Neutral Citation Number: [2019] EWHC 2691 (Admin)

Case No: CO/1699/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 October 2019

Before :

MRS JUSTICE LANG DBE

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Between :

LONDON BOROUGH OF ISLINGTON	**Appellant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	
(2) MAXWELL ESTATES LIMITED	**Respondents**

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- -

Charles Streeten (instructed by **London Borough of Islington Legal Services**) for the **Appellant**
Leon Glenister (instructed by the **Government Legal Department**) for the **First Respondent**
Rosie Scott (instructed by **Attwells Solicitors LLP**) for the **Second Respondent**

Hearing date: 17 September 2019

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Approved Judgment

Mrs Justice Lang :

1. The Appellant ("the Council") appeals under 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, made on his behalf by an Inspector on 29 March 2019, in which he allowed an appeal by the Second Respondent ("Maxwell Estates") against an enforcement notice issued by the Council in respect of a change of use of the basement at Maxwell Estates' premises at 85 Newington Green Road, London, N1 4QX ("the premises"), from ancillary A2 use to C3 residential use, without planning permission.

2. Permission was granted by Mr Tim Mould QC, sitting as a Deputy Judge of the High Court, at an oral hearing on 22 May 2019.

History

3. At all material times, Maxwell Estates was in business as an estate agent on the ground floor of the premises. The ground floor and the basement had an established A2 use (financial and professional services) under the Use Classes Order. The upper floors were in residential use.

4. The Inspector accepted the evidence of Mr Khalid Abbasi, manager of Maxwell Estates, that in early 2013 the basement was converted into a residential flat (by installing a shower and kitchen sink, in addition to the existing WC and kitchen units) and it was leased to a tenant (Mr Khan) from 11 April 2013, at a rent of £750 per month. The Inspector concluded, on the balance of probabilities, that the residential use of the basement commenced at the latest on 11 April 2013. Mr Khan continued to reside there until his lease expired on 10 October 2013.

5. No planning permission was sought for the change to C3 residential use. Maxwell Estates advertised the basement for letting with the cost of council tax and water included in the rent, but failed to register the basement separately for council tax or for its water supply, in accordance with legal requirements.

6. In October 2013, Maxwell Estates decided to renovate the basement, including damp proofing, re-wiring and shower room tiling, to comply with Building Regulations. The basement was "gutted" during the renovation works, and Mr Abbasi conceded in cross-examination that, had the Council inspected it at the time, it would not have been possible for anyone to say what the use of the unit was [paragraph 19 of the Decision Letter ("DL 19")].

7. Mr McDonald, planning enforcement officer at the Council, said in his evidence in chief that it would not have been possible to take enforcement action in respect of the basement when it was a shell unit, as without residential facilities it would not have been a residential unit. Its use would have been treated as ancillary to the office use on the ground floor.

8. It was common ground that the basement was uninhabitable during the renovation works. The works commenced in about November 2013, and on 4 February 2014 private building inspectors (Lewis Berkeley Building Control Ltd) certified that they

had been completed. Maxwell Estates also produced a certificate of installation of a smoke and fire alarm appropriate for a dwelling, dated 11 January 2014.

9. Thereafter other internal works were carried out and a separate access at the rear of the property was also installed. The Inspector concluded that the basement would have been habitable once the renovation works were completed in about February 2014, although Maxwell Estates decided to undertake further works before re-letting it in May 2014 [DL 16].

10. The basement was advertised for letting on the internet from the end of March 2014. On 3 May 2014, the basement was leased to a tenant, Miss Migliore, for one year, at a higher rent of £1,100 per month. The Inspector was satisfied, on the balance of probabilities, that she occupied the basement for a further year until May 2016. Thereafter the basement was leased to new tenants, Mr Colapietro and Miss Filippi, who were in occupation until May 2018.

11. The Inspector accepted Maxwell Estates' submission that the unauthorised residential use continued from October 2013 to May 2014, despite the break in occupation. He said, at [DL 15]:

> "At the Inquiry, in examination in chief, Mr Abbasi accepted that there was an intention to improve the quality of the flat to enable the rent to be increased and that that justified the subsequent tenant, Miss Migliore being charged more rent. It seems to me that, despite the break in occupation, this amounts to clear evidence of a continuation of the residential use and intention to permit occupation of the unit again, upon completion of the improvement works and thus to further the breach. This was therefore a period during which the unauthorised use continued."

12. The Inspector rejected the Council's submission that Maxwell Estates had deliberately concealed the existence of the change of use of the basement, in particular, by not registering the basement as a separate unit for council tax purposes. In reaching this conclusion, the Inspector took into account the fact that the basement was openly advertised as a residential flat on the internet and its existence was known to third parties.

13. The alleged breach of planning control was brought to the Council's attention by a third party, and an enforcement case was opened on 26 September 2017. A site visit by the Council took place in October 2017.

14. On 30 November 2017, Maxwell Estates applied to the Council for a certificate of lawfulness to regularise the change of use, on the basis that the basement had been in residential use for more than 4 years and so was immune from planning enforcement.

15. The Council rejected the application, concluding that there had not been 4 years continuous use as a residential unit, because the basement was not in residential use between 10 October 2013 and 3 May 2014. The Council decided to take enforcement proceedings, as the poor quality of the accommodation was contrary to national and

local planning policies, and it was expedient to take action to maintain the integrity of the Conservation Area and planning processes.

