Neutral Citation Number: [2024] EWCA Civ 960

Case No: CA-2023-001895

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
PLANNING COURT
MR C M G OCKLETON, VICE PRESIDENT OF THE UPPER TRIBUNAL
[2023] EWHC 2278 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/08/2024

Before:

LORD JUSTICE LEWISON
LORD JUSTICE MOYLAN
and
LORD JUSTICE MALES

- -

Between:

LONDON BOROUGH OF RICHMOND UPON THAMES	**Appellant**
- and -	
The King on the Application of OWOLABI ARIYO	**Respondent**

- -
- -

Charles Streeten (instructed by **South London Legal Partnership**) for the **Appellant**
Andrew Parkinson & Barney McCay (instructed by **Richard Buxton Solicitors**) for the **Respondent**

Hearing date: 13 June 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 9 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

The issue

1. The issue on this appeal is whether the Richmond upon Thames LBC ("the Council") acted unlawfully in granting planning permission for the retention and amendment of an existing "pergola" at the rear of a restaurant at 209 Hampton Road. Mr CMG Ockleton, sitting as a judge of the High Court, decided that it had. His judgment is at [2023] EWHC 2278 (Admin).

The site and its planning history

2. The property in question is part of a parade of shops with residential accommodation above. Originally the ground floor of the building was used as a hardware shop; but the ground floor also included a kitchen and a self-contained entrance to the flat above. At the rear of the building there was a garden in which there was a polytunnel used for growing plants for sale in the shop. The site also included a garage beyond the garden. On 21 March 2005 an application (given the reference 05/0844/COU) was made to the Council for planning permission for a change of use from use class A3 (shop) to A3 (restaurant). Although the application itself has not survived, it was accompanied by a site plan based on the Ordnance Map and a layout plan. The former showed the whole of the property (including the rear area) and a garage beyond the rear area. The latter showed only the built envelope, although the ground floor plan showed doors leading from the rear of the kitchen and from a fire exit to the area at the back of the building. On 19 July 2005 the Council refused permission. The development was described in the decision notice as "proposed change of use from A1 (hardware store) to A3 (restaurant)". The reason for the refusal was the loss of a retail unit in a key shopping frontage.

3. An appeal against the refusal succeeded. The inspector gave her decision on 1 December 2005. What she decided is an important part of the backdrop to this appeal. In the bullet points at the start of the decision letter she described the proposed development as "change of use of the ground floor from a general hardware store (Class A1) to a restaurant". That is a more restrictive description than that in the original refusal decision. She described the property at [4] and noted that the appeal proposal would relocate the kitchen to the first floor. She considered at [6] that there was little demand for a hardware shop in the particular location; and said at [7] that although the change of use would not comply with the relevant planning policy it would enhance the vitality and attractiveness of the parade. She went on to consider at [8] what conditions should be imposed. One condition was a condition "requiring sound insulation between the proposed restaurant and the residential accommodation above" which was "necessary to safeguard the amenity of those residents." In the event, however, that condition was not attached to the grant of planning permission. Paragraph [9] considered an objection about increased traffic. The inspector said that "the garage and parking area at the rear of the premises would be sufficient for the purposes of staff parking." Her formal decision was expressed as follows:

> "I … grant planning permission for change of use of the ground floor from a general hardware store (Class A1) to a restaurant (Class A3) at 208 Hampton Road … in accordance with the

> terms of the application Ref. 05/0844/COU … and the plans submitted therewith subject to the following conditions:
>
> …
>
> 2) the use hereby permitted shall not be open to customers outside of the following times: 08.00hrs and 23.00hrs…"

4. A further application for change of use was made in 2007. The proposed change was from A1 to a mixed A3/A5 use. Since planning permission had already been granted for A3 (restaurant) use, it is not clear why the change was said to be from A1 (shop). Class A5 is the sale of takeaway food which, it was estimated, would represent 20 to 25 per cent of turnover. Under the heading "Land use" the officer's report stated that:

> "Issues regarding smells, soundproofing etc were addressed at appeal and are controlled by other legislation."

5. Under the heading "Noise and disturbance" the report noted that if the proposal did encourage or attract anti-social behaviour such issues "could be controlled under separate legislation". Following the officer's recommendation temporary planning permission was granted for the change of use for one year expiring on 21 February 2009. Two of the conditions attached to the grant stated:

> "No moped/motorcycle deliveries shall take place from the rear of the site during the hours of 19:00 and 23:00.
>
> The development hereby approved shall not be occupied until the walls/floors, as applicable, have been insulated to provide sound attenuation against internally generated noise…"

6. On 29 December 2021 a further application for planning permission was made. This application was for the retention and amendment of an existing rear pergola at the rear of the building. Although the word "pergola" suggests a covered walkway or plants growing over a wooden or metal framework, the proposed development was more substantial. What was envisaged was a structure 8 metres long and 3 metres high, with retractable glass panels on the sides and roof. The application was dealt with by officers under delegated powers. By the time of this report the Use Classes Order had been simplified and amended. In her report the case officer described the site as follows:

> "The site comprises a two-storey terraced property. The ground floor and rear of the site is currently used as a Class E(b) Restaurant and the first floor is used as a Class C3 Dwellinghouse. The rear of the property comprises a large garden area."

7. As part of the background the report stated:

> "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 lawful use of the premises as a

> restaurant. The new shelter constructed in the garden is however unauthorised."

8. One of the key issues was said to be "Impact on neighbour amenity" to which the report devoted its own section. Under the sub-heading "Noise" the report stated:

> "The Application does not include any form of acoustic assessment and therefore it cannot be determined if the proposals would lead to an unacceptable loss of amenity to adjoining properties or not. There are also concerns over the proximity of the adjoining gardens which are used solely for residential purposes.
>
> The commercial use of this rear garden area 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."

9. The final recommendation was for refusal because there would be a material increase in harm to the residential amenity of nearby occupants. The recommendation added:

> "It is also unclear the scale of noise disturbance on the adjoining neighbours and if this will lead to an unacceptable loss of amenity."

10. It is quite clear from this report that the officer considered that questions of noise were forbidden territory; but it is equally clear that if that were not the case, questions of noise would be highly material to the decision. Permision was refused on 1 April 2022. Yet again there was an appeal, but this time the appeal failed. The inspector issued her decision letter on 10 October 2022. In paragraph 9 of her decision letter she said:

> "I note from the officer's report that use of the garden area by restaurant customers is "*not restricted by planning condition and would not be in breach 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."

