

Case Name: *Bounces Properties Ltd v Secretary of State for Levelling Up, Housing And Communities & Anor* [2023] EWHC 735 (Admin) (30 March 2023)

Full case: [Click Here](#)

Commentary: This was a s.288 challenge by the Claimant against the Inspector's decision to refuse prior approval for the conversion of a retail unit, owned by the Claimant, into a residential unit ("the Proposal") under Class M Part 3 Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 ("GPDO").

Prior approval was refused because the Inspector was not "certain that the proposed windows would be effective in enabling adequate natural light to penetrate into all of the habitable rooms within the proposed flat". This was despite the fact that the appellant in that appeal, Omkara Limited, had submitted a Daylight/Sunlight Report ("the Report"), from an expert in the field, which argued that the proposed windows would allow for sufficient adequate light using the value of 0.68 for the transmittance of the glass used for windows. Moreover, the local authority ("the Second Defendant"), did not submit any evidence to the contrary. However, the Inspector raised the issue that the proposed windows were to be located such that "obscure/texture" glass will likely need to be used to ensure sufficient privacy for the occupiers of the proposed flat and, it was not clear to him whether this was considered in the methodology adopted to assess daylight transmittance in the Report. As a result, the Inspector concluded that he was not certain that there will be sufficient daylight transmittance. The Claimant's key argument was that had the Inspector put this point to Omkara for a response, they would have submitted evidence demonstrating that "obscure/texture" glass in fact transmits light better than "clear" glass due to the higher reflective properties of "clear" glass. The Court held that by not giving Omkara the opportunity to respond to the issue raised, the Inspector's decision was procedurally unfair, therefore, it should be quashed.

Commentary

This was a highly fact specific case where the High Court heard arguments on various points. However, the key takeaways relate to what amounts to procedural fairness and when such a decision can be successfully challenged on this ground. Mr Timothy Corner KC ("the Judge") succinctly summarised the principles as follows at [32]:

1. Any participant to a planning appeal is entitled to know the case they have to meet and be given a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case;
2. It is the Inspector's duty to ensure that each party has such a reasonable opportunity to adduce evidence on material issues;
3. If an Inspector is to raise an issue which had not been previously explored, "fairness means that the Inspector should give the party an opportunity to deal

with it, although the Inspector does not need to do so where the party ought reasonably to have been aware of the material arguments presented such that a particular point could not be ignored";

4. The Inspector should bear in mind the highly focused nature of modern planning appeals, the emphasis of which is to encourage the parties to focus their evidence and submissions on those matters that are in dispute; and
5. The Claimant must also show that the unfairness relied upon has caused material prejudice.

Applying the above to the facts in this case, the Judge held that the decision by the Inspector was procedurally unfair. This was because the issue as to whether "obscure/texture" glass should be used and how this will impact the penetration of daylight into a property was not raised by the Second Defendant either at the appeal stage or during its earlier decision to refuse prior approval; it was purely an issue raised by the Inspector. Therefore, it could not be said that Omkara ought reasonably to have been aware that this was a point that needed to be addressed in its representations. Subsequently, the Judge held that the Inspector should have given Omkara the opportunity to respond to the issue.

A further key point to note was that this was an appeal conducted on written representations alone and it was held that the above principles applied to "whatever procedure was followed", notwithstanding whether it was an appeal on written representations only or one that involved an oral hearing. Albeit, in the case of the former, it was noted that it was only in exceptional circumstances that fairness required the Inspector to do something more such as, requesting further information and/or holding an oral hearing. On the facts of this case, the Judge held that such an exceptional circumstance did arise, for the above reasons, and so concluded that the Inspector's decision should be quashed.

Case summary prepared by Chatura Saravanan