Neutral Citation Number: [2015] EWHC 220 (Admin)

Case No: CO/3933/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 February 2015

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

- -

Between :

THE QUEEN **(on the application of** **ELITERANK LIMITED)**	**Claimant**
- and -	
ROYAL BOROUGH OF **KENSINGTON & CHELSEA**	**Defendant**
- and -	
(1) SECRETARY OF THE COURTFIELD **GARDENS WEST GARDEN COMMITTEE** **(2) THE TRUSTEES OF** **COURTFIELD GARDENS WEST**	**Interested Parties**

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- -

James Maurici QC (instructed by **Messrs Stitt & Co**) for the **Claimant**
Timothy Straker QC and Dilpreet Dhanoa (instructed by **Bi-Borough Legal Services (Hammersmith & Fulham and Kensington & Chelsea)**) for the **Defendant**

Hearing dates: 14 January 2015

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Approved Judgment

Mr Justice Supperstone :

Introduction

1. The Claimant, Eliterank Ltd, is the freehold owner of the residential property at 25 Collingham Road, London SW5 ("the Property"), which forms part of a terrace of dwellings running from 15-33 Collingham Road. The rear facades of that terrace of houses forms the eastern boundary of a private garden square, Courtfield Gardens West ("the Gardens"). The northwest and south boundaries of the square abut sections of the public highway known as Courtfield Gardens.

2. The Gardens are a "protected" square within the meaning of section 2(1) of the London Squares Preservation Act 1931 ("the 1931 Act"). The expression in the 1931 Act "the Council" originally referred to the London County Council ("LCC"). Upon the abolition of the LCC, its functions under the 1931 Act in relation to the Gardens passed to the Defendant.

3. The freehold of Courtfield Gardens is registered at HM Land Registry under title number BGL10910 and is vested in the Trustees of the Gardens. The Gardens are also subject to the Kensington Improvement Act 1851 ("the 1851 Act"). Section 43 of that Act enables the Trustees and Council Tax payers in respect of properties facing the garden square to appoint a sub-committee to be responsible for "the care, management and regulation" of the Gardens. Such a sub-committee has been appointed to manage the Gardens.

4. Section 51 of the 1851 Act provides that either the owners and occupiers, or the Council Tax payers, of the houses surrounding a garden square are to have the exclusive use of the garden and no other person is entitled to use the square. The garden is surrounded by railings and is gated. It is not available for public use.

5. The Property was formerly in use as a hotel. The Defendant granted planning permission in 2008 and 2012 for the alteration of the use of the building to three self-contained flats. Planning permission for alterations to the rear of the property included the creation of a rear lightwell extension at lower ground floor level with the provision of steps from ground floor doors to the garden.

6. However in May 2014 the Defendant indicated that it would apply for an injunction under the 1931 Act to seek the removal of the works to the rear of the Property which by that time were well underway. The Claimant responded by making an application for consent for the works in issue under section 3(2) of the 1931 Act. The Defendant decided that it had no jurisdiction under that Act to grant consent for the works carried out.

7. In these proceedings the Claimant challenges the Defendant's decision made on 11 July 2014 that the application dated 14 May 2014 by the Claimant for permission under the 1931 Act "should be recorded as invalid" and declining jurisdiction to decide the application. The effect of this decision was also to deny the Claimant the right of appeal it would otherwise have had under section 3(4) of the Act.

8. Counsel informed me that there is no authority on the construction and scope of the 1931 Act. Mr James Maurici QC, for the Claimant, contends that this case raises an

important point of legal principle for owners of properties adjoining squares throughout London. If the Defendant is correct then not just the Claimant but the owners of 15, 17, 21, 27, 31 and 33 Collingham Road (and other owners with properties adjoining squares elsewhere in London) all face the prospect that the development to the rear of their properties, which in a number of cases has been in place for many years, is now to be regarded as unlawful under the 1931 Act and hence liable to enforcement, including removal by injunction proceedings.

