England and Wales High Court (Administrative Court) Decisions

Neutral Citation Number: [2004] EWHC 2759 (Admin)
CO/1799/2004

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2
8 November 2004

B e f o r e :

MR JUSTICE SULLIVAN

THE QUEEN ON THE APPLICATION OF BASILDON DISTRICT COUNCIL	**(CLAIMANT)**
-and-	
FIRST SECRETARY OF STATE	**(DEFENDANT)**
-and-	
MRS R TEMPLE	**(INTERESTED PARTY)**

Computer-Aided Transcript of the Stenograph Notes of
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MR JAMES PEREIRA (instructed by Basildon District Council) appeared on behalf of the CLAIMANT
MR PHILIP COPPEL (instructed by Treasury Solicitors, London SW1H 9JS) appeared on behalf of

the DEFENDANT
MR MARC WILLERS (instructed on behalf of the Community Law partnership) appeared on behalf of the INTERESTED PARTY

HTML VERSION OF JUDGMENT ↟

Monday, 8 November 2004

1. MR JUSTICE SULLIVAN: This is an application under Section 288 of the Town and Country Planning Act 1990 to quash a decision by one of the first defendant's inspectors granting retrospective planning permission for the change of use of land at Hatchertang (aka "the Paddocks") Hovefields Avenue, Wickford, Essex ("the site") to a gypsy caravan site for a single family. The site, which is some 40 metres deep with a road frontage to Hovefields Avenue of about 25 metres, is within the Metropolitan Green Belt. The claimant, the local planning authority for the area, had refused planning permission on Green Belt, among other grounds.

2. The Inspector's summary of the relevant planning policies included the following statement:

> "It was common ground between the parties that the proposal had to be regarded as inappropriate development with regard to these policies [the policies in PPG2, the Government's Planning Policy Guidance Note on Green Belts]. Paragraph 3.2 of PPG2 makes clear that inappropriate development is, by definition, harmful to the Green Belt and it is for the applicant to show why permission should be granted. Very special circumstances to justify appropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

3. In paragraph 12 of her decision letter, the Inspector set out seven main issues:

> "(i) The provision of and need for gypsy sites in the locality.
>
> (ii) Whether the family can be considered as gypsies for the purposes of planning law and policy and has connections with the District.
>
> (iii) The visual impact of the development and its effect upon the openness of the Green Belt.
>
> (iv) The suitability of the site with regard to accessibility to schools/shops etc, and access to the main highway network.
>
> (v) The impact of the development upon existing residential properties.
>
> (vi) Whether there are any very special circumstances in this case which clearly outweigh the harm which would be caused to the Green Belt, and other harm, were the appeal to be allowed.
>
> (vii) Precedent."

4. She then dealt with each of these issues in turn in a particularly comprehensive and detailed manner. Before turning to issue (vi), she set out her conclusions in relation to Local Plan Policies in paragraph 45 of the decision-letter. Those conclusions included the following:

> "The appeal site fails the first locational criterion of S7 [which sets out the parameters against which applications for residential gypsy sites will be assessed], as it lies within the Green Belt, and therefore harm is caused by reason of inappropriateness. There would also be some, though a limited, impact upon openness and harm to the character and

appearance of the surrounding area. Overall I find that the proposal complies with the criteria in the second part of BAS S7 in terms of accessibility to schools, shops etc, having a minimum impact upon the Green Belt and the appearance of the countryside, convenient and safe access to the main highway network and minimum impact on existing residential properties."

5. In dealing with main issue (vi) the Inspector looked first, at educational issues in paragraph 46 of the decision-letter, and then dealt with alternative accommodation options for the family were the appeal to be dismissed between paragraphs 47 and 55. She set out her conclusions on the planning merits in paragraphs 56-59:

