Neutral Citation Number: [2017] EWCA Crim 924

Case No: 201605488 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SNARESBROOK CROWN COURT
H.H.J Sanders

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2017

Before :

LORD JUSTICE HAMBLEN
MRS JUSTICE CHEEMA-GRUBB OBE
and
HIS HONOUR JUDGE WAIT
(Sitting as a Judge of the CACD)

Between :

NUZHAT MIRZA	**Appellant**
- and -	
LONDON BOROUGH OF NEWHAM	**Respondent**

Mr S Jessop for the Appellant
Ms K Round for the **Respondent**

Hearing date : 21 June 2017

Approved Judgment

Lord Justice Hamblen :

Introduction

1. On 9 November 2016 in the Crown Court at Snaresbrook before H.H.J Sanders the appellant was convicted of breach of an enforcement notice contrary to section 179 (1) of the Town and Country Planning Act 1990 ("the Act") by an 11:1 majority. She was acquitted on count 1 in relation to a breach of an enforcement notice in respect of the same property.

2. She appeals against conviction by leave of the single judge.

The outline facts

3. The appellant is the owner of a property at 175 Shakespeare Crescent, Manor Park in East London ("the property"). She had owned the property since 2006. It is a two storey Victorian property with two rooms and a kitchen on the ground floor and two rooms on the first floor. The planning use for the property is as a residential dwelling for a single household.

4. In September 2012 Newham Borough Council ("the Council") became aware that there had been a material change of use in that the property had been divided into four self-contained flats. Each of the four parts had their own separate bathroom and kitchenette. On 28 February 2014 the planning department served upon the appellant an enforcement notice in respect of the property. The notice specified the steps which the appellant was required to take to remedy the breach of planning control. The steps were as follows:

(1) Cease the use of the property as self-contained flats;
(2) Remove from the property three of the four kitchens, plus all duplicate doorbells, signage, duplicate outside waste bins and any internal dividing doorways and internal partitioning;
(3) Remove from the property all but one supply of electricity, gas and water;
(4) Remove from the site all debris arising from compliance with requirements 1, 2 and 3

5. The notice took effect on 28 March 2014. The appellant was given until 28 August 2014 to carry out the necessary steps.

6. It was Mr Mirza's evidence at the trial that he completed the works required in March 2014 and that some time around then he contacted the Council's tax department seeking re-classification of the property as one dwelling, rather than four separate flats.

7. On 1 September 2014 the Council's planning department wrote to the appellant informing her that they wished to inspect the property to check whether the notice had been complied with. No reply was received and on 26 September 2014 the planning department sent a second letter stating that, as there had been no response to their first

letter, a visit would take place on 7 October 2014 to check whether there had been compliance with the enforcement notice.

8. No reply was received and the planning officers could not get inside the property to inspect it, when they visited as planned. As a result the Council's planning department sent the appellant a 'Final warning' letter on 8 October 2014, which explained that because their two previous letters had not been answered, and access into the property was not provided on the day they had said they would visit, the Council intended to execute a warrant to get inside on or about 30 October 2014.

9. In fact the Council decided not to apply for a warrant but planning officers were asked to make unannounced visits as they carried out their duties.

10. On 9 October 2014 Miss Andrea Ireland from the Council's tax department inspected the property and found that there was evidence that the house was still divided. The upstairs rooms had kitchen units and their own bathrooms, and the ground floor front room had its own kitchen sink and a small portable hob and partitioned bathroom. The officer did not see the ground floor rear room but it was known and not disputed that the ground floor rear had a full kitchen and a bathroom. The Council's tax department refused to refer the property for re-classification as a single dwelling on that basis.

11. On 20 October 2014 Miss Ireland made a second visit, this time with a council tax Valuation Officer. On inspection the kitchen units in the ground floor front room and in the two upstairs rooms had been removed.

12. The prosecution case on count 1 that there was a breach was based upon the evidence of Miss Ireland and her visits in October 2014 and their assertion that at that time there was a main kitchen to the rear of the property and a second kitchen in the ground floor front room, all the partitioned bathrooms were still present, and there were what she called 'fully fitted kitchen units'. In cross examination Mr Mirza agreed that the tiles in kitchen alcoves in the two upstairs rooms were not removed. The appellant was acquitted on this count.

