The Planning Inspectorate

Appeal Decision

Site visit made on 26 January 2023

by Grahame Kean B.A. (Hons), Solicitor HCA

an Inspector appointed by the Secretary of State

Decision date: 03 February 2023

Appeal Ref: APP/T5150/X/22/3311841
Ground Floor Flat, 154a Harlesden Road London NW10 3RE

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Aaron Muorah on behalf of Duchess Place LLP against the decision of London borough of Brent.
- The application Ref 22/3251 dated 20 September 2022 was refused by notice dated 23 November 2022.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended (the Act).
- The development for which a certificate of lawful use or development is sought is: the use of Ground Floor Flat, 154a Harlesden Road London NW10 3RE as a Single Dwelling House.

Formal Decision

1. The appeal is dismissed.

Summary of findings

2. The attempt to preserve the current configuration of the former house at No 154a Harlesden Road as two flats, by common consent effected since 2015, has been a prolonged and tortuous process, and may not yet be over. This appeal may turn out to be another staging post along the way to a definitive resolution of the lawful use of the premises. Be that as it may, I have to the best of my ability applied the facts and had regard to the proper application of relevant legislation and judicial authorities and concluded that the appellant is not entitled to a lawful development certificate (LDC) in the terms applied for.

3. This decision does not pretend to and cannot in any case set any precedent since the interpretation of the law is a matter for the courts. However, in my view the determinative reason for my decision is that in deciding what is lawful development for the purposes of s191(2)(b) of the Act, the Secretary of State's planning practice guidance is not applicable to the present situation where a pre-existing enforcement notice is extant and therefore apt to render the use applied for a contravention of its requirements, since it remains a notice "in force", even although, at the time when the LDC application falls to be considered, it might not have "effect" within the meaning or meanings ascribed to that word elsewhere in the Act.

4. In light of this finding, the fact that the Council has failed to take action under the so-called "second-bite power in s171B(4) by the due date, which would otherwise have preserved its ability to take enforcement action, is not strictly

relevant because the Council needs only to succeed on one of the two sub-paragraphs in s191(2) to defeat a lawfulness application in the current situation.

Costs application

5. An application for costs was made by the appellant against the Council. This application is the subject of a separate Decision.

Procedural matter

6. I conducted a site inspection of the ground floor flat at 154A Harlesden Road (No 154A). No arrangements could be made to view the upper floors, however I saw everything I needed to see to determine the appeal. The inspection was made in the presence of Ms Muorah and the Council's enforcement officer. Ms Muorah not unreasonably refused access to both Council officers who had turned up, saying, which turned out to be true, that the ground floor flat was very small and also that we would have difficulty in all moving around. It was agreed that one only of the officers accompany us inside the premises.

Preliminary matters

Request for abeyance

7. The Council asked for this appeal be put in abeyance pending the outcome of court proceedings by which Ebele Muorah, the current occupant of the ground floor flat at No 154A, seeks to overturn an enforcement notice (EN) requiring, inter alia the cessation of the use of the premises as a flat. She also appears to resist the making of a consent order by which the Council and the Secretary of State (SoS) have agreed that a previous appeal decision granting an LDC for the use of 154A as two flats, was made in error and should be reconsidered.

8. Requests to put appeals in abeyance are generally dealt with by the SoS, not the Inspector. The SoS was not inclined to grant the request. The appeal before me presents a slightly different factual matrix to that in the legal proceedings.

9. It may be said that the present appeal is academic since the EN remains to be considered in the s289 proceedings and if upheld my decision would be of no practical use to the appellant or Ms Muorah. However, I have no way of knowing whether the EN would be upheld or not. In this instance, an LDC delayed may turn out to have been an LDC denied.

Documents supplied in this appeal and late request to amend the application

10. I have considered all the appeal documentation including the Council's statement and appendices and the appellant's statement, appendices thereto, along with the application form, decision notice, and "final comments" (FC). The written representations procedure allows for both parties to submit additional comments by a given deadline after the initial cross-copying of appeal statements. The FCs are not intended to raise new evidence.

11. In the event the Council muddled up their appendices and failed to send most of them with its appeal statement. These were only sent to the appellant after additional comments had already been made on the Council statement and the appellant did on 1 February 2023 make made further comments on the

appendices after receiving them. However, and possibly thinking (perhaps not without some justification) that what is sauce for the goose is sauce for the gander, those comments were accompanied by several additional documents which were said to be "*equally documents that appear not to have been sent with our appeal statement*". The appellant asked for them to be sent to the Council to be commented on.

