Neutral Citation Number: [2022] EWHC 521 (Admin)

Case No: CO/92/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2022

Before

MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL

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Between

R (on the application of)	
CHRISTOPHER NEOPHYTOU	**Claimants**
RENA NEOPHYTOU	
- and -	
ENFIELD COUNCIL	**Defendant**
NARAIN SINGH CHUBBAH	**Interested**
DAMAYANTEE CHUBBAH	**Parties**

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- -

Mr S Whale (directly instructed) for the **Claimants**
Mr G Atkinson (instructed by **Enfield Council**) for the **Defendant**
No representation for the **Interested Parties**

Hearing date: 19 October 2021

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Approved Judgment

C.M.G. Ockelton :

The site

1. Hadley Way, London N21 1AN is a residential road of semi-detached houses built in the 1930s. The ground falls away rapidly on the south side of the road, with the result that the back gardens of the houses on that side are substantially below the level of the ground floor at the front. A number of the properties have raised terraces at the back, extending a terrace at approximately the level of the back door of the house, and supporting a garage: access to the garage is down the side of the house at a gradient more nearly level than would be possible without the terrace. One of the houses that has such a terrace is number 20, which belongs to Narain Singh Chubbah and Damayantee Chubbah, the interested parties, and is occupied by members of their family. Their immediate neighbours, occupying the other half of the semi-detached pair at number 18, are Christopher and Rena Neophytou, the claimants.

2. The present claim arises out of work undertaken at the rear of number 20. It apparently began because of a fear of subsidence threatening the garage. Before the work began there was a terrace of the type I have described. The garage, at the side away from the claimants, occupied the south-east corner of the terrace, that is to say it was as far into the garden as it could be while remaining on the terrace. The terrace then extended across the width of the house. At the side adjacent to number 18, however, the full width of the terrace extended only a few feet into the garden. The space approximately one metre wide, adjacent to the boundary with number 18, was occupied by a flight of steps, leading from terrace level to the garden. Thus, as perceived from the garden of number 18, there was a space between the boundary and the edge of the terrace.

3. It is convenient at this point to describe some other features of the terrace as it was before works began. It had a sheer vertical face to the south, fronting the rest of the garden. I shall call this face the 'front' of the terrace. The top, or surface, of the terrace, was paved with square concrete paving stones. There were three steps up from the surface to the back door of the house. I shall call the edge between the front and the surface the 'leading edge': it is of course defined by the front and the surface. Well inside the southern and western boundaries of the terrace was a balustrade constructed of pierced concrete blocks: it sufficed to prevent an accidental fall either from the front of the terrace or into the well where the steps descended to the garden level. The eastern boundary of the usable part of the terrace was the garage wall, pebbledashed down to the level of the paving of the terrace.

The development

4. Works to the terrace behind number 20 began in January 2019. The exact extent of them is the subject of the present dispute, but a certain amount is beyond dispute. The garage was demolished and rebuilt. The surface of the terrace was removed to a perceptible depth. A steel mesh reinforcement was installed above what then remained, and a new concrete surface was poured. These works included not only the whole extent of the existing terrace, but also the western edge, where the steps were. An RSJ was fixed above the bottom of the steps bridging the void above them, and the new surface of the terrace extended over that space, meaning that the western edge of the terrace was, for the whole of its depth, now adjacent to the boundary of number 18.

5. A new flight of steps was constructed starting at the middle of the usable part of the terrace and leading southwards into the garden. It was supported by a new concrete platform at approximately garden level, extending over the whole width of the garden (that is, behind the garage as well as the rest of the terrace). New fencing was also installed on the boundary with number 18.

6. The Claimants had been viewing this work with concern and made a number of representations to the local planning authority, Enfield Council ('the Council'), the defendant to this claim. Eventually, no doubt as a result of communication between the Council and the interested parties, the latter made an application on 13 June 2019 for planning permission, partly retrospective because of the work that had already been done. The works described included an 'extension to the rear patio'. The claimants objected. That application was refused on 8 August, on grounds including an increased perception of overlooking and loss of privacy to number 18. Despite the refusal, no enforcement action was taken at this stage. On 18 October there was a further application for planning permission, again partly retrospective. The changes from the first application were, in essence, a 75 cm reduction in the height of the new fence, and a one-metre narrowing of the width of the terrace adjacent to the boundary with number 18. The claimants objected. This application was also refused, on similar grounds. Again, no enforcement action was taken.

