



Neutral Citation Number: [2023] EWHC 488 (Admin)

Case No: CO/1759/2022  
CO/2997/2022

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 08/03/2023

**Before :**

**Mr Timothy Corner, KC**  
**Sitting as a Deputy High Court Judge**

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**Between :**

**Strongroom Limited**  
**- and -**  
**London Borough of Hackney**

**Claimant**

**Defendant**

**-and-**  
**Curtain Road Properties Limited**

**Interested Party**

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**Jonathan Darby** (instructed by Birketts) for the **Claimant**  
**Daisy Noble** (instructed by the Solicitor to the London Borough of Hackney) for the **Defendant**  
**Matthew Reed, KC** (instructed by Fladgate LLP) for the **Interested Party**

Hearing date: 22<sup>nd</sup> November 2022  
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**Approved Judgment**

**Timothy Corner, KC:**

## **INTRODUCTION**

1. The Claimant is Strongroom Limited. It owns recording studios (“the Studios”) and a bar at 120-124 Curtain Road, London EC2A 3PJ and is therefore an immediate neighbour of 118 Curtain Road (“the Site”). It is common ground that the Studios are sensitive to noise and vibration. They share a party wall with the Site. The Defendant is the local planning authority. The Interested Party (“IP”) is the applicant for the planning permissions at issue in this case.
2. The Claimant brought two judicial review claims against the Defendant in respect of works proposed by the Claimant. Those claims came before me on 22<sup>nd</sup> November 2022. The settlement agreement of that date (“the Settlement Agreement”) provided that costs as between the Claimant and Defendant were to be determined by the Court in default of agreement, and that there should be no order as to costs between the Claimant and the IP.
3. The Claimant and Defendant have not agreed costs and have made written submissions, the last being the Claimant’s Reply sent to me on 24 January 2023. This is my determination of the issue.

## **FACTUAL BACKGROUND**

### The First Permission

2. In 2018, the IP applied for planning permission in respect of the Site for:

*“Change of use from storage and distribution (Use Class B8) to offices (Use Class B1), including the conversion and extension of the building with the erection of three additional storeys to provide B1 office floorspace, together with the provision of associated secure cycle parking facilities and refuse and recycling storage” (the “Proposal”).*

3. As part of its wider objection to the Proposal, the Claimant submitted detailed evidence from a sound and vibration expert, Mr. Jim Griffiths of the music acoustic consultancy, Vanguardia. Mr. Griffiths’ professional view was that unless noise and vibration levels were strictly controlled during construction, the use of the Studios would be subject to harm, impossible to use and might be compelled to close as a result. In a report dated 3 October 2018, Mr. Griffiths therefore advised on the maximum noise and vibration levels that could be tolerated during the construction phase (the “**proposed maximum levels**”).
4. The proposed maximum levels were:  
*NR 15 Leq,  
15min; 25 dB  
LAmax;  
0.5 mm/s PPV.*
5. This led the IP to submit a revised acoustic report prepared by Bureau Veritas (“**BV**”) dated November 2018, which accepted that the proposed maximum levels advised by Mr. Griffiths were reasonable and could be secured by way of condition.

6. The Defendant appointed its own expert acoustic consultants Gilleron Scott (“**GSAD**”) to advise in respect of the suggested noise levels in the context of the application and the proposed maximum levels to be imposed as conditions. In a report dated 20 February 2019, GSAD confirmed that it was also content with the imposition of the proposed maximum levels suggested by Mr. Griffiths by way of condition and that *“these should be met at all times, unless agreed in advance with Strongroom”*.
7. Mr. Barry Coughlan (the Defendant’s planning officer) authored a report (“**OR1**”) included in the papers for the 6 March 2019 meeting of the Hackney Planning Subcommittee (“the **Committee**”), in which he advised Members as to both the issue of noise and disturbance from the construction phase and also in respect of the proposed approach in relation to the proposed maximum levels.
8. In line with the agreed recommendation of all three relevant experts, OR1 included a recommendation that permission be approved with a condition reflecting the above and detailing the contents of a Demolition and Construction Management Plan (“**DCMP**”). In making that recommendation, Mr. Coughlan stated that:  
*“the onus would be put upon the applicant to find a means of constructing the development in such a way that they would not exceed the targets which they themselves have agreed are reasonable”*.
9. On 6 March 2019, the Committee considered the Proposal. It resolved to grant the Permission (“the **First Permission**”), with Condition 15 attached, embodying the three proposed maximum levels, as follows (emphasis added):  
*“Notwithstanding the documents hereby approved, no development shall take place until a detailed Demolition and Construction Management Plan covering the matters set out below has been submitted to and approved in writing by the Local Planning Authority. The development shall only be carried out in accordance with the details and measures approved as part of the demolition and construction management plan, which shall be maintained throughout the entire construction period. The plan must include:*
  - a) *A demolition and construction method statement covering all phases of the development to include details of noise control measures and measures to preserve air quality (including a risk assessment of the demolition and construction phase); The statement must also include:*
    - i. *Details as to how the construction of the development can be carried out without exceeding the following noise and vibration levels at a location (or locations) to be agreed by the Local Planning Authority: 1 NR 15Leq, 15min; 2. 25dB LAmax; 3. 0.5 mm/s PPV.*
    - ii. *Details of on-site testing which demonstrates that the construction of the development can be carried out without exceeding the noise and vibration levels set out at part i above.*
    - iii. *Details of noise and vibration monitoring to be carried out in accordance with the methodology set out in the Acoustic Report by Bureau Veritas dated November 2018. This monitoring data must be made available to the Local Authority when it is requested.*
    - iv. *A liaison strategy between the applicant and adjacent businesses and*

*property occupiers including a commitment to liaise with neighbours when particularly noisy periods of construction are likely to occur...*”

10. The reason given for the imposition of Condition 15 was stated to be as follows:  
“To avoid hazard and obstruction being caused to users of the public highway, in the interest of public safety and amenity, in order to prevent the construction of the development having an unacceptable environmental impact upon neighbouring properties and to protect air quality, human health and to contribute to National Air Quality Objectives.”
11. The Committee reserved the discharge of Condition 15 to come back to it for consideration and final approval.

#### The First Discharge Application

12. By application dated 9 September 2021, the IP submitted details pursuant to Condition 15 (the “**First Discharge Application**”). In support of the First Discharge Application, the IP submitted a draft DCMP dated 9 September 2021 along with a BV report dated August 2021 (the “**August 21 BV Report**”).
13. The August 21 BV Report was based on testing conducted on 14 and 15 July 2021 (the “**Initial Testing**”). All the results reported in the August 21 BV Report with regards to impacts on the Studios are estimates.
14. On 14 October 2021, the Claimant’s solicitors wrote to the Defendant saying that the August 21 BV Report and the draft DCMP were flawed on their face and inviting the Defendant to reject the First Discharge Application. Further correspondence followed between the Claimant and the Defendant in which the Claimant urged the Defendant to stand by the agreed and imposed maximum levels and sought assurances from the Defendant that it would ensure that the IP fully complied with those levels in any purported attempt to discharge Condition 15.

#### Injunction

15. In November 2021 the Defendant commenced works at the Site. The Claimant sought injunctive relief to restrain what it alleged was a noise nuisance.
16. The claim for an injunction was resolved by consent, with the IP agreeing to ensure it stayed within the agreed limits and the Claimant agreeing to grant the IP a licence (“**the Licence**”) to carry out proper “on-site testing” in order to prepare a DCMP that showed it could properly discharge Condition 15 by complying with the agreed and imposed levels. The terms of the licence provided *inter alia* for the IP to i) consult with Vanguardia as to the location and nature of testing equipment; ii) for Vanguardia to be present during the testing; iii) for the IP to monitor the extent to which all the results met or exceeded the agreed noise limits; and iv) for BV to disclose all testing results to the Claimant.

