

CO/7146/2009

Neutral Citation Number: [2010] EWHC 1256 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 11 May 2010

B e f o r e :

IAN DOVE QC

(SITTING AS A DEPUTY HIGH COURT JUDGE)

Between:

THE QUEEN ON THE APPLICATION OF KELLY

Claimant

v

LONDON BOROUGH OF HOUNSLOW

Defendant

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(Official Shorthand Writers to the Court)

MR GOODMAN appeared on behalf of the **Claimant**

MR R HARWOOD appeared on behalf of the **Defendant**

J U D G M E N T

(As Approved by the Court)

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1. **THE DEPUTY JUDGE:** This case involves an unfortunate concatenation of circumstances which, no doubt, will rarely be repeated in other cases. In essence, it relates to the ability of the claimant to participate in their neighbour's planning application and, in particular, to address the Planning Committee at which that application was being considered, in the light of the policy operated by the defendant for the involvement of the public in their planning decisions.

The facts

2. The claimants live at 35 Spencer Road in Chiswick. On 23 February 2009, their neighbour made an application for an extension. On 10 March 2009, a letter was sent by the defendants to the claimants relating to the submission of that application by their neighbours at 37 Spencer Road. Those neighbours are the interested party in these proceedings. That letter provided, amongst other things, as follows:

"Comments must be received in writing within 21 days of this letter. Comments received after this date will still be considered if a decision has not been made. Objections made on previous applications will not be taken into account."

It then continued:

"Should the application be reported to a committee for decision, and you have made a representation, we will notify you of the date of the committee meeting. We will again notify you of the committee decision."

3. This letter had been written pursuant to a Statement of Community Involvement which had been adopted by the Council, pursuant to section 18 of the Planning and Compulsory Purchase Act 2004. That Statement of Community Involvement was targeted at providing the opportunity for public involvement in planning decisions. Mr Harwood, who appears on behalf of the defendants, advised me that it had been the subject of independent scrutiny prior to its adoption by an inspector from the Planning Inspectorate. Its contents provided for wider consultation than would be strictly necessary to comply with the legal requirements in the General Development Procedure Order 1995. In particular, the document provided, in respect of planning applications of the kind with which the letter I have quoted from was concerned, as follows:

"The council will ... allow supporters/objectors/applicants to be heard at committee meetings at the discretion of the Chair (please note that this needs to be agreed prior to meeting through the Committee Services: 02085832000 details as before)."

It went on, in a table relating to minor applications of the kind with which I am concerned, to state as follows:

"Who will we consult? - Both neighbouring properties; those backing on to the property; and any properties directly opposite the road."

How will consultation take place? - Residents will be informed by a formal letter, regardless of whether their outlook is considered to be affected. They are given the opportunity to comment within 21 days via email, phone, fax or letter. Area Committees if a decision is necessary."

4. That reference to Area Committees is taken up again in the document under the heading of "post application". Under that heading, a number of matters are addressed but, in particular, paragraph 13.12 provided as follows:

"13.12 If the application is to be determined at an Area Committee or SDC, any person who has commented on an application, in either support or objection, will be invited by letter to attend the committee meeting regarding the application to be considered. Only if an application is going up for approval will individuals with objections be able to address the committee meeting (with prior notice) along with the applicant and their agent. If an application is going up for refusal there is no right to speak."

5. Having received the letter of 10 March 2009, the claimants instructed a planning consultant, Mr Lee, to investigate the matter and examine whether or not he considered, in his professional judgment, that they would have grounds to object. He did conclude that there were grounds for the claimants to object to the application and, on 27 March 2009, he wrote a letter of objection on behalf of the claimants to the Council. In that letter he raised a number of objections but they were, principally, in relation to impacts on residential amenity and the assessment of the application in relation to the conservation area. The detail of those objections is not a matter which I need to rehearse for the purposes of this judgment but, suffice to say, as I have already noted, there were a number of points raised under those two headings.
6. The application proceeded through the consultation process and was to be considered at the Chiswick Area Committee on 11 May 2009. In preparation for that committee, and in accordance with the Statement of Community Involvement, on 29 April 2009 letters were written up to be distributed, advising both the claimants and the interested party, and any other third parties who had expressed an interest in matters to be considered by the committee, of the date of that committee. It was intended that those letters be distributed by second class post. Those letters contained the following advice:

"The Council received observations from you about the above proposed development and I am now writing to tell you that the application will be decided by the Chiswick Area Committee on 11 May 2009. The meeting is open to the public but speakers are only allowed to address the committee in particular circumstances. If you wish to enquire whether it would be possible to address the Chiswick Area Committee and to obtain details of the venue and time for the meeting, please contact the committee administrator [details then provided]. You must do so no later than 5pm, five working days prior to the committee meeting ... The meeting is open to the public but speakers are only allowed to address the committee in particular circumstances. Details of the rules for speaking at committee meetings are included on the first page of the agenda for

each meeting, which you can view on the website. If you wish to enquire whether it would be possible to address the Chiswick Area Committee, please contact [details then provided]. You must do so no later than 5pm, five working days before the date of the committee meeting (for instance, for a meeting on Monday you would need to contact the committee administrator by 5pm on Monday in the previous week)."

