Neutral Citation Number: [2024] EWHC 1221 (Admin)

Case No: CO/2500/2023
AC-2023-LON-002080

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 May 2024

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE KING	**Claimant**
on the application of	
STRONGROOM LIMITED	
- and -	
LONDON BOROUGH OF HACKNEY	**Defendant**
THE BELVEDERE REALTY INVESTMENTS LIMITED	**Interested Party**

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- -

Jonathan Darby (instructed by **Birketts LLP**) for the **Claimant**
Annabel Graham Paul (instructed by **Legal Services**) for the **Defendant**
Stephen Whale (instructed by **Cripps LLP**) for the **Interested Party**

Hearing date: 1 May 2024

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Approved Judgment

This judgment was handed down remotely at 10 am on 22 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mrs Justice Lang :

1. The Claimant seeks judicial review of the Defendant's decision of 9 January 2023 ("the Decision") to grant "Prior Approval for Change of use from commercial, business and service use (Class E) to 6 Residential dwellings" at 117-121 Curtain Road, Hackney ("the Site") to the Interested Party ("IP").

2. The Claimant owns and operates recording studios ("the Studios") and a bar and kitchen at 120-124 Curtain Road. The bar, which has an outdoor area, is a well-established and popular live music venue. The Studios are situated directly opposite the Site, on the other side of Curtain Road. The Claimant is concerned that the "bustle and noise" that emanates from its premises will be the subject of complaints from future residential occupiers of the Site, which could jeopardise its business. The Agent of Change principle should apply, requiring the IP to manage and mitigate the impact of the change.

3. The Defendant is the local planning authority. The IP is the owner and developer of the Site. The IP made its first application for Prior Approval ("the First Application") on 5 August 2022, which was refused by the Defendant on 29 September 2022. The IP made its second application for Prior Approval ("the Second Application"), on 14 November 2022, which was granted by the Defendant on 9 January 2023.

4. The Claimant challenged the Defendant's decision to grant the Second Application without first notifying and consulting the Claimant as it had done previously, on the following Grounds:

    i) Breach of legitimate expectation of proper notification and consultation;

    ii) Irrational exercise of discretion;

    iii) Mistake of fact;

    iv) Failure to have regard to a material consideration.

5. On 13 September 2023, I granted permission to apply for judicial review on the papers, together with an extension of time for filing the claim.

6. After the grant of permission, in its Detailed Grounds of Resistance, the Defendant conceded that the failure to consult the Claimant was unlawful, on Ground 2 only, because there was no rational reason for the decision to consult the Claimant on the First Application, but not on the Second Application.

7. The Defendant and the IP invited the Court to refuse the quashing order sought by the Claimant, in the exercise of its discretion, and applying section 31(2A) of the Senior Courts Act 1981. They submitted that the Claimant had suffered no prejudice. By contrast, significant prejudice would be suffered by the Interested Party if the decision was quashed as it could not make another application for Prior Approval, and in its current application for planning permission, it would not be able to rely on the previous grant of Prior Approval for permitted development, as a fallback position.

8. Although the Claimant did not concede Grounds 1, 3 and 4, it decided (very properly) that it was most proportionate not to pursue those grounds at the hearing, and instead to focus on the remaining issue in dispute, namely, the grant of relief.

Planning history

Previous claim

9. In 2020, the Claimant successfully challenged, by way of judicial review, a failure by the Defendant to carry out a lawful notification and consultation process in regard to the Claimant, prior to granting planning permission to an applicant for development at an adjoining property in Curtain Road (No. 118). The property and the applicant were different to those in the current claim.

10. Initially the Defendant defended the proceedings, asserting that the relevant consultation letters had been sent out, by reference to its records. However, once the relevant records were disclosed, the failure to notify was revealed. By a signed consent order, dated 22 May 2020, the parties agreed that the grant of planning permission should be quashed. In the Statement of Reasons, the Claimant accepted that the Defendant had a legitimate expectation, arising out of the Statement of Community Involvement, that it would be sent a neighbourhood notification letter, and that no such letter had been sent, because of an administrative error.

First Application

11. On 5 August 2022, the IP made the First Application for "Prior Approval for Change of use from commercial, business and service use (Class E) to 8 Residential dwellings (Class C3)" at the Site (Ref: 2022/2044).

12. By letter dated 30 August 2022, the Defendant consulted the Claimant on the First Application (the "First Consultation Letter"). As part of that consultation exercise, the Defendant sent the First Consultation Letter to 113 recipients in the local area. Aside from statutory consultees, two representations were received. One was a letter in support from 17 Charlotte Road and the other was the objection lodged by the Claimant.