The Factual Background

9. On 30 August 1960 Thakeham Properties Ltd ("Thakeham") (the then freeholder of the Gardens) granted to Swick Securities Ltd ("Swick") a 999 year lease of a strip of land extending 15 feet from the rear of the terrace comprising 15-33 Collingham Road. By a deed dated 18 November 1960 Swick demised to Embassy Flats Ltd rights to excavate and carry away soil to a depth of 10 feet up to a distance of 15 feet from the rear boundary of 25 Collingham Road, together with a right to light and air, for a term of 998 years from 1 July 1960. The benefit of that deed is now vested in the Claimant and is included in its title to 25 Collingham Road under title LN110715. The Trustees accept that they are bound by the 1960 deed. The deed applies to both the surface and the subsoil of the protected square.

10. The Claimant's title also includes a deed of licence dated 2 July 1956 by which Thakeham granted the right to use the Gardens and the right to a separate and private entrance or gateway from the rear of Number 25 to the Gardens. Indeed all those living at 15-33 Collingham Road have access to the Gardens via the rear of their properties.

11. Following the grant of planning permissions, in the conversion scheme the raised ground and lower ground floors of the Property have been made to form a single large flat, the main bedroom of which is situated at the rear (lower ground floor level).

12. The dispute which has arisen concerns the lightwell and related structures which the Claimant has sought to create at the rear of the property in order to provide light to the rooms in the rear of the flat.

13. Before the conversion work was carried out there was at the rear of the Property protruding into the Gardens: a porch; a side door in the porch with steps running parallel to the rear façade of the property and down to the square; a flat stone surface between the steps and the boundary between numbers 25 and 27; three very low walls protruding from the rear elevation of number 25 into the square by about 3.5m; two underground vaults beneath the porch and the steps extending about 1m from the rear façade of the property; and a lightwell to the north of those two vaults extending about 1m from the rear façade of the Property and providing light to a lower ground floor window. The area occupied by the porch, steps, lightwell and vaults was about 14sq.m. In addition there was a steep slope forming part of the garden square in front of the lightwell (which the Claimant contends would not have been useable by visitors to the garden). The slope and lightwell together occupied about 8.4sq.m. of space.

14. On 17 February 2012 a planning permission was granted allowing the creation of a lightwell extending 1m into the square across the whole width of the rear elevation of 25 Collingham Road with French doors to the Gardens.

15. On 2 August 2012 a further application for planning permission was made to the Defendant to create a lightwell across the whole width of the property of a depth of 3.5m at lower ground floor level extending from the rear façade into the square. The application also included steps down from the raised ground floor to the garden across the proposed lightwell. The area of the lightwell is about 25.5sq.m. The Defendant granted planning permission for this larger lightwell and steps on 14 November 2012. The decision notice stated that permission was being given solely for development under the Town and Country Planning Act 1990 ("the 1990 Act") and not under any other legislation, including the 1931 Act. The reasons for the decision were that:

> "The proposal would preserve the character and appearance of this property, Courtfield Gardens (West) and the Courtfield Conservation Area. … The proposal complies with the relevant development plan policies in particular… CR5…"

Policy CR5 states that the Council will "resist development that has an adverse effect on garden squares including proposals for subterranean development and to promote the enhancement of garden squares".

16. The Officer Report (approved on 31 October 2012) recommending the grant of planning permission stated, inter alia, that:

> "4.9 The prevailing character on this side of the gardens is now lightwells at basement level similar to that proposal and the proposed lightwell will not be any deeper than the general depth of these other lightwells. The proposed enclosed lightwell area to this property would therefore not be out of character with the pattern of development of this group of buildings.
>
> 4.11 Taking into account the existing rear gardens to other properties on this side of the gardens, one more enclosed lightwell would not adversely affect the garden square and would preserve the character and appearance of the building and the Courtfield conservation Area.
>
> 5.5 … It is recognised that the communal garden is an important amenity space but in the context of the space as a whole, the excavation of this lightwell would not have a material impact upon the communal space available to residents and would not reduce the amenity value of the green space.
>
> 5.6 … The proposed lightwell would not alter the overall planting scheme or proportions of the gardens. The grassed path between the planted area and the rear of the properties would not need to be diverted as the proposed lightwell will not extend as far as this path."