7. So far as the works were concerned, time passed with little further in the way of relevant events. The defendant gave the interested parties time to remedy matters, which time was extended on a number of occasions. On 7 August 2020 the defendant informed the claimants that an enforcement notice would be served if the interested parties has not substantially completed remedial works by 1 September. That date came and went without the remedial works being substantially completed, and without there being any enforcement notice. At this time is appears that work was done to the garden itself. Following what they regarded as an unsatisfactory exchange with the Council on 22 September, the claimants commissioned a report from a planning consultant, Litmus. Meanwhile, there was a meeting on site on 2 November. Officials of the Council attended, and discussed a considerable number of issues in relation to the development in the light of detailed submissions made by the claimants and supplemented by a PowerPoint presentation. The Council's summary of that meeting and its conclusion is contained in a spreadsheet ("the spreadsheet"). The report by Litmus is dated 5 November and was sent to the Council shortly afterwards.

8. By the time of the meeting it appears that the work was to all intents and purposes completed and in its present form. The steps on the front of the terrace into the garden have been removed. Access to the garden is again by a flight of steps on the western side of the terrace; the terrace itself no longer extends to the boundary with number 18 except at the part closest to the house. The terrace has been repaved. The three steps from the terrace to the back door have been renovated. A new metal fence has been erected along the sides of the terrace where the concrete balustrade had been; the fence is, however, close to the edge of the terrace, unlike its predecessor. The front of the terrace is sheer, except for a slight batter at the top of the wall immediately below the end of the garage. It is clear that there has been work to the garden, newly laid as a lawn surrounded by paving at various levels.

The decision, and this claim

9. On 27 November Vincent Lacovara, one of the Council officials who had taken part in the visit on 2 November, wrote to the claimants. His email attaches the spreadsheet. It notes that the visit and the claimants' submissions were helpful, but rejects significant parts of the Litmus report. It informs the claimants of the Council's view that "those elements of the development that did cause us concern were rectified by the works that were undertaken over the summer". The operative part of the email is the previous sentence: "Overall I can confirm that we have concluded that we do not intend to undertake any further enforcement action for development that has occurred to date at 20 Hadley Way".

10. That decision, to take no enforcement action, is the subject of the present challenge. The claim seeking judicial review of it was filed on 8 January 2021. There has been no response from the interested parties. Permission was granted by Mr Timothy Mould QC sitting as a Deputy Judge of this Court.

Clearing the ground

11. In the course of the process of seeking to challenge the building work taking place on their neighbours' land, the claimants have had long dealings with the Council. Those dealings have not been happy; the claimants have made a number of complaints and one at least has been upheld. I am not concerned with them. I am concerned only with whether the claimants can show that the decision under challenge was unlawful. Perhaps as part of the resultant unease that they felt about the Council's dealings with them, the claimants have taken a number of points about the identity of the Council witness whose witness statements constitute much of the Council's evidence before me. I see what the claimants mean, but there is nothing in the point. The statements are concerned with narrating the planning history and producing exhibits: they could have been made by any properly authorised officer of the Council. They are clearly not inadmissible; and they suffer in no relevant way by being made by an officer different from those previously involved.

12. The claimant's' objections to the development have had a considerable number of individual targets. The spreadsheet records investigation of nine separate factors, some of which raised more than one issue. I am concerned only with those matters which form the subject of the grounds of challenge.

The law

13. A development is defined by s 55 of the Town and Country Planning Act 1990 as including "the carrying out of building, engineering … or other operations in, on over or under land". In general, as required by s 57, planning permission is required for the carrying out of any development of land; but permission is deemed granted if the development falls within the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO").

14. A neighbour or other third party cannot require enforcement by pointing to a breach of planning control. The reason for that is that s 172 provides as follows:

> "(1) The local planning authority may issue a notice (in this Act referred to as an "enforcement notice") where it appears to them -
>
> (a) that there has been a breach of planning control; and
>
> (b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations."

15. The decision whether to enforce against unauthorised development is thus discretionary. A decision to issue, or not to issue, an enforcement notice may be challenged on ordinary public law grounds. If the decision-maker is shown to have taken irrelevant factors into account, or failed to take relevant factors into account, or behaved irrationally, the decision may be quashed, as it may also if there has been procedural error. But whether it is 'expedient' to issue an enforcement notice is a matter for the Council, properly advised, alone to determine. In particular a Council is entitled to seek remedial work before enforcement; and is entitled to consider whether enforcement would be upheld on any appeal, particularly bearing in mind that an Inspector might consider that a minor change to any previous structure ought to have been granted permission.

