

IN THE STRATFORD MAGISTRATES' COURT

BETWEEN:

BUILD HOLLYWOOD LTD

Appellant

-and-

LONDON BOROUGH OF HACKNEY

Respondent

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JUDGMENT OF DISTRICT JUDGE SUSAN HOLDHAM

HEARING 7-8 MARCH 2022

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*Mr. Peter Dovey appeared for the Appellant*

*Mr. Edmund Robb appeared for the Respondent*

1. The Appellant appealed against a notice issued by the Respondent pursuant to section 225A of the Town and Country Planning Act 1990 on 4 March 2021 (the **Notice**).
2. By way of the Notice, the Respondent required the removal of advertisements from two areas of the property known as The Tram Depot, 38 - 40 Upper Clapton Road, E5 8BQ (the **Property**). The Notice required the removal of the advertisements within four months from the date of the Notice. The Notice was served on Upper Clapton Limited (the freeholder owner of the Property), the "legal owners", the "occupiers", and Build Hollywood Limited, who is the Appellant.
3. The Appellant had a contract with the freehold owner to display advertisements at the Property since 2018. Previously, JCDecaux had displayed advertisements at the Property.

4. The Respondent's case is that the display of the advertisements at the Property contravened The Town and Country Planning (Control of Advertisements) (England) Regulations 2007 (the **Regulations**). The advertisements at the Property are in two locations: the high level advertisements on the flank wall of the building; and the low level advertisements that are at street level facing Upper Clapton Road.
5. For the advertisements not to be in contravention of the Regulations, they must benefit from express or deemed consent. It is common ground that there is no express consent. The Respondent's case is that the advertisements do not benefit from deemed consent because the advertisements have contravened the standard conditions in the Regulations.
6. Deemed consent is governed by Regulation 6 which states that consent can fall within any Class in Part 1 of Schedule 3. These classes of deemed consent are subject to the standard conditions and to the conditions and limitations set out in Schedule 1.
7. The standard conditions are set out in Schedule 2 of the Regulations. The Respondent asserts that standard conditions 1 and 3 have been breached. Standard condition 1 (**SC1**) states:

*“1. No advertisement is to be displayed without the permission of the owner of the site or any other person with an interest in the site entitled to grant permission.”*
8. Standard Condition 3 (**SC3**) states:

*“3. Any advertisement displayed, and any site used for the display of advertisements, shall be maintained in a condition that does not impair the visual amenity of the site.”*
9. The Respondent states that SC1 is breached by the low level advertisement on the basis that the advertisement oversails the public highway by some 20cm and that no licence has been granted by the Transport for London (the highway authority) pursuant to s177 of the Highways Act 1980.
10. The Respondent further argues that SC3 is breached by the high level advertisement because it impaired the visual amenity of the site. The Respondent relies on photographs taken between August [2017] and March 2021 which shows the advertisement structure in a dilapidated state and with no advertisements displayed between these dates.

11. A right of appeal against a removal issued pursuant to s225A of the 1990 Act is set out in s225B of the same Act. S225B(1) provides for four grounds of appeal: by virtue of S225B which provides for 4 grounds of appeal. These are:

- a) that the display structure concerned is not used for the display of advertisements in contravention of regulations under section 220;*
- b) that there has been some informality, defect or error in, or in connection with, the notice;*
- c) that the period between the date of the notice and the time specified in the notice is not reasonably sufficient for the removal of the display structure;*
- d) that the notice should have been served on another person.*

12. The burden of proof in an appeal lies with the appellant.

13. In its skeleton argument, the Appellant relied upon 225B(1)(b). However, this ground of appeal is no longer relied upon.

14. The second argument relied upon by the Appellant is that both high- and low-level advertisements benefit from deemed consent and that any breach of the standard conditions does not extinguish the deemed consent. Mr Robb (acting for the Respondent) does not agree.

