Neutral Citation Number: [2021] EWHC 59 (Admin)

Case No: CO/171/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 15 January 2021

Before :
DAVID ELVIN QC

(Sitting as a Deputy High Court Judge)

Between :

THE QUEEN

on the application of

PARKVIEW HOMES LIMITED

Claimant

v

CHICHESTER DISTRICT COUNCIL

Defendant

and

SUSSEX INNS LIMITED

Interested Party

Alexander Greaves (instructed by Irwin Mitchell LLP) appeared on behalf of the Claimant
Jon Wills (instructed by Wannops LLP) appeared on behalf of the Interested Party
The Defendant was not represented and did not appear

Hearing date: 15 September 2020
(By video link)

- -

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be at 10 am on 15.01.2021.

DAVID ELVIN QC (Sitting as a Deputy Judge of the High Court)

Introduction

1. The Claimant ("**the C**") brings this judicial review against the decision of Chichester District Council ("**the Council**") dated 9 December 2019, to grant planning permission (ref: CC/19/01288/FUL) ("**the s.73 Permission**") under s. 73 of the Town and Country Planning Act 1990 ("**TCPA**") for development at 21-23 Southgate, Chichester, PO19 1ES ("**the Premises**"), without compliance with conditions attached to a previous grant of permission granted on 22 May 2000 (ref: CC/00/00107/FUL) ("**the Original Permission**"). The s. 73 Permission as granted on the application of Sussex Inns Limited, the Interested Party ("**the IP**") which owns and operates "the Vestry", which is a bar and music venue, at the Premises.

2. The Original Permission allowed:

> "Change of use of 23 Southgate from Class A1 (retail) to Class A3 (food and drink) at ground floor with ancillary hotel bedroom accommodation at 1st floor and external works."

3. The Original Permission was granted subject to a number of conditions, which included:

> "3. The building shall be used for A3 (food and drink) purposes on the ground floor with ancillary hotel accommodation and manager's flat on the first floor and for no other purpose (including any other purposes in classes A3, C1 , C3, or D2 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 or in any provision equivalent to that Class in any other statutory instrument revoking and re-enacting that Order).
>
> Reason: To ensure the use of the building does not have a harmful environmental effect in the interests of amenity."
>
> "5. The A3 food and drink use hereby permitted shall not be operated at any time otherwise than between the hours of 10.00 am and 12.00 midnight with last orders being taken before 11.00pm except on January 1st of each year when the use may be operated until 1.00 am and customers and the public shall vacate the premises by 01.00am with last orders being taken before 12.30am.
>
> Reason: To safeguard the amenities of neighbouring properties."
>
> "14. At no time shall any amplified music (whether live or recorded) from the building be audible from the public highway.
>
> Reason: To protect the character of the Conservation Area and the amenities of residents."
>
> "17. The floor and roof of the proposed hotel accommodation shall be constructed or altered to ensure ambient noise is limited to 25-30bD (A) in accordance with details first to be submitted to and agreed in writing by the

> District Planning Authority.
>
> Reason: In the interests of amenity for future occupiers."

4. C owns the adjoining property at 19 Southgate, Chichester PO19 1ES, which is under development for residential accommodation pursuant to a number of planning permissions granted in 2018 and pursuant to permitted development rights confirmed by a lawful development certificate in 2019.

5. The Premises are currently operated by the IP as "The Vestry" under a premises licence issued by D (ref: 17/00850/LAPRE3) for the exhibition of a film, the performance of live music, the playing of recorded music, the performance of dance; late night refreshment and also for the sale by retail of alcohol. That premises licence does not restrict the level of noise generated at the Premises.

6. On 16 November 2017 in response to a planning application made by C (ref: 17/02777/FUL), the IP stated that the ground floor of the Premises:

> "is a nightclub environment and as such makes a great deal of noise until the small hours"

7. On 17 December 2019 the IP also stated that the Premises were:

> "a music & dance venue, therefore the noise from our premises is not conducive to residents on an adjoining wall".

8. In response to a threat of enforcement action by the Defendant, the IP applied for and obtained a certificate of existing lawful use or development ("the CLEUD") from D dated 12 November 2018, which certified the following use of the Premises as lawful:

> "Use as a public house (Class A4 Drinking Establishments) with ancillary live and/or recorded music at ground floor level with ancillary bedroom accommodation at first floor level."

9. The CLEUD stated that it did not confirm that the conditions attached to the Original Permission were being complied with.

