Neutral Citation Number: [2022] EWHC 3175 (Admin)

CO/4195/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 December 2022

Before :

Timothy Mould KC
(sitting as a Deputy High Court Judge)

- -

Between :

WELWYN HATFIELD BOROUGH COUNCIL	**Appellant**
- and -	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**First Respondent**
- and –	
ISMAIL KABALA	**Second Respondent**

- -
- -

Riccardo Calzavara (instructed by **Welwyn Hatfield Borough Council Legal Services**) for the **Appellant**
Horatio Waller (instructed by **Government Legal Department**) for the **First Respondent**
The Second Respondent did not appear and was not represented at the hearing of the appeal.
Hearing date: 16 June 2022

- -

Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 2pm on 12 December 2022.

Timothy Mould KC (sitting as a Deputy High Court Judge):

Introduction

1. This is an appeal under section 289 of the Town and Country Planning Act 1990 **['the TCPA']** from the decision of an inspector appointed by the First Respondent to allow the Second Respondent's appeal against an enforcement notice **['the EN']** issued by the Appellant on 29 July 2019. The EN related to land at 111 The Ryde Hatfield AL9 5DP **['the site']**. The inspector made his decision by letter dated 26 February 2020 **['the DL']**. The Appellant seeks an order remitting the appeal against the EN to the First Respondent for redetermination in accordance with the opinion of this Court. On 17 March 2022 following an oral hearing Mr Tim Smith (sitting as a Deputy Judge of the High Court) granted permission to appeal.

2. The site accommodates a two storey, detached house with a rear garden and a forecourt parking area. During the period of four years preceding the issue of the EN on 29 July 2019, conversion works were carried out to the interior of the house. The internal physical arrangement of the house resulting from those works is shown on a plan (1326/PL/01E) **['the plan']**. It comprises of four bedsitting rooms, two on the first floor and two on the ground floor, each of which is self-contained in that each is provided with its own kitchen and bathroom facilities. On the first floor there are two further bedrooms, identified as Bedrooms 1 and 2 on the plan. Neither of those bedrooms includes kitchen or bathroom facilities on a self-contained basis. However, there is a bathroom on the first floor and a kitchen on the ground floor, both of which are accessible to all occupiers of the house (including those in occupation of Bedrooms 1 and 2). There is a further room on the ground floor, described as a 'lounge/diner', which is accessible to all occupiers of the house. The rear garden and forecourt parking area are also available for use by all occupiers of the house.

3. The Appellant issued the EN on the basis that these arrangements had resulted in the sub-division of the house into five self-contained flats, in breach of planning control, an allegation which the Second Respondent challenged on appeal as factually incorrect on the basis that the house now comprised four self-contained units and two bedrooms. When the inspector visited the site on 11 February 2020, he found four self-contained bedsitting rooms and two bedrooms which shared a kitchen and bathroom accessible to all occupiers of the house. He found each of the bedsits and one of the bedrooms to be occupied at the date of his visit. He concluded that the site was now in use as an HMO for not more than six residents, a use which fell within the scope of Use Class C4 in schedule 1 to the Town and Country Planning (Use Classes Order) 1987 (as amended) **['the UCO']**. Therefore, the EN was incorrect and the breach of planning control which had in fact taken place was best described as a change of use to an HMO within Use Class C4. He decided that he could not correct the EN without causing injustice and so quashed it.

4. The Appellant's case is that in so concluding, the inspector erred in law. The inspector had wrongly assumed that the house at the site continued to be used as a single dwellinghouse, albeit one in multiple occupation. Given that the house now contained four self-contained bedsitting rooms which were occupied as such, the inspector ought to have addressed the question whether the house had in fact been sub-divided to form two or more separate dwellinghouses. He did not do so. Alternatively, if the inspector had addressed that question, he had failed properly to explain how, on the facts that he

had found following his inspection of the site, he had been able to conclude that the house continued to be used as a single dwellinghouse. The inspector's error vitiated his decision to quash the EN, rather than to correct it as the Appellant had asked him to do. The Second Respondent's appeal against the EN should be remitted for determination by the First Respondent.

The factual background

5. On 30 May 2019 an officer of the Appellant visited the site and found the internal and external layout of the site on that date to correspond to that shown on the plan. At that time, five people were in occupation of the building.

6. On 20 June 2019 the Appellant refused the Second Respondent's application for planning permission for the change of use of the site from a single dwellinghouse (Use Class C3) to a small HMO for up to six occupiers (Use Class C4). That planning application had been made on a retrospective basis. In reporting the planning application to the Appellant's Development Management Committee held on 20 June 2019, the planning officer stated that the building at the site was currently in use as an HMO, containing four bedsits with en-suite kitchenettes and bathrooms, two individual bedrooms, a shared bathroom and a shared lounge/diner. The planning officer had recommended that planning permission should be granted. The Appellant's reasons for refusing planning permission to change the use of the site to use as a small HMO were firstly, that the converted building and site failed to comply with certain development plan and supplementary planning policies for HMOs; and secondly, that the development failed to produce an acceptable standard of design or to respect the character and context of the surrounding area.