7. The defendants distribution of these letters was undertaken by a business support unit. Unfortunately, the envelope stuffing machine, which was required to distribute the letters, was broken and, therefore, there was a delay of some days prior to the letter being posted. On 5 May 2009, the letter was posted out second class. I have a witness statement from Miss Smith, the Planning Officer who was concerned with this matter, and she, in the witness statement, records that she recognised that the delay might mean that some parties would not get the requisite five days notice advertised in the letter. She therefore warned the Committee Clerk to warn the Chair of the meeting that there might be late requests to speak and that they should be considered sympathetically in the circumstances.
8. Other objectors to other applications to be heard at the meeting received the letter on 6 May and that provided some reassurance to the defendant that the letter had in fact got through. Later, indeed, it transpired that the interested party received his letter on 6 May.
9. On 11 May, the claimant's left home in the morning prior to the post arriving and when they arrived back at home, at supper time, they first discovered the letter notifying them of the meeting that night. In fact, the committee met and, in accordance with the officer's recommendation for approving the interested party's application, granted consent. The decision notice granting consent is dated 11 May 2009 but, Mr Harwood advises me, it ought to have been dated 12 May 2009. In any event, it was not sent out until 12 May 2009.
10. On 12 May 2009, one of the claimants contacted Mr Lee, having been concerned about receiving the letter advertising the meeting to them at such a late juncture. She left a message for Mr Lee but he was unable to deal with the matter that day. On 13 May 2009, Mr Lee having spoken to the claimants, faxed the defendant and then correspondence ensued in which it was contended that the decision was not valid and that, although it was unfortunate that the claimants had not been notified as would normally have been the case, the defendants offered the view that, as the decision had been validly reached, there was no legal error in the procedure.

The cases

11. The claimant's case is put on the basis of legitimate expectation and the requirements of fairness. It is said by Mr Goodman, who appears on behalf of the claimants, that the Statement of Community Involvement created a legitimate expectation that the claimant would be notified of the meeting in time to address it and that, effectively, being deprived of that opportunity was a breach of the requirements of fairness. As the argument developed it became clear that, in reality, there was little difference between

the point as it was made in relation to legitimate expectation and as it was made in respect of the requirements of fairness. Mr Goodman also relied on the fact that no notification at all was sent to Mr Lee who had written as the agent of the claimants.

12. In response, Mr Harwood, who appears on behalf of the defendants, says that the defendant did post a notification and that the time of its arrival was out of their hands, it having been posted in time to reach the claimants. He further submits, therefore, that any legitimate expectation pursuant to the Statement of Community Involvement had been satisfied. He submits that, at any point, the claimants could have contacted the defendants and matters could have been put in hand either to adjourn the meeting or take other steps in order to hear the problem that had arisen, but no contact had in fact been made.

The law

13. The case which was relied upon by the claimants in that early correspondence is the case of Alnwick District Council ex parte Allan Robson and Kathleen Robson [1997] EWHC Admin 933. That is a case where a Council had a policy of allowing objectors to address the planning committee when they had notified the Council of their objection. The claimant had objected and notified the Council that he wished to speak but the Council failed to tell him of the date, time and whereabouts of the meeting. On the basis that this was a breach of the Council's policy, Sedley J, as he then was, quashed the decision.
14. There has been a more recent examination of issues of this kind and, in particular, as they might arise in connection with a Statement of Community Involvement by the Court of Appeal in the case of R (Majed) v London Borough of Camden [2009] EWCA Civ 1029. That was another case in which there had been a failure to notify at all. Dealing with the first point which was raised by the claimant in that case, namely whether or not there had been a legitimate expectation, giving the lead judgment of the Court of Appeal, Sullivan LJ observed as follows:

"14. On behalf of the respondent and the interested party, Mr Beard and Mr Kolinsky submitted that there was no legitimate expectation. It was submitted that, since there was a specific statutory code -- the General Development Procedure Order ("GDPO") -- which regulates the balance between the various interests, applicants and local residents, as to who should and who should not be notified, it would be wrong to impose some rigid requirement to notify in accordance with the terms of Annex 6. It was submitted that this would upset the balance that had been struck by the statutory requirement. It seems to me that reference to the statutory requirements is of no real assistance. Legitimate expectation comes into play when there is no statutory requirement. If there is a breach of the statutory requirement then that breach can be the subject of proceedings. Legitimate expectation comes into play when there is a promise or a practice to do more than that which is required by statute. It seems to me the Statement is a paradigm example of such a promise and a practice. As I understood it, Mr Beard accepted that this appellant falls within Annex

6. Although he submitted there was an element of discretion, that is not relevant in the circumstances of the present case. No doubt if an officer had given consideration to the matter and had concluded that, for example, this appellant was so far away from the proposed development that he could not fairly be described as an adjoining occupier then, absent *Wednesbury* unreasonableness, the court would not interfere with that exercise of discretion. In the present case no discretion was exercised and the administrative mistake was made. It was submitted by the respondent and the interested party that, even though there was a clear statement that a person in the position of the appellant would be sent a letter, there was nevertheless no unequivocal assurance that they would be notified. I am quite unable to accept that submission given the clear terms of paragraph 1.3 of the Statement which tells the public that when the Statement is adopted by the Council it is "required to follow what it says". It would be difficult to imagine a more unequivocal statement as to who would, and would not, be notified.

15. There was therefore, in my judgment, a clear breach of the appellant's legitimate expectation that he would be notified of planning applications, such as the application made by the interested party, in accordance with the terms of Annex 6 of the statement. The appellant therefore succeeds on issue 1. It does not necessarily follow that the grant of planning permission was unlawful. It is unnecessary in the circumstances of this particular case to decide whether the claimant in the appellant's position must, in order to establish procedural unfairness, also demonstrate prejudice as a result of failure to notify him, because the question whether the appellant was prejudiced by the failure to notify him in accordance with the Statement (and, if so, to what extent) is plainly relevant to the exercise of the court's discretion as to whether the permission should be quashed or whether declaratory relief should be granted."

15. In terms of legitimate expectation as a concept wider than the Statement of Community Involvement, with which the case of Majed was concerned, I have also had my attention drawn to the case of Abdi v Secretary of State for the Home Department [2005] EWCA Civ 1363 in which, in the leading judgment of the Court of Appeal given by Laws LJ, there is an exposition of the case law in relation to legitimate expectation. In particular, Laws LJ provided as follows:

"48. In the *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 the question was whether an illegal entrant into Hong Kong was entitled to a hearing before a deportation order might be made against him, there having been an announcement that persons in the respondent's position would be interviewed. The Privy Council treated legitimate expectation as amounting to a "principle that a public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflict with its duty". There shortly followed ex parte Khan [1984] 1 WLR 1337 in which the Secretary of State had refused an entry clearance for a child to be allowed into the United Kingdom for the purposes of

adoption by the applicant, but had done so upon grounds nowhere mentioned in a Home Office circular letter apparently setting out the policy or criteria to be applied in dealing with such applications. By a majority (Watkins LJ dissenting) this court allowed the applicant's appeal against the adverse judgment of Stephen Brown J at first instance. After citing Ng Yuen Shiu and other cases Parker LJ said this at 1347B-E:

'I have no doubt the Home Office letter afforded the applicant a reasonable expectation that the procedures it set out, which were just as certain in their terms as the question and answer in Mr Ng's case, would be followed ... The Secretary of State is, of course, at liberty to change the policy but in my view, vis a vis the recipient of such a letter, a new policy can only be implemented after such recipient has been given a full and serious consideration whether there is some overriding public interest which justifies a departure from the procedures stated in the letter'.

I would make two observations before proceeding further, first, it seems clear at this stage in the law's development the courts were concerned, through the medium of legitimate or reasonable expectations, to insist that public decision-makers act fairly in a *procedural* sense. There was no question yet, I think, of the court's holding government to a strict adherence to stated policy - and so conferring a *substantive* legitimate expectation - if government concluded (no doubt, on rational grounds) that a change of policy was in the public interest. In such an event, the scope of the legitimate expectation enjoyed by a potential beneficiary of the old policy was limited to an entitlement to make representations. Secondly, this principle may be seen as a requirement of *reasonableness* as readily as one of *fairness*, as was expressly made plain by Dunn LJ in Ex p Khan. Having cited Wednesbury [1948] 1 KB 223 he said that by the circular letter the Secretary of State had 'stated those matters which he regarded as relevant and would consider in reaching his decision', and held that the Secretary of State's decision had been unreasonable and unfair: 'an unfair action can seldom be a reasonable one'."