13. In a letter dated 15 September 2022, the Claimant objected to the First Application, stating:

> "…..We write to express our client's very serious concerns regarding the potential impact on its businesses, particularly the Bar and Kitchen, if the proposed development for a change of use from use Class E uses (commercial, business and service uses) to Class C3 (residential use) is permitted through the prior approval procedure.
>
> …
>
> The application needs to be carefully considered within the Agent of Change context, which requires that the person or

> business responsible for the change in character of the area is responsible for managing and mitigating the impact of the change. It is therefore for the applicant to demonstrate how they will ensure that the residents occupying the new flats would not be disturbed by the normal operation of our client's long-running business. A failure to deal with this at the application stage may result in complaints from the new occupiers that would jeopardise our client's businesses.
>
> …
>
> It should not go without saying that our client's premises are part of the history and culture of Hackney and Shoreditch and should not be put at risk by permitting this development based on the current Noise Impact Assessment which does not fully address noise impact. The application should be refused as it threatens the operation of a cultural and creative business which forms a fundamental part of the mixed fabric of Shoreditch and is therefore contrary to both the Council's policy and the London Mayor's planning policy."

14. On 27 September 2022, the Defendant's planning officer (Mr Livett) produced an officer report ("OR1") and concluded that prior approval was required. He recommended that prior approval be refused, but not on the grounds raised by the Claimant. His recommendation was accepted, and approved by his Team Leader, Ms Adele Castle. The decision to refuse prior approval was made by the Head of Planning and Building Control, acting under delegated authority, on 29 September 2022.

15. On 29 September 2022, the Defendant refused to grant prior approval for the following reasons:

> "1. The applicant has failed to demonstrate that, on the balance of probabilities, each of the dwellinghouses would comply with the nationally described space standard issued by the Department for Communities and Local Government on 27th March 2015 and the proposal would not be permitted development.
>
> 2. The proposal would fail to provide sufficient cycle storage, to the detriment of the surrounding highway network and the amenity of future occupiers of the development.
>
> 3. The proposal would fail to provide adequate natural light to all habitable rooms, to the detriment of the amenity of future occupiers of the development.
>
> 4. The proposal would result in the change of use of part of the ground floor from commercial floorspace to ancillary residential floorspace, which would fail to preserve the character of the South Shoreditch Conservation Area."

Second Application

16. On 14 November 2022, the IP made the Second Application for "Prior Approval for Change of use from commercial, business and service use (Class E) to 6 Residential dwellings (Class C3)" (Ref: 2022/2754). The proposed scheme differed from the previous proposed scheme, in particular, the number of flats was reduced from 8 to 6, all habitable rooms would have natural light, and the number of cycle spaces was increased.

17. The Defendant stated that it consulted on the Second Application by posting a site notice and by sending a letter (the "Second Consultation Letter"). The Defendant stated that the Second Consultation Letter was only sent to 84 recipients, instead of the 113 recipients on the First Application. The Defendant accepted that the Second Consultation Letter was not sent to the Claimant.

18. The same planning officer as before (Mr Livett) produced an officer report ("OR2") dated 6 January 2023. He recommended that prior approval was required, and should be granted, subject to conditions. His recommendation was accepted and approved by his Team Leader, Ms Adele Castle, and the decision to grant prior approval, subject to conditions, was made by the Head of Planning and Building Control, acting under delegated authority, on 9 January 2023.

19. The Claimant first learned of the Second Application, and the Decision to grant prior approval, on 30 May 2023 when the Claimant's studio manager saw the publication on the Defendant's planning portal.

Legal framework

20. Section 57(1) Town and Country Planning Act 1990 ("TCPA 1990") provides that planning permission is required for "the carrying out of any development of land".

21. By section 58(1)(a) TCPA 1990, planning permission may be granted by a development order made by the Secretary of State under section 59 TCPA 1990. By section 60(1) or 60(2) TCPA 1990, planning permission may be granted by development order either conditionally or subject to limitations as specified in the order or unconditionally.

22. By Article 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015 ("GPDO 2015"), planning permission is granted for the classes of development described as permitted development in Schedule 2 to the GPDO 2015. Any permission granted by Article 3(1) is subject to any relevant exception, limitation or condition specified in Schedule 2.

23. In this case, the applications for Prior Approval were made under Class MA of Part 3 of Schedule 2 to the GPDO 2015. Under Class MA, permitted development is:

> "development consisting of a change of use of a building and any land within its curtilage from a use falling within Class E (commercial, business and service) of Schedule 2 to the Use Classes Order to a use falling within Class C3 (dwellinghouses) of Schedule 1 to that Order".

