The Planning Inspectorate

Appeal Decisions

Site visit made on 4 October 2022

by Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26TH OCTOBER 2022

Appeal A Ref: APP/A5270/C/20/3265284
Appeal B Ref: APP/A5270/C/20/3265285
Premises known as the upper floors at 181 Noel Road, Acton, London W3 0JJ

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended. The appeals are made by Mr Malek El-Houry (Appeal A) and Mr Mokhtar El-Houry (Appeal B) against an enforcement notice issued by the Council of the London Borough of Ealing.
- The notice was issued on 2 November 2020.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the upper floors to use as two flats (Flat B and Flat C) ("the unauthorised development").
- The requirements of the notice are to:
  1. Cease the use of the upper floors as two flats.
  2. Remove the kitchen facilities and drainage connections, which facilitate the unauthorised development, from one of the two flats.
  3. Remove all internal partitions, doors and locks that facilitate the unauthorised development.
  4. Remove all debris resulting from compliance with the above steps.
- The period for compliance with the requirements is six months.
- Appeal A is proceeding on the grounds set out in section 174(2)(a), (d) and (f) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act. Appeal B is proceeding on the grounds set out in section 174(2)(d) and (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees for Appeal B 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 has lapsed.

Decisions

1. It is directed that the enforcement notice be varied by the substitution of "two flats" in the requirements at step 1 with "more than one flat" and the deletion in the requirements at step 2 of "two". Subject to this variation appeals A and B are allowed and the enforcement notice is quashed.

Application for costs

2. An application for costs was made by Mr Malek El-Houry against the Council of the London Borough of Ealing. This application is the subject of a separate Decision.

Preliminary Matters

3. Step 1 of the enforcement notice requires cessation of the use of the appeal property as two flats. Step 2 also refers to two flats. However, the number of flats enforced against is already specified in the alleged breach of planning control. Therefore, specifying the number of flats in the requirements is

unnecessary. Furthermore, this could lead to uncertainty, for example whether the notice requires the cessation of a use for a greater number of flats. Consequently, I shall use the power available in s176(1) of the Act to vary the notice by substituting the reference to two flats in the requirements to refer to no more than one flat in step 1 and deleting the reference to two flats in step 2. In doing so, I am satisfied that there would be no injustice to either the appellants or the Council.

4. The Act makes it clear in s55(3)(a) that the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and each part of it that is so used. Therefore, in my view both the extent of the land affected by the notice and the allegation are correct.

Ground (d) appeals

5. The property contains an enlarged semi-detached residential building. There is a two-bedroom flat on the first floor (flat B) and a one-bedroom flat at loft level (flat C). A three-bedroom flat on the ground floor (flat A) is outside the scope of the notice.

6. The ground of appeal is that it was too late to take enforcement action against the breach of planning control alleged in the notice. Where, as in this instance, the allegation concerns a change of use to create a separate dwelling, the Act at s171B(2) provides that no enforcement action can be taken after the end of the period of four years beginning with the date of the breach. It is for the appellants to prove that the use of flats B and C as separate dwellings is immune from enforcement action, the relevant test of the evidence being on the balance of probability. Established case law confirms however that an appellant's evidence should not be rejected simply because it is not corroborated. If there is no evidence to contradict an appellant's version of events, or make it less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted[1].

7. Statutory Declarations (SD), all signed and dated in the presence of a solicitor, were supplied by both appellants as well as two other witnesses, providing the following account of events. Conversion of the building into two, three-bedroom flats (flats A and B) occurred after planning approval was obtained in May 2014[2]. Subsequent to appellant 'A' acquiring the property in early 2016 they occupied flat B, whilst appellant 'B' occupied flat A. Works were then undertaken to create a separate flat, flat C, in the loft level of flat B. Flat C was initially let to a tenant from 1 June 2016, with Council Tax also being paid. On 1 June 2017 this tenant moved into flat B, with appellant 'A' and their family moving into flat C and occupying it until 8 April 2018. Flat B has since been let to tenants continuously. On 9 April 2018 to 8 April 2019, flat C was again let to a tenant. From 9 April to 6 May 2019, flat C was occupied by appellant 'B' before being let to a tenant from 7 May to 7 December 2019, since when flat C has again been occupied by appellant 'B'.