11. She concluded that the proposed scheme would be overbearing and visually intrusive to neighbours, and dismissed the appeal.

The impugned decision

12. Undeterred, a fresh application for planning permission was made on 25 October 2022. The proposed structure was unchanged from that which had been the subject of the unsuccessful appeal; but the proposal was to reduce the height of the structure (relative to other buildings) by lowering the ground level of the garden by 60 cm. Something of the scale of the proposal can be gleaned from the fact that the application for permission stated that the projected cost of the proposal was "up to £2

million". That application was also dealt with by officers under delegated powers. Dr Ariyo, who is the claimant's wife; and who lives next door with him and their young family objected. Among her objections was that there would be undesired noise levels. The proposal was later modified by reducing the length of the structure from 12.8 metres to 6.4 metres; and lowering the ground level by 30 cm. The revised proposal would mean that the structure would protrude 50 cm above the boundary fence, rather than the 80cm at the time of the application.

13. The officer began his report by describing the site which, he said:

> "… comprises a two-storey terraced property and forms part of a parade of shops with residential accommodation above. The ground floor and rear garden of the site is currently in use as a Class E (b) Restaurant. The first floor is used as a Class C3 Dwellinghouse."

14. In the introductory part of the explanation for his decision, the officer stated:

> "Policy LP 8 states that development must protect the amenity and living conditions of neighbouring occupants. Design must … avoid … noise disturbance … or harm to the reasonable enjoyment of the uses of buildings and gardens. Harm may arise from various impacts such as noise….
>
> 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."

15. The officer identified the key issue as whether the proposed alterations to the structure would sufficiently mitigate its impact in terms of visual amenity. He considered that they would and that, accordingly, the proposal complied with Policy LP8 of the Local Plan.

16. Accordingly, the Council granted planning permission on 12 December 2022.

17. Mr Ariyo challenged that decision by judicial review.

Lawful use: question of planning judgment or question of law?

18. The first issue for the judge was whether the Council was entitled to take the view that the use of the rear area as a restaurant was lawful. He summarised the Council's argument on this question as follows:

> "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."

19. He decided to deal with the second argument first. As to that, he said at [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." (Emphasis added)

20. In his skeleton argument Mr Streeten challenged that statement head on. He argued that far from being a question of law for the court, it was always a question of planning judgment. But in the course of oral submissions, he accepted that the position was more nuanced. If (as in this case) the lawfulness of the use depends on the interpretation of a planning permission, the proper interpretation of that planning permission is a matter of law on which the courts regularly pronounce: *Barnett v Secretary of State for Communities and Local Government* [2009] EWCA Civ 476, [2010] 1 P & CR 8 at [28]; *Hillside Parks Ltd v Snowdonia National Park Authority* [2022] UKSC 30, [2022] 1 WLR 5077 at [26].

The 2005 planning permission

21. In its Detailed Grounds of Defence, the Council argued that the officer's statement that the use of the rear garden by customers was not a breach of planning control was correct, for two reasons. First, permission for that use had been granted by the 2005 planning permission, and in any event, the use had been ongoing for more than 10 years and thus was immune from enforcement. The interpretation of the planning permission (which occupied a large part of the argument) had not in fact featured in the officer's decision. His conclusion was that the reason why the use of the rear garden was not in breach of planning control was "the long-standing use of the premises as a restaurant". Nevertheless the Council relied on that planning permission, both before the judge and before us.

22. As I have said, the interpretation of a planning permission is a question of law. The question in such a case is what a reasonable reader would understand the words to mean, seen in their context; and for this purpose the reasonable reader is to be treated as equipped with some knowledge of planning law and practice: *DB Symmetry Ltd v Swindon BC* [2022] UKSC 33, [2023] 1 WLR 198 at [66]. At the time of the application which resulted in the inspector's grant of planning permission in 2005 the relevant regulations required an application for planning permission to be accompanied by a plan which "identifies the land to which it relates". The reasonable reader would understand that plans submitted with the application have particular

significance: *Hillside Parks Ltd v Snowdonia National Park Authority* at [27]. Where the proposed development is a change of use, the extent of the land covered by that change of use will "normally be ascertained by reference to the site as defined on the site plan": *Barnett v Secretary of State for Communities and Local Government* [2009] EWCA Civ 476, [2010] 1 P & CR 8 at [29].

23. At [22] the judge said:

> "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."

24. He turned to deal with that permission.

25. Mr Streeten relied in particular on the site plan accompanying the application as showing the area encompassed by the permitted change of use. The judge rejected that argument. He said at [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."

26. He concluded at [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."

27. Mr Streeten relied in particular on the terms of the grant of planning permission. Although it stated that permission for a change of use was granted in relation to "the ground floor", it also said that permission was granted "in accordance with the terms of the application Ref. 05/0844/COU … and the plans submitted therewith". In order to determine the extent of the grant it is therefore necessary to look at the plans (plural) submitted with the application. One of the submitted plans showed the built envelope, and the other showed the site boundary. The reasonable reader would thus look at the plans to determine the scope of the permission. The reasonable reader would see that, looking at the layout plans alone, both the kitchen and the fire exit opened onto the rear area. It was necessarily implicit in that layout that the use of the rear area would be encompassed in the change of use, at least for purposes ancillary to the use of the ground floor as a restaurant. The inspector who granted the permission also plainly envisaged that the future use of the garage beyond the garden would be used as staff parking ancillary to the use of the restaurant. The reasonable reader would see that the application was for a change of use only and the land identified to which it related was the whole site as delineated on the site plan. The reasonable reader would also be struck by the fact that, if the permitted change of use were not to extend to the rear area, the building owner would be left with an area whose permitted use was use as ancillary to a shop; and that that would have been useless, given that the shop was to be changed into a restaurant. Moreover the use of the garage was also ancillary to the use as a restaurant; and if the judge's interpretation is right there would appear to be a breach of planning control whenever the kitchen staff took deliveries or put out rubbish bins, or even if they walked from the garage to the kitchen. Such a result would be inconsistent with the general principle of planning law that changes of use are generally judged by reference to the "planning unit." The planning unit, at least in general terms, is the whole of an area in single occupation used for a main purpose to which other purposes are ancillary: *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207; *R (KP JR Management Co Ltd) v Richmond upon Thames BC* [2018] EWHC 84 (Admin), [2018] JPL 838 at [54] to [58]. The concept of an ancillary use is also a well-established part of planning law; and where a change of use is permitted it will generally extend to land used as ancillary to the changed use, if part of the same planning unit. Here it is clear that the inspector regarded the rear area (used for growing plants for sale in the shop) and the garage at the rear of the site as part of the same planning unit as the shop itself and as ancillary to that use. Although the judge considered the planning unit, he did so only *after* he had decided that the granted permission applied only to the ground floor of the building, rather than as part of the process of deciding *whether* that permission applied to the rear area. That was an error.

