BUILDING LAW REPORTS

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VOLUME
12

Theme

Cases of Current Interest
and from the Commonwealth

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Introduction

This volume, like volume 11, contains cases of current interest and also cases from the Commonwealth.

The first of the four current cases which we have selected is *B.L. Holdings Ltd* v *Robert J. Wood & Partners* at page 1. This is a decision of the Court of Appeal allowing the architect's appeal from the judgment of Gibson J which we included in 10 BLR 47. It is interesting to contrast the judgment of Gibson J with those of the three members of the Court of Appeal (Megaw, Lawton and Browne LJJ). The Court of Appeal did not disapprove Gibson J's general statements of an architect's duty to his clients but, in allowing the appeal, each of the three members of the Court took a very different view from that taken by Gibson J of the particular facts of that particular case.

London Borough of Lewisham v *Leslie & Co Ltd* at page 22 is a decision of the Court of Appeal concerning the ambit of Section 26 of the Limitation Act 1939. Defects in certain tower blocks of flats were found a decade after they had been completed; High Court proceedings were not commenced for another half a decade. The builders pleaded in their defence that the action was barred by the Limitation Act 1939; the Council responded that the right of action had been concealed by fraud within the meaning of Section 26 of the Limitation Act 1939. The judgment of the Court of Appeal is of general interest because it shows that the fact that the builders work was supervised by or on behalf of the employer who might, with the exercise of reasonable diligence, have discovered the defect complained of does not of itself prevent the employer placing reliance upon the doctrine of 'concealed fraud.'

Rayack Construction Ltd v *Lampeter Meat Co Ltd* at page 30 and *H. Fairweather Ltd* v *Asden Securities Ltd* at page 40 are each decisions upon the construction of parts of the JCT Standard Forms of Building Contract. In Rayack Construction Vinelott J construed Clause 30(4)(a) which provides that the employer's interest in retention monies is '. . . . fiduciary as trustee for the contractor . . . .'. He concluded that the employer was obliged to appropriate and set aside as a separate trust fund a sum equal to the certified retention and that that obligation was enforceable by injunction. In *Fairweather* v *Asden Securities* Judge Stabb QC had to consider whether an architect could, after he had issued the 'final certificate' under Clause 30(b) at some later date issue a valid delay certificate under Clause 22. Judge Stabb ruled that he could not do so.

Each of the three cases from the Commonwealth included in this volume is a decision of an Australian Court. *Commissioner for Main Roads* v *Reed and Stuart Pty Ltd* at page 55 is of interest because it concerns the extent of the power of the engineer named in a contract (as agent of the employer) to omit part of the works and to arrange for them to be undertaken by some other contractor. The High Court of Australia,

dismissing an appeal from the Supreme Court of New South Wales, Commercial Court, concluded that the engineer's actions in the particular case constituted a breach of contract on the part of the employer.

Arcos Industries Pty Ltd v *The Electricity Commission of New South Wales* at page 65 is a decision of the Supreme Court of New South Wales, Court of Appeal which highlights the important distinction between a 'lump-sum' contract and a 'measure and value' contract; in the case of 'lump sum' contracts it may well be that variations occur whenever increases or decreases in the quantities required for the completion of the works are found to occur but in the case of 'measure and value' contracts only if the nature of the work to be done is changed will there be a variation.

We have concluded the volume with the decision of the New South Wales Supreme Court in *Perini Corporation* v *Commonwealth of Australia* at page 82. This decision is of very considesrable general interest for the statements of principle about the duties of the appointed certifier and the employer's responsibility to the contractors in the case of certain failures on the part of that certifier. The contractors alleged that the 'Director of Works' who was named in the contract to certify (inter alia) extensions of time for completion had failed in his duty because he had taken into account matters which he ought not to have considered and, further, he had failed to make his decisions within a reasonable time. The Commonwealth of Australia was alleged (if the facts were proved) to be liable to the Contractors for breach of certain implied terms of the contract in consequence of the Director of Works failure to act properly. Macfarlan J ruled in favour of the contractors and, in the course of an extremely interesting judgment on the preliminary legal points argued before him there is to be found first, an impeccable appreciation of the legal basis upon which terms are to be implied into contracts and secondly, an illuminating discussion of the judgments of the Court of Appeal in *Panamena Europa Navigation Compania Limitada* v *Frederick Leyland & Co Ltd* (1943) 76 Ll.L.R114. Because the Panamena case was appealed to the House of Lords, it is the speeches of the law lords which are considered in the leading text books – see, particularly *Hudson's Building and Civil Engineering Contracts* 10th Edition at pages 476–478. We respectfully agree with Macfarlan J that the true basis for the decisions in that case is much more easily understood if the reasoning of the House of Lords (see [1947] A.C. 428) is read in the light of the early argument/judgments of the Court of Appeal.

