*187 Newport BC v The Secretary of State for Wales and Browning Ferris Environmental Services Ltd

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
18 June 1997

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[1998] Env. L.R. 174

Court of Appeal (Civil Division)

(Staughton L.J. , Aldous L.J. , Hutchison L.J.),

June 18, 1997

Planning permission for chemical waste treatment works—decision of the Secretary of State to make an award of costs against local planning authority for unreasonable behaviour—refusal based upon public perception of risks from proposed development —whether local planning authority may ever reasonably refuse to grant permission for development which is perceived to be unsafe even where that perception is not supported by the evidence.

The second respondents, Browning Ferris Environmental Services Limited ("BF") applied for planning permission to develop a chemical waste treatment plant at Newport, Gwent. The Appellant, Newport Borough Council ("NBC"), as local planning authority refused the application. One of the grounds for refusing planning permission was that the proposed development was perceived by the local community to be contrary to the public interest in that there were unacceptable risks to public health and safety. BF appealed and the first respondent, the Secretary of State for Wales ("SSW") allowed the appeal. In addition, SSW made an award of costs against NBC on the grounds of unreasonable behaviour. In doing so SSW relied upon the conclusions of the inspector appointed to hear the appeal who concluded that whilst public perception of risk was a relevant planning consideration, this perception was not supported by substantial evidence and that accordingly NBC had not behaved reasonably when relying upon that reason for refusal. NBC applied to quash the award of costs. The appeal was dismissed by Latham J.

On appeal to the Court of Appeal, NBC argued that the public's perception of risk was a material planning consideration and that even if that perception was unfounded it could, in an appropriate case, be capable of justifying a refusal of planning permission. SSW had unlawfully considered that unless there was evidence to substantiate the public's perception, that perception could never be a ground for refusing planning permission.

Held, in allowing the appeal and remitting the matter for reconsideration: *175

It was apparent from the inspector's main decision letter that genuine public perception of danger, even if not objectively well-founded, was a valid planning consideration. When the separate decision letter which dealt with the costs award was considered, the inspector's conclusion that genuine public fears, unless objectively justified, could never amount to a valid ground for refusal was, therefore, a material error of law (*per* Hutchison L.J. and Aldous L.J.).

(*Per* Staughton L.J. dissenting.) The inspector had taken public fears into account as a special circumstance. He had assessed the facts of the case and rightly concluded that the public fear was not supported by any planning grounds; in those circumstances there was no contradiction between the two decision letters and the inspector was entitled to conclude that NBC's opposition was unreasonable.

Legislation referred to:

Town and Country Planning Act 1990, s.320(2) .
Local Government Act 1972, s.250(5) .

Cases referred to:

Westminster CC v. Great Portland Estates Plc [1985] 1 A.C. 661 .
Gateshead MBC v. Secretary of State for the Environment [1994] 1 P.L.R. 85 .

Policy referred to:

Circular 5/87, paras 5–7, 9.

Representation

Mr J. Howell Q.C. appeared on behalf of the appellant.
Miss A. Robinson appeared on behalf of the first respondent.

STAUGHTON: L.J.:

Hutchison L.J. will give the first judgment.

HUTCHISON L.J.:

This is an appeal from a judgment of Latham J. who on July 11, 1995 dismissed Newport Borough Council's application to quash the decision of the Secretary of State for Wales of August 23, 1993, ordering them to pay to developers, Browning Ferris Environmental Services Limited, the costs of a planning inquiry in October 1991. The inquiry came about because the council had refused planning permission for the construction of a chemical waste treatment plant on land at the junction of Stephenson Street and Corporation Street in Newport, Gwent.

The ground on which the Secretary of State made the order was that the council had behaved unreasonably in refusing planning permission, and ***176** thus put the developers to unnecessary expense. It is accepted that if it was open to the Secretary of State on the material before him to conclude that the council had behaved unreasonably, he was entitled to make the order. This is because there is power by virtue of section 320(2) of the Town and Country Planning Act 1990 and section 250(5) of the Local Government Act 1972 to make orders as to costs of planning inquiries and the Secretary of State's declared policy in Circular 5/87 giving guidance as to awards of costs in such proceedings provides that costs should be ordered against a party "only on grounds of unreasonable behaviour" . I shall cite those passages of the Circular relevant to the present case. Part 1 in a paragraph headed "Costs in respect of appeals and other planning proceedings" provides:

> "5. In planning proceedings the parties are normally expected to meet their own expenses and costs are awarded only on grounds of unreasonable behaviour . . .
>
> 6. Before an award of costs is made, the following conditions will normally need to be met:
>
> (i) one of the parties has appealed for an award at the appropriate stage of the proceedings . . .;
> (ii) the party against whom the claim is made has acted unreasonably;
> (iii) this unreasonable conduct has caused the party making the application to incur expense unnecessarily, either because it should not have been necessary for the case to come before

> the Secretary of State for determination or because of the manner in which another party has conducted his part of the proceedings."

Under the heading "Awards against planning authorities—unreasonable refusal of planning permission" , one finds this:

> "7. A planning authority should not prevent, inhibit or delay development which could reasonably be permitted. In accordance with the advice given in Circular 22/80 . . . a planning authority should refuse planning permission only where this serves a sound and clear planning purpose and the economic effects have been taken into account. As stated in Circular 14/85 . . . 'There is . . . always a presumption in favour of allowing applications for development, having regard to all material considerations, unless that development would cause demonstrable harm to interests of acknowledge importance. Reasons for refusal should be complete, precise, specific and relevant to the application. In any appeal proceedings authorities will be expected to produce evidence to substantiate their reasons for refusal . . . While planning authorities are not bound to follow advice from their officers or from statutory bodies such as Water Authorities or the Health and Safety Executive, or from other Government Departments, they will be expected to show that they have reasonable planning grounds for a decision taken against such advice and that they ***177** were able to produce evidence to support those grounds. If they fail to do so, costs may be awarded against them."

Under the heading "Examples of unreasonable refusal", paragraph 9 reads:

> "Planning authorities are expected to take into accound the views of local residents when determining a planning application. Nevertheless, on its own, local opposition to a proposal is not a reasonable ground for the refusal of the planning application unless that opposition is founded upon valid planning reasons which are supported by substantial evidence. While the planning authority will need to consider the substance of any local opposition to the proposal their duty is to decide a case on its planning merits. They are unlikely to be considered to have acted reasonably in refusing an application if no material departure from statutory plans or policies is involved and there are no other planning reasons why permission should be refused."

As will become apparent, the appellants attach particular importance to paragraph 9, as indeed does the respondent.

The appellants submit that the decision of the Secretary of State gives rise to an important point of planning law with which they say the judge did not deal, namely whether a local authority may ever reasonably refuse to grant permission for a development which is perceived to be unsafe and to pose unacceptable health and safety hazards, even though that perception is not supported by opinions of experts.

