Neutral Citation Number: [2019] EWHC 3000 (Admin)

Case No: CO/1757/2019

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2019

Before:

MRS JUSTICE LIEVEN

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Between:

LONDON BOROUGH OF HARINGEY	**Appellant**
- and –	
SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT	**First Respondent**
and	
PAUL MUIR	**Second Respondent**

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- -

Mr Giles Atkinson (instructed by **London Borough of Haringey**) for the **Appellant**
Ms Jacqueline Lean (instructed by **Government Legal Department**) for the **First Respondent**
The Second Respondent was not represented and did not attend.
Hearing dates: 31/10/2019

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Approved Judgment

Mrs Justice Lieven :

1. This is an appeal under s.289 of the Town and Country Planning Act 1990 against the decision of a planning inspector appointed by the First Respondent. The inspector allowed an appeal by the Second Respondent against an enforcement notice issued by the London Borough of Haringey, the Claimant.

2. The enforcement notice was dated 21 May 2018 and alleged "*without planning permission the installation of UPVC windows on the ground floor front elevation"* of 49 Myddleton Road, Bowes Park, London N22 8 LZ "the property". The property is within the Bowes Park Conservation Area and is at the junction of Myddleton Road and Palmerston Road. It has windows facing on to both roads.

3. The Second Respondent originally appealed under s.174(2)(f) TCPA, but subsequently sought to add ground (c) to his appeal. The Inspector in subsequent correspondence drew the parties' attention to two cases; Church Commissioners v Secretary of State for the Environment [1995] 71 P&CR 73 and Burroughs Day v Bristol City Council [1996] 1 PLR 78. The appeal was determined by written representations following a site inspection on 2 April 2019.

The decision letter

4. The Inspector's decision letter is dated 2 April 2019 and I will refer to paragraphs in the decision letter as "DL*x*". The Council in their written representations had drawn the Inspector's attention to the definition of building in s.336 of the TCPA. It seems the point they were making, though it is a little opaque, was that the building included a part of the building and therefore the Inspector should focus on the external appearance of the flat. Mr Muir had pointed to the very large number of UPVC windows close to the property and the fact that enforcement action had not been taken against these.

5. At DL7 the Inspector explained that a key question under ground (c) is whether the installation of the disputed window was "development" as defined by s.55 of the TCPA. At DL9 he identified the two key issues he had to determine; what was the building and the meaning of the phrase "materially affect the external appearance of the building".

6. At DL10 he recorded the high number of UPVC windows in the vicinity of the appeal site along Myddleton Road and said that he estimated that 90% of the front windows in the vicinity of the site within the conservation area were UPVC. He explained that 49 Myddleton Road had been divided into flats and the house is "part of a terrace-block of three similar properties".

7. At DL 11 he said

> *"The flats at Number 49 are in a converted house which is part of a terrace-block of three similar properties (odd numbers 49-53). To the west is a pair of semidetached houses. Along the front of the block containing Numbers 49-53 all the ground floor windows are PVC, two of the three (51 and 53) have PVC*

windows at first floor level, and all of the second-floor windows are PVC. The ground floor of Number 49 itself has PVC-framed French doors in its side elevation facing Palmerston Road. "

8. Then at DL12-15 he said;

*"12. Although the circumstances are obviously different, there are parallels between the situation here and the case which led to a High Court judgment concerning a single shop unit in a shopping mall in north-east England.[*footnote reference to the Church Commissioners' case]. *In that case, the shop only occupied a part of one floor (the first floor) of the mall, a point of some relevance to the present case where the appellant's flat is on the ground floor of a three storey building and the enforcement notice is only directed at the ground floor front bay window. The court held that for the purposes of Section 55(2)(a)(ii), the "building" referred to the whole shopping mall, not just the single shop, even though the individual shops within the mall were separately occupied and the shop in question was a single unit of occupation or "planning unit".*

13. I have also had regard to the judgment in the Burroughs Day case which involved roof alterations and the replacement of windows on the front elevation of a commercial property. The court held that when deciding whether what had been done amounted to development requiring planning permission, it was not sufficient merely that works should affect the exterior of the building; the test was that the works should materially affect the external appearance. As the council has pointed out in response to my invitation to comment, Section 336 of the 1990 Act defines "building" as including any part of a building. Nevertheless, the Burroughs Day judgment indicates that the change in external appearance also had to be judged in relation to the building as a whole, not by reference to a part of the building taken in isolation.

