one cannot comment on something one is not allowed to see), the commission knows, as we do, that the area of the land in the proposed lease to be reserved for the purposes of this charity is in reality confined to the theatre and a tiny corner for a museum.

Please take this letter as also constituting our formal request for sight of the lease and of all correspondence between the commission and the trustee about this order under the Freedom of Information Act."

He was not the only one of the consultees to make a point of that kind, and other representations to the same effect are included in the court bundle. In the interests of time, I will not read them out.

11. It is clear that the officers advising the Commission were well aware that this objection had been made. They said when summarising the objections:

"The lease and project agreement should have been made public (or parts of it) before the notice period. As it is, the public do not know what covenants are contained in the lease or what else they may wish to make representations about."

12. Although the issue was raised, the officers gave no answer to the objection, and indeed none was provided for or by the Commission. The reason why the lease and project agreement were not disclosed is to be found in an earlier exchange of correspondence between the Commission and the Trustee's solicitor. In a letter dated 24 February 2006, the Trustee's solicitor wrote to the Charity Commission, saying:

"The General Manager has asked me to indicate his immediate and major concerns in regard to your statement that the Commission might decide that the draft Lease would need to be published so that members of the public would be consulted and given an opportunity to object."

13. The letter then went on to say why that should not happen, and in particular made the point:

"Nothing in Mr Clapp's letter, any communications to the Commissioner over the last 13 years or indeed anything said by the Minister in the course of the January 2004 Parliamentary Debate, has given a scintilla of a suggestion that there might be publication of highly confidential and commercially sensitive terms."

14. The Charity Commission was asked to reconsider its position. Unfortunately for the purposes of these proceedings the Charity Commission did reconsider its position, and in a letter dated 15 March 2006, the Trustees' solicitor was advised:

"It is likely that the order will need to be published as this is such an important local issue. You are correct in understanding that it is the fact that it is the Commission's intention to make the order that is published (with the public having sight of the draft order upon request) rather than the sealed executed order. I can confirm that we will not require the lease terms to be published."

15. The report to the Commission summarising the representations received said that the Commission had received 328 representations, and that 324 of the respondents had expressed at least some concern about aspects of the proposals. Four of those responding were clearly in support of the proposals. Thus, this was a case in which there was considerable local interest. Indeed, the defendant's letter of 15 March 2006 recognised that the Order was "an important local issue".

16. The report's summary of the consultation responses was sent to the Trustees so that they could make comment upon it. The Trustees' solicitor did so, and commented on the representations in a lengthy and detailed 13-page letter dated 13 February 2007. Again,

I do not read out the details of that letter. It is sufficient for present purposes to say that the Trustees responded to the concerns expressed by consultees by referring to numerous clauses in either the lease or the agreement, and then explaining by reference to those clauses why the concerns that had been expressed were not well-founded.

17. The points made in that detailed response were then taken up (at least in part) in a further report which was made to the Commission: "Decision review: Alexandra Palace" dated 2 March 2007. Simply by way of example, the report stated that the 2004 Scheme permitted a lease:

- "• to a person who would commercially exploit the premises;
- that the use of the premises must be restricted to uses to which the premises might otherwise have been put by the Trustee in the different context to pursuing the objects;
- that the use of the premises must be consistent with the use of the park remaining in the trustee's possession in furtherance of the objects by the trustee; and
- that the rent must be the best rent reasonably obtainable and consistent with the commercial exploitation of the premises, but revised to take account of the limited use to which the premises may be put."

18. The report then continued:

"In considering whether the lease met these requirements, the user provisions, nuisance provisions and rent provisions were particularly important."

The report then considered the terms of the user provisions and referred to specific clauses in the lease.

19. The reasons for the Commission's decision, which was made on 27 April 2007, are set out in a document. That sets out the background, and in paragraph 5.3 there is a heading, "Consideration of representations". The paragraph refers to the number of representations that have been made, and says:

"The Commissioners considered each of the potential areas for concern raised in the representations which are set down below."

20. The areas of concern are summarised and the Commissioner's response to them is set out. Under the heading "Issues already considered", the decision document said:

"Some representations questioned the power of the Commission to make the order or whether the lease fell within the power granted by the Scheme. Others questioned whether the Commission had given enough public notice of its intention to make the order."

