Neutral Citation Number: [2022] EWHC 1875 (Admin)

Case No: CO/3838/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2022

Before :

Neil Cameron QC
sitting as a Deputy High Court Judge

Between :

LONDON BOROUGH OF BRENT	**Claimant**
- and –	
SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT	**First Defendant**
-and-	
EBELE MUORAH	**Second Defendant**

- -
- -

Dr Ashley Bowes (instructed by **Prospect Law**) for the **Claimant**
Ned Westaway (instructed by **the Government Legal Department**) for the **First Defendant**
The Second Defendant in person

Hearing date: 25th May 2022

This judgment was handed down remotely. The date and time for hand-down is deemed to be 10.30am on Tuesday 19th July 2022

The Deputy Judge (Neil Cameron QC):

Introduction

1. In this case the London Borough of Brent, the Claimant or the Council, makes an application under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") for an order that a decision of the Secretary of State for Housing, Communities and Local Government, the First Defendant, to allow an appeal made section 195 TCPA 1990 and to grant a certificate of lawful use or development, be quashed.

2. This case was heard together with an appeal made under section 289 of the TCPA 1990 against the First Defendant's decision to uphold an enforcement notice. The Second Defendant to this application was the Appellant in the section 289 appeal.

3. Permission to proceed with the application under section 288 TCPA 1990 was granted by Lang J on 7th December 2020. By an order made on 13th September 2021 Lavender J granted permission to add a third ground of challenge.

4. At the hearing I was informed that the Second Defendant was an undischarged bankrupt. Ms Muorah informed the court that her interest in 154A, Harlesden Road, London NW10 3RE had passed to Duchess Place LLP, and that the transfer had taken place before she was declared bankrupt. On the basis of that information, and at the suggestion of the parties, I ordered that Duchess Place LLP be added a party and allowed Ms Muorah to represent the LLP. I indicated to the parties that the matter of Ms Muorah's bankruptcy should be investigated, and I allowed time for the parties to undertake those investigations.

5. Since the hearing

   i) The Government Legal Department ("GLD") has engaged in correspondence with Ms Muorah's trustee in bankruptcy (Ms Ellis). In that correspondence:

      a) In an email sent to Ms Ellis on 31st May 2022, the GLD state that it appears from Land Registry records that the interest in 154A, Harlesden Road is held by Ms Muorah, not Duchess Place LLP.

      b) In a further email to Ms Ellis, also sent on 31st May 2022, GLD invited the trustee in bankruptcy to consider agreeing to the consent orders proposed in relation to this claim and the related section 289 TCPA 1990 appeal.

   ii) On 15th June 2022 the solicitors acting for Ms Ellis responded to the GLD stating that she was not in a position to agree to a consent order.

   iii) On the 22nd June 2022 Ms Muorah's trustee in bankruptcy (Ms Ellis) disclaimed all her interest in 154A, Harlesden Road.

6. I have been provided with correspondence between Ms Muorah and Ms Ellis. In an email dated 30th March 2022 sent to Ms Ellis, Ms Muorah questioned the validity of Ms Ellis' appointment.

7. I invited the parties to make submissions to the Court on the consequences of the trustee in bankruptcy's decision to disclaim her interest in 154A Harlesden Road. Mr Westaway, who appears for the First Defendant, has made written submissions on this issue. On 4th July 2022 the solicitors acting for the Claimant stated that they did not have anything to add to the submissions made on behalf of the Secretary of State.

8. Mr Westaway submits:

   i) Ms Muorah become bankrupt on 28th July 2021.

   ii) Upon the appointment of a trustee in bankruptcy Ms Muorah's estate became vested in the trustee.

   iii) Section 315(3) of the Insolvency Act 1986 ("the 1986 Act") provides:

   > "(3) A disclaimer under this section—
   >
   > (a) operates so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the bankrupt and his estate in or in respect of the property disclaimed, and
   >
   > (b) discharges the trustee from all personal liability in respect of that property as from the commencement of his trusteeship,
   >
   > but does not, except so far as is necessary for the purpose of releasing the bankrupt, the bankrupt's estate and the trustee from any liability, affect the rights or liabilities of any other person."

   iv) The effect of the disclaimer is to determine Ms Muorah's interest in 154A, Harlesden Road.

