Case Name: *London Borough of Richmond Upon Thames v Ariyo, R (On the Application Of)* [2024] EWCA Civ 960 (09 August 2024)

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Commentary: This was an unsuccessful appeal by the London Borough of Richmond Upon Thames ("the Appellant") against the judgement given in the High Court by Mr C M G Ockleton Vice President of the Upper Tribunal (see Town's case summary here (*Ariyo, R (On the Application Of) v Richmond Upon Thames London Borough Council* [2023] EWHC 2278 (Admin) (11 September 2023)).

Background

The Respondent (Mr Ariyo) lives next door to a restaurant at 209 Hampton Road ("**the Property**"). The Property is located within the London Borough of Richmon Upon Thames ("**the Council**"). In 2005, the Property was given planning permission on appeal for the *"change of use of the ground floor from a general hardware store (Class A1) to a restaurant (Class A3)"* ("the 2005 Permission").

Although the Inspector considered imposing a condition requiring sound insulation between the proposed restaurant and Mr Ariyo's residential accommodation above as part of the 2005 Permission, in the end no such condition was attached to the 2005 Permission. The only relevant condition to the 2005 Permission for the purposes of this case is Condition 2, which restricts opening times of the restaurant to between 8:00am and 11:00pm.

In October 2022, a new planning application was made for the retention and amendment of an existing rear pergola at the rear of the building at the Property. The proposal was for a structure of substantial size with retractable glass panels on the sides and the roof. The Respondent's wife objected to the proposal on the grounds that it would result in undesired noise levels. The planning officer, giving the decision on the 2022 Application under delegated powers, noted that the use of the rear garden by customers of the restaurant is not restricted by planning conditions nor is it in breach of planning control given the "long-standing use of the premises as a restaurant"; therefore, he concluded (i) that issues associated with noise or parking are not in question and (ii) that mitigation of noise disturbance is secured by existing planning conditions.

The Respondent challenged the decision on the 2022 Application in the High Court.

The High Court held that, on a correct and lawful interpretation of the 2005 Permission, permission was only given for the use of the ground floor of the Property as a restaurant and this does not include the rear garden; therefore, the planning officer unlawfully concluded that the use of the rear garden of the Property as a restaurant was

permitted under the 2005 Permission.

The Appellant appealed the decision by the High Court and argued that the High Court was incorrect in its interpretation of the 2005 Permission. Further, the Respondent, by way of a Respondent's Notice, argued that even if the rear area could lawfully be used as a restaurant, the officer made two legal errors:

1. he wrongly concluded that mitigation of noise disturbance was secured by existing conditions; and
2. he wrongly concluded that issues such as noise are "not in question".

The Court of Appeal considered the arguments raised by the Respondent in its judgement, noting that these points were not completely new and that the question of noise was already raised, albeit in somewhat different terms, in the JR Claim Form; thus, allowing consideration of the points raised by the Respondent.

Judgement

Interpretation of the 2005 Permission

Lord Justice Lewison held that the High Court had incorrectly interpreted the 2005 Permission and thus concluded that the use of the rear garden as a restaurant was permitted under the 2005 Permission. Lord Justice Lewison noted that this was due to the fact that even though the description of the development in the 2005 Permission refers only to the conversion of the ground floor to a restaurant, the use of the garden was necessarily ancillary to the use of the ground floor as a restaurant, which was further indicated in the plans provided with the application for the 2005 Permission. Thus, the planning unit, for which the 2005 Permission was granted, included the rear garden. Further, Lord Justice Lewison noted that the High Court incorrectly assumed that, given there was consideration in the 2005 Permission as to the imposition of a sound insulation condition to protect neighbours in the upstairs flat, this must have meant that the Inspector did not grant permission for the rear garden to also be used as a restaurant since this would result in an Inspector wanting to protect those living upstairs only from noise arising from within the building and not the garden. This conclusion, Lord Justice Lewison found, was incorrect since, although such a condition was considered by the Inspector, it was not imposed in the 2005 Permission. Lord Justice Males agreed with Lord Justice Lewison.
Lord Justice Moylan dissented on the interpretation of the 2005 Permission and held that the High Court had correctly interpreted the 2005 Permission such that it did not permit the use of a rear garden as a restaurant. He reasoned his dissent by reference to the 2005 Permission which he noted clearly differentiates between what is the ground floor and the rear garden. Further, he held that, even though a sound insulation condition was not in the end imposed in the 2005 Permission, this was nevertheless the

intention and this is relevant for the purposes of the interpretation of the 2005 Permission since the discussion on the proposed condition noted that sound insultation should be required "between" the proposed restaurant and the first floor flat and this must be in reference to the ground floor alone and not the rear garden. Some other points relied upon by Lord Justice Moylan included, the limited access points to the garden from the restaurant (i.e. through the kitchen and toilets), the Proposed Layout plan submitted with the application for the 2005 Permission, and that the site plan cannot support the garden being implicitly included in the planning unit when the description of the development in the 2005 Permission is to the contrary. As for the ancillary use point, Lord Justice Moylan held that ancillary uses could amount to development in their own right where such uses have been intensified to the extent that it could amount to a material change of use and this point was not considered by the Council.

Noise

Notwithstanding the above conclusions on the interpretation of the 2005 Permission, the appeal failed since all three judges agreed that noise was a material consideration of the operational development proposed and the officer erred in law in failing to take this into account. No noise assessment was conducted by the Council or the applicant for the proposal and the design of such a pergola with retractable glass would result in increased noise for neighbours as opposed to open land use. This was especially so case given that in the refusal of a previous application made in 2021 for the same proposal, the Inspector had noted that the use of the rear garden with a large enclosed permanent structure is very different to the occasional outside seating in the garden. As a result, the Court of Appeal concluded that the planning permission under the 2022 Application must be quashed and the appeal dismissed.

Case summary prepared by Chatura Saravanan