16. The Council served an enforcement notice on 12 January 2018 which stated that there had been a breach of planning control, namely, "[w]ithout planning permission, the change of use of the basement from ancillary A2 use class to the creation of a self-contained C3 residential unit". Maxwell Estates was required to "[c]ease the use of the basement as residential and return the basement to its lawful use as ancillary A2 use", within one month of the notice.

The appeal

17. Maxwell Estates appealed under paragraphs (d), (f) and (g) of section 174(2) TCPA 1990. An Inquiry and a Site Visit took place. The Inspector allowed the appeal under paragraph (d) of section 174(2) TCPA 1990. He concluded that the basement had been in continuous use as a dwelling from at least 11 April 2013, including during the period of renovations from October 2013 to May 2014, and therefore a material change of use occurred more than 4 years before the enforcement notice was issued [DL 31]. He held that he did not need to determine the other grounds of appeal.

Grounds of appeal

18. On appeal, the Appellant only challenged the Inspector's conclusion that there had been continuous use during the renovations between October 2013 and May 2014. The Appellant's grounds of appeal were as follows:

    i) The Inspector misunderstood and/or misapplied the law regarding immunity from enforcement action taken against a material change of use.

    ii) The Inspector misinterpreted and/or misapplied the burden and standard of proof under section 174(2)(d) TCPA 1990.

    iii) In the alternative to (i) above, the Inspector's conclusion was contrary to the evidence, and so was irrational.

    iv) Procedural impropriety. The Inspector acted unfairly by relying on matters raised by Ms Scott, on behalf of Maxwell Estates, in her closing submissions, concerning the Council's ability to enforce against residential use during the period of the renovations, which had not been put to the Council's witness in cross-examination, nor in re-examination of Mr Abbasi. The Council did not have a reasonable opportunity to adduce evidence and to make submissions on these matters, and this was drawn to the Inspector's attention.

Statutory framework

19. By section 57(1) TCPA 1990, planning permission is required for the carrying out of development. Section 55(1) TCPA 1990 provides that the making of a material change of use is "development".

20. By section 171A(1) TCPA 1990, carrying out development without the required planning permission constitutes a breach of planning control. Where it appears to a local planning authority that there has been a breach of planning control and that it is expedient to issue an enforcement notice, the local planning authority may do so, under section 172 TCPA 1990. However, limitation periods apply.

21. In the appeal before the Inspector, Maxwell Estates relied upon section 171B(2) TCPA 1990, which grants immunity from enforcement where the relevant time limit has expired:

> "(2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach."

22. Section 174(2) TCPA 1990 sets out the prescribed grounds of appeal against an enforcement notice. The material ground in this appeal is at paragraph (d) which provides:

> "(d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters."

Ground 1: misdirection and/or misapplication of the law in relation to section 171B(2) TCPA 1990

Submissions by the Council

23. The Council submitted that the Inspector erred in failing to apply the approach to section 171B(2) TCPA 1990 set out by the Court of Appeal in *Thurrock Borough Council v Secretary of State for the Environment* [2002] EWCA Civ 226, [2002] JPL 1278 (upholding the judgment of the High Court, reported at [2001] JPL 1388) and *Swale v Borough Council v Secretary of State for the Environment* [2005] EWCA Civ 1568, [2006] JPL 886. In deciding whether or not there had been continuous use, the Inspector wrongly applied a presumption of continuance, and took into account impermissible factors such as Maxwell Estate's intentions and whether the basement was habitable.

24. Furthermore, the Inspector erred in relying upon the characteristics of a dwelling house as identified in *Gravesham BC v Secretary of State for Environment* (1984) 47 P & CR 142, as this was directed to a different question, namely, determining what is a dwelling house, not determining whether there has been a continuous breach of planning control by continuous use as a dwelling house, for the purposes of section 171B(2) TCPA 1990.

Submissions by the Secretary of State and Maxwell Estates

25. The Secretary of State and Maxwell Estates submitted that the Inspector correctly applied the statutory test, as explained in *Thurrock* and *Swale.* The question for the Inspector was whether the basement had been continuously used as a dwelling throughout the whole of the 4 year period, such that the Council could at any time during that period have taken enforcement action. In the absence of concealment (for which express provision was made separately in section 171BA TCPA 1990), it was irrelevant whether or not it was practicable for the Council to identify, and so enforce, against the unlawful use. This was not part of the statutory test.

26. Residential use was a different concept to residential occupation. Whereas residential use had to be continuous for the landowner to obtain the benefit of the immunity under section 171B(2) TCPA 1990, continuous occupation was not required. In support of his consideration of this issue, the Inspector was entitled to rely on the analysis of a dwelling house in *Gravesham,* which was approved by the Court of Appeal in *Moore v Secretary of State for the Environment & Anor* 77 P & CR 114, per Nourse LJ at 118-119. The Inspector's approach was also supported by *Impey v Secretary of State for the Environment* (1984) 47 P & CR 157, per Donaldson LJ, at 161-162, and *Welwyn Hatfield BC v Secretary of State for Communities and Local Government* [2011] 2 AC 204, per Lord Mance, at [27].

27. Where, as in this case, there was an interruption in occupation, it was a matter of fact and degree whether the use continued or had ceased. The Inspector lawfully exercised his planning judgment when deciding that the residential use was continuous.

