Judgment Approved by the court for handing down

Neutral Citation Number: [2023] EWHC 285 (Admin)

Case No: CO/74/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 February 2023

Before :

Neil Cameron KC
sitting as a Deputy High Court Judge

Between :

EBELE MUORAH — **Appellant**

- and –

SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT — **First Respondent**

-and-

LONDON BOROUGH OF BRENT — **Second Respondent**

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- -

The Appellant in person

Ned Westaway (instructed by **the Government Legal Department**) for the **First Respondent**
Dr Ashley Bowes (instructed by **Prospect Law**) for the **Second Respondent**

Hearing date: 7th February 2023

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JUDGMENT

The Deputy Judge (Neil Cameron KC):

Introduction

1. In this case Ms Ebele Muorah appeals under the provisions of section 289 of the Town and Country Planning Act 1990 ("TCPA 1990") against the decision of the Secretary of State for Housing, Communities and Local Government, the First Respondent, subject to making corrections and variations, to dismiss an appeal under section 174 of the TCPA 1990 against an enforcement notice issued by the Second Respondent.

2. Permission to proceed with the section 289 appeal was granted by Timothy Mould QC sitting as a Deputy High Court Judge at a hearing held (by telephone) on 16th February 2021.

3. An application to amend and add further grounds of appeal was refused by an order made by James Strachan QC sitting as a Deputy High Court Judge dated 10th December 2021.

4. On 25th May 2022, this case was heard together with an application made under section 288 of the TCPA 1990 to quash the First Respondent's decision to allow an appeal against the Second Respondent's decision to refuse to grant a certificate of lawfulness of existing use or development.

5. At the hearing held on 25th May 2022 the court was informed that the Appellant was made bankrupt. The date on which the Appellant's name was entered in the insolvency register was 28th July 2021.

6. Judgment in the section 288 application was handed down on 19th July 2022.

7. In an order dated 21st July 2022 I gave directions which allowed the parties to file and serve further submissions in writing on the consequences, if any, for the section 289 appeal, of the fact that the Appellant had been declared bankrupt.

8. The parties made written submissions and a hearing was set down to take place on 8th November 2022.

9. The Appellant sought an adjournment of the hearing set for 8th November 2022 on the grounds that she had made an application to the Central London County Court to determine whether her trustee in bankruptcy's notice of disclaimer in relation to 154A Harlesden Road, London NW10 3RE was defective. In her application for an adjournment, the Appellant stated that adjournment to the first open date in January 2023 would allow sufficient time to "…. resolve the issue of an alleged 'defective' title."

10. The Appellant made an application for an adjournment of the hearing fixed for 7th February 2023. That application was refused. I gave reasons for refusing that application at the hearing which took place on 7th February 2023.

11. The First Respondent seeks an order that the appeal be struck out as the effect of the Appellant's bankruptcy is:

    i) Her property formed part of the bankruptcy estate and vested in the trustee in bankruptcy.

    ii) That property includes 154A, Harlesden Road, and therefore the Appellant no longer has an interest in that property.

    iii) The cause of action in this case is a proprietary cause of action and therefore it also vested in the trustee in bankruptcy.

Background Facts

12. The enforcement notice relates to land at 154, Harlesden Road, London NW10 3RE ("the Site").

13. On 24th July 2017 the Council issued an enforcement notice ("the Enforcement Notice"). The alleged breaches of planning control specified in the Enforcement Notice were:

    "Without planning permission, the erection of a canopy and door, facing Harlesden Road."

    And

    "Without planning permission, the material change of use of the premises from one to two dwellings."

14. The steps required to be taken set out in Schedule 4 to the Enforcement Notice were:

    "Step 1: Cease the use of the premises as flats and its occupation by more than ONE household and remove all kitchens and cooking facilities except ONE, and remove all bathrooms except TWO, from the building.

    Step 2: Demolish the front canopy and door, facing Harlesden Road, and restore this elevation back to its original condition before these works took place as per the attached photograph.

    Step 3: Remove all fixtures and fittings associated with these works from the premises."

15. Ms Muorah, the Appellant, appealed against the Enforcement Notice ("the Enforcement Notice Appeal"). In that appeal Ms Muorah relied upon the grounds set out at section 174(2) (a), (c), (d), and (f) of the TCPCA 1990.