12. The additional documents are in fact available to, and should be known about by the Council, either as part of the legal proceedings I have referred to, or in the case of the further tenancy agreement and correspondence with the Council, as demonstrated by that very correspondence. In any case the additional tenancy information refers to the upper flat, as to which see below. Accordingly, and since the FC deadline had not passed, I determined that I should accept them and consider them as part of the appeal submissions, but there has been no need to seek further comments of the Council because the Council will not thereby have been prejudiced.

13. On 2 February 2023 the Council produced its FC, being the last day before the deadline, together with several documents from Companies House and Ms Muorah's application to the High Court dated 20 January 2013. The application and attachments amounted to 194 pages. It was quite unnecessary for the Council to produce this in unexpurgated form for the purpose of this appeal, as a large part of it is irrelevant to the matters to be determined here, and in any event, there is needless repetition as many documents were already submitted.

14. Moreover, the FC have clearly not been checked, Ms Muorah is continually referred to as Abella Moore, which I am sure was not calculated to cause distress but it is certainly capable of doing so, especially considering the assiduous attention paid by her to detail, for example in the documents for the legal proceedings which the Council sees fit to duplicate in the FC. I have disregarded new information in the Council's FC.

Identity of appellant in previous appeals and appellant in current appeal

15. The appeal is brought by Aaron Muorah of Duchess Place LLP to which I understand the subject premises were recently transferred. He is the father of Ms Muorah who has brought the court proceedings in respect of other appeals concerning the property, to which I shall have to refer in due course.

16. I am satisfied from the correspondence that the entity on behalf of which Mr Muorah applied for the LDC, and has now appealed, is Duchess Place LLP whose assets are understood to include 154A, whether owned legally or beneficially.

The property subject of previous appeals and property subject to this appeal

17. The EN appealed against alleged the material change of use of the premises (the building known as 154A) from one to two dwellings. Mr Muorah takes a point on this, saying, which I find to be correct, that the current application and appeal is made strictly in relation to one of the two flats that were created in September 2015, namely the ground floor flat. However, although the EN covered the MCU of the whole building it is incorrect to state there were no prior LDC application or high court appeals related to the ground floor flat. To the contrary, the EN would be apt to secure its conversion back into a single dwelling together with the upstairs accommodation, just as the LDC might to

enable the self-contained ground floor flat use to continue. There is nothing in this preliminary point and it is a distraction.

18. Similarly, the appeal statement throughout differentiates the "freehold" property from the ground floor flat, whereas perhaps the meaningful distinction is between the use of the whole building (154A) and the use of the ground floor. Mr Muorah may well be right in that there is no postal address save for Ground Floor Flat, 154A, and First Floor Flat, 154A. Again, this is a distraction.

The certified use as applied for

19. The application form gave as the existing use "Use of C3 Dwelling house as Flats" and described the site location as "Ground Floor Flat, 154a Harlesden Road London NW10 3RE and First Floor Flat, 154a Harlesden Road".

20. The Council queried discrepancies in descriptions of the use. It was clarified that only access to the ground floor flat was obtainable at this time and the appellant said "*we…therefore only seek a lawful development certificate for the property we have access to which is the ground floor flat".*

21. The appeal form gives the actual use of the site at the time of application as "Use of Dwelling house as two flats"; the appellant as Mr Aaron Muorah of Duchess Place Ltd [sic]; and the existing use in respect of which the LDC is sought, as "existing ground floor flat". The appellant also later stated "*the Certificate of Lawful Development is for the use of Ground Floor Flat, 154a Harlesden Road London NW10 3RE as a Single Dwelling House*" (email 29.9.2022, circa p.25, Council statement/appendices). I have used this later modified description as the definitive application in the banner heading above.

22. Having gone to considerable lengths to explain the position (which is entirely understandable) the appellant then unfortunately sought to change the application to include the use of the first floor flat "*which is the area Ms Muorah occupied for over a decade prior to her being forced to move out to comply with the terms of the defective enforcement notice*." He did this, because the general comment in Inspector Perrins' DL (Council appendix 15) to the effect that sometimes a site visit is unnecessary in LDC appeals, attracted his attention late in the day (but that is not the appellant's fault).

23. Various reasons had been given for the upstairs tenant being unable to afford access. The appellant then adds "*we could possibly motivate a viewing within [the tenant's] demise when next his lease comes up for renewal for a third year*." Noting the appellant's willingness to cooperate (the upper floor flat could then be visited, it seems, as soon as August 2023), and appreciating that the appellant might want to canvass its inclusion without a site visit even at this late stage, it would not be appropriate in this case to include the upper floor flat in the application without seeing inside it.

