Neutral Citation Number: [2024] EWHC 1745 (Admin)

AC-2023-LON-002737

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th July 2024

Before:

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

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Between:

The King
on the application of
[1] Carol Gurajena
[2] Gwenevere Benta

Claimants

- and –
London Borough of Newham

Defendant

-and-
[1] Anilkumar Kizhakkekunnath
[2] Radalakshmi Kizhakkekunnath

Interested Parties

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The Claimants in person
Stephanie Bruce-Smith (instructed by the Director of Legal Services, London Borough of Newham) for the **Defendant**
The Interested Parties were unrepresented and took no part in the proceedings.

Hearing date: 25 June 2024

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Timothy Corner, KC:

INTRODUCTION

1. Carol Gurajena and Gwenevere Benta ("the Claimants") challenge the decision of the London Borough of Newham ("the Council") to grant planning permission (part retrospective) for the construction of a rear extension, rear garden decking and an outbuilding, application ref. 23/0123/HH at 5 Silver Birch Gardens, East Ham, London E6 3SX ("the application site"). The planning application ("the Application") was made on behalf of Mr and Mrs Kizhakkekunnath ("the Interested Parties"). The First Claimant lives at 6 Silver Birch Gardens and the Second Claimant lives at 8 Silver Birch Gardens. Nos 1-8 Silver Birch Gardens form a terrace of modern houses. Nos. 4 and 6 are on either side of the application site, contiguous with it. No. 4 lies west of the application site, and no. 6 is to its east. No. 8 is separated from the application site by nos. 6 and 7.

2. The houses within the terrace have gardens with a small area of flat land immediately to the rear of the houses, with the remaining part of the gardens sloping steeply upwards to the north. It appears that the raised decking at the application site was built because the slope of the garden limited its utility. The decking is 1.65m above the level of the flat part of the garden.

3. Permission to apply for judicial review was granted by Mrs Justice Lang on 27 October 2023 on Ground 3 only, which alleges procedural impropriety and failure to act with procedural fairness, namely, that the Council failed to properly consult the Claimants.

FACTUAL BACKGROUND

4. On 15 May 2023, the Council received the Application, which was accompanied by plans.

5. On 22 May 2023, the Council sent consultation letters to nos. 4, 5 (this must have been a mistake) , 6 and 7 Silver Birch Gardens. These letters requested a response by 12 June 2023. The Council received responses from the occupants of nos. 6 and 8 (the First and Second Claimants respectively) on or before 12 June 2023.

6. The First Claimant gave as her reason for objecting loss of privacy and said:

“I am objecting to the construction of the raised decking and outbuilding due to loss of privacy and the overlooking of my property and also visual amenity and design.

The view from the raised decking looks into my living space, both inside and outside the house.

From the decking, someone can see into my property through the ground floor window and the first floor window…..

I have previously expressed that there is a problem with loss of privacy to the neighbours/applicants therefore I am surprised to see that their architect hasn’t mentioned it in their statement. I had said that I was considering whether a new, higher fence would assist. When I mentioned it last year, the neighbour said she would ask her builder to contact me. I never heard from him. I mentioned it again this year when my neighbour asked if I had made a complaint to the council leading to them contacting her. I informed her that I hadn’t contacted the council but that I had a problem with privacy. I now consider that a higher fence would not resolve the problem. The fence would need to be very very high which would create other problems by blocking sunlight and also not fit in with the visual amenity and design of the properties.

In addition to the above, I have similar concerns about the window to the outbuilding which sits on the decking.

The problem is exacerbated by the lay out of the land. The gardens are on a slope, with the houses at the bottom of the slope. The gardens are also very small, my guess is that the size is approximately 10 metres by 8 metres. In my view, it was inevitable that such a construction in that small space would lead to loss of privacy for neighbouring properties.

The loss of privacy is the reason for my objection. I have considered selling my property but I am concerned that potential buyers would be put off by the obvious lack of privacy.”

7. The Second Claimant gave as her reasons for objecting the proposal's impact on daylight/sunlight, outlook and visual amenity/design, and added:

   "Comment: I am objecting to the construction of the raised decking and outbuilding due to the design and visual amenity.
   The area of the garden is too small to have such a large construction and outbuilding. Due to the appearance of the extension, of which is of brick, it's blocking the view of the landscape of the area and blocking the natural light of the sounding [sic] properties, especially in the summer months. All the gardens (1 to 8) are on a slope. Therefore, if anyone is setting [sic] on the decking, they will be able to see directly into their neighbour's private space. The appearance of the extension is a monstrosity!!"

8. The First and Second Claimants told me that they made their representations on the assumption that a close boarded fence was proposed on the boundary between nos. 5 and 6, and that the stair up to the deck would remain in the current north-south alignment (at the west side of the deck, nearest to no. 4).

9. Upon reviewing the drawings, the Council's officer, Chloe Selwood, noticed that the plans provided as part of the Application did not reflect what she had seen during a site visit taken as part of a prior enforcement investigation. Ms Selwood therefore emailed the architect to seek revisions to the drawings.

10. On 21 July 2023, a set of revised drawings were submitted to the Council. These included a revised Drawing LK-10, a proposed section drawing. The original, now superseded, version of LK-10 had shown the stair leading up to the decking in a north-south location to the west of the deck, but the revised drawing showed the staircase in an east-west alignment, corresponding to what was shown on the other drawings of the proposed development.

11. The revised drawings also contained revisions to LK-03 and LK-04, the existing and proposed site plans. The superseded plans (both existing and proposed) showed a close boarded timber fence on both sides of the property. The revised plans (both existing and proposed) showed a close boarded timber fence on the boundary between nos. 4 and 5 and a low picket fence between nos. 5 and 6. These revised plans

correspond both to what was seen by the officer at the time of the site visit and the current position.