#### On-Site Testing

17. On 3 December 2021, the Licence was granted by the Claimant.
18. Vanguardia then liaised with BV on all aspects of the proposed testing and monitoring. It was agreed between the experts that testing would monitor the noise

and vibration in all three studios adjoining the Site: Studio 1 (ground floor to the rear); Studio 2 (ground floor to the front); and Studio 6 (second floor).

19. Pursuant to the Licence, the IP and its consultants (BV) attended the Studios over the period of 20-24 December 2021 for the purpose of taking measurements (the “**On-Site Testing**”).
20. The results of the On-Site Testing were purportedly reported in a BV Report dated January 2022 (the “**January 22 BV Report**”), which noted the likelihood of exceedances and the need to consider alternative techniques.

Further correspondence

21. The Claimant commissioned Vanguardia to review the January 22 BV report. In its report dated 21 January 2022 Vanguardia stated that the majority of the IP’s own tests exceeded the NR15 condition. In addition, the NR limit would be further exceeded if more than one of these activities were to be carried out simultaneously.
22. By letters dated 27 January 2022 to the Defendant, the Claimant’s solicitors raised further concerns about the Defendant’s approach to the First Discharge Application, as well as with regards to the alleged deficiencies in the submitted material itself, addressing those concerns to the Defendant’s Head of Planning and Building Control and the Defendant’s planning officer.

Unilateral Off-Site Testing

23. On 10 March 2022, BV unilaterally conducted off-site testing, which did not include monitoring at receptors within the Studios (the “**Unilateral Off-Site Testing**”). BV then presented a further report dated March 2022 (the “**March 22 BV Report**”) in support of the IP’s application to discharge Condition 15.
24. The covering letter from the IP’s planning consultant submitting the March 22 BV Report made clear that the Defendant was fully aware of, and indeed prompted, the further testing. The letter from CMA of 14<sup>th</sup> March 2022 read:

*“At the request of LB Hackney (in consultation with LB Hackney’s Environmental Protection Officer) additional noise testing and monitoring was undertaken on site at 118 Curtain Road on 10 March in order to verify that the use of a handheld core drill is acceptable...etc..”*

Further correspondence

25. The Unilateral Off-Site Testing came to the Claimant’s attention when Mr. Coughlan on behalf of the Defendant sent the March 22 BV Report to the Claimant’s solicitors on 22 March 2022. When he did so, Mr. Coughlan also indicated that the First Discharge Application would be referred to the Committee with a recommendation for approval.
26. On 23 March 2022, the Claimant’s solicitors sent an email in reply, stating that the Claimant would be:

*“instructing Vanguardia to review the revised details, testing and conclusions in relation*

*to the [March 22 BV Report] and condition 15 discharge application”, [before a] “full response” [could] “be provided so that the committee can consider a balanced view”.*

27. The Claimant was notified on 30 March 2022 that the First Discharge Application would be considered by the Committee at its meeting on 6 April 2022.
28. The Claimant instructed Vanguardia to review the March 22 BV Report, and Vanguardia produced a review dated 28 March 2022 (“**Vanguardia’s March 2022 Review**”), which contains a relevant “*Summary*” (at section 3), as well as a conclusion that:  
*“the [March 22 BV Report] provides no support for the contention that the Applicant is able to demonstrate that the construction can be carried out without exceeding the sound criteria of Condition 15, even on its own results, indeed it demonstrates the opposite.”*
29. The Claimant provided Vanguardia’s March 2022 Review to the Defendant under cover of a letter dated 30 March 2022.

#### The Recommendation

30. The relevant Officer’s Report (“**OR2**”), again authored by Mr. Barry Coughlan, recommended that the Committee approve the details required by Condition 15.
31. Under the heading “*Noise and Vibration*”, OR2 advises Members as to:
  - a. The background:
  - b. The Officer’s summary of the January 22 BV Report and March 22 BV Report:
  - c. The Officer’s summary of Vanguardia’s position in respect of the On-Site Testing and Unilateral Off-Site Testing:
  - d. The Officer’s summary of the position of the Council’s Environmental Protection Officer (“EPO”):
  - e. The Officer’s position in respect of the interpretation of Condition 15, as follows:
    - “6.6 *The wording of the specific part of the condition related to noise and vibration requires the submission of details, including testing at a location to be agreed by the Council, which show how construction can be carried out without exceeding the agreed noise and vibration levels, alongside details of monitoring and liaison. The relevant wording is repeated below for clarity...*
    - ...
    - 6.11 *... Whilst it is acknowledged that there may be exceedances, that does not mean that the limit cannot not be met as no amount of noise mitigation can guarantee non exceedances.*
    - 6.12 *In the event that an exceedance does occur, the applicant will need to take necessary action to rectify the situation. To this end, the approach for monitoring data levels during construction is*

*considered to be sound and will allow for effective monitoring of the relevant noise and vibration levels. The submitted liaison strategy is also considered to be acceptable and would facilitate effective communication between the applicant and affected neighbours. It is noted that Strongroom Studios have not objected to either of these aspects of the condition.”*

- f. The overall position in respect of the details submitted in relation to noise and vibration, as follows [CB/19/246/6.13]:

*“6.13 Overall, the details submitted in relation to noise and vibration are considered to be acceptable and sufficient to discharge the condition. The fact that testing has shown that one of the noise limits proposed by the Strongroom would be breached even in the existing background condition (i.e. with no construction works taking place) should also be noted, as should the studio’s location within a busy inner urban area where the existing sound insulation within the studios does not appear to prevent the 25 dB LAmax levels being exceeded in relation to background noise.”*

32. By email dated 6 April 2022, and having reviewed OR2, the Claimant’s solicitors brought their concerns as to the interpretation of Condition 15 to the attention of the Defendant’s officers.

#### The Addendum Report

33. In advance of the Committee meeting, the Defendant’s officers produced a “Planning Sub-Committee Addendum” (the “**Addendum Report**”), which sought to summarise the Claimant’s consultation response under the heading “*Item 7: 118 Curtain Road*”.

#### The Decision

34. At a meeting on 6 April 2022, the Committee considered the First Discharge Application and resolved to approve the submission of details.
35. The Decision Notice was issued on 8 April 2022.

#### The Change of Use Application

36. Alongside the determination of the First Permission and discharge of Condition 15, the IP had submitted a further application dated 26 November 2020 (Ref: 2020/3775, the “**Change of Use Application**”, by which the IP sought permission for: “*Change of use from storage and distribution (Use Class B8) to offices (Use Class E(g))*”.

