Neutral Citation Number: [2023] EWHC 1790 (Admin)

Case No: CO/3692/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 July 2023

Before :

LADY JUSTICE WHIPPLE
and
MR JUSTICE HOLGATE

- -

Between :

PATHFIELD ESTATES LIMITED	**Appellant**
- and -	
LONDON BOROUGH OF HARINGEY	**Respondent**

- -
- -

Melissa Murphy KC (instructed by **Sonn Macmillan Walker Solicitors**) for the **Appellant**
Charles Streeten (instructed by **London Borough of Haringey Legal Services**) for the **Respondent**

Hearing date: 27 June 2023

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Approved Judgment

LADY JUSTICE WHIPPLE:

Introduction

1. On 28 March 2008, the London Borough of Haringey, which is the respondent to this appeal ("LB Haringey"), issued an enforcement notice to Pathfield Estates Limited ("Pathfield"), which is the appellant, under section 172 of the Town and Country Planning Act 1990 ("TCPA"). This is the "Enforcement Notice" with which this appeal is concerned. The Enforcement Notice related to land at 13 Bounds Green Road, London N22 8HE (the "Property"). The issue in the appeal is whether the Crown Court was entitled to conclude that the third requirement in that Enforcement Notice, which required Pathfield to restore the Property to use as two flats, had not been waived or varied by LB Haringey in 2008.

2. Pathfield was convicted at Highbury Magistrates Court of breach of the Enforcement Notice on 28 October 2021. The magistrates committed the matter to the Crown Court for sentence and for the commencement of confiscation proceedings under section 70 of the Proceeds of Crime Act 2002. Pathfield appealed against conviction to the Crown Court. Following a full rehearing, the Crown Court (Miss Recorder E Deacon KC, sitting with Graziella Oragano JP and Gerry Teague JP) dismissed the appeal in a written ruling dated 15 June 2022 (the "ruling").

3. This is an appeal by way of case stated from the Crown Court. The case stated was dated 4 October 2022 and it was authored by HHJ Deacon KC (as she had by that time become). That case stated originally posed two questions for this Court. One of those questions has fallen away leaving a single question: whether the Crown Court was correct in deciding that there was sufficient evidence on which it could properly conclude that the requirements of the Enforcement Notice had not been varied (waived or relaxed) pursuant to section 173A TCPA. If the answer to that question is yes, the Crown Court did have sufficient evidence, then it is common ground that this appeal must be dismissed.

Facts

4. The case stated sets out the nature and history of the proceedings at paragraphs 3 to 6 and the facts at paragraphs 7 to 25. What follows is a summary.

5. Since the 1990s, the Property has been lawfully used as two flats. During a site visit on 15 November 2007, LB Haringey's officers noted that there had been an unauthorised conversion of the Property into five self-contained flats. That led to issue of the Enforcement Notice on 28 March 2008. The Enforcement Notice contained four requirements:

    i) To stop using the property as five self-contained flats.

    ii) To remove from the Property all fixtures and fittings in relation to the unauthorised conversion.

    iii) To restore the Property as two flats (this is "requirement 3").

iv) To remove from the Property any materials and debris associated with the unauthorised conversion.

6. The Enforcement Notice was served on 1 April 2008 and came into effect on 15 May 2008. Thereafter the time for compliance was 3 months.

7. On 18 August 2008, LB Haringey's planning enforcement officer, Ms Abiola Oloyede, visited the Property and recorded an agreement reached on site with Pathfield's representative, to the effect that the Property would be converted to a single dwelling-house, and that the tenants would be relocated by 1 October 2008 to permit the conversion works to be completed by 10 October 2008. Ms Oloyede made a number of entries after that date in the council's enforcement file, including this entry on 10 October 2008: "*Agreed that the removal of the units and entry door intercom is acceptable for compliance therefore case to be recommended for closure as compliance".*

