



Appeal Decision

by Debbie Moore BSc (HONS), MCD, MRTPI, PGDip

an Inspector appointed by the Secretary of State

Decision date: 9 November 2020

Appeal Ref: APP/N5090/C/18/3215654
148 Clitterhouse Road, London NW2 1DN

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Segun Omisore against an enforcement notice issued by the Council of the London Borough of Barnet.
- The enforcement notice was issued on 12 October 2018.
- The breach of planning control as alleged in the notice is without planning permission, the sub-division of the property into two self-contained flats.
- The requirements of the notice are:
 1. Cease the use of the property as self-contained flats.
 2. Permanently remove all but one set of kitchen facilities (units, sinks, cookers and food preparation areas) from the property.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(e), (d), (f) and (g) of the 1990 Act as amended.

Summary of Decision: The appeal succeeds in part and the enforcement notice is upheld with a variation in the terms set out below in the Formal Decision.

Application for costs

1. Applications for costs have been made by both of the main parties. These applications are the subject of separate Decisions.

Preliminary Matters

2. I consider that this appeal can be determined without the need for a site visit. This is because I have been able to reach a decision based on the information already available.
3. The evidence supplied by the appellant includes arguments under ground (a), that planning permission should be granted for the matters alleged. However, the appropriate fee has not been paid and so the ground (a) appeal and the application for deemed planning permission under Section 177(5) of the 1990 Act as amended have lapsed.
4. The appellant has submitted a nullity/invalidity argument, which I am obliged to consider. It is argued that the person who signed the delegated report, seeking authorisation to take enforcement action, did not have requisite powers to do so, or to issue the notice. The appellant indicates that a notice issued without proper resolutions or authority should be considered a nullity, since in those circumstances it cannot be an enforcement notice. In the first instance, I have had regard to *Britannia Assets*¹, which suggests the proper course is to make such complaints by way of Judicial Review.

¹ *Britannia Assets (UK) Ltd v SSCLG* [2011] EWHC 1980 (Admin).

5. Nonetheless, just because it could be the subject of a Judicial Review, I do not consider that such matters can only be raised in that way. If there was clearly no authority for the notice, it could not stand.
6. I have had further regard to *Koumis*², in which the Court of Appeal stated that the *Miller-Mead*³ approach to nullity should be confined to those cases where the failure to comply with the requirements of Section 173 of the 1990 Act as amended is apparent on the face of the notice itself. The matters at issue in this case could not fall within the scope of what can amount to a nullity argument as defined in *Koumis*, as they involve the examination of a delegated report and related documents.
7. Recent case law takes the matter further. In *Beg*⁴, it was held that the allegation that the person who had issued a planning enforcement notice had not the authority to do so was not an allegation of an error on the face of the notice, since resolving it required looking at outside material. It was concluded that any such error would not result in the notice being a nullity, but the appellant's arguments went to the issue of the notice's validity. This is because they were points which could have been pursued before a planning inspector on an appeal against the enforcement notice, if such an appeal had been issued in time. Alternatively, they could have been pursued by an application for Judicial Review in the High Court.
8. Thus, I consider that nullity arises via s173 of the 1990 Act as amended, comprising non-correctable errors on the face of the enforcement notice. Invalidity arises by way of such matters as are before me. I have, therefore, considered whether the notice is invalid because there was no authority to issue it. I note this approach is not entirely consistent with that taken by other Inspectors in the decisions referred to by the appellant⁵, but I have had regard to more recent caselaw on the subject.
9. I am referred to the Council's Scheme of Delegation (August 2018), which was in force when the notice was issued. This confers powers to authorise and issue enforcement notices to Tiers 1-5 Council employees, which range from Director to Officers. The relevant delegated report was prepared by Mr S Amoako-Adofo MRTPI, who is a senior planning officer in the enforcement team. I understand that the report was signed by Mr I Sutherland-Thomas, Planning Enforcement Manager and countersigned by Mr A Bates as Head of Development Management. It is clear to me that these individuals were acting fully within the Council's delegated powers. Even if Mr Sutherland-Thomas has had his powers temporarily suspended, as alleged by the appellant, the authorisation report was countersigned. Moreover, the notice itself was signed by the relevant Service Director.
10. The appellant appears to suggest that the person "acting for the service director" had no powers to do so, but there is no evidence to support this assertion. The fact that the 'Service Director – Planning and Building Control' is not listed in the scheme of delegation does not suggest that they have no delegated powers. The Council's scheme of delegation does not seek to identify every individual by job title but by level, hence the tiers.

