Neutral Citation Number: [2023] EWHC 563 (Admin)

Case No: CO/4261/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL
14th March 2023

Before:
MR JUSTICE FORDHAM

- -

Between:

PYROSOME LTD **Claimant**

- and -

(1) SECRETARY OF STATE FOR LEVELLING UP HOUSING AND COMMUNITIES
(2) LONDON BOROUGH OF RICHMOND UPON THAMES

Defendants

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- -

Jonas Stanius (Claimant Company Director) in person
Killian Garvey (instructed by Government Legal Department) for the **First Defendant**
The **Second Defendant** did not appear and was not represented

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Hearing date: 14.3.23

Judgment as delivered in open court at the hearing

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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.

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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 renewed application for permission to bring a Statutory Review pursuant to section 288 of the Town and Country Planning Act 1990. At the paper stage Lang J refused permission. In doing so she refused an extension of time for the "Form N208PC" Statutory Review claim form which was filed and issued with the £569 fee on 16 November 2022. The strict deadline for the application was midnight on 4 November 2022. Lang J also found that the claim was unarguable because no error of law had been identified in the Inspector's decision, and that this was an impermissible challenge to an exercise of planning judgment. On this renewed application I have considered all issues afresh. I have had the advantage of the written and oral submissions by Mr Stanius the Director of the Claimant company, who addressed me carefully and with clarity, and Mr Garvey who appears for the Secretary of State.

Standing

2. One of the supposed 'knockout' points identified by the Secretary of State in the Acknowledgement of Service related to standing. However, the authorities there cited recognised that a person "who has a relevant interest in the land" does have standing to bring a challenge (Eco-Energy (GB) Limited v First Secretary of State [2004] EWCA Civ 1566 [2005] 2 P & CR 5 at §7). There is a witness statement before the Court which explains that the Claimant company has become the direct and ultimate owner of the property title which is 9 Cheyne Avenue TW2 6AN. The standing point was not maintained at this renewal stage by the Secretary of State.

Delay

3. A "jurisdictional" point that is maintained by the Secretary of State relates to delay. What happened was that on 4 November 2022 the Claimant filed a judicial review claim "Form N461" with the £154 fee applicable to such a claim. There is some email correspondence in the bundle between the Claimant and the Court. The time limits are strict but the Secretary of State's Acknowledgement of Service cites authority which recognises that the Court does have a discretion to permit "the correction" of "the filing of the claim on the wrong claim form". The case is Croke v SSCLG [2019] EWCA Civ 54 [2019] PTSR 1406 and the passage is at §9. The point that has been maintained is that this was not just a case of the wrong claim form but the wrong fee. With conspicuous fairness, Mr Garvey has today produced Hayes v Butters [2021] EWCA Civ 252 [2021] 1 WLR 2886. That is a decision of the Court of Appeal recognising the force in the concerns, for the purposes of the Limitation Act, of disallowing a claim based on an inadvertent miscalculation of a court fee. Mr Garvey rightly points out that at Hayes §24 it is clear that the views expressed were not necessary to resolve the decision in that case and are therefore "obiter". He candidly tells me that he is not aware of any authority on the 'wrong fee' point for the purposes of the planning legislation. If anything turned on this issue I would without hesitation be directing a "rolled up" hearing so that this issue could be considered substantively at a substantive hearing. I cannot see that there is a 'knockout blow'. If there is legal merit in this challenge I would not be shutting the claim out at this stage by reference to a hotly controversial point about the implications of not paying the fee. As it seems to me, once it is recognised that the Court can properly allow the "correction" of

someone using the "wrong claim form" it must logically follow that it is likely that the 'wrong fee' will have been paid. That is this case. I cannot see the justice of allowing, in principle, the wrong claim form to be excusable, but not permitting the accompanying wrong fee to be equally excusable. That is notwithstanding that, as Mr Garvey points out, it is possible that someone might mistakenly use the wrong form but pay the fee applicable to the right form.

