IN THE WILLESDEN MAGISTRATES' COURT

BETWEEN

YEHUDA LEVHAR

Applicant/Defendant

-v-

LONDON BOROUGH OF BRENT

Respondent/Prosecution

RULING: 10th September 2021

Introduction

1. This is an application on behalf of Yehuda Levhar, [the 'Applicant'], to stay the prosecution against him as an abuse of process.

2. By way of a summons dated 16th September 2020, the London Borough of Brent ['LBB'], the Respondent in these proceedings, alleges breach of an Enforcement Notice ['EN'] by the Applicant between 19th October 2016 and 25th March 2020.

3. The Application to stay this prosecution is founded, in summary, on the following two grounds:

    a. There is a defect in the EN which can be irrefutably established AND the Applicant had an understandable reason for not pursuing an appeal to the planning inspector under s.174 Town and Country Planning Act 1990;

    and/or

b. LBB made an 'unequivocal representation' to the Applicant that he would not be prosecuted and so it would be an abuse of process to now proceed against him.

Evidence

4. In determining this application, I have read with care the written skeleton arguments helpfully submitted on behalf of each side, together with corresponding bundles of exhibits, witness statements, relevant legislative provisions and authorities. I have heard evidence from the Applicant during this hearing and from Scott Davies at LBB. I have been further assisted by detailed oral submissions made by each side. The evidence and submissions lasted a full day [9th September 2021] and I reserved judgment to the following day so that I could carefully consider my decision.

Salient Evidence

5. The case involves premises at 993 Harrow Road, Wembley, HA0 2SJ, ['the Property']. This was purchased by the Applicant, and another, on 16th August 1991 and at that time, it comprised a single dwelling-house.

6. From 2001 onwards, conversion works were undertaken by the Applicant to change the Property from a single dwelling-house into seven self-contained flats: two at the front and five at the rear. It is accepted that the conversion was gradual and over a number of years. A dance studio occupied part of the rear of the premises prior to being converted into the final flat in around early 2009.

7. In 2004, LBB issued an EN against the Applicant [reference E/03/0413 dated 27th April 2004]. This EN has been referred to in some of the written submissions served by each side as the 2003 EN, but for the purposes of clarity, I will refer to is as the 2004 EN because that is the date on the face of the document. The 2004 EN is not the EN which forms the subject-matter of the current summons. The 2004 EN alleged a breach of planning law by virtue of the following:

'*The material change of use of the premises from a residential to a mixed use as residential and a dance studio, social club and entertainment centre.'*

8. This EN required the use of the premises as a dance studio, social club, entertainment centre, to cease, and that all fixtures and fittings associated with this unauthorised use be removed. This EN took effect on the 6th of June 2004 and compliance was required one month thereafter. Information about appealing and the consequences of appealing or not appealing, were written clearly on the EN.

9. The Applicant did not appeal against this EN in 2004.

10. No further action was taken by LBB in respect of this EN. Exhibit YL/5 of the Applicant's Bundle sets out that a decision was made by LBB on the 20th of January 2009 to take no further action.

11. Scott Davies, a Deputy Planning Enforcement Manager at Brent Council since 2012, gave evidence at Court, that he believed LBB closed the case as they were of the view that the breach had been resolved. He could only assume that LBB believed, wrongly or rightly, that this EN had been complied with. He further stated that closing a case and taking no further action, does not stop the Council from taking enforcement action in respect of future breaches of that EN.

12. The Applicant in evidence stated that he recalled the dance studio still being in existence in around February 2009. He had made a YouTube video from the dance studio using that year's Eurovision Song Contest winning entry as the background to the video. He made the video at that time in order to maximise the impact from the song.

13. The Applicant was shown an invitation/flyer, [Applicant's Bundle page 62-63, exhibit YL/15], advertising a social event at the dance studio on Saturday November 16th. There is no year on this flyer, but it is accepted between the parties that November the 16th was a Saturday in 2002 and in 2013 for the purposes of the present case.

14. When cross-examined in relation to the dance studio, the Applicant was asked when it was converted into a residential unit. He stated that it was some time around 2009. He was asked the following question by Mr Robb for LBB:

Q – are you saying that between 2009 and when this EN was served 2013, you put in the last 2 units at the property?

