



Neutral Citation Number: [2021] EWHC 2885 (Admin)

Case No: CO/998/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/10/2021

Before :

SIR DUNCAN OUSELEY
Sitting as a High Court Judge

Between :

| | |
|---|------------------------------------|
| RICKI SAGE | <u>Claimant</u> |
| - and - | |
| SECRETARY OF STATE FOR HOUSING, LOCAL GOVERNMENT AND COMMUNITIES | <u>Defendant</u> |
| -and- | |
| LONDON BOROUGH OF BROMLEY | <u>Interested Party</u> |

KATE OLLEY (instructed by **KSLAW LLP**) for the **Claimant**
LEON GLENISTER (instructed by **GOVERNMENT LEGAL DEPARTMENT**) for the
Defendant
The Interested Party did not appear and was not represented

Hearing date: 14 October 2021

Approved Judgment

Sir Duncan Ouseley:

1. The Claimant, Mr Sage, lives in a two-storey semi-detached house with a garden, about 20 metres deep, in a residential street in a primarily residential area of

Beckenham in the London Borough of Bromley. At the rear of his garden is a timber out-building, with windows, which is used in part as a garden shed, and in part as a gym. Mr Sage keeps gym equipment there including a treadmill, cross-trainer, weights, balls, bench, and punch bag. It has no toilet or showering facilities. The garden, and the shed, can be accessed via a passage to the side of the house, shared with the neighbouring property. Mr Sage uses the gym himself and he permits family and friends to use it. He has used the gym part of the shed since 2016 for his business as a personal trainer, for paying clients, who attend at the premises. He has not sought planning permission for this. Instead, he has applied twice under s191 of the Town and Country Planning Act 1990, for a Certificate of Lawful Use, CLU, for this aspect of his use of the residential property. Such a certificate would be conclusive as to the lawfulness of the use of the property. This case concerns the second application.

2. Bromley LBC refused this second application for a CLU on much the same basis as it had refused his first application, which had been made with the same end in mind. The second application was intended to overcome shortcomings in the evidence found by the Inspector who dismissed his appeal against the refusal of his first application. He again appealed to the Secretary of State against the refusal of the second application. The Inspector, after an informal virtual hearing and a site visit, dismissed the appeal in a Decision Letter, DL, dated 10 February 2021. Mr Sage appeals against that decision under s288 of the 1990 Act.
3. Mr Sage claims that the second Inspector's decision took an immaterial consideration into account in her decision, namely what Ms Olley, who appeared for the Claimant, said was "visual disturbance" caused by the use at issue, that the decision was irrational, and that it was vitiated by legally inadequate reasoning.
4. In granting permission, Mr Timothy Mould QC, a very experienced planning lawyer, sitting as a Deputy High Court Judge, said this:

"This claim raises an arguable issue about the materiality of environmental and amenity considerations to the question whether the use of a building within the curtilage of a dwelling house is for a purpose incidental to the enjoyment of the dwellinghouse as such, within the terms of section 55(2)(d) of the Town and Country Planning Act 1990. The issue is of some importance given the increasing use of the home as a place of work and business. The court will be assisted by the parties' submissions on the correctness in law of the current Planning Practice Guidance on that question...."

The meaning of "development" by way of a material change of use

5. Section 55(1) of the 1990 Act defines "development", for which planning permission is required. This includes making a material change in the use of land. Subsection (2) lists operations or uses of land which "shall not be taken for the purposes of this Act to involve development of the land..." By s55 (2)(d), the following use is not be taken as involving development:

“the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such;...”

6. This subsection means that there are, in a case such as this, two questions to be asked. First, has there been a material change of use? Second, if so, was it for a purpose incidental to the use of the dwellinghouse as a dwellinghouse? It does not follow that all such incidental purposes involve a material change of use, but the subsection provides certainty that where they otherwise would do, planning permission is nonetheless not required. It creates an exception to the fundamental structure upon which development control is erected, through the need to apply for planning permission, its grant, conditional or not, or its refusal, with the related enforcement powers. Its scope and application should be seen in that light. In practice, however, the two questions overlap to such an extent that the answer to the one will frequently follow from the answer to the other. If the purpose is not incidental to the use of the dwellinghouse as a dwellinghouse, there will usually have been a material change in its use, and vice versa. Indeed, this case was approached, without demur on any side, on the basis that the questions here were essentially interchangeable, and the answers to them would inevitably lead to the same outcome.
7. It is necessary in view of the submissions and Mr Mould’s observations to refer briefly to the relevant authorities on material change of use and “incidental” uses. *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1027, Div Ct, Bridge J, with whom Lord Widgery and Willis J agreed, deals with the planning unit. At 1212D, it was the whole unit of occupation which should be considered “whenever it is possible to recognise a single main purpose of the occupier’s use of his land to which secondary activities are incidental or ancillary.” What is important is that secondary activities are not necessarily incidental or ancillary, contrary to the implication of the Guidance. The concepts of secondary and ancillary/incidental may overlap but are not the same. If incidental or ancillary, they are in law part of the single main use, and for these purposes are not a separate use at all: the “single main use” is in reality the single use of which the incidental and ancillary uses are part.
8. It may also be right to consider the entire unit of occupation even though a variety of activities are carried on without them being ancillary or incidental to each other, and where they are not confined to separate and physically distinct areas; this is a mixed or composite use, as the Inspector found had occurred here. At p1212H, Bridge J continued:

“Thus, for example, activities initially incidental to the main use of an area of land may grow in scale to a point where they convert the single use to a composite use and produce a material change of use of the whole.”
9. *Wallington v Secretary of State for Wales* (1991) 62 P&CR 150, CA, concerned an enforcement notice alleging that the keeping of 44 dogs as a hobby was not incidental to the use of a dwelling house “as such”, that is as a dwellinghouse. The notice was upheld and the dogs limited to 6. The fact that the owner genuinely regarded this as a hobby “cannot possibly suffice to prove by itself” that the purpose was incidental to the enjoyment of the dwelling house as a dwellinghouse. Significance had to be given

to the words “as such”. Slade LJ, with whom Nicholls and Farquharson LJJs agreed, said at p156:

“Furthermore, to construe the phrase “incidental to” as meaning no more than “not dominant” in my judgement gives inadequate weight to the phrase. The wording of [the precursor to section 55 (2)(d)] in my judgement contemplates that the dwelling-house in question at all material times remains used as a dwelling-house, not as anything else, and that the other use in question is no more than ancillary to that use a dwelling-house.