17. Following the grant of planning permission in November 2012 the Claimant commenced the works. As I have stated, in early May 2014 with the works well advanced, the Defendant intimated that it would be seeking an injunction to require

their removal. The decision to take this action followed a report dated 7 May 2014 (which the Claimant did not see at the time) which concluded that in order for Courtfield Gardens to be protected as intended in the 1931 Act "the encroachment that the proposed excavation work at No.25 represents should be resisted and the garden restored to its previous state". It was however accepted that the excavation projecting from the rear wall of the property had been carried out to the dimensions approved under the planning permission (para 2.2). On 14 May 2014 the Claimant made an application to the Defendant for consent for the works under s.3(2) of the 1931 Act.

18. On or about 11 July 2014 the Defendant sent to the Claimant's agent, Savills LLP, a Report by Mr Derek Taylor, an officer of the Defendant, concluding that the application should be recorded as invalid. The material part of the Report states:

> "3.10 The excavation and construction of the sunken terrace area do not involve the provision of a new work or building underground… Accordingly, an application cannot be made for the works as they fall outside the scope of section 3(2).
>
> 3.11 The steps, and the bridge, are in themselves a difficulty. The bridge is to enable access to and egress from the raised ground floor; they would not be provided for the maintenance and construction of underground works and underground buildings. Nor are they exits and entrances to any underground works or buildings.
>
> 3.13 The Council cannot give consent for works which fall outside of the terms of section 3(2) of the Act. The application made by the owners of no.25 for consent under the 1931 Act, cannot therefore be accepted as a valid application."

The Legislative Framework

19. Section 3 of the 1931 Act provides, so far as is material, as follows:

> "**3. – Protection of Squares**
>
> (1) Subject to the provisions of this Act a protected square shall not be used otherwise than for one or more of the following purposes (that is to say) the purpose of an ornamental garden pleasure ground or ground for play rest or recreation (in this Act referred to as 'authorised purposes') and no building or other structure or erection shall be erected or placed on or over any protected square except such as may be necessary or convenient or in connection with the use and maintenance of such square for one or more of the authorised purposes.
>
> (2) Nothing in this section shall be deemed to prevent the owner or lessee of a protected square or of the subsoil of a protected square from using the subsoil of the protected

> square or any part thereof or permitting the same to be used for the construction and maintenance of underground works and underground buildings in a manner which will not interfere with the enjoyment or maintenance of the protected square for any of the authorised purposes or (with the consent of the Council and subject to such conditions as they may impose) from using so much of the surface as may be reasonably necessary and proper for the construction and maintenance of underground works and underground buildings and for the erection of temporary buildings and for entrances exits and ventilation shafts in relation to the said underground works and underground buildings Provided that the Council shall not impose any condition except for preventing serious interference with the amenity of the protected square or the enjoyment or maintenance of the protected square for the authorised purposes."

20. S.3(3) requires the Council to determine an application for consent under the second part of s.3(2) within two months. The statute imposes an obligation to give reasons where an application is refused.

21. A person dissatisfied with the refusal or the imposition of conditions on approval, may appeal to an arbitrator (s.3(4)). The arbitrator determines the matter afresh, but may not give any decision which would permit the use of subsoil or surface of a protected square as will in his opinion:

> "(a) cause any material encroachment on the surface of the protected square; or
>
> (b) interfere seriously with the amenity of the protected square or the enjoyment or maintenance of the protected square for any of the authorised purposes;
>
> unless he is satisfied that the encroachment or interference will be only temporary." (s.3(5))

22. By s.3(9) every person who contravenes or fails to comply with s.3(1)-(8) or any condition imposed or order made thereunder shall be deemed to have committed an offence and (without prejudice to any other proceedings) shall be liable to a penalty not exceeding £20 and to a daily penalty not exceeding the same sum. By s.3(10) injunctions for the enforcement of the provisions of this Act and the observance of any conditions imposed thereunder may be granted to the Council, and the court has the power on the application of the Council "to order the restoration of the square to as nearly as may be the state in which it was before the offence against this Act was committed… including the removal of any building structure or erection which the court shall determine to have been erected or placed contrary to the provisions of this section".

