
Appeal Decisions

Site visit made on 22 July 2019

by Anthony J Wharton BArch RIBA RIASI

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

Decision date: 2 August 2019

Appeal Refs: Appeal A: APP/P4605/F/19/3219961

Appeal B: APP/P4605/F/19/3220247

Land at 60-62 Constitution Hill, Birmingham B19 3JT

- The appeals are made under section 39 of the Planning (Listed Buildings and Conservation Areas) Act 1990 as amended by the Planning and Compensation Act 1991.
 - Appeal A is made by Mr Aadil Ismail (Escape Reality Birmingham Ltd) and Appeal B is made by Mr Paramjit Singh Tank. Both appeals are made against the same listed building enforcement notice- LBEN (Reference: 2017/0489/ENF) issued by Birmingham City Council.
 - The enforcement notice was issued on 14 December 2018.
 - The contraventions of listed building control alleged in the notice are as follows:
 - (i) The installation of roller shutters to doors and windows
 - (ii) The installation of security grid panels to doors and windows
 - (iii) The erection of signage to the front elevation of the building
 - The requirements of the notice are as follows:
 - (i) Remove all roller shutters from the doors and windows of the premises
 - (ii) Remove all security grid panels from the doors and windows of the premises
 - (iii) Remove all signage including that fixed to the roller shutters, the 'to let' signs and the long 'H.S Tank & Sons' sign located under the second floor window cills from the front elevation of the premises
 - The period for compliance with the requirements is 3 months.
 - Appeal A is made on ground (d) only, and Appeal B is made on ground (k) only; both as set out in section 39(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 as amended (PLBCAA).
-

Decisions

1. Both Appeals A and B are dismissed. See formal decisions below.

Matters of clarification and background information

2. In Section 3 the enforcement notice incorrectly refers to roller shutters being installed on windows and security grid panels to doors. These parts of the allegation are incorrect. The roller shutters are only installed on the doors and the security panels are only affixed to the windows. I shall, therefore correct the notice accordingly and I am satisfied that this will cause no injustice to any party/person.
3. Appeal A is made by the current tenant of the ground floor of the building (Escape Reality Birmingham Ltd) on ground (d) only. Appeal B is made by the freeholder of the building (Mr Paramjit Singh Tank) on ground (k) only. The merits of the works carried out to the listed building do not fall to be considered.
4. The appeal building was listed in Grade II on 8 July 1982. It dates back to around 1820/1830 and was built for the company of Fenners and Betteridge who were Japanners, Papier Mache and Pearl Inlay manufacturers. At the time of listing it was stated to have been altered at the rear to form offices. It is constructed of brick, with

a stone cornice and parapet, sash windows and moulded cornice detailing above each window. There is a central stone coat of arms (referred to in the list description) above a former cartway entrance which had been incorporated into a shop front but now forms the entrance to the ground floor. The building lies within the 'Viaduct sub-area' as defined by the Jewellery Quarter Conservation Area Character and Appraisal and Management Plan (JQCACAMP).

5. Between 1993 and 2017 various planning permissions (PP) and listed building consents (LBC) have been granted for works including an extension to a warehouse; change of use to a restaurant; student flats and change of use from a restaurant (Use Class A3) to a Leisure and Assembly use (Use Class D2).

6. It is stated in the various submissions made on behalf of the freeholder that, following the acquisition of the property in the mid-1980s, there had been a number of burglaries and acts of vandalism. On the advice of the police security roller shutters were fitted as well as mesh to the windows. It is stated that the freeholder is willing to remove '*the offending items*' but had requested a site visit with the Conservation Officer and with the freeholder's insurance company present. Apparently, this request was refused. If the shutters were fitted in the mid-1980s this would have been after the building had been listed.

7. The tenant indicates that he was advised that the shutters and window grilles were fitted some 37 years ago which would date them back to 1982 when the building was listed. Thus there is a discrepancy in the dates that the works are indicated to have been carried out. Nevertheless it is stressed by the tenant that the shutters are required for security purposes and that the company has invested a significant amount since taking on the tenancy. The requirement to remove the shutters from the entrance would, it is stated, impact negatively on the business which currently employs 15 local people.

8. However, there is no firm evidence that the works were completed prior to the date of listing. If there had been such evidence then the LPA would have been precluded from taking LBEN action against works already carried out. On the basis of the evidence before me, therefore, I can only assume that the shutters and other works were carried out in the mid-1980s, after the building had been listed in 1982.

9. A photograph submitted by the Council also indicates that there were no shutters fitted to the building well after 1982 and this reinforces my view that the works were carried out after the building was listed and therefore that the roller shutters and metal grille installations constituted a breach of the PLBCAA. In relation to the issuing of a LBEN, unlike for a planning enforcement notice (PEN), there are no time limits whereby a LPA is precluded from taking enforcement action.

10. I now turn, therefore, to the specific grounds pleaded for each of the appeals and repeat that that the merits of the cases are not before me. Thus I cannot consider whether or not LBC should be granted for the works carried out in contravention of the PLBCAA. I must keep only to the specific ground pleaded for each appeal.

