Print Request: Selected Document(s): 75

Time of Request: August 11, 2006 04:47 AM EDT

Number of Lines: 533
Job Number: 2822:112941524

Client ID/Project Name:

Research Information:

 England and Wales Reported and Unreported Cases
(name(R. and Birmingham))

Send to: UNIVERSITY OF OXFORD, LNE-PROF/1125X4
UNIVERSITY OF OXFORD
WELLINGTON SQUARE
UNIVERSITY OFFICES
OXFORD, GBR OX1 2JD

75 of 166 DOCUMENTS

R v **Birmingham** City Council Ex parte Dredger and another

Queen's Bench Division (Crown Office List)

The Times 28 January 1993, 91 LGR 532, CO/2453/90,
(Transcript:Marten Walsh Cherer)

HEARING-DATES: 22 January 1993

22 January 1993

COUNSEL:

A Collins QC and R De Mello for the Applicants; S Issacs QC and R Singh for the Respondents

PANEL: Hutchison J

JUDGMENTBY-1: HUTCHISON J

JUDGMENT-1:

HUTCHISON J: By this application for judicial review the applicants, Mr Dredger and Mr Paget, challenge: (1) The decisions of the Commercial Services (Financial and General Purposes) sub-committee of the Birmingham City Council(a) to refuse to adjourn their meeting of 27th September 1990 in which they considered a report of Mr Atkins, the Director of Commercial Services, proposing fundamental changes in the methods of assessment and levels of rent for stalls in the Birmingham street markets; and (b) on that date to recommend the implementation of proposals in the report for increases in rent of 135%; and

(2) The decisions of the Commercial Services Committee of the Council (a) to refuse to adjourn their meeting of 3rd October 1990 in which they were considering whether to act upon the recommendations of the sub-committee of 27th September; and (b) at that meeting to increase rent levels in the Bull Ring markets by 20% on 1st November 1990, 1st April and 1st December 1991, and 1st April 1992.

A number of grounds are advanced in the Notice of Application in support of the relief claimed, which is the quashing of these decisions. However, the arguments advanced at the hearing were: (1) that there was a failure to consult the market traders properly or at all before implementing proposals based on a fundamentally new approach which resulted in erroneous rent increases; and that the decision to implement the proposals was irrational in the Wednesbury (Associated Provincial Picture Houses, Ltd v Wednesbury Corporation, [1948] 1 KB 223, [1947] 2 All ER 680), sense.

In answer to these arguments the respondents contend, first, that the present is not a public law case; second, that there was no duty of consultation and that if there was, it was fulfilled and there was no procedural unfairness; thirdly, that the irrationality argument must fail; and, lastly, that, in any event, as a matter of discretion, relief should be refused because of delay

and/or detriment to good administration.

This application is concerned with four markets. The first is the Bull Ring open market which operates six days a week, comprises some 150 stalls and deals with food, clothing and fancy goods in the main. Then there is the flea market operating on Tuesdays, Fridays and Saturdays, which contains about 140 stalls and deals in clothing, electrical goods, second-hand goods and food. The third market is the Row Market which operates on Tuesdays, Fridays and Saturdays and is concerned with clothes. Finally, there is the Rag Market, again operating on Tuesdays, Fridays and Saturdays, comprising some 550 stalls dealing in clothes, electrical goods, house wear and fancy goods.

The statutory background

A detailed account of this is to be found in the first affidavit of Mr Atkins, the Council's Director of Commercial Services, and the affidavit of Mr Barker, a solicitor employed by the Council, and I need not repeat what they have to say as to the means by which the Council has acquired a monopoly to regulate the holding of markets within the city, which derives originally from a Charter of Henry II in 1166. It is common ground that the Council has such a monopoly, and I cite only the relevant current statutory provisions.

The power to make charges is conferred by section 36(2) of the Local Government (Miscellaneous Provisions) Act 1976 which provides as follows:

"A local authority which maintains a market in pursuance of a local Act may, notwithstanding anything in any enactment relating to the market, make in connection with the market such charges as the authority determines from time to time."

Section 89 of the Birmingham Corporation (Consolidation) Act 1883 makes it an offence to sell or expose for sale anything in respect of which tolls or charges may be taken under the Act except in certain defined places, which include markets or fairs lawfully authorised. Section 90 of the same Act provides:

"Provided that the Corporation may if they think fit permit any such animal article or thing to be sold on any fair market of the Corporation on payment of the tolls rents stallages or charges authorised to be taken by this Act."

Section 91 of the same Act, as amended, provides:

"The Corporation may from time to time demand and receive tolls rent stallages and charges (not exceeding the tolls rent stallages and charges specified in the Second Schedule to this Act) from persons selling or offering or exposing for sale cattle or articles in any market or fair of the Corporation or using or occupying shops stalls standings or other conveniences in any such market or fair or frequenting any such market or fair or using any weighing house or place weights measures scales or machines in the markets or fairs or using the slaughter houses of the Corporation: Provided that nothing in this Act shall extend or prevent the Corporation receiving any rents or other charges exceeding those specified in the said Schedule in respect of any shops let by auction or public tender."

Section 15(1)(c) of the Local Government Finance Act 1982 provides that the

auditor must satisfy himself:

". . . that the [Council] . . . has made proper arrangements for securing economy, efficiency and effectiveness in its use of resources."

Finally, I refer to Section 52(1) of the Food and Drugs Act 1955, which was repealed by the Local Government Act 1972, but which required local authorities who did not enjoy a local power to limit charges to obtain ministerial approval in respect inter alia of stallages, tolls and charges for markets. When it was proposed to abolish this requirement, what is understood to be a consultation paper was circulated (see exhibit 1 to Mr Oates's affidavit) explaining that applications were nearly always unopposed and that even those that were opposed were almost always approved, and justifying the proposal to abolish ministerial oversight with the words:

"Local authorities are responsible bodies who can be relied on to exercise their powers reasonably and who know that the commercial prosperity of their markets will be damaged by the imposition of unreasonable charges."

