Neutral Citation Number: [2009] EWCA Civ 1059

Case No: C1/2008/3035

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEENS BENCH DIVISION THE ADMINISTRATIVE COURT
MR JUSTICE PITCHFORD
CO/9881/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/10/2009

Before :

LORD JUSTICE LAWS
LORD JUSTICE RIX
and
MR JUSTICE MANN

- - - - - - - - - - - - -

Between :

(1) BRIAN CONNOLLY **(2) ALISON CONNOLLY**	**Respondents / Claimants**
- and -	
(3) HAVERING LBC	**Third Respondent / Defendant**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Appellant / Defendant**

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(Transcript of the Handed Down Judgment of
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Mr Paul Brown QC & Mr Stephen Whale (instructed by **Treasury Solicitor**) for the **Appellant**
Mr Clive Wolman (instructed by **the Connollys**) for the **First and Second Respondents**
The Third Respondent was not represented and did not appear

Hearing date : Tuesday 19th May 2009

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Judgment

Lord Justice Rix :

1. Two issues arise on this appeal, brought by the Secretary of State for Communities and Local Government (the "Secretary of State"). The first is whether the judge was wrong to quash the decision of a planning inspector who granted planning permission for a home extension under section 288 of the Town and Country Planning Act 1990 (the "1990 Act"). The judge did so on the ground that there had been an error in the proceedings before the inspector whereby she was not informed of the full planning history of the property. The second is whether an allegation of unfairness can be undercut and removed by new evidence in this court, not before the judge, to the effect that the missing planning history was totally irrelevant and immaterial.

2. The property in question is the home of Mr Cullen at 2 [ ], Harold Wood, in the area of the London Borough of Havering ("Havering"). Adjacent to the Cullen home on its north side (or its left side as you look at the front of the house) is no 4 [ ], the home of Mr and Mrs Connolly. To the south or right hand side of the Cullen home is a street corner. The homes at Nos 2 and 4 are detached houses.

Mr Cullen's two applications

3. Mr Cullen wants to extend his home. On 4 May 2006 he applied to Havering for planning permission to carry out alterations to both the north and south sides of No 2. On the north flank he proposed to construct a new room or "study" over the existing single storey garage and over a carport to be erected in front of the garage, and to the rear of the garage in the garden he proposed to create a patio cover. These extensions and alterations would join the Connollys' boundary at No 4. On the south side, Mr Cullen proposed to create a covered storage area running the full depth of the house. His application number was P0772.06.

4. The Connollys did not get notice of this application and therefore did not object to it.

5. On 29 June 2006 Havering nevertheless refused this application, despite the lack of any neighbour's objection. It did so, not because it viewed the proposals on the north side with disfavour, but because the proposed covered area on the south side was considered unsuitable.

6. Havering's officer's report referred to the fact that no objections had been received, and also said that there was no relevant recorded planning history for the site, which at that time was true. As for the proposals for the north side, the report stated as follows:

> "It is believed that the proposed first floor side extension, carport and porch would be a good design response as it would appear subservient to the original dwelling and would not cause material detriment or effect [sic] the character of the surrounding area…
>
> It is Council policy that for any projection beyond the rear wall of the original dwelling on or close to a flank boundary should not be more than 4 metres in depth at ground floor level for a detached dwelling. Any greater depth required should be within an angle of 45 degrees at ground floor level. The proposed rear extension at ground floor meets the above setbacks and angles…

It is noted that the development will cast a shadow into adjoining properties however it is believed that adequate sunlight will still be received to the secluded open space areas of the properties throughout the day."

7. However, as to the southern proposal, the report was unfavourable:

"However, it is Council policy that side extensions should not normally be extended up both flank boundaries since this would involve closing the characteristic gaps between dwellings which will be detriment [sic] to the street scene and leave no access to the rear…This is reinforced as Council policy also states side extensions must be setback at least 1 metre from a highway and the proposed undercover area to the side of the dwelling is to be constructed right on the boundary which is an infringement o[f] policy…"

8. The ultimate decision was therefore against the proposal:

"KEY ISSUES/CONCLUSIONS

The proposal in particular the side undercover enclosure to the south of the dwelling is considered to have a detrimental impact to the street scene and the character of the surrounding area due to the lack of setback from the adjoining highway contrary to the Havering Unitary Development Plan notably policies ENV1 and the Supplementary Design Guidance (Residential Extensions and Alterations) and approval is refusal [sic] accordingly."