16. Where the fault is said to lie in the identification and determining of relevant facts, again the matter is subject to the general rules applicable to a decision by a public authority. It is for the deciding authority to determine any facts in dispute. Its carrying out of that process will not be subject to challenge unless it in its turn incorporates a public law error. Thus, if an authority determines a fact contrary to indisputable evidence, it may be possible to show that it failed to take a relevant matter into account in making a decision depending on that determination, and that the determination is to that extent unfair or unlawful. The circumstances in which an error of fact may thus be, or contribute to, an error of law, were analysed by the Court of Appeal in E v SSHD [2004] QB 1044, where Carnwath LJ (as he then was) giving the judgment of the Court, set out the requirements as follows:

> "First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the [decision-maker's] reasoning."

17. Where an authority, aware of a dispute on the facts, determines them on the basis of the evidence, the Court will not interfere unless an error of this sort is demonstrated. Mr Atkinson points to R (Chalfont St Peter Parish Council) v Chiltern District Council [2013] EWHC 2073 at [21] as an example of this well-established principle:

> "In my judgment there was clearly conflicting evidence as regards the extent of the playing fields on the site. This was all fairly placed before the committee. The officer set out why he

> believed the application complied with policy, including policy R2. There was also put before the committee the competing arguments. Nothing in the correspondence following the meeting changed that position so as to render any fact uncontentious. The Defendant made its decision taking into account all the relevant evidence and arguments. The committee was not misled as regards the availability of evidence. That decision and the basis upon which it was made cannot in law be criticised."

18. On appeal, [2014] EWCA Civ 1393 at [133], Moore-Bick LJ pointed out, after noting that there had been 'a lively dispute' about the import of the evidence, that

> "This is not one of those cases, therefore, in which it can be said that at the time of the decision the true position was capable of being objectively and incontrovertibly established but was somehow overlooked."

19. What is clear is that what is a dispute of fact cannot be turned into a dispute about an error of law by the assertion of facts that are not incontrovertible: see MT (Algeria) v SSHD [2007] EWCA Civ 808 at [69]. As Mr Atkinson argues in his written skeleton, 'it makes no sense to deny the facts are contentious by repeating the claim that one side is correct and the other wrong … that is what contentious means'. On the other hand, of course, a party cannot succeed in showing that facts are uncontentious merely by pointing to a dispute, where the dispute arises only from refusal to appreciate that a matter is in reality incapable of being disputed. It is for the Court to determine whether the evidence is such that the decision was erroneous for failure to take an uncontentious and objectively verifiable matter into account.

The decision in more detail, and the grounds of challenge

20. The reasons for the decision not to take enforcement action, so far as that decision is the subject of the present claim, are in lines 1, 2, 7 and 8 of the spreadsheet. Each of those lines records various information, including three or four site visits to investigate the asserted breach of planning control. I will set out in each case the "reported development" and the conclusions following the 2 November 2019 site visit.

> "Infilled/extended patio
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> It was confirmed that the patio's width has been reduced / the previously unauthorised extended element removed in line with previous findings, however it was advised by the complainant that in their view the steps have not been returned correctly and are higher than previous. On review it is our opinion that the steps have not been raised in totality and each step is not higher. From photos before, during and after it is our opinion that the tread is deeper, and the riser is the same or slightly shallower. We do not see this to be a breach of planning control, therefore no further action is required.
>
> Height of Patio

The submitted plans for the LDC app ref: 17/03685/CEA for the works to the roof. The rep for 18 put forward an argument that the patio was not shown on the plans therefore could not be there on submission, therefore the current raised patio was in excess of 30 cm in height from ground level and required PP. The rep also put forward that she had calculated the patio to have been raised by approx. 1.5m to its current height. The claimants put forward an opinion that the current patio had been raised by at least 500mm. A discussion was held where it was agreed that the rear extension had not changed in this time, neither had the boundary fencing and supporting wall adjacent to the patio. The garage of number 22 had also not been altered. It was also agreed the depth of the patio from the rear extension had not been altered. However, the rep and the owners of 18 were not able to confirm the original height of the patio, but would be willing to defend the council's decision in court if this was a criminal investigation. It was clear from photos obtained through the investigation that a new concrete surface to the patio had been constructed. This was confirmed in the powerpoint presentation given by 18. However, 18 in the meeting confirmed the builders had dug down while working on the patio and garage, but they did not know by how much. From aerial photos, photos taken through the build and on completion we can confirm there is in our opinion a minor difference in height. This is confirmed in the photos of the original structure and the completed patio. When assessing the heights and with confirmation from all parties the fence and supporting wall and neighbouring garage have not been changed, it is possible to see the heights against these structures before and after in submitted photographs. While we agree that works have taken place to the patio, digging down and then rebuilding with subsequent new slabs being laid, we do not take the view that there is a material difference in its form and appearance to suggest this is 1. A new structure and 2. The minor change in level warrants enforcement action. Taking into account at the evidence before us and what will be presented by all parties, if an appeal is submitted against further action, we do not believe we would be successful and would undoubtedly be subject to a cost application for unreasonable behaviour.

