Neutral Citation Number: [2021] EWHC 2115 (Admin)

Case No: CO/4341/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 July 2021

Before :

MRS JUSTICE LANG DBE

- -

Between :

RAMESH PATEL **Claimant**
- and -

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

(2) LONDON BOROUGH OF LEWISHAM

(3) MUSIC ROOM SOLUTIONS LIMITED T/A MUSIC ROOM LONDON **Defendants**

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Jack Parker (instructed by **Holmes & Hills LLP**) for the **Claimant**
Matthew Fraser (instructed by the **Government Legal Department**) for the **First Defendant**
Jon Darby (instructed by **Mackintosh Law**) for the **Third Defendant**
The **Second Defendant** did not appear and was not represented

Hearing date: 8 July 2021

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Approved Judgment

Mrs Justice Lang:

1. The Claimant applies for a statutory review, pursuant to section 288 of the Town and Country Planning Act 1990 ("TCPA 1990"), of the decision dated 13 October 2020, made by an Inspector appointed on behalf of the First Defendant, to dismiss the Claimant's appeal against the refusal by the Second Defendant ("the Council") to issue a certificate of lawfulness of existing use or development ("CLEUD") in respect of 122 New Cross Road, London SE14 5BA ("the Site") under section 191(1)(b) TCPA 1990.

2. The Claimant, who owns the Site, applied to the Council (the local planning authority) for a CLEUD to confirm that the development at the Site for which planning permission had been granted on 20 December 2010 ("the 2010 permission") was lawful. Whether the development was lawful depended on whether or not the 2010 permission had been lawfully implemented prior to its expiry which, in the circumstances of this appeal, depended on a single issue, namely, whether the information that had been submitted by the Claimant was sufficient to discharge Additional Condition 1 ("AC1") on the permission.

3. That issue turned on the proper construction of AC1, in particular, whether, as the Claimant contended, it only required soundproofing within the development, between the ground floor commercial units and the upper floor residential units, or whether it also required more extensive soundproofing. The Inspector accepted the Council's contention that AC1 also required the development to be soundproofed against transmission of noise from the commercial units to neighbouring land/premises, and from neighbouring land/premises to the residential units.

4. The Third Defendant ("MRL") supported the Council's position at the appeal, and the Inspector's conclusion. MRL has for many years operated music studios adjacent to the Site. Its concern is that the loud amplified sound which is generated from the studios may adversely affect the living conditions of residents at the development, and result in restrictions on the operation of MRL.

5. Permission to proceed with the claim was granted by Mr Timothy Mould QC, sitting as a Deputy High Court Judge, by order dated 28 April 2021.

Planning history

6. On 20 December 2010, the Council granted the Claimant planning permission for:

> "The construction of single to three storey building incorporating terraces, on land to the rear of 122 New Cross Road SE14, comprising 3 commercial units (Use Class B1) on the ground floor and 5 two bedroom self-contained maisonettes above, together with associated landscaping and alterations to the front and rear of 122 New Cross Road with the provision of refuse/recycle and bicycle stores at ground floor level."

7. The planning permission was granted subject to a number of conditions.

8. AC1 provided:

> "Full written details, including relevant drawings and specifications of:
>
> (a) The proposed construction of the ceilings and walls separating the ground floor use hereby permitted and the upper floors and the external walls; and
>
> (b) The proposed works of soundproofing against airborne and impact sound
>
> shall be submitted to and approved in writing by the local planning authority prior to any works starting on site. The use hereby permitted shall not commence until the soundproofing works have been implemented in accordance with the approved details. The soundproofing shall be retained permanently in accordance with the approved details."

9. There were two further conditions which were relevant to the issue of noise. Additional Conditions 16 and 17 provided:

> "16. No repairs or mechanical operations shall take place within the open areas of the site.
>
> 17. No process shall be carried on nor machinery installed which could not be carried on or installed in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell fumes, smoke, soot, ash, dust or grit."

10. The same reasons were given for AC1, and Additional Conditions 16 and 17:

> "**Reasons for the imposition of the Additional Conditions**
> 1, 16 & 17.
> To safeguard the amenities of the adjoining premises and the area generally and to comply with Policies ENV.PRO 9 Potentially Polluting Uses, ENV.PRO 11 Noise Generating Development and HSG 4 Residential Amenity in the adopted Unitary Development Plan (July 2004)."

11. The Standard Conditions imposed were as follows:

> "**Standard Conditions**
>
> 1. The development to which this permission relates must be begun not later than the expiration of three years beginning with the date on which the permission is granted.
>
> 2. Unless minor variations are otherwise approved in writing by the local planning authority, the development shall be carried out strictly in accordance with the application plans, drawing and documents hereby approved and as detailed in the Schedule above."

12. The Schedule referred to in Standard Condition 2 included the Claimant's plans, the "Design & Access Statement Ref 0912_PL DA01 by Alan Camp Associates January 2010" ("the DAS") and the "Sustainability Report R3 by EAC Ltd" ("the Sustainability Report").

13. Works to implement the development began on 23 October 2013 and comprised demolition of buildings, site clearance, foundation works and construction of a 1.3m wall.