10. The C's reason for bringing these proceedings lies in its concern for the noise impact of the Vestry on the residential accommodation it is developing. This issue arose during the process of the grant of the residential planning permissions to C and, whilst the environmental health officer on the first application was satisfied that noise mitigation provided by the proposed development would be adequate for the likely noise levels created by the development lawfully permitted at the Vestry, namely "a pub/restaurant type environment, where lower levels of amplified music co-exist with raised voices and laughter" this would not be true of the Vestry's current activities. There, the EHO considered the -

> "level of sound transmission here is of a different order of magnitude where sound levels at source are approaching 100dB(A) with powerful bass tones … It is debateable whether any reasonable noise mitigation between the properties would be totally effective in protecting new dwellings from intrusive

> noise from music levels found in a nightclub. … The protection of residents from excessive noise intrusion through the party wall is dependent on the adjacent property reverting to its lawful planning use and significantly reducing sound levels generated within to a level more typically expected within a pub/restaurant environment."

11. The delegated planning report accepted this assessment but concluded that the issue of noise impact should be determined on the basis of the authorised use of the Vestry. It added:

> "[S]hould the occupiers of the Vestry seek to regularise (by submitting a planning application) their current use and opening hours it will be necessary for them to, amongst other things, demonstrate what the impact of the proposed activities would be on both the existing and prospective residential occupiers. In this respect it is reasonable to assume that a likely pre-requisite of any planning permission to broaden the Vestry's use and opening hours would be that any potential noise and disturbance would be mitigated by, for example, additional noise insulation and/or the adoption of appropriate management practices."

12. The report into the second residential application noted that the circumstances had not materially changed.

13. The IP submitted the application for, and obtained, the s. 73 Permission (having withdrawn an earlier application). In consultations on this application, the EHO stated in an email dated 12.6.19 that:

> "[o]ur objective… is to ensure that appropriate and viable control measures are secure so that neighbouring activities to the Vestry's operations are afforded adequate amenity. If this is unable to be realised, then we would not be in a position to support any application"

14. It also stated that although the Environmental Health department accepted that appropriate conditions and noise control measures could facilitate an extension of the opening hours at the Vestry it did not consider that all of the proposed conditions were viable, suitable or enforceable. Moreover, it set out a number of technical reasons why it was not considered that the adverse impact on residential amenity was unlikely. This included the view that the separating structure at 19 Southgate approved as part of the residential development has been designed to mitigate against anticipated levels in the Vestry of 70dB. Internal music levels measured by the IP's noise consultant exceed this and give rise to a real potential for disturbance. Therefore, the EHO advised that sound testing of the separating structure should be undertaken as soon as possible once it has been constructed. The EHO consultation response was provided to the C's consultants.

15. The C submitted an objection to the IP's s. 73 application on the basis that the IP was operating as an unauthorised drinking establishment or night club and had been

described as such by agents acting for the IP in the context of the premises licence, that the proposed variation would intensify the noise impact on 19 Southgate and that it was unlikely that any level of mitigation could be provided to safeguard the amenity of the residential units. It also pointed out that day trade was nominal as was the provision of food, and it was apparent that the kitchen had been removed at some stage.

16. The importance of protecting future residents from noise generated by the Vestry was acknowledged not only in the earlier grants of permission for 19 Southgate but by and exchange of emails by officers with the IP leading up to the decision under challenge:

(1) On 16 August 2019, the case officer informed the IP that the EHO considered that a sound test was necessary -

> "so we can confirm the dB levels would be extremely beneficial. Not only would this allow us to set a level and tie this into a condition and able [sic] us to enforce this, it would also allow … the LPA to ensure the conditions and figures stipulated are reasonable".

(2) On 13 September 2019, the EHO told the case officer that a carefully worded condition would be required to set the noise limiter to secure compliance with the specified noise criteria.

(3) On 19 November 2019, the EHO informed the IP's noise consultant that notwithstanding the reference to a noise limiter in the Noise Management Plan, officers wanted -

> "to see the additional provision that the limiter is set to the agreement of the Environmental Protection Team prior to the occupation at 19 Southgate. The limiter will be set to ensure the NR20 stipulation for neighbouring residential bedrooms. If the criteria cannot be met by limiter alone, it has to be acknowledged that additional structural measures may be required. It was agreed we shall speak with Caitlin [the case officer] with regard to suitable wording for a Condition. We have to be mindful that access to the neighbouring properties may be denied.".

17. Despite the C's concerns with regard to noise impact, the C was not party to the consultation on the issue of testing noise levels to set the limiter and was not requested to permit access for that purpose.