The relationship between the council and stall holders

There is no formal system of application for and grant of licences. A trader who wishes to operate a stall in any of the markets for sale of goods falling within the ambit of that market may attend and if a stall is available will be allocated such a stall as a casual stall holder. He may apply in writing to become a regular stall holder and in due course -- depending on the regularity of his attendance as a casual stall holder and the nature of the goods he sells -- may expect to become such a regular stall holder, whereupon he is given a copy of the council's regulations governing the operation of the market. Regular stall holders who do not attend by a certain hour may expect to find their stalls let to casual stall holders for that day: and prolonged failure to attend will result in the loss of their status as regular stall holders. Both casual and regular stall holders have to pay stallage at the current rate.

There is little factual dispute between the parties as to the practice that existed before 1990 in relation to increase in charges. Mr Atkins, in paragraph 26 of his first affidavit, deposed that:

"Rental levels have previously been set on the basis of recovering costs on an historical basis the main determinant being inflation measured by the RPI."

Mr Dredger, in paragraph 9 of his affidavit, said that the respondents had always based the level of assessment on recovering costs incurred by them on an historical basis, and said that the principle factor was always inflation based on the RPI but that other factors, such as the capital expense of rebuilding parts of the market, had also from time to time been considered as relevant.

It seems to me, therefore, that there can be no doubt that Mr Collins is correct when he submits that, until 1990, the basis on which increases were calculated was known to both sides, and the consultations to which I am about to refer took place in that context.

Mr Dredger (paragraph 9 of his affidavit) deposes as follows:

"About six to eight weeks before the revised rent is to be set, the Director of Commercial Services of the Council (otherwise known as the General Manager) writes to the Chairman of the Rag and Bull Ring Open Markets Branch setting out the proposed revision to the rental levels. A meeting then takes place between the General Manager, the Chairman of the Branch and some of the Branch Committee members. The purpose of this meeting is for the Respondents and the traders' representatives to express their respective concerns over the proposed level of stall rental for the forthcoming year. The General Manager will explain to the Branch representatives the factors the Respondents have taken into account in making their assessment . . . A comparative account demonstrating the changes in operations and non- operational expenses from year to year is obtained by the Branch representatives to be used in considering the case for or against the particular rent increase proposed . . . The Branch representatives, in their turn, will explain to the General Manager factors of particular concern to traders, for example an increase in void stalls, or a downturn in trade owing to a poor economic climate.

10. The traders' representatives then historically have had ample opportunity following the meeting to consider their view and respond to the Sub-Committee. On no occasion, has the Branch considered that the Respondents' proposals for increased rental were fair. There has never in my experience been a rent increase without full negotiation.

11. Usually the traders . . . would request a meeting between the Branch representatives and the Sub-Committee. The Sub-Committee would then hear representations made by the Branch and would reconsider the proposals in the light of those representations. On many occasions the Sub- Committee has revised the proposals having considered the matters raised by the Branch.

12. There has in the past always been sufficient time and opportunity given to the traders to express any views and/or material they felt appropriate and relevant."

Before citing some passages in the respondents' evidence on this issue, I should say that their stance is exemplified by the emphasis which Mr Isaacs places on the perceived difference between consultation on the one hand -- which they admit regularly took place on the issue of the level of charges -- and negotiation, which they say did not take place.

Mr Atkins, at paragraph 28 of his first affidavit, says:

"It is my practice to consult with the representatives of market traders on issue that may have a significant effect upon them, but there is no formal or recognised consultation procedure.

Mrs Green, his assistant, to whom he defers for a detailed description of the history of consultation, says in her first affidavit (paragraph 4) that the increase in stallage charges has never been the subject of negotiation with one exception in 1987 when the General Manager was authorised by the Trading Services Committee to negotiate the method to achieve a prescribed income target.

Mrs Green continues:

"In 1987 certain of the market traders expressed the view to me that there was no use in the Council consulting them as the amount of targeted income from stall charges had already been identified in the revenue budget.

Paragraph 11 -- I cannot recall any occasion prior to 1990 when the Commercial Services Committee (or Trading Services Committee) had reduced the proposed increase in stallage charges initially put forward by its General Manager following the receipt of representations made by the Retail Markets Chairmen or market traders.

. . .

Paragraph 16 -- There is no established procedure for negotiation and consultation. The procedure could not have been said to be negotiation as the Retail Market Chairmen never presented their own proposals as to the extent of any increase they were prepared to pay with a view to reaching an agreement . . ."

In her second affidavit Mrs Green returned to this topic (paragraph 4):

"Consultation is I submit a distinct procedure from negotiation. In consultation a decision maker gives notice of its proposals, affording the consultee an opportunity to make representations before a final decision is made. In contrast, in negotiation both parties give notice of their starting positions and either proceed by compromise to an agreed position or they reach deadlock, or they refer the matter to a third party, whether an expert or an arbitrator whose decision, it is agreed, should be final.

5. The Council's practice for reviewing stallage charges . . . is one of consultation. Where traders have a tenancy of a retail unit in consideration of the payment of a rent, such rent is reviewed by negotiation. There is a substantial difference between the position of tenants who pay rent under a lease, and traders who pay a daily stallage charge."

These citations from the evidence highlight the nature of the differences between the parties as to the previous practice. Essentially, the respondents are concentrating on two matters -- first, the distinction they draw between consultation, which they agree took place, and negotiation which they say never took place; and second, the subject matter of the consultation, which they say was simply the amount of the charges, and did not embrace the method by which the charges were calculated. I shall have to return to consider these matters.

