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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

PLANNING COURT

In the matter of an application for permission to apply for Judicial Review

BETWEEN:

1. **PUREWALL LIMITED**
2. **BAHAREH SABER**
3. **SHEIKH MOHAMMED SHAMIN**
4. **RAINBOW CREATIONS LIMITED**
5. **FARRUKH RIAZ**

Claimants

and

WILLESDEN MAGISTRATES' COURT

Defendant

and

THE LONDON BOROUGH OF BRENT

Interested Party

GROUNDS FOR RESISTING THE APPLICATION FOR PERMISSION

ON BEHALF OF BRENT LONDON BOROUGH COUNCIL

Note: references to page numbers in this document are to the Bundle accompanying the application for permission, as filed by the Claimants.

Introduction

1. On 18th December 2017, the Claimants applied for permission to Judicially Review the decision of District Judge Jabbitt sitting at Willesden Magistrates' Court on 27th November 2017 **(pp. 198-251)** to convict the Claimants of various offences under the Town and Country Planning Act 1990 (the "1990 Act").

2. Brent London Borough (the "Council") is the local planning authority for its administrative area in North London and was the prosecuting authority in the case decided by the District Judge.

3. By an Order dated 8th January 2018, Mrs Justice Moulder refused the Claimants' application for urgent consideration of the Judicial Review, and ordered that the permission application be considered following the submission by the Council of its Acknowledgment of Service.

4. It should be noted that on 16th January 2017, Willesden Magistrates' Court itself filed an Acknowledgment of Service form that responded to the permission application at the High Court.

Factual Background

5. The Claimants were convicted of failing to comply with the requirements of a planning Enforcement Notice (the "Enforcement Notice") issued by the Council on 24th August 2012 in respect of the unlawful development of land at Neasden Service Station, Neasden Lane, in London, NW10 2UE (the "Property").

6. The Council issued the Enforcement Notice and served it on Mrs Bahareh Saber (the Second Claimant) who is the freehold owner of the Property, and on all occupiers and those with an interest in the Property (the "Relevant Persons").

7. Service was either effected by hand at the Property or by delivery to the registered address of the individuals or companies concerned.

8. The Enforcement Notice alleged as the "Breach of Planning Control" at Schedule 2:

   "Without planning permission, the erection of a two storey building and the change of use of the premises from a service station to a mixed use as service station, hand car wash and six self-contained flats."

9. The Enforcement Notice explained in detail at Schedule 3 the: *"Reasons for Issuing This Notice"* with reference to a variety of design, residential amenity and health and safety issues, constituting a number of breaches of national and development plan policies including the National Planning Policy Framework 2012.

10. The requirements of the Enforcement Notice were set out at Schedule 4 and these included the full demolition and removal of the unlawfully constructed block of six self-contained flats and the cessation of the residential and other unlawful uses of the Property, including the commercial car wash use.

11. A copy of the Enforcement Notice was recorded on the Council's statutory planning register, pursuant to the Council's duty at s. 188 of the 1990 Act.

12. No appeal was made against the Enforcement Notice, which therefore became effective on 4th October 2012. The period for compliance expired on 4th April 2013.

13. Following the coming into force of the Enforcement Notice, the Council wrote to the Relevant Persons on 13th December 2012 reminding them of the need to comply with the Notice and warning them of the possibility of prosecution proceedings for any continued non-compliance.

14. On 8th December 2015, the Council wrote further warning letters to the Relevant Persons, warning them that the Council was considering prosecuting for the continued breach of the Enforcement Notice.

15. On 21st September 2016, the Council issued the Claimants with Summonses to appear at Willesden Magistrates Court in respect of the offence of breaching the Enforcement Notice by:

    "carrying on or causing or permitting to carry on an activity or activities which was required by the notice to cease, namely the residential occupation of the site and/or the use of the premises as six self-contained flats"

16. All the Claimants were prosecuted by the Council not as the Owner/s of the Property under s. 179 (2) of the 1990 Act, but as persons with "control" of and an "interest" in the Land under s. 179 (4).

