Neutral Citation Number: [2023] EWHC 735 (Admin)

Case No: CO/3192/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/03/2023

Before:

Mr Timothy Corner, KC
Sitting as a Deputy High Court Judge

- -

Between:

Bounces Properties Limited	**Claimant**
- and –	
(1) Secretary of State for Levelling Up, Housing and Communities	
(2) London Borough of Enfield	
	Defendants

- -
- -

Charles Streeten (instructed directly under Public Access) for the **Claimant**
Matt Lewin (instructed by the Government Legal Department) for the **First Defendant**
The Second Defendant did not appear at the hearing and was not represented.

Hearing date: 22 March 2023

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Approved Judgment

This judgment was handed down remotely at 10am on 30th March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Timothy Corner, KC:

INTRODUCTION

1. This case concerns an Inspector's decision to dismiss an appeal against the refusal of prior approval under Town and Country Planning (General Permitted Development) (England) Order 2015 ("the **GPDO**") for development involving the conversion of a retail unit into a residential flat. In this judgement I will refer to paragraphs of the Inspector's Decision Letter as **"DL1"** etc.

2. The Inspector found for the appellant on all matters save in relation to the adequacy of natural light. He dismissed the appeal because he could not be 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.

3. On that issue, the appellant had commissioned a detailed technical report from an expert in the field, Terence A. Rook of Stinton Jones Consulting Engineers LLP, to provide a report (entitled Analysis of Site Layout for Sunlight and Daylight) ("the **Daylight/Sunlight Report**"). That Report applied the industry standard methodology set out in the applicable Building Research Establishment guidance (Site layout planning for Daylight and Sunlight 2011) ("the **BRE Guidance**") including specifying the transmittance of the glass as 0.68 as recommended by the BRE. It concluded that the proposed flat would have adequate daylight.

4. By virtue of Paragraph W (12) of Part 3 of Schedule 2 of the GPDO, any grant of approval would have been subject to a condition requiring that the development should be carried out in accordance with the details submitted in the Daylight/ Sunlight Report.

5. The Second Defendant local planning authority ("**the Council**") did not challenge the Daylight/ Sunlight Report or its conclusions. It did not produce any evidence, whether in relation to daylight/ sunlight or otherwise.

6. Nor did the Inspector disagree with or otherwise question the methodology used in the Daylight/ Sunlight Report. In particular, he did not dispute the application of the BRE Guidance (2011 edition) for assessment of the proposal. Rather, he held at DL14-15 that he could not be certain that the proposed windows would enable adequate natural light to all the habitable rooms in the flat, because of the likely use of obscure glass.

7. The Claimant contends that in reaching that conclusion, the Inspector erred in law:

   (1) First, as the Inspector himself appeared to recognise at DL8, privacy is not a relevant consideration on an application for prior approval under Class M. In taking matters relating to privacy into account, the Inspector misinterpreted Class M, including by failing to recognise the effect of Paragraph W (12), and/or had regard to an immaterial consideration, namely the privacy of occupants of the proposed flat.

   (2) Second, his approach was procedurally unfair. He reached conclusions on the impact of installing obscure glass without giving the Claimant the opportunity to comment upon that issue, in circumstances where it was not an issue raised by the Council.

   (3) Third, he failed to have regard to a relevant material consideration, erred in fact, and/or reached an irrational conclusion in failing to appreciate that: (1) compliance with the minimum transmittance value relied upon in the

Daylight/Sunlight Report was secured by the condition imposed under paragraph W(12) of Part 3; (2), in any event, light transmits better through obscured glass than clear glass; and (3) the window in the external rear façade of the building was not relied upon by the Claimant's expert in assessing the acceptability of the natural light in the habitable rooms of the proposed flat.

LEGISLATIVE BACKGROUND

8. Under the Town and Country Planning Act 1990 ("the **1990 Act**"), planning permission is generally required for the development of land (see section 57(1)). Planning permission may be granted by a development order, or by a local planning authority determining an application made under section 62 (see section 58(1)).

9. Section 59 empowers the First Defendant to make a development order granting planning permission by the order itself. The current development order which generally applies in England is the GPDO. If a developer is entitled to rely upon the permitted development rights granted by such an order, he generally need not make an application for the grant of planning permission. Section 60(1) empowers the First Defendant to impose conditions or limitations on permitted development rights. In particular, more recent development orders have made the grant of certain permitted development rights subject to the "prior approval" of the local planning authority.

