IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 2530 (Admin)

No. CO/3334/2020

Royal Courts of Justice

Wednesday, 19 May 2021

Before:

LORD JUSTICE SINGH
MR JUSTICE FOXTON

B E T W E E N :

(1) JOEL SALEM
(2) JUDITH DADOUN — Appellants

- and -

LONDON BOROUGH OF CAMDEN — Respondent

MR S. BUTLER (instructed by SBG Solicitors) appeared on behalf of the First Appellant.

MR J. THACKER appeared on behalf of the Second Appellant.

MR E. ROBB (of Prospect Law) appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE SINGH:

Introduction

1 This is an appeal by way of case stated against the decision of the Highbury Corner Magistrates' Court dated 16 June 2020 following the judgment of District Judge Allison given on 13 March 2020 permitting certain evidence to be admitted as hearsay under s.114(1)(d) of the Criminal Justice Act 2003 ("the 2003 Act").

2 The appellants were each found guilty on a single charge contrary to s.179(2) and (8) of the Town and Country Planning Act 1990 ("the 1990 Act"). The charge was that between 19 May 2011 and 7 June 2018 they each being a registered freehold owner of 52 Fortune Green Road, London, NW6 did fail to comply with an enforcement notice (2010 EN), EN08/0509 dated 6 October 2010 and served by the Council requiring that within six months of the notice taking effect, namely by 18 May 2011, they should completely and permanently cease the use of the property as seven self-contained flats by the removal of the bathrooms and kitchens or the residential use be implemented in accordance with the planning permission dated 2 March 2009 (2008/4346P) and any approved plans.

3 There are two questions which have been stated for the opinion of this court by the district judge:

> "1. Was I correct to rule the documents which might otherwise be admitted pursuant to s.117 of the Criminal Justice Act 2003 were not so admissible as the material had been prepared for the purposes of pending or contemplated legal proceedings and s.117(5) of the Act was not satisfied?
>
> 2. In the circumstances of this particular case, was I correct to admit the hearsay evidence pursuant to s.114(1)(d) of the Criminal Justice Act 2003 when I had ruled that the statements in question were not admissible under s.117 of the Act because none of the requirements [in] s.117(5) of the Act were satisfied?"

4 As became clear at the hearing before us, the focus of this appeal is on question 2. It has not been submitted on behalf of the respondent that the district judge was wrong in ruling the evidence to be inadmissible under s.117, which is the subject of question 1.

The decision under appeal

5 The trial took place on 12 to 13 March 2020. District Judge Allison gave her ruling on the admissibility of hearsay evidence on 13 March. She gave her judgment on the underlying charges on 16 June 2020. She set out the background, the evidence and submissions for the parties before setting out her decision at paras. 27 to 30. So far as material for present purposes, at para.28 she included the following:

> "…it was never suggested that the trial issue was that the property had not been converted and used as seven flats in breach of the EN; other technical defences were variously raised…"

At para.29 she said:

> "The evidence before the court is that Mr Nicholls visited the property on 7/7/2009 and saw seven flats. This was still the position on 16/6/2015, when he

> made a further visit and drew a sketch plan of the seven units. Mr Yeung visited the property on 24/5/2018 and 7/6/2018 and again noted there were seven flats and he has produced pictures of the same, clearly showing, in my judgment, that the flats were occupied. Furthermore, during his visit, Mr Yeung met the tenants of Flats 1, 2, 3, 5 and 7. There is evidence of Mr Salem's application for a certificate of lawfulness dated 19/4/2018 in which he reports that there have been seven self-contained flats for more than seven years at the property. There are tenancy agreements for at least six flats, albeit variously dated between 2014 - 2015 and there is proof of housing benefit being paid in respect of all seven flats at various times between 2010 and 2018."

At para.30 the district judge concluded as follows:

> "On the basis of the evidence I have seen and heard, I am satisfied so that I am sure that both defendants were the freehold owners of the land throughout the period in question, that the EN was lawfully issued and served pursuant to s.172 of the Act and that it addressed the matters required by s.173. I am also satisfied so that I am sure that the defendants failed to comply with the notice as alleged and that the failure subsisted throughout the time specified in the charge. I have no hesitation in finding both Mr Salem and Ms Robinson-Dadoun guilty."