Raised levels in garden

Taking into account the measurements taken of the garden patios at the top and bottom of the garden it is our opinion that the garden level has not been increased in excess of permitted development. We were shown pictures of the amount of soil delivered and the number of the workforce including a mini digger which in the complainant's view indication that the works were greater than something covered under PD. Due to the size of the garden and the level of change in heights observed and

> measured we do not agree that the works constitute a breach of planning control and therefore no further action should be taken.
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> Hard standing at rear of garden
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> On site number 20 raised 3 fence panels. The first 2 at garden level after the raised patio and the last full panel at the bottom of the garden. Measurements of ground level/patio level were taken. Levels at the first 2 panels showed 26 cm and 36 cm when measured from ground level at number 18. Two measurements taken at the bottom panel showed 27 cm and 32 cm respectfully. All 4 measurements were taken to the top of the new low level patios. While it is accepted that 2 out of the 4 measurements were over 30 cm therefore over PD it is our opinion that ground level at 18 is lower than that of the original level of 20. Photographic evidence provided by 18, 20 and on previous officer visits all show the original garden level of 20. This level, while not formally measured at the time would indicate 20's original garden level to be 10-15 cm higher than 18. While it is our opinion that the alterations to ground level do not impact on the neighbours at 18 or 22 if considering formal action, this evidence should be considered at both pre Notice and possibly at appeal. While on site it must also be noted the same level of overlooking from residents in 20 and 16's rear gardens was observed by officers when residents were walking up and down from the rear elevation of the properties. Taking into account all the evidence before us and what will be presented by all parties, if an appeal is submitted against formal action, we do not believe we would be successful and would undoubtedly be subject to a cost application for unreasonable behaviour. "

21. Ground 1 is that the Council has failed to take into account an extension of the terrace by over 2 m into the garden. Either the Council has appreciated that there was such an extension and failed to take it into account in its decision, or it has wrongly failed to appreciate that the end of the garage, and the terrace below it and hence the whole terrace, which was 6.23 m from the façade of number 20, is now 8.63 m from that façade.

22. Ground 2 is that the Council has failed to take into account the true increase in height of the terrace following the works. The second application for planning permission shows a height of 1.75 m, whereas the height during the building works was 1.5 m. This is considerably more than 2 cm as asserted by the Council, and the claimants' view is that the height has been raised by "at least 500 mm" (0.5 m).

23. Ground 3 is that the Council has applied an immaterial consideration in treating a raising of the ground level by under 30 cm as development permitted by the GPDO, has failed even in that calculation to take into account its own measurement that in places the ground has been raised by over 30 cm, and has failed to appreciate that the work in the garden was a "development" for which planning permission was required.

Submissions at and after the hearing

24. Mr Whale's submissions essentially reflected the grounds. He occupied some time in taking me through the claimants' difficulties with the Council and their continued concerns about the officers with whom they dealt. He submitted that the evidence available to the Council clearly demonstrated the claimants' case. Mr Atkinson submitted, broadly speaking, that it did not. The position was that the claimants' assertions of fact in relation to grounds 1 and 2 were not borne out by the evidence. In relation to ground 3, the Council had erred in thinking that the GDPO permitted an increase in general ground level of up to 30 cm, but that error had had no material effect on the decision, which would have been the same without that error.

25. It seemed to me that it might be of advantage for me to see the applications made to the Council for planning permission, in case they provided further evidence, clearly available to the Council, of any uncontentious facts. I therefore allowed time for them to be submitted, and fixed a timetable for final submissions in writing. Mr Whale submitted a further bundle of material, including the application, some annotated photographs and at least one wholly new photograph, together with his submissions. Mr Atkinson responded, and Mr Whale replied.

