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Case No: CO/4186/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2021

Before :

THE HON. MR JUSTICE HOLGATE

Between :

The Queen on the application of ZOE DAWES	**Claimant**
- and -	
BIRMINGHAM CITY COUNCIL	**Defendant**

- -
- -

Simon Bell (instructed by **Direct Access**) for the **Claimant**
Admas Habteslasie (instructed by **The Civil Litigation Team Legal and Governance Department**) for the **Defendant**

Hearing date: 18th May 2021
- -

Approved Judgment

Covid-19 Protocol: This judgment will be handed down remotely by circulation to the parties or their representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down will be deemed to be 10:30 am on 21 June 2021.

Mr Justice Holgate:

Introduction

1. The claimant, Zoe Dawes, challenges by way of judicial review, a general vesting declaration ("GVD") executed by the defendant, Birmingham City Council ("BCC"), on 13 August 2020 to vest in the Council her property 133, Wyatt Road, Sutton Coldfield B75 7ND.

2. The GVD was made pursuant to s.4 of the Compulsory Purchase (Vesting Declarations) Act 1981 ("the 1981 Act"). The 1981 Act applies to any Minister or public or local authority authorised to acquire land by means of a compulsory purchase order ("CPO") (s.1). Such an authority is referred to as an "acquiring authority" (s.2). By s.4 an acquiring authority may execute a GVD in respect of any land they are authorised to acquire, vesting that land in themselves not les than 3 months after the notification of that declaration to occupiers and other persons in accordance with s.6.

3. Section 8 of the 1981 Act provides that on the vesting date the land specified in the GVD, together with the right to enter upon and take possession of it, vests in the acquiring authority. Although the operation of this provision is not dependent upon the vesting of ownership being registered at the Land Registry, Mr. Habteslasie, who appeared on behalf of BCC, stated that, because of the current proceedings, no change had yet been made to the registered title to the property.

4. The GVD process is an alternative to the notice to treat procedure under s.5 of the Compulsory Purchase Act 1965. Where land has become vested in an acquiring authority under s.8, the authority is liable to pay compensation assessed in accordance with the compensation code, just as if they had served a notice of entry following a notice to treat under the 1965 Act.

5. The relevant CPO is the Birmingham City Council (Acocks Green, Hodge Hill, Handsworth, Kings Heath, Selly Oak, Yardley, Moseley, Tyseley and Sutton Coldfield) (Empty Properties) Part II Housing Act 1985 Compulsory Purchase Order (No. 13) 2018 ("the CPO"). The order was sealed by BCC on 26 June 2018 and submitted to the Secretary of State for Housing, Communities and Local Government for confirmation under the Acquisition of Land Act 1981. The order was confirmed on 26 April 2019. BCC published the first notice of the order having been confirmed on 4 June 2019, so the 6-week time limit for making a legal challenge to the CPO under s.23 of the Acquisition of Land Act 1981 expired on 18 July 2019. From then on, the CPO itself was no longer liable to be challenged in any legal proceedings.

6. The CPO was made under s.17 of the Housing Act 1985 "for the purposes of providing housing accommodation in accordance with the provisions of Part II of the …. Act" Section 17(1)(b) authorises the acquisition of houses for the purpose of providing housing accommodation. This power is often used in relation to dwellings which have been unoccupied for a substantial period of time and have not been properly maintained. In such cases expropriation is said to be necessary so that the acquiring authority can ensure that remedial works are carried out and the property is occupied, thereby helping to increase the housing stock for the area. This is all the more important where there is a substantial shortage of housing for people in need.

7. The CPO was made in respect of 12 properties, two of which belonged to the claimant, 133 and 135, Wyatt Road. On 5 September 2019 BCC executed a separate GVD in relation to 135 Wyatt Road. That GVD has not been challenged and has taken effect.

The background to the CPO

8. BCC adopted its Private Sector Empty Property Strategy 2013-2018. The Foreword referred to the acute housing shortage in the City. It was estimated that there were 7,700 empty homes in the private sector in the City and a high need for affordable housing. Empty homes represent a wasted resource. They also have an adverse social and economic effect on those who live in the vicinity.

9. BCC's policy involves an incremental approach. The Council may begin by contacting an owner to offer advice and assistance. Enforcement action is considered as a last resort. Page 6 states that where "owners cannot be traced or are unwilling to bring their property back into use, the Council can seek to compulsory purchase (sic) a property and then sell it on the open market."