Nullity argument

24. The appellant claims the EN is a nullity, seemingly because it is "*defective with nothing within it – any longer to enforce against*." It is a relevant point to argue as, if there were no EN there would be no impediment to granting an LDC. The appellant seems to adopt the phraseology used by his daughter ("*there is nothing left for to be done on the Enforcement Notice appeal*") in the submitted extract from the 25 May 2022 hearing transcript (page 40/G). Deputy High Court Judge Neil Cameron KC was there careful to take time to understand Ms

Muorah's position. In my view the appellants then, and now focus too much on the requirement to remove certain physical items. In its perilous journey through the appellate processes, the EN has certainly undergone revision but there is much that is left of it; a fundamental requirement remains, namely (and in this respect it is capable of applying severally to the ground floor flat as much as it applies jointly to the building) to:

"*Cease the use of the premises as flats*" (my emphasis).

25. On 10 December 2021, I note that the Deputy High Court Judge refused Ms Muorah's application to rely on certain grounds of appeal, including a nullity argument. Secondly, as appears from the SoS's skeleton argument in a combined hearing last year for the challenges to the Sherratt DL and the consent order promoted by the Council/SoS on the Perkins DL, the EN (as amended successively by Inspectors Braithwaite and Sherratt) is clear as to what the development enforced against is, - the change of the property to two separate dwellings, - and the steps required to achieve that.

26. My observations derive from material supplied by the appellant himself in the appendices to his own statement. Nevertheless, considering these matters myself and having regard to the discussion in *Oates v SSCLG [2017] EWHC 2716 (Admin),* I do not consider the EN is a nullity. It is, at the very least, an "extant" notice.

Legal framework

27. The planning merits of the use are irrelevant in an LDC appeal. The decision is made on the facts, relevant law and judicial authority. If the Council has no evidence itself, or from others, to contradict or make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.

28. By s55(3) of the Act, for the purposes of s55, which deals with the meaning of "development":

"(a) 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 of each part of it which is so used."

29. Where s55(3)(a) is engaged the 4-year rule applies to the change of use, by dint of s171B(2) which states:

"Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach."

30. By s191(2) of the 1990 Act uses and operations are lawful at any time if no enforcement action may then be taken in respect of them, because they did not involve development or require planning permission, or because the time for enforcement action has expired or for any other reason. The use must not contravene the requirements of any enforcement notice then "in force". I shall return to this matter in more detail.

31. On appeal under s195 of the 1990 Act the overriding issue, taking into account but ultimately irrespective of the reasons of the Council, is whether the refusal of the application would have been well-founded under s195(2) and (3).

32. By s191(6), the lawfulness of any use for which an LDC is in force under s191 shall be conclusively presumed. However, it only certifies lawfulness on the certified date. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

33. The time for taking enforcement action would normally expire, in the case of a MCU of a building to use as a single dwellinghouse (which can include a flat) after the end of the period of four years beginning with the date of the breach. Once established, the use must subsist legally at the time of any application for a LDC, although not necessarily as such provided it is not lost through abandonment, change in the planning unit and so forth.

Planning history

34. For the purposes of this appeal the relevant planning history is as follows.

35. On 24 July 2017 the Council issued the EN alleging a material change of use (MCU) of the premises (No 154A which was built as a bookend 2½/3 storey end terrace house) from one to two dwellings. It required (among other things) the cessation of "use of the premises as flats". The EN was appealed but was upheld on 22 August 2019 in relation to the MCU from one to two dwellings.

36. On 7 November 2019 an application for an LDC was made to certify as a lawful existing use, the "change of a dwelling house into two flats". It was refused on grounds that there was a contravention of the EN requirements (as above). An appeal was made which was allowed on 10 September 2020, and an LDC was granted for "change of use of dwelling house into two flats" at "Land at 154A Harlesden Road", referred to elsewhere as the Perkins decision letter (DL).

37. The SoS has acknowledged that the Perkins DL was in error as no account was taken of s191(2)(a) whereby the 4-year period from the date of issue of the EN had not expired by the time of the application for the LDC. Therefore s171B(2) did not then prevent the Council from taking further enforcement action (courtesy of the second-bite power in s171B(4)). The Deputy High Court Judge, Neil Cameron KC confirmed (paragraph 49, Ref CO/3838/2020), that at the time of the LDC application "no enforcement action may then be taken" under s191(2)(a). If account were taken of this, he said, the decision almost certainly would have been different. The appeal was remitted to the SoS to reconsider.