8. The use of the Property as flats ceased on 6 October 2008.

9. The reasons for recommending closure of the case in 2008 were set out by Ms Oloyede in her witness statement. That witness statement was before the Crown Court and was read to the Court as agreed. So far as relevant, that statement recorded:

> "On 23 October 2008, I recommended the case for closure… I arrived at that conclusion on the basis that the use as five flats had ceased and the building was to be used as a single dwelling, as proposed by the agent, thereby reducing the number of flats from five separate planning units to one unit. The resulting single unit was considered in my view as being capable of being used as a single dwelling, whilst still meeting the aims of the enforcement notice, which is to remove the over-intensification of the use to the property and to address the unsatisfactory living conditions of the occupants. An outcome of one dwelling in my view was considered reasonable as it was a further reduction of the units stated in requirement 3 of the notice to less than two flats. Also in my view, the owner would still have the option of converting the single dwelling to two flats at a future date and would not be in breach of requirement 3 of the notice if they chose to do this."

10. Ms Oloyede sent "closure letters" to a number of interested parties (including the original complainant, the mortgagee and Pathfield's agent) on 23 October 2008, stating:

> "…having undertaken a compliance visit, I can confirm that the Enforcement Notice served as a result of the above breach of planning control has now been complied with to the satisfaction of the local planning authority. Accordingly the Council is taking no further action and is recommending that this case be closed."

11. No formal notice of any waiver or relaxation of the Enforcement Notice was given by LB Haringey.

12. Council Tax records show that occupants of four flats at the Property paid Council Tax from March 2008 onwards, with a break from around September 2008 to June 2009. The occupants of a fifth flat paid Council Tax from March 2008 to October 2020, save for a break around October 2008. The occupants of a sixth flat paid Council Tax from June 2009 onwards.

13. By July 2011, LB Haringey's planning enforcement department was aware that the Property was being used as six self-contained flats. On 11 July 2011, LB Haringey laid an information before the Magistrates' Court alleging an offence contrary to section 181(5) TCPA. Pathfield was convicted but the prosecution was quashed by the Divisional Court ([2013] EWHC 2053 (Admin), Wilkie J) on grounds that there had been no development of the Property for the purposes of section 181(5), rather there had been a change of use in breach of the Enforcement Notice, which was a more serious offence coming within section 179(2) (see [22] and [26]-[31] of that judgment). Although the case was remitted to the Magistrates Court, no further proceedings were pursued at that stage by LB Haringey.

14. On 13 April 2020, a person called Yiddel Stern applied for a certificate of lawfulness in respect of the use of the Property as six self-contained flats. The grounds for the application were said to be that the Property had been converted from a single dwelling-house to six self-contained flats which had been in constant use for over four years (the application stated that use as six self-contained flats dated back to 19 February 2008). Haringey LB refused the application for a certificate of lawfulness, on the basis that the Enforcement Notice was still in force and the current use of the Property in that way contravened its requirements.

15. LB Haringey commenced the present proceedings by information dated 5 May 2021, alleging breach of section 179(2) TCPA. The particulars given in the information were as follows:

> "Between the 8th day of April 2016 and the 5th May 2021 at 13 Bounds Green Road, London N22 8HE, you did fail to comply with the requirements of an Enforcement Notice served on you as the owner of the property by the London Borough of Haringey on 28 March 2008, which required you to restore the property to two flats by 15 August 2008 contrary to Section 179(2) Town and Country Planning Act 1990."

16. Pathfield, the owner of the Property, was convicted by the Magistrates and appealed unsuccessfully to the Crown Court. This is Pathfield's second appeal.

Legislation

17. The relevant legislation is contained in Part VII of the TCPA which deals with enforcement against breaches of planning control. Section 172 permits the local planning authority to issue an enforcement notice where it appears to them that there has been a breach of planning control and that it is expedient to issue the notice.

18. By section 172A(1), the local authority is permitted to give a person who has been served with an enforcement notice a letter assuring that person that they will not face prosecution for breach of the enforcement notice. By section 172A(2), the local planning authority is permitted to give that person a letter withdrawing the assurance of non-prosecution from a future specified date.