24. Paragraph MA.1 sets out the circumstances in which development is not permitted by Class MA.

25. Paragraph MA.2 provides that development under Class MA is permitted subject to conditions which include as follows:

> "(2) Before beginning development under Class MA, the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to –
>
> ……
>
> (d) impacts of noise from commercial premises on the intended occupiers of the development;
>
> ……"

26. Section 31(2A) of the Senior Courts Act 1981 ("SCA 1981") provides:

> "(2A) The High Court—
>
> > (a) must refuse to grant relief on an application for judicial review, and
> >
> > (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

27. In *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, the Court of Appeal considered the scope of section 31(2A) SCA 1981 at [267] – [273] and gave the following guidance:

> "273. It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. 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. Furthermore, although there is undoubtedly a difference between the old *Simplex* test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales L.J., as he then was, in *R. (on the application of Public and Commercial Services Union) v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin); [2018] 1 All E.R. 142, at paragraph 89)."

28. In *R (Cava Bien Ltd) v Milton Keynes Council* [2021] EWHC 3003 (Admin), Kate Grange KC, sitting as a Deputy Judge of the High Court, set out a helpful summary of the case law at [52]-[53]:

> "52. The proper approach to this test is not in dispute between the parties. It has been considered in a number of authorities and it seems to me that the central points can be summarised as follows:
>
> i) The burden of proof is on the defendant: *R (Bokrosova) v Lambeth Borough Council* [2016] PTSR 355 [8];
>
> ii) The "highly likely" standard of proof sets a high hurdle. Although s. 31(2A) has lowered the threshold for refusal of relief where there has been unlawful conduct by a public authority below the previous strict test set out in authorities such as *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1988) 57 P & CR 306, the threshold remains a high one: *R (Public and Commercial Services Union) v Minister for the Cabinet Office* [2018] ICR 269 at [89] per Sales LJ, approved by Lindblom, Singh and Haddon-Cave LLJJ in *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] PTSR 1446 at [273].
>
> iii) The "highly likely" test expresses a standard somewhere between the civil standard (the balance of probabilities) and the criminal standard (beyond reasonable doubt): *R (Ron Glatter) v NHS Herts Valleys Clinical Commissioning Group* [2021] EWHC 12 (Admin) at [98] per Kerr J.
>
> iv) The court is required to undertake an evaluation of the hypothetical or counterfactual world in which the identified unlawful conduct by the public authority is assumed not to have occurred: *R (Public and Commercial Services Union) v Minister for the Cabinet Office (supra)* [89], *R (Plan B Earth) v Secretary of State for Transport (supra)* [273], *R (Ron Glatter) v NHS Herts Valleys Clinical Commissioning Group* (supra) [98].
>
> v) The court must undertake its own objective assessment of the decision-making process and what the result would have been if the decision-maker had not erred in law: *R*

(Goring-on-Thames Parish Council) v South Oxfordshire District Council [2018] 1 WLR 5161, judgment of the whole court at [55], *R (Gathercole) v Suffolk County Council* [2020] EWCA Civ 1179, [2021] PTSR 359 at [38] per Coulson LJ, (Asplin and Floyd LLJJ concurring at [78] and [79]).

vi) The test is not always easy to apply. The court has the unenviable task of (i) assessing objectively the decision and the process leading to it, (ii) identifying and then stripping out the "conduct complained of" (iii) deciding what on that footing the outcome for the applicant is "highly likely" to have been and/or (iv) deciding whether, for the applicant, the "highly likely" outcome is "substantially different" from the actual outcome': *R (Ron Glatter) v NHS Herts Valleys Clinical Commissioning Group* (supra) [98]-[99].

vii) It is important that a court faced with an application for judicial review does not shirk the obligation imposed by section 31(2A); the matter is not simply one of discretion but becomes one of duty provided the statutory criteria are satisfied: *R (Gathercole) v Suffolk County Council* (supra) at [38], [78] and [79] and *R (Plan B Earth) v Secretary of State for Transport* (supra) at [272].

viii) The provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic: *R (Gathercole) v Suffolk County Council* (supra) at [38], [78] and [79].

ix) The provisions 'require the court to look backwards to the situation at the date of the decision under challenge' and the 'conduct complained of' means the legal errors that have given rise to the claim: *R (KE) v Bristol City Council* [2018] EWHC 2103 (Admin) at [139] per HHJ Cotter QC, citing Jay J in *R (Skipton Properties Ltd) v Craven DC* [2017] EWHC 534 (Admin) at [97]-[98].

x) The Court can, with due caution, take account of evidence as to how the decision-making process would have been approached if the identified errors had not occurred. Section 31(2A) is not prescriptive as to material which the Court may consider in determining the "highly likely" issue: *R (Enfield LBC) v Secretary of State for*