² *Koumis v SSCLG* [2014] EWCA Civ 1723.

³ *Miller Mead v MHLG* [1963] 2 WLR 225.

⁴ *Beg and ors v Luton BC* [2017] EWHC 3435 (Admin).

⁵ APP/Q5300/C/15/3006366 dated 11 February 2016, APP/X3025/C/15/3006355 and APP/X3025/X/15/3003794 dated 1 April 2016.

11. The appellant has included a further nullity argument in his final comments. It is claimed that the allegation concerns operational development, which contradicts the requirements, one of which requires the use to cease. *Miller-Mead* is relied upon, on the basis that the recipient of the notice does not know what is expected of him.
12. The omission of the words 'material change of use' is not fatal to the notice. The alleged breach is clearly stated and refers to a use as "two self-contained flats". As such it is not confined to operational development. The precise requirements are abundantly clear to the recipient and would be to any successors in title. Indeed, it is apparent that the appellant was in no doubt about the meaning of the notice as he submitted an appeal on ground (d) at the outset, in which he argued the change of use had occurred at least four years prior to the issue of the notice. Therefore, I reject this argument.
13. For the reasons given above, I conclude that the notice is not a nullity, or otherwise invalid, and I have proceeded to consider the grounds of appeal as set out below.

The appeal on ground (e)

14. The main issue to consider is whether the appellant has shown, on the balance of probability, that the notice was not served as required by section 172 of the 1990 Act as amended and, as a result, there has been substantial prejudice.
15. Firstly, the appellant cites *Nelsovil*⁶ and argues that the onus of proof on ground (e) appeals lies with the Council. This case concluded, among other things, that the onus of proof in relation to a ground (d) appeal rested firmly with the developer. During the discourse, Mr Justice Widgery indicated, with reference to Section 33 of the 1960 Act⁷, that the onus of proof must rest on the person appealing "*other than paragraph (e)*". On that point, Mr Justice Slade commented with apparent reference to ground (e) appeals – "*...that the enforcement notice was not served on the owner or occupier of the land within the relevant period of four years. It is a novel proposition to me that an appellant does not have to prove his case*". I disagree with the appellant's interpretation of the case and do not find that this commentary translates to a requirement that the burden of proof rests with the Council.
16. The appellant correctly states that under s172(2)(a) a copy of the notice shall be served on the owner and the occupier of the land to which it relates. It is agreed that the notice was served on "The Occupier" of 148 Clitterhouse Road. I accept that, if the Council considered there were two flats, then attempts should have been made to serve the notice on each. However, section 176(5) of the 1990 Act as amended provides that, where it would otherwise be a ground for determining an appeal under section 174 in favour of the appellant that a person required to be served with a copy of the enforcement notice was not served, the Secretary of State may disregard that fact if neither the appellant nor that person has been substantially prejudiced by the failure to serve him.
17. The appellant has submitted a statement from the occupant of the ground floor flat, which states that they did not receive a copy of the enforcement notice. However, it is acknowledged that the ground floor occupant was made aware of

⁶ *Nelsovil v MHLG* [1962] 1 WLR 404.

