Case No: CO/2354/2017

Neutral Citation Number: [2017] EWHC 3102 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2017

Before :

Charles George QC

(Sitting as a Deputy High Court Judge)

- -

Between :

THE QUEEN on the application of

ALAN BISHOP

Claimant- and -

WESTMINSTER COUNCIL

- and -

(1)NADEEM ULLAH

(2)MORTIMER LONDON LIMITEDDefendant

Interested Parties

- -

- -

Jack Parker (instructed by **Russell-Cooke Solicitors**) for the **Claimant**

Charles Streeten (instructed by **Westminster City Council Legal Services**)

for the **Defendant**

Ali Reza Sinai (instructed on **Direct Public Access**) for the **Interested Parties**

Hearing dates: 16 November 2017

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Judgment**Mr Charles George QC :**

1. This is a cautionary tale about how not to submit a planning application and the consequences.

Background

2. Mortimer London Limited (the 2nd Interested Party, hereafter "Mortimer") is the freehold owner of a six-storey block of apartments at 23-25 Mortimer Street in the City of Westminster. In 1998 Mr Bishop (the Claimant) acquired a 999 year lease of the penthouse flat (Flat 10), in which he lives with his wife. Mr Ullah (the lst Interested Party) at all material times seems to have been acting as a consultant to Mortimer. Westminster Council (the Defendant, hereafter "the Council") is the local planning authority.

3. In July 2016 Mr and Mrs Bishop obtained planning permission (hereafter "the first permission") to extend his flat upwards by building a further floor and terraces above, incorporating a small part of his own property, although the majority of the development would have been above and beyond the area of his demise. They wrongly failed to identify in their planning application form that they were not the owners of the area above Flat 10, and that Mortimer was the freeholder of Flat 10. However, Mortimer learned of their planning application, and in May 2016 Mr Ullah along with Mortimers planning consultant, Milan Babic, had meetings and discussions with Mr and Mrs Bishop, where Mortimers ownership of the airspace was discussed, as well as two ways forward. The first was for the Bishops to negotiate a purchase of air-space rights from Mortimer; the second was for a joint application to be made by the Bishops and Mortimer for a self-contained flat above Flat 10. According to Mr Bishop, his extension proposal became unviable and thus did not proceed. The proposal for a joint application came to nothing, presumably because any such self-contained flat above Flat 10 was unwelcome to the Bishops.

4. Then in January 2017 Mortimer appears to have instructed Mr Babics firm, Milan Babic Architects, to submit an application (hereafter "the second application") for an independent flat above Flat 10. The proposed works were described in Box 3 of the planning application as "A rear extension to a previously granted planning application to form a larger, new self-contained unit". In Box 1 the applicant was named as "Mr Ullah", and the applicants address was given as "Flat 10, 23-25 Mortimer Street". In Box 4, headed "Site Address Details", the details "Flat 10, 23-25 Mortimer Street" were given. In Box 12, Mr Babic signed a standard-form certificate headed "Certificate of Ownership Certificate A. Town and Country Planning (Development Management Procedure) (England) Order 2015 Certificate under Article 14" which read as follows:

"I certify/The applicant certifies that on the day 21 days before the date of this application nobody except myself/the applicant was the owner *(owner is a person with a freehold interest or leasehold interest with at least 7 years left to run)* of any part of the land to which the application relates…".

Mr Babic stated in Box 12 that he was certifying as "agent" (and he and his firm had been so identified in Box 2). Then in Box 13, headed "Declaration", a tick was given following the standard wording: "I/we hereby apply for planning permission/consent as described in this form and the accompanying plans/drawings and additional information. I/we confirm that to the best of my/our knowledge, any facts stated are true and accurate and any opinions given are the genuine opinions of the person(s) giving them".

5. The plans accompanying the second application included two plans (PA-169-106, Proposed Sixth Floor Plan; and PA-162-109, Proposed Elevation to Mortimer Street (As granted permission)), both of which on a careful reading show that the proposed self-contained flat included part of the demise to Mr Bishop. The mistake in the former plan was identified by someone, and it was replaced by a revised version, showing a "New Flat 11 Entrance". The latter plan, however, was not replaced, and PA-162-109 was listed as one of the approved drawings when planning permission (hereafter "the second permission") was granted on 5 April 2017. It is the second permission which is challenged in these proceedings.

