The Planning Inspectorate

Appeal Decision

Inquiry held on 16 August 2016
Site visit made on 16 August 2016

by Pete Drew BSc (Hons), Dip TP (Dist) MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 23 September 2016

Appeal Ref: APP/A5270/C/15/3140939
Premises known as 46 Birkbeck Road, Acton, London W3 6BQ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 [hereinafter "the Act"] as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr David Robold against an enforcement notice issued by the Council of the London Borough of Ealing.
- The notice was issued on 3 December 2015.
- The breach of planning control as alleged in the notice is: *Without planning permission, the material change of use of the outbuilding at the rear of 46 Birkbeck Road, Acton, London W3 6BQ ("the Land") to use as primary living accommodation not ancillary to the use of the main building at 46 Birkbeck Road*.
- The requirements of the notice are: a. cease the use of the Land for use as primary living accommodation; b. do not use the Land for any purposes other than a use ancillary to the main dwelling at 46 Birkbeck Road; c. remove from the outbuilding the bathroom and drainage connections which facilitate the use of the outbuilding as primary living accommodation; d. remove from the outbuilding the bed and any associated bedroom furniture; e. remove all internal partition walls within the outbuilding; and f. remove all resultant debris from the Land.
- The period for compliance with the requirements is 3 months.
- The appeal was lodged on the ground set out in section 174(2) (d) of the Act.

Decision

1. The enforcement notice is corrected by:

    - the deletion of the words in paragraph 3 of the notice and their replacement with the following: "*Without planning permission, the making of a material change in the use of the outbuilding (shown with a black cross on the plan attached to the notice) at the rear of 46 Birkbeck Road, Acton, London W3 6BQ ("the Land") to use as a single dwellinghouse*.";
    - the deletion of the figure "10" in paragraph 4a of the notice and its replacement with the figure "4"; and,
    - the deletion of the words in paragraph 5 of the notice and their replacement with the following: "*a. cease the use of the outbuilding as a single dwellinghouse; b. remove from the outbuilding the bathroom and associated drainage connections which facilitate the use of the outbuilding as a single dwellinghouse; c. remove from the outbuilding the kitchen and associated drainage connections which facilitate the use of the outbuilding as a single dwellinghouse; d. remove from the outbuilding the bed and any associated bedroom furniture; e. remove all internal partition walls within the outbuilding; and f. remove all resultant debris from the Land*".

    Subject to these corrections the appeal is allowed and the notice is quashed.

Procedural matters

2. Following the conclusion of the Inquiry, in line with the discussion that had taken place, the Planning Inspectorate ['PINS'] sought comments from the main parties on the wording of corrections to the notice. I have taken account of the comments received [Documents 12 and 13] in reaching my decision.

3. The evidence given at the Inquiry by all witnesses apart from Mr Nam, with the agreement of the Council because he had no knowledge of the site prior to the issue of the enforcement notice the subject of this appeal, was taken on oath.

4. An application for a full award of costs was made by Mr David Robold against the Council of the London Borough of Ealing and an application for a full award of costs was made by the Council of the London Borough of Ealing against Mr David Robold. These applications are the subject of separate decisions.

The validity of the enforcement notice

5. It was agreed at the Inquiry that the enforcement notice, the subject of this appeal, is not a nullity. However the Appellant claims that the notice is invalid and incapable of correction. This, in short, is based on the findings of a former colleague who quashed an earlier enforcement notice on the same site in an appeal decision [Ref APP/A5270/C/15/30003810] dated 22 December 2015.

6. The first point to note is that this decision was issued despite clear evidence[1] that the notice that was subject of that appeal was withdrawn on 3 December 2015 and that PINS was advised of that withdrawal on10 December 2015. On behalf of PINS I offered an apology at the Inquiry for what in my opinion was a clear administrative error and I repeat that here. Following the withdrawal there was no valid appeal to be determined and so no appeal decision should have been issued. The Inquiry was advised that the Council had an exchange of emails with PINS to seek withdrawal of that decision and whilst I have not been provided with a copy of that exchange I understand that the view was taken that there was no power to withdraw the appeal decision. Regardless of whether that view is right what had been communicated to the Appellant could not be unwritten. The Appellant would still have come to this Inquiry and referred to that appeal decision even if it had been withdrawn. The error was in issuing the appeal decision rather than what happened subsequently.

7. The second point arising is to rhetorically ask what status the decision dated 22 December 2015 has? The Council has suggested that the decision is a nullity but since it is still available on PINS' website[2] in law it does still exist. Instead, at the Inquiry, it was agreed that the appeal decision is a material consideration. This must be right because what it says is in black and white: it stands on the public record as the view of the appointed Inspector and in dealing with a similar appeal in respect of the same building on the same site I have to take it into account. However the Council says the decision is of "*no precedent value*" whereas the Appellant has referred to pertinent case law[3] and submits that significant weight should be given to the first appeal because, in contrast to the facts of those reported cases, this appeal is on the same site against the same factual matrix that gives rise to the same circumstances.

8. As I indicated at the Inquiry I cannot accept that it would be appropriate to give significant weight to a decision that should never have been issued

[1] Appendix 3 to Ms Visagie's proof of evidence.
[2] https://acp.planninginspectorate.gov.uk/ViewCase.aspx?caseid=3003810
[3] *Pertemps Investments Ltd v SSCLG and Solihull MBC* [2015] EWHC 2308 (Admin) and *North Wiltshire DC v SSE and Clover* (1993) 65 P & CR 137.

because the notice against which the appeal was lodged had been withdrawn. These highly unusual circumstances must temper the weight that should be given to the appeal decision. For this reason it is a material consideration to which I attach limited weight[4]. As acknowledged in closing for the Appellant, even though I, like the previous Inspector, stand in the shoes of the Secretary of State in determining this appeal, I am not bound by the previous decision.

9. In the context of those general observations I turn to the previous Inspector's reasoning. At its heart is reasoning that I agree with and had I been faced with the same set of circumstances it is inevitable that I too would have quashed that notice. The core issue in my view is the tension between the allegation, which was in similar terms to the notice subject of this appeal[5], and reference to 4-years in the reasons for issue of the notice[6]. The Inspector, in paragraph 3 of the first decision, raises the prospect of correcting the allegation to refer to use as a dwellinghouse but says the Appellant has not had an opportunity to comment and, in paragraph 4, finds such an approach would be inconsistent with the Council's evidence. Crucially, having identified the tension, he found, in paragraph 7, that he could not apply the 10-year period without causing injustice to the Appellant; I agree. Moreover my strong impression is that the Council agree, which is why it withdrew the notice. It is clear, by reference to the second sentence of paragraph 8 of the decision, that the main reason why the Inspector could not correct the notice is because there would be injustice and by reference to the previous paragraph that is because of the time period.

