Neutral Citation Number: [2023] EWHC 1588 (Admin)

Case No: CO/4260/2022

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**PLANNING COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 27th June 2023

**Before**:

**MR JUSTICE FORDHAM**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

| | |
|---|---|
| **THE KING**<br>**(on the application of SUSAN HALL)** | **Claimant** |
| **- and -** | |
| **ROYAL BOROUGH OF GREENWICH** | **Defendant** |
| **-and-** | |
| **GOODCARE LIMITED** | **Interested Party** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Jonathan Darby** (instructed by Harrison Grant Ring) for the **Claimant**
**Flora Curtis** (instructed by Greenwich RBC) for the **Defendant**
The **Interested Party** did not appear and was not represented

- - - - - - - - - - - - - - - - - - - - -

Hearing date: 27.6.23

Judgment as delivered in open court at the hearing

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.............................

THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

## MR JUSTICE FORDHAM:

Introduction

1. This is a planning judicial review case. The relevant documents can all be found in the public domain, on the Royal Borough of Greenwich's planning application pages, using the reference 21/2864/F.

2. When the planning committee granted planning permission (on 5.10.22) for the proposed demolition of the existing dwelling at 113 Mycenae Road with redevelopment to provide three four-bedroom dwellings, it did so subject to the 21 scheduled Planning Conditions. Among the topics discussed in the Officer Report (for 28.6.22), later supplemented by the Addendum Officer Report (for 27.9.22) ("OR"), were design and heritage (OR §10.0), neighbouring amenity (OR §12.0) and trees and ecology (OR §15.0), culminating in an overall conclusion and planning balance (OR §19.0) and accompanied by the list of planning policies (Appendix 3). While accepting the positive OR recommendation, and the positive advice on planning acceptability by reference to the various topics and policies, the planning committee required protective revisions to Planning Conditions 3 and 6. Condition 3 concerned implementation of the development in accordance with a January 2022 Arboricultural Impact Assessment ("AIA"), to which the revision added implementation in accordance with a detailed tree survey ("DTS") for Tree T6. Condition 6 concerned implementation in accordance with a future Basement Impact Assessment ("BIA"), to which the revision added a geological survey and consideration of local sinkholes. Mr Darby emphasises that the revisions and discussion in the committee meeting mean that this is not simply a case where an OR was being adopted: the picture to some extent moved on, when information gaps and their implications were considered and steps identified as necessary.

3. Permission for judicial review having been refused on the papers on 17 April 2023 by Sir Ross Cranston, two interrelated grounds for judicial review are put forward at this renewal hearing. The first ground is that the planning committee could not reasonably conclude that the impact on trees, and on neighbouring amenity, were acceptable impacts in planning terms, having identified as necessary the DTS and BIA with its geological survey. The DTS and BIA and geological survey would identify whether and what impacts there were. The planning committee could not reasonably, and with a legally sufficient evidential basis, conclude that unascertained impacts were acceptable. This was a "shot in the dark", as Mr Darby put it orally today. The committee was "flying blind", as one objector put it to the committee. The second ground is that these unanswered questions, about tree roots and sinkholes in particular, meant that obviously relevant considerations were being disregarded when the planning committee was considering deliverability, as an aspect of whether the development brought benefits outweighing the heritage harm. Unless the development were deliverable, there could be no such benefits. Whether the development were deliverable would depend on what the DTS, BIA and geological survey uncovered.

Viability

4. Like Sir Ross Cranston on the papers, I have concluded that there is no arguable ground for judicial review having any realistic prospect of success. The DTS which the planning committee has required for tree T6 will demonstrate the location and size

of T6's roots, whether and how their retention and protection during implementation of the development is possible and, if not, the extent to which tree roots will be removed and with what effects for the health and stability of the tree. Condition 3 requires that the development be implemented in accordance with the approved details. The purpose is to safeguard the health and safety of trees during building operations and the visual amenities of the area generally. This is in the context of a planning policy that development proposals should ensure that, "wherever possible", existing trees of value are retained (OR §15.1), the AIA having itself been revised to reflect the fact that tree T6 would not necessarily be removed (OR §15.3). The planning committee wanted to maximise the protection and prospects of retention for Tree T6, through the revision. There was no arguable unreasonableness, lack of legally sufficient evidence, or disregarded material consideration in the committee adopting and tightening up the arrangements for protecting and retaining Tree T6 if possible, while accepting that the proposed development was acceptable in planning terms subject to that revised Condition.