8. Contemporaneous documentary evidence accompanied the witness testimony. This included for flat C, signed Assured Tenancy Agreements (ASTs) dated 1 June 2016, 9 April 2018 and 7 May 2019; Council Tax bills covering the periods 1 June 2016 to 31 March 2017 (addressed to tenant), 2017/18 (addressed to appellant 'A'), 9 April 2018 to 31 Mar 2019 (addressed to tenant) and 8 December 2019 to 31 March 2021 (addressed to appellant 'B'), together with utility bills covering the periods 28 December 2016 to 5 July 2017 (addressed to tenant), 5 July 2017 to 9 April 2018 (addressed to appellant 'A'), 9 April 2018 to 8 April 2019 (addressed to tenant), as well as a receipt for

[1] *Gabbitas v SSE & Newham LBC* [1985] JPL 630.
[2] Council Ref: PP/2014/1167.

payment dated 9 December 2020 (addressed to appellant 'B'). Gas and electrical installation certificates dated 19 April 2016 and 3 May 2016 respectively were also provided. The documentary evidence for flat B included signed ASTs as well as Council Tax and utility bills addressed to the various occupiers for the period between when appellant 'A' stated that they had acquired the property and the date of the notice.

9. An SD provided by the initial tenant of flat C confirmed the dates that they had occupied the flat in question, also when they swapped flats to occupy flat B and when their occupation of that flat ceased. The Council questioned the independence of this witness. Their testimony is nevertheless supported by contemporaneous documentation covering the periods of their claimed occupation of both flats. Utility bills did not show that the tenant was responsible for paying the bills prior to occupying flat C. Whilst this witness might be a colleague of appellant 'B', there was no clear and compelling explanation as to why less weight should be given to their evidence. An SD was also provided by one of the subsequent flat C tenants confirming their dates of occupation and supporting the appellants' account of events, as did a statement from the firm of letting agents responsible for letting flat C between April 2018 and December 2019. The witness and documentary evidence is thus indicative of a pattern of use of flats B and C as separate units of accommodation, physically and functionally, during the period since June 2016.

10. The Council drew a number of inferences from what it saw as omissions or inaccuracies in the appellants' account of events. The Council considered that this made it doubtful that flats B and C had been used as two separate dwellings throughout the relevant period. Reference was made to the electoral registration records, which did not correlate with the appellants' account of the occupation of flats B and C during the relevant period. However, that is not unusual where, as in this instance, the accommodation is often let for relatively short periods with the identity of occupiers changing on a reasonably regular basis. Other contemporaneous documentation, such as invoices for building works and materials, might have provided further support for the appellants' account. Even so, these are unlikely to have survived given the passage of time and in any event, substantial relevant evidence had already been submitted. The unauthorised erection of a separate, self-contained dwelling at the rear of the property is of limited relevance in respect of the continuity of the use of flats B and C as separate dwellings. Consequently, none of these matters cast significant doubt on the appellants' account.

11. The available ASTs did not cover the entirety of the claimed occupation of flat C, nor for that matter, flat B. Indeed, in themselves ASTs do not necessarily show occupancy, as tenants can cease occupation before the expiry of their tenancy for all sorts of reasons. Even so, when taken with other documentary evidence referred to above, including the payment of Council Tax and utility bills, they are a reasonably good indicator of the flats being occupied at times throughout the relevant period. Turning to the periods for which no ASTs are available, the appellants' evidence shows it is highly probable that appellant 'A' and at a later date appellant 'B' had resided at flat C during times when it was not let to tenants. In such circumstances, and having regard to appellants' close family relationship, it is not unreasonable to anticipate that there would be no formal tenancy arrangement.

12. Moreover, the documentary evidence showed that appellant 'A' and more recently appellant 'B' paid Council Tax for flat C during periods when they claimed to be occupying that flat and that it was rated separately from flat B. Although a Council Tax rating does not necessarily equate to use as a separate dwelling, in terms of showing occupancy it is highly significant that no discount was applied to the bills for any period of vacancy, whilst the most recent bill refers to a single person discount. Furthermore, utility bills for the period

5 July 2017 to 9 April 2018 and the receipt dated 9 December 2020 also indicate that flat C was occupied by one or other of the appellants when it was not occupied by tenants. Similar findings can be applied to the evidence relating to the period of occupation of flat B by appellant 'A'. Therefore, the documentary evidence is supportive of the appellants' account of the continuous occupation of flats B and C throughout the relevant period.