10. Plainly the above reasoning does not apply to the notice that is the subject of this appeal. The allegation sits comfortably with the reference to 10-years. Whilst the Inspector expresses other concerns about the drafting of the first notice these are not, on my reading of paragraph 7 of the decision, critical to his finding that the notice was incapable of being corrected without injustice. In my view, if the first notice had cited the correct time period, the Inspector could have exercised the power available within section 176 of the Act to correct the notice to, amongst other things, ensure consistency between the allegation and the requirements, as he saw fit, without causing any injustice.

11. For these reasons I entirely reject the submission that the enforcement notice subject of this appeal is invalid and should be quashed. For reasons that I now turn to I find that the enforcement notice does need to be corrected. However I am satisfied, as a matter of principle, that it would be possible to correct the re-issued enforcement notice without causing injustice to either main party.

Is the allegation in the enforcement notice correct?

12. I am in no doubt that the allegation in the current notice has been underpinned by the Appellant's response to the Planning Contravention Notice [PCN]. It said that the outbuilding was used as part of the House in Multiple Occupation [HMO], that only the Appellant slept in the outbuilding, that rent was not received, that the outbuilding shared a kitchen, dining room and entrance with the main house, that it had no separate cooking facilities and that there was no separate access to the outbuilding. The allegation and requirements of the enforcement notice are consistent with that insofar as it alleges use as primary

[4] Subject to one aspect that I deal with in due course.
[5] Perhaps the most significant difference is that the first notice said not "incidental to the enjoyment" whereas the second notice says not "ancillary to the use" but, as the Council agreed at the Inquiry, there is not a material difference in the context of this appeal between the respective words "incidental" and "ancillary".
[6] Section 172(1)(a) of the Act indicates that a Local Planning Authority [LPA] may issue a notice where it appears to them that there has been a breach of planning control which, by reference to section 171B of the Act, includes the requisite time period.

living accommodation that is not ancillary to the use of the main building. It does not require the removal of a kitchen because, on the basis of the PCN response, it was stated that there were no cooking facilities in the outbuilding.

13. Although, in an ideal world, the Council would have inspected the outbuilding to verify what it was being told in the PCN, I respect the answer that I was given by Ms Visagie that the Council has only limited resources. The PCN response was after all clear on its face and there appeared to be no scope for ambiguity. However for reasons that I shall examine at length below it is now clear that at the point that the enforcement notice that is the subject of this appeal was issued that the outbuilding was actually in use as a single dwellinghouse.

14. *Gravesham BC v SSE and O'Brien* [1983] JPL 307, held that the essential characteristic of a dwellinghouse is that it is a building which ordinarily affords the facilities required for day to day private domestic existence. It appears to be common ground that the key element that was perceived to be lacking at the time the notice subject of this appeal was issued is a kitchen and/or cooking facilities but both were present at the time of my site inspection. In addition to a microwave, fridge and washing machine, there was a small electric hob. The hob might be recent but the kitchen units, which incorporate a sink with a hot and cold water supply, appear to be long established. The Appellant's sworn evidence was that the kitchen was installed within 6 months of the building's completion. Noting this version of events was corroborated by Mr Jepson and that Mr Krzyzanowski confirmed the kitchen existed in July 2009, adopting the balance of probability, the kitchen was installed prior to the date of issue of the enforcement notice that is the subject of this appeal.

15. For all of the above reasons, I attach significant weight to the Inspector's finding of fact in the 2015 appeal decision. This view is reinforced by the Council's admission in its closing submission that the previous Inspector's decision is good evidence of fact. Paragraph 3 thereof records: "*It seemed to me on my site visit that, on the face of it at least, the outbuilding did contain all facilities required for day to day existence, even though cooking facilities were limited to a microwave*". On the balance of probability, with the possible exception of the hob, the facilities that I observed during my inspection were all present on 23 October 2015, when the Inspector made his accompanied site inspection. It follows that on the date of issue of the enforcement notice subject of this appeal I can be satisfied that the outbuilding provided all of the facilities required for day to day private domestic existence. Whilst the Council has implied that a microwave was not, of itself, adequate the last Inspector took a different view. Moreover the facilities that I observed, including the kitchen cupboards and sink, underline that it was not merely the existence of the microwave that led to him reach that conclusion.

16. It has been suggested that the absence of a separate boiler and electricity supply/fuse board, other than that contained in No 46, and the lack of a gas supply, are considerations that weigh against such a finding. However I do not find such factors to be conclusive. The test in Gravesham is met. It is possible to conceive of examples of dwellinghouses that might share utility supplies, such as flats within a single building. Whilst for the purpose of the GPDO[7] the term dwellinghouse does not include a flat contained within such a building it must follow that in other circumstances a flat is a dwelling. Here there is common ownership between the respective properties and if that were to change in future separate utilities could be installed within the exemption in

[7] Article 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015.

section 55(2)(a) of the Act. In the interim the respective properties appear to be separate planning units with only a degree of overlap insofar as both have access to a common back garden. However there can be no doubt that the outbuilding has a separate right of way over the rear passageway[8]. Taking all of these factors into account I am satisfied that the outbuilding provides all of the facilities required for day to day private domestic existence.

17. Moreover, in the light of the evidence before the Inquiry, there is no reason to doubt that the outbuilding was in use as a single dwellinghouse at the time the second enforcement notice was issued. In reaching this view I have taken account of, in particular, the tenancy and affidavit of Mr Tsui[9], the second of which says that he lived there between November 2014 and January 2016. The key evidence to contradict this version of events is the PCN response but in this respect the Appellant now acknowledges that the answers cannot be relied on because they are full of what he calls "*mistakes*". I turn to this in some detail below but for present purposes it does not dissuade me from finding that the outbuilding was in use as a single dwellinghouse at the time the second notice was issued. For these reasons the allegation needs to be corrected.

How should the allegation in the enforcement notice be corrected?

18. If I were minded to make such a finding, the Council advanced 2 alternative propositions at the Inquiry. The first was that the notice should be corrected to refer to the material change of use of the land, broadly in line with a notice that was the subject of a recent appeal decision[10]. This is on the basis of the line of authorities that are referred to in footnote 8 of that decision[11], which hold that the 10-year rule applies where there has not been a change of use of any building to use as a single dwellinghouse[12]. The second is that the notice should be corrected to allege a change of use of the outbuilding to use as a single dwellinghouse. In determining which is the appropriate allegation it is necessary to ask whether the use as a single dwellinghouse commenced when the outbuilding was first erected or whether there is evidence of an intervening use that would mean there was a change of use to use as a dwellinghouse.