5. Under Condition 6 the BIA is to involve steps such as the geological survey to demonstrate stability, and identify any local sinkholes, to demonstrate the maintenance of structural stability, and to demonstrate respect for residential amenity of adjacent occupiers during the construction process. The BIA has to be approved in writing by the local planning authority and structural methodologies have to be endorsed by a chartered civil or structural engineer. The purpose of Condition 6 is to prevent nuisance, protect environmental health and local amenity, as well as ensuring suitable protection for adjacent trees. Again, there was no arguable unreasonableness, lack of legally sufficient evidence, or disregarded material consideration in the committee adopting and tightening up those arrangements, while accepting that the proposed development was acceptable in planning terms, subject to the revised Condition.

6. That includes acceptability in relation to design and heritage. As to that, the relevant policy required a proposed development leading to heritage "harm" to the significance of a designated heritage asset (assessed as "less than substantial" harm), needing to be weighed against the public benefits of the proposal (OR §10.4). The planning officer's assessment was that the "quantum" of development of the site was greater than the existing situation, which could be considered as causing harm (less than substantial) to the Blackheath conservation area (OR §10.19). Mr Darby today accepts, rightly, that this – and nothing else – was the relevant heritage harm. But the assessment was that this harm would be outweighed by the "public benefit", from the same "quantum" of development, of 3 family dwellings (§10.19). If the development is delivered, the very same quantum of development as would then constitute the harm would also produce the outweighing public benefit. Finally, I make clear that I can find no lack of clarity evidenced in the discussion which Mr Darby has showed me. On the contrary, the points about whether more information should precede the decision, and how the Conditions would work, were expressly raised and answered. There is here no viable judicial review claim.

<u>Costs</u>

7. I have now heard submissions on costs. This is an Aarhus Convention claim for the purposes of CPR45.41. On the Defendant's and Interested Party's applications to vary (CPR45.44) the default £5,000 Claimant's costs exposure limit (CPR45.43(2)(a)), Sir

Ross Cranston decided to adopt a varied limit of £25,000. That was, and is, challenged by the Claimant, who submits that the increased limit should have been £15,000. The Claimant's argument is that above £15,000 – and at £25,000 – this constitutes "prohibitively expensive" costs of the proceedings for these Claimant, notwithstanding her disclosed substantial resources, as a matter of what is "objective[ly] unreasonable" and so as not to have a chilling effect undermining the purpose of these rules relating to such claims. Sir Ross Cranston also ordered the Claimant to pay the Defendant's Acknowledgement of Service costs (£7,017.50) plus a sum (£540) in respect of costs of replying to the Claimant's response to the application to vary the costs cap. He ordered the Claimant also to pay a portion (£13,200) of the Interested Party's Acknowledgement of Service Costs (which had been claimed at £27,145.20) plus a further £1,800 in respect of costs of replying to the Claimant's response to the application to vary the costs cap. The Claimant has challenged all those costs orders, criticising the AOS costs as excessive, and the costs of a reply to an Aarhus Convention response as unjustified in this case.

8. There is a discrete point which has emerged about the inapt inclusion pre-action costs of the Defendant (said by Mr Darby to be £277.50) and VAT (£900), the Defendant being VAT-registered. I am satisfied, on those discrete points, that £1,177.50 falls to be deducted. Ms Curtis accepted that she could not contest that deduction, reviewing matters in the round. Subject to that point, I have not been persuaded by the Claimant's submissions in relation to costs. She is a person who has properly disclosed her resources. That is specifically a relevant consideration for the purposes of the cap-setting rule (CPR45.44(4)) and is really the reason why she herself accepts that a raised cap (she accepts, up to £15,000) is justifiable. In my judgment, Sir Ross Cranston struck an entirely appropriate and just balance. He had read and considered the Claimant's lengthy costs submissions. He did not 'look at the point from the wrong end of the telescope' or 'reverse-engineer' the outcome regarding the cap, as has been suggested by Mr Darby. He set a justified and compliant, varied cap. He also identified as disproportionate that portion of the Interested Party's AOS costs which he disallowed. It was, in my judgment, appropriate to make the costs orders which he did, in the circumstances that he did, and for the reasons that he did. I decline to overturn any of them. In relation to costs of replying to the Claimant's response to the application to vary the costs cap, Mr Darby accepts that such costs can in principle be recoverable, depending on the outcome; and I am satisfied, viewed overall, that the cap outcome here fully justified their inclusion.

27.6.23