Neutral Citation Number: [2019] EWHC 628 (Admin)

Case No: CO/1843/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 March 2019

Before :

DAVID ELVIN QC
(Sitting as a Deputy Judge of the High Court)

- -

Between :

THE QUEEN

On the application of

KATE BROAD

Claimant

- and –

ROCHFORD DISTRICT COUNCIL

Defendant

SANCTUARY GROUP

Interested Party

- -
- -

Victoria Hutton (instructed by **LSR Solicitors and Planning Consultants**) for the **Claimant**
Charles Streeten (instructed by Legal Services, Rochford District Council)
for the **First Defendant**
(The Interested Party did not appear and was not represented)

- -

Hearing date: 8 November 2018

- -

APPROVED JUDGMENT

THE DEPUTY JUDGE (David Elvin QC):

1. This is an application for judicial review of the Defendant Council's ("**the Council**") grant of planning permission on 28 March 2018 ("**the Permission**") to the Interested Party ("**the IP**"), which is a provider of social housing, for the demolition of existing garages and their replacement with six social housing units ("**the Development**") at the garage block between 28 and 29 Althorne Way, Canewdon, Essex ("**the Site**").

2. The Claimant and her husband live in "Keld" a neighbouring property in Lambourne Hall Road, adjoining the Site along part of its western boundary.

3. A previous application in 2016 having been refused, the IP submitted plans for the Development on 4 August 2017 (Application 17/00783/FUL) and, following objections including on grounds of overlooking and overshadowing from, amongst others, the Claimant, they were amended on about 14 March 2018 (they bear date stamps for that date). The Development comprised two blocks of accommodation, Blocks A and B of which A was the larger, providing 4 flats, whilst Block B provided 2 flats. Block A was sited on the eastern side of the Site, away from Keld whereas Block B was sited close to the western boundary of the site, close to the boundary of Keld.

4. In the revised plans, the siting of Block B was moved by approximately 1.45m closer to Keld, altering the position of a balcony (which projects some 1.65m from the wall of the building) to a position adjacent to the boundary with Keld, and amending the external finish of the proposed development. Block B as amended is aligned approximately east-west and its front elevation faces north, away from Keld, and its rear elevation faces south. The gable wall which is

closest to the boundary with Keld is a blank wall, though the balcony on the rear elevation projects southwards with its side continuing the line of the gable wall. The balcony has a glazed door and window for access which exits from what appears from the floor plans (see plan 103 rev. I) to be a combined living/dining area with a kitchen at the far end.

5. It appears that the amended plans were not uploaded to the Council's website until the date that permission was granted. There has been no satisfactory explanation for this.

6. The Claimant objected to the application on a number of grounds which she sets out in her second witness statement, including concerns with regard to loss of light, overshadowing of house and garden, loss of privacy from overlooking, poor outlook of a brick wall from her garden, overdevelopment and noise and disturbance. She considers (as explained at paragraphs 4 and 5 of her statement) that the revisions would -

> "further impinge on my enjoyment of my property because the building shown as Block B has been has been moved closer to my house increasing the impact on my property in terms of it being dominant and overbearing… In addition, a first floor balcony has been added, which will directly overlook my side garden, rear garden and rear patio doors and windows in my house, having an adverse impact on my privacy."

7. She explains that had she been consulted on the revisions -

> "I would have said that my objection was maintained, and that the impact of the revised plans had worsened the impact on my property due to the building being moved close to my house and overlooking from the new first floor balcony resulting loss of privacy."

8. I have also read the Claimant's more detailed letter of objection dated 4 September 2017. There is also an objection from the Parish Council, made

online, dated 7 September 2017 which raises a number of similar issues, including overlooking.

9. The Claimant also helpfully provides aerial photographs showing the relationship of the Site and Block B with Keld, one of which overlays the revised first floor plan of Block B over the relevant part of the Site. No issue was taken with the accuracy of these plans. It shows Block B very close to the garden boundary of Keld with the gable end and side of the balcony extending along a significant length of the area of garden closest to Keld (the western elevation). Although there are a number of trees in the locality, it is difficult to believe that there will not be some overlooking of Keld, even if obliquely, from the balcony despite the inclusion of an opaque glazed panel that runs along the edge of the balcony parallel to the boundary (shown on plans 103 rev. I and 107 rev. I). That glazed panel is required to be constructed by condition 2 attached to the Permission which requires development to be undertaken "in strict accordance with the updated plans" including those I have mentioned above. However, there is no condition that requires the retention and maintenance of that panel, a matter noted by Mr Howell QC in granting permission.

10. In response to the lack of condition, on 2 August 2018 the IP executed a planning obligation by way of unilateral undertaking pursuant to s. 106 of the Town and Country Planning Act 1990, in which it covenanted in clause 3 to install the opaque panel (referred to as "the Privacy Screen") prior to the first occupation of Block B and to retain and maintain the Privacy Screen for the duration of the existence of Block B.

11. I have also been provided with a witness statement dated 11 May 2018 from

Fiona Bradley, a planning consultant instructed by the Claimant, which sets out a number of factual matters with respect to the Development and the amendments and also sets out her views on the impact of the revised proposals although I note she states at paragraph 17 that she has not visited the property. She also advances criticisms of a report prepared by a planning officer which considered the application, and preceded the grant of permission on 28 March 2018 ("**the OR**"). She has given an expert's declaration as required by the CPR though no permission has been given to adduce expert evidence.