The events immediately preceding the challenged decisions

In July 1990 the Commercial Services Committee asked Mr Atkins to undertake a fundamental review of rental levels and make recommendations. It is clear that this request resulted from Mr Atkins own initiative in raising the matter with the Committee. He set about preparing a report. On 7th September, he invited traders' representatives to the 27th September meeting which had been fixed to discuss rental levels for the ensuing year. Plainly, to the traders, this would have seemed a repetition of the normal consultation procedure.

On 20th September, Mr Atkins completed his report. On 25th September, a copy of it was first made available to the Traders Branch Committee. The report

itself is dated 27th September, the day of the meeting.

The report is long, detailed and complex. This is not the appropriate place to consider its contents in detail, and it suffices for present purposes to say that Mr Atkins put forward for consideration a number of options all of which involved completely different bases for the calculation of stallage charges and all of which would have resulted in significant increases. In particular, that which was adopted (with some minor modifications) involved a comparison between the charges levied in other markets and those levied by Birmingham and a suggested increase, on the strength of that comparison, of 134% in charges.

On 27th September, the sub-committee met in the morning and adjourned to 2.00 pm to enable the traders to be present. The traders, pleading that they had had insufficient time to consider and comment upon the report, sought further time but this was refused. It was said that the decision had to be made that day in order to implement any increases by 1st November. The traders advanced a number of other objections which it is unnecessary to refer to, but which were of a general nature and plainly -- and perhaps not surprisingly -- did not involve a detailed analysis of, or attack upon, the report.

Exhibited to Miss Hudson's affidavit, and more detailed than the Minutes, is a note of what took place; and from this it is interesting to observe that at one stage, while justifying his approach, Mr Atkins stated that the City Council should make a fair profit -- no more than a commercial operator -- and that he was mindful of the need of the City Council to maximise income, and could have justified increases higher than those proposed.

On 30th September, the traders drew up a response, running to two pages of typescript and containing general rather than detailed criticisms of the approach envisaged in Mr Atkins' report.

At the meeting of the Commercial Services Committee on 3rd October, the Committee had to consider the sub-committee's recommendation of option 4 in Mr Atkins' report, involving the increase of 135%. They also had the traders' written objections. They adopted Mr Atkins' proposal in a slightly modified form, which still involved an increase of more than 100%. At that meeting of 3rd October some representatives of the market traders were permitted to be present, but not to speak.

Is this a public law matter?

Though this is a point taken by the respondents, it is for obvious reasons logical to deal with it first. Mr Stuart Isaacs QC argues that, though his clients are a public body exercising statutory powers, that does not suffice to make their decision in relation to stallage charges susceptible of judicial review. There must also be a public law element in the subject matter of the case and, he contends, it is lacking here because the respondents, possessed of a valuable property right, are acting on an arms length basis with commercial people in the matter of charges. The transaction is a managerial and commercial one outside the field of public law. In support of this contention, Mr Isaacs referred me to a number of authorities and also sought to distinguish the case principally relied upon by Mr Collins, R v Barnsley Metropolitan Borough Council, ex parte Hook [1976] 1 WLR 1052.

Ex parte Hook was a case where the council, by virtue of various statutory provisions, had acquired the title to a very ancient market and the power to regulate the conduct of the market and make by-laws. Mr Hook, a market trader, had had his licence terminated by the council and his appeals to two council committees had been dismissed. He sought an order of certiorari on the ground that he had been denied natural justice because he had not been informed what rule or practice of the market he was alleged to have breached and there were procedural irregularities in the conduct of the hearings. A question arose as to whether the remedy of certiorari was available, and the court held that it was, on the basis that the council was exercising a discretionary power under statute to relate the common or public right to buy and sell in a market, and was thus not merely dealing with contractual relationships but also with the common law right of a man to earn his living.

In the course of his judgment, Lord Denning MR, at page 1056, said:

"The right of holding a market is subject to the common law of England. It says that every member of the public is entitled to come into the market place, to bring things there for sale: and others are entitled to come in to buy them. Sellers and buyers can come without let or hindrance, moving about and walking to and fro. But a seller has not any right to pitch a stall there unless it has been allocated to him by the owner of the market. When it is so allocated, the owner can charge a fee for it called stallage, which the seller has to pay."

Having cited some authorities in support of the proposition just quoted, and referred to the by-laws made pursuant to the relevant statute (the Barnsley Corporation Act 1969), the Master of the Rolls continued:

"Such being the legal position, I do not think that the right of a stall-holder arises merely under a contract or licence determinable at will. It is a right conferred on him by the common law under which, so long as he pays the stallage, he is entitled to have his stall there: and that right cannot be determined without just cause. I agree that he has to have the permission of the marketholder to start with. But once he has it and has set up his stall there, then so long as he pays the stallage, he has a right to keep it there. It is not to be taken away except for just cause and then only in accordance with the provisions of natural justice. I do not mind whether the marketholder is exercising a judicial or an administrative function. A stallholder counts on this right in order to enable him to earn his living. It is not to be taken away except for just cause and in accord with natural justice."

Scarman LJ said, at page 1058:

"This is a serious matter, because what has been done is to revoke an existing licence, a licence which enabled its holder to earn his living."

Scarman LJ then continued by considering whether the Corporation, in its administration of the market, was to be considered a body of persons having legal authority to determine questions affecting the rights of subjects and held that it was. He concluded this part of his judgment with the following words (at page 1060):

"Although, therefore, there is a contractual element in this case, there is also an element of public law, viz, the enjoyment of rights conferred upon the

subject by the common law. I think, therefore, upon analysis, it is clear that the Barnsley Corporation in its conduct of this market is a body having legal authority to determine questions affecting the rights of subjects."