19. In my view, adopting the balance of probability, the answer to that question is clear. The outbuilding was used for what might generically be called a purpose incidental to the enjoyment of the dwellinghouse as such[13]. My key reason for making such a finding is that the Council's own records confirm that it was so. The entry by the inspecting officer, Sarah Marshall, following her site inspection on 17 October 2007, says: "*The use is ancillary to the main dwelling and there are no facilities in there such as bathroom or kitchen*"[14]. Whilst oral evidence was adduced during the course of the Inquiry from Mr Jepson and the Appellant that the outbuilding was initially used as a TV room, which is consistent with the photographs taken during that site inspection[15], the determinative factor is the Officer's note. A suitably qualified Council Officer inspected the outbuilding in response to a complaint about its construction and determined that there was no breach of planning control because, amongst other things, it was in use

[8] As noted at A.2 of the Land Registry title deeds.
[9] Appendices 11 and 12, respectively, to Mr Nam's proof of evidence.
[10] Appeal decision Ref APP/A5270/C/15/3140002.
[11] *Lawson Builders Ltd v SSCLG and Wakefield MDC* [2013] EWHC 3368 (Admin) applying *Welwyn Hatfield BC v SSCLG and another* [2011] UKSC 15.
[12] Section 171B(2) of the Act.
[13] Section 55(2)(d) of the Act.
[14] Source of quote: page 39 of Appendix 8 to Ms Visagie's proof of evidence.
[15] Pages 40 and 41 of Appendix 8 to Ms Visagie's proof of evidence.

for a purpose incidental to the enjoyment of the dwellinghouse as such[16]. In the circumstances I attach significant weight to Ms Marshall's very clear and no doubt contemporaneous note that the use was ancillary to the main dwelling house. Applying the relevant test of the balance of probability it shows that the outbuilding was initially used for another, incidental or ancillary, purpose.

20. In the circumstances I deal briefly with the counter arguments. These appear to focus on Mr Jepson's oral statement under oath that he installed pipework underneath the concrete floor when the building was first erected because the client wanted it. However the Appellant said that it was put in later, after the outbuilding was completed, although when told what Mr Jepson had said he then appeared to concede that it might have been put in first, which I take to be a concession that Mr Jepson's version of events might be correct.

21. For reasons that I shall explore in due course, I found Mr Jepson's evidence to be rather less than convincing. There were a number of inconsistencies between his evidence and that of the Appellant. I am far from convinced that it would be appropriate to attach significant weight to Mr Jepson's evidence on this very specific point given that, by his own admission, his evidence as to dates cannot be relied upon. The position is unclear, but even if the pipes were installed at the outset, this would not conclusively show that the Appellant's intention was to convert the outbuilding into a single dwellinghouse. Whilst far from conclusive it is material that the October 2007 photograph[17] does appear to show the partition wall in place at that time which, at the very least, might suggest that the room in which the bathroom is now fitted did exist in 2007. However the Officer's note is clear that there was no bathroom and given the limited size of the outbuilding it is highly unlikely that the investigating Officer would have missed such a facility given the specific remit for her inspection.

22. In closing it is claimed that the Appellant said that he put living accommodation in the building from day one. My contemporaneous note records that when asked what he, the Appellant, intended to build, he said "*living accommodation for house*"[18]. However in the next breath he said that it was changed when it was not needed and so, on the balance of probability, I interpret this phrase to be a reference to its use as a TV room rather than habitable accommodation. Even if I might be wrong it is not a sufficient basis to conclude that the outbuilding was erected as a single dwellinghouse at the outset. The Council's claim in closing, that any TV room use was a sham, is inconsistent with its own evidence. In all the circumstances I cannot accept the submission that the use as a single dwellinghouse started as soon as the outbuilding was constructed.

23. For the above reasons I conclude that the allegation in the enforcement notice should be corrected to allege the making of a material change in the use of the outbuilding to use as a single dwellinghouse[19]. I am satisfied that neither main party would suffer an injustice from such a correction.

Should the enforcement notice be corrected in any other respect?

24. Having regard to my earlier reasoning it is appropriate for paragraph 4a of the notice to be corrected to make reference to the relevant time limit in section 171B(2) of the Act, namely 4-years rather than 10-years. This correction is a

[16] See Class E of Part 1 of Schedule 2 of what was then [October 2007] the Town and Country Planning (General Permitted Development) Order 1995, which must be met if the view was taken that it was permitted development.
[17] Page 41 of Ms Visagie's Appendix 8: at the site visit it was noted that the light switch is in the same position and that the distinctive high skirting board on the bottom right of the photograph was the same.
[18] Source of quote: my note although I acknowledge that it might paraphrase what was actually said.
[19] Having regard to, amongst other things, sections 55(1) and 171B(2) of the Act.

necessary consequence of the correction that I intend to make to the allegation and the Council has confirmed that it does not believe it would suffer an injustice from such a correction[20]. The Appellant has argued his ground (d) appeal on the basis of the 4-year period and hence I can be satisfied that he too would not suffer an injustice from such a correction[21].

25. Turning to the requirements of the notice, when PINS wrote to the main parties the opportunity was taken to draw attention to the Inspector's reasoning in paragraph 25 of the recent appeal decision[22]. There the Inspector took the view that a positive requirement not to use the outbuilding for any purpose other than a use ancillary to the main dwelling was inappropriate. Particularly where the Council acknowledges that the main building is in use as an HMO and that the outbuilding cannot form part of it[23], such a requirement would have the potential to render the outbuilding incapable of any beneficial use. For both of these reasons it would be appropriate to correct the enforcement notice by deleting requirement (b) as originally drafted.

26. However in line with the Council's closing submission I consider it would also be appropriate to correct the enforcement notice by adding an additional requirement to remove the kitchen from the outbuilding. I acknowledge that as a result of lodging the appeal an Appellant should not be placed in a worse position by virtue of a correction to a notice. In overall terms I believe this test would be met by the proposed corrections. The Appellant merely has to show 4-years rather than 10-years. Conversely the Council appears to have not required such a step in the notice because of the Appellant's response to the PCN. If the Appellant had disclosed the true position, in order to discontinue the unauthorised use[24], I am in no doubt that the Council would have sought the removal of the kitchen. Put bluntly I do not consider the Appellant can reasonably claim that he would suffer an injustice when it is down to his own action, or "*mistake*", that the requirement was not included in the first place. My view is confirmed by the fact that the Appellant has not, ultimately, argued that he would suffer injustice from such a correction [Document 13].

Background to and identification of the main issues in ground (d)

27. Under ground (d) the onus of proof falls on the Appellant to demonstrate that: "…*at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice*" [as per section (d) of the appeal form]. Having regard to the provisions of section 171B (4)(b) of the Act, the relevant date for this purpose is 4-years before the date of issue of the first enforcement notice, i.e. 6 January 2011, hereinafter '*the material date*'. The Appellant agreed at the Inquiry that the Council purported to take enforcement action when it issued the first notice that it later withdrew.