In my judgement, the inspector was perfectly entitled to have regard to what people normally do in dwellinghouses to decide whether or not, as a matter of fact and degree , on the one hand (a) the keeping of the appellants’ 40 or more dogs should reasonably be regarded as incidental to the enjoyment of her dwelling house as a dwelling house or, on the other hand (b) the number of dogs kept by her exceeded what could reasonably be so regarded.”

10. The Guidance in substance conflicts with the first and second sentences above. The structure of the Act did not mean that, because the section applied, even though there had been a material change of use, the incidental use to which section 55(2)(d) applied had to be one which was abnormal for a dwellinghouse.
11. Slade LJ found helpful and apposite what Sir Graham Eyre QC, sitting as a Deputy High Court Judge, said in *Emin v SSE* (1989) 58 P&CR 416 at p422, although the provision Sir Graham was dealing with concerned building development “required” for a use incidental to the enjoyment of the dwellinghouse as such:

“[This] could not rest solely on the unrestrained whim of him who dwelt there but connotes some sense of reasonableness in all the circumstances of the particular case. That was not to say that the arbiter can impose some hard objective test so as to frustrate the reasonable aspirations of a particular owner or occupier so long as they are sensibly related to his enjoyment of the dwelling. The word “incidental” connotes an element of subordination in land use terms in relation to the enjoyment of the dwelling-house itself.”

12. Farquharson LJ commented, in *Wallington*, contrasting hobbies with commercial use:

“On the other hand, the use of one room in a dwelling house as an office or study, even though it has commercial aspects, could still be regarded as incidental to the enjoyment of the house as a dwelling -house.”

13. He then referred, of relevance both points, to relevant factors to the resolution of the issue: the location of the dwellinghouse, in the town or country or remote from other dwellings; its size and the extent of its curtilage in the context of the incidental user; the nature and scale of the activity said to be incidental, and the more dominant the

less likely to be incidental. “The indulgence of a hobby is more likely to qualify than some commercial activity.” The disposition and character of the occupier was not irrelevant though how he or she regarded the activity could not be conclusive.

14. *Harrods Ltd v Secretary of State for the Environment, Transport and the Regions* [2002] EWCA Civ 412, concerned whether a heliport on top of Harrods involved a material change of use for which planning permission was required. The Secretary of State held that it was, and that the use of the shop roof for a heliport was not ordinary incidental to the retail use of the store. The Court broadly approved what Sullivan J had said at first instance, that the courts’ development of the incidental/ancillary use principle had removed those uses falling within that principle from the ambit of planning control.

“94 The use of the words ‘incidental /ancillary’ should not obscure the fact that such uses can be very substantial indeed, with potentially significant implications in terms of factors such as numbers of employees, noise, traffic et cetera, all of which would be relevant if planning permission was being sought for an independent use of a comparable scale and nature...

96 A restrictive formulation of the ancillary use test, so as to include the words ‘ordinarily incidental’ would, in my judgement, give effect to Parliament's intention that material changes of use should, in general, be subject to planning control. Where Parliament intends that changes of use which might otherwise be considered material should be deemed not to do so it says so in [section 55(2)].”

15. He pointed out that restricting flexibility to ancillary uses which were ordinarily incidental to the primary use of the planning unit did not prevent the introduction of the extraordinary or unusual. It merely meant the planning permission had to be applied for. If there were good reason to refuse it, it could not be in the public interest for that requirement to be sidestepped by the application of an “unqualified ‘incidental/ancillary’ use test.” He saw no practical difference between what people normally did in dwelling-houses and what uses were ordinarily incidental to other primary uses.
16. Schiemann LJ, with whom Sedley LJ and Charles J agreed, said, at [22], that a material change of use was not necessarily involved when a shop owner introduced an activity reasonably incidental to the running of his shop, but which was not reasonably incidental to the running of most shops. However, it was not appropriate to concentrate on what was incidental to the particular shop, with the way it was run and with its particular needs.:

“The right approach is to see what shops in general have as reasonably incidental activities and the reason that that is the right approach is, in my judgment, the reason given by Mr Sales [for the Secretary of State]. Planning is concerned with balancing the interests of the community with the interests of the landowner ...but on the other hand another thing one seeks to avoid is giving the opportunity to bypass careful scrutiny of

activities which do impact severely (or can do) on neighbours ...But if what an appellant wants to introduce is not generally associated with what goes on in shops then it seems probable that Parliament intended that neighbours should have the chance to object to the grant of planning permission and thus force the owner to go through the appropriate procedures to get his planning permission.”

17. Finally, I refer to my judgment in *Hertfordshire County Council v Secretary of State for Communities and Local Government* [2012] EWHC 277 (Admin). This concerned an enforcement notice alleging a material change of use by way of intensification. In a passage which both Mr Glenister and Ms Olley submitted was correct, at [40-42], I said that it was clear that a material change in the use of land required “a definable change in the character of the use made of the land”:

“41. I have no difficulty in seeing that significant environmental effects, experienced on or off-site, may support the contention that a material change of use of land by intensification has occurred...[and] may be very relevant to the argument that there has been a material change in the character and use of land.

42. The relevance of impact comes in evidencing a material change of use of the land, a definable change in its character, but one which is defined by a material change of use, and not by a change however severe or minimal, in the effects of a use.”