7. On 29 July 2019 the Appellant issued and served the EN on the Second Respondent. The breach of planning control alleged by the EN was –

> "*Without planning permission, the sub-division of a dwellinghouse into five self-contained flats*".

8. The EN set out the Appellant's reasons for its issue. Those reasons were founded upon the allegation that, within the preceding period of four years, the property had been sub-divided into self-contained dwelling units. That sub-division was said to have created a poor standard of accommodation for the current occupiers of the site. The Appellant also contended that the unauthorised use of the property as self-contained dwelling units had resulted in harm to the character and appearance of the local area, primarily due to an increase in parking on the site frontage.

9. The requirements of the EN were directed at reversing the alleged sub-division of the property into self-contained dwelling units. The steps required to be taken were in the following terms –

(1) Cease the use of the dwellinghouse as self-contained dwelling units.

(2) Remove all but one kitchen from the dwellinghouse to include ovens, hobs, extractor units, sinks, work surfaces, kitchen style cupboards, hot and cold water supply and foul waste drainage pipework.

(3) Remove all internal partitions, including doors, which enable the sub-division of the property as self-contained dwelling units in order to allow free internal passage to all areas.

(4) Remove from the land all chattels, debris, items, appliances, fixtures and fittings, building materials, plant and machinery associated with the unauthorised use and to comply with points (1) and (2) above.

10. A period of six months was given for compliance with those requirements.

The appeal against the enforcement notice

11. The Second Respondent appealed against the EN to the First Respondent. The appeal was made on grounds (a) and (b) in section 174(2) of the TCPA. Ground (b) enables an appeal to be brought against an enforcement notice on the ground that the matters stated in the notice have not occurred **['ground (b) appeal']**.

12. In support of the ground (b) appeal, paragraphs 5.2 and 5.3 of the Second Respondent's written representations recited the breach of planning control alleged in the EN and continued –

> "*The appellant considers that the above breach of planning control as alleged, has not occurred as a matter of fact. We are instructed that, at the time of serving the notice, 29 July 2019, the dwellinghouse was subdivided into four self-contained units and two bedrooms with access to shared bathroom, kitchen and communal facilities*".

13. Paragraph 5.8 of the Second Respondent's written representations concluded his case as follows on the ground (b) appeal –

> "*The appellant therefore concludes that, as the allegation within the Enforcement Notice incorrectly refers to '5 self-contained flats' and not '4 self-contained units and two bedrooms', the breach of planning control as alleged in the Notice has not occurred as a matter of fact. In these circumstances, the Enforcement Notice should be quashed*".

14. In summarising his case, the Second Respondent said –

> "*Context*
>
> *6.1 The Appeal Site subject to this Enforcement Appeal is a semi-detached property in Hatfield, which is currently in use as a small HMO and has been converted to contain four bedsits with kitchenettes and en-suite bathrooms, two individual bedrooms, a shared bathroom at first floor and a shared kitchen at ground floor.*
>
> …
>
> ***Ground B***

> *6.4 The appellant considers that the breach of planning control alleged within the Enforcement Notice has not occurred as a matter of fact. The allegation incorrectly assumes the property is sub-divided into five self-contained flats, when the current development on site is the subdivision of the property into four self-contained units and two bedrooms. This is evidenced by a Council officer who described the current layout of the property within the officer's report for the most recent application at the site, following a visit on the 30 May 2019.*
>
> *6.5 In these circumstances, the Enforcement Notice should be quashed*".

15. Paragraphs 5.2 to 5.5.13 of the Appellant's written representations set out its response to the ground (b) appeal. Paragraphs 5.3 to 5.5 stated –

> "*5.3 The appellant's case is that the alleged breach incorrectly refers to five self-contained flats, not four self-contained units and two bedrooms. In essence, the appellant claims that on the relevant date of 29 July 2019 the property was not in use as five self-contained flats, but as an HMO.*
>
> *5.4 The Council does not dispute the internal physical layout of the property as shown on the amended floor plan…*
>
> *5.5 Based on the appellant's submission, the Council understands that the fundamental issue of dispute between the Council and the appellant concerns whether the property was in use as self-contained flats or was in use as an HMO when the notice was served. Notwithstanding this, the Council acknowledge the possibility that the use may have comprised a mixed use of self-contained flats and an HMO*".