The Target Decision

4. I am therefore quite satisfied that it is necessary to consider whether there is any legal merit in this challenge. The target challenged is the decision of the Planning Inspector on 23 September 2022, dismissing an appeal against the local authority's refusal of planning permission on 28 January 2022. The case has a history including the dismissal of a previous appeal in November 2017. For anyone wishing to see the materials and background in the public domain the appeal reference is APP/L5810/W/22/3291683. The planning application was reference 21/4141/FUL. All materials are in the public domain including the Appeal Decision by the Inspector. It is for that reason – in case any reader of this Judgment does wish to follow through into public domain materials – that I will be giving paragraph numbers in the Decision.

5. The Inspector identified four main issues (at §3). In relation to the fourth of them ("living conditions") no adverse conclusion was arrived at (§§22-24, 28). But in relation to each of the other three points there were adverse conclusions: first, on "character and appearance of those property and surrounding area" (§§4-12, 29); secondly, on "adequate car parking" (§§13-18, 29); thirdly, on "affordable housing" (§§19-21, 29).

Permission for Statutory Review

6. Mr Stanius recognises rightly that a Statutory Review challenge can only succeed if there is a public law legal error. The claim documents characterise the grounds of challenge as involving 'errors of law' or 'unreasonable' evaluative judgments. For the purposes of today the permission threshold is one of arguability.

Character and Appearance

7. The first ground of challenge concerns the first objection: character and appearance. The argument, in essence, is that a number of basic mistakes were made in the reasoning of the Inspector. Whether individually or cumulatively, they constitute a "misconception" of the local area and its character. In public law terms they constitute either an 'error of material fact' or 'unreasonableness'. At my request, Mr Stanius was able to take me in detail through a number of examples of arguments which are advanced under this ground.

8. Mr Stanius said that the Inspector was wrong (at §4) to describe properties in this residential area as being "within generous sized plots", as to which he showed me a photograph where there is a small self-contained garden with its own fence, within a bigger plot. But I have no doubt that it is the bigger plot that the Inspector was describing. Mr Stanius said that the Inspector was wrong to talk of properties "set back from the highway" (§4) and pointed to a photograph which showed that the very

bottom part of one house's extension involving a low roof and wall adjacent to the pavement. That was the same point that featured later in the argument, by reference to two examples of extensions given by the Inspector himself (at §9). One example was 192 Waverley Avenue, said by the Inspector (at §9) "not directly adjacent [to] the pavement" but said by Mr Stanius, based on a photograph, to be – so far as the lower part of the extension is concerned – directly adjacent to the pavement. The other was 7 Cheyne Avenue, said by the Inspector (at §9) to be "located close to the back edge of the pavement" but said by Mr Stanius, based on a photograph, not to be "close" but "at" the back edge of the pavement. These sorts of point, in my judgment, are classic illustrations of an evaluative judgment. The description of property set back from the highway is a general description of the character of the area the extensions are singled out by the Inspector precisely because of their proximity to the pavement. The point about whether an extension is at the edge of the pavement may depend on whether one is looking at the entirety of the extension or very lowest part of it. In the case of 192 Waverley Ave (where the Inspector said: "the side extension at 192 incorporated a long sloping roof with dormers and was not directly adjacent the pavement"), it is fair to say that the bottom part of the extension is next to the wall next to the pavement, but equally fair to say that the top (the "long sloping roof with dormers") is not. What the Inspector was doing was considering the objections to this particular proposed development, in the light of character and appearance, which he was evaluating and describing.

9. Mr Stanius made a point about a description (§4) of "the area" being "characterised by semi-detached houses and bungalows". He showed me photographs and explained that really his point was about whether they could be described as "semi-detached houses and bungalows" which were "adjoining" or not "adjoining". What the Inspector said (at §4) was that the area is characterised by "semi-detached houses and bungalows". Having looked at the photographs with Mr Stanius, I would agree that that is an accurate description. But it is not my role as a Judge in a Statutory Review case to decide what evaluative description is apt. That is a matter for the Inspector, subject to public law standards of review.