> "56. The planning considerations relating to proposals for inappropriate development within the Green Belt all involve a balancing exercise between the harm which would be caused, by reason of inappropriateness and any other harm; and other considerations which may or may not, individually or together be regarded, as very special circumstances. National planning policy for the Green Belt, most recently expressed in PPG2, makes clear the strong presumption against inappropriate developments in the Green Belt and the substantial weight which should be given to this issue when considering applications and appeals. Where planning permission is granted for inappropriate development in the Green Belt those other considerations must clearly outweigh the harm in planning policy and other terms.
>
> 57. In this case the starting point is that the proposal represents inappropriate development in the Green Belt which, by definition would cause harm to the Green Belt. The continued siting of the mobile home, its possible replacement by a larger one, the addition of a touring caravan, and possible subsequent demand for a larger day room and stables (though not forming part of this application) would undoubtedly result in a considerably more developed appearance to the land than would be the case were the appeal to be dismissed and the requirements of the enforcement notices complied with. The proposal would also conflict with national and local policies of the Green Belt and criterion (i) of Local Plan Policy S7 and increase the extent of the developed frontage along this part of Hovefields Avenue.
>
> 58. However, against these must be weighed a number of factors:
>
> • Government policy seeks to encourage gypsies to provide and manage their own sites.
>
> • Realistically, any gypsy site within Basildon is likely to be within the Green Belt.
>
> • The appeal site is relatively small and self-contained. The amount and scale of development permitted would also be relatively small and would be seen in the context of adjoining and nearby similar authorised residential/gypsy development.
>
> • Neither the structure Plan nor Local Plan Policies relating to gypsy site position are based on a quantitative assessment of the need for sites, as required by Circular 1/94 and the recently issued PPG3. The Revised Local Plan is at a very early stage.
>
> • There is a severe shortage of suitable alternative and available sites within Basildon District or other parts of Essex, either for rent or purchase, and a valid enforcement notice exists on the site under which the Council could take action to evict the occupiers. Were they to do so the occupying family would be most likely to resort to unauthorised sites, quite probably also in the Green Belt. A dismissal of the appeal would in all probability result in considerable disruption to their family life, and the education of the children.
>
> • Even if an authorised gypsy site in the locality became available to buy, it would be beyond the resources of the appellants.
>
> • The dismissal of the appeal would effectively mean that the family were forced to choose between accepting Council housing in order to keep their children in school, but

effectively abandoning their gypsy lifestyle (together with at least some of the income they currently receive from horse dealing), or returning to a life on the road, possibly some distance from their roots, families, GP and established sources of work in the hope of finding another site, with their limited funds. This, almost certainly, would result in a severe disruption to their family life and children's education. Either option would increase the likelihood of the family requiring state support for their housing and/or living costs which has not been necessary up to now.

59. All these factors together, particularly the shortage of suitable alternative gypsy accommodation in the locality, the consequences for the family were the appeal to be dismissed and the potential disruption to the children's education I consider to be matters of considerable importance. In weighing them against the undoubted harm that would be caused by allowing the appeal value judgments have to be made as to the relative weight to be given to needs and outcomes which pull in opposite directions. However ultimately I consider that the need for the planning system to recognise and meet the particular land use requirements of gypsy families, together with the excess of demand over provision of sites in the locality, the lack of a suitable and accessible alternative site for this particular family, and the hardship and disruption to their family life which would result from a dismissal of the appeal are of overriding weight in this case."

6. The Inspector then dealt with issue (vii), precedent in paragraph 60:

"I appreciate the Council's concerns as to the precedent that the grant of planning permission would set in relation to their enforcement action against other unauthorised developments, particularly nearby and also in the Green Belt. In allowing this appeal it is on the basis of a number of material considerations, weighing in favour of the grant of planning permission which together in my view constitute the very special circumstances necessary to clearly outweigh development which will cause harm to the Green Belt. Some of those considerations are specific to the family involved and some site specific. It is possible that identical considerations may be found in other cases and that, in those cases this decision made be regarded as a precedent. But, by definition, circumstances which are found to be very special, particularly those of a personal nature will not create a precedent. Each case has to be considered on its merits and in the light of the particular relevant circumstances and judgment has to be made in each case on the weighting to be given to those factors. While understanding the concerns of the Council regarding precedent, I do not consider that this is a factor which merits significant weight as a material consideration in this case."

7. The Inspector therefore granted planning permission subject to a number of conditions, including the following:

"1) The residential use hereby permitted shall be carried on only by Mrs Rosanne Temple, Mr Roger Dennard and their dependants and no other persons.

2) the residential use hereby permitted shall be restricted to the stationing of one mobile phone and one touring caravan on the land."