12. Whilst Miss Bradley's evidence on the facts may be of assistance, I do not consider it relevant to consider her views on the OR and whether there should have been consultation on the revisions, since these are matters for the Court not a planning expert.

13. The Council has also filed witness statements from Katie Rodgers, the Development Management Team Leader, and who took the formal decision to grant permission, Arwell Evans (Senior Planning Consultant) who considers the OR, of which he was the author, and the revisions in detail and from Naomi Lucas and Matthew Wynn Thomas on the Council's current difficulties in terms of finances and recruiting to posts in the planning department, which appear to be directed at the Claimant's application for an Aarhus costs cap. In any event, the lawfulness of the Council's decision is not to be determined by reference to the difficulties which its planning department is experiencing in recruitment.

14. With regard to Ms Rodgers and Mr Evans' statements, objection is taken by Miss Hutton for the Claimant on the basis that it is an *ex post facto* attempt to remedy deficiencies in the OR and is inadmissible under the principle set out in

R v Westminster City Council ex p. Ermakov [1996] 2 All ER 302. I will return to this issue below.

15. The application was granted permission by an officer acting under delegated powers on 28 March 2018. This was preceded by the OR. The OR referred to the revised plans under the list of plans and statements on the first page and described the Site and Development (including the revisions) as follows[1]:

> "THE PROPOSALS
>
> 1. The development proposes the demolition of a row of single storey garages occupying part of a car park which is located to the rear of Althorne Way to make way for a modest residential development comprising 6 flats. The flats will be arranged in two blocks served by frontage parking. Block A (providing 4 flats) will be located within that area currently occupied by the garages to be demolished with its rear elevation orientated towards the Canewdon Community Association Hall whilst its front elevation will be orientated towards the current vehicular access point which serves the existing car park.
>
> 2. Block B which is the smaller of the blocks, providing 2 flats will be located at the southern extremity of the site served by rear and side communal amenity space. This block will be finished in render appears as one dwelling served by a chimney on either end of a uniform roof ridge line. The height of this building which has a continuous roof ridge as opposed to being staggered is approximately 8.5 metres.
>
> 3. The elevation plans have been revised to create more visual interest to the built form and propose a staggered roof line incorporating chimneys of a brick construction to match the brick outer finish which will be the predominant visible feature to the rear and side elevation of Block A. The height of this block will be approximately 8.7 metres with two rear first floor balconies and rear out door amenity space.
>
> 4. The proposed site layout plan indicates the provision of 12 vehicular parking spaces two of which would be disabled bays. An area currently occupied by tarmac surfacing will be utilised as part of the access serving the site. An element of green verges around the built form is proposed.

[1] The errors in the quotations from the OR are original.

> 5. External facing materials would include brick and render with coloured UPVC window and door frames which are intended to provide texture and complimentary visual contrast.
>
> THE SITE
>
> 6. The site is a rectangular area of land which currently provides a parking area with garaging accessed via Althorne Way. The site which enjoys no other means of access and is effectively tucked to the rear and side of the existing estate development which envelopes it to the north and east whilst an area of unoccupied ground screens the site from the highway to the south.
>
> To the east of the site is a community hall and amenity land which serves this community facility."

16. The OR then dealt with the planning history of the site and turned to s. 38(6) of the Planning and Compulsory Purchase Act 2004 and the relevant development plan policies (noting the revisions):

> "Policy H1 to the Council's adopted Core Strategy states that in order to protect the character of existing settlements, the Council will resist the intensification of smaller sites within residential areas. Limited infilling will be considered acceptable provided it relates well to the existing street pattern, density and character of the locality.
>
> 11. The site is located within the settlement development limits of Canewdon and although it serves as over flow parking for residential properties on Althorne way it is not understood that a legal obligation is placed on the retention of this parking in connection with the historic consents issued in respect of developments at Althorne Way. It is not considered that further intensification of the site in the form of the development proposed would fundamentally conflict with planning policy. The development would not appear inconsistent with nor out of character with the built form within this residential setting such that it would constitute in appropriate development.
>
> Design
>
> 12. Policies DM1 and DM3 and guidance within SPD2 require consideration of the relationship between existing and proposed buildings. The visual appearance of the two blocks has been revised to address the concerns raised in the course of the application. The mono block design originally proposed incorporating a balcony frontage to Block A overlooking the car

> park has now been revised to provide built form which appears more a kin to a terraced property block. A mix of materials has been introduced as have additional windows and stepped roof lines. Block B appears more as a single dwelling rather than a set of flats."