19. Section 173 relates to the contents and effect of an enforcement notice. By section 173(1) the notice must state the matters which appear to the local planning authority to constitute a breach of planning control. Section 173 further provides that:

> "(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.
>
> (4) Those purposes are –
>
> a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or
>
> b) remedying any injury to amenity which has been caused by the breach."

Section 173(9) provides that an enforcement notice must specify the period for compliance with it.

20. Section 173A is headed "variation and withdrawal of enforcement notices". It provides that:

> "(1) The local planning authority may –
>
> a) Withdraw an enforcement notice issued by them; or
>
> b) Waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 173(9).
>
> (2) The powers conferred by subsection (1) may be exercised whether or not the notice has taken effect.
>
> (3) The local planning authority shall, immediately after exercising the powers conferred by subsection (1), give notice of the exercise to every person who has been served with a copy of the enforcement notice or would, if the notice were re-issued, be served with a copy of it.

> (4) The withdrawal of an enforcement notice does not affect the power of the local planning authority to issue a further enforcement notice."

21. By section 179(2), it is an offence not to comply with an enforcement notice within the period specified for compliance.

22. Section 181(1) provides that compliance with an enforcement notice shall not discharge it. Section 181(2) provides that any provision in an enforcement notice requiring a use of land to be discontinued shall operate as a requirement that it be discontinued permanently. Accordingly, the resumption of that use at any time after it has been discontinued in compliance with the enforcement notice is a contravention of that notice.

Ruling

23. The Crown Court noted the background to the case, and the evidence that it had received. Although Ms Oloyede was available to give evidence, she had not been called. Instead, the Crown Court heard from Alan McPherson who was the current planning enforcement officer for LB Haringey. He had visited and found six flats at the Property: two on the first floor and four on the ground floor. He was not involved in the decisions by LB Haringey in 2008, but his evidence was that the local authority had been content for the Property to be turned into a single dwelling rather than restored to two flats on the basis that one house is a better outcome than two flats in terms of the quality of living conditions and less intensive use of the Property. He did not think LB Haringey had varied any of the requirements of the Enforcement Notice but that it had formed a view as to what was acceptable and that the requirements of the Enforcement Notice had been sufficiently satisfied but had not been complied with in every respect.

24. The ruling sets out the parties' rival submissions. So far as remains relevant, it was Pathfield's submission that requirement 3 in the Enforcement Notice had been waived or relaxed by LB Haringey pursuant to section 173A(1)(b) on or about 8 October 2008 such that Pathfield was not after that point required to restore the Property to two flats. In this context, Pathfield relied on LB Haringey's enforcement file notes authored by Ms Oloyede, the closure letters sent by Ms Oloyede and the fact that Council Tax was paid by the occupants of six flats from 2008/09 onwards.

25. The Crown Court noted that LB Haringey had not given notice of any variation, which was not determinative but was an evidential factor to be taken into account. It was common ground that absent a variation, the Enforcement Notice remained in force, pursuant to section 181(1) and (2). It was also common ground that there was no statutory power to substitute in the Enforcement Notice a requirement to convert the Property to a single dwelling house in place of the requirement to restore it to two flats.

26. The Crown Court held:

> "46. In our judgment, the key evidence as to whether a decision was made to waive a requirement in the enforcement notice is that of the planning enforcement officer who carried out the site