Mr Collins argues that this case is conclusive in his favour. He concedes that in the present case there is no question of his clients' licences to occupy stalls having been terminated -- in ex parte Hook there was a written licence, which was terminated, whereas here there was, he submits in my view rightly, an oral licence which has not been terminated. Nevertheless, Mr Collins contends that the fact that decisions as to the rates of charging for stallage may affect B the ability of market traders to come into the market and follow their livelihood, means that the present case is just as much in the public field as ex parte Hook. Can it be imagined, Mr Collins asks, that the court would have rejected Mr Hook's claim if what the council had done was to increase the charges he had to pay to a level which made it commercially impracticable for him to continue to trade?

Mr Isaacs made four specific points about the case of ex parte Hook. First, he argued that the fact that the court was there concerned with the termination of the licence was crucial because a licence goes to the existence of the right: whereas here the council were concerned with setting the price in return for which it would allow a stall to be used.

Secondly, which is really an extension of the first point, Mr Isaacs submitted that there are passages in Lord Denning's MR judgment which show that he recognised the importance of this distinction. First, there is the passage at page 1056H where Lord Denning MR says:

"But a seller has not any right to pitch a stall there unless it has been allocated to him by the owner of the market. When it is so allocated, the owner can charge a fee for it called stallage."

Then, on the following page, at letter C, Lord Denning MR says:

"It is a right conferred on him by the common law under which, so long as he pays the stallage, he is entitled to have his stall there: and that right cannot be determined without just cause. I agree that he has to have the permission of the marketholder to start with. But once he has it and has set up his stall there, then so long as he pays the stallage, he has a right to keep it there."

Moreover, submits Mr Isaacs, the judgment of Scarman LJ in the passages I have cited shows the particular importance that he attached to the fact that this was the termination of an existing licence. Mr Isaacs' third point is that the case of ex parte Hook turns on its particular facts. It involved the revocation of an existing licence and there was a strong element of punishment of the trader. It was accordingly understandable that the court should have expressed itself in the terms that it did. Again he relies upon their emphasis on the fact of the existing licence and its termination. There is, Mr Isaacs argues, nothing extraordinary or contradictory in the proposition that whereas in performing some functions in a field such as the present a local authority may be exercising a public law function, in performing others it is not.

Finally, Mr Isaacs indicated that, if necessary and before a different tribunal, he would argue that the case of ex parte Hook was wrongly decided.

Among the other authorities to which Mr Isaacs referred me was AGV Colchester Corporation [1952] Ch 586 and Ricketts v Havering London Borough Council 79 LGR 146. In the first of those cases, Dankwerts J had before him a relator action in connection with an ancient market held in the High Street of Colchester, in which it was contended that the Corporation were entitled by law to charge reasonable amounts only by way of stallage and that the new scale of charges which it had adopted was excessive. The Corporation contended that they could make such charges for stallage as they thought fit. It was held that where the right to occupy a space in a market and the stallage charges for such right were not specifically regulated by custom charter or otherwise, stallage charges were the subject of a free bargain between the trader and the owner of the soil; and that the owner could make such charges as he pleased. The action therefore failed.

Not surprisingly, Mr Isaacs contended that this case supported his argument. Mr Collins, however, while conceding that on the face of it it was against him, pointed to what he suggested was a crucial: the assumption made by the learned judge (see page 593) that there was sufficient space in the market for all who wished to trade to do so, without the necessity of taking stalls. While I am inclined to think that Mr Isaacs is correct when he submits that the Colchester Corporation case was decided as a private law matter, I do not think that it would be safe to take it as affording significant support to either side in the present case.

Nor do I find the case of Ricketts of significant assistance in resolving this problem. That was a case in which section 52 of the Food and Drugs Act 1955, as amended, applied and stall-holders, who considered the proposed increases were too great, applied for a declaration that they did not comply with the provisions of the section and were ultra vires the council as market authority. Whitford J, refusing the declaration, held that the council were correct in taking the view that the market was a potentially profit making operation and that it might be appropriate to operate it at an increased level of charges which would produce an income over and above the immediate needs of the market so as to produce greater benefits in the interests of the borough and the rate payers of the borough generally.

Neither of these cases, it seems to me, really bears on the question whether a challenge, such as the applicants mount in the present case, can properly be regarded as a public law matter. Mr Isaacs conceded that the case of ex parte Hook established that in revoking the licence, the authority was acting judicially or administratively, but contended that the case of Colchester Corporation, in particular, showed that the question of the level of rents was a purely private situation governed exclusively by private law. I reject this argument, and his suggested fundamental distinction between the case where the issue is whether the applicant has any right to use a stall at all, and the case where the issue is concerned with the terms on which he may exercise that right.

In support of his contentions, Mr Isaacs also referred me to a number of passages in Pease and Chitty on Markets and Fairs in which, he suggested, one found the relationship between the owner of the franchise and the stall-holders described in language appropriate to a private law relationship. The local authority is the owner, and the relationship is contractual. Thus, for example, one finds in Chapter 5, dealing with disturbance of the owner's right, statements to the effect that he has a right of action in tort for disturbance

and may recover damages and enforce his rights by injunction. Later, one finds the statement that the action for disturbance is a possessory action. However, in Chapter 8 there appears this statement:

"The licensing system is an attempt to maintain a balance between stall-holders, who are dependent on street trading for their livelihood, and councils, who must maintain control and recover costs. On the one hand, a council is not entitled to refuse, revoke or vary a licence, except on certain specified grounds, but on the other, it has absolute control over the number of stalls in the street, the number of traders dealing in the same goods and the minimum number of days on which a licence holder must trade. Reasonable conditions may be attached to a licence."

