The Planning Inspectorate

# Appeal Decision

Inquiry held and site visit made on 9 May 2017

**by Tim Belcher FCII, LLB (Hons), Solicitor (Non-Practising)**

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

**Decision date: 06 June 2017**

**Appeal Ref: APP/A5270/C/16/3141913 to 915**
**108 Girton Road, Northolt, UB5 4ST**

- The appeal is made under Section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 ("the 1990 Act").
- The appeal is made by Jack Thomas Dominiak, Marcin Tadeusz Szablinski & Ewelina Szablinski against an Enforcement Notice issued by the Council of the London Borough of Ealing ("the Council").
- The Enforcement Notice, numbered COM/2011/00423, was issued on 3 December 2015.
- The breach of planning control as alleged in the Enforcement Notice is without planning permission, the material change of use of the land at the rear of 108 Girton Road, Northolt, UB5 4ST to use as a self-contained residential dwelling.
- The requirements of the Enforcement Notice are: a) Cease the use of the outbuilding on the land as a self-contained residential dwelling; b) Do not use the outbuilding for any purposes other than a use incidental to the main dwelling; c) Remove the kitchen and drainage connections which facilitate the use of the outbuilding as a self-contained residential dwelling; d) Remove the bathroom and drainage connections which facilitate the use of the outbuilding as a self-contained residential dwelling; and e) Remove all resultant debris.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in Section 174(2)(d) of the 1990 Act.

**Summary of Decision:** The appeal is dismissed and the Enforcement Notice upheld.

## Application for costs

1. At the Inquiry an application for costs was made by the Council against the Appellants. This application will be the subject of a separate Decision.

## Procedural Matters

2. All oral evidence at the Inquiry was given under oath or by way of affirmation.

3. The onus of proving the Ground of Appeal rests with the Appellants and they have to prove their ground on the balance of probabilities.

4. The majority of the oral evidence given by Marcin Szablinski and Ewelina Szablinski was translated by Simon Poplawski who affirmed the translator's oath.

5. In my Appeal Decision I will refer to:

   a) The Enforcement Notice which is the subject of this appeal as "the Second Enforcement Notice".

   b) The land referred to in Part 2 of the Second Enforcement Notice as "the Appeal Site".

c) The outbuilding referred to in the Second Enforcement Notice as "the Outbuilding".

d) The main dwelling-house at the Appeal Site as "No. 108".

e) The owners of the Appeal Site are Marcin and Ewelina Szablinski and I will refer to them jointly as "the Owners".

**Background Matters**

6. The Owners bought the Appeal Site in the early part of 2007.

7. Later in 2007 the Owners advertised a room to rent within No. 108.

8. In about July 2007 Jack Dominiak went into occupation of the room referred to above.

9. Jack Dominiak needed accommodation as he had sold the house which he had lived in as part of a divorce settlement.

10. The Owners were aware that the garage at the Appeal Site was in a dilapidated state at the time of their acquisition of the Appeal Site. They therefore decided to replace the garage with a new structure.

11. The Owners discussed between themselves what they wanted the replacement building to be used for. The uses which they anticipated were as a summerhouse, additional storage space for their personal belongings, a play room for their children and space which could be used when friends or relatives from Poland visited them.

12. Works on the Outbuilding commenced in about April 2008 and were carried out by Janusz Walczyk.

13. The Outbuilding was substantially complete by 25 June 2008. It was confirmed by Janusz Walczyk, the Appellants and some local residents that the Outbuilding comprised:

a) A small bathroom containing a WC, a wash hand basin and space for a shower.

b) An open plan living area containing a kitchenette (with a gas hob, sink and spaces for an in-built oven, washing machine and a fridge freezer) ("the Kitchenette").

c) An upstairs bedroom accessed from a staircase in the open plan living area. The bedroom contained an in-built wardrobe. There was also a storage cupboard at the top of the stairs.

14. On 5 July 2008 Jack Dominiak started to live in the Outbuilding. He had discussed the possibility of living in the Outbuilding with the Owners. None of the Appellants could remember a date as to when it was decided that Jack Dominiak could occupy the Outbuilding. However, the Appellants stated in a document dated 9 October 2014, *"that before it* (the Outbuilding) *was completed our then tenant* (Jack Dominiak) *suggested he live there and we agreed".* From Jack Dominiak's point of view moving into the Outbuilding provided him with more space and a greater degree of privacy. The Owners clearly had no objection to Jack Dominiak's occupation of the Outbuilding – such an arrangement offered them and their family greater privacy within No.