Yes

15. On the 6th of June 2013, the second EN, was served by LBB upon the Applicant in respect of the Property. This 2013 EN does form the subject-matter of the current allegation set out in the summons. This EN alleges different breaches to the 2004 EN:

SCHEDULE 2
THE ALLEGED BREACH OF PLANNING CONTROL

'The change of use of the premises to 7 residential units of accommodation involving the use of the building in the rear garden as 5 self-contained flats and the use of the building to the front of the premises as 2 flats.
("the unauthorised change of use")

SCHEDULE 3
REASONS FOR ISSUING THIS NOTICE
It appears to the Council that the unauthorised change of use took place within the last 4 years.
…
SCHEDULE 4
WHAT YOU ARE REQUIRED TO DO
TO REMEDY THE BREACH OF PLANNING CONTROL - S173 (4)(A)

Step 1 - so as to cause the cessation of the of the property at 993 Harrow Road, Harrow, HA0 2SJ (The Property hereinafter) as seven residential units (flats).
Step 2 – Use & restoration of the property as 1 family dwelling.
Step 3 – Remove all fixtures & fittings associated with the unauthorised use.

16. The 2013 EN was effective from 16th July 2013, thus providing the Applicant with a period of approximately one month to lodge any appeals under s.174 of the 1990 Act. Time for compliance with the EN was three months: 16th October 2013. The EN provided information about the appeal process, including time limits, fees and addresses to lodge the appeal notice.

17. There is no dispute that the Applicant knew about the appeal process and that he had a right of appeal. However, it is stated in evidence by the Applicant, that he did not really read the 2013 EN properly, as he knew that the change in use of the Property had occurred many years before and not within the 4 years noted in the EN. The Applicant further states that because no further

action was taken by LBB in respect of the 2004 EN, he assumed and believed that he would not be prosecuted in respect of the subsequent EN.

18. In examination-in-chief on this issue, the Applicant gave the following evidence:

'I did not appeal either EN

I replied in my emails to Tim Rolt

I did not have the £4620 to appeal

I assumed the second EN was same as the first EN

I wrote to Tim, a number of letters and told him it was out of time

19. The Applicant further stated that English was not his first language, Hebrew is, and that he came to this country aged 20 years old in 1963 having been born in Israel. He is a man of previous good character who is not an expert in legal and planning issues.

20. In the Applicant's bundle, there is one typed letter, [exhibit YL10, page 48-49], written from 'Y Levhar' to Tim Rolt, dated 'June 2013' alleging that LBB were aware that the Property was divided into single flats since at least May 2003. The letter further states: '*Town and Country Planning Act 1990 will not apply to this property as use has been established more than 4 years. Ago.'*

21. The above letter is not date stamped or marked.

22. In cross-examination, the Applicant confirmed that in 2013 he owned two properties, a building company and that he was a builder himself. He confirmed that the conversion of the Property into a dance studio and self-contained residential units, was carried out by himself.

23. In relation to the appeals process, the Applicant stated in cross-examination that he did not seek legal advice when he was served with the 2013 EN, or indeed the 2004 EN. He did not read the 2013 EN property as he did not take the EN seriously. He knew there had been a change in use much earlier. He did not reply by way of any appeal as he thought *'it was stupid'.* He believed the 2013 EN had been abandoned due to the earlier decision by LBB, in respect of the 2004 EN, to take no further action. He stated that he did not have sufficient income at that time to meet the £4620 fee.

24. It is accepted between the parties that in fact the fee for appealing against the EN was zero. The £4620 fee was for an appeal which was coupled with an application for planning permission [Ground A]. This is set out in the appeals section on the 2013 EN in the following terms and format:

'**The application appeal fee for this case is £4620 (<u>if you select Ground A and wish to apply for planning permission through the appeal process).</u> This amount is double the usual Planning Application fee. This is now payable <u>ONLY to the Council</u> (before 22/11/2012 half of this fee was paid to the Planning Inspectorate). If the fee is set as £0, it means no fee payable in respect of this case. <u>If you do not wish to proceed under Ground A then no fee is payable.'</u>**

25. Following the service of the 2013 EN, Tim Rolt visited the Property together with other representatives from LBB on the 25th of October 2016. The Applicant states that during this inspection, he was informed by some of these representatives that he would be unable to evict the current tenants from the Property.

26. In November 2016, there was correspondence via email between the parties. On the 9th of November 2016, Tim Rolt emailed the Applicant at 'dancemood@hotmail.com,' as well as Scott Davies from LBB, setting out the following:

'You are aware that there is an enforcement notice which requires amongst other things the cessation of the use of the premises as seven residential units of accommodation…. Consequently, there is a breach of this enforcement notice, and I would be grateful to receive any comments that you may wish to make in this respect…. [caution administered]. You may wish to seek legal advice.'