9. The Decision on application P0772.06 was thus rendered and published in the terms of that last paragraph, together with the following additional information:

"INFORMATIVE: The applicant is advised that more favourable consideration would be given to a reduced proposal providing for a retention of a significant open space to the side boundary of the plot and squaring off of the covered areas…"

10. Thus Mr Cullen was encouraged to apply again with an amended proposal. This is what he did, but he chose to drop the extension on the south side altogether. His second application to Havering was dated 22 August 2006, and was given a different number, namely P1651.06. The proposed development on the north side was, however, retained: albeit with certain changes to the rear patio cover which I will mention below. I do not mention them at this point of the narrative, because, as will appear, the proceedings before the judge below, Pitchford J, and, until a late stage, before this court, were conducted on the basis that the second application was "almost identical" and "materially identical" to that contained in application P0772.06.

11. The Connollys did receive notice of Mr Cullen's second application and they responded by registering their objections. By a document headed "OBJECTIONS" dated 20 September 2006 they complained inter alia that the proposed works would not be in accordance with Havering's Design Guidance and that their shape and size would dominate their property.

12. On this occasion Havering rejected the north side proposal and thus refused application P1651.06. The officer's report was not before the judge. However,

Havering's published decision, dated 17 October 2006, was. It was in the following terms:

> "The proposed development would, by reason of its excessive depth, height and position close to the boundary with No 4 [ ], would [sic] result in loss of natural light and will unacceptably overbear and dominate the outlook of this property contrary to the provision of ENV1 of the Havering Unitary Development Plan and Supplementary Design Guidance Residential Extensions and Alterations."

Thus the Connollys' objections bore fruit.

13. The judge considered, as will appear, that this decision "was solely concerned with the environmental effect of the first storey garage extension" (at para 10 of his judgment, [2008] EWHC 2873 (Admin)).

Mr Cullen's section 78 appeal

14. The next thing that happened was that on 28 December 2006 Mr Cullen appealed to the planning inspector, ie formally to the Secretary of State, under section 78 of the 1990 Act. Section 79 of that Act provides:

> "(1) On an appeal under section 78 the Secretary of State may –
> (a) allow or dismiss the appeal, or
> (b) reverse or vary any part of the decision of the local planning authority (whether the appeal relates to that part of it or not), and may deal with the application as if it had been made to him in the first instance."

15. We do not know in what terms Mr Cullen appealed, for his section 78 appeal documents have not been disclosed. However, Havering, having received the Planning Inspectorate's statutory Questionnaire on 6 February 2007, returned it to the Inspectorate under cover of its letter dated 19 February 2007. Havering's completed Questionnaire, and the covering letter, both gave the application reference as "P0772.06", namely Mr Cullen's *first* application with its proposed extensions on both flanks of the property. In the Questionnaire Havering gave (inter alia) the following answers: it agreed to the written representations procedure; it did not wish to be heard by an inspector; it gave a nil return to the request for copies of "Any other relevant information or correspondence you consider we should be aware of"; it said that it intended to "send another statement about this appeal" and on that basis was not required to enclose "the relevant planning history". The questionnaire contemplated that either "the relevant planning history" would be enclosed, or that it would be dealt with in a further statement.

16. Such a questionnaire and the statutory need for the co-operation of the local planning authority in informing a planning inspector concerning a section 78 appeal where such is to be dealt with by a written representations procedure derive from The Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2000: see also *Patel v. Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 1963, [2003] 2 P&CR 17 below.

17. On 13 March 2007 Havering wrote again to the Planning Inspectorate, again under the reference P0772.06. This was presumably the "another statement about this appeal" which Havering in the Questionnaire had promised to send. In its letter of 13 March 2007 Havering wrote:

> "The London Borough of Havering is forwarding the questionnaire with the officer's report which forms the Council's statement of case. The Council will not be sending a further statement as the reasons for refusal are set out within the report.
>
> The relevant planning history is included in the statement…
>
> In the Council's opinion the side undercover enclosure element of the appeal proposal to the south of the dwelling, would have a detrimental impact upon the street scene and the character of the surrounding area by reason of the lack of setback from the adjoining highway and the irregular roof form.
>
> Whilst the Council notes the appellants desire to provide additional living and storage space this does not override its adopted planning policies and supplementary guidance and cannot therefore be justification alone for allowing the proposal given the harm identified in the officer's report.
>
> For the reasons set out in this statement and the officer's report, it is considered that the proposal is therefore contrary to the Havering Unitary Development Plan notably policy ENV1 and Supplementary Design Guidance for Residential Extensions and Alterations.
>
> In the Council's opinion there are no mitigating circumstances to justify a departure from its adopted policy and the Inspector is therefore respectfully asked to dismiss the appeal…"