12. On 26 July 2023, the Council granted planning permission for the Application, on the basis of a Delegated Report written by the case officer, Ms Selwood. In her report Ms Selwood said in relation to objections on grounds of privacy, overlooking and related matters:

"By virtue of the positioning of the gardens, and the natural slope that the gardens host, the occupants of any of the properties in this terrace have a natural vantage point from the top of the slope at the rear of the garden into neighbouring gardens. It is considered that the decking does not exacerbate the level of overlooking to a level that would warrant refusal. The on-balance decision of this matter has considered the potential for overlooking into gardens and habitable rooms, but concludes that the decking would not result in detriment to neighbouring properties and/or gardens, to an unacceptable degree.

No further detrimental impact is considered to arise as a result of this proposal in relation to loss of outlook, sense of overbearing, or a sense of overshadowing."

SUMMARY OF THE CLAIMANTS' CASE

13. The Claimants' case on procedural fairness takes the form of three sub-grounds:

a. The Council's consultation on the Application was in breach of the requirements of Article 15(5) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("DMPO") because the Second Claimant was not consulted:

b. There was a breach of the Second Claimant's legitimate expectation that no. 8 Silver Birch Gardens would be consulted on the Application:

c. There was a material change to the Application after the close of the consultation period, and the Council's failure to carry out any further consultation in the circumstances amounted to procedural unfairness.

14. In their skeleton argument the Claimants contended in addition that the grant of planning permission was vitiated by a mistake of fact by the decision-maker, but withdrew that ground before the hearing. I think they were right to do so. There is no evidence that the Defendant or Ms Selwood (the case officer) mistook the facts. In particular, in July 2023 Ms Selwood checked what was the nature of the proposal with the applicants' architect, by pointing out that the plans as submitted did not accord with what she had seen on site and stating that in relation to fencing on the boundary with no. 6 the plans needed to accord with what now exists on site unless it was intended to erect a new fence. The architect did provide clarification and the plans were amended accordingly so that the retention of the current fence is now shown on revised plan LK-04. As I have said, in addition plan LK-10 was revised to show the new east-west stair.

15. At the start of the hearing, I gave permission for the First and Second Claimant to rely on supplementary witness statements and for the Defendant's witness, case officer Chloe Sellwood, to rely on a second witness statement.

SUBMISSIONS

Breach of duty under Article 15 (5) of the DMPO to consult the Second Claimant

16. The DMPO sets out the legislative requirements for local planning authorities in relation to publicity for applications for planning permission. Article 15(5) of the DMPO states that the publicity requirements for the application are either "(a) by site display in at least one place on or near the land to which the application relates for not less than 21 days; or (b) by serving the notice on any adjoining owner or occupier".

17. Article 15(10) of the DMPO defines "adjoining owner or occupier" as meaning "any owner or occupier of any land adjoining the land to which the application relates".

Claimants' case

18. The Claimants argued that the Defendant was required to consult the Second Claimant about the Application, because the Second Claimant was an adjoining owner or occupier within Article 15 (5) (b) of the DMPO.

19. In support of this submission, the Claimants relied on *R (Corbett) v Cornwall Council* [2024] EWHC 1114 (Admin). In that case it was held that the local planning authority had not erred in deciding that a site proposed for development was "immediately adjoining" an existing settlement so as to satisfy the policy requirements of Policy 3 of the Cornwall Local Plan, notwithstanding that the site and the settlement were separated by public roads (and, according to the claimant in that case, a field).

20. Jefford J said at [49]:

"the restrictive meaning of 'immediately adjoining' that the claimant contends for is not right and…the words are apt to include 'very near to' and 'next to' and that whether the site falls within that meaning involves an exercise of judgment."

Defendant's case

21. The Defendant said that the Oxford Concise English Dictionary defines "adjoin" to mean "be next to and joined with". When used in conjunction with the word "land", the word "adjoining" in its primary sense means that which lies near so as to touch in some part the land which it is said to adjoin: *Re Ecclesiastical Commissioners for England's Conveyance* [1936] CH. 439 at 440-441 (Luxmoor J). Similarly, "adjoining land" in s.10(3)(b) of the Town and Country Planning (Scotland) Act 1947 was held to mean the contours of land immediately adjoining the site in question: *MacDonald v Glasgow Corp,* 1960 SLT (Sh. Ct.) 21.

22. In the case of no. 5 Silver Birch Gardens, the Defendant submitted that an "adjoining owner or occupier" for the purposes of Article 15(10) would be an owner or occupier of nos. 4 and 6, i.e. the two properties that are next to and joined with no. 5. As letters of consultation were sent to the properties adjoining no. 5 Silver Birch Gardens, namely nos. 4 and 6**,** it follows that the Defendant's public consultation met the requirements stipulated by the DMPO.

23. The Defendant drew my attention to *CAB Housing Ltd v Secretary of State for Levelling Up, Housing and Communities* [2023] EWCA Civ 194, which concerned paragraph A.A.2(3)(a)(i) of the Town and Country Planning (General Permitted Development Order) 2015 ("the GPDO").