Grounds of Challenge

23. Mr Maurici advances five grounds of challenge to the decisions of the Defendant:

(1) That the Defendant wrongly used the criteria in the 1931 Act for determining whether, on the merits, consent should be granted under s.3(2) for treating the application as invalid;

(2) That the Defendant erred in deciding that the lightwell could not for the purposes of s.3(2) be regarded as "underground works";

(3) That the Defendant failed to consider, as the application asked it to, whether the steps fell within s.3(1) and thus do not require any consent under s.3(2);

(4) That the decision to take enforcement action is vitiated by the Defendant's errors under Grounds (1)-(3);

(5) The Claimant seeks, on the basis that the Defendant's decision is quashed, declaratory relief in respect of the Defendant's future determination of the application for consent under s.3(2) of the 1931 Act.

Discussion

24. It is convenient to start with Ground 2 which is fundamental to the Claimant's case.

Ground 2: Whether the lightwell can for the purposes of s.3(2) of the 1931 Act be regarded as "underground works".

25. It is the Claimant's case that the creation of the lightwell constitutes underground works. The steps to the garden (and the bridge) are authorised, the Claimant contends, under s.3(1) (see Ground 3 at paras 48-51 below); in the alternative the Claimant contends that the Defendant can approve the steps under the second part of s.3(2) "as an entrance or exit relating to the underground works, namely the creation of the lightwell. The steps are needed to cross the lightwell in order to gain access to the garden" (para 93 of the Claimant's application under s.3(2) dated 14 May 2014).

26. The 1931 Act does not contain any definition of the phrase "underground works". Mr Maurici submits that works which are situated below the ground level of a garden square are underground works for the purposes of the 1931 Act, irrespective of whether they are, or are not, exposed to the sky. Mr Timothy Straker QC, for the Defendant, submits that the expression "underground works" carries its contextual, ordinary English meaning. It is, he suggests, not necessarily desirable to put into other words ordinary English words that are perfectly capable of being understood. However, in seeking to do so, he submits, they mean works under the earth or subterranean works, or concealed or hidden works. On no basis, he contends, would one define underground works as including exposed surface works that are open to the sky.

27. In support of his submission that works which are situated below ground level are "underground" works, Mr Maurici relies on the definition of "underground" in the Collins English Dictionary as meaning "below ground level". He contends that further support for his interpretation of the expression "underground works" can be

obtained from the Defendant's Supplementary Planning Document *Subterranean Development (Adopted May 2009)* which states at paragraph 8.1.1:

> "Subterranean development is predominately located underground and, apart from their impact on trees and roots, may have little impact on the character and appearance of the street scene. However, subterranean development can lead to a proliferation of visible impacts, such as lightwells…"

Paragraph 8.3.2 states:

> "… Lightwells must not exceed a depth of one storey below ground level…"

Mr Maurici submits that these passages in the Defendant's own document support his contention that lightwells are similar to underground vaults.

28. Mr Maurici criticises the Defendant's interpretation of "underground works" for being unduly narrow and rigid. S.3(2) plainly, as the Defendant accepts, may authorise the construction of car parks below the surface of a protected square, together with entrances and exits on the surface. Mr Maurici submits that it makes no sense to construe the 1931 Act as allowing vehicular access on the surface and serving a below ground car park, to be "maintained" permanently, but not a domestic lightwell simply because the latter is exposed to the sky. The correct interpretation of the statute treats both types of structure as "underground works", but applies the test in s.3(5) to each in order to determine acceptability.

29. Both parts of sub-section 3(2) must be read together, Mr Maurici submits, in order to understand what in totality may be allowed by the 1931 Act. Under the first part of s.3(2) "underground works" are not prevented by the operation of s.3(1) (and do not require any consent from "the Council") where those works are by "the owner or lessee of a protected square" and they "will not interfere with the enjoyment or maintenance of the protected square for any of the authorised purposes". Significantly, Mr Maurici emphasises, the sub-section deliberately goes further in the second part of s.3(2) which expressly allows consent to be granted for the use of the "surface" of a protected square for "the construction and maintenance of underground works and underground buildings… and for entrances exits and ventilation shafts in relation to the … underground works and underground buildings". Mr Maurici observes that these works will, it almost goes without saying, have nothing above them. They will be on the "surface".