18. On 19 March 2007 the Connollys sent their own objections to the Planning Inspectorate. This was headed by reference to both Mr Cullen's planning applications, viz P1651.06 and P0772.06. They asked for the rejection of the appeal, inter alia on the ground that the "shape and size of the works proposed will dominate our property". The judge found that they did not go into further details about application P1651.06 because they were under the impression that that was contained in the relevant planning history which Havering had told the inspector in its letter was contained in its statement. As the judge found (at para 11)

> "The reason for that is that they were told the Council would be specifying the planning history for the Inspector, which, of course, as I have observed, the Council did undertake to do in its letter of submission to the Inspector."

19. The inspector, Jacqueline North, made a site visit on 19 June 2007 and gave her decision, allowing the appeal, on 20 July 2007. The appeal seems to have had its own reference number, viz "APP/B5480/A/07/2034615". The appeal decision document referred only to application P0772.61. The inspector observed that "The Council raises no objections in relation to the room over the garage, car port, revised porch and patio cover" (para 5). She therefore designated the "Main Issue" to be "the effect of the proposed covered yard", ie the south flank proposal, on the character and appearance of the area. In that respect she agreed with the Council's view, namely that it would be visually intrusive or incongruous. As for the northern

flank proposals, she again agreed with what the Council had said in its officer's report on application P0772.06, namely that it was acceptable and compliant with the ENV1 policy. She then referred to the Connollys' objections in these terms:

> "8. Neighbouring residents have raised concerns regarding potential overlooking, overshadowing and poor outlook. Given the orientation of the site and siting of dwellings I consider that the overshadowing of adjoining properties will be minor…The main change in outlook would be a view from No 4 over a covered area in the garden and, in my opinion, this would not result in any significant harm to the living conditions of the occupiers of No 4. I consider that the extension and carport would comply with UDP Policy ENV1 and the SPG."

20. Thus the inspector's reasoning essentially tracked that of the Havering officer's report on application P0772.06. The main difference was that, while the disfavour in which the south flank's covered storage area was held had led to Havering refusing the application as a whole, the inspector on appeal distinguished between the south flank proposal where permission was refused, and the north flank proposal where the appeal was allowed and permission was granted. However, all this occurred without any knowledge on the inspector's part of Havering's negative reaction to application P1651.06.

The Connollys' section 288 appeal

21. It was now the Connollys who appealed, that is to say applied to the High Court pursuant to section 288 of the 1990 Act, which inter alia provides –

> "(5) On any application under this section the High Court –
>
> …
>
> (b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action."

22. The Connollys' claim form, issued against both Havering and the Secretary of State, but not against Mr Cullen, complained both of a perverse decision by the inspector (that is not pursued) and that the inspector had left matters out of account which she ought to have taken into account, inter alia Havering's own objections to and reasons for refusal of application P1651.06: since "The material part of the applications P0772.06 and P1651.06 are, in part identical and in part strikingly similar." The judge was to accept that submission ("materially identical"), indeed it appears to have been more or less common ground.

The judgment

23. Only the Secretary of State appeared before the judge, represented by Mr Whale of counsel instructed by the Treasury Solicitor. The judge's order records that Havering was neither present nor represented before him.

24. The Connollys' submission was recognised by the judge as essentially amounting to the proposition that the "Inspector's decision…was reached under a fundamental misapprehension as to the planning history". On the other hand, the Secretary of State submitted that the Connollys were seeking to rely on new evidence (the Havering decision on application P1651.06) to challenge a planning appeal decision on the merits. Such a challenge could only be permitted in a very rare case where "some matter of real importance has been wholly omitted from the Inspector's report" (*per* Sullivan J at para 10 of *R (on the application of New Smith Stainless Limited) v. Secretary of State for Environment, Transport and the Regions* [2001] EWHC (Admin) 74 (1 February 2001).