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19 July 1979 *Court of Appeal*

Megaw, Lawton and Browne LJJ

In 1970 the Plaintiffs engaged the Defendants to act for them as their architects in connection with the development of a derelict site in Brighton. The site stood in an area zoned in the development plan for commercial use. At that time the Control of Office and Industrial Development Act 1965 applied so that any planning permission for the erection of a building for office use would be 'of no effect' unless an Office Development Permit (ODP) had been issued. An ODP was not then required if the office floor space did not exceed 10,000 sq. ft. gross. The relevant floor space was to be calculated by including not only the parts of the building of which 'the sole or principal use was to be used as an office or for office purposes' but also those parts of the building which were to be occupied, together with the office space, and were to be so occupied wholly or mainly for the purposes of the activities to be carried on in the office space. A ministerial circular had been issued drawing attention to the provisions of the Act and emphasising that car parking space within buildings might have to be included in the calculations.

The plaintiffs first asked the defendants for advice 'from the planning aspect'. The plaintiffs informed the defendants that they would not be able to claim an office development permit as they had no identifiable occupant with approved need for office accommodation in the Brighton area.

In the course of the discussions with an officer of the local planning authority the defendants were told that the largest building that would be permitted on the site would be about 15,000 sq. ft. and that it would be necessary to provide car parking in the basement of the building. Either on that occasion or on another occasion the officer told the defendants that the local planning authority would not take parking into account in determining whether or not an ODP was necessary. The defendants were surprised at this statement but they did not mention it to their clients and accordingly went ahead with a design with four floors of office space and car parking in the basement of the building.

On submitting that design to the local planning authority they were told by the officer that a building on that site required an additional floor, but if the top floor were a self-contained residential unit it would also not be counted for the purposes of ODP calculations. The plaintiffs therefore authorised the defendants to add an additional 1,000 sq. ft. of caretaker/showroom on the roof and gave their approval to the design.

The Defendants believed that the question of whether or not an ODP was necessary in such circumstances was a matter to be left to the decision of the local planning authority.

On behalf of the plaintiffs, the defendants applied for planning permis-

sion for a building comprising a basement car park with five floors, including the 'flat/showroom'. The building had a gross area of 16,100 sq. ft. of which the four floors of office space comprised 10,000 sq. ft. No ODP was obtained. On 3 February 1971 planning permission was granted for that building. In 1972 the building was completed. In 1973 a prospective tenant questioned the absence of an ODP. Thereafter the plaintiffs tried to get the matter put right but were not able to do so until 1976 when the exemption limit was raised from 10,000 sq. ft. to 50,000 sq. ft. Throughout, the building remained unoccupied.

From a document produced on discovery it appeared that the Chief Estates Surveyor of the plaintiffs (but who did not join the group until 1973) was in 1974 of the view that it was common practice for developers to apply and obtain planning consents upon the basis that the exemption limit for the purpose of an ODP was to be calculated without reference to the area occupied by ancillary services.

The plaintiffs commenced proceedings against the defendants claiming that they were in breach of their duty and negligent in failing to advise the plaintiffs that an ODP was required for the building that had been erected and that the sale and letting of the building had thereby been delayed.

Gibson J held that the Defendants were liable to the Plaintiffs (see the report at 10 BLR 48).

HELD: allowing the appeal:
That the Defendants were not negligent or in breach of their duty in holding and acting on the view that the question of whether an ODP should or should not be calculated with the inclusion of car parking and ancillary services was a matter of opinion or was for the discretion of the local authority.

Raymond Sears QC and S. Cripps appeared for the appellant defendants, instructed by Kennedys.
S. Goldblatt QC and Richard Phillips appeared for the Respondent plaintiffs, instructed by Berwin Leighton.

Commentary
This case was reported in full in 10 BLR 47.