> visits and who recommended the case for closure … . Her evidence was agreed by the Appellant. She states that she recommended the case for closure on the basis that the use as five flats had ceased, and the building was to be used as a single dwelling which "still met the aims of the enforcement notice" and which she considered to be a reasonable outcome as it reduced the number of units to fewer than the two stated in requirement 3. She expressly refers to the continuation of requirement 3 of the notice, such that a conversion by the owner of the property to two flats at a future date would not breach the enforcement notice. There is nothing in the reasoning of the planning enforcement officer which suggests that there was a waiver of requirement 3.
>
> 47. This evidence of [Ms Oloyede] is consistent with the language in the contemporaneous note in the records dated 10 October 2008 that the removal of the kitchen units and entry door intercom "is **acceptable** for compliance" and the language in the letters which were sent out at the time, that the enforcement notice "has now been complied with **to the satisfaction** of the local planning authority" (our emphasis in bold). There is nothing in the file notes which suggests that the local authority was actually waiving a requirement in the enforcement notice rather than simply agreeing what it considered to be a satisfactory outcome which still met the aims of the enforcement notice.
>
> 48. Alan McPherson's evidence based on his own view of the records was that the local authority appeared to have taken the approach that there had been an acceptable compliance or sufficient level of compliance with the enforcement notice rather than full compliance. This is also consistent with the agreed evidence of [Ms Oloyede]."

27. The Crown Court declined to infer from the fact that Council Tax payments from six flats were collected that LB Haringey's planning department knew the Property was being used as six self-contained flats or that the position on Council Tax payments could amount to evidence of a variation of the enforcement notice ([54]).

28. The Crown Court concluded:

> "55. In our judgment, there is sufficient evidence on which we would be entitled to be sure that the local planning authority did not waive requirement 3 of the enforcement notice in October 2008 (or at any time)."

29. After dealing with other aspects of Pathfield's case, the Crown Court concluded that requirement 3 of the Enforcement Notice remained a lawful requirement, and that "we are sure on the evidence before us that it had not been waived or relaxed pursuant to section 173A of the TCPA" ([72]). The Crown Court was satisfied that Pathfield was

in breach of the Enforcement Notice and had committed the offence charged. The appeal was dismissed.

Submissions

30. Ms Murphy KC appeared for Pathfield. She did not appear below. She submitted that LB Haringey, by Ms Oloyede, had waived requirement 3 in the Enforcement Notice by her actions in 2008. Works which satisfied the second requirement but not requirement 3 were accepted by LB Haringey as sufficient for compliance with the Enforcement Notice. Viewed objectively, this amounted to a waiver of requirement 3, because LB Haringey had exercised its powers under section 173A(1)(b). The Crown Court was wrong in law to reach a different conclusion on the evidence before it. Ms Murphy relied on two cases which had concerned waivers, albeit in different contexts: *Kammins Co v Zenith Investments* [1971] AC 850 and *Co-operative Wholesale Society v Chester le Street District Council* (1997) 73 P&CR 111.

31. She argued that LB Haringey's acceptance that Pathfield had complied with the Enforcement Notice necessarily implied that LB Haringey was waiving requirement 3, which mandated that the Property was returned to use as two flats. LB Haringey was well aware in 2008 that the Property had not been returned to use as two flats, yet LB Haringey said that it was satisfied that Pathfield had complied with the Enforcement Notice. The Crown Court had misdirected itself by looking at the language contained in internal notes on the council's file (which were unknown to Pathfield at the time); the Crown Court should have considered the objective effect of the council's actions, as they were communicated to Pathfield and other third parties. The Crown Court had wrongly focussed on the internal actions and thought processes of Ms Oloyede when the statute in fact required regard to be had to the objective effect of her actions. It was entirely possible that she had made an election (to waive requirement 3) without intending to and without understanding the consequences of her actions.

32. Mr Streeten appeared for LB Haringey. He did not appear below. He submitted that the short answer to this appeal was that the issue whether the requirements of the Enforcement Notice had been waived or varied was a question of fact for the Crown Court. There had been ample evidence before the Crown Court to support its conclusion that there had been no waiver, and the Crown Court's conclusion was not irrational or perverse which was the test Pathfield had to meet following *DPP v Zeigler* [2022] AC 408 at [36]-[49] and [99]. But in any event, Pathfield wrongly elided a public authority's representation that it would take no enforcement action, which is all that had occurred here, with the exercise of the statutory power to vary an enforcement notice. The distinction between a statement as to how a local planning authority will approach the enforcement of the notice and a formal variation of that notice is confirmed in *Wilson v Maldon DC* [2021] EWHC 715 (Admin) per Holgate J at [18]. In this case, as a matter of law and fact, there was no exercise of the statutory power to vary the Enforcement Notice and requirement 3 remained in force.