38. Given that the date to consider in determining if enforcement action can be taken is the date when the LDC application is made, matters are somewhat different here. The date of the currently appealed LDC application, 20 September 2022 has now to be considered, and it is clear that on that date, the 4-year window from 24 July 2017 for exercising the second-bite power, had expired by then. Indeed, the Council would or should have been aware it had expired, during the somewhat ambulatory pace of the legal proceedings.

39. At any rate, the EN appeal decision of 11 August 2019 (the Braithwaite DL) was also successfully challenged. On 17 January 2020 the High Court remitted this appeal to the SoS. The error was summarised by David Elvin KC in his judgement *Muorah v SSHCLG [2020] EWHC 649 (Admin)*, at paragraph 31, as

an unintended failure to consider correcting the EN to remove the requirement for its occupation by a single household. (This would have been at odds with permitted development rights available to the owner to change the dwelling's use to a house in multiple occupation (HMO) which of course, could entail occupation by more than one household).

40. Next up, Inspector Sherratt dismissed the remitted appeal by DL on 10 September 2020 and upheld the EN. When an EN is upheld on appeal, the compliance period is taken to start immediately so it must then come into effect unless the decision letter is challenged within 28 days by application to the High Court under s289. Ms Muorah was dissatisfied with the decision and her s289 challenge is currently scheduled to be heard on 8 February 2023, along with resolution of the consent order for the s288 claim. She was satisfied with the costs decision issued by Inspector Sherratt which awarded costs against the Council (as it was the Council who had originally, and excessively, required cessation of occupation of the building by more than one household).

The application, refusal and grounds of appeal

41. The application form stated that the use in respect of which the LDC was sought "*commenced 7 years ago from 25 September 2015 when an internal partition was erected within the premises*."

42. The decision refusing the application took no issue with the claim that the premises were partitioned in September 2015, however it stated:

    "the existing use as a self-contained flat is unlawful as it fails to satisfy the requirements of Section 191 of the Town & Country Planning Act 1990 and contravenes the requirements of the Enforcement Notice E/17/0062.

43. The grounds of appeal in the appeal form do perceive that the Council's refusal is based on the existence of an enforcement notice said to be "in force". However the appellant says that the notice is "*invalid <u>despite</u> further being under appeal*" (my emphasis).

44. The grounds are amplified in the appeal statement: because no further enforcement action was taken, whether 4 years from the date the partition was inserted in September 2015 or 4 years from the date when the enforcement notice was issued in July 2017, the appeal should be allowed. The appeal form suggests that since the EN is under appeal, this goes to "nullity", which is really the converse of the point in the appeal form, but it is clearly the appellant's case that the fact of the appeal being outstanding is a reason independently to substantiate the grounds for issuing an LDC.

Main issues and reasons

45. The principal controversial issues are:

    i. Whether ground floor flat is part of a C4 HMO;

    ii. Whether it is sufficient to show that the building has been subdivided and one part only occupied as a dwellinghouse;

    iii. Whether there is 4 years' continued use of the ground floor flat; and

    iv. Application of s191(2)(a) and s191(2)(b).

Whether ground floor flat is part of a C4 HMO

46. Firstly, the Council now appears to assert, based on an alleged ambiguity as to whether the ground floor flat is part of a C4 HMO, that if the ground floor flat is indeed part of a C4 HMO, such a use would be subject to the 10 year rule under s171B(3) (cf *Welwyn Hatfield Borough Council v Secretary of State for Levelling Up, Housing and Communities and Ismail Kabala [2022] EWHC 3175 (Admin))*.

47. In *Kabala* the High Court considered whether a building comprising a mix of self-contained and shared residential accommodation could fall within Class C4 (houses in multiple occupation) of the Town and Country Planning (Use Classes Order) 1987 (*SI 1987/764*). At paragraph 51 of the judgment Timothy Mould KC, sitting as a High Court Judge, held that:

    "…the scope of the use as defined in Use Class C4 is such that it is possible, in principle, for a building to remain in use as a single dwellinghouse falling within the scope of that Use Class, notwithstanding that it includes a mixture of both self-contained and shared residential accommodation. Whether it does so is a question of fact and degree for the decision maker; and if it is found to remain in use as a single dwellinghouse, then subsection 55(3)(a) of the TCPA does not apply."