21. That would appear to be the closest one gets to any recognition by the defendant of the fact that a number of consultees had said in effect that they needed to see the lease in order to be able to make sensible representations. The ambit of the defendant's decision is described in the concluding paragraph of the reasons:

"In conclusion the Commissioners were satisfied that the proposed lease falls within the Scheme, that the decision is in furtherance of the objects and powers of the Charity, that the decision to enter into the proposed lease was properly taken by the Board in the best interests of the Charity. The Commissioners were satisfied that the decision to enter into the proposed lease by the Board was in the interests of the Charity and provided an advantageous means of furthering its purposes, and consequently will be authorised under the Charities (Alexandra Park and Palace) Order 2004 as being expedient in the interests of the charity ..."

22. Thus it is clear that the ambit of the Commission's decision was not simply to decide whether or not what was proposed fell within the terms of the Act and the Scheme, but also whether it was "expedient in the interests of the charity". One might have thought that it would be a fairly elementary proposition that a decision whether it would be expedient in the interests of a charity to enter into a particular 125-year lease and project agreement would depend on the particular terms of that lease and project agreement.
23. Against that background, certain conclusions can be drawn. The proper starting point is that one is not concerned with just any promise of consultation. This is not a case where a junior official in an off-guard moment has, perhaps unwisely, given an assurance on behalf of a public body. This was a promise made by a junior minister of the Crown, in Parliament, during the consideration of subordinate legislation. Moreover, the promise was made to meet the concerns of those who were opposing the passage of that legislation. It seems to me that two things follow from that. Firstly, it is of particular importance that a promise of that kind, given in Parliament, is honoured. Conversely, there would have to be very good reasons indeed if the Commission was to decide that it should not after all be honoured. Secondly, the minister's promise has to be interpreted not in a legalistic way, but purposefully, bearing in mind the background against which, and the reason for which, it was given. Moreover, it has to be interpreted in such a way as to make sense of the promise that there would be consultation on how beneficial interests should be protected, rather than to make a nonsense of that assurance and to make it ineffective.
24. When giving the assurance to Parliament, the minister no doubt expected, as did those who were listening to her, that the consultation carried out by the Commission would be both effective and fair; and that it would not be ineffective and/or unfair. The Commission's approach, as explained to me by Mr Kovats in his submissions on behalf of the defendant, was that the Commission had honoured the commitment that had been given by the minister, and it has done so because it promised to publish the draft order and seek representations on the draft order, and that indeed is precisely what it had done.

25. The submission was, as I understood it, that the Commission was obliged to do no more than that as a result of the minister's assurance. In my judgment, that makes a complete nonsense of the minister's promise and strips it of any real effect. The reason for that is quite simple. Any reasonable person asked to comment on a draft order giving trustees that have power, subject to consent, to enter into 125-year leases, consent to enter into a particular 125-year lease tied into a development agreement on the basis that it would be expedient in the interests of the trust that they should do so, would be bound to say: "Show me the lease and the agreement, and then I will be able to answer your question", or at the very least they would say: "If for some reason you are unable to show me the lease and the project agreements themselves, then at least tell me sufficient about them to enable me to form a view about whether entering into them would be expedient in the interests of the trust". The draft order may be consenting to a most excellent proposal. Conversely, it may be consenting to a thoroughly disadvantageous proposal. It all depends on what is contained in the lease and project agreement.
26. To put it bluntly, it would be a nonsense for a public body to give a public assurance that it will consult upon a draft order which proposes to consent to X, and then when it is asked by consultees, "Well, what is X?", for the public body to answer: "We do not propose to tell you; it is confidential". It is not too difficult to imagine the likely reaction of Mr Foster MP and the other MPs who were opposing the Order (para 4 above) if the minister had told them: "While the Commission has promised to publish the draft of any order authorising a lease under the scheme, the Order will not, of course, contain any information about the terms of the lease, and if consultees ask what those terms are, they will be told that some of the terms can be made available because they are all confidential." The minister's assurance would have been met with the Parliamentary equivalent of hoots of derision.
27. Mr Kovats very properly accepted that whatever the precise terms of the minister's undertaking may have been, there was nevertheless an overarching requirement that the consultation process should be fair. It is difficult to see how in the complete absence of any information as to what it was that consent was proposed to be given to, there could have been much fairness, but the unfairness of the process as a whole is emphasised by the fact that although some objectors had asked for and been refused a copy of the lease and the project agreement, when their representations were referred to the Trustees, the Trustees were able to, and did, respond to the representations of consultees, who were essentially shooting in the dark, by reference to the detailed provisions of the lease and the project agreement. One can see that in the letter of the Trustees' solicitor to the Commission, and also in the way in which the detailed points by reference to particular clauses of the lease were then picked up in the report of officials to the Commission. I find it difficult to understand how the Commission could have thought that this was a fair process. One would have thought that the alarm bells would be ringing loud and clear, in particular since the point had been flagged up, but not answered, by the officials in the report to the Commissioners in the passage to which I have referred above.
28. In his submissions, Mr Kovats relied on the fact that there had been compliance with the statutory requirements as to consultation, and he submitted that those requirements