28. Reflecting the Council's closing submissions at the Inquiry I consider that there are 2 main issues to be determined in relation to ground (d). The first is whether on the balance of probability the use of the outbuilding as a single dwellinghouse commenced prior to the material date and has continued. The

[20] Paragraph 4.1 of the Council's closing submission.
[21] See, amongst other things, paragraph 2.5 of Mr Nam's proof of evidence, noting that he acknowledged in chief that the requisite period set out therein was 6 January 2011 to 6 January 2015.
[22] Appeal decision Ref APP/A5270/C/15/3140002.
[23] Paragraph 7.2 of Ms Visagie's proof of evidence.
[24] Noting the reference in paragraph 4e of the notice to remedying the breach of planning control, which confirms that the objective was not within section 173(4)(b) of the Act, my reading of the notice is that this was the purpose within section 173(4)(a) of the Act that informed the drafting of the notice. Even if the objective was also to restore the land, which includes building, to its condition before the breach took place, which is the only other realistic possibility, the removal of the kitchen would be necessary to achieve that objective.

second is whether this is a case in which the principle of public policy that a person should not benefit from their own wrong is invoked.

First main issue

29. In approaching this issue, because the evidence has shifted considerably since the appeal was first lodged and there is no other public record of what was said on oath at the Inquiry, I shall summarise my record and understanding of the oral testimony that was given by witnesses. Amongst other things, given the admitted "*mistakes*" in the response to the PCN, it might be in prospect that the Council might wish to bring proceedings under section 171D (5) of the Act.

Hayden Jepson

30. Mr Jepson has provided an affidavit but, given that he does not dispute that the aerial photograph dates from 2 May 2007[25] and that it does not show the outbuilding, he accepted that he had got his dates wrong. Moreover the affidavit suggests on its face that he lived there in return for doing building work but his oral evidence was that he paid £140 per week in rent and that he invoiced the Appellant for the building work. That may or may not be the same thing. No paper trail, such as a tenancy[26] or invoices, has been provided. For these reasons I attach extremely limited weight to the contents of the affidavit.

31. Having been discredited as to his dates the most that I can take from Mr Jepson's evidence is the broad sequence of events. I accept his evidence that he initially built the outbuilding without a kitchen and bathroom, and that it was initially used as a TV room, because that is confirmed by the Council's own records. I also accept that the kitchen and bathroom were installed some time after 17 October 2007[27], but I attach limited weight to Mr Jepson's claim that this was 6 months after the building was completed because I am unconvinced that his evidence as to dates can be relied on in any respect. There is however no reason to doubt his testimony that the kitchen and bathroom were installed during the period that Mr Jepson lived at No 46 and/or in the outbuilding. If Mr Jepson's recollection is correct and this was a period of around 18 months he might have lived in the outbuilding during 2008 and the first half of 2009. Mr Jepson got his dates wrong but he was big enough to acknowledge that and, conversely, there is no reason to think that he has committed perjury.

32. I attach moderate weight to Mr Jepson's oral testimony in terms of the sequence, i.e. that once the kitchen and bathroom had been installed that he moved into the outbuilding and lived there with his girlfriend for a period of time. However because his testimony is so vague I cannot be sure that the use that he made of the outbuilding at that time was wholly independent of the dwelling at No 46. He described himself as a friend of the Appellant, whom he also worked for, and whilst he said he used the rear passageway he also said that he put the cobblestones down the middle of the garden. These can be seen in the later photograph[28]. These strongly suggest to me that there was interaction with the main dwelling. I note that he said he used the outbuilding as a "*private getaway*", which might suggest he got away from the main house rather than being totally separated from it. Noting the onus of proof, Mr Jepson did not even claim that he did not rely on any of the facilities in the main house when he lived in the outbuilding. On the balance of probability I

[25] Appendix 6 to Ms Visagie's proof of evidence.
[26] His oral evidence was that there was no written tenancy.
[27] Appendix 8 to Ms Visagie's proof of evidence.
[28] Appendix 7 to Ms Visagie's proof of evidence.

conclude that Mr Jepson's evidence does not demonstrate that the outbuilding was in use as a single dwellinghouse during the period that he lived in it.

Stan Krzyzanowski

33. Paragraph 3.11 of the Council's closing is rather sceptical of Mr Krzyzanowski's evidence but I found him to be a convincing witness. He said he lived in the outbuilding between July 2009 and July 2010. Whilst he could not remember the precise date that he moved in or even what day of the week it was, the contrast to Mr Jepson's evidence was striking. Mr Krzyzanowski said it was definitely in July 2009 because he fell out with his previous landlady and had to move at short notice. Perhaps because of that experience he said that whilst he was not a friend of the Appellant he respected him as a landlord. He said that he had destroyed the tenancy agreement after he moved from No 46 but paid circa £700 per month in rent, which never varied even after he moved into the main house in 2010, where he lived until earlier this year. Whilst he stated that he initially valued being in a separate outbuilding he later changed his mind as he felt "*out of it*" and lonely. There is no reason to think that his oral evidence was anything other than the truth and I attach it significant weight. I entirely reject the assertion that Mr Krzyzanowski's credibility was suspect. Whilst he cannot produce a tenancy there is no reason to doubt he lived there.

34. Mr Krzyzanowski said in chief that the outbuilding was "*fully self-contained*" and he referred to a microwave with 2 hobs on top, a sink with hot and cold water and a fridge. He said he liked to cook a range of dishes including rice and pasta. He parked his motorbikes[29] in the rear passageway even after he moved into the house and whilst this would have made it tight to get past, my site inspection confirmed that this would be possible. Given the terms of A.2 of the Land Registry document I reject the Council's closing submission that the rear alleyway is of recent construction and, based on the testimony of Mr Krzyzanowski, he used it during the period that he lived in the outbuilding.

35. Mr Krzyzanowski said he never met Mr Jepson and that the outbuilding was empty when he first moved into it. Taking account of all of the above this suggests that the outbuilding was in use as a single dwellinghouse during the time that Mr Krzyzanowski lived in it and so I identify the change of use to have taken place at the start of July 2009. Prior to this the outbuilding was empty for an unquantified period of time and there is ambiguity as to whether it was used separately from the main dwellinghouse at No 46.

36. Following Mr Krzyzanowski's move into the main house, he confirmed that he was aware that the outbuilding was let to Mr Seidel, whose tenancy is dated 1 October 2010[30]. That does suggest there might have been a gap when the outbuilding was vacant of perhaps 2 months. Mr Krzyzanowski said he could look down on the outbuilding from his window in the loft conversion and could see lights as part of a daily routine because of the roof lights in the outbuilding. Although I did not gain access to the loft conversion during my inspection I saw the roof lights and the extent to which those would be visible from the window in the loft conversion was self-evident. Mr Krzyzanowski's affidavit says: "*For as long as I was a tenant in the main house, I have always been aware that there was someone always living in the outhouse at the back of the garden*". In essence his evidence was that he was aware the outbuilding was occupied continuously but not necessarily by whom. He confirmed that Mr Robold had asked him to give a statement and did not tell him what to put in it.