14. On 29 October 2013, the Claimant applied to the Council to discharge conditions, including AC1. In response to the question "[p]lease state the condition number(s) to which this application relates", the Claimant ticked and circled number 1, without restricting it to part (a).

15. The details submitted by the Claimant in respect of AC1 included drawings showing the proposed construction of the ceilings and walls separating the ground and upper floors and of the external walls. The drawings also show details of the proposed soundproofing works for the ceilings and walls (both internal and external), and data sheets in respect of the soundproofing materials to be used in those elements of the building.

16. The application to discharge conditions was validated by the Council on 29 November 2013 but was not determined.

17. In May 2014, the Claimant submitted an application for planning permission for an alternative development proposal for the site with nine residential units.

18. The application for planning permission was considered by the Council by way of an officer's report to committee dated 21 January 2016. The report stated that "officers are satisfied that this planning permission has been implemented following the submission of evidence from the applicant" (paragraph 2.4).

19. At paragraph 2.5, it was noted that an application was made to discharge the conditions (soundproofing, code of sustainability, wheelchair lift, screening, refuse and cycle racks, landscaping, paving-sample and living roof) attached to this consent in November 2013, although it had not yet been decided at that time.

20. Paragraph 6.39 stated:

> "The London Music Room (116 – 118 New Cross Road) have objected to the scheme and raised concerns that introducing residential properties would limit their ability to operate. They did not object to the 2010 planning application. At that time their use did not have the benefit of planning permission and officers were not aware of the noisy nature of its operation. Therefore, no sound protection conditions relating to the protection of occupants from the noise at 116-118 New Cross Road were attached to the 2010 consent. As works have commenced on the 2010 scheme it could be built and the units occupied without any protection against external noise."

21. The officer recommended that planning permission be approved subject to conditions. Contrary to that recommendation, the application was refused by members of the Council's Planning Committee, by a notice dated 16 September 2016, which gave as the reason for refusal that the Claimant had "failed to demonstrate through the submission of a Noise Assessment that the proposed residential development would not limit the ability of the London Music Room …. to operate contrary to DM Policy 26 of the Development Management Local Plan (November 2014) and London Plan Policy 7.15 Reducing Noise and Enhancing Soundscapes".

22. The Claimant appealed the refusal of planning permission. In a statement of common ground agreed between the Claimant and the Council in that appeal, it was recorded, at section 3, in relation to the 2010 permission that:

> "The planning permission was dated 20 December 2010. At the time of that permission being granted Music Room London was in occupation at nos. 116-118 New Cross Road. However, as confirmed at paragraph 6.38 of the January 2016 Committee Report, the Council was unaware of the operation's existence at the time of granting planning permission for the site's redevelopment. The conditions relating to noise insulation measures were not, therefore, triggered by an awareness of the noise making operation occupying the nearby site."

23. It was also agreed that the 2010 permission was extant (both in Section 1, Site Description, and in Section 6, Other Agreed Matters). At the hearing of the planning appeal, however, the Council subsequently changed its position and expressed the view to the Inspector that the 2010 permission was not extant (see paragraph 12 of the appeal decision).

24. The appeal was dismissed by Inspector JP Sargent on 10 November 2017. He declined to determine whether or not the 2010 planning permission remained extant and recommended that an application for a lawful development certificate be made to determine that issue. He upheld the Council's reasons for refusal of permission, concluding that the proposal would create unreasonable living conditions for future residents because of the noise generated by MRL, and would also result in unreasonable restrictions on the operation of MRL. As such, it would conflict with DM Policy 26 of the Development Management Local Plan (November 2014) and London Plan Policy 7.15, and the National Planning Policy Framework.

25. An application for a CLEUD was made by the Claimant on 25 January 2018. The application was refused by the Council by notice dated 6 April 2018. The reason for the refusal was stated as:

> "The evidence submitted demonstrates that the material operations at land to the rear of 122 New Cross Road SE14 were undertaken prior to discharge of pre- commencement conditions as required by planning permission DC/10/073432/X and therefore the works are unlawful and the planning permission DC/10/073432/X has expired."

26. The Claimant appealed against the refusal of the application for the CLEUD. In the meantime, a further application for a CLEUD was made by the Claimant, and refused by the Council by notice dated 5 October 2018.

27. In the appeal, the Claimant and the Council submitted Statements of Case, supported by opinions from counsel. MRL made representations, and also submitted opinions from counsel. In response, the Claimant submitted "technical advice" from his architect.

