



Neutral Citation Number: [2023] EWHC 911 (Admin)

Case No: CO/736/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 April 2023

Before :

HHJ KAREN WALDEN-SMITH SITTING AS A JUDGE OF THE HIGH COURT

Between :

- (1) MRS ESTHER GURVITS**
- (2) MR JOSEPH GURVITS**

Appellants

- and -

- (1) SECRETARY OF STATE FOR
LEVELLING UP, HOUSING AND
COMMUNITIES**
- (2) THE LONDON BOROUGH OF BARNET**

Respondents

CRAIG HOWELL WILLIAMS KC and BRENDAN BRETT (instructed by **Sonn Macmillan Walker**) for the **Appellants**
MATT LEWIN (instructed by the **Government Legal Department**) for the **Respondents**

Hearing dates: 28 March 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on Tuesday, 25 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ KAREN WALDEN-SMITH SITTING AS A JUDGE OF THE HIGH COURT

HHJ KAREN WALDEN-SMITH:

1. The Appellants, Mr and Mrs Gurvits, seek permission pursuant to the provisions of section 289(6) of the Town and Country Planning Act 1990 (“TCPA 1990”) to bring a challenge pursuant to the provisions of section 289(1) of the TCPA 1990 against the decision of the First Respondent’s Inspector dated 30 January 2023 (“the Decision”).
2. The Decision of the Inspector was to dismiss the Appellants’ appeals under section 174 of the TCPA against an enforcement notice issued on 4 October 2021 by the Second Respondent (“the Enforcement Notice”). The Inspector upheld the Enforcement Notice and introduced some amendments, including the addition of the words “*Permanently remove the internal doors and seal up the existing openings which link the three component buildings.*”
3. The Appellants seek permission on four grounds:

GROUND 1:

- (a) The Inspector failed to have regard to a material consideration, namely the First Appellant’s unchallenged evidence as to the use of the land;
- (b) The Inspector’s finding that each part of the outbuilding was prior to 2017 used solely in connection with one of the three dwellings was irrational as unsupportable on the unchallenged evidence of the Applicant; and/or
- (c) The Inspector failed to give any reasons for not accepting the appellant’s unchallenged evidence on this point.

GROUND 2:

The Inspector took into account an immaterial consideration, namely whether or not operational development fell within or without certain permitted development rights.

GROUND 3:

- (a) The Inspector’s finding that there was harm to neighbouring amenity on the grounds of “noise and disturbance” was irrational as unsupportable on the evidence and submissions from the Second Respondent or local residents; and
- (b) In reaching that finding, the Inspector failed to take into account material considerations, namely the evidence of local residents that no such noise and disturbance was caused by the Appellants’ use of the land; or
- (c) In reaching that finding the Inspector failed to give any reasons for rejecting the evidence of local residents that no such noise and disturbance was caused by the Appellants’ use of the land.

GROUND 4:

The amendment of the notice by the insertion of a new requirement 4 without the removal of requirements 2 and 3 was:

- (a) unlawful applying the principle in Mansi v Elstree RDC (1965) 16 P&CR 153; and/or
 - (b) irrational; or
 - (c) the Inspector failed to give adequate reasons for this course of action.
4. The First Respondent, the Secretary of State contends that there is no arguable error of law in the Inspector's decision and that permission to appeal should be refused. The Second Respondent has not taken an active part in the appeal.

Factual Background

5. The Enforcement Notice alleges a breach of planning control by reason of: *“The making of a material change of use of the outbuilding to the rear to use as an office and associated storage.”* The Enforcement Notice required the following:
1. Cease the use of the building as a commercial office and associated storage.
 2. Permanently remove all kitchen units, sinks, cooking facilities and worktops from the outbuilding.
 3. Permanently remove all toilets from the outbuilding.
6. The outbuilding referred to in the Enforcement Notice is a low-lying structure, in places almost subterranean, which had been constructed over time to the rear of the properties at 46, 48, and 50 Hurstwood Road, London, NW11 0AT.
7. The Appellants occupy 48 Hurstwood Road. This property was purchased by the Appellants as their family home in 1990. In 1999 the Appellants purchased 50 Hurstwood Road as a home for their adult daughter and her children. In 2013, the Appellants purchased 46 Hurstwood Road as a home for their adult son and his family. At the time of the Enforcement Notice, all three properties were owned by the Appellants and occupied either by the Appellants or their children and their respective families.
8. The evidence with respect to the use and development of the outbuildings to the rear of 46, 48 and 50 Hurstwood Road was contained in the proof of evidence of the First Appellant which was the only factual evidence relating to the outbuildings provided for the purpose of the public inquiry.
9. It has been accepted by both parties that it was common ground before the Inspector that the outbuilding had been built in stages. The first part of the outbuilding was created in 1998 on land in the rear garden of 48 Hurstwood Road, which was the home of the First and Second Appellants. The purpose of the outbuilding was to provide an office and storage for filing for the First Appellant's work running the property management company, Eagerstates Limited. The outbuilding replaced a pre-existing bomb shelter and was needed in order to provide additional office space as her family had grown and the available space at 48 Hurstwood Road had diminished.
10. The Appellants' son was also working for Eagerstates Limited and in 2013 the second part of the outbuilding was erected immediately adjoining the first on the land to the