33. I am grateful to both counsel and their respective legal teams for their submissions.

Discussion

34. The question posed for this Court is a narrow one: whether the Crown Court was correct in deciding that there was sufficient evidence on which it could properly conclude that the requirements of the Enforcement Notice had not been varied (waived or relaxed) pursuant to section 173A of the TCPA. Some of Ms Murphy's submissions appeared to stray beyond that question. To the extent that they did so, they are not properly before the Court and warrant no answer by the Court.

35. I would reject Mr Streeten's first submission that the issue of whether there had been a variation for the purposes of section 173A was one of pure fact. The local planning authority plainly has power to waive or vary an enforcement notice under that provision. The question whether it has done so is one which has a very substantial factual component but it also involves issues of law, because it must be seen in its statutory context. It is, in my judgment, a question of mixed fact and law.

36. I would, however, also reject Ms Murphy's suggestion that the only evidence which it was permissible for the Crown Court to take into account when determining whether there had been a waiver of requirement 3 was that contained in the exchanges between LB Haringey and Pathfield or other third parties. I can see no reason to constrain the evidence in that way. The issue before the Crown Court was whether, as a matter of mixed fact and law, there had been a waiver of requirement 3 in 2008. The Crown Court was entitled to take into account all the available evidence touching on that issue, whether it was contained in notes held on LB Haringey's files (in which case it was unknown to Pathfield until disclosure was given) or contained in correspondence with third parties (likely to be known to Pathfield at an earlier point). All of this evidence was relevant to the question whether there had been a waiver. Specifically, the Crown Court was entitled to take into account what Ms Oloyede knew and wrote at the time, the reasons given in her witness statement and the evidence given by Mr McPherson supporting Ms Oloyede's explanation, even though he was not involved in 2008 and had no direct knowledge of these events. This was all relevant evidence about the thought processes of those involved in the planning department of the local planning authority; those thought processes were not necessarily determinative of the issue, but the Crown Court was entitled to take them into account. It was also relevant for the Crown Court to understand the background: the fact that Ms Oloyede met Pathfield's representatives on site at the Property and that Pathfield's representatives gave her assurances that the Property was to be used as a single dwelling-house in future. That provided the background to Ms Oloyede's record that what Pathfield had done or said it would do was "acceptable for compliance", and the statement in the closure letters that the breach of planning control "has now been complied with to the satisfaction" of LB Haringey.

37. The cases cited by Ms Murphy do not assist. The general propositions contained in *Kammins Ballrooms* and *Co-operative Wholesale* about what amounts to a waiver or estoppel are not controversial, set in the contexts in which they arose. But they do not help to resolve this appeal, which arises in circumstances where, as all agree, LB Haringey had the power to waive requirement 3 and the question is whether there was sufficient evidence to support the Crown Court's conclusion that it never did so.

38. *Wilsdon v Maldon DC* is of more assistance. In that case, the local planning authority (the respondent) had issued an enforcement notice to the landowner (the appellant) requiring him to cease unauthorised storage use of the land and remove all machinery and other items from the land which were associated with its unauthorised use. The

issue arose as to whether an email dated 12 March 2018 from the local planning authority to the landowner amounted to a variation of an enforcement notice; that email said that "at the time when the compliance with the notice will have to be checked, the Council will have to consider whether the items stored on the land are reasonably necessary for agricultural purposes". The appellant argued that this was a variation of the enforcement notice. Holgate J said:

> "18. ... the appellant accepts that the formal provision for varying an enforcement notice is contained in section 173A of the TCPA 1990. He accepts that there was no formal variation. In my judgment, the email dated 12 March 2018 did not purport to vary the enforcement notice. It simply offered a view on how the respondent would approach the enforcement of the requirements set out in the enforcement notice…".