25. However, the judge considered that this case fell within that exception. He reasoned the matter thus:

> "18. The London Borough of Havering was not merely a party to the section 78 appeal, but it was also the custodian of the public interest in that it was expected to draw to the Inspector's attention planning considerations which may be of relevance to her decision. It seems to me that a recent and separate refusal of permission on discrete and relevant planning grounds was undoubtedly information with which the Inspector should have been provided by the Council, but was not…
>
> 20…While it is correct to recognise that the Inspector did indeed carry out her own assessment of the site and the proposal, and reached a judgment about them, she also recorded that the Council raised no objections in relation to the room over the garage, the carport and the patio cover. Had she been aware that the Council had in fact raised very substantial objections to a materially identical proposal for the same property, I have no doubt that her approach to the planning issues and planning judgment would have been more circumspect than it was.
>
> 21. I cannot conclude that had she been provided with this knowledge her decision would have been different. I can conceive of previous planning decisions which would have been of no materiality whatever to the Planning Inspector's decision. I can, at the other end of the scale, anticipate planning decisions, like this one, in which the content of the reasons for refusal may be of significant materiality to the exercise of the planning judgment. While I cannot conclude that her decision would have been different, I can conclude that it might have been."

26. The judge therefore quashed the inspector's decision and remitted the matter to the Secretary of State for further consideration.

27. It appears to have been common ground that the two planning applications were materially identical so far as concerns the north flank proposal. There is no suggestion whatsoever of any issue on that score.

Mr Cullen's reaction to the judgment

28. The judge gave his judgment, and made the order which proceeded from it, on 12 November 2008. On 24 November 2008 Mr Cullen wrote directly to the judge, complaining that he had not been previously advised about the proceedings. His letter, with its accompanying documents, was included in the appeal documents at

a very late stage. In any event they were not referred to at the hearing. I do not therefore propose to refer to them.

This appeal

29. The only appellant is the Secretary of State. Mr Cullen has not asked to be joined in the appeal as an interested party. The Secretary of State's grounds of appeal do not complain that the judge was wrong to find, so far as concerned the north flank proposal, that it was "almost identical" (para 10) or "materially identical" (para 20) in both applications P0772.06 and P1651.06. His grounds rather complain solely that (1) the judge should not have considered material (the decision on the P1651.06 application) which had not been before the inspector; (2) it was no fault of the inspector that such material was not before her; and (3) the judge erred in concluding that the inspector's decision might have been different if she had taken Havering's P1651.06 decision into account.

30. In support of these limited grounds the skeleton served on behalf of the Secretary of State made its essential point that it was one thing to say that an inspector had left out of account something that was properly before him, but quite another to say that there was something more that an objector to the appeal proposal could or might have brought to the inspector's attention, but had failed to do so. In such circumstances, an inspector could not be faulted for having left such a matter out of account. If he could be, then the judge's ratio was dangerously wide, the consequence, it was said, of misapplying the doctrine of the *Newsmith Stainless* case. At the oral hearing, Mr Paul Brown QC on behalf of the Secretary of State made it clear that there was a real concern that the judge's approach had trespassed dangerously on the sacrosanct principle that planning merits were solely for the inspector and not for the court. It was wrong that the inspector could be criticised for failing to take into account something which had never been brought to her attention. The judge had accepted that no fault could be ascribed to the inspector herself. If the judge's decision stood, then inspectors would be forced to undertake an investigatory role, which was contrary to principle. It was this concern that had generated the Secretary of State's appeal.

31. However, subject to an entirely new point raised by Mr Brown at the oral hearing to which I shall refer below, an examination of the Secretary of State's pleaded grounds of appeal at the oral hearing demonstrated that there was something close to unanimity (although I emphasise there was no formal concession) that the judge's decision could be properly supported, although on the slightly different basis of unfairness or mistake of fact.

32. This was because on behalf of the Connollys, Mr Clive Wolman in his skeleton argument had supported the judge's decision by drawing attention to what might be described as the narrower and more specific ground (for quashing a decision) based on procedural unfairness. Thus he drew attention to the cases of *R v. Criminal Injuries Compensation Board, Ex p A* [1999] 2 AC 330, *E v. Secretary of State for the Home Department, R v. Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044 and (in the planning context) *Patel v. Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 1963, [2003] 2 P&CR 17 (Collins J).