rear of 46 Hurstwood Road for the purpose of providing general household storage space and to accommodate the office which also required more filing storage space. The outbuilding was accessible from both 46 and 50 Hurstwood Road, and from a side gate between the properties at 48 and 50 Hurstwood Road.

11. The third part of the outbuilding was constructed to the rear of 50 Hurstwood Road, also adjoining the original outbuilding to the rear of 48 Hurstwood Road, for the purpose “*to accommodate use, the staff, and the filing that was needed for the office and the children*”. The Appellants’ daughter had started working for Eagerstates Limited from 2015. This part of the outbuilding also replaced a pre-existing bunker and was accessible from 46 Hurstwood Road by a staircase and door.
12. At some point the three individually constructed outbuildings were connected with interlinking doors to create a single structure. No rent was paid by Eagerstates Limited for the use of the outbuilding, which was provided gas and electricity from 48 Hurstwood Road, but it had its own telephone line. The Appellants and both their son and daughter were working for Eagerstates and the outbuilding was being used, at least in the most part, for office accommodation and associated storage.

The Section 174 Appeal

13. The Appellants appealed under grounds (b), (c), (d) and (f) of section 174(2) of the TCPA and the First Appellant also appealed under ground (a) of section 174(2) of the TCPA.
14. On ground (b) the Appellants submitted that the matters alleged in the Notice had not occurred as a matter of fact and on ground (c) that the matters alleged did not constitute a breach of planning control. The Appellants argued under ground (f) that the steps required by the Notice were excessive and that lesser steps would overcome the objections – the point being made that on-site toilets and kitchen facilities is incidental to the residential use and did not need to be removed and that any breach of planning control arising from the use of the outbuilding as a whole could be remedied by closing the internal access between the buildings.
15. Under ground (a) it was submitted that planning permission should be granted for the matters set out in the notice, the argument being that the use of the outbuilding as offices to carry out any operational or administrative function could be carried out in a residential area without detriment to the area’s amenity.
16. The appeal was heard by the First Respondent’s Inspector at a public inquiry and his Decision was promulgated on 30 January 2023.

Ground 1

17. Ground 1 of the appeal is arguable. The Appellants contend that the Inspector did not have regard to the First Appellant’s unchallenged evidence as to the use of the land, failed to give reasons for not accepting her unchallenged evidence and found that each part of the outbuilding was, prior to 2017, used solely in connection with one of the three dwellings.

18. It is clear that the evidence of the First Appellant provided that the three constituent parts of the outbuilding had been constructed separately between 1999 and 2016 and that they had been lawfully constructed. The Inspector was fully aware of this. It was common ground (as had been accepted by the Appellants subsequent to the oral hearing) that the outbuildings had been constructed as permitted development. However, the Appellants contend that is irrelevant as the Enforcement Notice was with respect to a material change of use rather than operational development. Each constituent part of the outbuilding had been erected for purposes incidental to the enjoyment of the three respective properties.

19. The Inspector's finding in his decision letter set out in paragraph 3 that:

“It is my understanding that before a material change of use to office with associated storage occurred the appeal site was used as three separate outbuildings by the appellants and their family. Each of the component units was constructed under permitted development provisions pursuant to Class E, Part 1, Schedule 2 to the Town and Country Planning (General Permitted Development)(England) Order 2015 (the GDPO). Each outbuilding was used for purposes incidental to the enjoyment of the associated dwelling houses Nos 46 to 50”

reflects the evidence provided in the First Appellant's proof of evidence.

20. However, the following paragraph (paragraph 4) might indicate confusion where it is said that *“sometime after 2017 the appellant's property business expanded and as a consequence the outbuildings were connected to form a single larger office with associated storage. Therefore the office space became no longer incidental to the dwellinghouses, but rather a material change of use had occurred for which planning permission was required”* (emphasis added). Which was then repeated in paragraphs 7 *“before 2017 the separate units were used for purposes incidental to the enjoyment of the dwelling houses”* and paragraph 14 *“...the connection of them has taken the three parts which were comprised within separate dwellinghouses and combined them to form a single new planning unit ...”* and paragraph 17 *“The joining of the three different parts of the outbuilding to form a single office with storage has taken the development outside the scope of permitted development granted by virtue of the provisions of Class E.”*

21. The evidence of the First Appellant was that the first part of the outbuilding was used as an office for the occupation of 48 Hurstwood Road. The second part of the outbuilding was erected in 2013 to the rear of 46 Hurstwood Road and was also used in connection with her occupation of 48 Hurstwood Road and then by the occupants, respectively of 46 and 50 Hurstwood Road when they moved into those properties. The third part of the outbuilding was erected to the rear of 50 Hurstwood Road and used by the occupants of 46, 48 and 50 Hurstwood Road.