17. The OR then considered the application of the policies, the revisions made to the plans and the objections that had been received (to the original plans) concluding that it was no necessary to re-consult since the revisions were not "significantly material":

> "13. It is not considered that the revisions are significantly material (as there is no fundamental change in the location or orientation of the blocks) that a re-consultation on the revisions was considered necessary. The Local Planning Authority is satisfied on this basis that it has taken into account the advice provided by the Town and Country Development Management Procedure 2015 in arriving at its position in this context.
>
> 14. Policy DM3 requires that new dwellings have a positive relationship with nearby buildings and a scale and form appropriate to the locality. From the perspective of the design of the built form, it is not considered that the development in terms of scale will appear out of place with its wider setting, such that it can be concluded on this basis that the development is objectionable.
>
> 15. Concerns have been raised with regard to perception of overlooking and overbearing dominance associated with the design of Block B from a property known as Keld. However, given the orientation and the fact that the gable elevation which will be glimpsed from Keld constitutes a solid wall with no window openings it is not considered that Block B will demonstrably affect amenity of any neighbouring property.
>
> 16. The concerns raised by neighbours with regard to potential overlooking from the proposed development have been taken into account. Given the location of the two buildings relative to adjoining properties and their respective orientation and degree of physical separation it is not considered that the design in terms of window positioning and height will have any demonstrable detrimental impact upon the amenity of neighbouring properties. The gable elevation of Block A consists of solid wall such that there will be no overlooking of adjacent dwellings from internal living space. The balcony projection to the rear of block A given its position and orientation which affects outlook is not considered to demonstrably affect the amenity of any private

> realm space as the outlook will be towards a public amenity area which serves the Village Hall."

18. Various other issues were considered including car parking, amenity space (of which the balconies formed part) and housing space standards. The Development was considered to be satisfactory in these respects overcoming the objections to the previously refused scheme.

19. The OR then summarised representations made with regard to the Development including the objections from the Parish Council I have already mentioned and from Essex County Council (Urban Design). Essex County Council, in fact, suggested that Block B might be moved further back (i.e. closer to Keld) to maximise the ability to provide amenity space in front of the block. Neighbour objections were also noted, including those from Keld. I will not list them all but they included:

> "49. NEIGHBOURS: A number of representations of objection have been received in relation to the application including representations from the following households:
>
> …
>
> Keld Lambourne Hall Road (SS43PG)
>
> …
>
> Issues raised include
>
> …
>
> - Squeezing in properties
> - Inaccuracies in submitted Design and Access Statement and concern that aerial photographs used are out of date, inaccurate statement relating to public transport, Loss of light to property (Keld, Lambourne Hall Road as a consequence of the position of Block B as proposed
> - Size and nature of block are inappropriate to existing housing supply
> - Overlooking from Kitchen window of Elevation 7 Block B into a neighbouring property

- Overbearing impact of the gable elevation of block B on a neighbouring property affecting open aspects …"

20. The report then recommended that permission be granted, set out the conditions that should be imposed and ended with its reasons:

> "REASON FOR DECISION AND STATEMENT
>
> The Local Planning Authority has acted positively and proactively in determining this application by assessing the proposal against the adopted Development Plan and all material considerations, including planning policies and any representations that may have been received and subsequently determining to grant planning permission in accordance with the presumption in favour of sustainable development, as set out within the National Planning Policy Framework. The proposal is considered not to cause significant demonstrable harm to any development plan interests, other material considerations, to the character and appearance of the area, to the street scene or residential amenity such as to justify refusing the application; nor to surrounding occupiers in neighbouring streets."

21. The Permission was issued on 28 March 2018 and the application for permission to bring judicial review was made to the Court on 9 May 2018 following a letter before claim dated 3 May 2018. The short time period between the letter and the issue of proceedings was because the Claimant had first sought an internal review of the decision by the Council (though there was little the Council could do at that stage other than consider a revocation order) and so the proceedings were issued close to the expiry of the 6-week challenge period under CPR Part 54.5.

22. Permission was granted by the Deputy Judge, John Howell QC, on 20 June 2018. Permission to amend the grounds of challenge was given by Robin Purchas QC on 3 July 2018.

Grounds of challenge

23. The Amended Statement of Facts and Grounds make the following allegations:

    i) The Council acted unlawfully in approving the amended plans without consultation (Ground 1);

    ii) The Council's decision was vitiated by errors of fact (Ground 2A) which comprise erroneous descriptions of the amended proposals and conclusions that the wall which would be visible from Keld would be a "solid wall with no window openings" and would only be "glimpsed" from Keld;

    iii) The Council erred in assessing the amenity impacts of the Development on the Claimant's property (Ground 2B) in that it -

        a) failed to take into account the fact that the balcony on Block B of the Development would overlook Keld; and

        b) irrationally concluded that the gable elevation of Block B was a solid wall and would have no demonstrable effect on amenity in circumstances where that elevation extended some 7m along the length of the boundary with Keld and there was a balcony proposed which overlooked Keld.

24. There is a significant overlap between Grounds 2A and 2B which are both concerned with the failure of the Council properly to understand and assess the impact of the amended Block B on Keld.

General approach

25. The principles applicable to the exercise of the Court's power to review planning decisions in judicial review and equivalent statutory challenges are well-known. See Lindblom LJ in ***St Modwen Developments Ltd v Secretary of State for Communities and Local Government*** [2018] P.T.S.R. 746 at paras. 6 and 7, ***East Staffordshire Borough Council v Secretary of State for Communities and Local Government*** [2018] P.T.S.R. 88 at para. 50 and, particularly in the context of challenges to local authority decisions, ***Mansell v Tonbridge and Malling BC*** [2018] J.P.L. 176 at [41] and [63].

