



Appeal Decision

Site visit made on 8 December 2022

by **M Madge Dip TP MA MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 11 January 2023

Appeal Ref: APP/T5150/C/22/3298427

26 Lyon Park Avenue, Wembley HA0 4DR

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Ms Linda Benkerrache against an enforcement notice issued by the Council of the London Borough of Brent.
- The notice, numbered E/21/0298, was issued on 30 March 2022.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the premises to three flats.
- The requirements of the notice are:
 - STEP 1 Cease the use of the premises as flats.
 - STEP 2 Remove all internal partitions, items, materials and debris associated with the unauthorised change of use, including the removal of all kitchens, en-suite bathrooms/shower rooms and toilets.
 - STEP 3 Restore the internal configuration to the layout which existed prior to the unauthorised change of use taking place, as shown in "Plan A" attached to this notice.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(d) and (f) of the Town and Country Planning Act 1990 as amended.

Decision

1. It is directed that the enforcement notice is varied by:

In SCHEDULE 4:

- *In Step 2, the deletion of the words 'all kitchens, en-suite bathrooms/shower rooms and toilets', and the substitution of the words 'all but ONE kitchen, all but TWO bathrooms/shower rooms and toilets, and all but TWO en-suite bathrooms/shower rooms and toilets'; and*
- *the deletion of Step 3.*

Subject to the variations, the appeal is dismissed, and the enforcement notice is upheld.

Preliminary Matters

2. The Council claims that the appellant has gone by names other than that set out in the appeal form. The documentary evidence submitted confirms that the appellant has previously been married and email correspondence shows she has gone by the name of Mrs Lynda Nebab. I have taken references to Linda or Lynda Benkerrache or Nebab to be references to the appellant.
3. Planning permission was granted in 2002 for a ground floor and two-storey extension at the premises ("the 2002 PP"). The appellant claims that, at the time the extensions were being built, internal alterations were carried out to

create additional rooms and bathrooms, to allow the premises subsequent subdivision. The external appearance of the property is like that which was approved. However, there is nothing to show that the internal works were completed in accordance with the approved plans. As such, it has not been demonstrated that the 2002 PP was implemented and/or completed in accordance with the approved plans.

4. I will refer to the premises as 26 Lyon Park Avenue. I will refer to the appellant's flat, which occupies part of the ground floor and part of the first floor as No26. I will refer to the ground floor flat as No26A and the first floor flat as No26B.

Appeal on Ground (d)

5. An appeal on this ground is that, at the time the notice was issued, the matters alleged had achieved immunity due to the passage of time. The appellant needs to show that each of the flats has been occupied as a separate dwellinghouse for at least 4 years, without significant interruption. Any 4-year period starting on or before the material date is relevant. The material date is 30 March 2018.
6. There is no statutory definition of a dwellinghouse. The courts have however held that whether a building, or part thereof, is a dwellinghouse is a question of fact, and a distinctive characteristic of a dwellinghouse is its ability to afford to those who use it the facilities required for day-to-day private domestic existence. Facilities required for day-to-day private domestic existence include, but are not limited to, washing, cooking and living facilities.
7. The courts have also held that the appellant's own evidence does not need to be corroborated by independent evidence in order to be accepted. The appellant's evidence does however have to be sufficiently precise and unambiguous to meet the relevant test, which is on the balance of probability.
8. The appellant's statutory declaration states she lives at 26 Lyon Park Avenue and that the material change of use has taken place, but not in the last 4 years. The appellant also states that she has lived at the premises continuously since it was purchased in 1997 and that it was subdivided in 2003. While plan numbers: 26_HAO-4DR_RR004 and 26_HAO-4DR_RR005, dated 'Sep 2021' are labelled 'existing' and plan numbers: PL-100-001 and PL-100-002 also allude to show the 'existing' layout, but at an earlier date of 22 September 2020, there are no plans claiming to show how the premises were divided in 2003.
9. The appellant's statutory declaration states that Megna Joshi and her mother occupied No26B from November 2003 until January 2015. This single period of occupation is more than the required 4 years. However, the appellant's statutory declaration only identifies the provision of additional rooms and bathrooms occurring when the premises was extended following the 2002 PP. There is nothing to show how the premises was subdivided or to show if or when additional cooking facilities were provided. The appellant's evidence relating to how the first floor accommodation was used as a single dwellinghouse during Megna Joshi and her mother's occupation is therefore imprecise and ambiguous.