There is no doubt that the proposed development gave rise to very substantial public opposition. As the judge said, this was not at all surprising. The council gave four reasons for refusing permission, the second of which was withdrawn before the inquiry began. The first, which asserted the increase in Newport of heavy goods vehicles carrying toxic or other hazardous waste materials would give rise to additional public safety risks, as to which the inspector found that the council had offered no substantial evidence, needs no separate consideration as it is no longer material. The third and fourth reasons were as follows:

> "(3) In the interests of public safety and proper planning, major waste treatment plants should not be located within urban communities.
>
> (4) The proposed development is perceived by the local community to be contrary to the public interest generally and to their interests in particular."

The inspector's conclusion was that there was no evidence to support the third reason. As to the fourth, he accepted the accuracy of what was asserted, but found there was no valid basis for the subjective perception. Since the Secretary of State agreed with, and adopted, the reasoning of the ***178*** inspector when making the order as to costs, it is to the inspector's recommendation in his report dealing with the developer's application for costs that regard must be had.

However, it is necessary first to make some reference to his recommendations and findings as to the substantive appeal. In summary what he said was that, while he accepted that there was in the minds of the residents of the area a perception that the plant would occasion unacceptable danger to public health, and that that perception would remain however much reassurance there was from experts, there was no objective basis for reasonable fears. He concluded as follows in paragraph 9.33:

> "As the proposal would be in accordance with the policies of the Development Plan, determination of the appeal should be in favour of the development, unless there are material considerations which indicate otherwise. In my opinion, the above material considerations do not indicate otherwise. However, there remains the question of public perception and opinion. It is expected that the views of residents will be taken into account when determining applications for planning permission. Nevertheless, in land-use planning considerations, public opinion should be founded on valid planning reasons and supported by substantial evidence. In this instance, it seems to me that the evidence produced in opposition to the development has not indicated that the proposal would cause demonstrable harm to the environment or public health. The public's perception of the hazards and risks remains. In my judgment, this is a factor which counts against the development. Nevertheless, bearing in mind the actual evidence regarding the foreseeable risks to health and all the circumstances surrounding this case, I find that the opposition of the general public, expressed through various bodies and individuals as well as the Local Planning Authority, is insufficient to override the acceptability of the proposals in terms of Development Plan Policies and the lack of demonstrable harm to the public or the environment."

I turn next to the reasons given for ordering the council to pay the developer's costs. Directing himself in accordance with Circular 5/87, the inspector noted that neither the council's offices nor the statutory bodies consulted recommended refusal and that the experts whom the authority had consulted had reported that in land-use terms there would be no significant environmental impact and agreed with the conclusions of the environmental statement on siting, overall design and intended operation. Against this background, he said, any evidence relied on to support refusal on the grounds of safety and risk should be "strong and convincing".

The inspector then summarised the evidence, apart from that relating to the perceptions of local people and concluded that there had been nothing to establish a prima facie case for refusing permission. It will be remembered, from the passage I have cited from his substantive report, ***179*** that he considered that the public perception of the hazards and risks remained and was a factor against the development, but one which in the light of the evidence was insufficient to justify refusal of permission for the development.

Returning to this topic in his costs report, he said:

> "There was substantial local interest in the proposal. That is understandable, bearing in mind the publicity which related to the other nearby plants, one at Pontypool and the other at Caerleon. No doubt the fire at KwikSave added to local concern over accidents at commercial and industrial premises. There was, therefore, an intense and justifiable local sensitivity to the issue of chemical waste treatment plants. Whilst there is substantial evidence of substantial local opposition, it seems to me that that is not the same as significant land-use planning evidence. Although the objections made to the council indicated the genuine and widespread public concern, the evidence offered by many of the objectors related to the waste disposal industry in its widest and most general aspects and to opposition against a chemical waste treatment plant in general and consequently to its location in Newport. I ask the question: is that extensive perceived public concern sufficient reason to refuse planning permission? The Local Planning Authority take the view that it is. Bearing in mind the advice of Circular 5/87 and PPG1, it seems to me that that perception of public concern, without substantial supporting evidence does not amount to demonstrable harm nor is it, on its own, a sound and clear cut reason sufficient to warrant the refusal of planning permission."

Commenting on the council's individual reasons for refusing permission, the inspector said of this matter of local perception:

> "Clearly the development was perceived by the local community to be unsafe and to pose unacceptable public health and safety hazards and there was evidence to support the volume of public concern. However, in my opinion, that public concern was not supported by substantial evidence, even when founded on valid planning reasons.
>
> Accordingly, it seems to me that the Council did not behave reasonably in refusing planning permission and that, as a consequence, the applicants have incurred the unnecessary expense of an inquiry."

The principal argument advanced by the applicants in support of the detailed grounds of appeal can be simply stated. What is said is that, once it is accepted that the public's perception and risk to their safety inherent in the proposed development, even if objectively unfounded, is a material consideration, it must follow that the unfounded perception alone *can* , in an appropriate case, justify refusal. The inspector and the Secretary of State failed to consider whether the present was such a case, but instead approached the case on the basis that unless there was evidence to substantiate the public's perception, that perception could never be a ***180** ground for refusing permission. This was inconsistent with the acceptance of the proposition that the perception was a material consideration. The Secretary of State, therefore erred in law by approaching the question of the reasonableness or otherwise of the council's refusal of permission on the basis that, absent reasonable grounds on which the public perception was based, it was necessarily unreasonable.

It is also contended, as I have already noted, that the judge in determining the application for judicial review did not address this argument because he based his judgment on the assumption that the inspector had found that there was no substance in planning terms in the public's perception, whereas the inspector had held that it *was* a planning consideration, but one which in the light of all the evidence was "insufficient to override the acceptability of the proposals in terms of the development plan policies and the lack of demonstrable harm to the public or the environment" .

It is submitted that the source of error into which the inspector and the Secretary of State fell was their misconstruction of paragraph 9 of Circular 5/87. That paragraph, it is argued, is concerned with local opposition to a proposed development and is saying that there should be reasonable grounds for the opposition. It is not saying that there must be reasonable grounds for the perception. On the contrary, it is the perception which may constitute a ground for the opposition. The argument is that the inspector and the Secretary of State, who adopted his reasons, misconstruing this paragraph and paragraph 18 of PPG1, treated them as in effect requiring that there should be objective grounds for the perception rather than for the opposition. It is said that the judge did not address this argument, but wrongly treated fear as synonymous with opposition and, therefore, regarded the Circular as applying.

Finally, three particular points are urged, which I summarise briefly. It is said that the Secretary of State misconstrued the requirement for substantial evidence as requiring something more than substantial evidence of public concern and anxiety. It is said that he failed to consider properly the evidence that was before the inspector. Further, it is said that if the guidance in effect condemns as irrational any refusal based on public perception alone, it is in itself irrational.

Those arguments have been extensively developed by Mr Howell Q.C. before us today in his submissions. Miss Robinson, on behalf of the Secretary of State, has contested the validity of any of those contentions. It will be observed that there is no assertion that the decision to award costs was unreasonable in the *Wednesbury* sense. Accordingly, the challenge before the judge depended on its being shown that the Secretary of State had erred in law in one or more of the respects relied on, and whether or not the judge properly understood or dealt with the arguments before him. ***181** That, in the last resort, is the position on this appeal. I shall therefore consider the validity of the criticisms advanced in respect of the Secretary of State's decision (or at any rate some of them) without taking time to analyse the way in which the learned judge dealt with those submissions.