Conclusions

28. I accept the Council's submission that the Inspector ought to have applied the guidance in the cases of *Thurrock* and *Swale*. Those cases were authoritative on the issue which he had to decide.

29. In *Thurrock*, which concerned a change of use from use for domestic purposes and agriculture to use for domestic purposes and as an airfield and for the storage of aircraft, the Court of Appeal held that the Inspector had misdirected himself in law in respect of the relevant immunity provisions, and dismissed an appeal against the judgment of Newman J. in the High Court.

30. Schiemann LJ helpfully summarised Newman J.'s reasoning at [15]:

> "15. The essential reasoning of the judge was as follows
>
> i) The *Panton* case was distinguishable since that was concerned with an accrued right to use land in a particular way and how this could be lost;
>
> ii) The statute gives immunity if the breach complained of in the enforcement notice occurred more than 10 years ago;

> iii) The rationale of the immunity is that throughout the relevant period of unlawful use the LPA, although having the opportunity to take enforcement action has failed to take any action and consequently it would be unfair and/or could be regarded as unnecessary to permit enforcement;
>
> iv) 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.
>
> v) It was for the landowner to show that at any time during the relevant period enforcement action could have been taken;
>
> vi) The inspector had misunderstood *Panton* and treated the two years of unlawful activity in the early 1980's as though this had resulted then and there in that activity being a lawful use;
>
> vii) This constituted an error of law."

31. Schiemann LJ then gave guidance on the operation of the immunity provisions, as follows:

> "25. I agree with the judge as to the rationale of the immunity provisions. If there is a planning objection to the erection of a building the LPA must take enforcement action within 4 years of completion or lose the chance of taking such action. If there is a planning objection to a use which has been instituted without the grant of planning permission then again the LPA must take enforcement action within the appropriate time limit, 10 years in the present case. If the new use continues throughout that period then the LPA have lost their chance. Their position is much the same as that of a landowner who lets the world regularly walk along a path over his land. There comes a time when he has lost his right to object.
>
> 26. The concept of abandonment, which was central to the Inspector's reasoning, is one which has been evolved in circumstances where a landowner has a right under planning law to use his land in a particular way but then either does not use it actively at all or starts to use it in a different way. Can the landowner thereafter resume without a further planning permission what undoubtedly had been a lawful use on an earlier date? This sort of situation can undoubtedly pose problems. It was that sort of situation with which *Panton* was concerned.

> 27. In the present case, had the activities which took place on the land between 1981-1983 continued unabated until 1992 and had the landowner then ceased to use the land for aircraft activities for 3 years and then sought once more to use it for aircraft activities that type of problem would have arisen. But the inspector did not find that the commercial use continued unabated. If anything, he found the contrary. He approached his task by asking whether the LPA had shown that the commercial use which existed in 1981 and 1982 had been abandoned and applying a presumption that in the absence of clear evidence to the contrary the unlawful commercial activity continued throughout the period 1981-1989. Thus instead of deciding whether the landowner had shown that the unlawful activity had continued throughout the relevant period he asked himself whether the LPA had discharged some burden of proof in relation to that period. He apparently held that the landowner's own declaration in the Requisition for Information that on 8 July 1983 the land was being used for agriculture and a dwelling was not sufficient. He did not ask himself whether enforcement action could have been taken throughout the period 1981-1991 or any other clearly defined 10 year period. That is a question which should in my judgment have been addressed by him and should be addressed by the Secretary of State if this appeal is dismissed and the case is remitted to him.
>
> 28. I accept Mr Corner's point that an enforcement notice can lawfully be issued notwithstanding that at the moment of issue the activity objected to is not going on — because it is the week-end or the factory's summer holiday, for instance. The land would still be properly described as being used for the objectionable activity. However, I would reject Mr Hockman's submission that enforcement action can be taken once the new activity which resulted from the material change in the use of land has permanently ceased. I accept that there will be borderline cases when it is not clear whether the land is being used for the objectionable activity. These are matters of judgment for others."

32. Chadwick LJ agreed, distinguishing between the principles to be applied where an established use had accrued, which could only be lost by operation of law (i.e. abandonment or a change to the planning unit or a material change of use), and the different position where there was no established use and no accrued planning right (at [57] – [62]). There was no presumption of continuance in respect of a change of use which had ceased to be an active use before any accrued planning right had arisen (at [59]).

33. In *Swale*, which concerned intermittent residential use of a barn originally used for agricultural purposes, the Court of Appeal held that the Inspector had erred in using the concept of abandonment of a use when applying the relevant immunity provisions.