10. In 2003 the claimant acquired the freeholds of 133 and 135 Wyatt Road as investment properties. In May 2015 BCC received a complaint from neighbours that number 133 had been empty for many years and the front garden had become so overgrown as to prevent access to the front door. An officer visited the property that month and noted its poor condition.

11. On 26 May 2015 BCC served a notice under s.215 of the Town and Country Planning Act 1990 requiring the front garden to be cleared of rubbish and vegetation. The claimant contacted the authority indicating that she wished to appeal against the notice, without indicating why. However, no appeal was made to the Magistrates' Court and the time limit expired. The works required by the notice were completed at some time between 31 July and 10 August 2015.

12. On 26 November 2015 BCC wrote to the claimant's father who was involved in the management of the property, at least to some extent with the claimant's approval,. BCC referred to its Empty Property Strategy and advised that the property needed to be bought back into full residential occupation. The email stated that because the property (along with No 135) had been empty for a considerable length of time, the officer would be presenting a report to committee to obtain authority to buy it on a voluntary or compulsory basis.

13. On 20 July 2016 BCC wrote to the claimant stating that the property had continued to be neglected and that authority had been given to begin the process for compulsory purchase. In fact, BCC's cabinet authorised that action at its meeting the following day. That prompted the claimant to express her concerns to BCC about facing the risk of compulsory purchase and to ask them to contact her father, who was dealing with various works to the property. BCC responded on 27 July 2016 making it clear that any compulsory purchase action would only cease when both properties were fully renovated and bought back into "full-time residential use."

14. On 23 June 2017 the claimant's father sent an email to BCC stating that the claimant had decided to rent out Number 133. BCC visited the property on 16 August 2017. Neighbours said that it had been vacant for many years and remained so. On 13

February 2018 the claimant's father emailed BCC to say that roofing works, which had proved to be more extensive than originally planned, had yet to be completed.

15. According to the chronology provided by the parties, nothing then happened until the CPO was sealed on 26 June 2018. A copy of the CPO was sent to the claimant two days later together with a statement giving BCC's reasons for having made the order. The claimant was also told that any objection to the CPO would have to be made by 26 July 2018. A public local inquiry would be held to consider any objections received. On 10 August 2018 an objection letter signed by both the claimant and her father was sent referring to the health and financial problems they had been suffering. It stated that the claimant lived in Number 133 and her father lived in Number 135, and that works had been carried out. The letter was accepted out of time.

16. BCC organised site meetings to be held on 18 September, 26 September, 3 October and 10 October 2018 (the last one to enable the claimant's independent surveyor to attend). Someone on the claimant's side cancelled each of those meetings. However, eventually on 3 November 2018 BCC was able to inspect the house. BCC merely observed that the property was empty and appeared not to have been lived in for many years.

17. On 4 January 2019 BCC delivered a draft "mutual undertaking" to the claimant at the property. This practice has been followed by acquiring authorities over many years to ensure that unoccupied residential properties in poor condition are brought into proper use without the authority having to use the powers of compulsory purchase it obtains (see, for example, *Riddle v Secretary of State for the Environment* [1998] 2 EGLR 17; *Singh v Secretary of State for the Environment* (unreported) Court of Appeal 1 January 1989).

18. The document provided that the claimant would withdraw her objection to the CPO, so that the order would be confirmed by the Secretary of State in relation to Number 133. In return BCC gave an undertaking that they would not acquire the property under the confirmed CPO unless the claimant failed to comply fully with any one of the following undertakings by the dates specified:-

> "1. By 30th April 2019 the Properties will be repaired, renovated and/or improved to a good and habitable standard to the reasonable satisfaction of the officers of the Housing Department of Birmingham City Council and will be kept at that standard. The decision of the officers will be final.
>
> 2. Not to sell the Properties before completion of paragraph 1 above unless otherwise agreed by the officers of the Council.
>
> 3. By 30th April 2019, the Properties will either (a) be placed on the market with at least one reputable estate agent for either sale or for rent (for a minimum period of 6 months) at arm's length and will remain for sale or rent until successfully sold or rented, or (b) if either one of the Properties is permanently occupied by Zoe Stephanie Pat Dawes as her sole or main residence the remaining Property will be placed on the market with at least one reputable estate agent for either sale or for rent (for a minimum

> period of 6 months) at arm's length and will remain for sale or rent until successfully sold or rented.
>
> 4. Following compliance with either paragraph 3(a) or 3(b) above, to complete the sale or rental of the Properties/Property (as applicable) by 28th June 2019 unless a longer period is agreed by the Council (acting reasonably)."