Laws LJ goes on to address developments in the law in relation to substantive legitimate expectations which do not arise in relation to this case.

16. As will be clear from the decision in Majed, it is accepted on both sides that, even if the claimant is successful in establishing that there has been a breach of a legitimate expectation, it is still necessary for them to show that they have been prejudiced and there remains a discretion as to whether or not to quash the decision. If the decision would be the same in connection with any re-determination of this planning application, then it would, of course, be a pointless exercise to remit it to the defendant to take the decision again, in accordance with what might be perceived as the appropriate procedure, but arrive at the same outcome. These questions of discretion are alive in the submissions made by both of the parties in this case.

17. That said, in relation to the cases which deal with the opportunity to be heard, the authorities require that there is a certain degree of caution. For instance, in R v Ealing Magistrates Court ex parte Fanneran, Rougier J observed as follows:

"I entirely agree that, on the present material, it is very difficult to see the presence of the applicant at the proceedings would have made any difference to their fatal outcome. Yet, no one can ever say for certain what must have happened in the circumstances which have not in fact arisen. The robing rooms up and down this land are full of strange tales of seemingly impregnable cases floundering on some unforeseen forensic brief. It is not, in my opinion, for this court to employ its imagination to postulate facts which might or might not have occurred, or arguments which might or might not have succeeded had the rules of natural justice been followed. That such a fundamental rule as the present should have been followed strikes me as a far more important factor than the destruction of one harmless dog".

Discussion

18. As set out above, this is a case about a legitimate expectation in relation to procedure to be followed and does not raise points in respect of any developments of the law associated with substantive legitimate expectations such as were canvassed and synthesised in the case of Abdi. In this case there is no doubt or dispute but that, in the light of the case of Majed, the Statement of Community Involvement, and indeed the defendant's correspondence with the claimant, could and did create a legitimate expectation. The question which is at the heart of this case is, an expectation of what?
19. In my judgment, that question has to be answered by looking both at the letter and also at the Statement of Community Involvement, which I have set out so far as relevant above. It is clear and undisputed that the defendant promised that they would notify the claimant of the meeting but, it is said by Mr Harwood, they did not promise *when* they would notify the claimant. That submission is correct in terms of what is said explicitly within the Statement of Community Involvement and the letter. However, to my mind, it must be the case that the notification must be sent so as to arrive at a time which enables the objector to organise himself and take up that opportunity. Notice at a time when there is no realistic chance to coordinate oneself and make arrangements to attend the meeting is no better than no notice at all. It is not necessary for me to be prescriptive as to how much time that might require. This is a very fact sensitive assessment and, no doubt, different cases will turn upon their particular facts. On the one hand, it is to be noted that this was a very simple application, described in the Statement of Community Involvement as a "minor application". On the other, it is to be noted that the defendant asked for five days notice of an intention to speak so that they could organise themselves to make the necessary arrangements. Neither of those matters are decisive but they do provide some context.
20. In my judgment, it is clear in this case that receiving the letter on the day of the meeting, plainly, did not afford the claimant the opportunity that had been promised, since, sensibly, there would be a need to digest the committee report which had been

promulgated to martial the arguments which were pertinent to the claimant's objections and prepare their presentation and make arrangements to attend the meeting. It is well known that domestic post does not arrive first thing in the morning and, also, it is likely that people will have other commitments which mean that the contents of their post probably do not come to their notice until after the close of business. Thus, if the letter of notification is timed to arrive, or indeed does arrive, at some point on the day of the meeting then, in my judgment, there is a very serious risk that, as here, the notification will turn out to be worthless.