6. No notification of the making of the second application was served on the Bishops at Flat 10 by the Council or by Mr Babic, Mr Ullah or Mortimer. The Council, however, placed a site notice in the street outside 23-25 Mortimer Street, which went undetected by the Bishops. The occupants of the properties either side of 23-25 Mortimer Street were notified by the Council of the second application directly by letter, but not any of the occupants of the flats in 23-25 Mortimer Street.

7. The Bishops first became aware of the second application and permission when a structural engineer attended Flat 10 in the week commencing 24 April 2017, who informed Mr Bishop that the visit related to a fresh grant of planning permission. Mr Bishop then checked the Councils website on 28 April and discovered the grant of the second permission. The same day he telephoned the Councils planning officer, Mr Giles, who told him that he remembered Mr Bishops flat from the first application and said that he had assumed the flat had been sold and that the second application was made by its new owner. When Mr Bishop asked why he had not received a consultation letter, he was told that this was because a Certificate A had been submitted indicating that no lease longer than 7 years was affected. When Mr Bishop pointed out that his lease still had 980 years remaining, Mr Giles told him that he would call the agent (presumably Mr Babic) to find out the position. Mr Giles then called back Mr Bishop later that day to say that the agent has been instructed by the landlord of the building to submit a Certificate A. Mr Giles has submitted a witness statement in response to the claim which is silent on the matter, and implicitly confirms Mr Bishops account, as set out above.

8. Mr Giles told Mr Bishop that he was going on annual leave until 10 May and that he could discuss t[illegible] further with him on his return. On 10 May, Mr Bishop called Mr Giles and was told that there was n[illegible] Giles could do about the application and asked him if he was considering a judicial review. Mr Bishop confirmed that he would seek legal advice. By this time the six-week deadline for bringing a claim for judicial review was only seven days away. Mr Bishop decided that there was insufficient time to send a pre-action protocol letter to the other parties. He telephoned solicitors two days later, on Friday 12 May and formally instructed them to proceed with a judicial review application on Tuesday 16 May, by which time there was only one day to file the claim. The claim was filed on 17 May.

The Grounds of challenge

9. There are two Grounds:

Ground 1: Failure by the applicant in the second application to notify Mr Bishop as an "owner" of the land to which the application related. It is also claimed that the applicant should have notified 23-25 Mortimer Street RTM Company Limited (hereafter "RTM") which has management rights in respect of the common parts of 23-25 Mortimer Street.

Ground 2: Failure by the Council to notify Mr Bishop of the second application as an adjoining owner or occupier of land to which the application related.

10. From the time of its Acknowledgment of Service, dated 14 June 2017, the Council has consented to the quashing of the second planning permission on Ground 1 (but not on Ground 2).

The position of the Interested Parties

11. The claim form was properly served on Mr Ullah as an Interested Party, because he was identified in the second application as the applicant for planning permission. He served an in-time Acknowledgment of Service, indicating that he "intend[ed] to contest all of the claim". His summary grounds, supported by a statement of belief that the facts stated were true, sought dismissal of the application for judicial review on three grounds. First, that it was out of time (a contention expressly rejected by Dove J in granting permission, and not pursued at the hearing). Second, non-compliance with the pre-action protocol. Third, that "the Applicants [sic] grounds for the application are unreasonable as they have my contact and Milan Babics contact details [but] they have never advised they would oppose any objection [sic]". The material to which I have already referred concerning meetings and discussions between the Bishops and Mr Ullah and Mr Babic is drawn from Mr Ullahs Acknowledgment of Service, and was implicitly accepted in Mr Bishops second witness statement. The Acknowledgment of Service is silent as to the reasons for the wording of the second planning application form.

12. Mortimer (whose identity was not disclosed in the second planning application form) seems first to have been identified as an Interested Party by the Council in its Acknowledgment of Service. It served an out-of-time Acknowledgment of Service (which was not seen by Dove J when granting permission). This also indicated an intention to contest all of the claim, asserted that Mr Bishop had "not exhausted all the possible routes of redress before making the judicial review application", referring to the pre-action protocol, and criticised his approach as disproportionate, frivolous and vexatious. Amongst the facts declared by one of Mortimers directors to be true, were that Mr Ullah was an agent instructed by Mortimer who worked with Mr Babic, and that Mortimer instructed Mr Ullah to assist in pursuing the second planning application; also that Mr Bishop was not the owner of "the land" and that his demise was not encroached upon by the second planning application. The planning application was described as "submitted on our behalf by our agents (Nadeem Ullah and Milan Babic), and whilst Mortimer accepted a "certain vagueness in section 1 and 4", it maintained that the Certificate A was correct because "we are the Freeholders of the site who have the ownership of this space". Complaint was also made that Mr Bishop had wrongly signed a Certificate A in respect of the first application.

