Case Name: *Gurajena & Anor, R (on the application of) v London Borough of Newham* [2024] EWHC 1745 (Admin) (05 July 2024)

Full case: Click Here

Commentary: This was a successful application for judicial review arising from the Council ("Defendant")'s decision to grant permission for works to the rear garden of a residential property which formed part of a terrace of five homes. The first of the two Claimants lived in the adjacent house, and the second's home was separated from the application site by two houses. The Council had, during the consideration period, sought amended plans to correct two errors the case officer had noticed. The Claimants were aggrieved by the Council's failure to carry out consultation on the corrected drawings. The second Claimant complained additionally that the Council had failed to consult her on the application at all. The first Claimant had received an initial letter notifying her of the application, but she was not given the opportunity to comment on the corrected drawings.

There was one ground of challenge – procedural unfairness – which developed into three sub-grounds as follows:

a) the Council's consultation on the application failed to comply with the requirements of the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("DMPO");
b) the second Claimant had a legitimate expectation that they would be consulted on the application, and that expectation was breached;
c) the corrections to the drawings constituted a material change to the application and that the Council's failure to re-consult was procedurally unfair.

The first sub-ground turned on the meaning of "adjoining" in article 15(5) of the DMPO, which provides that in most circumstances applications for planning permission must be publicised by site notice or "by serving the notice on any adjoining owner or occupier". The Defendant maintained that second Claimant's home did not adjoin the application site, primarily on the basis that it did not touch it (being separated by two intervening dwellings), and that the Defendant was therefore under no obligation to consult her. Timothy Corner KC, sitting as a Deputy High Court Judge, disagreed with the first element of the defence and found that the term "adjoining" could embrace properties "very near to" an application site and it was not necessary for a property to be contiguous. Notwithstanding, the second Claimant failed on this sub-ground because determining whether a property falls within the definition of "adjoining" is a matter of judgment for the local planning authority, and in this case the Defendant's decision not to consult the second Claimant was not Wednesbury unreasonable. There was no duty on the Defendant to consult the second Claimant.

On the second sub-ground, the court found that the second Claimant did not have a

legitimate expectation that she would be consulted. The second Claimant had been consulted on an application in 2022, for a roof extension at the application site, but this was not "a practice of consultation sufficiently settled and uniform to amount to a clear, unambiguous and unqualified promise" to consult her on this application. The judge went on to address section 31(2A) of the Senior Courts Act 1981, which requires that the court must refuse relief if it is highly likely that the outcome for the claimant would not have been substantially different if the defendant's conduct hadn't occurred. In this case, the judge was required to consider whether the grant of permission would have been highly likely to have occurred if the second Claimant had been consulted on the application. Given that the second Claimant had made representations opposing the application (despite her non-consultation), the judge found that the permission would highly likely have been granted in any event. Accordingly, this sub-ground also failed.

The third and final sub-ground concerned whether the first Claimant should have been consulted following the Defendant's receipt of the corrected drawings, and whether the Defendant should have considered at that point whether to consult the second Claimant. The plans initially submitted by the applicant had been contradictory and, in the judge's words, "so confusing that what I am told were misapprehensions by the Claimants were reasonable misapprehensions". There was a misunderstanding firstly as to what was to become of the existing low picket fence between the application site and the first Claimant's property, with two of the initial plans indicating incorrectly that it was to be replaced with a close-boarded fence. One of the plans also incorrectly showed that the steps to the decking were to be in a north-south alignment, when the proposal was in fact for an east-west alignment.

In her representations on the application, the first Claimant had already expressed her view that the development would be unacceptable if the low picket fence remained in place. Accordingly, the judge found that there was no obligation on the Defendant to re-consult her once the intended retention of the picket fence became clear: the Defendant already knew the first Claimant's position on it.

The judge reached the opposite conclusion on the steps to the decking, finding that the related corrections to the drawing should have led the Defendant to re-consult the first Defendant. The Defendant had provided evidence on the form of a witness statement from the case officer that any representations relating to the changed orientation of the steps would not have changed her recommendation, as there was in her assessment no difference in the privacy impacts between the two orientations. Counsel for the Defendant was therefore able to argue that the permission would have been highly likely to have been granted even if representations opposing the steps had been made by the first Claimant. The judge disagreed, finding that even though the steps were only part of the application proposals, the case officer's opinion on the application could have been influenced by the first Claimant's objection to the steps and that the permission might then have been refused. The claim was therefore successful on this

point and the permission was quashed. This passage in the judgment suggests that an alternative outcome (i.e. the refusal of permission in this case) need only to be "realistically possible" to overcome the highly likely/no substantial difference test and lead to the grant of relief.

In relation to the second Claimant, it seemed to be accepted by the Council that it had not considered whether to consult her once it had received the amended drawings. The judge commented that the Defendant should have considered whether to consult the second Claimant, but given the earlier finding that the Defendant was not bound to consult her, and the judge's finding that the her representations on the superseded drawings did not necessitate her consultation on the corrected drawings, a decision not to consult the second Claimant (had such a decision been taken) could have been lawful. The judge declined to fully elucidate their position on whether the outcome would have been highly likely to be the same if the second Claimant had been consulted, noting that the permission needed to be quashed in any event as the decision not to re-consult the first Claimant was unlawful.

The judge concluded by noting that the Council had attempted to clarify the proposal, and that the responsibility for the ensuing litigation was the applicant's. The applicant had taken no part in the proceedings.

For further discussion see Simonicity

Case summary prepared by Aline Hyde