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

No. CO/4444/2018

[2019] EWHC 754 (Admin)

Rolls Building

Thursday, 28 February 2019

Before:

MR JUSTICE WAKSMAN

B E T W E E N:

THE QUEEN
ON THE APPLICATION OF
KATHERINE KERSWELL — Applicant

- and -

LONDON BOROUGH OF LEWISHAM — Respondent

- and -

ESTHER CAVETT — Interested Party

MR L. GLENISTER appeared on behalf of the Applicant.

MS S. HALL (instructed by London Borough of Lewisham Legal Services) appeared on behalf of Respondent.

J U D G M E N T

MR JUSTICE WAKSMAN:

1 This is an application for judicial review of the grant of planning permission made by the defendant local planning authority, London Borough of Lewisham, on 26 September 2018. Permission for this claim was given on paper by Elizabeth Laing J on 19 December 2018. The interested party, Ms Cavett, is the recipient of the planning permission in respect of a development at 13 Dartmouth Row, where she lives with her partner. The claimant, Ms Kerswell, and her partner live next door at number 11.

2 By the permission, the council permitted Ms Cavett to undertake various works to the property, but the work in question comprises the creation of a roof terrace to sit on top of the garage which is presently sandwiched between the properties and is physically attached to each of them. I have been referred to a number of photographs.

3 The photograph at the head of the Capita report, to which I shall refer later, shows very clearly the two properties. Looking at that photograph, the property to the right is the property presently the recipient of the planning permission, number 13. There is the garage between them in white and then to the left-hand side is number 11. Number 11 is the end house in a terrace which begins at number 7.

4 The size and shape of the proposed terrace as a whole can be shown from the relative plans. It runs along and on top of the length of the garage nearly to the rear of number 13. At the garden end, as it were, the rear end, there is a metal circular staircase which will lead down into number 13's rear garden. The front of the intended terrace is not open, but will be behind a metal mesh facade with a window in it: see for example the plans at p.119 and 120. The access to the terrace will be by French windows opening on to it from a room which the interested party, Ms Cavett, says is the main bedroom, although for her part Ms Kerswell

thinks it presently serves as a study, but not much turns on that. On the side of number 11 which faces number 13 there are no windows in the side wall looking out above the garage, but there are front and rear windows, i.e. in close proximity.

5 After being notified of the application for planning permission, Ms Kerswell and her husband Mr Quirk had a number of concerns. Mr Quirk wrote to the council on their behalf on 26 August 2018. He made the point that the roof terrace was overdevelopment and it would adversely affect the appearance of the row of property to the front. The terrace itself is locally listed, as is number 13. He also made the point that the cladding, i.e. the front metal mesh which would be on the street side of the terrace coloured brown it would appear, would be wholly out of character for the street. He also said that the garden would be overlooked or overlooked more than at present, because of the stairs at the rear of the new terrace.

6 The original deadline for submissions was 27 August, but Mr Quirk sought an extension as he had been on holiday and only heard of the plans recently. It was not formally extended, but it is common ground that a further letter dated 11 September 2018 from Ms Kerswell's planning consultant's, PPS, was sent and was received. The council acknowledged receipt on 12 September. There has been no suggestion that the council was not obliged to consider it. Indeed, it would appear from Mr Williams, who was the planning officer who submitted the report to the designated officer for this was a case of planning permission according to a delegated power, did read it.

7 The PPS letter is very detailed and comprehensive. I need to refer to some parts of it. First of all, at p.264, which looks at the plans which again are a very good way of seeing how these two properties relate to each other, it says at the top of p.264:

> "Though the properties are connected by retaining a single storey, the infills maintain the sense of space and visual separation between the properties. It is very characteristic of the area."

8 Then at the bottom of that page:

> "The gap is significantly eroding resulting in the terrace appearing to merge into the application property to the detriment of the open character conservation area."

9 That is p.264. At 265 it makes the point halfway down:

> "At 7 to 11 the terrace is constructed of stop brick while the host property is fully stuccoed. The use of perforated metal cladding will introduce a wholly new material into a prominent and important frontage that does not compliment or reflect the existing appearance. The perforated metal will appear as an incongruous and alien feature."

10 Then there is a new section at p.267 which is all about noise and disturbance and runs for one and a half pages including a very detailed plan. First of all, it said:

> "The terrace would be located one to two metres away from our client's bedroom and, secondly, it would directly abut the side wall of our client's house."