33. In the *Criminal Injuries Compensation Board* case, the claimant claimed compensation on the basis that she had been raped and buggered by a burglar. She was examined five days after the burglary by a police doctor who reported findings consistent with the claimant's allegations. However, at the hearing of her claim that

medical report was not included in the evidence and the board was given the impression by the police witnesses that there was no medical evidence to support her case. The claimant did not produce the medical report, but she had been told she should not ask for police statements and was entitled to believe that the police doctor's medical report would be made available by the police as part of their evidence. Lord Slynn discussed whether the Board's decision, rendered in ignorance of the medical report, could be quashed on the ground of mistake of fact, which he thought it could be, although he preferred to ground his decision ultimately on a breach of natural justice amounting to unfairness (at 344/347). The other members of the House of Lords agreed with Lord Slynn, who said:

> "It does not seem to me to be necessary to find that anyone was at fault in order to arrive at this result. It is sufficient if objectively there is unfairness. Thus I would accept that it is in the ordinary way for the applicant to produce the necessary evidence. There is no onus on the board to go out to look for evidence, nor does the board have a duty to adjourn the case for further inquiries if the applicant does not ask for one…Nor is it necessarily the duty of the police to go out to look for evidence on particular matters" (at 345).
>
> "I consider therefore, on the special facts of this case and in the light of the importance of the role of the police in co-operating with the board in the obtaining of evidence, that there was unfairness in the failure to put the doctor's evidence before the board and if necessary to grant an adjournment for that purpose. I do not think it possible to say here that justice was done or seen to be done" (at 347).

34. In *E and R* this court, in the immigration context, built on the *Criminal Injuries Compensation Case* case and other authorities to expound the following doctrine:

> "63. In our view, the *Criminal Injuries Compensation Board* case [1999] 2 AC 330 points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between "ignorance of fact" and "unfairness" as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that "objectively" there was unfairness. On analysis, the "unfairness" arose from the combination of five factors: (i) an erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case); (ii) the fact was "established", in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence; (iii) the claimant could not fairly be held responsible for the error; (iv) although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result; (v) the mistaken impression played a material part in the reasoning.
>
> 64. If that is the correct analysis, then it provides a convincing explanation of the cases where decisions have been set aside on grounds of mistake of fact. Although planning inquiries are also adversarial, the planning authority has a public interest, shared with the Secretary of State through his inspector, in ensuring that development control is carried out on the correct factual basis…The same thinking can be applied to asylum cases. Although the Secretary of State has no general duty to assist the appellant by providing information about conditions in other countries…he has a shared interest with

the appellant and the tribunal in ensuring that decisions are reached on the best information…

65. The apparent unfairness in the *Criminal Injuries Compensation Board* case [1999] 2 AC 330 was accentuated because the police had in their possession the relevant information and failed to produce it. But, as we read the speeches, "fault" on their part was not essential to the reasoning of the House…

66. In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of the *Criminal Injuries Compensation Board* case. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning."

35. Even before *E and R*, the *Criminal Injuries Compensation Board* case was the basis upon which Collins J allowed an appeal from the decision of an inspector in a planning case, in *Patel*: see at paras 25ff. There an inspector had allowed an appeal from a local planning authority's refusal to permit the building of a conservatory in the garden of a house. However, the planning inspector had applied an out of date version of the authority's supplementary planning guidance. The objecting next-door neighbour applied to the High Court under section 288. The court quashed the decision of the inspector. Collins J put the matter thus:

"31. The position here is, as it seems to me, analogous in this way. The local planning authority has an obligation, in accordance with the Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2000, to submit to the Secretary of State and copy to the appellant a completed questionnaire and a copy of each of the documents referred to in it. I am told by Miss Wigley, who appeared on behalf of the London Borough of Brent, that one of the documents referred to in the questionnaire is any relevant SPG…

32. Although it may be wrong to put it as high as a duty in the same terms as that upon the prosecution in a criminal case, nonetheless, as it seems to me, there is an analogy and the inspector, and indeed the appellants and any interested parties, are entitled to assume that the local planning authority have placed before the Secretary of State all material documentation of that sort, that is to say planning guidance. That did not happen in this case. As it seems to me, the approach which the House of Lords had adopted in *Ex p. A* is an appropriate approach to adopt in a case such as this."

36. It was disputed whether the inspector's knowledge of the correct version of the guidance would have made any difference. However, Collins J could not go as far as to say that it would not (at para 34).