10. Under the GPDO, Article 3(1) grants planning permission for the classes of development described in Schedule 2.

11. Class M of Part 3 of Schedule 2 to the GPDO (as it was at the relevant time) is entitled "Class M – Retail or betting office or pay day loan shop to dwellinghouse". Insofar as relevant, the development it permitted was:

> "Development consisting of—
>
> (a) a change of use of a building from—
> (i) a use falling within Class A1 (shops) or Class A2 (financial and professional services) of the Schedule to the Use Classes Order;
> (ii) a use as a betting office or pay day loan shop, or
> (iii) a mixed use combining use as a dwellinghouse with—
> (aa) a use as a betting office or pay day loan shop, or
> (bb) a use falling within either Class A1 (shops) or Class A2 (financial and professional services) of that Schedule (whether that use was granted permission under Class G of this Part or otherwise),
>
> to a use falling within Class C3 (dwellinghouses) of that Schedule, and
>
> (b) building operations reasonably necessary to convert the building referred to in paragraph (a) to a use falling within Class C3 (dwellinghouses) of that Schedule."

12. Paragraph M.1 sets out various exclusions to the application of Class M, which are not relevant in this case.

13. Paragraph M.2 subjected the grant of permission under Class M to various conditions, including (where the development proposed is development under Class M(a) together with development under Class M(b)) a condition requiring the developer to apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to matters including (insofar as were relevant in this case):

(a) transport and highways impacts of the development; (b) contamination risks; (c) flooding risks; and (f) "the provision of adequate natural light in all habitable rooms of the dwellinghouses". Sub-paragraph (f) was added by the Town and Country Planning (Permitted Development and Miscellaneous amendments) (England) (Coronavirus) Regulations 2020, prior to which adequate natural lighting was not a requirement for the grant of prior approval under Class M.

14. Paragraph W of Part 3 to Schedule 2 of the GPDO provides in part as follows:

> "(1) The following provisions apply where under this Part a developer is required to make an application to a local planning authority for a determination as to whether the prior approval of the authority will be required.
>
> (2A) Where the application relates to prior approval as to adequate light, the local planning authority must refuse prior approval if adequate natural light is not provided in all the habitable rooms of the dwellinghouses.
>
> (9) The local planning authority [or, on appeal, the First Defendant] may require the developer to submit such information as the authority may reasonably require in order to determine the application.
>
> (12) The development must be carried out-
> (a) where prior approval is required, in accordance with the details approved by the local planning authority [or, on appeal, the First Defendant];
>
> (13) The local planning authority [or, on appeal, the First Defendant] may grant prior approval unconditionally or subject to conditions reasonably related to the subject matter of the prior approval."

15. The principle of development may not be considered when assessing an application for prior approval. On the contrary, the only matters which the local planning authority is entitled to consider when assessing such an application are those specifically requiring prior approval as prescribed by Schedule 2 to the GPDO (see *Murrell v Secretary of State* [2011] 1 P&CR 6 at paras. 44-45).

16. When an approval is granted, paragraph W (12) of Part 3 of Schedule 2 to the GPDO has effect. It imposes a condition that development permitted pursuant to a prior approval must be carried out in accordance with the details approved (if prior approval is required) or provided with the application (if it is not).

17. Nor does either section 70 of the 1990 Act or section 38(6) of the Planning and Compulsory Purchase Act 2004 apply to such applications. In assessing an application for prior approval, it is not necessary to have regard to the development plan or the policies in it (see *R (Patel) v Secretary of State* [2016] EWHC 3354 (Admin) at paras. 52).

FACTS

18. On 26 March 2021, Omkara Limited ("**Omkara**") submitted to the Council an application for prior approval under Class M (reference 21/01190/PIA) to create the proposed flat at 79 Bounces Road, Edmonton, N9 8LD ("the **Property**").[1]

19. The Council refused the application on 8 June 2021. Its reasons for doing so were set out

[1] By the decision letter the Inspector also allowed appeal reference APP/Q5400/W/21/3280788 ("**Appeal B**"). His conclusions in relation to Appeal B are not subject to challenge.

in the decision notice with the reasoning provided in a delegated report of the same date ("the **OR**"). In short, the report concluded that:

> "The proposed scheme fails to meet the conditions above in terms of the scheme's insufficient provisions related to traffic and transportation, flood protection, and internal spaces. Accordingly, the scheme cannot meet the requirements of conditions (a), (c) and (f) of Class M and as such the proposal is contrary to those conditions."