10. The appellant's recollection of the occupation of No26A is less precise than that of No26B. Her statutory declaration states No26A was occupied for a similar period to No26B by various residents, but no indication of the dates or periods of their occupation is provided. Furthermore, there is nothing to show precisely when No26A was separated from the remainder of the premises, or if and when cooking facilities were first installed. The appellant's evidence relating to the use of No26A as a single dwellinghouse, without significant interruption, between November 2003 and January 2015 therefore lacks precision and is ambiguous.
11. The appellant's statutory declaration also refers to No26A and No26B being rented through Airbnb and a spreadsheet showing bookings is provided. Airbnb's email, dated 23 April 2021, confirms that their records show that No26B was first listed as a '*Beautiful 1 Bed Apartment*' on 19 December 2015 and No26A was first listed as a '*Comfortable and charming flat*' on 13 November 2016. The appellant's Airbnb bookings spreadsheet shows that No26B was occupied intermittently from 27 April 2016 until 9 April 2017, and No26A was occupied intermittently from 25 November 2016 until 3 April 2017. Airbnb also confirm that listings for No26A and No26B were removed on 5 April 2017.
12. No information is provided to show how the premises was used between January 2015 and December 2015/November 2016. The Airbnb email refers to the premises including '*2 separate dwellings...26A and B*' and it would therefore be reasonable to conclude that the premises had ceased to be used as a single dwellinghouse on or around 19 December 2015. What use the premises was put to on or around December 2015 however remains unclear as there is nothing to show what facilities were provided within No26A and No26B at that time. Furthermore, it is commonly accepted that the transient pattern of occupation associated with the Airbnb temporary sleeping accommodation and short-term letting, while of a residential nature, is materially different to the occupation of a dwellinghouse by a single household and such a use would not generally fall within Use Class C3: dwellinghouses¹. It is therefore reasonable to conclude that the Airbnb use of the premises would represent a mixed use, and therefore another chapter in the premise's planning history.
13. An application for a house in multiple occupation licence (HMO Licence) was submitted in December 2016. The HMO Licence form, completed by the appellant, claims the premises is a semi-detached, shared house containing 10 habitable rooms. It also claims the HMO to be occupied by 8 people. The available accommodation is shown to consist of 2 en-suite bedrooms, 1 bedroom with a kitchen, and 2 further bedrooms. Shared facilities include kitchen/diner, living room and 2 bathrooms on the ground floor with a further kitchen on the first floor. This is the only document to refer to kitchen facilities, but their descriptions do not show them to be located within 3 separate flats.
14. Full names of the occupiers are not provided but, by cross referencing the first names against other evidence provided, it is reasonable to conclude that 6 of the 8 residents of the premises were the appellant, her husband, her 2 daughters, and Kiren and Husam Azam, who are also claimed to occupy No26A during a later period. The other 2 residents, Mateah and Alannah, are not referenced elsewhere by the appellant. The 4 non-family residents are shown

¹ Town and Country Planning (Use Classes) Order 1987 as amended

to occupy the premises at a time when parts of the building were rented out for Airbnb purposes, according to the appellant's bookings spreadsheet. This document provides uncertainty as to the use of the premises in December 2016.

15. No reference is made to the HMO Licence in the appellant's statutory declaration. In their final comments, the appellant suggests that the Council should have provided details of why the HMO licence application was made and details of how the premises were used after the date of the application. These are matters for the appellant to address, and the provision of this information could have provided greater certainty as to what use the premises were being put to in December 2016.
16. A retrospective application for the conversion of a single dwellinghouse into 3 flats, made on 12 October 2020, states that the conversion works to 3 flats started on 1 October 2015 and were completed by 1 December 2015. The form also confirms that one 3 bedroomed flat and 2 x one bedroomed flats were created. This application was made on behalf of the appellant and the information contained within it conflicts with that contained in the appellant's statutory declaration and that set out by the appellant in the HMO licence form.
17. Having regard to all the above, there is no precise and unambiguous evidence to show, on the balance of probability, that the premises had been converted into 3 self-contained flats between 2003 and 5 April 2017, when the Airbnb use is said to have ended.