The case stated

6 In the case stated District Judge Allison set out the nature and the history of the proceedings at paras. 1 to 11. At para.11 she said that it was "worthy of note that it was never contended by the appellants that the property was not, in fact, being used as seven self-contained flats". She set out her decision in relation to the hearsay evidence at paras. 12 to 22.

7 The respondent called a single witness, Mr Raymond Yeung, a planning enforcement officer of the respondent council. He produced a copy of the enforcement notice. He gave evidence that he had visited the property on 24 May 2018 and 7 June 2018 and had observed that it was divided into seven self-contained flats and that he had met the tenants of six of them across the two visits. Thereafter, he gave a substantial amount of hearsay evidence which was not challenged by the appellants until the conclusion of the prosecution case. That evidence could be summarised as follows. Mr Philip Jones, a planning officer, had visited the property on 7 July 2009 and observed that there were seven flats contrary to planning permission. Mr Jones wrote a letter following this visit on 14 August 2009 (Exhibit RY/2).

8 Mr Yeung also produced sketch plans (RY/3) which he said had been produced by Mr John Nicholls, a planning officer who had visited the site on 16 June 2015 when he observed the seven flats. Mr Yeung also stated that on 7 June 2018 Mr Salem submitted an application dated 19 April 2018 (RY/5) for a certificate of lawful development, stating that "the house has been converted to seven self-contained flats more than seven years and its [sic] been occupied since" and that the building works were substantially completed by 18 October 2010. A copy of that application was produced. Mr Yeung also produced other documents, including a document showing the breakdown of housing benefit payments for the seven flats and council tax bills for the seven units.

9 At paras. 32 to 40 of the case stated District Judge Allison set out the material part of the ruling of the admissibility of the hearsay evidence. I will return to this later in this judgment.

Material legislation

10 Section 117 of the 2003 Act, so far as material, provides:

> "(1) In criminal proceedings a statement contained in a document is admissible as evidence of any matter stated if -
>
> (a) oral evidence given in the proceedings would be admissible as evidence of that matter,
>
> (b) the requirements of subsection (2) are satisfied, and
>
> (c) the requirements of subsection (5) are satisfied, in a case where subsection (4) requires them to be."

Subsection (2) sets out the requirements in relation to documents created or received by a person in the course of a trade, business, profession or other occupation or as the holder of a paid or unpaid office. Subsection (4) provides:

> "The additional requirements of subsection (5) must be satisfied if the statement—
>
> (a) was prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation, but
>
> (b) was not obtained pursuant to…"

The provisions are then specified (all of which relate to overseas evidence). Subsection (5) provides that the requirements of that subsection are satisfied if either (a), any of the five conditions mentioned in section 116(2) is satisfied (absence of relevant person, et cetera) or (b) the relevant person cannot reasonably be expected to have any recollection of the matters dealt with in the statement.

11 It is necessary, therefore, to go to s.116 of the 2003 Act. Subsection (1) provides that:

> "In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if—
>
> (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,
>
> (b) the person who made the statement (the relevant person) is identified to the court's satisfaction, and
>
> (c) any of the five conditions mentioned in subsection (2) is satisfied."

It will be recalled that s.117 cross-refers to the requirements in s.116(2). Those conditions are (a) that the relevant person is dead; (b) that the relevant person is unfit to be a witness because of his bodily or mental condition; (c) that the relevant person is outside the UK and it is not reasonably practicable to secure his attendance; (d) that the relevant person cannot be found, although such steps as it is reasonably practicable to

take to find him have been taken; (e) that through fear the relevant person does not give oral evidence in the proceedings.

12 Section 114 lies at the heart of the present appeal. So far as material, it provides as follows:

> "(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if…
>
> > (d) the court is satisfied that it is in the interests of justice for it to be admissible."