were a powerful indicator as to what fairness required. As a general proposition, the fact that there are statutory requirements and that they have been complied with will often be a powerful indicator that there has been fairness, but that is beside the point in the present case because here there was not simply a promise to comply with the statutory framework, there was a specific promise of consultation given by the minister to assuage concerns that were being raised in Parliament. She told Parliament that she had sought and obtained a specific assurance from the Commission.

29. So far as the proposition that the Commission honoured the minister's undertaking, I accept Mr Kovats' submission that the Commission appears to have understood the undertaking in a very limited way. But, in my judgment, that understanding was simply unreasonable and wholly unrealistic since it stripped the assurance of any real effect. One asks rhetorically: what would be the point in publishing for consultation a draft order that indicated that consent was to be given to enter into a particular lease if one then refused to give consultees information about what the lease contained?
30. Mr Kovats referred to the confidentiality agreement between the Commission and the Trustees, but it is difficult to see how such a private agreement between two parties could possibly negate the effectiveness of a consultation which had been publicly promised by a minister in Parliament. The Commission, in apparently changing its position and giving the assurance sought by the Trustees that the lease would not be made public, appears to have lost sight of the need for there to be an effective and fair consultation in line with the minister's assurance. Unless it decided that the undertaking given in Parliament should not be honoured, the Commission had no power to enter into any agreement that would render the promised consultation ineffective. What is particularly surprising is that the point having been squarely raised by a number of consultees, and having been identified by the Commission's officers, there appears to have been no further consideration of the matter: no further consideration for example of whether it might be possible to supply a redacted version of the lease and the agreement; no further consideration of whether it might be possible to supply a gist or a summary of all or parts of those documents, so that those who were being consulted would at least have some idea of what they were being consulted about.
31. Lastly, Mr Kovats mentioned the history of disclosure by the Trustees themselves. This was a point which was elaborated by Mr Hickman on behalf of the Trustees. He too relied particularly strongly on the confidentiality agreement between the Trustees and the defendant. But, as I have said, the primary obligation on the Commission as a public body was to ensure that there was an effective and fair process of consultation. It should not have given any assurance that prevented that process from taking place. That is not to say that it could not have agreed that certain particularly sensitive terms of the lease, for example rent or financial payments, should be redacted, but it was under an obligation to ensure that those who were consulted had sufficient information to be able to make a meaningful response to the question: should consent be given to the Trustees entering into this particular lease because it would be expedient in the interests of the charity for them to do so?
32. Reverting to the question of earlier disclosure and consultation by the Trustees themselves, Mr Hickman referred to the different stages of consultation. Firstly, there

was consultation prior to what became the 2004 Scheme. That is of no assistance to the Trustees because we know that that consultation resulted in objections to the scheme, and it was to remove the concerns of those objectors that the minister gave the assurance that there would be consultation.

33. Then it said that there was consultation by the Trustees in respect of Firoka's own scheme: there was an exhibition in the Palm Court at Alexandra Palace for some six days in January 2006. However, on the face of the brochure it is clear that what Firoka were presenting at that stage were outline proposals, and indeed in a subsequent report they were correctly described by the general manager of the Trustees as "outlined concepts". It was clear that the detail would be worked up later, and it is clear from the extensive documentation in the bundle that there was a lengthy period of negotiation, and that there were various versions of the lease. At the end of the day what mattered was not what was shown in outline at the exhibition in January 2006, but what had been finally agreed and incorporated into the lease and the project agreement in November 2006, and it is clear from the documents that changes had occurred over the intervening months.
34. Mr Hickman referred to the consultations with the various statutory and non-statutory bodies that advised the Trustees. But again, if one looks at the minutes of the meetings of those bodies, one can find them asking to see copies of the lease and the project agreement -- again for perfectly understandable reasons. He also referred to the section 36(6) consultation by the Trustees themselves in respect of the proposal to grant a lease, but the notice in respect of that proposal is barely more informative than the notice in respect of the draft order consulted upon by the defendant. The notice of proposed disposition under section 36(6) of the 1993 Act says:

"The Alexandra Park and Palace Board as charity trustees ... hereby give public notice pursuant to section 36(6) of the Charities Act 1993 of their proposal to grant a lease of the appellant's buildings in the immediate surrounding area shown in the plan below coloured red. Representations which should be addressed to the General Manager are invited by 27 April 2006. Any representations about the proposed disposition received by 27 April 2006 will be taken into consideration."

