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

No. CO/178/2019

[2019] EWHC 808 (Admin)

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 26 February 2019

IN THE MATTER OF **AN APPLICATION UNDER SECTION 288 OF THE TOWN AND COUNTRY PLANNING ACT 1990**
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IN THE MATTER OF **AN APPEAL UNDER SECTION 289 OF THE TOWN AND COUNTRY PLANNING ACT 1990**

Before:

MR JUSTICE WAKSMAN

B E T W E E N :

LONDON BOROUGH OF TOWER HAMLETS — Claimant/Appellant

- and -

(1) THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT
(2) ANGELIC INTERIORS LIMITED
(In Administration) — Defendants/Respondents

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APPROVED JUDGMENT

A P P E A R A N C E S

MR R. TAYLOR QC and MISS H. GIBBS (instructed by London Borough of Tower Hamlets) appeared on behalf of the Claimant/Appellant.

MR J. JOLLIFFE (instructed by Government Legal Department) appeared on behalf of the First Defendant/Respondent.

MS S. SHEIKH QC and MR N. WESTAWAY (instructed by Jones Day) appeared on behalf of the Second Defendant/Respondent.

MR JUSTICE WAKSMAN:

1 I have reached the clear view that permission should be granted here. That being the case, I am not going to spend time on an extended judgment, and I certainly do not wish to trespass on the consideration which will be given in due course on the substantive hearing of the review.

2 Let me just record first of all, there has been no decision on permission on paper here because Holgate J ordered that the conjoined s.289 and s.288 applications for statutory review should be heard together. They concern the decision of the Inspector of 17 December 2018.

3 The second defendant here is the owner of land which was formerly known as 'Cubitt Town' in the Isle of Dogs. It formed part of the Coldharbour Conservation Area, which, I agree, is the "designated heritage asset" rather than the particular three buildings with which this appeal was concerned. The buildings were demolished in clear breach of planning control. Rather than prosecute, the Council decided to issue enforcement notices, and the appeal was against the issue of those enforcement notices, together with an application for retrospective planning permission. The proposal in issue was nothing more than the demolition of the site which had already taken place because the relevant owner was hoping to sell the site on for development by someone else. The relevant owner is, in fact, in administration.

4 There is really quite a short point here, but it is a point which is important in my judgment, and it concerns the proper interpretation of para. 196 of the NPPF. I am not going to read all of the other provisions because it is not necessary on the basis that I am giving permission. It is very simply this, that when one looks at 196 in this context where the Inspector had found that there would be less than substantial harm to the designated asset (that is to say the

conservation area), by reason of the demolition of these three particular properties. He did not consider they had any real value at all but, nonetheless, made the finding, which he was obliged to do, that there would be harm, but it was less than substantial harm. That takes one to 196, which says:

> "Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal (underlining added) . . . including, where appropriate, securing its optimum viable use."

5 What the Secretary of State then did, in short, was to embark upon a balancing exercise, having taken into account that even with less than substantial harm, great weight had to be given to the harm, and to the significance of the conservation area; nonetheless, he then put into the balance the putative benefits that could accrue if the relevant land was then sold, and if development took place, because that development was not part of the proposal itself.

6 Points have been taken about his use of the word "speculative". I accept that, to a large extent, he was saying "speculative" because he was aware of the fact that there was no planning permission, indeed, there was no application for planning permission as far as I know it, at that time. Indeed, it would still appear to be the case that there is no application for planning permission. So, as he rightly said in para. 31:

> "Any public benefits are therefore speculative and the weight to be given to them is reduced accordingly. But given the development background described above, it would seem highly likely that a suitable development proposal could be found . . ."

And that is what he says: "could be found" not, necessarily, "would be found", but there was a possibility, or a real possibility, that development would ensue at some point in the future. Then, in para. 34, which is the core of his reasoning:

> "[the] benefits are the redevelopment of the site with a much larger number of dwellings than would be the case if the demolished houses were rebuilt, including much needed affordable housing, all of which would be in accord with the prevailing policy ethos for the area . . . and there is a good chance they would be realised . . ."

7 The arguable point of principle here is that if one focuses on the words: "[they] should be weighed against the public benefits of the proposal" is this meant to go any wider than the public benefits of the proposal which has been put? This is a rather unusual case because, in a normal case, you would have an application for redevelopment, which would necessarily include demolishing what was there before, and then saying: 'What is going to go in its place?'. In such a case there is no real difficulty about it because you can look at what is said to flow from the rebuilt development, whatever it happens to be.

8 Without going into any of the detail, I consider that there is at least an argument that 196 has to be confined to the public benefits of the proposal in question which, in this case, is simply the question of demolition. A somewhat forensic point was made that this never formed part of the Council's arguments before the Inspector – strictly speaking that is not right. Paragraph 43 does make that point as, indeed, did the witness statement of the relevant Planning Officer at 6.29. But, putting that to one side, that is the point.

9 The counter argument is that that does not make much sense. I am not sure that is right, certainly for today's purposes. If there is a planning application which is run together with the application for demolition then all of that makes sense. If all there is is an application for demolition then I think it is at least arguable that one has to say what is that proposal? It is the demolition and what does that demolition itself offer? The counter argument, expressed particularly by Ms Sheikh QC, is that even if the proposal is demolition, you have to look at all of the benefits that would stem from it at one remove. In other words, on the

assumption that, as a result of the demolition, there will be or might be developments which might have particular benefits, particularly in the case of housing in an area which needs it. I see that argument. It is an argument. I do not accept that for present purposes it is decisive, and I think that the right way to approach 196 in these circumstances is something which needs proper argument at a full hearing.

10 I take the points that have been made on the PPG by both sides, but I do not consider that they are in any way determinative. I take the point that, on one view, what the Inspector was doing was exercising planning judgment. That, of course, depends on whether he was starting from the right point; arguably he was not. Therefore, ground 1 should go forwards.

11 So far as ground 2 is concerned, it is an irrationality challenge which, of course, is always a difficult one, particularly in the case of an experienced Inspector, but I think that should go forwards and is arguable as well, because it will need to be looked at in the context of the first ground.

12 Ground 3 adds very little. It is a question of reasons but, in a case like this, that should go forward, too.

13 That means that there must be permission unless it is clear that, on a matter of discretion, there is no point the same outcome would result. That is where para. 35 of the decision is relevant where the Inspector said:

> "Had my decision been more finely balanced, I would have had to consider the proportionality of the requirement to rebuild the dwellings. As is well known the enforcement system is intended to be remedial and not punitive. The only possible remedy for unlawful demolition is a complete rebuild. While I agree that it is important that the loss of historic buildings should not be seen to be condoned, in this

> case one has to question the need to rebuild the dwellings when they were of such low historic significance and I do not think that such a requirement would have been proportionate."

14. Is that fatal to the claim? In other words can it be said that even if the appeal was not allowed then the enforcement notice in its then form would still be quashed because to rebuild would be disproportionate? In my judgment, it is not for these reasons: it is a slightly curiously worded paragraph because it begins by saying: "Had my decision been more finely balanced . . ." If it was more finely balanced, but still in favour of the appellant, you would not actually need it. It would only be right if, in fact, he had been wrong on the decision he had taken on the principal question of the appeal.

15. It is possible, and arguable, in my judgment, that had everything gone the other way 'round, as the present claimant says that it would, then the approach to proportionality could have been different. It is one of those cases where it would all depend on what the earlier findings should have been. So, while I understand why the point has been put before me, I do not consider in the circumstances of this case that it is a knock-out blow.

16. Accordingly, I will grant permission on all grounds.

CERTIFICATE

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