There is, in my view, no doubt that a substantial part of the reasoning of the inspector in that part of his report where he states his conclusions (*i.e* . paragraph 5) addresses the question whether there were any objective grounds for the public perception that the plant would give rise to significant risks to the local inhabitants. This is, however, in my view understandable, given that the arguments relied on by the council, as Miss Robinson reminded us, in resisting the order for costs included arguments to the effect that the decision was not unreasonable because the evidence before them showed that there were, objectively viewed, good grounds for fear. I refer to parts of paragraph 4 of the Inspector's report on costs. In paragraph 4.03(a) he says that the submission was that the evidence before him showed that the plant had not been shown to be safe; (b) that, in any event, a proposal which gave rise to this degree of public concern was not appropriate for an urban area. So the inspector could not properly have disregarded arguments as to substantive risks.

However, it is contended that he had no real regard to the argument that perceived safety risks, even though unjustified, could constitute a valid ground for refusal. Rather, the main thrust of his reasoning is to the effect that, absent any evidence to substantiate the validity of those fears, perceived hazards alone could not as a matter of principle amount to good planning grounds for rejecting an application.

Miss Robinson for the Secretary of State accepts that public perception, even if not objectively justified, is a material consideration to be taken into account on the issue of costs. She seeks to make a distinction in two ways from the way in which Mr Howell puts the matter. First, she does not conceded that it is a relevant planning consideration (*i.e.* it is not relevant in land-use terms), but it is nevertheless relevant to the decision whether planning permission should be granted. Secondly, she seeks to argue that the authorities show that it is only rarely or in exceptional cases that such a consideration would be held to be decisive, absent other planning considerations militating against the grant of planning permission. Those differences apart, it is common ground between the parties to this appeal that a perceived concern about safety is a material consideration which must be taken into account and given such weight as may be appropriate in the particular circumstances of the case. Miss Robinson's submission is that in this case the public's perception of risk was taken into account by the inspector and the Secretary of State as a material consideration, and found to be insufficient to give reasonable grounds for refusing permission. She submits that the Secretary of State was right to have regard ***182** to the policy of Circular 5/87, and she argues that he is not shown to have misconstrued or misapplied it. Since the question whether the public perception was soundly based remained in issue, and because of the terms of the Circular, it was necessary for the inspector to decide that question and his conclusion that it was not soundly based was a material one to which he could have regard in deciding the question of reasonableness. The decision was not made on the basis that mere perception could never justify refusal, but was a decision that in the circumstances of this case it did not do so. Therefore, Miss Robinson submits, there was no error of law on the part of the inspector and, therefore, none on the part of the Secretary of State.

Given the substantial agreement between counsel as to the law, it does not seem to me necessary to cite any of the five or six authorities to which we were helpfully referred by counsel. Nor, as I see it, is it necessary to consider the criticisms of the judge's approach because, as I have already pointed out, it is with the approach and reasoning of the inspector, whose conclusions the Secretary of State in effect adopted, that we are essentially concerned. Has it been shown that he erred in law in his approach to the resolution of the question whether the council had acted reasonably or unreasonably in refusing permission? Though it is of course stating the obvious, I nevertheless emphasise that we are not concerned with the merits of the decision, but with whether it was lawfully reached in the sense that all material and no immaterial matters were taken into account.

That the inspector accepted that genuine public perception of danger, even if not objectively well-founded was a valid planning consideration, is apparent from what he said in paragraph 9.33 of his substantive report where, it will be remembered, having stated his conclusion that the evidence had not established that there would be any demonstrable harm to the environment or to public health, he continued:

> "The public's perception of the hazards and risks remains. In my judgment this is a factor which counts against the development."

He went on to conclude that it was insufficient to override the other considerations.

However, as I suggest the passages I have cited show, in his costs report he adopted a different approach. As I read the material passages in which he gives his reasons for his award of costs, he was, as Mr Howell asserts on the appellant's behalf, directing himself that:

> ". . . perception of public concern without substantial supporting evidence does not amount to demonstrable harm nor is it, on its own, a sound and clear-cut reason sufficient to warrant the refusal of planning permission."

Miss Robinson's argument is that this and the passages I have cited ****183*** from paragraphs 5.06 and 5.07 can be understood as accepting that perception of fear which is not objectively based *can* but on the particular facts of this case *did not* constitute a valid reason for refusing permission, must in my view be rejected since it is simply incompatible with the language he uses. Miss Robinson places particular emphasis on the latter part of paragraph 5.05. Mr Howell submits that in the last two sentences of that paragraph the inspector is stating a general proposition of law, rather than addressing himself to the particular facts of this case. Miss Robinson seeks to refute that by pointing to the fact that he uses the word "that" on two occasions in a context which, she argues, suggests that he is addressing the facts of this particular case.

For my own part, I have concluded that if the passage is read as a whole the proper construction is that the inspector was indeed, as Mr Howell submits, stating a general proposition, a proposition contrary to what he had said in his earlier report dealing with the substantive application. If there were any doubt about the matter, it is in my judgment dispelled by the words in sub-paragraph (04) of paragraphs 5.06 and 5.07, which I have already quoted and which seem to me to be inconsistent with any construction other than that the inspector was saying that in no circumstances could an objectively unfounded fear constitute by itself a reason for refusing planning permission. Moreover, had he had in mind his conclusion in the substantive appeal, as Miss Robinson suggests he must as a matter of common sense have done, he would in my view inevitably have used different language from that which he employed in the passage which I have cited from his costs decision. I accept Mr Howell's submission that the only sensible construction of the material words is that the inspector, and, therefore, the Secretary of State who adopted his reasoning, was approaching the question whether the council had behaved unreasonably on the basis that the genuine fears on the part of the public, unless objectively justified, could never amount to a valid ground for refusal. That was in my judgment

a material error of law. In the circumstances I consider it unnecessary to deal with any of the other points raised and relied on by Mr Howell. I would on that ground quash his decision and remit the matter for reconsideration.

ALDOUS L.J.:

I agree. Having listened to the submissions of Mr Howell Q.C. and Miss Robinson, I have not in the end discerned any dispute as to the relevant law.

A planning authority may properly take into account the perceived fears of the public when deciding whether a proposed development would affect the amenity of an area. Miss Robinson for the Secretary of State submitted that such fears will rarely provide grounds for refusal of planning permission, whereas Mr Howell for the council submitted that **184* each case will depend on its facts. Both may be right. However, perceived fears of the public are a planning factor which can amount (perhaps rarely) to a good reason for refusal of planning permission. It is therefore in my view "another planning reason" within paragraph 9 of Circular 14/85.

That being the law, the inspector should have considered whether the council acted unreasonably so that it was not necessary for the case to come before the Secretary of State. In so doing, he should have accepted that the perceived fears, even though they were not soundly based upon scientific or logical fact, were a relevant planning consideration and then gone on to decide whether, upon the facts of the particular case, they were of so little weight as to result in the conclusion that refusal by the council was unreasonable.

Miss Robinson submitted that the Inspector must have had in mind that perceived fears were a relevant factor and, when read in that light, his decision was unobjectionable. Mr Howell submitted that, upon the wording of the decision, it appeared that he did not have that in mind. The inspector appeared to have concluded that if the fears were not based on scientific, technical or logical fact, it followed that refusal by the council was unreasonable with the result that costs should be paid.