13. The standard directions of Dove J in granting permission gave 21 days for serving detailed or additional grounds and any written evidence, and required that any interested party must file and serve a skeleton argument not less than 7 days before the date of the hearing.

14. I was informed that there was some correspondence between the parties (including the interested parties) relating to the making of a consent order to quash the second permission, but that this came to nothing. On the day before the hearing, the Interested Parties instructed Mr Sinai of counsel to represent them at the hearing. Shortly before the start of the hearing a Skeleton Argument from him was handed to me which included reference to various items of new evidence. With the consent of counsel for the Claimant and the Defendant I extended time for service of Mortimers Acknowledgment of Service (so that it properly became an Interested Party), refused to allow the Interested Parties to submit any further evidence at that late stage, but allowed Mr Sinai to address me on the basis of a redacted Skeleton Argument omitting any reference to new evidence.

15. An unfortunate consequence of decisions taken by the Interested Parties is that neither has served witness statements, whereas some further explanation in relation to the drafting of the second application, perhaps from Mr Babic, might have been expected if they were to continue to resist the quashing of the second permission. This was particularly so since the claim form included twice-over the contention that Mr Ullah and/or Mr Babic might have committed a criminal offence in making a false declaration in the second planning

application, whilst the Councils Acknowledgment of Service asserted that it was difficult to see how an Mr Babics part in relation to the contents of the second planning application could have been entirely referred to case law relating to fraudulent certificates, and indicated an intention to seek costs from Mr Ullah for making an erroneous declaration.

Failure to follow the pre-action protocol

16. Both Mr Streeten and Mr Sinai (the latter more strongly than the former) criticise Mr Bishop for failing to send a pre-action protocol letter before making his application for judicial review. Since the issue may have relevance to costs, I need to deal with it. It is unfortunate that the parties were unable to agree the terms of a consent order quashing the second permission at an early stage of the proceedings, which would have led to a major saving of costs. I find, however, that, in the circumstances set out above, Mr Bishop acted with appropriate promptitude in starting these proceedings, and that his failure to send a pre-action protocol letter was wholly understandable given the time-scale and the impossibility of achieving quashing of the second permission (even by a consent order) unless an in-time application for judicial review was made.

Statutory provisions

17. Section 65 of the Town and Country Planning Act 1990, as amended (hereafter "the 1990 Act") provides that:

"(1) A development order may make provisions requiring

(a) notice to be given of any application for planning permission…, and

(b) any applicant for such permission to issue a certificate as to the interests in the land to which the application relates or the purposes for which it is used,

and may provide for publicising such applications and for the form, content and service of such notices and certificates.

(2) Provisions shall be made by a development order for the purpose of securing that, in the case of any application for planning permission, any person (other than the applicant) who on such date as may be prescribed by the order is an owner of the land to which the application relates,…

is given notice of the application in such manner as may be requested by the order.

(3) A development order may require an applicant for planning permission… to certify, in such form as may be prescribed in the order, or to provide evidence, that any requirements of the order have been satisfied.

… …

(5) A local planning authority shall not entertain an application for planning permission… unless any requirements imposed by virtue of this section have been satisfied.

(6) If any person

(a) issues such a certificate which purports to comply with any requirements imposed by virtue of this section and contains a statement which he knows to be false or misleading in a material particular; or

(b) recklessly issues a certificate which purports to comply with any such requirement and contains a statement which is false or misleading in a material particular,

he shall be guilty of an offence.

(7) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(8) In this section-

… …

"owner" in relation to any land means any person who

(a) is the estate owner in respect of the fee simple;

(b) is entitled to a tenancy granted or extended for a term of years certain of which not less than seven years remain unexpired…"

18. Section 327A of the 1990 Act provides that:

"(1) This section applies to any application in respect of which this Act or any provision made under it i requirement as to

(a) the form or manner in which the application must be made;

(b) the form or content of any document or other matter which accompanies the application.