   v) Ms Muorah did not have an interest in the land for the purposes of bringing an appeal under section 289 TCPA 1990 without assignment from the trustee in bankruptcy. Such an assignment was not sought or made.

   vi) As an appeal under section 289 TCPA 1990 can only be made by a person having an interest in the land. Ms Muorah has no interest in 154A Harlesden Road, and the court has no jurisdiction to hear the appeal and it should be struck out.

   vii) In relation to the section 288 TCPA application, Ms Muorah is the Second Defendant and the claim can proceed without her participation.

   viii) The appropriate way to determine the section 289 TCPA 1990 proceedings is to strike out the appeal for want of jurisdiction.

9. As it appears that Duchess Place LLP have no interest in 154A Harlesden Road, I reverse the order I made at the hearing, and order that Duchess Place LLP should not be joined as a party.

10. As Ms Muorah is the Appellant in the related section 289 TCPA 1990 appeal, I have given directions to allow her and the other parties to make submissions on the consequences of the fact that Ms Muorah has been declared bankrupt and that her trustee in bankruptcy has disclaimed her interest in 154A Harlesden Road. As Ms Muorah is the Second Defendant in section 288 TCPA 1990 application I have come to the conclusion that there is nothing to prevent me proceeding to give judgment in this claim.

11. As Ms Muorah made submissions during the course of the hearing on the section 288 TCPA 1990 application I have referred to those submissions in this judgment.

Background Facts

12. The certificate of lawful use or development relates to land at 154, Harlesden Road, London NW10 3RE.

13. On 24th July 2017, the Council issued an enforcement notice ("the Enforcement Notice"). The land or premises to which the Enforcement Notice relates is 154A Harlesden Road. The alleged breaches of planning control specified in the Enforcement Notice are:

"Without planning permission, the erection of a canopy and door, facing Harlesden Road."

And

"Without planning permission, the material change of use of the premises from one to two dwellings."

14. The steps required to be taken set out in Schedule 4 to the Enforcement Notice are:

"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.

Step 2: Demolish the front canopy and door, facing Harlesden Road, and restore this elevation back to its original condition before these works took place as per the attached photograph.

Step 3: Remove all fixtures and fittings associated with these works from the premises."

15. Ms Muorah, the Second Defendant, appealed against the Enforcement Notice ("the Enforcement Notice Appeal"). In that appeal Ms Muorah relied upon the grounds set out at section 174(2) (a), (c), (d), and (f) of the TCPCA 1990.

16. The appeal against the Enforcement Notice was determined by an inspector appointed by the First Defendant. The inspector's decision was communicated by letter dated 22nd August 2019 ("the August 2019 Decision Letter"). The inspector allowed Ms Muorah

to add a ground of appeal under section 174(2)(g) of the TCPA 1990. He corrected Step 3 as set out in the Enforcement Notice by the deletion of the words "these works" and the substitution of the words "the change of use". The ground (c) appeal succeeded in part. The inspector deleted the words "the erection of a canopy and door facing Harlesden Road" in Schedule 2, and deleted Step 2 in Schedule 4. The basis upon which that aspect of the ground (c) appeal succeeded were findings that that the ground floor window had been altered to form a door and the canopy erected, in September 2015, and at that time the property was in use as a dwellinghouse, and therefore benefited from the permitted development rights described in Class A of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO"). The ground (d) appeal failed on the basis of the inspector's finding that in September 2015 the property was in use as a dwellinghouse falling with either class C3(c) or class C4 set out in Schedule 1 to the Town and Country Planning (Use Classes) Order 1987 ("the Use Classes Order"). The ground (a) appeal was dismissed on the ground that the change of use from a single dwellinghouse to two flats was contrary to development plan policy. The ground (f) appeal was allowed on the basis that the requirement to remove all bathrooms except two exceeded what was necessary to remedy the breach of planning control. The ground (g) appeal was dismissed.

17. Ms Muorah appealed to the High Court against the decision set out in the August 2019 Decision Letter. The Secretary of State accepted that the August 2019 Decision Letter contained an error of law, as the effect of Step 1 in the enforcement notice was to deprive the owner of the permitted development right conferred by Article 3(1) and Class L of Part 3 of Schedule 2 to the GPDO. By an order made on 17th January 2020 David Elvin QC sitting as a Deputy High Court Judge remitted the case to the Secretary of State for re-hearing and determination in accordance with the opinion of the court. That case has the neutral citation [2020] EWHC 649 (Admin).

