



Appeal Decision

Inquiry opened on 15 November 2016

Site visit made on 16 November 2016

by Pete Drew BSc (Hons), Dip TP (Dist) MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 29 December 2016

Appeal Ref: APP/P4605/C/15/3129371

36 Langleys Road, Selly Oak, Birmingham B29 6HP

- The appeal is made under section 174 of the Town and Country Planning Act 1990 [hereinafter "the Act"] as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr I Hussain against an enforcement notice issued by Birmingham City Council.
 - The notice was issued on 10 June 2015.
 - The breach of planning control as alleged in the notice is: *Without planning permission, the material change of use of the premises to a large House in Multiple Occupation (Sui Generis)*.
 - The requirement of the notice is to: *Cease the use of the property as a large House in Multiple Occupation (Sui Generis)*.
 - The period for compliance is 3 months.
 - The appeal was lodged on the grounds set out in section 174(2) (a), (d) and (g) of the Act.
 - The Inquiry sat for 2 days and evidence from all witnesses, except for Mr Barnes and Mrs Powell, was taken on oath.
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Decision

1. As there is no appeal to be determined, I take no further action.

Procedural matters

2. On 24 November 2016 Gavin Barwell MP, Minister of State for Housing and Planning, wrote to Birmingham City Council to withdraw the holding direction in relation to the Birmingham Development Plan 2031. The effect of the letter is that the Council can proceed to adopt the Plan. The Planning Inspectorate [PINS] subsequently wrote to both main parties to suggest that, applying paragraph 216 of the National Planning Policy Framework, it would be appropriate to attach substantial weight to relevant policies in the Birmingham Development Plan. In his reply dated 5 December 2016, Mr Hussain's Agent does not dispute this attribution of weight "*unless circumstances changed*".
3. An application for a full or, in the alternative, a partial award of costs was made by Birmingham City Council against Mr I Hussain. This application is the subject of a separate decision.

Whether Mr I Hussain has a right of appeal

4. The notice was issued on 10 June 2015 and section 7 of the notice says that it would take effect on 10 July 2015 unless an appeal was made beforehand. Penry-Davey J held in *R v Benham-Crosswell and SSETR* [2001] EWHC Admin 146 that: "*the wording of Section 174(1) of the Act requires the interest in land to subsist at the time the appeal is brought*"¹. It is therefore of significance that the appeal was received by PINS on "07/07/2015" [at 21:45:34 hours].

¹ Source of quote: paragraph 17 of the judgment [Document 7.2].

5. Section A of the appeal form identifies "*Mr I Hussain*" to be the sole "*Appellant*". Section D of the appeal form asks: "*What is your/the appellant's interest in the land/building?*" to which the box "*Owner*" is ticked. It is trite to record that the alternative boxes include "*Tenant*", "*Mortgagee*" and "*None of the above*", and that none of those boxes have been ticked. PINS accepted the appeal as having been validly made, on the basis that Mr Hussain was an owner, in good faith. However paragraph 2.1 of Mr Hussain's proof of evidence says: "*The property was purchased by Mr A Hussain from Mrs Tozer in July 2002. In June 2011 the ownership was transferred to Mrs Mussarat Hussain*".
6. It would now appear that paragraph 2.1 of Mr Hussain's proof of evidence does not actually reflect the full evolution of the matter. The Inquiry was provided with an email from the conveyancing solicitor, which says: "*This property was purchased by Altaf Hussain and Mussarat Hussain on the 1st July 2002. It was transferred to the joint names of yourself [Mr I Hussain] and Mussarat on 26th February 2009 and then to the sole name of Mussarat on the 5th May 2011*"². The email is dated 21 November 2014 and appears to have been forwarded to the letting agent 3 days later. In the circumstances, whilst I have not had sight of an official copy of the register of title or other independent confirmation to substantiate the position, I accept this as a true account of what has happened.
7. Section 174 of the Act says that a person having an interest in the land to which an enforcement notice relates or a relevant occupier may appeal against a notice. On 7 July 2015, being the date on which the appeal was brought, information before the Inquiry confirms that Mr I Hussain was not in occupation of 36 Langleys Road. The appeal form itself gives his address to be a different property in another part of the city. Other evidence before the Inquiry confirms that on 7 July 2015 the property was let to a group of 10 persons³, albeit the names of those persons have been redacted. That evidence also shows that on the date the enforcement notice was issued, 10 June 2015, a different group of 10 individuals was in occupation of 36 Langleys Road such that no one person appears to have been occupying the property on 10 June and 7 July 2015. It is material that no claim has been made during the course of the Inquiry that Mr I Hussain is a relevant occupier. Accordingly the focus must be on whether Mr I Hussain had an interest in the land on 7 July 2015.
8. The most obvious relevant interest is one of ownership and, as I have noted, in completing the appeal form Mr Hussain indicated that he was the owner. The term owner is defined in section 336 of the Act, but this term does not appear in section 174(1) and so whilst I have noted that definition it is not conclusive in answering the question as to whether Mr Hussain was an owner of the land on the relevant date. However paragraph 2.1 of Mr Hussain's proof of evidence acknowledges that he was not an owner on 7 July 2015. It has not been suggested that this part of Mr Hussain's proof of evidence is not correct in substance. Mr Hussain gave evidence on oath and swore that the content of his proof of evidence was true. It is appropriate to attach substantial weight to his own statement that a different person is the owner of the property and, by extension, that he has not been the owner of 36 Langleys Road since 2011.
9. On the final day of the Inquiry I was given a statement by Mrs Mussarat Hussain that says: "*I, Mrs Mussarat Hussain, as the current owner of 36*

