Neutral Citation Number:

Case No: CO/3862/2018

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**PLANNING COURT**

Date: 27 February 2019

**Before:**

**His Honour Judge Bird sitting as a Judge of this Court**

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**Between:**

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|---|---|
| **THE QUEEN ON THE APPLICATION OF RIZMEE SAMI** | **Appellant** |
| **- and -** | |
| **(1) THE SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT**<br>**(2) THE MAYOR AND BURGESSES OF THE LONDON BORUGH OF HAVERING** | **Respondents** |

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**Mr Anthony Jones** (instructed by UK law Solicitors) for the Appellant
**Mr Daniel Stedman Jones** (instructed by GLD) for the Secretary of State
**Mr David Matthias QC** (instructed by the Director of Legal and Governance) for the second Respondent

Hearing dates: 12 February 2019

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I direct that no transcript need be taken and that this copy of the judgment shall be treated as final

.....

**His Honour Judge Bird:**

1. This is an appeal brought under section 289(1) of the Town and Country Planning Act 1990 ("TCPA") against the decision of the Planning Inspector to dismiss a section 174 appeal brought by Ms Rizmee Sami against 2 enforcement notices issued by the first Respondent in respect of 2 adjoining plots of land on the eastern side of Benskins Lane, Noak Hill in Romford.

2. Noak Hill lies between junctions 27 and junction 28 of the M25. Benskins Lane runs perpendicular to the motorway, running roughly in a north-east, south-west direction. The enforcement notices (Notice A and Notice B), each dated 24 July 2017, relate to a thin strip of land running perpendicular to the lane.

3. Notice A covers the first two-thirds or so of the strip closest to the Lane, and notice B covers the remaining one-third. Notice A specifies 2 alleged breaches of planning control. First, the land has undergone an unauthorised change of use, now being used for the "storage of motor vehicles and dismantled vehicle parts and [for] undertaking vehicle repairs and the dismantling of motor vehicles" ("the Change of Use"). Secondly, a shed measuring 4.5m high, 10m wide and 12m deep has been built on the land ("the Operational Development"). Notice B specifies a single alleged breach of planning control, that is the Change of Use.

4. It is common ground between all parties that no steps may be taken to enforce the alleged Operational Development breach more than 4 years after building operations were substantially completed (section 171B(1) TCPA) and no steps may be taken to enforce the alleged Change of Use breach more than 10 years after the start of those activities (section 171B(3) TCPA).

5. Appeal 3182523 (in respect of Notice A) and appeal 3182540 (in respect of Notice B) were submitted electronically to the Planning Inspectorate on 18 August 2017. Ms Sami appealed each notice on the ground that enforcement action was barred section under section 171B, noting that the relevant dates were 24 July 2007 in respect of the Change of Use and 24 July 2013 in respect of the Operational Development.

6. Those appeals proceeded, at the request of the Appellant, by way of a written procedure. The relevant procedure is that specifically designed for enforcement appeals and set out in the Town and Country Planning (Enforcement) (Written Representations Procedure) (England) Regulations 2002/2683.

7. Insofar as relevant those regulations provide as follows:

> *7.— Representations*
>
> *(1) The notice of appeal, the documents accompanying it and any statement submitted under regulation 6 of the Enforcement Notices and Appeals Regulations shall comprise the appellant's representations in relation to the appeal.*
>
> ...
>
> *(3) If the appellant wishes to make any further representations to those in paragraph (1), he shall submit 2 copies of those further representations to the Secretary of State within 6 weeks of the starting date.*
>
> ...
>
> *(5) Any representations made to the Secretary of State under paragraphs (3) or (4) should be dated and submitted to the Secretary of State on the date they bear.*
>
> *(6) The Secretary of State shall, as soon as practicable after receipt, send a copy of any representations made to him by the local planning authority to the appellant and shall, subject to paragraph (7A), send a copy of any representations made to him by the appellant to the local planning authority.*
>
> *(7) The appellant and the local planning authority shall submit 2 copies of any comments they have on each other's representations to the Secretary of State within 9 weeks of the starting date; and the Secretary of State shall, as soon as practicable after receipt and subject to paragraph (7A), send a copy of these further comments to the other party.*

*(8) The Secretary of State may disregard further information from the appellant and the local planning authority which was not submitted within 9 weeks of the starting date unless that further information has been requested by him.*

*(9) Where a party to which this regulation applies elects to use electronic communications for submitting, sending, copying, or sending a copy of any representations, questionnaire or other document, this regulation shall have effect subject to the following modifications—*

*(a) where the party so electing is the appellant, in paragraphs (3) and (7) omit the words "2 copies of";*