18. By an application dated 7th November 2019, Ms Muorah applied to the Council for a certificate of lawfulness of existing use or development ("the CLEUD Application"). The application related to 154A, Harlesden Road. The change of use in respect of which the certificate was sought was "change of a dwelling house into two flats". By a decision notice dated 2nd January 2020 the Council refused the CLEUD Application. In the decision notice by which they refused the application the Council state that the application was made on 8th November 2019. For the purposes of these proceedings, it makes no difference whether the application was made on the 7th or the 8th November 2019. The reason for refusing the application was:

"The proposal is not lawful as it contravenes the requirements of enforcement notice E/17/0062 for 154A Harlesden Road, NW10 3RE, which requires the use as two flats to cease and fixtures and fittings associated with the change of use to be removed."

19. Ms Muorah appealed to the Secretary of State against the Council's decision to refuse to grant the CLEUD Application ("the CLEUD Appeal").

20. On 7th April 2020, the Planning Inspectorate ("PINS") wrote to the Council and stated that they intended to appoint the same inspector to determine the CLEUD Appeal and the Enforcement Notice Appeal.

21. In a letter dated 16th April 2020 the Council wrote to PINS setting out their position. That letter included the following:

"3. The Inspector decided that there was an unlawful change of use from a single to two dwellings. The High Court quashed that decision because of an inconsistency arising in the requirements of Step 1 of the notice, deciding "It is an issue which it appears could be dealt with simply on redetermination by the correction of step one, consistently with the other aspects of the DL" (paragraphs 33 and 49). In its letter of 24 March 2020 the Council suggested such simple correction. This could have been achieved by an exchange of letters with the appellant, but the appellant has rejected such an approach."

22. In a letter dated 19th August 2020 PINS wrote to the Council and informed them that it had not been possible to appoint the same inspector to determine the CLEUD Appeal and the Enforcement Notice Appeal and that different inspectors had been appointed to determine each appeal.

23. On the 19th August 2020, an officer of the Council sent an email to PINS stating:

" Thank you for the attached letter. It was my understanding that the enforcement appeal had been linked to the Lawful Development Certificate (LDC) appeal and would be dealt with at the same time and by the same Inspector. It was on this basis that the Council did not produce a statement in respect of the appeal against the LDC- as its position was already set out in the enforcement notice appeal. I therefore trust that the Planning Inspector will consider the representations made by the Council in respect of the enforcement appeal when assessing the merits of the LDC application."

24. The CLEUD Appeal was determined using the written representations procedure. The appeal was allowed by a decision letter dated 10th September 2020. In that decision letter the inspector ("the CLEUD Appeal Inspector" and "the CLEUD Appeal Decision Letter") stated:

"4. The appellant states the property has been in use as two flats since September 2015 and that a partition was erected at the same time. The Council's evidence does not dispute this claim, indicating that no enforcement action may be taken, pursuant to section 171B(2) of the 1990 Act. However, the Council's decision states that the existing use as two self-contained flats is not lawful as it contravenes an enforcement notice which requires the use of the property as two flats to cease.

5. The Planning Practice Guidance[1] 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.

6. From the evidence available to me, an enforcement notice issued by the Council on 24 July 2017, required (inter alia) the use of the property as flats to cease. An appeal decision (Ref: APP/T5150/C/17/3182904) dated 22 August 2019 purported to uphold that enforcement notice. However, that appeal decision has been the subject of an appeal to the High Court under section 289 of the 1990 Act.

7. As a consequence of the section 289 appeal, the matter of the appeal against the enforcement notice was remitted to the Secretary of State for redetermination on 15

January 2020. Therefore, on the date of this LDC application i.e. 7 November 2019, there was no enforcement notice "in force" for the purposes of section 191(2)(b) of the 1990 Act, and, the enforcement notice is of "no effect" pending the final determination of the appeal as per section 175(4) of the 1990 Act.

Conclusion

8. For the reasons given above I conclude, on the evidence now available, 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. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended."