28. The Claimant's appeal was allowed by Inspector Simon Hand on 20 August 2019. He concluded, at paragraphs 12 and 13 of his decision:

> "12. It seems to me that even if the condition were read as including details of the noise transmission from external sources, such as the Music Rooms, then those details would not suggest the condition went to the heart of the permission. The works already undertaken would thus not be unlawful and would be sufficient to have implemented the 2010 planning permission. I do not consider the condition does involve soundproofing against external noise sources such as the Music Rooms. Had that been the Council's intention then the condition would surely have said so. The external sources of noise should have been identified so that the developer could reasonably determine what soundproofing was needed, and preferably a proper scheme with decibel ratings etc should have been requested so that the success of the proposed soundproofing could be measured. The appellant says no soundproofing was ever suggested to deal with external noise sources and the Music Rooms did not object to the original 2010 proposal, so there were no "proposed" works to start with.
>
> 13. Consequently, and notwithstanding that the submission did not specifically mention 1(b), I consider the details provided by the appellant were sufficient to discharge condition 1(b) and the condition, in any event, is not a condition precedent which goes to the heart of the permission. Therefore the works to implement planning permission DC/10/073432/X were lawful and that planning permission is still implementable. I shall issue the LDC as requested."

29. MRL applied for a statutory review of Inspector Hand's decision, pursuant to section 288 TCPA 1990, on three grounds:

    i) Ground 1: it was irrational and/or perverse for the Inspector to find that AC1 was not a genuine pre-commencement condition going to the heart of the 2010 permission.

    ii) Ground 2: the Inspector speculated as to what the Council might have done if the noise protection issue had been considered to be crucial at the time, which was irrelevant and/or unreasonable given that what the Council did do was clear on the face of the 2010 permission.

iii) Ground 3: it was irrational and/or perverse for the Inspector to have concluded that sufficient information was submitted to discharge part (b) of AC1.

30. Permission to proceed with the claim was granted by Holgate J. on 26 November 2019, on all three grounds. The claim was subsequently settled by way of a consent order dated 23 December 2019 between MRL and the First Defendant. The order records that the interested parties – the Claimant and the Council – took no active role in the proceedings and did not sign the order. Under the terms of the consent order, Inspector Hand's decision was quashed and remitted for reconsideration. The reasons for the consent order were set out in the Schedule as follows:

> "3. The Defendant concedes his Inspector erred in law for the following reasons:
>
> a In relation to Ground 1, the Inspector provided insufficient reasons for relying on the technical advice and there was an unlawful failure to invite submissions on it.
>
> b In relation to Ground 2, there was a failure to consider and give reasons for rejecting the …. argument that the fact the Council granted permission conditional on the noise issue being resolved demonstrated its crucialness to the development."

31. However, the Secretary of State did not concede Ground 3 which concerned the issue in this claim, namely, the scope of AC1. Paragraph 4 of the Schedule to the order stated:

> "The parties reserve their position on Ground 3 and other matters arising in Grounds 1 and 2."

32. When the appeal was remitted for reconsideration, the parties were given the opportunity to make further representations. At the appeal, it was agreed between the parties that AC1 was a condition precedent. The only issue between the parties was the proper construction of AC1.

The Inspector's decision

33. Inspector Diane Lewis BA (Hons) MCD MA LLM MRTPI dismissed the Claimant's appeal in a decision letter ("DL") dated 13 October 2020.

34. The Inspector identified the main issues at DL 10:

> "10. The main issue is whether the Council's decision to refuse a LDC is well-founded. The matters of particular relevance are:
>
> • Is additional condition 1 attached to the 2010 permission a pre- commencement condition that goes to the heart of the permission as a matter of judgement?
>
> • If it is, was the condition discharged before the commencement of development?

> • If not, does a *Whitley* [FN *F G Whitley & Sons v Secretary of State for Wales and Clwyd County Council* [1990] JPL 678, [1992] JPL 856] exception apply, whereby all relevant information was submitted in time to enable additional condition 1 to be discharged?"

35. The Inspector confirmed (at DL 12) that the third question was the remaining matter in dispute. She noted that the construction of AC1 was "essentially one of law for the court".

36. The Inspector agreed with the interpretation of AC1 advanced by the Council and MRL, and rejected the Claimant's interpretation. Accordingly she held that the details submitted to discharge Condition 1 (soundproofing between the ground floor commercial units and the upper floor residential units) were insufficient to cover what was required by part (b) of AC1.

37. Following an analysis of the competing arguments advanced by the parties, the Inspector reached the following conclusions:

> "47. In conclusion, the condition is not confined to requiring construction details of the ceilings and walls separating the ground floor use and the upper floors. Insufficient information was provided to enable the pre-commencement element of the condition to be discharged. Furthermore, there was inadequate consideration as to how the policy requirements to protect the noise-sensitive residential element would be met from noise sources external to the site. Having regard to the wording of and reason for additional condition 1 the information submitted is insufficient to address point (b) of the condition. The local planning authority reasonably concluded that the condition should not be discharged.
>
> **Conclusions**
>
> 48. Additional condition 1 is a pre-commencement condition that goes to the heart of the permission. The condition was not discharged by the local planning authority before the commencement of development. All relevant information was not submitted in time to enable additional condition 1 to be discharged and consequently a *Whitley* exception does not apply in this instance. The three year time limit for commencing the development, imposed by standard condition 1 expired on 19 December 2013."

38. Therefore the Inspector held that the Council's refusal to grant a CLEUD was well-founded, and the appeal was dismissed.