21. It is said by the defendant that once the notification letter had been put in the post, the matter was out of their hands and that they could not be held responsible for delays arising from the post office's operations. In my view, I do not need to resolve the question of what might be the outcome of a failure to notify arising from default on the part of the post office. That is because, in the light of what I have observed above, the defendant still has to post the letter at a time and in a manner which means that it will arrive in time to enable the objector to organise himself and avail himself of the opportunity to speak. In this case, the claimant points to several statutory instruments which deem that service by second class post occurs on the fourth business day from posting; in effect what happened here. Those statutory instruments include the provisions of the Insolvency Rules 1986 and the Council Tax Alteration of Lists and Appeals Regulations 1993. My attention has also been taken by the claimant to the post office's website where it describes the services provided under its delivery options. Second class post is described as being a service "for when time is not important", providing for delivery to take effect in "three plus days".
22. The defendants' retort is to alert me to another extract from the post office's website describing second class mail in which it says "second class mail aims to deliver your letter or packet by the third working day after posting".
23. I do not see that latter website extract as being inconsistent with the material provided by the claimant. The short point here is that the arrival of the letter on the day of the meeting was consistent with the general promised performance of the post office and could have been anticipated if the notification was posted when it was and how it was. The fact that, in respect of other letters sent out in relation to this meeting, the post office exceeded their general performance standard for second class post does not avail the defendant in respect of notifying these claimants.
24. The defendant, through Mr Harwood, further says that the claimant could have rung the council and pointed out the problem before the meeting started or on the following day. That may be true if the letter does not arrive on the day of the meeting. If the letter arrives on the day of the meeting there is a clear danger that what will happen is what happened here, namely that it will come to the objector's attention after the close of business and on the cusp of the start of the Planning Committee meeting. I do not consider it unreasonable for a lay person in receipt of such a letter to think that it is, at that time, too late to ring the Council to seek any relief. I also do not think it unreasonable for a lay person to consider that the day after the meeting is too late to ring up to try to address the problem which has occurred. There may be other cases where such a failure to alert the Council to late arrival of a letter of notification could

be of significance in assessing whether or not there has, in substance, been a breach of legitimate expectation, but this is not such a case.

25. I do not accept that there was, in effect, a separate promise in respect of the claimant's agent, Mr Lee. The Statement of Community Involvement does not refer to agents or, to my mind, create any promise in respect of notification of both the objector and any agent that they may have appointed. Whether the legitimate expectation might have been met by notifying Mr Lee in good time alone is an academic point in this case about which I express no view. I have approached my conclusions by analysing and examining the position of the claimants personally in order to reach my finding. My finding is that the legitimate expectation of notification, at a time which enabled the claimant to have an appropriate opportunity to exercise the right to address the committee, was breached in this case.
26. I turn then to the question of prejudice and discretion. I accept and was impressed by the committee report in this case. It is, to my mind, a model of good practice, in the sense that it sets out and summarises appropriately the objections raised by the claimants and then responds to them on behalf of the officers, dealing with why those objections have not been accepted. However, it seems to me that if that sufficed to adequately consult the claimants in a way imagined by the Statement of Community Involvement, then the defendant would not have offered the opportunity to address the meeting. The basis of offering that opportunity is, no doubt, that it is the members who decide the application, having heard the oral presentation by the officers and read their report. Oral presentation of the objector's case affords the opportunity of persuading the members to depart from the officer's recommendation. It is clear that, in relation to issues concerning residential amenity and the impact of the proposals on the conservation area, matters of judgment were at stake. Although Mr Harwood, on behalf of the defendant, says that the claimants have not said in detail what they would have said to the committee, in my judgment, the concern here is not that there was some new point that might have been made but that the claimants would have had the opportunity to present their argument and also respond to the oral presentation of the application made by the officers to the committee, to give rise to the opportunity to persuade members to a view that differed from the officers, as contemplated implicitly by the Statement of Community Involvement.
27. I cannot, therefore, find myself persuaded that there would be no difference to the decision if the claimants were given that opportunity. It is clear that the Statement of Community Involvement contemplates that an objector's oral presentation of his case to the committee is a significant feature of the defendant's consultation procedures. It is therefore, in my view, inappropriate to exercise my discretion against the claimants in this case and I conclude that they have been prejudiced by the breach of the legitimate expectation in this matter.
28. **MR GOODMAN:** My Lord, I have an application for my costs to be assessed on the summary basis. I understand that the vast majority, and potentially all, of our costs are agreed between the parties.
29. **MR HARWOOD:** My Lord, that is right. The principle and sum are agreed.

30. **THE DEPUTY JUDGE:** And they are?
31. **MR GOODMAN:** My Lord, my total costs in summary are £8,731.59, including VAT that is.
32. **THE DEPUTY JUDGE:** So, the usual spuriously accurate amount. I shall order that the defendant pay the claimant's costs in that sum. Are there any other orders that are required on the basis of your being publicly accessed?
33. **MR GOODMAN:** No, my Lord.
34. My Lord, the only other matter would be then for me to draw up an order specifically quashing the decision. I trust that follows from your Lordship's judgment?
35. **THE DEPUTY JUDGE:** Indeed. There is no issue here about relief is there Mr Harwood?
36. **MR HARWOOD:** No, my Lord.
37. **THE DEPUTY JUDGE:** Your client's decision is quashed.
38. **MR HARWOOD:** Quash the planning permission, yes.
39. **THE DEPUTY JUDGE:** Thank you very much. Thank you both very much indeed for your assistance.