48. The Braithwaite DL at paragraph 22 explicitly recognised this possibility (although the Council has not drawn attention to it) in stating:

    "The property, if it reverted to its original layout, could be occupied as a 4-bedroom HMO. Occupation of the property <u>on this basis</u> would be similar to the use of the property as two dwellings, <u>a single bedroomed flat and a three bedroomed dwelling which could be occupied by three individuals on an HMO basis</u>."

49. He did not need to mention (although it is inherent in the definition of an HMO) the fact that a building can also meet the definition of an HMO if it meets 'the converted building test' in s254(4) Housing Act 2004. In order to meet that test, the building must, amongst other things, contain one or more units of living accommodation that do not consist of a self-contained flat or flats (<u>whether or not it also contains any such flat or flats</u>).

50. The ground floor flat currently occupied by Ms Muorah is clearly capable of being a dwelling house in its own right. In *Kabala* Inspector Willows merely assumed that since the house in question met the 'converted building test' in s254(4) HA2004, it was correctly to be described as a dwellinghouse now in use as an HMO within Use Class C4, and his findings were upheld.

51. One possible distinguishing feature of such an arrangement that occurs to me, might be the existence of some common parts to a building, for example an internal passageway that leads not only to rooms that constitute shared residential accommodation, but also a door or doors behind which lie self-contained accommodation. But as implied by *Kabala*, there is no hard and fast rule. In that case the self-contained accommodation comprised 4 units which were bedsit rooms, accessed internally from common passageways, and the shared accommodation comprised rooms distributed around the house in which kitchen and bathroom were accessible by other tenants unless kept locked.

52. The arrangements at No 154A are not like that at all. I saw that the ground floor is entirely self-contained, the stairs that once were contained within the ground floor space (see the plan at Appendix 1 of the Council's statement) are now entirely excluded from the ground floor flat which has its own separate entrance to the side of the property. There are no common passageways or accesses, internal or external to the building. This part of the Council's case is somewhat conjectural, and there being no other evidence proffered in support, I find it unlikely as a matter of fact and degree that the subject matter of the appeal, the ground floor flat, has been part of an HMO since sometime after September 2015.

Whether it is insufficient to prove that the house has been subdivided and one part occupied as a dwellinghouse

53. The Council cites *Rajesh Bansal v Secretary of State for Housing, Communities and Local Government, London Borough of Hounslow [2021] EWHC 1604 (Admin)*. This case considered the link between the creation of a dwelling and its "use" as such in order to establish a MCU for the 4-year immunity period under s171B.

54. In *Bansal* however, the Inspector was dealing with the enforcement notice itself that alleged the MCU of a dwelling into use as two flats. He was thus entitled to require it to be established that the flats were separately occupied as two dwelling houses throughout that time, in order to demonstrate the ongoing breach of planning control by using the property as two dwelling houses instead of one. In the present appeal however, it is an LDC that is applied for and only in respect of the ground floor flat which is in itself a dwelling. It is that part only that is the subject of the LDC and therefore *Bansal* is not strictly relevant to the situation.

Whether continued use of the subject premises for more than 4 years

55. I first set out the evidence supplied as to several tenancy agreements and related information.

56. The "house/flat share agreement" of 23 August 2015 is for a fixed term of one year from that date until 22 August 2016. It does state that "*the Rooms are part of a house or flat which the Landlord occupies as her home*". In the individual agreement the occupier is the "tenant" and the then landlord Ms Muorah agrees to "let the Room in the Property". Three tenants' signatures appear at the foot of the document, apparently cut and pasted onto it, but I see nothing untoward, it is probably for convenience whether done at the time of the agreement(s) or later for presentation purposes. This may signify an HMO letting as the Council asserts, or not, it is impossible to tell without more. These tenants gave notice in December 2015 but it is unclear when they left.

57. The next agreement is a shorthold tenancy agreement (AST) clearly relating to "*the flat known as and forming #154a [sic] Harlesden Road*" and consisting of a "*semi furnished <u>ground</u> floor property with shared garden*". It is dated 29 May 2016 and the term commences from then to 28 November 2016. On page 2 it is acknowledged that another person may also live in the property and after their name there is the date in parentheses: *"(October 2015)"* indicating the date from which that person's occupation commenced. The surname is the same as the named tenant, they are probably both related but there appears to be no connection with the three previous occupants.

58. The Council supplied a statutory declaration of 15 June 2018 made by Ms Muorah. It describes the use of 154A but does not conflict in any material way with what has been understood to be the agreed position that the MCU of 154A into 2 dwellings, that included the use of the ground floor as a flat, was substantially completed by the end of September 2015. She does however affirm (this was in June 2018) that:

    "I am extensively out of the country and invariably not in my part of the premises – my "flat" which is often left vacant."