10. Then there was a point about a description (§6) of the "established 'building line' in Sheringham Avenue" and a "two-storey gable wall" in the "proposed dwelling" which "would be close to the back edge of the pavement". Mr Stanius says that the word "gable" is inappropriate for this proposed development but, in my judgment, that misses the point that the Inspector was making which was about close proximity of a two-storey wall to the back edge of the pavement in the context of a 'building line'. So far as 'building lines' are concerned, Mr Stanius pointed to the Inspector's description (at §4) of "well-defined 'building lines' to both roads". He pointed to photographs which he said showed a 'misalignment'. I am in no position to disagree with the Inspector, nor would the Judge at a substantive hearing be, based on these photographs. But in any event this was an evaluative judgment about the neighbourhood's overall character and, even if it were possible to point to an exception in a photograph, that would not undermine the point the Inspector makes.

11. The final example – in this series of points said by Mr Stanius to be his clearest illustration of something demonstrably "wrong" in the Inspector's description of the surrounding area concerned the use of the word "cul-de-sac" (§4). That word does on the face of it suggest a 'dead-end' road which would be a misdescription of these

streets. But in my judgment it does not begin to be a material error that vitiates the substance of the points that are being made. What the Inspector was deciding, for a number of key reasons which can be seen (at §§5-7 in particular) were the implications of the proposed development; the stark contrast it would present; its prominence; its incongruous and detrimental nature; its appearance. Those were the central planning judgements which gave rise to the "character and appearance" adverse conclusion. In my judgment nothing in the points of detail comes within touching distance of showing that that evaluative judgment was flawed in public law terms. I have dealt with points in some detail because they were advanced and developed, at my invitation, in some detail by Mr Stanius.

The Other Grounds

12. Grounds 2, 3 and 4 raise other issues. But I would accept the submission of Mr Garvey that, even if there were some arguable public law error in relation to these, the present claim has no realistic prospect of success in the light of the unimpeachable conclusions on "character and appearance", which are plainly (and inevitably) fatal to the planning application, given their nature and all the circumstances.

13. Ground two is a criticism of the Inspector's adverse conclusion on car parking. The Inspector concluded (at §17) that "in the absence of dedicated off-street parking space for the host property" – that is to say the existing property that would remain if the new proposed dwelling were to be built on its plot and next door to it – "there would be a net increase in on-street parking". This was in the context where (§14) "the host property's parking space would be transferred to the new dwelling and not replaced". That ("the host property's parking space") is a description of a parking space on the plot of land and off-street. Mr Stanius's answer is that the planning applicant had stated that, at the moment, that off-street parking space is not used for parking by the owner of the host property. That means transferring the off-street parking space to the new development property would leave things exactly the way they currently are. In terms of fact and reality, the use of the street for parking by the residents of the host dwelling would be exactly the same after as it is at present. But, in my judgment, the Inspector was focusing on the question of off-street parking, and the right and parking space which was being "transferred". That could not have been an inappropriate perspective for the Inspector to adopt. After all, the plot goes with the land, as do rights. Practices and current habits are one thing, but regard needs to be had to circumstances were they to change. The fact is that the current host property has a parking spot, off the street: one property; one parking spot. With this development, the new development property would have that off-street parking spot; but the host property would have lost its off-street parking spot. That was relevant and that is what the Inspector was describing. There was no error and it was a matter of evaluative judgment for the Inspector as to whether that was a material feature albeit "incremental" (§15) and "small" (§17).