37. The Change of Use Application was supported by several documents, including a Design, Access and Planning Statement (the “**DAS**”) which asserted that:

*“1.6 The proposals are for change of use from B8 to E(g) use only, with no operational development / external alterations to the building. It is proposed that the E(g) office space will be naturally ventilated (i.e., using passive ventilation) and as such there is no requirement for new mechanical plant / air handling equipment. The sole consideration in relation to impacts on amenity is therefore the potential noise generated by the day-to-day operations of a E(g) office workspace.*

- 1.7 *In this regard it is relevant to note that The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 defined Use Class E Commercial, Business and Service use as: “being a use, which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, small, fumes, smoke, soot, ash, dust or grit.”*
- 1.8 *The proposed use of the site for E(g) office workspace purposes would therefore, by definition, not result in any adverse impacts on surrounding amenity.*
- 1.9 *As the proposals do not include any operational development / external alterations, there are no design or heritage implications. Internal works in association with the proposed change of use (which are not subject to planning control) would be limited to the installation of small power and data, the installation of new partitions to provide offices and meeting rooms, general finishes / decorative works and the installation of office furniture.”*
38. Further reference is made at paragraphs 4.21-4.25 of the DAS to the noise that would be generated during the construction and operational phases.
39. By letter dated 7 January 2021, the Claimant’s solicitors notified the Defendant that the Claimant would not object to the Change of Use Application:  
*“on the strict understanding that planning conditions are imposed as set out below so that that the ‘development’ is carried out in strict accordance within the declared boundaries cited in the Design and Access and Planning Statement submitted as part of the [Change of Use Application]”.*
40. Having set out that expressly conditional position, the Claimant’s solicitors requested that *“in the event that the Council is minded to grant permission”*, conditions mirroring the practical effect of Condition 15 attached to the First Permission be imposed. In doing so, the Claimant’s solicitors also noted that:  
*“..when the [First Permission] was heard by committee, members wanted the strict noise conditions to be imposed in order to protect Strongroom. The nature of our clients’ business has not changed since members wanted these conditions imposed and it remains a noise sensitive business and it needs to continue to be protected”.*
41. By letter dated 2 March 2021, further concerns were raised on behalf of the Claimant, emphasising the need for protection equivalent to that imposed by Condition 15 to the First Permission.

#### The Second Permission

42. By delegated report dated 11 March 2021, the Defendant’s officer recommended that permission be granted for the Change of Use Application, including as follows:  
  
*“Given that no external alterations are proposed, it is considered unlikely that the extent of construction works that would arise from the change of use would have an unacceptable impact upon neighbouring properties by reason of noise or disturbance.*



*The objections/comments received in relation to the potential impact of the proposal upon the adjacent Strongroom Studio are noted as are the particular characteristics of the Strongroom in terms of noise sensitivity. The specific request of the Strongroom to impose the same noise and vibration limits that were included in the Construction and Management Plan condition attached to the earlier approval at the site (2018/0363) is also noted.*

*Planning permission 2018/0363 involved the partial demolition of the roof of the building and the erection of a substantial extension. The extent of potential noise and vibration impacts upon the Strongroom arising from this proposal were considered to warrant specific mitigation measures.*

*In this case, the proposal is for a change of use only with no external alterations proposed. The extent of noise and vibration impacts that would arise from the implementation of the development are such that it is considered unreasonable in this case to impose the same noise and vibration limits to this permission as were imposed for a significantly more impactful form of development. The imposition of the condition sought by Strongroom Studios is therefore not considered to meet the relevant tests set out in the NPPF for conditions.*

*Whilst it is noted that the Design and Access Statement submitted with the application states that no operational development will be undertaken as part of the building to office, it is considered to remain the case that imposing the specific noise and vibration limits would not meet the relevant tests given the nature of the development.*

*However, in view of the sensitivity of the Strongroom to noise and vibration, it is recommended that a standard CMP condition be imposed with this permission. This will not set out specific noise and vibration limits but will require the submission and approval of a CMP which includes proposed methods for mitigating noise and vibration (among other matters). The works of conversion associated with the proposed change of use may be minimal, in which case the CMP would only need to be minimal, however the works of conversion may be more extensive in which case the CMP would need to be more detailed and include specific noise and vibration limits. This condition is considered to be reasonable for both the developer and the neighbour in the circumstances and is considered to be a suitable response to the particular characteristics of the site and the nature of the development proposed.”*

43. By decision notice dated 11 March 2021, the Defendant granted permission for the proposed change of use (Ref: 2020/3775, the “**Second Permission**”), without any condition prescribing numerical noise and vibration limits during construction, but-in line with the officer’s recommendation-imposing Condition 6, which required submission and approval of a Construction Management Plan, as follows (emphasis added):

*“Notwithstanding the documents hereby approved, no development shall take place until a detailed Construction Management Plan covering the matters set out below has been submitted to and approved in writing by the Local Planning Authority. The development shall only be carried out in accordance with the details and measures approved as part of the construction management plan, which shall be maintained throughout the entire construction period. The plan must include: A*

*demolition and construction method statement covering all phases of the development to include details of noise control measures and measures to preserve air quality (including a risk assessment of the demolition and construction phase); A Dust Management Plan to control dust emissions during demolition and construction; Details of compliance with ‘chapter 7 of the Cleaner Construction Machinery for London: A Low Emission Zone for Non-Road Mobile Machinery’ in relation to Only Non Road Mobile Machinery or used at the development site during the demolition and construction process along with details that all NRMM are entered on the Non Road Mobile Machinery online register at <https://nrmm.london/user-nermm/register> before being operated. Where Non-Road Mobile Machinery, which does not comply with ‘chapter 7 of the Cleaner Construction Machinery for London: A Low Emission Zone for Non-Road Mobile Machinery’, is present on site all development work will stop until it has been removed from site. A demolition and construction waste management plan setting out how resources will be managed and waste controlled at all stages during a construction project, including, but not limited to, details of dust mitigation measures during site clearance and construction works (including any works of demolition of existing buildings or breaking out or crushing of concrete), the location of any mobile plant machinery, details of measures to be employed to mitigate against noise and vibration arising out of the construction process demonstrating best practical means. Details of the location where deliveries will be undertaken; the size and number of lorries expected to access the site daily; the access arrangements (including turning provision if applicable); construction traffic routing; details of parking suspensions (if required) for the duration of construction.”*

44. The reason stated for the imposition of Condition 6 was as follows:

*“REASON: To avoid hazard and obstruction being caused to users of the public highway, in the interest of public safety and amenity, in order to prevent the construction of the development having an unacceptable environmental impact upon neighbouring properties and to protect air quality, human health and to contribute to National Air Quality Objectives.”*

#### The Undertaking

45. By letter dated 15 April 2021, the Claimant’s solicitors sought an urgent undertaking from the Defendant, including that it would be notified directly of any application made to discharge Condition 6 of the Second Permission in order that it could make written representations.

46. By email dated 20 April 2021, the Defendant provided an undertaking in the form sought.

#### Second Discharge Application

47. An application dated 8 October 2021 (Ref: 2021/3014, the “**Second Discharge Application**”, was made to discharge Condition 6 and was supported by a Construction Management Plan dated 5 October 2021 (the “**CMP**”).

48. The CMP provides (so far as is relevant):

a. At para 2.1, the “*outline scope of works*”:

- b. At section 6, the “*Project Method Statements*”, which are said to “*cover all phases of the development*”:
- c. At section 7.1, noise control measures, with construction noise thresholds specified in Table 01 (75dB LAeq.T, freefield):
- d. At para 7.1.1.2, some “*General Noise Control Measures*”, which indicate that the proposed works envisage “*noisy*” works (see bullet points 1, 5, 6, 7, 8, 9, 10, 16, 17 and 18):
- e. At para 7.1.1.5, discussion of the “*Erection of Physical Barriers*”, which confirms that some activities “*are expected to generate particularly high noise levels*”, for which screening attenuation may be deemed appropriate:
- f. Appendix C, which sets out a “*Noise Exceedance Protocol*”, but does not provide any further details as to the locations and/or number of monitoring points.

#### Objection

49. The Claimant objected to the Second Discharge Application by letter dated 15 November 2021.

#### Decision

50. The delegated report (dated 14 April 2022 and authored by Mr Coughlan) recorded:
- a. That no objections were received from Transport; TfL; Environmental Protection or Air Quality.
  - b. The following “*Comments*”:  
*“The condition required the submission of a construction management plan. The details submitted have been assessed by the Council’s Transport Team and TfL and are considered acceptable in terms of mitigating the impact upon the local and strategic highway network. The details have also been assessed by officers in relation to the environmental impacts of construction and site waste management and are considered to be acceptable. As such, it is considered that the condition may be discharged.”*
  - c. The following “*Conclusion*”:  
*“The details submitted are considered sufficient and acceptable to discharge conditions 6 (Construction Management Plan) attached to planning permission 2020/3775.”*
51. By delegated decision dated 8 July 2022, Condition 6 was discharged with reference to the CMP.