18. The Defendant granted the s. 73 Permission under delegated powers by officers. The report setting out the reasons for the decision further acknowledged the importance of protecting the amenity of 19 Southgate:

> "The key consideration here is the impact on neighbouring amenity. Paragraph 127(f) seeks to ensure that decisions create places that are safe, inclusive and accessible and which

> promote health and well-being with a high standard of amenity for existing and future users...' To the south of the site there are presently no occupiers, however there is consent for a number of residential flats as part a redevelopment of the entire building. These are currently under construction. As part of their consent, a new party wall was to be constructed which would provide sound insulation between the two premises and assist in mitigating against any noise disturbance between the two units.
>
> As part of this application a noise assessment has been carried out by the applicants and the Councils Environmental Health officers have undertaken a thorough site visit looking in detail at all aspects of the Noise Management Plan (NMP) and the accommodation provided within the premises. The officers were happy with the principle of the change to the opening hours subject to some points explored further below.
>
> The applicant's noise consultant proposed the use of Noise Rating Curves (NRCs) as an appropriate music noise threshold. CDC EH officers have undertaken further research about the use of NRCs and are happy these would provide for an appropriate way managing noise. A condition is proposed which seeks to ensure that noise control measures will have been implemented in accordance with the NMP and maintained to ensure that music noise levels as measured in any residential neighbouring habitable room, used for resting and sleeping do not exceed
>
> Bedrooms: Noise Rating Curve NR20
>
> Living Rooms: Noise Rating Curve NR30
>
> Officers are happy these levels would allow the appropriate level of amenity for the occupiers of the neighbouring properties.
>
> The site is located within a mixed urban area, where there are a number of other A4 and A3 uses which open later in the evening. Policy 10 of the CLP refers to development within the city centre and seeks to support and strengthen the vitality and viability of the city centre and enhance the city's existing entertainment and leisure offer, including the 'evening economy'. There is therefore an existing ambient noise environment within the vicinity of the application site. The premises has opened past midnight for a number of years with minimal noise complaints, and controlled by licensing, including the NMP."

19. The report then set out the measures required by the NMP and added:

> "Notably a new sound system has been installed and the system includes a limiter which is set and locked so that it cannot operate beyond a pre-set maximum level. The areas in the building are zoned to create lower sound levels near the front door and thus reducing the noise escaping when people leave the premises. The limiter provides restrictions to the noise levels ensuring that the NR20 curve can be met and thus mitigating against any impacts on neighbouring properties. EHO have concluded that subject to appropriate conditions this would mitigate against impacts on neighbouring amenities.
>
> Overall there are a number of measures in place to assist in mitigating any noise disturbance to neighbouring properties and the wider area. The premises is located within an area characterised by A3 and A4 uses which are open later in to the night and this site has been operating for a number of years, without many complaints, past midnight. The city does not have many venues that open late into the night and there are also no nightclubs. Regularising the late night opening of the premises would contribute to the night time economy within the city centre. With the appropriate noise mitigation conditions in place, the principle of the late night opening is considered to comply with local and national development plan policies."

20. The report set out the proposed conditions and then set out a number of "informatives," namely notes that did not amount to conditions, which included:

> "2) Condition 11 provides ultimate control for safeguarding the amenity of neighbouring residential dwellings, from music noise, in that, the level of activity in the venue shall be restricted or controlled as to attain the criteria.
>
> 3) Prior to occupation of the residential dwellings at Number 19 Southgate the music noise limiter, at the venue, shall be set and maintained at a music noise level approved by the Environmental Protection Team. It shall be recognised that the setting of the noise limiter will require the involvement of an appropriately qualified Acoustic Consultant, commissioned by the applicant.
>
> It is acknowledged that the applicant shall not be beholden to the aforementioned informative, however it is considered important that they are specified on any final decision notice in order that the reasoning for the conditions are explicitly explained. It also documents the expectation that a sound test should take place once no 19 has been constructed. The last point is recommended as an informative, rather than a condition, as it is recognised that access to number 19 may not be available to the applicant."

21. With regard to the information concerning the noise limiter, and its calibration, the significance was made clear in the report (above), this was not secured by condition or obligation. The informative itself acknowledged it was not enforceable. Although the difficulty of securing a sound test since there was no control by the IP over 19 Southgate was acknowledged in terms, no attempt was made to address that issue in any enforceable manner - nor did the report consider a deferral of the decision pending any discussions between the IP and the C with regard to carrying out sound testing.

22. The S. 73 Permission was granted in the terms set out above and with the following description of development:

> "Change of use of 23 Southgate from Class A1 (retail) to Class A3 (food and drink) at ground floor with ancillary hotel accommodation at 1st floor and external works (variation of condition 5, 6, 8, 14, and 17 of permission CC/00/001070/FUL – extension of opening hours on Thursday to Saturdays).".