The Court of Appeal did not disapprove the statements of principle of Gibson J which are as to the duties generally to be owed by an architect to his client when matters of law arise. However they took the view that in the circumstances and in particular, it seems, the fact that the issue of law as a difficult one, the Defendants were not negligent in not specifically advising their clients to the need to obtain legal advice.

The Court was evidently also much influenced by evidence as to what the Plaintiffs believed to be common practice at the time. They did not however deal with the expert evidence adduced before Gibson J which the trial judge found supported his view that the Defendants were negligent. Therefore whilst a comparison of the judgment of Gibson J with those of the Court of Appeal is instructive, it does not provide answers to all the issues canvassed by Gibson J. The decision is nonetheless of value in determining the standards to be expected of architects in advising their clients on matters of a legal nature.

B.L. HOLDINGS Ltd v ROBERT J. WOOD & PARTNERS

19 July 1979 *Court of Appeal*

Megaw, Lawton and Browne LJJ

MEGAW LJ: I shall ask Browne LJ to deliver the first judgment.

BROWNE LJ: This is an appeal by the defendants from a judgment of Gibson J given on 14th July, 1978. It is a claim by clients against a firm of architects for damages for breach of contract or negligence. The judge found for the plaintiffs on liability, formulated the issue on damages, and gave directions as to the future procedure.

The facts are very fully and helpfully stated in the judgment of Gibson J but in view of the judge's findings and the conclusion I have reached I do not think that I need state them in the same detail.

The case concerns an office building in Queen's Road, Brighton, known as Britannia House. The plaintiffs are a subsidiary of British Land Co. Ltd., who were at the material times closely connected with Conrad, Ritblat & Company, a firm of surveyors and property agents.

The people mainly involved in this case on the plaintiffs' side were as follows. Mr John Ritblat, who was the managing director of British Land Company, and later its chairman. He was also the senior partner in Conrad, Ritblat & Company. Mr Tony Shipman, who has been described as 'development executive', employed by British Land Company. He had no professional qualifications, but considerable practical experience in the world of property development. Mr David Pickard was employed by Conrad, Ritblat & Company but at the material times was seconded to the British Land Company. He was a chartered surveyor. The partner in the defendant firm who dealt with this matter was Mr Chapman. The people on the planning side of the Brighton County Borough who were involved were: Mr Patterson, the Borough Surveyor, Engineer and Planning Officer, who had over-all responsibility for planning, as I understand it. Under him was the Planning Department. The head of the Planning Department was Mr Upton, a Fellow of the Royal Institution of Chartered Surveyors. He had been with the Brighton Corporation for 28 years and had been in charge of the Planning Department for 23 years. His first assistant or deputy in the Planning Department was Mr Linecar. Mr Linecar had been with the Brighton Corporation for 26 years and had been in charge of his section of the Planning Department for many years. He was an Associate of the Institute of Architects and Surveyors.

In September, 1970, Mr Chapman met Mr Ritblat and they discussed various developments in which British Land Company were interested, including the Queen's Road, Brighton site, which was then derelict after a fire. At that time the provisions of the Control of Office and Industrial Development Act, 1965, were in force in Brighton. These provisions were re-enacted in the Town and Country Planning Act, 1971; and we were referred to these provisions as they appear in the latter Act, in sections 73 to 85. I think it is enough to say that section 74 (1) of the 1971 Act provides that:

> '. . . an application to the local planning authority for planning permission to carry out . . . any development of land which consists of or includes – (a) the erection of a building containing office premises' (which are defined in section 73 (1)) '. . . shall be of no effect unless . . . an "office development permit" in respect of that development is issued under these provisions by the Secretary of State, and a copy of the permit is furnished to the local planning authority together with the application'.

Section 75 (1) exempts from the requirement to obtain an office development permit an application for planning permission to carry out any development if 'the office floor space' (as defined in section 85 (3), which throws one back to the definition of 'office premises' in section 74 (1)), does not exceed the prescribed limit, which at the times material in this case was 10,000 square feet.

The judge found that:

> 'Mr Chapman received and accepted instructions to design and to seek planning permission for the best building, that is to say the most attractive commercially, that could be got on the site without the need for an ODP' (see 10 BLR at p.59).