17. The Second Defendant was charged under s. 179 (2) of the 1990 Act as the Owner of the Property.

18. The Second, Third and Fifth Claimants were also charged and convicted under s. 331 of the 1990 Act as Directors of various companies namely: Purewall Limited (the First Claimant); Rainbow Creations Limited (the Fourth Claimant); and Athacross Limited (dissolved).

19. A further summons was issued against the Second and Fifth Claimants in relation to the continued unlawful operation of the car wash facility at the Property despite the requirement of the Enforcement Notice.

20. On 9th December 2016, the Fifth Claimant (Mr Farrukh Riaz) issued an application in the High Court for permission to Judicially Review the Council's decision to pursue prosecution proceedings against him, on the basis that he had not been served with the Enforcement Notice and that the decision to prosecute him was unfair.

21. The application for permission was refused by Mr Justice Dove on 23 January 2017, with the Order describing Mr Riaz's application for permission as *"totally without merit"*.

22. The trial took place at Willesden Magistrates' Court between 26th-27th June 2017.

23. At the conclusion of the second day of the trial on 27th June, District Judge Jabbitt arranged for all parties to provide written closing submissions to the Court and for judgment to be handed down on 3rd October 2017.

24. In the event, a further hearing did take place on 3rd October. However, it transpired that the Claimants' Closing Submissions had not been received by the Court. District

Judge Jabbitt therefore set a new date for the handing down of the judgment, 27th November.

25. At the request of the Claimants' representatives, the District Judge also set a timetable for written submissions and new evidence to be provided to the Court.

26. A "Further Submissions" document dated 10th October 2017 **(pp. 97-100)** and various materials were provided by the Claimants, and the Council responded to these in a "Response Note" dated 16th October 2017 **(pp. 86-95)**.

27. On 31st October 2017, the Claimants representatives provided a further set of materials to Willesden Magistrates' Court **(pp. 9-85)**. The Council responded to this further material. The District Judge refused to accept the Claimants further evidence and submissions, or the Council's response.

28. Following the eventual conviction on 27th November 2017, District Judge Jabbitt committed the Defendants for sentencing and for confiscation proceedings to Harrow Crown Court.

29. On 18th December 2017, Willesden Magistrates' Court received an *"appeal to the Crown Court from the Magistrates' Court"* which was filed by the Claimants Solicitor **(pp. 195-201).**

30. On 9th January 2018, a Mention took place at Harrow Crown Court before HH Judge Barrie. The Claimants appeal against their conviction was listed for a two day hearing commencing on 10th May 2018.

31. A further timetable was set out for the evolution of confiscation proceedings to take place according to sections 16, 17 and 18 of the Proceeds of Crime Act 2002. This timetable was to lead up to a further Mention at Harrow Crown Court to take place on 9th November 2018.

32. It should be noted that the timetable for confiscation proceedings was set out expressly by HH Judge Barrie on the proviso that the Claimants appeal against their conviction was ultimately unsuccessful.

Summary of the Findings

33. In summary, District Judge Jabbitt concluded is his judgment handed down on 27th November 2017 **(pp. 198-251)** that clear evidence existed to demonstrate beyond reasonable doubt:

    (i) that Purewall Limited and Rainbow Creations Limited (the First and Fourth Claimants) acted as landlords of the Property, had been involved in a series of planning applications to redevelop the Property, were registered at the same London address, and that both companies benefited financially from the unlawful residential development and continued use of the Property;

    (ii) that Mrs Bahareh Saber (the Second Claimant) was the freehold owner of the Property and that she and Sheikh Mohammed Shamin (the Third Claimant) acted as the registered Directors of the First and Fourth Defendant companies, and were involved in various correspondence concerning the Property for an extended period since compliance with the Enforcement Notice was meant to have occurred in April 2013;

    (iii) that Farrukh Riaz (the Fifth Claimant) acted as Director of a company which was a Leaseholder and operator of the Property, and had been involved in various plans to redevelop the Property with the Third and Fourth Claimants; and

(iv) that the Council had therefore proved that the Claimants either directly "carried out", or alternatively "caused or permitted" the continued failure to comply in full with the requirements of the Enforcement Notice.