#### **GROUNDS OF CHALLENGE**

52. By claim CO/1759/2022 (“**JR1**”) the Claimant sought an order quashing the decision to discharge Condition 15 and a declaration as to the proper interpretation of the First Permission. Its grounds for seeking a quashing order were:

- (1) Failure to properly interpret Condition 15:
- (2) Failure to properly apply Condition 15:
- (3) Failure to advise and/or misleading advice given as to noise and vibration evidence:
- (4) Failure to take into account an important material consideration and/or Tameside irrationality.

53. By claim CO/2997/2022 (“**JR2**”) the Claimant sought a quashing order in relation to the Defendant’s decision to discharge Condition 6 of the Second Permission, on the following grounds:

- i) Unreasonable and/or irrational discharge of Condition 6 /approval of the submitted CMP:
- ii) Failure to take account of an important material consideration:
- iii) Breach of duty of inquiry/Tameside irrationality.

## **SUBMISSIONS**

### JR1

54. In relation to *ground 1*, the Claimant submitted that Condition 15 does not permit exceedances of the specified noise levels and that the Defendant’s planning officer misunderstood its meaning and therefore misled the Committee. Specifically, the Claimant said that the planning officer told the Committee that Condition 15 permitted exceedances, relying on this passage in OR 2 at para 6.11:

*“[whilst] it is acknowledged that there may be exceedances, that does not mean the limit cannot be met as no amount of noise mitigation can guarantee non exceedances.”*

55. The Claimant sought a Declaration from this Court as to the meaning of Condition 15.

56. The Defendant and IP accepted that Condition 15 is unambiguous on its face and does not permit exceedances. They also contended that OR2 does not suggest otherwise. They were both content that I should grant a Declaration if appropriate, but suggested it was unnecessary to do so.

57. In relation to *ground 2*, the Claimant made the following points additional to those in ground 1:

- (1) Neither the August 21 nor the March 22 BV reports can rationally be considered to report the results of on-site testing, because they were not informed by testing carried out at the Claimant’s studios.
- (2) The “on-site” testing that informed the January 22 BV report was inadequate because it failed to calculate NR values and reveals a considerable risk of exceeding the limits imposed by Condition 15.

58. The Defendant and IP responded as follows:

- (1) As to “on-site” testing, that expression in Condition 15 means within the Site. At no point does the First Permission identify the “site” for the purpose of the expression “on-site” testing to mean the Studios. In any event, the Council was reasonably able to decide (as it did-see OR2, para 6.11) that information derived from testing within the Site as opposed to within the Studios, was sufficient to establish compliance with Condition 15. Further, the Council had the January 22 BV report in addition to those from August 2021 and March 2022, and the January 22 report undertook testing in the Studios.
- (2) In relation to NR values, the BV reports set out the substance of what was required. The issue between BV and Vanguardia was whether it was appropriate to account for the margin of error in BV’s calculations and the process of rounding. The Defendant took account of this disagreement and was entitled to accept BV’s position. In any event, the measured data established that if there would otherwise be exceedances, alternative techniques could be used to avoid them.
- (3) As to cumulative effects, such effects were considered in the BV January and March 22 reports and the conclusion reached that they were not a matter of concern. The Claimant’s concerns were taken into account by the Defendant (see OR 2 at para 6.10 and 6.11) and the judgement rationally reached that the criteria on Condition 15 could be met.

59. In relation to *ground 3*, the Claimant contended that the advice given to Members was misleading and distorted the true situation as to the acoustic evidence. Members were given no advice as to how the EPO was satisfied in respect of the information provided by the IP.

60. The Defendant and IP responded that the planning officer properly reported the EPO’s view that he was satisfied with the information provided by the IP (OR 2 at para 6.11), and that the EPO’s reasoning for that conclusion at the Committee meeting was acceptable. They also argue that the argument that the view of the EPO was reported in a misleading fashion rested on the erroneous suggestion that the BV reports were themselves misleading or wrong.

61. In relation to *ground 4a*, the Claimant said that because Members were offered no advice on cumulative impacts or the requirement for on-site testing, the Committee-and therefore the Defendant-failed to take these points into account, or if it did, failed to give reasons for its conclusions on them.

62. The Defendant and IP responded that it was made clear to the Committee that Condition 15 related to noise in the Studios, and cumulative impacts were dealt with, and further that the issue of the meaning of “on-site testing” was dealt with (in the Addendum Report, in the section dealing with whether testing was required within the Studios), while testing within the Studios did take place for the January 22 BV report. Further, it was submitted that the reasoning in OR2 and the Addendum Report was adequate.

63. In relation to *ground 4b*, the Claimant argued that the Defendant breached the duty of inquiry to which it was subject and therefore acted irrationally, as per Tameside MBC v Secretary of State for Education and Science [1977] AC 1014. To have discharged Condition 15 lawfully, the Defendant needed all the relevant material before it, and if it did not have it, was required to obtain it. It did not have the relevant information it needed to understand the measured impacts of certain, alternative, construction methods on receptors within the Studios, or the cumulative impacts.
64. The Defendant and IP responded that the Defendant had the benefit of expert reports from both BV and Vanguardia, and that the Council's assessment of the evidence, including by its EPO, was sufficient.

## JR2

65. In relation to JR2, the Defendant and IP contended that the claim was *out of time* because it was in reality a challenge to Condition 6 of the Second Permission. The Claimant responded that the challenge was to the discharge of Condition 6, not the condition itself. It said that had the Claimant sought to challenge the Second Permission, the claim would no doubt have been defended on the basis that it had been brought prematurely, because the question of the need for and nature of any appropriate protection for the Studios was to follow pursuant to submission of the CMP and application for discharge of Condition 6.
66. Turning to the substantive contentions, with regard to *ground 1* the Claimant submitted that the Defendant erred and acted unreasonably in approving the submitted CMP in the absence of full details as to the nature, extent and location of the proposed works of conversion and/or their likely impacts. The Claimant said the Defendant could not properly discharge Condition 6 of the Second Permission without considering the sensitivity of the Studios and whether "standard limits" would be adequate and contended that the Defendant acted irrationally in discharging Condition 6 without requiring a CMP that imposed noise and vibration limits equivalent to those required by Condition 15 of the First Permission. The Claimant also contended that the Defendant should have considered whether the noise mitigation strategies would be effective to meet the 75dB limit in the CMP.
67. The Defendant and IP responded that the decision to discharge Condition 6 was entirely rational. The Officer Report on the Change of Use Application recognised that as the proposal was for a change of use with no external alterations, the extent of likely noise and vibration did not justify an equivalent to Condition 15 of the First Permission, but a standard CMP condition should be imposed, and the adequacy of the CMP judged having regard to the details of the work which were provided. The CMP set out in detail the noise mitigation measures that would be adopted. In the circumstances, the Defendant was entitled to conclude that the CMP provided enough detail and to rely on the CMP requirement that the limit set out in the CMP would be met. Further, it was rational for the Defendant to conclude that an equivalent condition to Condition 15 of the First Permission was not required.
68. In relation to *ground 2*, the Claimant contended that the Defendant erred in failing to take account of the Defendant's acknowledgement of the lack of sufficient information, the acknowledgement by all parties of the need for the limits imposed by Condition 15 of the

First Permission, the overlap between the First and Second Permissions, and the breach of sound levels by the IP in November 2021.