23. The conditions imposed included also:

> "2) The building shall be used for A4 (food and drink) purposes on the ground floor with ancillary hotel accommodation and managers flat on the first floor and for no other purpose (including any other purpose in Classes A, C1, C3 or D2 of the schedule to the Town and Country Planning (Use Classes) Order 1987 or in any provision equivalent to that class in any other statutory instrument revoking and re-enacting that Order.
>
> Reason: To ensure the use of the building does not have a harmful environmental effect in the interests of amenity
>
> 3) No part of the A4 food and drink use on the ground floor shall be used for the sale of takeaway food unless a specific planning permission is granted for such a use.
>
> Reason: In the interests of amenity and highway safety
>
> 4) The public house with ancillary live and/or recorded music at ground floor level shall not be operated at any time other than between the hours of 07:00 and 00:00 midnight on Sundays to Wednesdays. On Thursday to Saturday evenings, Christmas Eve and New Year's Eve the premises shall not be open except between the hours of 07:00 and 02:00 the following morning, and all customers shall vacate the premises by no later than 02:30 on the morning following Thursday to Saturday evenings, Christmas Eve and New Year's Eve.
>
> Reason: To safeguard the amenities of neighbouring properties.
>
> …

> 10) Within 1 month of the date of this permission, all the noise control measures as identified within the approved Noise Management Plan (19.11.2019) shall be implemented and thereafter maintained fully in accordance with the approved plan. Any alteration to the plan will first require written consent from the Local Planning Authority.
>
> Reason: In the interests of neighbour amenity and the protection of the Chichester Conservation Area.
>
> 11) Music Noise Levels, as measured* in any residential neighbouring habitable room, used for resting and sleeping, shall not exceed the following criteria:
>
> Bedrooms: Noise Rating Curve NR20
>
> Living Rooms: Noise Rating Curve NR30.
>
> *The Noise Rating Curves shall be measured as a 15 minute linear Leq at the octave band centre frequencies 31.5 Hz to 8 kHz.
>
> Reason: In the interest of neighbouring amenity."

24. The Noise Management Plan ("**NMP**") (19.11.19) included a number of measures concerning the operational management of the Premises e.g., keeping windows closed, operating a lobby door system, specific hours for disposing of glass waste, dispersal of customers and the stepping down of the risk of noise escape from the Premises in the period up to closing. By their nature, most of the requirements are not clear cut and depend to a large extent on the assiduity and effectiveness of day-to-day management which, in turn, will not be simple or easy to enforce.

25. It is agreed by all parties that the retention of the original A3 description "(food and drink)" after "A4" in the revised condition is an error, and that this should in fact read "A4 (drinking establishments)" given the amendments to Use Class A3 in 2005, considered below. However, for reasons I will explain, this will not save the s 73 Permission.

Grounds of challenge

26. The four grounds advanced on behalf of the C are:

    (1) The s. 73 Permission amounts to an unlawful variation of the Original Permission that is beyond the scope of the Council's powers under section 73 of the 1990 Act (Ground 1);

    (2) Reliance upon an informative attached to the s. 73 Permission to secure mitigation necessary to make the development acceptable (Ground 2);

    (3) The failure to publish the additional EHO consultation responses or consult the Claimant on the revised noise mitigation proposals was procedurally unfair (Ground 3);

(4) It was irrational to conclude that the proposed noise mitigation measures would ensure that there would be no harmful impact on the future residential occupants of 19 Southgate in light of the Defendant's previous conclusions and in the absence of any further assessments to demonstrate that acceptable noise levels could in fact be secured (Ground 4).

27. The Defendant does not contest these proceedings in respect of Ground 1 and therefore did not take part in the hearing.

The Court's approach to challenges to planning authority decisions

28. This ground has been thoroughly considered by the Courts. With respect to the approach to considering challenges to local authority planning decisions I refer in particular to Lady Hale in ***R (Morge) v Hampshire County Council*** [2011] PTSR 337 at [36]; Lindblom LJ in ***Mansell v Tonbridge and Malling BC*** [2019] PTSR 1452 at [41]-[42] and [63]; and Hickinbottom J in ***R (Midcounties Co-op Ltd) v Forest of Dean DC*** [2015] JPL 288 at [5]. The principles were summarised by Lindblom LJ in ***Mansell*** at [42]:

> "42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:
>
> (1) The essential principles are as stated by the Court of Appeal in *R v Selby District Council, Ex p Oxton Farms* [2017] PTSR 1103: see, in particular, the judgment of Judge LJ. They have since been confirmed several times by this court, notably by Sullivan LJ in *R (Siraj) v Kirklees Metropolitan Borough Council* [2011] JPL 571, para 19, and applied in many cases at first instance: see, for example, the judgment of Hickinbottom J in *R (Zurich Assurance Ltd (trading as Threadneedle Property Investments)) v North Lincolnshire* Council [2012] EWHC 3708 (Admin) at [15].
>
> (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge: see the judgment of Baroness Hale of Richmond JSC in *R (Morge) v Hampshire County Council* [2011] PTSR 33, para 36 and the judgment of Sullivan J in *R v Mendip District Council, Ex p Fabre* [2017] PTSR 1112, 1120. Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave: see the judgment of Lewison LJ in *R (Palmer) v Herefordshire Council* [2017] 1 WLR 41, para 7. The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is

> only if the advice in the officer's report is such as to misdirect the members in a material way—so that, but for the flawed advice it was given, the committee's decision would or might have been different—that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
>
> (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading—misleading in a material way—and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R (Loader) v Rother District Council* [2017] JPL 25), or has plainly misdirected the members as to the meaning of a relevant policy: see, for example, *R (Watermead Parish Council) v Aylesbury Vale District Council* [2018] PTSR 43. There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law: see, for example, *R (Williams) v Powys County Council* [2018] 1 WLR 439. But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

29. So far as concerns the specific issue of requirements for officers' advice to members on planning issues in addition to the authorities referred to above, and their reasons, I also refer to Sullivan J in ***R v Mendip District Council ex parte Fabre*** [2017] PTSR 1112, 1120, Andrews J. in ***Pagham Parish Council v Arun District Council*** [2019] EWHC 1721 (Admin). This is not a case where officers advised members since the decision was taken under delegated powers so that the above principles need to be adapted to deal with the characteristics of a delegated decision.

30. I remind myself that it not appropriate to adopt an unduly legalistic approach to officer's reports in planning cases. See Lindblom LJ in ***Mansell*** at [41].

31. I will refer to authorities in more detail as necessary.

Discussion

Ground 1:

32. This ground illustrates once again, the difficulties caused when a local planning authority purports to grant permission under s. 73 without sufficient care as to its relationship with the parent permission. See, on different facts, ***R (Reid) v Secretary of State*** [2002] EWHC 2174 (Admin) and ***London Borough of Lambeth v Secretary of State*** [2019] 1 W.L.R. 4317. In both those cases, the Court considered that the errors that had been made were not fatal to the permission. I am less sanguine about such an outcome here and the Defendant has itself accepted that it made an error of law.

33. Mr Greaves submitted that Condition 2 of the s. 73 Permission unlawfully sought to restrict the use of the ground floor of the Premises to a use which is inconsistent with the use specified in the description of development in the Original Permission.

34. He relied on principles that a s. 73 permission may not, by variation of the conditions, conflict with the description of development granted by the original planning permission: ***R v Coventry CC ex p Arrowcroft Group plc*** [2001] PLCR 7 at [33]-[35] (Sullivan J) and ***Finney v Welsh Ministers*** [2020] PTSR 455 at [43] (Lewison LJ). The revised conditions on a s. 73 permission may not derogate from the operative words of the grant describing the development which cannot be amended under s 73, which only permits the variation of conditions. If a party wishes to vary the description of the development, then it must apply for a new planning permission.

35. Sullivan J. held in ***Arrowcroft***:

> "33. Faced with the imposition of such a condition there can be little doubt that Marks & Spencer would have replied to the local planning authority: 'Whilst you have purported to grant planning permission for one variety store the condition negates the effect of that permission. You may not lawfully grant planning permission with one hand and effectively refuse planning permission for that development with the other by imposing such an inconsistent condition.' If that was the extent of the council's powers in response to the application in 1998, as in my judgment it was, I do not see how the council can claim to be entitled to impose such a fundamentally inconsistent condition under section 73. It is true that the outcome of a successful application under section 73 is a fresh planning permission, but in deciding whether or not to grant that fresh planning permission the local planning authority,
>
> > "… shall consider only the question of the conditions subject to which planning permission should be granted."
>
> (See section 73(1) and *Powergen* above). Thus the council is able to impose different conditions upon a new planning permission, but only if they are conditions which the council could lawfully have imposed upon the original planning permission in the sense that they do not amount to a fundamental alteration of the proposal put forward in the original application. I bear in mind that the variety superstore was but one element of a very large mixed use scheme, nevertheless it is plain on the evidence that it was an important element in the mix and this is reflected in the retail implications of its removal.
>
> …
>
> 35. Whatever the planning merits of this new proposal, which can, of course, be incorporated into a new "full" application, I

> am satisfied that the council had no power under section 73 to vary the conditions in the manner set out above. The variation has the effect that the "operative" part of the new planning permission gives permission for one variety superstore on the one hand, but the new planning permission by the revised conditions takes away that consent with the other."