Grounds of challenge

39. The Claimant's sole ground of challenge was that the Inspector had misinterpreted AC1. In particular, the Inspector erred in finding that part (b) required the submission of details of soundproofing works in relation to anything other than the elements of the building specified in part (a), that is to say the ceilings and walls separating the ground and upper floors and the external walls. The meaning of AC1 was unambiguous. Had the Inspector construed the condition correctly, it was evident from her DL that she would have found the details submitted by the Claimant sufficient to discharge it.

40. The Claimant submitted that AC1 was unambiguous and therefore extrinsic material ought not be referred to, especially material which post-dated the grant of permission.

41. The Claimant further submitted that, even if his interpretation of AC1 was not correct, the Inspector erred in finding that the condition required details of soundproofing works to be submitted to protect the noise sensitive elements of the development from external sources. Properly interpreted, the condition did not impose any such requirement.

42. At the hearing, I refused the Claimant permission to rely on a second ground, as set out in his skeleton argument at paragraphs 90 to 91, because it was not pleaded in the Statement of Facts and Grounds and there was no application to amend.

43. In response, the First Defendant submitted that AC1 was unambiguous and the Inspector's interpretation of it was correct.

44. MRL supported the First Defendant's case, arguing that the words of AC1 were clear and unambiguous. Additionally, it sought to rely upon evidence from its Director, Mr Gapper, on MRL's longstanding relationship with the Council, and the Council's knowledge of its activities.

Legal framework

(i) Applications under section 288 TCPA 1990

45. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with, and in consequence, the interests of the applicant have been substantially prejudiced.

46. In *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746, at [6] – [7], Lindblom LJ set out the principles upon which the Court will act in a challenge under section 288 TCPA 1990.

47. The general principles of judicial review are applicable. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

48. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6]:

> "An application under section 288 is not an opportunity for a review of the planning merits….."

49. A decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

(ii) Certificate of lawful use

50. By section 191 TCPA 1990, a person may apply for a certificate of lawfulness of existing use or development. Section 191 provides, so far as is material:

> "(1) If any person wishes to ascertain whether—
>
> (a) any existing use of buildings or other land is lawful;
>
> (b) any operations which have been carried out in, on, over or under land, are lawful;
>
> (c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,
>
> he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.
>
> ……
>
> (4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of application of the use, operations or other matter described in the application ….., they shall issue a certificate to that effect; and in any other case they shall refuse the application.
>
> ……"

51. By section 195 TCPA 1990, an applicant may appeal to the Secretary of State against a refusal of an application under section 191 TCPA 1990.

(iii) Planning conditions

52. By section 70(1)(a) TCPA 1990, a local planning authority "…may grant planning permission, either unconditionally or subject to…such conditions as they think fit".

53. Section 72 TCPA 1990 confers power to impose conditions upon the grant of planning permission. It provides, so far as is material:

> "**Conditional grant of planning permission**
>
> 72 (1) Without prejudice to the generality of section 70(1), conditions may be imposed on the grant of planning permission under that section –
>
> (a) for regulating the…use of any land under the control of the applicant…so far as appears to the local planning authority to be expedient for the purposes of or in connection with the development authorised by the permission…"

54. At the date of the grant of planning permission, Circular 11/95: Use of conditions in planning permission was still operative. Paragraph 14 provided:

> "….conditions should not be imposed unless they are both necessary and effective, and do not place unjustifiable burdens on applicants. As a matter of policy, conditions should only be imposed where they satisfy all of the tests described in paragraphs 14-42. In brief, these explain that conditions should be:
>
> i necessary;
>
> ii relevant to planning;
>
> iii relevant to the development to be permitted;
>
> iv enforceable;
>
> v precise; and
>
> vi reasonable in all other respects."

55. The general rule on the attempted commencement of development in breach of conditions, commonly described as the "*Whitley* principle", was set out in *FG Whitley & Sons v Secretary of State for Wales* (1992) 64 P & CR 296, where Woolf LJ held at 301 that:

> "The permission is controlled by and subject to the conditions. If the operations contravene the conditions they cannot be properly described as commencing the development authorised by the permission. If they do not comply with the permission they constitute a breach of planning control and for planning purposes will be unauthorised and thus unlawful."

56. However, the general rule admits of some exceptions. The relevant exception for the purposes of this claim was identified by Keene J. (as he then was) in *Leisure Great Britain Plc v Isle of Wight Council* (2000) 80 P & CR 370 at 379 as being derived from *Whitley* itself:

> "The decision in *Whitley* can be seen as establishing the proposition that, if a condition requires an approval before a given date and the developer has applied by then for the approval, which is subsequently given so that no enforcement action could be taken, work done before the deadline and in accordance with the scheme ultimately approved can amount to a start to development. The justification for that proposition can readily be seen. Where a condition requires not merely the submission of a scheme, but its approval by a given date, the planning authority would be in a position to invalidate the permission merely by dragging its heels unless that proposition were accepted."

57. The interpretation of a planning condition is a question of law for the Court. The leading authorities are *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85 and *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2019] 1 WLR 4317.