11 I should interpose here to say, although it is not wholly clear what the intentions of the interested party were as to the method of installing the roof terrace, it looks very much as if, certainly at the time of making the application, the intention was that the roof terrace will not only sit on top of or above the then roof of the garage, but it will be physically joined to, in the sense of being tied to, the side wall. That is really the only reasonable interpretation of looking at the plan and the dotted areas which cross over the boundary of the wall into the side wall itself.

12 Secondly, the letter from the interested party sent after these proceedings began on 27 November 2018, rather suggests that that was the original plan, because it says:

> "We are willing to discuss whether the metal frame for the terrace needs to be attached to our neighbour's end wall or whether it could be made lighter."

13 It is really against that background that two concerns were made in the PPS letter. First:

> "The terrace is utilised in the evening when the clients are open, very short distances will mean that any voice means that comings and goings will be readily audible."

14 But then it says:

> "Secondly, the terrace would itself physically adjoin the side wall. No details are provided, but it may be that the case there will be some form of structural connection physically tying into to the wall. It raises the concern there will be noise and vibration transference through the wall as a result of footsteps on the terrace, general moving, scraping of chairs et cetera. The wall was not designed to insulate against such noise impacts and it is an end of terrace property.
>
> The application has provided no assessment of the impact of noise and disturbance or proposed any acoustic treatment and this runs contrary to policy DM31."

15 DM31 is the policy which says that with residential extensions, roof terraces and balconies and non-residential extensions adjacent to dwellings, they must not result in any significant loss of privacy and amenity. Both sides accept before me that one feature of amenity is the question of noise.

16 I then should recite the relevant parts of the officer's report. This is dated 19 July. It was compiled by Mr Williams. It sets out the property site description under observations and goes into great detail about which particular properties are Grade 2 listed. It also says that the property itself, that is number 13, is locally listed as a heritage asset. It does not state the fact, as was the case, that the terrace, which includes number 11, was locally listed.

17 Then at p.273, when dealing with consultation, he said this and it is necessary I think to quote all of it:

> "The second objection expressed concern for potential noise disturbance due to proximity of roof terrace to adjoining bedroom windows. The letter also states the roof terrace and staircase would result in overlooking reducing the level of privacy enjoyed in a neighbouring garden. Furthermore, the letter states that the side extension would reduce sun light to neighbouring gardens.
>
> The letter also objects to visual impact on the side extension due to the loss of visual separation between the adjoining terrace on Dartmouth Row and the application property eroding the open character of the conservation area. In addition, the letter states a side extension introduces a new material to prominent frontage, contrasting significantly with the stucco of the application property and the brick of the adjoining terrace forming an incongruous addition to the Street."

18 At p.274 under the heading "Development Management Local Plan", that is the development plan for today's purpose, it says:

> "The following policies are considered to be relevant to this application: DM1, 30, 31 and 36."

19 There is no reference to DM37. That is important for reasons which will become clear.

> "Side extension of terrace is said to be considered to be a later extension to the property. If replacement is considered acceptable, the proposed side extension will be relatively modest, proportionately subservient. Officers consider the contrasting material and canted frontage will prevent a terracing effect helping to maintain the sense of visual separation. The retention of the large gap at roof level further enhances the separation. The extension successfully responds to the surrounding architecture, particularly the canted frontage which references various elements of the host building. Furthermore, the reddish colour references the tone of bricks on properties on the western side of Dartmouth Row

> opposite the application property. Both the terrace and the French doors would be screened. That is because of the structure at the front."

20 He deals in some detail with possible loss of privacy and amenity and the whole question of overlooking. Then the final paragraph of the section on residential amenity in relation to the roof terrace says this:

> "The roof terrace is not considered to give rise to unacceptable noise disturbances given that the side elevation does not have windows. The terrace is considered to be a sufficient distance from the windows in the rear and front elevations of number 11. It is also considered that an element of external noise would be expected within an urban residential environment such as this."

21 That was then the basis for the subsequent grant of planning permission. The grounds of challenge can now be stated briefly. The first and core ground, in my judgment, is one which says that the officer's report materially misled the decision maker in the senses that it failed to make any reference to the whole question of structural noise, as opposed to the airborne noise which is referred to. The claimant says that that was an important issue that had been raised by PPS in their letter and not only had it not been referred to in the officer's report, but, in context and inferentially, the only conclusion can be that no consideration was given by the officer at all and the result of that would be that there was material consideration which was not taken into account by the decision maker.

