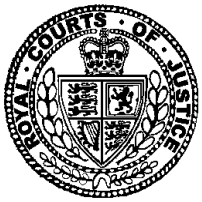

Neutral Citation Number: [2021] EWHC 1604 (Admin)

Case No: CO/4067/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 June 2021

Before :

MRS JUSTICE LANG DBE

- -

Between :

RAJESH BANSAL	**Appellant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	
(2) LONDON BOROUGH OF HOUNSLOW	**Respondents**

- -
- -

Katherine Barnes (instructed by **Attwells Solicitors LLP**) for the **Appellant**
Emma Dring (instructed by the **Government Legal Department**) for the **First Respondent**
The **Second Respondent** did not appear and was not represented

Hearing date: 18 May 2021

- -

Approved Judgment

Mrs Justice Lang :

1. The Appellant appeals under section 289(1) of the Town and Country Planning Act 1990 ("TCPA 1990") against the decision, dated 9 October 2020, of an Inspector, appointed by the First Respondent, to dismiss the Appellant's appeal against an enforcement notice issued by the Second Respondent ("the Council") in respect of the unauthorised conversion of 203, Great West Road, Hounslow TW5 0DQ ("the Property") into two flats.

2. At a hearing on 8 December 2020, Rhodri Price Lewis QC, sitting as a Deputy High Court Judge, granted the Appellant permission to appeal.

Grounds of appeal

3. In summary, the Appellant's grounds of appeal were as follows:

Ground 1

i) The Inspector's finding that the Appellant had failed to establish the use of the ground floor as a self-contained flat for the requisite period was irrational, given his findings in relation to the use of the first floor for the same period, and in the light of section 55(3)(a) TCPA 1990, which provides that the use as two or more separate dwelling houses of any building previously used as a single dwelling house involves a material change in the use of the building, and of each part of it which is used.

ii) Further or alternatively, the Inspector erred in his consideration of whether the ground floor had been in use as a self-contained flat for the requisite period because he failed to have regard to a material consideration, namely his prior finding that the first floor flat had been in use as a self-contained flat.

Ground 2

iii) In assessing whether a change of use from a single dwelling house to two separate dwelling houses was ongoing for the purposes of section 171B(2) TCPA 1990, the Inspector failed to take account of a material consideration in the form of the physical works which had taken place to create the two separate flats. The Inspector unlawfully limited his assessment to whether both flats had been occupied, instead of considering the broader concept of use which is informed by physical works.

Planning history

4. The Property is a two storey semi-detached residential dwelling house, which is owned by the Appellant.

5. The Appellant stated in his 'Statement of Facts & Grounds' on appeal to the Inspector that he purchased the Property in 2012, and at that time, it had already been divided into two flats.

6. The enforcement history was set out by the Council in its Case Statement as follows. On 10 May 2018, the Council received a complaint that the Property had been divided into flats. In June and July 2018, the enforcement officer undertook visits to the Property, but did not gain access. On 10 August 2018, the enforcement officer visited the Property again. He did not gain access but he spoke to tenants who confirmed that the Property was divided into two flats.

7. On 27 February 2019, the housing enforcement team gained access to the Property and confirmed that it had been subdivided into two self-contained flats.

8. On 16 May 2019, the enforcement officer sent a Planning Contravention Notice (PCN) to the Appellant. The Appellant responded on 2 June 2019. In answer to the question as to how long the Property had been used for its current purpose, the Appellant replied "since at least April 2014". He gave the names of the tenants living in the Property, stating that the ground floor tenants had lived there since April 2015 and the first floor tenants had lived there since April 2014. He submitted a tenancy agreement for the first floor flat.

9. On 21 March 2019, the enforcement officer wrote to the Appellant advising him that the conversion of the Property into two self-contained flats was in breach of planning control.

10. On 14 February 2020, an Enforcement Notice was issued, alleging a breach of planning control by the unauthorised conversion of the Property into two self-contained flats, without planning permission, in the last 4 years. It set out the reasons why it considered it expedient to issue the notice, namely, breaches of various Local Plan policies. It required the Appellant, within 3 months, to cease the use of the Property as two self-contained flats; to remove all but one of the kitchens and bathrooms; and to remove the sub dividing doors.

11. The Appellant appealed to the Secretary of State under section 174(2)(d) TCPA 1990 on the ground that, at the date the enforcement notice was issued, enforcement action could no longer be taken, by virtue of section 171B(2) TCPA 1990, as four years had expired from the date of the breach.

12. In his 'Statement of Facts & Grounds', at paragraph 3, the Appellant submitted a number of documents and photos "to demonstrate that the property was in use as two dwellings since at least January 2015 to the present day, over 5 years" i.e. photographs, tenancy agreements, tenancy deposit certificates, poll card, electoral register household enquiry. The documents showed that there had been a change of tenant in the first floor flat in October 2018.