37. So, in this case, it seems to me (subject to the new point discussed below) that there has been unfairness arising out of a mistake of fact in circumstances closely analogous to those discussed in the three cases discussed above. Thus, (1) there was a mistake as to the previous planning history of the site, namely the omission of reference to Havering's negative views about what was accepted before the judge as a materially identical proposal in relation to the northern flank of No 2, viz Havering's response to application P1651.06. (2) That evidence relating to the planning history of the site was "established" in an uncontentious and objectively verifiable form, for it was documented in Havering's decision on application P1651.06, and it was accepted before the judge that that application so far as concerned the northern flank proposal was materially identical to the proposal under appeal. (3) The Connollys were not responsible for the mistake, as the judge found. It is not a question of fault, but under the 2000 Regulations Havering was responsible for co-operating in putting before the inspector the material planning history. This is what they said they were doing, but they erred. (4) The mistake played a material part in the inspector's reasoning. That was the judge's view, and I agree.

38. In that fourth respect, it is noticeable that where, as in the case of application P0772.06, there was no objection to the northern flank proposal from the neighbouring Connollys at No 4, that proposal was acceptable to Havering; when, however, in relation to the materially identical proposal under application P1651.06 the Connollys did object, that objection was upheld by Havering. The inspector was of course entitled to an independent judgment, but it is again noticeable both that she referred to the fact that there had been no objections to application P0772.06 and that her reasoning in respect to both the northern and southern flank proposals tracked that of Havering. If, however, the inspector had known that when, on a materially identical proposal, the neighbours at No 4 had objected, and that objection had been upheld by Havering, it is impossible to say that that knowledge would not have had a material impact on the inspector's decision. In this respect there was no issue before us as to where the burden of proof lies, but for the sake of argument I am prepared to assume that it lies on the Connollys. In my judgment, on that assumption, I consider that the Connollys have met that burden.

39. Subject to the second point in this appeal, discussed below, I would dismiss this appeal on the ground that there was unfairness arising from the failure of Havering to provide to the inspector the full and material planning history of the site. The inspector made her decision under the false impression that she was possessed of that history, but unfortunately she was not.

40. On behalf of the Secretary of State, Mr Brown QC acknowledged that he would not be perturbed by that result, if it were to be the judgment of this court, since in such a case the quashing of the inspector's decision would be on a narrow basis, supported by authority, instead of on what was feared to be the judge's over-broad interference in the merits of the decision under appeal to the inspector.

The new point

41. However, Mr Brown's primary argument on this appeal was not directed at all to the above considerations, but to an entirely new point which he sought to make by reference to a document not before the judge and to entirely new submissions which attempted to show that, contrary to what was common ground before the judge, the

northern flank proposals on applications P0772.06 and P1651.06 were not materially identical. Moreover, this new point arose at the last moment, without any regard to the formalities which prima facie would need to be observed if a new point such as this was to be taken.

42. The point arose in the following way. By letter dated (Sunday) 17 May 2009 Havering, which as I have observed above was not a party to the appeal, wrote to the clerk to my Lord, Lord Justice Laws, in order to bring before the court new submissions, in part by reference to a document not previously before the court, namely the officer report of Havering's decision on Mr Cullen's (second) application P1651.06. This communication came effectively on the eve of this court's hearing on Tuesday 19 May. The letter was written for and on behalf of Ms Christine Dooley, a solicitor and Havering's assistant chief executive, legal and democratic services.

43. The submission contained in Havering's letter, as explained to the court by Mr Brown at the hearing, was to the following effect. Havering had deliberately chosen not to inform the Planning Inspectorate concerning Mr Cullen's second application P1651.06, because in its view that second application and the reason for Havering's refusal of it was of no relevance. Thus:

> "LBH did not consider the decision to refuse the second planning application under Reference P1651.06 to be part of the relevant planning history for the clear reason that the basis of refusing the second application is not material to the decision the Inspector made to uphold the appeal pursuant to the refusal of the first application under reference P0772.06…The Council is of the view that the second planning application had no bearing on the first, subject to appeal, and so was not relevant planning history that had to be disclosed."

44. There was, of course, no evidence before the judge to this effect, and there is still no evidence from any relevant personnel at Havering to this effect. Such personnel might have included the officers who made the two officer reports on the respective applications, or the more senior manager in Havering's planning department who confirmed the decisions recommended by those reports, or the person whose indecipherable signature appears on Havering's response to the Questionnaire, or "Susan Stone, Planning Appeals" who signed Havering's letter to the Inspectorate dated 19 February 2007, or "George Allpress, Senior Planner (Enforcement & Appeals)" who signed Havering's letter to the Inspectorate dated 13 March 2007.