108. It was also clear from Ewelina Szablinski's evidence that she thought that the arrangement of Jack Dominiak living in the Outbuilding would be temporary and that Jack Dominiak would establish a home away from the Appeal Site within a relatively short period. Jack Dominiak continued to pay rent for his accommodation in the Outbuilding.

15. The Outbuilding was not used for any of the uses which the Owners considered it might be used for prior to Jack Dominiak's occupation of the Outbuilding.

16. I have explained above what the bathroom within the Outbuilding contained. It is clear that there was no bath or shower available to Jack Dominiak within the Outbuilding. Jack Dominiak continued to shower within No. 108. In addition I was told that Jack Dominiak did most of his cooking within No. 108 but took the food back to the Outbuilding to eat. Likewise he took his cooking utensils back to the Outbuilding to be washed up.

17. There were no regular communal eating arrangements between Jack Dominiak. the Owners although if the Owners were having a barbeque or if a family celebration was being held at No. 108 Jack Dominiak would often be invited to join them.

18. On 24 September 2008 a Council Officer (Victoria Wilson) visited the Appeal Site following a complaint that the Outbuilding was being used as self-contained accommodation. Ewelina Szablinski was in No. 108; Jack Dominiak was away visiting his ill mother in South Yorkshire and Marcin Szablinski was working away from home. Victoria Wilson was unable to get access to the Outbuilding because Ewelina Szablinski did not have keys available. Ewelina Szablinski provided Victoria Wilson with Marcin Szablinski's mobile phone number. Victoria Wilson subsequently made arrangements to visit the Appeal Site on another date when access to the Outbuilding would be provided.

19. On 21 October 2008 Victoria Wilson carried out a further site visit at the Appeal Site and on this occasion Ewelina Szablinski provided access to the Outbuilding. Jack Dominiak was not present at this inspection – he was still in South Yorkshire with his mother. Marcin Szablinski arrived at the Appeal Site as the site visit was being concluded.

20. Victoria Wilson came to the following conclusions:

    a) That the Outbuilding was not occupied. This is clearly incorrect as the evidence from the Appellants was that Jack Dominiak went into occupation on 5 July 2008 and has been in occupation ever since.

    b) That the Outbuilding did not contain a kitchen as there was no cooker or a sink. Again, this was incorrect. The Kitchenette contained the items referred to above although I understand that the doors on the units in the Kitchenette had not been fitted to the units.

    c) That there was no shower in the bathroom. This was correct.

21. As a result of her inspection Victoria Wilson wrote to Marcin Szablinski on 22 October 2008 and:

    a) Confirmed that the enforcement investigation had been closed as she had not been able to establish a breach of planning control.

b) Suggested that he apply for a Certificate of Lawful Use (CLU) for the Outbuilding to be used ancillary to No. 108. She enclosed the relevant form to make such an application.

c) She explained what the advantages of the CLU might be.

d) She explained that if an application for a CLU was made it would not necessarily be forthcoming as such an application would have to be judged on the basis of a full assessment of the facts at the time.

22. No application for a CLU was made.

23. The photographs taken by Victoria Wilson show, according to Jack Dominiak, about four deck-chairs, about four boxes and several other unidentified items within the open plan/kitchenette area of the Outbuilding. Jack Dominiak suggests that this is evidence that the Outbuilding was being used for storage uses. I have no doubt that there was a very small element of storage going on at that time. Marcin Szablinski explained that the, "*boxes and chairs were actually waiting for transportation to Poland, they were being kept in the Annexe* (the Outbuilding) *whilst Mr Dominiak was away looking after his ill mum at the time".* There is no evidence before me that this storage use within the Outbuilding was anything other than a very temporary use of the Outbuilding whilst Jack Dominiak was away from his home.

24. I am also aware of the claim that Marcin Szablinski stored plastic membrane in a cubby hole under the stairs in the Outbuilding. I consider that this very minor level of storage is simply indicative of the close friendly relationship between Jack Dominiak and the Owners and Jack Dominiak's willingness to allow this minor level of storage within his home. It comes nowhere near the level of storage use which might be indicative that the Outbuilding was used for a mixed storage/residential use.

25. In January 2009 Jack Dominiak was attacked initially in the Outbuilding and later in the garden at the Appeal Site. The attack initially lasted about 10 to 15 minutes. His assailants fled from the Outbuilding. When Ewelina Szablinski became aware of the attack the emergency services were called. Two of Jack Dominiak's assailants returned and continued to beat Jack Dominiak. Ewelina Szablinski intervened and Jack Dominiak believes that but for her intervention he would have been murdered. Ewelina Szablinski was assaulted but managed to drag Jack Dominiak into safety at No. 108. The Police arrived. Jack Dominiak was hospitalised.

