

Case No: CO/3138/2014

Neutral Citation Number: [2015] EWHC 19 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 January 2015

Before :

HIS HONOUR JUDGE SYCAMORE
(SITTING AS A JUDGE OF THE HIGH COURT)

Between :

VALENTINO PLUS LIMITED
- and -
SECRETARY OF STATE FOR COMMUNITIES
AND LOCAL GOVERNMENT
and
ROD COWAN
and
EAMES LONDON ESTATES LIMITED
and
ROYAL BOROUGH OF KENSINGTON AND
CHELSEA

Claimant

Defendants

Mr R Langham (Public Access) for the **Claimant**
Mr R Kimblin (instructed by the Treasury Solicitor) for the **First Defendant**
Mr R Taylor QC (instructed by Messrs Porter Dodson) for the **Third Defendant**

Hearing dates: 9 December 2014

Judgment

His Honour Judge Sycamore:

1. This is a claim by Valentino Plus Limited (“the Claimant”) to quash the decision of the First Defendant’s Inspector (“the Inspector”) to grant a Certificate of Lawful Use or Development (“LDC”) under section 192 of the Town and Country Planning Act 1990 (“the Act”) in relation to premises at 1-3 Thackeray Street, London W8 by a decision letter dated 3 June 2014. The decision was made on appeal under section 195 of the Act and this application is made under section 288 of the Act, which provides:

“ Proceedings for questioning the validity of other orders, decisions and directions.

(1) If any person –

(a) is aggrieved by any order to which this section applies and wishes to question the validity of that order on the grounds –

(i) that the order is not within the powers of this Act,
or

(ii) that any of the relevant requirements have not been complied with in relation to that order; or

(b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds –

(i) that the action is not within the powers of this Act,
or

(ii) that any of the relevant requirements have not been complied with in relation to that action,

he may make an application to the High Court under this section.

.... (5) on any application under this section the High Court –

(a) may, subject to subsection 6, by interim order suspend the operation of the order or action, the validity of which is questioned by the application, until the final determination of the proceedings;

(b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicants have been substantially prejudiced by failure to comply with any of the relevant requirements in relation to it, may quash that order or action...”

2. Section 192 provides:

“192. – Certificate of Lawfulness of proposed use or development.

(1) If any person wishes to ascertain whether –

- (a) any proposed use of buildings or other land; or
- (b) any operations proposed to be carried out in, on, over or under land, would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question.

(2) If, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

(3) A certificate under this section shall –

- (a) specify the land to which it relates;
- (b) describe the use or operations in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);
- (c) give the reasons for determining the use or operations to be lawful; and
- (d) specify the date of the application for the certificate.

(4) The lawfulness of any use or operations for which a certificate is in force under this section shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness.

3. On appeal under section 195 of the Act the First Defendant has the powers of the local planning authority under section 192 of the Act.

4. The parties to the action are as follows:

The Claimant is the tenant of the basement, ground and first floor premises, 1-3 Thackeray Street, London W8 5ET. The second and third floors are in residential use. The basement, ground and first floors are in use for retail premises as a hairdressing business operated by the Claimant.

Mr Rodolfo Valentini is a Director of the Claimant company and he provided a witness statement in these proceedings.

The Second Defendant Mr Rod Cowan is the agent of the Third Defendant and made the application for the LDC to establish that a proposed use of the first floor of the property would be lawful.

The Third Defendant is the Claimant's landlord.

The Fourth Defendant is the planning authority which refused the application by notice dated 6 March 2014.

5. The appeal related to the Second Defendant's proposal to convert the first floor into a self-contained flat with separate access from an adjoining building with no internal connection between the ground and first floors.
6. The Claimant objected to the application which was made pursuant to Class F of Part 3 Schedule 2 of the General Permitted Development Order (1995) ("GPDO") on the basis that the proposal did not fall within Class F because it did not involve "mixed use". The Fourth Defendant refused the application. The Second Defendant appealed to the Inspector, who upheld the appeal.
7. Class F grants permission for a change of use of a building

"to a mixed use for any purpose within Class A1 (shops) of the Schedule to the Use Classes Order and as up to two flats, from a use for any purpose within class A1 of that Schedule"

Such permission is subject to the following conditions:

"(a) some or all of the parts of the building used for any purposes within Class A1 shall be situated on a floor below the lowest part of the building used as a flat;

(b) where the development consists of a change of use of any building with a display window at ground floor level, the ground floor shall not be used in whole or in part as a flat.