20. In relation to condition (f) the OR said:

> "6.16 As shown on the plans submitted with the application, although rooflights are proposed, the application site would be single aspect with only windows proposed along the principal elevation. London Plan (2021) Policy Policy [sic] D6 Housing Quality and Standards states that housing development should maximise the provision of dual aspect dwellings and normally avoid the provision of single aspect dwellings. Further, the policy indicates that single aspect dwelling [sic] are only acceptable where it can be demonstrated that they will have adequate passive ventilation, daylight and privacy, and avoid overheating. Insufficient information is provided in the application to confirm these points. Specifically, the bedroom does not include any windows, other than rooflight, and no indication is given as to how it will be ventilated. Accordingly, it cannot be satisfied that there would be adequate natural light (daylight / sunlight) and ventilation in the habitable spaces as proposed. This would result in substandard, poor and oppressive living conditions for future occupiers and cannot be tolerated.
>
> 6.17 Therefore, the scheme would not comply with condition (f) above because insufficient natural light would be provided in the habitable room."

21. Omkara appealed (by appeal form dated 11 August 2021) against the Council's decision to refuse prior approval. In support of its appeal, it submitted the Daylight/Sunlight Report, which concluded:

> "The proposed development will have no effect on the daylight and sunlight to nearby buildings or gardens.
>
> The proposed flat has windows of adequate size to ensure adequate daylight and sunlight. Daylight and sunlight in all cases is better than the recommendations of the Building Research Establishment publication 'Site layout and planning for daylight and sunlight, a guide to good practice' published in 2011, the normal planning requirements of London Borough of Enfield the London Plan and accepted good practice.
>
> This is a permitted development application and not a planning application. There is no requirement for the windows to have adequate outlook. For permitted development it is only necessary to have adequate natural light. This requirement is fulfilled for all the rooms of the flat."

22. The assessment in Daylight/Sunlight Report was based on the BRE Guidance, which at Appendix C sets out recommendations for daylight (as measured in Average Daylight Factor-"ADF") for rooms of various types, and a method for calculating what the ADF would be in particular cases. One of the factors in the calculation was transmittance of the glass. The Daylight/Sunlight Report stated at paragraph 5.1 that the ADF had been calculated on the basis of transmittance ("T") of 0.68.

23. In applying the BRE Guidance and in reaching its conclusion that all rooms in the proposed flat would have adequate daylight and sunlight, the Daylight/Sunlight Report did not rely on the window on the rear elevation of the proposed flat. Rather its conclusions were reached exclusively on the basis of the light from roof windows (see the Appendix on p.12 of the Daylight/Sunlight Report).

24. The Council did not submit any evidence in response. Indeed, as the Inspector noted at DL9, the Council did not even submit a statement of case for either Appeal A or Appeal B.

<u>The Decision Letter</u>

25. In relation to Appeal A, the Inspector identified the main issues at DL11 as being:

> "whether the proposal would be suitable for the building in respect of the provision of adequate natural light in all habitable rooms, transport and highways impacts of the development, and flooding risks in relation to the building".

26. In relation to transport and highways and flooding risks, the Inspector concluded that the proposed development would not conflict with the requirements of Class M under paras M.2(1)(a) and M.2(1)(c) (see DL17-22).

27. The sole basis upon which he dismissed Appeal A was in relation to 'natural light', in which regard he said:

> "14. The roof of the proposed flat would be traversed by an existing access leading to a first floor flat above No 79. The proposed rooflight for its bedroom would be situated close to the terrace outside and the door and window of the flat above. The rooflight over the lounge would also lie next to the access walkway of the above flat. It is therefore likely that these rooflights would need to be fitted with obscure glass to provide privacy for occupants of the proposed flat. The appellant's document entitled Analysis of Site Layout for Sunlight and Daylight (July 2021) acknowledges the importance of designing for sunlight to ensure appropriate levels of privacy. However, it is unclear whether privacy was factored into the methodology for determining the extent of natural light that would be received in the proposed flat. Furthermore, the window in the external rear façade of the building would be close to the external wall of the adjacent stepped access to a neighbouring flat and would be crossed by the stairs to the flat above No 79.
>
> 15. Given these factors, I cannot be 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. I therefore conclude that the scheme has failed to demonstrate compliance with paragraph M.2.(1)(f) of Part 3 of the GPDO and the aims of DMD Policies DMD6 and DMD8, CS Core Policy 4, and paragraphs 126 and 130 of the Framework."

