Neutral Citation Number: [2023] EWHC 2278 (Admin)

Case No: CO/284/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/09/2023

Before :

MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL

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Between :

The King on the application of OWOLABI ARIYO	**Claimant**
- and -	
RICHMOND UPON THAMES LONDON BOROUGH COUNCIL	**Defendant**
ARBEN JAHJA and PAUL JIT DHILLON	**Interested Parties**

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- -

Barney McCay (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Charles Streeten (instructed by **South London Legal Partnership**) for the **Defendant**
No appearance or representation for the **Interested Parties**

Hearing date: 25 May 2023

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Approved Judgment

C M G Ockelton :

Introduction

1. This is an application for judicial review of a decision of the defendant planning authority, Richmond upon Thames London Borough Council ("the Council") to grant planning permission for an extension to a restaurant. The claimant, Owolabi Ariyo, lives next door. The interested parties, Arben Jahja and Paul Jit Dhillon, are the owners of the restaurant. They have not taken any part in these proceedings. Permission was granted, with other consequential Orders, by Lang J on 1 March 2023. There has been extensive exchange of written arguments and other materials between the parties, and I am also asked to grant permission to amend the grounds and to allow the defendant to rely on a skeleton argument exceeding the normal maximum length of 25 pages.

2. The claimant has sought to add further grounds or points of claim after seeing the defendant's Detailed Grounds of Defence. It was not quite clear on what basis these were put forward. On the one hand they were said to be a mere expansion of matters already pleaded in the Statement of Facts and Grounds accompanying the claim form or in the Reply that Lang J had allowed the Claimant to rely on. That approach, however, is not consistent with an agreed list of issues for the Court to determine, which sets out certain issues as arising only if the new grounds are permitted. The defendant resisted the application. It says that some or all of the matters that the claimant now seeks to add are new and that it is too late to add them: the claimant should have put his case comprehensively when he issued the proceedings, and it is not right that the defendant should be faced with new issues after compiling its defence. The defendant might want to be able to rebut the new material by evidence.

3. At the beginning of the hearing, I ruled that the added grounds would not be admitted. Insofar as they are encompassed within the existing pleadings the addition is unnecessary; insofar as they are not, the addition does not meet the justifiable demands of procedural rigour and would be unfair. The new points are not of such obvious merit that their substance calls for consideration in determining whether to allow their admission. It follows that any questions that would require determination if the new grounds were admitted do not fall for decision.

4. The second procedural issue is that the defendant sought permission to rely on a skeleton exceeding 25 pages in length. It is regrettable that its draftsman was not able to write more concisely in what is after all not a case of the utmost complexity, but no issue of fairness arises. I granted permission for the skeleton as filed to be used.

The Claim

5. The site is at 208 Hampton Road, Twickenham, TW2 5NJ. So far as concerns its basic appearance from the front, the building is one of a row of shops with residential accommodation above. The ground floor has operated as a restaurant since about 2005, planning permission having been granted on appeal for change of use to Class A3. In 2008 there was a further grant of planning permission to mixed A3/A5 use to allow takeaways from the restaurant. In the mean time, in 2006, the Council had granted planning permission for development at the back of the property and in its back garden, consisting of the demolition of the garage and construction of a new garage, a detached store, and an extension to the main building. It is not clear that the store was ever built.

6. In 2021 and 2022, the Council investigated a possible breach of planning control. A building, called in the documentation a 'pergola', had been erected in the garden, occupying most of the space between the main building and the garage, and apparently intended for use as an extension to the seating area of the restaurant. It is this building, subject to proposed modifications, that is the subject of the decision under challenge and the present claim. The interested parties applied for retrospective permission to retain the pergola but shorten it, but permission was refused on 1 April 2022, and an appeal was dismissed.

7. Promptly after the appeal decision, the interested parties submitted a further similar application, this time also proposing a reduction in height. The claimant submitted a letter of objection. Following a discussion between the interested parties and the defendant, the application was modified so that as at the time of decision the floor level was to be lowered by 30 cm (thus reducing the roof height by that amount), reducing the length of the structure at the end nearer to the main building, so that there would be a space between the two of them, and screening was proposed between the site and the claimant's property at no. 210. On 12 December 2022 the Council granted permission subject to conditions including screening of that boundary, for a period of five years expiring on 12 December 2027. That is the decision under challenge. The claim was received on 23 January 2023.