28. The judge relied at least in part on his perception that the grant included a condition about soundproofing which would be ineffective if the garden were to be used as a

restaurant. Mr Stretten pointed out, correctly, that although the inspector did consider such a condition, no such condition was in fact attached to the grant. Moreover, it is difficult to see how any sound-proofing condition could have been attached to the use of the garden as ancillary to the use of the ground floor of the building as a restaurant. In addition, the inspector regarded such a condition as necessary to safeguard the residential accommodation above the restaurant; and said nothing about any need to safeguard neighbours in the event that the rear area were to be used as ancillary to the restaurant. For all these reasons, the judge was wrong in his interpretation of the planning permission.

29. Mr Parkinson and Mr McCay supported the judge's conclusion for the reasons that he gave. The most important part of the planning permission was the description of the development itself. It was limited to a change of use of the "ground floor" of the property. The "ground floor", as a matter of ordinary English, can only mean ground level within the built envelope. It would be a misuse of language to describe the rear area as the "ground floor". In so far as there is some sort of presumption that a change of use applies to the whole of the site identified in the site plan accompanying the application, the description of the development is sufficient to rebut that presumption. The exclusion of the rear area from the scope of the application may have been a deliberate choice in order to minimise any conflict between the proposed development and local planning policy which resisted the loss of retail units.

30. Mr Parkinson could not, however, answer the question: if the lawful use of the rear area was not use ancillary to the restaurant use, what was its lawful use?

31. In essence I accept Mr Streeten's submission. Although the description of the development in the decision letter and the grant as change of use of the "ground floor" is a point against him, it is outweighed by all the other considerations on which he relied. I note also that the original refusal of planning permission by the Council described the proposed development in broader terms ("Proposed change of use from A1 (hardware store) to A3 (restaurant)", and it was an appeal against that refusal that was allowed. I am therefore puzzled by the judge's statement that the "application … sought permission only for the "ground floor" when the application has not survived and the original refusal of permission by the Council was not so limited. In my judgment, for the reasons that Mr Streeten gave, the reasonable reader would interpret the granted change of use as extending to the rear area and the garage.

Long-standing use

32. As mentioned, the officer considered that the use of the rear area as a restaurant was lawful because it was "long-standing." The judge dealt with this point at [37]. He said:

> "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."

33. I do not consider that the judge was entitled to make that finding of fact. Whether a use is or is not long-standing is a question of fact for the local planning authority. That would depend (at least in part) on when the use began. The judge was not in a position to make that finding of fact; and he did not (at least in terms) say that the officer's finding was irrational.

34. In my judgment, therefore, the Council was entitled to proceed on the basis that use of the rear area for the purposes of a restaurant was lawful.

The Respondent's Notice

35. That is not, however, the end of the matter. By Respondent's Notice dated 7 February 2024 Mr Ariyo contends that even if use of the rear area as part of a restaurant was lawful either as a result of long-standing use or as a result of the Use Classes Order the officer nevertheless made two legal errors. First, he wrongly said that mitigation of noise disturbance was secured by existing conditions. Second, he was wrong in saying that issues such as noise "are not in question". The subject matter of the application was not merely a change of use: it was an application for operational development consisting of building operations; and to the extent that such operational development was capable of generating additional noise, it was a plainly material consideration.

36. Mr Streeten objected to these points being raised on the basis that they were new points. He relied on a decision of mine in *Brent LBC v Johnson* [2022] EWCA Civ 28 at [37] to [42], in which I applied the decisions of this court in *Singh v Dass* [2019] EWCA Civ 360 and *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146. In the latter of these two cases, the court decided that there was a spectrum of cases. In some, new findings of fact would have to be made (in which event permission is likely to be refused) and in others the point can be decided on the basis of the facts as found. Just as there is a spectrum of cases, there is also a spectrum of "newness": *Azhar v All Money Matters T/A TFC Home Loans* [2023] EWCA Civ 1341.

37. One of Dr Ariyo's objections was based on noise. The question of noise was also raised in the JR Claim Form at paragraphs 25 to 29, although the argument was not put in the same terms as that in the Respondent's Notice. But the argument was put in the claimant's skeleton argument below at paragraph 35. This is not, therefore, a completely new point although it has been given greater emphasis in this court.

38. Moreover, the point was raised in the Respondent's Notice dated 7 February 2024, and it was not until 3 June 2024 that any objection was taken. The only additional material that the Council seeks to rely on is the premises licence granted under the Licensing Act 2003, which the Respondent does not object to the Court considering. The Council has been on notice of this argument for four months, it has not acted to its detriment on the basis that this specific point was not raised; and in any event the question of noise was mentioned both in the claim form and the skeleton argument below. I would permit Mr Ariyo to rely on these points.

39. As Mr Streeten pointed out, the first of the errors is said to arise only if the Council fails in its argument that the judge misinterpreted the 2005 planning permission. I have concluded that he did. On that basis, there was a condition attached to the grant,

namely that restaurant use was limited to the period between 08.00hrs and 23.00hrs. Whether that was sufficient to address mitigation of noise disturbance in consequence of the use was a question of judgment for the officer. Although this is a very benevolent interpretation of the officer's report, I will assume that it is correct.

40. The second alleged error is not, however, dependent on the interpretation of the 2005 permission. It is indisputable that the application under consideration was an application for planning permission to carry out building operations which would result in the construction (or retention) of a permanent all-weather dining area. As the inspector said in her decision in 2022:

> "I note from the officer's report that use of the garden area by restaurant customers is "*not restricted by planning condition and would not be in breach 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."

41. In *Fidler v First Secretary of State* [2004] EWCA Civ 1295, [2005] 1 P & CR 12 Carnwath LJ said at [28] (v):

> "It is of course correct that the erection of a building as such may not give rise to a material change of use of the planning unit on which it is erected. On the other hand, as a matter of both common sense and law, the character of the activities on a site may be materially affected by the nature of the buildings on the site, as the inspector found in this case. Again that was a matter of fact and degree for him."