69. The Defendant and IP responded that the Defendant never acknowledged a lack of sufficient information, that it was not acknowledged by all that an equivalent of Condition 15 needed to be imposed in the Second Permission, that the nature of the works authorised by each Permission was distinct, and that a previous breach of noise levels by the IP was not a consideration to which the Defendant was obliged to have regard.
70. In relation to *ground 3*, the Claimant argued that the decision to discharge Condition 6 was flawed by Tameside irrationality because the Defendant did not ensure that it had sufficient information on which to make a proper assessment of whether to discharge the condition.
71. The Defendant and IP argued that the Defendant clearly had sufficient information before it, and that this ground was a repetition of ground 1.

### **SETTLEMENT OF THE CLAIM**

72. On the day of the hearing, 22 November 2022, the parties settled the claim. My Order, made by consent of all the parties, provided in part:

“..ON THE PARTIES AGREEING TERMS AS SET OUT IN THE DECLARATION AND AGREEMENT DATED 22 NOVEMBER 2022 AS APPENDED HERETO (the “Agreement”)

IT IS ORDERED THAT:...

1 The claims are adjourned generally.

3 Costs as between the Claimant and Defendant shall be determined in accordance with paragraph 4 of the Agreement.

4 There shall be no order as to costs between the Claimant and Interested Party.

5 An application shall be made by the Claimant to withdraw the claims in accordance with paragraph 5 of the Agreement (including applying to withdraw the application to admit the transcript) within 14 days of....receipt of the Court’s determination of costs....”

73. The Agreement provided in part as follows:

“1.The practical effect of Condition 15 of Planning Consent 2018/0363 is that the Interested Party shall, during the construction work it carries out pursuant to the First Permission, ensure that there are no exceedances, within the Claimant’s studios, from construction noise and vibration of the following maximum levels: NR 15 Leq, 15 min, 25dB L<sub>Amax</sub>, 0.5mm/s PPV with monitoring to be undertaken at a location (or locations) to be agreed by the Local Planning Authority.

2.In the event that there are exceedances of the maximum levels stated in paragraph 1, these will constitute breaches of Condition 15 which the Defendant may take enforcement action against. ...

IT IS FURTHER AGREED AND DECLARED THAT BETWEEN THE CLAIMANT AND THE INTERESTED PARTY:

6. The following terms shall have the following meanings:

‘Noisy works’ means works which shall not exceed a limit of 75dBA inside the Claimant’s Studios

‘Noisy day’ means days within the Relevant Period when the Interested Party wishes to carry out Noisy Works during the Noisy Work Hours

‘Noisy Works Hours’ means between 8:am and 11:am on Monday to Saturday

‘Relevant Period’ means the period of 4 weeks commencing on the date 4 weeks after the date of the notice referred to in paragraph 7

‘Construction Fee’ a fee of £1000 for each Noisy Day

7. The Interested Party shall give 4 weeks written notice to the Claimant of the Noisy Days within next Relevant Period.

8 The Interested Party shall pay 50% of the Construction Fee to the Claimant on each day on which notice is served under paragraph 7.

9 The Interested Party shall pay the remaining 50% of the Construction Fee to the Claimant on the day which is 4 weeks after the date on which notice was served under paragraph 7 and prior to the commencement of any Noisy Works associated with said notice.

10. The Interested Party shall ensure that any works under the First Planning Permission or the Second Planning Permission do not exceed 75dBA inside the Claimant’s Studios during the Noisy Works Hours

11 The Interested Party shall ensure that any works under the First Planning Permission or the Second Planning Permission do not exceed the limits set out in paragraph 1 inside the Claimant’s Studios outside of the Noisy Works Hours

12 The Claimant and the Interested Party shall use their reasonable endeavours to agree terms for any licences which may be reasonably required by the Interested Party to enable the works approved by the First and Second Planning Permission to be constructed.

13 As between the parties, the Council shall take into account the terms of this agreement in considering the expediency of enforcement action against any breaches of the noise limits specified in the construction management plans as approved in respect of the First and Second Planning Permissions.”

74. The terms “First Planning Permission” and “Second Planning Permission” are not defined in the Agreement, but my understanding is that all concerned agree that those terms correspond with the First Permission and Second Permission referred to in this judgement.

75. The Claimant and Defendant have been unable to agree costs, so the issue falls to me to determine. I have seen submissions from the Claimant, a response from the Defendant, and the Claimant’s Reply.



## LEGAL BACKGROUND

### Approach in relation to costs where a case settles

76. The leading case is R (M) v Croydon LBC [2012] 1 WLR 2607. Lord Neuberger MR said:

*“60..in Administrative Court cases, just as in other civil litigation, particularly where a claim has been settled, there is..a sharp difference between (i) a case where a claimant has been wholly successful..and (ii) a case where he has only succeeded in part...and (iii) a case where there has been some compromise which does not actually reflect the claimant’s claims. While in every case, the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.*

*61 In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgement following a contested hearing, or by virtue of a settlement, the claimant can, at least absent special circumstances, say that he has been vindicated and, as the successful party, that he should recover his costs. In the latter case, the defendants can no doubt say that they were realistic in settling, and should not be penalised in costs, but the answer to that point is that the defendants should, on that basis, have settled before the proceedings were issued: that is one of the main points of the pre-action protocols ....*

*62. In case (ii), when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. Given that there will have been a hearing, the court will be in a reasonably good position to make findings on such questions. However, where there has been a settlement, the court will, at least normally, be in a significantly worse position to make findings on such issues than where the case has been fought out. In many such cases, the court will be able to form a view as to the appropriate costs order based on such issues; in other cases, it will be much more difficult. I would accept the argument that, where the parties have settled the claimant’s substantive claims on the basis that he succeeds in part, but only part, there is often much to be said for concluding that there is no order for costs....However, where there is not a clear winner, so much would depend on the particular facts. In some such cases, it may help to consider who would have won if the matter had proceeded to trial, as, if it is tolerably clear, it may, for instance support or undermine that one of the two claims was stronger than the other ...*

*63 In case (iii), the court is often unable to gauge whether there is a successful party in any respect, and if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases, it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win.”*

77. If the claimant obtains the relief he sought for a reason which is unrelated to the claim, the claimant is not for that reason entitled to his costs when the claim settles; see R (Tesfay) v Secretary of State for the Home Department [2016] 1 WLR 4853 and R (MH)

(Eritrea) v Secretary of State for the Home Department [2022] EWCA Civ 1296 at [43].

#### Interpretation of planning permission

78. The proper interpretation of a planning permission is a matter of law for the court: Barnett v Secretary of State for Communities and Local Government [2009] EWCA Civ 476; [2010] 1 P & CR, per Keene LJ, at [28]. In Lambeth LBC v Secretary of State for Housing, Communities and Local Government [2019] PTSR 1388, Lord Carnwath said:

“19. *In summary, whatever the legal character of the document in question, the starting point – and usually the end point – is to find “the natural and ordinary meaning” of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense.*”

79. In UBB Waste Essex Ltd v Essex CC [2019] EWHC 1924 (Admin) Lieven J set out at [51] onwards factors which were applied in respect of the interpretation of a planning permission in that case. She said that permissions should be interpreted as by a reasonable reader with some knowledge of planning law and the matter in question, and that permissions should be interpreted having regard to the planning purpose as shown in the reasons given for the conditions and any documents incorporated into the permission.