22 The third ground is allied to the first. That is the specific point that the PPS letter was not even taken into account at all. Allied to that is a reasons challenge. That is what might be described as the noise grounds. Then there is what might be described as the heritage asset grounds. That is to the effect that a relevant policy here was DM37, which I will refer to later on, which dealt specifically with heritage assets, which include, for these purposes, in conservation areas locally listed assets of which the terrace and number 13 formed part. The challenge is that that was not considered and the requirements, therefore, of that part of

the development plan were not considered and that had a material impact on the overall outcome.

23 So far as outcome is concerned, there has been some debate before me as to what the relevant test is in the light of the introduction of s.31(2)(a) of the Senior Courts Act 1981. This adjusted the position which had prevailed since cases like *Simplex*. Now, the court no longer needs to be satisfied by the party which is resisting the challenge that, even if the decision was unlawful, the outcome would have been the same and by outcome here it means the outcome so far as the decision maker is concerned, nothing else. Only that it is highly likely. There is no discretion here, because if the court is satisfied that it is highly likely that it would have been the same outcome, it is bound to refuse relief. Secondly, the outcome need not be exactly the same, provided it would not have been substantially different. I am reading here from para.74 of the discussion of Singh J, as he was, in the case of *Wet Finishing Works v Taunton Deane Borough Council* [2017] EWHC 1837.

24 Ms Hall in her submission says that it is not quite as simple as that. There are really two exercises to be undertaken. First of all, as part of the submissions as to whether the decision was unlawful in the first place in a case like this where one is looking at considerations, the applicant has to show that the considerations in question were themselves material and that actually involves the applicant showing that, had those considerations been taken into account, the result at least could have been different and then, once that is done, there is then the burden on the defendant to show that the result was highly likely to have been the same in any event.

25 For my part, I am not persuaded that this is a correct way to look at matters. It seems to me that the ultimate point is the s.31(2)(a) test where the burden is clearly on the defendant. However, for reasons which will be become clear, it makes no difference on the facts of this

case whether the outcome test is solely that under s.31(2)(a) or whether there is some intermediate threshold which has to be satisfied by the applicant along the way.

26 Let me just make a few other observations here. It is of course right that one should not read an officer's report like a statute and subject it to overly pedantic or legalistic analysis. One has to take a common sense and fair view and reasonable view of it. Equally, it is of course the case that the mere fact that an officer does not refer to something does not necessarily mean it has not been considered. In particular, if an officer does not refer to a particular policy, it does not necessarily mean that the officer did not have it in mind. They are broad principles which are familiar to all. What can and cannot be read into an officer's report going beyond that is as usual a matter of fact and analysis.

27 The first point I am going to deal with is whether it can be said that the PPS letter was simply disregarded and not read in its entirety. I do not think that can be said. If one compares the relevant parts of the officer's report with some parts of the PPS letter, it is plain that the officer had in mind and had looked at those passages and considered those passages in the PPS report. So, at p.264 there are references to the need to maintain visual separation. There is a reference to eroding the character of the area. At p.265 there is a reference to the stucco character of number 13 compared to the brick character of the terrace and then the reference to the perforated metal appearing to be incongruous.

28 That he had those passages in mind in my judgment is clear from the parts of the officer's report that I read out, which are at p.273 and 275. To that extent, if that is all that ground three was about then it could not be made out. However, that is to look at form rather than substance. The real point at issue on ground one and three is whether the officer had any regard at all to the whole question of noise disturbance arising in a structural fashion because of the fact that the terrace was going to be adjacent to the side wall.

29 Let me start with the officer's report. The officer dealt with the question of amenity. It is no answer to say that as he said he had dealt with amenity that must include every aspect of amenity which had been raised as an issue, whether or not he specifically makes mention to it. That is far too high and generous an approach to take, even in relation to an officer's report. In fact, it is not for the most part what he did. He actually considered the whole question of visual impact in some considerable detail. He considered the whole question of privacy and overlooking, which are all features of amenity in considerable detail.

30 He considered noise to this extent. He had recited the point that there could be noise entering into the windows at the front or rear of number 11. Then at p.276 he said that:

> "It does not give rise to unacceptable noise disturbances, given that the side elevation does not have windows. The terrace is considered to be a sufficient distance from the windows in the rear and front elevations of number 11 and you would consider that that element of external noise would be expected in an urban environment anyway."