16. Paragraphs 5.8 to 5.13 of the Appellant's written representations were primarily directed at the question whether the building at the site fulfilled the statutory definition of a *'house in multiple occupation'* in section 254 of the Housing Act 2004 **['the HA 2004']** –

> "*5.8 The floor plan of the property (Appendix A) shows that there are three flats on the ground floor and one on the right-hand side of the first floor that are all self-contained behind a door with each containing the 'basic amenities' available for the exclusive use of their occupant. Given the presence of self-contained flats, the property does not meet 'the standard test' in section 254(2) to be considered as an HMO.*
>
> *5.9 With regard to the fifth flat, the Council considers that it comprises Bedroom 02 on the first floor, the first floor bathroom at the front of the property and the central kitchen located on the ground floor at the rear of the building. In the Council's view, this flat fulfils the above definition of a self-contained flat*

because all of the 'basic amenities' are available for the exclusive use of the occupant. The Council recognises that it is not contained behind a door like the other flats and this could be considered not to meet the everyday understanding of what comprises a self-contained flat. Consequently, the Council has no objection to the wording of the notice being varied by removing the words self-contained used in the description of the breach and amending the wording of the requirements accordingly. The Council agree with the Inspector who dealt with a similar case under [reference given] that such variations would cause no injustice to either the appellant or the Council…

….

5.11 The Council acknowledges the potential for the 'basic amenities' of the fifth flat to be used by the occupants of the other flats. However, the Council contends that when the notice was issued each flat was exclusively occupied by a single household comprising one person, and as each flat contained all of the 'basic amenities' it was not necessary for any of the occupants to share the 'basic amenities'. In short, there was no practical need for the occupants to share any of the 'basic amenities' because each person had the use of their own. For example, each flat contained a fully fitted kitchen and therefore it would not be credible to suggest that any of the occupants from the other four flats used the central kitchen on the ground floor at the rear of the property. Photographs of the kitchens can be seen at Appendix D. Giving the aforementioned, the Council contends that [the] property was in use as self-contained flats as defined by section 254(8).

5.12 The appellant makes reference to shared use of the rear garden and communal facilities. There may well have been some shared facilities such as the rear garden; however, the Council does not consider these to fall within the definition of 'basic amenities' as defined by section 254(8).

5.13 Having regard to the above, the Council is satisfied that the breach has occurred as a matter of fact".

17. The Appellant concluded its written representations on the ground (b) appeal as follows –

"*7.1 The appellant has failed to demonstrate that the property was in use as an HMO when the notice was issued. Further, the Council has shown that the breach has occurred as a matter of fact. Consequently, the Ground (b) should fail*".

Statutory framework

Town and Country Planning Act 1990

18. By virtue of section 57(1) of the TCPA, planning permission is required for the carrying out of any development of land. The meaning of *'development'* is stated by section 55 of the TCPA. For the purposes of the present appeal, the relevant provisions are as follows –

> "*55(1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development" means…the making of any material change in the use of any buildings or other land.*
>
> …
>
> *(2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land –*
>
> …
>
> *(f) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, any part of the buildings or the other land, for any other purpose of the same class.*
>
> …
>
> *(3) 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;*
>
> ….".

19. Carrying out development without the required planning permission constitutes a breach of planning control: see section 171A(1) of the TCPA. Section 172 of the TCPA empowers a local planning authority to issue and to serve 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 provisions of the development plan and to any other material considerations. Section 174 provides for appeals against enforcement notices to the Secretary of State. The grounds of appeal are specified in subsection 174(2). Grounds (a) and (b) are as follows –

> "*174(2) An appeal may be brought on any of the following grounds –*
>
> *(a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning*

> *permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;*
>
> *(b) that those matters have not occurred;*".

20. Section 176 of the TCPA provides for the determination of appeals against enforcement notices. Subsections 176(1) and (2) state –

> "*176(1) On an appeal under section 174 the Secretary of State may –*
>
> *(a) correct any defect, error or misdescription in the enforcement notice; or*
>
> *(b) vary the terms of the enforcement notice,*
>
> *if he is satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority.*
>
> *(2) Where the Secretary of State determines to allow the appeal, he may quash the notice*".

21. By virtue of subsections 289(1) and (6) of the TCPA, the appellant or the local planning authority (or any other person having an interest in the land to which the enforcement notice relates) may, with the leave of the Court, appeal on a point of law to this Court against the Secretary of State's decision on an enforcement notice appeal.