Issues raised in the Judicial Review

34. Section 2 of the Judicial Review Claim Form sets out the decision to be Judicially Reviewed as:
"Relevant paragraphs 92-95, 218, 223 & 227, the proceeding was out of time because the car wash was in existence since 2000. But unfortunately, DJ Jabbitt did not allow (the Defendants) to adduce any further evidence or make any oral submission".

35. Further to this overall complaint, the detailed issues raised by the Claimants are set out within Sections 5 and 8 of the Judicial Review Claim Form **(pp. 3-8)**. They are summarised here for the Court's ease of reference as follows:

(i) The conduct of the trial was not fair because: the Claimant had further evidence to prove the existence of the car wash since at least the year 2000, but District Judge Jabbitt refused the Claimants permission to adduce this further evidence (Grounds 1 and 3 in Sections 5 and 8);

(ii) The conviction is flawed as a matter of fact because: the Enforcement Notice was defective as it was served "out of time" i.e. "over 10 years had elapsed" since the car wash use had commenced (Grounds 2 and 6 in Sections 5 and 8);

(iii) The District Judge committed various other "procedure irregularities" which have been "challenged before the Crown Court" (Ground 4 in Section 8);

(iv) The basis of the prosecution was flawed since the Enforcement Notice was not properly served on the Claimants (Ground 5 in Section 8); and

36. The issues raised by the Claimants will be dealt with in turn. In broad terms, however, it will be noted that the Claimants have appealed against their conviction and a hearing is set down for 10th-11th May 2018. This appeal will be De novo: it will fall to the Council to prove their case in full a second time before a Crown Court judge and two Magistrates.

37. It therefore follows that the Claimants will be entitled to adduce whatever arguments they wish to raise in support of their defence. If the Council fails to prove its case to the requisite standard, the appeals will be upheld and the convictions will be quashed.

38. The Claimants seek to have the convictions "set aside" and for subsequent orders relating to sentencing and confiscation proceedings which were made by District Judge Jabbitt "quashed".

39. In circumstances where an appeal is being run (and as explained within the Acknowledgment of Service form provided by Willesden Magistrates' Court), such an order would be entirely inappropriate, and the application for permission to Judicially Review the judgment of District Judge Jabbitt is therefore fundamentally misconceived.

Grounds of Opposition

Issue (i): the alleged unfairness relating to the refusal to allow the introduction of further evidence concerning to the car was use (Grounds 1 and 3)

40. As set out at paragraphs 24-26 above, District Judge Jabbitt specifically allowed the Claimants to produce further evidence relating to the extent of the car wash use at the hearing on 3rd October 2017.

41. Further to the District Judge's direction, evidence was in fact adduced by the Claimants and this was dealt with in the Council's "Response Note" dated 16th October 2017 between paragraphs 15-23 **(pp. 89-90)**.

42. District Judge Jabbitt made it clear in his judgment at paragraphs 219 and 225 **(pp. 248- 250),** that he considered the Claimants new submissions. He went out of his way to accommodate the request of the Claimants to adduce late evidence.

43. However, after the exchange of the further evidence and submissions produced as a result of the directions given on 3rd October, the Claimants representatives provided new material to the Court without having first sought leave to do so from the District Judge.

44. This new material comprised further correspondence with the Valuation Office and a series of signed statements to the effect that the car wash use had continued "for at least 15 years". Most of the statements were signed on or around 21st October 2017.