8. The grounds of challenge are as follows. First, in making its decision the Council erred in thinking that restaurant use was a lawful use of the garden part of the site. Secondly, the officer's report supporting the grant of planning permission was inconsistent with that supporting the refusal of the immediately preceding application in its assessment of the impact of noise: the earlier report had said that noise was a material consideration counting in favour of refusal, whereas the later had discounted this factor on the basis that the noise impact was already lawful. There should have been a clear statement of the reason for the change of view. Thirdly, the two reports were inconsistent on the physical aspects of the impact of the structure: again there should have been a clear statement of the reason for the change of view. Fourthly, the decision failed to take into account the claimant's rights to private and family life under article 8 of the European Convention on Human Rights. Fifthly, the defendant was guilty of procedural unfairness: having allowed a modification of the application on which there had been consultation and to which the claimant had responded, it should not have proceeded to grant planning permission without giving the claimant an opportunity to respond to the modified application. The defendant resists the application on all grounds.

Grounds 1 and 2: the facts

9. Grounds 1 and 2 raise separate issues, but they are both concerned with the existing lawful use of the garden space at the rear of no.208. The relevant background facts are essentially the same and must now be examined.

10. The starting point is the application for, and grant of, planning permission for change of use in 2005. I have not seen all the application papers. There were two plans. One showed, edged in red, the entirety of the premises, including the rear garden and garage, as mapped by the Ordnance Survey. The other showed only the main building on the site, with no indication of surrounding land. On this plan, the ground floor is principally divided into "restaurant" at the front, and "kitchen" at the back. To the

side of the restaurant frontage is a part reserved for a separate "entrance to upper floors", leading to a staircase up; behind that feature, but accessible only from the restaurant, are toilets and a fire escape door. There is a separate toilet serving the kitchen; there is no access to the land at the rear from the restaurant save through the kitchen or the fire escape. The arrival of the stairs on the first floor is indicated in the second element of the plan, which shows the whole of that floor. The inspector's decision summarises the application as "change of use of the ground floor from a general hardware store (Class A1) to a restaurant (Class A3)". It notes that the ground floor is currently in use as a hardware shop, and that "in the area to the rear, there is a polytunnel where plants are grown for sale in the shop". It concludes that change of use would (in broad terms: the details are not important in the present context) be advantageous.

11. In relation to conditions, the inspector required details of the proposed extraction and ventilation system to be provided as a safeguard to the amenities of surrounding residents, and for the same reason imposed a condition limiting opening hours, but did not require the hours to be displayed, or a further condition limiting the time staff could be on the premises. Specifically in regard to general noise the inspector wrote "I agree that a condition requiring sound insulation between the proposed restaurant and the residential accommodation above is necessary to safeguard the amenity of those residents". Subject to those conditions, permission for change of use of the ground floor was granted.

12. The application for structural alterations resulting in the grant of permission in 2006 was accompanied by plans of what was proposed. The whole of the existing ground floor area previously occupied by the spaces called "restaurant" and "kitchen" (and including the staff toilet) would become the dining area of the restaurant. A new extension to the rear would house the kitchen, and another smaller one behind the existing toilets would be part of an extended toilet block. Again, there would be no access from the restaurant to the garden area except through the kitchen (no separate fire escape is shown). As already indicated, there was to be demolition and rebuilding of the garage (at the rearmost part of the property) and construction of a store adjacent to the boundary with no. 206, about halfway down the garden.

13. The second change of use application, received by the Council on 25 July 2007, is described under "Proposal" as "Amendment to existing planning permission COU from A1 [sic] to A3/A5". There is again a site plan identifying the whole premises and adjacent features. There does not appear to have been any other more detailed plan of the premises. The report makes it clear, however, that although part of the takeaway trade is envisaged as from customers entering the restaurant from the street, another part will consist of deliveries to be undertaken from the rear of the premises, presumably by drivers with access to the kitchen through the garden. The grant of permission contained conditions about extractor plant similar to those already in force, and about hours of operation and in particular prohibiting "moped/motorcycle deliveries" from the rear of the property in the evening. The grant of planning permission was limited to one year, following which the lawful use reverted to that in the 2005 permission.