Occupation of No26A after 5 April 2017

18. The appellant's statutory declaration states that Kiren and Husam Azam took up occupation of No26A on the 6 April 2017. This would coincide with the cessation of use as Airbnb accommodation. The appellant's email dated 11 June 2018, states that the Azams' length of tenancy *'thus far is 14 months'*. While this puts the beginning of their tenancy on or around 18 April 2017, it does not show when they took up occupation. Furthermore, the appellant's email states they were residing at *'26 Lyon Park Avenue'*. NHS documentation to Kiren Azam, dated 16 March 2018, is also addressed to *'26 Lyon Park Avenue'*. An email to Kiren Azam, dated 4 February 2018, does however state a delivery address of *'26 Flat A Lyon Park Avenue'*.
19. As noted above, the HMO Licence application identified Kiren and Husam as tenants of *'26 Lyon Park Avenue'* in December 2016. Given the limited information relating to the Azams' occupation of No26A, as opposed to that suggesting they lived at *'26 Lyon Park Avenue'*, the date upon which their occupation of No26A commenced has not been demonstrated with precision. Little weight can therefore be given to the Azams' claimed occupation of No26A from 6 April 2017.
20. The appellant confirms that the Energy Performance Certificate (EPC) was issued without its author having visited the premises because *'it was already on their system'*. The EPC refers to a semi-detached house of 155 square metres in floor area, which relates to the whole premises. No reference is made to its subdivision into flats, and no date is provided as to when the premises were first registered on Stroma Certifications Ltd's system. While the appellant claims that this EPC has been used to certify No26A, the EPC provides no certainty as to the use of the premises on or up to 26 July 2018.

21. Evidence relating to Aston Baretto's and Angela Fernandez's occupation of No26A shows that their tenancy commenced on 26 July 2018. Further evidence, in the form of tenants' statutory declarations, bank statements and electricity bills, support the appellant's claim that No26A was occupied by a succession of residents from 26 July 2018 without significant interruption. There is nothing to cast doubt on this more recent evidence and I give it significant weight.

Occupation of No26B after 5 April 2017

22. The Airbnb spreadsheet shows overlap between Irfan Rao's tenancy of No26B, which the appellant claims began in February 2017, and the bookings listed for No26B into April 2017. The tenancy agreement for Irfan Rao (for the period of 10 February 2017 to 10 February 2018) lists the premises as '*26 Lyon Park Avenue*' and further describes it as relating to a '*Fully furnished, one-bedroom in detached home: kitchen/dining room, spacious lounge, downstairs cloakroom WC and family bathroom, parking and garden*'. This does not provide an accurate description of No26B.
23. Irfan Rao's mobile phone bill dated 26 July 2018 has his address as '*Flat B, 26 Lyon Park Avenue*', whereas his mobile phone bill dated 26 December 2018 has his address as '*Flat 26, 26 Lyon Park Road*'. Both bills were issued by Virgin Media only some 3 months apart, but no explanation is given for their use of an incorrect postal address on the latter bill.
24. The 'Confirmation of Voter Registration 2021' document, dated 6 May 2021, has the appellant, Juliet Coutinho, Allwyn De Souza and Irfan Rao registered at '*26 Lyon Park Road*'. Juliet Coutinho and Allwyn De Souza are however claimed to have been occupying No26B on this date. Furthermore, No26A was claimed to be occupied by Vitus Carvalho and Sybil Ataide on this date and Irfan Rao is claimed to have left the premises by February 2021, at the latest. This document provides uncertainty as to who was residing at the property in May 2021, undermining the credibility of and weight that can be given to other evidence provided.
25. The Safely Insured letter dated 13 May 2019 is addressed to Irfan Rao at Flat B, 26 Lyon Park Road. While this coincides with the appellant's occupation timeline, it conflicts with Irfan Rao's evidence. Irfan Rao's bank statement for the period 15 February 2017 to 14 February 2018 and his payslip dated 29 February 2020 are again addressed to '*26 Lyon Park Road*'. Irfan Rao's driving licence confirms his address as '*26 Lyon Park Avenue*'.
26. Furthermore, Irfan Rao's 'Confirmation of Residence' document, dated 21 August 2021, states that he '*has been living uninterruptedly on my own at 26A (downstairs flat)...from February 2017 up until February 2021*'. It would be reasonable to expect Irfan Rao to know where he had lived, and he clarifies that this was downstairs. This document provides uncertainty to the credibility of other evidence provided relating to where Irfan Rao lived.
27. Bank statements provided by the appellant show payments received from Irfan Rao from 30 January 2018 until 28 June 2019. The payments are not made on any regular day of the month nor are they for consistent amounts. None of the amounts paid correspond with the monthly rental payment specified in the tenancy agreement provided. While Irfan Rao may well have lived at the premises, the evidence is not clear as to where within the premises