26. In the following three months Ewelina Szablinski cooked and looked after Jack Dominiak.

27. Jack Dominiak continued to live in the Outbuilding. An electric oven was installed in the Kitchenette.

28. Jack Dominiak attempted to return to work before he was well enough. He was suffering both physical and psychological injuries.

29. In May 2010 Jack Dominiak's employment as a well-paid telecommunications salesman was terminated. Jack Dominiak has not worked since then and has been advised that it is unlikely that he will be able to work full-time in the future.

30. As Jack Dominiak no longer had any paid employment he applied for Housing Benefit from the Council. So as to prove his payment of rent a formal Tenancy Agreement ("the Tenancy Agreement") was entered into. The Tenancy Agreement is an Assured Shorthold Tenancy. The form of the Tenancy Agreement was downloaded from the Internet.

31. Within the Tenancy Agreement:

    a) The landlord is identified as being Marcin Szablinski.

    b) Jack Dominiak is identified as being the Tenant.

    c) The Tenancy Agreement is dated 5 July 2008 being the date when Jack Dominiak went into occupation of the Outbuilding.

    d) The "First Rent Payment Date" is specified as being the 5 July 2008.

    e) The Term of the Tenancy Agreement is stated to be 1 May 2010 to 1 November 2010.

    f) The use of the Outbuilding is restricted to a private dwelling-house.

32. In 2011 Jack Dominiak was diagnosed as suffering from Post-Traumatic Stress Disorder.

33. In June 2011 the Council received another complaint about the residential use of the Outbuilding.

34. The Council's records indicate that:

    a) An Officer went to No. 108 on 7 July 2011. The Officer was unable to access the Outbuilding because Ewelina Szablinski did not have keys to the Outbuilding and Marcin Szablinski was in Poland.

    b) The Officer attempted to re-visit on 11 July 2011 but Ewelina Szablinski again stated that she did not have the keys.

    c) The Officer noted in the Council's records that a further attempt to carry out an inspection would be made and if this failed he would write a letter requiring access to be provided.

35. According to Jack Dominiak a man called at the Appeal Site and attempted to inspect the Outbuilding. On the first occasion Ewelina Szablinski was at home looking after a baby and she was scared by this person. On the next occasion Ewelina Szablinski referred this man to Jack Dominiak who was in the Outbuilding. Jack Dominiak recalls that the man pretended to be a surveyor working for the Ordnance Survey Office. Jack Dominiak challenged this story and explained that this person admitted that he was from the Council.

36. Further, Jack Dominiak explained to this person that he lived in the Outbuilding and if Council Officers wanted access to the Outbuilding they should formally write to the Appellants.

37. The gas, electricity, water and sewerage services which benefit the Outbuilding are all part of parcel of those serving No. 108. The Appellants therefore consider that the use of the Outbuilding is ancillary to the use of No. 108. I was informed that Jack Dominiak does not pay any additional sums of money for the gas, electricity and water that he consumes – he simply pays rent. I do

not agree with the Appellants that the reliance of the Outbuilding on services provided from No. 108 means that the use of the Outbuilding is ancillary to No. 108. The provision of those services is not a matter of use – it is simply a product of how the Outbuilding came to be erected. Also, it is not uncommon for separate dwellings to share common services.

38. As far as I am able to ascertain Council Tax liabilities for the Outbuilding commenced around mid-September 2011. The Appellants confirmed that no-one other than Jack Dominiak has paid Council Tax in respect of the Outbuilding. Jack Dominiak deducts the Council Tax that he has to pay from the Housing Benefit he receives – the balance of the Housing Benefit is then paid to the Owners as rent. No-one was able to assist as to how the Valuation Office / Council Tax Department at the Council became aware of the use of the Outbuilding as a dwelling-house.

39. Also in September 2011 Jack Dominiak asked Marcin Szablinski to install a shower in the bathroom of the Outbuilding. I understand that this was installed around September 2011. I was informed that the water pressure reaching the shower was insufficient and thus the shower did not function properly. However, the relevant Water Company fixed a leak in the water supply system. Following this repair the shower worked properly. I was not provided with a date when the shower first became operational. The Appellants representation dated 9 October 2014 suggests that the shower was still not working by that date

40. In February 2014 the Council served a Planning Contravention Notice ("the PCN") on the Owners. The PCN identified a possible breach of planning control as the *"unauthorised use of an outbuilding as a self-contained unit separate from the use of the dwelling-house"*. The Owners were away at the time the PCN was served. When the Owners returned they had little time to complete the PCN and Jack Dominiak was also away and was not available to assist in the translation of the questions asked or the accuracy of the answers provided.