Transport [2015] EWHC 3758 at [106], per Laing J. Furthermore, a witness statement could be a very important aspect of such evidence: *R (Harvey) v Mendip District Council* [2017] EWCA Civ 1784 at [47], per Sales LJ, although the court should approach with a degree of scepticism self-interested speculations by an official of the public authority which is found to have acted unlawfully about how things might have worked out if no unlawfulness had occurred: *R (Public and Commercial Services Union) v Minister for the Cabinet Office* (supra) [91].

xi) Importantly, the court must not cast itself in the role of the decision-maker: *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* (supra) at [55]. While much will depend on the particular facts of the case before the court, 'nevertheless 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.' *R (Plan B Earth) v Secretary of State for Transport* (supra) [273].

xii) It follows that where particular facts relevant to the substantive decision are in dispute, the court must not 'take on a fact- finding role, which is inappropriate for judicial review proceedings' where the 'issue raised…is not an issue of jurisdictional fact'. The court must not be enticed 'into forbidden territory which belongs to the decision-maker, reaching decisions on the basis of material before it *at the time of the decision under challenge,* and not additional evidence after the event when a challenge is brought'. To do otherwise would be to use s.31(2A) in a way which was never intended by Parliament: *R (Zoe Dawes) v Birmingham City Council* [2021] EWHC 1676 (Admin), unrep., at [79] – [81] per Holgate J.

xiii) The impermissibility of the court assuming the mantle of the decision-maker has been particularly emphasised in the planning context where e.g. it may require an assessment of aesthetic judgment or adjudicating on matters of expert evidence: *R (Williams) v Powys CC* [2018] 1 WLR 439 per

> Lindblom J at [72] and *R (Thurloe Lodge Ltd) v Royal Borough of Kensington & Chelsea* [2020] EWHC 2381 (Admin) at [26] per David Elvin QC (sitting as a Deputy High Court Judge).
>
> xiv) Finally, the contention that the s.31(2A) duty is restricted to situations in which there have been trivial procedural or technical errors (see e.g. the dicta of Blake J in *R (Logan) v Havering LBC* [2015] EWHC 3193 (Admin) at [55]) was rejected by the Court of Appeal in *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* [2018] 1 WLR 5161 [47] and [55] and in *R (Gathercole) v Suffolk County Council* (supra) [36], [77] and [78].
>
> 53. I should make clear that, although the Court of Appeal decision in *Plan B Earth* was reversed in the Supreme Court on a question as to whether oral statements in Parliament by ministers amounted to 'government policy', the Supreme Court did not address the s.31(2A) duty – see *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] UKSC 52. Nevertheless the parties are agreed (and I accept) that the important statements by the Court of Appeal in *Plan B Earth* about the limitations of the court's task under s.31(2A) of the 1981 Act remain good law and I note that they are entirely consistent with the earlier Court of Appeal decision in *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* (supra) at [55]."

Submissions

Claimant's submissions

29. The Claimant submitted that the Defendant had failed to discharge the burden of proof upon it to establish the elements of section 31(2A) SCA 1981. The Court would normally expect a witness statement, with a statement of truth, and disclosure of any relevant documents, to support reliance upon these provisions, and setting out the counter-factual analysis, but none was provided in this case.

30. The Defendant refused to disclose the polygons which determined who was on the list of consultees, or to provide any evidence as to which addresses were among the 113 consultees on the first occasion, but excluded from the list of 84 consultees on the second occasion, or to confirm that the Second Consultation Letter was indeed sent out by GOV.UK Notify. Thus, the Court does not know who else was excluded and what they might have said if consulted.

31. The planning officers proceeded on the unreliable basis that there were no objections to the Second Application, even though Mr Livett must have been aware that the Claimant had recently objected to the First Application. No explanation has been given for the decision to exclude the Claimant from the consultation, in circumstances where

it was not only included as a consultee in the First Application, but also objected to the application.

32. As the Court could not make any reliable findings as to what did occur, and why, it was not in a position to reach any reliable conclusions in respect of what might have occurred had the conduct complained of not occurred.

33. The Claimant submitted that, if it had been consulted on the Second Application, it would have objected on the basis of the potential impacts on its business, if noise complaints were made by future residents at the Site. It would have expressed its very serious concerns that the expert Noise Impact Assessment by Gillieron Scott ("the NIA"), relied upon by the IP did not adequately address noise impact from external commercial premises, which was the IP's responsibility, applying the Agent of Change principle. It would have had the opportunity to review the material submitted in support of the application, with the benefit of input from a specialist noise consultant (Vanguardia) that it had previously used in respect of planning applications. If so advised, it would have submitted an expert report.