15. In relation to the high-level advertisement and the alleged breach of SC3, the Appellant says that merely not having a paper advertisement in place does not impair visual amenity. It was originally said that the gantry does not form part of the advertisement structure, but now it is accepted by the Appellant that the gantry is part of the advertisement structure. It is also said that the Appellant took over the site in 2018 and that from March 2020 it was not practical to maintain the site due to the COVID lockdown. The Appellant points out that the high-level advertisement has now been repaired and since September 2021 a paper advertisement has been in place. The Appellant further argues that other powers were available to the Respondent to remedy the situation.

16. The Council says that an advertisement is widely defined pursuant to section 336 of the 1990 Act and that it includes the fixtures used to support the advertisement structure. I was directed to photographs at pages 99 onwards of the hearing bundle from which the decline of the advertisement was easy to

identify. From the various images, I can see graffiti, rusted and broken railings, and a paper advertisement hanging from the gantry.

17. It is immaterial in my view that the advertisement has now been repaired. At the time the Notice was issued, the advertisement did impair the visual amenity of the site. It is also immaterial whether alternative powers were available to the Respondent to remedy the breach of the standard condition. As there is a breach of SC3, there is no deemed consent and the Notice is valid. The appeal in respect of the high-level advertisement fails.

18. Turning to the low-level advertisement and the alleged breach of SC1. The Respondent says that although the Appellant may have had a contract with the owner of the Tram Depot to display the advertisement, the Appellant also requires consent of the highway authority because the advertisement oversails the public highway.

19. I have been referred to s177 of the Highways Act 1980. Section 177(1) states:

*No person shall—*

- a) except in the exercise of statutory powers, construct a building over any part of a highway maintainable at the public expense (whether it is intended to span the highway or not), or alter a building so constructed, without a licence granted under this section by the highway authority for that highway or otherwise than in accordance with the terms and conditions of a licence so granted;*
- b) use a building so constructed or altered in pursuance of a licence so granted otherwise than in accordance with the terms and conditions thereof;*
- c) and any person who contravenes any provision of this subsection is guilty of an offence and liable to a fine not exceeding [F1level 5 on the standard scale]; and if the offence is continued after conviction, he is guilty of a further offence and liable to a fine not exceeding £50 for each day on which the offence is so continued.*

20. The Appellant accepts that the display is a 'building' for the purposes of s177 but it argues that the oversail is *de minimis*. The Appellant further says it is an abuse of process that the Respondent has asked Transport for London to require a licence to be granted: it alleges the Respondent to have acted in a

'Putin-esque' manner and to have involved with TfL when TfL had not identified any issue, and to have not readily disclosed correspondence between TfL and the Respondent regarding the licence.

21. I understand the Appellant has now applied for a licence. I have heard this morning that TfL has responded to confirm that it will agree to grant a s177 licence. It is interesting to note that neither the Appellant nor TfL have said that no licence is required.
22. The Respondent argues that it is not for the local planning authority to point out any shortcomings and that the responsibility lay with the Appellant to have made necessary enquires when it acquired the site and to have ensured that the required consents were in place. The Council also argues that there is nothing in the relevant legislation that suggests any *de minimis* incursion is permissible.
23. This matter caused me some concern. I was concerned, for example, what the position would be if the incursion amounted to 1cm or even 1mm. But I think that Mr Robb's response is correct. In theory, it could be said that such incursion would be in breach of Regulations but that it would be a matter of discretion for the relevant authority whether to take enforcement action in those circumstances. That exercise of discretion would be subject to judicial review as to whether it were Wednesbury unreasonable. In these circumstances, the Appellant could have issued judicial review proceedings about the Notice, or about the breach of the Respondent's enforcement policy (a matter that was also in issue). The Appellant chose not to do so.
24. I find that TfL have an interest in the site where the low-level advertisement is displayed and that it is entitled to grant a licence for the oversailing of a building across the highway. The Appellant has not shown it has the necessary consent to display the advertisement. It was for the Appellant to show they did have the necessary consent. I find that Appellant has breached SC1 and thus the Notice is valid. The appeal against the Notice fails.
25. Because of these findings I do not need to consider the issue of deemed consent and whether there was a break in the continual use of the site for the display of advertisements.
26. Costs awarded to the Council in the sum of £28,139.20 payable within 28 days of this hearing.

**8 March 2022**