22. The Inspector's conclusion that the joining of the three different parts to form a single office with associated storage resulted in a material change of use was the basis for the dismissal of grounds (b), (c) and (d) and Ground 1 is arguable so that permission should be granted pursuant to section 289(6) of the TCPA.

Ground 2

23. Ground 2 is also arguable. It appears from paragraph 17 of the Decision Letter that, having identified three key issues that needed to be determined in order to decide whether a material change of use of the outbuilding had occurred, the Inspector set out his understanding that each part of the outbuilding had been lawfully erected on the basis of Class E of Schedule 1 or Part 1 to the GPDO as the building was “*incidental to the enjoyment of a dwelling house*”.
24. The only matter in the Enforcement Notice was with respect to a material change of use and whether the erection of the outbuilding fell within the parameters of a permitted development right was not relevant to whether there was a breach of planning control by reason of the use of the outbuilding. While the Inspector had properly identified that the key question was whether the making of a material change of use amounted to development, it is arguable that he was taking into account an irrelevant matter which influenced his final decision.
25. While this is not the strongest of points, as the Inspector did identify a number of factors which he determined resulted in a definable change in the character of the use made of the land, it is a properly arguable matter.

Ground 3

26. Under this ground, the Appellants raise three sub-headings that the Inspector’s finding that there was harm to neighbouring amenity on the grounds of “*noise and disturbance*” was irrational. These grounds can be summarised as submissions that the Inspector’s conclusions were unsupportable on the basis of the submissions of local residents; that harm on the grounds of “*noise and disturbance*” failed to take into account the evidence that this was not caused by the Appellants’ use of the land; and failed to give reasons for rejecting the evidence of neighbours that noise and disturbance.
27. Ground 3 is not arguable. The Inspector’s decision with respect to dismissing this ground of appeal against the Enforcement Notice was a reasonable exercise of his planning judgment. There was evidence from a Mr Basil Petrides, living at 58 Hurstwood Road, who provided a sworn affidavit rather than the short letter submissions of other neighbours, stated that there was a “*noticeable change in the volume of traffic and activity in the area*” and that it went from quiet to busy around 2017-18. He said that “*Prior to this period I cannot recall any change in the area and if the appellant was using this space at the rear as their home office then good luck to them. However, working staff operating from there is an entirely different matter.*”
28. The Inspector correctly identified that there were no specific highway issues raised by the local authority but, there was concern about “*noise and disturbance associated with vehicle and other movements*”. That was an entirely appropriate conclusion for the Inspector to reach on the basis of the evidence before him and was not irrational.
29. The “*parking stress*” identified by the Inspector in paragraph 34 of his Decision Letter, was an accurate description of a repeated concern of the occupants of neighbouring properties and something the Inspector was entitled to take into account.

30. The Inspector was not obliged to set out in the Decision Letter a record of those neighbours who did not find any interference and those who did, and then explain the balancing exercise he undertook. This was ultimately a matter of planning judgment and he was entitled to come to the conclusions he did based upon what was before him.

Ground 4

31. The Inspector added a further requirement to the Enforcement Notice to “*Permanently remove the internal doors and seal up the existing openings which link the three component buildings*” without removing the requirements to “*Permanently remove all kitchen units, sinks, cooking facilities and worktops from the outbuilding*” (2) and “*Permanently remove all toilets from the outbuilding*” (3).
32. The Inspector added condition 4 in order to enable the Appellants to use the outbuildings. By not removing conditions 2 and 3 at the same time, the Inspector appears to have created a situation where the Appellants would be prohibited, or potentially prohibited, from using the separated outbuildings in a way that they are entitled to without planning permission. This would offend against the principle in *Mansi v Elstree RDC* (1965) 16 P & CR. The Inspector had determined that it was the amalgamation of the building units, rather than the facilities, that altered the way the building was used and resulted in the alleged material change of use and breach of planning control (paras. 7, 13 and 14).

CONCLUSION

33. For the reasons set out above, permission to appeal is granted in respect of Grounds 1, 2 and 4 as being arguable pursuant to the provisions of section 289(6) of the TCPA.
34. This judgment will formerly be handed down remotely on Tuesday, 25 April 2023. It would be of assistance if the appropriate order is agreed in draft between Counsel and I can then ensure that is made at the same time as the hand down.