18. In the Court of Appeal, [2012] EWCA Civ 1473, Pill LJ observed that impact could not be considered in isolation from what was happening on the land.

The statutory provisions governing a CLU

19. S191 enables a person who wishes to ascertain whether an existing use of buildings or other land is lawful to apply for a certificate of the lawfulness of that existing use. Uses are “lawful” at any time when no enforcement action may be taken in respect of them, whether because they did not involve development or require planning permission, or because the time for enforcement action has expired. The CLU procedure is not concerned with the planning merits of the use, that is, with whether planning permission, if applied for, should be granted, or granted subject to conditions.

20. S191(4)-(6) provide:

“(4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use...or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect and in any other case they shall refuse the application.

(5) A certificate under this section shall –

(a) specify the land to which it relates;

(b) describe the use ...in question (in the case of any use falling within one of the classes specified in the [Use Classes Order] Identifying it by reference to that class);

(c) give the reasons for determining the use ...to be lawful ;
and

(d) specify the date of the application for the certificate.

(6) The lawfulness of any use ...for which a certificate is in force under the section shall be conclusively presumed.”

21. The onus is clearly on the applicant to satisfy the local planning authority of the case for the CLU. On an appeal, the Secretary of State has to decide whether the refusal is well-founded, and if satisfied that it is not well-founded, he grants the certificate. The certificate is granted or refused, in the terms in which it is applied for, so the language of the certificate applied for is crucial, subject to the decision-maker’s power of modification. This exists for an entirely different reason than enabling the applicant to submit wholly inadequate applications, leaving the decision-maker to sort it all out.
22. If a decision-maker decides that the applicant has not proved the lawfulness of a use of the description for which the certificate was sought, he or she may decide that the lawfulness of a different use or a use differently described or over a different area, has nonetheless been proved as at that date. In those circumstances, the decision-maker may grant a certificate for that different use, modifying or substituting the description of that proven use for the one applied for.
23. The date of the application is the relevant date for the assessment of whether the activities proven amount to a material change of use or have become immune from enforcement control. It is not open to the applicant to contend that the existing use at that date is not what he is seeking a certificate for, but some reduced version of it, or to contend that that use, if reduced, from what it was at the date of application, would involve no material change of use. The relevant date here preceded the restrictions brought about by Covid.
24. The effect of the certificate is to make the use as set out in the certificate lawful under the Planning Acts, and so prevents enforcement action being taken in respect of it. A CLU is not personal; it runs with the land. Conditions cannot be imposed on it and there is no direct means of enforcing the limitations described on the use. Operating a use, therefore, in a way which adheres to the description of the use in the certificate cannot be unlawful. Operating a use in a more intensive or intrusive way than that described in a CLU is not of itself a material change of use; it might evidence a material change of use. A CLU does not set the limit beyond which a material change of use inevitably occurs. All that the local authority can do, where the description of the use is not adhered to, is to contend that the use as now being carried on is a material change of use from the lawful use as set out in the certificate. But that may

be very hard to show, where the ancillary or incidental use has been accepted as lawful, requiring no planning permission.

The Secretary of State's Planning Practice Guidance

25. The Secretary of State has issued Planning Practice Guidance, PPG, in respect of CLUs and as to when planning permission is required. The guidance on Lawful Development Certificates is a proper reflection of the legislation. It emphasises that:

“An application needs to describe precisely what is being applied for (not simply the use class) and the land to which the application relates. Without sufficient or precise information, a local planning authority may be justified in refusing a certificate.”

26. Later it states:

“A certificate for existing use must include a description of the use, operations or other matter for which it is granted, regardless of whether the matters fall within a use class. But where it is within a “use class”, a certificate must also specify the relevant “class”. In all cases, the description needs to be more than simply a title or label, if future problems interpreting it are to be avoided. The certificate needs to therefore spell out the characteristics of the matter so as to define it unambiguously and with precision. This is particularly important for uses which do not fall within any “use class” (i.e. “sui generis” use);

and where a certificate is granted for one use on a “planning unit” which is in mixed or composite use, that situation may need to be carefully reflected in the certificate. Failure to do so may result in a loss of control over subsequent intensification of the certificated use.”

27. The Guidance entitled “Do I need planning permission to homework or run a business from home?” is what troubled the judge granting permission. It is problematic as a statement of the law, and is potentially misleading, as I shall come to. It states:

“Planning permission will not normally be required to home work or run a business from home, provided that a dwelling house remains a private residence first and business second (or in planning terms, provided that a business use does not result in a material change of use of a property so that it is no longer a single dwelling house). A local planning authority is responsible for deciding whether planning permission is required and will determine this on the basis of individual facts. Issues which they may consider include whether home working or a business leads to noticeable increases in traffic, disturbance to neighbours, abnormal noise or smells or the need for any major structural changes or major renovations.”

The applications for a CLU

28. I need to set out something of the two applications, as the second application assumed acquaintance with the first. The first application, of February 2018, described Mr Sage as “Peak Fitness Personal Trainer”. The use for which he sought a CLU was described as “D2 Assembly and leisure (Use of a timber outbuilding as a one to one personal training studio)”. That is the opposite of what Mr Sage was in fact contending. The existing use, which was said to have begun in February 2016, was described as:

“The use relates to an outbuilding at the bottom of the garden being used as a personal training studio. Training is carried out on a one to one basis. The residential home is not affected.”