41. In the PCN the Owners state, amongst other things, that Jack Dominiak had lived in the Outbuilding since 1 October 2011. This is clearly incorrect.

42. On 20 May 2014 a further inspection of the Outbuilding was carried out by a Council Officer (William Hearn). Jack Dominiak provided access for William Hearn to inspect the Outbuilding.

43. On 2 June 2014 the Council issued an Enforcement Notice ("the First Enforcement Notice"). The material differences between the First Enforcement Notice and the Second Enforcement Notice are:

    a) That the breach of planning control alleged in the First Enforcement Notice was the material change of use of the Outbuilding to use as a self-contained residential dwelling.

    b) That the alleged breach of planning control occurred within the last four years.

    c) That one of the requirements of the First Enforcement Notice was the removal of the Outbuilding in its entirety.

44. The Appellants appealed the First Enforcement Notice on 1 July 2014. In their Grounds of Appeal the Appellants explained, amongst other things, that Jack Dominiak *"still has to cook in the main house and shower in the main house"*.

45. On 26 October 2015 the Planning Inspectorate wrote to the parties because the Inspector appointed to determine the First Enforcement Notice was of the initial view that:

    a) The First Enforcement Notice could not require the demolition of the Outbuilding.

    b) The Council had not alleged that the Outbuilding itself was unlawful.

    c) Because the Council had alleged a material change of use of the Outbuilding the Outbuilding must have had a previous use.

    d) The Inspector could correct the First Enforcement Notice by deleting the requirement to demolish the Outbuilding.

    e) A further Enforcement Notice could be issued requiring the demolition of the Outbuilding if it was not lawful.

46. The letter asked for the Council's comments on the Inspector's initial observations by 9 November 2015. No comments were received within that timeframe.

47. The Council withdrew the First Enforcement Notice on 3 December 2015 and issued the Second Enforcement Notice on the same date. The Planning Inspectorate was informed of this decision on 10 December 2015.

48. Jack Dominiak sought an order for costs against the Council in respect of their unreasonable behaviour in issuing the First Enforcement Notice.

49. On 6 March 2016 the Appellants stated in their Statement that, *"we installed a shower a sink in the kitchen and an electric oven, so that Mr Dominiak could become less reliant on the main house, however we could never get enough pressure in the shower, so Mr Dominiak still has to use the bathroom in the main house, the electric oven is only really there to warm things up, so he still cooks in the main house if he wants to".*

50. This statement appears to me to be inaccurate in so far as there was a sink already installed in the Kitchenette and that sink had been there since 25 June 2008.

51. Further, it would appear from this Statement that the shower installed in September 2011 was still not functional as at March 2016.

52. On 19 April 2016 the Planning Inspectorate determined Jack Dominiak's costs application in his favour.

**Reasons**

*Hidden Ground (b) Appeal - that the breach of control alleged has not occurred as a matter of fact*

53. Within the appeal representations made is a hidden Ground (b) appeal. I raised this with the parties at the Inquiry. The Ground (b) appeal is brought

into play because the Appellants argue that the Outbuilding was not a self-contained dwelling as alleged in the Second Enforcement Notice.

*Is the Outbuilding a Self-Contained Residential Dwelling?*

54. The Appellants claim that the Outbuilding and its use were ancillary to No. 108 between the date it was completed up and at least up until September 2011. The change of use occurred, according to the Appellants, when the shower was installed and when the Outbuilding was placed within the Council Tax system. However, the installation of the shower (which according to the Appellants' evidence did not work and was still not working at the date that the Second Enforcement Notice was issued), cannot, in my view, be the trigger to a change of use of the land as alleged by the Appellants.

55. I was referred to the case of Gravesham Borough Council v Secretary of State for the Environment and Another [1983] JPL 306 ("Gravesham"). There is no definition of what a dwelling-house is in the 1990 Act. In Gravesham it was accepted that the distinctive characteristics of a dwelling-house is its ability to afford to those who used it the facilities required for day-to-day private domestic existence.

56. The Appellants argue that the Outbuilding does not meet that test because it did not afford Jack Dominiak a shower which is required for his day to day private domestic existence. The facts of Gravesham included that the building which was found to be a dwelling-house did not have a bathroom or a WC. In this case the Outbuilding has always had a WC. In Gravesham it was explained that the absence of a bathroom and inside toilet does not necessarily prevent a building that is used for residential purposes from being a dwelling-house. There is no doubt whatsoever that the Outbuilding has been used since its completion for residential purposes. I have had regard to the accommodation and the facilities within the Outbuilding and whilst there was clearly an absence of a shower (and then a working shower for several years thereafter) I do not consider that this deprives the Outbuilding from providing the main activities of day to day domestic existence for its occupiers.