Preliminary observations

26. I shall consider the grounds of challenge in turn, but there are some preliminary remarks to be made. The first is that some of the evidence and argument seem to be a little confused on what is in issue. The terrace itself is certainly a platform whose construction would have required planning permission if it had been erected today. The "construction or provision of a verandah, balcony or raised platform" is not work permitted by the GPDO except in the case of a platform raised by less than 30 cms (that is the consequence of the definition of "raised"). But the starting-point in relation to the terrace is not bare ground: it is the pre-existing terrace, which was too old to be the subject of enforcement. Works were done to it, and the Council's task was to assess the effect of them against the pre-existing position in order to determine whether any unauthorised new work should be the subject of enforcement which might return the terrace to its state before the works. In relation to the terrace, it is the new work, including any increase in height or depth, that is in question. In relation to the garden, however, the work is all new.

27. Secondly, the overall question is not whether there were breaches of planning control, but whether there was a reviewable error in the decision not to enforce against any breaches that did occur. I need to emphasise this because of the position taken by the claimants. As I have said, the decision whether to enforce is a matter for the Council, and in making it there are a number of factors to take into account including the extent of any breach, its own planning judgment of the effect of the breach, and the anticipated view of any Inspector who might be called upon to make a decision if enforcement was challenged. The fact of a breach, and the concerns of neighbours, although important, are not the only things that had to be considered. They had to be balanced with all other factors.

28. Thirdly, the ambit of the present enquiry is limited. I am not concerned with the state of number 20 before the remedial works were undertaken, which did include enlarging

the terrace by widening it and moving the steps to beyond it. Some of the allusions in Mr Whale's submissions are clearly to the terrace as so widened.

29. Fourthly, although units can be counted from photographs, and measurements can be taken from drawings when the measurement is stated on the drawing, unstated measurements cannot be scaled from drawings (indeed the drawings in this case say that they should not be) and trying to take measurements from photographs is likely to be unpersuasive given the various difficulties of parallax and the general state of the world as shown in the photograph. This means that much of the content of Mr Whale's submissions after the hearing is of very limited assistance.

30. Fifthly, although by the nature of this case I have had to examine the evidence of the works in some detail, I am not concerned to determine what the works involved or what the state of the property was after them. I am concerned with whether the Council's decision was unlawful for failure to draw necessary or obvious conclusions from the evidence and take them into account. That also means that I am not concerned with material or arguments not presented to the Council before the decision was taken.

Grounds 1 and 2: the Evidence

31. It is convenient to take grounds 1 and 2 together, particularly because the evidence tends to show the terrace as a whole. The nature of this claim, in the light of the authorities, requires the claimants to show that the evidence was such as to make the facts on which they rely in reality uncontentious.

32. The Litmus report, on which the measurements cited in ground 1 are based, is itself based on a plan submitted in 2017 supporting an application for a certificate of lawful development in relation to alteration of the roof of number 20. It is drawn, and although said to be drawn to scale, was not accompanied by photographs of the terrace as it then was. The Litmus report bases its conclusions as to the increase in height of the terrace on comparisons with the height of the garage as shown on the 2017 drawing and the height after the works, and although the calculation is far from easy to understand clearly concludes that "the new garage has been elevated approximately 1.7 m compared to the old garage". Although the report accepts that the building works involved the removal of the top of the terrace in order to lay new concrete reinforced by a mesh, the report concludes that this work took place after raising the terrace. The report draws further support from what are said to be changes in the relationship between the terrace and the side door of the garage. It is wholly unclear to me what the import of those alleged changes is, given that the garage, including its side wall, is new.

33. The claimants' witness statement dated 11 February 2021 makes a number of assertions about the terrace. They are as follows. (i) the steps from the terrace to the back door used to be five bricks in height but have been replaced and are now only three bricks in height. (ii) The terrace used to slope downwards towards the garden but is now horizontal, so the increase in height is (even) more at the garden end than the house end by the back door. (iii) Pictures taken during the works show the steel beam with concrete above it and 'it is perfectly obvious that their height is over 30 cm. The idea that their height is 2-5 cm is laughable'. (iv) The remedial works 'did nothing to remedy the raising of the patio and their remedial work left the patio extended.' (v) "The unauthorised works have had a devastating effect on our amenity and well-being. People on the patio now loom over us and our garden". (vi) This statement also makes

reference to a pair of security photographs, which I shall also consider in some detail: the claimants say that "even a schoolboy can see from these two photographs that the rear patio has been extended".