The Inspector's decision

13. The Inspector conducted the appeal by way of written representations.

14. In his Decision Letter ("DL"), at DL3, he found that the Property had been sub-divided horizontally to form two self-contained flats. He made no findings as to the date on which the conversion had taken place.

15. The Inspector summarised the law and the issue for determination at DL4:

> "The appellant's case sets out the statutory framework and case law to be applied in this appeal. In respect of the latter, the decisions in *Thurrock BC v SSETR & Holding* (CA) [2002] and *Swale BC v FSS & Less* [2005] EWCA Civ 1568, [2006] are cited. From these, in essence, it is for the appellant to show that the material change of use of 203 Great West Road to two self-contained flats ('the use') took place at least 4 years before the issue of the enforcement notice, that the use was continuous for 4 years thereafter and that the use was not subsequently lost. Given that the notice was issued on the 14 February 2020, it has to be shown that the use commenced by the 14 February 2016."

16. In respect of the first floor flat, the Inspector found, at DL5, that the Assured Shorthold Tenancy Agreements and the Tenancy Deposit Certificates, and the Appellant's bank statements, showed on the balance of probabilities that the flat had "been occupied continuously for more than four years". There was evidence that it had been occupied by tenants from 3 April 2015 to 3 April 2018, and then different tenants from 5 October 2018 to 5 August 2019. There had been two sets of tenants.

17. In respect of the ground floor flat, the Inspector was not satisfied that it had been occupied for a continuous period of four years prior to the notice being issued (DL11). He accepted that the Assured Shorthold Tenancy Agreement dated 5 April 2015, with an associated Tenancy Deposit Certificate, showed that the flat was occupied by Ashley Collado and Brahami Mouloud (DL6). However, the other documentary evidence – a Polling Card dated 23 May 2019 and a Household Enquiry letter from the Council's Electoral services department, dated 25 July 2019 – did not show that Ashley Collado still resided there at the dates on the documents (DL7).

18. At DL9 the Inspector found that the photographs of the flats which had been submitted carried little weight as there was no evidence as to when they were taken, and they did not show evidence of occupation.

19. The Inspector concluded, at DL11, that "the evidence before me does not show that when the notice was issued, no enforcement action could be taken in respect of the breach of planning control – namely, the use of 203 Great West Road as two self-contained flats".

Legal framework

Appeal under section 289 TCPA 1990

20. An appeal under section 289 TCPA 1990 against the decision of the Secretary of State on an appeal against an enforcement notice may only be made on a point of law. It is not an appeal on the merits.

21. In *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865, Lord Carnwath giving the judgment of the Supreme Court warned, at [23], against over-legalisation of the planning process. At [24] to [26], he gave guidance that the courts should recognise the expertise of the specialist planning inspectors and work from the presumption that they will have understood the policy and legal framework correctly. Inspectors are akin to expert tribunals who have been accorded primary responsibility for resolving planning disputes and the courts have cautioned against undue intervention by the courts.

22. A decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

TCPA 1990

23. Section 55 TCPA 1990 sets out the meaning of "development". By subsection (1), development includes "the making of any material change on the use of any buildings". Subsection (3) provides:

> "For the avoidance of doubt it is hereby declared that for the purposes of this section –
>
> (a) the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used; …"

24. Section 366 TCPA 1990 defines the term *"building"* as including any part of a building.

25. Section 57(1) TCPA 1990 provides that planning permission is required for the carrying out of any development of land. By section 171A TCPA 1990, carrying out development without the required planning permission constitutes a breach of planning control.

26. The local planning authority may issue an enforcement notice where it appears to them that there has been a breach of planning control and that it is expedient to issue the notice, having regard to the development plan and any other material considerations (section 172(1) TCPA 1990).

27. However, there is a four year time limit for taking enforcement action in respect of use as a dwelling house. Section 171B TCPA 1990 provides:

> "Where there has been a breach of planning control consisting in the change of use of any building to use as a single

> dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach."

28. 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."

Authorities

29. In *Doncaster MBC and Van Dyck v Secretary of State for the Environment* (1993) 66 P & CR 61, the Court of Appeal held that the immunity conferred by section 172(4) TCPA 1990 applied to all separate residences, including the original dwelling house, and any dwelling houses created by subdivision.

30. The general position is that for a material change of use to occur, there has to be a change in the actual activity going on (*Caledonian Terminal Investments Ltd v Edinburgh Corp* [1970] SC 271).