*(b) where the party so electing is the local planning authority, in paragraphs (4) and (7) omit the words "2 copies of"*

8. Regulation 10 sets out the following:

*"10. – Decision on Appeal*

*(1) The Secretary of State may proceed to a decision on an appeal taking into account only such written representations as have been submitted within the relevant time limits*

*(2) ....*

*(3) In this Regulation "relevant time limits" means the time limits prescribed by these Regulations or, where the Secretary of State has exercised his power under regulation 9, any later time limit"*

9. Regulation 2, dealing with interpretation sets out the following:

*2. Interpretation*

*... (3) Paragraphs (4) to (7) apply where an electronic communication is used by a person for the purpose of fulfilling any requirement in regulations 4 to 8 of these Regulations that representations or other documents should be sent or submitted to any other person ("the recipient").*

*(4) The requirement shall be taken to be fulfilled where the document transmitted by means of the electronic communication is—*

*(a) capable of being accessed by the recipient,*

*(b) legible in all material respects, and*

*(c) sufficiently permanent to be used for subsequent reference.*

*(5) In paragraph [(4)], "legible in all material respects" means that the information contained in the document is available to the recipient to no lesser extent than it would be if sent or given by means of a document in printed form.*

*(6) Where the electronic communication is received by the recipient outside the recipient's business hours, it shall be taken to have been received on the next working day; and for this purpose "working day" means a day which is not a Saturday, Sunday, Bank Holiday or other public holiday.*

10. The Planning Inspectorate wrote to Ms Sami's solicitors on 26 January 2018 accepting that the appeal could proceed by way of the written procedure and setting out the key procedural steps in the appeal. The letter refers to the possibility of a site visit by the Inspector.

11. On 18 February 2018 the Appellant's solicitor sent to the Planning Inspectorate a letter with google map print outs as enclosures. The Letter was (as Mr Matthias QC who appeared for the Local Planning Authority put it) "frugal". Insofar as relevant the letter set out the following:

*"The Appellant's case is that the Site has been used for the purposes of a scrap metal yard and for the storage of scrap metal and cars for over 10 years...The Appellant relies on the photographic evidence which has been obtained from Google Earth which demonstrates that since at least 1999 the land in question has been used for these purposes....[a number of photos are then listed by reference to the year they were apparently taken].....In fact there is very little material change in the appearance of the site between 1999 and .... 2013. Thus since at least 1999, the material use the land has included its use as a scrap yard and storage yard. In the circumstances, the Appellant appeals against the enforcement notice and contends that the material use of the land had in fact changed and has been used since before 1999 as a scrap yard. The enforcement notices should therefore be dismissed"*

12. Whilst it is difficult to describe the photographs, the table below gives a sufficient description for the purposes of this judgment.

| Year | Notice A land | Notice B land | Comment |
|---|---|---|---|
| 1999 | Occupied and being used. Cars and industrial type units are visible. | No activity. The land comprises an open small field and a large pond | It is not possible to see what type of business is being carried on |
| 2006 | Activity appears to have intensified. | The open field has been covered over and subsumed into the activity going on on A. The pond remains in place. | |
| 2006 | Activity seems to be the same. | Part of the large pond has been filled in. No activity going on on the filled in pond. | |
| 2008 | Difficult to see if there is any change in the level of activity | The pond is filled in. There is no activity on the filled in pond area. | |
| 2010 | The photo is accepted to be the same as that produced as the first 2006 photo | | |
| 2010 | Difficult to see if there is any change in the level of activity | The pond is filled in. There is no activity on the filled in pond which has started to grass over. | |
| 2013 | Activity seems to have decreased substantially. Large parts of the site may have been cleared. | There is no activity and the grassing over is becoming more advanced | It was accepted in the course of submissions that there had been a lessening of activity in 2013 |

13. Although I accept for the purposes of this appeal that the letter and the photographs were sent, I also accept the written evidence of Eleanor Church of the Planning Inspectorate, that the letter was never received.

14. On 9 March 2018, the Local Planning Authority provided its appeal statements to the Inspector. Six google earth photographs were produced together with others taken on the ground. The table below describes the relevant photographs.

| Year | Notice A land | Notice B land | Comment |
|---|---|---|---|
| 2002 | Very little activity is shown on site | No activity | It is not possible to see what type of business is being carried on |
| 2007 | Activity has increased | The pond has been filled in | |
| 2010 | Activity seems to have increased again | No activity | |
| 2013 | Activity seems to have substantially decreased. | No activity | |
| 2016 | More activity but less than in 2010. | Same activity is continued over the length of this area and across approximately Half of its depth | |
| 2018 | Activity across the whole site seems to have intensified | | |

15. On 23 July 2018 the Inspector wrote fixing the site visit for 14 August 2018. It was made clear that the Inspector would expect a representative of the Appellant to be present. The visit took place on that date, but the Appellant was not present in person or through an agent.