19. It is important to note that these four undertakings, like BCC's Empty Property Strategy, had two important objectives. One was to ensure that the property was brought back into use as a dwelling. But that alone would not suffice. The condition of the property also had to be brought up to "a good and habitable standard." The reason for this is obvious. The sustainable use of the property as a dwelling would depend upon it being habitable. Otherwise, any re-occupation of the property would be likely to be short term. A dwelling can only make a proper contribution to the housing stock if it is in a good and habitable condition, rather than substandard.

20. On 24th January 2019 the claimant's father returned the mutual undertakings document to BCC, purporting to bear the signature of the claimant dated 16 January 2019. The document was signed by BCC on 11 March 2019 and sent to the Planning Inspectorate.

21. It appears that there were no relevant objections outstanding so as to necessitate the holding of an inquiry. On 28 April 2019 the Secretary of State issued a decision letter confirming the CPO. Paragraph 2 of the letter noted that the claimant had withdrawn her objection on the basis of the mutual undertakings.

22. On 3 June 2019 notice of the confirmation of the CPO was sent to the property. A meeting took place on 25 June 2019 between the claimant and BCC officers at the authority's offices. At the meeting the claimant was shown the mutual undertakings document. Her response was that she had never seen it before and had not signed it. She had been surprised to receive the notice of confirmation of the CPO because she had been expecting her objection to be presented at a public inquiry. The claimant even went so far as to obtain a report from a handwriting expert expressing the opinion that the signature on the undertakings document was not hers.

23. It is unnecessary for the court to resolve this factual issue. The Secretary of State acted on the basis that the signed undertakings he had received were genuine. In paragraph 14 of her first witness statement the claimant plainly says that before the meeting with BCC on 25 June 2019 she had received their letter dated 3 June 2019. She had therefore seen the Secretary of State's letter confirming the CPO, with its reference to the undertaking and the withdrawal of her objection. The claimant had the opportunity to bring a legal challenge under the Acquisition of Land Act 1981 to the compulsory acquisition of Number 133 on the grounds that she had not signed the document and had not withdrawn her objection. But no such claim was made before the expiry of the statutory time limit for such a challenge.

24. The upshot is that whether or not the mutual undertaking was signed by the claimant, the power of compulsory purchase conferred by the CPO is immune from legal challenge and the issue about the undertaking cannot be raised collaterally to challenge the GVD. Indeed, the claimant, rightly, does not seek to do so. In any event, assuming that the undertaking was a genuine, valid document, the time limits in the "claimant's

undertakings" expired by either 30th April 2019 or 28 June 2019 and so the document would have long ceased to operate as a constraint on BCC's exercise of its powers under the CPO.

25. What is important for the purposes of the legal challenge to the GVD is that BCC continued to apply the approach in the mutual undertakings document to the exercise of its discretion on whether to use its powers to acquire Number 133 compulsorily. On two occasions BCC wrote to the claimant setting a time limit for her to (a) bring the property into a "reasonable state for occupation" or a "habitable condition" and (b) secure the occupation of the property as the sole residence of an occupier. BCC said that it would make a general vesting declaration immediately if the claimant failed to satisfy either requirement within the time stipulated. Plainly, this correspondence implied that if BCC should decide that both conditions were satisfied, then it would not execute a vesting declaration. Otherwise the correspondence setting time limits for compliance with those two conditions would have been pointless. BCC might just as well have executed a general vesting declaration at any time without any prior warning. But, not surprisingly for a case of this kind, BCC pursued a more reasonable course.

The claimant's personal circumstances

26. At various times the claimant has drawn to the attention of BCC's officers the health problems which both she and her son face. For example, at the meeting on 25 June 2019 the claimant told BCC that her son, aged 11, suffered from autism and dyspraxia. She also explained to the authority the additional responsibilities that she has to bear as a single parent coping with the effects of these conditions, including the provision of schooling at home. This has made it more difficult for the claimant to find time to address other issues, such as the condition of 133, Wyatt Road.

