Neutral Citation Number: [2012] EWHC 1564 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Case No CO/11629/2011

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 3 May 2012

B e f o r e:

MR JUSTICE UNDERHILL

The Queen on the application of

RICHARD SZPIRO

Claimant

and

ROYAL BOROUGH OF KENSINGTON AND CHELSEA

Defendant

and

NICHOLAS WHEELER

Interested Party

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Mr Paul Brown QC (instructed by Clyde & Co, London EC3A 7AR)
appeared on behalf of the Claimant

Mr Richard Harwood (instructed by Legal Services Department,
London Borough of Kensington and Chelsea)
appeared on behalf of the Defendant

J U D G M E N T
(As Approved by the Court)

Thursday 3 May 2012

MR JUSTICE UNDERHILL:

1. I propose to refuse permission in this case. Since this is a renewal hearing, and in view of the lateness of the hour, I will give my reasons briefly and I will eschew any setting out of the background, which is well known to the parties.

2. The original claim form advanced multifarious grounds, but Mr Brown QC in his clear and helpful skeleton argument has grouped the essential issues together under two main headings: (a) Structural Integrity and (b) Residential Amenity.

3. Under "Structural Integrity" four points are made.

4. First, it is said that the Construction Method Statement ("CMS") was manifestly inadequate when compared with the requirements of the Supplementary Planning Document ("SPD") relating to subterranean developments and in particular with section 6 of the SPD. Six points are made, which I will take in turn. However, I should start by noting that the officer's report made the point that the CMS was adequate "at the planning stage". That implicitly, but clearly, acknowledged that there are detailed aspects of the construction with which it did not deal, but meant that the officer took the view that those matters did not require review or assessment at the stage of considering whether planning permission should be granted and that it was reasonable to leave points of that character to the professionalism of the engineers. That specific point is made in the SPD itself and as a matter of principle seems to me to be entirely reasonable. I turn to consider the particular points of criticism.

5. Point 1 is that the CMS was based simply on an external visual inspection of the site and that no structural survey had been carried out. It is not strictly accurate to say that the CMS was based simply on an external visual inspection. The authors had available to them various other materials and some test results; but certainly no structural survey (in the sense that that is generally understood) had been carried out. However, I can see nothing in the SPD to suggest that a structural survey of that kind is required. It is noteworthy that even the claimant's own structural engineers, who were asked to comment on the first version of the CMS, made only modest and tentative criticisms of it. They certainly did not draw attention to the failure to conduct a structural survey.

6. Point 2 is that, contrary to paragraph 6.1.3 of the CPD, the CMS contained no information about existing sewers, drainage runs, gas or electricity services on the site. The relevant part of that paragraph of the SPD states:

> "The CMS will need to address the following .... the impact of the subterranean development .... on utilities and .... drainage, sewage, service water ...."

I do not read that as imposing a requirement that the CMS provide detailed plans of how any possible impact on utilities will be met. It simply requires that the issues raised in the CMS be

addressed. That was done, although only in the most general terms, with an acknowledgement that the relevant services would need to be identified and an outline explanation of how they would be protected and, where necessary, replaced and upgraded. I do not read the CMS as requiring more than that, and certainly not as requiring it in every case. It should be borne in mind that we are not here concerned with a major development where unusual or sophisticated problems relating to utilities were to be anticipated.

7. I take points 3 and 4 together. It is said that the CMS acknowledged that no real information had yet been obtained about the ownership and condition of the boundary walls or their foundations. Again, I do not read the SPD as requiring a full preliminary assessment of possible party wall problems or plans for dealing with such problems. It suffices that it be flagged up that these issues needed to be addressed. That was certainly done. The CMS states:

> "Assuming the works are carried out to best practice and in accordance with FORM drawings and specifications, we would not expect significant movements and the party wall should remain stable and unaffected by the works. A Contractor's Method Statement will be required at this stage for comment by the engineer and party wall surveyors."

Mr Brown submits that, by accepting such a statement as adequate, the council was in effect abdicating its responsibilities as a matter of public law to assess the possible risk to adjoining structures and that it was not entitled simply to rely on the fact that a party wall agreement would be required or the mechanisms under the Act employed. No doubt Mr Brown is correct that the council must pay proper regard to questions of the structural integrity of adjoining buildings, but I do not accept that the acceptance of a CMS in these terms, which acknowledges the fact that inevitably proper party wall procedures will have to be gone through, involves any such abdication.

8. Point 5 is that the CMS does not set out the sequence for the temporary works or how this will mitigate the impact on neighbouring properties; nor does it provide details of the preferred method in accordance with the relevant British Standard. In general terms the CMS refers (at page 10) to the main temporary works and the principles to be used in relation to them. I do not consider that it is arguable that anything more than this was required.