16. The Inspector's decision on the appeal was dated 24 August 2018. The Inspector's conclusions, set out at paragraphs 13 to 16 of the decision, can be summarised as follows:

    a. Ms Sami asserted that the Change of use had been ongoing for more than 10 years. She advanced no evidence to support the assertion.

    b. Ms Sami said nothing about the Operational Development.

    c. The only evidence the Inspector had as to past use was in the form of "Google Earth" photographs from 2002, 2007, 2010, 2013 and 2016 produced by the Local Planning Authority. The Inspector formed the view that the images:

        > *"only cover a handful of moments in time, they do not offer a great deal of help insofar as the continuous nature of the uses question are concerned. Nor do they offer a cogent basis for concluding that the disputed structure had been substantially completed by 24 July 2013".*

    d. The Inspector noted "*the lack of evidence of any description, documentary or otherwise [produced by Ms Sami]*".

17. On 2 October 2018, the Appellant issued her Appellant's Notice seeking to appeal the decision of the Inspector. On 26 October 2018, Mr Robin Purchas QC, sitting as a Deputy

Judge granted permission to appeal at an oral hearing. The Deputy Judge had before him evidence from the Appellant's solicitor that in mid-February 2018, he had sent to the Planning Inspectorate, written submissions to the effect that an inspection would show that the site had been occupied for over 20 years and operated as a scrap yard and photographs (again from Google Earth) which "clearly show the operation of the scrap yard dating back to 1999".

18. The grounds of appeal are summarised in ground 2: the Secretary of State failed to operate a fair appeal process in which he considered (a) the evidence submitted by the Appellant and (b) all of the evidence available from the Site Inspection.

The issues

19. The Appellant argues that the written appeals procedure was procedurally unfair in particular because the Inspector failed to take account of all relevant evidence submitted. Mr Jones submitted there were 3 main issues to be resolved:

    a. Was the evidence "submitted" as required by the procedural regulations
    b. If so, was the evidence taken into account
    c. If the evidence was submitted but not considered, was the failure material.

20. Mr Jones raises a fourth point, namely that the Inspector failed to take account of matters that would have been obvious on the site inspection.

The First Issue

21. Mr Jones drew my attention to *Keevil v (1) The Secretary of State and (2) Bath and North East Somerset Council* [2012] EWHC 322 (Admin) in support of the submission that the Inspector's failure to take account of a relevant consideration might give rise to an appeal on a point of law under section 289 of the 1990 Act. I accept that submission.

22. I was also referred to *West v (1) the First Secretary of State and (2) Rochford DC* [2005] EWHC 729 (Admin) a decision of Mr Justice Richards as he then was. I was referred to paragraph 42:

> *"....the general rule is that it is incumbent on the parties to a planning appeal to place before the Inspector the material on which they rely. Where the written representations procedure is used, that means that they must produce such material as part of their written representations. The Inspector is entitled to reach his decision on the basis of the material put before him."*

23. Mr Jones submitted that the Appellant had done all she needed to do by posting the letter of 18 February 2018 and enclosing the google earth images. He pointed out that regulation 10 of the 2002 regulations does not make express reference to the need for evidence to be "received".

24. He referred to section 7 of the Interpretation Act 1978:

> *"Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post"*

25. Counsel for the Secretary of State submitted that the appeal should be dismissed. On the first issue it was submitted that it was incumbent on the Appellant to make sure that the relevant materials needed to decide the appeal were before the Inspector and that no support for the

Appellant's position could sensibly be found in Regulation 10 of the 2002 Regulations. He submitted that the Interpretation Act simply raised a presumption of service which could easily be rebutted where (as here) it was clear that the letter was not received.

26. Mr Matthias QC for the Local Planning Authority, took me to regulations 2, 7 and 10 of the 2002 Regulations and submitted that each supports the proposition that on the true interpretation of the Regulations, the relevant submissions need to be received, not merely sent. He referred me to a decision of Morgan J, *Calladine-Smith v Saveorder Limited* [2011] EWHC 2501 (Ch). The thrust of that decision is that the intended recipient of a letter will succeed in disapplying the deemed service of the letter if he establishes, on the balance of probabilities, that he did not receive it.