16. The appeal against the Enforcement Notice was determined by an inspector appointed by the First Respondent. The inspector's decision was communicated by letter dated 22nd August 2019 ("the August 2019 Decision Letter"). The inspector allowed Ms Muorah to add a ground of appeal under section 174(2)(g) of the TCPA 1990. He corrected Step 3 as set out in the Enforcement Notice by the deletion of the words "these

works" and the substitution of the words "the change of use". The ground (c) appeal succeeded in part. The inspector deleted the words "the erection of a canopy and door facing Harlesden Road" in Schedule 2, and deleted Step 2 in Schedule 4. The basis upon which that aspect of the ground (c) appeal succeeded were findings that that the ground floor window had been altered to form a door and the canopy erected, in September 2015, and at that time the property was in use as a dwellinghouse, and therefore benefited from the permitted development rights described in Class A of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO"). The ground (d) appeal failed on the basis of the inspector's finding that in September 2015 the property was in use as a dwellinghouse falling with either class C3(c) or class C4 set out in Schedule 1 to the Town and Country Planning (Use Classes) Order 1987 ("the Use Classes Order"). The ground (a) appeal was dismissed on the ground that the change of use from a single dwellinghouse to two flats was contrary to development plan policy. The ground (f) appeal was allowed on the basis that the requirement to remove all bathrooms except two exceeded what was necessary to remedy the breach of planning control. The ground (g) appeal was dismissed.

17. Ms Muorah appealed to the High Court against the decision set out in the August 2019 Decision Letter. The Secretary of State accepted that the August 2019 Decision Letter contained an error of law, as the effect of Step 1 in the enforcement notice was to deprive the owner of the permitted development right conferred by Article 3(1) and Class L of Part 3 of Schedule 2 to the GPDO. By an order made on 17th January 2020 David Elvin QC sitting as a Deputy High Court Judge remitted the case to the Secretary of State for re-hearing and determination in accordance with the opinion of the court. That case has the neutral citation [2020] EWHC 649 (Admin).

18. By an application dated 7th November 2019, Ms Muorah applied to the Council for a certificate of lawfulness of existing use or development ("the CLEUD Application"). The application related to the Site. The change of use in respect of which the certificate was sought was "change of a dwelling house into two flats". By a decision notice dated 2nd January 2020 the Council refused the CLEUD Application. In the decision notice by which they refused the application the Council stated that the application was made on 8th November 2019. For the purposes of these proceedings, it makes no difference whether the application was made on the 7th or the 8th November 2019. The reason for refusing the application was:

"The proposal is not lawful as it contravenes the requirements of enforcement notice E/17/0062 for 154A Harlesden Road, NW10 3RE, which requires the use as two flats to cease and fixtures and fittings associated with the change of use to be removed."

19. Ms Muorah appealed to the Secretary of State against the Council's decision to refuse to grant the CLEUD Application ("the CLEUD Appeal").

20. On 7th April 2020 the Planning Inspectorate ("PINS") wrote to the Council and stated that they intended to appoint the same inspector to determine the CLEUD Appeal and the Enforcement Notice Appeal.

21. In a letter dated 16th April 2020 the Council wrote to PINS setting out their position. That letter included the following:

"3. The Inspector decided that there was an unlawful change of use from a single to two dwellings. The High Court quashed that decision because of an inconsistency arising in the requirements of Step 1 of the notice, deciding "It is an issue which it appears could be dealt with simply on redetermination by the correction of step one, consistently with the other aspects of the DL" (paragraphs 33 and 49). In its letter of 24 March 2020 the Council suggested such simple correction. This could have been achieved by an exchange of letters with the appellant, but the appellant has rejected such an approach."

22. In a letter dated 19th August 2020 PINS wrote to the Council and informed them that it had not been possible to appoint the same inspector to determine the CLEUD Appeal and the Enforcement Notice Appeal and that different inspectors had been appointed to determine each appeal.

23. The CLEUD Appeal was determined using the written representations procedure. The appeal was allowed by a decision letter dated 10th September 2020 ("the CLEUD Appeal Decision Letter").