31 It is absolutely plain, and Ms Hall did not really argue to the contrary, that all of that is dealing with the question of airborne noise. There is nothing said there about the question of structural noise. I do not accept at all that this is a case where it can be inferred that the officer must have taken structural noise disturbance into account. The very fact of what he did say indicates that, if he had turned his mind to it, he would have said something about it. The fact that he obviously looked at the PPS letter, whether you call that letter and the earlier letter the single objection from the claimant or otherwise does not matter, does not in my judgment mean that he actually took on bored what was present in the rest of the letter.

32 Mr Williams for his part has given a witness statement which is after the event. It is well known from cases like *Ermikon* and is summarised recently in the case of *Watermead* that the court has to be cautious about weight that can be given to evidence from or related to

the decision maker after the event in particular with knowledge of what the challenge actually is as to what they did or what they would have done at the time.

33 Bearing that caveat in mind, I go to para.6 which says that there were objections in para.5. Then at para.7 Mr Williams says he was aware of both objections submitted on behalf of Mr Quirk. That does not actually tell you very much, except it may mean he was aware of both letters, but that is not the point. At para.8 he says:

> "I confirm I took potential noise impact of the proposed roof terrace into account. I did not request the applicant to submit any formal noise assessment. I did not consider that one was required."

34 That does not help, because it does not say what noise impact it was that he took into account. I bear in mind that by the time he came to write this witness statement he knew perfectly well what the highly specific area of noise disturbance was that was being complained about and which it was said the council had not taken into account. He had every opportunity to address it, but instead he put it in entirely general terms. He then goes on to say:

> "It is not clear whether the extension was to be attached."

35 Well, I understand there is a degree of uncertainty, but, as I say, on a fair reading of the plan there has got to be at least a high likelihood that the intention was to attach it to the wall from the plans themselves and also from what the PPS letter said, but he said:

> "Even if it was constructed in such a way, vibration would not be a material planning consideration for this type of development."

36 I have to say I find that a most surprising statement. If it is clear from the planning application that the new development is going to be attached to someone else's property and if, for example, to take a clearer example, it had been made a submission by one side, and perhaps not even resisted by the other, that the effect of this was going to be significant and

disturbing vibration in the other property, it is ludicrous in my submission to say this has got nothing to do with planning considerations.

37 Of course, and let me deal with another point here, I take into account that there can be areas where private rights are going to be determinative of the issue as to whether the development is actually built or not. Let me give a simple example. The council does not have to prescribe that when a building is built, particularly in close proximity to the other or where there are possibilities of structural interference, that the building regulations have to be complied with. That is a given. But it is all a question of fact and degree.

38 The fact that here, if the development and the roof terrace was to be built as apparently intended, it might be possible, because of party wall rights or rights to the whole of the side wall which only vest in the claimant, to stop it or change it does not relieve the council of considering matters which go to the whole question of loss of amenity, of which noise is one. So, I completely reject the notion that the council can simply dispense with that. Indeed, it is not clear that is what the council in fact would have done, notwithstanding what Mr Williams says ex post facto, because had it had those considerations in mind it seems to me it is highly likely that it would have chosen to do something about that and I will come back to that later on. All I can say for present purposes is I do not regard the witness statement of Mr Williams as assisting on the matter in any real sense.

39 In my judgment, the only fair conclusion one can reach from the officer's report was that he simply did not have any regard to the whole question of structural noise disturbance. Was that, to use a family phrase, a controversial issue or was it wholly irrelevant or immaterial? We now know plainly that it is not. First of all, PPS said it was a significant issue and, at the time of the application, that was the only evidence on the point, but I now have the benefit of two noise assessment reports.

40 The first was produced after this claim was brought by the claimant BYG. That actually looked at the plan and said that on the face of it the terrace was going to be attached to the side wall. It actually explained how there could be a number of mitigation or abatement measures that would deal with it, but in fact the more helpful report is the one which has been obtained by the council. All I need to do is to refer to the discussion at p.405 and 406:

> "To avoid structural transmission between the two properties the avoidance of physical contact between the dividing wall and the new proposed structure would generally rule out the appearance of adverse effects. Conceptually, a metal structure fixed directly without a resilient and anti-vibration product onto a party wall has the potential of transmitting structural noise in the new structure and its connected elements and through to the dividing wall. This could then become a new source of reradiated structural noise not previously present at 11 Dartmouth Row.
>
> Typical uses of the new terrace which would have the potential to transmit structural noise are walking on the terrace or stairs, trailing or dropping objects and, depending on the type of structural connection, banging of doors. All of these are considered to be reasonable use of the space. If the new proposed structure were connected without the anti-vibration products, the noise transmitted via the structure of the adjoining residence would have the potential for being noticeable and not intrusive or potentially noticeable and intrusive during the daytime based on the definitions in PPGN."