The Use Classes Order

22. The UCO was made pursuant to subsection 55(2)(f) of the TCPA. Use Class C4 is described in schedule 1 to the UCO –

> "*Class C4. Houses in Multiple Occupation*
>
> *Use of a dwellinghouse by not more than six residents as a "house in multiple occupation".*
>
> *Interpretation of Class C4*
>
> *For the purposes of Class C4 a "house in multiple occupation" does not include a converted block of flats to which section 257 of the Housing Act 2004 applies but otherwise has the same meaning as in section 254 of the Housing Act 2004.*"

Housing Act 2004 - HMOs

23. Section 254 of the HA 2004 provides a statutory definition of *'house in multiple occupation'*. Omitting those parts of that definition which do not bear on the present appeal, section 254 states –

"*(1) For the purposes of this Act a building or a part of a building is a "house in multiple occupation" if -*

(a) it meets the conditions in subsection (2) ("the standard test");

…

(c) it meets the conditions in subsection (4) ("the converted building test");

…

(2) A building or a part of a building meets the standard test if -

(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;

(b) the living accommodation is occupied by persons who do not form a single household (see section 258);

(c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);

(d) their occupation of the living accommodation constitutes the only use of that accommodation;

(e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and

(f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

…

(4) A building or a part of a building meets the converted building test if -

(a) it is a converted building;

(b) it contains one or more units of living accommodation that do not consist of a self-contained flat or flats (whether or not it also contains any such flat or flats);

(c) the living accommodation is occupied by persons who do not form a single household (see section 258);

> *(d) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);*
>
> *(e) their occupation of the living accommodation constitutes the only use of that accommodation; and*
>
> *(f) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation.*
>
> *….*
>
> *(8) In this section -*
>
> *"basic amenities" means -*
>
> *(a) a toilet,*
>
> *(b) personal washing facilities, or*
>
> *(c) cooking facilities;*
>
> "*converted building" means a building or part of a building consisting of living accommodation in which one or more units of such accommodation have been created since the building or part was constructed;*
>
> …
>
> "*self-contained flat*" *means a separate set of premises (whether or not on the same floor) –*
>
> *(a) which forms part of a building;*
>
> *(b) either the whole or a material part of which lies above or below some other part of the building; and*
>
> *(c) in which all three basic amenities are available for the exclusive use of its occupants*".

24. Subsections 258(1) and (2) of the HA 2004 state –

> "*(1) This section sets out when persons are to be regarded as not forming a single household for the purposes of section 254.*
>
> *(2) Persons are to be regarded as not forming a single household unless -*
>
> *(a) they are all members of the same family, or*

> *(b) their circumstances are circumstances of a description specified for the purposes of this section in regulations made by the appropriate national authority*".

The inspector's decision

25. The inspector determined the appeal on the basis of the parties' written representations, having visited the site and inspected the house. He allowed the appeal on ground (b) and quashed the EN. It was unnecessary for him to determine the appeal on ground (a); and he did not do so.

26. In DL2, the inspector correctly stated the asserted basis of the Second Respondent's ground (b) appeal –

> "*2. The basis of the appeal on ground (b) is that, when the notice was served, the house was divided into 4 self-contained units and 2 bedrooms with access to shared facilities. On this basis, the allegation of 5 self-contained flats is said to be wrong*".

27. The inspector concluded that the ground (b) appeal was well-founded. His reasons are set out in DL3 to DL6. In DL3 he said that when he viewed the house on 11 February 2020, the internal layout was as shown on the plan. He recorded it as being common ground between the parties that this layout had been in place when the Appellant's officer inspected the site on 30 May 2019, shortly before the EN was issued.

28. The inspector continued as follows in DL4 to DL6 –

> "*4. Four of the units, described as 'bedsits' on the submitted drawings, are self-contained in that they each have their own beds, living areas, toilets, showers, basins and kitchen areas, including cookers, sinks, storage areas and worktops. All 4 of these units were evidently occupied when I saw them.*
>
> *5. Two first floor rooms are described on the plans as Bedrooms 01 and 02. These rooms do not incorporate their own kitchens, toilets or showers. However, both have access to a first floor 'Bathroom' (which actually contains a shower rather than a bath), together with a kitchen on the ground floor. When I viewed the property, Bedroom 02 was evidently in use, while Bedroom 01 appeared not to be in use.*
>
> *6. The Council's position is that Bedroom 02, together with the first floor bathroom and ground floor kitchen, amount to one of the 5 flats alleged. However, these rooms are distributed around the house rather than being clearly related to each other. In my view, this arrangement, in which key rooms such as the kitchen and bathroom can be accessed by other tenants unless they are kept locked, means that this collection of rooms cannot be*

> *regarded as a self-contained flat. Accordingly, the allegation in the notice is wrong*".