45. District Judge Jabbitt refused to accept this new evidence or to take it, or the Council's response, into account in his already much delayed judgment. The District Judge was correct to take this stance. The Claimants had been given every opportunity to provide their evidence in the main trial and subsequent to the directions given on 3rd October, and it was clearly neither proportionate nor fair to delay the conclusion of the trial yet again in order to cater for the Claimants continued attempts to drip feed evidence on the case in support of their position.

Issue (ii): the alleged "defectiveness" of the Enforcement Notice on the basis that the car wash use had taken place for at least 10 years (Grounds 2 and 6)

46. In relation to the first round of new evidential material produced by the Claimants after the directions given on 3rd October 2017, the Council made two points.

47. First, no appeal had been run in relation to the longevity of the car wash use under s. 174 (2) (d) of the 1990 Act when the Enforcement Notice was first served, and it was therefore too late to seek to run a length of use appeal as part of a defence to a prosecution for non-compliance under s. 179 of the Act.

48. Second, the use evidence now presented related to claimed events in 2004 and 2008 when, in order to prove 10 years use, such evidence would have needed to go back to before August 2002 – i.e. 10 years before August 2012 when the Enforcement Notice was served by the Council.

49. The new materials produced after the Council's "Response Note" had been submitted, material which was subsequently rejected by the District Judge, related once again to the claimed 10 year use of the car wash at the Property.

50. However, this material could and should have been used as part of an appeal against the Enforcement Notice under s. 174 (2) (d) of the 1990 Act. It was not appropriate to run this appeal in a prosecution under s. 179 of the 1990 Act – and indeed s. 285 (1) prevents the validity of any Enforcement Notice being questioned subsequently on grounds that it could have been used on appeal.

51. In any event, the "new" material is, once again, inconclusive and cannot be tested by effective cross examination in the proper forum – which is at a Public Inquiry into the s. 174 (2) (d) appeal. The information from the Valuation Office is not clear as to either dates, or the actual extent of any car wash use taking place at the Property, and the new Statements relate to a period which still fails to cover the requisite 10 years before the service of the Enforcement Notice (i.e. to before August 2002).

Issue (iii): Other alleged procedural irregularities (Ground 4)

52. The Judicial Review Claim Form refers to allegations of "irregularities in a judicial capacity" which, it is stated, are set out within the Grounds of Appeal against conviction document **(pp. 195-201)**. The three issues canvassed can be found under the "Procedural Irregularities" section of the document at paragraph (5) **(p. 200)** and can be summarized as follows:

    (i) The Judgment "was copied" from the local authority's counsel's Opening Note;

    (ii) The Judgment was "proof read" by the local authority's Counsel; and

(iii) The District Judge refused to allow the Claimants' representatives to make oral submissions at the hearing on 27th November 2017.

53. With regards to the first alleged "irregularity", the District Judge himself dealt fully with the point within his judgment at paragraph 224 **(p. 250)**:

"I acknowledged in my decision that I reproduced Mr Robb's Opening Note as a useful way of setting out the LA's (Local Authority's) case and the relevant law and legal principles. I have proceeded to summarise the evidence, make findings of fact and applied those findings to the offences alleged. The judgement is mine."

54. With regards to the second alleged "irregularity", the District Judge stated within his judgement at paragraph 226 **(p. 250)**:

"I sent the original draft to the LA (Local Authority one day before my decision, so that any corrections or amendments could be drawn to my attention. I did this openly. I had no knowledge that the LA had already obtained a restraining order from Harrow Crown Court I relation to the Neasden Service Station."

55. With regards to the third alleged "irregularity" the District Judge did indeed state at paragraph 227 of the judgment that he would: "…not be hearing any further oral submissions at the final hearing on 27th November 2017." **(p. 250)**.

56. The ruling was manifestly fair and proportionate bearing in mind that:

(a) there had been a lengthy trial, during the course of which evidence from both sides had been given and tested by cross examination in front of the District Judge,
(b) the Claimants had been given a further opportunity by the District Judge to provide written submissions and evidence following the hearing on 3rd October 2017, and
(c) all the Claimants were represented by Counsel throughout the proceedings.

