Case Name: *Ariyo, R (On the Application Of) v Richmond Upon Thames London Borough Council* [2023] EWHC 2278 (Admin) (11 September 2023)

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Commentary: This case involved a successful appeal by Owolabi Ariyo (Claimant) against the decision of the Defendant, Richmond Upon Thames London Borough (Council), to grant retrospective permission for an outdoor dining area at the rear of an existing restaurant.

Background

In 2005, the relevant site (in Twickenham) received planning permission to change the use of the ground floor from A1 (Hardware Store) to A3 (Restaurant). The first floor remained residential. In 2008, a temporary change of use permission was granted to allow takeaways from the back of the restaurant through the garden area. In or around 2021, a pergola structure with dining tables and chairs had been constructed in the garden area between the main building and the garage.

The owner of the land applied for retrospective permission to retain the pergola area; this was initially refused by the Council (2021 Decision). However, a revised application (with modifications to the height, length, and screening of the pergola) was approved by the Council (Approval Decision). The officer's report for both the 2021 Decision and Approval Decision stated that the use of rear garden by customers was not in breach of any planning control given the long-standing use of the premises as a restaurant.

Grounds

The appeal was brought by the Claimant against the Approval Decision on five grounds, but the principal (and successful) claim was on grounds 1 & 2:

Ground 1: In making its decision, the Council was wrong in thinking that the restaurant use was a lawful use on the garden part of the site.

Ground 2: The officer's report for the Approval Decision was inconsistent with the 2021 Decision to support refusal, given the earlier report had said noise was a material consideration in favour of refusal, whereas the later discounted this factor on the basis the noise impact was already lawful.

The Council's main argument was that the restaurant use in the garden was lawful as a result of the 2005 grant of permission.

Judgment

The Court dealt with Grounds 1 & 2 together, as despite raising separate issues, both concerned the same question: Was the use of the garden as a restaurant a long-standing lawful use?

The Court set out the three ways in which the use of the garden as a restaurant, or as part of the restaurant, would be lawful:

1. The first was if it was expressly permitted by the 2005 grant of planning permission;

To argue this, the Council relied on a plan from the 2005 application showing the boundary of the applicants' ownership (including the garden area) and in support, referred to the 2008 permission, which included the use of the garden area for loading takeaways. In interpreting the grants of permission in accordance with the principles set out in R v Ashford BC ex p Shepway DC [1999] PLCR 12, the Court found the restaurant use in the garden was contrary to the grants of permission.

2. The second way set out by the Court was if the 2005 grant of planning permission were subject to implied permission to the necessary effect (here whether there was implied permission to use the larger space, including the garden, as a restaurant);

This required consideration of the planning unit and the Court cited the "leading and classic" authority on the identification of planning units (see paragraph 31) in Burdle v Secretary of State for the Environment [1972] 1 WLR 1207. In the Court's view, clear consideration of the issue of the planning unit in light of the grants of permission and the physical state and use of the building at the time of those grants was required. The absence of this "crucial factor" from the Council decision-making was an indication to the fact that the matter had not been lawfully determined, particularly given the lawfulness of the use had been raised by the Claimant. This led to the Court finding that the matter of the planning unit in the context of the permissions granted could not be simply assumed, and there was no implied permission to use the garden area as a restaurant.

3. The third way set out by the court was if a use originally not lawful had, through the passage of time, ceased to be amenable to enforcement;
This was not applicable given ten years' use of the garden could not be established on the evidence pursuant to section 171B(3) of the Town and Country Planning Act 1990.

Given the Court's conclusion on Ground 1, Ground 2 also succeeded as the consideration of noise was predicated on the use of the garden as a restaurant being lawful.

Conclusion

The key takeaways from this case are two-fold for Councils and Applicants alike in considering whether there is a lawful existing use. First, any existing permissions must be read and interpreted on their face and any proposed lawful use should not be contrary to these. Second, in determining whether there is a lawful existing use for part of a site, the decision-maker must understand the extent of the planning unit in light of existing permissions and the physical state and use of the building or area at the time of those grants.

Case summary prepared by Jack Curnow