1 Lawful development certificates. Paragraph: 003 Reference ID: 17c-003-20140306

25. I note that the lawful development certificate, which is attached to the CLEUD Appeal Decision Letter, relates to land at 154 Harlesden Road, whereas the application related to 154A Harlesden Road. That inconsistency makes no material differenced to the matters in issue.

26. The Enforcement Notice Appeal decision was communicated in a letter dated 9th December 2020 ("the Enforcement Notice Appeal Decision Letter"). That decision letter included the following:

"3. In short, the error related solely to the Inspector's consideration of ground (f) and in particular, the failure of the Inspector to consider an appropriate correction to step one to remove the requirement for its occupation to cease by more than one single household. No error was found in relation to the other grounds of appeal, those being grounds (a), (c), (d) and (g). The ground (g) appeal was introduced in the appellant's Statement of Case. The Council had the opportunity to respond and so, as no prejudice would be caused, this additional ground was considered by the previous Inspector.

4. With the exception of ground (g), it is not necessary to re-visit the other grounds of the decision other than to say, for the reasons previously set out by the Inspector, I agree with the conclusions reached on those other grounds. In doing so, I note that policies contained in the draft London Plan concerning space standards, would not alter the consideration of the deemed planning application. I shall re-visit ground (g) in light of the covid-19 restrictions which represents a material change in circumstances since the previous decision.

……

7. It is directed that the enforcement notice be corrected by the:

• Deletion of 'the erection of a canopy and door facing Harlesden Road and' from the description of the alleged breach of planning control set out in schedule 2 and the deletion of Step 2 in the requirements set out in Schedule 4; and

• Replacement of the words ‘these works’ with ‘the material change of use’ in Step 3 of the requirements in Schedule 4;

and varied by the:

• Deletion of the words ‘and its occupation by more than ONE household and’ and the words ‘and remove all bathrooms, except TWO’ from Step 1 of the requirements set out in Schedule 4.

Subject to these corrections and variations the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

…….

10. The purpose of the notice is clearly stated as being to remedy the breach of planning control; that being its use as two dwellings (flats). It is therefore the use of the premises as flats that should cease together with the removal of any works integral to and solely for the purpose of facilitating the unauthorised use. Accordingly, the additional restriction in step 1, to also limit its occupation to not more than one household, would clearly exceed what is reasonably necessary to remedy the breach of planning control. In order to ensure that the use of the property is not curtailed to such an extent as to prevent its lawful use as a dwelling house and for purposes falling under Class C4, following compliance with the notice, it would be necessary to strike out the words “and its occupation by more than ONE household” from step 1.

11. No fault was found with the reasoning of the previous Inspector in relation to the remainder of step 1. For the reasons set out I shall therefore vary step 1 to delete any reference to the need to remove one of the bathrooms in order to comply with the notice since this is considered to be excessive to remedy the breach and would serve no useful purpose in the particular circumstances of this case.

12. To this extent, the ground (f) appeal succeeds and the enforcement notice shall be varied accordingly.”

27. This case is concerned with the application made under section 288 of the TCPA 1990 that the CLEUD Appeal Decision Letter be quashed.

The grounds of claim

28. There are three grounds which are relied upon by the Claimant.

i) Ground 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.

ii) Ground 2: The First Defendant 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.

iii) Ground 3: The First Defendant acted outside the powers conferred on him by the TCPA 1990 by certifying as lawful a use which was not lawful.

29. The First Defendant accepts that his decision was unlawful on the basis of Ground 3, but does not accept that the decision was unlawful on grounds 1 and 2. The First Defendant was prepared to consent to judgment on the basis that Ground 3 was made out. Ms Muorah was not prepared to consent to judgment.

The Legal Framework

The Statutory Framework

30. Section 191 of the TCPA 1990 provides:

"191.— Certificate of lawfulness of existing use or development.

(1) If any person wishes to ascertain whether—

(a) any existing use of buildings or other land is lawful;

(b) any operations which have been carried out in, on, over or under land are lawful; or

(c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,

he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.

(2) For the purposes of this Act uses and operations are lawful at any time if—

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force."

31. The term 'enforcement action' is defined in section 171A(2) TCPA 1990:

"(2) For the purposes of this Act—

(a) the issue of an enforcement notice (defined in section 172); or

(aa) the issue of an enforcement warning notice (defined in section 173ZA);

(b) the service of a breach of condition notice (defined in section 187A),

Constitutes taking enforcement action."