Hutchison L.J. has read the relevant passages from the inspector's decision. I believe that they can only be read in one way, namely that suggested by Mr Howell for the reasons given by my Lord. It may be that what is said in that decision does not reflect the true views of the inspector, but we have to interpret what he said.

The judge appears in my view to have read the decision letter in a somewhat similar way. He said at page 7 of the transcript:

> "It follows that the Inspector had come to the conclusion that, although public perception was a relevant consideration, it had no substance in planning terms. In those circumstances there was no justification by way of clear-cut sound planning for refusing planning permission. It was on the basis of that approach that the Inspector, when considering the question of costs, came to the determination that he did."

In that passage the judge points to the illogical conclusion that he thought the inspector had reached, namely that public perception was a relevant consideration, but it had no substance in planning terms. How then could it be relevant on a planning inquiry, as the inspector held? In any case, both Miss Robinson and Mr Howell accepted that public perception is a factor in planning terms and on rare occasions can be grounds for refusal.

The judge went on at page 9 to consider the effects of Circular 5/87. He said:

> "The position was, and comes out clearly from the documents, that this was a case where the public quite understandably and, as the inspector **185* recognised, with some justification had real fears about what might happen were the development to be permitted. As the Circular, however, makes

> clear, that is not of itself to be an adequate reason for refusing a planning permission which should otherwise be granted and if, in fact, there is no significant evidence or substantial evidence to support the fear then for a Council to rely upon it, it must fall within paragraph 9 so as to carry with it the consequence as to costs which occurred in this case."

In my view the judge was wrong to come to that conclusion. The Circular does not have that meaning. The Circular states that local opposition is not a reasonable ground for refusal. Mr Howell did not suggest that it was. However, there is a difference between local opposition and a perceived fear which by itself could affect the amenity of the area. The Circular makes it clear that if there are planning reasons, refusal may be reasonable. A perceived fear by the public can in appropriate (perhaps rare) occasions be a reason for refusing planning permission, whether or not that has caused local opposition. It follows that the Circular contemplates that planning reasons such as public perception can (again, perhaps rarely) warrant refusal, even though the factual basis for that fear has no scientific or logical reason. That being so, I conclude that the judge wrongly interpreted the Circular. For the reasons given by Hutchison L.J., I agree with the order proposed by him.

STAUGHTON L.J.:

The conclusion which I have reached is that this appeal should be dismissed. It is right to say that Mr Howell sensibly elected not to address us in reply when he heard that two members of the court were in his favour. It is also right to say that his opening address was by no means abbreviated.

The statute entrusts the task for deciding whether there shall be an award of costs to the Secretary of State. The decision is not for the courts but for him. We can interfere if his decision was unlawful or irrational or procedurally improper. It is said in this case that it was unlawful or irrational.

I feel that one has to start with paragraph 9 of the Circular. Mr Howell submitted that although that paragraph was dealing with the effect of local opposition, it was not dealing with fear (whether justified or not) in local people. I do not agree with that conclusion. It seems to me that it is dealing with local opposition of any kind and the weight that one must give to opposition.

The second sentence of paragraph 9 seems to me to conflict with the fourth. The second sentence says:

> ". . . on its own, local opposition to a proposal is not a reasonable ground for the refusal of a planning application unless that opposition is founded on valid planning reasons which are supported by substantial evidence." ***186**

The fourth sentence says:

> "They are unlikely to be considered to have acted reasonably in refusing an application if no material departure from statutory plans or policies is involved and there are no other planning reasons why permission should be refused."

The fourth sentence does not lay down an absolute rule, but merely says that in those circumstances a refusal is unlikely to be reasonable. In my judgment the fourth sentence prevails over the second, and there is no absolute rule.

That seems to me to accord with the substantive law, at any rate as it was put to us by Miss Robinson. In *Westminster City Council v. Great Portland Estates Plc [1985] 1 A.C. 661* , Lord Scarman at page 670 said:

> "It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present of course indirectly as the background to the consideration of the character of land use. It can, however, and sometimes should, be given direct effect as an exceptional or special circumstance. But such circumstances, when they arise, fall to be considered not as a general rule but as exceptions to a general rule to be met in special cases."

Applying that to the present case, I would say that local fears which are not, in fact, justified can rank as part of the human factor and could be given direct effect as an exceptional or special circumstance. I would not go so far Glidewell L.J. did in *Gateshead Metropolitan Borough Council v. Secretary of State for the Environment [1994] 1 P.L.R. 85* , where he said at page 95:

> ". . . if in the end public concern is not justified, it cannot be conclusive."

Glidewell L.J. is a great authority on planning matters, but in this instance I cannot agree with him.

So I look to see whether the inspector did take into account public fears as a special circumstance. In my judgment he did. He said as much in his decision letter on the substantive application. He said:

> "The public's perception of the hazards and risks remains. In my judgment, this is a factor which counts against the development."

He had earlier said that public opinion should be founded on valid planning reasons and supported by substantial evidence.

But then in his decision on costs, which had adopted by the Secretary of State, he said:

> "I asked the question is that extensive perceived public concern sufficient reason to refuse planning permission? The local planning authority take the view that it is. Bearing in mind the advice of Circular 5/87 and PPGI it ***187*** seems to me that that perception of public concern without

> substantial supporting evidence does not amount to demonstrable harm nor is it on its own a sound and clear-cut reason sufficient to warrant refusal of planning permission."

That was not in my the judgment an abstract statement of law, but the inspector's assessment of the facts in this case. Perhaps in reaching that conclusion I am influenced by what he said in his substantive decision letter which was dated in the same month as his decision on costs. I am prepared to assume that he did not intend to contradict in a second document what he had said in the first.

It is true that the passage at paragraph .04 says that public concern was not supported by substantial evidence, even when founded on valid planning reasons. I have difficulty with that sentence, not least because I do not understand what it means. But I can see nothing irrational or unlawful in the inspector's decision as I have construed it. He took into account the public fear; he rightly concluded that it was not supported by any planning grounds; and in those circumstances he was entitled to conclude that the council's opposition was unreasonable. I would, as I have said, have dismissed this appeal.

ORDER: *Appeal allowed with costs; the matter to be remitted for reconsideration .*

Representation

Solicitors— Head of Legal and Administrative Services, Newport Country Borough Council , The Treasury Solicitor .

NEWPORT BC v. THE SECRETARY OF STATE FOR WALES AND BROWNING FERRIS ENVIRONMENTAL SERVICES LTD

COURT OF APPEAL (CIVIL DIVISION)

(Staughton L.J., Aldous L.J., Hutchison L.J.), June 18, 1997

Planning permission for chemical waste treatment works—decision of the Secretary of State to make an award of costs against local planning authority for unreasonable behaviour—refusal based upon public perception of risks from proposed development—whether local planning authority may ever reasonably refuse to grant permission for development which is perceived to be unsafe even where that perception is not supported by the evidence.