36. With regard to the applicability of those authorities, I see no basis for drawing a distinction between a s. 73 permission which gives consent to modify an existing development and one which acts "as an alternative to an unimplemented original permission", as Mr Wills submitted. It appears to me that the legal limits on the use of the provision apply to all s. 73 applications and it would be wrong to read the specific facts of ***Finney*** to limit its effect, especially given the other restrictions on the use of s. 73 set out in ***Arrowcroft***.

37. Mr Greaves submitted that the limitations on s. 73 were infringed in this case. He submitted, in my view rightly, that the relevant questions were:

(1) What is the proper interpretation of the operative part of the Original Permission?

(2) Whether Condition 2 is inconsistent with the use permitted by the operative part of the Original Permission?

38. With regard to the first question, the Original Permission was for

> "Class A3 (food and drink) at ground floor with ancillary hotel bedroom accommodation at 1st floor and external works".

39. The version of Use Class A3 changed from the version in force at the time of the Original Permission and that in force when the s. 73 Permission was granted, though nothing much may turn on it. At the time of the Original Permission, Class A3 comprised:

> "Use for the sale of food or drink for consumption on the premises or of hot food for consumption off the premises".

40. That version of Class A3 was disaggregated as from 21 April 2005 into 3 classes, new A3 (restaurants and cafes), A4 (drinking establishments) and A5 (takeaway and fast food). However, it appears to me that the scope of the Original Permission should be interpreted in the light of the version of Class A3 in force at the date of grant, and that the description of development for the purposes of applying s. 73 correctly should be understood accordingly.

41. Condition 4 of the Original Permission prohibited the use of the Premises for the provision of takeaway food so the old Class A3 was not fully applicable. Mr Greaves is right to describe the permission as one for a mixed pub and restaurant use. This was emphasised by the conditions that were imposed, which included conditions relating to both restaurant and pub use, such as condition 6 which relates to restaurant seating, condition 8 which concerns an extraction flue and odour suppression system for the kitchen and condition 9 with regard to a ventilation and cellar cooling system.

42. I agree that the use of the Premises, as originally permitted, if described in UCO terms following the 2005 modifications, would be a mixed A3/A4 use. It is common ground that the recent amendments to the Use Classes Order does not affect the approach to be taken to this issue.

43. Mr Greaves submits that Condition 2 properly construed prevents one half of the mixed use originally permitted and is therefore inconsistent with the operative part of the Original Permission which defines the use by reference to the former Class A3:

    (1) The operative part of the s. 73 Permission grants planning permission for a mixed A3/A4 use of the ground floor, but Condition 2 prevents any A3 use of the ground floor.

    (2) As in ***Arrowcroft***, the s. 73 Permission grants planning permission with one hand and the revised condition takes it away with the other. If Condition 2 had been imposed on the Original Permission, he submits, the original applicant would have been entitled to say "whilst you have purported to grant planning permission for a pub/restaurant use, you have effectively refused planning permission for that use by imposing such an inconsistent condition".

    (3) Condition 2 is also internally inconsistent with other conditions. It prevents restaurant use, but condition 7 contemplates the installation of cooking facilities and condition 3 seeks to restrict the sale of takeaway food.

44. Mr Wills, for the IP, submitted that the wording of the conditions was not fatal to the legality of the permission:

    (1) the s. 73 Permission, properly construed, allowed the IP to continue with the use that had already been implemented under the Original Permission, which fell within the old Class A3, but subject to different conditions;

    (2) the opening words of condition 2 merely operate "for the avoidance of doubt". Planning permissions run with land, and it is beneficial for any third party to understand that notwithstanding the use of the literal words of the old A3 use class within the operative description, the changed legislative background together with the implementation of the Original Permission means that it would not be lawful for the current new A4 use to be to changed to other uses within old use class A3;

    (3) Condition 2 was necessary, or at least lawfully permissible, in order to make clear that changes of use from the current use within class A4 would require a further planning permission;

    (4) Reliance is placed on the proposition that an operative part of a permission may grant consent for a use by reference to an entire Use Class, but a condition may remove permission for uses that fall within that Use Class;

    (5) the operative words of the s. 73 merely parrot what had been authorised in the Original Permission. Thus, "Class A3 (food and drink)" means, quite clearly, the class that was called A3 at the time of the Original Permission, and which was entitled "Food and drink". The operative part of the s. 73 Permission

expressly refers to the Original Permission reference number and thereby incorporates it by reference. Further, the new Class A3 is not called "Food and drink". It is therefore clear that the old words were carried over, and they bore the same meaning as they had in the Original Permission;

