

39 from 39 Webinar Series

The Holborn Studios cases

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Will start shortly

Holborn Studios

- Two judgments:

R(Holborn Studios) v London Borough of Hackney [2017] EWHC 2823 (Admin),
[2018] PTSR 997 (*Holborn Studios 1*)

R(Holborn Studios) v London Borough of Hackney [2020] EWHC 1509
(Admin) (*Holborn Studios 2*)

The Studio Buildings

- Eagle Wharf
- Victorian former industrial buildings by Regents Canal
- Now used as photographic studios and offices
- With a nice cafe



Holborn Studios

- largest photographic studio complex in Europe
- Helmut Newton: ‘the Abbey Road of photography’



Frankie Dettori © Nicky Johnston

The studios

- Holborn Studios lessees of most of the site
- 7 studios
- Most large
- Office accommodation elsewhere, much sublet



The proposals

- Galliard Homes
- Demolish most of the existing buildings, except some waterfront and chimney
- 3 new blocks, 2-7 storeys, B1, residential and cafe
- Doctor Who © Ray Burminston



Problems with basements

- Both applications propose photographic/film studios in basement
- Expressed to accommodate Holborn Studios
- But, issues of ceiling height, lift access



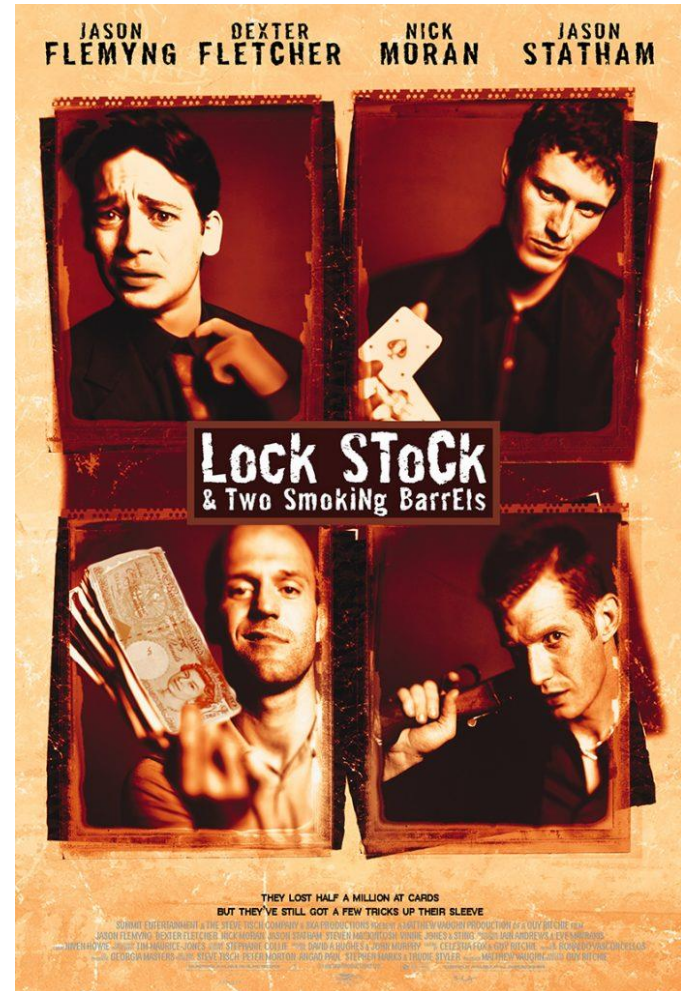
Holborn Studios 1: consultation on amendments

- Application in 2015 for 4218 m² B1, 64 flats
 - Studio in basement ‘specifically designed to meet the requirements of Holborn Studios’
 - Holborn Studios said not suitable, ceilings too low, no vehicular access
-
- Tamsin Outhwaite © Nicky Johnston



Amendments

- May 2016
- Scheme amended
- More commercial, but lose all 14 affordable dwellings
- Columns removed in the basement to facilitate studio use
- No consultation
- Lock, Stock and Two Smoking Barrels
© Adam Lawrence



- Holborn Studios & others only aware of amendments when saw committee report
- HS objected and sought adjournment to address; instruct engineer on beams
- Council approved application
- Victoria Pendleton © Adam Lawrence