The second respondents, Browning Ferris Environmental Services Limited ("BF") applied for planning permission to develop a chemical waste treatment plant at Newport, Gwent. The Appellant, Newport Borough Council ("NBC"), as local planning authority refused the application. One of the grounds for refusing planning permission was that the proposed development was perceived by the local community to be contrary to the public interest in that there were unacceptable risks to public health and safety. BF appealed and the first respondent, the Secretary of State for Wales ("SSW") allowed the appeal. In addition, SSW made an award of costs against NBC on the grounds of unreasonable behaviour. In doing so SSW relied upon the conclusions of the inspector appointed to hear the appeal who concluded that whilst public perception of risk was a relevant planning consideration, this perception was not supported by substantial evidence and that accordingly NBC had not behaved reasonably when relying upon that reason for refusal. NBC applied to quash the award of costs. The appeal was dismissed by Latham J.

On appeal to the Court of Appeal, NBC argued that the public's perception of risk was a material planning consideration and that even if that perception was unfounded it could, in an appropriate case, be capable of justifying a refusal of planning permission. SSW had unlawfully considered that unless there was evidence to substantiate the public's perception, that perception could never be a ground for refusing planning permission.

Held, in allowing the appeal and remitting the matter for reconsideration:

It was apparent from the inspector's main decision letter that genuine public perception of danger, even if not objectively well-founded, was a valid planning consideration. When the separate decision letter which dealt with the costs award was considered, the inspector's conclusion that genuine public fears, unless objectively justified, could never amount to a valid ground for refusal was, therefore, a material error of law (*per* Hutchison L.J. and Aldous L.J.).

(*Per* Staughton L.J. dissenting.) The inspector had taken public fears into account as a special circumstance. He had assessed the facts of the case and rightly concluded that the public fear was not supported by any planning grounds; in those circumstances there was no contradiction between the two decision letters and the inspector was entitled to conclude that NBC's opposition was unreasonable.

Legislation referred to:

Town and Country Planning Act 1990, s.320(2).
Local Government Act 1972, s.250(5).

Cases referred to:

Westminster CC v. Great Portland Estates Plc [1985] 1 A.C. 661.
Gateshead MBC v. Secretary of State for the Environment [1994] 1 P.L.R. 85.

Policy referred to:

Circular 5/87, paras 5–7, 9.

Mr J. Howell Q.C. appeared on behalf of the appellant.
Miss A. Robinson appeared on behalf of the first respondent.

STAUGHTON: L.J.: Hutchison L.J. will give the first judgment.

HUTCHISON L.J.: This is an appeal from a judgment of Latham J. who on July 11, 1995 dismissed Newport Borough Council's application to quash the decision of the Secretary of State for Wales of August 23, 1993, ordering them to pay to developers, Browning Ferris Environmental Services Limited, the costs of a planning inquiry in October 1991. The inquiry came about because the council had refused planning permission for the construction of a chemical waste treatment plant on land at the junction of Stephenson Street and Corporation Street in Newport, Gwent.

The ground on which the Secretary of State made the order was that the council had behaved unreasonably in refusing planning permission, and

thus put the developers to unnecessary expense. It is accepted that if it was open to the Secretary of State on the material before him to conclude that the council had behaved unreasonably, he was entitled to make the order. This is because there is power by virtue of section 320(2) of the Town and Country Planning Act 1990 and section 250(5) of the Local Government Act 1972 to make orders as to costs of planning inquiries and the Secretary of State's declared policy in Circular 5/87 giving guidance as to awards of costs in such proceedings provides that costs should be ordered against a party "only on grounds of unreasonable behaviour". I shall cite those passages of the Circular relevant to the present case. Part 1 in a paragraph headed "Costs in respect of appeals and other planning proceedings" provides:

> "5. In planning proceedings the parties are normally expected to meet their own expenses and costs are awarded only on grounds of unreasonable behaviour. ...
> 6. Before an award of costs is made, the following conditions will normally need to be met:
> (i) one of the parties has appealed for an award at the appropriate stage of the proceedings ... ;
> (ii) the party against whom the claim is made has acted unreasonably;
> (iii) this unreasonable conduct has caused the party making the application to incur expense unnecessarily, either because it should not have been necessary for the case to come before the Secretary of State for determination or because of the manner in which another party has conducted his part of the proceedings."

Under the heading "Awards against planning authorities—unreasonable refusal of planning permission", one finds this:

> "7. A planning authority should not prevent, inhibit or delay development which could reasonably be permitted. In accordance with the advice given in Circular 22/80 ... a planning authority should refuse planning permission only where this serves a sound and clear planning purpose and the economic effects have been taken into account. As stated in Circular 14/85 ... 'There is ... always a presumption in favour of allowing applications for development, having regard to all material considerations, unless that development would cause demonstrable harm to interests of acknowledged importance. Reasons for refusal should be complete, precise, specific and relevant to the application. In any appeal proceedings authorities will be expected to produce evidence to substantiate their reasons for refusal ... While planning authorities are not bound to follow advice from their officers or from statutory bodies such as Water Authorities or the Health and Safety Executive, or from other Government Departments, they will be expected to show that they have reasonable planning grounds for a decision taken against such advice and that they

> were able to produce evidence to support those grounds. If they fail to do so, costs may be awarded against them."

Under the heading "Examples of unreasonable refusal", paragraph 9 reads:

> "Planning authorities are expected to take into accound the views of local residents when determining a planning application. Nevertheless, on its own, local opposition to a proposal is not a reasonable ground for the refusal of the planning application unless that opposition is founded upon valid planning reasons which are supported by substantial evidence. While the planning authority will need to consider the substance of any local opposition to the proposal their duty is to decide a case on its planning merits. They are unlikely to be considered to have acted reasonably in refusing an application if no material departure from statutory plans or policies is involved and there are no other planning reasons why permission should be refused."

As will become apparent, the appellants attach particular importance to paragraph 9, as indeed does the respondent.

The appellants submit that the decision of the Secretary of State gives rise to an important point of planning law with which they say the judge did not deal, namely whether a local authority may ever reasonably refuse to grant permission for a development which is perceived to be unsafe and to pose unacceptable health and safety hazards, even though that perception is not supported by opinions of experts.

There is no doubt that the proposed development gave rise to very substantial public opposition. As the judge said, this was not at all surprising. The council gave four reasons for refusing permission, the second of which was withdrawn before the inquiry began. The first, which asserted the increase in Newport of heavy goods vehicles carrying toxic or other hazardous waste materials would give rise to additional public safety risks, as to which the inspector found that the council had offered no substantial evidence, needs no separate consideration as it is no longer material. The third and fourth reasons were as follows:

> "(3) In the interests of public safety and proper planning, major waste treatment plants should not be located within urban communities.
>
> (4) The proposed development is perceived by the local community to be contrary to the public interest generally and to their interests in particular."

The inspector's conclusion was that there was no evidence to support the third reason. As to the fourth, he accepted the accuracy of what was asserted, but found there was no valid basis for the subjective perception. Since the Secretary of State agreed with, and adopted, the reasoning of the

inspector when making the order as to costs, it is to the inspector's recommendation in his report dealing with the developer's application for costs that regard must be had.