(6) if that is the case, then by virtue of the proposition that a consent may cut down a use class permission by condition, there is nothing objectionable about condition 2 at all; and

(7) it is unhelpful to use non-statutory terms such as “pub” and “restaurant” to describe a use which is described in the Original Permission in statutory language (e.g. "The A3 food and drink use" at conditions 4 and 5). What was permitted by the Original Permission was any aspect of the former A3 use which did not offend any of the conditions attached to the Original Permission. Accordingly, by condition 4, a use including the "sale of take away food" was excluded. However, the occupier was entitled to choose any other use within former class A3 and operate it in accordance with the conditions of the Original Permission.

45. I do not find Mr Wills’ submissions persuasive.

46. With regard to ***Finney***, Mr Wills submitted that Condition 2 positively upholds the principle in ***Finney*** by allowing the operative description to remain the same as in the Original Consent but merely cutting down on what was permitted. However, this is not itself an answer to the challenge and it should be noted that in ***Finney*** Lewison LJ noted the effect of not purporting to amend the operative words in what are essentially ***Arrowcroft*** terms:

> “43. If the inspector had left the description of the permitted development intact, there would in my judgment have been a conflict between what was permitted (a 100 metre turbine) and what the new condition required (a 125 metre turbine). A condition altering the nature of what was permitted would have been unlawful. That, no doubt, was why the inspector changed the description of the permitted development. But in my judgment that change was outside the power conferred by section 73.”

47. In my judgment the s. 73 Permission infringes the ***Arrowcroft*** principle since the restriction imposed by the new condition 2 (reading the description of Class A4 correctly as agreed) is inconsistent with the description of the development in the Original Permission as repeated in the operative parts of the s. 73 Permission. It is clear from ***Finney*** that the operative terms of a permission cannot be changed pursuant to s. 73 and although the s. 73 Permission does not purport to amend the operative words, contrary to the ratio in ***Finney***, it seeks to create the same effect by imposing conditions inconsistent with it and to a more significant extent than the original restriction on takeaway food. Had the application been made as an ordinary planning application, the issue could have been dealt with simply by granting planning permission for a drinking establishment and imposing a condition preventing change within the UCO if that were considered justified.

48. Whilst the exclusion of takeaway food was present in the Original Permission and was carried through into the s. 73 Permission, this does not alter the fact that the grant purports to be for a mixed restaurant and drinking establishment use but the new condition seeks to take away one of the two principal components of that mixed use by limiting the use of the ground floor to A4 use. The restriction on takeaways by the Original Permission left intact the substance of the restaurant element of the A3 use. This is not the same, contrary to Mr Wills' submissions, as an occupier choosing only to operate in accordance with one major aspect of the use in a use class granted permission by the Original Permission since the new permission actually precludes that (and not merely a subsidiary aspect of part of it).

49. The imposition of condition 3 highlights the confused thinking behind the new permission since condition 2 purported to limit the ground floor use to A4, drinking establishments only, so condition 3 was otiose. It also served to highlight the fact that the condition 2 was in fact inconsistent with the operative words of the grant of permission which, as ***Finney*** establishes, cannot be amended under s. 73.

50. The inconsistency is further highlighted by the following:

    (1) Conditions 4 and 5 that explicitly refer to the use as a "public house". Whether, as Mr Wills submits, such language is unhelpful it was in fact employed by the Council in granting permission and underlines the intention of not permitting under s. 73 that which was permitted by the Original Permission.

    (2) Condition 7 contemplates the "installation of kitchen facilities and … cooking on site" and, although some drinking establishments provide food, and it is ancillary to them, there is little to show this was a realistic possibility. Whilst it is unnecessary to go into detail over this, I note in particular that –

        (a) The Officer's Report noted that there are no longer any kitchen facilities within the Premises; and

        (b) The Planning Statement submitted in support of the application stated that no cooking takes place on the site and that all food provided is cooked and prepared off site and brought onto site for consumption only.

51. It appears to me that the Council confused the nature of the uses sought and the form of the permission in trying to give effect to s. 73 within their powers. The existence of the CLEUD does not appear to me to allow a different approach to be taken under s. 73 to the variation of conditions since it exists alongside the permission and no conclusions was reached in the grant of the CLEUD as to compliance with the conditions. In my judgment, this has resulted in a permission which has had conditions imposed that are inconsistent with the original permission, purported to grant permission for something other than originally permitted and other conditions that were not consistent with attempt to limit the new permission.