29. In DL6 to DL10, the inspector turned to consider how the allegation of breach of planning control in the EN might be corrected, taking account of the parties' respective contentions on that question –

> "*7. The Council appears to accept this and suggests that it could be remedied by the removal of the words 'self-contained' from the allegation. Yet that would still leave the allegation referring to 5 flats, and this would imply self-contained accommodation, even without those specific words.*
>
> *8. The appellant's position is that the allegation should be amended to read, 'without planning permission, the sub-division of a dwellinghouse to a small HMO for up to three to six persons (Use Class C4)". The Council rejects this, arguing that the property cannot be regarded as a House in Multiple Occupation (HMO) because it does not meet all the criteria in 'the standard test' set out in s254(2) of the Housing Act 2004.*
>
> *9. However, a building can also meet the definition of an HMO if it meets 'the converted building test' in s254(4). In order to meet that test, the building must, amongst other things, contain one or more units of living accommodation that do not consist of a self-contained flat or flats (whether or not it also contains any such flat or flats). The appeal property meets that requirement. It is also a converted building and appears to meet the other requirements of 'the converted building test'. The current (unauthorised) use can therefore be regarded as an HMO.*
>
> *10. For these reasons, having reviewed the various options before me, I consider that the breach of planning control that has occurred is best described as, 'change of use to a house in multiple occupation for not more than six residents (Use Class C4)*".

30. In the light of that conclusion, in DL11 to DL13 the inspector next considered whether he could exercise his powers under section 176(1) of the TCPA to correct the erroneous description in the EN of the alleged breach of planning control, without causing injustice to the parties. For the reasons given in those paragraphs, he decided that he could not do so. He said –

> "*11. The next question is whether the allegation in the notice can be corrected along these lines. I have the power to correct any defect in the notice, but only if doing so would not cause injustice to the appellant or the local planning authority. I am satisfied that there would be no injustice to the appellant, who has suggested revised wording along similar lines.*

> *12. However, I consider that there would be injustice to the local planning authority. Use as an HMO for up to 6 people is a significantly different use to the 5 flats the Council alleges. The Council's case regarding the appeal on ground (a) is clearly made on the basis that the proposal is for flats. Policies relating to HMOs, including floorspace requirements, are different, and thus the Council would be likely to want to make out a different case if it were to oppose such a use. To proceed on the basis of the case put to me in relation to the allegation of 5 flats could put the Council at a disadvantage.*
>
> *13. I appreciate that the Council itself has suggested amending the allegation. However, the wording suggested by the Council is different to the wording I have outlined above and does not alter my view that injustice would occur if I amended the allegation in the notice along those lines. Similarly, the correction to the notice in the appeal decision referred to by the Council is different to the one discussed above and does not alter my view. My decision below to quash the notice leaves open to the Council the option of issuing a further notice with a corrected allegation*".

Having briefly considered other matters, in DL15 the inspector stated his conclusion –

> "*15. For the reasons I have given above I conclude that the appeal should succeed on ground (b). The enforcement notice will be quashed. In these circumstances, the appeal under ground (a), as set out in section 174(2) of the 1990 Act as amended, and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended, do not fall to be considered*".

Legal principles

What is a dwellinghouse?

31. Neither the TCPA nor the UCO provides a definition of *'dwellinghouse'*. The meaning of that term in the context of town and country planning legislation has been considered by the courts in a number of cases and is now well-known to practitioners. The established definition is that given by McCullough J in *Gravesham Borough Council v Secretary of State for the Environment* (1984) 47 P&CR 142, 146 where he identified the distinctive characteristic of a dwellinghouse as being its ability to afford to those who use it the facilities required for day-to-day private domestic existence. In *Moore v Secretary of State for the Environment* (1998) 77 P&CR 114, Nourse LJ said –

> "*McCullough J's judgment [in Gravesham] contains a valuable discussion of the circumstances in which a building might or might not be regarded as being a dwelling-house. He concluded that the distinctive characteristic of a dwelling-house is its ability to afford to those who use it the facilities required for day-to-day private domestic existence. In coming to that conclusion,*

> *he firmly rejected the notion that a building which had that characteristic ceased to be a dwelling-house because it was occupied only for a part or parts of the year or at infrequent or irregular intervals or by a series of different persons.*
>
> *In my judgment McCullough J's approach to the meaning of "dwelling-house" was entirely correct*".

Pill and Thorpe LJJ agreed.

32. In *Moore*, enforcement notices had been issued in respect of the unauthorised conversion of parts of the outbuildings of a country house into ten self-contained units of residential accommodation for use as holiday lets. The appellant contended that in determining appeals against the enforcement notices, the Secretary of State had erred in law in concluding that the use to which the change had been made was not a use of separate parts of the outbuildings as ten single dwellinghouses, but a use of the whole as one unit for the purposes of holiday accommodation comprising ten apartments. At page 118, Nourse LJ said –

> "*The question whether the ten self-contained units of residential accommodation are being used as single dwelling-houses was a question of fact and degree to be determined by the Secretary of State on the basis of the facts found by the Inspector and accepted by him. A question of fact and degree, although it is a question of fact, involves the application of a legal test. If the Secretary of State applies the correct test, the court, on an appeal under section 289, can only interfere with his decision if the facts found are incapable of supporting it. If, on the other hand, he applies an incorrect test, then the court can interfere and itself apply the correct test to the facts found*".