34. Keene LJ agreed with the statements of the law by Schiemann LJ and Chadwick LJ in *Thurrock*, and proceeded to consider in more detail the principles to be applied where residential occupation is interrupted. He said:

> "22. On behalf of Mr Lee it is submitted that the Inspector's findings were consistent, both with the evidence and with the approach endorsed in the *Thurrock* case. It is, says Mr Green on behalf of Mr Lee, a question of fact whether a building is being used as a dwelling house. He draws attention also to a passage in Schiemann LJ's judgment in the *Thurrock* case at paragraph 28 which reads as follows:
>
> > "I accept Mr Corner's point that an enforcement notice can lawfully be issued notwithstanding that at the moment of issue the activity objected to is not going on — because it is the weekend or the factory's summer holiday, for instance. The land would still be properly described as being used for the objectionable activity. However, I would reject Mr Hockman's submission that enforcement action can be taken once a new activity which resulted from the material change in the use of land has permanently ceased. I accept that there will be borderline cases when it is not clear whether the land is being used for the objectionable activity. These are matters of judgment for others."
>
> 23. Effectively, says Mr Green, the Inspector in the present case found that the residential use had not permanently ceased during the critical period. The judge below was right to distinguish between a cessation of use on the one hand and an absence of the occupier for a time, such as for the purpose of a holiday. Mr Green argues that the absence of an intention to abandon residential use was relevant because, had such an intention existed, it would have negated continuity of such use.
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> 24. As to the reasons challenge, both respondents submit that the Inspector's decision letter, when read as a whole, contained adequate and sufficiently clear reasons.
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> 25. I accept that whether a building is, or was, being used for a particular purpose at a particular time or times is largely a question of fact. But it is not, in the planning law context, wholly such. It is necessary, as the *Thurrock* decision demonstrates, for the decision-maker to adopt the proper approach as a matter of law to his decision on that question. It is not always an easy question to answer. But I am in no doubt that the legally correct question for the Inspector here to have asked was whether this building had been used as a single dwelling throughout the whole of the four years preceding 6th

March 2001, so that the planning authority could at any time during that period have taken the enforcement action.

26. That is a quite different question from whether a use has been abandoned, at least in the sense in which that word is normally used in planning law in the context of abandoning established use rights. Patently, when Schiemann LJ referred in paragraph 28 of the *Thurrock* case, the passage I have just quoted, to the permanent cessation of the use, he was not intending to advocate a test similar to that of abandonment, which he had already expressly rejected in his judgment.

27. The proper approach was put, if I may say so, very clearly by my Lord, Chadwick LJ, at paragraphs 58 and 59 in Thurrock when referring to the earlier case of *Panton and Farmer v Secretary of State for the Environment* [1999] JPL 461. Chadwick LJ there said this:

> "If, on the other hand, the deputy judge intended to suggest that an enforcement notice could and should be served in respect of a use which had commenced as a result of a material change of use in breach of planning control but which had ceased to be an active use before any accrued planning right had arisen, then I am unable to follow his reasoning or to see how an enforcement notice could be appropriate in those circumstances. It is important to keep in mind that an enforcement notice must specify the steps which the local planning authority required to be taken 'or the activities which the authority require to cease', for the purposes of remedying the breach — see section 173(3) of the 1990 Act. There is, I think, force in the editorial comment at [1999] JPL 461, 471, that, if the deputy judge is to be taken to suggest that the notional continuation of a use which had ceased to be an active use before any accrued planning right had arisen could be sufficient to establish its own lawfulness:
>
> > '… this would mean that a local planning authority might have to issue an enforcement notice to require the sleeping use to stop: this would surely be a nonsense.'
>
> (59) The "nonsense" can be avoided by recognising that the deputy judge did not intend to suggest, in the *Panton and Farmer* case, that there was any need to serve an enforcement notice in respect of the use which had ceased to be an active use before any accrued planning right had accrued."

28. On the face of it, as the passage I have quoted earlier in paragraph 23 of the decision shows, the Inspector here did find that such residential use had begun more than four years earlier and had continued since then "without significant break". But what about the process of reasoning which precedes that finding and which is criticised by the appellant Council? It appears that the Inspector found also that there were periods of time during 1997 to the end of 1999 when this building was not occupied for residential purposes. He refers not only to the "erratic pattern of use", but also to the appellant and others frequently living and sleeping in the barn "for substantial periods". That does not mean that there were not also substantial periods when it was not so occupied, and nowhere prior to his conclusion does he suggest — and nor did the evidence — that the non-occupation periods were *de minimis*. Nor does he ever clearly deal with what the use was, or what was happening in the building, in March 1997 when the four year period began. That was a crucial date.

29. What appears to have led him to the conclusion which I have cited were a number of other factors. One of those was the absence of evidence of an intention to abandon the residential use of the barn. Had that been the only troubling reference it might (and I emphasise that word) not have cast sufficient doubt on his process of reasoning. But there are other references which also give rise to concern. The Inspector refers to there being no substantial evidence that during the critical period "the barn was used for any purpose other than residential", apart from some minor storage. That, however, is not the test. A building may not be being used at certain times for any purpose at all. The fact that it is not put to some alternative use does not demonstrate that it was in residential use, which is the real issue. Likewise, the Inspector emphasises in paragraph 21 that once initial repairs had been carried out "the barn appears to have been fitted and available for residential use from then onwards". That, I am bound to say is irrelevant. 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.

30. Those factors to which I have just referred, relied on by the Inspector, have to be added to his reference to the absence of evidence of intention to abandon residential use. That causes me concern because a building may well not be in continuous use for residential purposes and yet the owner fully intends to resume occupation for such purposes at a future date. The existence of such an intention would not by itself entitle the planning authority to serve an enforcement notice when the building is not being residentially used. The concept of abandoning the use is, in my judgment, best confined to the

> topic of established use rights where it is a well recognised concept: see *Hartley v Minister of Housing and Local Government* [1970] 1 QB 413."