28. At DL 35, the Inspector concluded:

> "Despite my findings in relation to flood risk and transport and highways, I cannot be 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. Accordingly, for the reasons given above I conclude that [the] Appeal..should be dismissed."

29. On 2 September 2022, the Claimant, which is the freehold owner of the Property, challenged the Inspector's decision pursuant to section 288 of the 1990 Act and the First

Defendant acknowledged service and filed summary grounds of resistance on 16 September 2022.

30. On 6 October 2022 Eyre J granted permission on what he described as "grounds 2-4" (understood to mean the points made in the Claimant's Statement of Facts and Grounds at paras 26-29). The Claimant applied to renew Ground 1 and on 14 November 2022, Neil Cameron KC (sitting as a deputy judge of the High Court) ordered that the Claimant's application to renew Ground 1 should be heard on a "rolled-up" basis, together with the substantive hearing of grounds 2-4.

31. For completeness, on 31 January 2023, the Council granted prior approval under Class MA for the change of use of the Property to use as a flat under Class MA, on the basis of a layout with fewer rooflights than proposed for the development which was the subject of the Appeal.

APPLICABLE PRINCIPLES

Procedural fairness

32. The relevant legal principles were summarised by John Howell KC (sitting as a deputy judge of the High Court) in *R (Wokingham BC) v Secretary of State* [2018] PTSR at [51-54]). In short:

    (1) Any participant to a planning appeal is entitled: (1) to know the case which he has to meet; and (2) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case (see *Hopkins Developments Limited v Secretary of State for Communities and Local Government* [2014] EWCA Civ 470 per Jackson LJ at [470].

    (2) It is the Inspector's duty to conduct the proceedings so that each party has a reasonable opportunity to adduce evidence and make submissions on the material issues, whether identified at the outset or emerging during the course of the hearing (*Hopkins* at [61-62]). What is needed is knowledge of the issues in fact before the Inspector and an opportunity to adduce evidence and make submissions on those issues (*Hopkins* at [90]).

    (3) Whilst an inspector can reasonably expect parties to an appeal to explore and clarify the position of their opponents, if an Inspector is to take a line which has not been explored, fairness means that the Inspector should give the party an opportunity to deal with it, although he need not do so where the party ought reasonably to have been aware on the material arguments presented that a particular point could not be ignored or that a particular aspect needed to be addressed (*Castleford Homes Ltd v Secretary of State* [2001] PLCR 29 per Ouseley J at [53]).

    (4) What fairness requires is acutely fact sensitive and what it requires must be considered in all the circumstances of the case (see *Hopkins* at [93]). In considering whether the parties to a planning appeal have had a fair opportunity to comment on an issue raised by the Inspector of his own motion, and whether they could reasonably have anticipated that an issue had to be addressed because it might be raised by the Inspector, it is important to bear in mind the highly focused nature of modern planning appeals, where the whole emphasis of the rules and procedural guidance is to encourage the parties to focus their evidence and submissions on those matters that are in dispute (*R (Poole) v*

Secretary of State [2008] JPL 1774 per Sullivan J (as he then was) at [40]).

(5) The Claimant must also show that the unfairness relied upon has caused material prejudice (*Wokingham* at [54]).

33. Those principles apply under "whatever procedure is followed" (see *Dyason v Secretary of State* [1998] JPL 778). In the context of appeals under the written representations procedure Richards J in *West v First Secretary of State* [2005] EWHC 729 (Admin) said:

> "42 In my judgement,….the general rule is that it is incumbent on the parties to a planning appeal to place before the inspector the material on which they rely. Where the written representations procedure is used, that means they must produce such material as part of their written representations. The inspector is entitled to reach his decision on the basis of the material put before him.
>
> 43 That general rule accords with principle, is supported by the decision in Patel and is consistent with the decision in E v Secretary of State. It also accords with the acceptance by Pill LJ in Dyason that 'an appellant must be expected to tell the Inspector all he wishes to tell him': that was said in the context of an oral hearing, but seems to me to apply with at least as much force in the context of the written procedure. There is nothing inherently unfair in the operation of that general rule.
>
> 44 In reaching his decision on the basis of the parties' written representations, the inspector is subject to the inquisitorial burden referred to in Dyason and must subject the material before him to rigorous examination. As Pill LJ observed, '[w]hatever procedure is followed, the strength of a case can be determined only upon an understanding of that case and by testing it with reference to propositions in the opposing case.' In general, however, that process does not require anything beyond proper consideration of the material put forward by the parties.
>
> 45. There will be exceptional cases where, on the particular facts, fairness requires the inspector to do something more, for example by requesting further information or by departing from the written procedure and holding an oral hearing. The Regulations can accommodate such cases without difficulty."