[29] He said he had more than one at one stage, which included a 750cc super sport, but otherwise a 125cc scooter.
[30] Appendix 8 to Mr Nam's proof of evidence.

37. Apart from seeing lights as part of a daily routine Mr Krzyzanowski said he had contact with Mr Seidel in a social capacity. When asked what their relationship was he said he viewed Mr Seidel as a housemate in a similar way to the others who lived in No 46. Amongst other things he said that he had been into the outbuilding whilst Mr Seidel lived there, including using that bathroom, which had not changed since 2009. The Council's observation that Mr Krzyzanowski did not really see Mr Seidel appears to be fair, but Mr Krzyzanowski confirmed that Mr Seidel did not use the cooking facilities in the main house. Although their lives might not have crossed that often Mr Krzyzanowski was aware of Mr Seidel's continued occupation until 2014 when he moved back to South Africa. In these circumstances it is appropriate to draw the conclusion that Mr Seidel continued to occupy the outbuilding during the period 2010-2014 and that Mr Krzyzanowski is a reliable witness to that continued residency over that period.

38. He said that he was aware of subsequent tenants, including Mr Tsui, whose affidavit confirms that he was in occupation on the date that the enforcement notice was issued. However he was not aware that Mr Robold ever stayed over in the outbuilding and I consider this point further in the context of Mr Robold's evidence. He also said that he sometimes left the rent out for Mr Robold in his room but that Mr Seidel did not collect it. Whilst this contrasts with evidence held by the Council[31] there is no reason to find these accounts contradictory and again I deal with this point further in the context of Mr Robold's evidence.

David Robold

39. In chief Mr Robold stated that the outbuilding was erected in the summer of 2007 and said that it was originally used as a TV room for up to 6 months; I have already given reasons for accepting this account, which fits with evidence before the Inquiry[32]. However in that context the affidavit is plainly wrong: it says the outbuilding was erected "*soon after*" the date of purchase in 2005 and refers to "*letting it out to tenants*" for "*approximately 10 - 11 years*" which, in view of the date of the affidavit, July 2016, would take one back to 2005. He stated during cross-examination that this part of the affidavit was a "*mistake*".

40. The affidavit suggests that Mr Robold used the outbuilding from early 2008 to mid 2009 but this is precisely the period that Mr Jepson ultimately suggested that he lived there with his girlfriend. Given the date of the building's erection and that I have given reasons to attach significant weight to Mr Krzyzanowski's claim that he lived in the outbuilding from July 2009, the claim that Mr Robold used it as accommodation during that period with, by reference to the previous paragraph, the inference that it was self-contained, appears to be incorrect.

41. The most likely explanation is that Mr Robold stayed there occasionally whilst he was renovating the main house, but that means it was used as part of the main dwelling rather than separate from it. Among other things the Appellant's statement dated February 2015 says: "…*we both stayed at the property until all work was completed*"[33]. However this reinforces my finding that the outbuilding was not used as separate accommodation prior to July 2009. For these reasons I attach extremely limited weight to the contents of the affidavit.

42. Mr Robold said that there had been 5 tenants in the outbuilding: Mr Jepson, Mr Krzyzanowski, Mr Seidel, Mr Tsui and Danuta Strazdonika, the current tenant[34]. However Mr Robold said that he used the outbuilding intermittently, with the

[31] Page 42 of the bundle appended to Ms Visagie's proof of evidence.
[32] Appendices 6 and 8 to Ms Visagie's proof of evidence.
[33] Page 27 of the bundle appended to Ms Visagie's proof of evidence.
[34] Tenancy at Appendix 13 to Mr Nam's proof of evidence.

tenant's agreement, when they had gone travelling because he had been going through a separation. Amongst other things, in re-examination, Mr Robold said that his marriage difficulties started in 2009 but went on for a few years when they tried to get it together. On the balance of probability this occurred during the period that Mr Seidel lived in the outbuilding. Up to July 2009 Mr Robold appears to have had use of the main house and subsequently Mr Krzyzanowski worked locally, at "*Carluccio's*", such that he appears to have lived in the outbuilding exclusively throughout his tenancy without long periods abroad. Mr Krzyzanowski was unaware Mr Robold had ever stayed in the outbuilding.

43. In contrast Mr Seidel appears to have been more than just Mr Robold's tenant. Mr Robold confirmed that he did occasionally ask Mr Seidel to collect rent and so whilst Mr Krzyzanowski had no knowledge of this, it endorses what is said in the evidence base[35]. Given the rear access it is possible that Mr Krzyzanowski was not aware that Mr Robold was living in the outbuilding intermittently as his observations were largely restricted to seeing the lights on via the rooflights. Mr Robold confirmed in cross-examination that he used the rear access when he lived there because he did not want to disturb the tenants and said he could get past the motorbikes as they were in a line and did not block the access.

44. On the balance of probability there is no reason for me to doubt Mr Robold's claim that he did reside in the outbuilding for several periods of up to 4 weeks but I pinpoint this as being exclusively during the period of Mr Seidel's tenancy. This appears to have been from October 2010 until, at the latest, October 2014. Mr Robold said that Mr Seidel went travelling for periods of between 4 and 6-weeks, and that the agreement was that he, Mr Robold, would not charge rent for those periods if he stayed there. In re-examination, Mr Robold said that he had stayed at a number of the properties that he rented out because he could not afford to pay for the marital home as well as pay rent. For these reasons this arrangement would appear to have suited both parties.

45. A key reason why Mr Robold gave evidence rather than relying on his affidavit appears to have been because of the concerns that I raised in my pre-Inquiry note about the answers given to the PCN. The reason given for what are now agreed to be incorrect answers is that he had not received professional advice. In cross-examination he maintained that he had not understood the questions and, amongst other things, said he had always viewed the property as one plot of land in which the outbuilding was not separate from the main dwellinghouse.

46. Apart from this generic answer Mr Robold said that he did not realise that a microwave and a hob would constitute cooking facilities, that he had slept in the outbuilding himself and that the rear access could be seen on the deeds. Mr Robold acknowledged that English was his first language and that it was "*obvious*" that he did rent it out but said he had misread that question. Mr Robold maintained that he did not lie when answering the PCN and apologised for getting a number of the answers wrong. Whilst his attention was drawn to the declaration on the reply to the PCN which says: "*…I have not wilfully stated in it anything which I know to be false or I do not believe to be true*", Mr Robold asserted that he would sign the same response to the PCN again today. I shall express a view on this matter when I turn to the second main issue.