(c) a flat shall not be used otherwise than as a dwelling (whether or not as a sole or main residence)

(i) by a single person or by people living together as a family, or

(ii) by not more than six residents living together as a single household, (including a household where care is provided for residents)."

8. Article 1 of the GPDO defines "flat" and "building" in the following terms:

"'Flat' means a separate and self-contained set of premises constructed or adapted for use for the purpose of a dwelling and forming part of a building, from some other part of which it is divided horizontally."

'building'

a) includes any structure or erection and except in Parts 24, 25, 33 and 40 Class A of Part 31 and Class C of part 38 of schedule 2, includes any part of the building as defined in this article; and

b) does not include plant or machinery and in Schedule 2, except in class B of Part 31 and Part 33, does not include any gate, fence, wall or other means of enclosure”.

Prior to the amendments in 2012 Class F had only applied to a single flat. The Claimant's objections to the LDC were summarised in the skeleton argument prepared on behalf of the First Defendant in the following terms:

- i) For there to be a “*mixed use for Class A1 (shops) and as up to two flats*” there had to be a single planning unit in a mixed use in a technical sense used in case law (as for example in *Belmont Riding Stables v Secretary of State* 2003 EWHC 1895);
 - ii) That the meaning of “*mixed use*” in Class F had not changed when, in 2012 Class F was amended to refer to up to two flats;
 - iii) Two decisions of other inspectors supported this construction (referred to in the decision letter under challenge) and
 - iv) The LDC proposal would not involve a single planning unit embracing the basement ground and first floors in a mixed use.
9. The Claimant pointed out that in the decision letter the Inspector found that the flat would “have no functional, physical or personal association with the retail use at ground floor level” and that it would constitute a separate planning unit from the retail planning unit. The Inspector nevertheless considered that the proposal fell within Class F since “mixed use” in the context of Class F meant a number of uses in the same building. The Claimant was critical of the Inspector's conclusion that Class F could only operate where separate planning units are created as set out in paragraphs 9 and 10 of the decision letter.
10. In his decision letter the Inspector found, inter alia, as follows:
- “3. The principal consideration in this case is whether Schedule 2, Part 3, Class F contemplates the creation of separate planning units from a single planning unit. The proposal before me would result in an arrangement whereby the proposed flat at first floor level would have no functional, physical or personal association with the retail use at ground floor level. Class F (a) permits the change of use of a building to a mixed use for any purpose within Class A1 (shops) of the Schedule to the Use Classes Order and as up to two flats, from a purpose within Class A of that schedule. The wording of Class F (a) was revised by the Town and Country Planning*

(General Permitted Development) (Amendment) (No 2) (England) Order 2012 which came into force on 1 October 2012. Prior to that revision, Class F (a) permitted the change of use to one flat.

....

7. The term “mixed use” is not defined in the GDPO or in the Town and Country Planning Act 1990. The judgment in the **Burdle v. Secretary of State for the Environment** (1972) established the test that “within” common ownership, it is only possible to identify a separate planning unit where there is a functional or physical separation of activity”. The judgment also states that “it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit”.

8. A “flat” is defined in Article 1 of the GDPO as a separate and self-contained set of premises constructed or adapted for use for the purpose of a dwelling and forming part of a building from some other part of which it is divided horizontally. The proposed development would create two separate planning units, namely a ground floor retail use and a first floor dwelling.

9. However, as the revised Class F allows for the provision of up to two flats above the ground floor, given the definition of a flat, this could result in three separate planning units. Moreover, F.1 Condition (c) of Class F requires that a flat shall not be used otherwise than as a dwelling by a single person or by people living together as a single household (including a household where care is provided for the resident). The condition appears therefore to require that there be no common relationship between the occupants of the two individual flats or between the occupiers of the Class A1 use and the occupiers of either of the flats.

10. Indeed, in the legal opinion which forms part of the evidence submitted by the tenant of the retail premises, the author, Richard Langham of Landmark Chambers, has stated that “I accept that it is more difficult to imagine a mixed use with two flats” and I agree with that view. In my judgment, such an arrangement would militate against the concept of a mixed use comprising only one planning unit. The appellant has argued on the basis of the above considerations that “mixed use” in the context of Class F means a number of uses in the same building and, on the basis of the evidence before me, I find no compelling reasons to differ.