29. The grounds for seeking the CLU were that there had been no development, but the CLU was sought so that he could work from the studio. This application was refused and the refusal was appealed to the Secretary of State.
30. The Inspector’s decision on the first appeal identified as the main issue “whether the appellant has shown that use of a residential outbuilding as a one-to-one personal training studio is ancillary to the residential use of the dwelling and has not amounted to a material change of use requiring planning permission.” That is indeed the only issue.
31. It was agreed that the relevant planning unit was the dwellinghouse and its curtilage, rather than the outbuilding or the gym part of it; the dwellinghouse and its curtilage was the unit of occupation. The Inspector referred to the PPG, saying that: “Issues which might be relevant can include ...notable increases in traffic, disturbance to neighbours or abnormal noise.” He was “given to understand” that up to eight people a day could visit on weekdays, with up to four on Saturdays and two on Sundays. People could arrive as early as 06.00 and go as late as 21.30 on most weekdays. There might have been a modest increase in vehicular traffic in the “reasonably quiet, predominantly residential setting.” The Inspector was also “given to understand” that the studio use involved no external activities, and a noise survey showed noise levels during the personal training sessions to fall considerably below local average background noise levels for the relevant times of day, even in one instance when the outbuilding doors were left open. Noise from the outbuilding, music or exercise, was barely audible in the garden.
32. However, the Inspector said that the number of people accessing the property, DL11:
- “is likely to have resulted in a substantial increase in the number and frequency of daily comings and goings. Given the residential setting, this is likely to have caused a noticeable increase in general noise and disturbance in and around the property. Consequently having regard to the number, frequency and duration of the training sessions the studio use is materially different in character to use as a home gym by occupiers of the dwelling and it has appreciably changed the manner in which the property is being used.”

33. The first Inspector continued, saying that although the appellant, Mr Sage, had taken steps to minimise noise, and that the studio was currently used in the early morning and later evening only on three days a week, “these factors do not address the significant increase in general noise and disturbance due to the number of daily comings and goings to the property associated with the studio use.”
34. The appellant therefore had failed to show that the studio use did not amount to a material change of use of the property. Instead, the Inspector concluded that there had been a material change in character which had resulted in material change in the use of the property “to a mixed use as a dwelling and a personal training studio.” That is the correct analysis of the use on the appraisal of the evidence by that Inspector. It was not contended, as is a commonplace of CLU applications, that that use had endured for a sufficient length of time to have become immune from enforcement control.
35. Mr Sage therefore identified the weakness in his case for a CLU as being the evidence about noise and disturbance caused by the number of daily comings and goings associated with the studio use, at the level as at the date of that application. The second application for a CLU was intended to put that omission right.
36. The second application was dated 28 May 2019. That is the date by reference to which the nature of the uses at issue has to be assessed. This time the application said that the use was begun on 25 May 2019, which simply indicates muddle. This time the use for which the CLU was sought was “C3- Dwellinghouses”, which correctly reflects Mr Sage’s case. The description of the existing use was: “The current use of the outbuilding was not a material change of use of the planning unit”. This was seriously deficient, despite the box on the application form, reflecting the terms of s191 and Guidance, saying “Please fully describe the existing use...or activity for which you want the lawful development certificate.” The grounds for the application were set out in “attached submissions.”
37. These were prefaced by a reference to the first Inspector’s dismissal of the appeal on the basis that there was an increase in general noise and disturbance. The submissions then said that there had been a material change in circumstance as the hours of use were “now” on weekdays 06.00 finishing at 20.30 on Mondays and Wednesdays, 19.30 on Tuesdays and Thursdays and 19.00 on Fridays. Saturday sessions now lasted from 08.00-12.00. There were now no Sunday sessions. Tables attached to this attachment showed the mode of transport of clients. The application was accompanied, as supporting material rather than as part of the application, by letters from neighbours referring to their experience of noise or disturbance, or rather the absence of it. There was also supporting material in the form of a report from acoustic consultants on the noise created by comings and goings, stating that they created no discernible noise or disturbance. Accordingly, there was no material change in the use of the land and the Inspector’s “sole reason for refusing to issue a certificate has been surmounted.” There was no reference in the application itself or its attached submission to client numbers, or to any other aspect of the mode of operation than its days and hours.
38. LB Bromley refused to issue a certificate, saying that the use of the outbuilding for personal training sessions as described in the application and supporting documents would result in a material change of use requiring planning permission. It had

consulted in the area. There were responses saying that the use had created no disturbance, including from an immediate neighbour. Others objected, referring to disturbance, and saying that nothing had changed since the previous decision, conditions such as limits on hours could not be imposed on a CLU, and this was a business use, not incidental to residential use. LB Bromley said that:

“The degree of use requires an assessment of the likely impact of the use, for example what impact there will be on traffic, disturbance to neighbours and noise levels. The host dwelling is situated in a quiet street which is predominantly residential in character. Two client schedules for the weeks ending 18th May and 25th May 2019 have been provided detailing the number of clients that visited the property and their means of transport. The information displayed on the schedules is not clear but appears to indicate that during the week ending 18th May a total of 14 clients arrived either by walking or by taking a cab or tram and 18 clients arrived by car. During the week ending 25th May 2019 a total of 13 clients arrived by walking or by taking a cab or tram and 20 clients arrived by car.”

39. After referring to the first Inspector’s decision, LB Bromley’s decision report continued:

“While the issue of noise is addressed below it is considered that, based on the information provided, the frequency and number of daily comings and goings is still likely to cause disturbance to neighbouring properties when compared with the residential use and that even with the revised timetable the use has the potential to have a negative impact on existing residents. In addition, the location of the building would still result in the rear garden being used more intensively than a typical residential garden due to visitors who do not live at the property having access to it as a route to the studio.”

40. The report summarised the Claimant’s acoustic consultant’s report without dissenting from it. It also referred to “supporting information”, not part of the application nor its attached submission, that “no sessions take place within the garden and that the studio is fitted with an air conditioning unit which means that the windows and doors of the outbuilding do not need to be opened while in use.” Nonetheless the report concluded that the use of the building was still substantially different in character to the use of the host dwelling, and was sufficient to change the character of its use.
41. The Claimant’s appeal statement said that the correct test was whether there was any definable change in the character of the use of the dwelling unit. There was now no evidence, with the consultant’s report and the letters from local residents, to sustain the claim that the use would be likely to cause noise or disturbance to neighbouring properties. The fact that the use was being undertaken in the outbuilding as opposed to in the house itself could not make a difference in principle. This was not a case about intensification of use. The statement also referred to the reduction in numbers of clients. The introduction of a commercial use did not necessarily mean that there was a change in the character of the use of the property.