Judgment

- John Howell QC
- Substantive constraint: Amendments allowed provided not substantial or not in substance what applied for
- Procedural: fairness given the statutory duties to consult on the original application
- *Bernard Wheatcroft* judgment wrongly conflates the two

The fairness approach

- ‘necessary to consider whether not doing so deprives those who were entitled to be consulted on the application of the opportunity to make any representations that, given the nature and extent of the changes proposed, they may have wanted to make on the application as amended’
- Not ‘fundamental change’, ‘substantial difference’
- Fairness is a matter for the Court
- Although whether and how the decision maker considered the matter is relevant; simply thinking the changes positive is not enough

Conclusion in Holborn Studios

- Proposal was substantially changed
- Loss of all affordable housing
- Suitability of the basement for studio work was an issue. If columns removed, Holborn Studios concern that transfer beams required, reducing ceiling height
- Should have been proper opportunity for representations
- Notice of the committee meeting discouraged further representations

Holborn Studios followed

- *R(Sykes) v Cheshire West & Chester* [2018] EWHC 3655 (Admin)
- Late amendment to water sports application that site open to public should have been consulted on
- *R(Broad) v Rochford DC* [2019] EWHC 628 (Admin)
- Holborn Studios followed, but objections to the amendments would have been the same as the original scheme
- But always fact sensitive see *R(Kverndal) v LB Hounslow* [2015] EWHC 3084 (Admin) on further marketing material submitted

Legitimate Expectation and Document Disclosure

- In *Holborn Studios 1* the Council refused to disclose, unredacted, two letters from other film/photographic studio occupiers who stated that they would be interested in occupying the space should the Claimant need to vacate.
- The OR relied on those letters as supporting the retention of the existing photographic/film studios use.
- The Claimant sought disclosure of the letters including under the Freedom of Information Act 2000.
- 2.5 hours before the subcommittee meeting the Council sent an email attaching redacted versions of the letters (including the redaction of their authors).

Legitimate Expectation and Document Disclosure

- Statements of Community Involvement are required by s18 PCPA 2004
- LPAs required to follow published policy unless there are good reasons for not doing so (*R(WL(Congo)) v SoSHD* [2012] 1 AC 245)
- SCIs may also give rise to legitimate expectation that the authority will do what it has promised.
- Test is whether the assurance is clear, unambiguous and devoid of relevant qualification (*R(Majed) v Camden LBC* [2010] JPL 621)

Legitimate Expectation and Document Disclosure

- Council's SCI included statements such as:

'Hackney's website contains details of all applications including copies of all associated documents and drawings'

'Comments are kept on the planning file...Once submitted to the council, letters of objection or support become public documents which other interested parties are entitled to inspect.'

- Claimant argued that they had a legitimate expectation to inspect the letters based on the SCI and also that the Council acted unfairly

Legitimate Expectation and Document Disclosure

- Court held:
 - SCI provided for both letters to be made available for public inspection on the website
 - The disclosure in redacted form only meant the Claimant was deprived the opportunity of making meaningful representations on them
 - The Claimant submitted material which set out the representations they would have made, had they been privy to the redacted letters. The Judge held that those representations could have undermined the credibility/cogency of those letters. Therefore any submission that the disclosure would have made no difference did not succeed.

Publication of Viability Assessments and Background Documents

- Mainly relevant to *Holborn Studios 2*
- At the time of the decision the PPG provided that
 - ‘Any viability assessment should be prepared on the basis that it will be made publicly available other than in exceptional circumstances...’; and
 - ‘Where an exemption from publication is sought, the planning authority must be satisfied that the information to be excluded is commercially sensitive.’
- Section 100D Local Government Act 1972 concerns the inspection of background papers.

Publication of Viability Assessments and Background Documents

- The Claimant relied on *R(Joicey) v Northumberland CC* [2014] EWHC 3657.
 - Application for a wind turbine.
 - Noise report submitted with application which applied higher noise levels as those residing on the farmland were ‘financially involved’ in the project.
 - Noise report not placed on defendant’s website until the day before the committee meeting and not identified as a background paper.

Publication of Viability Assessments and Background Documents

- Cranston J:

‘Right to know provisions relevant to the taking of a decision such as those in the 1972 Act and the Council’s Statement of Community Involvement require timely publication.