...

13. In light of the above considerations, I conclude that the proposed development would consist of a change of use to a mixed use of shop and flat within the same building notwithstanding that they would be physically and functionally separate and constitute separate planning units. It would therefore represent permitted development in accordance with Schedule 2, Part 3, Class F (a) of the Town and Country Planning (General Permitted Development Order) 1995, as amended”.

11. It is clear from the explanatory memorandum to the Town and Country Planning (General Permitted Development) (Amendment) (No 2) (England) Order 2012 that the Parliamentary Purpose as explained was:

“Policy Background

What is being done and why

7.1 We wish to create the opportunity to bring vacant and underused properties back into economic use and at the same time contribute to delivering more homes. Currently, the ancillary space associated with a retail unit (A1) or financial/professional services unit (A2) can be converted into residential, as long as the A1 or A2 use is on a floor below the residential part of the building, there remains a ground floor shop frontage/display window, and only a single flat is created as a result of the change of use.

7.2 While the current provision allows for converting ancillary A1/A2 space into a single flat, we now want this provision to be extended to no more than two flats so as to incentivise the conversion to housing of vacant space above retail units in town centre and elsewhere.

7.3 We would expect that such conversions could often be effected without requiring any other form of planning permission, but if external works (such as separate access where needed, then a planning application would need to be made).”

12. The Defendants submit that in deciding as he did the Inspector was giving effect to that purpose by increasing the development right from one to two flats. The Claimant maintains that “mixed use” should be given a restrictive interpretation in the sense set out in *Belmont* that is to say a single planning unit which involves two activities neither of which is ancillary to the other.
13. What is clear, as the Inspector pointed out, is that whilst the GPDO does not provide a definition of “mixed use” it does define “flat.” It is also the case that the phrase “mixed use” is not used in the Act. It is clear that planning permission is granted for

two flats in a building, which, by definition, in terms are necessarily self-contained. The GPDO was clearly concerned with granting permission for two self-contained and functionally separate flats in the same building. The intention of the amendment to the GPDO was to create more housing by increasing the permitted development right from one to two flats. The conditions attached to Class F, to which I have already referred, require functional and physical separation.

14. In my judgment this case involves a short point of statutory construction. For the Claimant's argument to succeed it would be necessary to interpret the GPDO as requiring a functional relationship between the different uses in the building. It is clear that the provision permits a change of use which can result in three elements, that is to say retail and two flats above. As I have already observed the definition of "flat" requires that each flat is a separate dwelling for a single person or by a number of people living together as a family, thus requiring functional and physical separation. I consider that in those circumstances it cannot be said that Part 3 Class F contemplates a physical relationship between the retail use and the two flats. Physical separation of the three elements is made necessary by the definition.
15. As the Inspector observed, in *Burdle v Secretary of State* [1972] 1 WLR 1207 Bridge J (as he then was) observed that:

".... it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit

Bridge J went on to say:

".... It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally"

16. The Inspector's conclusion at paragraph 13 of the decision letter was that:

".... the proposed development would consist of a change of use to a mixed use of shop and flat within the same building notwithstanding that they would be physically and functionally separate and constitute separate planning units. It would therefore represent permitted development in accordance with Schedule 2, Part 3, Class F (a) of the Town and Country Planning (General Permitted Development Order) 1995 as amended."

17. Given the definition of "flat" within the GPDO and the conditions imposed by Part 3 Class F in my judgment a proper interpretation of Part 3 Class F permits a change from a single planning unit to up to three planning units, that is to say one in A1 use and two flats. To accept the interpretation advanced by the Claimant would be

inconsistent with the clear words of the GPDO. Put simply, it would not be possible for each of the two flats to be separate and self-contained, as they are required to be, occupied by separate households and at the same time for the flats and the A1 use to be physically and functionally related.

18. In those circumstances I am satisfied that there is no basis for the restrictive meaning of “mixed use” as contended for by the Claimant and that the Inspector applied the law correctly in concluding that functional and physical separation were required by the clear words of the GPDO. In so concluding he correctly gave the words their ordinary meaning, that is to say a number of uses in the same building. The construction contended for by the Claimant is inconsistent with the GPDO.
19. Accordingly I dismiss this application.