31. In *Impey v Secretary of State for the Environment* (1984) 47 P & CR 157, which concerned a conversion of kennels into a dwelling house without planning permission, the Court of Appeal held that a physical conversion of the site is a factor to take into account in assessing whether and when a material change of use has occurred. Donaldson LJ said, at 161 - 163:

> "That ….leaves Mr Lockhart-Mummery's second argument, for which there is a great deal more to be said. His submission is this. Change of use to residential development can take place before the premises are used in the ordinary and accepted sense of the word, and he gives by way of example cases where operations are taken 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.
>
> ……

> …..We were referred to the decision of Upjohn L.J. in *Howell v Sunbury-on-Thames Urban District Council* (1964) 15 P & CR 26, where he said this:
>
> > "….I agree that development by works and development by user are different matters and must be considered separately, but when one is considering whether there has been a material change in the use of the buildings or land one must first consider the site as a whole and then, as a matter of commons sense, compare the user before the critical date and after the critical date. When doing that, any changes in the physical state of the land must be taken into account as an element, for, if this is ignored, the user before and the user after cannot be properly assessed and compared. In some cases, and I think in this case, the change in the physical state of the land must be an important element; in other cases it may be entirely unimportant; but it seems to me you cannot, as an element, disregard the physical state of the land before and after."
>
> Applying that to this case, I would say that the physical state of these premises is very important, but it is not decisive. Actual use or attempted use is important but not decisive. These matters have to be looked at in the round." *(emphasis added)*

32. The passages which I have underlined in Donaldson LJ's judgment in *Impey* were approved by the Supreme Court in *Welwyn Hatfield Council v Secretary of State for Communities and Local Government* [2011] UKSC 15, per Lord Mance at [27] – [29]. In that case, a builder constructed a building which had the external appearance of a hay barn, for which he had planning permission, but which was fitted out internally as a dwelling house, for which he did not have planning permission. He and his wife lived there for four years before applying for a certificate of lawfulness of the existing use. Lord Mance said, at [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 is artificial 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)."

33. In *Thurrock BC v Secretary of State for the Environment* [2002] EWCA Civ 226, [2002] JPL 1278, 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.

34. 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."

35. 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.
>
> ……
>
> 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."

36. 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]).

37. In *Swale BC v First Secretary of State* [2005] EWCA Civ 1568, [2006] JPL 886, 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.

38. 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:

> "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."

39. Sedley LJ agreed, and added:

> "34. ….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 ….
>
> 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.
>
> 36. ……Mr Lee had the benefit of an initial period of undoubted residential use, and of a finding, which I respectfully think was relevant, that at no point intended to abandon it. But this is not enough. The mistake in the Inspector's reasoning, as it seems to me, was to proceed from the proposition that "failure to occupy the building for a period, with no other use being introduced, does not often mean that residential use has ceased" directly to the conclusion that there had been continuous residential use from March 1997 to March 2001. This necessarily assumed that residential use was already established, when, so far as the evidence, went, it had been relatively brief and tenuous."

40. In *Islington LBC v Secretary of State for Housing, Communities and Local Government & Anor* [2019] EWHC 2691 (Admin), which concerned a change of use, from A2 use as an estate agent's office, to C3 residential use, I held that the Inspector erred by failing to apply the reasoning in *Thurrock* and *Swale*. In this case, the parties referred to the following passages in my judgment:

> "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:
>
> …
>
> 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."

Grounds of appeal

41. Because of the overlap between the Grounds, it is convenient to consider them together.

Submissions

42. The Appellant accepted that the Inspector correctly directed himself on the correct test, as set out in the cases of *Thurrock* and *Swale*, but submitted that he failed to apply it to the facts of this case.

43. Under Ground 1, the Appellant submitted that it was irrational for the Inspector to conclude that the first floor was in use as a self-contained flat for the four years, while the ground floor was not, because the original single dwelling house use had clearly ceased. Unless the ground floor had been taken over by a new non-residential use, then the ground floor necessarily became a residential unit.

44. Alternatively, the Inspector's finding in respect of the use of the first floor was so obviously material to his consideration of the use of the ground floor that he erred in not taking it into account.

45. Under Ground 2, the Appellant submitted that the Inspector failed to have regard to a relevant consideration, namely, whether the internal physical changes to the building (installation of a second kitchen and bathroom, and dividing doors) were in themselves indicative of a change of use. The Inspector wrongly limited his assessment of "use" as being "occupation", treating the terms as synonymous e.g. DL5, DL9, DL10, DL11. Thus, he made the same error as the Inspector in *Impey*.

46. In response, under Ground 1, the First Respondent accepted that the previous use as a single dwelling house no longer existed once the building had been divided into two flats, but he submitted that it did not follow that use of part of the building as a self contained unit of accommodation was sufficient to establish immunity from enforcement for the separate use of the remainder.

47. There was no dispute that, applying section 55(3)(s) TCPA 1990, there had been a material change of use. The outstanding issues for determination in the appeal were:

    i) whether the material change of use to two flats took place at least 4 years before the issue of the enforcement notice; and

    ii) whether the new use was continuous for four years thereafter.