33. *R (Grendon) v First Secretary of State* [2007] JPL 275 is one of numerous cases which have concerned the application of the *Gravesham* approach to the meaning of a dwellinghouse. At [21], McCombe J said –

> "*As the cases under [the TCPA] and its predecessors have emphasised the question is to have regard to an appropriate degree in each case, to both the physical state of the premises and their user, actual, intended and/or attempted*".

Principles upon which the Court decides appeals under section 289 of the TCPA

34. The principles which govern the court's determination of a challenge to the validity of a planning appeal decision brought under section 288 of the TCPA are summarised at [6]-[7] in the judgment of Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643. In the present case I am concerned with an appeal on a point of law under section 289 of the TCPA. Nevertheless, I am satisfied that essentially the same principles must govern my decision in the present case. The following principles are of particular relevance to the present case (from *St Modwen's* case at [6]) –

(1) An inspector's decision on an appeal against a refusal of planning permission is to be construed in a reasonably flexible way. Decision letters are written principally for the parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to rehearse every argument relating to each matter in every paragraph of the decision.

(2) The reasons for a planning appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the principal important controversial issues. The reasons need refer only to the main issues in the dispute; they need not refer to every material consideration. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, but such an adverse inference will not readily be drawn.

Submissions

35. For the Appellant, Mr Calzavara submitted that the inspector had erred in law in concluding in DL10 that the breach of planning control which had occurred was to be described as a change of use to an HMO for not more than six residents (Use Class C4). Alternatively, the inspector had failed to give proper, adequate or intelligible reasons for that conclusion.

36. In order lawfully to reach the conclusion that the unauthorised material change of use alleged in the EN was best described as a change of use to use as an HMO, it was necessary to consider whether the internal conversion works had resulted in the subdivision of a single dwellinghouse into two or more separate dwellinghouses. It was necessary for the inspector to answer that question because the class of use described in Use Class C4 is use of a dwellinghouse, not a use of two or more dwellinghouses within a single building. The inspector had failed to address that question. Each of the four self-contained units created by the conversion works was at least capable of being a dwelling house in its own right. Each was occupied at the date of the inspector's site visit, as he acknowledged in his decision. The inspector had simply assumed that because the house satisfied the *'converted building test'* in subsection 254(4) of the HA 2004, it was correctly to be described as being a dwellinghouse now in use as an HMO within Use Class C4.

37. Alternatively, it was submitted, the inspector's reasons did give rise to a substantial doubt as to whether he had erred in law, by founding his conclusion in DL10 essentially and only on the fact that the house satisfied the *'converted building test'* in subsection 254(4) of the HA 2004.

38. For the First Respondent, Mr Waller submitted that on a fair reading of his decision, the inspector had reached the conclusion that, notwithstanding its physical conversion, the house remained in use as a single dwellinghouse, albeit one in multiple occupation. That was a conclusion which the inspector had been entitled properly to reach on the evidence that was before him. He had inspected the property. In DL4, the inspector was primarily considering the question whether the house satisfied the *'converted building test'* in section 254(4) of the HA 2004. DL4 is not to be read as a finding that the four self-contained units were each in use as separate dwellinghouses. To the contrary, in DL6 the inspector referred to the fact that the communal facilities at the house were

accessible to all its occupiers, including those in occupation of the four self-contained bedsits. The Second Respondent's stated case that the house was in use as a small HMO was consistent with that evidence. There was also evidence that, in reporting the application for planning permission refused by the Appellant on 20 June 2019, the planning officer had advised that the converted house was then in use as an HMO.

Conclusions

39. An appeal under section 289 of the TCPA proceeds on a point of law only. The question of law raised in this appeal is whether the inspector erred in concluding in DL10 that the breach of planning control that had occurred at the site was best described as (without planning permission) a change of use to a small HMO falling within Use Class C4.

40. It was not in dispute before the inspector that prior to the internal conversion works, the house at the site had been in use as a single dwellinghouse. The breach of planning control as alleged in the EN was without planning permission, the sub-division of a dwellinghouse into five self-contained flats. Subsection 55(3)(a) of the TCPA declares that 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. Although the EN did not refer expressly to subsection 55(3)(a) of the TCPA, the Appellant may reasonably be taken to have had that provision well in mind when formulating the allegation of breach of planning control in this case. In other words, the EN was concerned with the alleged sub-division of a single dwellinghouse into two or more separate dwellinghouses.