42. Thus Mr Parkinson argues that even if there was no material change of use, the operational development for which permission was sought had the obvious potential to increase noise disturbance and as such was an obviously material consideration that the officer ought to have considered. Instead, the officer said that issues such as noise were "not in question". In other words, he took the same view as the officer who considered the 2021 application. It was on that basis, and that basis alone, that he considered that the proposed development complied with Policy LP 8 of the local plan. He thus ignored a critical part of Policy LP 8 namely that development (here the erection of the all-weather structure) must protect the amenity and living conditions of neighbouring occupants; and that design must avoid noise disturbance. Moreover, although he referred to the inspector's decision in 2022, he failed to quote (and by inference to take account of) her conclusion that occasional use of the garden (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. He certainly gave no reason for disagreeing.

43. Mr Streeten submitted in response that the officer did consider objections based on noise. He referred to Policy LP8; and concluded that noise was adequately controlled by the limitation of operating hours and that the proposed development complied with Policy LP8. It was for the officer to decide how much information needs to be included in his report; and he adequately explained his reasoning.

44. In addition the officer did consider the inspector's decision in 2022, and quoted from it. The question of noise was not raised on that appeal, and the inspector's observation on which Mr Ariyo relies was directed to the visual appearance of the enclosed structure rather than its noise-generating capability. It was for visual aspects of the development that the inspector dismissed the appeal. Those reasons were all addressed in the officer's report.

45. I do not agree that the officer did adequately consider the objection based on noise. The critical part of his report, after setting out a paraphrase of Policy LP 8 says this:

> "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."

46. The straightforward reading of that passage is that because the use of the garden by customers was lawful it was not possible to consider the question of noise which would or might be associated with the new structure and its operation (issues associated with noise "are not in question"). Even if he was correct in saying that noise connected with *the use* in itself was not in question, he failed to consider whether noise associated with the operational development and its subsequent use as a permanent year-round dining area (as opposed to use of the garden as open land) was capable of being a material consideration. Both "common sense and law" suggest that it is.

47. Moreover Policy LP8 does not merely apply to land use. It states specifically that *design* must avoid noise nuisance. Design could not have been a feature of the existing use of the rear area, even if lawful. In his consideration of design of the proposed structure, the officer addressed only its visual appearance and impact. It seems to me to be obvious that the construction of a large enclosed structure hard against the boundary wall and clad with retractable glass panels would bring noise far closer to neighbours than the existing open land use. That is especially so where, as here, the premises licence permits the playing of live music (until 22.30 on most days) and recorded music (until 23.00 on most days) with no condition restricting the sound level audible outside the structure. As in the application made in 2021, there was no form of acoustic assessment; and as the officer considering that application stated it was not possible to determine whether the proposal would lead to an unacceptable loss of amenity to adjoining premises. The inspector in 2021 went out of her way to point out the difference between mere use of the garden for occasional outside seating and the prospect of a permanent large enclosed structure to facilitate year-round use by restaurant guests. Nowhere in the impugned decision did the officer consider the noise generating potential of such a structure. Indeed, like the officer in 2021, he does not appear to have had any material on which an assessment could have been made. Had he paid any attention to the noise generating potential of the proposed structure, he might have refused permission. Or he might, at the very least, have imposed some condition relating to the materials from which it was to be constructed. He might, for example, have required the cladding panels to have been non-retractable; or to have been constructed with specialist glass.

48. I do not consider that we can say that even if he had considered those questions, the decision is highly likely not to have been substantially different. I do not, therefore, consider that the decision is saved by section 31 (2A) of the Senior Courts Act 1981.

Result

49. Although I consider that the judge misinterpreted the 2005 planning permission, I would dismiss the appeal for the reasons stated in the Respondent's Notice.

Lord Justice Moylan:

50. I agree with Lewison LJ that the appeal should be dismissed for the reasons relied on in the Respondent's Notice.

51. I respectfully disagree, however, with his conclusion that the judge misinterpreted the 2005 planning permission and that the Council's appeal should be allowed. As referred to by Lewison LJ (paragraph 20) in the present case the lawfulness of the use of the garden depends on the interpretation of the 2005 grant of permission. In my view, as set out below, the matters relied on by the Council do not outweigh the very clear words in the 2005 permission, namely that planning permission was given "for change of use of the *ground floor* from a general hardware store … to a restaurant" (my emphasis). The Council's submission that the words "ground floor" included the garden is, in my view, untenable and the other matters they rely on are insufficient to surmount the clear effect of the use of the words, "ground floor", in the 2005 permission.

52. I also do not consider that the Council's decision was based on any separate factual assessment of the actual use of the garden as being long-standing. The reference in the officer's report to: "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 lawful use of the premises* as a restaurant" (my emphasis), was clearly based on the officer's view of the effect of the 2005 planning permission and nothing more.

53. Additionally, standing back, I consider that there would need to be identified a clear route comprising factors which had been properly considered during the course of the planning process and which explained the conclusion that what, on an objective analysis, would be a radical transformation of the garden by, as referred to by Lewison LJ (paragraph 6), the construction of a permanent structure, 8 metres long and 3 metres high with retractable glass panels, for the use of restaurant customers was lawful.

Planning History

54. There are limited documents available in respect of the grant of planning permission in 2005. We do not, in particular, have the application itself. We only have the Decision Notice refusing permission, the Appeal Decision, a plan showing the "Proposed Layout" of the ground and first floors of the building and a plan of the site.

55. I start with the wording of the grant of planning permission in 2005. In the summary at the start of the Appeal Decision it is stated in clear terms that:

> "*The development proposed is change of use of the ground floor* from a general hardware store (Class A1) to a restaurant (Class A3)". (my emphasis)

This wording is, further, repeated at the end of the Decision under the heading "Formal Decision":

> "I allow the appeal and grant planning permission for *change of use of the ground floor* from a general hardware store (Class A1) to a restaurant (Class A3) at 208 Hampton Road … in accordance with the terms of the application Ref. 05/0844/COU dated 15 March 2005 and the plans submitted therewith subject to the following conditions." (my emphasis)

56. In the body of the Appeal Decision it is stated that the "ground floor of the appeal premises is currently in use as a hardware shop, but also includes the kitchen and self contained entrance to the flat on the upper floor". It then referred to "the area to the rear" where there was a polytunnel. These references make clear that the ground floor and the area to the rear were distinct.