24. The Defendant said that issue for the court in this case is the true meaning of the word "adjoining", viewed in its own legislative context, and keeping in mind the evident purpose of the provision in which it sits: *CAB Housing* at [38]. There are several key distinctions between these cases and the present case:

    a. First, *Corbett* concerned the meaning of planning policy, not legislation. While the interpretation of policy is a matter for the courts, the approach to the interpretation of policy differs from a court's approach to statutory or legislative interpretation: unlike statutes or contracts, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment: see *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 at [19].

    b. Second, the purpose of Article 15(5) DMPO differs considerably from a policy that seeks to determine whether land should be considered "previously developed land immediately adjacent to a settlement" for the purposes of planning policy (as in *Corbett*), or the meaning of "adjoining" in the context of assessing the effects on "adjoining premises" (as in *CAB Housing*). Whilst a wider interpretation of "adjoining" is suitable in these latter cases, particularly as it permits the exercise of judgment, Article 15(5) is intended to establish the minimum consultation requirements for local planning authorities. There is clear benefit to a precise and narrow interpretation of the word "adjoining" in this context.

    c. Third, the inclusion of a definition of "adjoining owners or occupiers" in Article 15(10) further indicates a narrow and precise meaning of the term "adjoining". "Land adjoining the land to which the application relates" can be given a clear and precise meaning, namely, land that is next to and joins the site boundary. Moreover, unlike in *CAB*, there is no indication from other provisions in the DMPO that "adjoining" was intended to be used interchangeably with "neighbouring".

    d. Fourth, the courts' finding in both *Corbett* and *CAB* permitted the decision-maker in each case to determine what should be taken into account or whether a development was policy compliant. By contrast, if the court finds that

"adjoining" has the wider meaning contended for by the Claimants, what constitutes "adjoining land" in any particular case would become a matter for the court to determine – not the decision-maker. For example, in this case, the court would be required to take a view as to which properties should be considered "near to" the application site. Yet, this is quintessentially a matter of planning judgment, which the decision-maker is better placed to determine. By interpreting "adjoining" narrowly, Article 15(5) becomes a clearly defined legal minimum, permitting the appropriate scope of the consultation in each case to be determined by the planning officer in accordance with the local planning authority's statement of community involvement, challengeable only where there is an error of law.

25. It follows that the narrow definition of "adjoining", namely one that includes contiguity, is clearly more appropriate in this legislative context.

26. The Defendant continued that in any event, to the extent that the claimants rely on *Corbett* as authority for the proposition that what should be considered "adjoining" may include "very near to" or "next to" and is a matter of planning judgment, that judgment can only be challenged where there is a clear error of law, so it does not assist the Claimants. In this case, the LPA exercised such judgment in accordance with its Statement of Community Involvement and extended its consultation to no. 7 Silver Birch Gardens, the property two doors down from no. 5. The Claimants have failed to identify any error of law arising from this determination. It follows that this sub-ground must fail.

Legitimate expectation that the Second Claimant would be consulted

Claimants' case

27. The Claimants contended that the Second Claimant had a legitimate expectation of being consulted about the Application because the Second Claimant was previously consulted in relation to a previous planning application at the application site ("the 2022 application"), which concerned the construction of a rear dormer extension with rooflights to the front roof slope.

28. The Claimants relied on *CCSU v Minister for the Civil Service* [1985] AC 374, which established that a legitimate expectation may arise from a past practice of consultation. The Claimants accepted that to give rise to this kind of legitimate expectation, a practice of consultation needs to be sufficiently settled and uniform to be akin to a clear, unambiguous and unqualified promise. The test is whether a practice is so consistent as to imply clearly, unambiguously and without relevant qualification that it will be followed in the future: see *R (on the application of MP) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1634, [2021] 4 All ER 326 at [52]-[53].

29. The Claimants pointed out that the consultation on the 2022 application included not only 8 Silver Birch Gardens but also properties in Lonsdale Avenue, a street within the area, due to the risk of overlooking and loss of privacy. The risk of overlooking and loss of privacy in the present case was even more significant than in the case of the 2022 application because of the raised decking and outbuilding.

30. In relation to the fact that the Second Claimant did, in fact, make representations to the Defendant about the Application, the Second Claimant said that the normal practice of the Defendant is to allow local residents who are consulted on applications 21 days in which to respond, and that should have been done in the present case.

31. The Second Claimant said in her witness statement that she found out about the Application and the consultation from the First Claimant in June 2023 (para 8). She asked the First Claimant for details of the application so she could quickly put together a response (para 9). She recalled that it was difficult for her to communicate with the First Claimant because the First Claimant was visiting family in Australia at the time and was therefore in a different time zone. She found out that the consultation was closing on Monday 12 June 2023 (para 10). Although she did not have adequate time to properly consider the documents, she felt she had no choice but to provide a brief and rushed response, which she did on Sunday 11 June 2023, as she would not have had time to consider the documents and submit a response on 12 June because of work commitments.

32. In her second witness statement the Second Claimant said (para 7) that one consequence of having to make a rushed response was that she forgot to mention the impact of the window in the outbuilding which overlooks her patio.

33. She added (second statement, para 8) that having the benefit of the usual period of 21 days consultation would have enabled her to investigate possible modifications to provide privacy, such as the use of frosted glass for the window in the outbuilding as a condition of any planning appeal, and it would also have provided more time to scrutinise the plans and raise questions about aspects that were not clear.

Defendant's case

34. The Defendant contended that no legitimate expectation arose in this case. As set out in Ms Selwood's first witness statement, for the 2022 application nos. 1-8 Silver Birch Gardens were consulted, as well as several properties on Lonsdale Avenue. The reason for this wider consultation was that the 2022 application was for a dormer loft extension and works to the roof, whereas the present Application was for ground floor development only.

35. That the Council, on one previous occasion, sent a letter of consultation to no. 8 (as one of many other properties) in respect of a materially different application relating to the application site did not amount to a consistent practice that implied clearly and unambiguously that a letter would be sent to no. 8 for all future applications in relation to no. 5 Silver Birch Gardens. It followed that no legitimate expectation arose on the facts.

36. In any event, the Second Claimant was informed of the Application by her neighbours in June and submitted a consultation response to the Council on 11 June. This representation was taken into account by the officer determining the decision. It follows that even if a legitimate expectation of consultation arose, there was no breach as the Second Claimant was consulted as a matter of fact.