57. The Outbuilding has afforded Jack Dominiak a home since he moved in to it in July 2008. The fact that it may be preferable to have a shower within the building would not prevent someone living in the Outbuilding from maintaining cleanliness through the use of the wash hand basin in the bathroom. I am aware that at one time it was not uncommon for dwelling-houses to have no bathroom but clearly the vast majority of dwelling-houses today do have such facilities. I know that Jack Dominiak has used the shower facilities in No. 108 but that appears to me to be a matter of choice for him. As a matter of fact and degree I consider that the Outbuilding was a dwelling-house when it was built and has remained so since.

58. Similarly, I have no doubt that Jack Dominiak cooked meals within No. 108 whilst he was living in his home within the Outbuilding. Again he did this in preference to using the cooking facilities that have always been present within the Outbuilding. The cooking facilities may not have been as good as those within No. 108 but I have no doubt that the limited Kitchenette facilities within the Outbuilding were sufficient to provide for the day to day needs of a person living there.

59. I do not consider that the fact that the Outbuilding has been included within the Council Tax system since September 2011 amounts to a change of use from ancillary accommodation to a self-contained dwelling. I also note that the Appellants did not challenge, as far as I am aware, Council Tax being levied for the Outbuilding which they say they considered to be ancillary because Jack Dominiak still had to take showers and cook at No. 108.

60. I am also aware that Jack Dominiak allowed the Owners to use the Outbuilding as additional accommodation for visiting members of their families for about a week during 2016 and for a similar period in 2012. The visiting family members were there because the Owners' daughters had their First Communions. I do not consider that allowing visiting members of the Owner's families to use the Outbuilding on these limited occasions indicates that the Outbuilding was not a self-contained dwelling.

61. I therefore conclude that the Outbuilding was a self-contained dwelling from the date of its completion. The hidden Ground (b) appeal therefore fails.

62. I will now move on to decide whether the Council issued the Second Enforcement Notice in time.

**Ground (d) that at the time the Second Enforcement Notice was issued, it was too late to take enforcement action against the matters stated**

63. Section 171B of the 1990 Act deals with the time limits for the taking of enforcement action. Section 171B(1) is not relevant in this case because it relates to breaches of planning control relating to operational development.

64. Section 171B(2) relates to breaches of planning control relating the changes of use of buildings. This does not apply in this case because the Outbuilding had not been used for any use other than a self-contained dwelling – accordingly there was no change of use.

65. Section 171B(2A) is not relevant to this case.

66. Section 171B(3) states that in the case of any other breach of planning control no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

67. In my assessment the breach of planning control occurred when the Outbuilding was capable of independent residential use which was at its date of completion i.e. 25 June 2008.

68. The Second Enforcement Notice was issued on 3 December 2015. This is clearly less than ten years before the breach of planning control alleged in the Second Enforcement Notice occurred.

69. I am aware that the Appellants do not accept this and rely on the case of Arun District Council –v- First Secretary of State & Brown [2006] EWCA Civ 1172 (Arun) but this was a case where planning conditions prevented the use of a building as a separate dwelling-house. The Court decided that the relevant time period for taking enforcement action in such a case is four years. There is no breach of planning condition limiting the use of the Outbuilding in this case and therefore Arun is of no relevance.

70. I therefore conclude that at the time the Second Enforcement Notice was issued, it was not too late to take enforcement action against the matters

stated in the Second Enforcement Notice. Accordingly, the appeal on Ground (d) must fail.

**Overall Conclusion**

71. For the reasons given above I consider that the appeal should not succeed.

**Decision**

72. The appeal is dismissed and the Second Enforcement Notice is upheld.

*Tim Belcher*

**Inspector**

## APPEARANCES

## FOR THE APPELLANTS

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|---|---|
| Jack Dominiak | Appellant and occupier of the Outbuilding |

He called:

Himself

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| Marcin Szablinski | Appellant and occupier of No. 108 |
| Ewelina Szablinski | Appellant and occupier of No. 108 |

## FOR THE COUNCIL

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| Roderick Morton – Solicitor | Ivy Legal Limited |

Instructed by the Solicitor to the Council

He called:

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| Ingrid Smith BA (Hons) | Enforcement Officer |

## DOCUMENTS

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| Document 1 | – | E-mail dated 11 May 2017 from Jack Dominiak and document entitled "Definition of a self-Contained Dwelling". |
| Document 2 | – | E-mail from Ingrid Smith dated 11 May 2017. |