58. In *Trump*, Lord Hodge said:

> "34. When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference …..or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent."
>
> 35. Interpretation is not the same as the implication of terms. Interpretation of the words of a document is the precursor of implication. It forms the context in which the law may have to imply terms into a document, where the court concludes from its interpretation of the words used in the document that it must have been intended that the document would have a certain effect, although the words to give it that effect are absent. See the decision of the Privy Council in *Attorney General of Belize v*

> *Belize Telecom Ltd* [2009] 1 WLR 1988 per Lord Hoffmann at paras 16 to 24 as explained by this court in *Marks & Spencer plc v BNP Paribas Securities Trust Company (Jersey) Ltd* [2015] UKSC 71, per Lord Neuberger at paras 22 to 30. While the court will, understandably, exercise great restraint in implying terms into public documents which have criminal sanctions, I see no principled reason for excluding implication altogether."

59. In *Lambeth*, the Supreme Court affirmed the principles set out in *Trump*. Lord Carnwath concluded at [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."

60. Mr Parker referred to the judgment of Lewison LJ in *Swindon Borough Council v. Secretary of State for Housing, Communities and Local Government* [2021] PTSR 432, at [60] – [64] and [68]:

> "60. The court asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense.
>
> 61. In carrying out that exercise, there is no absolute bar on the implication of words, although the court will be cautious in doing so.
>
> 62. There is no special set of rules applying to planning conditions, as compared to other legal documents.
>
> 63. Like any other document, a planning permission must be interpreted in context. The context includes the legal framework within which planning permissions are granted.
>
> 64. Since the context includes the legal framework, the reasonable reader must be equipped with some knowledge of planning law and practice: *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 143. (Although the decision in the case was reversed by the Supreme Court, it was common ground that this principle remained unaffected).
>
> …

> 68. As noted, the Supreme Court held that the same principles apply to the interpretation of a planning permission as apply to other documents. One principle that applies (both to contracts and to other instruments) is that the court will prefer an interpretation which results in the clause or contract being valid as opposed to void. It is known as the validity or validation principle: see, most recently, *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] 1 WLR 4117. This approach is triggered where the court is faced with a choice between two realistic interpretations: *Egon Zehnder Ltd v Tillman* [2020] AC 154. In that case Lord Wilson JSC described the principle at para 38:
>
> > "… the validity principle proceeds on the premise that the parties to a contract or other instrument will have intended it to be valid. It therefore provides that, in circumstances in which a clause in their contract is (at this stage to use a word intended only in a general sense) capable of having two meanings, one which would result in its being void and the other which would result in its being valid, the latter should be preferred.""

61. The principles applicable to the use of other documents as an aid to interpretation were summarised in *R v Ashford Borough Council, Ex p Shepway District Council* [1999] PLCR 12, per Keene J. at pp 19C-20B (as approved by the Court by Lord Hodge in *Trump* at [33]):

> "(1) The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions: see *Slough Borough Council v. Secretary of State for the Environment* (1995) J.P.L. 1128, and *Miller-Mead v. Minister of Housing and Local Government* [1963] 2 Q.B. 196.
>
> (2) This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. The reason for normally not having regard to the application is that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application: see *Slough Borough Council v. Secretary of State* (ante); *Wilson v. West Sussex County Council* [1963] 2 Q.B. 764; and *Slough Estates Limited v. Slough Borough Council* [1971] A.C. 958.
>
> (3) For incorporation of the application in the permission to be achieved, more is required than a mere reference to the

> application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are needed, such as "… in accordance with the plans and application …" or "… on the terms of the application …," and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is granted. These words need to govern the description of the development permitted: see *Wilson* (ante); *Slough Borough Council v. Secretary of State for the Environment* (ante).
>
> (4) If there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity: see *Staffordshire Moorlands District Council v. Cartwright* (1992) J.P.L. 138 at 139; *Slough Estates Limited v. Slough Borough Council* (ante); *Creighton Estates Limited v. London County Council*, The Times, March 20, 1958."

62. Further guidance on those principles was provided by Lieven J. in *UBB Waste Essex Ltd v Essex CC* [2019] EWHC 1924 (Admin), at [56] – [57]:

> "56. … where documents are incorporated into the permission, as here, plainly regard can be had to them. Where the documents sought to be relied upon are "extrinsic", then save perhaps for exceptional circumstances, they can only be relied upon if there is ambiguity in the condition. In my view, even where there is ambiguity there is a difference between documents that are in the public domain, and easily accessible such as the officer's report that led to the grant of the permission and private documents passing between the parties or their agents.
>
> 57. The Court should be extremely slow to consider the intention alleged to be behind the condition from documents which are not incorporated and particularly if they are not in the public domain. This is for three reasons. The determination of planning applications is a public process which is required to be transparent. Any reliance on documents passing between the developer and the LPA, even if they ultimately end up on the planning register, is contrary to that principle of transparency. Planning permissions impact on third party rights in a number of different ways. It is therefore essential that those third parties can rely on the face of the permission and the documents expressly referred to. Finally, breach of planning permission and their conditions, can lead to criminal sanctions."

Interpretation of AC1

63. Applying the principles set out in these authorities, the starting point is to identify, through the eyes of the reasonable reader, the ordinary and natural meaning of the words, in the context of the other conditions and the consent as a whole.