⁷ Caravan Sites and Control of Development Act 1960.

an official letter from the Council, which related to the whole property at No 148, by the resident of the first floor flat. The notice was not specifically addressed to the first floor flat, which would have been apparent to the recipient. However, the ground floor occupant did not seek to take any action in respect of the letter to establish its implications. This would not have been an onerous course of action.

18. The occupant has submitted representations to which I have had regard insofar as they relate to the expanded grounds of appeal before me. The occupant indicates he wishes to appeal against the notice and states - "*I am told that the formal ground of appeal is on ground A*". However, there is very limited evidence to support the assertion that the occupier would be prepared to pay a fee and pursue a deemed planning application for a property they did not own. Under these circumstances, I consider that neither the appellant nor the occupant have been substantially prejudiced.
19. I am directed to a decision in which a ground (e) appeal succeeded⁸. That appeal concerned an outbuilding, which was alleged to have been in use as two self-contained residential units. In that case, it appears that the Council served the notice on the occupier of main house but there was no evidence that any of the occupiers of the outbuilding received a copy of the notice. That is not the case here, as explained above. As such, there are significant differences between the appeals, which justifies me reaching a different conclusion.
20. For the reasons set out above, the appeal on ground (e) fails.

The appeal on ground (d)

21. In order to succeed in an appeal on ground (d), the appellant must show on the balance of probability that the change of use occurred at least four years prior to the issue of the notice, and has continued since that date without significant interruption, such that it is now too late for the Council to take enforcement action. The relevant date in this case is 12 October 2014. It is important to establish whether there was any period during the four years when the units were not physically occupied, even though available, when the Council could not have taken enforcement action against the use. It is also necessary to make a finding as to whether any periods of non-occupation were *de minimis*.
22. The appellant claims that an extension at the premises was completed in May 2014 and the property was divided into two flats from that date. It is indicated that the flats were occupied almost immediately and Assured Shorthold Tenancy documents (AST) has been provided, dated May 2014. A statement of truth has been submitted by the occupier of the ground floor flat stating that he has lived in that property since 31 July 2018. I have a copy of an AST to that effect. It is also stated the first floor flat has been occupied since that date. A second statement has been submitted by a former occupant of the first floor flat, who lived at the premises from 31 May 2014 until June 2019. During that time, it is stated that the ground floor flat was also occupied aside from a void period of "a couple of months" during the summer of 2018.
23. The appellant has also submitted results of a Building Control search at the appeal premises dating from 2008. The works comprise new windows, a door, a single storey rear extension, a boiler and a consumer unit. There is no

⁸ APP/N5090/C/19/3242178 dated 12 June 2020.

evidence that the all the works listed were completed but, in any case, they do not show a change of use occurred or that the property was subdivided.

24. The Council challenges the date on which the extension was completed. It is acknowledged that the appellant's Building Regulations application for the extension and ground floor works was submitted on 5 February 2014 and work commenced soon after. However, the Council's inspections records suggest these were undertaken in 2015. The Council has also submitted aerial photographs that show work was underway in 2015⁹. In addition, I have a letter from a neighbour who says that the work started in 2015.
25. The appellant's evidence in support of his claim is limited and is contradicted by the evidence of the Council and a third party. Even if I were to accept the appellant's argument, it is not explained how the flats were used and occupied throughout the relevant period. It has been confirmed that the ground floor flat was vacant for a significant period of time, which is not explained. During this void period, the Council would not have been able to take enforcement action.
26. I find, therefore, that the appellant's evidence is imprecise and ambiguous. It does not show on the balance of probability that the change of use occurred at least four prior to the issue of the notice, and has continued since that date without significant interruption, such that it is now too late for the Council to take enforcement action.
27. The appeal on ground (d) must fail, therefore.