34. In a further witness statement, dated 13 April 2021, the claimants repeat that last view, adding that "one only has to count the tiles (which are of the same size) before and after the works" to see that the terrace has been extended rearwards. This statement also exhibits a new pair of photographs. The first is a view from the claimants' garden taken before the works during a family party. Over the boundary fence can be seen the side wall of the old garage, but there is no other part of the terrace apparent. The second photograph is after the work, and is said to be taken from the same position. It shows the side wall of the new garage, with a new door in a new position. It also shows the upper part of the new railings around the terrace. The terrace itself cannot be seen on either photograph. The statement asserts that "The fact that the terrace has been increased in height by over 30 cm is obvious from the two photographs. The [later] photograph also shows that the railings on the new patio are waist high". In this statement the claimants take the opportunity to repeat what they had said previously, that they did not at the site meeting agree that there had been no rearward extension of the patio.

35. I now turn to the photographs. There are a considerable number of them, from various sources. There is no reason to suspect that any of them is of itself unreliable, although their interpretation is not always easy. It is convenient to start with the security photographs to which I have already referred, and which the claimants so vividly characterise as establishing their case. Those photographs were taken from a security camera on the rear façade of number 20, which was in the same position before and after the work. They thus provide a pair of directly comparable records, which although not perfect are clearer than any of the other evidence in the case. They are dated "01-6-2019" and "10-21-2020", that is to say 6 January 2019 and 21 October 2020.

36. In respect of height, the change near the house is absolutely clear. In the earlier picture one row of bricks is visible at the bottom right of the picture between the wooden fence (which is not said to have moved) and the terrace paving. In the later picture the terrace paving comes to the bottom of the fence. The increase in height is the depth of one brick. That is confirmed by photographs of the three steps from the terrace up to the back door. Those photographs give no reason to suppose the steps have been rebuilt, and no photograph shows them absent. What the photographs do show is that the bottom step used to have a riser of about two bricks in height and now has a riser of one brick in height. Thus again, the rise in level of the terrace is about the thickness of one brick.

37. Returning to the security camera photographs, they also demonstrate that the new garage side door is nearer the house than the old one was. The old one can be seen in the picture; the new one is out of range to the left. That explains why it, and not its predecessor, is so visible in the pair of photographs from the claimants' garden; though the old one is just visible partly behind a bush and cannot be seen to be lower.

38. The next point to consider is the claimants' assertion about what can be told about the size of the terrace from the number of the paving stones. Here there are some difficulties, for two reasons. The first is that, as I have already indicated, before the work the boundary balustrade of the terrace was set a considerable distance in from the

edge. All the relevant pictures show this. It is seen very clearly in two aerial photographs taken before the work was begun, where it looks as though the part of the terrace outside the balustrade can be seen as a quite substantial ledge and is confirmed by the earlier security camera picture, which shows the garage extending beyond the balustrade. That means that the bottom of the balustrade does not mark the leading edge of the terrace as it was: the actual leading edge was (as seen by the security camera) some distance beyond that. But what makes it even more difficult is that there is debris against the bottom of the balustrade in the earlier picture, so that even that cannot be seen precisely.

39. However, certain aspects are clear. It is right that the new paving stones are the same size as the old, or nearly so: the width of the terrace from boundary fence on the right to garage on the left is nine clear whole stones and a little less than half a stone in both photographs. It is not possible to tell for certain whether the leading edge, clearly visible in the later photograph, is further away than in the earlier, because there is nowhere in that picture where the paving slabs can be counted near the leading edge. But there is nothing to hint, let alone demonstrate, that the leading edge is further away. What can be said is that both raising of the terrace and its extension into the garden would each have the effect of raising the image of the leading edge towards the top of the photograph. There has certainly been a small increase in height at the house end. The claimants say there has been a greater increase at the garden end. If there has been any increase in depth it does not appear significant from these photographs.

40. The claimants' claim that these two photographs clearly show the increase in size is simply wrong. The photographs show an open terrace with a boundary fence nearer the edge. That is all. Some help can, however, be obtained from the aerial photographs. They are not entirely clear, but they all seem to show that both before and after the work (a) the end of the garage of number 20 was level with the end of the garage at number 22, the neighbours on the other side from the claimants; (b) the terrace may before the work have been slightly set back from the end of the garage, but very little (much less than the amount by which the balustrade was set back from the terrace) and (c) before and after the work the end of the terrace was roughly at the level of the northern side of a hemi-elliptical feature visible in the claimants' garden.

