



Building beautiful: Recent decisions on design

Richard Ground KC and Matt Lewin

Planning Day – 6th November 2023



Design in the courts

Richard Ground KC

Question 1

Can you be sued in private nuisance if you have planning permission for a development?

1. **Yes** [hand up]
2. **No** [no hands up]

Question 2

In the current version of the September 2023 NPPF how many times in chapter 12 (on achieving well designed places) is the word “beautiful” used?

1. **Not at all** [No hands]
2. **Twice** [1 hand]
3. **5 times** [2 hands]

Question 3

Did the Court of Appeal recently say that permission was validly refused on character and appearance grounds where there was **no effect at all** on appearance?

1. **Yes** [No hands]
2. **No** [1 hand]

Question 4

In the GPDO, Schedule 2, Part 1, Class AA does “*impact on adjoining premises*” mean

1. **Those contiguous with the development?** [No hands]
2. **Lying close or contiguous with the development?** [1 hand]

Question 5

When Chat GPT was asked for the single most important thing in getting a building scheme successfully through the English planning system on design did the answer included the following:

- A** **“The single most important thing in getting a building scheme successfully through the English planning system on design is ensuring that your design aligns with local planning policies and guidelines”?**
- B** **“Remember that the planning system can be complex, and it's often advisable to work with professionals who have experience in dealing with the specific requirements of the English planning system”?**

1. **A only** [No hands]
2. **B Only** [1 hand]
3. **A and B** [2 hands]

Three Cases on Design

This talk will focus on three cases that have dealt extensively with design issues:

1. **Tate Modern Viewing Gallery** (*Fearn and others v Board of Trustees of the Tate Modern* [2023] UKSC 4)
2. **Kazalbash on “character and appearance”** (*Kazalbash v SSLUHC* [2023] EWCA Civ 904)
3. **CAB Housing and PD** (*CAB Housing Ltd v SSLUHC* [2023] EWCA Civ 194)



The Tate Modern





The key question for planners

This was a private nuisance case brought against the Tate by residents of local flats.

It went to the Supreme Court.

The key question: **is it for the Planning System or private law claims to police private rights?**

The answer

The answer given by the Supreme Court to this question is that the grant of a planning permission does not remove the rights to pursue a private law claim.

Lord Leggatt explained the difference in the considerations of planning and private law:

*“unlike the common law of nuisance the planning system does not have as its object preventing or compensating violations of private rights in the use of land. **Its purpose is to control the development of land in the public interest.**”*

Importance for practice

There are 3 messages of importance:

1. Impacts of proposal on amenity of neighbouring building will be relevant to planning but that is a decision in the public interest.
2. The planning authority will be able to approach the case on the basis that they do not need to decide the private law right.
3. This was a highly unusual set of facts because the planning effects of the viewing gallery were not considered in the planning process because the Block C flats and Tate proposals took place in parallel.



Kazalbash





Character and Appearance

The development was the subdivision of 26 Highland Road In Hillingdon.

The application was refused on the basis of its effect on character and appearance.

The High Court quashed the decision on the basis that:

“nothing was identified .. which would change the physical form or appearance of the extension when it became a separate dwelling”

However, what the Court of Appeal concluded was that the subdivision would be read because the fence would be clearly visible.

It did say that the expression “character and appearance” is self-evidently a larger concept than appearance. However, it did not set out what character was and how it differed from appearance.



CAB Housing



New PD classes

The Government introduced a whole series of Operational Development PD rights in 2020 to extend development upwards:

1. Up to 2 storeys on top of block of flats and commercial buildings which are freestanding. [Schedule 2, Part 20]
2. Up to 2 storeys on top of terraces for certain commercial uses.
3. Existing houses which are detached or part of a terrace can have either one or two storeys added. [Schedule 2, Part 1, Class AA]

Prior approval

Schedule 2 Part 1 Class AA2 provides as follows.

3(a) before beginning the development, the developer must apply to the local planning authority for prior approval as to –

- (i) impact on the amenity of any adjoining premises including overlooking, privacy and the loss of light;*
- (ii) the external appearance of the dwellinghouse, including the design and architectural features of –*

CAB Housing Ltd Lindblom LJ

01

Scale

Scale can be controlled under prior approval despite maxima being in early parts.

02

Adjoining

Impact on adjoining amenity can involve consideration of those lying close not merely contiguous

03

Amenity

Amenity wider than overlooking privacy and light.
Can include noise, disturbance and outlook.

04

External appearance

External appearance can include more than principal and side elevations.



Conclusion



The result of this is that even upward extensions under Class AA of the PD regime will have to grapple with issues of design.



Retrofitting



Matt Lewin

“Beauty” and the planning system

1947

*“[The Town and Country Planning Bill is] an instrument of which we can be justly proud; we shall have begun a new era in the life of this country, an era in which **human happiness, beauty and culture** will play a greater part in its social and economic life than they ever have done before.”*

2023

*“Almost all the [National Model Design Code] pilots **struggled with the notion of beauty and few found it useful** in either their analysis, engagement or coding. Instead, codes tended to prioritise tangible issues such as landscape, density, height and building line as the enduring qualities of places that, It was argued, define character.”*



The M&S decision



NPPF paragraph 152

152. The planning system should support the transition to a low carbon future in a changing climate[.] ... It should help to:

... encourage the reuse of existing resources, including the conversion of existing buildings

... support renewable and low carbon energy and associated infrastructure

M&S: approach to paragraph 152

The **Inspector** [IR 13.43]:

“I find that there would be harm through substantial quantities of embodied energy in the demolition of three sound structures and the construction of a new, larger building with two levels of basements. While **there should generally be a strong presumption in favour of repurposing and reusing buildings**, much must depend on the circumstances of how important it is that the use of the site should be optimised, and what alternatives are realistically available.”

The **Secretary of State** [DL24]:

“The Secretary of State agrees with the Inspector at IR13.43 that **there should generally be a strong presumption in favour of repurposing and reusing buildings**, as reflected in paragraph 152 ... In the circumstances of the present case, where the buildings in question are structurally sound and are in a location with the highest accessibility levels, he considers that **a strong reason would be needed to justify demolition and rebuilding**. However, he agrees that much must depend on the circumstances of the case, including how important it is that the use of the site should be optimised, and what alternatives are realistically available.”

M&S: the key points

01

**WLCA is essential –
even if not
mandatory**

02

**Alternatives
considered at early
stage of design**

03

**Robust comparison
with proposed
scheme**