13. As to count 2, on 26 November 2015 Miss Ireland visited the property again. She visited because council tax was not being paid and a tenant who had been made liable had submitted a Housing benefit claim form which appeared to be for a studio flat at the property, rather than for the whole house. Miss Ireland found that the property was being used and rented as four self-contained flats.

14. On 12 November 2015, on an unannounced visit, an officer of the Council's planning department, Mr Pavett, was given access by a tenant. He visited again on 26 January 2016. He found the property was being used and rented as four self-contained flats.

15. The prosecution case was that the appellant failed to cease using the property as self-contained flats. The requirement to cease using the property as self-contained flats is permanent. If therefore there was compliance initially but thereafter the property was used as self-contained flats it would still constitute an offence. The person whose actions or inactions fell to be considered were those of the appellant, not her husband.

16. The defence case was that the appellant had a defence under s.179(3) of the Act, namely that she had done everything that she could be expected to do to comply with

the Notice. In particular, she relied upon the evidence of her husband in respect of that defence in that she had delegated the task of the management of the property to him. She could do nothing about the breach because she did not know about it. It was accepted that at the time of the visits by Council officers in November 2015 the property was being used as four self-contained flats. Therefore the fact of a breach from this period, as reflected in count 2, was not in dispute.

17. The issue for the jury was whether the appellant had a valid defence under s. 179 (3) of the Act.

The evidence at trial

18. The prosecution evidence was as summarised above.

19. The appellant gave evidence. She confirmed that she was the owner of the property and that it had been purchased in 2006. However, she did not manage it nor any of her other four properties. Her husband was a very experienced landlord so she gave it to him to manage and virtually had no dealings with it. She trusted him and left all decisions in relation to the property to him. She knew it had been rented as a single dwelling but that was all she knew about it. When she received/saw the notice she gave it to her husband because it was his responsibility to manage the property's affairs. She owned other property but was not involved in any aspect of their management. Her husband told her that he would do whatever was needed to comply with the notice. He would organise the building work and take one kitchen away, remove the kitchen, remove the things what the council had told. Three weeks later he told her it had been done. He did not tell her what he had done. She did not go to check. The only piece of paper she had seen was the enforcement notice. She knew nothing about planning applications regarding use of the property as a house in multiple occupation and knew nothing about who was living there. She had not visited the property since about 2010 or 2011 when she visited her daughter who was living there at that time and did not know about visits from Council officers. She had received no other letters or documents about the property. She said that sometimes she opened post addressed to her, sometimes her husband. She had not seen any of the council's letters of 1 September, 26 September and knew nothing of their intention to visit on 7 October. She opened letters very little.

20. Mr Mirza gave evidence. He had been a landlord for 45 years and owned over a dozen properties. The property was rented out and he managed the property entirely in every way. His wife left all matters relating to the property for his sole attention.

21. His wife opened the letter about being prosecuted. Usually post is put on the table and if he gets a chance he opens it, or his wife opens it. More usually he opens it but his wife was very distressed about the prosecution and that is how he remembered that she possibly opened the letter. He does not normally show his wife letters about the property because she has left everything to him. He did not tell her about the planning decisions. He agreed he might show her a letter, such as the prosecution letter, just talking about his concerns, but said he would not show her things to ask her advice or seek her permission. He did not think he had shown her the enforcement notice letter. It was not important to him to do so because it was something he had to do, it was in his ability to do it, and he did not have any problem or worry about it. He did not remember discussing the enforcement notice with his wife, only the prosecution. He

thought that she knew about the builders going in because she was in the house and may have heard him on the phone. He did not need her approval or permission. He just got on with it and she trusted him to have done everything.

22. He had received the enforcement notice. It was addressed to his wife but he always opened the letters. He immediately wanted to comply with it. He had had enough of paying for architects and not getting anywhere. He asked the builder to do what was necessary and gave him a copy of the notice and explained he wanted him to remove the three kitchenettes, the cooking facility, the partitioning, remove the use of the house as separate flats and to put it all into one use. After one or two weeks he visited and was satisfied all the partitioning, the kitchen units and everything was removed but the plastering and painting had to be made good. He produced a receipt for the work which was shown to the jury as exhibit 6. Then on 4 April 2014 he came back on the last day of work and everything was completed to the letter. In cross examination he explained that he had not removed the tiles from the kitchen alcoves upstairs as they were not part of the notice, there was no reason to do so.