14. Physical changes in the garden area are set out by the claimant in his witness statement of 23 January 2023 and accompanying photographs. There is no reason to doubt the history he gives. The first photograph was taken by the previous owner of

no. 210, said to have been in September 2014. It shows the sort of frame used to support a polytunnel, though with no cover. The area encompassed is a very large proportion of the garden between the extended kitchen and the rebuilt garage. As noted earlier, there is no sign of the detached store. The space appears to be occupied by largely unkempt vegetation and patches of rubble. The second photograph is the first of a series taken by the claimant. By March 2021 there was an opaque cover over most of the frame, and there is some sort of plant and perhaps scaffolding within it. In the third photograph, of August 2021, the cover is still there; the signs of construction activity under it are a little clearer, and the garage has been partly demolished and is being rebuilt. There is a "portaloo", of the type used on building sites, behind it.

15. The photograph of 4 September 2021 shows the rebuilt garage building substantially higher than its predecessor. The boundary fence between nos. 208 and 210 has been removed and the framework of a new boundary, perhaps a little higher, has been erected. The ground between the rear kitchen and the rebuilt garage has been cleared and levelled; there is a tracked vehicle equipped with a bulldozer blade and screw bore, and a spare shovel attachment to hand. The driver's seat is occupied. On 2 October 2021 the claimant photographed the pergola in course of construction. There are metal stanchions running along close to both side boundaries of the garden and a further row to support a low-pitched roof. The structure will evidently occupy all, or very nearly all, of the space between the main building and the rebuilt garage. The boundary fence has been replaced in the new framework for it; the side walls of the pergola are higher, and the pitch of the roof will be at the level of the garage as raised in rebuilding. This picture also shows that the rear extensions of no. 208 are not those authorised in 2006: it looks as though there has been a further extension to the rear of the (then) toilet extension, bringing the two elements to a common rear plane. (There is a suggestion in the papers of further consents, including perhaps consent for this.)

16. A further photograph, taken at night in August 2022, shows the pergola fully lit for use and occupied by dining tables and chairs.

17. The applications and decisions in 2021-2022 do not purport to have any change of use content, but they are relevant as part of the history behind grounds 1 and 2 because of some of the comments made. The officer's report in relation to the first retrospective application said this: "The ground floor and rear of the site is currently used as a Class E(b) Restaurant. … The use of the rear garden by customers is not restricted by planning condition and is not in breach of planning control given the long-standing use of the premises as a restaurant. … Noise: … The commercial use of the rear garden is lawful in planning terms and associated noise connected with this land use, whether open or enclosed, cannot be raised as a material reason for refusal in this case". In the "recommendation", however, the officer wrote, after recommending refusal based on the physical aspects of the pergola, "It is also unclear the scale of noise disturbance on the adjoining neighbours and if this will lead to an unacceptable loss of amenity". The actual refusal makes no mention of this factor. (I should note that the reference to "Class E(b)" the result of the changes in classification introduced by the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020. Class E(b) encompasses 'Use, or part use, for the sale of food and drink principally to visiting members of the public where consumption of that food and drink is mostly undertaken on the premises.)

18. In her decision on appeal, the inspector wrote this:

> "9. I note from the officer's report that the use of the garden by restaurant customers "is not restricted by planning conditions and would not in breach [sic] of planning control". However, it is my view that the use of such a garden area for occasional outside seating (weather permitting) would be a very different prospect to the creation of a permanent, large, enclosed structure to facilitate year-round usage by restaurant guests."

19. The officer's report prepared for the second application for retrospective planning permission said this: "The ground floor and rear garden of the site is currently used as a Class E(b) Restaurant. … The use of the rear garden by customers is not restricted by planning condition and is not in breach of planning control given the long-standing use of the premises as a restaurant. Consequently, issues associated with this use, such as noise or parking, are not in question. Mitigation of noise disturbance is secured by existing planning conditions. Any breaches of conditions, such as operating hours of the business, should be dealt with separately to this application. … Noise: … The commercial use of the rear garden is lawful in planning terms and associated noise connected with this land use, whether open or enclosed, cannot be raised as a material reason for refusal in this case".