41. The claimants attempt to prove uncontentious facts is, I have to say, not improved by a certain amount of prevarication about what those uncontentious facts are. Ground 1 clearly asserts an increase of 2 m in the depth of the terrace. That was the uncontentious fact on which the claimants relied in bringing this claim. In the course of oral argument, the 2 m seemed to diminish rather rapidly when it was shown by the Council to be implausible. In Mr Whale's last reply he says that the Council's reference to a 2 m extension is "a red herring" and directs himself instead to the possibility of a 50 cm extension.

42. In relation to the increased height of the patio, the Council's eventual view was that the increase was the thickness of one brick or paving stone, "2-5 cm". The claimants object that bricks and paving stones are not the same thickness, and that the increase was more than 5 cm. The thickness of a brick is, I think 6.5 cm; and the thickness of a brick is the amount by which I find the terrace was raised at the house end. The Council clearly had a sufficient impression of the relevant facts: the thickness of one brick was amongst the relatively close alternatives indicated as its conclusion.

43. As far as concerns the claim that the terrace used to be sloping, so that its levelling involved a greater increase in height near its front, that is a point that never seems to have been raised or agreed before the decision was made, and is entirely unsubstantiated other than by the claimants' late observation. This alleged feature of the terrace before the work has not been identified on any photograph or drawing. Even if it could now be identified, it would not show any fault in the decision.

44. The Litmus report is unreliable. I suspect that it was prepared in ignorance of the fact that there was already a substantial terrace at number 20 before the present works began, whereas the position was that (whether or not the terrace was shown on the 2017 drawing) it was in 2019 and 2020 many years old and could not be the subject of enforcement. More to the point, the claimants are unreliable. This is a matter of some concern. I return to their statements about the pair of photographs including the one of the family party. That includes the assertion that the railings on the new patio are waist high, which carries clear implications about where the unseen paved floor of the terrace is to be envisaged, and about the amount of a person on the terrace that would be seen from their garden. They must have known that that was not true. There is a series of photographs attached to the Litmus report, which they had commissioned and produced, showing men standing behind the fence. The top of the fence appears to be nearly at shoulder level. The claimants are not able to see people from the waist up above the top bar of the fence. Further, the assertions in their witness statements that because of the increase in height (much more than the Council said) and depth (unrecognised by the Council) their neighbours 'now' loom over them was not true either. The terrace is very slightly higher and not demonstrably longer. The claimants' statements are an attempt to make their case without, in my judgment, proper regard for the truth.

45. In any event, the claimants have entirely failed to show that the facts of the dimensions of the new terrace as compared with the old were uncontentious and were as they assert. The truth of the matter is that the facts were uncontentiously <u>not</u> as the claimants asserted, and the reliable evidence all points to the position taken by the Council; but it is sufficient for the purposes of a challenge of this sort to find, as I do, that the evidence did not and does not begin to show that the Council was not entitled to take the view it did about the difference between the terrace before the works and after them. Grounds 1 and 2 fail.

<u>Ground 3</u>

46. In relation to ground 3, as I have indicated above, Mr Atkinson on behalf of the Council accepts a measure of confusion, and of error. The question for me is whether the claimants establish that the Council's decision on the works to the garden was, for that or any other pleaded reason, one which should be quashed. The works to the garden, as seen in the later photographs, consist of patios at each end of the garden connected by paved paths along the boundary fences. I call them "patios" in distinction from the raised terrace that is the subject of grounds 1 and 2. There are two apparently shallow steps down from the patio at the house end onto the paths. There is at least one step from the paths to the patio at the further end. The enclosed space is laid to grass.

47. There is a measure of confusion about what the works involved, how much of the result might have needed planning permission, and how much was the subject of complaint by the claimants and investigation. Sorting the matter out is not helped by the claimants' treating of the entire garden area as a whole, sometimes under the name of

"the groundworks", and the defendant's apparent inability to say whether, in the end, they consider there to have been an unauthorised development or not.

48. Mr Whale said in oral argument that 'the garden' had been raised. But it is very far from clear that that is right or that that that was the subject of the complaint or the Council's investigation. What was said was that the presence of a tractor and digger meant that there were engineering works; that a certain amount of soil had been brought into the garden, and that the works as described above had been done; but what was measured, with the help of the claimants, was the height of the edge of the patios against the ground level of number 18's garden: "All 4 measurements were taken to the top of the new low level patios". No measurements were taken except of the difference between the ground level at number 18 and the tops of the patios at number 20.