45. The reason given by Ms Dooley in her submission letter to the court dated 17 May 2009 for her assertion that a deliberate decision was taken not to refer to Havering's decision on application P1651.06 is as follows. She submits that the northern flank proposal under application P1651.06 was "not identical" to the northern proposal under application P0772.06, and that the reasons given in the officer's report on application P1651.06 for refusing that application related solely to the different proposal set out there concerning the *patio cover to the rear of the garage*, and did not relate to any other part of the proposal such as the first floor extension to make the study.

46. Mr Brown was presented with this new material almost as late in the day as was the court, and is in no way responsible for it. Nor can any criticism attach to him or to the Secretary of State for seeking in these circumstances to put this material before the court or helpfully addressing submissions to this court upon it. However, as will appear, there are considerable difficulties, both in substance and in procedure, in such a path.

47. Thus Mr Brown developed Ms Dooley's submission with the assistance of the designs submitted to support the respective applications and the officer's reports on them. His own submissions went beyond Ms Dooley's letter but were clearly informed by them. They are not surprisingly nowhere reflected in the Secretary of State's grounds of appeal or skeleton argument to this court.

48. Thus Mr Brown indicated that the design of the patio cover under Mr Cullen's first application (P0772.06), the subject-matter of Mr Cullen's appeal to the planning inspector, showed a construction, to the rear of the garage and up against the boundary with the Connollys' garden, whose sloping roof was highest at the point where the patio cover met the boundary and then sloped away from that boundary from north to south. The officer report for application P0772.06 explains that the "covered area towards the rear of the garage will project 4 metres from the rear façade by a width of 2.8 metres. The extension will have a solid wall located on the boundary measuring 3 metres in height". The report stated that the 4 metre depth from the back of the garage met Council policy. It made no comment about the height. All in all, there is little comment on the patio cover.

49. Mr Brown then indicated that the design of the patio cover under Mr Cullen's second application (P1651.06) differed. Its roof now sloped not from north to south (ie from the boundary towards the centre of Mr Cullen's house) but from west to east (ie from the rear elevation of Mr Cullen's house towards his garden). The officer report for application P1651.06 (newly proffered as an attachment to Ms Dooley's letter and seen neither by the inspector nor the judge) on this occasion goes into greater detail about the patio cover, under the heading of "Impact on neighbouring properties". Thus:

> "It is Council policy that for any projection beyond the rear wall of the original dwelling on or close to a flank boundary should not be more than 4 metres in depth at ground floor level for a detached dwelling. Any greater depth required should be within an angle of 45 degrees at ground floor level. Guidelines also indicate that the maximum height of the extension should not exceed 3m.
>
> In this case the application dwelling incorporates as an original feature, a rear projection to the garage of about 0.8m. The development was found not to encroach upon a notional line constructed at 45 degrees measured at a depth of 4m from the rear corner of No 4. The proposed rear extension therefore meets the setback and angles in respect of this part of the guidance."

50. So far, so good. However, the report continued:

> "However, it is noted that the rear extension rises from 2.6m to a maximum overall height of 3.5m which is in excess of that usually permitted by guidelines. In the absence of any mitigating factors and mindful that the overall depth of the extension is some 4.8m (including original garage projection), it is considered that the development would seriously overbear and dominate the outlook and amenity of this neighbour. It is noted also that the development would result in actual sunlight loss to the rear elevation and patio of this property.
>
> Having regard to the above, the proposals are considered to be unneighbourly and therefore do not comply with this aspect of the guidelines."

51. The report therefore concluded thus:

> "KEY ISSUES/CONCLUSIONS:
>
> The proposal, in particular the single storey rear extension, is considered to be unneighbourly and is thus contrary to the Havering Unitary Development Plan notably policies ENV1 and the Supplementary Design Guidance (Residential Extensions and Alterations). Refusal of planning permission is therefore recommended…
>
> RECOMMENDATION Refusal for the following reason(s):
>
> 1. The proposed development would, by reason of its excessive depth, height and position close to the boundary with No. 4 [ ], would result in loss of natural light and will unacceptably overbear and dominate the outlook of this property contrary to the provision of ENV1 of the Havering Unitary Development Plan and Supplementary Design Guidance Residential Extensions and Alterations."

The decision (in the same terms as that recommendation) had been before the judge and is cited at para 12 above.