Ground 1

20. The claimant's principal claim is that the Council was wrong to consider that the use of the garden as a restaurant was a long-standing lawful use. The defendant meets that argument in two ways. First, it argues that the use of the garden as a restaurant was lawful as a result of the grant of planning permission in 2005. Secondly, it argues that the question whether the use was longstanding and lawful was a matter of fact and degree and a pure matter of planning judgment for the Council and so not amenable to challenge in this Court.

21. I deal with the second argument first, as I must (because if correct it nullifies consideration of the first). I accept that whether a use is longstanding is a matter of assessment. Further, whether a use ought to be permitted is clearly a matter of planning judgment. But whether an admitted use is (or would be) lawful is not a matter of planning judgment: it is a matter of law, within the jurisdiction of the Court. The Court needs to construe any existing grants of permission, and if appropriate any provisions relating to permitted development; the Court needs to decide whether the use is permitted or if for some other reason cannot be the subject of enforcement. I do not accept Mr Streeten's argument that this is not a matter for the Court.

22. I turn then to evaluate the claimant's argument. It is a short one, because it asserts a negative: that there is no lawful authority for use of the garden as a restaurant. The defendant's response is more complex, because it deals with a number of ways in which it says it can be shown that the use is permitted. It is not suggested that a change of use from the pre-2005 use of the garden for growing plants sold in the hardware shop to use as a restaurant would not be a material change of use and therefore a development requiring planning permission. As it appears to me, the use of the garden as a restaurant, or as part of the restaurant, would be lawful if (a) it was expressly permitted by the 2005 grant of planning permission; or (b) if the 2005 grant

of planning permission were subject to some principle of interpretation implying a grant of permission to the necessary effect; or (c) if a use originally not lawful had, through the passage of time, ceased to be amenable to enforcement.

23. The defendant points out that the premises were identified in the 2005 application by reference to a plan showing the boundary of the applicants' ownership. The position is confirmed, in Mr Steeten's submission, by the plans in the application and the officers' report in relation to the second change of use, and further, by the fact that the latter proposal included the use of the back access for loading takeaways for delivery. It is said to follow that the permission was specifically granted in relation to the whole of that site. Mr Streeten relies for that proposition on Barnett v Secretary of State [2010] 1 P & CR 8 at [29]; but that was a case where the question was the extent of the curtilage of a newly-built dwelling house, it being accepted that use ancillary to the purposes of the dwelling would be permitted within that area, whatever it was. Here there is no doubt about the area: the question is the extent to which the area has permission for the use in question. Barnett provides no assistance on that.

24. The problem with the argument that the site plan governs the permission, to my mind, is that it cuts across almost every other aspect of the 2005 application and resulting grant. First, it is abundantly clear that there was no application to use the building above the ground floor, or the part of the ground floor with its separate entrance to the residence above, as a restaurant. Both are within the boundaries outlined on the plan. Secondly, the application was specifically for change of use of "the ground floor", not the whole of the building or the whole of the property. Thirdly, the grant included conditions of soundproofing in the construction of the building to protect those in the flat above from noise from the restaurant, which would be ineffective if the garden were to be used as a restaurant too. In DC Symmetry v Swindon Borough Council [2022] UKSC 33 the Supreme Court has indicated that one factor to be taken into account in interpreting conditions in a grant of planning permission is "any other conditions which cast light on the purpose of the relevant words" (per Lord Hodge at [66]); it seems to me that that is also a proper factor to take into account in interpreting the extent of the permission itself.

25. Using the plan of the whole property to construe the grant of planning permission in 2005 as a grant extending to the use of the garden, but not the residential parts of the house as a restaurant is neither principled (because clearly not all the property was included in the application) nor reasonable (because the grant followed the application, which sought permission only for the "ground floor"). It verges on the absurd in that it is impossible to see that a person who thought permission was being granted for restaurant use in the garden would have sought to protect from noise only those living in the same property, and them only from noise arising from restaurant use within the building itself.

26. The grant of temporary permission for additional A5 use in 2008 does not change the position. The application did not seek to extend the area of permitted restaurant use, so an area not having permitted restaurant use before that grant did not have it afterwards either. The use again of the Ordnance Survey map to identify the property is again not to the point; neither is the fact that some deliveries may have been intended to be from the back of the premises: carrying a takeaway meal for delivery does not mean that every place where it is carried is being used as a restaurant or needs permission for such use.