I will refer later to the duties which the judge found the acceptance of these instructions imposed on Mr Chapman. If planning permission was granted, he was to supervise the carrying out of the building, as he did. Various modifications in the proposals were suggested and agreed, which appear from the various plans we were shown and from the correspondence. I do not think I need refer to these in detail. The scheme, as it finally emerged, was for a building with four floors of offices, car parking in the basement, and a 'caretaker's flat' on the top floor above the offices. If only the office floors were taken into account, the building was within the 10,000 square feet exemption, but if the car parking space or the caretaker's flat was taken into account it was well outside the exemption and an ODP was required. I have no doubt that this situation was fully understood by the representatives of the plaintiffs.

Before applying for planning permission, Mr Chapman had various

discussions with the planning officers of the Brighton Corporation, to which I will have to come back in more detail later. The judge found that Mr Chapman:

> 'duly reported to the plaintiffs each stage of his negotiation with the planning officers and the effect of their observations upon his proposals' (see 10 BLR at p.59).

The planning application and the accompanying plans made the proposals perfectly clear to the planning authority; it must have been obvious to the authority that the question whether or not an ODP was required depended on whether or not the car parking area and the caretaker's flat were to be included in the 10,000 square feet.

The application for planning permission was made on 14th December, 1970. The application was signed by the defendant firm as agents. It gives the location of the premises; and it gives as the applicant the British Land Company. The description of the proposal is as follows:

> 'Office block with on site parking facilities. Caretaker's flat top floor'.

Permission was granted on 19 January, 1971 (although it is dated 3rd February, 1971), subject to three conditions, as follows:

> 'In pursuance of their powers' (and so on) 'the Council of the Borough of Brighton as local planning authority on the 19th January, 1971, granted permission for the development described above in accordance with the application and plans submitted . . .'; and 'the development described above' is 'Office block with on site parking facilities. Caretaker's flat top floor'.

As I have said, there were three conditions. The first one does not matter: it dealt with the question of submitting samples of the materials. Condition (2): 'The Caretaker's flat shall be occupied as a single dwelling unit only and shall be self-contained before it is occupied for human habitation'. Condition (3): 'Before the works are occupied and space indicated on (the Plan) for the parking of cars shall be available for that purpose and thereafter maintained as such'.

The building was finished about July, 1972, but was never occupied. In November, 1973, the plaintiffs were negotiating with a prospective tenant, Meridian Securities, whose solicitors raised the point that an ODP was necessary and had not been obtained. At that stage the plaintiffs' solicitors were maintaining that no ODP was required and that the planning permission was valid. These negotiations fell through. In 1974 and 1975 the Board of Trade granted ODPs for named tenants, but those tenants did not materialise. In 1976 the Brighton Borough Council, as local planning authority, granted planning permission, the office

development exemption area having been increased meanwhile. We were told that the building has been sold since the hearing before Gibson J.

By September, 1975, the defendants were pressing the plaintiffs for payment of their fees for various work, mostly I think (I hope counsel will correct me if I am wrong) work other than the development at Queen's Road; and by their letter of 23rd September, 1975 (nearly a year after the negotiations with Meridian Securities), the plaintiffs' solicitors for the first time made allegations of negligence against the defendants, which did not include the allegation on which they succeeded before Gibson J. It seems to me that this was not a promising beginning for an action for professional negligence.

The statement of claim put the plaintiffs' claim in two ways. Paragraph 5 alleged:

> 'It was at all times an express term and condition of the agreement thus made between the plaintiffs and the defendants that the defendants would ensure that the total floor area of the building, for the purposes of the restrictions imposed by the Control of Offices and Industrial Development Act, 1965, would be less than 10,000 square feet, so that an Office Development Permit would not be required for the construction and/or use of the building'.

Paragraph 6:

> 'Construction of the building was completed on 1st July 1972. In breach of the said term and condition the total relevant area of the building was greater than 10,000 square feet'.

Then it sets out the various areas, including the basement and the caretaker's flat, with a total of 14,416 square feet.

Then paragraph 7:

> 'Further and alternatively the said failure to design and to ensure the construction of a building with a total relevant area of less than 10,000 square feet was caused by the negligence of the defendants. *Particulars of Negligence*: The plaintiffs rely upon the maxim "res ipsa loquitur" . . .'. Then there are other allegations, of which I think I need only read (d): 'Failed to give the plaintiffs sufficient or any warning that the building might be and/or would be of such size and design that it would require application for an Office Development Permit'.