The notice is at least accompanied by a plan which shows the area of the trustee's proposal at that time.

35. For these reasons, the earlier consultation exercises, which preceded the detailed negotiations on the lease and the project agreement, could not sensibly have been regarded as a substitute for the consultation which had been promised by the minister, which was consultation not by the Trustees but by the defendant. It follows that the process was very seriously flawed. This is not a case of a consultation exercise where consultees have been given some but inadequate information. This is a consultation exercise where simply publishing the draft notice, with virtually nothing more, gave consultees virtually no information about what it was that consent was being sought for. It had been established by that stage that the Trustees could, subject to the defendant's consent, grant a 125-year lease of the Palace buildings and their immediate surrounds,

that much was known, but the notice given by the defendant told consultees virtually nothing beyond that. All the critical information was withheld, and it appears that for whatever reason no thought was given as to how it might have been made available to consultees, even if the Trustees and Firoka were raising objections to the disclosure of the lease and project agreements on the grounds of confidentiality.

36. It follows that, subject to the question of discretion, the claimant is entitled to the relief that he seeks. Mr Hickman strenuously argued on behalf of the Trustees that, as a matter of discretion, the court should not grant relief. He made the point that the claimant had been able to make detailed representations. That is perfectly true. The claimant did make detailed representations, but it is equally clear that he was asking, not in the least unreasonably, to see copies of the lease and agreement which were the subject of the draft order. When I say "not in the least unreasonably", I do not mean to imply that the whole of those documents unredacted should necessarily have been given to him. I do say that that request having been made, very serious consideration should have been given as to the extent to which he could properly have been given details of what was contained in the lease of the project agreement so as to enable him to make fully informed representations.
37. It is important to bear in mind when considering this exercise of discretion that although there is only one claimant in these proceedings, as I have said he was not alone among consultees in raising this issue, and it is clear from the number of representations that were made to the Commission that this was an issue of very considerable local interest, eliciting 328 representations, of which 324 were expressing some degree of concern.
38. Mr Hickman submitted that the practical consequence of granting relief would in effect be that Firoka were likely to walk away. If the lease is not signed by 17 November, then Firoka will be entitled to treat the Trustees as being in fundamental breach of the lease. While there is a good deal of second-hand evidence about that, it is perhaps significant that Firoka themselves have not chosen to play any part in these proceedings. However, Mr Hickman did seek permission to put in a very belated witness statement dated 2 October 2007 from Mr Kassam, who is a director of both Firoka (Alexandra Palace) Limited (FAP) and Firoka (Kings Cross) Limited. That statement, amongst other things, does make it clear that Firoka have invested huge amounts of time, energy and money, including a considerable amount of management time, in the Alexandra Palace project. That suggests that he would be somewhat reluctant to simply walk away from the project. Mr Kassam states that if the Trustees are unable to enter into the documents which have been agreed, then "as matters currently stand and for wholly commercial reasons" FAP will withdraw their interest in Alexandra Palace:

"Neither FAP nor Kings Cross believe it commercially sensible or viable as matters currently stand to engage in a new tender and negotiation process, with all the time, expense and uncertainty that would necessarily involve."

39. He also states that FAP would be unwilling to revise terms which had been finally agreed after an extremely long negotiation process. The witness statement also says:

"If during those negotiations the Trustees had suggested to me that as part of the consultation process which the Charity Commission had agreed to undertake prior to granting the required order, the lease and perhaps the other associated documents would need to be disclosed in full for public scrutiny, I would have been extremely uncomfortable and would have seriously considered walking away from the project at that stage."