26. I bear in mind in particular the emphasis placed by the Court of Appeal on not adopting a legalistic or unduly forensic approach to planning decisions. As Lindblom LJ held in ***Mansell*** at [41] point (2) -

> "Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge… Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice."

(That passage has to be adapted to deal with the situation where the report is written for a senior officer to take a delegated decision.)

27. Glidewell LJ summarised the principles applicable to cases where there was an alleged failure to take into account material considerations in ***Bolton MBC v Secretary of State for the Environment*** [2017] P.T.S.R. 1063 at 1072-3.

28. In terms of the failure to consult on the amended plans, reliance is placed on the well-known judgment of Forbes J. in ***Bernard Wheatcroft v Secretary of State*** (1980) 43 P. & C.R. 233 and on the more recent judgment of John Howell QC (sitting as a Deputy High Court Judge) in ***R (Holborn Studios Ltd) v Hackney LBC*** [2018] P.T.S.R. 997. Forbes J. held at pp. 239 and 241:

> "Although, therefore, Mr. Harper and Mr. Sullivan put forward a number of propositions, in the end I do not think that they differ markedly from each other on the essential principles governing the question of when conditions can be regarded as intra vires. … the question here is whether it is permissible to grant a planning permission subject to a condition that only what I may call a "reduced development" is carried out. Both counsel, I think, accept that it is permissible to grant planning permission subject to such a condition; both, I think, would seek to limit such conditions to those that do not alter the substance of the application; and both agree that in considering whether it is right to grant planning permission subject to such a condition the planning authority should, among other things, have regard to one of the underlying purposes of Part III of the Act of 1971, which is to ensure that before planning permission is granted there should be adequate consultation with the appropriate authorities and a proper opportunity for public comment and participation. The broad proposition, therefore, as I see it, to which both counsel would give assent is that a condition the effect of which is to allow the development but which amounts to a reduction on that proposed in the application can legitimately be imposed so long as it does not alter the substance of the development for which permission was applied for. If it does alter the substance, the argument goes on, it cannot legitimately be imposed, because there has been no opportunity for consultation and so on about what would be a substantially different proposal. Parliament cannot have intended conditional planning permission to be used to circumvent the provisions for consultation and public participation contained in this Part of the Act.
>
> ….

> I should add a rider. The true test is, I feel sure, that accepted by both counsel: is the effect of the conditional planning permission to allow development that is in substance not that which was applied for? Of course, in deciding whether or not there is a substantial difference the local planning authority or the Secretary of State will be exercising a judgment, and a judgment with which the courts will not ordinarily interfere unless it is manifestly unreasonably exercised. The main, but not the only, criterion on which that judgment should be exercised is whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation, and I use these words to cover all the matters of this kind with which Part III of the Act of 1971 deals."

29. In ***Holborn Studios,*** the Deputy Judge was critical of ***Wheatcroft*** and held:

> "77 The purpose of the relevant requirements for consultation in this case is not only to contribute to better decision-making when that application is considered, by ensuring that the decision-maker receives all relevant information, but it is also to ensure procedural fairness for those whose interests may be adversely affected by any grant of planning permission and to provide for public participation and involvement in decision-making on applications for such permission.
>
> 78 In considering whether it is unfair not to reconsult, in my judgment 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.
>
> 79 I do not accept that the test for whether reconsultation is required if an amendment is proposed to an application for planning permission is whether it involves a "fundamental change" and involves a "substantial difference" to the application or whether it results in a development that is in substance different from that applied for. These are three potentially different tests that have been suggested as stating the substantive constraint on what changes are impermissible. Depending on how each is interpreted, it is possible that the test would indicate reconsultation was not required when fairness would require it. As I have explained, even if the proposed amendment was not of any these types, a person may still have representations that he or she may want to make about the changes, given their nature and extent, if given the opportunity. In my judgment it is preferable to ask what fairness requires in the circumstances."

30. Subsequent to the close of argument in this case, the principles were summarised by Andrews J. in ***Barlow (on behalf of Harthill Against Fracking) v Secretary of State*** [2019] EWHC 146 (QB):

> "12 A planning inspector (or a planning authority) is entitled to grant planning permission which is different to that sought, provided that it does not result in a development which is substantially or significantly different from that which the application envisaged: see *Bernard Wheatcroft Ltd v Secretary of State for the Environment* (1980) 43 P & CR 233 . The Planning Inspectorate has indicated that its inspectors will take account of the *Wheatcroft* principles when deciding if proposed amendments will be accepted: see *Planning Inspectorate Procedural Guide – Planning Appeals (England) 2018, Annex M*, at paragraph M 2.2.
>
> 13 However, even if proposed changes to the application do not appear to involve a substantial or significant difference, procedural fairness may still require that persons other than the applicant be consulted upon and afforded a reasonable opportunity to make representations about them. The importance of not conflating the substantive and procedural constraints upon the powers of a local planning authority (or an inspector on an appeal) was emphasised by John Howells QC in *R (Holborn Studios Ltd) v Hackney London Borough Council* [2017] EWHC 2823 (Admin) at [72] and [73]."