8. On behalf of the claimant, Mr Pereira challenges the decision-letter on two grounds. First, the manner in which the Inspector dealt with the issue of very special circumstances; and secondly, the manner in which she dealt with the issue of alternative accommodation for the family. 1. Very special circumstances.

9. Mr Perera submits the very special circumstances are not merely factors that weigh in favour of granting planning permission. Each factor relied upon must be a factor which is of a quality that can reasonably be called "very special". On this approach, it follows that if particular individual factors cannot each reasonably be described as very special, then they cannot cumulatively be described as very special circumstances. He submitted that, considered individually, none of the factors listed by the Inspector in paragraph 58 of the decision-letter could reasonably be described as very special. For example, the first factor, Government Policy, is common to all cases concerning gypsy caravan site

provision. Expressed in numerical terms, the Inspector listed seven factors in paragraph 58, and seven times nought still equals nought.

10. It is unnecessary to rehearse the detail since the defendants do not submit that, looked at individually, any one of the factors listed by the Inspector is very special in character. They submit that the claimant's approach is fallacious since a number of factors, none of them "very special", when considered in isolation may, when combined together, amount to very special circumstances. I agree. The claimant's approach does not accord with either logic or common sense. There is no reason why a number of factors ordinary in themselves cannot combine to create something very special. The claimant's approach flies in the face of the approach normally adopted to the determination of planning issues: to consider all relevant factors in the round. The weight to be given to any particular factor will be very much a matter of degree and planning judgment. To adopt the numerical approach above, whilst some factors may score nought, planning judgments are rarely so clear-cut or absolute, and seven times one/seventh equals one.

11. Mr Pereira relies upon two decisions of mine, Chelmsford Borough Council v First Secretary of State [2003] EWHC 2978 (Admin), and Doncaster Metropolitan Borough Council v Secretary of State for the Environment, Transport and the Regions [2002] EWHC 808 (Admin). He submits that those decisions are to be distinguished from another challenge involving this local planning authority, Basildon District Council v Secretary of State for the Environment [2001] JPL 1104. In that case, the Secretary of State had disagreed with his Inspector's recommendation that planning permission should be refused for a gypsy caravan site in the Green Belt, and had concluded that the substantial harm to the Green Belt in that case was clearly outweighed by the family's personal circumstances including, in particular, the educational needs of the children on the site when coupled with the need for more gypsy sites in the area. The claimant's challenge to that decision was rejected by Ouseley J. It might be thought that the present case is on all fours with the Basildon decision, save that the Secretary of State's reasoning in that case was far less extensive than his Inspector's reasoning in the present case. Moreover, that was a case where the Secretary of State accepted that there would be substantial harm to the Green Belt.

12. Mr Pereira points out that it was not argued in that case that the circumstances relied upon by the Secretary of State could not reasonably be described as "very special" circumstances. He submits, in effect, that the decision in Basildon was erroneous and that the decisions in Chelmsford and Doncaster are to be distinguished and preferred. In my judgment, the decision in Basildon is not inconsistent with the decisions in Chelmsford and Doncaster. In those two cases only one factor was relied upon as constituting very special circumstances by the Secretary of State and one of his inspectors respectively.

13. In such a case it is plain that the one factor relied upon must itself be capable of being a very special circumstance. In Chelmsford, I concluded that the apparently ordinary educational needs of two girls aged 7 and 6 could not reasonably be described as special, let alone as "very special". Although Doncaster was a reasons challenge, a similar problem had arisen. The sole alleged very special circumstance was the apparently unexceptional educational needs of the children on the site.

14. Unlike the present case where the Inspector not merely set out the correct test in paragraph 3 of her decision-letter, but also repeated it in the title to issue (vi) and in paragraphs 56 and 60, the Inspector's reasoning in Doncaster left me in real doubt as to whether he had in fact applied the correct Green Belt test.

15. Mr Pereira relied upon the last sentence in paragraph 56 of my judgment in the Chelmsford case:

> "The decision taker must be able to point to a circumstance or circumstances which, viewed objectively, are reasonably capable of being described as 'very special'."