34. In *Spitfire Bespoke Homes Ltd v Secretary of State for Housing and Local Government and Warwick District Council* [2020] EWHC 958 (Admin) Andrews J stated at [49] that:

> "The principles of natural justice apply as much to written appeal processes ..as they do to oral hearings."

Interpreting Inspectors' decision letters

35. In *Newcastle City Council v Secretary of State for Levelling Up, Housing and Communities* [2022] EWHC 2752 (Admin) Holgate J summarised the relevant principles at [7]:

> "..decision letters should be read (1) fairly and as a whole, (2) in a straightforward and down-to-earth manner, without excessive legalism or criticism and (3) as if by a well-informed reader who understands the principal controversial issues in the case. They should be read with 'reasonable benevolence' (see also Sales LJ, as he then was, in *Daventry District Council v Secretary of State for Communities and Local Government* [2017] JPL 402 at

[35])."

THE GROUNDS AND THE PARTIES' SUBMISSIONS

36. The points raised by the Claimant were pleaded as a single ground with various aspects. I have considered them under the following headings.

Privacy

37. The Claimant contends that the Inspector erred in taking account of the privacy of occupiers in reaching a judgement on the adequacy of the natural light to the flat. There was no dispute that privacy was not a relevant matter for the Inspector's decision on prior approval, as the Inspector accepted at DL8. Tying privacy concerns to the analysis of the daylight available in the habitable rooms cannot make it relevant; otherwise, other amenity considerations could be brought in by the "back door" (for example in the absence of transparent glass it might be said that occupants would have no outlook).

38. The First Defendant responds that the Inspector's reference to privacy at DL 14 has to be read in the light of his reminder to himself in DL 8 that the GPDO does not require privacy and that "As paragraph M.2 (1) (f) …only refers to natural light, I have not referred to these other matters in the determination of these appeals."

39. The First Defendant says that in DL14 the Inspector was just making the common-sense observation that given the location of the rooflights over the main living areas of the proposed development, the developer would likely use obscure glass to provide privacy to the occupants.

Procedural Fairness

40. The Claimant contends that the Inspector's approach was procedurally unfair. He acted unfairly in failing to give Omkara the opportunity to address the question whether obscure glass would materially affect light transmittance through the proposed roof windows. That was a point which had never been raised by anyone and which Omkara could not reasonably have been expected to address, particularly given privacy was not in question.

41. In *R(Ashley) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 559, the Court emphasised that the written representations procedure is specifically intended to apply in circumstances where "the inspector should not need to test the evidence by questioning or to clarify any other matters" (see para. 26 and Annexe K to the PINS Procedural Guide). It proceeds on the basis that the appellant will provide its statement of case and supporting documentation to the Planning Inspectorate ("PINS") and the local planning authority (see PINS Procedural Guide Annexe para. D.2); the local planning authority will provide its full statement of case 5 weeks later (D.5) and the appellant will then have a further two weeks to respond to any matters raised in that full statement of case (D.7). That three-stage process is intended generally to achieve fairness in cases where the written representations procedure is appropriate (ie where the Inspector does not need to clarify matters) by providing the appellant with the opportunity to make further submissions following the local planning authority's statement of case.

42. In this case, the Council did not even provide a Statement of Case in relation to Appeal A. Nor did it present any final comments. It did nothing to rebut the position of the

Claimant's expert in the Daylight/Sunlight Report.

43. Certainly, it made no suggestion that obscure glass would mean natural light was less able to penetrate the window aperture. That was an entirely new point raised by the Inspector, on which he gave the Claimant no opportunity to comment. That was procedurally unfair in all the circumstances. It was not a matter which Omkara ought reasonably to have been aware needed to be addressed in all the circumstances:

(1) It was not a point raised by the Council in the officer's report refusing to grant prior approval or as part of the appeal.

(2) Privacy is not a matter relevant to the prior approval under Class M, so it could not be anticipated that the Inspector would have regard to it in considering the adequacy of the natural light available to occupants of the proposed flat.

(3) Omkara appointed a reputable daylight/sunlight expert to produce an independent report on the issue of daylight/sunlight. The Daylight/Sunlight Report took the industry standard approach to glazing transmittance, relying upon the BRE standard level of 0.68.