57. Under the heading "Conditions", the Inspector agreed that there should be a condition "requiring sound insulation *between* the proposed restaurant and the residential accommodation above" (my emphasis). This was "necessary to safeguard the amenity of those residents". No such condition was in fact included in the Inspector's "Formal Decision" although it would seem to have been intended that there should be. However, it is relevant for the purposes of interpretation because it is clear from this wording that the expression, "the proposed restaurant", was confined to the ground floor of the premises and did not extend to the garden. This is clear from the reference to sound insulation being required *between* the proposed restaurant and the first floor flat. It did not extend to any noise from anywhere else, in particular noise from the use of "the area to the rear" *as* a restaurant. This would be a surprising omission given the Inspector's evident concern "to safeguard the amenity" of the residents of the flat above the restaurant if the garden/area to the rear was included within the proposed change of use. It would be surprising also because the Inspector can be seen to have had in mind surrounding residents when she referred to the need for a condition (which was included) requiring details of the extraction and ventilation system "to safeguard the amenities of surrounding residents".

58. As noted by Lewison LJ, there is reference to the garage at the end of the garden, but this was only in the context of it and "the parking area at the rear of the premises [being] sufficient for the purposes of staff parking".

59. The site plan has a solid line around the whole of the site including the garden and the garage.

60. The "Proposed Layout" plan does not extend beyond the ground floor and first floor of the building. It shows a "Restaurant" which comprises a large room with an entrance straight from the street. There is another entrance from the street to the "Upper Floors". The rest of the ground floor comprises toilets, with a door to the garden labelled "Fire Exit", and the kitchen, also with doors to the garden. The

garden does not feature at all in this plan. There is no direct access from the restaurant to the garden.

61. The judgment below dealt with the effect of a further grant of permission in 2006/2007 in respect of what was described as a "rear extension":

> "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."

It can be seen, again, that the plans which accompanied this application confined the "restaurant" to within the ground floor area and that there was no access to the garden other than through the kitchen.

62. As referred to by Lewison LJ, there have been two applications in respect of the pergola, dated 29 December 2021 and 25 October 2022. The first was refused on 1 April 2022. The respective officer's reports are dated 1 April 2022 and 12 December 2022. The reports described the site as follows:

> "The site comprises a two-storey terraced property. The ground floor and rear of the site is currently used as a Class E(b) Restaurant and the first floor is used as a Class C3 Dwellinghouse. The rear of the property comprises a large garden area."

It can be seen that the use of the "ground floor and rear of the site" as a restaurant is stated as a fact. It is not based on any analysis of how the garden had in fact been used.

63. The reports also included the following observation:

> "*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 lawful use of the premises* as a restaurant." (my emphasis)

There is, again, nothing to suggest that this was based on any determination as to the actual use of the garden rather than on an assumption as to the effect of the 2005 permission, namely that it made the use of the garden by restaurant customers lawful. This conclusion is supported by the later observation in the first report, as referred to

by Lewison LJ (paragraph 8), namely that the "commercial use of this 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". There is no reference to this being based on actual use rather than use permitted as a result of the 2005 permission.

64. I would also repeat Lewison LJ's reference (paragraph 10) to the observation in the inspector's decision on 10 October 2022:

> "I note from the officer's report that use of the garden area by restaurant customers is "*not restricted by planning condition and would not be in breach 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."

I would emphasise her reference to "a very different prospect".

Judgment Below

65. As set out by Lewison LJ (paragraphs 23-26), the judge dealt with the matters relied on by the Council to support their contention that the 2005 permission for use as a restaurant included the garden and concluded that the grant only applied to the ground floor of the building. The Council's contention throughout, as set out for example in the Detailed Grounds of Defence, has been that "the inspector determining the appeal clearly regarded *the external ground floor space* as forming part of the land which the grant of planning permission attached to" (my emphasis).

66. As for the site plan, and indeed the other plans relied on by the Council, the judge, at [24], decided that the "problem" with this argument was that "it cuts across almost every other aspect of the 2005 application and resulting grant". It was "abundantly clear" that the application for a change of use did *not* include the first floor or that part of the ground floor "with its separate entrance to the residence above" although both were included within the site plan and the layout plan. Next, as described in the inspector's decision, "the application was specifically for change of use of the 'ground floor', not the whole of the building or the whole of the property". It was, at [25], "neither principled … nor reasonable" to use "the plan … to construe the grant of planning permission in 2005 as … extending to the use of the garden, but not the residential parts of the house as a restaurant". The judge noted, thirdly, at [24], that the manner in which soundproofing was addressed in the 2005 permission, "to protect those in the flat above from noise from the restaurant, …. would be ineffective if the garden were used as a restaurant too" because it only referred to soundproofing between the ground and first floors. It was, at [25], verging "on the absurd" to suggest that, if "permission was being granted for restaurant use in the garden", the inspector "would have sought to protect from noise only those living in the property, and then only from noise arising from restaurant use within the building itself".

67. The judge also considered, from [29], the Council's reliance on the planning unit as meaning that, "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". He noted, at [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."

68. He then referred to *Burdle v Secretary of State for the Environment* and, at [32], to the need "to bear in mind that the task is to determine the ambit of the permission actually granted". He concluded that the Council's decision had not been based on any consideration of this issue which, at [33], would have "required separate and specific consideration".

69. The judge concluded, at [38], that the decision that the use of the garden as a restaurant was lawful was "marred by public law error": (a) it was contrary to the true construction of the 2005 permission; (b) there had been no lawful determination of whether the 2005 permission was subject "to some principle of interpretation implying a grant of permission to the necessary effect"; and (c) it was established that there had not been ten years' use of the garden as a restaurant.

Council's Appeal

70. The sole ground of appeal is that the judge "was wrong to find that the [Council] acted unlawfully in concluding that the use of the "garden area" of the land at 208 Hampton Road … as part of the restaurant on the ground floor was longstanding and lawful". I would emphasise the phrasing "*as part of the restaurant on the ground floor*" (my emphasis) which reflects the comment in the officer's report that "use of the rear garden by restaurant customers" was permitted.

71. In the skeleton argument it was argued that, in essence:

> "(1) The deputy judge erred in his construction of the planning permissions granted for the use of the Property as a restaurant; and/or
>
> (2) The deputy judge erred in his approach to the question of whether the use of that garden was longstanding and lawful."

