

Appeal Decision

Site Inspection on 21 November 2016

by Graham Self MA MSc FRTPI

Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 24 November 2016

Appeal Reference: APP/K5600/C/16/3147583

Site at: 275 Old Brompton Road, London SW5 9JA

- The appeal is made by Jovo Investments Ltd under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by the Royal Borough of Kensington and Chelsea Council.
- The council's reference is E/15/00571.
- The notice is dated 24 February 2016.
- The breach of planning control alleged in the notice is: "Without planning permission, the erection of a plastic lean-to extension on the parapets and roof of the rear addition of the Land".
- The requirement of the notice is:
"(i) Remove the plastic lean-to extension and associated timber supporting posts and fixings from the side parapet walls, rear fenestration and roof of the rear addition and make good the Land".
- The period for compliance is five calendar months.
- The appeal was made on grounds (d) and (g) as set out in Section 174(2) of the 1990 Act.

Summary of Decision: The appeal succeeds.

Ground (d)

1. Under this ground of appeal it is claimed that the development enforced against is "immune" from enforcement through the passage of time. The relevant period in this case is four years before the date of the enforcement notice - that is to say, for the development to have gained immunity and become lawful it had to have been at least substantially completed by 24 February 2012. The onus of proof is on the appellant, the standard of proof being the balance of probability.
2. The evidence is conflicting, and includes written statements made under oath by different people giving different information about the timing of past events. For the appellant, the submitted evidence includes sworn declarations by Miljan Dojin, George Gojkovic and Nigel Witham. The council's case is supported by sworn declarations by Vincenzo Treggiari and Silvia Toseroni.
3. Mr Dojin states that he is the director of a building company which carried out work to the upper floors of the appeal property. Part of the work involved installing new water heaters and pipes on a rear flat roof at second floor level, and constructing a lightweight structure made with timber and polycarbonate

panels to protect the heater and pipes, replacing a smaller structure. He states that the work was completed before August 2011, when the company started work on its next project. A copy of a receipt from a builders merchants is also submitted. The receipt (dated 8 May 2011) refers to a cash purchase by "Milan" of six sheets of 16mm polycarbonate, plus some joint strip and flashing. The copy is certified by a solicitor as a true copy of the original.¹ Mr Dojin refers to this receipt in his declaration and states that these panels were used to construct the new covering.

4. Mr Witham, a restaurant designer who appears to have been primarily involved in the work carried out on the ground and basement floors, states that the disputed structure was not in place when he visited on 10 March 2011; but when he visited on 4 October 2012 he saw a structure made from wood and polycarbonate panels covering water heaters and plant which had been installed since his previous visit.
5. Mr Gojkovic is evidently a director of Jovo Ltd. He states that the new canopy structure was completed prior to the re-occupation of the refurbished residential units, which was in the latter half of 2011.
6. Mr Treggiari and Ms Toseroni live at 2 Wharfedale Street, a property to the north-east of the appeal site. The structure subject to the enforcement proceedings is visible from their rear garden. They both state that they first noticed the plastic extension being erected in April 2014 and that the works were completed around the end of May 2014. They initially thought the structure was temporary and so did not raise any formal complaint until May 2015.
7. Other evidence includes references to shorthold tenancy agreements and to the electoral register. The council's statement also mentions an enquiry they say they received in March 2015, from a person who "believes that the lean-to structure was not erected as far back as suggested by the appellant"; but this person evidently "does not wish to participate in the appeal process".
8. There are weaknesses in the cases for both sides. For example on the appellant's side, Mr Gojkovic made a fresh declaration after apparently realising that in his first declaration he had erroneously described facts relating to the ownership of the appeal property. Although the error is understandable to an extent, it suggests that Mr Gojkovic was prepared to make a sworn statement without taking proper care about its accuracy. This reduces the weight which can be attached to his declarations. Mr Dojin states that the polycarbonate panels were used to construct the covering of the disputed structure but there is no corroborating evidence, and the structure seen by Mr Witham in October 2012 could have been the smaller original structure.
9. On the council's side, the electoral register is often an unreliable source of evidence about the exact timing of occupation of a property; and it is unfortunate that the person who evidently contacted the council in March 2015 has not been prepared to provide any written statement. Another unhelpful feature of this case is that there are no statements or other evidence from occupiers of properties with windows or gardens backing directly on the appeal site, as opposed to the more distant, angled views from the garden of 2 Wharfedale Street. As I saw during my site inspection, the dwellings in Wharfedale Street have numerous windows directly opposite the rear of the appeal property, and I would have thought that occupiers of those Wharfedale Street dwellings would have been a prime source of evidence.

¹ A curious feature of this case is that the same solicitor appears to have administered the oath for conflicting sworn statements by those on both sides.