This language, it seems to me, is at least as apt to describe a public as a private law relationship.

In my judgment, Mr Collins is correct when he says that the case of ex parte Hook constitutes an insurmountable difficulty in the way of Mr Isaacs' submissions. He concedes that the ownership of a market gives rise to certain private law rights on each side, and rightly argues that the court in ex parte Hook recognised that, but nevertheless held that the relationship also gave rise to public law rights because, independently of private law, common law rights are in issue. There is force, it seems to me, in Mr Collins' argument that the only way in which traders can trade in these markets is by obtaining and paying for a stall, and that if in the case of ex parte Hook the council had effectively excluded the plaintiff by putting his rent up to a ridiculously high level, the court would have entertained his complaint on precisely the same grounds. Mr Collins, in my view rightly, rejects what is involved in Mr Isaacs' argument, namely that the applicants in the present case would have no remedy even if the Council increased rents to an irrational level.

I emphasise that there has, in the present case, been no suggestion of lack of good faith. That, however, is not material to the question whether this is a public law matter. It seems to me that it is, since underlying the relationship is the common law right to trade which is referred to in the case of ex parte Hook. It would be repugnant, I consider, to arrive at a decision which involved that the respondents, in a monopoly position to administer ancient markets, were the sole arbiters of the level of rent, and accordingly in a position effectively to exclude traders altogether if for some reason they wished to do so.

In my judgment, a claim such as that mounted in the present case is properly advanced as a public law claim. This conclusion makes it unnecessary to consider Mr Collins' alternative argument that in any event the point is a barren one because there is material before me on which I could and should decide the matter as though this were a claim for a declaration -- he referred to Roy v Kensington and Chelsea FPC [1992] 1 AC 624 and the provisions of Order 15, Rule 16. I record only that Mr Isaacs disputed the appropriateness of this approach, contending both that the facts were not sufficiently clearly established and that there was no identifiable cause of action.

In the light of my conclusion that the objection that this is not a public law matter fails, I proceed to consider the substantive arguments.

Consultation

Three questions arise under this head. The first is whether the applicants have established that there was a legitimate expectation that they would be consulted in relation to the matters with which this case is concerned. That depends on previous practice, since there is no suggestion of a promise of consultation. The second question, which needs to be considered only if the applicants do not obtain a favourable answer on the first, is whether there was a duty to consult as a matter of fairness, and quite independently of the existence of any legitimate expectation based on previous practice. The third question, which only arises if the applicants obtain a favourable answer on one or other of the first two, is whether such consultation as did take place was adequate.

The first question

I have already indicated that the respondents accept that there was a practice of consultation on the level of rent. Their argument, however, is that this cannot give rise to an expectation of consultation on other matters: and that it is no answer to that objection to say, as the applicants do, that under the previous practice there was nothing to consult about, save the level of rent, because questions of principle never arose. A separate point under this head is that the practice was of consultation and not negotiation, which it is suggested means that the applicants had a right to be told about the proposals but not a right to negotiate them.

Mr Isaacs argues, and I agree, that the evidence shows that what had been established by practice was that the traders were consulted as to why the level of rent provisionally fixed by the Council should be reduced, and the traders raised and there were sometimes taken into account practical considerations like bus services, down turn in trade, the state of repair of stalls, the number of void stalls and so on. However, all of this has to be seen in the context of a settled policy by the Council of increasing rents broadly in line with inflation and taking account of historical costs.

I have to say that I find profoundly unattractive the submission that a regular practice of consultation as to the level of rent year after year when that rent is decided on the basis of a broadly consistent formula known to both parties, does not give rise to a legitimate expectation of being consulted about a proposal fundamentally to alter the basis of computation -- as Mr Collins put it, to move the goal posts. How can it be said that the failure of the applicants to raise and secure consultation on matters of principle in previous years is fatal to their claim when there have been no matters of principle to raise? Moreover, it seems to me that one of the arguments advanced by Mr Collins provides a simple answer to the respondents' submissions. He contends that if there is, as there is conceded to be, a practice giving rise to a legitimate expectation of consultation on the level of rents, that must extend to embrace consultation about the basis of calculation when, for the first time, the level of rents is said to be objectionably high by reason of a change in that method. The applicants are not, Mr Collins submits, contending for rights greater than they have always been accorded.

I am also attracted by an alternative submission made by Mr Collins which is that, since the change in the method of computing the charges was one which

manifestly had a very significant effect on the traders, they had a legitimate expectation of being consulted by reason of a practice established by the evidence that they were consulted about proposed changes of importance. In paragraph 28 of his first affidavit Mr Atkins says:

"It is my practice to consult with the representatives of market traders on issues that may have a significant effect upon them, but there is no formal recognised consultation procedure."

The evidence shows that on matters such as reservation fees, licences, and movement of stores in the market, the traders were consulted. These were important matters, but less important and likely to have a less significant effect on the traders than the fundamental change in the method of computation of charges. It could hardly be suggested that because the latter proposals were even more significant, the previous practice did not give rise to a legitimate expectation of consultation.

I hold therefore that the applicants have established that they had a legitimate expectation of being consulted as to the levels of charges proposed in the report by Mr Atkins adopted by the Council, and that that legitimate expectation extended both to the bare question of the amount of the charges and to the method of arriving at them. I reach this conclusion on the basis both that a practice of consulting as to the level of rents conceded to exist inevitably on the facts of this case gives rise to a legitimate expectation to be consulted when the Council proposed to move the goal posts; and on the basis that the evidence establishes a practice of consultation when changes of importance were in prospect.