24. The Enforcement Notice Appeal decision was communicated in a letter dated 9th December 2020 ("the Enforcement Notice Appeal Decision Letter"). That decision letter included the following:

"7. It is directed that the enforcement notice be corrected by the:

• Deletion of 'the erection of a canopy and door facing Harlesden Road and' from the description of the alleged breach of planning control set out in schedule 2 and the deletion of Step 2 in the requirements set out in Schedule 4; and

• Replacement of the words 'these works' with 'the material change of use' in Step 3 of the requirements in Schedule 4;

and varied by the:

• Deletion of the words 'and its occupation by more than ONE household and' and the words 'and remove all bathrooms, except TWO' from Step 1 of the requirements set out in Schedule 4.

Subject to these corrections and variations the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended."

25. This case is concerned with the appeal under section 289 TCPA 1990 against the First Respondent's decision on the Enforcement Notice Appeal.

The Section 289 TCPA Appeal

26. The appeal to this court was made on 31st December 2020.

27. There are two grounds which are relied upon by the Appellant.

i) Ground One: In determining the Appellant's appeal against the enforcement notice, the Inspector failed to have regard to a material consideration, namely the CLEUD Appeal Decision Letter.

ii) Ground Two: In determining the Appellant's appeal against the enforcement notice under section 174(2)(f) TCPA 1990, the Inspector failed to have regard to the effect on the Appellant's use of the premises as a C4 House in Multiple Occupation of the requirement that all kitchen and cooking facilities except one be removed from the premises, notwithstanding –

a) The Appellant's case that, both for legal and practical reasons, the said requirement would be likely to result in her being prevented from using the premises for that purpose notwithstanding her right to do so pursuant to article 3 of and Part 3 Class L in schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015; and

b) The Appellant's case that the kitchen and cooking facilities had been installed at the premises at least 10 years prior to the date of the enforcement notice.

28. The First Respondent accepts that his decision was unlawful on the basis of Ground 2, but does not accept that the decision was unlawful on ground 1. The First Respondent was prepared to consent to judgment on the basis that Ground 2 was made out. Ms Muorah was not prepared to agree to judgment by consent based upon Ground 2.

Bankruptcy Proceedings

29. On 28th July 2021 the Appellant was recorded as bankrupt on the insolvency register.

30. By a notice dated 22nd June 2022 the trustee in bankruptcy disclaimed her interest in 154A, Harlesden Road, London NW10 3RE.

31. Ms Muorah has initiated proceedings in the Central London County Court in which she seeks an order that the disclaimer be reversed.

The Legal Framework

The Statutory Framework

32. Section 174(1) and (2) of the TCPA 1990 provide:

"(1) 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."

33. Section 179 of the TCPA 1990 provides:

"(1) Where, at any time after the end of the period for compliance with an enforcement notice, any step required by the notice to be taken has not been taken or any activity

required by the notice to cease is being carried on, the person who is then the owner of the land is in breach of the notice.

(2) Where the owner of the land is in breach of an enforcement notice he shall be guilty of an offence.

(3) In proceedings against any person for an offence under subsection (2), it shall be a defence for him to show that he did everything he could be expected to do to secure compliance with the notice.

(4) A person who has control of or an interest in the land to which an enforcement notice relates (other than the owner) must not carry on any activity which is required by the notice to cease or cause or permit such an activity to be carried on.

(5) A person who, at any time after the end of the period for compliance with the notice, contravenes subsection (4) shall be guilty of an offence."

34. Section 289(1) TCPA 1990 provides:

"(1) Where the Secretary of State gives a decision in proceedings on an appeal under Part VII against an enforcement notice the appellant or the local planning authority or any other person having an interest in the land to which the notice relates may, according as rules of court may provide, either appeal to the High Court against the decision on a point of law or require the Secretary of State to state and sign a case for the opinion of the High Court."

35. The right to appeal to the Secretary of State against an enforcement notice is restricted to those persons having an interest in the land to which the enforcement notice relates, or to a relevant occupier (as defined in section 174(6) TCPA 1990).

36. The right to bring an appeal under section 289 is restricted to the appellant in the section 174 appeal, or the local planning authority, or any other person having an interest in the land.

37. The restriction of the right to appeal, both at the section 174 stage, and the section 289 stage, to those having an interest in the land (or relevant occupiers) is consistent with the statutory scheme, which provides criminal sanctions for failing to comply with the requirements of an enforcement notice. Those who are liable to prosecution for failing to comply with the requirements of an enforcement notice are the owners of the land, a persons who have control of or an interest in the land.