64. The Inspector's interpretation of the wording of AC1 began at DL 22 where she stated:

> "22. The condition is concerned with ensuring adequate soundproofing works are incorporated into the development. The details required include those related to the construction of the buildings, including the building envelopes, the internal walls and ceilings and any soundproofing that may be incorporated into the building fabric. The use of the word 'including' in the first phrase of the condition indicates that the required details may not necessarily only comprise those addressing points (a) and (b). The form and content of the development, together with the enclosure and proximity to neighbouring buildings and land, indicate that effective management of noise would be an essential consideration to ensure the health and quality of life of future residents and to protect the amenity of the surroundings in accordance with development plan policy."

65. In my judgment, this interpretation was clearly incorrect. It is contrary to the ordinary and natural meaning of the words. The function of the word "including" in the first line of AC1 is to indicate that the "full written details" have to include relevant drawings and specifications but are not limited to drawings and specifications. The word "including" in the first line does not indicate that the requirements of AC1 are not exhaustively set out in points (a) and (b), so that the "required details may not necessarily only comprise those addressing points (a) and (b)" and could also include other details relating to the effective management of noise.

66. The error in interpretation in DL 22 appears to have led to the Inspector's further description of the probable "required details" in DL 23 where she said:

> "The probability is that the details required would not be confined to a small element or design detail but would affect a substantial part of the building at the least. A comprehensive noise attenuation scheme would be required to be submitted, rather than one or more schemes dealing with different elements …."

67. The First and Third Defendants conceded that the Inspector's interpretation was incorrect, but submitted that it was not significant because DL 22 was in a section of the decision letter that was concerned with a different issue, namely, whether AC1 went to the heart of the permission. I do not agree. It was common ground by the date of the appeal that the condition went to the heart of the permission – the Inspector did not need to spend 10 paragraphs determining an agreed issue. The sub-heading to the section – Additional Condition 1 – accurately reflected its contents, namely, a series of general observations on AC1, in its context. In my view, these observations are likely to have

informed the Inspector's interpretation of the scope of AC1 throughout her decision, and so the error did infect her reasoning in a material way.

68. The Inspector's view of the natural and ordinary meaning of AC1 was set out at DL 31:

> "As an initial observation and approaching the matter afresh, my reading of the planning condition is that point (a) is specifically and primarily concerned with the relationship between the ground floor commercial units and the maisonettes above. Point (b) has a wider application to the building and site as a whole, including potential transmission of external noise to the new accommodation and from within the building to noise sensitive space outside. The two distinct sub-paragraphs indicate that it is unlikely that the two parts together require only details of how separating floors and walls in the building will be dealt with."

69. In my view, the flaw in this reading of AC1 is that all that was required by part (a) is the provision of details of the proposed construction of the ceilings and walls. Part (a) does not impose any requirement for soundproofing works to be incorporated into the ceilings or walls. It is only part (b) which imposes a requirement to soundproof the ceilings and walls referred to in part (a). I consider that, through the eyes of the reasonable reader, the natural and ordinary meaning of AC1 is that parts (a) and (b) are complementary. Part (a) requires full written details of the proposed construction of the ceiling and walls and part (b) requires full written details of the soundproofing to be installed within those walls and ceilings.

70. A further difficulty with the Inspector's interpretation is that it requires the reader to depart from the natural and ordinary meaning of "the proposed works" as the soundproofing works which had been proposed at the date the planning permission was granted, and to add the underlined words "<u>to be submitted</u> proposed works", to incorporate a reference to soundproofing works which were only proposed at a later date, after the grant of planning permission (see DL 33).

71. In my view, the Claimant's interpretation of the meaning of "the proposed works" is supported by reading AC1 in the context of the permission as a whole. Standard Condition 2 requires that "the development shall be carried out strictly in accordance with the application plans, drawing and documents hereby approved and as detailed in the Schedule above". The reason for Standard Condition 2 is to "ensure that the development is carried out in accordance with the approved documents, plans and drawings submitted with the application and is acceptable to the local planning authority". The documents listed in the Schedule are incorporated by reference into the planning permission and are a legitimate aid to the interpretation of the conditions.

72. The Schedule referred to in Standard Condition 2 includes the Claimant's plans, the DAS and the Sustainability Report.

73. The Sustainability Report provided (so far as is material):

> "7 Soundscapes

> 7.1 The site is located within a primarily residential area. There are no particular sound problems impinging on the site.
>
> 7.2 The dwellings are designed so that rooms of similar use are adjacent to each other.
>
> 7.3 The new homes are isolated from road noise by the existing buildings.
>
> 7.4 The proposed use of the commercial units as B1 will be a use that does not generate much noise, and any noise generation will tend to beat different hours to the occupation of the dwellings. There will be Building Regulation compliant sound insulation between the dwellings and the commercial units."

74. Thus, the only soundproofing work identified in the Sustainability Report, was the need for sound insulation between the dwellings and the commercial units. External noise from MRL was not identified as an issue. Therefore, at the date when the Council granted permission and imposed conditions, the natural and ordinary meaning of the "proposed works" in AC1 was the sound insulation between the commercial and the residential units, as proposed in the Sustainability Report.