Issue (iv): The basis of the prosecution was flawed as the Enforcement Notice was improperly served (Ground 5)

57. The Court is asked to note that the service issues have already been raised in front of the High Court in the Fifth Defendant's Judicial Review application, which was dismissed as "totally without merit" by Dove J on 23rd January 2017.

58. In any event, pursuant to section 179 (7) of the 1990 Act, it is a defence for a person (i.e. an owner or person who has an interest in or control over the land) who has been charged with an offence under s. 179 of the 1990 Act to show that:

    (i) he was not served with a copy of the notice; ***and***

    (ii) the notice was not recorded on the enforcement register (that local planning authorities are required to keep updated pursuant to s188 of the Act); ***and***

    he was not aware of its existence. (emphasis added)

59. However, the Defendant must be able to demonstrate ***all three*** of these points before he has a valid defence to a prosecution.

60. The Council served the Enforcement Notice on the First, Second and Fifth Claimants. The Third and Fourth Claimants acquired their knowledge of and interest in the Property only on 30 June 2014.

61. The Enforcement Notice was registered on the Enforcement Register in accordance with the Council's duties under s. 188 of the 1990 Act, and the Claimants continued (over the course of several years and despite various warnings) to fail to comply with the requirements of the Enforcement Notice – this despite knowing about the existence of the Notice.

62. In the circumstances, the s. 179 (7) defence could not have succeeded, a finding correctly made by the District Judge at paragraph 217 of the judgment **(p. 247)**.

63. Even if the s. 179 (7) defence could not have applied, the Claimants could still seek to rely (in theory at least) on a further service related defence set out at s. 285 of the 1990 Act.

64. S. 285 of the 1990 Act deals with the circumstances in which the validity of an enforcement notice can be questioned in legal proceedings.

65. S. 285 (1) provides that the validity of an enforcement notice shall not, except by way of an appeal under Part VII, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought.

66. However, s. 285 (2) provides that subsection (1) shall not apply to proceedings brought under section 179 against a person who:

> *(a) has held an interest in the land since before the enforcement notice was issued;* ***and***
> *(b) did not have a copy of the enforcement notice served on him;* ***and***
> *(c) satisfies the court –*
>
> *(i) that he did not know and could not reasonably have been expected to know that the enforcement notice had been issued;* ***and***
> *(ii) that his interests have been substantially prejudiced by the failure to serve him with a copy of it.* (emphasis added)

67. Only if a Defendant can demonstrate all of these points can he establish a defence to the prosecution.

68. The Third and Fourth Claimants acquired an interest in the Property only after the service of the Enforcement Notice. They were therefore deemed to know about the Enforcement Notice because this was registered on the Council's Enforcement Register according to s. 188 of the 1990 Act.

69. In relation to the First, Second and Fifth Claimants, all were served correctly with the Notice on the day it was issued by the Council, and the Notice was placed on the Council's Enforcement Register.

70. Further, all the Claimants either knew about the existence of the Enforcement Notice or could "reasonably" have been expected to know about its existence, since all had an interest in the Property, and/or collected rents, and/or were involved in the redevelopment of the Property, and/or were warned repeatedly in correspondence from the Council of the need to comply with the requirements of the Notice, or face the threat of criminal prosecution for non-compliance.

71. The District Judge was therefore correct to conclude at paragraph 218 of the judgment **(p. 247)** that the service defence at s. 285 (2) could not apply since *"there has been effective service and / or the defendants came to be aware of the notice."*

Conclusion

72. For the reasons set out above, the Council seeks an order from the Court that the application for permission be refused.

73. The Council has been required as an Interested Party to defend the application where Willesden Magistrates' Court has been named as the primary defendant to the claim and has filed a short Acknowledgment of Service form.

74. In the circumstances, it is appropriate and proportionate that the Claimants should be required to pay the Council's costs of dealing in detail with the grounds raised in the application for permission, in the sum of £3000.

Brent Council

24th January 2018