16. Judgments should not be construed as though they were statutes, since they respond to the facts found and the submissions advanced in the particular case. In paragraph 56, I was rejecting the proposition that was then being advanced on behalf of the Secretary of State: that a factor amounted to very special circumstances because, and only because, he so described it. The final sentence is not to be read as saying: "The decision-taker must be able to point to a circumstance or circumstances, each and every one of which, viewed objectively, is reasonably capable of being described as 'very special'"; rather it is

saying: "the decision-taker must be able to point to a circumstance, or combination of circumstances which, viewed objectively, is reasonably capable of being described as 'very special'."

17. The short answer to the claimant's argument is that in planning, as in ordinary life, a number of ordinary factors may when combined together result in something very special. Whether any particular combination amounts to very special circumstances for the purposes of PPG2 will be a matter for the planning judgment of the decision-taker. Having applied the correct test, it was open to the Inspector in the present case to conclude that the combination of factors which she identified in paragraph 58 of her decision-letter amounted to very special circumstances.

18. The claimant is clearly concerned that this decision will set an unfortunate precedent. The Inspector dealt with that issue in paragraph 60 of her decision-letter. I would simply add this. When considering the danger of precedent, it is important to bear in mind the whole and not merely part of the test in PPG2. The question is not merely whether there are very special circumstances, but whether those circumstances clearly outweigh the harm done by reason of inappropriateness and any other harm. Thus, a combination of factors which amounted to special circumstances might be sufficient to clearly outweigh the limited degree of harm that would be caused by granting planning permission upon one particular site, but the same or a similar combination of factors might well be insufficient to justify the grant of planning permission for a site that was more harmful in planning terms, for example because it had a greater impact upon the underlying objectives of the Green Belt; it was more harmful in terms of the character or appearance of the countryside; it had a greater effect upon residential amenity and/or highway safety, etc.

2. Alternative accommodation.

19. The Inspector dealt with this issue in considerable detail between paragraphs 47 and 55 of her decision-letter. She noted in paragraph 47 that alternative accommodation options for the family if they had to leave the site were limited. In paragraph 48 she noted that the claimant's principal planning officer agreed that the chance of the family being offered a pitch in a council-owned site anywhere in Essex was negligible.

20. In paragraphs 50 and 51, she summarised the interested party's position:

> "50. Mr Dennard and Mrs Temple said that in terms of accommodation, their priorities were to stay within 5 or 10 miles of Wickford so their children could continue to attend their schools on a daily basis. The also did not want to move any further away as this was their home area, they had family nearby, as were all Mr Dennard's work contacts. It would be very hard to move away and start up somewhere else where he wasn't known. Their other priorities were to have a place where they could keep their horses. If they were forced off the site their first choice option was to go back to living on the road, even though this would be extremely hard. They would have to sell the mobile home, for which they would not get much as it would be a forced sale and buy a tourer, which would be very cramped for the family and unsatisfactory as the girls would have to share sleeping space with the boys and washing facilities would be poor. They would take the horses with them and go wherever they could find.
>
> 51. If this didn't work out they supposed they would have to declare themselves homeless to Basildon Council. Although they did not rule out ever living in a house, especially if they had no practical alternative, they had never done this. If there were other gypsies nearby and they had enough land nearby to stable their horses it might be manageable, but they did not think this was likely, it might take some time and they were worried about how they might be treated by other people living nearby. In practice it would be very difficult to keep the horses if they had to move into a normal Council house. They could not afford a privately rented property."

21. The Inspector's own conclusions are to be found in paragraphs 54 and 55:

> "54. Given the stated priorities and intentions of the family they are likely to initially try and follow an itinerant life on the roadside or on other public or privately owned land in

the local area in order to keep the elder children in school and look after the horses. Realistically this cannot be regarded as a sustainable option, even in the short term, given the lack of suitable sites, disruption and cost to land-owners and the hardship and disruption to their family life. Declaring themselves homeless to the Council would provide them with some accommodation, and could allow the children to continue their education uninterrupted. But in practical terms it would be very unlikely that Mr Dennard could continue to keep his horses, which are an important part of his gypsy lifestyle and family income. It is also uncertain as to whether the family could adapt to living in bricks and mortar in a non-gypsy community and if this proved too hard the only obvious alternative would be to return to the road.