75. The Inspector rejected this interpretation for three reasons.

i) First, if the condition was limited to requiring further details of the proposed sound insulation works it would be duplicating the control of the Building Regulations. However, AC1 does not merely require Building Regulations compliant sound insulation to be installed between the commercial and residential units so as to duplicate the requirements of the Buildings Regulations. AC1 was imposed because the Council wanted to have details of the soundproofing works that were being proposed in order to be able to understand whether those proposed works would adequately mitigate airborne and impact sound for the purpose of planning policy and, if so, to ensure that they were incorporated into the development.

ii) Second, the Inspector pointed out that AC1 made no express reference to the Sustainability Report, in contrast to Additional Condition 2. However, Additional Condition 2 explicitly refers to the Sustainability Report because the condition requires the development to be constructed in accordance with it. AC1 does not refer to the Sustainability Report because its function is different. As noted above, it does not seek to ensure that the development is built in accordance with the commitment in the Sustainability Report to install Building Regulation compliant sound insulation but rather to obtain details of the proposed soundproofing works to ensure that those works would adequately mitigate airborne and impact sound.

iii) Thirdly, the Inspector pointed out that the commentary provided by the architects who made the 2013 application did not refer at all to the Sustainability Report. However, it is only in cases of ambiguity that reference to extrinsic material is permitted. Even if AC1 was ambiguous, a consultant's report in respect of a different application which post-dated the Council's drafting of the

> planning permission and conditions by several years is not a reliable source of evidence as to how the condition was intended to be understood at the time it was drafted.

76. The DAS, which was expressly incorporated into the permission as an approved document, also did not refer to any concerns about external noise from neighbouring developments. At DL 20, the Inspector criticised the Claimant for failing to take account of the proposed 'New Deals for Communities' ("NDC") development on the neighbouring site which had a significant influence over the scheme design. However, if anything, the influence over the scheme design supported the Claimant's submission that there were no concerns or proposals regarding noise insulation from external sources. The DAS referred to the Claimant's three pre-application submissions to the Council, each of which elicited feedback from the Council's planning officers. It is apparent that the Claimant introduced windows on the flank boundary wall in response to feedback from those involved with the NDC proposal that they would "look favourably on having windows and balconies to the flank wall to animate the NDC Community Garden enclosure and offer passive surveillance" (page 11). There was nothing in the DAS to suggest that those windows would require any particular soundproofing measures or that there would be any noise concerns arising from the relationship between the two developments.

77. The absence of any reference to external noise concerns in the Sustainability Report and the DAS was consistent with the agreed position that, when the Council was considering whether to grant the 2010 permission, there was no objection from MRL, and the current concerns about external noise from MRL affecting residential use at the Site, were not communicated to planning officers or Members (see paragraphs 20 and 22 above).

78. The Claimant submitted that there was nothing in the reasons for AC1 to suggest that its purpose is to protect future occupants of the residential dwellings from sources of noise external to the development. I agree with the Claimant's submission.

79. The same reasons are given for AC1, and Additional Conditions 16 and 17:

> "**Reasons for the imposition of the Additional Conditions**
> 1, 16 & 17.
> To safeguard the amenities of the adjoining premises and the area generally and to comply with Policies ENV.PRO 9 Potentially Polluting Uses, ENV.PRO 11 Noise Generating Development and HSG 4 Residential Amenity in the adopted Unitary Development Plan (July 2004)."

80. Additional Conditions 16 and 17 provide:

> "16. No repairs or mechanical operations shall take place within the open areas of the site.
>
> 17. No process shall be carried on nor machinery installed which could not be carried on or installed in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell fumes, smoke, soot, ash, dust or grit."

81. Additional Conditions 16 and 17 are obviously intended to prevent unacceptable impacts arising from within the development and, in particular, from the commercial ground floor uses. They do not relate in any way to protection from noise generated externally to the site.

82. The Claimant submitted that the fact that the reasons for Conditions 1, 16 and 17 are all the same suggests that each of the Conditions was imposed for the same purpose, i.e. to protect from unacceptable impacts arising from within the development from the commercial ground floor uses. Indeed, the only way in which the reasons for Additional Conditions 1, 16 and 17 can be read consistently with one another is if those reasons relate to the need to protect the amenities of the adjoining premises and the area generally from the noise generating activities of the commercial ground floor uses. Otherwise, on the Inspector's interpretation, the reasons given for Additional Conditions 16 and 17 (i.e. solely the protection from noise generated within the development) must be read inconsistently with the reasons given for Additional Condition 1 (i.e. the protection from noise generated both within the development and from outside the development). I accept the Claimant's submission on this point.

83. At DL 34 to 40, the Inspector examined the stated reasons for AC1, and concluded:

> "40. In summary, the objective of the cited policies is to safeguard amenities and secure high design standards and in this general sense provide a reason for the conditions. In addition, they provide justification for seeking soundproofing measures to protect the noise sensitive residential element from existing noise sources external to the site and from the proposed commercial units."

