Case Name: *Gurvits & Anor v Secretary of State for Levelling Up, Housing And Communities* [2024] EWHC 490 (Admin) (06 March 2024)

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Commentary: This was a statutory review under section 289 of the Town and Country Planning Act 1990 ("TCPA 1990") following the decision of an inspector to dismiss the Appellants' appeals against an enforcement notice issued by the London Borough of Barnet in October 2021.

The enforcement notice (the "Notice") alleged that the Appellants had, without planning permission, materially changed the use of an outbuilding to use as an office and associated storage and that this breach had occurred within 10 years of the date of the enforcement notice. The outbuilding to which the Notice related was a low lying structure which had been erected in three stages across the rear gardens of the residential premises at 46, 48 and 50 Hurstwood Road.

The Appellants appealed against the enforcement notice but were unsuccessful – the Inspector upheld the Notice subject to an additional requirement that the Appellants "permanently remove the internal doors and seal up the existing openings which link the three component buildings".

The Appellants sought to challenge the Inspector's decision on three grounds.

Ground 1

(a) The Inspector failed to have regard to a material consideration, namely the First Appellant's unchallenged evidence as to the use of the land; and/or
(b) The Inspector's finding that each part of the outbuilding was prior to 2017 used solely in connection with one of the three dwellings was irrational as unsupportable on the unchallenged evidence of the First Appellant; and/or
(c) The Inspector failed to give any reasons for not accepting the First Appellant's unchallenged evidence on this point.

The Appellants alleged that the Inspector's determination was based upon a finding that, prior to amalgamation in 2017, each component part of the outbuilding on the appeal site was used solely in connection with the single dwellinghouse to the rear of which it was situated. The Appellants submitted, however, that the finding was unsupported by the evidence before the Inspector. In particular, it was unsupported by and in conflict with the unchallenged evidence given by the First Appellant in her witness statement. The Appellants alleged that there was nothing in the First Appellant's evidence upon which the Inspector could reasonably have concluded that, prior to their amalgamation in 2017, each component element of the outbuilding constructed on the appeal site had been solely used in connection with and for purposes incidental to each

individual dwelling to the rear of which it was located.

The Court rejected this submission on the basis that the First Appellant's proof of evidence was not the only evidence before the public inquiry; a detailed factual history of the development was provided in both oral evidence and in closing submissions. It was in the light of this more detailed account of the history of development and use of the outbuilding and its component parts that the Inspector's findings were to be judged. The Inspector's findings therefore accurately responded to and reflected the evidence before him - prior to their amalgamation into a single outbuilding in 2017, the three component elements of the appeal site had indeed been used as three separate outbuildings by the Appellants and their families and had been constructed under the householder Class E permitted development right which contemplates a building constructed within the curtilage of a dwellinghouse which is "required for a purpose incidental to the enjoyment of the dwellinghouse as such".

For these reasons, this ground was dismissed.

Ground 2 - The Inspector took into account an immaterial consideration, namely whether or not operational development fell within or without certain permitted development rights.

The Appellants submitted that the Inspector had treated the building operations carried out in 2017 to join together the three component parts of the outbuilding as axiomatically resulting in a material change in the use of the whole outbuilding. They submitted that the Inspector had confused the operational development which had resulted in the creation of the outbuilding at the appeal site with the quite different issue raised by the Notice, which was whether the alleged material change of use had taken place.

Mr Justice Mould dismissed this ground on the basis that it was a relevant consideration for the Inspector as to whether following the amalgamation of the three buildings constructed under the Class E permitted development right into a single unit of occupation, the use of the outbuilding as a single office with associated storage remained within the scope of the use permitted under the Class E permitted development right. It was for the Inspector to decide whether this consideration was material to the appeal and if so the weight to be given to it. The Inspector therefore did not err in law in taking into account this issue and Ground 2 was accordingly dismissed.

Ground 3 - The inspector's amendment to the Notice by the insertion of a new requirement without the removal of requirements 2 and 3 was:

(a) unlawful applying the principle in Mansi v Elstree Rural District Council (1965) 16 P&CR 153 ['Mansi']; and/or

(b) irrational; and/or
(c) the Inspector failed to give adequate reasons for this course of action.

The Appellants alleged that the Inspector's amendment to the Notice to insert a requirement that the Appellants "permanently remove the internal doors and seal up the existing openings which link the three component buildings", in conjunction with his acceptance of requirements 2 and 3 of the Council's Notice (which required that the Appellants permanently remove all kitchen units and toilets from the outbuilding) was a breach of the principle in Mansi that an enforcement notice should not be drafted in such a way as to impose requirements which abrogate existing lawful or permitted use rights.

The Court agreed that it was unnecessary for the second and third requirements to have been expressed as requiring the removal "permanently" of kitchen facilities and toilets from the outbuilding. It would have been sufficient simply to have required their removal, which would have achieved the intended objective. Mr Justice Mould disagreed however that the requirement for permanent removal of the toilets and kitchen facilities resulted in a breach of the Mansi principle. R v Harfield [1993] 2 PLR 23 established the proposition that any enforcement notice will be construed so as to retain legally permitted rights. Applying that proposition to the present case, the substantive position was clear; the outbuilding was a lawful building. Its separation into its three former constituent elements in accordance with the Inspector's amendment to the Notice would result in practice in three lawful outbuildings, each of which would in future be able to be used for purposes incidental to the dwellinghouses to the rear of which they are situated. The right to use each of the three outbuildings for such purpose is a statutory right, defined as such by section 55(2)(d) TCPA 1990. The right to carry out internal works for the improvement or other alteration of a building is also a statutory right, defined as such by section 55(2)(a). Both are legal rights which could not be taken away by the Notice. As a matter of established legal principle, in any future criminal proceedings, the Notice would therefore be construed so as to retain those rights. There was therefore no need for the Inspector to refer to the statutory rights enjoyed by the Appellants under sections 55(2)(a) and 55(2)(d) TCPA 1990, because each of those statutory enactments operate as a matter of law within parameters that are certain, being those defined by section 55(2) itself.

For the reasons given above, the section 289 appeal was dismissed.

Case summary prepared by Emma McDonald