Subsection (2) provides:

> "In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors (and to any others it considers relevant)—
>
> > (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
> >
> > (b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);
> >
> > (c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
> >
> > (d) the circumstances in which the statement was made;
> >
> > (e) how reliable the maker of the statement appears to be;
> >
> > (f) how reliable the evidence of the making of the statement appears to be;
> >
> > (g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
> >
> > (h) the amount of difficulty involved in challenging the statement;
> >
> > (i) the extent to which that difficulty would be likely to prejudice the party facing it."

Submissions on behalf of the first appellant

13 On behalf of the first appellant, Joel Salem, Mr Simon Butler makes the following submissions. He submits that having correctly concluded that the documents should not be admitted under s.117 of the 2003 Act the judge was wrong to admit the hearsay evidence under s.114. He draws attention to a number of decisions of the Court of Appeal (Criminal Division) in which that court has deprecated an approach which would too readily admit evidence under s.114(1)(d) in circumstances which would circumvent

the more precise requirements of s.116 and 117. He draws attention in particular to the decision of the Court of Appeal in *R v Z* [2009] EWCA Crim 20; [2009] 3 All ER 1015, in particular, at paras. 18 to 20 in the judgment of Stanley Burnton LJ. He also draws attention to *R v C* [2010] EWCA Crim 2402 and *R v ED* [2010] EWCA Crim 1213; [2010] Crim LR 862. Mr Butler submits that to dispense with the opportunity to cross-examine the person who made the statements in the documents was not in the interests of justice. It would not have been difficulty or burdensome for the respondent to produce signed witness statements. He submits that it is inappropriate to produce a witness statement from a person without the relevant factual knowledge with a large number of exhibits attached to establish relevant and important facts. He submits fundamentally that the judge failed to consider the relationship between s.114 and s.117.

Submissions on behalf of the second appellant

14 On behalf of the second appellant, Judith Dadoun, Mr James Thacker makes the following submissions. He submits that the starting point should have been Part 20 of the Criminal Procedure Rules. He submits that it was a mandatory requirement for the respondent to comply with those rules, in particular r.20.2(2), and they should have complied as soon as reasonably practicable (see r.20.2(4)) and not more than 28 days following a plea of not guilty (see r.20.2(3)(a)).

15 We should note, however, the terms of r.20.5(1) which gives the court power to extend the time limit and to dispense with the requirement to give notice. It is clear that is what the district judge did on the facts of this case. It is also clear, in my view, that she was entitled to exercise that discretion in this case since the relevant documents had been served on the defence over a year earlier and no issue had been raised about their admissibility until late in the day.

16 Further, Mr Thacker submits that almost the entirely of the respondent's case in support of the prosecution was based on hearsay evidence. He observes that Mr Yeung confirmed in his evidence (see paras. 17 and 20 of the case stated) that both Mr Nicholls, the senior planning officer who had visited the site earlier, and the housing benefits manager still worked for the respondent. No enquiry appears to have been made as to whether those witnesses, together with Mr Jones, were available and no enquiry as to why the respondent had failed to take statements from those witnesses.

17 As well as the authorities to which Mr Butler has referred, Mr Thacker has also drawn our attention to the decision of the Supreme Court in *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373: see in particular para.31, where s.114(1)(d) was described by Lord Phillips, PSC as a "limited residual power". He has also drawn attention to *R v Tindle* [2011] EWCA Crim 2341. Mr Thacker submits that the district judge fell into error because she was not assisted by the respondent, nor referred by it to relevant authorities.

Submissions on behalf of the respondent

18 On behalf of the respondent Mr Edmund Robb makes the following submissions. He observes that the documents concerned were first served by the respondent on solicitors for the defence on 1 November 2018. They were included in the trial bundle in readiness for a trial which was then to take place on 12 to 13 September 2019. It was only very shortly before the trial in fact commenced, in a skeleton argument dated 28 February 2020, that a new argument was advanced that the respondent was wrongly relying on hearsay evidence.