The requirement of fairness

The arguments under this head, which in the light of my conclusions on legitimate expectation I can deal with quite shortly, are based principally upon the well known case of R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association [1972] 2 QB 299, [1972] 2 All ER 589.

In that case, the applicants had received assurances that they would be consulted about any proposed changes in the maximum number of Hackney Carriage licenses; and at a public meeting the committee chairman had given a public undertaking that the numbers would not be increased above 300 until proposed legislation in the form of a private bill, which included provision controlling private hire vehicles, had been enacted by Parliament and come into force. That undertaking was confirmed in writing to the applicants. Nevertheless, the respondents proposed an increase in the number and the committee confirmed it without consulting the applicants. It was held that the applicants were justifiably aggrieved by the council's unfair conduct and plainly, in the light of the facts I have recited, the Council were in a position to argue, and would today have argued, that they could rely on a legitimate expectation created by the repeated promises of being consulted. Indeed, the decision in their favour was on that basis: but also on the basis that in the particular circumstances the requirement of fairness demanded that the applicants should be given an opportunity to be heard.

At page 308B, Lord Denning MR put the matter, first, on the basis of the requirements of fairness and then went on to say that in the particular

circumstances, the Corporation were not at liberty to disregard their undertaking. When stating his conclusion at letter G, he said:

"Applying these principles, it seems to me that the corporation acted wrongly at their meetings in November and December 1971. In the first place, they took their decisions without giving the owners' association an opportunity of being heard. In the second place, they broke their undertaking without any sufficiency cause or excuse."

The reference in taking the decision without giving an opportunity to the association to be heard is, in the context, plainly a reference back to the first ground, the requirements of fairness. The judgment of Roskill LJ is to the same effect.

Mr Collins also relies on R v Wyre Valley District Council, ex parte Binks [1985] 2 All ER 699. In that case, a street trader who had operated a hot food take away caravan from the market place under an informal arrangement with the council whereby she paid a nightly fee, and who had been given notice to quit without any notification or reasons, was held to be entitled to an order of certiorari to quash the council's decision on the grounds that it was contrary to natural justice. Taylor J (as he then was) held that whether the council was regulating a statutory market or an informal market was irrelevant to the application of the rules of natural justice, since the exercise of the council's powers in the performance of its duties as a local authority were governed by the same principles, including the rules of natural justice, in both cases; and that since the applicant had been given permission to trade in a place to which the public had access at all times the situation was akin to the operation of an informal market and, since the applicant would be deprived of her livelihood, it followed that for both those reasons the rules of natural justice applied to the ending of the arrangement under which she was allowed to trade. The council should therefore have given her prior notification and an opportunity to be heard and should have given reasons for its decision and she had a valid claim based on denial of natural justice. Plainly, as it seems to me, the same principle of fairness, independently of a legitimate expectation, underlies that decision.

The case of Wyre Valley was, however, distinguished in the decision of the Divisional Court in R v Manchester City Council, ex parte King 89 LGR 696. That was a case concerned with a proposed increase of fees to street traders in which the applicant, on behalf of the association, sought judicial review of a decision to increase licence fees and of a subsequent decision by the council to reduce the level of new fees by 20% after they had heard representations by the association. It was held that the rules of natural justice did not apply to the determination of licence fees for street trading. At page 708, Roch J, having recorded that no question of legitimate expectation arose and that the argument was based upon a failure to observe the rules of natural justice, said:

"In my judgment there is no question of the rules of natural justice having application to this case, despite the fact that the livelihoods of street traders can be effected by fees for street trading licences and consents set by local authorities. Parliament in the Act of 1982 has required local authorities to invite and to consider representations from street traders in two situations but has refrained from making such requirements part of the process of the determination of licence fees unless the licence fees include those matters set

out in sub-paragraph (6) of paragraph 9 of schedule 4.

The two cases relied upon by Mr Stinchcombe can both be distinguished from the present case. In R v Wyre Valley District Council, ex parte Binks . . . the case concerned the revocation of an informal licence or permission given to a particular street trader, where the effect of the revocation was to deprive the street trader of her livelihood. There the court held that the council's failure to give the applicant prior notice or an opportunity to be heard or any reasons for their decision amounted to a denial of natural justice and consequently their decision giving her notice to quit would be quashed. The second case of Mahon v Air New Zealand (supra) concerned the making of an order that Air New Zealand should pay $150,000 towards the costs of a Royal Commission investigating the cause and circumstances of an air disaster made by a judge of the High Court of New Zealand who had been appointed by the Governor as Royal Commissioner to investigate the air crash. Both cases concerned the making of decisions which affected a single legal person and are to be contrasted with the administrative act of setting licence fees which will apply generally to a class of persons. Further, in the first case the effect of the local authority's decision was to prevent the applicant from trading altogether."

Mr Collins argues that Roch J was wrong in this conclusion and that his reasoning was unsatisfactory. He also contends that this part of his judgment was obiter. This contention is based on the fact that Roch J went on to state that if he was wrong in that conclusion, he was satisfied that there had in fact been adequate consultation.

As to these arguments, I accept Mr Isaacs' submission that I am bound by the decision in ex parte King and must give effect to it insofar as it is material to the present case. I reject the contention that the relevant part of the judgment is obiter: it was plainly the first and principal reason for the dismissal of the claim; and I find nothing in the judgment of Nolan LJ in the same case which leads me to think that I should not give full weight to it.

However, the case of ex parte King is plainly not on all fours with the present, for the court was there considering the problem in the context of a particular statutory scheme which does not apply here. Accordingly, it cannot be said to be a decision that, as a matter of law, market traders can never invoke the rules of natural justice and contend that fairness requires they should be given an opportunity of being heard on the issue of increase of charges.