34. The Claimant relied upon the expert acoustic report submitted in these proceedings, by Vanguardia, noise consultants. In his witness statement, dated 6 November 2023, Mr Fiumicelli explained why, in his opinion, the IP's NIA was flawed. The Claimant submitted that there was, at the very least, a dispute between experts as to the sufficiency of the submitted NIA and the extent to which it can be relied upon to understand the degree to which future residents will be protected from external sources of noise from the Claimant. Mr Woolf, a Director of the Claimant, stated in his second witness statement that the Claimant had been deprived of an opportunity to submit its expert's views. If the Claimant had been consulted, it might well have instructed Vanguardia to provide its views to the Defendant, and to discuss issues with the IP's consultants, as it had done on other development applications between 2017 and 2020.

35. The Claimant challenged the submission made by the Defendant that its concerns about noise impacts were immaterial to the outcome of the Second Application because the view of its officers was that Prior Approval could be granted on the basis that noise insulation measures would be secured by Condition 4. The Defendant's understanding of the protection afforded by Condition 4 was fundamentally flawed. It was plain from its wording that Condition 4 was imposed to ensure adequate soundproofing for party walls within the premises to ensure that the commercial uses on the ground floor did not give rise to complaints from residents on the floors above. It did not address noise from external commercial premises, such as the Claimant's premises.

36. The Claimant submitted that the recommendations in the NIA for further noise insulation measures were not sufficiently clear or precise to be incorporated into the Prior Approval, and required as part of Condition 5 to the Prior Approval. They would not be capable of enforcement. It accepted that the secondary glazing shown on the plans was required, and would be enforceable pursuant to Condition 5.

Defendant's submissions

37. The Defendant did not file any evidence from its officers in response to the Claimant's criticisms of its consultation procedure. In her skeleton argument, Ms Graham Paul

stated that a smaller number of neighbouring occupiers were notified of the Second Application for Prior Approval (84 as opposed to the previous 113). The Claimant was not one of those notified. The practical reason for the difference in notification was that the officer hand drew a different, smaller polygon around the Site. This still exceeded the minimum statutory requirements. However, the Defendant accepted that there was no rational reason for reducing the size of the polygon in respect of the revised application.

38. The Defendant disclosed a full list of addresses of who was notified of the First and Second Applications and was able to show that the lists were sent to GOV.UK Notify. It could not prove that GOV.UK Notify actually posted the letters but the presumption of regularity must mean that it did, in the absence of any contrary evidence.

39. The Defendant submitted that the Claimant would not suffer any prejudice if the grant of Prior Approval was maintained, and not quashed, because it was highly likely that the Prior Approval would have been granted in exactly the same terms even if the Claimant had been expressly notified of the opportunity to make representations. The Defendant had already considered the Claimant's concerns when determining the First Application and decided that they could be met by conditions. Thus, they were not a reason for refusing Prior Approval.

40. The Defendant submitted that its planning officer, in OR1 and OR2, expressly considered the impacts of noise from commercial premises on future residents at the Site and recommended that Prior Approval be granted on the basis that noise insulation measures were secured by condition. In the Summary Grounds of Resistance, dated 26 July 2023, Ms Graham Paul submitted:

> "19. In any event, no prejudice has been suffered by the Claimant at all, since the issue upon which it was concerned (namely the impact of its noise generation on future residents) was fully taken into account in the second prior approval (in exactly the same way as in the first) and condition 4 was imposed to ensure adequate sound-proofing."
>
> **Discretion**
>
> "26 Even if the Claimant had been notified of the second prior application, they do not claim they would have made any representation other than one in the same terms as the first (relating to the impact on future residential occupiers of noise from their venue). This issue was fully addressed in the decision under challenge and it was concluded it could be dealt with by ensuring adequate sound proofing of the new residential flats. This was secured by Condition 4. Therefore, even if the Claimant had known of the second application and submitted an objection letter in time, the outcome would have been exactly the same."

41. The Defendant's pre-action protocol response letter, dated 9 June 2023, stated:

> "….the Council does not consider that Strongroom has established any prejudice as a result of the lack of

> notification….Assuming that your client's points would have been the same ones that they made in objection to the first application, then the case officer has confirmed that this would have had no bearing on the Council's decision to grant prior approval."

42. However, in the Defendant's skeleton argument, dated 17 April 2024, Ms Graham Paul made a different submission:

> "(4) The Defendant accepts that Condition 4 is relevant to internal noise only and so would have been imposed in response to the impacts on future occupiers arising from the commercial premises on the ground floor of the building. It is not relevant to the impacts from external commercial premises. The officer was clearly satisfied that no condition was required to regulate those noise impacts which were acceptable *per se* and subject to the approved plans."