42. LB Bromley's statement summarised the responses from third parties, both for and against the application. It identified the key issue as being:

“whether the use of the outbuilding as a one to one personal training studio within the appeal site is ancillary to the established residential use of the dwelling, and whether it amounts to a material change of use of the site which requires planning permission. Planning merits relating to the use are irrelevant in this case.”

43. It discussed the “planning unit”, that is the area by reference to which materiality of any change in use had to be judged. It was agreed in this case, and accepted by the Inspector, that the relevant planning unit, was the whole house and curtilage including the outbuilding, and not just the outbuilding itself or the substantial part of it used for the training studio. It correctly noted that “activities initially incidental to the main use of an area of land may grow in scale to a point where they convert the single use to a composite use and produce a material change of use of the whole.”

44. The submission pointed out that:

“the personal training gym is not confined to the building - customers have to pass through the residential garden of the site in order to go to and from the building. The courts have held that one of the factors which can help to determine whether an activity is merely incidental or ancillary to a primary use is whether the introduction of the activity has what may be termed ‘planning consequences’ ”.

45. Having set out the previous decision and the summary of the Claimant's supporting material to the application, the statement concluded that, in view of the location of the property,

“it was still likely to be used more intensively than would be normal for a domestic garden, allowing for the fact that the use involves visitors who do not live at the property having access to the residential garden behind the house. The additional level of activity associated with the use is considered to be substantial and evident within its immediate environs.”

The use was substantially different from and not incidental to the residential use of the dwellinghouse as such.

The second Decision Letter, DL

46. The second Inspector's DL began by pointing out that the planning merits of the development are not material to the grant of a CLU. (Many of the letters in support had in fact dwelt on the planning merits of the small business which Mr Sage ran.)
47. She then explained, in DL4, that it was necessary to clarify the nature of the proposal, as this was not set out clearly in the application. The Inspector then rather indulged the Claimant, as had LB Bromley, by saying that the application was “to establish

whether the use of the existing outbuilding for personal training sessions, as described in the application and supporting documents, would result in a material change of use requiring planning permission. I have determined the appeal on this basis.” That is the purpose of the application but not the language of the application itself, nor the language of a detailed description of the use in respect of which a CLU was sought.

48. The Inspector, DL5, identified the main area of disagreement as being “whether the use, [as described in DL4] is incidental to the residential use of the dwelling or represents a material change in that use, that requires planning permission.” The question was whether the refusal of the certificate on that basis was well-founded.
49. She described the appeal site, DL7, as comprising:

“a two storey dwelling within a primarily residential area. The general character of the area is of close knit housing with small front gardens, set within generally modest plots. Some properties including the appeal site, have converted their front gardens into off street parking. At the time of my site visit there was considerable on street parking, although a number of spaces were still available.”
50. LB Bromley’s case was that the level of activity created by the use of the outbuilding was not incidental to the enjoyment of the dwellinghouse; planning permission was required. Mr Sage’s case was that the level of use was either de minimis or, if not de minimis, did not change the character of the use of the property comprising the planning unit, and so did not amount to a material change of use.
51. She identified the issue, DL12, before her as arising out of s55(2)(d): where a use, including home working, is incidental to the enjoyment of the dwellinghouse, then it does not constitute development. “It is therefore necessary for me to assess whether there has been material change in the character of the dwelling resulting from this particular activity.”
52. The Inspector found that the training itself was confined to the outbuilding. But access to the outbuilding was via a “narrow pedestrian access” between the property and its neighbour, and then through the rear garden. The outbuilding was used by Mr Sage, his friends and “for providing commercial personal training for visiting customers.”
53. She referred to the schedules for the two weeks in May 2019, around the date of the application, “which seemed to indicate some 32 or 33 business related sessions” weekly and also to the reduced numbers after the start of Covid restrictions in 2020, approximately 25, presumably business, callers at the gym in the week. (The statement of common ground referred to a maximum of 8 sessions a day, consistently with the use as described for the purpose of the first application.) The customers’ modes of travel, evidenced by data during the period of restrictions, could not be controlled readily. On-line Zoom sessions were not suitable for all Mr Sage’s customers, some of whom wanted to return to training on site when Covid restrictions were lifted.
54. The Inspector accepted, from the acoustics report and the evidence of third parties, that the training sessions “have little, if any, consequential effects on neighbouring

properties in terms of noise.” She did not however accept that childminding, for up to 6 children, was a suitable parallel: that level of childminding could constitute a material change of use, “depending on the particular circumstances of the site, such as type and size of the dwelling and its curtilage.”

55. She then said, in DL18-20:

“18. I acknowledge that the training sessions themselves appear to be well controlled, and this is a view supported by the acoustic report and evidence provided by local residents about the lack of noise. Nonetheless to my mind, noise is not the only factor to consider. The comings and goings that arise from at least 4 to 5 clients a day, in addition to those individuals who would usually be expected to visit a dwelling, can also cause disturbance to neighbours. Any disturbance is exacerbated by the tight knit design of the properties and need for callers to use the narrow access and small rear garden, which is clearly visible for [from] the rear windows and gardens of the neighbouring dwellings.

19. For the above reasons, in this compact residential setting, I do not consider that the scale of the business related training sessions, both at the time of the application, and at the reduced level, can reasonably be considered to be either de minimis or incidental to the enjoyment of the dwelling house. Accordingly, a mixed use has occurred. I am satisfied that this finding accords with the advice found on the Planning Portal and referred to in the appellants’ statement.