² Source of quote: Document 6.2.

³ See, amongst other things: (i) the list of occupiers for the period "01/07/2015 to Present" at page 33 of the bundle attached to the proof of evidence of Mr Houghton; and (ii) the letter from Direct Housing to the City Council at page 49 of the bundle attached to the proof of evidence of Mr Houghton.

*Langleys Road, Selly Oak, Birmingham B29 6HP confirm that my husband, Mr Ikhtlaq Hussain, has my agreement to act on my behalf in the submission and prosecution of the appeal against the Enforcement Notice by Birmingham City Council on 10 June 2015. I have been fully aware of the issuing of the Enforcement Notice, submission of the appeal and the appearance by Mr Hussain at the inquiry to give evidence as a representative of my family*⁴.

10. If the appeal had been lodged by Mrs Mussarat Hussain then such a statement would have been entirely in order and perfectly understandable. However I am far from convinced that such a submission addresses the fundamental issue to be considered under this head because she, as the sole owner of the property, chose not to lodge an appeal against the enforcement notice that was served on her. As the Council observe, she is time barred from doing so now.
11. It is significant that Penry-Davey J held in *R v Benham-Crosswell and SSETR* [2001] EWHC Admin 146 that: "*The burden was on each of the applicants on the balance of probabilities to establish that he or she had an interest in the land at that time [when the appeal is brought] and accordingly, the requisite standing to appeal*"⁵. Far from discharging that onus of proof, Mr Hussain has admitted that he is not the owner because he openly says his wife has, at all material times since at least June 2011, been the sole owner of the property.
12. As I have already indicated it is clear that an interest in the land is a broader term than owner and includes a mortgagee not in possession. However Mr Hussain is plainly not a mortgagee and, amongst other things, made no claim to that effect on the appeal form. The Council says that the term 'interest in the land' is not defined in the Act; I agree. However Lewis J held in *Flynn and Sheridan v SSCLG and Basildon BC* [2014] EWHC 390 (Admin) that it: "*means a person having a legal or equitable interest in land and does not include a person who has no such interest but has some other link with the land*"⁶.
13. The Council submits that it is trite law that Mr Hussain does not accrue any legal or equitable interest by virtue of his marriage, but it is said for Mr Hussain that he retains an equitable interest precisely because his wife holds legal title. However neither party has referred me to any case law that is directly on point. In the circumstances my position is determined by the onus of proof which, the High Court has held, falls on Mr Hussain but has not been discharged here.
14. In reaching this view I accept that Mr I Hussain had an interest in the land up to 5 May 2011 but, for reasons that are unclear, the title was transferred into the sole name of Mrs Mussarat Hussain. However since the High Court has determined that the material date for this purpose is the date on which the appeal was brought, the fact that Mr Hussain was previously an owner of the property does not lead me to find that he had an interest in it on 7 July 2015.
15. I rhetorically ask if, as is submitted, irrespective of whose name is attached to a given asset, what one spouse owns the other has an equitable interest in, what would be the purpose of transferring the title into the sole name of Mrs Hussain? On that analysis no purpose would be served and Mr Hussain would continue to be jointly liable for the property, e.g. for paying income tax on the rental income received. As a married couple they made a deliberate decision to transfer the joint ownership of the land into the sole ownership of Mrs Hussain and that plainly has consequences, including in relation to these proceedings.