27. In response to this email, the Applicant emailed Tim Rolt on the 15th of November 2016, referring to the site visit on the 25th of October 2016 and that it had been pointed out to the Applicant at this visit, 'that it **<u>would not be legal</u>** for me to give Notice to Quit to the occupiers of this premises……**<u>so what do you want me to do?'</u>**

28. The Applicant states that he received no reply to this email from Tim Rolt or anyone from LBB.

29. In September 2020, the Applicant put the entire Property up for auction with a guide price of £675,000: exhibit YL14, page 57-61 of the Applicant's Bundle. On the face of the auction advertisement, there is the following Note:

'Prospective buyers are advised that there was an enforcement notice on the building in 2010, however Brent Council have recently registered the flats for individual Council Tax. Further details are available in the legal pack.'

30. In examination-in-chief, the Applicant stated that all parties involved in the auction sale were aware of the 2013 EN and thought that it had been abandoned. These parties included the solicitor, auctioneers and purchaser. The Applicant thought that the fact that each flat was registered for Council Tax, indicated that LBB were taking no further action on the 2013 EN.

31. Scott Davies, on behalf of LBB, gave the following evidence on this issue of Council Tax and whether or not the continued payment of that Tax, exonerates any breaches of planning law:

'Council tax is payable on all dwellings irrespective if they have planning permission or not. This is because the residents will be using pavements, highways etc. Even if we were aware that a dwelling was unlawful, it takes time for EN to take effect. There could be many months of occupation during this time and so council tax is payable. It does not mean that an EN does not need to be complied with. ENs and Council Tax are separate issues.'

32. On the 16th of September 2020, the Applicant was then served with the current summons by LBB. Proceedings therefore commenced in the Magistrates' Court.

Relevant Legislative Framework

33. The relevant provisions of the 1990 Act for the purposes of this hearing are as follows:

    a. Section 171: Time Limits
    b. Section 174: Appeals Against ENs
    c. Section 258: Validity of ENs

34. These provisions are helpfully set out in LBB's Bundle and so I do not propose to repeat them here.

Relevant Authorities

35. The Applicant relies on the Court of Appeal case of *Staffordshire County Council v Challiner and Robinson*, [2007] EWCA Civ 864, [hereinafter referred to as the 'Staffordshire case'], and the judgment of Lord Justice Hughes at paragraphs 74-78 inclusive. Section 285 of the 1990 Act was looked at by the Court and how it could, in certain rare cases, cause an injustice to a defendant who has a cast iron defence to a breach of an enforcement allegation, but is deprived of advancing it because he or she did not appeal against the EN on time. LJ Hughes at paragraph 75 stated:

"It is certainly possible to envisage rare cases in which this law may work some injustice. They will be confined to those in which both (a) there is a defect in the Enforcement Notice which can irrefutably be established, and (b) the landowner had an understandable reason for omitting to pursue a section 174 appeal. The coincidence of those factors will, I think, be rare. But it is not entirely unknown for administrative errors to lead to the issue of an Enforcement Notice when there is an existing planning permission, or Certificate of Lawful Use, and the chance of such error is no doubt increased if there are two different authorities concerned in the case. It is no doubt possible that a landowner might be absent abroad, ill, illiterate or simply may wrongly think that his CLU provides an answer and he need take no advice and do nothing. There is, we are told, no power even in an exceptional case to extend time for bringing a section 174 appeal. So, in such a case, rare as it may be, the landowner could perhaps find himself with a cast iron defence to a prosecution under an Enforcement Notice, which he is prevented by section 285 from advancing".

36. LJ Hughes further stated at paragraph 78:

"If such a case were to arise, then the courts do, as it seems to me, have limited capacity to address it. Firstly, so long as the court retains the rarely exercised but important power to stay a prosecution on the grounds that it is an abuse of the process of the court, under the second limb of the law as explained by the House of Lords in R v Horseferry Road Magistrates Court ex p Bennett [1994] 1 AC 42, the criminal court has available the means of preventing the gross injustice of a conviction. Secondly, the civil court plainly retains a discretion whether or not to grant an injunction if one is sought, and it might be very relevant if the scenario were that envisaged."