#### Reports to committee

80. The proper approach to be taken to officer reports to committee is now well settled, as summarised in Mansell v Tonbridge & Malling Borough Council & Ors [2017] EWCA Civ 1314 [Leading Planning Cases, p 436], at 42:

*“..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 in R (on the application of Morge) v Hampshire County Council [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J, as he then was, in R v Mendip District Council, ex parte Fabre (2000) 80 P & CR 500, at p.509). 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 Palmer v Herefordshire Council [2016] EWCA Civ 1061, at paragraph 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.*

*(2) 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 consequence 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 (on the application of Loader) v Rother District Council [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, Watermead Parish Council v*

*Aylesbury Vale District Council [2017] EWCA Civ 152). 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 (on the application of Williams) v Powys County Council [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."*

81. In Juden v London Borough of Tower Hamlets & Ors [2021] EWHC, it was accepted by Sir Duncan Ouseley (sitting as a High Court Judge) that the principles in relation to misleading advice could also apply to advice provided by an officer during the course of discussions at a committee meeting considering an application for planning permission: in that case misleading advice recorded in the officers' report was not properly clarified in the oral presentation to members so as to obviate the error in the report.
82. The proper approach of the court upon being presented with a transcript of a discussion leading to a resolution of a committee is as set out by Singh J (as he then was) in the case of R (Mid-Counties Co-operative Ltd) v Forest of Dean District Council [2017] EWHC 20156, at [58], as applied with approval recently by Dove J in R (Village Concerns) v Wealden District Council & Ors [2022] EWHC 20139 (Admin); namely that i) it is necessary to approach the transcripts with realism as to their nature; and ii) examining the general tenor of the debate. In Bishop Stortford Civic Federation v East Hertfordshire District Council [2014] PTSR 1035, the court recognised that the cut and thrust of political debate is not conducive to refined textual analysis.

## **ASSESSMENT**

83. Before dealing with the merits of the costs claims, I should note that both JR1 and JR2 are Aarhus Convention claims. In the case of each claim, Lang J limited the Defendant's liability to £35,000 (see her orders of 17 June 2022 for JR1 and 4 October 2022 in relation to JR2). As I understand it, the Defendant therefore has a possible liability of the Defendant of up to £70,000 if I make a costs award against it for both JR1 and JR2, though the actual amounts claimed are less.
84. To decide the costs issue, the guidance in R(M) v Croydon LBC is that I should focus in the first instance on whether pursuant to the settlement the Claimant was wholly or partly successful, or whether the settlement does not reflect the Claimant's claims.
85. The Claimant has not been successful in obtaining the quashing of the Defendant's decision to discharge either condition 15 of the First Permission (sought in JR1) or condition 6 of the Second Permission (sought in JR2). Both those decisions stand.
86. The Claimant did succeed in obtaining agreement by the Defendant (and IP) in the Settlement Agreement to the Claimant's interpretation of Condition 15 of the First Permission.
87. However, it seems to me that from an early stage the Defendant has not contested the Claimant's interpretation. It is plain from the Defendant's Summary Grounds of Defence for defending the claim that it was not suggesting that exceedances of the noise limits are permitted; see paragraphs 46 and 47:

“46...the Officer’s subsequent explanation that ‘[i]n the event that an exceedance does occur, the applicant will need to take necessary action to rectify the situation’...This plainly does not indicate that those exceedances would be ‘permitted’; on the contrary, it states clearly that they will not be permitted and must be rectified.

47. Moreover, this is consistent with the four-pronged approach to noise control set out in the condition itself. The very purpose of the monitoring and liaison strategy is to ensure that in the event there is an exceedance, it is identified and addressed. In this way, the condition itself recognises the possibility (but not the permissibility) of exceedances (ie that they ‘may’ occur). This simply reflects the reality of construction processes.”

88. Indeed, that the Defendant’s Summary Grounds of Defence accorded with the Claimant’s interpretation of Condition 15 is apparent from the Claimant’s letter to the Defendant dated 18 July 2022, referred to below.

89. In my view a fair reading of the Defendant’s Pre-Action Protocol response shows that the interpretation of Condition 15 put forward by the Defendant in that document also accorded with the Claimant’s interpretation.

90. The section of the Pre-Action Protocol response dealing with ground 1 starts by setting out Condition 15 and then says at paragraph 18:

“The purpose of these requirements was appropriately summarised by the officer in his report to the sub-committee in respect of the discharge application. At paragraph 6.6.26 [of OR1] the officer explained that under the condition, *the onus would be put upon the applicant to find a means of constructing the development in such a way that they would not exceed the targets which they themselves have agreed are reasonable.*”

91. Paragraphs 22, 27 and 28 of the Pre-Action Protocol response say:

“22 The DCMP is ..required to demonstrate that there are means of constructing the development whilst meeting the noise and vibration limits. The condition then requires that the development is carried out ‘*in accordance with the details and measures approved.*’ In other words, the IP was required to demonstrate how it intended to construct the development in accordance with noise and vibration limits, and thereafter it is required to comply with the means of construction that it has identified as capable of meeting those limits.

27 By the Claimant’s interpretation, Condition 15 provides an absolute prohibition on noise and vibration above the levels specified in the condition. As such, the condition could not be discharged unless the material submitted by the IP demonstrated that there was a means of construction which would necessarily mean that exceedances could never occur.

28 This interpretation cannot be right. As is discussed in paragraphs 22 and 26 of this response, such a requirement would be inconsistent with the type of noise and vibration generated on a construction site. What is possible (and what the condition explicitly requires) is for the IP to submit details of how ‘construction of the development can be carried out without exceeding...noise and vibration levels.’ The IP was required to

demonstrate that the construction methods it intended to employ could meet defined criteria (Part (a) (i) of the condition). Condition 15 will now operate to require compliance with the details that have now been approved.”

92. It might be contended that on a literal reading of paragraph 27, it was being said that exceedance of the noise limits was not “prohibited”, meaning that it was permitted.
93. But I do not think that is a fair reading, in context. In paragraph 27 the Defendant is referring to what it understands to be the Claimant’s interpretation, namely that there has to be a guarantee that exceedances “could never occur.” I think the remaining paragraphs make clear that as the Officer told the Committee, it was not permitted to exceed the noise levels set out in condition 15, even though it could not be physically guaranteed that such exceedance would never take place. Paragraph 18 quotes the Officer in OR1 saying that the IP had to find a means of constructing the development in such a way that it would “not exceed the targets”, and paragraph 22 says that having shown how it intended to construct the development in accordance with the noise and vibration limits, thereafter it was required to “comply with the means of construction that it has identified as capable of meeting those limits”. Paragraph 28 in essence repeats those points. Further, because the Claimant’s Pre-Action Protocol letter focused on alleged deficiencies in OR2, I think it is also appropriate to interpret the Defendant’s Pre-Action Protocol response in the light of OR2, which as I say below did not mean that exceedances of the limits were permitted.
94. In those circumstances it seems to me that although the Claimant has secured explicit agreement to its interpretation of condition 15 in the Agreement, in reality that interpretation was never contested, and the Claimant did not need to commence proceedings in order to secure recognition of its interpretation.
95. In relation to JR2, the Agreement between the Claimant and the IP (paragraph 11) secures that the noise limits of condition 15 shall apply to works pursuant to the Second Permission. Could it be said that the Claimant has therefore secured the relief it sought in JR2?
96. I do not think it could. With regard to ground 1, the Claimant argued that the Defendant acted irrationally in discharging condition 6 without requiring a CMP that imposed noise and vibration limits equivalent to those required by condition 15 of the First Permission.
97. However, the agreement the Claimant secured that the noise limits of condition 15 should apply to works pursuant to the Second Permission was with the IP, and not the Defendant.
98. That agreement does not secure quashing of the Defendant’s decision to discharge condition 6. The agreement only secures agreement with the IP and does not result in an approval of discharge of Condition 6 which replaces the one the Claimant sought to quash. The agreement would have no effect if the IP sold the Site to another developer.
99. Furthermore, under the terms of the agreement between the IP and the Claimant the IP was granted the right to buy the right to exceed the noise limits in Condition 15 (provided that the noise within the Studios did not exceed 75dBA).
100. In reality, as the Claimant recognises in its Submissions in Reply on Costs (paragraph

10), “the Agreement is primarily a commercial agreement with the IP.” In those circumstances I do not think it can properly be said that the Claimant has secured the relief it sought under JR2.