31. Mr Streeten submitted that ***Holborn Studios*** was based on an analysis of the law which no longer holds good following the Supreme Court's decision ***R (Gallagher Group Ltd) v Competition Markets Authority*** [2019] A.C. 96 at [41] and [50]. In making this submission, he draws attention to the reference by Mr Howell in ***Holborn Studios*** at [85] to the point that -

> "it is not sufficient to establish that a decision is unlawful merely to show that it would have been better or fairer for there to have been reconsultation. "The test is whether the process has been so unfair as to be unlawful": see the *Keep Wythenshawe Special case* 148 BMLR 1 , paras 77 and 87, per Dove J; and *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] PTSR 982, para 60."

32. His criticism is that, in ***Gallagher***, Lord Carnwath (with whom the other

members of the Supreme Court agreed) considered in the context of legitimate expectations the role of fairness as abuse of power. He held at [41]:

> "41 In summary, procedural unfairness is well-established and well-understood. Substantive unfairness on the other hand—or, in Lord Dyson MR's words [2016] Bus LR 1200, para 53, "whether there has been unfairness on the part of the authority having regard to all the circumstances"—is not a distinct legal criterion. Nor is it made so by the addition of terms such as "conspicuous" or "abuse of power". Such language adds nothing to the ordinary principles of judicial review, notably in the present context irrationality and legitimate expectation. It is by reference to those principles that cases such as the present must be judged."

33. Lord Sumption agreed and added at [50]:

> "I agree with Lord Carnwath JSC's analysis of the relevant legal principles. In public law, as in most other areas of law, it is important not unnecessarily to multiply categories. It tends to undermine the coherence of the law by generating a mass of disparate special rules distinct from those applying in public law generally or those which apply to neighbouring categories."

34. It is notable that Lord Carnwath pointed out that "procedural unfairness is well-established and well-understood": see also his discussion at [31]-[34] which makes it clear that it was substantive fairness as a separate ground of review that was troubling the Court.

35. I reject Mr Streeten's attempt to distinguish ***Holborn Studios*** since it is clear in that case that Mr Howell QC was considering the application of the rules of procedural fairness, not substantive fairness, which was the issue considered in ***Gallagher***. This is how Andrews J approach the issue in ***Barlow*** at [13]. It is further underlined by the fact that the two cases cited by Mr Howell QC were dealing with procedural fairness. See, for example, in ***R (West Berkshire District Council) v Secretary of State for Communities and Local Government*** [2016] PTSR 982, Laws and Treacy LJJ (with whom Lord Dysion MR agreed)

held at [60]:

> "60 A consideration of whether a non-statutory consultation process such as this contravened the requirements of procedural fairness will always be fact and context sensitive. As Burnett LJ identified in the *London Criminal Courts Solicitors Association* case [2015] 1 Costs LR 7 , the test is whether the process has been so unfair as to be unlawful …"

36. Dove J. in ***Keep Wythenshawe Special v South Manchester NHS Foundation Trust*** [2016] EWHC 17 (Admin), stated at [73] (considered further below) -

> "One of the particular questions which arises in this case is when fairness determines that there should be re-consultation by the decision-maker…"

37. Since ***Gallagher*** did not purport to alter the law relating to procedural unfairness, which is the issue here and in ***Holborn Studios***, I consider I should follow the approach of Andrews J and John Howell QC.

Admissibility of Ms Rodgers and Mr Evans' witness statements

38. Miss Hutton relies upon ***Ermakov*** where Hutchison LJ stated at p. 315 H-J:

> "The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in *Ex p Graham*, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence – as in this case – which indicates that the real reasons were wholly different from the stated reasons."

39. In ***R (Watermead Parish Council) v Aylesbury Vale DC*** [2018] P.T.S.R. 43, Lindblom LJ (with whom Patten LJ agreed) considered the application of the

Ermakov principle to planning cases following Jackson LJ in in ***R (Lanner Parish Council) v Cornwall Council*** [2013] EWCA Civ 1290 at [59]–[65]. Lindblom LJ stated at [35], in the context of an alleged defect in a planning report:

> "35. As the authorities show, the court should always be cautious in admitting evidence which, in response to a challenge to a grant of planning permission, elaborates on the advice given by a planning officer in his report to committee—the more so when it expands at length on the advice in the report, or even differs from it. This is not simply because an attempt to reinforce the advice given in the report may only strengthen the argument that the advice fell short of what was required, or was such as to mislead the committee. It is also for the more basic and no less obvious reason that the committee considered the proposal in the light of the advice the officer gave, not the advice he might now wish to have given having seen the claim for judicial review. Of course, evidence in a planning officer's witness statement cannot correct an error of law in the assessment of the proposal on which the committee relied when it made its decision. In some cases, however, it can shed useful light on the advice he gave to the members in his report."

40. There appears to me to be no reason why the same approach should not be taken to a report which is meant to provide the basis for an officer's delegated decision – if, anything, it applies with greater force since the officer (or here, consultant contracted to deal with the application) is setting out directly the reasons for the decision taken by officers and there is no need to consider whether members took a different view.

41. As John Howell QC (sitting as a Deputy Judge) observed in ***R (Shasha) v Westminster CC*** [2017] P.T.S.R. 306 at [42]:

> "42 Those principles allow for the admission of evidence to elucidate but only exceptionally to correct, or to add to, the reasons required to be produced. The examples of the corrections which may be exceptionally be considered (which do not amount to an impermissible contradiction or alteration) include errors in transcription or expression and words inadvertently omitted. An

> example of an addition that may be permitted exceptionally is where the language used may be lacking in clarity in some way: see *Ex p Ermakov* [1996] 2 All ER 302 , 315. Such corrections or additions ought now to emerge in any event before any claim for judicial review is brought if the pre-action protocol is complied with."