47. Mr Robold was also asked about other documents that are before the Inquiry. In respect of the first[36], which says the outbuilding has: "*…always been*

[35] Page 42 of the bundle appended to Ms Visagie's proof of evidence.
[36] The statement made in relation to the first appeal that was relied on again when lodging this appeal, which is produced at page 27 of the bundle appended to Ms Visagie's proof of evidence.

connected to the house in the way that there are no cooking facilities inside", Mr Robold said again that in his mind it had always been one plot. In respect of the second[37] he said it was possible he had been resident on 18 April 2011. In respect of the record of the telephone conversation on 14 February 2014[38], which indicates that Mr Robold said the occupier was using the kitchen facilities in the main building, he was vague as to whether he even said it. He stated that he had 4 properties that were let out, of which this is one, and hence he was unsure whether he had received the letter dated 22 April 2014[39]. For this reason, whilst the rental income normally went direct into his bank account, he had not produced his bank statements because the entries would not reveal the source, i.e. the bank statement would not say '*rent for outbuilding*' or similar.

48. In summary, whilst I have given reasons for attaching extremely limited weight to the contents of the affidavit, there is no reason to think that Mr Robold has committed perjury when giving evidence on oath. In these circumstances it would be appropriate to attach moderate weight to Mr Robold's oral testimony.

Professional witnesses

49. As noted previously Mr Nam did not give evidence on oath because he had only been instructed, and hence visited the appeal site for the first time, since the notice the subject of this appeal had been issued. The only point of note is that Mr Nam confirmed my reading of the tenancy agreements, which all contain similar text, that there is no clause in them that says beyond the fixed period, which is typically 6 months, that they switch to become periodic tenancies.

50. Ms Visagie did give evidence on oath because, following the issue of the PCN, she took a telephone call from the Appellant on 14 February 2014. There is no reason to doubt that her file note[40] is an accurate record of that conversation or that it was written contemporaneously and I attach it substantial weight. Whilst it was suggested for the Appellant that he had always responded to all of the Council's enquiries, Ms Visagie pointed to a number of examples to show that was not made out. Amongst other things she pointed out that the only written response from the Appellant to any of the Council's correspondence was the reply to the PCN and that was now acknowledged to be unreliable. The only other point of note, not otherwise covered by the Council's closing submissions, is that in Ms Visagie's view the Appellant's correspondence, up to the date of issue of the notice subject of this appeal, presented a very consistent picture.

Substantive discussion on the first main issue

51. I have given reasons for finding that the change of use took place at the start of July 2009, which is prior to the material date. Mr Krzyzanowski was clear as to the extent of the kitchen facilities that existed at that time and said that the bathroom had not subsequently changed when he visited Mr Seidel. Prior to this date the position is unclear and the Appellant has not discharged the onus of proof to show that the use of the outbuilding was functionally separate from the main house at No 46. So whilst I accept that the bathroom and kitchen were installed prior to July 2009 that alone is not conclusive as to its use.

52. I have identified a gap when the outbuilding was vacant of some 2 months prior to the start of Mr Seidel's tenancy. However this gap is not significant and would allow for the outbuilding to be advertised, e.g. on Gumtree, where

[37] Email dated 18 April 2011 at page 44 of the bundle appended to Ms Visagie's proof of evidence.
[38] Page 63 of the bundle appended to Ms Visagie's proof of evidence.
[39] Appendix 14 to Ms Visagie's proof of evidence.
[40] Page 63 of the bundle appended to Ms Visagie's proof of evidence.

Mr Krzyzanowski saw the earlier advert. Whilst Mr Krzyzanowski did not have to give notice when he first moved into the outbuilding, another tenant might reasonably be expected to have to give notice. A short gap between tenancies is therefore to be expected. My view on this point is underlined by the fact that the Council makes nothing of this gap in its closing submissions.

53. The Council's closing says: "*Mr Seidel may have lived there in 2010 but there is no real evidence of his existence or the dates of his occupation*", but it was said for the Appellant in closing that the first of these claims is nonsense. The tenancy, in the name of Kevin Lee Seidl[41], is dated 1 October 2010, which is before the material date. Both Mr Krzyzanowski and the Appellant referred to Mr Seidel's occupation of the outbuilding when giving evidence on oath and so there is no reason to doubt his existence. Moreover the Council's own record of a complaint received on 23 March 2011[42] refers to an "*Outbuilding where Kevin lives…*" and, adopting the balance of probability, this is a reference to Mr Seidel. There is no reason to think that Mr Seidel's tenancy is not genuine as, amongst other things, it is witnessed by Brad Cramer who, the Appellant said, is a work friend and whose signature is evident on a number of other tenancies that are before the Inquiry. It is unclear why the Council's closing views this as a basis for being suspicious about the tenancies: there is no good reason in my view to have doubts about their veracity. For these reasons I am satisfied that Mr Seidel commenced his residency of the outbuilding in October 2010.

54. I do however accept that the date on which the tenancy ended is less clear because none of the tenancies even contain a clause that enables them to switch to become a periodic tenancy after the initial 6 month fixed period. Nevertheless this appears to have been the Appellant's practice as is apparent from examining the tenancy and affidavit of Mr Tsui. The fact that Mr Seidel's tenancy is for a fixed period that expired at the end of April 2011 does not automatically lead me to conclude that the tenancy expired at the end of April 2011 such that he would have need to vacate the property by 1 May 2011.

55. After 30 April 2011, evidence that the outbuilding continued to be occupied is found in the Council's letter dated 24 November 2011. Whilst it does not refer to Mr Seidel it says the outbuilding was occupied on 9 November 2011 when the author of the letter, Mr MacPherson, inspected the property and reached the view that it was in use as a "*separate dwelling*" [43]. It is appropriate to attach this aspect of the Council's letter significant weight. A suitably qualified Officer[44] of the Council inspected the outbuilding, presumably pursuant to a complaint[45], and reached the view that the outbuilding was occupied as a "*self contained unit*" [as per the title of the letter]. Implicit to such a finding is that the outbuilding had a kitchen and bathroom, and that the outbuilding was being used separately from the main dwelling at No 46. Whilst this is after the material date it is confirmation, if required, of the nature of the residency.

56. The Appellant's unchallenged claim is that he responded in a telephone call on 12 December 2011 to say he would be available from the middle of January 2012, but he never heard from the Officer and concluded that everything was satisfactory[46]. This is confirmed by the entry on that date on the complaint

[41] Appendix 8 to Mr Nam's proof of evidence, noting that it is signed "Kevin Seidel", which informs the spelling of his name in the remainder of my decision.
[42] Page 42 of the bundle appended to Ms Visagie's proof of evidence.
[43] Source of quote: second paragraph on page 47 of the bundle appended to Ms Visagie's proof of evidence.
[44] As at 22 January 2015 he still appears to be employed in Planning Enforcement at the Council, as is evident from his email of that date that formed part of the bundle of papers submitted with the appeal.
[45] It appears to have been pursuant to the complaint received on 31 October 2011.
[46] Page 27 of the bundle appended to Ms Visagie's proof of evidence.

record, which says that the Officer would contact Mr Robold in "*Feb 2012*"[47]. Noting that the next entry on the complaint record is 2-years later, in February 2014, the Council has not offered an explanation for the absence of a follow-up to the terms of the letter in 2011 and I consider this point further elsewhere.