30. Mr Maurici further submits that the Defendant's interpretation is too strict and does not accord with Parliament's intentions when enacting the 1931 Act. The preamble to the Act referred to the terms of reference of the Royal Commission on London Squares (1928, cmd 3196):

> "To inquire and report on the squares and similar open spaces existing in the area of the Administrative County of London with special reference to the conditions on which they are held and used and the desirability of their preservation as open spaces and to recommend whether any or all of them should be

> permanently safeguarded against any use detrimental to their character as open spaces and if so, by what means and on what terms and conditions."

The Royal Commission recommended that 461 enclosures should be "permanently preserved as open spaces" (para 103(1)), and the Royal Commission Report ("the Report") stated at paragraph 63:

> "... the enclosures should be reserved as ornamental gardens or pleasure grounds or as grounds for play, rest or recreation, and that the erection of buildings or structures, other than buildings or structures necessary or convenient for the enjoyment of the lands for those purposes, should be prohibited."

31. In the section entitled "Desirability of Preservation" the Report stated at paragraph 55:

> "… The enclosures, particularly those which abut on roads and are open to the public view, are a very distinctive and attractive feature of the plan of the parts of London in which they are situate: similar open spaces are not to be found except to a very limited extent in other towns in this or other countries. It is beyond question that the enclosures add greatly to the amenities, not only of their immediate surroundings, but of London as a whole, and the air spaces they afford are of benefit to the well-being of the community. Their loss to any extent would effect an alteration in the characteristic development of the parts of London concerned which would, in our view, be deplorable. We recognise that the comparatively few enclosures which are situate at the rear of houses and completely shut off from the public view do not form so essential a feature of the town plan as those which are open to the public view, and that the interest of the community at large in their preservation may not, therefore, be so great. Nevertheless, we consider that it is important that they should be preserved as open spaces on account of the air spaces they afford which are of benefit to the locality, and the amenities they provide for the inhabitants of the houses immediately surrounding them."

32. The key point, Mr Maurici submits, is that the 1931 Act was concerned to protect the openness of London squares. The construction of an underground structure, whether open to the skies or not, does not, he submits, inherently conflict with the statutory objective of maintaining the openness of protected squares, so long as such works judged as a whole meet the test in s.3(2) and (5) and there is no material encroachment on the surface and serious interference with amenity or enjoyment for authorised purposes.

33. Mr Maurici observes that the Royal Commission specifically had regard to the redevelopment of flats that may require some use of the garden. Paragraph 65 of the Report states:

> "It has been suggested to us that where the rear of buildings abuts onto an enclosure, allowance should be made for a reasonable expansion of the area occupied by the existing buildings on re-development. The enclosures in question are mostly situate in residential areas and, so far as can at present be foreseen, the natural trend of re-development will be the erection of further residential buildings. The depth of site occupied by the existing buildings abutting on the enclosures is in many cases small, and less than would normally be required for the erection of flats at the present time. We do not think it would be in the best interests of the community to impose restrictions which might prejudicially affect normal re-development of existing buildings, and we suggest therefore that the London County Council, in the exercise of the powers which we propose later in this Report should be conferred upon them for the purpose of securing the preservation of the enclosures, should have regard to this consideration in negotiating with owners."

Mr Maurici submits that if s.3(2) is read as the Claimant contends that it should be, lightwells which facilitate light for flats can be permitted.

34. Mr Straker agrees that whilst s.3(2) has two distinct parts, it must be read as a whole. He submits that what the sub-section is doing is enabling the use of the subsoil. The first part of the sub-section permits the owner of the subsoil to use the subsoil in a way which does not impact on the surface and accordingly does not interfere with the enjoyment of the protected square for any of the authorised purposes. Mr Straker gives the example of a pipe being driven from one side of the square to the other so long as it does not interfere with an authorised use. This he describes as an entirely subterranean activity. The subsoil is, he contends, by definition beneath the surface. In this instance nothing on the surface is affected. Similarly he observes underground railways run under certain protected squares.