Information must be published by the public authority in good time for members of the public to be able to digest it and make intelligent representations: cf. *R. v North and East Devon Health Authority Ex p. Coughlan* [2001] QB 213,

[108]; *R (on the application of Moseley) (in substitution of Stirling Deceased) v Haringey LBC* [2014] UKSC 56, [25].

The very purpose of a legal obligation conferring a right to know is to put members of the public in a position where they can make sensible contributions to democratic decision-making’

Publication of Viability Assessments and Background Documents

- The Defendant relied upon *R(Perry) v Hackney LBC* [2014] EWHC 3499
 - 2 planning applications for mixed-use development
 - Viability assessment submitted in confidence to the Council. Only ever made available in redacted form
 - In response to argument that there was a common law right for members of the committee to be provided with the report, Patterson J disagreed
 - Patterson J further decided the viability assessments were ‘exempt information’ under s100F(2A) LGA 1972

Publication of Viability Assessments and Background Documents

- Dove J rejected the contention that the viability material was ‘exempt information’. He held (at para 64):
 - Paragraph 10 of Schedule 12 LGA 1972 contains an exception to the definition of exempt information where ‘the public interest in maintaining the exemption outweighs the public interest in disclosing the information’
 - The existence of the PPG and the NPPF have an important bearing on whether there is a public interest in disclosure.
 - Clear from PPG that only in exceptional circumstances should disclosure be withheld.
 - The extent to which the Defendant considered the question of public interest was unclear

Publication of Viability Assessments and Background Documents

- Dove J further held:
 - Critical elements of the viability information in the public domain were opaque and unexplained. There was therefore a material legal error.

Publication of Viability Assessments and Background Documents

- Issue also arose in *Holborn Studios 1*. The Defendant relied on *Perry* to argue that the two letters did not have to be disclosed.
- Judge held that *Perry* was of little assistance because:
 - The letters were not submitted in confidence
 - Not clear whether the Council ever considered the public interest in concealing the identity of the authors vs disclosure
 - The case of *Holborn Studios* was not based on the right to inspect background papers

Publication of Viability Assessments and Background Documents

- Do *Perry* and *Holborn Studios 2* conflict?
 - Dove J addressed this at para.65. In *Perry* the NPPF and PPG were not in the same terms and therefore did not inform the ‘public interest’ issue in the same way.

LOBBYING & PUBLIC
CONTACT OF MEMBERS
+
FAIRNESS OF PROCESS IN
VIRTUAL WORLD

PUBLIC RIGHT TO COMMENT ON APPLICATIONS

- Statutory right of public to comment on application – s65 TCPA & Art 13 & 15 DMPO
- Art 33 DMPO (s71(2)(a)) LPA must take into account any reps made within stat periods where notice; service & publication
- SCI – s18 PCPA 04 - Compliance and Legit Expectation - Lumba; Majed & Gerber

PUBLIC REPS 'OUTSIDE' STAT PROCESS

- Reps received post stat 21 days will still to be considered “*as far as reasonably possible*”(see §4.10 SCI)
- Planning Code for Councillors/Code of Conduct in Holborn Studios (2) (debate about which code)
- Code C forward lobbying material unread
- Code D forward lobbying material

PUBLIC REPS 'OUTSIDE' STAT PROCESS

- Public Advice leaflet– no contact with Committee Cllrs prior decision meeting
- Correspondence with Public – no contact with Committee Cllrs prior decision meeting

Facts & Ground

- Post publication of OR prior to committee meeting reps made direct to Cllr Members by C;
- Cllrs in accordance with Code forwarded to Clerk unread
- C argued Code; advice and actions unlawful breach of ECHR 10 – Freedom of expression

LAW ON LOBBYING

- Localism Act 2011 s25 –
Predetermination/ Bias/Closed Mind
(considered in I.M. Properties
Development Ltd [2014] EWHC 2440
(Admin))
- Localism Act s27 & 28 - Codes of
Conduct
- Freedom of expression ECHR 10 engaged
in Holborn Studios (2) but no prejudice in
the circumstances – oral reps by RHQC

- "*Lobbying is a normal part of the planning process.*" – Probity in Planning LGA
- Committee is not 'quasi judicial'
- "*extremely difficult to justify as proportionate the discouragement, prohibition or prevention of communication between public and the councillors representing them which was otherwise in accordance with the law*" §78.
- Proportionate for lobbying material to be forwarded to officers but not proportionate for there to be "*an injunction that members must not read them*" §78.