9. Point 6 is a more general point which expands some of the more particular points already made, namely that "the CMS provides virtually no assessment of the impact of the proposed development on the structural integrity and structural stability of the claimant's property". However, as I have already quoted, there is an express statement on that point. It is not, it is true, supported in any detail, but it shows that the issue had been addressed. I do not believe that the council was obliged to regard what was said as unsatisfactory. It is important to bear in mind that, although there are known problems with subterranean developments (referred to in the SPD as "sometimes challenging"), they are extremely common, particularly in central London boroughs. The council was entitled to have regard to the fact that what were being carried out were procedures of a fairly standard character under the supervision of experienced architects;

and both the council's own officers and indeed the members of the Committee had seen such applications before and had experience of them.

10. The second point made under the heading "Structural Integrity" is that the officer's report did not sufficiently identify the various issues about structural integrity raised by the claimant, which I have reviewed, and did not draw members' attention to the fact (as it is said to be) that the CMS was non-compliant with the SPD. However, as I have already made clear, I do not accept that there was non-compliance with the SPD. Even if there were some points which were arguably on the margin (in terms of the degree of detail supplied), I see no reason as a matter of law why the officer's report needed to refer in detail to points which the officer clearly regarded as satisfactorily dealt with but on the basis that the claimant took a different view. The report squarely flagged up that a challenge had been made to the adequacy of the CMS. The members of the Committee were addressed about those issues by the claimant himself and they were entitled to ask for further information from officers or to access the file, which would have included both Taylor Wessing's letters, if they were minded to do so.

11. The third such point is that the council should have insisted on a resubmission of the whole application on the basis of the revised CMS or (and this was where Mr Brown concentrated his arguments), if they proposed to allow the application to proceed on the basis of the revised CMS, should have explicitly drawn that document to the attention of the claimant and his advisers. So far as the former point is concerned, I am quite satisfied that there was no obligation to require re-submission of the entire application on the basis of the amendments to the CMS. As to the latter point, whatever the rights and wrongs about how the claimant should have been notified, the fact is that he was made aware of the revised CMS in good time and his solicitors made representations in relation to it (ie Taylor Wessing's letter of 8 September 2011). I do not accept that there was any obligation on officers to provide copies of that letter to individual members or to draw it to their attention in any other way. As with other later developments, the claimant had the opportunity to make the points in the letter in his oral submissions to the Committee. He did so to some extent. He says, however, that he structured his submissions, no doubt on advice, on the basis that the members of the Committee would have had a copy of the Taylor Wessing letter and that he would do better to concentrate on points not made in that letter. There was no basis whatever for that assumption. In any event, the points made in the letter are not, in my view, fundamentally different from those which had already been made by reference to the earlier CMS, many of which remained live. Finally, all that is besides the point if there were, as I hold, no defects in the revised CMS.

12. The fourth point made under this heading is that the council should have made it an express condition of the granting of any planning permission that the requirements of the CMS be complied with. I am told that it was not the policy of the council to do so. I can see no reason why, as a matter of law, they were under any such obligation. I am not surprised to be told, as I was by Mr Brown, that it is not uncommon for such a condition to be attached, but to say that it is often done is not the same as to say that it must be done. The question of the conditions to be attached is always a matter of discretion and I cannot see that it was even arguably irrational not to attach such a condition here. The fundamental position is that the CMS should be obtained and should be decided to be satisfactory before permission is granted: if so, the making of a condition is unnecessary.

13. I turn to the second heading, "Residential Amenity", under which Mr Brown makes three points.

14. The first point is that the officer's report misstated the scale of the proposed development with the result that members of the Committee would not have appreciated the extent of the disruption which the works were likely to cause. Mr Brown fought shy of submitting that had they done so permission might have been refused altogether. But, as I understand it, his case was that more stringent conditions might, and indeed should, have been imposed. I do not accept the premise of this argument. It is true that there are passages in the officer's report which, if read in isolation, might suggest that the major works consisted only of the works that were to take place in the rear garden. However, if the report is read as a whole, no one could possibly have been under that misconception. Still less could they have been when regard is had to the discussion at the meeting where the plans were prominently on display, and of which I have a useful note taken by the claimant's solicitor.

15. The second point is that the SPD says at 7.1.2:

> "The council's environmental health noise and nuisance officer will consider the Construction Method Statement submitted as part of the planning application and may suggest alternative approaches to the construction or temporary works which would reduce the impact of noise and nuisance upon neighbours."