27. In an email to BCC on 23 September 2019 the claimant referred to having been diagnosed with PTSD and prescribed anti-depressants. That diagnosis goes back to at least September 2013 when a report was prepared by a consultant psychiatrist, Dr Salwa Khalil. The report stated that at that stage she was finding it difficult to cope with everyday life, being unable to focus on tasks and lacking energy. Paragraph 4.3 of the report opined that "enduring personality changes secondary to an untreated post-traumatic stress disorder is the most likely explanation for her social withdrawal" and it was thought unlikely at that stage that she would "improve or resume her pre-morbid level of functioning" (para. 4.6). The claimant says that she provided a copy of that report to BCC in earlier proceedings. BCC has not been able to confirm or deny that.

28. In any event, BCC's officers have taken the claimant's difficulties seriously and been prepared to make allowances for them. But I do not detect in the documentation any judgment on the part of BCC that those difficulties were such that the claimant was thought to be incapable of satisfying the conditions set by the authority within a reasonable timescale. Once again, if that had been the thinking, taking into account the previous dealings which BCC had had with the claimant, there would have been no point in laying down those conditions.

29. I also note that the claimant told BCC that from September 2019 onwards she was awaiting investigation for other medical issues which had placed her under additional pressure and strain.

30. At the meeting on 25 June 2019 the claimant also told BCC that she had received an eviction notice in relation to her rented accommodation, because her landlady wished to sell the property. Initially the claimant said to the authority that the notice would take effect some three weeks later and that it was therefore important for her to be able to live in one of the two properties. Once Number 135 became vested in the authority, this left Number 133 as the only option.

31. The claimant says that she carried on renovating Number 133 so that she could move in there with her son. She says that she did in fact move into the property on 1 July 2020. The elasticity of the eviction notice served in June 2019 is said to be explained by the landlady's willingness to be flexible about when it would in fact take effect, to allow the claimant to complete necessary works on Number 133.

32. BCC does not accept all of the points made by the claimant. Some are positively disputed. For example, BCC produces evidence which, they say, suggests that the claimant was still living in her rented accommodation some weeks after 1 July 2020, and was not occupying Number 133. Much of the material produced on both sides is directed to issues of this kind, ignoring the long-established principle that judicial review is an inappropriate means of resolving such factual disputes. Rightly, no one suggests that these are matters of jurisdictional fact. They are therefore irrelevant to the only issue with which this court is concerned, namely whether there is a legal basis for impugning the execution of the vesting declaration on 13 August 2020.

A summary of the grounds of challenge

33. On 17 March 2021 Steyn J made an order in which she refused to grant permission to apply for judicial review on grounds 1 to 3. She granted permission to proceed on ground 4 and to amend the Statement of Facts and Grounds so as to raise a breach of the "Tameside duty" to make reasonable enquiries as ground 5 and a breach of the claimant's rights under article 8 of the ECHR as ground 6.

34. During the hearing the parties agreed that grounds 4 and 6 are dependent on whether the claimant can succeed under ground 5. This challenge now raises three grounds which it is appropriate to consider in the following order:-

> *Ground 5*
> When BCC executed the GVD it acted in breach of a *Tameside* duty to make reasonable inquiries beforehand to ascertain the condition of the property and whether it was in occupation or being marketed for occupation;
> *Ground 4*
> BCC failed to consider the Public Sector Equality Duty ("PSED") in s.149 of the Equality Act 2010;
> *Ground 6*
> BCC failed to assess whether the GVD would breach the article 8 rights of herself and her son.

Legal principles for a challenge to a general vesting declaration

35. Because of a possibility that the issues raised by this case might have had wider implications for challenges to compulsory acquisition more generally, whether pursued

through a general vesting declaration or by the service of notices to treat and to enter, the court invited submissions from the Secretary of State for Housing, Communities and Local Government. The Government Legal Department helpfully provided written submissions in a letter dated 11 May 2021. The claimant and the defendant took no issue with those submissions.

36. In principle, an acquiring authority's decision to exercise its powers of compulsory purchase, whether by the notice to treat route or by executing a general vesting declaration, is amenable to judicial review. The authority may only implement the CPO for an authorised purpose and to the extent that it is lawful so to do (*Norris v First Secretary of State* [2007] 1 P&CR 3 at [27]). So, for example, an authority may not acquire land compulsorily for a purpose falling outside the scope of a CPO (*R* (*Sainsbury's Supermarkets Limited) v Wolverhampton City Council* [2011] 1 AC 437). Some statutory powers of acquisition and CPOs are cast in very broad terms and so may confer on an acquiring authority greater flexibility as to purpose than, for example, CPOs under s.17 of the Housing Act 1985 (see the discussion in *R (Argos Limited) v Birmingham City Council* [2012] J.P.L 401 at [89]-[97]).