23. Mr Mirza then let the property to a Mr Shrenaith and family. He said that in October 2014 he had a call from the Council saying that they wanted to inspect the property and Mr Mirza asked the introducing agent to attend with the tenant. He supposed it was the planning authority as he did not know if there was much difference between them and the Council. He did not go to the meeting himself. He was told that everything was ok. In cross examination he said that the agent was Mr Anthony Paris and there was no particular reason that he did not go with Mr Paris to the inspection. He denied knowing that Miss Ireland had said that there were still kitchen units upstairs and a sink, fridge and a portable stove in the downstairs front room. He said it would not make sense for him to invite the Council to inspect if he had kitchen units in there. He said that he had left the visit for Mr Anthony to deal with and guessed everything was ok.

24. Mr Mirza said that he did not reply to the Council's planning department letters of 1 September 2014, 26 September 2016 or 8 October 2016 as he had not seen any of those three letters.

25. In March 2015 he was advised that he could get a better rent if he did the garden, updated the paint, put in new beds, things like that. He did the work straight away. Whilst doing the outside painting he was approached by a man who asked if he would let the property to him. It was Mr Sheikh. He entered into a tenancy agreement with Mr Sheikh. A meeting was held at his office and before entering into the agreement Mr Mirza was satisfied by what he saw of the office, and by what he was told at that meeting, that Mr Sheikh was reputable and was genuinely interested in renting the property for himself and his family. Mr Sheikh gave him ID in the form of a driving licence, but his best ID was his office. However, in November 2015, Mr Mirza was shocked to receive a letter from the Council saying the property was being rented out as separate flats. The letter was sent to his wife who handed it over for him to deal with. He immediately contacted the Council and also sought advice from his solicitor. He then 'hounded' Mr Sheikh. He served a s.21 notice requiring possession of the property from Mr Sheikh and Mr Sheikh gave up possession and gave the keys back to him on 4 May 2016. He became aware that Mr Sheikh had tried to evict one of the sub-tenants and Mr Mirza helped her report the matter to the police.

26. He also gave evidence that he later discovered that Mr Sheikh appeared to be connected to a letting agency, Chambers Lettings, who apparently were known to the authorities for their involvement in sub-letting properties unbeknown to the landlord.

27. He was aware there was a right of appeal against the notice but he did not exercise it because by that stage he had 'had enough'.

Ruling on admissibility of Mr Mirza's evidence

28. At the conclusion of the defence case the judge asked to speak to both counsel in the absence of the jury. He stated that in his view the evidence of Mr Mirza concerning what he did in 2015 with regards to the renting and management of the property, including evidence of steps he took to verify who the tenant was, visit the tenant, and take action once he knew of the breach of the notice, was inadmissible.

29. A discussion then took place between the judge and counsel as to the issues facing the jury in respect of count 1, where the breach was not admitted, and count 2, where it was.

30. In relation to count 1 the judge concluded that Mr Mirza's evidence was relevant to the issue of whether there was a breach but that it was not relevant to the defence under s.179(3) for either count one and/or to count 2. The appellant was the registered owner. There was no suggestion that the evidence was insufficient for the jury to come to reach a conclusion of failure to comply with count 2.

31. In the context of this case, the appellant's evidence in effect was that she left everything to her husband. Her decision was not based on how well or how badly he actually carried out the instructions because she did not know this. She only knew what she was told.

The grounds of appeal

32. The grounds of appeal are that the judge erred in directing the jury that they could not consider the evidence of Mr Mirza in relation to the appellant's defence under s.179(3) and that the conviction is accordingly unsafe.

33. Section 179 of the Act provides as follows:

> "179(1) Where, at any time after the end of the period for compliance with an enforcement notice, any step required by the notice to be taken has not been taken or any activity required by the notice to cease is being carried on, the person who is then the owner of the land is in breach of the notice.
>
> (2) Where the owner of the land is in breach of an enforcement notice he shall be guilty of an offence.
>
> (3) In proceedings against any person for an offence under subsection (2), it shall be a defence for him to show that he did everything he could be expected to do to secure compliance with the notice.