57. From 30 April 2011 until November 2014, being the start of Mr Tsui's tenancy, the testimony of Mr Krzyzanowski and the Appellant also attest to Mr Seidel's continued occupation of the outbuilding. I have given reasons for attaching significant weight to Mr Krzyzanowski's testimony and I find no reason to doubt his affidavit insofar as it states that Mr Seidel lived in the outbuilding until he moved back to South Africa late in 2014. I have also found that it would be appropriate to give moderate weight to the Appellant's testimony and, as such, it is more likely than not that Mr Seidel did continue to reside in the outbuilding until November 2014 and that during those periods when Mr Seidel was out of the country that the Appellant lived there himself. Although Mr Krzyzanowski did not see who occupied the outbuilding there is no reason to doubt that he saw signs that the outbuilding was continuously occupied during that period.

58. My view on this is underlined by 2 further affidavits that are before the Inquiry. The first relevant affidavit is that of Mr Tsui, which says: "*I took over the Outhouse from the previous tenant, Kevin, who was moving back to his native South Africa*". On the balance of probability, noting that it broadly corroborates this aspect of the terms of Mr Krzyzanowski's affidavit, this is a reference to Kevin Seidel. The second affidavit, of Priya Shah[48], attests to her awareness since moving into No 46 on 1 April 2012: "…*that there was an Outhouse at the back of the garden which has always been let out as separate accommodation*".

59. From 1 November 2014 until the date of issue of the notice I consider that the tenancy and affidavit of Mr Tsui are clear that he occupied the outbuilding. There is no reason to doubt that the tenancy is genuine and I attach significant weight to the affidavit. Again, in closing, the Council suggests that Mr Nam has no knowledge of Mr Tsui or whether he even exists. However his existence was corroborated by Mr Krzyzanowski, who said in chief that Mr Tsui moved from the outbuilding into the main house in 2016, and so there can be no doubt that he exists. For completeness, whilst the tenancy of Danuta Strazdonika is dated 6 January 2016, which is after the date of issue of the notice subject of this appeal, there is no reason to doubt that it is genuine. It was clear from my inspection that the outbuilding is occupied and in the circumstances I attach significant weight to the current tenant's affidavit. For these reasons, the Appellant's case that the outbuilding has been continuously occupied since the material change of use, which occurred before the material date, is made out.

60. I acknowledge that the Council would normally expect to see evidence of rental income. The Appellant's explanation, that his bank statements do not identify where particular entries come from, is rather less than convincing. In my experience such entries normally contain some indication of their source, whether by reason of the name of the person or the account. It might have been better to put in redacted copies to identify all rental income to allow a view to be taken. Nevertheless I find this omission is not fatal to the claim.

61. Similarly I respect the fact that the Council would normally seek evidence from independent sources of information to corroborate the Appellant's version of events, including things like utility bills, Council Tax and the Register of Electors. Since the utility bills are shared with No 46 it is unlikely that these

[47] Page 63 of the bundle appended to Ms Visagie's proof of evidence.
[48] Appendix 15 to Mr Nam's proof of evidence.

would assist any understanding of the nature of the use of the outbuilding. The Appellant said the electoral roll was not his responsibility and thought the Council Tax was covered by that which was paid on the HMO at No 46. Taken together it would appear that these records do not exist or, to the extent that they might, might not support the claim the outbuilding is separately occupied. However again in my view the absence of such evidence is not conclusive and it would appear to have been open to the Council to refer to such public records as exist in support of any claim that this contradicted the Appellant's case.

62. In reaching this view I have also taken account of the Appellant's response to the PCN, other correspondence from him and to the telephone conversation with Ms Visagie in February 2014. However it is appropriate to attach greater weight to the Appellant's sworn testimony than the version of events stated by the Appellant in that correspondence. The Appellant says he was "*mistaken*" in his views which in my view extends up to and includes the correspondence with PINS dated 23 February 2016, in which he said he would appoint an advisor. I therefore turn to consider this correspondence under the second main issue.

Second main issue

63. The case of *Welwyn Hatfield v SSCLG & Beesley* [2011] UKSC 15 held that in appropriate cases the principle of public policy that a person should not benefit from their own wrong can preclude them from relying on section 171B(2) of the Act. Reflecting the analysis at paragraph 56 of *Welwyn Hatfield*, the Council identifies 4-tests, or a 4-stage process, the first of which is that there must be positive deception in matters integral to the planning process.

64. In my view regardless of whether I accept the Appellant's claim, that he made "*mistakes*" in filling out the PCN, or the Council's claim, that the Appellant lied, the result is that the Council was deceived by the Appellant's conduct. It issued the enforcement notice the subject of this appeal and thereafter prepared its Statement of Case and Ms Visagie's proof of evidence on the basis of an understanding of the use of the outbuilding that was largely, if not exclusively, derived from the Appellant's position both in response to the PCN and in other correspondence, including the telephone call with Ms Visagie.

65. When looking at the answers to the PCN, there are some answers which could be said to have been made in ignorance, e.g. the answer to question G that there were no cooking facilities. Mr Robold stated on oath that he did not appreciate that a microwave and hob were sufficient to constitute cooking facilities. That argument is maintained in the grounds of appeal[49], although there is reference in Ms Visagie's note of the conversation on 14 February 2014 to the existence of a kitchenette. The answer to question D of the PCN, that only Mr Robold lived there, might also be capable of explanation on the basis that he slept there himself and the question is silent as to date. Whilst I do not accept the submission that was made in closing for the Appellant that these constitute "*small*" mistakes I am prepared to accept that they are mistakes arising from a misunderstanding of what was being asked in the PCN.

66. However there are other answers to the PCN are more difficult to pass off as mere "*mistakes*". The Appellant said the answer to question I, about rent, was as a result of misreading the question, but the question does appear to be plain on its face. Insofar as question G asks about separate access to the outhouse it would also appear to be unambiguous even though the Appellant maintained that he did not understand the question and only subsequently, at the time of

[49] Page 27 of the bundle appended to Ms Visagie's proof of evidence, which was reproduced for this appeal.

the Inquiry, said he realised what it was talking about. Other answers, such as to questions C and F, that it was used as part of the HMO and shared facilities such as its kitchen, are more difficult to square with the factual matrix that has subsequently been presented during this Inquiry. Accordingly I am satisfied there has been positive deception in matters integral to the planning process because the Appellant undertook positive steps, in answering the PCN in the manner that he did, that deceived the LPA in its exercise of a planning function.