(2) The local planning authority must not entertain such an application if it fails to comply with the requirement".

19. Article 7 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (hereafter "The DMPO") provides that:

"(1)…..an application for planning permission must

(a) be made in writing to the local planning authority on a form published by the Secretary of State (or a form to substantially the same effect);

(b) include the particulars referred to in the form".

Article 13 provides that:

"(1)….an applicant for planning permission must give requisite notice of the application to any person (other than the applicant) who on the prescribed date is the owner of the land to which the application relates….

(a) by serving the notice on every such person whose name and address is known to the applicant;

…".

Article 14 provides that:

"(1) Where an application for planning permission is made, the application must certify, in a form published by the Secretary of State or in a form substantially to the same effect that the relevant requirements of Article 13 have been satisfied."

Article 15 provides that:

"(1) An application for planning permission must be publicised by the local planning authority to which the application is made in the manner prescribed by this article.

… …

(5) … the application must be publicised …by giving requisite notice

(a) by site display in at least one place on or near the land to which the application relates for not less than 21 days; or

(b) by serving the notice on any adjoining owner or occupier.

… …

(10) In this article

"*adjoining owner or occupier"* means any owner or occupier of any land adjoining the land to which the application relates; and

"requisite notice" means notice in the appropriate form set out in Schedule 3 or in a form substantially to the same effect."

GROUND 1

20. I have already set out the contents of the second planning application form. The information in it was plainly erroneous in a number of respects. Taking the various boxes in order:

(1) In box 1, it is wholly unclear why Mr Ullah was stated to be the applicant. This was a mistake, according to his counsel, since the true applicant was Mortimer, the freeholder of 23-25 Mortimer Street and owner of the air-space above Flat 10.

(2) Neither Mr Ullah, nor for that matter Mortimer, occupied Flat 10, 23-25 Mortimer Street, which was erroneously stated to be the applicants address.

(3) In Box 3, the site address was wrongly given as Flat 10, and should have been "airspace above Flat 10, but including a small part of Flat 10". Mr Babic, as an architect, should have appreciated that his drawing PA-162-109

included that small part of the existing Flat 10 which had also been included in the first applic[illegible] permission.

(4) In Box 4, Certificate A was incorrect. Given that the applicant was stated in Box 1 to be Mr Ullah, it was plainly wrong to certify that he was the sole owner of "the land to which the application relates", for Mr Ullah owned no interest at all in the building at 23-25 Mortimer Street. Further, even if the reference in the Certificate A to "the applicant" was intended by Mr Babic to refer to Mortimer, he must have known (or certainly should have known) that Mortimer were not the only owner of Flat 10, part of which was to be redeveloped as part of the proposed works.

21. In the light of these errors it was not merely understandable, but inevitable, that the Councils planning officer, Mr Giles, assumed that Mr Ullah was the applicant for planning permission and that he had purchased Flat 10 from Mr Bishop.

22. Initially Mr Sinai argued that the second planning application form was in substance correct, since the works described in Box 3 of the application form would principally be built on land of which Mortimer were the only owner. Therefore he said that Article 13 of the DMPO was not breached, nor was section 65 of the 1990 Act engaged. However, in oral argument he formally abandoned this part of his argument and accepted that the second planning application form, and in particular the Certificate A, was at the very least false or misleading. I agree. Moreover, as owner of even a small part of the land which was to be developed, Mr Bishop ought to have been given the requisite notice of the second planning application by the applicant (be it Mr Ullah or Mortimer). Thus a breach of Article 13(1) of the DMPO occurred, related to the erroneous Certificate A. There was also probably a breach of Article 7(1)(b), but this was not separately argued.