37. In the present case the Secretary of State decided to confirm the CPO in relation to Number 133 on his understanding that the claimant had withdrawn her objection in return for the undertaking given by BCC. So if the claimant had complied with all of her undertakings by the dates specified in the document, the undertaking by BCC not to acquire the property would, in principle, have been enforceable in an application for judicial review challenging the exercise of compulsory purchase powers. However, I recognise that further thought may need to be given to the extent to which judicial review may be used to resolve significant factual issues on whether a landowner has complied with his undertakings.

38. On the other hand, the point is well-made in the submissions for the Secretary of State that a challenge to a GVD may not be allowed if, as a matter of substance, it is simply an attempt to re-litigate the merits of the CPO or the legal status of that order. That would generally run counter to s.25 of the Acquisition of Land Act 1981.

39. There is a risk of this happening where the issue relates to matters such as the application of the PSED and Article 8 of the ECHR. Typically, such matters are taken into account in an acquiring authority's Statement of Reasons for making the CPO and in its Statement of Case under the Compulsory Purchase (Inquiries Procedure) Rules 2007. BCC followed that course here. It had to demonstrate to the Secretary of State that there was a compelling case in the public interest for the compulsory acquisition of each of the twelve properties in the CPO.

40. The objection and public inquiry procedure provides a good opportunity for someone in the claimant's position to provide information on their personal circumstances so that they may properly be taken into account before the decision is taken on whether to confirm the CPO in relation to that person's property. The problems faced by the claimant and her son, their impact on her ability to manage the property have been ongoing for many years. They have not arisen since the CPO was confirmed. In her witness statement the claimant described her plans at various stages to move into the property. These were subjects which she was able to raise through the objection and public inquiry process, before the confirmation decision was taken. All this information was known to, and specific to, the claimant. When a person does not avail themselves

of an opportunity to bring to the attention of the confirming authority information regarding the application of the PSED and/or Article 8, they may face considerable difficulties in arguing subsequently that the acquiring authority did not comply with those provisions by failing to take such matters into account or by making Tameside inquiries (see e.g. *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 553 at [121]-[122]).

41. Here the public inquiry did not take place because objections, including those of the claimant, were withdrawn. The suggestion that the claimant did not sign the mutual undertaking is not in point. No evidence has been produced to show that she kept in touch with the Planning Inspectorate or took steps to find out what was happening with the CPO procedure. In any event, it was open to the claimant to bring a legal challenge to the inclusion of Number 133 in the CPO on the grounds that she had not withdrawn her objection and had been deprived of the opportunity to present information relating to the PSED and Article 8. The claimant did not take that opportunity.

42. I have great reservations about whether it is permissible for matters of this kind to be raised in a challenge to a GVD or the notice to treat procedure where a claimant has failed to raise them at some stage under the Acquisition of Land Act 1981. It might be said that there is a public interest in the finality of litigation, or dispute resolution, and in discouraging the raising of points in legal proceedings which could and should have been addressed at an earlier stage.

43. For many CPOs there is a further consideration which needs to be borne in mind. Compulsory purchase is often used to assemble a number of property interests, sometimes a great many, so that an overall project can be delivered in the public interest, for example town centre redevelopment or new infrastructure. Individual plots of land may be essential to the timely delivery or even the realisation of the scheme. Once a CPO is confirmed, the acquiring authority generally has 3 years within which to exercise its powers of compulsory purchase (see e.g. s.4 of the Compulsory Purchase Act 1965). The object of the time limit is to help limit the potential blighting effect of an order and uncertainty for landowners. It is therefore of great importance that the circumstances of individual landowners is taken into account before the CPO is confirmed, and not raised for the first time, without any real justification, when the powers of compulsory purchase come to be exercised. Even where there is a proper justification for not having raised personal circumstances during the authorisation of a CPO, the acquiring authority may also be entitled to have regard to the confirmation of the order and the basis upon which that decision was made, including the compelling case in the public interest which has been accepted, or, at the very least, not challenged.