⁴ Source of quote: Document 6.1.

⁵ Source of quote: paragraph 18 of the judgment [Document 7.2].

⁶ Source of quote: paragraph 35 of the judgment [Document 7.3].

- Thus the fact that there is a close nexus between Mr Ikhtaq Hussain and his wife, Mrs Mussarat Hussain, does not show that he has an equitable interest.
16. I have also taken account of the statement that the property was "gifted"⁷ to Mr Ikhtaq Hussain and his wife, Mrs Mussarat Hussain, by Mr I Hussain's father, Altaf Hussain, in 2009. The inference might be that it is a form of inheritance from the paternal side of the family. However this still fails to demonstrate that Mr I Hussain would have retained an equitable interest in the property. By way of example if he had chosen to sell the property to a third party, the fact that he had been gifted the property by his father, jointly or otherwise, would be of no consequence because he would have chosen to divest himself of the legal interest. The transfer to Mrs Hussain was therefore a one way ticket.
 17. I have no reason to doubt that the law of intestacy provides that if a spouse dies property passes to the spouse (subject to any will). That much was acknowledged as common ground by the Council. However that is not the position that exists and so it does not assist, or discharge the onus of proof.
 18. There is no reason to doubt that Mr I Hussain has dealt with some matters in relation to the land, including appointing letting agents and meeting Council officers at the site. Amongst other things Mr Harrison confirmed on oath that he met Mr I Hussain at the property on 2 July 2013 despite the inference from the contemporaneous letter⁸ that he met Altaf Hussain. However it has not been explained how that equates to an equitable interest. The analogy has rightly been made to Mr Hussain acting as an Agent for his wife. However just as it would be ludicrous to suggest that Mr Barnes has acquired an equitable interest in the property by virtue of acting as the "Agent"⁹ in this appeal, so I reject any claim that Mr Hussain has acquired an equitable interest in this way.
 19. In oral closing attention was drawn to the fact that Mr I Hussain has given evidence on oath as to the fact that he had personally attended the property to, amongst other things, mow the lawn. I have to record that Mr Hussain's evidence as to the number of times he attended the property was imprecise. He initially said that he went there between 2 and 4 times a year to cut the lawn, deal with any boiler breakdown or clean when the tenants vacate the property. However he then said that he personally went there 5-6 times a year. Nevertheless I accept that he has had some involvement in the property and that is part of the picture as to how the tenanted property has been run. This does not however demonstrate that Mr Hussain has a legal or equitable interest in the land, but suggests that he has some other link with the land.
 20. For completeness, whilst the parties did not address me on the following points in closing, in reaching my decision I have taken account of the fact that Mr I Hussain was served with a copy of the enforcement notice. The answer to question 13 of the Questionnaire reveals that the Council did not issue a Planning Contravention Notice [PCN] in this case to clarify interests in the land. Neither has the Council exhibited an official copy of the register of title.
 21. It would therefore appear that Mr I Hussain was served with a copy because of his previous indications that he was a landowner. In his statutory declaration dated 20 February 2015 Mr I Hussain describes himself as the "landlord of 36 Langleys Road, Selly Oak"¹⁰. Paragraph 2 thereof says: "*The property was the*

⁷ The term used in the closing submissions, Document 8, my version of which is annotated in manuscript.

⁸ See letter dated 18 July 2013 at page 17 of the bundle attached to the proof of evidence of Mr Houghton.

⁹ Source of quote: section B of the appeal form.

¹⁰ Source of quote: first sentence at page 22 of the bundle attached to the proof of evidence of Mr Houghton.

subject of an internal transfer from Mr A Hussein & M Hussain to me and my wife on 26/2/2009", but it does not go on to say there was a further transfer to his wife in 2011. Indeed by describing himself as the landlord in the context of paragraph 2 the clear inference is that he was still an owner. Although I do not have a copy of the application form for the Lawful Development Certificate [LDC] that was submitted in 2015 [No 2015/01451/PA], the decision is directed to "Mr I Hussain" as Applicant, c/o his Agent¹¹. In that sense it appears to be the same as the 2013 LDC application [No 2013/08882/PA], submitted by Mr I Hussain, in which the answer to question 5 indicates that he is the "Owner"¹².