41 This makes it even more obvious that these are indeed matters classically for decision-making in the planning process, because these experts for the council are actually remaking reference to National Planning Policy Guidance:

> "The implications would be that small changes would imply, for example, turning up the volume of a TV set next door defined as an adverse effect during the night-time. The same type of noise would be notable and intrusive and potentially noticeable and disruptive. It can

affect sleep. There is potential for this type of sound transmission to qualify as a significant adverse effect, which according to the guidance in a worst case scenario should be avoided and there could be the possibility of sleep disturbance.

However, it is best practice to isolate finished floors from adjacent residential properties vertically and horizontally. There is no clear requirement to address the lateral transmission of impact sounds. In building regulations it is generally accepted any flooring will be resiliently separated from the structure. It is therefore reasonable to assume the applicant would adopt best practice to minimise the effect of the transmission into the structurally connected adjacent properties.

In summary, if the applicant had no rights on the dividing wall, the construction of an independent structure is unlikely to create adverse effect. If the applicant has the right to access the dividing wall to build the proposed side extension, use of best practice would likely mitigate. Therefore, the intrusiveness of the noise would be reduced in relation to a scenario where best construction practice was not applied."

42 Several points arise from this. First, it is absolutely plain that there could be a significant impact from the construction of the new terrace in terms of the amenity by reference to the need not to be disturbed by noise on number 13 and the residents therein. That is absolutely plain. The second point is, notwithstanding the reference later on to best practice, having started with the relevance of planning policy guidelines, and I refer here to what is set out in detail at s.2.2 and s.2.3, I am quite sure that those matters are not ones which can simply be left to best building practice.

43 It seems to me that if those matters had been considered one very obvious course which the council might take would be to impose certain conditions which would affect the structure of the terrace which would be designed to avoid the noise disturbance which is so clearly highlighted in the Capita report. It is not for me to grant a condition if that was what was to happen and if this planning permission was quashed, but Ms Hall raised, somewhat

faintly at the end of her submissions, that it is not clear that a lawful condition could be made. I do not accept that for a moment. It seems to me that it would be quite possible to make a lawful condition that satisfied the six qualities which the case law has established in order for it to be lawful.

44 That being the case, it is impossible to conclude other than that the whole question of structural noise disturbance was a controversial issue - but it was a controversial issue which was simply not addressed or taken account of by the author of the report. It must follow from that that it was not taken into account by the decision maker afterwards. The real opposition to this, and it had to be this kind of opposition in my judgment, from the council was that amenity can be taken at such a high level that the question of structural noise disturbance is such a detail that this very broad approach taken in the officer's report is sufficient and it would be too onerous and burdensome and wrong to impose on the officer writing the report to go any further.

45 There are two problems with that. First of all, it is a really significant issue in my judgment. Second of all, it is not that the officer conducted a very broad analysis of amenity. He conducted a very detailed analysis of amenity. It is just that he left one thing out. Had he considered it, it seems to me to be impossible to suggest that he would not have put it into his report.

46 On that basis, it is clear to me that ground one is made out. Ground two I think is really parasitic on ground one. Ground three would be made out as well, not because he did not read the letter at all, but it seems clear to me that he did not read all of it or, if he did read all of it, he did not take all of it on board. On that basis, the planning permission itself was granted unlawfully.

47 Then there is the question of outcome. First of all, had it been necessary to do so, I would unquestionably hold that the consideration of structure-borne noise was a material

consideration and that if there was an initial threshold level it obviously could have affected what the decision maker would do. Secondly, if we then go to the ultimate threshold imposed by s.31(2)(a), it is quite impossible in my judgment for the council to be able to discharge the burden that it is highly likely that the same decision would have resulted.

48 Let me make one thing plain. A decision to grant planning permission without conditions as to the structure dealing with structural noise disturbance and a planning permission which does impose such a condition are not the same or substantially the same. Therefore, if the submission was made that it does not matter because they would have granted planning permission and they would just have put a condition in is not to the point. Therefore, so far as what used to be the question of discretion to refuse relief is concerned, there is no way, in my judgment, at this stage, that it can be said that it is highly likely that the same or a substantially the same result would accrue.

49 Having said all of that, this means that any finding in relation to ground two is academic. However, let me just say something but no more than is necessary so far as that is concerned. It is common ground that DM37 applies here, because the buildings are locally listed. DM37 says:

> "The council will protect the local distinctiveness of the borough by sustaining and enhancing the significance of non-designated heritage assets. Development proposals should be accompanied by a heritage statement proportionate for significance of the asset. The council will seek to retain and enhance locally listed buildings and structures and may use its power to protect their character, significance and contribution made by their setting where appropriate."