35. The second part of the sub-section also contemplates something subterranean. However in this instance the surface is affected. Hence the need for consent. Provided there is consent and it is reasonably necessary the second part of the sub-section enables some of the surface to be used for the construction and maintenance of underground works or for temporary buildings or entrances (or ventilation shafts) in relation to the underground works.

36. Mr Straker submits that it is not tenable to contend that the second part of the sub-section is dealing with anything other than something which is underground. The word "underground" in s.3(2) qualifies the words "works" and "buildings". Mr Straker refers to the Oxford English Dictionary which defines "underground" as "below the surface of the ground".

37. What the Claimant has done is to enclose part of the protected square and excavated that segregated area of land to create a courtyard for the Property. Inspection in February 2014 revealed that the total area of the excavation is approximately 8m wide by 3.8m deep, projecting from the rear wall of the property. The area of garden square affected is approximately 38sq.m. The master bedroom of the four-bedroom

flat opens onto the courtyard through three sets of doors (see the drawing by the Claimant's architects dated October 2011 at page 163 in the Trial Bundle). The courtyard has a floor made of York stone paving on pedestals. A bridge has been built out from the ground floor of the flat which is accessed directly from the reception room (see Trial Bundle at page 164). The bridge crosses the courtyard and has a number of steps down onto the Gardens.

38. Mr Straker submits that there is here no use of the subsoil. The only subsoil used is that which was taken away in the excavation. Further there is no surface use of the protected square in connection with any construction or maintenance of underground works or buildings. The only surface use is the use of the York flagstone in the courtyard. There are no underground works or buildings. There is nothing under the courtyard constituting underground works or underground buildings. There is a clear interference with enjoyment and maintenance of the protected square. Mr Straker submits, accordingly, there is and can be no application under s.3(2).

39. Mr Straker submits that the passages in the Defendant's Supplementary Planning Document on which Mr Maurici relies (see para 27 above) do not assist the Claimant for two reasons. First, a planning document written in 2009 cannot influence the construction of an expression in the 1931 Act. Second, in any event, the paragraphs relied upon do not suggest that lightwells are underground works or buildings (see para 8.1.1).

40. In my judgment s.3(2) has no application to the work that has been carried out. The purpose of the 1931 Act is, as the long title states, "to provide for the preservation and for restricting the user of certain squares gardens and enclosures in the administrative county of London and for other purposes". I agree with Mr Straker that s.3(2) is to be construed as allowing unrestricted use of the subsoil of a protected square so long as the square is unaffected or, provided there is consent, use of the subsoil of the square which brings with it such use of the surface as is reasonably necessary and proper for such subsoil use. Such use of the surface as can occur must be for an underground purpose, namely for the construction and maintenance of underground works and underground buildings or for the erection of temporary buildings and for entrances exits and ventilations shafts in relation to such works and buildings.

41. In my view "underground" in s.3 means below the surface of the ground. That accords with its ordinary English meaning as defined by the Oxford English Dictionary; and the definitions of it given in the Collins English Dictionary are not inconsistent with this interpretation. Indeed Collins gives "below the surface" as a synonym for "below ground". I reject Mr Maurici's submission that works which are situated below the ground level of a protected square are underground works for the purposes of the 1931 Act, irrespective of whether they are, or are not, exposed to the sky.

42. There is, in my view, force in Mr Straker's submission that underground works and buildings carry the same meaning in both parts of s.3(2). However if the Claimant's contention that an underground work can be open and on the surface is correct, then underground works are given a different meaning in the second part of s.3(2) from the first part. S.3(2) refers in its first part to owners not being prevented from using the subsoil for the construction and maintenance of underground works and buildings. It therefore contemplates the subsoil as the place for such work. The surface is

separately referred to by the Act. As a matter of ordinary English the subsoil is always under something, namely the topsoil.

43. The Royal Commission recommended that any proposals in connection with the use of the subsoil, if they affected the surface, should require consent (para 103(4)(c); and see para 69 on the construction of underground garages). I agree with Mr Straker that this is only consistent with the second part of 2.3(2) dealing with something underneath the ground.