35. At the inquiry, the statutory test which the Inspector had to apply under section 171B(2) TCPA 1990 was whether the enforcement action had been "taken after the end of the period of four years beginning with the date of the breach". The parties before me agreed that the judicial interpretation of the statutory test in *Thurrock* and *Swale* was encapsulated by Keene LJ in *Swale* at [25], where he said:

> "… I am in no doubt that the legally correct question for the Inspector here to have asked was whether this building had been used as a single dwelling throughout the whole of the four years …., so that the planning authority could at any time during that period have taken the enforcement action."

36. However, the parties disagreed on the meaning of Keene LJ's reference to the position of the planning authority. At times the Appellant submitted that, in addition to a continuous breach by use as a dwelling, it was necessary to show that it was practicable for the planning authority to take enforcement action, for example, that the planning officers could reasonably have discovered the breach. In my judgment, unless it was a case of concealment to which specific provisions apply, this interpretation was not supported by the wording of the statutory test, nor the judgments in *Thurrock* and *Swale*. In my view, there was a single test, namely, a continuous breach by use as a dwelling, such that the planning authority could have enforced against the breach. As the court explained in *Thurrock* and *Swale*, the rationale of the immunity provision was that the planning authority had a four year window in which to take enforcement action, after which it would lose the right to object to the development. Keene LJ's formulation of the legal test in *Swale* was intended to reflect that rationale. An example given by Keene LJ, at [30], was a building in which residential use had ceased, but the owner intended to resume residential use at a later date. In those circumstances, the planning authority would not be entitled to serve an enforcement notice merely on the basis of the owner's intention, and so the test would not be satisfied. This illustrates the relevance of the planning authority's ability to take enforcement action throughout the four year period, in order to satisfy the statutory test. In my view, the same reasoning could apply in circumstances where a building has been stripped down to a shell unit, and the unauthorised residential use and breach of planning control had ceased, and so could not be enforced against by the planning authority during that period, even if the owner intended to resume residential use at a later date. Of course, whether or not the statutory test was satisfied would depend upon the factual findings in the particular case.

37. On my reading of the decision letter and the closing submissions of the parties, it appears that the Inspector was persuaded by counsel for Maxwell Estates that he should apply the principles in *Gravesham*, rather than the principles in *Thurrock* and *Swale*, when deciding whether the break in occupation and the renovations between October 2013 and May 2014 meant that the breach by way of residential use was not continuous. At DL 14, the Inspector said "In terms of the alleged break in continuity of use, I have had regard to the *Gravesham* case referred to by the appellant". At DL 22, the Inspector said "I therefore consider that this case can be distinguished from the

problem area identified in the *Thurrock* case, cited by the Council", apparently disregarding the wider statements of principle by the court in *Thurrock.* He made no mention of *Swale*, despite the fact that it was directly relevant, as it concerned interrupted residential use.

38. Of course, decision letters are not court judgments or examination papers, and Inspectors can and do direct themselves on the law, and apply it, without referring to specific cases. However, in my view, this decision letter disclosed errors in the Inspector's approach which were directly contrary to the guidance in *Thurrock* and *Swale.*

39. At DL 15, the Inspector referred to Mr Abbasi's evidence that there was an intention to improve the quality of the flat to enable the rent to be increased when it was re-let. He found that this amounted to "clear evidence of the intention to permit occupation of the unit again", and thus to further the breach, and concluded that "this was therefore a period during which the unauthorised use continued" (emphasis added).

40. In my view, the Inspector's reliance on the intention to resume residential use in the future was contrary to the guidance given by Keene LJ in *Swale*, at [30]:

> "…. a building may well not be in continuous use for residential purposes and yet the owner fully intends to resume occupation for such purposes at a future date. The existence of such an intention would not by itself entitle the planning authority to serve an enforcement notice when the building is not being residentially used."

41. At DL 16, the Inspector found that "despite the non-occupation of the flat being prolonged during this time, it seems to me that once the renovation works to improve the flat had been completed, it would nevertheless have been capable of occupation, therefore weighing in favour of the continued use of the unit as a dwelling". In my view, this approach was contrary to the guidance in *Swale*, where Keene LJ said, at [29]:

> "The Inspector emphasises … that once initial repairs had been carried out "the barn appears to have been fitted and available for residential use from then onwards". That I am bound to say is irrelevant. 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."

42. At DL 12 and DL 17, the Inspector applied a 'presumption of continuance' stating that subsequent events "did not take away" (DL 12) or "did not harm" (DL 17) "its use as a dwelling". I consider that this approach was contrary to the guidance given by Chadwick LJ in *Thurrock*, at [56], endorsed by Keene LJ in *Swale* at [9] – [10], namely, that there was no presumption of continuance in respect of an unauthorised use.