27. The grant of permission for the extension in 2006 was perhaps capable of altering the position, because if there were no existing lawful use of the garden as a restaurant, the occupation of part of the garden by the extended kitchen would constitute a change of use of that part. No point was taken on this. In any event s 75(3) of the Town and Country Planning Act 1990 would apply: the grant of permission for construction of the kitchen extension included permission for its use for the purpose for which it was designed. There was no impact on any other part of the garden.

28. I interpret the grants of planning permission in accordance with the principles set out by Keene J (as he then was) in R v Ashford BC ex p Shepway DC [1999] PLCR 12 at 19-20. I conclude that on their face they apply only to the ground floor of the building.

29. The question then is whether there is some means by which the grant of permission for change of use of the ground floor of the building, although apparently expressly only for that area, carried with it permission to use some larger space as a restaurant. The only means suggested is that the grant applied to a planning unit larger than that specifically covered by the terms of the grant itself. This is a difficult argument, but Mr Streeten makes it, so I must deal with it. I acknowledge of course that the identification of a planning unit is a matter of planning judgment, as emphasised by Lang J after reviewing the authorities in R (KP JR Management Co Ltd) v Richmond upon Thames LBC [2018] EWHC 84 at [59]. In that case, there were opposing views on whether individual boats within a single mooring area on the bank of the Thames constituted separate planning units or were together a single planning unit. Each of the views was supported by legal advice. The Council had taken into account all relevant material in making its decision, which was accordingly lawful.

30. In the present case there is so far as I can see no suggestion that any proper investigation of the extent of the relevant planning unit was undertaken at any stage. It seems to have been assumed by the authors of the reports in 2021 and 2022 that there was permission to use the garden as a restaurant: that was an assumption, not a decision, either that the 2005 consent applied to the garden on its face or that it applied to a planning unit larger than that specified on its face. It is therefore right at least to consider whether the absence of proper consideration of this issue was material.

31. The leading and classic authority on the identification of planning units is Burdle v Secretary of State for the Environment [1972] 1 WLR 1207. At 1212-12103 Bridge J (as he then was) said this:

> First, 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, the whole unit of occupation should be considered. That proposition emerges clearly from G. Percy Trentham Ltd. v. Gloucestershire County Council [1966] 1 W.L.R. 506, where Diplock L.J. said, at p. 513:
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> "What is the unit which the local authority are entitled to look at and deal with in an enforcement notice for the purpose of determining whether or not there has been a 'material change in the use of any buildings or other land'? As I suggested in the

> course of the argument, I think for that purpose what the local authority are entitled to look at is the whole of the area which was used for a particular purpose, including any part of that area whose use was incidental to or ancillary to the achievement of that purpose."
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> But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separate and physically distinct areas of land.
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> Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit.
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> To decide which of these three categories apply to the circumstances of any particular case at any given time may be difficult. Like the question of material change of use, it must be a question of fact and degree. There may indeed be an almost imperceptible change from one category to another 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. Again, activities once properly regarded as incidental to another use or as part of a composite use may be so intensified in scale and physically concentrated in a recognisably separate area that they produce a new planning unit the use of which is materially changed. It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally."

32. In that case, as in a number of the other authorities on the subject, the planning unit had to be identified for a retrospective purpose, that is to say in order to identify whether events that had occurred constituted a material change of use. It was not suggested to me that different considerations apply to the essentially prospective question what land is encompassed in a grant of permission for a change of use, but it is nevertheless necessary to bear in mind that the task is to determine the ambit of the permission actually granted. If the concept of a planning unit has relevance in this case, it is because it is capable of overriding the meaning of the 2005 permission on its face and imposing a permission applying not to the part of the area of occupation for which permission was sought but to the whole of the area.

33. That, in my judgment, is a matter which required separate and specific consideration and could not be simply assumed. The passage cited above from Burdle amply demonstrates that the identification of the unit of occupation is not the end of the quest (although, as Lord Widgery CJ pointed out in Johnston v Secretary of State for the Environment (1974) 28 P & CR 424 at 426-7, it may well be the starting-point). The paragraph in Burdle beginning "Thirdly", and the closing word of the above extract may be regarded as particularly relevant to the present case. In addition to the factors I mentioned in construing the grant, the lack of access from the "restaurant" area to the garden both before and after the structural alterations permitted in 2006 is an obviously relevant matter.