84. Policy *HSG4 – Residential Amenity* seeks to improve and safeguard the character and amenities of residential areas throughout the Borough by, among other matters, ensuring that new dwellings are sited appropriately, and resisting the siting of incompatible development in or close to residential areas and dealing with existing uses that create a nuisance. It was common ground that it says nothing about external sources of noise.

85. Policy *ENV.PRO 9 - Potentially Polluting Uses* sets out the principal land use considerations that will be used to assess polluting or potentially polluting uses, wherever they arise. It was common ground that it says nothing about external sources of noise.

86. Policy *ENV.PRO 11 – Noise Generating Development* provides:

> "The Council will resist development that could lead to unacceptable levels of noise. Where noise sensitive development is proposed close to an existing source of noise, or when a noise generating development is proposed, the Council may require the developers to have prepared a detailed noise impact survey outlining possible attenuation measures."

87. The reasons for the policy are stated as follows:

> "The impact of noise can be a material consideration in the determination of planning applications. The role of the planning system is to guide development to the most appropriate location. Essentially, noise-sensitive land uses, such as housing, hospitals or schools, should as far as practicable, be kept separate from noise-generating use, such as industrial processes, road, rail and air transport facilities.
>
> It will generally not be appropriate to allow noise generating development to take place close to noise-sensitive areas, such as housing. Equally, it may not be appropriate to introduce noise-sensitive uses into areas that are already characterised by noisy activities, for example in the Defined Employment Areas.
>
> Where it is not practicable to ensure separation of noise-sensitive and noise-generating uses, permission for noisy uses may be granted with suitable planning conditions attached to moderate the impact of any noise."

88. Policy ENV.PRO 11 seeks to prevent development that would lead to unacceptable levels of noise, either by refusal of planning permission, or by imposing suitable planning conditions to moderate the impact of any noise. It expressly includes the introduction of noise-sensitive uses, as well as noise-generating development. The Inspector found, at DL 36, that the reference to this Policy in the reason supported the expectation of and the need for a scheme of noise attenuating measures to safeguard the residential units from existing sources of noise. However, I consider that this finding focussed on what the Inspector thought should have been included in the permission, rather than what was actually included. The Policy provides that the Council may require the developers to prepare a detailed noise impact survey outlining possible attenuation measures. In my view, it is a significant point in support of the Claimant's interpretation, that no such noise survey in respect of external noise from MRL was ever required by the Council in its determination of the planning application, nor was the Claimant required to submit one under the terms of AC1. No noise attenuation measures, other than those specified in the Sustainability Report, are identified anywhere in the planning permission or the material incorporated into the permission.

89. The Inspector accepted at DL 43 that AC1 "does not specifically state that protection is required from noise external to the site, nor does it identify specific noise sources or standards of protection to be achieved". However, she concluded that "the absence of such specific references would not necessarily rule out the need to address external noise protection in the details of soundproofing". The difficulty which the Inspector did not address was that conditions must be sufficiently precise (see Circular 11/95). On the Inspector's interpretation, part (b) of AC1 is unacceptably general and vague. In my judgment, the reasonable reader, with some knowledge of planning law and practice, would interpret AC1 on the basis of the ordinary and natural wording of the condition, in the context of the permission and the incorporated documents. Faced with the obvious interpretation of AC1, namely, that it only requires soundproofing between the ground floor commercial units and the upper floor residential units, the reasonable reader would not (and should not) also seek to imply into AC1 a set of requirements as to external soundproofing which is not expressly referred to in AC1, and was not identified by the Council when granting the 2010 permission. AC1 is a pre-

commencement condition and a condition precedent. Therefore it is imperative that the Claimant knows what noise attenuation measures he has to address, prior to making an application to discharge the condition.

90. In my judgment, AC1 is unambiguous and therefore it is impermissible to rely on extrinsic material which was not incorporated by reference into the permission (see *R v Ashford Borough Council, Ex p Shepway District Council* [1999] PLCR 12, per Keene J. at pp 19C-20B (as approved by the Court by Lord Hodge in *Trump* at [33])).

91. The Inspector referred extensively at DL 45 and 46 to extrinsic material submitted in respect of an appeal against the refusal of planning permission in 2017. In my view, this reflected the general approach taken by the Inspector and the First and Third Defendants, namely, that because an external noise condition was subsequently considered to be desirable, the 2010 permission should be interpreted so as to include it. However, I consider it is wrong as a matter of law to use material produced in 2017 to cast light on how a condition imposed in 2010 should be interpreted. As a matter of fact, there is undisputed evidence that the Council did not have before it the information concerning MRL which was available in 2017.

92. The Third Defendant also submitted witness evidence from its Director, Mr Gapper, on MRL's longstanding relationship with the Council, and the Council's knowledge of its activities. This was inadmissible as an aid to interpretation, as Mr Gapper's evidence was not referred to in the material accompanying the planning permission, and was not publicly available.

Conclusion

93. For the reasons set out above, the Claimant's application succeeds and the decision of the Inspector must be quashed and remitted to the First Defendant.