he resided; whether it was No26A, No26B or a bedroom with shared facilities within 26 Lyon Park Avenue.

28. Juliet Coutinho in her statutory declaration states that her occupation of No26B with Allwyn De Souza occurred from 4 June 2019 until 11 July 2021. The tenancy agreement claiming to relate to this occupation does not specify an address, nor is it dated. The 'Inventory of Furniture, Contents and Fixtures and Fittings at the Property' document is however dated 4 June 2019. That inventory includes several items of furniture and a fridge freezer, it does not provide any details of washing or cooking facilities. Bank statements for these 2 residents cite their address as '26 Lyon Park Avenue'. These documents do not specifically contradict Juliet Coutinho's version of events, and they do not lessen the weight I give to Juliet Coutinho's statutory declaration.
29. Further occupation of No26B is confirmed as being by Vitus Carvalho and Sybil Ataide from 26 July 2021 until at least 5 August 2022, when he signed his statutory declaration. Sybil Ataide's payslips along with credit card statements, Vitus Carvalho's employment references and electricity bills covering their period of occupation all identify No26B as their address. Other bank statements and Vitus Carvalho's payslips refer only to '26 Lyon Park Avenue', but these documents do not specifically contradict Vitus Carvalho's version of events and I give his statutory declaration significant weight.
30. Having regard to all of the above, the appellant's evidence of conversion to 3 flats and occupation as self-contained flats on or before the material date is imprecise, ambiguous and contradictory. Even if I were to accept Aston Baretto's tenancy agreement as demonstrating that No26A was occupied from 26 July 2018 and that No26B was occupied from 4 June 2019, these dates are after the material date. The appellant has therefore failed to show, on the balance of probability, that No26A and No26B have been occupied as self-contained flats for any continuous 4-year period on or before the material date. The development has not therefore achieved immunity from enforcement action due to the passage of time.
31. For these reasons, the appeal on ground (d) fails.

Appeal on Ground (f)

32. An appeal on this ground is that the steps required to be taken go beyond what is necessary to remedy the breach of planning control or, as the case may be, the injury to amenity. In this case the purpose of the steps required to be taken is to remedy the breach. The cessation of the use of the premises as flats set out in step 1 is therefore necessary.
33. Step 2 requires the removal of all kitchens, en-suite bathrooms/shower rooms and toilets, amongst other things. Step 3 requires the restoration of the *'internal configuration to the layout which existed prior to the unauthorised change of use taking place, as shown in "Plan A" attached to this notice'*. The layout shown in "Plan A" includes a kitchen, 2 bathrooms and 2 en-suite bedrooms. Given that kitchen and bathrooms/shower rooms and toilets would need to be reinstated, elements of step 2 are excessive.
34. As set out above, there is nothing to show that the layout in "Plan A" existed prior to the unauthorised change of use. Step 3 goes beyond what is required to remedy the breach as internal alterations, including relocating the kitchen

and the provision of additional bathrooms/shower rooms and toilets within a single dwellinghouse would not be development.

35. Step 2 shall be varied so as to require the removal of all internal partitions, items, materials and debris associated with the unauthorised change of use, including the removal of all but ONE kitchen, all but TWO bathrooms/shower rooms and all but TWO en-suite bathrooms/shower rooms. This variation would be less onerous for the appellant but would secure the same provision of facilities shown in "Plan A" required by the Council. As such, no injustice would arise.

36. The appeal on ground (f) succeeds to this limited degree.

Overall Conclusion

37. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with variations.

M Madge

INSPECTOR