IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE (PLANNING COURT)
(Mrs Justice Thornton DBE Case No. CO/3041/2021)

BETWEEN:

THE LONDON HISTORIC PARKS AND GARDENS TRUST

Claimant

-and-

THE MINISTER OF STATE FOR HOUSING

First Defendant

-and-

WESTMINSTER CITY COUNCIL

Second Defendant

-and-

(1) THE SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT
(2) LEARNING FROM THE RIGHTEOUS

Interested Parties

CLAIMANT'S STATEMENT OF REASONS WHY PERMISSION TO APPEAL SHOULD NOT BE GRANTED – CPR PD52C.19

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1. Both the Minister and the Secretary of State seek permission to appeal. Permission to appeal should not be granted because (1) the appeals do not have a real prospect of success and (2) there is no other compelling reason for the appeal to be heard. With the concurrence of the parties and the Court, this statement addresses both applications for permission to appeal. It therefore slightly exceeds the limit of 3 pages in CPR PD52C.19(1)(b).

2. The Minister (Grounds 1 and 2) and the Secretary of State (Ground 2) allege that the Judge erred in holding that the prohibition in the 1900 Act was a material consideration. The judge addressed the issue in point of legal principle, paras. [107]-[111]; on the facts, para. [112]-[125]; and as a matter of discretion, para. [127]. She held that the issue was relevant because the timing of delivery was regarded as important [110]; there were no additional facts which needed to be considered to address it [126]; the point had in fact been raised [118] and following; and so it was appropriate to consider it [127]-[128].

3. In fact, in addition to the examples of instances where the 1900 Act had been referred to by the parties which are listed by the judge, the Claimant's own evidence to the inquiry was that "Construction of civic buildings and plazas is not compatible with the conscious objective of the 1900 Act "maintain[ing] use [of the RPG] as a garden open to the public", see proof of evidence of Sally Prothero, Chair of the Claimant's Planning and Conservation Working Group, inquiry doc. CD 8.46, para. 2.1.13 and other references.

4. Similarly, Baroness Deech, another Rule 6 party to the inquiry, gave evidence that "Alterations to the VTG would be contrary to the London County Council (Improvements) Act 1900 s.8, and therefore would result in litigation unless it is repealed by primary legislation. This statutory provision highlights the importance of the dedication of the Gardens in their open accessible condition which has been maintained for over a century without interruption", inquiry doc. CD 8.41, para. 14.

5. Contrary to the Minister's submission at para. 37 of his skeleton argument, the judge did not err "in principle" (a point not made to her in applying for permission to appeal). The Secretary of State makes a similar point at para. 9 and following, asserting that the consideration could not have been "obviously material". But it was obviously material for the reasons the judge gave (and which was a matter for the court); she did not err in principle. So an appeal would not have a real prospect of success.

6. In any event, in purporting to focus on issues of "principle" this ground ignores the fact that, regardless of the court's conclusion on the point, the 1900 Act remains as an obstacle to delivery of the Holocaust Memorial which has not been addressed. As the Claimant submitted in terms to the judge, the matter cannot simply be "wished away".

7. The Minister (Ground 3) and the Secretary of State (Ground 1) also allege that the judge erred in construing section 8(1) of the 1900 Act. The judge's conclusions are at [76], largely adopting the Claimant's submissions on the point and having dealt with the Minister's submissions at [66]-[75] which the Secretary of State adopted, [67] against the background of legal principles which required reading the provision in context, [55]. She also referred to certain pre-legislative material (but expressly did not rely on it, [105]).

8. The Minister essentially repeats the submissions made below. The Claimant maintains (as submitted to the judge and accepted by her):

   (1) Section 8(1) of the 1900 Act, both on the basis of its ordinary and natural meaning and as defined in context, imposed an enduring, prospective obligation to "lay out and maintain" the southern part of Victoria Tower Gardens as "a garden… open to the public… and as an integral part of the existing Victoria Tower Garden". It was not an obligation which was "spent" once the Gardens had been laid out so that the "public" use of the Gardens as such could be given over to some other use at some point after they had been laid out whenever it suited those subject to the obligation.
   (2) The detailed prohibitions in subs. (15), (16), (18), (20) and (21) do not detract from the substantive obligation in section 8(1). That subsection did not need to include the words "for ever" for its provisions to operate prospectively. (But the contemporaneous contextual evidence sheds light on what was clearly envisaged).
   (3) Even though section 8(1) uses the expression "as hereinafter provided" that is not necessarily restricted to "maintenance" and applies equally to the succeeding provisions for "laying out". Even if that were not correct, that still does not mean that, having been laid out, the Gardens could be used otherwise than as provided for in section 8(1).
   (4) The repeal of the larger part of the 1900 Act, save for the prospective and continuing obligations in ss. 7-9, confirms the enduring nature of the obligations imposed by them. And (as was ultimately accepted by the Minister, see [76(5)]) the advent of the modern planning system has no bearing on the obligations in the 1900 Act.

9. The Secretary of State alleges that section 8(1) does not prevent the Memorial being built in the Gardens, see skeleton argument paras. 31 to 33. But the judge expressly concluded that it did, para. [76(1)].

10. The Claimant therefore submits that the judge (1) did not err in her interpretation of the 1900 Act and (2) did not err in her application of the legal principles to its construction. It follows that this ground of appeal has no real prospect of success either.

11. The Minister also alleges (Ground 4) that the judge was wrong to conclude that the Minister and Inspector had failed to consider the merits of alternative sites. This ground is expressly founded on the Minister's assertions responded to above and does not add anything to them.

12. The Secretary of State separately alleges (Ground 3) that the judge was wrong not to apply the law on adequacy of reasons to the Minister and Inspector's conclusions on the materiality of the 1900 Act, in that the Claimant did not challenge the Inspector's list of

main considerations which did not include the 1900 Act and so the Inspector and Minister cannot have been obliged to grapple with it, skeleton argument paras. 24-26.

13. But that cannot absolve the Minister – who does not himself rely on this as an issue on which permission to appeal should be granted – from dealing with a consideration which the court found to be material to his decision for the reasons given in para. [110]. It does not therefore add anything to the Secretary of State's Ground 2 above. In any event, this forensic attempt to bar criticism of the Minister's decision does not get around the fact that the 1900 Act represents an obstacle to delivery which has not been addressed. Again, the matter cannot be "wished away".

14. Finally, the Minister (skeleton argument para. 7) asserts that the case "raises compelling reasons for a hearing before this court" but does not set out what those reasons are. Para. 47 states that Ground 1 "raises important issues concerning the application of established legal principle in the circumstances of this very important development proposal" but without saying what those "important issues" are. The Secretary of State refers to the "unique and extraordinary significance" of the proposal, skeleton argument para. 38.

15. But the above "reasons" for the Court of Appeal to hear the matter do not on their own justify hearing a case which enjoys no real prospect of success. The issue of the construction of section 8 will not arise in any other context than the present application for planning permission; and if the construction of section 8 is correct the proposals cannot proceed on the basis of the current legislation. No further elucidation of the reasoning behind its construction can change this. This is not a case where there is any need to elucidate the legal policy behind section 8 or to investigate the implications of the construction in other factual scenarios. A "compelling" reason must be a legally compelling reason.

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