10. The aerial photographs are of poor quality (also mostly angled with the rear of the appeal property appearing in shadow) and such evidence as they provide is inconclusive. The apparent lack of good quality vertical photographs taken at regular intervals is surprising for this part of London, and is a pity since such photographs would probably have provided clear evidence.
11. The installation of the disputed structure appears to have been linked to the refurbishment and other alterations to the property. Despite my reservations about the electoral register, it is notable that according to the electoral register records referred to by the council, no occupiers were listed at the property on the qualifying dates of 1 December 2012 and 14 April 2014. This suggests that the property was unoccupied - or at least, not occupied by anyone on the electoral register - during 2013 and the early part of 2014. In contrast, the records indicate that the property was occupied on the qualifying dates of 1 December 2009, 1 December 2010 and 1 February 2011, thereby casting doubt on the claim that alteration work was being carried out during the first half of 2011. The apparent occupation (or at least part occupation) of the property in early 2011 is difficult to reconcile with Mr Dojin's statement that by 2011, the works "had extended to all the floors of the property".
12. The electoral register records also conflict with Mr Witham's statement that after March 2010, because of the need to install a ventilation riser linked to the restaurant kitchen through the upper floors, the short term residential tenants of those floors were required to vacate. However, precise information about the timing of events is lacking.
13. A council officer's report written in February 2016 stated: "it is believed that the upper floors were refurbished in 2011/12". Although "it is believed" is vaguely phrased the council appeared then to accept that the refurbishment works were undertaken at a time when the names of occupiers were on the electoral register. In later comments, the council say their reference to the upper floor refurbishment was based on the information available at the time and did not take into account information discovered later.
14. Putting together the statements by Mr Dojin and Mr Witham, it seems that what may have happened is that work on a restaurant in the ground floor and basement may have started in 2010, and then was suspended in about February or March 2011 when the owners decided to give priority to refurbishing the upper floors. Some tenants, as shown in tenancy agreements, may then have moved in during September 2011, although for unexplained reasons their names do not appear on the electoral register for December 2011. The electoral register suggests that a tenant named "G Martino, Ana I"² lived in the property throughout the period from 2008-9 to about 2012. The appellant has not tried to explain how this tenant continued occupation (if that happened, or if not, why this tenant's name continued to be on the electoral register) while the refurbishment including the installation of heating was being carried out - indeed, Mr Gojkovic says in his sworn declaration that: "none of the tenancies could have been occupied prior to the completed installation of the water heaters and the covering since the plant services all tenancies".
15. In summary, the evidence about the history of this property is unclear and inconsistent. Because of the inconsistencies there is considerable room for doubt; and as the council point out, the onus of proof is on the appellant. The appellant's case has certainly not been proved beyond reasonable doubt, but the standard of proof required in this type of appeal is lower (as noted above, the

² It is possible that "G Martino, Ana I" refers to two people - this aspect of the council's evidence is unclear.

balance of probability). That is the basis on which I have to weigh the conflicting information supplied by both sides.

16. In my judgment strong evidence is provided by Mr Dojin's sworn declaration, together with the receipt for the 16mm polycarbonate sheets and Mr Dojin's statement that his firm used this material to construct the roofed enclosure by August 2011. I checked the thickness of the polycarbonate sheets during my inspection and I am satisfied that they are 16mm sheets. They are also joined using joint strips of the type listed in the receipt. Those are not compelling points by themselves since 16mm is one of several commonly used thicknesses for this material, but they add to the evidential matrix.
17. Mr Dojin says he is "certain that everything was completed before August 2011 since that is when the company commenced full time work on its next project". I have to consider the possibility that Mr Dojin's expressed certainty could be deliberately false. I have also considered the possibility that the receipt is forged, as this would not be very difficult to do, but taking account of the solicitor's confirmation that it is a true copy of the original, and the misspelling of Mr Dojin's name, I think the document is genuine.³ From the information before me, I have no good reason to disbelieve Mr Dojin's sworn statement that the polycarbonate sheets were bought in May 2011 and were used to construct the enclosing structure.
18. In their statements, Mr Treggiari and Ms Toseroni make clear that they cannot see the disputed structure from their dwelling, only from their garden. It also seems that they are normally away for about two months in the summer, and may only use their garden infrequently. Taking these factors into account I think it is possible that they may either not have noticed the disputed structure when it was first erected as a replacement for a smaller structure, or may be mistaken about the length of time it was in place before they reported it to the council. As I have suggested earlier, a key weakness in the council's case is that only one dwelling's occupiers contacted the council about the unauthorised structure.
19. On balance, I judge that the case for the appellant company is more probable than the case for the council, to a degree which is sufficient to meet the appropriate standard of proof. On that basis, I find that the structure enforced against was erected more than four years before the enforcement notice was issued. The appeal succeeds on ground (d).

Ground (g)

20. This ground of appeal concerns the period allowed for complying with the enforcement notice. Since the notice is being quashed because of the success of ground (d), ground (g) becomes superfluous and I make no comment or finding on it.

Clarification

21. I wish to make two matters clear here. The first is that a decision on ground (d) of Section 174(2) has to be based solely on findings relating to historical facts. The appeal succeeds for legal reasons, and I am not considering whether planning permission should be granted, only whether the unauthorised structure

³ There are smudge marks on the submitted document which have caused me some suspicion, and misspellings can sometimes indicate a forgery; but in this instance I think "Milan" is the sort of approximation of Mr Dojin's first name likely to have been written by a typical builder's merchant employee. The date on the receipt appears to have been written by the same person and with the same type of pen as the rest of the document.

has gained immunity from enforcement. The unsightly, incongruous appearance of the structure cannot affect the decision.

22. Second, my decision is made by weighing the evidence before me. If further evidence were to emerge showing that any of the persons who made sworn declarations in support of the appellant's case made statements on oath which they knew to be false, they could be liable to prosecution; and if evidence of deliberate deception were to be found, enforcement proceedings could be taken after expiry of the normal period for gaining immunity.

Formal Decision

23. I allow the appeal and direct that the enforcement notice be quashed.

G F Self

Inspector