Case Name: *London Borough of Brent v Secretary of State for Housing Communities and Local Government & Anor* [2022] EWHC 1875 (Admin) (19 July 2022)

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Commentary: This was an application made by the London Borough of Brent (" the Council") under s288 Town and Country Planning Act 1990 for an order quashing the decision of the Secretary of State for Housing, Communities and Local Government to allow an appeal made under section 195 TCPA 1990 and to grant a certificate of lawful use or development.

The enforcement notice
The Council issued an enforcement notice on Ebele Muorah's property, 154A Harlesden Road, London ("the Property") for carrying out without planning permission a) the erection of a canopy and door facing on Harlesdon Road and b) the material change of use of the premises from one to two dwellings.
The Council set out the steps to be taken by the second defendant to remedy the breach of planning control which included:
"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."

The enforcement appeal
An appeal against the enforcement notice ("the Enforcement Appeal") was made by Ebele Muorah however the appeal was unsuccessful as the decision purported to uphold the enforcement notice. Ebele Muorah then appealed to the High Court under s289 Town and Country Planning Act 1990 against the Secretary of State's decision at the Enforcement Appeal.

The s289 Challenge
At the High Court challenge, the Secretary of State accepted that the decision notice issued at the Enforcement Appeal contained an error of law as Step 1 would effectively deprive the owner of the permitted development right derived from Article 3(1) and Class L of Part 3 of Schedule 2 of the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2015. The High Court then quashed the Secretary of State's decision because of the inconsistency arising from the requirements of Step 1 of the enforcement notice. The High Court then remitted the case to the Secretary of State for re-hearing and determination.

The CLEUD application
The second defendant then applied to the Council for a certificate of lawfulness of existing use or development for a change of a dwelling house into two flats at land at 154 Harlesdon, London ("the CLEUD Application"). The CLEUD application was refused by the Council on the basis that the proposal under the CLEUD application was in

contravention with the requirements of an existing enforcement notice at the Property which required the use as two flats to cease and fixtures and fittings associated with the change of use to be removed.

The CLEUD appeal

An appeal against the refusal to grant the CLEUD application was subsequently made by Ebele Muorah to the Secretary of State. The CLEUD appeal was allowed on the basis that the Council's evidence did not dispute Ebele Muorah's claim that land at 154 Harlesdon, London had been in use as two flats since September 2015 and that a partition was erected at the same time. Instead, the Council's decision notice stated that "the existing use as two self-contained flats was not lawful as it contravened an enforcement notice which required the use of the property as two flats to cease".

In reaching its decision, the inspector went on to quote the Planning Practice Guidance which states that "an enforcement notice is not in force where an enforcement appeal is outstanding or an appeal has been upheld and the decision has been remitted to the Secretary of State for redetermination, but that redetermination is still outstanding". As these were the circumstances on the date of the CLEUD application it was held that "there was no enforcement notice "in force" for the purposes of section 191(2)(b) of the 1990 Act and that the enforcement notice would be of "no effect" pending the final determination". The Inspector went on to state that "the Council's refusal to grant a certificate of lawful use or development in respect of a change of a dwellinghouse into two flats was not well-founded and that the appeal should succeed".

The re-hearing of the enforcement appeal

The decision notice stated that the inspector at the Enforcement Appeal "had failed to consider an appropriate correction to Step 1 of the enforcement notice to remove the requirement for occupation to cease by more than one single household". However the Enforcement Notice issued was upheld but was subject to corrections and variations to remedy the errors identified in the previous decision.

The s288 Challenge by the Council

The Council then made an application under section 288 of the Town and Country Planning Act 1990 that the CLEUD application be quashed. The grounds of the application included:

1. The inspector failed to have regard to the principle of consistency in decision making by failing to refer to and give reasons for departing from the August 2019 Decision Letter.
2. The Secretary of State acted in breach of the rules of natural justice by failing to send the CLEUD Appeal Inspector the Council's submissions in relation to the Enforcement Notice Appeal.

The Council was found to be successful under grounds 2. In reaching its decision, the Court held that "the failure by the CLEUD Appeal Inspector to consider whether the requirements of section 191(2)(a) of the TCPA 1990 were satisfied was a fundamental error which went to the central question that the inspector had to address, namely whether the use was lawful. It cannot be said that decision would necessarily have been the same if the inspector had not made that error. Indeed, it is almost inevitable that the decision would have been different."

For this reason, the Council's s288 challenge was successful and the decision to grant the CLEUD application was quashed.

Case summary prepared by Cobi Bonani