43. In *Gravesham*, the Court had to determine whether a weekend and holiday chalet was a dwelling house within the meaning of the Town and Country Planning General

Development Order 1977, in which case the extension which the owner had added would be permitted development. McCullough J. said, at 145-146:

> "The more helpful approach, in my opinion, is to consider a number of buildings that quite clearly are dwelling-houses and others that equally clearly are not and to see whether this throws up any indication of what ought and what ought not to be taken into account.
>
> Consider a building that anyone would acknowledge was a dwelling-house. If it is not being lived in because, for example, the occupants are on holiday or because they have two houses and spend half the year in each, it remains a dwelling-house. Take a common situation where a family has a second house in the country that is only visited at weekends, in the summer months and for a summer holiday. That is clearly a dwelling-house. So the intention to use one's house, or the practice of using it throughout the year, is not essential.
>
> If a house is empty pending its sale or because its owner cannot, or does not want, to let it, it is still a dwelling-house. So emptiness is not fatal.
>
> If it cannot be occupied because it is flooded, or is undergoing extensive repair, it is still a dwelling-house. So, too, a second home in a remote mountainous district, cut off by snow every winter. So an ability to use it whenever one wants to is not an essential either.
>
> Suppose that there is a national emergency and an order is made prohibiting the use of houses in a particular area for the duration of the emergency: they would nevertheless remain dwelling-houses. So even an inability to use a house lawfully does not necessarily prevent it from being a dwelling-house.
>
> Leaving aside extraordinary events like floods and national emergencies and repairs so extensive that the occupant has to move out, is it a characteristic of every dwelling-house that the owner or occupier could live in it permanently if he wanted to? I think not.
>
> Suppose that a London-based company requires a succession of employees to be based one at a time for four months in a location far distant from London. Suppose that the company buys a house and makes it available to each employee and his family for his tour of duty. It would still be a dwelling-house. Take a holiday cottage subject to time-share with a number of owners each enjoying the right to occupy it for two particular weeks each year. That would still be a dwelling-house.

> What have these examples in common? All are buildings that ordinarily afford the facilities required for day-to-day private domestic existence.
>
> This characteristic is lacking in hotels, holiday camps, hostels, residential schools, naval and military barracks and similar places where people may eat, sleep and perhaps spend 24 hours a day. Quite clearly, none of these is a dwelling-house.
>
> Mr. Aitchison has emphasised the "dwelling" in "dwelling-house" and has stressed that to dwell is to remain or reside. Comparatively few of those living in the buildings last mentioned ordinarily stay for long enough to be regarded as residing there. He submits, therefore, that a capacity to provide permanent accommodation is the essential character of a dwelling-house.
>
> In my judgment, however, its more distinctive characteristic is its ability to afford to those who use it the facilities required for day-to-day private domestic existence."

44. Counsel for Maxwell Estates cited this passage from the judgment in *Gravesham* in support of the following submission:

> "*Gravesham* therefore establishes that continuous residential occupation is not a requirement for a building to be "a dwelling house" and that, therefore, "use as a single dwelling house" does not require continuous residential occupation either…" (paragraph 10 of the Closing Submissions to the Inquiry).

45. In my judgment, the Inspector's reliance upon this submission led to an error of law in his decision. *Gravesham* was not an enforcement case and so the court was not applying the test under section 171B(2) TCPA 1990. It was concerned with a different issue, namely, the definition of a dwelling house for the purposes of the General Development Order. So the commonplace factual scenarios set out in the judgment were being viewed through a different lens in *Gravesham*. In particular, it was not relevant for McCullough J. to distinguish between an established residential use, which could only come to an end by operation of law, and an unauthorised residential use for which immunity from enforcement could only be obtained by proving continuous residential use throughout the relevant period. However, this distinction was highly relevant to the appeal before the Inspector. The distinction was well expressed by Sedley LJ in *Swale* where he said, at [34] – [35]:

> "34. I agree. Mr Coppel for the First Secretary of State has submitted in the course of his argument that Mr Findlay's contentions on behalf of the local planning authority are predicated upon a false distinction between the continuous residential use of an established dwelling house and establishing the continuous use of a structure as a dwelling house. I do not think this *is* a false distinction. If a building is in established use as a dwelling-house, something approaching

> abandonment of that use will be necessary if a break in continuity is to be shown. Short of this, the law has always recognised that an occupier does not have to be continuously or even regularly present in order to establish unbroken use of the premises as a dwelling-house: see the decision of this court in *Brown v Brush* [1948] 2 QB 247; Megarry on the Rent Acts, 11th edition, Volume 1, pages 245 to 249. But a point may come where the evidential burden shifts to the occupier to displace the influence that residential occupation has ceased.
>
> 35. If, by contrast, a structure is not in established use as a dwelling-house at the start of the material period, such use has to be affirmatively established, not merely at the start but over the whole period. Here, logically, discontinuous residential use is not continuous residential use."

46. I do not consider that the Council contributed to the Inspector's error by citing *Gravesham* in support of a different submission, namely, that when the basement became a shell unit, it no longer fulfilled McCullough J.'s definition of a dwelling house as it did not include the facilities required for day-to-day private domestic existence. That was a legitimate submission, in my view, when applying the statutory test and its formulation by Keene LJ in *Swale*. In that context, the definition of a dwelling house in *Gravesham* was relevant.

47. In my view, the Inspector's failure to apply the guidance in *Thurrock* and *Swale* was not justified by the judgments of the Divisional Court in *Impey v Secretary of State for the Environment* (1984) 47 P & CR 157, per Donaldson LJ at 161 – 162, and the Supreme Court in *Welwyn Hatfield BC v Secretary of State for Communities and Local Government* [2011] 2 AC 304, in which *Impey* was considered.