20. Consequently, in the particular circumstances of this case, I find that as a matter of fact and degree, the use of the outbuilding for business related training sessions on this scale, is not incidental to the use of the dwelling and results in an overall change in the character of the property.”

56. The Inspector also referred to Mr Sage’s personal circumstances, and the effect which that conclusion would be likely to have, particularly with the medical condition he had. It was that which had led her to consider the public sector equality duty in s149 of the Equality Act 2010, not an issue which the parties had raised before her. She expressed no particular conclusion on it, unless it is included in the way in which she concluded in the next paragraph, having referred to Mr Sage’s human rights in general terms, that the protection of the public interest could not be achieved with less interference in those rights. This too was not an issue raised before her by the parties.

The Claimant’s submissions

57. **Immaterial consideration:** Ms Olley submitted that the Inspector had not found that there was any notable increase in noise or disturbance to neighbours. She had then found that noise was not “the only factor to consider” and that there was what Ms Olley described as “visual disturbance”, which as Mr Glenister pointed out was not

the language used by the Inspector. This was said to have been found because the small garden was visible from the rear windows and gardens of neighbouring dwellings. “Visual disturbance” was an immaterial consideration as it did not feature in the PPG in the non-exhaustive list of “issues which [the decision-maker] may wish to consider” in deciding whether there had been a material change of use.

58. I cannot accept, to the extent that environmental impacts are relevant to the issue in a s191 case, that noise disturbance is in law relevant, but that visual disturbance is in law not. The list in the PPG “Do I need planning permission ...?” is stated to be a list of issues which the decision-maker “may wish to consider”. They are not mandatory considerations but possible ones. They include those referred to, without excluding in any way those not referred to. The distinction in this context would be irrational. The consideration was not immaterial in law.
59. **Adequacy of reasons:** Ms Olley submitted that the Inspector had not explained why there was visual disturbance from the 4 or 5 visitors daily. That meant that the reasoning was legally inadequate as it did not meet the requirements of *South Bucks DC v Porter* [2004] UKHL 33 at [36]. How could “visual disturbance” occur and what was the difference in visual terms between a paying customer and a friend who did not pay? DL 19 showed that the reasons in DL18 underlay the dismissal of the appeal, the main one of which was this factor.
60. Reasons must enable the reader to understand why the matter was decided as it was, and what conclusions were reached on the principal important controversial issues, disclosing how any issues of fact or law were resolved. The letters are to be read in a straightforward manner, and not leave any substantial doubt to whether there was an error of law in the decision. The deficiency in that standard of reasoning must also substantially prejudice the losing party, for example by leaving him unable to understand how to adjust the proposal so as to overcome objections. The absence of such prejudice is not of itself the test for the legal deficiency in reasoning, though both are required by s288 for the decision to be liable to be quashed.
61. It is important, in my judgment, to set the passage which is said to be inadequately reasoned in context. The Inspector has dealt with the training sessions themselves, that is with what happens in the studio itself, in DL16; they do not create a noise problem. In DL18, she is looking at disturbance generally, having already pointed out that Mr Sage has no real control over how people now or in the future may travel to the studio. When she says, DL18, that noise is not the only factor, she is talking about the noise from the sessions themselves. She then refers to “The comings and goings that arise from at least 4 to 5 clients a day”. This “can also cause disturbance to neighbours.” It is focussing on what makes residents aware of the extra activity. It covers the general disturbance, including at the front of the house from the arrivals and departures of business clients, the sound of steps or conversation in the shared alleyway and garden, and their visible presence in the garden, rather than just at the front of the house, all in addition to the normal comings and goings of a dwelling house, including the use of the gym by family and friends. The Inspector continues: “Any disturbance is exacerbated by the tight knit design of the properties...” That too is a reference to the scope for general disturbance caused by the proximity, presence and passage of the clients. It is not confined to what is visible, but focusses on the proximity of residents to these comings and goings, and their awareness of what was going on. It is not determinative for this issue that the supportive individual

neighbours did not consider themselves disturbed. It is an objective assessment of the effect on residential amenity that is needed., and which is given in DL18.

62. There is no deficiency in reasoning. It is a perfectly straightforward expression of the planning judgment on the issues the Inspector was seeking to resolve.
63. **Irrationality:** Ms Olley submitted that it was irrational to reach that conclusion on disturbance, visual or otherwise, in view of the evidence. Neighbours said that they were not disturbed by the use of the property, or comings or goings. The acoustic consultant's report showed that there was no disturbance from the noise of comings and goings either, and the Inspector had said nothing to suggest that that report, which was not disputed, had not been accepted. So, the Inspector must have been dealing with the visual effect of the clients in the garden, who, submitted Ms Olley, could only be seen from the upper windows of neighbours. Seeing other people in a garden for the short time it took to walk through the quite small garden, and who were not making a noise, could not rationally be regarded as a disturbance, at least without explanation. "Can also cause disturbance" was an expression of a possibility rather than an evidence-based conclusion as to what happened with the existing use, which is what the Inspector should have focussed on. There was no number of people which it was normal for a dwellinghouse to receive as visitors. There was no basis for the Inspector's conclusion on human rights, nor did she reach a view on s149 Equality Act, where Mr Sage's medical condition was a "protected characteristic."
64. First, I note that some of Ms Olley's written submissions under this head continued allegations which were in effect that "visual disturbance" had not been raised as an issue, and that the upper floors of neighbours had not been visited, and she had instructions as to what could or could not be seen. She had been refused permission by Sir Ross Cranston, sitting as a High Court Judge, to adduce witness statements which she would have relied on, in this context. I am not prepared to accept arguments, which if properly arguable, would have required an evidence-based amendment to her grounds. They simply raised no such point. Nor am I prepared to accept what her solicitor instructs her by way of what could or could not be seen, or as to what happened during the site visit. That would have required evidence, so that response could have been made. I am going to take it that the Inspector could see all she needed to see to reach the conclusions she did. And if she did not go up to the first floor of neighbouring property, she could judge from the garden and alleyway, what could be seen from neighbouring windows looking over where she was.
65. Second, taking the wrongly over-emphasised environmental impact approach, the issue was not whether the use was at a level where planning permission should be refused but whether it had reached the level where planning permission was required, or to put it another way, had reached the level where, if to be permitted, it needed to be controlled by enforceable condition. As I have explained when dealing with the reasons ground of challenge, the Inspector was considering the general disturbance in a residential area, from comings and goings for a business use in a residential property. This is a matter for a planning judgment which by its nature is not susceptible to much analysis. What she considered neighbours, objectively, would be aware of and disturbed by was for her: there are obvious enough sources for it, in the general disturbance I have described in relation to the reasons ground of challenge. The numbers of "at least 4 to 5" customers each weekday, with no reference to a maximum, if they were the figures she had in mind as the May 2019 level of activity,