101. My view is therefore that (with the exception of recognition of its interpretation of Condition 15, for which it did not need to commence proceedings) the Claimant has failed to secure what it sought, in both claims. This is therefore (except for recognition of the Claimant’s interpretation of Condition 15) a case within category (iii) and paragraph [63] of the judgement of Lord Neuberger MR in R (M) v Croydon LBC. Lord Neuberger suggested that in some such cases it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. I therefore proceed to do that, with regard to both JR1 and JR2.

102. What if (contrary to my view) the Claimant is to be viewed as having succeeded in part in JR2, so that in relation to JR2 its case falls within category (ii) and paragraph [62] of Lord Neuberger MR’s judgement in Croydon? Lord Neuberger said that in such a situation there is often much to be said for concluding that there is no order for costs. However, he added that it may help to consider who would have won had the matter proceeded to trial as, if it is tolerably clear, it may support or undermine the contention that (as between claims which succeeded and claims that did not) one of the claims was stronger than the other. I therefore think it would be relevant to look at the merits of the claim even if the Claimant were to be viewed as having succeeded in part.

103. I now proceed to examine the merits of both JR1 and JR2.

#### JR1

104. I start with *ground 1*. It is clear, as is common ground for all the parties, that condition 15 does not permit exceedance of the levels specified in the condition. The condition requires a DCMP to be submitted containing details as to how construction of the development can be carried out without exceeding the levels. That can only mean that exceedance of those levels is not being permitted.

105. I do not think the Officer suggested otherwise, either in his report (OR2 and the Addendum) or in his verbal comments to the Committee (and, as I have said, I do not think the Defendant suggested otherwise in its Pre-Action Protocol response letter of 13 May 2022, or in its Summary Grounds or Detailed Grounds of Defence). Even read on its own, the sentence relied on by the Claimant (at OR6.11) does not suggest that meaning to me, but in any case, the sentence must be understood in the context of OR2 as a whole. The Officer explained the need for limits at 6.5, set out what Condition 15 required at 6.6 (ie that it should be shown “how construction can be carried out without exceeding the agreed noise and vibration levels”), referred to the submitted DCMP at 6.7, referred to testing results at 6.8 (as showing that the development could be carried out in accordance with the agreed levels) and at 6.9-6.10 discussed whether the limits in the Condition could be met. He also explained at 6.11 and 6.12 that if an exceedance did occur the applicant would need to take action to rectify the situation. That is why Condition 15 requires monitoring and liaison, so that if exceedances occur, they can be rectified.

106. I add that although in its Submissions in Reply on Costs (paragraph 6) the Claimant

suggested that at 6.8 the officer indicated that the limit of 25dB LA Max “could be ignored”, I do not think this is correct; the wording is that the Claimant did not object to the “discharge” of this aspect of the condition, and discharge of the condition just meant that the DCMP dealt appropriately with this part of Condition 15.

107. I do not think anything said at the Committee meeting itself would have misled Members. The officer’s advice was clear, and as the Court recognised in Bishops Stortford Civic Federation v East Hertfordshire District Council, the cut and thrust of political debate is not conducive to refined textual analysis. The Claimant complained about the Defendant’s legal adviser saying that the work “can” be carried out within the limits in Condition 15 as opposed to be “must.” I think that in the context this did not amount to a statement that might have misled the Committee into thinking that compliance with the limits was optional or that Condition 15 would not be breached if the limits were not complied with. The discussion at the meeting was mainly about whether there would be exceedances of the limits, and it is plain from the transcript that Members understood that if there were exceedances there would be “breaches” of the limits, meaning that enforcement action could be taken by the Defendant if work did not cease.

108. I turn to *ground 2*.

109. Dealing first with the submissions about “on-site testing”, I think that expression means within the Site, ie the planning application site bounded by the red line in the planning application. Nowhere is it suggested that “the site” for the purpose of the expression “on-site” testing necessarily means testing inside the Studios themselves. As was submitted for the IP, conditions 8, 11, 12, 17 and 23 refer to “the site” in various contexts. In each case the condition is referring to the Site, not the Studios. It would be surprising if a condition were to require testing to take place within the Studios, as this is land in third-party control and as such a condition containing such a requirement could be considered unreasonable.

110. In any event, testing was, in fact, undertaken in the Studios, as part of the work for the January 2022 report. The Council therefore had the benefit of testing within the Studios as well as within the Site in order to reach its conclusions about the acceptability of what was proposed.

111. In relation to the Claimant’s submissions about NR values, it appears that the real issue between the parties was about the method of assessment, and in particular whether it was appropriate to account for the margin of error in BV’s calculations of up to 3dB, and the process of rounding. BV’s position was that the recorded exceedances were within the reasonable margin for error. Vanguardia’s position (Mr Griffiths) was that the exceedances (of up to 2dB) should be considered leaving out of account the margin for error. This point was discussed at the Committee meeting, with the acoustic consultants for both the Claimant and IP setting out their position.

112. In my view the Defendant was entitled to reach a conclusion on this matter as a matter of judgement on the basis of advice from its officers, and the Committee was advised (OR 2, para 6.11) that the view of the EPO was that the relevant criteria could be met. The EPO repeated this judgement at the Committee meeting, stating that he had reached the conclusion that the NR15 limits “can be met.”

113. It was indicated in the BV reports and to the Committee in OR2 (see 6.9) and verbally at the Committee meeting that methods had been proposed which could be undertaken without exceeding the limits in the condition. It seems to me that the officers were entitled so to advise the Committee, on the basis of the information they had.

114. The various BV reports need to be read together and I do not think reliance on the January 22 BV report alone as showing a “considerable risk” of exceedance grounds a valid challenge to the Defendant’s decision to discharge Condition 15. The January 22 BV report indicated that percussive breaking of concrete/masonry and breaking of the roof would exceed one of the limits (NR15). Alternative methods were suggested. The March 22 report tested further alternatives, in particular saw cutting and hand-held core drilling. This was also referred to in the Addendum Report. I think Members were entitled to conclude on the basis of the expert evidence they had and the advice from their own officers that the construction work could be carried out without breaching the limits in Condition 15.

115. In any event, as Members were told at the meeting, if monitoring did identify exceedances over the limit, then work was to cease immediately.

116. As to cumulative effects, they were considered in the BV January 22 and March 22 reports. It was stated at para 7.8 of the March 22 report that:

“The outcome of the measurements and subsequent assessment of construction activities has shown that there are construction and demolition activities commonly adopted within the construction industry that meet the limits defined in Condition 15 (a) (i). However, should some of these activities be undertaken simultaneously, there is a risk of exceeding limits within the most sensitive parts of 120-124 Curtain Road. Nonetheless, it should be noted that noise and vibration monitoring will be carried out in accordance with an agreed Demolition and Construction Management Plan in order to provide live monitoring and should limits be exceeded, activities can be ceased until a suitable alternative approach can be implemented.”