34. The first officer's report may well have been right to say that there was permission for "commercial" use of the garden, because of the use essentially as a market garden in connexion with the use as a shop. The partial reversion to the issue in the "recommendation" may demonstrate a doubt, and it is clear that the inspector also doubted the stance taken. The treatment of the garden as having permission for use as a restaurant, so putting questions arising from that use as beyond consideration in the second application for retrospective permission, required clear consideration of the issue of the planning unit in the light of the grants of permission and the physical state and use of the building at the time of those grants. It is always necessary to be very cautious before criticising an officer's report for what it does not include. The absence of this crucial factor from either of the reports is, however, in my judgment a clear pointer to the fact that in this case this matter had not been lawfully determined, particularly bearing in mind that the lawfulness of the use had been raised by the claimant.

35. I should add, because Mr Streeten relied on it, that s 55(2)(f) is of no assistance to him. That paragraph provides that there is no development by

> "in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class."

36. This does not mean that where part of a property is used for a purpose, the whole of the property may be used for the same purpose: it means, on the contrary, that where the whole of an element of a property is used for a purpose, part (or the whole) of that element may be used for certain different purposes. The situation envisaged there – the use for a purpose different from that which was the subject of a permission, but which falls within the same use class – is not a feature of this case.

37. The only other way in which the use as a restaurant could be lawful would be by lapse of time. Ten years' use of the garden as a restaurant would need to be established (s 171B(3)). The photographs exhibited to the claimant's witness statement make it clear that the garden was not used as a restaurant until the building of the pergola, at the end of 2021 at the earliest.

38. In paragraph 22 above I set out the ways in which the use of the garden as a restaurant could be lawful. The first is contrary to the true construction of the grants of

permission. There was no lawful determination of the second. The third is not applicable on the facts. It follows that the conclusion that the use of the garden as a restaurant was a lawful use was marred by public law error. The claimant succeeds on ground 1.

Ground 2

39. Given my conclusion on ground 1, ground 2 must succeed also. The consideration of noise was predicated on the use of the garden as a restaurant being a lawful use. In treating the question in this way, the officer failed to take into account the clearly material factor that the use was not one that was entitled to be considered lawful. The consideration of noise in the most recent report was therefore unlawful: the reason is not precisely that argued by the claimant, but is sufficiently encompassed in his claim that the change from noise having some relevance to its having none in the most recent report required explanation.

Grounds 3, 4 and 5

40. In the circumstances I can deal with the remaining grounds relatively briefly. In relation to each of them I regard the defendant's arguments as compelling.

41. Ground 3 challenges the sufficiency of the reasons given for the decision in relation to matters of visual amenity. The claimant argues that the reasons that were given were not in law sufficient to show why the decision was different from the earlier refusal that had been upheld by the inspector, or perhaps that the reasons were not sufficient in an absolute sense.

42. In my judgment the reasons are sufficient to show the process by which the defendant reached its decision. The duty specifically to give reasons for a grant of planning permission is in essence limited to that derived from reg 7 of the Openness of Local Government Bodies Regulations 2014: in the circumstances of the present case that means that the officer's report has to meet the well-known test set out by Lord Brown in South Buckinghamshire DC v Porter [2004] UKHL 33 at [36]. There is no basis for saying that the material made available to the public, including the claimant, does not pass that test. The differences between the earlier application and the present were not so marginal that there could be any expectation that the decision would simply be repeated. Those differences are set out: the approval sought was for a structure that was smaller, visually lower, and which was screened along the boundary with no 210. The decision that such a structure would, unlike either the existing pergola or the previously-proposed alterations, meet the amenity requirements of the applicable policy was not merely justified on its own merits but by distinction from the specific difficulties raised by the inspector in her decision, and was, further, a matter of pure planning judgment. For these reasons ground 3 cannot succeed.