32. Section 171B sets out the time limits for taking action in respect of breaches of planning control:

"(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.

(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.

(2A) There is no restriction on when enforcement action may be taken in relation to a breach of planning control in respect of relevant demolition (within the meaning of section 196D).

(3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

(4) The preceding subsections do not prevent—

(a) the service of a breach of condition notice in respect of any breach of planning control if an enforcement notice in respect of the breach is in effect; or

(b) taking further enforcement action in respect of any breach of planning control if, during the period of four years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach."

33. Section 175(4) of the TCPA 1990 provides:

"(4) Where an appeal is brought under section 174 the enforcement notice shall [subject to any order under section 289(4A)] be of no effect pending the final determination or the withdrawal of the appeal."

Challenges under Section 288 TCPA 1990

34. Under section 288 TCPA 1990 , a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act ; or (b) any of the relevant requirements have not been complied with, and in consequence, the interests of the applicant have been substantially prejudiced.

35. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990 . Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

Consistency in decision making

36. A previous appeal decision is capable of being a material consideration to be taken into account when the Secretary of State or his inspectors determine planning appeals. That principle is long established, and its effect was explained by Mann LJ in ***North Wiltshire District Council v. Secretary of State for the Environment and Clover*** (1993) 65 P & CR 137 at page 145:

"In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.

To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

37. There will be some cases where it would be unreasonable for the Secretary of State not to have regard to a previous appeal decision even though none of the parties has relied upon the previous appeal decision or brought it to the Secretary of State's attention (Lindblom LJ at paragraph 34 in ***Baroness Cumberlege of Newick and another v. Secretary of State for Communities Housing and Local Government and another*** [2018] PTSR 2063).

38. The principle of consistency is not limited to the formal decision but extends to the reasoning underlying the decision. A previously quashed decision is capable of being a material consideration. (***R (Davison) v. Elmbridge Borough Council*** [2019] EWHC 1409 (Admin) at paragraph 56).

Natural Justice

39. The principles to be applied in the context of planning decisions were summarised by Beatson LJ in ***Hopkins Developments v. Secretary of State for Communities and Local Government*** [2014] EWCA Civ 470 at paragraph 62:

> "62 From reviewing the authorities I derive the following principles:
> (1) Any party to a planning inquiry is entitled (i) to know the case which he has to meet and (ii) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case. (2) If there is procedural unfairness which materially prejudices a party to a planning inquiry that may be a good ground for quashing the inspector s decision. (3) The 2000 Rules are designed to assist in achieving objective (1)(i), avoiding pitfall (1)(ii) and promoting efficiency. Nevertheless the Rules are not a complete code for achieving procedural fairness. (4) A rule 7 statement or a rule 16 statement identifies what the inspector regards as the main issues at the time of his statement. Such a statement is likely to assist the parties, but it does not bind the inspector to disregard evidence on other issues.
> Nor does it oblige him to give the parties regular updates about his thinking as the Inquiry proceeds. (5) The inspector will consider any significant issues raised by third parties, even if those issues are not in dispute between the main parties. The main parties should therefore deal with any such issues, unless and until the inspector expressly states that they need not do so. (6) If a main party resiles from a matter agreed in the statement of common ground prepared pursuant to rule 15, the inspector must give the other party a reasonable opportunity to deal with the new issue which has emerged."

The Grounds and Conclusions on each Ground

40. I will consider Ground 3 first.

Ground 3

41. This ground is conceded by the Secretary of State.

42. Ms Muorah argues that:

i) The CLEUD Appeal Inspector cannot legitimately be criticised for failing to address an issue which was not put before him.

ii) The provisions of section 171B(4) do not apply when an appellant succeeds on an appeal under ground (c) or ground (d) as set out in section 174(2) of the TCPA 1990.

iii) If the provisions of section 171B(4)(b) do apply the four year period in which further enforcement action may be taken has now expired.

iv) Permission should not have been granted to add Ground 3.

43. It was for the inspector to determine whether the use put forward in the application for the CLEUD was lawful. That use was "change of a dwellinghouse into two flats".