117. Cumulative effects are also considered in OR2 (para 6.10), which is part of the analysis to which reference is made in para 6.11 where it is said that:

“The comments of the acoustic consultant for the Strongroom have been considered but it is considered that the manner in which the analysis in relation to NR15 Leq 15 min has been presented in the application submission is sound.”

118. It seems to me that cumulative impact was properly considered by the Defendant and a rational conclusion reached.

119. I turn to *ground 3*. I do not think the advice given to Members was misleading or distorted the true situation. The views of the EPO were properly summarised in OR2 and the EPO expanded on his reasoning at the meeting. I am not convinced that there was any obligation on officers to report the views of the EPO in more detail in the Report, or on the EPO to say more than he did at the meeting.



120. I do not think ground 4a adds materially to the previous grounds. I have already set out my view on the meaning of on-site testing, and the Members were correctly advised in the Addendum Report that:

“There is no requirement within the wording of the condition for testing to take place within [the Studios]”.

121. Also, as I have already said, cumulative impacts were dealt with. Further, the reasons given in OR2 and the Addendum Report were adequate. The Defendant correctly considered the requirements of Condition 15 and reasonably, for the reasons set out, concluded that the material submitted by the IP was adequate.

122. Finally, in relation to ground 4b, I think the Defendant had sufficient information to understand the impacts of construction methods, including cumulative impacts, having regard to the substantial amount of expert evidence before it.

### JR2

123. I begin with the issue of *delay*. In my judgement, the claim was not out of time. This is because I agree with the Claimant that the issues raised by the claim arose from the Defendant’s decision to discharge Condition 6 and not from Condition 6 itself.

124. In relation to ground 1, I am not persuaded that the Defendant acted irrationally in approving the submitted CMP. As the Defendant and IP submit, the Officer Report on the application for the Second Permission recognised that the proposal was for a change of use which did not involve external alterations (unlike the application for the First Permission). That Report specifically contrasted the two applications and dealt in detail with the Claimant’s case that a condition equivalent to Condition 15 of the First Permission should be imposed. As I say below, I do not think the Defendant acknowledged any lack of necessary information, and in my view it had enough information to make the judgement it in fact made.

125. Overall, it seems to me that it was rational for the Defendant to decide not to impose a condition equivalent to Condition 15 of the First Permission in the Second Permission or to require such a condition as part of the CMP under Condition 6.

126. I understand the Claimant’s wish to have an equivalent condition to Condition 15 imposed in relation to the Second Permission, but I am not convinced that this aspect of the challenge was anything other than a disagreement with the Defendant as a matter of planning judgement.

127. As to the Claimant’s contention that the Defendant should have considered whether the noise mitigation strategies would be effective to meet the 75dB limit in the CMP, I think that having regard to the extent of the works proposed, the Defendant was entitled to rely on the CMP requirement that the limit would be met and which was enforceable by Condition 6.

128. As to *ground 2*, I do not think it was the case that the Defendant and IP acknowledged a lack of sufficient information or that an equivalent of Condition 15 needed to be

imposed in the Second Permission. Furthermore, on the basis of the evidence and written submissions I do not see how a previous breach of the noise limits by IP in relation to works permitted by the First Permission was a material consideration which the Defendant was obliged to take into account in dealing with the application for the Second Permission. Next, as was pointed out in the Officer Report on the application for the Second Permission, what was proposed in the application for the Second Permission was different from what was proposed in the application for the First Permission; in relation to the Claimant's submissions about the overlap between the two Permissions, they are distinct and the Defendant would have been able to require the developer to identify which permission was being relied on.

129. I think *ground 3* adds nothing. It does not appear to me to be the case that the Defendant had insufficient information to determine the Second Discharge Application. Having regard to Condition 6 and the information provided as to works proposed in the CMP, I think the information the Defendant had was sufficient.

### **OVERALL CONCLUSIONS**

130. The first step in my assessment was that (except for obtaining acknowledgement of its interpretation of Condition 15, for which commencement of proceedings was unnecessary) the Claimant did not succeed in securing the relief sought in either claim. In accordance with paragraph [63] of Lord Neuberger's judgement in R(M) v Croydon LBC, I have then reviewed the merits of the claims.

131. Having regard to the review of the merits of JR1 and JR2 set out above, my overall view is that with the exception of the declaration sought in JR1, it is not tolerably clear that had these claims been litigated, the Claimant would have won. I am conscious that without a hearing my ability to assess the merits is limited. At a hearing the Claimant would no doubt wish to address the points I have made above in relation to the merits of the two claims. But that is not possible where parties choose to settle a case but leave costs to the Court. Inevitably, in that situation, the Court is in an imperfect position to judge who would have won. Acknowledging that imperfect position but doing the best I can on the basis of the written evidence and submissions, my view is that (save for the declaration) the Defendant, not the Claimant, would have won.

132. Further, in relation to the declaration sought, I have concluded that the Defendant did not suggest an interpretation of Condition 15 which was incorrect or inconsistent with the position of the Claimant and as set out in the Settlement Agreement, even in its response to the Claimant's pre-action protocol letter in relation to JR1. This is hardly surprising, because I do not think that the position as stated by the Officer in OR2 was incorrect, either. It follows that JR1 was unnecessary insofar as the claim for a declaration was concerned.

133. I have noted that the Claimant made offers to settle JR1 following the issue of proceedings (see its Submissions on Costs at paragraphs 67-73) but that does not mean the Claimant should be awarded all or any of its costs of JR1, because in my judgement it was not necessary for the JR1 proceedings to be commenced in the first place in order to obtain the Defendant's agreement to the Claimant's position on the interpretation of Condition 15. I note that the Claimant's letter to the Defendant of 18 July 2022 (sent after receipt of the Defendant's Summary Grounds of Defence, which the Claimant

accepted in that letter agreed with the Claimant's interpretation of Condition 15) required the Defendant to bear the Claimant's costs on the ground that it was clear that the interpretation offered in the Summary Grounds of Defence differed from that given in the Officer's advice to Members and the Defendant's Pre-Action Protocol response. I have not seen the Defendant's reply to this letter, but it will be apparent from earlier sections of this judgement that I do not agree that there was such a difference.

134. Also, even if the Defendant's acceptance of the Claimant's interpretation of Condition 15 had been made clear only in its Summary Grounds (and not in its Pre-Action Protocol response), it still would not have been right to make a costs order in favour of the Claimant, because after receipt of the Summary Grounds the Claimant continued with JR1, running up further costs and causing the Defendant to do so, in circumstances where it had already secured acceptance of its interpretation of Condition 15 and where I do not think it would have succeeded in relation to the rest of its claim.
135. Having regard to my findings on the merits of JR2, I think the right decision would be for no order as to costs even if (contrary to my view) the Claimant could be said to have succeeded in part. This is a case where in the words of Lord Neuberger "there is...much to be said for concluding that there is no order as to costs." Even if the Claimant secured some of what it sought, it has failed in relation to the rest.
136. Finally, in relation to JR2, even if (contrary to my view) it could be said that the Claimant did secure the relief it sought (in whole or part) by agreeing with the IP that Condition 15 of the First Permission would in effect be applied over to Condition 6 of the Second Permission, I think this would be a case as per R(Tesfay) v Secretary of State for the Home Department and R(MH) (Eritrea) v Secretary of State for the Home Department (both cited above) where the Claimant obtained the relief it sought for reasons which are unrelated to the underlying merits of the claim. As set out above, I am not convinced that the Claimant would have succeeded in JR2, and it seems to me that insofar as it succeeded in securing the IP's agreement to cross-apply condition 15 to the Second Permission, it did so as part of a commercial negotiation which did not reflect the merits of the JR2 claim.
137. Having regard to the above matters, I think that the proper order in the case of both JR1 and JR2 is that there is no order as to costs.