42. I do not find ***R (Rogers) v Wycombe DC*** [2017] EWHC 3317 (Admin) at [76] to assist here since Lang J was there dealing with the separate issue of what the Court may take into account in exercising its power under s. 31(2A) of the Senior Courts Act 1981 which post-dates ***Ermakov*** and raises different considerations. It may become relevant if it have to consider the application of s. 31(2A), which Mr Streeten suggests I should.

43. Applying the principles as set out above, it appears to me that while a substantial portion of Mr Evans' statement is admissible as simply providing elucidation of the factual context of the decision it does appear to me especially in paras. 11 to 14 that his statement does elaborate on the terms of the OR although not in terms which are contradictory to it. I will therefore not exclude them but will treat those paragraphs with caution although they may ultimately have an adverse effect on the Council's case, as Lindblom LJ pointed out in ***Watermead***.

44. Similarly, Ms Rodgers confines herself to giving short factual evidence as to what she had before her and considered in granting permission. It is not inconsistent with the decision and appears to me to be admissible as shedding light on the issues considered by the decision-maker in a manner that is not inconsistent with the OR or decision.

45. Whilst I will therefore not exclude any of the witness statements, for the reasons I have set out there are some aspects I regard as irrelevant and others, such as those in Mr Evans' statement, I approach with caution.

Grounds of Challenge

46. The first ground concerns whether the decision to allow the revisions was unlawful in the light of lack of further consultation. This to a degree overlaps with the Ground 2A and B allegations relating to the failure to consider the impact of the change in location of the balcony. It is therefore convenient if I take all the grounds together and return to set out my views on the individual grounds.

47. Miss Hutton submitted that whilst, of course, her client had made her general concerns known with regard to overlooking, loss of privacy and similar concerns, these were in the context of the earlier proposals which did not involve the repositioning of the balcony on the south side of the house closest to Keld and which also meant that the position of the balcony was closer to Keld than the windows in the original plan which were, as might be expected, set into the elevation of Block B (as shown on Plan 107E exhibited by Ms Bradley).

48. The extension originally proposed, which was a brick construction with windows rather than the later balcony, did overlook Keld's garden but at the opposite end of the gable (elevation 8 on Plan 107E) of Block B to the balcony and at a greater distance away from Keld itself and much closer to the northern end of Keld's garden. This is referred to by the Claimant in her second statement as worsening the impact, the overlooking and loss of privacy: see the quotations from her statement above.

49. Miss Hutton also points out:

i) The plans were not put on the Council's website until Permission was granted, which meant that members of the public could not even see them until it was too late to raise concerns;

ii) The revised plans were clearly sent to the County Council since I have seen a letter from "Place Services" of the County Council dated 9 March 2018 and they are referred to in the OR at paras. 36 ("the updated plans create a better form than the earlier submissions") and 37 (reference to the removal of the windows from the west elevation of Block B and the privacy screen);

iii) The treatment of overlooking in the OR refers exclusively to the removal of the windows from the western elevation of Block B at para. 15 with no reference to the balcony, in terms that make it clear that the OR considered this change resolved the concerns of overlooking and privacy. No mention is made of the issue of the privacy screen except at para. 37 when summarising the representations from the County Council;

iv) The reference to "glimpses" in the case of the balcony is not a reasonable judgment to make and is something that would have been addressed in substance by the Claimant if she had been consulted;

v) Mr Evans seeks in paras. 13 and 14 to add to the reasoning he set out in the OR adding points about the switching of the balcony (though I note he fails to refer to the differences in construction and design) and the privacy screen which he says "would guard against potential for direct overlooking to the adjoining property Keld". I note that he does not

a) comment on the greater proximity of the balcony to Keld in the revision;

b) explain why the reference to the omission of windows from the gable does not refer to the addition of the balcony and its potential to overlook. This was obviously a concern since there would be no reason otherwise to require an opaque glazed screen to be provided;

c) explain why there is no reference to the reasoning set out in para. 13 regarding the balcony and the screen in the OR.

50. Mr Streeten, for the Council, resisted the challenge and pointed out that Ms Rodgers, who took the decision, agrees with Mr Evans' statement and understood from the plans that the revised plans incorporated a "first floor terrace" with a privacy screen and is referred to at para. 37 of the OR. He submitted that Grounds 2A and 2B should fail since it is plain that the Council decision-maker:

i) Took proper account of the revised plans;

ii) Understood the revised layout and design;

iii) Was aware of the change in design of Block B including the removal of windows from the western elevation and the substitution of the balcony with privacy panel (specifically mentioned at para. 37).

51. Mr Streeten pointed out the need for a common-sense approach and not a forensic approach to the OR and decision, relying on the clear guidance from

the Court of Appeal in ***Mansell***, above. He also relied upon the fact that the proposals had raised concerns and objections that were well-known and recorded in the OR and that they were plainly considered in the light of the revised proposals. He submitted that it was a matter of "common-sense" that if someone objected on grounds of amenity they would not want to have a balcony next to their garden. It was a rational decision not to reconsult.