On the morning of the first day of the hearing the plaintiffs applied for and were granted leave to amend by adding a new paragraph 7A, which is as follows:

'In any event (whether or not the building, as in fact erected, required an Office Development Permit) the defendants were negligent in that, knowing that the plaintiffs required on the site a building which could be marketed free from Office Development control – such requirement being implicit in the plaintiffs' said express instructions – they designed the building and advised its erection, when they knew or ought to have known that an intending lessee or purchaser would be likely (as Meridian Securities Ltd did) to query the validity of planning permission granted in respect of the building, in the absence of an Office Development Permit; and the defendants failed at any time before November 1973 when the plaintiffs learned of the problems from Meridian Securities Ltd., to advise the plaintiffs that the grant of planning permission in respect of the building was open to query, so as to enable the plaintiffs to take legal advice upon their position and/or to take any steps to regularise the position and/or to revise their marketing strategy in respect of the building accordingly'.

Gibson J rejected the claim based on the express contract alleged in paragraphs 5 and 6 of the statement of claim, but found for the plaintiffs on the basis alleged in paragraph 7A; although he seems to have regarded this claim as also covered by sub-paragraph (d) of the particulars under paragraph 7.

The plaintiffs relied on various letters as forming part of the express contract on which they relied; but in view of the judge's finding, and of the fact that there is no cross-notice, I need not refer to them. The judge found as follows:

'When Mr Chapman referred, in the letter of 22nd December 1970 to the plan showing a gross figure of 10,000 square feet for "the office content of the scheme" he was not, in my judgment, giving any warranty or promise of insurance that the total floor area of the building for purposes of office development control would be less than 10,000 square feet – he was doing no more than inform Mr Shipman of the calculated gross area of the four floors shown on those plans as offices (see 10 BLR at p.63). There is in my judgment no doubt whatever that the letters relied upon the plaintiffs were, and were no more than, letters of instruction by the plaintiffs to the defendants, and letters of report by the defendants to the plaintiffs, in which the instructions were accepted. The defendants made no such special promise as is set out in paragraph 5 of the statement of claim. In accepting instructions in return for the normal fee the defendants warranted that they had, and would use, all the necessary and ordinary skill and judgment of an architect undertaking to advise upon and handle a planning application for office development but their warranty went no further'.

Later in his judgment, dealing with the duty of the defendants, he said:

'It is not in dispute that, in accepting these instructions, the defendants impliedly undertook and agreed with the plaintiffs that the defendants had, and would use, all reasonably necessary skill; and that the defendants would use all reasonably necessary care, in and about the handling of the application for planning consent. On behalf of the defendants Mr Sears did not dispute that a professional man, such as an architect, who agrees to act in some field of activity commonly carried on by architects, in which a knowledge and understanding of certain principles of law is required, if the work is to be done properly and the client's interest duly protected, must have a sufficient knowledge of those principles of law in order reasonably to protect his client from damage and loss. If authority for that proposition is needed it can be found in the cases cited in *Charlesworth on Negligence*, 6th edition, paragraph 948. In many particular cases a professional man engaging in such work will have, and display, a sufficient knowledge of the relevant principles of law by knowing, and by advising his client, that he knows little or nothing of them, and by refusing to incur expense on behalf of his client, or to expose him to risk of financial loss, until his client has obtained legal advice or decided to act upon his own judgment' (see 10 BLR at pp.69-70).

A little later he said:

'The question whether the plaintiffs have proved that the defendants were in breach of duty to the plaintiffs can in my judgment be reduced to one multiple question: Should Mr Chapman, as a reasonably competent architect, have warned the plaintiffs that the attitude of the planning officers of Brighton was surprising; was either probably or possibly wrong; that, even if the planning authority on the advice of their officers should entertain the application and grant planning permission, yet that permission would be, or might be, shown to be invalid; and that, if the application was to proceed upon the basis that it was within the office development control exemption, the plaintiffs should obtain legal advice on the validity of any permission granted?' (see 10 BLR at p.70).

The judge, having heard the evidence of Mr Upton, took the view that the policy which the Brighton Planning Department had been following ever since the 1965 Act of not including parking space in the office area for the purposes of the ODP exemption was (in his words) 'a wrong and unlawful policy'. He also held that the plaintiffs' application for planning permission was 'of no effect' by virtue of section 74 (1) of the 1971 Act, and that the planning permission was therefore also 'of no effect' – that is, void (see 10 BLR at p.69).