14. The short terrace of properties at Numbers 49-53 Myddleton Road appears to have been built at the same time, comprising a block of three houses which have the same design pattern. Bearing that in mind, I consider it reasonable to treat the block as a whole as "the building" for the purposes of Section 55.

15. I judge that the installation of the ground floor front bay window subject to this enforcement notice would have changed

> *the appearance of - and therefore "affected" - the exterior, and the external appearance, of Number 49. It almost certainly "materially affected" the external appearance of the ground floor of Number 49 and probably of Number 49 itself. The installation also changed the appearance and therefore affected the exterior of "the building", that is to say the terrace block at Numbers 49-53. But because of the pre-existing predominance of PVC windows in this building as explained above, I judge that the installation of the PVC-framed ground floor front bay window at Number 49 has not materially affected the external appearance of the building. Therefore, I find that the installation did not amount to development as defined in Section 55 of the 1990 Act"*

9. At DL18 the Inspector is at pains to point out that the conclusion depends on the particular circumstances of the case and said;

> *"The judgment I have reached depends on the particular circumstances of this case. Similar window frames in a different property in a different location might well involve development. Indeed, if more consistent action had been taken in the past against PVC window installations in this part of the conservation area, the visual impact of this development, judged against the provisions of Section 55, might well have been different. However, I should make clear that what has influenced my decision on ground (c) is the planning and related legal effect of the lack of past enforcement against PVC windows, not what might be regarded as morality or perceived unfairness as argued by Mr Muir. Like many local authorities, the council evidently tends to take enforcement action only in reaction to complaints, which is bound to cause inconsistency. In this instance, it has led to the existence of such a high proportion of PVC windows as to result in the success of the appeal on ground (c)."*

The law

10. By section 174(1) of the 1990 Act, a person having an interest in the land to which an enforcement notice relates or a relevant occupier may appeal to the Secretary of State against the notice, whether or not a copy of it has been served on him. Section 174(2) of the TCPA sets out the grounds of appeal. So far as is relevant to the present case, the grounds are:

> *"(c) that those matters (if they occurred) do not constitute a breach of planning control;*
>
> *…(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to*

> *remedy any injury to amenity which has been caused by any such breach"*

11. Section 55 of the TCPA defines "development" for the purposes of the Act. S.55(2) sets out operations or activities which are not to be taken as development for the purposes of the Act. These include:

> *"(a)the carrying out for the maintenance, improvement or other alteration of any building of works which—*
>
> *(i)affect only the interior of the building, or*
>
> *(ii) do not materially affect the external appearance of the building."*

12. 'Building' is defined at section 336 TCPA 1990:

> *"Building" includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery, comprised in a building"*

13. The Inspector has referred to two cases. In Church Commissioners v Secretary of State for the Environment [1995] 71 P&CR 73 the Court (Mr Gray QC sitting as a Deputy High Court judge) was considering whether a single retail unit within the Metro Centre Gateshead was a separate planning unit, or whether the entire shopping centre, being a single building owned and occupied by the Church Commissioners, was the appropriate planning unit. The Judge found that the Secretary of State had not erred in law in finding that the individual unit, rather than the entire Metro Centre, was the planning unit. He said;

> *"I ought to observe, as a matter of history, that the Inspector had in front of him two appeals, one of which concerned a different point. It concerned the shop front in Unit 1.62 of the Centre and was an argument concerning the provisions of section 55(2) of the 1990 Act, with which this court is not concerned ". (*my emphasis*).*

14. It should be noted, as the Judge explains, that the Secretary of State in his decision letter had also been considering whether the Metro Centre as a whole was one building for the purposes of s.55. That issue did not go to the High Court, and it is not clear that the Inspector in the present case had the Secretary of State's decision letter in the Metro Centre case which is reported at [1995] JPL 643. The fact that the High Court decision on the Metro Centre did not deal with the issue of what was "the building" was expressly drawn to the Inspector's attention by the Council in its written representations.