59. She continues in the declaration clearly to differentiate between the number of households in the property (by which she means the whole building) as one, when she is away on business, and "*while being marketed to [a] person willing to occupy the property despite the enforcement notice*". She is accustomed to longer than normal voids, where the studio is "*normally empty while being actively marketed*." Plainly she regarded the downstairs accommodation as a "flat" even before it was partitioned (statutory declaration, page 5/8).

60. The next agreement, an AST is dated 28 July 2018, relates also to the ground floor flat at 154A Harlesden Road, is for a period 31 July 2018 to 30 January 2019, and contains a note that the tenant accepts the property is subject to enforcement action which may result in possession being sought. Subsequent correspondence between Ms Muorah and the Council's homelessness prevention officer, indicates the tenant was probably still there in March 2019 and possibly for a while thereafter. A further agreement, also an AST, relates to the subject premises, is for a fixed term of 2 years from 1 May 2020, and at the end lists a named tenant and a named "permitted occupier" both apparently with possessory/occupation rights for that 2-year period.

<u>Analysis</u>

61. The relevant period to be considered here is any 4-year period when the use has continued, before the LDC application made on 20 September 2022, provided the use subsists in law immediately prior to the application. The Council asserts a failure on the part of the appellant to provide sufficiently precise and unambiguous evidence of the continued use of the ground floor as a flat for more than 4 years.

62. It was undisputed that the change of use from a single dwellinghouse to two flats occurred in September 2015, this was the Council's case as noted by the SoS and apparently accepted by the Deputy High Court Judge in paragraph 56 of his decision in *London Borough of Brent v Secretary of State for Housing Communities and Local Government, Ebele Muorah [2022] EWHC 1875 (Admin).*

63. Moreover, although the Perkins DL was remitted by the High Court it is established that some part of a remitted DL may potentially be a material consideration in future appeals. It is self-evidently important for the purpose of securing public confidence in the operation of the development management regime, that like cases should be decided in a like manner which justifies the treatment of previous decisions as potentially material. It was found in that DL that (paragraph 4) "*the appellant states the property has been in use as two flats since September 2015 and that a partition was erected at the same time. The Council's evidence does not dispute this claim*."

64. If one accepts that the 4-year period had been established by September 2019, which has indeed been the tenor of the evidence given in the proceedings related to the previous appeals, then (putting aside the EN for the moment) it is less easy to regard subsequent gaps in actual occupation or use as significant enough to affect its lawful continuing use.

65. Why the Council has not referred to its previous concession may be guessed at. It *may* not be able to make as much use of the gaps between the tenancy agreements now submitted, if it admitted in this appeal that the 4-year period had been established by September 2019.

66. Certainly, when considering what 4-year period of continued use there is prior to September 2022, there are gaps between the tenancy periods, the most notable being that before 1 May 2020 (although it is entirely possible that the subject premises were vacated later than March 2019). As to the garden which was shared with the upstairs accommodation pursuant to the tenancy agreement of 29 May 2016, this does not mean the ground floor flat was not then self-contained and occupied as such. There is some ambiguity over the exact occupation arrangements in or around September 2015, viz a viz the later occupation of the second named tenant from October 2015 in the subsequent AST which does relate exclusively to the ground floor flat. That ambiguity causes me some concern, as does the significant gap in evidence of a tenancy agreement, or other robust evidence sufficient to demonstrate continued use in the several months prior to the tenancy begun in May 2020.

67. If the appeal turned on this issue alone, I would consider it unlikely on the present evidence, whatever concessions may or may not have been made in satellite litigation, that the premises have continued in residential use as a self-contained ground floor flat since September 2015. Looking at the matter in the round, during the gaps in the tenancies, it is likely that Ms Muorah has always had control of the premises when they were not actually let, whether she lived there herself, or was away for shorter periods or for longer periods when ostensibly she attempted to let it to a suitable tenant.

68. Latterly she is said to be in occupation again herself, although as I observed on my site inspection, there was a noticeable lack of any personal items in the premises. The Council suggests (FC, paragraph 13) that she does not live there permanently, however, it is established that for a change of use to a single dwelling house under s171B(2) the use need not be carried on by someone whose only or main residence is that dwelling house. It is also established that regard should be had, to an appropriate degree in each case, to both the physical state of the premises and their user, actual, intended and/or attempted.