48. On the first issue, the Inspector found that both flats were occupied by tenants in April 2015, and therefore the material change of use had taken place more than four years before service of the enforcement notice.

49. On the second issue, the Inspector correctly directed himself by reference to the cases of *Thurrock* and *Swale*. On a proper application of those authorities, the Appellant had to establish affirmatively a continuous residential use of both flats over the four year period, subject to any *de minimis* periods of vacancy between tenancies, or temporary absences. The Inspector reached rational conclusions on the evidence before him, finding that the Appellant had not established a continuous residential use of the ground floor flat.

50. Under Ground 2, the Respondent submitted that the Inspector was clearly aware of the physical works of conversion which had been carried out. There was photographic evidence before him of the physical state of both flats, and he referred to the horizontal sub-division of the property in DL3.

51. Applying Keene LJ's judgment in *Swale* at [29], the decision maker was required to consider not the building's availability for residential use, but whether it was actually put to such use. The physical works (which were operational development) were not of themselves sufficient enough to constitute the change of use. As I held in *Islington LBC*, the cases of *Impey* and *Welwyn* were both concerned with an initial change of use, rather than an interruption in continuous use.

Conclusions

52. Both parties agreed that the Inspector correctly directed himself, in DL3, that applying the cases of *Thurrock* and *Swale*, "it is for the appellant to show that the material change of use of 203 Great West Road to two self-contained flats ('the use') took place at least 4 years before the issue of the enforcement notice, that the use was continuous for 4 years thereafter and that the use was not subsequently lost". I agree that the Inspector correctly summarised the issues which he had to decide in the appeal.

53. It was an agreed fact before the Inspector that the Property had been divided into two self-contained flats, each with its own bathroom and kitchen, and with dividing doors. The Inspector clearly had this fact well in mind. He stated in DL3 that the Property "has been sub-divided horizontally to form two self-contained flats"; he referred to the photographs of the two flats produced by the Appellant and he made repeated references to the two flats, and treated them as separate units. The Inspector found that in April 2015 the two flats were rented out separately to tenants, and so by inference, he found that was the date at which the material change of use occurred. It is reasonable to infer that the Inspector took into account, as a factor, that the Property had been converted into two self-contained flats when reaching these conclusions.

54. However, the Inspector did not consider that the conversion into two flats was a sufficient basis upon which to find that there had been continuous use throughout the four year period, during which time the Council could have commenced enforcement proceedings. He required the Appellant to establish that the flats were separately occupied as two dwelling houses throughout that time, in order to demonstrate the

ongoing breach of planning control by using the Property as two dwelling houses instead of one.

55. In my judgment, the authorities support the Inspector's approach. In *Thurrock*, Schiemann LJ said at [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."

56. Chadwick LJ agreed, stating that an enforcement notice could not be properly served in respect of a use had commenced as a result of a material change in use in breach of planning control, but which had ceased to be an active use (at [58]).

57. In *Swale*, Keene LJ identified, at [25], the "legally correct question" for the Inspector, namely, "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". In considering the application of that test, he said, at [29]:

> "….. 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."

58. Sedley LJ agreed and distinguished the abandonment cases, applicable where a building is in established use as a dwelling, from the enforcement immunity cases, where the 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" ([34]-[35]).

59. The Appellant relied upon Lord Mance's judgment in *Welwyn*, in which he approved Donaldson LJ's conclusion in *Impey* that a change of use could occur before any actual use had begun, and he observed at [29]:

> "Too much stress has … been placed on the need for 'actual use'….. 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. ….. I consider it artificial to say that a building has or is of no use at all, or that its use is anything other than a dwelling house, when its owner has just built it to live in ….."

60. However, as I said in *Islington LBC* (at [49]), in *Welwyn* Lord Mance was considering a different factual and legal issue, namely, the approach to take in determining when an initial change of use has occurred. The Supreme Court did not consider the test for establishing continuous use for the purposes of acquiring immunity from enforcement under section 171B TCPA 1990, as set out in *Thurrock* and *Swale*, and those cases have not been overruled. Therefore, I do not consider that the Appellant can rely upon the decisions in *Impey* and *Welwyn*, in the context of this appeal.

61. In the light of the judgments in *Thurrock* and *Swale*, it was rational for the Inspector to require the Appellant to establish that both flats had been occupied as separate dwelling houses throughout the four year period, so as to demonstrate that the Council would have been able to take enforcement action during that time. It was not sufficient for the Appellant to establish that the Property had been physically converted into two flats, nor that the first floor flat was occupied throughout the four year period, as that would not have enabled the Council to take enforcement action against the Appellant in respect of the entire Property, for a material change of use from a single dwelling house to two dwelling houses.

62. For these reasons, the appeal is dismissed.