23. Despite some initial hesitation from Mr Parker, finally all counsel agreed that despite the starkly mandatory, and identical, wording of section 65(5) and section 327A(2) of the 1990 Act ("must not entertain"), nevertheless the court retained a discretion whether or not to quash the second planning application. In this respect my attention was drawn in particular to the Court of Appeals reasoning in *Main v Swansea City Council*(1984) 49 P&CR 26, pages 37 to 38, and in *R (Jeyeanthan*) *v Secretary of State for the Home Department* [2000] 1 WLR 354, especially at 358E to 362G; and to the reasoning in *R (on the application of Pridmore) v Salisbury District Council* [2005] 1 P&CR 32, paras 24 to 26 and 33-41); [2004] EWHC 2511 (Admin), and in *The Queen (on the application of OBrien) v West Lancashire Borough Council* [2012] EWHC 2376 (Admin) paras 28 to 42), both of which Administrative Court decisions specifically concerned erroneous Certificate As. But whereas Mr Parker and Mr Streeten urged me to exercise the courts discretion in favour of quashing the second planning permission, Mr Sinai urged me to the contrary effect.

24. Given the stringent wording of the two sections, the scales do not start equally balanced, especially in a case where the defective planning permission has not yet been implemented, there is no evidence of expenditure incurred by the interested parties in reliance upon it, and where there was not the sort of delay by the claimant which was found to have occurred on the facts of *OBrien*, which was described by the deputy judge as "prejudicial not only to [the interested party] but to the wider local community" (para 83). If in a Certificate A case the claimant is not even the owner of any part of the development site (as in *OBrien* para 80), the situation is likely to be different.

25. Factors relied upon by Mr Sinai for exercising the discretion so as not to quash were:

(1) The evidence of Mr Giles that the planning application gave rise to no issue about overlooking and would not be contrary to the requirements of development plan policies on enclosure or overlooking. He relied also on the Councils position in relation to Ground 2 that even if Mr Bishop had known of and objected to the second application, it was highly likely that the outcome would not have been substantially different (see section 31(2A) of the Senior Courts Act 1981, as amended).

(2) If and insofar as the second planning application and permission involved encroachment on the land demised with Flat 10, then that was not a material planning consideration and in any event the permission would be unimplementable without the consent of the Bishops.

(3) The actions of Mr Babic (for which the interested parties could not be held responsible) cannot have been deliberate and must have constituted an honest mistake, given the discussions which took place with Mr Bishop before the submission of the second planning application.

(4) For the same reasons neither Mr Bishop nor the Council had been misled.

(5) Mr Bishops conduct in these proceedings had been "questionable" because in his first witness statement he had not provided details of his meeting with Mr Babic and Mr Ullah and his consequent knowledge of Mortimers intentions, nor disclosed that the financial unviability of implementation of the first permission resulted from his discussions with Mr Ullah and Mortimer.

26. Factors relied upon for exercising the discretion in favour of quashing were:

(1) Those submitting the second application must have known it to be false or misleading. In partic... declaration that Mr Ullah (the stated applicant) was the owner of Flat 10 could not have been hones... since Mr Babic, Mr Ullah and Mortimer all knew from the prior discussions and negotiations there had been with Mr Bishop that Flat 10 was demised to Mr and Mrs Bishop. Where a fraud was proved, the court should intervene to "get rid of a decision which the tribunal had been misled into making": *R v Fulham, Hammersmith and Kensington Rent Tribunal ex p. Gormly* [1952] 1 KB 179,187 per Lord Goddard CJ. Reliance was also placed on section 65(6)(a) of the 1990 Act. This aspect was more strongly urged by Mr Streeten than by Mr Parker.

(2) The public interest lay in quashing where there had been "a deliberate failure to comply with the mandatory requirements of the scheme of the legislation": *Pridmore* page 563 para 40 *per* Newman J. If (which Mr Parker did not accept) it was "highly likely that the outcome for [Mr Bishop] would not have been substantially different if the conduct complained of had not occurred, the court could disregard the requirement to refuse to grant relief, if it was appropriate to do so for reasons of exceptional public interest (see section 31(2B) of the Senior Courts Act 1981) which, according to Mr Parker and Mr Streeten, here arose.

(3) Even if the failures of Mr Babic fell short of deliberate fraud/dishonesty, they constituted reckless behaviour of the sort castigated in section 65(6)(b) of the 1990 Act, giving rise to a like public interest in quashing as would arise if section 65(6)(a) of the 1990 Act were in play.

27. In determining which way the discretion should be exercised, I need first to address two matters. First, whether it was "highly likely" that, even had Mr Bishop been notified by Mortimer of the second application and put in objections thereto, the second permission would still have been granted. Second, whether the wording of the second application demonstrated fraud or dishonesty on the part of Mr Babic, Mr Ullah or Mortimer.