37. I additionally asked the parties to consider three other authorities: *R (on the application of Altunkaynak) v Northamptonshire Magistrates' Court,* [2012] EWHC 174 (Admin) [the 'Northamptonshire case']; *R v Clayton*, [2014] EWCA Crim 1030 [the 'Clayton case']; and *R v Wicks*, [1998] AC 92 [the 'Wicks case'].

38. I have also referred the parties to paragraph 4-90, page 405, in the current edition of Archbold, which states the following in relation to the *Northamptonshire* case and the *Clayton* case:

"A prosecution for breach of an enforcement notice under the Town and Country Planning Act 1990 against which an appeal would inevitably have succeeded is not an abuse of process if the defendant did not have an understandable reason for failing to pursue the appeal: R. (Altunkaynak) v Northamptonshire Magistrates' Court [2012] EWHC 174 (Admin); [2012] A.C.D. 59, DC But in Clayton [2014] EWCA Crim 1030; [2014] 2 Cr. App. R. 20, it was said, without reference to this case, that the validity of an enforcement notice could only be challenged by way of an appeal under Pt VII of the 1990 Act (see s.285) or on an application for judicial review, and thus any abuse argument that involved a challenge to the validity of the notice was bound to fail, and this was so even if the solicitor to the local authority had been guilty of contumelious conduct in obtaining the notice in the first place."

39. I further referred the parties to paragraph D3-71 in the current edition of Blackstones, which deals with the jurisdiction of the Magistrates' Court when determining abuse of process applications:

"In Horseferry Road Magistrates' Court, ex parte Bennett *[1994] 1 AC 42, the House of Lords ruled that the jurisdiction exercised by magistrates to protect the court's process from abuse is confined strictly to matters directly affecting the fairness of the trial of the particular accused with whom they were dealing (such as delay or unfair manipulation of court procedures). It does not extend to a wider supervisory jurisdiction to uphold the rule of law. The rationale is that supervision of the use of executive power is a responsibility that is vested in the High Court. Where such an issue arises, the magistrates should adjourn the matter so that an application can be made to the Divisional Court, which is the proper forum for deciding the matter (per Lord Griffiths at p. 64). It follows that, where it is contended that a summary trial should not*

*take place because it would be unfair to try the accused (as opposed to the question being whether the accused can have a fair trial), the issue of abuse of process should be dealt with by the High Court, not in the magistrates' court (*Nembhard v DPP *[2009] EWHC 194 (Admin);* R (Smith) v CPS *[2010] EWHC 3593 (Admin)). However, as the Divisional Court observed in* R (Kay) v Leeds Magistrates' Court *[2018] EWHC 1233 (Admin), [2018] 4 WLR 91, at [30], the 'wide category of cases over which the magistrates' court has jurisdiction includes investigation of the* bona fides *of the prosecution or of whether the prosecution has been instituted oppressively or unfairly — including, since a magistrate has jurisdiction to refuse to issue a summons that is vexatious, the jurisdiction to stay proceedings on such a summons at a later stage'; alternatively, the magistrates' court can adjourn the case to enable the matter to be considered by the Divisional Court."*

40. In legal submissions developed orally before me, both parties accepted that there appears to be an inconsistency in approach taken by the Courts. In the *Staffordshire / Northamptonshire* cases on the one hand, the Court held that the abuse of process regime could be used in cases that are time barred on appeal but where the EN is clearly defective. In *Clayton /* and the much earlier House of Lords case of *Wicks*, on the other hand, the Court held that section 285 of the 1990 Act was a statutory bar to challenges to an EN other than challenges brought through an appeal under the 1990 Act or judicial review.

41. It is interesting to note that the Court in *Clayton* was not referred to either *Staffordshire / Northamptonshire.* In *Wicks*, the issue was whether that defendant could raise issues of mala fides/bad faith by the planning authority as a defence to his prosecution. The House of Lords decided that he could not as the meaning of 'enforcement notice' under s.179 of the 1990 Act, was a notice which was not nullity on its face and had not been quashed on appeal or by way of judicial review

42. It is submitted by both sides in the present case, and agreed, that the *Staffordshire case* and the two-limbed test set out by LJ Hughes should be considered given the similarities in the factual

scenarios of both cases. It is further agreed by both parties, that I have jurisdiction to determine an abuse of process application but only in relation to the first limb of *ex parte Bennett*, namely can the Applicant have a fair trial, not whether it is fair for him to be tried.