14. The third ground for Statutory Review attacks §20 of the Inspector's decision. That concerned "affordable housing". The Inspector recorded, accurately: that the appellant had indicated a willingness to make a reasonable contribution towards the provision of off-site affordable housing; that there had been discussions as to the amount; but that no legal agreement had been presented. That was a description of circumstances in which there was disagreement as to the appropriate figure, a unilateral undertaking had been put forward, but there was no legal agreement. In the Statutory Review

challenge the concern has been raised as to whether this meant that a document that had been provided had not been received, but it is clear that it had been. That document was a unilateral undertaking, in a lower amount than the local planning authority had identified. I repeat that, even if there were a viable ground so far as this point is concerned, I would refuse permission on the basis that it could not arguably vitiate the decision as a whole in light of the other adverse conclusions. Mr Stanius, as I understood him, realistically accepted that. He made the point that it would be helpful "for the future" to have clarity on points, even if not decisive to this challenge. That would not have been a basis, in my judgment, for granting permission.

Dormer Loft Conversion

15. That leaves an elusive final ground relating to "dormer" loft conversion. On examination this was an attack on §7 of the Inspector's decision. In that passage the Inspector is considering whether "the overall scheme would be detrimental to the character and appearance of the host property and the area". The point is being made by the Inspector that "the extensions" are not "severable" and would be "viewed as part of the larger scheme". The point is made by the Inspector that:

> ***the proposed dormer would combine with the proposed dwelling adding to the overall bulk and mass of the resultant development.***

16. Mr Stanius was able to explain orally to me what this ground was getting at. He said this, as I understood it. It is true that there are dormer alterations proposed for the host property. It is also true that there is also a dormer proposal for the proposed dwelling. His point was this. Once you have a dwelling on a site, proposed dormer alterations to the roof would fall within "general permitted development rights". He argued that what the Inspector had done was to have considered dormer implications, for both the host property and the development dwelling, without appreciating the implications of these "general permitted development rights". Having teased out with him orally the nature of the argument that, in my judgment, was the essence of what the point came to.

17. The two problems with that argument are these:

    i) In the first place, this. The Inspector, beyond argument in my judgment, was entitled to look at the proposal 'in the round', including the new proposed dwelling, and including the 'dormer'. The Inspector was entitled to consider whether the proposal would be detrimental to character and appearance. The Inspector was also entitled, in principle, to consider that it would be no answer to say that 'if I can get permission, a dormer is capable of following as a general permitted development right': that premise would not arise because permission would first need to be given for the proposed dwelling in order for any such consequence to follow.

    ii) But secondly, and in any event, this. As Mr Garvey points out, this 'general permitted development rights' argument about dormers was not an argument that was advanced before the Inspector. There can, in the circumstances of the present case, be no material error of law in or legal inadequacy in the reasoning.

I repeat: even if there were a viable self-contained 'dormer' point, it could not even arguably prevail, viewed against the other planning judgment on character and appearance.

Conclusion

18. For the reasons that I have given, having considered all matters afresh, I am satisfied that this claim has no realistic prospect of success and for that reason I refuse permission for Statutory Review. I will now pause to see whether any consequential matter arises.

Costs

19. Having heard both parties in relation to costs, and in the particular circumstances of this case, I can see no basis for interfering with the costs order that Lang J made on the papers: namely that the Claimant pay the Secretary of State's costs of preparing the acknowledgement of service summarily assessed in the sum of £5,804.50. There is an additional reason why that costs order should be impervious. That is because the judge specifically spelled out that the Claimant had the prospect, if those costs were challenged, to object and file objections which could then be considered at any renewed hearing. I asked Mr Stanius whether any such objection was filed and I have not been shown any. But in any event, in all the circumstances, I would not interfere with that costs order.

Dormer Revisited

20. Having given my ruling, Mr Stanius asked me to "correct" one point in what I have attributed to him. He says that he was not submitting to me that the proposed dwelling development would have a 'dormer' within it, but rather that the only proposed dormer would be in the host dwelling. So far as that point is concerned, I am quite satisfied that it does not make any difference to my conclusions or my reasoning. What the Inspector said "the proposed dormer" would "combine with the proposed dwelling" thus "adding to the overall bulk and mass of the resultant development". The Inspector – in assessing the planning merits – did not describe a dormer within the proposed dwelling.