



Appeal Decision

No site visit required

by Simon Hand MA

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

Decision date: 26 May 2020

Appeal Ref: APP/N5090/C/17/3190564

Land at 42 Clifton Gardens, London NW11 7EL

- 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 appeal is made by Plankton Ltd against an enforcement notice issued by the Council of the London Borough of Barnet.
 - The enforcement notice, numbered ENF/00906/17, was issued on 31 October 2017.
 - The breach of planning control as alleged in the notice is the subdivision of the property into seven self-contained units.
 - The requirements of the notice are: (i) Cease the use of the property as seven self-contained flats. (ii) Restore the property to the state in which it was prior to the breach as per drawing numbers 001 and 003 included as part of planning application reference C03931A/99, approved on 14.02.2000 by (a) permanently removing from the property kitchen units, sinks, cookers and food preparation areas from all rooms other than those marked 'kitchen' on the above plan; and (b) permanently removing from the property baths, showers, basins and toilets from all rooms other than those marked 'W.C.', 'shower', 'W.C./W.H.B' and 'W.C./Bath' on the above plan.
 - The period for compliance with the requirements is 5 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
 - This decision supersedes that issued on 8 June 2018 which was quashed by the order of the High Court
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Decision

1. The appeal is allowed on ground f, and it is directed that the enforcement notice be varied: by deleting the words "*cease the use of the property as seven self-contained flats*" in paragraph 5 1) and substituting them with "cease the use of the property as self-contained flats". Subject to this variation the enforcement notice is upheld.

Background to the Appeal

2. The original appeal proceeded by way of grounds (f) and (g). The Inspector agreed with the appellant's arguments that the requirements were excessive in that they went beyond what was required to remedy the breach, which was not contested, that the property had been divided into 7 self-contained flats. The Inspector found that whether the property was used for C3 or C4 purposes the provision of bathrooms in all the bedrooms would not be a material change of use. He also found it was not necessary to remove all the kitchen units. Only

the cooking facilities need go. In reaching this conclusion he differentiated between cupboards and units, sinks and food preparation areas, all of which might be considered part of a kitchen, and cooking facilities, which would comprise actual equipment designed to heat up food. The latter had to go, but the former could remain as they did not contribute to the change of use to self-contained flats.

3. He allowed the appeal and varied the requirements by deleting the need to remove any of the bathrooms and by deleting reference to "kitchen units, sinks, cookers and food preparation areas" replacing it with "cooking facilities", all of which should be removed but for one.
4. The Council complained to the Planning Inspectorate about the decision. They argued that the notice was carefully drafted to require the remedying of the breach by restoring the land to its condition before the breach took place. To this end they had provided plans showing the use of the property as a single dwelling from 1999. They argued the Inspector had come up with his own version of how to remedy the breach that was different from theirs. The Planning Inspectorate agreed this was problematic and did not oppose the subsequent challenge made by the Council to the High Court.

Main Issue

5. Kestrel Hydro¹ and Bowring² are well known cases referred to by the Council in the High Court case. These established that when enforcing against a change of use, where that change of use has entailed subsequent physical works to facilitate it, and those works are integral to that change of use then the enforcement notice can require them to be removed.
6. It is clear the notice was directed against the breach and so any requirements which are intended to return the property to its last lawful state before the breach are unlikely to be excessive. The question is not therefore are the requirements necessary to remedy the breach, which was the question essentially posed by the previous Inspector, but what was the last lawful use of the property and are the requirements excessive when considering how to return the property to that state. The difference is subtle but important. It is often argued that a single dwelling could have 2 kitchens and every bedroom could be ensuite, so anything more than that is excessive. But the correct approach is to ask would the requirements, as drafted by the Council, leave the property in its last lawful state. One may prefer ensuites, but if the notice leaves just one bathroom, then is that excessive to render the property back into a single dwelling? Quite probably not.

The Last Lawful Use of the Property

7. The previous Inspector noted this was "not entirely clear". The reason for this is explained by the following timeline. In 1999 planning permission was granted for various alterations to the property, which was then, it is clear from the plans, used as single dwellinghouse. Sometime in 2010 (according to the appellant) the property was converted into 7 flats. Following complaints and after several failed attempts to determine what was going on the Council decided it was actually a large (sui generis) HMO and in December 2010 issued an enforcement notice with that as an allegation. On 20 January 2011 the

¹ Kestrel Hydro v SSCLG & Spelthorne BC [2016] EWCA Civ 784

² Bowring v SSCLG [2013] JPL 1417

Council wrote to the appellant recording the outcome of a visit made the day before that the property was now a 6 person HMO falling within C4 and that the notice had been complied with.