However, it is necessary first to make some reference to his recommendations and findings as to the substantive appeal. In summary what he said was that, while he accepted that there was in the minds of the residents of the area a perception that the plant would occasion unacceptable danger to public health, and that that perception would remain however much reassurance there was from experts, there was no objective basis for reasonable fears. He concluded as follows in paragraph 9.33:

> "As the proposal would be in accordance with the policies of the Development Plan, determination of the appeal should be in favour of the development, unless there are material considerations which indicate otherwise. In my opinion, the above material considerations do not indicate otherwise. However, there remains the question of public perception and opinion. It is expected that the views of residents will be taken into account when determining applications for planning permission. Nevertheless, in land-use planning considerations, public opinion should be founded on valid planning reasons and supported by substantial evidence. In this instance, it seems to me that the evidence produced in opposition to the development has not indicated that the proposal would cause demonstrable harm to the environment or public health. The public's perception of the hazards and risks remains. In my judgment, this is a factor which counts against the development. Nevertheless, bearing in mind the actual evidence regarding the foreseeable risks to health and all the circumstances surrounding this case, I find that the opposition of the general public, expressed through various bodies and individuals as well as the Local Planning Authority, is insufficient to override the acceptability of the proposals in terms of Development Plan Policies and the lack of demonstrable harm to the public or the environment."

I turn next to the reasons given for ordering the council to pay the developer's costs. Directing himself in accordance with Circular 5/87, the inspector noted that neither the council's offices nor the statutory bodies consulted recommended refusal and that the experts whom the authority had consulted had reported that in land-use terms there would be no significant environmental impact and agreed with the conclusions of the environmental statement on siting, overall design and intended operation. Against this background, he said, any evidence relied on to support refusal on the grounds of safety and risk should be "strong and convincing".

The inspector then summarised the evidence, apart from that relating to the perceptions of local people and concluded that there had been nothing to establish a prima facie case for refusing permission. It will be remembered, from the passage I have cited from his substantive report,

that he considered that the public perception of the hazards and risks remained and was a factor against the development, but one which in the light of the evidence was insufficient to justify refusal of permission for the development.

Returning to this topic in his costs report, he said:

> "There was substantial local interest in the proposal. That is understandable, bearing in mind the publicity which related to the other nearby plants, one at Pontypool and the other at Caerleon. No doubt the fire at KwikSave added to local concern over accidents at commercial and industrial premises. There was, therefore, an intense and justifiable local sensitivity to the issue of chemical waste treatment plants. Whilst there is substantial evidence of substantial local opposition, it seems to me that that is not the same as significant land-use planning evidence. Although the objections made to the council indicated the genuine and widespread public concern, the evidence offered by many of the objectors related to the waste disposal industry in its widest and most general aspects and to opposition against a chemical waste treatment plant in general and consequently to its location in Newport. I ask the question: is that extensive perceived public concern sufficient reason to refuse planning permission? The Local Planning Authority take the view that it is. Bearing in mind the advice of Circular 5/87 and PPG1, it seems to me that that perception of public concern, without substantial supporting evidence does not amount to demonstrable harm nor is it, on its own, a sound and clear cut reason sufficient to warrant the refusal of planning permission."

Commenting on the council's individual reasons for refusing permission, the inspector said of this matter of local perception:

> "Clearly the development was perceived by the local community to be unsafe and to pose unacceptable public health and safety hazards and there was evidence to support the volume of public concern. However, in my opinion, that public concern was not supported by substantial evidence, even when founded on valid planning reasons.
>
> Accordingly, it seems to me that the Council did not behave reasonably in refusing planning permission and that, as a consequence, the applicants have incurred the unnecessary expense of an inquiry."

The principal argument advanced by the applicants in support of the detailed grounds of appeal can be simply stated. What is said is that, once it is accepted that the public's perception and risk to their safety inherent in the proposed development, even if objectively unfounded, is a material consideration, it must follow that the unfounded perception alone *can*, in an appropriate case, justify refusal. The inspector and the Secretary of State failed to consider whether the present was such a case, but instead approached the case on the basis that unless there was evidence to substantiate the public's perception, that perception could never be a

ground for refusing permission. This was inconsistent with the acceptance of the proposition that the perception was a material consideration. The Secretary of State, therefore erred in law by approaching the question of the reasonableness or otherwise of the council's refusal of permission on the basis that, absent reasonable grounds on which the public perception was based, it was necessarily unreasonable.

It is also contended, as I have already noted, that the judge in determining the application for judicial review did not address this argument because he based his judgment on the assumption that the inspector had found that there was no substance in planning terms in the public's perception, whereas the inspector had held that it *was* a planning consideration, but one which in the light of all the evidence was "insufficient to override the acceptability of the proposals in terms of the development plan policies and the lack of demonstrable harm to the public or the environment".

It is submitted that the source of error into which the inspector and the Secretary of State fell was their misconstruction of paragraph 9 of Circular 5/87. That paragraph, it is argued, is concerned with local opposition to a proposed development and is saying that there should be reasonable grounds for the opposition. It is not saying that there must be reasonable grounds for the perception. On the contrary, it is the perception which may constitute a ground for the opposition. The argument is that the inspector and the Secretary of State, who adopted his reasons, misconstruing this paragraph and paragraph 18 of PPG1, treated them as in effect requiring that there should be objective grounds for the perception rather than for the opposition. It is said that the judge did not address this argument, but wrongly treated fear as synonymous with opposition and, therefore, regarded the Circular as applying.

Finally, three particular points are urged, which I summarise briefly. It is said that the Secretary of State misconstrued the requirement for substantial evidence as requiring something more than substantial evidence of public concern and anxiety. It is said that he failed to consider properly the evidence that was before the inspector. Further, it is said that if the guidance in effect condemns as irrational any refusal based on public perception alone, it is in itself irrational.

Those arguments have been extensively developed by Mr Howell Q.C. before us today in his submissions. Miss Robinson, on behalf of the Secretary of State, has contested the validity of any of those contentions. It will be observed that there is no assertion that the decision to award costs was unreasonable in the *Wednesbury* sense. Accordingly, the challenge before the judge depended on its being shown that the Secretary of State had erred in law in one or more of the respects relied on, and whether or not the judge properly understood or dealt with the arguments before him.

That, in the last resort, is the position on this appeal. I shall therefore consider the validity of the criticisms advanced in respect of the Secretary of State's decision (or at any rate some of them) without taking time to analyse the way in which the learned judge dealt with those submissions.

There is, in my view, no doubt that a substantial part of the reasoning of the inspector in that part of his report where he states his conclusions (*i.e.* paragraph 5) addresses the question whether there were any objective grounds for the public perception that the plant would give rise to significant risks to the local inhabitants. This is, however, in my view understandable, given that the arguments relied on by the council, as Miss Robinson reminded us, in resisting the order for costs included arguments to the effect that the decision was not unreasonable because the evidence before them showed that there were, objectively viewed, good grounds for fear. I refer to parts of paragraph 4 of the Inspector's report on costs. In paragraph 4.03(a) he says that the submission was that the evidence before him showed that the plant had not been shown to be safe; (b) that, in any event, a proposal which gave rise to this degree of public concern was not appropriate for an urban area. So the inspector could not properly have disregarded arguments as to substantive risks.