40. It is interesting to note that Mr Kassam does not state in terms that even if full disclosure had been required, he would have walked away, merely that he would have given serious consideration to doing so. Moreover, his expressed concern, at least in his witness statement, is about disclosure in full. It says nothing about the extent to which he might have been persuaded to agree to some form of redacted disclosure, or summary or gist of what had been agreed. So if one looks at the evidence as it emerges from the horse's mouth rather than second hand, some of the submissions made by Mr Hickman on behalf of the Trustees as to the likely outcome of relief being given in this case are not made out.

41. Lastly, it is submitted that, into the balancing exercise, in addition to the question of confidentiality, the opportunity to make representations, and the likely adverse impact on the Trustees, the court should reach the view that really there would be no chance of a different decision being reached, even if the consultation process was reopened. As a matter of principle, the court ought to be extremely cautious in accepting such a submission. In the case of Smith v North East Derbyshire Primary Care Trust [2006] EWHC Civ 129, May LJ (with whom Keene LJ agreed) said this:

"I have already noted that neither Mr Pittaway nor Mr Post [who appeared on behalf of the defendant and the interested party] contended that the judge's second reason, that is that the decision would probably have been the same anyway, was alone sufficient to sustain his conclusion. That is a proper concession. Probability is not enough. The defendants would have to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of the decision. Authority for this synthesis may be found in R v Chief Constable of Thames Valley Police ex parte Cotton [1990] IRLR 344 at 352; Simplex G.E. (Holdings) Ltd and another v Secretary of State for the Environment (1989) 57 P & CR 306 at 327; R v Secretary of State for Environment ex parte Brent London Borough Council [1982] 1 QB 593 at 646, and see also Fordham, *Judicial Review Handbook* (4th Ed) at paragraph 4.5 and Clive Lewis, *Judicial Remedies in Public Law* (3rd Ed) at paragraph 11 027. In the light of this, I think that Collins J applied a wrong principle in paragraph 27 of his judgment."

42. As I have mentioned, the question for the Commission was not simply a legal one: was this proposal within the terms of the trust?; it was also a judgmental one involving consideration whether the proposal was expedient in the interests of the trust. In deciding the question of discretion, it seems to me that Mr Hickman's submissions overlook the starting point in this case, which is an assurance given by a minister in Parliament. It does seem to me that there would have to be very powerful reasons indeed, where a minister has promised that there would be consultation, to allow a situation to arise where the court acquiesces in a consultation that has been manifestly ineffective and unfair. In saying that, I should make it clear, perhaps at the risk of repetition, that I am not saying that all of the lease and the project agreement, every single clause, had to be disclosed. I am saying that sufficient information about what is contained in the lease and the project agreement must be disclosed to consultees to enable them to make a meaningful response to the question posed by the Commission: should we give consent to the Trustees entering into this lease and this agreement? It seems to me axiomatic that in order to answer the question whether it is expedient in the interests of a charity that its Trustees should enter into a particular lease one must have sufficient information about the lease proposed.
43. It should not be assumed that I am endorsing the extent of the redaction that has occurred in respect of the lease in response to Freedom of Information Act requests. It is most regrettable that the redacted version of the lease appeared after the conclusion of the consultation period. It is a matter for the Commission, having given an assurance to the minister that there would be consultation, to consider how it can ensure that that consultation is both effective and fair. There can be no doubt whatsoever that, in the absence of any meaningful information about the lease and project agreement, that requirement was not satisfied.
44. For these reasons, I grant the relief sought. I grant a declaration that the Order is unlawful, and I quash the Order.
45. MR WOLFE: My Lord, I am grateful. I just have one application, which is an application for costs, if I may. It is an application for costs against the Trustees. If I can just ask you to turn up Part 44 of the White Book.
46. MR JUSTICE SULLIVAN: This assumes that the magnificence of the public service will mean that I have a 2007 White Book on my desk. That, I am afraid, is a wrong assumption.
47. MR WOLFE: A 2006 version will do.
48. MR JUSTICE SULLIVAN: What about a 2005 version?
49. MR WOLFE: I do not think it has changed. I simply want to look at the rule.
50. MR JUSTICE SULLIVAN: Which one are you wanting?
51. MR WOLFE: 44.3(1) identifies the general discretion that the court has to make an order as to whether costs are payable by one party to the other, and indeed the amount of those costs. Rule 44.3(2) sets out the general rule. 44.3(4) explains that:

"In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –

(a) the conduct of all the parties ..."

And then sub-section (5) says:

The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol ..."