43. In her oral submissions, Ms Graham Paul stated that the Defendant did not accept the submission by the IP that the noise insulation measures recommended in the NIA were incorporated and therefore required as part of Condition 5 to the Prior Approval. The scope of issues under the GPDO 2015 is fixed exclusively by the terms of the Order (*Keenan v Woking BC* [2017] EWCA Civ 438, at [38]) and the primary concerns in the NIA, such as insulation against traffic and other street noise, fell outside the scope of paragraph MA2. They would not be capable of enforcement. She did accept, however, that the secondary glazing shown on the plans was required, pursuant to Condition 5.

44. The Defendant cast doubt on the Claimant's evidence that, if consulted, it may well have reviewed the NIA submitted by the IP and submitted expert evidence from Vanguardia. It did not submit expert evidence on the First Application when an earlier version of the NIA was submitted by the IP. As Prior Approval applications are usually processed relatively swiftly by officers exercising delegated powers, the Claimant would have had to submit any expert evidence promptly, without sight of the officer's report.

45. The Defendant submitted that significant prejudice would be suffered by the IP if the decision was quashed because the Defendant had made a direction under Article 4 GPDO 2015 preventing the use of permitted development rights to convert offices to residential use, which was confirmed on 27 April 2023. Instead the IP would have to make an application for planning permission in order to pursue the proposed development.

46. In December 2023, the IP made an application for full planning permission for an expanded scheme at the Site, which is under consideration. In addition to the commercial and residential proposals made in the Second Application, the application for planning permission also includes a proposal for an additional storey at the top of the building, to accommodate more residential units. The grant of Prior Approval remains relevant as it represents the lawful fallback position.

IP's Submissions

47. The IP adopted the Defendant's submissions, save in respect of the incorporation of the noise mitigation measures into the Prior Approval by Condition 5.

48. The IP relied upon the noise mitigation measures recommended in the NIA by its acoustic consultants, Gillieron Scott, namely:

    i) Sound insulation measures were recommended between the ground floor commercial premises and the upper floor residential units.

    ii) In regard to "Noise Intrusion from Exterior":

        a) "….No significant sources of commercial activity were noted whilst on site and audio recording during the unattended survey shows that the local noise climate is dominated by road traffic and pedestrian activity noise on Curtain Road …. it is recommended that the sound insulation of the external façade be improved to reduce these dominant noise sources. The proposed improvements will also ensure that any external commercial activity noise such as loading and unloading of goods is also sufficiently mitigated."

        b) "It is also recommended that the glazing is improved to reduce the impact of road traffic and pedestrian noise from Curtain Road ….by replacing the glazing or installing secondary glazing…".

        c) Ventilation strategies, where windows are to remain closed, can be implemented into the design accordingly.

49. The IP submitted that the mitigation measures for the facade would meet the Claimant's concerns even though they were directed at traffic and pedestrian noise, not commercial activities. It was not necessary to rely on Condition 4. On a proper interpretation of the Prior Approval, dated 9 January 2023, the NIA should be treated as if it was part of the "submitted Plans", which were incorporated into the Prior Approval by Condition 5.

50. The IP submitted that the Claimant's evidence ought not to be admitted as it had been filed too late. If it was admitted, there would be conflicting noise expert evidence. If the Court could not resolve that conflict, it should approach the disputed matters by accepting the account in the IP's evidence (see *Flattery v Secretary of State* [2010] EWHC 2868 (Admin), at [56]).

51. In response to the Claimant's point that the IP was not prejudiced by this application, as Condition 3 of the Prior Approval (a scheme for cycle storage) had not yet been discharged, the IP informed the Court that the condition had been discharged by the Defendant shortly before the hearing.

52. The IP confirmed that it had applied for full planning permission for a development at the Site, which is similar to the Prior Approval proposed scheme, but on a larger scale. The Claimant has objected to the application for planning permission but has not lodged an expert's report. Mr Whale concluded in paragraph 7 of his skeleton argument:

> "If planning permission is granted, it is likely to render these proceedings academic."

However, at the hearing, he adopted the Defendant's submission that the grant of Prior Approval remained relevant as it represented the lawful fallback position for the still undetermined planning application.

Conclusions

The consultation process

53. Initially, in its Summary Grounds of Resistance, the Defendant resisted the claim on the basis that the Defendant had complied with the statutory notification requirements in Paragraph W(8) of GPDO 2015, and the express notification promises in its Statement of Community Involvement, which required notification of owners and occupiers whose properties adjoined the Site. The Defendant advertised the application by site notice, in the local press and on its website.