44. The present type of CPO is different. The purpose of the order was not to assemble plots of land to form a site for a project. The individual dwellings included in the CPO were mainly dotted around different parts of the Birmingham conurbation. Nevertheless, it remains contrary to the public interest for points to be raised in a challenge to a GVD which could and should have been raised prior to the confirmation of the CPO. This is a subject which will need to be considered in future cases in more depth, and with the assistance of the Secretary of State. But in the present case I have reached the clear conclusion that the outcome of the claim does not depend upon the merits of grounds 4 or 6.

Ground 5

45. The claimant submitted that before BCC executed a GVD it had to take into account the condition of the property and whether it was in occupation, or being marketed for occupation. They were "obviously material considerations", applying the test laid down in, for example, In *Re Findlay* [1985] AC 318, 333-4 and *R (Friends of the Earth Limited) v Secretary of State for Transport* [2021] PTSR 190 at [116] –[121]. There is no dispute in this case that these were indeed obviously material considerations.

46. Instead, the issue is whether BCC failed to take reasonable steps to obtain information regarding the condition and occupation of the property. This obligation derives from *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 where Lord Diplock said this at p.1065B:-

> "…the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly. "

47. However, the *Tameside* obligation has since been clarified, for example in *R (Khatun) v Newham London Borough Council* [2005] QB 37 at [35], such that the manner and intensity of any inquiry by the decision maker may only be challenged in the courts on the grounds of irrationality. The principles were summarised in R *(Balajigari) v Secretary of State for the Home Department* [2019] 1WLR 4647 at [70]:-

> "…..First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948]1KB223), it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken: see *R (Khatun) v Newham London Borough Council* [2005] QB37, para. 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

Mr Habteslasie rightly emphasised the third and fourth principles. I also accept his submission that the application of *Tameside* principles is sensitive to the factual circumstances as they were at the time leading up to the decision.

48. I have previously referred to the meeting which took place between the claimant and BCC on 25 June 2019. I now deal with what happened subsequently.

49. On 5 July 2019 the claimant wrote to BCC referring to works she had carried out to the roof of Number 133 in 2018 and further works which were to be carried out shortly. She had installed a fitted kitchen and was about to have some decorating work carried out. She was in the process of moving some furniture in.

50. On 9 July 2019 BCC responded saying that it was "essential that an internal inspection is made to check that the properties are habitable" and "to be assured that the properties are being lived in as someone's main residence or that the properties will be sold for housing use." The Council said that Numbers 133 and 135 would be considered separately. BCC asked the claimant to provide a programme setting out the specific works being carried out, the estimated completion date and a time for carrying out the inspection.

51. It does not appear that the claimant ever supplied a specification for the works she was carrying out. But equally, BCC never served a schedule of the works they considered should be carried out to render the premises habitable. This is a common practice in cases of this kind, so that a landowner knows precisely what he is expected by the acquiring authority to do in order to avoid having his property expropriated.

52. An inspection was carried out on 7 August 2019. On that occasion there was scaffolding up to first floor level and a roofing contractor carrying out repairs to the ridge tiles. However, no gas supply was connected to the property. Some electrical work was required which would take 2 weeks. The claimant said that it would take 8 weeks in all for the property to be ready to move into. The claimant's landlady was allowing her to remain in the rented accommodation until the works were complete. BCC's officer estimated that with a concerted effort, Number 133 could be habitable within a month. Number 135 required rather more work.

53. As a result of the inspection, BCC wrote to the claimant on 22 August 2019. The authority said that Number 135 would be included in a GVD because it was not in a condition enabling it to be occupied within a reasonable time. Number 133 differed in that respect. BCC served a statutory notice to inspect the premises on 26 September 2019, by which time it expected "the works" to have been completed, but without identifying what those works would be. The letter stated that on 26 September officers would need to be satisfied that (a) the property was in a reasonable state for occupation and (b) steps had been taken to secure the occupation of the property as the sole residence of an occupier. The letter identified the documentary evidence required on point (b). The letter warned that if access were to be denied on 26 September 2019 or if these conditions were not satisfied by that date, a GVD would be executed immediately.

54. During September 2019 the claimant saw her doctor. She was being treated for depression and PTSD.

55. BCC did carry out a further inspection on 26 September 2019. The scaffolding was still up. An electrician was present. However BCC considered progress inside the property to be negligible. For her part, the claimant referred to the health issues from which she and her son had been suffering, which had affected her ability to progress matters. She said that the electrical works had been completed around 24 September. Redecoration and flooring work remained to be carried out. Quotations had been obtained for the latter. Acknowledging the claimant's health and personal issues, BCC asked how long would be required for the works to be completed. The claimant estimated 7 weeks. She explained that she needed Number 133 as a home for herself and her son. The inspection on 26 September 2019 turned out to be the last internal inspection made by BCC.