52. My Lord, there is no doubt that the court has jurisdiction to make an order that the Trustees pay the costs, and I identify within the context of 44.3(5) their conduct in two regards: (1) before the proceedings and also during the proceedings. Before the proceedings it was their pushing of the Commission on the question of disclosure which led to the position we now find ourselves in. My Lord has gone through in detail the correspondence trail and the request of the Commission to reverse its decision, which was then agreed to by the Commission. True it is that the Commission should not have acceded to that request, but the pressure came from the Trustees. In terms of the litigation itself, my Lord has already seen my complaint about the way in which the Trustees have amended their case, and indeed a substantial part of the matters which troubled my Lord today were those driven by the Trustees -- not only the arguments but, in my submission, the adding of the arguments late in the day in relation to the two aspects on discretion, which could have made a difference on the one hand, and pure discretionary relief on the other, and, my Lord, in the event it has been Mr Hickman on the part of the Trustees who has taken the running. It is a bit like one of those cases -- not as crisp, I accept, as one of those cases where the defendant accepts the error of his ways and the interested parties step in, but it is akin to that situation. So, my Lord, in my submission for those reasons and in the circumstances of the case I do ask that the court make an order that the Trustees pay the claimant's costs, to be assessed if not agreed. My Lord will have seen that he is privately funded, effectively by public contribution.
53. MR JUSTICE SULLIVAN: Yes. Could I just say: have you got a fall-back position if I do not think the Trustees -- a possible position would be to say: a plague on both your houses on that (inaudible) and you can have it 50/50. But apparently not.
54. MR WOLFE: My Lord may have seen there is an agreement between the claimant and the defendant that neither would seek the costs from the other whatever the outcome.
55. MR JUSTICE SULLIVAN: No, I had not seen that.
56. MR WOLFE: At an earlier stage of litigation there had been correspondence between the parties about, firstly, a protected costs order, and then a no costs agreement. The defendant chose to enter into one of those; the other parties did not.
57. MR JUSTICE SULLIVAN: Thank you very much. Yes, Mr Hickman?

58. MR HICKMAN: My Lord, we resist the application. We are an innocent party to this. We do not accept that the Trustees were responsible for the defect that you have identified in the consultation process. As a matter of fact, the correspondence that you referred to in your judgment we say that there was a mistake on the part of Mr Harris in that he thought the Commission had suggested that the lease might be disclosed, but that the Commission preferred that that had not been their intention to suggest that. It had always been understood that the lease would not have to be disclosed and the Trustees were never asked to disclose the lease by the Commission. When they were asked directly under the Freedom of Information Act they did disclose the lease.
59. The fact that the claimant and the defendant have agreed between themselves not to seek costs, in my submission, should not prejudice the charity. In other circumstances, I should think, there would be no question of the charity paying all of the costs of the claimant, and the fact that they have reached this agreement between themselves should not mean, in my submission, that the burden falls on the charity. The case would have of course gone ahead had the Trustees not intervened in this case. It still would have been heard today, and there are only two submissions which my learned friend has identified which were made by myself which supplemented substantively those that were raised by, as it was then, Mr Stilitz in the grounds of the Commission, and those relate to discretion and whether or not there would have been a difference made. In respect of those, my Lord, if I could ask you to refer to the supplementary skeleton of Mr Wolfe, you will see at paragraph 45 of that supplementary skeleton, that is where Mr Wolfe deals with the point about him not having made any difference, and he takes the point that this is a point additional to the one made by the defendant -- not also made by the defendant. He deals with that very shortly and he has dealt with it very shortly in his oral submissions today, and then at paragraph 47, relating to the exercise of discretion, which my learned friend said was not included in the grounds put in by the Trustees, well, you will see there that that has not caused him to spend an awful amount of trouble; it is three paragraphs.
60. MR JUSTICE SULLIVAN: Yes. So far as previous publicity is concerned, while Mr Kovats mentioned it, he made it clear it is very much your pigeon, as it were. I appreciate confidentiality might be said to be both of you, but --
61. MR HICKMAN: I should ask you to turn up the defendant's grounds of resistance. They may be at the front of the second bundle. At the front of tab 10.
62. MR KOVATS: My Lord, they start at 326 in my bundle, which is tab 10.
63. MR JUSTICE SULLIVAN: Yes.
64. MR HICKMAN: For instance, if you look at paragraph 19 of the grounds of resistance, you will see that the Commission does rely on the Palm Court display.
65. MR JUSTICE SULLIVAN: Which paragraph did you say?
66. MR HICKMAN: 129.
67. MR JUSTICE SULLIVAN: Yes.