50 There is no reference to DM37 in the list of policies which were carefully set out by the officer. That in the context of this case where he has gone to the trouble of listing out those specific policies within the local plan must give rise to the inference that he did not

consider DM37 to be relevant. In some ways that is almost borne out by the witness statement of Ms Ecclestone. She is not a decision maker. She is the council's senior conservation officer. She says that DM37 was in fact considered by the council and planning officers at the pre-application and application stage. That there was an assessment of the local historical contexts.

51 If the suggestion there is that provided it is dealt with at the pre-application stage, it does not need to be dealt with afterwards that is a very surprising proposition in my judgment. It would be different if there had been specific consideration by the officer or the decision maker as to DM37 and a considered judgment as to whether it was relevant or not. It is difficult to see why it is not relevant, because it applies specifically to these properties.

52 Mr Glenister put ground two really on this basis, that the problem was that the officer's report and, therefore by implication the decision maker, concentrated only on policy 36, which deals with conservation areas. That said:

> "A new development or alterations to existing buildings. You should not grant planning permission where it is incompatible with the special characteristics of the area, its building spaces, settings and plot coverage, stale form and material."

53 Now, Mr Glenister said that is a somewhat more relaxed test and you have to read the officer's report in that regard, because that is the test that he directed himself to. I think in terms of what he actually did that is correct. It is also right that there was not a heritage statement. I do not accept that the design and access statement can somehow be reinterpreted so as to produce a heritage statement. I have been taken to the detailed guidance which is actually part of Lewisham's own guidance (see p.134 and p.135) which explains precisely what that statement has to contain. So, there is no doubt in my mind that DM37 should have been considered. It is a material consideration and it was not considered.

54 The real question here I think and the real point which Ms Hall was making, is does it actually make any difference here? Ms Hall rejects the notion that there is anything really different about the exercise which has to be undertaken. It is really all a question of is the development proposal going to cause an inconsistency with the other locally listed buildings. That is something which the planning officer did consider.

55 Mr Glenister says, no, it is a heightened policy, because you have to actually "retain and enhance". That is a phrase which is used a lot. Ms Hall says that the word "enhance" cannot be right, because if that suggests a positive obligation on the council either to do some form of enhancing building works itself or to require someone else to enhance another property, then that is absurd, but the logic of that submission is that the word "enhance" is entirely otiose.

56 Speaking for myself and provisionally, because, as I say, this point is actually unnecessary for determination, it does seem to me that there is a heightened exercise here which is all about the local enhancement of locally listed buildings, which means paying particular attention to their significance and to their character. It does seem to me, provisionally, that that is a somewhat stricter test than that which entailed by DM Policy 36. That being so and given that the whole question of visual impact and character and the nature of the frontage to the roof terrace as compared with the rest of the terrace was a controversial issue. Had I had to decide this, then I would have said that it is a material consideration and I would have not have accepted that it would be highly likely that the council would have reached the same or substantially the same conclusion; but, as I have said, strictly speaking, that is academic.

57 I am going to hear counsel on consequential matters in a moment. Can I just, however, add a postscript please to my judgment. There has to be a way through this in my view. I notice that those at number 11 and number 13 seem to have got on with each other perfectly well.

I notice the conciliatory tone which has been adopted in the letter from Ms Cavett dated 27 November. This planning permission is going to be quashed. It is going to go back to the council, but there is no reason why the parties should not, and every reason why they should, try to cooperate with each other and to find a way in which the development can be put forward which will, in particular, without prejudice to the DM37 point, but in particular deal with the question of structural noise disturbance.

58 It may well require the assistance of a structural engineer. There may well have to be consideration about party wall rights, although that is a separate matter, but, if at all possible, I would urge them to come to a common or agreed position which might make the whole question of reconsideration by the council much more straightforward. Without pre-empting any decision in anyway at all, if the council were minded still to grant planning permission, it would in my judgment be highly likely, but, again, I am not dictating, to include a condition and that is something which of course, subject to the council's ultimate decision, is something which can be canvassed between or even agreed between the protagonists in this case, because it seems to me that the sooner that this whole issue can be put to bed and both sides can get on with their normal lives the better.

59 With those concluding remarks, I will now hear counsel on any consequential matters. Mr Glenister.