55. Without a fixed address and the likelihood of constant moving from place to place it would be very difficult to keep the children at their current schools, or indeed enrol them at any other with any real expectation that they could stay there for any length of time. While the children have no special educational needs, at present, this must be in part because they have enjoyed a normal and uninterrupted schooling up to now. Were the family required to move away from this site the likelihood of disrupted education, with no definite end point, is high. Continuity of education for the children is both a private and public benefit. Dismissal of the appeal would, almost certainly, have a direct effect upon that continuity of education and I regard that factor as an important material consideration in this case. While the children are not yet at the stage of taking public examinations, a disrupted or missing education at any age, if it continues for any length of time, can be seriously disadvantageous to educational attainment."

22. In his second ground of challenge Mr Pereira made two criticisms of the Inspector's approach to the issue of alternative accommodation. First, he submitted that the Inspector failed to reach any conclusion as to whether the second defendant (the interested party and her family) would be prepared to accept a bricks and mortar home. In the grounds it was also put in the alternative that she failed to give effect to what was described as "the burden of proof in PPG2" in her findings on this aspect of the appeal. It was submitted that the interested party and her family had accepted that conventional housing was an option. They had accepted that they would reside in conventional housing if attempts at an itinerant lifestyle failed. Thus it was said the Inspector erred in accepting that very special circumstances existed as a consequence of the absence of suitable alternative accommodation when the appellants had failed to show that such alternative accommodation, in the form of conventional housing, would not be appropriate.

23. Secondly, it was submitted that the Inspector had not dealt satisfactorily with the proposition that land could be rented for grazing the horses in the winter. Setting aside the question of grazing land for the horses for the moment, I can see no basis for criticising the Inspector's conclusions in paragraph 54 or in the last bullet point in paragraph 58. It must be remembered that this was a family who had never lived in a bricks and mortar home. The Inspector's conclusion that they would therefore initially try and follow an itinerant lifestyle on the roadside or other publicly or privately owned land in the local area is readily understandable; so is her conclusion that, in the light of the particular local circumstances relating to the need for and availability of sites, that could not realistically be regarded as a sustainable option, even in the short-term.

24. She then dealt with what the consequences would be if the interested party and her family were to declare themselves homeless to the Council, who would then have to provide them with some accommodation. She also stated that she was:

> "... uncertain as to whether the family could adapt to living in bricks and mortar in a non-gypsy community and if this proved too hard the only obvious alternative would be to return to the road."

25. In many cases it may be possible to reach a firm conclusion, on the balance of probability, as to whether or not bricks and mortar accommodation for a particular family would prove to be an appropriate alternative to a nomadic lifestyle. This was a case where the Inspector made it perfectly clear that she was unable to be certain about whether or not this particular family would be able to

adapt to living in a bricks and mortar home. Given the evidence, she was entitled to conclude that the prospects for this happening were indeed uncertain. In my judgment, her reasoning in this respect was impeccable.

26. So far as the question of providing grazing for the horses is concerned, the position was explained by Mr Dennard and is summarised by the Inspector in paragraph 26 of the decision-letter: most of the family income came from tree/landscape/paving work from regular clients in the Basildon/Wickford/Chelmsford area who knew the claimant, or his father who is now retired. During the winter when that type of job was hard to get the family relied on the income from selling horses. The Inspector said:

> "I saw two horses kept in makeshift stables in the rear part of the site. Mr Dennard said he normally has 3 or 4, including typical piebald gypsy horses which many people do not allow to graze on their land. During the summer he rents grazing land for his horses near Chelmsford as he cannot find anywhere nearer. He, and his father, had always kept horses and he would [find] it very hard to give them up. Any alternative accommodation would have to make provision for stabling his horses during the winter."

27. It is against this background that the Inspector concluded in paragraph 54 of her decision-letter: "... in practical terms it would be very unlikely that Mr Dennard could continue to keep his horses, which are an important part of his gypsy lifestyle and family income", if the family was to be provided with Council accommodation.