For reasons which will appear later, I do not think that in this appeal it is necessary to decide whether the judge was right or wrong about these

points. If it was necessary, I think we should have had to consider whether to invite the help of the Secretary of State. Having formed his view and emphasised (as I think, unduly) Mr Chapman's evidence that he was 'surprised' at the attitude of the planning officers, the judge stated his decision that the defendants were liable as follows:

> 'It remains, therefore, in my judgment, the plain and obvious duty of Mr Chapman to have warned his clients of the danger of this planning application, as provisionally formulated, being of no effect in law, unless upon any other available evidence or by reference to any other principles it should appear to me that my provisional opinion may be setting too high a standard of care and of judgment for an ordinarily competent architect who, as I have said, had the misfortune to encounter such a policy as this planning department of the County Borough of Brighton was operating in 1970. I have much in mind that the burden of proof on these matters is upon the plaintiffs to prove positively that the defendants were in breach of duty. I think that not a few architects engaged in this work would have been misled exactly as Mr Chapman was and I think that he might well have been followed in error by some lawyers. Mr Chapman was acting with complete devotion to his clients. He had negotiated what, if the law as I have found it to be be disregarded, was a magnificent answer to their request for the best possible office development without an ODP. The attitude of the planning authority, which in my judgment was wrong and contrary to law, had not been brought about by anything said by Mr Chapman. His planning application and drawings described the intended development with entire accuracy and candour. It may be thought by some to be 'hard' to require of an architect that he know more law than the planning authority or at least have a sufficient awareness of what may be bad law when enunciated by such an authority as to make him advise his clients to check up on it' (see 10 BLR at pp.77-78).

Finally, the judge said:

> 'Having considered as best I can all the relevant matters which appear to me to bear upon the question, I am left with the clear conviction that I have not on the facts set too high a standard of care or judgment for an ordinarily competent architect who in 1970 was undertaking to advise in planning matters relating to office development. Indeed I am convinced that the standard which the law sets, namely that of the ordinarily competent and skilled architect, certainly required of Mr Chapman that he should at least have given that advice and warning to his clients. It would be wrong in my judgment to excuse an architect in these circumstances on the ground that he was entitled to rely upon and accept the views of the planning officers. The client pays the independent professional adviser for independent and skilled advice

and the payment due should be sufficient to recognise the burden and obligations which the independent professional adviser assumes. The giving of independent and competent professional advice upon the facts of this case, as I have found them to be, required of Mr Chapman that he advise his clients that the attitude of the planning officers of Brighton, as expressed by Mr Linecar, was or might well be wrong in law and that any planning permission granted in reliance upon Mr Linecar's advice would be or might be of no effect in law. There is no doubt that he did not give any such advice' (see 10 BLR at p.80).

I must now go back in rather more detail to Mr Chapman's discussions with the planning officers. As to the car parking, he said this in chief:

'(Mr Sears): Had anything been said with Mr Linecar about the problems of getting ODPs?
(A) Yes. He stated quite specifically that speculative ODPs in Brighton were almost non-existent, in fact I think "impossible" is the better word'.

Pausing there, as I understand it a speculative ODP would be an ODP which did not specify a particular intended tenant. The evidence of Mr Chapman goes on:

'I think it was obvious from that statement that we had therefore, as I think subsequently came out in correspondence, to either produce a maximum scheme which was backed by an ODP or we had to produce a scheme which was acceptable in planning terms for the local authority of one within the prescribed limits, ie 10,000 sq. ft. This meant I think that we had to resolve this problem of the basement. The planners' policy at that time, as I understood Mr Linecar, was that they were not too concerned with including car parking in a grossed up figure for ODP.
(Q) This is your discussion at the first meeting?
(A) Indeed. I was surprised at this because I, as has been commented by other people, was under the understanding that this was a grossed up element in any content for an office development permit.
Gibson J: You say you were surprised, because, putting it shortly, you had previously thought otherwise?

(A) Indeed.'

Then I can leave out the next few questions and go over the page. Mr Chapman had explained that the planning authority wanted a rather more imposing building than had been contemplated by the plaintiffs up to that stage. He said that he was concerned because if they had a bigger building they would go over the limit.