37. As to the Claimants' contention that the Second Claimant should have been given the "usual" 21 days, even if a legitimate expectation arose on the facts, the expectation would be of a legally adequate consultation, not a consultation of any particular length. A legally adequate consultation is one that permits adequate time for a person to give intelligent consideration and intelligent response, and where the product of consultation is conscientiously taken into account when the ultimate decision is taken: *R(Moseley) v Haringey LBC* [2014] UKSC 56; [2014] 1 WLR 3947 at [25].

38. The Second Claimant not only responded to the consultation in time, but moreover, had failed to explain as part of her case why the time she had (the precise length of which remained unclear) was legally inadequate. Although the Second Claimant now referred to a desire to make certain investigations, there was no evidence before the court to support her claim that she would have made such investigations had she been given 21 days to respond, or that such investigations were impossible in the time she had but would have been possible within the usual period of 21 days.

39. The Defendant said that it followed that for this reason too, if the court finds that the Second Claimant had a legitimate expectation of consultation, the Second Claimant has failed to demonstrate that it was frustrated, where the Second Claimant in any event participated in the consultation process, albeit with a shorter consultation period.

Failure to reconsult following changes in the Application

The Claimants' case

40. The Claimants argued that they were unfairly deprived of the opportunity to make any representations on the impact of two changes to the application:

    a. The removal of a proposal to erect a close boarded fence on the east side – the side facing 6 Silver Birch Gardens – of the timber deck.

    b. A change in the direction of the steps leading to the decking, from north-south (on the west side of the application plot, next to no. 4) to east-west (again, starting from the west side of the application site).

41. The Claimants relied on *R (Holborn Studios Ltd) v London Borough of Hackney and another* [2018] PTSR 997 at [78] as setting out the test for whether a local planning authority should carry out a second consultation on a planning application:

    "In considering whether it is unfair not to reconsult…it is necessary to consider whether not doing so deprives those who were entitled to be consulted on the application of the opportunity to make any representations that, given the nature and

extent of the changes proposed, they may have wanted to make on the application as amended."

42. The Claimants said the changes materially worsened the impact of the proposal, particularly on no. 6 and other properties further east in the terrace. They said, particularly, that with a low picket fence (as now exists) on the east side of the application site the use of the deck has significantly greater impact than if a close boarded fence were provided as shown on the original plans.

43. The Claimants' case was that they had been prejudiced by not being reconsulted on the changes, because they were not able to point out the increased impact of the proposals as a result of those changes.

Defendant's case

44. The Defendant said that this ground was based on a misunderstanding on the part of the Claimants.

Purported revisions to the proposed fencing

45. This part of the Claimants' case was based on a misunderstanding of what is shown in plans LK-03 and LK-04 in relation to the close boarded fencing. In the superseded plans, existing site plan LK-03 and proposed site plan LK-04 both incorrectly depicted a close boarded timber fencing on both boundaries. This is what prompted the email from Ms Selwood asking for clarification since, at the time of the site visit, Ms Selwood observed a low picket fence between no.5 and no.6.

46. A revised set of plans was subsequently submitted by the architect, with the revised existing site plan LK-03 and revised proposed site plan LK-04 showing a close boarded timber fence between no.4 and no. 5 and a low picket fence between no. 5 and no. 6 (i.e. correcting this error).

47. Since the proposed and existing site plans in both sets of plans show the same fence type (close boarded on both sides in the superseded plans; close boarded on one side and low picket on the other in the revised plans) it is clear that there was never any proposed change to the type of fence as part of the development proposal. Nor does the planning statement record any such change. In the planning application there is a

reference to "Proposed materials and finishes: Brown Painted Close Boarded Fence to match existing." However, this text is under the heading of "Material", and simply refers to the existing close boarded fence on the boundary between no. 4 and the application site.

48. Moreover, it is clear from the consultation response by the First Claimant that the First Claimant never thought that a change from the existing situation was proposed. At the hearing, the Defendant repeated that it did not accept that when they submitted their representations on the superseded plans, the Claimants thought it was intended to provide a close boarded fence on the boundary between the application site and no. 6. To support this, they pointed to the fact that the Claimants did not allege that they thought this until well after submission of their Statement of Facts and Grounds, even though they were well aware of the revised plans before then.

49. As stated in Ms Selwood's second witness statement, the reference in paragraph 13 of the officer's first witness statement to a close boarded fence on both boundary sides was an error in the witness statement, not the decision to grant planning permission.

50. In any event, said the Defendant, this purported change to the application would not have satisfied the test for re-consultation. Both (i) the nature and extent of the changes and (ii) the representations already made as part of a consultation are a key consideration as to whether a further consultation is required.

51. It is highly pertinent that the First Claimant already addressed the issue of fencing in detail in her response, explaining in no uncertain terms that even if the low picket fence were to be replaced by a higher fence, this would be unsatisfactory. She made clear that the nature and extent of a change from the existing fence to a close boarded fence (if it occurred) would have been minimal from her perspective. The Second Claimant (who was not in any case entitled to be consulted on the Application) had not indicated at any point that she disagreed with any of the First Claimant's comments.

52. In these circumstances, fairness would clearly not require the Claimants to be re-consulted.

Purported revisions to the position of the steps

53. As for the steps, there is a similar misunderstanding, in that a change to the position of the steps had always been proposed. As explained in the witness statement of Ms Selwood, the drawings originally submitted with the application (except for LK-10, the proposed right-side elevation) all show the steps in the same location as the revised drawings. The superseded drawing LK-10 erroneously showed the steps remaining in a north-south direction, the same direction as LK-09.

54. That this was an error was not only clear from comparison with the site plans, which all show the steps changing alignment, but also from the pair of section drawings, LK-11 and LK-12. The superseded versions of the existing section LK-11 and proposed section LK-12 show from a side view that the direction of the steps would change. Read as a complete set of drawings, it is therefore clear that this was the case of one erroneous drawing, rather than a change in the location of the steps after the consultation period had ended.