22. So, in this way, when I rhetorically ask why Mr I Hussain was served with a copy of the enforcement notice, the answer appears to be because Mr Hussain has repeatedly told the Council that he was the owner of the land to which the enforcement notice relates. He appears to have been served because he said he was an owner, rather than because he was a person having an interest in the land which the Authority considered would be materially affected by the notice¹³. Since it would appear that service was made on Mr I Hussain on the basis of his own misleading, inaccurate or false statements then I consider that the fact that he was served with a copy of the notice is not, of itself, a good reason to find that he was entitled to bring an appeal against the notice.

Other matters

23. It is appropriate to record that both Counsels agreed at the Inquiry that if I were minded to reach such a conclusion that I should proceed to deal with the grounds of appeal as they had been submitted. However I hope it is fair to say that I expressed my reservations about whether such a course of action was open to me at the Inquiry. As the Council has observed in relation to the concurrent costs application, the situation is comparable to a nullity in which case there is no notice against which to consider, by way of example, whether planning permission should be granted on a deemed application arising from ground (a). In this case, in the absence of a valid appeal having been lodged within the requisite timescale, the notice has taken effect and thus it is not open to me to deal with any point in relation to the enforcement notice that was discussed at the Inquiry. Amongst other things, whilst I sought views on whether the sentence in paragraph 6 of the notice that says: "*You are required to comply with this notice by 10 October 2015*" should be corrected, as I have no jurisdiction to review the enforcement notice I decline to consider the point.

Conclusion

24. For the reasons given, and having regard to all other matters raised, I conclude that since Mr I Hussain was not a person having an interest in the land or a relevant occupier on the date that the appeal was brought he had no right of appeal. In those circumstances, since there is no appeal to be determined, I conclude that it would be appropriate to take no further action in this matter.

Pete Drew
INSPECTOR

¹¹ See page 20 of the bundle attached to the proof of evidence of Mr Houghton.

¹² See page 14 of the bundle attached to the proof of evidence of Mr Houghton.

¹³ Which are the respective categories in section 172(2) of the Act.

APPEARANCES

FOR MR HUSSAIN:

Jack Smyth	Counsel.
He called:	
Ikhaq Hussain	Owner's husband.
David Barnes MBA, BSc (Hons), DipTP, MRTPI	Managing Director, Star Planning and Development.
Alan Garnett	Proprietor, Design House.
Darren Evans	Former resident.
Arshed Hussein	Director, Home Appliances Warehouse Ltd.
Zia Ul Haq	Zia DIY Local Handyman.

FOR THE LOCAL PLANNING AUTHORITY:

Killian Garvey	Counsel.
He called:	
James Houghton BSc (Hons), PgDip	Senior Enforcement Officer, Birmingham City Council.
Alison Powell BSc (Hons), DipTP, MRTPI	Principal Planning Officer, Birmingham City Council.
George Baker	Senior Planning Officer, Birmingham City Council.
Kevan Harrison	Senior Enforcement Officer, Birmingham City Council.

INTERESTED PERSONS [THOSE WHO ADDRESSED THE INQUIRY]:

Councillor Karen McCarthy	Local Councillor.
Rex Perreau	Local resident.

Documents submitted at the Inquiry

1. Copy of an enforcement notice in relation to the site issued by the Council on 29 April 2015, which was submitted at the Inquiry by the Council.
2. Excerpts from the Birmingham Plan 2031, which were submitted at the Inquiry by the Council.
3. Sick note of Tasadduq Hussain, which was submitted at the Inquiry on behalf of Mr Hussain.
4. A3 copy of drawing No 2012-068-002, which was submitted at the Inquiry by the Council.
5. Draft noise condition, which was submitted at the Inquiry on behalf of Mr Hussain.
6. (.1) Signed statement of Mrs M Hussain, together with (.2) email from the conveyancing solicitor to Mr I Hussain that confirms the transfer of ownership, which was submitted at the Inquiry on behalf of Mr Hussain.
7. (.1) Closing submissions on behalf of the Council, which refer to the judgments of: (.2) *R v Benham-Crosswell and SSETR* [2001] EWHC Admin 146; and (.3) *Flynn and Sheridan v SSCLG and Basildon BC* [2014] EWHC 390 (Admin).
8. Closing submissions on behalf of Mr Hussain.
9. Email dated 5 December 2016 from David Barnes to PINS.