Case Name: *London Borough of Islington v Secretary of State for Housing, Communities And Local Government & Anor* [2019] EWHC 2691 (Admin) (17 October 2019)

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Commentary: The Council was successful in its appeal against an Inspector's decision overturning the Council's enforcement notice against an unlawful change of use from A2 to C3 residential on the ground that there had been four years' continuous use. The Court held that the Inspector had erred in applying the case law on continuous use in the context of enforcement action.

The basement in question had first been used for C3 residential use in April 2013. However, in October 2013, the tenant moved out and the basement was renovated which involved "gutting" the space. The space would have been habitable from February 2014 and a tenant moved in in May 2014. The developer had not registered the flat as a separate unit for Council Tax but had openly advertised it for rent. The Council started enforcement action in September 2017 with a site visit in October 2017 and rejected an application in November 2017 for a Certificate of Lawfulness on the basis that there had not been 4 years of continuous use because of the interruption in use between October 2013 and May 2014. The enforcement notice was issued in January 2018.

The Court held that the Inspector had misdirected himself in law and misapplied the relevant law. He had failed to apply the guidance in Thurrock Borough Council v Secretary of State for the Environment [2002] EWCA Civ 226 and Swale v Borough Council v Secretary of State for the Environment [2005] EWCA Civ 1568.

The essential reasoning in Thurrock was that "If at any time during the relevant period the LPA would not have been able to take enforcement proceedings in respect of the breach, for example, because no breach was taking place, then any such period can not count towards the rolling period of years which gives rise to the immunity." and "It was for the landowner to show that at any time during the relevant period enforcement action could have been taken".

Swale concerned intermittent residential use of a barn originally used for agricultural purposes. This established that the concept of abandonment was relevant only where a lawful use had been established and not when applying the relevant immunity provisions. Although the use of a building at a particular time is largely a question of fact, the legally correct question is whether the building had been used throughout the whole four-year period so that the planning authority could at any time during that period have taken the enforcement action. The decision-maker is required to consider not the building's availability or suitability for residential use but whether it was actually put to such use. Where it was not in use, the owner's intention to return it to the relevant use was not relevant because the planning authority could not take enforcement action based on the Owner's intention.

The Inspector had erred in applying Gravesham BC v Secretary of State for Environment (1984) 47 P & CR 142 which concerned the question as to whether a building was a dwelling

within the GPDO.

The Court also distinguished the case of Impey v Secretary of State for the Environment (1984) 47 P & CR 157 and the Supreme Court case of Welwyn Hatfield BC v Secretary of State for Communities and Local Government [2011] 2 AC 304 which concerned operational development and an initial change of use, not interruption in continuous use.

Case summary prepared by Susannah Herbert