28. On the first matter, I am far from satisfied that Mr Bishop might not have been able to influence the outcome of the second planning application had he been notified of it and able to make representations. As the deputy judge stated in a very recent case to which my attention was drawn by Mr Parker, "It is not for this Court generally speaking to anticipate what the outcome would be if a planning authority had had regard to representations which they have not considered": *R (on the application of Holborn Studios Limited v The Council of the London Borough of Hackney and GHL (Eagle Wharf Road) Limited* [2017] EWHC 2823 (Admin) para 163. Furthermore, and regardless of the planning merits, it is likely that, if Mr Bishops hypothetical objection were to have referred to the encroachment into Flat 10, the Council would have drawn the matter to Mr Babics attention; and that, acting on behalf of Mortimer, he would have amended the application plans in the hope of eventually receiving a planning permission which could be implemented without the consent of the Bishops. Thus, even if planning permission were eventually issued, it would have been substantially different from the second planning permission. That disposes of the first two grounds for refusing relief relied upon by Mr Sinai, and means that section 31(2A) of the Senior Courts Act 1981 simply has no application on the facts of this case.

29. On the second matter, in the absence of witness statements from Mr Babic, Mr Ullah or Mortimer, the only explanation offered to the court by Mr Sinai for the wording of the first application was an honest mistake by Mr Babic. Even if (as may possibly have been the case) Mr Babic did not appreciate that the plans he was submitting included encroachment onto Flat 10, it is difficult, and in my view ultimately impossible, to see how Mr Babic could honestly have believed that Mr Ullahs address was Flat 10, or that the proposed development was solely of Flat 10, or that Mr Ullah was the sole owner of Flat 10. The case for quashing is not, however, dependent on the court finding there to have been fraud or dishonesty on Mr Babics part, for (applying the civil standard of proof) I am entirely satisfied that he, acting on Mortimers behalf with the involvement of Mr Ullah, recklessly issued a certificate which purported to comply with the statutory requirements and which contained a statement which was false and misleading in a material particular (see section 65(6)(b) of the 1990 Act). In my view this recklessness disclosed "a cavalier disregard for the mandatory requirements in connection with a statutory certificate", to use Newman Js phrase in *Pridmore* at page 562. This conclusion on recklessness disposes of Mr Sinais third ground for refusing relief, and substantiates Mr Parker and Mr Streetens third ground to the contrary.

30. There remains Mr Sinais fifth ground for refusing relief, namely the conduct of Mr Bishop in relation to the discussions and negotiations with Mortimer and its agents. It would have been better if Mr Bishop had referred to these in his first witness statement, and in particular the participation therein of Mr Ullah. But any failures by Mr Bishop (including his own failure to complete the Certificate A correctly when making the first application) did not amount to knowledge of the making of the second application nor excuse Mr Babics incorrect completion of the Certificate A in the second application form or the failure to notify Mr Bishop of the making of an application for permission which incorporated part of Flat 10. I can see no basis for the claim in Mortimers Acknowledgment of Service that Mr Bishops claim was disproportionate, frivolous and vexatious.

31. Accordingly there exist no proper grounds for exercising the courts discretion to refuse relief, and everything points towards quashing, so as to enable any new application properly to reflect the scheme of the legislation by containing an accurate description of the owner and the site, and an accurate certificate of ownership, and then be determined on its merits.

32. For completeness I should say that I am inclined to accept Mr Sinais argument that reference to RTM under Ground 1 was misconceived, since RTM had no interest in the land as owner. It is however, the contention of the

Claimant that the air space is demised in a lease of the common parts (and is not therefore within the c of Mortimer); and this issue was not the subject of oral argument before me.

GROUND 2

33. In his Skeleton Argument Mr Parker suggested that Ground 2 only arose for consideration if the court were not to quash the second permission pursuant to Ground 1. However, the point having been briefly argued before me, and because it may be relevant to costs, I need to deal with it. In Mr Bishops original grounds reliance was placed principally on the Councils alleged non-compliance with Article 15(5)(a) of the DMPO. However, it is now conceded on the basis of the evidence and photographs in Mr Giles witness statement that a site notice was displayed, so that the first of the alternatives in Article 15(5)(a) was met.