55. In any event, as with the fencing, the test for re-consultation in *Holborn Studios* had not been met. Ms Selwood explained at paragraph 18 of her first witness statement that from a planning perspective the location of the steps was not considered to result in any difference in the level of overlooking or loss of privacy from the steps or the decking, and that there would not be any difference in the level of overlooking or privacy from the steps or the decking as the height and vantage point of anybody standing on the steps would not be changed to a discernible degree. It followed that the nature and extent of this change was clearly minor in the context of the proposal.

56. Moreover, both Claimants had already raised the issue of privacy resulting from the raised decking in their objections**,** and the Claimants have failed to explain how the position of the steps (which are lower than the decking) would result in greater impacts on their privacy than the raised decking.

57. It followed that either because there were no changes, or, in the alternative, because such changes (if arising) did not satisfy the test in *Holborn Studios*, that this sub-ground must also fail.

CONCLUSIONS

Should the Second Claimant have been consulted on the Application as originally submitted?

58. The first element of the Claimants' case is that the Second Claimant should have been consulted about the Application as originally submitted, either because of Article 15(5) of the DMPO or because the Second Claimant had a legitimate expectation that she would be consulted.

Article 15(5) of the DMPO

59. I will deal with Article 15 first. In *R (Corbett) v Cornwall Council* [2021] EWHC 1114 (Admin) the court's conclusion was that the local planning authority had not erred in deciding that a site was "immediately adjoining" the existing settlement although the site and the settlement were not literally contiguous. Jefford J said at [49] that the words "immediately adjoining" were apt to include "very near to" and "next to", and that whether the site falls within that meaning involves an exercise of judgement. In *CAB Housing v Secretary of State* [2023] PTSR 1433 the court was dealing with the meaning of legislation and not planning policy as in *Corbett*. However, the conclusion was similar. It was held that "adjoining" in the context of the legislation in issue in that case meant "lying close, or contiguous to" (see Lindblom LJ at [44]).

60. The Defendant's primary case was that "adjoining" in Article 15 (5) and (10) of the DMPO should be given a narrower meaning that in *Corbett* and *CAB Housing*. I agree that an expression used in legislation must be construed according to its context, and therefore that it does not necessarily follow that "adjoining" has the same meaning in Article 15 of the DMPO as in paragraph A.A.2(3) (a) (i) of the GPDO.

61. However, having regard to the context, I do not agree that "adjoining" in Article 15 of the DMPO should have a narrower meaning than in the GPDO provision. The aim of both provisions is to ensure that the interests of those who may be affected by proposals for development are considered.

62. The fact that the Oxford Concise English Dictionary defines "adjoin" as "next to and joined with" does not change my view. In the fuller and more authoritative New Shorter Oxford English Dictionary, as quoted by Lindblom LJ in *CAB Housing* at [35], the meanings given for the verb "adjoin" include "lie close to each other" and "lie close or be contiguous to."

63. The older cases to which the Defendant referred me, *Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch 430 and *MacDonald v Glasgow Corporation* (1960) SLT (Sh.Ct.) do not change my view. The context in both was different, the issue in *Re Ecclesiastical Commissioners* being the interpretation of a restrictive covenant in a conveyance, and in *Macdonald* a provision in the then Scottish planning legislation stating that depositing waste on land did not require planning permission if the height of the deposit did not exceed the level of adjoining land.

64. I therefore think that "adjoining" in Article 15 of the DMPO embraces not just properties which are contiguous, but also those which are "very near to" or "lying close to" the application site.

65. Nevertheless, as Jefford J said in *Corbett* at [49], whether a property in the vicinity of a proposed development site falls within the definition of "adjoining" will be a matter of judgement in each case for local planning authority. The concepts of "very near to" or "lying close to" are not absolute in the way that "contiguous" is. Whether one site is "very near to" or "lying close to" another requires judgement, and that judgement is one for the local planning authority. The court will interfere with the authority's judgement only if it is *Wednesbury* unreasonable, by reason of being a judgement that is so unreasonable that no reasonable authority could have reached it.

66. In the present case, the Defendant made its judgement about whom to consult in relation to the Application. It consulted the properties on either side of the application site, as well as no. 7 Silver Birch Gardens, to the east of no. 6. The Second Claimant's property is to the east of no. 7, i.e. next-door-but-two to the application site. I do not think it can be said that the judgement of the Defendant in deciding whom to consult can be said to be so unreasonable that no reasonable authority could have reached it.

67. As Ms Selwood's first witness statement states at para 21, the Defendant's Statement of Community Involvement states in relation to consultation letters sent to adjoining

properties that the "scale of letter coverage defined as appropriate to the scale and nature of the proposal." In other words, the Defendant reaches a judgement in every case as to whom to consult, having regard to the nature of the proposal. I do not think the Defendant's decision as to whom to consult in the present case can be impugned as being unreasonable.

68. I conclude that the Defendant's failure to consult the Second Claimant about the Application did not contravene Article 15 of the DMPO.

Legitimate expectation

69. I turn to the Claimants' case concerning legitimate expectation.

70. The basis for the Claimants' contention is that the Second Claimant was consulted about the 2022 application. However, as Ms Selwood says in her first witness statement at para 28:

"The application ref: 22/02007/HH was for a dormer loft extension and associated works to the roof, whereas application ref: 23/01023/HH was for ground floor development only. Therefore, the anticipated impacts would have been different due to the height and scale of the different planning applications…"

71. In my judgement the Second Claimant did not have a legitimate expectation that she would be consulted about the Application. The reality is that a judgement was reached in the case of the 2022 application as to whom to consult, based on the anticipated impact. The Application in the present case was different, being at ground floor level only. The fact that no. 8 was consulted once about a planning application different in nature from the Application does not amount to a practice of consultation sufficiently settled and uniform to amount to a clear, unambiguous and unqualified promise to consult the Second Claimant on a planning application having the nature of the Application. Therefore, the test in *CCSU v Minister for the Civil Service* and *R (on the application of MP) v Secretary of State for Health and Social Care* is not met in this case.