(4) Paragraph W (12) of Part 3 of Schedule 2 imposes a condition requiring accordance with the details submitted, in which circumstances any suggestion by the Inspector that glass achieving a lower transmittance than that referred to in the Daylight/Sunlight report was especially unforeseeable.

(5) The BRE transmittance figure relied upon (0.68) is conservative and could easily be achieved with clear or textured (obscure) glass.

(6) Obscure glass in fact has better light transmittance properties than clear class, because clear glass has a more reflective outer surface, so less light passes through it. Thus, in the Glass Handbook 2014 (Pilkington) obscure glass achieves transmittance of 0.86 for 6mm thick glass, whilst active clear glass (the clear glass with the highest light transmittance value) achieves only 0.83 (ie 3% less). That is consistent with the standard values for light transmittance in other relevant guidance, including CIBSE Guide and the Society of Light and Lighting LG10.

(7) The local authority did not raise the issue following Omkara's statement of case. It did not in any way challenge the conclusions reached by a qualified expert in the Daylight/ Sunlight Report.

44. The Inspector's approach, which was to dismiss the appeal contrary to the only expert evidence before him, on the basis of an entirely new point not previously raised by anyone and which relied upon the privacy of occupants (which was not a material consideration), an assumption that the value of 0.68 transmittance was not secured (when it was by paragraph W(12)), and an assumption that obscure glass results in lower levels of light transmittance (which it does not) was procedurally unfair.

45. That unfairness caused prejudice. Had the issue been identified it could easily have been addressed with reference to the light transmittance properties of obscure glass.

46. The First Defendant submits that this is not an exceptional case where fairness required the Inspector to give the parties an opportunity to fill gaps in their evidence. It was

reasonable to expect the appellant's evidence to deal with the use of obscure glass because:

(a) the location of the rooflights raised obvious privacy implications and therefore it was reasonable to assume that the developer would install obscure glass windows, whether or not it was under a legal duty to do so:

(b) it is not obvious or common knowledge that obscure glass transmits light as effectively (or better) than plain glass, as the Claimant now argues. Therefore, it was reasonable for the Inspector to question whether the use of obscure glass would impact on natural light levels within the dwelling; and

(c) the appellant was professionally advised and was well aware that the adequacy of natural light was a central issue in the appeal.

Irrationality/Material Considerations

47. The Claimant contends that the Inspector's decision is premised on the assumption that obscure glass reduces light transmission, which is not the case. Obscure glass achieves better light transmittance than clear glass, because clear glass has a reflective surface, so less light passes through it. Accordingly, the Claimant argues that the Inspector failed to have regard to an obviously relevant consideration, proceeded by flawed reasoning and/or reached a decision contrary to the evidence.

48. The First Defendant responds that the Inspector did not have regard to an irrelevant consideration or reach an irrational conclusion about the potential impact on natural light levels of obscure glass. It was far from "irrational" for the Inspector to query whether the use of obscure glass might affect natural light levels. It is not obvious or common knowledge that *"light transmits better through obscured glass than other glass*", as the Claimant now argues. This was clearly a matter for evidence. In the absence of such evidence, the Inspector was entitled to reach the conclusion that "*it is unclear whether privacy was factored into the methodology for determining the extent of natural light that would be received in the proposed flat"*.

External Rear Façade Window

49. The Claimant contends that the Inspector's reliance (DL 14) on the fact that the rear window would be close to the external wall of the adjacent stepped access to a neighbouring flat and would be crossed by the flat above was irrational given that the Daylight/Sunlight Report stated that adequate levels of daylight could be achieved without that window.

50. The First Defendant responds that the Inspector was entitled to refer to the rear window in the way that he did. There is no sustainable challenge to the Inspector's conclusion that the rear window would not contribute to providing adequate natural light levels, and in those circumstances the Inspector cannot be criticised for making a passing reference to this window.

Paragraph W (12)

51. The Claimant argues that the Inspector's decision was based on the misconception that the development could be carried out using glass which failed to achieve the level of transmittance referred to in the Daylight and Sunlight Report. It could not. W (12) imposes a condition on prior approvals requiring them to be carried out "in accordance with the details approved by the local authority" or if no such details are approved, "in

accordance with the details provided." The details provided include the Daylight and Sunlight Report, which identified that the level of transmittance relied on was 0.68. Were the proposal approved, it would be a breach of condition for glass to be installed achieving less than 0.68.

52. The First Defendant responds that this is a new ground on which the Claimant does not have permission to rely, but in any event, it adds nothing. There was no obligation on the Inspector to accept the content of the appellant's Daylight/Sunlight Report at face value. He was entitled to conclude that the Daylight/Sunlight Report did not adequately address the central issue of the natural light levels in the dwelling.