It appears to be common ground that that had not occurred prior to the meeting. Mr Bore, the council officer who presented the case at the meeting, apparently told the Committee that that practice had been discontinued and that now the standard conditions recommended by the Environmental Health Department were imposed. At least two such conditions were imposed: first, a condition in relation to impact on traffic; and second, a requirement that the contractor subscribe to the Considerate Contractor Scheme. Mr Brown makes the point that if that were indeed the explanation for the council's practice, it was still a significant departure from the SPD since the SPD itself provides for those standard conditions and the exercise referred to in paragraph 7.1.2 is clearly something different and additional. I do not accept that submission. In the first place, I do not read paragraph 7.1.2 as stating that the intervention of the environmental health officer need always occur prior to the grant of planning permission. The matters on which he was intending to advise could equally as well be tackled after permission had been granted as before. But even if that is a misreading of the SPD, I do not believe that it is arguable that a departure in this limited respect from the recommendation of the SPD could render the permission unlawful. The functions of the Environmental Health Department will continue and its services will be available to the developer and to persons affected by the development, such as the claimant, after as well as before the grant of permission.

16. Lastly, the point is taken that the council should have imposed specific conditions to protect residential amenity -- that is to say, to mitigate the very considerable impact on the claimant of the works that will be necessary in order to carry out the development. The two standard conditions to which I have referred are said to be wholly inadequate for that purpose. As I have

already said, the question of the conditions to be imposed is quintessentially a matter for the discretion of the council. I do not regard it as even arguable that failure to impose more specific conditions in this case was irrational. A similar issue arises to that to which I have already alluded about the relevance of the fact that the claimant would have private law remedies. While I accept that that does not mean that the imposition of conditions to protect adjoining occupiers from the disturbance of their amenities cannot fall within the scope of planning permission, nor do I accept that it is an irrelevant consideration.

17. I do not underestimate the disruption which the carrying out of the development for which permission has been given is likely to cause to the claimant. Mr Brown made that point fully and clearly at the forefront of his submissions; and indeed, for what it is worth, the claimant has my sympathy. But it is a fact of life that in an urban environment development in neighbouring properties will from time to time cause real disruption to neighbours. That is not a reason for refusing the grant of planning permission. There are many remedies, both legal and social, for a person in the claimant's position to mitigate (though I appreciate it will not remove) the amount of the disruption, but I cannot see that it was even arguably unlawful for the council to grant permission on the conditions that it did.

MR HARWOOD: My Lord, there is one matter. I ask for the costs of the Acknowledgement of Service.

MR JUSTICE UNDERHILL: Yes.

MR HARWOOD: My Lord, there is a schedule of costs in the sum of £4,375.50.

MR JUSTICE UNDERHILL: Yes. Mr Brown, what do you have to say about this?

MR BROWN: My Lord, two things. First, as your Lordship will have noted, Mr Purchas on looking at this matters on the papers ordered the sum of £600 because at that stage the defendant had not done what every defendant is told he ought to do, and that is if he wants his costs --

MR JUSTICE UNDERHILL: Well, that is old history.

MR BROWN: Well, my Lord, it is, but there is a point there about procedures and my starting point is that, not having done what the defendant is supposed to have done, then they ought to be stuck with the order that Mr Purchas made of £600. My Lord, if your Lordship is against me on that point, in relation to the schedule that has been handed up to your Lordship, it is quite clearly not a compliant schedule in that there is absolutely no breakdown whatsoever of how the solicitor's time has been spent. I do not quarrel or quibble with the fees claimed by my learned friend --

MR JUSTICE UNDERHILL: If you did, I would be asking to see what was marked on your brief.

MR BROWN: But it is simply a lump sum of 15 hours. It is completely impossible for my instructing solicitors to desegregate that or to interrogate it. Looking at it globally, we think that for a local authority these figures are high. Something of the order of about half that amount

would be more in line with what we would expect. I make that point generally because, in the absence of breakdown --

MR JUSTICE UNDERHILL: Well, I am going to cut you short. Subject, I suppose, to Mr Harwood trying to persuade me otherwise, which I doubt he would try to do, I have in mind a figure of £2,500. Were you going to argue with that?

MR BROWN: No, my Lord.

MR HARWOOD: I will not argue with that, my Lord.

MR JUSTICE UNDERHILL: Right. I should say that it is not a criticism of anyone's level of fees or a suggestion that the council's solicitors did not do a good deal of hard work on this, as I am sure they did. But there is the matter of proportionality, and that seems to me to be the right figure for a case of this degree of complication in the circumstances. So £2,500. Fourteen days? Payable within fourteen days.

MR BROWN: My Lord, I am grateful to your Lordship for sitting late. I know my client will be disappointed, but he will be helped by having the full reasons, and we are grateful.