13. The Council also suggested that there was uncertainty as to whether the flats had been used as a single residential planning unit during the periods that they had been occupied by the appellants. According to the appellants' evidence however at no time prior to the date of the notice did the periods of their respective occupation of flats B and C coincide; by the time appellant 'B' first moved into flat C, in April 2019, appellant 'A' had not resided at that flat for more than a year, whilst flat B had been let to tenants for almost two years. Although no details of any rent paid by appellant 'B' to occupy flat C were provided, this can also probably be explained by the close family relationship with the owner. Besides, the existence of a separate residential planning unit is not solely or even mainly dependent on the payment of rent. The respective occupation of flats A and B by the appellants between early 2016 and 1 June 2017 has only a limited bearing on whether flat C was in use as a separate dwelling during that part of the relevant period. In any event, from the available evidence it is not unreasonable to draw the inference that the respective appellants and their families are highly unlikely to have occupied the flats other than as separate dwellings. Two separate flats do not become a single residential planning unit simply because their occupiers are related. Consequently, there is little to suggest that flats B and C were not used as two separate dwellings throughout the relevant period.

14. In relation to the occupation of flat C between June 2017 and April 2018, it is unclear why appellant 'A' would have paid full Council Tax as well as for the use of utility services if they had not in fact been residing there. Whilst this flat is of limited floor area and the headroom is constrained in places, I saw that two of the rooms are capable of accommodating beds. Moreover, appellant 'A' stated that they often spent time away from home for business purposes. Accordingly, the evidence that appellant 'A' resided in flat C together with their wife and son during the relatively short period in question does not seem fanciful.

15. In respect of the occupation of flat C in the period 9 April 2018 to 7 May 2019, the appellants' evidence clearly showed that for the year to 8 April 2019 the flat was occupied by tenants, before being resided in by appellant 'B' for one month prior to a new tenant taking up occupancy. The gap between the end of a tenancy and the beginning of a new one explains why appellant 'B' was able to occupy flat C for a short time. The change in appellant 'B's family circumstances and the close family relationship with the owner also probably explains why this occupation was not mentioned by the letting agents. In any event, if there had been a gap in occupation for around a month between tenants it would not have been unusual, for example to allow for refurbishment works to be undertaken, and would in all likelihood have been *de minimis*, thereby not affecting the continuity of the use of flat C as a separate dwelling.

16. The appellants did not claim that the conversion to two flats took place in late 2013. That would have been prior to the approval for two flats being granted, as well as the current ownership. As Appellant 'A' had acquired the property under the terms of an Islamic mortgage, which precludes the payment of interest, it is perhaps not surprising that the Land Registry shows their ownership as dating from around late 2019 when flat A was sold off to pay the mortgage balance. The appellants' account of the works to create flat C being undertaken during early 2016, sometime after the other flats had been created, is supported by their other evidence. The 2015 Building Regulations

application, which described the works to the property as including 'three flats', was submitted on behalf of the previous owner. Use as three flats is not referred to on the drawings accompanying that application, the site visit notes made by approved inspectors or photographs. Moreover, the Council's Building Control service issued a certificate of completion relating to the property which refers to "*one self-contained flat and one self-contained maisonette*" and records a completion inspection taking place on 11 November 2015 (although the Council stated that it has no records of any inspections taking place). Accordingly, the suggestion that flat C could have been created simultaneously with flats A and B has limited evidential foundation.

17. Drawing all of the above together, the appellants' account is consistent and it is sufficiently precise and unambiguous, both in terms of when the use of flats B and C as separate dwellings is highly likely to have commenced, as well as the continuity of such use throughout the relevant period. It is also supported by contemporaneous documentary evidence as well as other witness testimony. There is little before me that materially affects the significant weight that should therefore be given to the appellants' evidence. The Council advanced little by way of clear and compelling evidence which might contradict that provided by the appellants. Furthermore, the inferences drawn by the Council are in my view not persuasive, as they do not reflect the available evidence and do not make the appellants' account less than probable. Accordingly, I find that on the balance of probability on the date of the notice it was too late for the Council to take enforcement action in respect of the material change of use of the property to two flats.

18. The ground (d) appeals succeed.

Conclusion

19. For the reasons given above I conclude that the appeals should succeed on ground (d). Accordingly, the enforcement notice will be quashed. In these circumstances the appeal under the grounds set out in section 174(2)(a) and (f) to the 1990 Act as amended and the application for planning permission deemed to have been made under section 177(5) of the 1990 as amended in Appeal A, and the appeal under the grounds set out in section 174(2)(f) to the 1990 Act as amended in Appeal B, do not need to be considered.

Stephen Hawkins

INSPECTOR