34. Mr Parker helpfully summarised the remaining issue arising under Ground 2 as whether a legitimate expectation arose and was breached because Mr Bishop was not notified of the second application by letter by reason of his being an adjoining owner of the land to which the application related. To this was added the submission that, even if there was no relevant legitimate expectation, there was obvious procedural unfairness in not serving individual notice of the second application on the occupiers of Flat 10.

35. Mr Parker contended that the Council did adopt a practice of notifying adjoining owners by letter (whether in relation to all its planning applications or merely the second application) and in fact notified all adjoining owners/occupiers other than these owners/occupiers of flats in 23-25 Mortimer Street. He says that, since the Bishops were the closest owner/occupiers, this gave rise to a legitimate expectation on Mr Bishop that he would be similarly notified, and that it was manifestly unfair that he (along with the other flats in 23-25 Mortimer Street) was not notified of the application by letter, when all other adjoining owners were notified. Mr Streeten contends that no sufficient practice has been identified. The fact that on this occasion a notice in writing was provided to adjoining occupiers but not to the occupants of other flats within 23-25 Mortimer Street fell short of establishing a legitimate expectation that Mr Bishop would be notified in writing. Unlike the mandatory terms of the Statement of Community Involvement described in paras 3 to 4 of Sullivan LJs judgment in *The Queen on the Application of Majed v London Borough of Camden and Adam Kaye* [2009] EWCA Civ 1029 which in para 15 were held to give rise to a legitimate expectation, the terms of para 8.5 of Westminster Councils Statement of Community Involvement were demonstrably discretionary using the phrase "Consultation may include ….advising in writing occupiers of properties immediately adjacent to the application site and directly affected by the proposal". Further, given the posting of a site notice in accordance with Article 15(5)(a)(i) of the DMPO, there was no conspicuous unfairness. Mr Sinai sensibly confined his submissions to Ground 1.

36. A helpful restatement of the principles relating to the legitimate expectation of consultation is found in para 98 of the Divisional Courts judgment in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3 All E.R. 261; [2014] EWHC 1662 Admin:

"10. A legitimate expectation may be created by express representation that there will be consultation *R* (*(Nadarajah) v Secretary of State for the Home Department* [2003] EWCA 1768 Civ), or a practice of the requisite clarity, unequivocality and unconditionality (*R (Davies) v HMRC* [2011] 1 WLR 2625 at paragraphs [49] and [58], *per* Lord Wilson).

11. Even where a requisite legitimate expectation is created, it must further be shown that there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise (*R (Coughlan) v North and East Devon Health Authority* [2001] 1 QB 213 at paragraph [89] *per* Lord Woolf MR)."

37. In the present case there is no express promise, and no evidence of any unequivocal practice, upon which Mr Bishop can rely. Indeed there is no evidence from Mr Bishop that he did expect to be consulted by the Council in the case of any planning application as an adjoining owner. Therefore the claim based on legitimate expectation is hopeless. Nor was there any conspicuous unfairness in the way the Council proceeded, which is both a further reason why the claim based on legitimate expectation cannot succeed, and also an answer to Mr Parkers fall-back argument based on general fairness principles.

38. There are two further matters. First, there is no allegation that, on the particular facts of this case, it was *Wednesbury* unreasonable of the Council not to consult the Bishops by individual letter rather than by site notice. Nor, on the facts, could any such argument have succeeded, in the light of Mr Giles wholly reasonable belief, on the basis of what was said in the second application form, that Flat 10 had been sold and that the application was being made by the new owner. The court has not, however, been provided with any explanation for the Councils perplexing decision not to serve individual notices about the second application in the occupants of the other flats in 23-25 Mortimer Street, but rather to rely on a site notice, when a different course was taken in respect of adjoining properties. Had individual notices been served, it is at least possible that the second application would have come to the Bishops attention in time to put in an objection, and these proceedings might then have been avoided.

39. Second, and as his own fall-back, Mr Streeten argued that in any event relief should be refused on Ground 2, pursuant to section 31(2A) of the Senior Court Act 1981. For the reasons given above under Ground 1, I do not consider that section 31(2A) applies to the facts of this case.

40. Accordingly the challenge on Ground 2 fails.

Outcome

41. The claim succeeds on Ground 1, and the second planning permission is quashed. The claim is rejected, however, on Ground 2.

42. Unless the parties can agree an order for costs, they should submit short written submissions on the form the order should take.