28. Against this background the Inspector was entitled to use her common sense and to reach such a conclusion. If the family had to accept Council accommodation it was unlikely that Mr Dennard would be able to continue to keep his horses. There is plainly a difference between being able to obtain and make use of land for summer grazing, and being able too obtain and make use of land with stabling for the accommodation of horses during the winter. Although the claimant seeks to focus on this particular aspect of the decision-letter, it is wholly unrealistic, since it is not suggested that this was a major issue before the Inspector and that details of stabling accommodation for winter use were presented to the Inspector. No doubt if there had been detailed argument and evidence about this particular aspect of the matter, the Inspector would have recorded it and dealt with it in what is, by any standards, a very full and detailed decision-letter. In brief, the Inspector gave the matter the attention that it deserved and reached a conclusion which was certainly open to her as a matter of common sense.

29. For these reasons the Council's two grounds of challenge fail, and the application must be dismissed.

30. MR COPPEL: I am grateful, my Lord. I make an application that the claimant do pay the Secretary of State's costs, the first costs to be summarily assessed, and that they be assessed in the figure sought by the first defendant. Does Your Lordship have a copy of the summary assessment?

31. MR JUSTICE SULLIVAN: No, that did not get to me. Is there going to be an argument about it, Mr Pereira?

32. MR PEREIRA: My Lord, no.

33. MR JUSTICE SULLIVAN: Then just give me the figure, there is no need to hand it up. What is the end figure?

34. MR COPPEL: The end figure, my Lord, is £3,820 neat.

35. MR JUSTICE SULLIVAN: £3,820. Can I check, Mr Pereira, is there any argument about the principle of detail?

36. MR PEREIRA: No, there is not.

37. MR JUSTICE SULLIVAN: Yes, Mr Willers, it is very nice to see you again. Do you have any application?

38. MR WILLERS: Thank you, my Lord. There is an application for the second defendant's costs. I am sure your Lordship is well aware of the decision in Bolton, and also the decision that your Lord took in the Keston Travelling Showmen's Park case. I can hand that case up to your Lordship, but I think your Lordship's decision was predicated on the basis that the land owners, the travellers, who were effectively fighting to keep their home which was the subject of the appeal in that case, were entitled to be separately represented, given the interests that they had in maintaining that home and the threat to their continuing occupation of that property posed by the application to quash the Inspector's decision.

39. MR JUSTICE SULLIVAN: Yes, I think there had been another decision. I know Richards J in another case -- I have seen it.

40. MR WILLERS: A case called Bucks, where I made the same argument based on your Lordship's judgment.

41. MR JUSTICE SULLIVAN: Richards J did not give you costs.

42. MR WILLERS: He did not, my Lord, no. But there is another matter though that perhaps supports this application, and it requires me to go briefly into the chronology of how this matter came before your Lordship. If I can do that very swiftly, my Lord.

43. MR JUSTICE SULLIVAN: Yes.

44. MR WILLERS: My understanding is that the section 288 application was lodged in the spring of this year, certainly before I was instructed. I was instructed on 27 April. I conducted a number of telephone conferences with my instructing solicitors and suggested, when it became clear that the case would certainly be affected by the House of Lords' decision in Porter, that this case ought to be adjourned pending the outcome of that decision.

45. MR JUSTICE SULLIVAN: He managed to decide it without reference to Porter in any event.

46. MR WILLERS: Well, if your Lordship had heard from me I would have made it quite clear that the applicant's case does not sit very happily with the decision in Porter, because that was a case where there was a combination of factors and the House of Lords did not seem to have any concerns about the way in which the Inspector arrived at his decision in that case. But this matter was actually adjourned pending the outcome, and subsequently it seems that the claimant has withdrawn a number of grounds of claim; and it may be on the basis of the decision, I know not. But when the matter came back as a result of the judgment in Porter when the matter was relisted, I inquired as to whether or not the Secretary of State was to be represented. And it was not until 3 November, in other words last week, that my instructing solicitors were informed that the Secretary of State was to be represented.