68. MR HICKMAN: And confidentiality is also raised for example, and the other point on fairness. So it is really only those discretionary points that the Trustees have raised. Obviously, the Trustees dealt with the points raised by the Commission in my skeleton argument, and we did so in a way that we thought would assist the court, and obviously as interested party we did not seek simply to repeat the submissions of the Commission. But we did stick to the grounds, and to the extent that we raised matters of discretion, in my submission that was quite proper and has not caused any significant costs to the claimant, still less has it been such a departure that the Trustees should have to bear the full costs of the claimant.
69. MR JUSTICE SULLIVAN: Someone is trying to instruct you. You are being prodded from behind, or will be. (pause)
70. Is there anything else you want to add?
71. MR HICKMAN: No. In my submission, there should be no order as to costs.
72. MR JUSTICE SULLIVAN: Right.
73. MR WOLFE: My Lord, there are two points, if I may. Firstly, in relation to the request not to require disclosure, if you can go back to page 405, Mr Hickman suggested that there was not so much a request of a change in mind, I think the tenor of 405 makes the position reasonably clear. It is the second paragraph on 405:
- "The General Manager has asked me to indicate his immediate and major concerns in regard to your statement that the Commission might decide that the draft Lease would need to be published ..."
- So the Commission was open minded, verging on "might need to be", and it was the Trustees who piled in, and my Lord has seen the subsequent correspondence putting heavy pressure on them not to do so.
74. In terms of the weight of the arguments, the other thing I would draw my Lord's attention to is the evidence. The Charity Commissioner has put in two short witness statements -- actually I think possibly three -- from the Commissioners and then from a member of the Treasury Solicitor's department which say very little. I do not mean that disparagingly. They simply set out the decision-maker, and this happened on this day.
75. MR JUSTICE SULLIVAN: I suppose they were the circumstances I was referring to when I said I could not find any explanation of, for example, consideration --
76. MR WOLFE: There is real meat -- and it is only when one comes into the questions like the Palm Court display -- and what might have been said differently is in the three witness statements from Mr Harris. Firstly, he dealt in his initial one with the need for expedition, but that was the factual basis for the discretionary relief argument, and then his second and third are very much going over the ground of what it was the claimant may or may not have said, and then in the third one seeking to show that nothing the claimant might have said could have made a difference, and it was to those that the claimant then gave his witness statements in response. It is essentially as between the

claimant and Mr Harris that the evidential battle ground in the proceedings has been laid out, not between the claimant and anybody from the Commission. There has not been essential controversy in that regard at all. So, my Lord, whichever way one looks at it, whether it is by reference to skeleton arguments or evidence, in my submission it has been the Trustees in the end in the driving seat. So that is the basis of my application.

77. MR JUSTICE SULLIVAN: Thank you very much.
78. MR HICKMAN: Can I clarify one point of fact?
79. MR JUSTICE SULLIVAN: Yes, of course.
80. MR HICKMAN: I have been reminded that my instructing solicitor was in discussions which do not appear in the correspondence. It was accepted that the Commission had never said or never intended to say that they might require disclosure of the lease. That is my point.
81. MR JUSTICE SULLIVAN: Yes, thank you.
82. First of all it is clear that the claimant ought to recover his costs. Then the question is: from whom? I certainly accept the submission that it should not make any difference that there has been some agreement between one of the parties, the defendant, and the claimant that each will not claim costs from the other. The question is: what would I have done absent that agreement? I am satisfied that what I would have done is to say that in large measure the Trustees are the authors of their own misfortune, but they have been ably assisted and abetted, I am afraid, by the Commission. In reality, the running today was made very largely by the Trustees, both in terms of submissions and evidence, but again I bear in mind that they are not the decision-making body; that of course is the Commission. I think the only fair thing to do is to say that, in respect of the defendant and the interested party, I would have thought that they were both equally to blame for this unfortunate set of circumstances, so the proper order for costs would have been a 50/50 order. So in respect of the defendant I make no order as to costs because of the prior agreement, but in respect of the interested party, the interested party is to pay 50 per cent of the claimant's costs; those costs to go for detailed assessment unless otherwise agreed.
83. MR WOLFE: My Lord, I am grateful.
84. MR JUSTICE SULLIVAN: Thank you.