

Case Name: *Devonhurst Investments Ltd, R (On the Application Of) v Luton Borough Council* [2023] EWHC 978 (Admin) (28 April 2023)

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Commentary: A developer's claim for judicial review of a planning enforcement notice issued by Luton Borough Council has been dismissed in the High Court.

Luton Borough Council (the 'Council') issued an enforcement notice to Devonhurst Investments Ltd (the 'Claimant') on 17 February 2022 in relation to Shire House, Luton, on the basis that the Claimant had without planning permission:

- I. changed its use of a site from its former employment use to residential use; and erected three two storey structures used to accommodate multiple self-contained residential units on the site.

The Claimant challenged the enforcement notice on two grounds:

1. the Council issued the enforcement notice without regard to:
 - i) its Public Sector Equality Duty arising under s.149 Equality Act 2010;
 - ii) the best interests of children residing on the site; and/or
 - iii) the Article 8 ECHR rights of occupants.
2. the decision to issue the enforcement notice was taken without any, or any proper regard, to the statutory test of expediency under s.172(1)(b) TCPA 1990.

Ground 1

Ground 1 i) – Public Sector Equality Duty

The Claimant alleged that the Council made its decision to issue the enforcement notice not knowing:

- a) (a) how many of the occupants were persons with protected characteristics,
- b) (b) whether those persons were adults or children,
- c) (c) what protected characteristics those persons held,
- d) (d) the nature and extent of the vulnerability of those possessing protected characteristics,
- e) (e) what needs arose from those protected,
- f) (f) how those needs were or were not being met by their accommodation in Shire House or
- g) (g) what the impact would be on those persons of being made homeless.

The Claimant therefore argued that the Council took no reasonable steps to make enquiries about what was not known to it. The Claimant accepted that the Council was not necessarily required to undertake a door-to-door survey of all the occupants or consider the impact of enforcement action on each individual occupant with a protected characteristic but submitted that the Council had to grasp the likely consequences of the decision it was taking for the range of persons affected with protected characteristics. The Claimant contended that given the final and

permanent nature of the proposed decision (albeit subject to appeal), there was a heavy onus on the Council to determine the nature and extent of any protected characteristics that were engaged and to undertake a conscious assessment of the likely consequences of the enforcement action for people with those specific protected characteristics, having regard to the statutory needs.

In finding for the Council, Steyn J held that that the duty of enquiry in the context of the PSED is subject to challenge only on Wednesbury grounds. It was evident from the Officer's Report that the Council consciously considered the impact of the proposed enforcement action on the needs of those with protected characteristics before issuing the enforcement notice. Before making its decision, the Council was aware that there were about 200 people occupying the flats and had obtained a schedule of the (then) occupiers which provided the names of the tenant(s) of each flat, as well as the start and end date, and length, of each tenancy. The Council also had a proper appreciation of the desirability of promoting the equality objectives. Although the Council had not assessed the potential impacts by reference to each of the relevant protected characteristics, and ordinarily it would be better to do so, ultimately, in the circumstances of this case, the Council had clearly shown a proper appreciation of the potential impact of the decision on equality objectives and of the desirability of promoting those objectives.

Accordingly, Ground 1 i) was rejected.

Ground 1 ii) – best interests of children

Section 11(2) of the Children Act 2004 provides:

"Each person and body to whom this section applies must make arrangements for ensuring that –

- a) their functions are discharged having regard to the need to safeguard and promote the welfare of children;..."

Section 11(1) provides that s.11 of that Act applies to local authorities. The Claimant contended that Article 3.1 of the United Nations Convention on the Rights of the Child ('UNCRC') was given effect in domestic law by s.11 of the Children Act 2004, and that it requires that all relevant authorities treat the best interests of the child as a primary consideration. In support of this contention, the Claimant relied on *ZH (Tanzania) v Secretary of State for the Home Department*. In rejecting this ground, Steyn J held that the Claimant's submissions did not reflect the law and that the result of *ZH (Tanzania)* was not that article 3.1 of the UNCRC has been incorporated into the law of England and Wales by s.11(1) of the Children Act 2004. What was said was that the spirit of it has been translated into national law. The UNCRC is an unincorporated treaty and as such does not form part of the law of the UK.

In any event, in circumstances where the relevant duty was to make arrangements for ensuring that the Council made its decision "having regard to the need to safeguard and promote the welfare of children", the court found that the objection to the terms in which the Council described the regard it had had to the welfare of children was "a semantic one which lacked substance". The extent of the duty under s.11 depended on the context and the function that the authority is exercising and, in the context of this determination regarding the exercise of its enforcement powers, s.11 of the Children Act 2004 did not impose a duty on the Council to investigate the individual needs of the children occupying the property. It was sufficient that the Council had due regard to the positive and negative impacts of its proposed decision on children, and reached the view that the positive impact of stopping the use of such poor accommodation substantially outweighed the disruption and potential distress that was likely to be caused.

Ground 1 iii) – Article 8 Rights of Occupants

The Claimant contended that the Council failed to make proper inquiry into the impacts on the approximately 200 residents of the residential use of Shire House ceasing, and so failed to assess properly the proportionality of pursuing enforcement action. In these circumstances, the Claimant alleged the Council has breached the Article 8 rights of the residents of Shire House.

Steyn J noted that s.7 of the Human Rights Act 1998 has the effect that a claimant only has standing to pursue an allegation of breach of Article 8 if he would be victim for the purposes of Article 34 ECHR if proceedings were brought in the Strasbourg court in respect of that act. Steyn J therefore queried whether the Claimant in fact had standing to bring such a claim. However, as neither party has raised standing as an issue, the judge went on to consider the substance of the claim.

In dismissing the claim, the court held that, in circumstances where there was no evidence as to the impact of the Council's decision on any individual resident of Shire House, and the Claimant has not sought to adduce any such evidence, it was manifest that no violation of Article 8 has been established. In any event, having regard to the assessed positive and negative impacts that the Council assessed would be the consequence of issuing the enforcement notice, Steyn J was satisfied that that the decision was necessary and proportionate.

Accordingly, Ground 1 was dismissed.

Ground 2 – Expediency

The Claimant contended that the Council did not properly address the expediency test in s.172(1)(b) of the TCPA. The Claimant acknowledged that the Officer's Report

addressed the question of expediency in express terms. However, the Claimant submitted that the following matters were material considerations which the Council failed to take into account in assessing whether it was expedient to take enforcement action:

- I. the view of Mr Inwards (the Council's Joint Interim Development Management Service Manager) expressed in 2019 to a director of the Claimant that the residential development at the Site was authorised; and
- II. The views of the Council's housing officers that they had no issue with the quality of the accommodation provided at the Site.

In rejecting this ground, the court held that it could not be suggested that Mr Inwards' statements gave rise to any legitimate expectation. His statements were made informally, albeit he conveyed them to the Claimant and to housing officers, in a context where, as the claimant must have known, it was open to it to seek a formal statement as to the Council's view of the lawfulness of the development. His statements could not be said to be "clear, unambiguous and devoid of relevant qualification".

Similarly, the email from the Council's housing officer about the extent of the issues that required remediation in one flat that the officer visited was plainly not obviously material to the decision whether to take enforcement action. It was not the housing officer's function to consider the lawfulness of the development as a matter of planning law, and he did not do so.

The approach taken in the Officer's Report to the question whether it would be expedient to issue an enforcement notice was therefore found to be lawful. Accordingly, Ground 2 also failed.

Case summary prepared by Emma McDonald