44. For the purposes of the TCPA 1990 uses are lawful if they fall within the definition set out in section 191(2) of that Act. The inspector's role was to determine whether the use put forward in the CLEUD Application was lawful as defined in section 191(2).

45. In order to be lawful a use must be one in respect of which no enforcement action may be taken, and be one which does not constitute a contravention of any enforcement notice then in force.

46. The inspector was required to consider both limbs of section 191(2).

47. The inspector considered the second limb (of section 191(2)) in his decision letter, and held that as the enforcement notice appeal was still in progress (following remission of the case to the Secretary of State) the Enforcement Notice was of no effect, and as a consequence there was no enforcement notice then in force.

48. The inspector did not consider the first limb of section 191(2), in that he did not consider whether enforcement action "may then be taken" as result of the provisions of section 171B(4) of the TCPA 1990. The Council had purported to take enforcement action in respect of the breach by issuing the Enforcement Notice on the 24th July 2017, and at the time that the inspector made his decision on the CLEUD Appeal the four year period running from that date had not expired. As a consequence, the provisions of section 171B(2) did not prevent the Council from taking further enforcement action. Therefore, at the time that the CLEUD Application was made, this was not a case where 'no enforcement action may then be taken' (as referred to in section 191(2)(a) TCPA 1990).

49. As a result, the inspector acted outside the powers conferred on the Secretary of State by the TCPA 1990 by certifying a use as lawful which did not fall within the definition of a lawful as set out in section 191(2) of the Act.

50. Ms Muorah relies upon the fact that the argument relating to the first limb of section 191(2) TCPA 1990 was not put before the CLEUD Appeal Inspector. In my judgment, it was incumbent on the inspector to consider whether the use put forward in the CLEUD Application was lawful, as defined in section 191(2) TCPA 1990, whether or not that issue was put before him by the parties.

51. The argument raised by Ms Muorah, namely that the provisions of section 171B(4) do not apply when an appellant succeeds on ground (c) or (d) (as set out in section 174(2) of the TCPA 1990) cannot be sustained on the facts, as in this case Ms Muorah's success on ground (c) related to the operational development not the use. Accordingly, the question of whether the provisions of section 171B(4) apply when an appellant succeeds on a ground (c) or ground (d) enforcement notice appeal does not arise. I make no finding on whether or not the provisions of section 171B(4) apply when an appellant against an enforcement notice succeeds on grounds (c) or (d) as set out in section 174(2) of the TCPA 1990.

52. When determining an application and appeal for a CLEUD the decision maker is to determine whether the use or operations are lawful on the date when the application is made. The date to be considered when considering whether enforcement action may be

taken was the date when the application was made, namely 8th November 2019 (the date referred to on the Council's decision notice on the CLEUD Application). The date on the CLEUD Application itself was 7th November 2019. The four year period running from the date when the enforcement notice was issued (as referred to in section 171B(4)(b) TCPA 1990) had not expired on the 7th or the 8th November 2019.

53. The issue of permission to proceed on the various grounds of challenge was considered and determined at earlier stages in these proceedings. Permission was granted to pursue the application on ground 3. That decision was not appealed.

54. For those reasons, the inspector acted outside the powers conferred on him by the Act when he allowed the CLEUD Appeal, as he failed to consider whether the requirements of section 191(2)(a) of the TCPA 1990 were satisfied. Accordingly, the Claimant succeeds on ground 3.

Ground 1

55. Dr Bowes, for the Claimant, argues that although the inspector refers to the August 2019 Decision Letter (at paragraph 6 of the CLEUD Appeal Decision Letter) he did not 'grapple' with the conclusion that the use of the property as two flats was not lawful at the time that enforcement notice had been issued (24th July 2017). Dr Bowes relies on ***Davison*** in support of the proposition that a remitted decision remains a material consideration, and argues that the reasoning relating to use was unaffected by the decision to remit the case to the Secretary of State.

56. Mr Westaway, for the Secretary of State, argues that there was no inconsistency between the CLEUD Appeal Decision Letter and the August 2019 Decision Letter as the CLEUD Appeal inspector was considering the four year period to 8th November 2019 (or the 7th November 2019), whereas the Enforcement Notice Appeal inspector considered the four year period ending on 24th July 2017. Mr Westaway drew attention to the fact that the Council's case (as set out in their evidence for the Enforcement Notice Appeal) was that the change of use from a single dwellinghouse to two flats occurred in September 2015.