54. In the Detailed Grounds of Resistance, the Defendant accepted that the failure to consult the Claimant on the Second Application was unlawful because there was no rational reason for the decision to consult the Claimant on the First Application, but not the Second Application.

55. In my view, this concession was rightly made. The Defendant had made a rational decision that the consultees on the First Application should be more extensive than the minimum requirements, presumably because of the nature of the application and the location of the Site. The reduction in the number of consultees on the Second Application was significant. Moreover, the list excluded all properties located on the other side of Curtain Road from the Site, despite their proximity to the Site. The Claimant's Studios were directly opposite the Site.

56. The list of consultees excluded the sole objector to the application and the sole supporter of the application in the consultation on the First Application. The planning officer knew that the Claimant had lodged a serious objection to a very similar proposal some 6 weeks previously. That alone should have been a sufficient reason for the Claimant to be consulted on this revised application.

57. The planning officer recorded in OR2 that no objections to the application had been received, which was obviously a relevant consideration for the decision-making officers. However, it was an unreliable statement. The planning officer must have appreciated that the likely reason why there was no objection from the Claimant was that the Claimant had not been notified or consulted, and to that extent, his report did not disclose the full position.

58. For these reasons, I consider that the consultation procedure was seriously flawed.

59. In the previous claim in 2020, the Defendant claimed to have sent a consultation letter to the Claimant but eventually conceded that no such letter had been sent, as a result of administrative error. Probably because of that disappointing experience of the Defendant's consultation procedures, the Claimant has questioned whether the Second

Consultation Letter was ever dispatched. The Defendant has produced evidence that the list of 84 addresses was sent to GOV.UK Notify but no evidence has been produced that GOV.UK Notify in fact sent out notification letters on this occasion. No representations were received, which could indicate that the letters were not sent. On the other hand, the only two consultees who sent representations on the First Prior Approval Application – 17 Charlotte Street and the Claimant – were not notified of the Second Prior Approval Application. The Claimant has been unable to satisfy me on the balance of probabilities that the notification letters were not sent out.

Condition 4

60. It is apparent from the Defendant's pre-action correspondence which refer to the views of "the case officer", and its Summary Grounds of Resistance, that the planning officer erroneously believed that the Claimant's concerns were met by Condition 4 of the prior approval – see Judgment/40 and 41. Condition 4 provides:

> "Soundproofing shall be provided to ensure that dwelling houses, flats, and rooms for residential purposes sharing a party element with a premises to which this planning permission relates shall receive a minimum airborne sound insulation on the party element which achieves DnTw of 60dB before the first use of the development hereby approved. The soundproofing shall be retained thereafter in perpetuity."

61. However, Condition 4 did not address the Claimant's concerns. The reasons for the Condition were stated to be: "To ensure that neighbouring occupiers do not suffer a loss of amenity by reason of noise nuisance and other excess noise from activities <u>within the premises</u>" (emphasis added). It is highly probable that Condition 4 was imposed to ensure that the commercial uses on the ground floor did not give rise to unacceptable noise for the residents on the floor above, as the NIA identified this as a major concern. The Claimant's concern was quite different, namely, that the residential occupiers of the proposed development would complain about noise emanating from outside the premises (i.e. from the Claimant's normal operations), and thus jeopardise its business.

62. When the Defendant's legal team realised that its initial position could not be upheld, it sought to amend its case by asserting that the planning officer was "clearly satisfied" that no condition was required to regulate the noise impacts arising from the Claimant's normal operations as they were acceptable.

63. I doubt whether this submission is correct. In both OR1 and OR2, the planning officer expressly stated that noise insulation measures should be secured by condition in respect of impacts of noise from commercial premises on the intended occupiers of the development. He did not make an express finding that the noise impacts from the Claimant's operations did not require a condition because they were acceptable, and I am not satisfied that such a finding can be inferred. When the Claimant challenged the Decision, it was justified by the planning officer on the basis that the noise impacts from the Claimant's operations were adequately addressed by Condition 4, not that they were acceptable and therefore no condition was required.

64. The impact of noise from commercial premises on the intended occupiers of the development was a consideration set out in Paragraph MA.2(2) of Part 3 of Schedule 2 of the GPDO 2015, and therefore it was a necessary material consideration in reaching the Decision.

65. In the light of the planning officer's misunderstanding of the scope of Condition 4, I am in doubt as to whether the planning officer ever properly evaluated the noise impacts from the Claimant's operations, or considered what, if any, condition might be required to address the noise impacts of a bar with live music and patrons coming and going late at night. It is possible that, if the Claimant had been consulted and its concerns properly addressed, the planning officer's conclusions could have been different, and therefore the "no substantial difference" test under section 31(2A) SCA 1981 is not met.