67. The second test is that the deception was directly intended to undermine the planning process. However the Appellant states in his affidavit: "*I was also not fully aware of how to fill out the Planning Contravention Notice and Appeal submissions as this was before I received professional advice*". In giving evidence on oath he consistently maintained that he did not understand the questions and said he had not lied. Although I have expressed reservations about certain answers to the PCN, on balance I am not satisfied the Appellant intended to undermine the planning process. There is no clear basis to go behind what the Appellant said in this respect on oath and hence the admitted "*mistakes*" should be seen as passive rather than deliberate deception. There is no evidence that the intention of the positive conduct was to deceive the LPA.

68. In this respect a clear contrast can be drawn with the decided court cases. In *Welwyn Hatfield* the "*cover story*" of the application for a hay barn was deliberately intended to deceive. Paragraph 37 of the judgment of Holgate J in *Jackson v SSCLG* [2015] EWHC 20 (Admin) reviews the Court of Appeal case of *Fidler* and says it found there was: "…*positive conduct intended to deceive*". In *Jackson* itself, paragraph 75 of the judgement identifies a strategy of deception aimed at giving the Council's Officers assurances that there was no intention to use the barn for residential purposes. Although I have been referred to the case of *Roger Leon v Hertsmere BC* [2016] P.A.D.21 this is an appeal decision, not a court judgement, and hence it is not of great assistance on this point.

69. The Council identifies the third test to be that the deception did undermine the planning process but I have given reasons for finding that the material change of use took place at the start of July 2009. This would mean that 4-years had elapsed before the PCN was even issued. The telephone conversation and the grounds of appeal pursuant to the first notice both post-date issue of the PCN.

70. Accordingly if the Appellant had not made "*mistakes*" on the PCN and had disclosed the information that is now set out in, and/or appended to, Mr Nam's proof of evidence, the planning process could have had a different outcome. The Council could have invited a lawful development certificate, as indeed it had in its letter dated 24 November 2011. For these reasons I am not satisfied that the third test is met either. The planning process was not undermined because the use of the outbuilding was already lawful prior to issue of the PCN.

71. In the circumstances the fourth test, which when fully articulated is that the wrong-doer would profit directly from the deception if the normal limitation period were to enable him to resist enforcement[50], is not met either. Indeed with some irony the answers to the PCN actually led the Council to think the 10-year rule applied, so that it could take enforcement action, and so it had the opposite effect. This tends to reinforce my view that the answers were given in ignorance rather than as part of a calculated or deliberate deception. As I have shown the 4-year period had elapsed prior to the issue of the PCN in 2014.

[50] Taken from paragraph 34 of the judgment of Holgate J in *Jackson v SSCLG* [2015] EWHC 20 (Admin).

72. In reaching the view that this is not a case in which all 4 features identified in *Welwyn Hatfield* are met in combination I have also noted the comments of Lord Mance JSC in paragraph 54 in which he said: "…*the four-year statutory periods must have been conceived as periods during which a planning authority would normally be expected to discover an unlawful building operation or use and after which the general interest in proper planning control should yield and the status quo prevail. Positive and deliberately misleading false statements by an owner successfully preventing discovery take the case outside that rationale*" [*my emphasis*]. However this is not a case where the Council was prevented from discovering the breach. The use of the building as a single dwellinghouse had already been 'discovered' by Mr MacPherson on 9 November 2011, following which he sought an application or required the use to cease.

73. For whatever reason, following the telephone conversation on 12 December 2011, the Council did not follow the matter up despite the note that endorses the Appellant's indication that the Council agreed to contact him. Moreover the penultimate paragraph of the letter itself signalled an intention to re-inspect in the New Year to confirm that the remedial action, namely cessation of the use as a separate dwelling and removal of the kitchen, had been undertaken. If the Council had followed this up it could, if no remedial action had been taken and/or no application had been made, have taken enforcement action. For this reason this is not a case in which positive and deliberately misleading false statements by an owner successfully prevented the discovery of the use.

74. On the second main issue I conclude that this is not a case in which the principle of public policy that a person should not benefit from their own wrong is invoked. To the contrary, the Council had every opportunity to discover the use within the requisite 4-year period and, moreover, did so. However beyond issue of the initial correspondence it did nothing about it and, in particular, did not follow up the requirement that the: "…*use of the outbuilding as a separate dwelling*" should cease within 28 days of the letter dated 24 November 2011. In those circumstances, in the words of Lord Mance JSC, the general interest in proper planning control should yield and the status quo prevail.

Overall conclusion on ground (d)

75. For the reasons identified, taking account of my finding on the second main issue that this is not a case in which the principle of public policy that a person should not benefit from their own wrong is invoked, I conclude overall that the Appellant has discharged the onus of proof to show that the use of the outbuilding as a single dwellinghouse commenced prior to the material date and has continued. In these circumstances I conclude that, at the time the notice was issued, it was too late to take enforcement action against the matters stated in the notice. In finding that the ground (d) appeal should succeed I have taken account of all other evidence that is before the Inquiry.

Conclusion

76. For the reasons given above, and having regard to all other matters raised, I conclude that the appeal should be allowed and I shall quash the corrected enforcement notice.

Pete Drew

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Anne Williams	Counsel.
She called:	
Bhoseok Nam BA (Hons), MA, MRTPI	Planning Consultant, MZA Planning.
Hayden Jepson	Builder.
Stan Krzyzanowski	Former tenant.
David Robold	Appellant.

FOR THE LOCAL PLANNING AUTHORITY:

Roderick Morton	Solicitor, Ivy Legal Ltd.
He called:	
Izindi Visagie	Partner, Ivy Legal Ltd.

Documents submitted at or following the Inquiry

1. Statement of Common ground submitted at the Inquiry.
2. Council's opening statement.
3. Appellant's opening statement including case of *Pertemps Investments Ltd v SSCLG and Solihull MBC* [2015] EWHC 2308 (Admin) and *North Wiltshire DC v SSE and Clover* (1993) 65 P & CR 137.
4. Appeal decision Ref APP/A5270/C/15/3140002.
5. Closing submissions on behalf of the Council.
6. *Lawson Builders Ltd v SSCLG and Wakefield MDC* [2013] EWHC 3368 (Admin) submitted by the Council.
7. Closing submissions on behalf of the Appellant.
8. *Jackson v SSCLG* [2015] EWHC 20 (Admin) submitted by the Appellant.
9. *Roger Leon v Hertsmere BC* [2016] P.A.D.21 submitted by the Appellant.
10. *Gravesham BC v SSE and O'Brien* [1983] JPL 307 submitted by the Appellant.
11. *Welwyn Hatfield BC v SSCLG and another* [2011] UKSC 15 submitted by the Appellant.
12. Letter dated 30 August 2016 from Ivy Legal Ltd to PINS.
13. Email dated 31 August 2016 from MZA Planning to PINS.