69. Of particular concern is the lack of robust evidence as to continued use from the end of the occupation pursuant to the tenancy dated 28 July 2018, and the start of the tenancy agreement dated 1 May 2020. If the premises were being actively marketed during this time it is uncertain why they could not have been let sooner, even appreciating Ms Muorah's ongoing concern to obtain the ideal tenant, and there is no information which persuades me that during this time Ms Muorah or other person was clearly resident there. Also, the 4-year period from September 2015 to September 2019 is called into question by the lack of clear evidence of continued use in the remaining months from March 2019.

70. When the chronology and the appellant's and Ms Muorah's intentions are objectively assessed, together with the former use of the building, its physical state and actual use at the relevant date, then – and in any case apart from the effect of the EN considered below - the continued use of the ground floor flat as a matter of fact and degree has not been affirmatively established on the balance of probability in any 4-year period prior to the current LDC application date, on the information available to me.

71. However, such use as there has been, has taken place during the currency, if that is not too loaded a word, of the EN, a matter I consider next.

Application of s191(2)(a) and s191(2)(b)

72. When this appeal was received by The Planning Inspectorate (PINS) it was noticed that there was an extant EN on the appeal site which appeared to relate to the same development. Comments were sought, if the breach cited in the notice and the development in the LDC application were the same, as to what would be the possible effect of s191 on the appeal.

73. The Council was clear that the EN required cessation of the use of the premises as flats, and it was in force, therefore the existing use of a flat cannot be lawful because it constitutes a contravention of that requirement (s191(2)(b)). It acknowledged that the EN was not in effect, but, contrary to the appellant's submission, the outstanding appeal against the EN served only to reinforce the fact that it was in force. If, as the appellant suggested, the EN were a nullity there could be no notice to appeal.

74. In his FC, the appellant is clearly alive to the second-bite power but says, correctly, that the further action must be within 4 years of the original taking of enforcement action and as enforcement action was taken on 24 July 2017 the date by which any further enforcement action ought to have been taken was by 24 July 2021, so the Council is now statute-barred.

75. The Council responds in effect by saying there has been no need to use the second bite provisions to preserve its ability to take further enforcement action. Of course, as Dr Bowes appears to accept on behalf of the Council in the EN proceedings (transcript p11/B) there could come a time when the second bite provision power, if not exercised at the right time, could prove fatal to meeting the requirements of s191(2)(a).

76. I do not think that any wider scope is given to the phrase "time for taking enforcement action has expired" The wording is apparently taken to be strictly connected to: firstly, the definition of enforcement action and the relevant part of s171A(2) which states "(a) *the issue of an enforcement notice…constitutes taking enforcement action*"; and secondly, the fact that the "*time for taking enforcement action*" must relate to the "<u>time limits</u>" which is the sub-heading of s 171B which speaks to when "*enforcement action may be taken*".

77. Where there is no appeal, or no court order under s289(4A), the EN takes effect on the date specified within it, see s173 (8). At the time of the LDC application (20 September 2022), the appellant would argue that the use did not constitute a breach of an enforcement notice *"then in force"* for the purpose of s191(2)(b). This is because on an appeal brought under s174, the EN shall be of no effect pending the final determination or withdrawal of the appeal.

78. At page 14/E of the transcript in *Brent* supplied to me by the appellant Dr Bowes for the Council said his client had until 24 July 2021 to take advantage of the second bite provisions "*if it needed to*". The SoS's view in the Planning Practice Guidance (PPG), published on 6 March 2014, is that an EN is not to be treated as in force whilst it is appealed. Mr Bowes regarded that (p15/A) as "*possibly a submission for another day as to whether that is quite right or not*".

79. If the PPG guidance cannot sensibly be applied to the current situation, and the EN whilst not in effect is still in force for the purposes of s191(2)(b), that would deny Mr Muorah any established immunity which he is otherwise entitled to by virtue of the Council's failure to utilise the second-bite power.

80. The SoS's view as expressed in PPG, Paragraph: 003 Reference ID: 17c-003-20140306, is:

    How is lawfulness defined in relation to lawful development certificates?

    The statutory framework covering "lawfulness" for lawful development certificates is set out in section 191(2) of the Act. In summary, lawful development is development against which no enforcement action may be taken and where no enforcement notice is in force, or, for which planning permission is not required.

    An enforcement notice is not in force where an enforcement appeal is outstanding or an appeal has been upheld and the decision has been remitted to the Secretary of State for redetermination, but that redetermination is still outstanding.