57. Ms Muorah agrees with the arguments put forward on behalf of the Secretary of State.

58. The CLEUD Appeal Inspector was considering the facts and circumstances applicable on the date when the application for the CLEUD was made, on 8th November 2019 (or 7th November 2019) when considering whether enforcement action may be taken. The four year period under consideration in the CLEUD Appeal was the four years to 8th November 2019 (or 7th November 2019).

59. In the August 2019 Decision letter, when considering whether enforcement action may be taken, the inspector was considering the facts and circumstances applicable on the date when the enforcement notice was issued, being the 24th July 2017. The four year period under consideration in the August 2019 Decision Letter was the four years to 24th July 2017.

60. If the CLEUD Appeal Inspector had applied the practical test referred to at page 145 in ***North Wiltshire***, namely if I decide this case in a particular way (by allowing the appeal) am I necessarily agreeing or disagreeing with some critical aspect of the August 2019 Decision Letter, the answer would have been 'no', as he was dealing with a different four year period.

61. As the August 2019 Decision Letter was distinguishable, in my judgment there was no obligation on the CLEUD Appeal Inspector to refer to its reasoning, or to have regard to the importance of consistency with that decision.

62. For those reasons, the CLEUD Appeal Inspector did not err by failing to give reasons for departing from the reasoning in the August 2019 Decision Letter; there was no such departure. Accordingly, the Claimant does not succeed on Ground 1.

Ground 2

63. In the email sent on 19th August 2020 the Council's officer stated that the Council's position was set out in the representations on the enforcement notice appeal and that "I therefore trust that the Planning Inspector will consider the representations made by the Council in respect of the enforcement notice appeal when considering the merits of the LDC application."

64. Dr Bowes submits that by failing to send the CLEUD Appeal Inspector the Council's evidence and submissions on the Enforcement Notice Appeal or by failing to inform the Council that they had not done so, PINS denied the Council a reasonable opportunity to put their case or to adduce evidence and make submissions. Dr Bowes relied upon paragraph 1(ii) of the principles set out by Beatson LJ at paragraph 62 in ***Hopkins***.

65. Mr Westaway relies upon the case put in the Secretary of State's Summary Grounds of Defence, namely that the Council, in failing to submit representations, failed to comply with the procedural requirements applicable in relation to appeals conducted under the written representations procedure.

66. Ms Muorah agrees with Mr Westaway's submissions.

67. The failure by PINS to provide the CLEUD Appeal Inspector with the Council's representations in relation to the Enforcement Notice Appeal when requested to do so, and the failure to tell the Council that it had not done so, was a procedural failing. The question to be asked is whether that procedural failing, or deficiency was such as to deprive the Council of a reasonable opportunity to put their case, adduce evidence and make submissions.

68. In my judgment the failure by PINS to notify the Council that the representations in the Enforcement Notice Appeal had not been sent on to the CLEUD Appeal Inspector did deprive the Council of the opportunity to put their case, adduce evidence and make submissions. If the Council had been told that their representations in the Enforcement Notice Appeal would not be sent on the CLEUD Appeal Inspector they would then have had the opportunity to send in those representations to be considered in the CLEUD Appeal or to have adduced further evidence and/or submissions. On that basis I hold that the Council succeeds on Ground 2.

Discretion

69. Ms Muorah argues that the Court should exercise its discretion not to quash the decision.

70. In considering this issue I note that the First Defendant agrees that the decision should be quashed as a result of the failure by the CLEUD Appeal inspector to consider whether enforcement action may have been taken (Ground 3).

71. 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 those reasons I reject Ms Muorah's submissions on discretion.

72. If the only ground on which the Claimant had succeeded was Ground 2, Ms Muorah would have had a stronger argument that the Court should exercise its discretion not to quash, as if the error had not occurred, and the representations on the Enforcement Notice Appeal had been sent to the CLEUD Appeal Inspector, it would have made no material difference to the outcome as those representations did not address the four year period to the 7th or 8th November 2019.

73. The claim is allowed and the First Defendant's decision under section 195(2) of the Town and Country Planning Act 1990 to allow the CLEUD Appeal is quashed.