> (4) A person who has control of or an interest in the land to which an enforcement notice relates (other than the owner) must not carry on any activity which is required by the notice to cease or cause or permit such an activity to be carried on.
>
> (5) A person who, at any time after the end of the period for compliance with the notice, contravenes subsection (4) shall be guilty of an offence.
>
> (6) An offence under subsection (2) or (5) may be charged by reference to any day or longer period of time and a person may be convicted for a second or subsequent offence under the subsection in question by reference to any period of time following the preceding conviction for such an offence.
>
> (7) Where –
>
> (a) a person charged with an offence under this section has not been served with a copy of the enforcement notice; and
>
> (b) the notice is not contained in the appropriate register kept under section 188.
>
> it shall be a defence for him to show that he was not aware of the existence of the notice.
>
> ...."

34. Section 179 creates two criminal offences: one in respect of the owner of the land (s.179(1)(2)) and one in relation to a person who has control of or an interest in the land (s.179(3)(4)). It is an offence of strict liability subject only to the statutory defences set out in s.179.

35. Under s.179(7) there is a statutory defence to both subsection (2) and subsection (5) charges where the person charged has not been served with a copy of the enforcement notice and the notice is not contained in the appropriate register kept under s.188.

36. Under s.179(3) there is a further statutory defence to the owner offence.

37. The defence is not available to an owner who had the power to comply with the notice without the assistance of others. As stated by Hobhouse LJ in the judgment of the Court of Appeal in *R v Beard* [1997] 1 PLR 64 at 71:

> ". . . subsection (3) uses the words "everything he could be expected to do to secure compliance" (our emphasis). The argument of the Appellant ignores these words and their necessary implication that the owner is having to secure that someone else comply with, or assist in the compliance with, the notice. "

38. As made clear in the same case "everything he could be expected to do" should be read as "everything he could reasonably be expected to do" – see *R v Beard* at p72: *R v David Wood* [2001] EWCA Crim 1395 at [11].

39. As explained by Hobhouse LJ in *R v Beard* at p72:

> "We consider that the submissions made on behalf of the prosecution are correct. The meaning of section 179 is clear and unambiguous. Where it is within the power of the owner of the land to comply with the notice without the assistance of others, no question of a defence under subsection (3) arises. Before a defence can arise under that subsection, the owner must show that compliance with the notice is not within his own unaided powers, otherwise no question of his having to secure compliance with the notice can arise. Thus, if there are other persons in occupation of the land, it is enough if he has done everything he could reasonably be expected to do to secure that they comply with the notice. If compliance would require, for example, some engineering work and the owner is not himself able to do that work and does not have the resources to employ another to do it, he will have a defence if he can show that he did everything he could reasonably be expected to do to secure compliance with the notice. These examples suffice to illustrate the application of subsection (3)."

40. "Everything he could reasonably be expected to do" involves an objective criterion of reasonableness. It may take into account the owner's personal circumstances – see *Kent County Council v Brockman* [1996] PLR 1. It is a higher burden than reasonable excuse – see *R v Basildon Crown Court Ex P. Cooper* [unreported] per Blofeld J at [27].

41. It follows that the defence under s.179 (3) has two stages: (1) is it within the owner's power to comply with the notice without the assistance of others? If "yes" then the owner has to do so and no defence of doing everything the owner could reasonably be expected to do arises. If "no", then (2) has the owner shown on a balance of probabilities that he did everything he could be expected to do to secure compliance with the notice. It follows that an inability or incapacity for the owner to comply with the notice unaided is not the end of the defence, rather it is the gateway to the defence.

42. In the present case it was accepted by the Crown that the appellant could not comply with the notice unaided or without the assistance of others. The appellant's argument that it was only through admitting the evidence of Mrs Mirza's husband that she could show that compliance was outside her power unaided therefore misses the point. In the light of the Crown's concession this was not an issue which arose.

43. In those circumstances, the relevant question for the jury was whether she could show on the balance of probabilities that she had done everything she could reasonably be expected to do to secure compliance with the notice. As the judge correctly put it in his directions:

> "In this case, if you were sure that there had been non-compliance with the notice then it would be a defence for Mrs Mirza to prove that she had done everything that could reasonably be expected of her to secure compliance with the notice. The burden of proving this is on Mrs Mirza. However where a defendant has to prove something she does not have to make you sure of it. She only has to show that it is more likely than not. So if your view is that Mrs Mirza has shown that it is more likely than not that she had done everything she could be reasonably be expected to do to secure compliance with the notice then you would find her not guilty on the count you are considering."