Issues for the Court

43. The Applicant submits that:

    a. The 2013 EN was served out of time and so is irrefutably defective/invalid. Mr Khan, on behalf of the Applicant, no longer maintains that the Property was converted in 2001, as he set out in his written submissions. In light of the evidence of his lay client, that the dance studio was converted in February 2009, he now submits that the EN was still out of time by just over 4 years as it is dated June 2013.
    b. The Applicant had an understandable reason for not appealing the 2013 EN, namely he had assumed that due to the passage of time, and the fact that no further action was taken by LBB on the alleged breaches set out in the 2004 EN, that the 2013 EN was no longer being pursued against him;
    c. Furthermore, he did not have £4620 to pay for an appeal;
    d. The Applicant did not understand that there may, in fact, be no fee for the appeal given his lack of expertise and language difficulties;
    e. He was given an unequivocal representation by LBB that he would not be prosecuted and he relied upon this representation to his detriment by not appealing;
    f. It would be an abuse of process [first limb] to prosecute him now for breaching the 2013 EN and so the proceedings should be stayed as he cannot have a fair trial;
    g. It would be an abuse of process [second limb] for him to be tried at all but this limb is not one for the Magistrates' Court to determine.

44. The Crown submit in response to the Applicant's application, that:

    a. The Applicant could and should have appealed against the 2013 EN in order to challenge the validity of the 2013 EN, under s.174 of the 1990 Act;
    b. The Applicant is now time barred from appealing;
    c. The 2013 EN was not served out of time and so is not defective;

d. There was no understandable reason for the Applicant not to appeal under s.174;
e. There is no abuse of process in this case as no unequivocal representation was made by LBB to the Applicant;
f. It is clear, given the evidence presented at the hearing, that the Applicant can have a fair trial as the same evidence could be adduced and the same issues relied upon in a defence.

Findings of Fact

45. The Court makes the following findings of fact for the purposes of this application:

a. The 2013 EN is not irrefutably defective, as required by LJ Hughes in *Staffordshire*.
b. There is insufficient evidence before me from either side, to determine whether or not the 2013 EN was served late or within the 4-year period required by s.171B of the 1990 Act.
c. There was not an understandable reason for the Applicant not to appeal the 2013 EN, as required by the *Staffordshire case*.
d. The 2013 EN was served on the Applicant: he was not absent abroad or ill at the time of service.
e. The Applicant is not illiterate and his level of English, having lived in the UK since 1963, was more than sufficient to enable him to purchase two properties, to convert 993 Harrow Road, and to run a building company. Indeed, his English as set out in various letters and emails from 2013 and 2016 is more than sufficient to enable him to read the EN served upon him.
f. The 2004 EN was clearly dealing with a separate planning breach than that set out in the 2013 EN.
g. No representations, unequivocal or otherwise, were made to the Applicant that he would never be prosecuted for the 2013 EN. This case is far removed from the principles set out in the well-known authority of *Abu-Hamza* [2006] EWCA Crim 2918.
h. The Applicant was warned about the consequences of not complying with the 2013 EN in correspondence in 2016.
i. The Applicant's evidence that he did not read the ENs properly as he did not take the 2013 EN seriously, is not an understandable reason for not appealing the EN.

j. It was open to the Applicant to obtain legal or professional advice or to consult the planning portal website which was set out on each of the ENs served upon him.

k. The Applicant's evidence that he could not afford the £4620 appeal fee is not an understandable reason for not appealing the EN. If it were such a reason, it would provide an easy excuse for those wishing to circumvent the appeals process.

l. The Applicant was the owner of two properties at the relevant time, he ran a building business and was in receipt of rental income from the seven self-contained flats.

m. The fact that the self-contained units were each registered for the purposes of Council Tax liability, is not a bar to any breaches of planning permission and neither is it an implied representation to the Applicant that he will not be prosecuted for these breaches.

n. This is not one of those rare cases, highlighted by LJ Hughes in the *Staffordshire case*, where the EN is irrefutably defective, and the landowner has an understandable reason for not appealing the EN.

o. The Applicant could have, and indeed should have, appealed against the 2013 EN or taken actions to remedy the alleged breaches set out in the EN.

p. This is not one of those rare cases where proceedings against the Applicant should be stayed as an abuse of process.

q. The Applicant has not shown why he could not have a fair trial.

r. The application must therefore be refused.

Maria Karaiskos

District Judge [Deputy]

10th September 2021