15. In Burroughs Day v Bristol City Council [1996] 1 PLR 78 the Court was considering an application for a declaration that certain works to a listed building did not consist of

"development" for the purposes of s.55 of the 1990 Act, because they were works which "do not materially affect the external appearance of the building". The building(s) in issue were 14,15,16 Charlotte Street, Bristol which are Georgian houses listed as Grade II*, which form part of an Eighteenth-Century terrace. The Judge (Richard Southwell QC sitting as a Deputy High Court Judge) said that the case turned on the meaning of s.55(2)(a)(ii) of the 1990 Act and set out a number of points which should be taken into account in interpreting the statutory words. It was apparently not contested in that case that the individual property, number 16, was the building for the purposes of s.55. The Judge set out a series of matters to take into account under s.55 and most relevantly said;

> *"(5) Mr Hobson submitted correctly that the effect on the external appearance must be judged for its materiality in relation to the building as a whole, and not by reference to a part of the building taken in isolation."*

16. In any challenge under s.289 TCPA, as with one under s.288, the approach set out in numerous cases and summarised by Lindblom J (as he then was) in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) apply. The decision letter must be read as a whole; in a reasonably flexible manner and taking into account that it is written for the parties, who will have knowledge of the issues and the evidence and arguments that have been put. Reasons must be intelligible and adequate, but the decision letter is not an examination paper, and a relatively benign approach should be taken.

The Submissions

17. Mr Atkinson for Haringey advances two grounds. The first is that the Inspector in reaching his conclusion that the building was the block as a whole, i.e. 49-53 Myddleton Road, thought he was applying the approach set out by the High Court in Church Commissioners. However, he had misdirected himself because that case was not concerned with the question of what was the building for the purposes of s.55, but rather what was the planning unit for the purposes of an argument about material change of use. Both parties agree these are different issues and, one building could have a number of planning units within it, or indeed vice versa.

18. Mr Atkinson also pointed to the Secretary of State's decision in the Metro Centre decision and submits that when the Secretary of State had to consider in the context of the Metro Centre what was the building, he said, that the determinants were whether it has external elevations and public access and considered in some detail the physical attributes of the building in question. Mr Atkinson argues the Inspector has failed to carry out that kind of analysis on the facts of the present case.

19. He also says that the Inspector appears to have relied on Burroughs Day in answering the first question, what is the building, but that case was only concerned with the second question – whether the works materially affect the external appearance of the building. Mr Atkinson argues that the Inspector had therefore conflated the two issues before him.

20. The second ground is that the Inspector erred in assessing the impact of the new windows against the whole block and the vicinity. Mr Atkinson says that it is clear if one reads DL10 and 11 that the Inspector has taken into account an immaterial matter, i.e. the nature of the wider area, and not restricted himself to the effect on the building itself. He relies on DL18 where he says that it is clear that the Inspector has wrongly had regard to the wider area.

21. Ms Lean for the Secretary of State argues on the first ground, that although the Inspector did make a mistake in DL12, with regard to the High Court judgment in Church Commissioners, that was not a material error. She says the Inspector properly directed himself as to the two questions which he had to answer. All he was doing in DL12 was saying that there were some parallels with the Metro Centre, as considered in Church Commissioners, and he was correct in this regard, because the Secretary of State had found that the Metro Centre was one building, albeit that was not an issue in the High Court.

22. On this basis she argues that I should apply the principle in Simplex Holding v Secretary of State for the Environment 1989 57 P&CR 306, that the accepted error was not material, and therefore the decision should not be quashed.

23. On ground two she argues that in DL10 and 11 the inspector was simply setting the context of the decision, and to some degree covering the issues raised by Mr Muir about the wider area. However, in DL15 it is entirely clear that the Inspector had focused on the building as he had found it to be, i.e. the terrace block. He was therefore not wrongly drawing on the wider area in his conclusion on the issue of effect on the external appearance of the building.

24. Ms Lean argues that DL18 should not be read in isolation. The Inspector had reached his conclusion on the effect on the external appearance in DL15 and DL18 was only further comment, again in part to deal with the points made by Mr Muir.

Conclusions

25. The starting point in any case such as this are the principles in Bloor Homes, and the importance of not taking an overly forensic approach to a decision letter. However, this is a short decision letter, which in itself is wholly commendable, but the errors identified do in my view go to the heart of the reasoning on the two key issues the Inspector had to determine.