39. This shows that a local planning authority can discuss the way in which an enforcement notice will be implemented without, necessarily, being taken to amend the terms of that enforcement notice.

40. In this case, the local planning authority clearly signified that it was satisfied with the Property being used as a single dwelling-house: that was the upshot of discussions at the Property between Ms Oloyede and Pathfield's representatives; that was the clear message conveyed by the closure letters dated 23 October 2008. That message is consistent with internal entries in the council's files, and with Mr McPherson's evidence and understanding of what had occurred.

41. The Crown Court accepted Ms Oloyede's and Mr McPherson's evidence as to what was intended in 2008. It concluded, based on that evidence, that no variation of the Enforcement Notice had ever occurred. This was a conclusion open to the Crown Court: as *Wilson v Maldon DC* shows, a local planning authority can say what it would accept as compliance with a requirement of an enforcement notice without waiving that requirement. It is important not to elide those two things. Here the language used by Ms Oloyede simply meant that the authority would not take action under the Enforcement Notice against conversion to a single dwelling. It did not mean that LB Haringey was going further by effectively deleting requirement 3, so that the Enforcement Notice would no longer prohibit the use of the property for more than two flats.

42. In this case, therefore, there is a compelling explanation for the position adopted by Ms Oloyede and Mr McPherson, which was that LB Haringey accepted that Pathfield had complied with the spirit if not the letter of the Enforcement Notice by making the Property into a single dwelling-house. Section 181 provides that compliance with an enforcement notice does not discharge it; section 172A(1) provides that even if an enforcement notice has been issued, the local planning authority can give an assurance that that there will be no prosecution based on it (which assurance may be withdrawn under subsection (2)); section 173A provides that a local planning authority can relax or waive a requirement in an enforcement notice but cannot make it more onerous. These provisions would have been familiar to Ms Oloyede and they provide the context in which her actions should be assessed. Read in the context of these provisions, her actions make perfect sense: she stated that there was compliance (or at least action which was "acceptable for compliance" or "compliance to the satisfaction of" LB Haringey), which was to confirm that the Enforcement Notice

remained extant (compliance did not discharge the notice, section 181); she took the view, based on Pathfield's proposals, that there would be no prosecution, even though requirement 3 had not been met in terms, which was to exercise powers akin to those in section 172A; she had no power to require Pathfield to use the Property as a single dwelling-house, which would have been more onerous than the use as two flats which was specified in requirement 3, this being the effect of section 173A. The reasons why she acted in this way, and took these decisions, are amply set out in the contemporary materials and in her witness statement.

43. There was no notice of variation pursuant to section 173A(3). That is, as the Crown Court found, evidentially significant, because it was consistent with all the other evidence in showing that Haringey LB had not intended to vary the Enforcement Notice and had not, to its knowledge, done anything to vary or induce a belief that there had been a variation.

44. Ms Murphy is therefore left with a bald assertion that the acceptance of a single dwelling-house as satisfactory compliance with requirement 3 in this case necessarily amounted to a waiver of that requirement. That assertion is unsound in law and unsupported by the facts and evidence in this case. It was open to LB Haringey to accept use as a single dwelling-house as satisfactory compliance with requirement 3, in the sense that LB Haringey would not take further enforcement action so long as that was how the Property was used, without waiving requirement 3 or rendering it unenforceable in future.

Conclusion

45. The case stated asks this question: was the Crown Court correct in deciding that there was sufficient evidence on which the Crown Court could properly conclude that the requirements of the Enforcement Notice had not been varied (waived or relaxed) pursuant to section 173A TCPA?

46. The answer to that question is "yes".

47. This appeal is dismissed.

MR JUSTICE HOLGATE:

48. I agree.