43. Ground 4 was not pressed at the hearing. It is, in the terms pleaded, hopeless. Interestingly, the claimant's claim form states that the claim does not include any issues arising from the Human Rights Act 1998, and in reality that is correct. Any development is likely to have some effect on the private and family lives of neighbours, whether adults or children. The approach to that issue in planning matters was set out by the Court of Appeal in Lough v First Secretary of State [2004] EWCA Civ 905. The comprehensive and authoritative discussion of the authorities

and article 8 in this context by Pill LJ at [23]-[44] was elegantly summarised as to its applicability in that case as follows by Keane LJ:

> "54. Not every adverse effect on residential amenity will amount to an infringement of the right to respect for a person's home under Article 8(1), as the Strasbourg jurisprudence makes clear. The inspector's findings in the present case suggest that that threshold level of impact would not be reached as a result of the proposed development, but it is clear from those findings that, even if there was a prima facie infringement, it was justified under Article 8(2) once one took into account the need to protect "the rights and freedoms of others". Those others would include the owners of the appeal site as well as the public in general."
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> 55. I agree with Pill LJ that the process outlined in Samaroo, while appropriate where there is direct interference with Article 8 rights by a public body, cannot be applied without adaptation in a situation where the essential conflict is between two or more groups of private interests. In such a situation, a balancing exercise of the kind conducted in the present case by the inspector is sufficient to meet any requirement of proportionality.

44. The relevant balancing process, and the assessment of proportionality, is "inherent in the approach to decision making in planning law" (ibid at [49] per Pill LJ). A similar view was expressed by Hickinbottom J (as he then was) in Stevens v Secretary of State for Communities and Local Government [2013] EWHC 792 (Admin) at [85]. This all means that in general merely showing some adverse effect within the general scope of article 8 is not sufficient to cast any shadow of illegality on a planning decision. The claimant's grounds under this head do no more than that.

45. Ground 5 asserts that the defendant should have given the claimant a further opportunity to make observations before proceeding to grant planning permission on the basis of a proposal that neither he nor any other member of the public had seen. The authorities show that following the initial obligatory consultation process it is lawful for planning permission to be granted for a development that is less extensive than that which has been the subject of consultation; that whether there is a requirement to consult again is a planning judgment taking into account whether the newly-proposed development is substantially different to that originally proposed and whether there would be procedural unfairness if there were no further consultation; and that even a wholly new feature adverse to a consultee does not of itself require re-consultation (see Bernard Wheatcroft v Secretary of State (1980) 43 P&C R 433; Keep Wythenshawe Special v University Hospital of South Manchester NHS Foundation Trust [2016] EWHC 17 (Admin) at [73]-[75]; R (Hough) v Secretary of State for the Home Department [2022] EWHC 1635 at [79] ff; Broad v Rochford DC [2019] EWHC 628 (Admin)).

46. There is perhaps room for doubt whether the unfairness would have to be so conspicuous as to amount to an abuse of power in a matter such as this where procedural rather than substantive unfairness is in issue (see the discussion in Broad v

Rochford DC at [29]-[37] of R (Holborn Studios Ltd) v Hackney LBC [2017] EWHC 2823 and R (Gallagher Group) v CMA [2018] UKSC 25). What is not in doubt is that when there is a challenge of this sort it is for the Court to assess whether the failure to re-consult was unfair, taking into account the position as it appeared to the decision-maker at the time.

47. The claimant had put in objections to the scheme upon which consultation had taken place. The revisions met some of the claimant's points. There was no reason to suppose that the claimant would have anything different or additional to say about the revised proposal. The defendant's task was to reach a balanced decision on the proposal, not to provide a solution that would entirely satisfy the claimant. The defendant was entitled to decide, as it did, that the revised proposals were not substantially different: indeed that was obvious. The defendant was entitled to decide, as it did, that no further consultation was necessary as the retained features of the proposal were those on which it had already consulted. There was no perceptible unfairness.

48. Even in the course of these proceedings the claimant has not identified any topic on which he would have made representations save in respect of the adequacy of the screening now forming part of the development, for his benefit and in response to his objection; but that is a question not concluded by the permission granted, which leaves this matter to be resolved as part of the compliance with conditions.

49. It follows that the claimant has failed to show that there was a duty to re-consult; and he has in addition failed to show that he was (whether unfairly or not) adversely affected in fact by the lack of further consultation.

Conclusion

50. The claimant fails on grounds 3, 4 and 5 but succeeds on grounds 1 and 2. The failure to consider properly whether there was an established lawful use of the garden as part of a restaurant and the consequent failure to take into account the noise arising from its use in the context of making the present decision were public law errors. They were material to the decision made and (contrary to what Mr Steeten has argued) it cannot be said that it is highly likely that the decision would have been the same if the errors had not been made. There will be an order quashing the grant of planning permission.