44. In my judgment the surface use of the protected square by the Claimant was not for or in relation to the construction and maintenance of underground works or buildings. None of the works (the courtyard, the lightwell, the bridge or the stairs) are underground works or buildings for the purposes of s.3(2) of the 1931 Act.

Ground 1: The Defendant wrongly used the criteria for determining whether, on the merits, a consent should be granted under s.3(2) for treating the application as invalid.

45. The Claimant contends that in paragraph 3.8 and 3.12 of the Report dated 11 July 2014 the Defendant's officer misconstrued the criteria in s.3(5) of the 1931 Act as grounds for treating the Claimant's application as invalid, or outside the scope of the 1931 Act. Upon a proper construction of the 1931 Act the criteria simply provide a basis upon which a valid application may be refused on the merits, subject to the right of appeal under s.3(4). The effect of the Defendant's error is that it has denied the Claimant its statutory right of appeal under s.3(4).

46. Mr Straker accepts that the criteria go only to the merits, and not to the validity, of an application. However, as Mr Straker points out, at paragraph 3.7 and 3.13 the Report notes that the Council cannot give consent for something which falls outside the terms of s.3(2). Paragraph 3.10 records the officer's finding that the works in issue do not amount to underground works or buildings for the purposes of the 1931 Act.

47. On that basis the Defendant's officer was entitled to conclude that the application should be recorded as invalid. There was, in my view, no error of law in this regard.

Ground 3: The Defendant failed to consider whether the steps fall within s.3(1) of the 1931 Act.

48. The Claimant contends that the Defendant's Report dated 11 July 2014 failed to engage with its primary case that the steps did not require consent at all under s.3(1). Mr Maurici submits that steps from a rear entrance to a raised ground floor of an adjacent dwelling down to the garden is a structure which is convenient for or in connection with the authorised use of the square, and therefore not prohibited under s.3(1). He observes that such features are common place to protected squares, and that all of the properties in the terrace have steps down to the garden save for one.

49. I do not understand Mr Straker to disagree with Mr Maurici's contention that the stairs are used by the residents of the Property to go up and down in order to access the Gardens and to use them for authorised purposes under the 1931 Act. However, as Mr Straker points out, s.3(1) requires a structure to be for "the use and maintenance" of a square for an authorised purpose. Mr Straker gives the example of a shed for keeping a lawnmower as falling within the exception in s.3(1).

50. Mr Maurici submits that this is too narrow a construction of the sub-section. Maintenance is, he submits, a widely defined term (see *Sevenoaks, Maidstone, and Tunbridge Railway Company v London, Chatham and Dover Railway Company* (1879) 11 Ch.D 625 at 64-65, per Jessel MR; and *Haydon v Kent County Council* [1978] QB 343). The words "use and maintenance" are, he submits, sufficiently broad to apply to a structure that enables owners to access the gardens to use them for authorised purposes.

51. I reject this submission. I do not accept that the bridge (with its stairs) is "convenient for… the use and maintenance of" the square for an authorised purpose. In its application dated 14 May 2014 the purpose of the structure is stated to be "to enable the occupants to gain access to the gardens" (para 68). I agree with Mr Straker that has nothing to do with maintenance. That being so the Claimant's case under s.3(1) necessarily fails.

Ground 4: The decision to take enforcement action is vitiated by the Defendant's errors under Grounds (1)-(3).

52. The Claimant contends that the decision to take enforcement action is vitiated by the errors identified in the earlier grounds of challenge. In the light of the conclusions I have reached in relation to those grounds, this ground of challenge falls away.

53. In any event the subject matter of this judicial review is the Defendant's decision to decline jurisdiction to decide the Claimant's application dated 14 May 2014 (see section 3 of the Claim Form). As Mr Straker observes, the 1931 Act provides for a judicial system of enforcement, and this process has not yet been initiated by the Defendant.

Ground 5: On the basis that the Defendant's decision is quashed, the Claimant seeks declaratory relief in respect of the Defendant's future determination of the application for consent under s.3(2)

54. In the light of the conclusions that I have reached on Grounds (1)-(3) I do not consider this ground of challenge.

Conclusion

55. For the reasons which I have given this claim fails.