19 In his skeleton argument for the present appeal, Mr Robb made two fundamental submissions. First, the appellants have impliedly agreed to the admission of the hearsay

under s.114(1)(c) of the 2003 Act because they did not challenge the admissibility of the evidence for a period of one year and two months until a late stage in the proceedings. In response to this, Mr Butler submitted that the respondent was not entitled to raise new legal arguments following the ruling of the district judge and after representations had been made on the application to state a case.

20 At the hearing before us it became clear that this point was not being pursued on behalf of the respondent. It had been raised as part of the background rather than as a distinct submission. In any event, it is clear, in my judgment, that we must focus on the questions which have been stated for the opinion of this court and those questions do not raise the issue of whether the hearsay evidence was admissible by agreement, implied or otherwise.

21 Secondly, and in what it became clear is Mr Robb's fundamental submission, the district judge properly exercised her discretion pursuant to s.114(1)(d), correctly having regard to the factors set out at subsection (2). Mr Robb also submits that it would be difficult to challenge the exercise of such a discretion in an appellate court: see *R v Taylor* [2006] EWCA Crim 260; [2006] 2 CAR 222, in which the judgment was given by Rose LJ.

22 Mr Robb also draws attention to the character of the evidence in this case as contrasted with what may have been evidence in other criminal cases. The evidence was largely of a business document kind or was produced by the appellant Mr Salem himself in an application for a certificate of lawful development. Furthermore, he submits that there can be no prejudice to the appellants because the hearsay evidence went to an issue which has never been in dispute, namely, that the property has seven residential units. Accordingly, Mr Robb submits that this is a wholly unmeritorious appeal and should be dismissed.

Relevant authorities

23 The first relevant authority is *R v Taylor*. At para.39, Rose LJ said, of the requirements of s.114(2) that:

> "…they do not impose an obligation on the judge to reach a conclusion. What is required of him is the exercise of judgment in the light of the factors identified in the subsection. What is required of him is to give consideration to those factors. There is nothing in the wording of the statute to require him to reach a specific conclusion in relation to each or any of them. He must give consideration to those identified factors and any others which he considers relevant (as expressed in s.114(2) before the nine factors are listed). It is then his task to assess the significance of those factors, both in relation to each other and having regard to such weight as in his judgment they bear individually and in relation to each other. Having approached the matter in that way he will be able, as it seems to us, in accordance with the words of the statute, to reach a proper conclusion as to whether or not the oral evidence should be admitted. That is a process which, as it seems to us, the trial judge followed in this case. He followed it in the exercise of his discretion in a way which, in our judgment, cannot be effectively challenged."

That passage is also important because it makes it clear that the role of an appellate court, although important, is a relatively limited one in this context. It is not simply to substitute its own view for that of the trial judge.

24 In *R v Z* at para.25, Stanley Burnton LJ said:

> "The Court of Appeal will not readily interfere with a trial judge's decision to admit evidence under section 114(1)(d) [of the 2003 Act]. It will do so, in general, only if his decision is marred by legal error, or by a failure to take relevant matters into account or it is such that the judge could not sensibly have made. The Court will be more willing to interfere with his decision if he has not taken into account, or has not shown that he took into account, relevant matters listed in subsection (2). This is such a case..."

Stanley Burnton LJ then proceeding to set out the ways in which the trial judge had fallen into error as to the approach to be taken in that case.

25 It is against that background and in that context that the passage upon which the appellants place particular reliance at paras. 18 to 20 and para.22 must be read:

> "18. It can be seen that subsection (1) comprehensively restricts the circumstances in which hearsay evidence may be admitted in criminal proceedings to those set out in its four paragraphs. Paragraph (d) is the only paragraph having positive substantive effect: the other paragraphs of subsection (1) simply refer to other provisions or rules of law permitting such evidence to be admitted. Paragraph (d) is unhelpfully drafted. It has been referred to as creating a residual power or as a safety valve; considered in isolation, it might be given a wide or a narrow application.
>
> 19. However, section 114(1)(d) must be construed and applied in its statutory context. In particular, in a case such as the present, where the evidence in question is of a statement making an allegation of misconduct, it must be read together with section 116. That section is narrowly drawn. It is headed "Cases where a witness is unavailable", which would not include the case of D…"

The judge then set out the terms of subsection (2) of s.116, none of which applied to D in that case.