72. As to the former, it was submitted that the 2005 permission:

> "granted permission to change the use of *the whole of the Property* into two units: (1) a self-contained residential unit on the first floor with its own front door; and (2) *a restaurant unit*

> *encompassing the ground floor, including the garden* which could only be accessed from the restaurant." (my emphasis)

I have emphasised the phrases, "as part of the restaurant on the ground floor" and "a restaurant unit encompassing the ground floor, including the garden", because they reflect the Council's substantive submission that the expression in the 2005 planning permission, "the ground floor", included the garden. As set out in the Council's Skeleton argument, it was submitted that the correct interpretation of the 2005 permission was that the "garden area formed [part] of the 'ground floor', it was at ground floor level, accessible only through the kitchen and fire escape, and was specifically referred to by the Inspector when describing the Property" when she referred to the "area to the rear".

73. The Council's other submissions are reflected in Lewison LJ's judgment.

Claimant/Respondent's Case

74. The Respondent submitted that the judge was right to decide that the 2005 planning permission did *not* permit a restaurant use of the garden, which was restricted to the "ground floor" as expressly stated in the grant of permission, and that the Council had, therefore, been wrong in concluding that this use of the garden was lawful.

75. The judge's conclusion was supported by the matters he relied on, namely the express wording of the 2005 permission which gave permission only for a change of use of the "ground floor" which did not include the garden; the fact that other parts of the building, "within the boundaries outlined on the plan", were not included in the change of use; the reference to, and proposed condition in respect of, soundproofing to protect those in the flat above from noise *from* the restaurant, which would be ineffective if the garden was also to be used as a restaurant; and the contention that the 2005 permission changed "the use of the whole Property into two units" was not supported by the terms of the permission and could not be derived from the site plan which included parts of the ground floor and the first floor which were excluded from the change of use.

76. It was also submitted that the judge had been right to find that there had not been ten years' use of the garden as a restaurant. Mr Parkinson submitted, further, that the Council's reference to long-standing use had not been based on any consideration of how the garden had been used between 2009 and 2019. It had, instead, been based on the same assumption as to the effect of the 2005 permission. The judge's decision did not, therefore, encroach on areas of planning judgment because the conclusion that the use of the garden by restaurant customers was lawful had been based on the incorrect interpretation of the effect of the 2005 permission.

77. I deal with other aspects of Mr Parkinson's submissions below.

Determination

78. As referred to above, the lawfulness of the use of the garden by restaurant customers depends on the interpretation of the 2005 permission. Further, as Lewison LJ says (paragraph 22), applying *DB Symmetry Ltd v Swindon BC*, at [66], the interpretation of that permission depends on what a reasonable reader would understand the words

to mean, seen in their context, with the reader being treated as being equipped with some knowledge of planning law and practice. I would just add to this the following additional words from *DB Symmetry Ltd v Swindon BC*, at [66]:

> "This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense."

79. I start with the wording of the 2005 permission. The "natural and ordinary meaning of" the words, "for change of use of *the ground floor*" (my emphasis), is that the permitted change of use is limited to the ground floor of the built envelope. Their meaning, in my view, could not be clearer and I cannot see how the words "ground floor" could be interpreted as including the garden. Indeed, the Council's submission that they do, could be said to reveal the fragility of the Council's case.

80. The issue, therefore, is whether, when these words are weighed in the balance with other factors, the proper interpretation of the 2005 permission is that restaurant use is not confined to the ground floor but includes the garden. I propose to consider this largely by reference to the matters which have led Lewison LJ to conclude (paragraph 31) that this wording is outweighed by those other considerations.

81. The first is the 2005 plans, on which Mr Streeten placed great weight and in respect of which he relied on *Hillside Parks Ltd v Snowdonia National Park Authority*, at [27]. The plans are undoubtedly relevant because the 2005 permission granted planning permission "for change of use of the ground floor … to a restaurant … in accordance with the terms of the application … and the plans submitted therewith". As referred to above, we do not have the application.

82. Although plans can be relevant to the issue of interpretation, they do not have any special status. In so far as they have been described as having "particular significance", as referred to by Lewison LJ (paragraph 22), the nature and extent of that significance depends on the context. As discussed further below, this does not mean that they necessarily have some sort of status over and above, or have greater weight than, the wording used in the grant of permission.

83. The expression "particular significance" comes from the judgment of Lord Sales and Lord Leggatt JJSC in *Hillside Parks Ltd v Snowdonia National Park Authority*. In using that expression, I do not consider that they were suggesting that plans should have some special status in respect of the interpretation of a planning permission. This can be seen from what they said, at [27], about the process of interpretation:

> "the meaning of the document should be ascertainable from the document itself, other public documents to which it refers such as the planning application and plans and drawings submitted with the application, and physical inspection of the land to which it relates."

Plans and drawings are *among* the potentially relevant factors. It can also be seen from the context in which they used the expression "particular significance":

> "In this case, we are concerned with grants of full planning permission, in relation to which it is to be expected that a reasonable reader would understand that the detailed plans submitted with the application have particular significance: *Barnett v Secretary of State for Communities and Local Government* [2009] JPL 243, para 24 (Sullivan J); affirmed [2009] JPL 1597, paras 17—22 (Keene LJ); R Harwood, Planning Permission (2016), para 28.9."

84. The issue being addressed in *Barnett v Secretary of State for Communities and Local Government* was whether plans and drawings were relevant to the issue of interpretation at all. The inspector had declined to look at the application form and plans because the planning permission had not expressly incorporated them. This was held to have been wrong. A distinction was drawn between outline and full planning permission. In respect of the latter, Sullivan J (as he then was) said, at [24] (in a passage approved by Keene LJ in the Court of Appeal, at [20]-[21]):

> "If it is plain on the face of a permission that it is a full permission for the construction, erection or alteration of the building, the public will know that, in addition to the plan which identifies the site, there will be plans and drawings which will describe the building works which have been permitted precisely because the permission is not, on its face, an outline planning permission. In such a case those plans and drawings describing the building works were as much a part of the description of what has been permitted as the permission notice itself. It is not a question of resolving an "ambiguity". On its face, a grant of full planning permission for building operations is incomplete without the approved plans and drawings showing the detail of what has been permitted."

As can be seen, this passage, on which the expression particular significance was based, was dealing with plans and drawings "which will describe the building works" and will show "the detail of what has been permitted". They were not given an elevated status but were "as much *a part of the description* of what has been permitted as the permission notice itself" (my emphasis).