41. Both parties to the appeal against the EN recognised that the issue between them was whether, following the internal conversion works, the house remained in use as a single dwellinghouse in multiple occupation or had been sub-divided to form multiple dwellinghouses. In his written representations, the Second Respondent contended that the house was now in use as a small HMO. In its written representations in response, the Appellant said that the fundamental issue between the parties was whether following the conversion works, the building was in use as self-contained flats or was in use as an HMO.

42. In DL10, the inspector resolved that issue in favour of the Second Respondent. It is at least implicit in the Inspector's formulation in DL10 of what he considered to be the best description of the alleged breach of planning control, that he had rejected the Appellant's case that, following internal conversion, the house was now in use as a number of separate dwellinghouses. The class of use described in Use Class C4 is use of a dwellinghouse as a small HMO, not a use of two or more dwellinghouses within a single building as a small HMO. The question is whether he reached his conclusion in DL10 without addressing the significance of his earlier finding in DL4 that the house now contained four self-contained units, each apparently providing the facilities required for day-to-day private domestic existence.

43. Whether the four self-contained units, the bedsits, were being used as single dwellinghouses was a question of fact and degree for the inspector to determine on the basis of the evidence before him, including what he observed during his site visit: *Moore v Secretary of State for the Environment* (1998) 77 P&CR 114, 118. In determining that question, the inspector was required to follow the applicable legal

principles. The Appellant did raise an issue before the inspector about the application of legal principle to the facts of this case. That issue was whether the house fell within the definition of an HMO in section 254 of the HA 2004; in particular, whether the house fulfilled the *'standard test'* for an HMO in subsection 254(2) of the HA 2004.

44. The inspector resolved that issue in DL9. He concluded that the house did fall within the definition of an HMO in section 254 of the HA 2004. The house did so because it satisfied the *'converted building test'* in subsection 254(4) of the HA 2004. Mr Calzavara submitted that the inspector appears to have assumed, without any direct evidence, that those in occupation of the house resided there as their only or main residence, that they did not form a single household and that at least one of them paid rent. I accept that submission, but it seems to me that the inspector was reasonably entitled to proceed on those assumptions without the need for direct evidence to substantiate them, given that it had not been the Appellant's case that those common requirements of the statutory definitions in subsections 254(2) and 254(4) of the HA 2003 were unfulfilled in this case.

45. Section 254 of the HA 2004 provides the definition of a *'house in multiple occupation'* for the purposes of determining whether a dwellinghouse is being used as a small HMO within the scope of Use Class C4. The UCO does not exclude a *'converted building'* HMO within the terms of subsection 254(4) of the HA 2004 from falling within the scope of Use Class C4, if the facts support the contrary conclusion. If the legislative intention had been to exclude *'converted building'* HMOs altogether from the scope of Use Class C4, it would have been straightforward to state that exclusion in the *'Interpretation'* clause for Use Class C4. No such exclusion exists. It follows that it is possible, at least in principle, for a house to remain in use as a single dwellinghouse falling within the scope of Use Class C4, notwithstanding that it includes a mixture of both self-contained and shared residential accommodation. It is for the decision maker to judge on the facts of the given case whether such a building remains in use as a single dwellinghouse; or whether the provision of self-contained units of residential accommodation within that building has resulted in its sub-division into two or more separate dwellinghouses, as the Appellant alleged had occurred in the present case.

46. For these reasons, the house in its converted state was at least capable of falling within the scope of Use Class C4. The next, determinative question for the inspector was whether the house was in fact being used as small HMO within Use Class C4. That was the Second Respondent's contention, as the inspector said in DL8. It was a question of fact and degree for the inspector to determine.

47. In my view, the inspector determined that question in DL10. I cannot accept Mr Calzavara's submission that, in doing so, the inspector simply assumed that the house remained in use as a single dwellinghouse, without considering whether it had in fact been sub-divided to use as multiple dwellinghouses. In my judgment, the inspector did address that consideration. The facts found in DL3 to DL6 were capable of supporting his conclusion in DL10. It was reasonably open to the inspector to conclude as he did, given the existence of communal facilities at the property which were available for use by all of those in occupation, including those occupying the four self-contained bedsits. On a fair reading of his decision, the inspector had considered and rejected the Appellant's case for subdivision of the building into multiple dwellinghouses, on the basis that on the evidence, all occupiers of the residential accommodation produced by conversion of the house had the use of the shared or communal facilities. On that basis,

the inspector's conclusion in DL10 was both reasonable and understandable. There is no justification for this Court drawing the adverse inference that the inspector simply assumed the conclusion that he reached in DL10, without consideration of the factual findings that he had made on the basis of the evidence that was before him.