However, it is contended that he had no real regard to the argument that perceived safety risks, even though unjustified, could constitute a valid ground for refusal. Rather, the main thrust of his reasoning is to the effect that, absent any evidence to substantiate the validity of those fears, perceived hazards alone could not as a matter of principle amount to good planning grounds for rejecting an application.

Miss Robinson for the Secretary of State accepts that public perception, even if not objectively justified, is a material consideration to be taken into account on the issue of costs. She seeks to make a distinction in two ways from the way in which Mr Howell puts the matter. First, she does not conceded that it is a relevant planning consideration (*i.e.* it is not relevant in land-use terms), but it is nevertheless relevant to the decision whether planning permission should be granted. Secondly, she seeks to argue that the authorities show that it is only rarely or in exceptional cases that such a consideration would be held to be decisive, absent other planning considerations militating against the grant of planning permission. Those differences apart, it is common ground between the parties to this appeal that a perceived concern about safety is a material consideration which must be taken into account and given such weight as may be appropriate in the particular circumstances of the case. Miss Robinson's submission is that in this case the public's perception of risk was taken into account by the inspector and the Secretary of State as a material consideration, and found to be insufficient to give reasonable grounds for refusing permission. She submits that the Secretary of State was right to have regard

to the policy of Circular 5/87, and she argues that he is not shown to have misconstrued or misapplied it. Since the question whether the public perception was soundly based remained in issue, and because of the terms of the Circular, it was necessary for the inspector to decide that question and his conclusion that it was not soundly based was a material one to which he could have regard in deciding the question of reasonableness. The decision was not made on the basis that mere perception could never justify refusal, but was a decision that in the circumstances of this case it did not do so. Therefore, Miss Robinson submits, there was no error of law on the part of the inspector and, therefore, none on the part of the Secretary of State.

Given the substantial agreement between counsel as to the law, it does not seem to me necessary to cite any of the five or six authorities to which we were helpfully referred by counsel. Nor, as I see it, is it necessary to consider the criticisms of the judge's approach because, as I have already pointed out, it is with the approach and reasoning of the inspector, whose conclusions the Secretary of State in effect adopted, that we are essentially concerned. Has it been shown that he erred in law in his approach to the resolution of the question whether the council had acted reasonably or unreasonably in refusing permission? Though it is of course stating the obvious, I nevertheless emphasise that we are not concerned with the merits of the decision, but with whether it was lawfully reached in the sense that all material and no immaterial matters were taken into account.

That the inspector accepted that genuine public perception of danger, even if not objectively well-founded was a valid planning consideration, is apparent from what he said in paragraph 9.33 of his substantive report where, it will be remembered, having stated his conclusion that the evidence had not established that there would be any demonstrable harm to the environment or to public health, he continued:

> "The public's perception of the hazards and risks remains. In my judgment this is a factor which counts against the development."

He went on to conclude that it was insufficient to override the other considerations.

However, as I suggest the passages I have cited show, in his costs report he adopted a different approach. As I read the material passages in which he gives his reasons for his award of costs, he was, as Mr Howell asserts on the appellant's behalf, directing himself that:

> "... perception of public concern without substantial supporting evidence does not amount to demonstrable harm nor is it, on its own, a sound and clear-cut reason sufficient to warrant the refusal of planning permission."

Miss Robinson's argument is that this and the passages I have cited

from paragraphs 5.06 and 5.07 can be understood as accepting that perception of fear which is not objectively based *can* but on the particular facts of this case *did not* constitue a valid reason for refusing permission, must in my view be rejected since it is simply incompatible with the language he uses. Miss Robinson places particular emphasis on the latter part of paragraph 5.05. Mr Howell submits that in the last two sentences of that paragraph the inspector is stating a general proposition of law, rather than addressing himself to the particular facts of this case. Miss Robinson seeks to refute that by pointing to the fact that he uses the word "that" on two occasions in a context which, she argues, suggests that he is addressing the facts of this particular case.

For my own part, I have concluded that if the passage is read as a whole the proper construction is that the inspector was indeed, as Mr Howell submits, stating a general proposition, a proposition contrary to what he had said in his earlier report dealing with the substantive application. If there were any doubt about the matter, it is in my judgment dispelled by the words in sub-paragraph (04) of paragraphs 5.06 and 5.07, which I have already quoted and which seem to me to be inconsistent with any construction other than that the inspector was saying that in no circumstances could an objectively unfounded fear constitute by itself a reason for refusing planning permission. Moreover, had he had in mind his conclusion in the substantive appeal, as Miss Robinson suggests he must as a matter of common sense have done, he would in my view inevitably have used different language from that which he employed in the passages which I have cited from his costs decision. I accept Mr Howell's submission that the only sensible construction of the material words is that the inspector, and, therefore, the Secretary of State who adopted his reasoning, was approaching the question whether the council had behaved unreasonably on the basis that the genuine fears on the part of the public, unless objectively justified, could never amount to a valid ground for refusal. That was in my judgment a material error of law. In the circumstances I consider it unnecessary to deal with any of the other points raised and relied on by Mr Howell. I would on that ground quash his decision and remit the matter for reconsideration.

ALDOUS L.J.: I agree. Having listened to the submissions of Mr Howell Q.C. and Miss Robinson, I have not in the end discerned any dispute as to the relevant law.

A planning authority may properly take into account the perceived fears of the public when deciding whether a proposed development would affect the amenity of an area. Miss Robinson for the Secretary of State submitted that such fears will rarely provide grounds for refusal of planning permission, whereas Mr Howell for the council submitted that

each case will depend on its facts. Both may be right. However, perceived fears of the public are a planning factor which can amount (perhaps rarely) to a good reason for refusal of planning permission. It is therefore in my view "another planning reason" within paragraph 9 of Circular 14/85.

That being the law, the inspector should have considered whether the council acted unreasonably so that it was not necessary for the case to come before the Secretary of State. In so doing, he should have accepted that the perceived fears, even though they were not soundly based upon scientific or logical fact, were a relevant planning consideration and then gone on to decide whether, upon the facts of the particular case, they were of so little weight as to result in the conclusion that refusal by the council was unreasonable.

Miss Robinson submitted that the Inspector must have had in mind that perceived fears were a relevant factor and, when read in that light, his decision was unobjectionable. Mr Howell submitted that, upon the wording of the decision, it appeared that he did not have that in mind. The inspector appeared to have concluded that if the fears were not based on scientific, technical or logical fact, it followed that refusal by the council was unreasonable with the result that costs should be paid.

Hutchison L.J. has read the relevant passages from the inspector's decision. I believe that they can only be read in one way, namely that suggested by Mr Howell for the reasons given by my Lord. It may be that what is said in that decision does not reflect the true views of the inspector, but we have to interpret what he said.

The judge appears in my view to have read the decision letter in a somewhat similar way. He said at page 7 of the transcript:

> "It follows that the Inspector had come to the conclusion that, although public perception was a relevant consideration, it had no substance in planning terms. In those circumstances there was no justification by way of clear-cut sound planning for refusing planning permission. It was on the basis of that approach that the Inspector, when considering the question of costs, came to the determination that he did."