8. This is the key point, the appellant says he turned the property from the unlawful flats to a lawful C4 HMO. Later he turned it back into 7 flats. In fact he says it was in February the same year (ie less than a month after the conversion to a C4 HMO). An article 4 direction was made in 2015 preventing the change of use from a C3 to a C4 use, but this does not act retrospectively so the appellant argues the establishment of the C4 HMO in January 2011 was lawful and that is the use to which the property should be returned.
9. There is no dispute that the property was in appearance in use as a C4 HMO on 19 January 2011 as evidenced by the Council's letter of the 20th. However the Council argue that was a simple deception on the part of the appellant to fool the enforcement officer. This is no idle speculation as in July 2017 a Planning Enforcement Order was made by Willesden Magistrates' Court that there had been a breach of planning control at the property consisting of a material change of use to 7 self-contained flats. This Order was occasioned by an application made by the appellant in 2016 for an LDC for the use of the property as 7 self-contained flats. In that application the appellant stated the use as flats began on 20th January 2011. That is the day after the visit by the enforcement officer. The Council clearly considered this to be suspicious and developed that argument in their application to the Court.
10. The appellant argues that the Court Order is silent on what the last lawful use of the premises was and provides no evidence to support the Council's arguments. It is true the Order is limited to a few lines describing the breach of planning control that has occurred, but that was necessarily based on some persuasive arguments. Those arguments are detailed in the Council's statement to the Court. The Council argued that it was highly unlikely the conversion works to 7 flats could have taken place on the day after the visit which showed the property to be a 6 person HMO. It was clear to the Council that the appellant had always used the property as 7 flats, merely changing things around inside solely for the purpose of deceiving the enforcement officer, then changing them back the next day to resume the unlawful use of 7 flats. They argued the appellant should not benefit from this deception and clearly the Court agreed.
11. However, there is more to this, for the Council used inconsistencies in the evidence provided to support the LDC application to demonstrate their case. They pointed to a tenancy agreement for 'flat E' signed December 2010, after the enforcement notice was issued and on 30 December 2010 the Council received housing benefit claims from flats B, C, D, E and G. these claims were due to start on 10 January and 17 January 2011. Clearly the tenants envisaged residing in flats at the property 2 days before the enforcement officer visited (19 January) when it was apparently an HMO. Furthermore, on the application form for the LDC it was stated the flats had been in use since 2008 and bank statements showing payments made in February 2011 by the occupiers of some of the flats were from the same occupiers as before the visit in January 2011.
12. It was clear to the Council that the unlawful conversion to 7 flats took place before 2011 (the appellant says in 2010). Following the issue of the

enforcement notice which erroneously assumed it was a large HMO, the appellant decided to deceive the Council by making it appear the (imagined) large HMO had been turned into a C4 HMO, and then immediately resumed the use as flats. This analysis has not been disputed by the appellant and no counter evidence has been provided to suggest any alternative reading of the situation is possible.

13. This has two effects on the argument concerning the establishment of the C4 HMO. Firstly, it would seem that use was never actually established. The property had the appearance of a C4 HMO but was never used as one, as the 7 flats existed before and after the fleeting C4 HMO conversion. That on its own suggests to me the C4 HMO was never a lawful use, but secondly, the use, if established by those few days, was done so in order to deceive the Council. In *Welwyn*³ the Supreme Court held that one cannot benefit from fraud. In particular where there was "*positive deception in matters integral to the planning process...[which] was directly intended to and did undermine the regular operation of that process*". Although a high bar has been set by Inspectors when applying this test, it seems in this case it is fully met by a deliberate deception which was intended to deceive the Council and is now relied on to establish a lawful use in order to secure a relaxation on the requirements of the enforcement notice.
14. The appellant has sought to argue that the Council consider they made a mistake when they identified the large HMO and were not deceived. This may be true, but the issue is that they were deceived by the C4 HMO and that is the last lawful use the appellant seeks to rely on. The appellant also argues the use as a C4 HMO is not a benefit but a right so falls outside the question of deception as outlined in *Welwyn*. However, in my view, the C4 HMO use was only established in order to deceive the Council, there was no intention to actually 'use' the property as an HMO, it was flats before and after the short period of the HMO 'use'. Thus the appellant did benefit from the deception.
15. In conclusion, I do not consider a C4 HMO use was ever established and if it was it was through the process of deliberate deception and so the appellant should not benefit from it. Therefore, the last lawful use was a single dwellinghouse as described in the plans provided by the Council dating from 1999 and there is no evidence to suggest otherwise.

Conclusion

16. The removal of the bathroom and kitchen facilities other than those shown on the plans, as required by the notice, is not excessive to return the property to its last lawful use. I shall dismiss the appeal on ground (f).

Other Matters

17. The previous Inspector corrected the requirement to remove the reference to the specific number of flats. This was not contested and I shall correct the requirement in the same manner.
18. The appeal on ground (g) was dismissed by the previous Inspector and I have received no further evidence on this ground. I have no reason to depart from the previous Inspector's view that 5 months was ample time to comply with the notice, even taking into account the possibility that some of the tenants might

³ *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15

lose their home and that any interference with their Article 8(1) Human Rights was reasonable and proportionate given the legitimate aim of remedying the breach. The appeal on ground (g) fails.

Simon Hand

Inspector