Discussion and conclusion on the first issue

27. The 2002 Regulations are a procedural code designed to regulate the manner in which appeals against enforcement notices (issued under section 172(1) of the 1990 Act or section 38 of the Planning (Listed Buildings and Conservation Areas) Act 1990) can be dealt with on written representations alone. The regulations aim to provide a fair and transparent procedure which gives all parties involved a degree of certainty about when written submissions are to be made and what the Inspector is entitled to take account when reaching his decision.

28. The basis of the appeal is that the Inspector failed to take account of the written representations set out in the letter dated 18 February 2018, and that that failure renders the process unfair. It follows that the meaning of "submitted" in regulation 10 is key to the outcome of the appeal.

29. Regulation 10 should be read (insofar as the language used permits) consistently with the overall aim and purpose of the regulation and in a way that means the regulations can be made to work in practice. If the Appellant's contentions are correct, it would mean that the Inspector ought to have taken account of written representations that had never reached him. It is difficult to see how such a construction is consistent with the overall aim and purpose of the regulation, and even more difficult to see how the regulations would work in practice if it was correct. The certainty of timing that regulations 7, 9 and in particular 10 seek to achieve would be lost.

30. It is impossible to see how the Inspector could take account of representations that have never reached him because (as here) they have been lost in the post. The only sensible way to read the word "submitted" in regulation 10 is to read it as "received by the Planning Inspectorate".

31. There is some support for a different meaning of "submit" in regulation 7. Although the point was not argued, regulation 7(5) requires further representations made to the Secretary of State to be dated "and submitted to the Secretary of State on the date they bear". Common sense suggests that the date to be put on the document is the date the document is sent, not the date that it is supposed it will be received. In regulation 7(5) therefore "submitted" can only mean "sent". It should also be noted (although the point was not raised in argument) that regulations 7(6) and (7) distinguish between submission and receipt.

32. Even if Mr Jones is right, so that the Appellant should to be taken to have complied with regulation 7 by putting the written representations in the post, it is not clear how that helps him. The Inspector cannot "take into account.....written representations" until they have been received. It follows that compliance with regulation 7 alone is, in the context of this appeal, of no practical relevance.

33. I do not see that section of the Interpretation Act 1978 assists the Appellant. It is clear from *Calladine-Smith* that the deemed fact of service is capable of being displaced by evidence that there was no service. There is such evidence here and all parties proceed on the agreed basis that the written representations were not received.

34. It follows that the inspector in deciding the Appellant's appeal acted in accordance with the regulations. As to the first issue, I am satisfied that the written representations dated 18 February 2018 were not "submitted" as required by regulation 10.

The second issue

35. The second issue does not arise. However, I am satisfied that the written submissions were not taken into account. As they were not "submitted" that fact does not assist the Appellant.

The third issue

36. If my conclusion on the first issue is wrong, so that the written representations were "submitted" as required by regulation 10, I should go on to consider if the written representations were material, or if the Inspector would in any event have reached the same decision.

37. The photographs which were posted to the Inspector on 18 February 2018 taken together with the contents of the covering letter, in my judgment add nothing to the matters the Inspector was considering.

38. The new photographs (like those considered by the Inspector) do not clearly show what activities were being carried on but do seem to show that activity only began on the Notice B Land in or about 2016. They also show (as do the photographs that were considered) that

activity on the Notice A land decreased substantially in 2013. The general point made by the Inspector in the decision that the photographs do not provide much assistance applies equally to the new photographs.

39. The new photographs (like those considered) do not – as the Inspector noted, "offer a cogent basis for concluding that the disputed structure had been substantially completed by 24 July 2013".

40. It follows that if I am wrong in my resolution of the first issue, that the new photographs and the written representations made in the covering letter would have been immaterial to the outcome of the appeal. In the absence of a narrative explanation from the Appellant about what the photographs show they are, broadly speaking, unhelpful.

The fourth point

41. In submission and his skeleton argument Mr Jones may have added to the grounds of appeal and argued that the Inspector had behaved irrationally by ignoring factors that were obvious on the site visit. Even if I were to look at that essentially new and unpleaded point, I am satisfied that there is nothing in it.

42. In order to make good the point it would have been necessary for the Appellant to explain to me what the Inspector saw but failed to take account of. In the absence of specific evidence on the point it seems to me it must fail.

Conclusion

43. In light of these conclusions I am satisfied that the appeal must be dismissed. The process of the appeal was fair and the Inspector took into account all written representations "submitted"

in accordance with regulation 10. In any event the additional representations were immaterial and would have made no difference to the outcome.

44. I will hand down judgment on a date to be arranged and am likely to do so in Manchester. If the parties can agree and order it should be submitted to me in agreed form as soon as possible. If there is an argument about costs the parties should attempt to agree how that should be dealt with.