

(1) The law on consultation

**(2) Leases and other rights of occupation:
the basics**



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This talk

- Consultation
- Introduction to types of legal occupation



Consultation



Consultation

- Prior to big redevelopment decisions there is often a consultation
- It is important that public authorities get the law on this right: if they do not they can be challenged in court



Consultation: legal requirements

R. (Medway Council) v Secretary of State for Transport, Local Government and the Regions [2002] EWHC 2516 (Admin), Maurice Kay J at [26]:

“Consultation is not negotiation. It is a process within which a decision maker at a formative stage in the decision making process invites representations on one or more possible courses of action. In the words of Lord Woolf MR in *Ex parte Coughlan* [2001] QB 23 at para 112, the decision maker's obligation “is to let those who have potential interest in the subject matter know in clear terms what the proposal is and why exactly it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.”



Consultation: legal requirements

No general duty for public bodies to consult. However, a duty to consult may arise under certain circumstances (see *R (Plantagenet Alliance) v SSJ* [2014] EWHC 1662, [98]: the Richard III reburial case), e.g.

- Where there is a statutory duty to consult.
- Where there has been a promise to consult.
- Where there has been an established practice of consultation.
- Where, in exceptional cases, a failure to consult would lead to conspicuous unfairness.



Consultation: legal requirements

- It is important to note that a public body cannot avoid the legal requirements regarding *how* to consult if it elects to carry out a consultation, even in circumstances where it has no duty to consult

(See *R v N E Devon HA ex p Coughlan* [2001] QB 213 at [108])



Consultation: legal requirements

- Key legal principles set out Hodgson J in *R v Brent London Borough Council ex p Gunning* (1985) 84 LGR 168, 189 (the “Sedley/Gunning” criteria) (Sedley was the advocate, later a judge):

“Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third . . . that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.”



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Consultation: legal requirements

- These principles have been subsequently approved and expanded on by the courts

see e.g. *R v North and East Devon HA ex p Coughlan* [2001] QB 213, [108].



Consultation: legal requirement 1- proposal must be at a formative stage

- Another way of putting this is that a decision maker cannot have made up their mind before consulting.
- E.g. *R (Dudley MBC) v. SSCLG* [2012] EWHC 1729 (Admin), consultation was not at a formative stage where a letter invited responses relating to the mitigation of the effects of a decision that had already been made [71-4].
- However, that is not to say that a decision-maker cannot have a “preferred option”: only that the decision-maker must allow for the possibility of choosing an alternative option following consideration of the consultation responses.

See Owen J in *Royal Brompton & Harefield NHS Foundation Trust v Joint Committee of Primary Care Trusts* [2011] EWHC 2986 (Admin) at [16], “to have an open mind does not mean an empty mind.”



Consultation: legal requirement 1- proposal must be at a formative stage

- NB generally a decision-maker has a very broad discretion on what options to consult on, although fairness may require particular options to be consulted on

See e.g. *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) [2007] Env LR 29, [62]; *R. (Medway Council) v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 2516 (Admin).



Consultation: legal requirement 2-sufficient information

- In short, consultees need to know why the consultation proposals are what they are, and how their responses will feed into the final decision.
- Consultees should be made aware of why some options were rejected.
- Consultees should be given the opportunity to propose alternatives to the options consulted on.
- Consultees should be aware of the criteria for assessing the proposals: *Robin Murray & Co. v. The Lord Chancellor* [2011] EWHC 1528 (Admin) at [37(4)].
- It is also important to note that where a provisional view is formed or there is a preferred option, consultees must be made aware of this: *R (Sardar) v. Watford Borough Council* [2006] EWHC 1590 (Admin) at [29] per Wilkie J



Consultation: legal requirement 3-sufficient time to respond

- No specific time frame for a consultation if there is no statutory requirement.
- Length of time needed by law depends on the circumstances:
 - a consultation a single, relatively simple issue might justify a shorter consultation period
 - a consultation on several issues or a particularly complex issue may justify a longer period
 - a consultation period that falls over a holiday may well require the provision of additional time to account for the holiday period.