> "20. In our judgment, section 114(1)(d) is to be cautiously applied, since otherwise the conditions laid down by Parliament in section 116 would be circumvented. As Scott Baker LJ said in *O'Hare* [2006] EWCA Crim 2512 at paragraph 30:
>
> > "We think it important to point out that, as a matter of generality, section 114 cannot and should not be applied so as to render section 116 nugatory."
>
> But section 114(1)(d) should not be so narrowly applied that it has no effect. It follows that there will be cases in which hearsay evidence may be admitted under it in circumstances in which it could not be admitted under section 116…"

It is clear, therefore, that Stanley Burnton LJ himself accepted that s.114(1)(d) should not be so narrowly applied that it has no effect and that hearsay evidence may be admitted under it in circumstances in which it could not be under s.116.

26 The same point can be made about *R v C*, in which the judgment was given by Wyn Williams J. At para.40, referring to the judgment of the court in *Z*, he repeated the point that s.114(1)(d) is to be cautiously applied, since otherwise the conditions laid down by Parliament in s.116 could be circumvented. However, he continued: "That is not to say that section 114(d) [sic] can never be invoked when the criteria laid down in section 116 cannot be met…"

27 In *R v EED*, in which the judgment was given by Pitchford LJ, it was said at para.17:

> "It is not permissible to nod through hearsay evidence merely because it is convenient to the party seeking its admission and the evidence is of value upon an important issue in the trial."

We note, however, that neither the court in *Z*, nor the court on any other occasion brought to our attention, has ruled that in no circumstances will hearsay evidence be admitted on this ground when otherwise there would be cogent reasons for admitting the evidence in the interests of justice. On the contrary, the terms of section 114(2)(g) read in context with the other paragraphs of section 114(2) suggest that it is contemplated that there may be occasions when evidence, which cannot be given orally for reasons other than those provided for by section 116, may be admitted. In *R v CT* (otherwise known as *Tindle*) [2011] EWCA Crim 2341 at para.16 Stanley Burnton LJ said:

> "…The evidence in question could not have been more important in the context of the case as a whole. Without it, the prosecution could not continue. It was virtually the entirety of the prosecution case. Only in rare circumstances, if any, can it be right to allow evidence of this importance to be adduced when there has been a failure to take reasonable steps to secure the attendance of the witness. There was no justification for it to be admitted *in the present case*."

(emphasis added) Each case must, of course, turn on its own facts.

Analysis

28 At paras. 32 to 40 of the case stated, District Judge Allison set out the material part of the ruling on the admissibility of the hearsay evidence. Of particular relevance for present purposes are paras. 38 to 40:

> "38. Dealing firstly with the issues under s.117(2), (4) and (5), I accept the defence submission that virtually all the material falls within s.117(4). Having had the benefit of Mr Butler's expanded arguments, I accept that the s.116(2) conditions are not met and that without a statement from the witnesses who created/produced the various documents as to the state of their recollection of the matters referred to within the documents the court would be in difficulties finding that s.117(5)(b) was satisfied. I therefore declined to admit the material under s.117.
>
> 39. The prosecution invite the court to consider admitting hearsay evidence pursuant to s.114(1)(d) in the alternative. I have already

> noted that it has never been suggested that there is anything other than seven flats at the property.
>
> 40. In considering the requirements of s.114(2) the evidence is highly probative evidence of seven flats. Other evidence has been adduced on this point from Mr Yeung and he has been available for cross-examination. The evidence is important, as it establishes that there were seven units at the property in the years before Mr Yeung's involvement. The evidence was made in the course of business. All makers of the statements are likely to be professional employees of the Council and therefore presumed to be reliable. It is possible that evidence could be given by Mr Nicholls and the supplier of the evidence about housing benefit payments, but these witnesses are not at court today. Any adjournment to secure their attendance would cause further delay and, in any event, it has never been suggested that the property does not have seven residential units. In terms of challenging the evidence, both defendants have been the freehold owners of the property throughout the period in question. They can plainly give evidence as to the state of the property. Finally, I must consider the extent of prejudice to the defendants if I admit the evidence. I consider there would be no such prejudice as the evidence goes to an issue which has never been said to be disputed. In all the circumstances, I admit the evidence pursuant to s.114(1)(d) of the 2003 Act."