Section 31 (2A) of the Senior Courts Act 1981

72. I therefore do not accept that the Defendant was under a duty to consult the Second Respondent about the proposal on the basis of the superseded plans.

73. In any case, the Second Claimant did, in fact, respond to the Defendant's consultation letter, even though it was not addressed to her. This is because she was notified about the consultation by the First Claimant, her neighbour.

74. In those circumstances I am invited by the Defendant to apply section 31 (2A) of the Senior Courts Act 1981 ("the 1981 Act"), under which I must refuse relief if it appears to me to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. The Defendant says that even if it owed a duty to the Second Claimant to consult her (either under Article 15 of the DMPO or because of a legitimate expectation), the outcome would have been the same because she had the opportunity to make any representations she wished.

75. I accept that if the Defendant had a duty to consult the Second Claimant that duty was to give her "adequate time…for consideration and response" (see *R (Moseley) v Haringey LBC* [2014] 1 WLR 3947 at [25]), and not necessarily the 21 days the Defendant usually allows. However, the Second Claimant says that in her haste she forgot to refer to the views towards her property from the window in the outbuilding on the decking in the application site and did not have time to explore the potential of replacing clear with obscure glazing in that window.

76. Nevertheless, the First Claimant, who lived next to the application site, did complain about the impact from the window in the outbuilding in her objection. I cannot see how for the Second Claimant, who lived further away, to have raised the same point could have led to the refusal of the Application. There was no evidence before me that the Second Claimant's property had particular characteristics which would make it particularly vulnerable to views from the window. Indeed, there was no convincing evidence about the extent to which the Second Claimant's property is visible from the window at all. Despite having its attention drawn to the fact that there was an south-facing window in the outbuilding, the Defendant decided to grant planning permission for the Application. I do not think that for the Second Claimant to repeat the point made by the First Claimant would have made any difference to the outcome.

77. Further, I do not accept that the Second Claimant did not have enough time to investigate the potential for using frosted glass in the window. Apart from the fact that it is not clear from the evidence how much time she actually had to consider the Application, suggesting the use of frosted or obscure glass does not require expert investigation and the suggestion could have been made in the representation she submitted.

78. In those circumstances, had I decided that the Defendant should have consulted the Second Claimant, I would have concluded that had she been consulted the outcome would highly likely have been the same and would have refused relief under section 31 (2A) of the 1981 Act. However, my primary finding is that the Defendant had no duty to consult the Second Claimant on the proposal as submitted in the superseded drawings.

Should there have been re-consultation of the First Claimant after the Application plans were amended, and should the Defendant have consulted or considered whether to consult the Second Claimant?

79. I turn to whether the Defendant should have re-consulted the First Claimant and consulted or considered whether to consult the Second Claimant, after the Application plans were amended.

80. I begin with the facts. What was shown in the proposed plans changed as between the superseded plans and the revised plans. In relation to the fencing on the boundary between the application site and no. 6 Silver Birch Gardens, the superseded proposed site plan LK-04 showed a close boarded fence on the boundary between the application site and no. 6, as did the superseded existing site plan LK-03. This would be a change from the existing situation; the fence between those properties is currently a low picket fence. The revised proposed site plan LK-04 and revised existing site plan LK-03 show a low-level picket fence between the application site and no. 6 Silver Birch Gardens, as existing.

81. Also, a close-boarded fence was shown on the superseded proposed right side elevation LK-10 and on the superseded proposed section A - A LK-12. This has not been changed in the revised plans, but the Defendant said that this was because the

close boarded fence shown on LK-10 and LK-12 is the existing close boarded fence on the boundary between 4 Silver Birch Gardens and the application site.

82. In relation to the steps, steps were shown running north-south on one plan showing the proposal, i.e. LK-10 in the superseded plans. This was amended in the revised plans, to show a new stair running east-west.

83. The Defendant's case is that the reference in superseded plans LK-03 and LK-04 to a close boarded fence on the boundary of the application site and no. 6 and the north-south alignment of the steps shown on superseded LK-10 were errors. There was never any intention that there should be a close boarded fence on the boundary with no. 6 or that the existing north-south stair should be kept. It was always intended that the existing low picket fence on the boundary with no. 6 should be retained, and that the alignment of the stair would be changed to east-west from north-south.

84. This may well have been the intention. However, in my view the superseded plans failed to provide clarity as to the nature of the proposal, in relation both to the nature of the fencing on the boundary between nos. 5 and 6 and the position of the stair to the deck. This confusion is exemplified by the fact that in paragraph 13 of her first witness statement, Ms Selwood for the Defendant said that the revised drawings "confirmed inclusion of the timber boarded fence on both boundary sides." I accept that as she said in her second witness statement this was a mistake, but the mistake is hardly surprising given the confusing plans.

85. The Defendant accepted that when they submitted their representations the Claimants thought that the superseded plans indicated retention of the north-south alignment of the stairs, while stating that it should have been clear to the Claimants that this was not the case, as all the plans describing the proposals other than LK-10 showed the new east-west alignment.

86. However, the Defendant did not accept that when they submitted their representations the Claimants thought that a close boarded fence was proposed on the boundary between the application site and no. 6. At the hearing before me, the Claimants were adamant that they had indeed understood that a close boarded fence was proposed. Unusually for a judicial review case, I was thus faced with a conflict of factual evidence, with the Defendant doubting the Claimants' word. I offered the Defendant

the opportunity of cross-examining the Claimants, but their counsel declined my offer.