52. On Ground 1, Mr Streeten relied, in the alternative to the submissions considered above, on the judgment in ***Holborn Studios*** (which Miss Hutton also relied upon) as to the correct approach to amended applications and, as I have indicated above, I am content to adopt this approach especially in the light of the judgment of Andrews J in ***Barlow***.

53. In ***Holborn Studios***, John Howell QC found that there had been a breach of the duty of fairness in that the claimant had not been consulted concerning significant changes to the design of a proposal. However, even if the case is one in principle where fairness might require reconsultation, it is nonetheless necessary to show material prejudice:

> "115 For the reasons given above, in my judgment the public generally, including Mr Brenner, and Holborn Studios were deprived of a fair opportunity to make such representations as they might have wanted to make on the amendments to the planning application made in May 2016.
>
> 116 Both claimants have provided evidence of matters on which they could have made representations. Moreover a person may be substantially prejudiced by a failure to give appropriate notice which might have attracted other potential objectors to his or her cause: see *Wilson v Secretary of State for the Environment* [1973] 1 WLR 1083, 1096D–E, per Browne J; and *Walton v Scottish Ministers* [2013] PTSR 51, para 110, per Lord Carnwath JSC.
>
> 117 In my judgment the claimants would not have suffered

> material prejudice if whatever they might have said, and whatever support they might have received (had there been a fair opportunity for the public to make representations on the amendments made in May 2016 to the 2015 application), would inevitably have made no difference to the decision of the planning subcommittee.
>
> 118 For the reasons given above in my judgment what Holborn Studios could have said given the opportunity might have made a difference to that decision. If only on that basis, it has been substantially prejudiced."

54. Unlike the ***Holborn Studios*** case where the Council filed no evidence, Mr Streeten submits that since the issues were plainly before the officer (Ms Rodgers) taking the decision and she was fully aware of the revisions and the existing objections, there is no basis for finding that there was a failure to take account of the addition of the balcony and its implications.

55. Both Mr Streeten and the Court in ***Holborn Studios*** refer to the judgment of Dove J in ***Keep Wythenshawe Special***. Dove J underlined the fact that differences necessary to justify a duty to reconsult on grounds of fairness would have to be of a "very high order". He held at [73]-[75]:

> "73 One of the particular questions which arises in this case is when fairness determines that there should be re-consultation by the decision-maker. When do circumstances exist which give rise to a legal requirement that there should be a further round of consultation? This issue arose before Silber J in the case of *Smith v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin). From paragraph 43 onwards he reached the following conclusions:
>
> > "43 A matter of crucial importance in determining whether the defendants in this case should have re-consulted on the proposals under challenge was the nature and extent of the difference between what was consulted on in the consultation paper and the proposal accepted in the March 2002 decision. Clearly, if all the fundamental aspects of the decision under challenge had not been consulted on but ought to have been, that would indicate a breach of the duty to consult, whilst at the other extreme, trivial changes do not require further consideration. In approaching this issue, it is necessary to bear

in mind not only the strong obligation of the defendants to consult, but also the dangers and consequences of too readily requiring re-consultation, as those dangers also flow from the underlying concept of fairness, which underpins the duty to consult.

44 As Schiemann J, as he then was, (with whom Lloyd LJ agreed) pointed out in explaining these dangers in *R v Shropshire Health Authority ex p Duffus* [1990] 1 Med LR 119 at p223:

> "A consultation procedure, if it is to be as full and fair as it ought to be, takes considerable time and meanwhile the underlying facts and projections are changing all the time. It is not just a question of an iterative process which can speedily be run through a computer. Each consultation process if it produces any changes has the potential to give rise to an expectation in others, that they will be consulted about any changes. If the courts are to be too liberal in the use of their power of judicial review to compel consultation on any change, there is a danger that the process will prevent any change-either in the sense that the authority will be disinclined to make any change because of the repeated consultation process which this might engender, or in the sense that no decision gets taken because consultation never comes to an end. One must not forget there are those with legitimate expectations that decisions will be taken."

45 So I approach the issue of whether there should have been re-consultation by the defendants in this case, on the proposals now under challenge on the basis that the defendants had a strong obligation to consult with all parts of the community. The concept of fairness should determine whether there is a need to re-consult if the decision-maker wishes to accept a fresh proposal but the courts should not be too liberal in the use of its power of judicial review to compel further consultation on any change. In determining whether there should be further re-consultation, a proper balance has to be struck between the strong obligation to consult on the part of the health authority and the need for decisions to be taken that affect the running of the health service. This means that there should only be re-consultation if there is a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt."