Insolvency Act 1986

38. Section 306 of the Insolvency Act 1986 ("IA 1986") provides:

"(1) The bankrupt's estate shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee.

(2) Where any property which is, or is to be, comprised in the bankrupt's estate vests in the trustee (whether under this section or under any other provision of this Part), it shall so vest without any conveyance, assignment or transfer."

39. Section 315(1) of the IA 1986 provides:

"(1) Subject as follows, the trustee may, by the giving of the prescribed notice, disclaim any onerous property and may do so notwithstanding that he has taken possession of it, endeavoured to sell it or otherwise exercised rights of ownership in relation to it."

Actions commenced or continued by those made bankrupt

40. In ***Pickthall v. Hill Dickinson*** [2009] EWCA Civ 543 the Court of Appeal considered a case in which the Claimant had started proceedings knowing that the cause of action was not vested in him as it was vested in his trustee in bankruptcy. The Claimant had sought an assignment from his trustee in bankruptcy, but no assignment had been made at the time he commenced the action. At paragraph 15, Mann J (with whom the other members of the court agreed) stated:

"15. So I turn to consider the basis on which it is said that the proceedings in this case were an abuse. In my view the starting point is that where a man starts proceedings knowing that the cause of action is vested in someone else, then it is hard to see why those proceedings are not an abuse. He has started proceedings in which, even if he proves all the facts he wants to prove and establishes all the law he wants to establish, he will still lose because he does not have a right to sue. It is hard to see how that cannot be an abuse. Only people who own causes of action, or who have an appropriate interest in proceedings, have any business asserting the cause of action or starting proceedings. Any other use of the court's proceedings is improper. The position would be likely to be otherwise if the claimant does not know, or is uncertain, as to whether he has title to the relevant cause of action. In those circumstances, at least until it is authoritatively determined that the claimant does not own the cause of action, it may well not be appropriate to characterise the proceedings as an abuse, but that is different from the case currently under consideration."

41. The principles to be applied when considering whether a bankrupt is entitled to commence or to continue to pursue a claim were also considered by the Court of Appeal in ***Pathania v. Adedeji and others*** [2014] EWCA (Civ) 681. At paragraphs 15 and 16 Floyd LJ (with whom the other members of the court agreed) stated:

"15. Where a bankrupt is commencing or pursuing a claim which he knows he does not have, the abuse of process in commencing or pursuing that claim is obvious. No claimant is entitled to sue on a right which he knows belongs to someone else. The abuse lies in knowingly pursuing a claim which, as presently constituted, is bound to fail. The abuse does, however, depend on actual knowledge of the lack of title to the cause of action, not on what he or she ought to have known.

16. Nevertheless, where an action is commenced or continued after the cause of action has vested in a trustee in bankruptcy, the action does not abate and the position is capable of being regularised by the joinder of the trustee or by the taking of an assignment from him. Whether the court will permit that to happen will involve an exercise of discretion. It will be necessary to have regard to the interests of those likely to be affected, including the creditors in the bankruptcy. The court would be likely to stay the action until the position in the bankruptcy is clarified."

The Application to Strike out the Appeal

42. Mr Westaway, for the First Respondent, submits that the Appeal should be struck out as an abuse of process, as neither the cause of action, or the property at 154A, Harlesden Road, vest in the Appellant.

43. Mr Westaway submits that when the Appellant was made bankrupt her property vested in her trustee in bankruptcy and that such property included her cause of action in this case, which he submitted was a proprietary cause of action.

44. Mr Westaway further submits that, in order to pursue an appeal under section 289 TCPA 1990 an appellant must have an interest in the land to which the enforcement notice relates. He submits that following the vesting of 154A, Harlesden Road in her trustee in bankruptcy, the Appellant no longer has an interest in the land to which the enforcement notice relates. In support of that point, Mr Westaway submits that:

    i) The right to appeal under section 289 TCPA 1990 is restricted to the appellant, the local planning authority and any other person having an interest in the land.

    ii) The use of the word 'other' before the words 'person having an interest in the land' indicates that the third category refers to those with an interest in the land other than the appellant, who (if not a relevant occupier) is required by section 174(1) TCPA to have an interest in the land.

    iii) The statutory scheme supports that construction of section 289(1) of the TCPA 1990 as it would restrict the right of appeal to those upon whom criminal liability for failing to comply with an enforcement notice falls. Criminal liability for failing to comply with an enforcement notice falls on the owner (as provided by section 179(1) TCPA 1990). Mr Westaway submits that it can be assumed that Parliament did not intend to confer on those who do not face criminal sanctions for failing to comply with an enforcement notice the right to appeal under section 289 TCPA 1990 and thereby influence or affect the enforcement notice which can give rise to criminal sanctions.