Condition 5

66. I agree with the submissions by the Claimant and the Defendant that the noise insulation measures recommended in the NIA were not incorporated into the Prior Approval, and not required as part of Condition 5 to the Prior Approval. The recommendations were not sufficiently certain and precise to be imposed by condition. In any event, the scope of issues under the GPDO 2015 is fixed exclusively by the terms of the Order (*Keenan v Woking BC* [2017] EWCA Civ 438, at [38]) and the primary concerns in the NIA, such as insulation against traffic and other street noise, fell outside the scope of paragraph MA2. They would not be capable of enforcement by the Defendant. Therefore the assurances given by Mr Canossa, on behalf of the IP, that the recommendations in the NIA would be implemented, carried little weight. The only recommendation in the NIA which did form part of Condition 5 was the secondary glazing, as it was shown on the Plans.

The Claimant's objection

67. In the light of the Claimant's detailed objection to the First Application, there cannot be any real doubt that, if the Claimant had been consulted on the Second Application, it would have objected in similar terms, on the basis of the potential impacts on its business, if noise complaints were made by future residents at the Site.

68. On reading the acoustic report from Vanguardia and the witness statement, dated 6 November 2023, which summarises why Mr Fiumicelli considers the IP's NIA was flawed, I consider that there is, at the very least, a dispute between experts as to the sufficiency of the NIA, and the extent to which it could be relied upon to understand the degree to which future residents may need protection from external sources of noise from the Claimant. It is possible that, if these issues had been raised with the Defendant in the course of a consultation, the outcome might have been different. The Defendant would probably have investigated further and perhaps imposed additional conditions. Therefore the "no substantial difference" test under section 31(2A) SCA 1981 is not met.

69. Mr Woolf, a Director of the Claimant, stated in his second witness statement, dated 7 November 2023, that the Claimant had been deprived of an opportunity to submit its expert's views. If the Claimant had been consulted, it might well have instructed

Vanguardia to provide its views to the Defendant, and to discuss issues with the IP's consultants, as it had done on other development applications between 2017 and 2020. Mr Woolf's evidence was in a witness statement, verified by a Statement of Truth.

70. Against that, counsel for the Defendant and the IP submitted that the Claimant would not have submitted any technical evidence from Vanguardia because it did not do so in response to the First Application or the current application for planning permission. Unlike the previous planning applications where the Claimant had commissioned Vanguardia to review the developer's technical evidence and submit a response on behalf of the Claimant, the streamlined Prior Approval procedure did not give objectors the opportunity to comment on the planning officer's report, and so the Claimant would have had to submit Vanguardia's review with its objections, at a much earlier stage. The IP also submitted that, as the Court could not resolve the dispute between the experts, the NIA should be accepted, applying the principles which apply when the Court is determining a substantive claim for judicial review.

71. I remind myself that the burden of proof is on the Defendant under section 31(2A) SCA 1981, unlike a substantive claim for judicial review, where the burden of proof rests on the Claimant. The "highly likely" standard of proof sets a high hurdle. The points raised by Counsel for the Defendant and the IP do raise a doubt in my mind as to whether the Claimant would have submitted technical evidence in time or at all, but they are essentially speculative, and when weighed against Mr Woolf's clear evidence to the contrary, they are not sufficient to satisfy me that it is highly likely that the outcome for the Claimant would not have been substantially different if the Claimant had been consulted.

Prejudice

72. In my judgment, the Claimant has suffered prejudice by being deprived of an opportunity to express its views and submit expert evidence in the consultation process for the Second Application. I do not consider that declaratory relief would be an adequate remedy because the Prior Approval would remain in place in its current form and the Claimant would continue to be deprived of any opportunity to object to it.

73. If the Prior Approval is quashed, the IP would suffer prejudice because it would be forced to apply for planning permission for its development instead, following the Defendant's Article 4 direction which prevents applications for prior approval under this class. However, the IP has already made an application for planning permission for a larger development on the Site. If planning permission is granted, the Prior Approval will be superseded. Its only relevance now is that it represents the lawful fallback position for the purpose of determining the application for planning permission. I accept that loss of the fallback position is a disadvantage to the IP but it does not outweigh the prejudice suffered by the Claimant as a result of the Defendant's unlawful act.

74. Furthermore, given the errors made in the Defendant's consideration of the Prior Approval, I consider that it is in the public interest for the impacts of external noise from commercial premises on residential units at the Site to be re-assessed. This will be achieved in the course of determining the application for planning permission.

75. For these reasons, I do not accept the submissions by the Defendant and the IP that no quashing order should be made whether in the exercise of my general discretion or pursuant to section 31(2A) Senior Courts Act 1981. A quashing order is the appropriate relief in this claim.