49. Both lines 7 and 8 of the spreadsheet bear on this matter. Line 7 appears, as indicated by the "reported development" entry, to be devoted entirely to an assessment of whether the garden of number 20 as existing is more than 30 cm higher than the garden of number 18. Line 8 deals with the different issue of the patios, specifically the further one. The part of the garden between the patios is obviously lower than the patios. The work to that part of the garden involved laying paths and tidying up. There is not the slightest reason to think that any "engineering" was involved, even if garden tools of more than usual dimensions were employed in what was, after all, a considerable task of design and work. In that part of the garden what was done is not shown to have gone beyond garden maintenance. It did not require planning permission and there is nothing before me to suggest that it involved unauthorised development. The conclusions in line 7 are marred by taking the garden as a whole and importing an imaginary GPDO permission for raising the level of the garden by 30 cms. But the garden did not fall to be treated as a whole, and there is no good reason to think that the part of the garden between the patios had been raised at all. If it had been, no doubt the Council would have been invited to take measurements there too. They were not.

50. Mr Whale essentially rests his case on the error about the GDPO, which is mentioned again in line 8. Mr Atkinson argues that the decision under challenge was more complex than that.

51. The decision considers the evidence of the ground levels before the works, and concludes that there was already a difference: the ground level at number 20 was "10-15 cms higher" than number 18; and "the ground level at 18 is lower than the original ground level at 20". Further, the level of overlooking of number 18 from the garden was similar on both sides, that is to say from number 20 and from number 16 on the other side. The conclusion on this issue was that, taking all the evidence into account, enforcement would be "undoubtedly" regarded as unreasonable if challenged, and would therefore not only be unsuccessful but would result in a costs order against the Council.

52. Mr Atkinson's position is that line 8 shows that the decision would have been the same even without the error about the ambit of the GPDO. The primary question for the Council was to ascertain the facts. There is no clear evidence before the court, except for a photograph of the site of one of the measurements after the works. For the reasons given in relation to grounds 1 and 2, I would not be inclined to accept statements of the claimants about the levels in the garden unless they were supported by independent

measurements: none have been drawn to my attention except those contained in line 8 of the spreadsheet.

53. The Council's factual conclusions were as follows. (i) The patio level at number 20 was higher than the ground level at number 18 by an amount which at the lowest level of the patios was 26 or 27 cms and at their highest 32 or 36 cms. (ii) Before the works, the level of the ground at number 18 was lower than that of number 20. (iii) After the works, the amount of overlooking of number 18 from number 20 was the same as that from number 16. The Council also assessed that (iv) the alterations do not impact on number 18 or number 22.

54. There can be no doubt that the Council did appreciate that some of the work would not have been permitted even under the GPDO provision it imagined existed. It was concerned, however, as it should have been, with whether enforcement of any sort was "expedient". It was entitled, and no doubt bound, to consider the possible consequences of so doing. It took the view that an enforcement notice would not be upheld if challenged on appeal. The reasons for that view are clear from line 8. The actual raising of the level by the work was unclear because of the lack of measurements before the work began, but was estimated to be a maximum of something of the order of between 21-26 cms in two places on the patios, and was not the subject of any concern apart from the patios. The Council's view was that there was no effect on the amenity of the neighbours. The result of an appeal would have been that an enforcement notice would be set aside: the Council no doubt had in mind the possibility of success under ground (a). The Council would be ordered to pay the costs. Thus, whether or not there had been a breach of planning control, the reality was that enforcement was not only impossible, but would involve the Council in undue expense and reputational damage.

55. Those reasons, which, as I say, are apparent from the spreadsheet, are amply sufficient to justify the decision not to issue an enforcement notice.

56. I should say, however, that I am far from confident that the relevance of the GPDO has been fully taken into account by the parties. As indicated and conceded, there is no provision for the general raising of ground level. But a raised platform of not more than 30 cms may be constructed in a garden by virtue of Class E (with reference to paragraph E.1(h) and again the definition of "raised"). This point was the subject of a brief allusion by Mr Atkinson in his oral submissions, but he did not develop it and does not refer to it in his written submission after the hearing. The overall conclusion of fact in the spreadsheet is that the patios, as raised platforms, are, taking into account the original ground level of number 20, not over 30 cms high. In that case they are permitted development in any case, and could not be the subject of enforcement. In that case none of the work covered by ground 3 was in breach of planning control.

57. Ground 3 fails, either because the Council took a view that it was entitled to take about the enforcement against any breach, or because there was no breach.

Conclusion

58. The claimants' claim fails on all grounds and will be dismissed.