52. As for the rest of the northern flank proposal, however, viz the building over the garage to create a new study at first floor level etc, the officer report on this application P1651.06 reflected the favourable response of the earlier officer report on application P0772.06, namely –

> "It is believed that the proposed first floor side extension, carport and porch would be a good design response as it is would appear subservient to the original dwelling and would not cause material detriment or [a]ffect the character of the surrounding area."

53. It was on this basis that Mr Brown submitted that Ms Dooley was correct to assert that the refusal of application P1651.06 was not inconsistent with the acceptance of the northern flank proposal under application P0772.06 and was therefore irrelevant to Mr Cullen's appeal.

54. In my judgment, however, this new submission is flawed both procedurally and in terms of its intrinsic merits. So far as procedural aspects are concerned, the new point invites the court to enter for itself into the planning merits of the proposal in question. It does so without any relevant ground of appeal. There is no appeal against the judge's finding that for relevant purposes Mr Cullen's two applications were "almost identical" and "materially identical". As I have observed, that finding appears not to have been in issue below. Moreover, the submission is built on the basis of new documentary material, namely Havering's own official report on Mr Cullen's application P1651.06, which was not before the judge. In relying on this document, the Secretary of State has to advance an appeal on unpleaded grounds on the basis of new evidence without being in a position to bring himself either formally or substantively within the three tests of *Ladd v. Marshall* [1954] 1 WLR 1489 (CA) or any broader discretion founded on the interests of justice permitted under the CPR. Mr Brown has not sought to bring himself within those tests or that

discretion, and therefore they need not be discussed: but I do not see how any attempt could have been successful. The matter goes wider still, for the new point involves opening up matters which were not in issue before the judge, based on the submission that Havering's failure to inform the inspector about its reaction to application P1651.06 was deliberate and reflected its view that the second application was materially different and therefore of no relevance to Mr Cullen's section 78 appeal. It is, however, classical doctrine that a new issue can only be raised on appeal where all possible relevant factual material had been considered below, so that the new issue becomes a pure matter of law on uncontested facts.

55. As for the intrinsic merits of the proposition that application P1651.06 and Havering's decision on it were not part of the relevant planning history of the site and were therefore deliberately omitted in Havering's statement to the Planning Inspectorate (cf Havering's letter to the Planning Inspectorate dated 13 March 2007: "The relevant planning history is included in the statement"): it seems to me that these are in any event flawed. Even if it would be admissible, there is no evidence as to Havering's views that application P1651.06 and its refusal were an irrelevant part of the planning history of the proposals for the northern flank of Mr Cullen's house. The proposition is in any event highly debatable. It is possible that the point made in Ms Dooley's letter to the court would, if it had been exposed at the section 78 appeal, have borne fruit in support of that appeal and as detracting from the Connollys' objections to the proposal in question. But it seems to me that it is impossible for this court to be sure of that. What is so striking is that, even if one assumes in favour of the Secretary of State that he is not bound by the judge's finding of "materially identical", nevertheless at any rate arguably very similar proposals, when subject to no objection from Mr Cullen's neighbours, were (but for the southern flank proposal) acceptable to Havering (on application P0772.06), but later when objected to were rejected as "unneighbourly" (on application P1651.06). It is submitted that this was solely because the second proposal for the patio cover was of an excessive height (3.5 metres), but that is by no means obviously correct on a reading of the officer report on application P1651.06 which refers to "excessive depth, height and position close to the boundary". If anything, the report and conclusion suggest that height above 3 metres was only one factor taken into account. In any event it is not obvious to me that a maximum height of 3 metres all along the boundary with the Connollys' garden was to be preferred to a slope from 3.5 metres to 2.6 metres along that boundary, where the maximum height of 3.5 metres only occurs along the back of Mr Cullen's own house rather than along the boundary wall.

56. In all these circumstances it seems to me that it is Havering through the Secretary of State who is asking this court to trespass onto the planning merits of the section 78 appeal, and who is doing so on the basis of a last minute attempt to introduce new evidence (and assertions of fact for which there is no evidence) in support of an unpleaded ground of appeal which flies in the face of a finding of the judge below representing the common understanding of the parties before him. I would therefore reject the new point, and thus, in the light of the reasons I have given above on the first point, dismiss this appeal.

Mr Justice Mann :

57. I agree.

Lord Justice Laws :

58. I also agree