29 I will address here three specific submissions that were made on behalf of the appellants at the hearing before us. First, Mr Butler submits that the district judge was wrong to say that there were no factual disputes about the matters to which the hearsay evidence related. By way of example, he showed us the printouts of housing benefit payments which had been made for a number of years since 2010. He pointed out that the records did not show that the payments had been made throughout the period of the alleged offence in the same way in respect of each of the units at the property. The difficulty with that submission is that it does not go to the admissibility of the hearsay evidence but rather its weight. The further difficulty is that the appellants had the opportunity to question the weight to be given to the hearsay evidence and to make submissions that its probative value was so slight that it did not, in fact, prove the case against them to the criminal standard, but they chose not to take that course before the district judge. Rather, they sought to challenge the admissibility of the hearsay evidence. If anything, this submission by Mr Butler underlines the point that there was nothing unfair about the district judge's admitting the evidence because if they had wished to do so the appellants could have challenged the probative value of the evidence.

30 Secondly, Mr Butler submitted that the evidence of what was said in the application by Mr Salem for a certificate of lawful development was not an admission by him, but only a "proposal" of what was envisaged. As I have mentioned earlier, in the application it was stated that:

> "The house has been converted to seven self-contained flats more than seven years ago and its [sic] been occupied since."

In my view, that submission rests on a misunderstanding of the nature of an application for a certificate of lawful development. It is not an application for planning permission for proposed development. It is instead an application for it to be recognised by a local

planning authority that no planning permission is required for development. It will be recalled that under the planning legislation there are two types of development for which, in principle, planning permission is required: operational development and a material change of use. In this case, what was being said by Mr Salem was that the change of use had already occurred for more than four years and so planning permission was not required and the development was already lawful. It was not therefore merely a "proposal" for future use, but made clear statements as to the historic position.

31 The third point I will mention here is a submission made by Mr Thacker to the effect that the district judge did not properly consider the matters that she was required to by s.114(2) and, in particular, para.(g) which I have set out earlier but will quote again:

> "whether oral evidence of the matter stated can be given and, if not, why it cannot."

32 I do not accept that submission. In my judgment, the district judge carefully went through those matters in the passage of her ruling set out at para.40 of the case stated. Indeed, going through para.40, it is possible to see the relevant subparagraphs of s.114(2) being considered in turn. As for para.(g), Mr Thacker complained in this context that the district judge never considered what were the reasons for a witness not being available to give oral evidence. But the premise of that submission is wrong; the district judge thought that witnesses could be called to give oral evidence. She expressly referred to the fact that in her view it was possible that other witnesses could be produced to give oral evidence, for example, Mr Nicholls. She concluded that that would require an adjournment for no good reason, especially in circumstances in which the crucial issue of fact was not in dispute. Mr Thacker accepted that it was implicit in s.114(2)(g) that there may be cases when the court may exercise its discretion to admit a hearsay statement even though the maker of the statement could be produced to give oral evidence.

33 Returning to the reasoning of the district judge, in particular in the passage set out at para.40 of case stated, in my judgment, the district judge did not fall into error in a way which would justify this court interfering with her ruling on an appeal. She asked herself the right question, she took into account all relevant matters in accordance with s.114(2) and the conclusion to which she came was one which was reasonably open to her on the material before her.

Conclusion

34 For the reasons I have given, I would answer the two questions stated for the opinion of this court in the affirmative and would dismiss these appeals.

MR JUSTICE FOXTON: I agree.

CERTIFICATE

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