81. When the PPG was first launched it was accompanied by a Ministerial Statement including a list of the previous planning guidance cancelled. This included what some still regard as the much-lamented demise of Circular 10/97 (Enforcing planning control: legislative provisions and procedural requirements, Annex 2: Enforcement notices and appeals). Annex 2, "Finality of appeal decision", states:

    Where an enforcement notice has yet to take effect, because an appeal against it is still outstanding, it is possible that it would not be regarded as being "in force" for the purposes of section 191(2)(b) and (3)(b).

82. To change the settled position would involve recognising that "in force" and "in effect" have two very different meanings. This is urged on me by the Council who cites various appeal decisions, although it is said there is no judicial authority directly on point. Not unnaturally, the decisions pre-date the PPG but they contain relevant points, especially in the Perrins DL (Appendix 15).

83. Analogies could be considered with legislation. I note that the UK Parliament web site states:

    "Although a bill, draft measure or statutory instrument may become law on a particular day, it may not have legal effect until sometime later. In these cases, the law does not operate in practice until it 'comes into force' (also called 'coming into effect')"

    However, I do not think the comparison with legislation is entirely apposite. What is the mischief that s191(2)(b) is aimed at? It is already enacted (sub-

paragraph (a)) that one hurdle to overcome to establish lawfulness is to prove that no enforcement action may then be taken for reasons that broadly equate to a putative success on grounds (c) or (d). Once that obtains, why add a further requirement?

84. To my mind, s191(2) when it refers to a contravention of a requirement of a notice, does not imply that something must have occurred in fact that gives rise to immediate liability for a breach, but rather that the use must yet have the potential to render: either the owner "in breach" – cf s179(2) - of a notice's requirement(s), or to attach liability to someone with control over activities by who "contravenes" a duty not to carry on any activity required to cease (s179(4) and (5). These are the penal provisions. The drafting does not attempt a precise alignment of words and phrases, or with s191(2)(b). Where the word "contravention" occurs in s191(2) therefore, it surely must be understood as applying more generally to a potentially enforceable contravention, whether or not the notice is actually then "in effect" or "has effect" for the purposes of the Act.

85. I note that one or two of the cases cited in this appeal were considered in *The Queen on the application of Ocado Retail Limited v London Borough of Islington v Telereal Trillium Limited, Concerned Residents of Tufnell Park [2021] EWHC 1509 (Admin),* Holgate J analysed the way the 1990 Act worked in relation to several LDC matters.

86. The case turned on a breach of a condition, but at paragraph 146 Holgate J held:

"Section 191(2)(b) and s.191(3)(b) apply equally to uses, operations and breaches of conditions without drawing any material distinction between them. Third, they operate by making it clear that a lawful right does not accrue upon the expiration of a time limit in s.171B for taking enforcement action if the use, operation, or breach of condition in question contravenes the requirements of an enforcement notice then in force. <u>In other words, Parliament did not wish an extant enforcement notice</u> (or breach of condition notice) <u>to be negated by the subsequent application of a time limit in s.171B to something which contravened the requirements of that notice"</u> (my emphasis).

87. In *Brent* it was said that "*There is currently no judicial authority on the question whether a LDC granted in these circumstances would be a defence against an enforcement notice issued before, but coming into effect after, the date specified in that LDC*". It would seem nonetheless that Holgate J was expressly referring to the operation of sub-paragraph (b) when he ascertained the intention of Parliament with regard to an extant notice in precisely these circumstances. I appreciate that the appellant may say such a comment was not strictly necessary to the decision and is therefore not binding, but as obiter dicta from a High Court Judge it seems persuasive.

88. Holgate J added that "*the position would be different if at the time the relevant period in s.171B expired the notice had ceased to be in force, e.g. because it had been withdrawn (s.173A of TCPA 1990) or quashed*." Those, then, are the circumstances as it seems to me, that constitute the characteristics of an enforcement notice "in force" for the purposes of s191(2)(b), ie a notice that is in existence, is not withdrawn or otherwise quashed, declared invalid or a nullity.

89. Therefore, essentially, I agree with the Council's reasons in this matter as set out in its statement. In my view the correct application of 191(2) is that although the opportunity for a second-bite notice had passed, the MCU even if it is otherwise established through 4 years' continued use, - which on the current information available to me it is not - does not entitle the appellant to a LDC because that use would be a contravention of an enforcement notice in force at the time of the application, ie the EN issued on 24 July 2017.

Conclusion

90. The onus is on the appellant to discharge the burden of proof on the balance of probability to demonstrate that the use is lawful, which despite its sincere and genuine efforts, it has failed to do.

91. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a dwelling house was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Grahame Kean

INSPECTOR