74 During the course of the argument on this point both parties, and in particular the defendants and those defending the decision, emphasised the phrase "fundamental difference" in their submissions. As the argument developed, it appeared to me

> that this phrase was in danger of having more rhetorical force than substantive content, and in and of itself providing limited assistance in determining when re-consultation might be required. In my view that phrase cannot be detached from the clear and undoubtedly accurate conclusion reached by Silber J that any consideration of the need to re-consult will be determined by the concept of fairness.
>
> 75 The requirements of fairness in considering whether or not to re-consult must start from an understanding of any differences between the proposal and material consulted upon and the decision that the public body in fact intends to proceed to make. This is because there will have already been consultation. The issue is, then, whether it is fair to proceed to make the decision without consultation on the differences, which will therefore be heavily influenced in this particular context by the nature and extent of the differences. Whilst it is not possible to produce any exhaustive list of the kind of matters that would need to be considered (alongside all the other legal principles set out above) to determine whether re-consultation is required, some illustrations may assist. Examples would include where it has been determined that it is necessary to re-open key decisions in a staged decision-making process which had already been settled prior to consultation occurring; or where the key criteria set out for determining the decision and against which the consultation occurred have been changed; or where a central or vital evidential premise of the proposed decision on which the consultation was based has been completely falsified. These examples serve to illustrate the very high order of the significance of any difference which would warrant re-consultation."

Conclusions

56. In my judgment, I do not consider that the errors alleged in Grounds 2A and 2B are made out. Whilst I sympathise with the Claimant in terms of the unsatisfactory nature of the OR, and its lack of clarity especially on the issues arising from the addition of balcony, I am satisfied from the evidence that the officer taking the decision was aware of the revisions, including the balcony, the provision of the privacy screen, and reached her conclusions in the light of the relevant circumstances including the objections already made to the proposals on grounds relating to overlooking at lack of privacy. Adopting the

approach advised by Lindblom LJ in ***Mansell***, and not applying undue rigour, but reading it with "reasonable benevolence", I do not consider that the criticisms that were made of the OR, whilst understandable, demonstrate that the officer erred in law in failing to take account of material considerations. I do note however that the witness statement of Mr Evans came close to supporting the Claimant's case by providing more detailed reasons that could easily, and arguably should have been, put into his OR.

57. I do not consider that the OR, and its absence of direct reference to the balcony (except in para. 37) misled Ms Rodgers in her decision-making and her own statement supports that view. The issue of whether the revised proposals were sufficiently harmful in terms of overlooking, loss of privacy and similar concerns is a matter of planning judgment and, whilst I understand the concern at the use of the word "glimpsed" I do have to adopt a benevolent approach to the OR and recognise this is an issue of planning judgment and the case falls short of meeting the high standard of irrationality. Looked at in the round, the OR recognises that views of Keld and its garden were oblique, taking account of the orientation of Block B and the privacy screen.

58. I do not consider that there were material errors of fact shown by the OR within the judgment of Carnwath LJ (as he then was) in ***E v Secretary of State for the Home Department*** [2004] Q.B. 1044 at [66], since I do not consider there were any mistakes as to existing fact since the context of the revised plans and what they showed was clearly a fact and was known to the author of the OR and the decision-maker. At best, the case is put onto the simpler basis of a failure to have regard to material considerations but, for the reasons set out above I do not

consider that ground to be made out.

59. I therefore reject the challenge on grounds 2A and 2B.

60. With regard to ground 1, I have already indicated my view that I should adopt what appears to me to be the correct approach in ***Holborn Studios*** and ***Barlow*** to revised applications. However, in the context of the present case, the differences may be more apparent than real since if the changes were wrongly said not to be fundamental this will almost be bound to affect the assessment of whether material prejudice has been caused by the failure to consult.

61. I have considered the points raised in support of ground 1 carefully and I confess to their having troubled me. The change in plans undoubtedly created a difference in the layout and design of Block B and introduced a completely new feature to the southern elevation, namely the balcony which provides outdoor space for the living area of the first floor flat which, in spite of the screen, is likely to have oblique views of the garden and the rear of Keld. I am also not satisfied with the circumstances where one consultee, Essex County Council's design team, did have an opportunity to comment on the revisions (for whatever reason) but this was not extended to the Parish Council or neighbours who might be thought to have the greater degree of interest in the revisions. Moreover, the plans were not placed on the website when they ought to have been or, as far as I am aware, on the planning register in good time to allow comments to be made before the grant of the Permission. However, I consider that the Council's view, set out in the OR that the changes were not fundamental so as to prevent amendment of the plans, was not ***Wednesbury*** unreasonable.

62. Against this, I have to bear in mind that a duty to reconsult on changes requires

a consideration of the nature of the changes and whether they are of a high order of significance. The difficulty here is that the objections made were also applicable to the revisions, albeit in a modified way given the changes. The revisions created some improvements in that there was a loss of windows from the western elevation but they created a potentially new source of impact from the balcony, whilst mitigating this with a privacy screen. However, since the issue remained fundamentally the same, namely overlooking of Keld and its garden I have reluctantly concluded that I cannot accept the changes were of a high order of significance but that they were ones that the Council could properly consider in the light of the existing concerns. On that basis, I consider that no material prejudice was suffered by the Claimant either in the form of being unable to make further representations herself or that others might have been able to do so.

63. In the light of the evidence and the terms of the OR, supported by the evidence filed by the Council as to what was taken into account in reaching the decision to grant permission, it seems to me that the Council would have reached the same conclusion even had the Claimant had an opportunity to present further objections and that this also militates against a finding of material prejudice. Ground 1 also fails.

64. It follows that it is unnecessary for me to consider the application of s. 31(2A) or the court's general discretion with regard to relief.

65. I therefore dismiss the application on all grounds and make the order in the terms agreed by the parties. The Claimant shall pay the Defendant's costs in the agreed sum of £5,000.