The conclusion I have reached is that there is nothing in the decisions of ex parte Hook, or the case of Liverpool Corporation, or Wyre Valley which should lead me to hold that, on the facts of the present case, the requirements of natural justice and fairness demanded that the applicants should be consulted about changes in the methods of calculation or the levels of charges. I am impressed by the distinction between cases where the action complained of does and cases where it merely may affect the livelihood of the applicants. I recognise that the case of Liverpool Corporation falls into the latter category; but that was a case, on its facts, which can clearly be justified on the basis of legitimate expectation. It is not without significance that in his speech in the case of CCSU [1985] AC 374, 401 Lord Fraser categorised the case of Liverpool Corporation as an example of legitimate expectation based on express promise.

If one assumes, as for present purposes I am assuming, the absence of either an express promise or a regular practice of consultation then, in my judgment, it cannot be said that the requirements of procedural fairness or natural justice demanded that the traders should be consulted in the matter of the determination by the Council of the level of charges in the street markets which the Council controlled. Was there in the present case adequate consultation?

It is necessary to consider, first, what, as a matter of law, the duty of consultation required and, second, whether those requirements were met in the present case. As to what is required, Mr Collins referred me to two authorities. The first was R v Brent London Borough Council, ex parte Gunning and Others 84 LGR 168. In that case, which had to do with closure and amalgamation of schools, Hodgson J, at page 189, summarised the submissions of Mr Stephen Sedley QC (as he then was) on this topic as follows:

"Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, to which I shall return, that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

Mr Collins submits, and I agree, that it is clear from the context that the learned judge accepted, for the purposes of the case he was considering, that formulation.

I was also referred to R v Social Services Secretary, ex parte AMA [1986] 1 WLR 1, a case in which a challenge was mounted to new housing benefits regulations. The applicants' case was that there was a duty to consult before making the regulations and that that duty had been breached. The duty in that case arose by virtue of the provisions of section 36(1) of the Social Security and Housing Benefits Act 1982 which provided that before making regulations, "the Secretary of State shall consult with organisations appearing to him to be representative of the authorities concerned". The real issue in the case was whether such consultation as there had been fulfilled that requirement. At page 4F Webster J said:

"There is no general principal to be extracted from the case law as to what kind or amount of consultation is required before delegated legislation, of which consultation is a pre-condition, can validly be made. But in any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice.

Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party. Sufficient, in that context does not mean ample, but at least enough to enable the relevant purpose to be fulfilled. By helpful advice, in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implications for the consulted party, being aspects material to the

implementation of the proposal as to which the Secretary of State might not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer."

Mr Collins relied primarily upon the first of these formulations. Mr Isaacs submitted that, by reason of the different subject-matter of the cases in which they were voiced, neither could be applied without modification.

In my judgment, in the present case, it was incumbent on the council to provide sufficient details of its proposals and the reasons for them to enable the traders to understand what was proposed and why it was proposed, and to make sensible comments in reply. Secondly, those details had to be provided, and the responses received, bona fide -- that is to say, with an open mind and a willingness to consider the representations of the traders and, if appropriate, to give effect to them. Thirdly, the traders had to be given adequate time to consider what was proposed and respond to it. Fourthly, in conformity with the second requirement, the council had conscientiously to take into account such representations as the traders made in reaching a final decision.

There is, in my judgment, no doubt that the first of these requirements was met. While the report is challenged on grounds of irrationality, complaint can hardly be made that it provides adequate detail. It is long and complex and the processes by which Mr Atkins reaches his conclusions as to what should be done are fully set out.

Turning to the second and fourth questions, it is to be noted that in paragraph 30 of his first affidavit Mr Atkins says:

"I made a copy of my report available to the Retail Market Chairmen on Tuesday, 25th September 1990. This was the day on which all the retail markets were open. The purpose of giving the traders the report was to consult on the conclusions, as opposed to allow them to question the validity of the background information. My report had only been completed on Thursday, 20th September 1990."

I am not quite sure what Mr Atkins means by this -- it could be suggested that his stance, and that which he invited the council sub- committee to take, was that there could be argument only about the level of charges proposed, and not about the reasoning by which proposals for charges at that level had been arrived at. This, of course, would be consistent with the respondents' stance in these proceedings, which was that there was no practice or obligation to consult as to the basis upon which proposals for increased charges were made, only as to the figures themselves. This was Mr Collins' submission, and he described the exercise as pointless.

However, a consideration of the Minutes of the meeting of 27th September (page 82 of the bundle) and of the affidavit and notes of Mrs Hudson -- see in particular paragraph 4 of her affidavit and the note she exhibits -- has satisfied me that despite what Mr Atkins says, there was exhibited by the sub-committee on that date a willingness to listen to such arguments as were placed before it not only on the bare question of the amount of the proposed increased charges, but also upon the reasoning and validity of the conclusions in Mr Atkins' report. I have no material before me to suggest that the sub-committee members were not proceeding with that consideration in a bona fide

manner.

The real point is whether the traders were given sufficient time. Mr Collins, arguing that the crucial meeting was that of the sub- committee on 27th September, because they effectively determined the matter, contends that there was far too little time for the traders to absorb and get advice upon a long, complex and detailed report making proposals for a variation of charges on a number of different bases, all of which were new.

Mr Isaacs, who of course does not accept the wider duty of consultation which I have found existed, argues that nevertheless there was sufficient time even assuming that such a duty did exist. He concedes that, if the crucial date is 27th September, then his case on adequacy of time is not at its strongest: but he argues nevertheless that on that date the traders, who had had two days to consider the report, were permitted to make lengthy representations and apparently felt able to do so. As to the refusal of an adjournment, he submits that the council had a discretion whether to adjourn or not, considered exercising it, and decided against doing so -- a decision which cannot be impugned.