In that passage the judge points to the illogical conclusion that he thought the inspector had reached, namely that public perception was a relevant consideration, but it had no substance in planning terms. How then could it be relevant on a planning inquiry, as the inspector held? In any case, both Miss Robinson and Mr Howell accepted that public perception is a factor in planning terms and on rare occasions can be grounds for refusal.

The judge went on at page 9 to consider the effects of Circular 5/87. He said:

> "The position was, and comes out clearly from the documents, that this was a case where the public quite understandably and, as the inspector

> recognised, with some justification had real fears about what might happen were the development to be permitted. As the Circular, however, makes clear, that is not of itself to be an adequate reason for refusing a planning permission which should otherwise be granted and if, in fact, there is no significant evidence or substantial evidence to support the fear then for a Council to rely upon it, it must fall within paragraph 9 so as to carry with it the consequence as to costs which occurred in this case."

In my view the judge was wrong to come to that conclusion. The Circular does not have that meaning. The Circular states that local opposition is not a reasonable ground for refusal. Mr Howell did not suggest that it was. However, there is a difference between local opposition and a perceived fear which by itself could affect the amenity of the area. The Circular makes it clear that if there are planning reasons, refusal may be reasonable. A perceived fear by the public can in appropriate (perhaps rare) occasions be a reason for refusing planning permission, whether or not that has caused local opposition. It follows that the Circular contemplates that planning reasons such as public perception can (again, perhaps rarely) warrant refusal, even though the factual basis for that fear has no scientific or logical reason. That being so, I conclude that the judge wrongly interpreted the Circular. For the reasons given by Hutchison L.J., I agree with the order proposed by him.

STAUGHTON L.J.: The conclusion which I have reached is that this appeal should be dismissed. It is right to say that Mr Howell sensibly elected not to address us in reply when he heard that two members of the court were in his favour. It is also right to say that his opening address was by no means abbreviated.

The statute entrusts the task for deciding whether there shall be an award of costs to the Secretary of State. The decision is not for the courts but for him. We can interfere if his decision was unlawful or irrational or procedurally improper. It is said in this case that it was unlawful or irrational.

I feel that one has to start with paragraph 9 of the Circular. Mr Howell submitted that although that paragraph was dealing with the effect of local opposition, it was not dealing with fear (whether justified or not) in local people. I do not agree with that conclusion. It seems to me that it is dealing with local opposition of any kind and the weight that one must give to opposition.

The second sentence of paragraph 9 seems to me to conflict with the fourth. The second sentence says:

> "... on its own, local opposition to a proposal is not a reasonable ground for the refusal of a planning application unless that opposition is founded on valid planning reasons which are supported by substantial evidence."

The fourth sentence says:

> "They are unlikely to be considered to have acted reasonably in refusing an application if no material departure from statutory plans or policies is involved and there are no other planning reasons why permission should be refused."

The fourth sentence does not lay down an absolute rule, but merely says that in those circumstances a refusal is unlikely to be reasonable. In my judgment the fourth sentence prevails over the second, and there is no absolute rule.

That seems to me to accord with the substantive law, at any rate as it was put to us by Miss Robinson. In *Westminster City Council v. Great Portland Estates Plc* [1985] 1 A.C. 661, Lord Scarman at page 670 said:

> "It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present of course indirectly as the background to the consideration of the character of land use. It can, however, and sometimes should, be given direct effect as an exceptional or special circumstance. But such circumstances, when they arise, fall to be considered not as a general rule but as exceptions to a general rule to be met in special cases."

Applying that to the present case, I would say that local fears which are not, in fact, justified can rank as part of the human factor and could be given direct effect as an exceptional or special circumstance. I would not go so far Glidewell L.J. did in *Gateshead Metropolitan Borough Council v. Secretary of State for the Environment* [1994] 1 P.L.R. 85, where he said at page 95:

> "... if in the end public concern is not justified, it cannot be conclusive."

Glidewell L.J. is a great authority on planning matters, but in this instance I cannot agree with him.

So I look to see whether the inspector did take into account public fears as a special circumstance. In my judgment he did. He said as much in his decision letter on the substantive application. He said:

> "The public's perception of the hazards and risks remains. In my judgment, this is a factor which counts against the development."

He had earlier said that public opinion should be founded on valid planning reasons and supported by substantial evidence.

But then in his decision on costs, which had adopted by the Secretary of State, he said:

> "I asked the question is that extensive perceived public concern sufficient reason to refuse planning permission? The local planning authority take the view that it is. Bearing in mind the advice of Circular 5/87 and PPG1 it

> seems to me that that perception of public concern without substantial supporting evidence does not amount to demonstrable harm nor is it on its own a sound and clear-cut reason sufficient to warrant refusal of planning permission."

That was not in my the judgment an abstract statement of law, but the inspector's assessment of the facts in this case. Perhaps in reaching that conclusion I am influenced by what he said in his substantive decision letter which was dated in the same month as his decision on costs. I am prepared to assume that he did not intend to contradict in a second document what he had said in the first.

It is true that the passage at paragraph .04 says that public concern was not supported by substantial evidence, even when founded on valid planning reasons. I have difficulty with that sentence, not least because I do not understand what it means. But I can see nothing irrational or unlawful in the inspector's decision as I have construed it. He took into account the public fear; he rightly concluded that it was not supported by any planning grounds; and in those circumstances he was entitled to conclude that the council's opposition was unreasonable. I would, as I have said, have dismissed this appeal.

> **ORDER:** *Appeal allowed with costs; the matter to be remitted for reconsideration.*

Solicitors—Head of Legal and Administrative Services, Newport County Borough Council, The Treasury Solicitor.

COMMENTARY

This case was, in essence, concerned with the interpretation of a paragraph in an inspector's letter on the award of costs. It is an accepted proposition that public perception of risk, even where unsubstantiated, can be a valid consideration to take into account when determining whether to grant planning permission for a potentially hazardous operation. Therefore, it would be an error of law to conclude that the unsubstantiated public perception of risk would always render a refusal unreasonable in the sense put forward in paragraph 9 of Circular 5/87 on costs. A refusal based upon unsubstantiated objections may well be a ground for an award of costs in the circumstances set out in the Circular. In this case, however, the inspector seemingly fell into the trap of asserting that:

> "... perception of public concern without substantial supporting evidence, does not amount to demonstrable harm nor is it, on its own, a sound and clear cut reason sufficient to warrant refusal of planning permission."

This paragraph could be (and actually was) interpreted in two ways. Hutchison and Aldous L.J. took the view that this was put forward as a general proposition which could apply to all cases (and therefore

unlawful), whereas Staughton L.J. took the view that this was an assessment of the evidence on the facts of the case (and therefore lawful). Whatever interpretation is taken, there was little disagreement over the fundamental principle, that unsubstantiated public perception of risk could amount to a reasonable ground of refusal for planning permission. This addresses the legality of the decision, it does not of course deal with the political dimension. It is difficult to envisage a situation where unsubstantiated fears could have a planning impact which was demonstrable and harmful. Thus, although the planning authority may have been entitled in law to reject the application, it is unlikely that the Secretary of State would be easily convinced of the reasonableness of the refusal on appeal.