52. In my judgment, this ground of challenge succeeds.

Ground 2:

53. Mr Greaves submits that the decision was irrational since Council officers clearly understood and acknowledged the importance of ensuring the protection of residential amenity from noise generated by the Vestry but failed to achieve this. He pointed to the correspondence between officers and the IP which underlined the concerns and the need to find an appropriate mechanism to resolve them.

54. Mr Wills submitted that, regardless of the informative, Condition 11 (utilising noise rating curves) had been imposed and "stood on its own two feet". He argued that the informative was only a means by which the IP would be well advised to seek to ensure that they did not fall foul of condition 11 once the Claimant's residential units were built out. The Defendant was entitled to consider that the use of noise rating curves as an absolute noise ceiling was an appropriate manner in which to ensure that the proposed use of the Premises was not permitted in such a way as to cause any unacceptable noise impacts at neighbouring residential properties.

55. There is no doubt that impact on residential amenity through noise from the nightclub-type use of the Vestry was a consistent thread in EHO advice in 2018 and 2019. Its importance was recognised by the delegated report itself and Mr Wills does not dispute it. However, there was a breakdown in the logic of the decision in failing to follow through that need to resolve the potential impact on residential amenity.

56. The difficulty with Mr Wills' submissions on this ground is that officers clearly were not satisfied with condition 11 alone as the EHO's email on 19 November stated:

> "If the criteria cannot be met by limiter alone, it has to be acknowledged that additional structural measures may be required."

57. This does not support Mr Wills' contention that condition 11 would of itself meet the concerns of the C. Nor is that contention supported by the terms on the informative itself which noted that it documented "the expectation that a sound test should take place once no 19 has been constructed". If it were not necessary, it is difficult to see why it was not, consistently with the IP's case, simply expressed in terms to the effect that to ensure compliance with Condition 11, the IP would be well-advised to ensure the proper calibration of the limiter.

58. In my judgment, it was perverse of the Defendant through its officers to note the importance of the limiter but to fail to secure compliance by some means, or to consider deferral or even refusal, if compliance could not be secured. The informative itself recognises the difficulty and acknowledged that "the applicant shall not be beholden to the aforementioned informative" but perversely added that

> "it is considered important that they are specified on any final decision notice in order that the reasoning for the conditions are explicitly explained."

59. In my judgment, Ground 2 is also made out.

Grounds 3 and 4

60. It is unnecessary for me to deal with these grounds in any detail having already determined that the decision was unlawful on Grounds 1 and 2. However, my views on Ground 2 suggest that Ground 4 has substance since the absence of the noise test considered by the report meant that the decision was made in the absence of information that was clearly important to the resolution of the issue of impact on amenity.

61. There also appears to be substance in Ground 3 although since I am quashing the decision, there will have to be fresh consultation and the Defendant must ensure that the C is fairly consulted with regard to the measures to be taken to secure the amenity of 19 Southgate and be provided with an opportunity to address the issues raised. I accept the submission that on the basis of Sullivan J's judgment in ***Jory v Secretary of State*** [2002] EWHC 2724 (Admin) that since the C was a party intimately concerned with the resolution of the noise issues, as was amply demonstrated by the evidence and the terms of the officer's report, it was unfair of the Council to exclude the C from the consultation between the IP and officers over the noise measures. Had it been necessary to determine the issue, I would not have considered the lack of further consultation to fall into the same category as in ***R (Broad) v Rochford DC*** [2019] EWHC 628 (Admin).

Discretion and s. 31(2A) to (2C) of the Senior Courts Act 1981

62. Since the errors which I have identified were significant and went to the major objection to the application this is not an appropriate case to exercise the power in the 1981 Act. The errors manifestly go to the manner in which the decision should have been considered and the Court is unable to say with any degree of confidence whether the outcome would be the same. Indeed, it appears unlikely that this could be the case since had the issue of mitigation been properly considered then there are a number of potential outcomes, depending on the circumstances then prevailing and the planning judgment to be made, from the inclusion of an enforceable mechanism to secure appropriate noise limits or even refusal of the application.

63. As the Court of Appeal pointed out in ***R (Plan B Earth Ltd.) v Secretary of State for Transport*** [2020] PTSR 1446 at [273] (which is not affected by the Supreme Court's judgment [2020] UKSC 52):

> "Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law.

> Courts should also not lose sight of their fundamental function, which is to maintain the rule of law."

64. See also ***Gathercole v Suffolk CC*** [2020] EWCA Civ. 1179 at [38]-[44] (Coulson LJ).

65. This is a case of multiple errors in the decision-making process, including in the consultation process, and in the substance of the permission issued, where I cannot conclude that it is highly likely that the outcome would not have been substantially different.

Conclusion

66. I therefore quash the decision and the s. 73 Permission.