still have to be added to those who come to use the gym as friends or non-resident family, and are in addition to the normal comings and goings at a dwellinghouse. The commercial use is routine: every weekday and half of Saturday, with some quite early and late hours. The mode of transport cannot be controlled. It is a small property in a tight-knit residential area. The judgment she reached cannot be described as irrational.

66. I accept Ms Olley's point that the Inspector, in reaching her conclusion on fact and degree, in DL19 is repeating what she said in DL18, where she attributes the material change of use or non-incidental use to "the above reasons." These reasons are based on the degree of disturbance. But that can only be used as an indicator of scale and degree. If it were to have been treated as the touchstone or test, that would have been an error of law but one in favour of Mr Sage.
67. Third, the number of visitors, the number of days a week, the hours of daily operation of the studio, all as a routine, are the crucial determinants of scale and degree: is that a use incidental to the use of the dwellinghouse as such? That is the question which the Inspector was truly answering. The environmental impact was only one aspect of that issue. The essential conclusion of the Inspector was that, as a matter of fact and degree, the level of use had gone beyond that point. That is a planning judgment which is unarguably rational. Indeed, I cannot see that she could rationally have reached any other conclusion.
68. The Inspector did not refer in this context to the acoustic report, which was said to show that there would be no noise disturbance from the sound of the comings and goings. I am not clear how the report could be said to have shown any such thing. The Inspector, moreover, would have needed no expert to tell her what noise of footsteps might be audible to a neighbour and, if heard, disturbing.
69. The acoustic report itself is based on the understanding that up to 8 people on weekdays, up to 4 on Saturdays, and up to 2 on Sundays, may come to the studio, a higher level than the Inspector may have based her decision on. It used as the closest sensitive receptor, a front window of the neighbour to the passageway, where noise levels were dominated by road and railway. It took a one hour reference period against which it assessed the effect of 4 trips each of 30 seconds from road to outbuilding and back. The noise levels assessed from those trips did not exceed the background noise level; the background noise level, or L90, is the noise level exceeded for not more than 90 percent of the time period chosen, here one hour. What the report does not explain is how the L90 can tell of anything useful in relation to the disturbance caused by noise events which last two minutes per hour and rather less than 10 percent of the total L90 period, or why that is one whit more useful than what an Inspector, or other human being, would understand from everyday experience, applied to the route over which customers walked, its distance and its proximity to the neighbouring property. Ms Olley could not explain either.
70. Indeed, the Inspector may have reached her judgment on a basis which may err in a way favourable to the Claimant. First, the relevant figures are those as at May 2019, and not the Covid reduced figures a year later. The Inspector ought not to have considered the reduced number following Covid restrictions. Second, the Inspector referred to "at least 4 to 5 clients a day, in addition to those individuals who would usually be expected to visit a dwelling." "At least" is important. The relevant figure

appears likely to have been higher than 4 to 5. The weekly business visitor numbers set out in the Schedules referred to in the DL are 32-33, and so at least 5-6 every day for 6 days a week; from the hours set out in the “attached submissions” they are likely to be higher on the 5 weekdays than on Saturdays. The statement of agreed facts states that “the maximum daily number of persons who visit for training by the appellant is 8”. This is in line with the previous appeal, and the difference was in the reduced hours of operation, but not in numbers. It is in line with the figures in the acoustic report. The factual issue of Sunday use in May 2019 was not resolved, as the application differed from the supporting material. I read the DL as taking “at least 4-5” daily customers as being the Covid average and the non-Covid average as being higher, and up to 8. “At least 5 to 6 and up to 8” would have been closer to the weekday levels figures for May 2019, supplied at various stages for the second application. Properly approached, the acoustic report would have reinforced the Inspector’s conclusions.

71. There were no submissions on the human rights point; this appears to have been raised by the Inspector in her DL; no human right was suggested to me, as affected by the decision. None spring to mind. The public sector equality duty may have been a point the Inspector considered because of a medical condition, if characterised as disability, on Mr Sage’s part. But no point was pursued on it before her or me, beyond Ms Olley pointing out that she may have reached no view on it.
72. This ground of challenge also fails and with it the claim.
73. I need to say something, helpful I hope, about the form of application and the PPG.

The form of the application

74. I have made brief comments about the way in which the application was formulated. But more needs to be said. Applications for CLUs require detail and specificity. S191(5) of the Act, and the PPG which accurately reflects that provision, are clear about what is required. The description of the existing use here was wholly inadequate for a CLU.
75. The Claimant, if successful, was expecting the decision-maker to do a considerable amount of careful drafting, including by reference to conflicting material on numbers supplied by him, but not as part of the application. The vaguer it was, the more a different occupier, or Mr Sage with a change of outlook, could have exploited it without risk of a material change of use occurring. Ms Olley suggested that the Inspector would have sorted things out. I do not know about that, but she should not have been expected to do so.
76. Obvious problems were: what were the numbers in the existing use in the business as at May 2019? What was the maximum in a day or week? The lower numbers during the period of Covid restrictions have no relevance at all. What, if anything, was to be described as the garden use and means of access? Passage by visitors in silence? Warming up or down? No stretching exercise at all, or only none by commercial clients? Were the outbuilding doors opened other than to allow people in and out? Did people cross the garden to go to the house to use the lavatory?