44. The issue which arises on the appeal is whether the judge was correct to rule and then direct the jury that in considering that question the jury was to focus on what Mrs Mirza knew and did.

45. It is submitted that he was wrong so to do because it meant ignoring the evidence of Mr Mirza as to what he had known and done. It meant that the jury were not to have regard to the evidence of Mr Mirza, such as: his evidence about the tenancy agreement; the fact that the property was rented to Mr Sheikh as a single dwelling; the proof of the rent going into Mr Mirza's bank account in support of this issue; the evidence of his due diligence checks including a copy of an identity document in the name of Mr Sheikh; evidence of the premises being sub-let to another company called Chambers Lettings (known to the Crown to have been so involved with separate unconnected properties in the borough); evidence of Mr Mirza becoming aware of the sub-letting and his evidence of what he did to then evict Mr Sheikh and comply with the notice.

46. It is submitted that in order to determine whether the appellant had done all she reasonably could be expected to do to comply with the notice it was necessary to consider why her husband, to whom she had delegated the task, was allegedly unable to secure compliance. The jury were, however, excluded from considering this evidence.

47. It is pointed out that if Mrs Mirza had managed the property herself and had carried out the due diligence checks, given evidence that she had been duped by the tenant and that she then had taken steps to evict him, there is no doubt that this evidence would have been ruled to be relevant and admissible. However, on the judge's approach the same evidence would not be relevant or admissible where the owner had delegated responsibility to someone else and where she (the owner) did not know what steps had been taken by the delegated person. That was an incorrect approach and meant that the jury would not have had regard to all the relevant circumstances.

48. The reason that the judge ruled that this evidence was not admissible in the present case was twofold. First, it had no relevance to the reasonableness of her decision to entrust the management of the property and compliance with the notice to her husband because it post-dated that decision. Secondly, she had no knowledge of what her husband had done because she did not ask him and he did not tell her.

49. This was an unusual case because of the very limited role and knowledge of the appellant in relation to compliance with the notice. As set out in the summing up the evidence of the appellant was as follows:

> "He told me that he would do whatever was needed, and that he would organise building work. He said he was going to comply with the notice, and he told me that he'd done it. He said he would get rid of the kitchens and the things that the councils wanted. I don't get involved in any of our other properties. Sometimes I open the mail, and sometimes my husband does as well. The reason I gave it to my husband is because he will do all that is required. He is better than me and he knows all these things. He told me about three weeks after the notice that he'd done the works. I didn't check, but he told me he'd checked. The only piece of paper I saw was the enforcement notice. I didn't know anything about the proceedings about the house in multiple occupation. My husband did that. I didn't know anything about who was living in my property. My husband deals with all of it. I hadn't visited since my daughter was living there in about 2010 or 2011. I didn't know about the council tax visit in October 2014". She said, "I don't know things. All I did was to give the notice to my husband and I never checked what he has done". She said, "As far as anything about 173 was concerned, my husband deals with everything".

50. In summary, although it was her property her husband took full responsibility for managing it; she was aware of the notice issued in 2014; her husband took responsibility for dealing with it; he was an experienced landlord and she trusted him; he told her (not long afterwards) that he had dealt with the notice. She did and asked no more. In particular, she denied any knowledge of the circumstances of the letting of the property to Mr Sheikh in 2015 and her husband's involvement with the property including his eventual eviction proceedings.

51. In these somewhat unusual circumstances in our judgment the judge was correct to direct the jury to focus on what the appellant did or did not do. She had no knowledge beyond that. The duty to comply rested on her as the owner of the property. She knew nothing about what had or had not been done to comply with the notice. She left everything to her husband. In those circumstances all she could rely upon to show that she had done all that could reasonably be expected of her to secure compliance with the notice was the reasonableness of her decision to entrust everything to her husband because that was all she had done and she knew nothing further.

52. It is submitted that it was unfortunate that the jury were left in the position of having heard a good deal of evidence from Mr Mirza that was irrelevant to the issue which they had to decide. That may be so but no application was made to discharge the jury and this is not pursued as a separate ground of appeal. It is not submitted that the hearing of this evidence could or would have prevented the jury from deciding the case in accordance with the directions given to them or otherwise been prejudicial to the appellant.

Conclusion

53. For the reasons outlined above we dismiss the appeal.