85. This applies, in my view, equally to the layout plan and the site plan which are potentially *among* the relevant factors for the purposes of interpretation.

86. Further, in respect of the latter, which was particularly relied on by Mr Streeten, he also pointed to the fact that, under the relevant regulations at the time of the 2005 permission, an application for planning permission had to "be accompanied by a plan which identifies the land to which it relates and any other plans and drawings and information necessary to describe the development which is the subject of the application": *Barnett v Secretary of State for Communities and Local Government* [2009] 1 P & CR 24, 565, at [19].

87. In *Barnett*, Sullivan J decided that the site plan which had accompanied an application in 1998 for permission to extend an existing residential building (for which

permission had been given in 1995) had not had the effect of extending the existing curtilage (as defined by the 1995 site plan). He decided, at [34] of his decision that:

> "It was a necessary implication of permitting the new detached dwelling in 1995 that it would have a curtilage. Given that context and the other information on the site plan, the only reasonable inference was that it defined the extent of the proposed curtilage in 1995. In 1998 the position was materially different. There was a dwelling in existence, it had a curtilage. It was not a necessary implication of permitting the extension or alteration of that dwelling that its curtilage would be extended beyond that which had been permitted in 1995. There was nothing on the site plan which suggested that the red line should be interpreted as defining the extent of such an extension. For these reasons the Inspector's conclusions that the 1998 permission did not grant planning permission for an extension to the residential curtilage of Miscombe Manor was correct."

88. On appeal, that conclusion was challenged and reliance was placed on the 1998 site plan in a manner very similar to that advanced by Mr Streeten in this appeal. It was argued, at [26], that Sullivan J should have decided that the 1998 grant of permission related "to the area of land shown on the site plan" which accompanied the application:

> "Mr Newberry QC … points out that it is mandatory to submit a site plan with a planning application: see the 1988 Regulations, reg 3(1)(b), which requires a 'plan which identifies the land to which it [that is the application] relates'. Mr Newberry then argues that the planning permission subsequently granted then relates to that area of land shown on the site plan. That, he says, is the function and purpose of the site plan. He acknowledges that his argument logically implies, if pushed to the extreme, that a permission to alter the windows of an existing house would also grant permission for ancillary residential use of the whole area shown within a red line on a site plan even if it covered a much larger area than the existing curtilage. But he submits that, even when such a use is not specified on the permission itself or within the application, the change of use is implicit within the documents to which reference can be made. He contends that, as a matter of principle, all land shown as included within the site on a site plan in a planning application therefore receives the benefit of any resulting planning permission unless expressly excluded by a condition on the permission. In consequence all such land where permission is granted either for a new dwelling or for an extension to a dwelling house enjoys permission for use for purposes ancillary or incidental to the dwelling house."

89. This argument was rejected. In his judgment, Keene LJ agreed with Sullivan J that there was a distinction between the 1995 permission, which had been for "a new

dwelling on non-residential land", and the 1998 permission, which had been for the alteration and extension of the existing dwelling. As to the former, Sullivan J, at [29], had "recognised that when permission is granted for a new dwelling house, that dwelling house will normally have a curtilage including such uses as a garden, possibly a driveway, and a curtilage will normally be identified by the site as it is defined on the site plan". The 1995 permission had carried "with it permission to use the new dwelling for residential purposes". This was an obvious implication and:

> "the extent of the land covered by the implicit permission for a change of use will normally be ascertained by reference to the site as defined on the site plan. Thus that part of the site not built on can be used for purposes ancillary to the dwelling unless there is some obvious restriction shown on the permission itself. The site boundary shown on the plans defines the area of the new use."

90. The position in respect of the 1998 application and permission was different. There was an existing building with a defined curtilage. Accordingly, at [30]: "There is not necessarily any new use of land involved nor any extension to the existing curtilage". Whether there was depended on "the documents in question". In that case, at [31], "the red line shown on the site plan" was in "the appellant's favour" but that was "all which favours his interpretation". Keene LJ considered that what resolved the matter in that case was that neither the application form nor "the permission itself" referred to "any proposed change of use of any land". This meant, at [32]: "When all that is put together it seems to me to be quite clear that this 1998 permission was not granting permission for any new use beyond the established residential site".

91. As Mr Parkinson submitted, these cases do not establish any general principle that the site plan delineates the extent of any change of use. They demonstrate that, in each case, it is a matter of interpretation in respect of which the site plan is one factor. In some circumstances, such as permission to construct a new dwelling on non-residential land, there will be "implicit permission for a change of use" but, even then, this will only "*normally* be ascertained by reference to the site as defined on the site plan" (my emphasis). Further, I repeat, this observation was made in respect of the grant of permission for a *new* dwelling on what was non-residential land.

92. Applying the above to the 2005 plans in the present case, in my view, the "Proposed Layout" plan supports the Respondent's case or, at least, is not inconsistent with permission for use as a restaurant being confined to the ground floor.

93. First, the plan is a plan of the ground and first floors only and contains no reference to the garden at all. The word "Restaurant" appears only as describing the main room on the ground floor. I would also observe that this is repeated in the 2006/2007 plan. Secondly, the fact that the plan showed doors into the garden from the ground floor might support the conclusion that the change of use extended to the garden. However, contrary to Lewison LJ's conclusion (paragraph 27), I consider that the fact that such access is *only* through and from the end of the kitchen and through and from the toilets (described as a "fire exit") supports the conclusion that the garden was not encompassed in the change to restaurant use, in particular so as to permit the "use of the rear garden by [restaurant] customers" as set out in the officer's report. As the judge observed, at [33], "*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" (my emphasis).

94. As for the site plan, the present case has more similarities to the 1998 permission than the 1995 permission in *Barnett*. The site plan which accompanied the former did not lead to the curtilage being extended, the extent of which had been established, as a matter of necessary implication, by the site plan which accompanied the 1995 application. As Mr Parkinson submitted, the present case is not one in which there is a necessary or obvious implication that a change of use of the ground floor would extend to or include the garden. Indeed, if this was intended, it is not clear why the words "the ground floor" were included at all (other than if these words included the garden which is a submission I have dealt with above). Further, I do not see how the site plan can support the garden being *implicitly* included when this is contrary to the express words in the 2005 permission. In this respect, I agree with the judge that this argument "cuts across" a number of other factors.