48. Nor am I able to accept the Appellant's alternative argument that having found that the building now contained four self-contained units of residential accommodation, the Inspector did not explain how he concluded that the house remained in use as a single dwellinghouse. The inspector had acknowledged that, following the conversion works, parts of the building now formed self-contained units. Nevertheless, he referred also to the existence of communal facilities which were accessible to all occupiers of the house. In the light of those matters, I see no particular difficulty in understanding how and why he came to the conclusion that he did in DL10. It is of some relevance that he came to describe the current, unauthorised use of the site in terms which broadly correspond to that given by the planning officer in reporting the Second Respondent's planning application to the Appellant's Development Management Committee held on 20 June 2019, shortly before the date on which the EN was issued.

49. For these reasons, which essentially reflect Mr Waller's submissions on behalf of the First Respondent, I conclude that the inspector did not fall into legal error. He was entitled to conclude as he did in DL10, that the change of use without planning permission which has occurred at the site was best described as a change of use to an HMO for not more than six residents (Use Class C4). In the light of my conclusion, there is no basis for questioning the validity of the inspector's refusal to exercise his power to correct the EN by amending the alleged breach of planning control in accordance with the description given in DL10.

50. Counsel for the Appellant submitted that the inspector's approach created difficulties with the application of subsection 55(3)(a) of the TCPA. Whilst that provision stated that the sub-division of a building formerly used as single dwellinghouse into use as two or more separate dwellinghouses amounts to a material change in the use of the building and each part of it so used, it could be avoided by the simple expedient of retaining some accommodation within the building which was accessible to all its occupiers.

51. I do not share that concern. As I have explained, the scope of the use as defined in Use Class C4 is such that it is possible, in principle, for a building to remain in use as a single dwellinghouse falling within the scope of that Use Class, notwithstanding that it includes a mixture of both self-contained and shared residential accommodation. Whether it does so is a question of fact and degree for the decision maker; and if it is found to remain in use as a single dwellinghouse, then subsection 55(3)(a) of the TCPA does not apply.

52. Notwithstanding my conclusion that the inspector did not make the error of law contended for by the Appellant in determining the appeal against the EN, I should briefly address the underlying practical concern which led the Appellant to bring this appeal.

53. The Appellant's practical concern was that the inspector's conclusion in DL10 would effectively prevent it from issuing a further enforcement notice. The Appellant acknowledged that by virtue of subsection 171B(4)(b) of the TCPA, it had the power

to issue a further enforcement notice. However, if it did so, alleging as the breach of planning control a change of use to an HMO for not more than six residents (Use Class C4), the Second Respondent would inevitably succeed on an appeal against that further notice on the basis that he had planning permission to change the use of the site to use as a small HMO within Use Class C4.

54. The Appellant referred to article 3(1) of and part 3 class L of schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 **['the GPDO']**, the effect of which is to grant planning permission for the following class of development **['the Class L permitted development right']**–

*"**L. Permitted Development***

Development consisting of a change of use of a building –

...

(b) from a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order, to a use falling within Class C4 (houses in multiple occupation) of that Schedule".

54. It was submitted that given the Class L permitted development right, the inspector had been wrong in the final sentence of DL13 to say that his decision left open to the Appellant the option of issuing a further enforcement notice with a corrected allegation of breach.

55. As Counsel for the First Respondent submitted, however, the force of the Appellant's practical concern was greatly diminished by the fact that the site lies within an area of Hatfield which is subject to a direction made under article 4 of the GPDO. The effect of that direction is to restrict the operation of the Class L permitted development right and to require an application for planning permission in order to change the use of a property from Use Class C3 to Use Class C4. That being the position, it would not be open to the Second Respondent to invoke the Class L permitted development right in an appeal against a further enforcement notice issued by the Appellant alleging a breach of planning control as described in DL10.

56. Moreover, it seems to me that there is considerable force in Mr Waller's submission that the Appellant is not bound by the inspector's conclusion in DL10. That conclusion is, as I have said, one of fact and degree in response to the evidence which was before him at the time of his decision. In the event that the Appellant is minded to exercise its power under subsection 171B(4) of the TCPA to issue a further enforcement notice in relation to the current use of the site, it is in a position to decide for itself how best to describe the alleged breach of planning control, taking account of the evidence that is available to it for that purpose. No doubt the Appellant will sensibly have the inspector's reasoning, and his conclusion in DL10 well in mind; but it will be in a position to take account of any further, relevant evidence which may inform its own judgement of the correct description of the alleged breach, should it consider that further enforcement action is merited.

Disposal

57. The appeal is dismissed. I am very grateful to Counsel and their respective teams for their clear and helpful submissions and preparation of the case materials.