48. *Welwyn* and *Impey* were both concerned with an initial change of use, rather than an interruption in continuous use. In *Welwyn*, where the landowner built a dwelling house when he only had planning permission to build a barn, the court had to consider the Court of Appeal's finding that there had been a period of "no use" before the landowner moved into the building. Lord Mance said:

> "27. The cases on abandonment show that use as a dwelling house should not be judged on a day-by-day basis, but on a broader and longer-term basis. Dwelling houses are frequently left empty for long periods without any question of abandonment or of their not being in or of use. A holiday home visited only yearly remains of and in residential use. Of course, such cases usually fall to be viewed against the background of previous active use. In the present case, the question is whether it is right to describe a dwelling house as having or being of no use as a dwelling house, when it has just been completed and its owner intends to occupy it within days. This too is not a question which can sensibly be answered on a day by day basis. It calls for a broader and longer-term view. Support for this is found in *Impey v Secretary of State for the Environment* (1980) 47 P & CR 157. The question before the Divisional Court there

was whether development had occurred in the form of a material change of use of a building from the breeding of dogs to residential use. Donaldson LJ said, at pp 161–162:

> "Change of use to residential development can take place before the premises are used in the ordinary and accepted sense of the word, and [counsel] gives by way of example cases where operations are undertaken to convert premises for residential use and they are then put on the market as being available for letting. Nobody is using those premises in the ordinary connotation of the term, because they are empty, but there has plainly, on those facts, been a change of use. The question arises as to how much earlier there can be a change of use. Before the operations have been begun to convert to residential accommodation plainly there has been no change of use, assuming that the premises are not in the ordinary sense of the word being used for residential purposes. It may well be that during the course of the operations the premises will be wholly unusable for residential purposes. It may be that the test is whether they are usable, but it is a question of fact and degree."

28. In a later case, *Backer v Secretary of State for the Environment (*1982) 47 P & CR 149, Mr David Widdicombe QC, sitting as a deputy judge, expressed doubt about the decision in *Impey*. He said (p 154) that, but for it, he would have had no hesitation in accepting an argument that "physical works of conversion, that is, say building operations, cannot by themselves give rise to a material change of use: some actual use is required". Backer is on any view an odd case, and the deputy judge's doubt as to whether any change of use had occurred is understandable, even on the approach in *Impey*- indeed, although he remitted the matter for further consideration, his expressed view was that there had been none. The issue was whether development had taken place before 7 July 1976, in circumstances where all that appears is that the works of conversion were "completed, or substantially completed, by July 1976": see p 151. The owner's brother was sleeping in the building at nights on a mattress which he moved to and from his van every day, since workmen were working during the day: see p 151. Yet the argument was that it was not necessary to consider his activity, and that the result of the physical works of conversion to a residential unit alone sufficed to constitute a material change of use. On any view, the present case involves an altogether simpler and (apart from the deceit underlying it) more conventional scenario.

> 29. As a matter of law, I consider that the approach taken by Donaldson LJ was correct and is to be preferred to the doubt expressed in *Backer*. Too much stress has, I think, been placed on the need for "actual use", with its connotations of familiar domestic activities carried on daily. In dealing with a subsection which speaks of "change of use of any building to use as a single dwelling house", it is more appropriate to look at the matter in the round and to ask what use the building has or of what use it is. As I have said, I consider it artificial to say that a building has or is of no use at all, or that its use is as anything other than a dwelling house, when its owner has just built it to live in and is about to move in within a few days' time (having, one might speculate, probably also spent a good deal of that time planning the move)."

49. I accept the Council's submission that Lord Mance was considering a different factual and legal issue to the issue in this appeal. The ratio in *Welwyn Hatfield* concerned those cases where operational development was carried out to create a dwelling house, not cases in which the use of a building was changed to use as a dwelling house. Lord Mance's reference in *Welwyn Hatfield*, at [27], to the question of whether a building was in residential use was in the context of considering whether that building was constructed as a dwelling house, and was drawn from the authorities on abandonment. In my view, that approach did not replace the test established in *Thurrock* and *Swale*, and the distinction drawn in those cases between cessation of an established use and cessation of an unauthorised use. In *Welwyn Hatfield*, the Supreme Court did not consider the test for establishing four years continuous use under section 171B(2) TCPA 1990. Neither *Thurrock* nor *Swale* was cited to the Supreme Court in argument or referred to in Lord Mance's judgment. There was no suggestion that the Supreme Court intended to overrule those decisions.

50. For the reasons I have given, I have concluded that the Inspector misdirected himself in law and misapplied the relevant law, and so Ground 1 succeeds.

Ground 2: burden and standard of proof

51. It was common ground that the burden of proof lay on the landowner, Maxwell Estates, to establish that there had been continuous residential use during the four year period, and that the civil standard of proof, namely, the balance of probabilities applied (*Ravensdale Limited v Secretary of State for Communities and Local Government* [2016] EWHC 2374 (Admin), per David Elvin QC (sitting as a Deputy Judge of the High Court), at [4]; *Thurrock* per Lord Schiemann, at [15] & [27]).

52. The Secretary of State and Maxwell Estates relied upon the Inspector's direction at DL 5, that Maxwell Estates had to demonstrate that the use as a separate self-contained residential unit had continued for a period of not less than four years before the notice was issued, that is from 11 January 2014. The Secretary of State submitted that the Inspector applied the correct burden and standard of proof in the decision letter, for example, at DL 7, 10, 11 and 17.

53. The Council conceded that the direction at DL 5 was correct, but submitted that the Inspector did not always apply the correct burden and standard of proof to the question of whether the use was continuous.