ASSESSMENT

53. Before dealing with the grounds raised, I mention terminology. The Inspector used the term "obscure glass" for the type of glass he thought would be used in order to secure the privacy of the occupants of the proposed flat. That term was also used at the hearing before me, and I have used it in this judgement. However, another term, which is used in the Pilkington Glass Handbook, is "texture" glass. The hearing proceeded on the basis that these terms are interchangeable, meaning glass which is not clear, and which therefore affords more privacy. However, the term "obscure glass" may be misleading, in that it has connotations of glass which leads to a darker or more "obscure" interior, because it transmits less light. This is unfortunate because it was apparent from the evidence before me that this is not the case.

<u>Privacy</u>

54. I do not think the Inspector erred in taking account of the privacy of occupiers in reaching a judgement on the adequacy of natural light available. He was clearly aware of the fact that privacy was not a material consideration for the purposes of his judgement; see DL8. In my judgement he was, as the First Defendant said, just making a common-sense point that given the location of the rooflights over the main living areas of the proposed development, the rooflights would likely be glazed with obscure glass. In other words, the Inspector did not dismiss the appeal because he did not think that the appeal proposal secured privacy for the occupants of the new unit. Instead, he considered that in order to secure their privacy, obscure glass would be used, and it was in the light of that common-sense judgement that he assessed the adequacy of lighting, which I deal with below.

55. Having regard to the above conclusions I refuse permission to the Claimant to rely on this ground. It also follows that even if I had given permission, I would not quash the Inspector's decision on this ground.

<u>Procedural Fairness</u>

56. The crucial principle in relation to this ground is that each party has a reasonable opportunity to adduce evidence on the material issues. If an Inspector is to take a line which has not been explored, fairness means that the party affected should be given an opportunity to deal with it, though the Inspector need not do so where the party ought reasonably to have been aware of that the point needed to be addressed. What fairness requires is acutely fact sensitive, as was pointed out in *R (Wokingham BC) v Secretary of State* (cited above) at [54].

57. In my view, fairness in the present case required the Inspector to give Omkara, the appellant, an opportunity to deal with the issue of the effect of glass being obscure. I agree with the Claimant that it could not be said that Omkara ought reasonably to have

been aware that it needed to be addressed.

58. Omkara's Daylight/Sunlight Report did address transmittance, stating at paragraph 5.1, page 7, that the transmittance of the glass was taken as 0.68. It was agreed at the hearing that there was nothing in any document before the Inspector which specified whether the glass was to be clear or obscure. In fact, the Daylight/Sunlight report referred to paragraph 2.3.45 of the Mayor of London's Supplementary Planning Guidance on Housing, which suggests (as the Inspector said at DL 14) that the author of the Daylight/Sunlight Report was conscious of the need for privacy, making it at least possible that obscure glass was contemplated.

59. Again, there was nothing before the Inspector which suggested that if it was to be obscure, the transmittance would be less than the 0.68 used in the Daylight/Sunlight. Furthermore, it was agreed before me that there is simply no basis for any suggestion that obscure glass would take the transmittance below 0.68.

60. Finally, no concern as to the effect of obscure glass was expressed by the Council. The issue was not touched on in the OR, and the Council did not submit a statement of case in relation to the appeal.

61. In those circumstances, I cannot see how Omkara could have been expected to deal with the matter. It may have been reasonable, as the First Defendant submitted, to suppose that the developer would likely install obscure glass. But in the absence of any evidence that obscure glass would reduce the transmittance to below 0.68, Omkara could not be expected to anticipate that its use would be a source of concern for the Inspector.

62. The First Defendant submits that it is not obvious or common knowledge that obscure glass transmits light as effectively or better than plain glass and that it was therefore reasonable for the Inspector to question whether the use of obscure glass would impact on natural light levels within the dwelling. My view is that in the absence of any evidence that obscure glass *would* reduce the transmittance below what had been assumed by Omkara's consultants, the Inspector should have given Omkara the chance to deal with his concern. If he was questioning the impact of using obscure glass, he should have given the parties the chance to comment.

63. In my view, therefore, this an exceptional case (see *West v First Secretary of State*, cited above, at [45]) where the Inspector should have sought further information before reaching his decision. It was agreed at the hearing that this could have been a relatively simple process. There could have been a communication (perhaps by email) from PINS to the parties seeking a response within a short timescale, and a reply from Omkara attaching a letter from the daylight consultant which briefly stated that obscure glass would not have less transmittance than clear glass and would not take transmittance below 0.68. This need not have caused substantial further delay to the decision.