87. I have been troubled by the fact that in their submitted Statement of Facts and Grounds the Claimants did not contend that they should have been re-consulted because of any change in the proposed fencing on the boundary between the application site and no. 6. The Defendants suggested that this was because the Claimants had only belatedly thought up the argument that they should have been re-consulted because of the change in the fencing. The Claimants responded that it was only when they received the results of their Freedom of Information request in October 2023 (the results were the emails between Ms Selwood and the scheme architect about the plans) that they realised the plans had been amended so as to make clear that the picket fence was to remain. On balance and having seen and heard from both Claimants in court, I accept their evidence. I accept that when making their initial representations they thought that a close boarded fence was proposed between the application site and no. 6.

88. Therefore, on the evidence I accept, the Claimants thought when they made their representations that a close boarded fence was proposed on the boundary with no. 6 and that the stairs would remain in a north-south alignment.

89. I do not think it was the Claimants' fault that they did not understand that these things were not intended. It was not clear from the superseded plans that the existing low picket fence should remain on the boundary between nos. 5 and 6 and that it was proposed to move the stair to an east-west alignment, and this has caused considerable confusion. A person examining LK-04 could reasonably conclude that a close boarded fence was proposed on the boundary with no. 6, and a person examining LK-10 could reasonably conclude that the stair would remain in its existing north-south alignment.

90. The Defendant says that what was shown on LK-04 and LK-10 was simply in error, and that the Application did not change when the revised plans were submitted, so the principle in *Holborn Studios* does not apply. I disagree. Whatever the Interested Parties intended in relation to the Application, the Application plans were amended. Also, as the Defendant accepted, consultation is meaningless unless the consultee is enabled to be clear about the nature of the proposal being consulted on. The

superseded plans were so confusing that what I am told were misapprehensions by the Claimants were reasonable misapprehensions. In those circumstances, the essence of the principle in *Holborn Studios* applies. Once the revised plans were submitted, making clear the true nature of the proposals, it was necessary to consider whether to re-consult those entitled to be consulted so as not to not to deprive them of the opportunity to make representations that they might have wanted to make, now they understood what was being proposed.

91. In this situation, re-consultation of the First Claimant was required about the fence, unless she had already expressed her views about the Application proposals if the existing low picket fence were retained. After all, the plans had been amended and the change from what she had assumed to be proposed in relation to the fencing on her boundary with the application site was material. With the retained picket fence on her boundary, the impact of the Application development would be greater than if a close boarded fence were provided.

92. Following *Holborn Studios* and having regard to what she (reasonably) thought was intended in the Application, it could be anticipated that she might have wanted to make representations about the proposals with the picket fence retained, had she not done so already.

93. However, in her consultation response on the superseded plans she made clear (giving reasons) that the development as built with the existing low picket fence was unacceptable and said that a higher close boarded fence – which she understood to be proposed – would not resolve the problem.

94. Thus, she had already given her views on the existing situation with the low picket fence in place. I appreciate that in her supplemental witness statement the First Claimant adds to the matters covered in her submitted objection a concern about items from the deck on the application site being blown over the picket fence into her garden. However, if this was a concern of any substance, it was open to her to make this point in the objection she submitted to the Defendant. As between the objection she submitted in June 2023 and her supplemental statement in June 2024 there was no change in the deck or the fencing at the application site, and there was no evidence before me that items had only started being blown from the deck into her garden after she submitted her initial objection. After all, her submitted objection was commenting

on the situation as existing. She had, and took, the opportunity of voicing whatever objections she wished in relation to that existing situation.

95. Overall, for the reasons I have set out, I find that there was no need to re-consult her about the amendment of plans in relation to the fencing between the application site and her property.

96. In relation to the steps, as with the fence, the Application plans were amended, and in any event the superseded plans were so confusing that the Claimants cannot be blamed for assuming that the alignment of the stair would remain as existing.

97. Applying *Holborn Studios* as explained above, should the First Claimant should have been re-consulted once plan LK-10 had been amended to make clear that it was proposed to amend the alignment of the stair to east-west?

98. Ms Selwood has said (first witness statement, paragraph 18) that:
"…the location of the steps (when positioned either east-west or north-south) is not considered to result in any difference in the level of overlooking or loss of privacy from the steps or the decking, as the height and vantage point of anybody standing on the steps would not be changed to a discernible degree."

99. The Defendant submitted therefore that the change in alignment is immaterial and makes no difference to the impact on the First Claimant, so there was no need to re-consult her. Therefore, said the Defendant, even if the First Claimant had been consulted about the east-west alignment of the stair, her further representations would have made no difference, because the effect of such a stair on her privacy is no different from a north-south alignment. The Defendant said that this means that even if the Defendant should have re-consulted the First Claimant on this aspect, I should apply section 31 (2A) of the 1981 Act and refuse relief. It is highly likely that the outcome for the First Claimant would have been the same, because the Application would still have been permitted.

100. I cannot accept the Defendant's submissions in this regard. The complaint of the First Claimant is that with the new stair a person climbing the stair will be facing in the direction of no. 6, whereas with the present north-south stair they will not. It seems to me that this is capable of being considered a material difference from the

present situation. The new stair will be brought closer to no. 6 than the present stair and the people climbing it and reaching the top will face towards no. 6 and be close to the boundary with no. 6.

101. It is clear from the delegated report on the basis of which the Application was determined that Ms Selwood, the case officer, took account of the changed alignment of the stair and considered that the Application as a whole was acceptable. However, her delegated report does not refer to the specific point made by the First Claimant and summarised in the previous paragraph of this judgment. Had the First Claimant made that point in a representation to the Defendant, it is possible that Ms Selwood would have reached a different view about the acceptability of the Application.

102. I am conscious that in her witness statement in the present proceedings Ms Selwood said that the realignment of the stair made no material difference. However, a "post-hoc" statement of this nature which seeks to retrospectively justify the decision in the context of proceedings which have been commenced to challenge that decision is of very limited assistance to the court. Such comments are made in hindsight.