26. The first issue was - what was the building to be considered under s.55? The Inspector decided the building was the terrace block of 49-53 and his reasoning on this point seems to be limited to DL12 and 14. It is effectively accepted by Ms Lean that the Inspector misdirected himself in DL12 when he said, "*the court held that for the purposes of section 55(2)(a)(ii), the "building" referred to the whole shopping mall…",* because he had misunderstood what the Church Commissioners case was about. Although I accept that the Inspector said this was a "parallel" case, rather than suggesting he was bound by the decision, it was plainly influential in his reasoning process. Equally importantly, there was no other reasoning process set out in the decision letter to explain why it was appropriate to take the block of terraced houses, rather than the individual house. It is on the face of it a somewhat surprising proposition that "the building" is an entire terrace, rather than each individual property. Such an approach is, to my understanding, an unusual one. In common parlance each house in a terrace would be considered a building. Also, when there are a

number of listed buildings in a terrace, each separate house is usually, if not always, separately listed. Although this does not mean that as a matter of law the Inspector was necessarily wrong to find that the whole terrace was a building, particularly given that it was a short terrace, it was a conclusion which required clear and adequate reasoning.

27. In those circumstances the fact that a significant proportion of the Inspector's reasoning on the point, namely the reliance in DL12 on the Church Commissioners case, was based on a misunderstanding of the case is important. Ms Lean relies on the fact that the Secretary of State had found that the whole Metro Centre was one building, see p.645 of the report in the JPL. However, in my view this does not avail her, because the Inspector in the present case does not begin to undertake the kind of analysis carried out in the Metro Centre decision, where the Secretary of State had considered the nature of the building in terms of external walls, roofs and access in deciding the building issue.

28. I also agree with Mr Atkinson that the Inspector, particularly in DL13, seems to have somewhat conflated the issue of what is the building, with the second question of what is the effect on the external appearance. In the last sentence of DL 13 he has relied on the passage in Burroughs Day at (5), which I have set out above, for the proposition that he needs to consider the building as a whole. The first point to make is that in Burroughs Day the question of what was the building was not in issue, so the Inspector here does seem to have conflated the two matters. Secondly, however to the degree that Mr Southwell QC was suggesting that it is wrong as a matter of law to consider part of the building, in my view he was not correct. Mr Southwell QC did not refer to the fact that s.336 TCPA makes the definition of "the building" include "part of a building". So, when s.55 requires consideration of the effect on the external appearance of the building, that can include part of the building. It is easy to imagine that in a large building, with different facades within public view, new fenestration might have a material effect on part of the building but not the whole. Given the statutory definition in s.336 it is open to the decision maker to take into account the impact on that part alone, and to the degree the Judge in Burroughs Day was suggesting that as a matter of law (rather on the facts of the case) that was not material, in my view he was wrong.

29. Ms Lean relies on Simplex but in my view the misdirection here was plainly material, as it went to the heart of what the Inspector had to decide and his reasoning. I therefore conclude that the Inspector misdirected himself and find for the Claimant on ground one.

30. On ground two the Inspector's reasoning is somewhat unclear. Ms Lean is correct that in DL15 the Inspector is focusing on the external appearance of the building, as he had found it to be, i.e. the terrace. However, at DL10 he had undoubtedly been considering the wider area and he comes back to this in DL18. It is not clear to me what function DL18 plays in the reasons. It may be that in the Inspector's mind he was dealing with Mr Muir's arguments about the wider area and the unfairness of enforcement action being taken against him given the lack of enforcement action on other properties. However, there are two sentences in DL18 which indicate strongly that the wider area had a material impact on the Inspector's conclusions. He said "*Indeed if more consistent action had been taken in the past against PVC window installations in this part of the conservation area, ….[and] However, I should make clear that what has influenced my decision on ground (c) is the planning and related legal effect of the lack of past enforcement against PVC windows…"* (my emphasis added).

31. Given those comments it is in my view very difficult not to conclude that the Inspector took into account the wider area in judging the external effect on the building. The analysis in DL18 is in truth much closer to an analysis of the impact on part of the conservation area, than a lawful analysis of the test in s.55(2)(a)(ii).

32. It is plain that in carrying out the analysis in s.55(2)(a)(ii) a decision maker should not have regard to the impact on the external appearance of anything other than the building. So, the fact that when seen in the wider context of that part of the Conservation Area there was no material effect, because of the number of UPVC windows, is plainly legally irrelevant. I could accept the argument that having reached his conclusion in DL15 that there was no material effect on the building (assuming that he had not erred in law under ground one in finding the block to be the building), DL18 is to some degree otiose. However, it is very unclear from DL18 the degree to which the reasoning in that paragraph has fed back into the earlier reasoning.

33. For these reasons I find that ground two is also made out. I therefore allow the appeal and will remit the matter to the First Respondent.