95. Mr Streeten also relied on the concept of "planning unit" and *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207 and *R (KP JR Management Co Ltd) v Richmond upon Thames BC* [2018] EWHC 84 (Admin), [2018] JPL 838. I am inclined to agree with Mr Parkinson's submission that this concept, designed to assist in assessing whether a material change of use has occurred, is not particularly helpful in determining the meaning of the 2005 permission and that, even if it was, it is not apparent, as the judge said, at [30], that this was a matter considered by the officer at all. Further, however, in my view this again comes up against the clear wording in the grant of permission which expressly confined the change of use to the ground floor. Even if the ground floor, apart from that part used for the purposes of the first floor, and the garden and garage were viewed as one planning unit at the time of the application for permission, there is no reason in law why permission for a change of use should not be confined to one part of that unit. Again, Mr Streeten's reliance on implication or general propositions come up against the plain wording in the 2005 permission. I would also, again, question, if it was intended that the change of use would include the garden, why it was expressly confined to the "ground floor". In my view, this clear choice of wording is contrary to the Council's reliance on the concept of a planning unit.

96. The final issue relied on by Mr Streeten and which I propose to consider is "ancillary status" combined with the Use Classes Order. This is, in effect, part of the same argument as that advanced in respect of the planning unit which I have addressed above. It was submitted, in very brief summary, that permission for a change of use in respect of part of a property will apply to all the property. Even if I have unduly simplified Mr Streeten's submission, it is again a *general* submission which, as with the other matters he relies on, depends on the context and the facts of the particular case.

97. I also think the argument is far removed from the facts of this case. The issue is whether the use of the garden by restaurant customers was included within the change of use permitted by the 2005 permission. The fact that the previous use of the garden might have been ancillary to a general hardware store does not assist. Nor, in my view, does the fact that shops and restaurants are both in Class E. This was a circular argument because the answer to the question, as posed by article 3 of the UCO, depended on how the garden was in fact being used. This has never been considered

or determined as is clear from the officer's report. Further, even though ancillary use is determined by the primary use, the former can amount to development if the use has intensified to the extent that it amounts to a material change of use. Again, this has not been considered by the Council and, standing back for a moment, it would not be difficult to see that a change from a garden to a permanent structure with lights, tables and chairs for use as a restaurant might amount to a material change of use and an operational development. Even based on some assumed use, the inspector in her October 2022 report referred to this as "a very different prospect".

98. During the course of the appeal hearing, Mr Parkinson was asked what lawful use could be made of the garden after the 2005 permission. He had previously submitted that there was nothing nonsensical with the change of use being restricted to the ground floor and that there might have been reasons at the time why the application was restricted in this way. In answer to the question, he submitted that it remained whatever it had been prior to the 2005 permission which, I would add, could easily encompass use of the garden and the garage in a similar manner to the manner in which they had been used as ancillary to a hardware store (such as for the delivery of goods or for rubbish or for staff). This was, he submitted, for the Council to consider and determine which, as referred to above, has never happened. It was however, he submitted, clear that it did not extend to restaurant use as there was no evidence that the garden had ever been used by restaurant customers.

99. In summary, as to the proper interpretation of the 2005 permission, in respectful disagreement with Lewison LJ, I find the reasoning contained in the judgment below combined with the submissions made by Mr Parkinson more persuasive than the matters relied on by Mr Streeten. Applying the approach set out in *DB Symmetry*, the "natural and ordinary meaning of the relevant words", "permission for change of use of the ground floor … to a restaurant", is clear and, for the reasons summarised above, when weighed with the plans and other factors in this case lead to the conclusion that the change of use did not extend to the garden so as to permit its use by restaurant customers.

100. The final matter I address is long-standing use. I have dealt with this above but drawing the points together.

101. As submitted by Mr Parkinson, the reference to long-standing use in the report was not based on any consideration of how the garden had been used. It was, instead, based on the same assumption as to the effect of the 2005 permission. There is nothing which suggests that any such conclusion was based on any separate factual assessment of the actual use of the garden as being long-standing. The reference in the officer's report to: "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 lawful use of the premises* as a restaurant" (my emphasis), was clearly based on the officer's view of, or assumption as to, the effect of the 2005 planning permission and nothing more. The use of the word "lawful", for example, in my view shows that the officer is basing this on the assumed effect of the 2005 permission.

102. I would, lastly, just add that, in my view, the matters advanced by Mr Streeten were largely not points considered by the Council during the course of the planning process and seem to me to be an attempt, retrospectively, to seek to support a decision which was simply based on the officer's interpretation of, or the assumed effect of, the 2005

permission rather than these other matters, some of which would have requited separate consideration. Something as significant as, what I have described as, the radical transformation of the garden required clear rationalisation and justification which, in my view, are absent in the present case. A case, I repeat, which concerns what should be a matter which is relatively accessible to the general public, namely the interpretation of a planning permission.

103. In conclusion, therefore, I would uphold the judge's decision and dismiss the Council's appeal.

Lord Justice Males:

104. I agree with both my Lords that the Council failed properly to consider the issue of noise and that, for that reason, the grant of planning permission must be quashed. That is sufficient for the appeal to be dismissed. However, because it is necessary to be clear as to the basis on which the Council will have to reconsider the matter, or deal with any fresh application, I cannot leave the matter there.

105. Lord Justice Lewison has concluded that the change of use from a general hardware store to a restaurant permitted by the 2005 grant of planning permission extended to the use of the rear garden, while Lord Justice Moylan has concluded that it was limited to the ground floor of the built envelope.

106. I agree with Lord Justice Lewison for the reasons which he has given. In particular, before 2005 the use of the rear garden was ancillary to the use of the ground floor as a shop. It seems to me that it would be paradoxical, and contrary to what a reasonable reader equipped with some knowledge of planning law and practice would understand the words of the 2005 grant to mean, for the permitted change of use to be limited to the ground floor of the built envelope, while the permitted use of the rear garden remained use as a shop. I do not suppose that anybody in 2005 was expecting that restaurant customers would be served their meals in the rear garden. But the rear garden had been ancillary to the shop which had previously occupied the ground floor, and it was a natural meaning of the grant of permission that future use of the garden would continue to be ancillary to the use of the ground floor, which from then on would be use as a restaurant. Accordingly, while the construction of a new structure in the rear garden as part of the restaurant would require planning permission, it would not represent a material change of use.