54. At DL 13, the Inspector said:

> "… I am not persuaded, from the information before me, that the unit would have been uninhabitable and therefore incapable of being used as a dwelling before this time."

I agree with the Council's submission that the Inspector did not apply the correct burden of proof and standard of proof here. The question was whether the Appellant had demonstrated that the basement was in continuous residential use. However, as this related to the period prior to the renovation works from October 2013 onwards, it was not material to the issues in the appeal to the High Court.

55. At DL 21, the Inspector said:

> "Although it cannot be certain, it seems to me that it would have at least been possible for these documents to have been revealed to the Council… it would have been possible for the Council to have found out from the Appellant about the commencement of the use of the property for residential occupation ... ."

56. At DL 22, the Inspector said:

> "…. notwithstanding whether the appearance of the unit, in itself, would have disguised its use, I am not persuaded that it can be said unequivocally that the local planning authority would not have been able to take enforcement action in respect of the breach of planning control at any time during the relevant four year period."

57. I agree with the Council's submission that the Inspector did not apply the correct burden and standard of proof in these paragraphs. He should have asked himself whether the Appellant had demonstrated that the local planning authority would have been able to take enforcement action during the four year period. However, this section of the decision letter was directed to the practicalities of the Council being able to take enforcement action during the period of the renovation works, which I have found was irrelevant to the statutory test (see paragraph 36 above).

58. Therefore I conclude that the errors relied upon under Ground 2 were immaterial to the issues in this appeal, and so Ground 2 does not succeed.

Ground 3: irrationality

59. In the alternative, the Council submitted that, even if the Inspector did not apply the wrong legal tests, his conclusions flew in the teeth of the evidence and were irrational (*R (Keegan) v Sutton LBC* (1995) 27 H.L.R. 92, per Potts J. at 100A). It was irrational for the Inspector (1) to find that the basement was in continuous residential

use when it was "gutted" for renovations, and (2) to find that the Council could have taken enforcement action during that time.

60. As I have found that the Inspector did apply the wrong legal tests, I do not need to decide the Claimant's alternative ground.

Ground 4: procedural impropriety

61. At the Inquiry, Mr Abbasi was cross-examined by Mr Streeten on behalf of the Council. Mr Streeten put to him that the Council could not have taken enforcement action when the refurbishment works were being carried out as the basement was just a shell. Mr Abbasi accepted that, during the works, "everything was gutted"; "no one could say what it is"; and he thought it was "not possible to take enforcement action" (quotations taken from the Inspector's notes of evidence). He was not re-examined on this point by Ms Scott, on behalf of Maxwell Estates.

62. At the Inquiry, Mr McDonald, planning enforcement officer at the Council, said in his evidence in chief that it would not have been possible to take enforcement action in respect of the basement when it was a shell unit, as in the absence of a kitchen and shower, it would not have been a residential unit, its use would have been treated as ancillary to the office use on the ground floor. In her cross-examination Ms Scott did not challenge this evidence. She did however ask Mr McDonald whether, in deciding whether to take enforcement action, he would take into account any relevant documentary evidence supplied, and any information from other sources, such as neighbours. Then in her written closing submissions she said:

> "47. Had the Council made any further inquiries, for example, had they asked Mr Kayani from Eden Super Market … as to what he knew about the use of the basement, had they inquired with Mr M T Khan who undertook the works to create the "self-contained basement flat" …; had they sought documents pertaining to the nature of the works (such as the Certificate of Installation in a dwelling, or the inspector from Lewis Berkeley …..; had they asked Mr Abbasi, Mr Lotay or his colleagues what use had been made of the space; had the Council taken any number of a very wide range of steps, there would have been evidence to establish a material change of use from its permitted ancillary A2 usage and to establish its use as a "single dwelling house"."

63. The Council complained that it was taken by surprise by Ms Scott's closing submissions and that neither its counsel (Mr Streeten) nor Mr McDonald was given an opportunity to respond to these points. Mr Streeten asked the Inspector to note that Mr McDonald had not been cross-examined on these points, and the Inspector duly did so, in DL 21. Mr Streeten did not ask for Mr McDonald to be recalled. Nor did he ask for an opportunity to make submissions in response to these points, which he had not anticipated.

64. In my view, the Inspector was entitled to proceed in the manner that he did, at DL 21, taking account of the fact that he had not heard from Mr McDonald on these points,

but concluding that he could make findings without doing so, given the nature of the evidence, which included the undisputed certificate under the Building Regulations. The Inspector had a discretion as to how best to proceed in circumstances where a witness had not been fully cross-examined, and I do not consider that the Inspector acted unfairly.

65. In any event, the points made by Ms Scott in paragraph 47 of her closing submissions were primarily relevant to the question whether or not it was practicable for the Council to discover the breach of planning control and enforce against it. I have found that, absent a finding of concealment, the practicability of enforcement by the planning authority is not part of the statutory test (paragraph 36 above). Therefore even if there was procedural unfairness in this regard, it would have been irrelevant to the outcome of this appeal.

66. For these reasons, Ground 4 does not succeed.

Conclusions

67. For the reasons I have set out above, the appeal succeeds, on Ground 1 only. The Inspector misdirected himself and/or misapplied the law in relation to section 171B(2) TCPA 1990.