77. Mr Sage could have had no legitimate complaint if the application had been rejected out of hand in the form in which it was presented. It could not have been granted as applied for. The modification power would have been tested to the limit.
78. Ms Olley drew my attention to the way in which Mr Sage kept his charges low so that “ordinary” people could benefit from his services, and to how many of his clients would not go to a public or shared facility because of their personal circumstances. He had offered free services during the first Covid lockdown, and Zoom exercise sessions. This is immaterial. It could not form part of how the existing use was described. This rather illustrates how the application crossed the line from asking whether a material change of use had taken place, to asking whether unconditional planning permission should be granted for this particular individual’s business. These problems would have been clearer had the description complied with the requirements set out in the Act, Guidance and application form. Mr Sage has got as far as he has by failing to describe the business use with any specificity.
79. Were I otherwise minded to quash the decision, I might well have refused to do so because the appeal ought to have been dismissed on the ground that no certificate could properly be granted as applied for. A proper application ought then to have been submitted.

The Secretary of State’s Planning Practice Guidance

80. The Guidance on the application for a CLU is correct in law, and clear. It is the Guidance “Do I need planning permission to homework or to run a business from home?” which is problematic and on which I now comment, particularly in the light of the observations of Mr Mould, granting permission. I have already set out the relevant case law.
81. This latter Guidance suffers from two main problems. The first question is what use is being made of the land, including its ancillary uses, and, in the case of a dwelling house, whether any purposes to which it is put are reasonably incidental to its use as a dwelling house. The passage in brackets at the end of the first sentence of this guidance is correct but too readily capable of leading to the concept, of a material change of use or a purpose incidental to the use of dwellinghouse as such, being misunderstood. This is because a business use in a dwellinghouse may well be secondary to the primary residential use of the dwellinghouse; but may still create a material change of use, be for a non-incidental purpose. A secondary use will involve a material change of use of the dwellinghouse to a mixed or composite use, as was found to have occurred here, unless it is so secondary that it is merely ancillary to the residential use as a dwelling house such that there is still just that one use; or in the case of a dwelling house, the purpose at issue is reasonably incidental to the enjoyment of the dwelling house as such. This is a crucial point which the Guidance ignores or blurs badly.
82. Second, a material change of use can be made without any adverse environmental impact at all. Treating environmental impact as the seemingly crucial issue for the judgment as to whether a material change of use has occurred, or a purpose is reasonably incidental is not consistent with clearly established law. The crucial test is whether there has been change in the character of the use. Environmental impact can be relevant as evidence that a material change has occurred, because a use of the new

character may be capable of yielding environmental impacts or have done so already. The Guidance as written is apt to mislead as to what the real question is, and as to the true but limited relevance of environmental impact.

83. Once the use of the outbuilding for the business of a personal training studio for paying visitors is accepted as an ancillary to or reasonably incidental to the use of a dwellinghouse as such, the difficulty of measuring the materiality of a change in the scale of the activities or their mode of operation points to the limitations of using environmental impact as the measures not of impact but of materiality of the change of use. It appears quite difficult to contend that using the garden for exercise, warming up and warming down, post-exercise conversation, refreshment, or using the outbuilding with the doors open in hotter weather or if the air-conditioning is inadequate, or enabling visitors to traipse to the lavatory and back, involves a material change of use, when use of the outbuilding for 6 days a week for personal training did not. This is the more so if others, who are not commercial clients, do so. It is difficult to see that an increase in numbers and disturbance would be of itself a material change of use. The neighbours might change; a new owner of the house could intensify the use. There could be, as here, a local difference of view about the effect of the business. This all is grist to the mill of the limitations of the role of environmental impact in resolving the materiality of a change in use and the incidental nature of the additional use. The Guidance is far too loose to reflect the true focus of the question at issue.
84. I also appreciate that there are many forms of service offered within a dwelling house, from private tuition, including in music or singing, child minding, medical services. I accept that what is normal or reasonably incidental now may have shifted with changes in work habits as a result of Covid. This is not relevant to this particular case. And an important distinction would have to be drawn between working from home, where work-related visitors were few and far between, and working from home which took the form of routine and frequent work-related visitors, notably customers. However, the question of how much actual noise the music or maths teacher and pupil make, how much actual disturbance is generated by young children or dogs being minded, is not the touchstone of the materiality of the change of use, although it may point to a nature or degree of use which is materially different from that of a dwellinghouse or its incidental purposes. One is a residential use, and the other is a residential and commercial use. Of course, they both may vary in their intensity and impact, but one cannot be controlled through the need for planning permission and the other can and should be.
85. I appreciate that this is guidance, drafted for the general public and not for experienced lawyers, and I do not wish to be overly critical of an attempt to put the point in layman's terms. There was however no dispute from either Ms Olley or Mr Glenister that this Guidance suffered from these identified problems.
86. It seems to have affected the way in which appeal was presented, and hence the way in which the decision was framed and focussed, although not in a way adverse to the Claimant. Naturally, it affected the focus of Ms Olley's submissions. The law would have been rather more adverse to Mr Sage, with the true emphasis on the character of the use, the objective component in what was incidental, the scale and nature of what is incidental, and the indirect relevance of environmental impact. Indeed, an Inspector properly directed by lawful guidance could not rationally have concluded, as a matter

of fact and degree, that the six day a week use, with 30 or so sessions, with the hours envisaged on this property in a tight knit residential area, was incidental or ancillary to the use of a dwelling house as a dwelling house.

Overall conclusion

87. This application is dismissed.