47. Now, my understanding is that my learned friend, Mr Pereira, drafted the skeleton argument on 29 October. I would not normally complain about the fact that it was late in terms of the timetable, that is not my style, if I could put it that way, but in this instance that skeleton argument came late. It came as a result, as I understand it, that instructions between my learned friend and those instructing me ---

48. MR JUSTICE SULLIVAN: Yes, I received a note from Mr Pereira.

49. MR WILLERS: Exactly, and Mr Pereira was very good in apologising to me for the late arrival of it. But it meant that it was only at that stage that we were able to see exactly what the claimant was pursuing by way of grounds of the claim; and I drafted my skeleton argument on 4 November. Now I appreciate that was the day after my instructing solicitors were told that the Secretary of State would be appearing and defending this. But it was before I had seen a copy of Mr Coppel's skeleton argument. In fact I did not see that until late on Friday evening because it was not served on me until Friday and it came by fax from my chambers. I was away on other business on Friday - so I did not see it until Friday evening - and considered it over the weekend. But quite clearly I am happy to see that Mr Coppel has dealt with admirably, if I may say so, in his skeleton argument with all the points that I sought to address your Lordship upon. But it was not until this weekend when considering the papers that I had the opportunity to decide for myself whether or not it was a matter that needed separate representation. I have to say frankly, my Lord, that I would have advised that the second defendant be

represented in any event. But your Lordship may think that there would be no need for me to have attended, had I seen Mr Coppel's skeleton argument at an earlier stage.

50. MR JUSTICE SULLIVAN: Yes, I think you would have been here in any event on a sort of fireman basis, as it were.

51. MR WILLERS: I think that is right, my Lord.

52. MR JUSTICE SULLIVAN: Just in case some unexpected ---

53. MR WILLERS: Exactly, if I had been asked to do so I would have drawn your Lordship's attention to Porter. I think I am the only one in my skeleton argument that has drawn attention to it and provided your Lordship, for what it is worth, with the value authority which (inaudible). Your Lordship perhaps ought to ask yourself what I have added by way of attendance. Certainly that is the way that your Lordship looked at the case when considering the application by the second defendant in the Keston Travellers Showmen's case. But my Lord, for those reasons, and given the late indication on the part of the Secretary of State, and indeed the late arrival of the skeleton argument, for no other -- and I am not criticising Mr Coppel for that, but no decision could have been taken. It may have been that I might have advised, said I would be here, as it were, as a fireman to deal with any fires, but my instructing solicitor having taken instructions may have concluded otherwise. We simply did not have that opportunity.

54. MR JUSTICE SULLIVAN: Thank you very much. What do you want to say, Mr Pereira?

55. MR PEREIRA: Mr Lord, Mr Willers accepts that he would have been here in any event, and in all of those circumstances that come before I do not think add anything to bring the case out of the normal kind of case when something exceptional is required for the second defendant to get his costs.

56. MR JUSTICE SULLIVAN: Thank you very much. I do not think the circumstances are sufficiently unusual to justify a second award of costs. I simply say this, really for the benefit of those sitting behind Mr Coppel. It might help to reduce the need for multiple representation of defendants or interested parties if the Treasury Solicitor could let interested parties or potential second, third, fourth defendants know at an early stage whether or not the Secretary of State proposes to be represented. I appreciate there are perfectly good reasons for not doing so until a fairly late stage, but I am not saying it in any critical sense; it probably is just a matter of common sense really, but the earlier the Secretary of State's position can be known, either the less chance there is of people turning up unnecessarily or, even if they do turn up, it would be more -- if they had not turned up the basis on which they turn up have to be absolutely essential. Mr Coppel I am not trying to be critical.

57. MR COPPEL: Those behind me are saying that in fact there is correspondence far earlier than that to suggest the Secretary of State would be defending, so the actual position as I understand it...

58. MR JUSTICE SULLIVAN: I do not think it is necessary to resolve the argument. I said what I have said and those behind you will have heard. There are other cases like this, and it is really just a matter of common sense. But I also think that plainly the Secretary of State would have been interested in the principle argument run by Mr Pereira in any event. That is obviously an issue of principle, right or wrong, the Secretary of State would want to be represented. But if I had to put any money on it I would have put my money on the Secretary of State turning up in any event. I suspect Mr Willers did as well quietly to himself. That said, I think this is a case for one set of costs and the form order is the application is dismissed, the claimant will pay the first defendant's costs, such costs to be summarily assessed in the agreed sum of £3,820, and no order in respect of the second defendant's costs. Do you need legal aid?

59. MR PEREIRA: No my Lord.

60. MR COPPEL: My Lord, I know if I apply for permission to appeal the answer will be no, but as a safeguard can I apply in that context?

61. MR JUSTICE SULLIVAN: I shall write on the form for the Court of Appeal "a bold submission". Thank you very much indeed.