The appeal on ground (f)

28. Section 173(4) of the 1990 Act as amended indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve. The first is to remedy the breach of planning control which has occurred. The second is to remedy any injury to amenity which has been caused by the breach. In this case, the purpose of the notice is to remedy the breach of planning control.
29. The Courts have ruled that where a notice is directed at a change of use, and requires that certain works be removed, those works must have been integral to or part and parcel of the making of the material change of use. It will not be sufficient if the works had been undertaken for a different and lawful use and could be used for that other lawful use if the unauthorised use ceased¹⁰. The question of what is necessary to prevent the unauthorised use depends on the facts. In this case, the use as self-contained flats must cease to remedy the breach.
30. The critical determining factor in deciding whether the units are self-contained is that three basic amenities; toilet, personal washing and cooking facilities are available for the exclusive use of its occupants. It is clear from evidence that each flat contains these facilities. It follows, therefore, that both kitchens are integral to and part and parcel of the making of the material change of use. One of these should be removed to prevent the unauthorised use from continuing.

⁹ 'Google' Earth images 2013, 2015 and 2017.

¹⁰ *Mansi v Elstree RDC* [1964] 16 P & CR 154.

31. It is put to me that for religious and or dietary needs it is important that the house has two kitchens. I consider that a small kitchenette limited to cooking facilities would likely meet the specific needs and a fully equipped kitchen would not be necessary.
32. I am referred a previous decision concerning an alleged change of use to five flats¹¹. In that case I varied the requirements to allow two kitchens to be retained; three were to be removed. This was considered appropriate to remedy the breach and prevent the use from continuing, without being excessive. The size and layout of that property was entirely different to the appeal premises and it was reasonable to allow one kitchenette for food preparation to be retained along with the fully-equipped kitchen. That case differed significantly from the matters before me, where there are only two flats each with a fully-equipped kitchen. As explained above, the kitchens are integral to the unauthorised use and it is necessary to require one of these to be removed in order to remedy the breach. Given the overall size and layout of the appeal property, I do not consider it likely that a separate food preparation area would be re-installed.
33. The appeal on ground (f) must fail, therefore.

The appeal on ground (g)

34. The appeal on ground (g) is that the period for compliance with the notice falls short of what should reasonably be required. The appellant is seeking a compliance of period of 24 months due to problems with finding suitable accommodation in London, which is exacerbated during the current COVID-19 pandemic, and due to regulations introduced pursuant to the Coronavirus Act 2020. I understand that the fixed term tenancy for the ground floor flat has expired, therefore, the statutory notice period would be six months.
35. The tenants' rights under the European Convention on Human Rights, which is incorporated into the Human Rights Act 1998, must be considered. Article 8 deals with the right to respect for family life and the home. Dismissal of this appeal will require the tenants to vacate their current home, with no immediate alternative accommodation. This would represent an interference with their home and family life. Nonetheless, the Council asserts that the development provides sub-standard accommodation of a type that is incompatible with the surrounding housing.
36. I am not aware of any circumstances that limit the type of housing needed. It should, therefore, be possible for the tenants to find alternative accommodation in the area. I am satisfied that the legitimate aim of conforming with planning policy and avoiding detriment to the character of the area cannot be achieved by any means which are less interfering with the tenants' rights. I appreciate that this decision will lead to stress and uncertainty for the tenants. Consequently, I accept the appellant's request that the time for compliance be extended from six months. I consider that nine months is an adequate length of time for the tenants to find somewhere else to live. As such, the interference with home and family life is proportionate and necessary in the circumstances and would not result in a violation of their rights under Article 8. Consequently, the appeal on ground (g) succeeds.

¹¹ APP/N5090/C/19/3230596 dated 6 January 2020.

Conclusion

37. For the reasons given above, I conclude that the period for compliance with the notice falls short of what is reasonable. I shall vary the enforcement notice prior to upholding it. The appeal on ground (g) succeeds to that extent.

Formal Decision

38. It is directed that the enforcement notice is varied by the deletion of six months and the substitution of nine months as the period for compliance. Subject to the variations, the enforcement notice is upheld.

Debbie Moore

Inspector