103. I accept that an assessment of whether the outcome for the First Claimant might have been different (i.e. refusal of the Application) had she had the chance to comment on the realignment of the stair must take account of the context, which is the Application as a whole. The Application comprised erection of an extension, with raised timber deck and a new outbuilding on the deck. The stair to the deck was only a part of the Application as a whole. However, in my judgment the position and orientation of the new stair is capable of having an important effect on the privacy of no. 6.

104. Overall, I conclude that the Defendant had a duty to re-consult the First Claimant once LK-10 was revised to show the new east-west alignment of the stair, and that I should not refuse relief under section 31 (2A) because I cannot say that if the First Claimant had been re-consulted the outcome would highly likely have been the same. It seems to me realistically possible that had the First Claimant been given the opportunity to make known her views on the new stair, Ms Selwood's view on the Application would have changed and the Application would have been refused.

105. The decision must therefore be quashed on this ground.

106. There is also the Second Claimant to consider. My understanding is that no consideration was given to consulting the Second Claimant in the light of the amended plans showing (LK-03 and LK-04) the low picket fence remaining between the application site and no. 6 and (LK-10) a new stair in an east-west alignment.

107. Once the proposal was amended or clarified by the submission of the revised plans, the Defendant should have considered (or reconsidered if it had previously done so) whether to consult the Second Claimant as an adjoining owner or occupier under Article 15 of the DMPO in relation to the fencing between the application site and no. 6.

108. I have set out above my conclusion that "adjoining" in Article 15 means "very near" or "lying close to" and not just "contiguous". In my judgment, what is "very near" or "lying close" may depend in part on the nature of the proposal. In my view, the retention of the low picket fence on the boundary between nos. 5 and 6 Silver Birch Gardens had the potential to exacerbate the impact on the Second Defendant's enjoyment of her property, as compared with the new close boarded fence which the Second Claimant had assumed would be built. In those circumstances it could be concluded that no. 8 was "very near" to the application site or "lying close to" it, and the Defendant should have considered whether to consult her, but it did not.

109. However, I have concluded that I would have to refuse relief under section 31 (2A) of the 1981 Act, as it is highly likely that had the Defendant considered whether to consult her in relation to the amended plan LK-04, the outcome for the Second Claimant would not have been substantially different; in other words, it is highly likely that the Application would still have been permitted.

110. To begin with, the Defendant was not bound to consult her and a decision not to do so would not have been *Wednesbury* unreasonable or in breach of a legitimate expectation. I have concluded in a previous section of this judgment that the Defendant's failure to consult the Second Claimant on the Application as initially submitted was not unreasonable or in breach of a legitimate expectation. In considering whether to consult the Second Claimant on the plans as amended, the Defendant would need to take account of the fact that despite not being consulted, the Second Claimant had submitted objections to the Application as initially submitted. However, a decision by the Defendant nevertheless not to consult her on the amended

plans could not be said to be either *Wednesbury* unreasonable or in breach of a legitimate expectation. The fact that she chose to object to the Application as initially submitted did not bind the Defendant to consult her on the amended plans.

111. Also, even if the Defendant had consulted her, I think it highly unlikely that the Application would have been refused as a result. The case officer, Ms Selwood, was already aware of the objections of the First Claimant to the proposed development with the existing low picket fence retained, and the First Claimant was more affected by the proposals than the Second Claimant, because her property is contiguous with the application site. I therefore cannot see that the Second Claimant could have added anything of substance to the points made by the First Claimant.

112. I think the Defendant had a duty to consider whether to consult or re-consult the Second Claimant in relation to the east-west alignment of the stair once the plans were amended. As with the amendments to the plans in relation to fencing, the Defendant was not bound to consult her and a decision not to consult her would be lawful provided it took account of the relevant material considerations. Had the Defendant consulted her, it is unlikely that she would have added materially to the views of the First Claimant, but I do not need to consider the application of section 31 (2A) in this context because the decision will have to be quashed in any event by reason of the Defendant's failure to re-consult the First Claimant about this matter.

CONCLUSION

113. I conclude therefore as follows:

a. There was no obligation on the Defendant to consult the Second Claimant on the proposals as shown in the superseded plans.

b. Once the nature of the proposals was amended or clarified in the revised plans my conclusions are these:

i. There was no need to reconsult the First Claimant about the fence, because she had already had the opportunity (which she had taken) to

set out her objections to the impact of the development with the existing low picket fence in place.

ii. However, the Defendant should have re-consulted the First Claimant in relation to the new alignment of the stair, and I cannot refuse relief under section 31 (2A) of the 1981 Act because I cannot say that it is highly likely that if the First Claimant had been re-consulted the Application would still have been permitted and therefore that the outcome of the application would have been the same.

iii. The Defendant should have considered whether to consult the Second Claimant in relation to the fencing after the plans were amended, but I would have to refuse relief under section 31 (2A) in relation to this matter for the reasons set out above.

iv. The Defendant should also have considered whether to consult the Second Claimant in relation to the new stair. Had the Defendant consulted her, it is unlikely that she would have added materially to the views of the First Claimant, but I do not need to consider the application of section 31 (2A) in this context because the decision will have to be quashed in any event by reason of the Defendant's failure to re-consult the First Claimant about this matter.

114. I close by thanking both the First Claimant and the Defendant's counsel for their clear and fair advocacy at the hearing. I add that this case illustrates the danger of applicants submitting confusing plans in support of a planning application. Though I have found that the claim must succeed because the Defendant should have re-consulted the First Claimant once the plans were clarified in relation to the new stair, I appreciate that Ms Selwood tried to obtain clarification about the plans. The prime responsibility what has happened lies with those responsible for the Application.

115. For the reasons I have given, this claim will be allowed.