Mr Isaacs further contends that 27th September is not the crucial date, because the matter was not finally determined until 3rd October. This gave a considerably extended period for representations and for the obtaining of advice, and he asks rhetorically why the traders had not obtained advice of the sort now tendered in the form of Mr Oates's affidavit. It would, by 3rd October, have been perfectly possible for the traders to make a reasoned attack on the bases upon which Mr Atkins had arrived at his various recommendations.

I have little doubt that the decision of the sub-committee on 27th September was of major significance: but I cannot accept that the matter was effectively concluded with that decision. It is true that the wish of the traders to be heard at the meeting of 3rd October was not granted: but there is no reason to think that the committee would not have received further written representations from the traders -- indeed they would have been bound to consider them had they been provided. The evidence shows (see Susan Hudson paragraph 8) that the committee spent about 1 hour considering the matter before passing the resolution and the Minutes substantiate the contention that there was a good deal of discussion about whether and, if so, on which basis the charges should be increased. Accordingly, in my judgment the question of adequacy of time for consideration and response falls to be determined on the basis that the traders had from 25th September to 3rd October to consider the matter and make representations.

It seems to me that in resolving this question I ought to approach the matter on conventional lines -- that is to say by asking whether it can be said that on the facts of this case a reasonable authority acting reasonably could not have concluded that this period was sufficient to enable the traders to consider, get advice upon and respond to the report. The question has to be answered in the light of the conclusions I have reached as to the proper ambit of consultation; and having regard to the report as a whole, and not merely those parts of it which, detailed analysis having taken place, appear to be open to challenge. This is to a large extent a matter of impression, but I have to say that I am in no doubt that, given the length and complexity of the report, the fundamental changes that it proposed, the various different basis of change which it

advanced, and the identity and number of the persons affected, the period was plainly wholly inadequate.

It follows from this finding that the applicants are (subject to the argument on discretion) entitled to succeed, on the basis that they had a legitimate expectation of being consulted as to the proposed changes in the method of assessment and amount of market changes, and that that legitimate expectation was not met because they were given an insufficient opportunity to consider and make representations upon the proposals. In the circumstances, I consider it unnecessary to prolong this judgment by deciding the further issue of the alleged Wednesbury (Associated Provincial Picture Houses, Ltd v Wednesbury Corporation, [1948] 1 KB 223, [1947] 2 All ER 680) unreasonableness of the decision of the committee to adopt Mr Atkins' proposals. I record simply that there were two limbs to Mr Collins' cogent argument under this head -- first, the contention that the report itself was irrational in that the basis on which the various proposals -- in particular that which was adopted -- were put forward was fundamentally irrational; and, second, that the committee took into account an irrelevant consideration, namely the suggested necessity to maximise potential income.

There is, however, the further argument raised by the respondents which it is necessary to deal with, and which I have already foreshadowed -- their invitation to me to refuse relief in my discretion. Here again, there are two limbs to the argument. The first submission is that the applicants delayed applying for relief until after the decision had been implemented. The application was made on 15th November, some six weeks after the meeting of 3rd October, although the applicants knew that the decisions were to be implemented on 1st November. Moreover, it is plain from the Minutes of a traders meeting on 23rd October that by that date a brief to counsel had already been prepared. It is suggested that in the circumstances of this particular case much prompter action would have been appropriate, possibly including an application for a stay of the implementation of the proposals.

Then it is said that the delay has caused prejudice to proper administration of the respondents' area because the decisions have been implemented and indeed further changes have been made to them on the strength of that implementation. Furthermore, it is argued, no real advantage would be gained by compelling the parties to go through the consultation exercise, and such advantages as there would be would be outweighed by prejudice to public administration. The respondents' accounts will have to be re-opened and expenditure at present incurred by these enhanced charges re-allocated to the general fund.

Finally, it is submitted that the respondents had made a commitment to keep the system of charges under review and that accordingly the applicants had plenty of opportunity to make representations even after the implementation of the decision. Accordingly, the argument runs, any breach of the duty to consult at the time was technical only and has been cured: and to grant relief would achieve little advantage at the cost of the very considerable disadvantages already mentioned. The respondents still have an open mind and the quashing of the decisions would achieve little of practical value.

In this connection, there is evidence from Mr Atkins in his first affidavit that it would cost an estimated £10,000 to refund increased stallage charges collected since November 1990 and that the amounts repayable would be £130,000

for the period to 31st March 1991 and £190,000 for the subsequent period to 31st October.

In my judgment, Mr Collins is correct when he submits that, given the nature of the problem in this case, affecting as it did a large number of traders, the applicants cannot really be criticised for dilatoriness in launching the proceeding. That they did not apply for a stay is hardly a ground for refusing relief now. Furthermore, I accept Mr Collins' contention that small weight should be given to delay occasioned since the commencement of proceedings.

On the other aspect of the case, it is undoubtedly true that a certain amount of disruption and expenditure will result from the quashing of the decision. However, it should not be particularly difficult, although somewhat tedious, to embark upon the refunding of the charges -- the respondents' records are presumably in good order -- and while the sums are from one point of view not particularly large, they are in total by no means insignificant and may well be important to individual traders.

In the circumstances, I am not persuaded that, in the exercise of my discretion, I ought to refuse the relief to which, on the basis of the findings I have made, I consider that the applicants are entitled.

DISPOSITION:

Judgment accordingly

SOLICITORS:

Rosenberg and Company, Birmingham; Sharpe Pritchard Agents for S Dobson, Solicitor, Birmingham City Council