See e.g. the Building Schools for the Future litigation, [2011] EWHC 217 (Admin) at [94]



Consultation: legal requirement 4- “conscientiously taking into account”

- This relates to what happens *after* the consultation has finished.
- A decision-maker must consider the responses received: failing to do so may amount to an unlawful failure to take account of a material consideration.
- It is not sufficient that an employee or agent of the decision-maker has considered the responses if the decision-maker has not considered them: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154.
- No need for decision maker to consider all individual responses though if fair summary provided to them



When is there a duty to re-consult?

- Generally, fairness only requires re-consultation if there is a “fundamental change”: *R. (Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin) at [45].
- If a “new factor” or “some internal material of potential significance” emerges, fairness may require re-consultation: *Edwards v Environment Agency* [2006] EWCA Civ 877 at [94].
- The test is whether in all the circumstances, fairness demands that it must (not may) be drawn to the attention of consultees: *R. (M) v Haringey LBC* [2013] P.T.S.R. 1285 at [24].



Case study

- In this example the consultee is a market trader and the local authority set the opening hours for the market stalls, currently 9.30am-5pm every day.
- The consultee gets this letter:

“The local authority have received numerous complaints about weekend noise. We have carried out a full impact assessment and based on its findings have decided to limit weekend opening hours to 10am-3pm. If you have any comments on this, please respond to [address] within 7 working days”



Case study

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- There are a number of immediate problems with this example:
 - No information about impact assessment findings or extent of the problem
 - Very short consultation period
 - Seems that decision has already been taken

-Highly likely to be unlawful



Rights of occupation



Rights of occupation: the basics

- There are a number of ways you could be occupying your market stall/ shop, including:
 - Freehold owner
 - Lease: including tenancy at will, periodic tenancy and fixed-term tenancy
 - Licence to occupy



Freehold owner

- You own your building/ land: great!
- However, even then, regeneration schemes can involve compulsory purchase: see e.g. Tottenham redevelopment by Lendlease
- Freehold owners can have their properties compulsorily purchased and then offered back leases only
- Often not enough business land in regeneration scheme for existing businesses... where do they go?



Leases

- A contract between you and your landlord, granting you right to exclusive possession of landlord's property for an ascertainable period of time
- Rent usually paid to landlord (but not necessarily)
- Key question is usually exclusive possession: can you exclude others from the premises, including the landlord? If so, you probably have a lease
(this all depends on the terms of the written contract or, if oral, what was agreed)
- Must be a deed (formal written contract) if the lease is for a fixed term over 3 years



Leases: tenancy at will

- Key elements: (1) exclusive possession, (2) either party can cancel at any time
- Very precarious position as landlord can kick you out at any time
- May be a periodic tenancy if regular rent payments made: but a question of intent



Leases: periodic tenancies

- Exclusive possession
- Must be payment of rent
- Can be weekly, monthly, quarterly, yearly
- No need for written contract
- Continues from term to term until cancelled with proper notice as set out in the terms of the agreement (and subject to business tenancy protection)
- Even where a document or agreement is expressed as a tenancy at will: it could still be a periodic tenancy
- If your tenancy is a periodic tenancy rather than a tenancy at will, then you will have better protection from eviction as Harley will explain



Leases: business tenancies

- Could be fixed term or periodic tenancy
- Harley to cover in his talk: but essentially if you have a lease for business purposes you have a right to a new lease once it expires: so you cannot easily be evicted/ have much better protection
- Does not apply to tenancies at will



Licence to occupy

- This is simply permission to use the land without the intention to create a lease
- Can be 'bare' (no contract) or supported by contract
- Key element is lack of exclusive possession
- Very insecure: can be terminated at any time absent a contractual term precluding this, although if the licence arises from a contract damages may be payable
- If landlord sells their property, a licence will not bind the new owner







Q&A



Thank you

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