45. Ms Muorah argues that the inspector's decision on the enforcement notice appeal is acknowledged by the First Respondent to be defective as he indicated that he was prepared to consent to judgment. Ms Muorah submits that a decision to strike out her claim would cause injustice.

46. Ms Muorah also argues that:

i) 154A, Harlesden Road was property held by her on trust and did not form part of her estate. In making that submission she relied upon section 283(3)(b) of the IA 1986.

ii) Her trustee in bankruptcy lacks the necessary qualifications, or has not established that she has the necessary qualifications.

iii) That her trustee's decision to disclaim 154A, Harlesden Road as onerous property was defective and should be reversed.

47. The arguments put forward by Ms Muorah under the headings set out at paragraph [46] above are not before this court for determination. Ms Muorah has initiated proceedings in the Central London County Court in relation to issue (iii).

48. At the time this action was commenced Ms Muorah was not bankrupt, and had an interest in the land to which the enforcement notice related.

49. When Ms Muorah was made bankrupt on 28th July 2021, 154A, Harlesden Road vested in Ms Muorah's trustee in bankruptcy.

50. Ms Muorah's cause of action in this appeal vested in her trustee in bankruptcy and was not assigned to Ms Muorah.

51. As the cause of action has passed to the trustee in bankruptcy it is no longer open to Ms Muorah to pursue this action. The court delayed consideration of this case following the hearing in May 2022 in order to allow issues relating to Ms Muorah's bankruptcy to be investigated and appropriate action taken. During that time the cause of action in this appeal has not been assigned to Ms Muorah.

52. On 22nd June 2022 the trustee in bankruptcy disclaimed that property, and as a result it passed to the Crown.

53. The cause of action in this appeal vested in the trustee in bankruptcy. The trustee in bankruptcy has been allowed time in order to consider her position. During that time she has not participated in the appeal or assigned the cause of action. Ms Muorah does not own the cause of action and so it is an abuse of process for her to seek to continue this appeal. Accordingly I have concluded that the appeal must be struck out.

54. As the appeal must be struck out as the cause of action vests in the trustee in bankruptcy, the issue of whether Ms Muorah falls within the category of persons who can maintain an appeal under section 289 TCPA 1990 does not arise.

55. As the appeal must be struck out as the cause of action does not vest in the Appellant, even if Ms Muorah were to be successful in her claim in the County Court that the notice of disclaimer was defective and should be reversed, or if she were able to establish that 154A, Harlesden was held on her in trust for others, such decisions would not overcome the fact that the cause of action in this appeal vested in her trustee in bankruptcy.

56. The First Respondent accepted that the decision on the enforcement notice appeal was unlawful on the basis of ground 2 of the grounds of appeal and was prepared to consent

to judgment on the basis of that ground. Ms Muorah was not prepared to agree to a consent order limited to ground 2.

57. The defect identified in ground 2 was "In determining the Appellant's appeal against the enforcement notice under ground (f) in section 174(2) of the Town and Country Planning Act 1990, the Inspector failed to have regard to the effect on the Appellant's use of the premises as a C4 House in Multiple Occupation of the requirement that all kitchen and cooking facilities except one be removed from the premises, …"

58. As a result of the appeal being struck out, the inspector's decision on the enforcement notice appeal stands. Section 173A of the TCPA 1990 empowers a local planning authority to withdraw an enforcement notice issued by them, or waive or relax any requirement of such a notice. Those powers can be exercised whether or not the notice has taken effect. It would be open to Ms Muorah to request that the Second Respondent exercise the powers conferred on them by section 173A. If such a request were to be made the Second Respondent would be able to consider exercising the section 173A powers, and when considering such a request they would be able to take account of the concession made by the Secretary of State in these proceedings.

59. A draft order, together with written submissions on any consequential matters which cannot be agreed, should be filed within 14 days of hand down of this judgment, and any further determination will be on the basis of such written submissions.