64. The Claimant has clearly suffered prejudice because of the Inspector's failure to revert to Omkara on this matter. On the evidence before me, namely the Pilkington Glass Handbook, obscure glass can be used whose transmittance exceeds 0.68; indeed, it appears that the transmittance of obscure glass is better than clear glass, because obscure glass is less reflective than clear glass.

65. The Inspector's decision must therefore be quashed on the ground of procedural unfairness.

66. I add for completeness, that for the reasons given at paragraph 71 below, I am not persuaded on the evidence that W (12) required transmittance of 0.68, so I reject the

Claimant's contention that W (12) was a further reason why Omkara could not have been expected to deal with the effect of obscure glass.

Irrationality/Material Considerations

67. The Inspector did not conclude that obscure glass would, in fact, transmit light at less than 0.68, and went no further than to question whether it would do so. However, as is clear from DL35, it was on that basis that he dismissed the appeal. In circumstances where, as the First Defendant agreed at the hearing before me, he had no basis for supposing that obscure glass would transmit light at less than 0.68, it was in my view irrational to dismiss the appeal on the basis that it might do so, unless he had first given the parties the opportunity to comment. It might also be said that he failed to take into account a material consideration, namely the fact that obscure glass has transmittance of greater than 0.68 and better than clear glass; but he did not have that evidence before him. Overall, that part of the Claimant's case which is based on irrationality and failure to take account of material considerations is simply another way of expressing its case about procedural fairness. The real failing in this case is that having become concerned about the impact of using obscure glass, he did not seek the parties' views about it.

Rear Façade Window

68. I am not persuaded by this ground. All the Inspector was suggesting was that the rear window would not make a sufficient contribution to light levels to counteract any inadequacy in the rooflights by reason of the fact that they would be likely to have obscure glass. There was no suggestion in the Daylight/Sunlight Report that the rear windows would make a material contribution. Again, the crucial failing in this case is that having become concerned about the obscure glass, the Inspector did not give Omkara the chance to deal with that concern.

Paragraph W (12)

69. As I have said above, this point is relevant to procedural unfairness as one of the reasons the Claimant gives as to why Omkara could not reasonably be expected to anticipate that the Inspector would be concerned about the effect of obscure glass being used. However, it seems to me that paragraph W (12) is also raised as a separate ground and should have been pleaded separately. It was raised only in the Claimant's Reply submitted in November 2022, and without a formal application for permission to add a further ground. Mr Streeten for the Claimant asked for permission to add the further ground at the hearing. It would be appropriate to grant such an application only exceptionally. However, I do so, because of the absence of any evidence of prejudice to the First Defendant. It is in essence a point of pure law. Also, the First Defendant has had notice of it for several months since receiving the Claimant's Reply (to whose admission it did not object), and did not suggest, either on receipt of the Reply or since, that a formal application for permission to add a further ground was required.

70. As to the merits, it is plain that paragraph W (12) of Part 2 to Schedule 3 to the GPDO requires development to be carried out in accordance with the details approved.

71. However, the legislation must be construed in a common-sense way, and I do not think the words of W (12) necessarily meant that what was installed must conform in every single particular with what was set out in the Daylight/Sunlight Report. The important conclusion in that Report was that daylight within the new accommodation would meet the ADF recommendations contained in the BRE Guidance. Had it been possible to achieve those recommended levels with glass whose transmittance was less than 0.68, I think the requirements of W (12) would have been satisfied and I am not convinced that

the legislature intended that transmittance of 0.68 would be mandatory in that event. It is not clear from the evidence whether ADF recommended levels could still be achieved with transmittance of less than 0.68. However, from the Appendix to the Daylight/Sunlight Report it appears that the ADF levels for the relevant habitable rooms (bedroom and living room) were markedly above the recommended levels, which would suggest that the recommended levels could still be achieved with glass with a lower transmittance. In those circumstances I do not think it has been demonstrated that glass transmittance of less than 0.68 would have contravened W (12).

CONCLUSION

72. Having regard to my conclusions set out above, the Inspector's decision was reached unlawfully and must be quashed. Fundamentally, the appellant could not reasonably have been expected to deal with the effect of installing obscure (or texture) glass, and the Inspector's concern as to the effect of installing such glass should have been raised with the parties.