Appeal A on ground (d)

11. This ground of appeal addresses situations where essential and urgent works were needed to preserve the listed building. The emphasis is on the words '*essential*' and '*urgent*' and '*to preserve the listed building*'. This ground of appeal comprises three tests. The first is whether the works were urgently necessary in the interests of safety or health; the second test is that it was not practicable to achieve the aims of safety, health or preservation of the building by repair or temporary support and

the third test is that the works carried out were the minimum measures immediately necessary to achieve the aims of safety, health or preservation.

12. For an appeal to succeed on ground (d) all three tests must be met and in this appeal the onus is on the appellants to conclusively show that this is the case. The tests under ground (d) do not specifically relate to a need for 'security'. Thus, whilst accepting that this might well have been a requirement for both landlord and tenant, and indeed one which was recommended by the police, it does not fall into the category of being a requirement which was '*essential and urgent in order to preserve the listed building*' (my underlining).

13. In relation to the first test, the evidence is that the works carried out were necessary for security purposes as opposed to being '*urgently necessary in the interests of health and safety*'. It has not been shown that the health of any user of the building was at risk if the security measures were not carried out and clearly there was no risk to public safety due to the lack of any shutters or grilles to the windows. Thus the appeal fails on this first test.

14. On the second test there is some evidence that the security measures were '*urgently necessary*' because there had been burglaries and acts of vandalism carried out at the premises. However, there is no evidence to suggest that any consultations were carried out with the Council before the shutters and grilles were fitted to the listed building. Again if it was purely for security purposes it has not been shown that the works related to the aims of achieving safety, health or the preservation of the building. The works carried out were clearly not so '*urgently*' necessary for safety or health reasons. Therefore, the second test is not met either.

15. On the third test it must be shown that the works carried out were the '*minimum measures*' necessary. But again they must be measures relating to the need to again to overcome any health or safety issues as opposed to purely relating to necessary security measures. Thus the shutters and grilles to the windows do not meet this third test. Appeal A fails on all three tests and cannot succeed on ground (d) and there are no other grounds pleaded.

Appeal B on ground (k)

16. An appeal on this ground must be made on the basis that the steps required to be taken by virtue of section 38(2)(c) of the PLBCAA exceed what is necessary to bring the building to the state in which it would have been, if the terms and conditions of a listed building consent (LBC) had been complied with. However, there is no extant LBC in place for the works carried out and there never has been such a consent granted for the roller shutters and other works. It would appear that the appellant is claiming that the works exceed what is required to bring the building back to its condition prior to the works being carried out. This is an appeal on ground (g) and I have, therefore, considered it on that basis.

17. The only PP and LBC approvals date back to the 2012 approvals for internal and external works associated with the conversion of the building from wholesalers to restaurant, warehouse and student flats. One of the submitted drawings was a front elevation as proposed and, amongst other things, this showed the central shop window (former cartway opening) being replaced by a set of timber double doors. As indicated by the Council, this demonstrated an attempt to improve the visual impact of the listed building and indeed restored the former cartway entrance.

18. As also indicated by the Council, the appellant for this appeal has not specifically stated why the requirements of the LBEN are considered to be excessive. I agree with the authority that the appellant seems to be relying on the fact that the

insurance company would seek some form of redress if the security shutters and grids were removed. However, that does not explain why the carrying out of the requirements would not restore the building to the state it was in before the unauthorised works were carried out.

19. The reasons for the issue of the LBEN were to restore the listed building to its condition before the breach of control took place. It would appear that all of the matters relating to the breach were brought to the attention of both the freeholder and the tenant more than 2 years and 18 months ago respectively, before the date of the Council's appeals statement. However, neither party submitted any alternative proposals for the Council to consider.

20. In summary I can only conclude that the appellant has failed to show that the requirements exceed what is required to bring the building back to the state it was in prior to the works being carried out and the appeal fails on ground (k) as well as the implied ground (g). There are no other grounds to consider and thus the LBEN must stand as drafted. As indicated above I am not empowered to consider the merits of the works carried out and whether or not LBC should be granted for the retention of the shutters, grilles and signage.

Other Matters

21. In reaching my conclusions on both appeals I have taken into account all of the other matters raised by the Council and by and on behalf of the landlord and the tenant. These include the initial submissions; the detailed statements; the planning history; the police reports and the photographic evidence. However, none of these alters my conclusions on the ground pleaded in both appeals. Nor are any other factors of such significance so as to change my decisions that both appeals should be dismissed.

Formal decisions

22. I direct that the LBEN be corrected by deleting the words '*and windows*' in Part 3 (i) and by deleting the words '*doors and*' in Part 3 (ii).

23. Subject to the above corrections Appeal A is dismissed and the Listed Building Enforcement Notice is upheld as corrected. Listed Building Consent is refused for the works carried out in contravention of the Planning (Listed Buildings and Conservation Areas) Act 1990, at 60-62 Constitution Hill, Birmingham B19 3JT.

24. Subject to the above corrections Appeal B is also dismissed and the Listed Building Enforcement Notice is upheld as corrected. Listed Building Consent is refused for the works carried out in contravention of the Planning (Listed Buildings and Conservation Areas) Act 1990, at 60-62 Constitution Hill, Birmingham B19 3JT.

Anthony J Wharton

Inspector