Fairness and Process in an Age of Virtual Meetings

CORONAVIRUS ACT 2020

- S78 LA Meetings
- 78(1) Power to make regs
- 78(2) Re public
- 78 (3) Limited to local authority meetings required to be held, or held, before 7 May 2021.

RELEVANT C 19 LEGISLATION

Local Authorities and Police and Crime Panels
(Coronavirus) (Flexibility of Local Authority and
Police and Crime Panel Meetings) (England and
Wales) Regulations 2020/392

(‘the C19 Meetings Regs’)

- Applies to meeting of a local authority; an executive Part 1A of the LGA 2000; joint committee of two or more LAs; and committee or sub-committee - Reg 3

RELEVANT C 19 LEGISLATION

C19 Meetings Regs : PT 2 ‘Remote Attendance’

- Reg 4 (1) (a) power to hold meetings;
- Reg 4 (1) (b) “*alter the frequency, move or cancel such meetings, without requirement for further notice*”.
- Reg4 (2) relaxes requirement annual meetings for appointments which otherwise can continue

RELEVANT C 19 LEGISLATION

C19 Meetings Regs : PT 2 ‘Remote Attendance’

- **NB Reg 5 & 6**– re “place”
- Reg 5 *“includes reference to more than one place including electronic, digital or virtual locations such as internet locations, web addresses or conference call telephone numbers”*
- Reg 6 adds to interpretation under Sch 12 of LGA 1971

RELEVANT C 19

LEGISLATION

C19 Meetings Regs: Public Access

- Reg 13 – widens out Public Bodies (Admission to Meetings) Act 1960
- Publication of information
- Open to public
- Reg 14 & 15 same for open to public under LGA 2000 & 1972
- Reg 16 Reg 8 Openness of Local Government Bodies Regulations 2014

RELEVANT C 19

LEGISLATION

C19 Meetings Regs: NB REG 17

AMENDS LGA 1972 S.101L

“Supplemental provision on public access to meetings and documents

In this Part references (however expressed) to—

(a) a meeting being "open to the public" include access through remote means including (but not limited to) video conferencing, live webcast, and live interactive streaming and where a meeting is accessible to the public through such remote means the meeting is open to the public whether or not members of the public are able to attend the meeting in person;

(b) being "present" at a meeting include access through remote means mentioned in paragraph (a) above;

(c) a document being "open to inspection" includes being published on the website of the council;

(d) the publication, posting or making available of a document at offices of the council include publication on the website of the council.".

CONSTITUTION; SOs; & PROTOCOLS

REG 4 AND 5(5) – appear wide & permissive

“may hold...without further notice”

“provision made.. applies notwithstanding any prohibition or other restriction contained in the standing orders or any other rules of the authority governing the meeting and any such prohibition or restriction has no effect.”

BUT MAY BE CLASHES

- **REG 5(6) POWER TO MAKE SOs** “and other rules” re Voting; Member & Public Doc Access; and Public & Press remote access of public and press to a local authority meeting to enable them to attend or participate in that meeting by electronic means, including by telephone conference, video conference, live webcasts, and live interactive streaming.

CONSTITUTION; SOs; & PROTOCOLS

REG 5(6) POWER

- To makes SOs “*and other rules*” re
- Voting;
- Member & Public Doc Access;
- and Public & Press Remote Access to LA meeting “*to enable them to attend or participate in that meeting by electronic means, including by telephone conference, video conference, live webcasts, and live interactive streaming*”.
- Fairness

REQUIREMENT TO BE 'IN ATTENDANCE'

Reg 5 (2) and (3)

- "member in remote attendance" - if all Reg 5(3) conditions are satisfied.
- (a) - to hear, and where practicable see, and be so heard and, where practicable, be seen by, the other members in attendance,
- (b)- to hear, and where practicable see, and be so heard and, where practicable, be seen by, any members of the public entitled to attend the meeting in order to exercise a right to speak at the meeting, and
- (c)- to be so heard and, where practicable, be seen by any other members of the public attending the meeting.

'OPEN TO PUBLIC' ?

Regs 13 – 17

- Practical and technological issues
- No 'right' to public to speak
- Fairness - overall test in circumstances - does not have to be 'fairest'
- Principles of natural justice, legit expectation and compliance with notification regs
- **NB make documents available on website including background docs**