56. BCC wrote to the claimant a month later on 24 October 2019, referring to the 7 week time estimate that the claimant had given. The letter notified her that an inspection would be carried out on 17 December 2019, a further 7 weeks away. The letter required the claimant to satisfy by 17 December essentially the same conditions as had been set out in BCC's letter of 22 August 2019 in order to avoid the execution of a GVD. BCC added that it did not anticipate any further extensions of time being allowed for renovating the property and securing its occupation.

57. On 25 November 2019 the claimant sent an email to BCC to ask that the inspection of Number 133 be deferred from 17 December 2019 to 17 January 2020. She referred to the effects which medical problems and investigations were having on her. She said that she was waiting to hear from a supplier about when they would reconnect the gas supply, and that was expected to take 6-8 weeks. Paragraph 27 of the claimant's first witness statement states that the gas supply was in fact reconnected in January 2020. But it was also necessary for a gas meter to be installed and the boiler repaired, which took until early March 2020.

58. BCC responded on 2 December 2019, noting that the claimant's request to postpone the inspection had been based upon her health issues. However, BCC pointed out that they had already allowed 4 weeks more than the 7 weeks which, on 26 September 2019, the claimant had said would be needed to complete the works. In these circumstances, BCC refused to defer the inspection beyond 17 December. The email said:-

> "Once the inspection has taken place, officers from the Council will then review the condition of the property and progress made *towards* it being habitable and occupied at that time and determine *the most appropriate course of action*." (emphasis added)

59. This was undoubtedly an important email, given the earlier history of events, including the letters from BCC of 22 August and 24 October 2019. Previously the authority had said that a GVD would be executed if the terms it had set were not fully satisfied by the relevant deadline. Now the authority was saying that:-

> (a) it would review the condition of the property at the inspection;
> (b) it would review the progress made towards the property being habitable and occupied at that time; and
> (c) in the light of those matters, it would then determine the most appropriate course of action.

60. BCC was no longer saying that it would immediately execute a GVD if, by the inspection date, the premises were not in a habitable condition and arrangements for occupation secured. Indeed, the reference to "the most appropriate course of action" plainly indicated that now more than one option would be open to the authority. In other words, BCC would not necessarily execute a GVD. It all depended on the extent of the progress made towards satisfying the objectives of the CPO, which in turn depended on an inspection taking place. Understandably, the authority would have wished to see for themselves what had been achieved, rather than simply rely upon anything they were told. The introduction of this degree of flexibility no doubt reflected BCC's appreciation of the particular personal circumstances of the claimant and her son.

61. On 17 December 2019 the claimant contacted BCC to say that she could not be present at the inspection that day and that she had arranged for her father to be there instead. Mr Dawes did not attend. The authority's evidence shows that at 4.30pm a nurse rang from a hospital to say that at 1.35pm he had been admitted, following a referral by his GP, but he would be discharged later that day.

62. It is astonishing that, according to the evidence, neither side followed up the inability to carry out an inspection that day. But at least it can be said that the claimant had offered an inspection in mid-January 2020, against the background that inspections had recently taken place on 22 August and 26 September 2019. Furthermore, there was evidence that some progress was being made in the carrying out of works. In a telephone conversation on 20 February 2020 the claimant referred to works she had been carrying out at Number 133. She also said that she had tried to contact certain officers at BCC but had not obtained any reply.

63. The evidence from BCC moves very quickly forward from December 2019 to a crucial meeting between officers on 24 June 2020. There is no explanation as to why, during the 3 months before the first national lockdown began in March 2020, BCC did not carry out the inspection which they had consistently regarded as being a necessary part of any decision to execute a GVD.

64. This continuing need for an inspection to be carried out by the authority is reinforced by emails between BCC's officers between 12 and 26 March 2020 discussing the carrying out of an inspection on 6 April 2020. On 16 March Mr. Matthew Smith, BCC's Private Rented Service Manager, wrote about a communication which BCC was going to send to the claimant:-

> "… the wording should be exactly the same as it was last time a date set and strict instructions if not complete we vest on both ….."

65. Plainly BCC intended to return to the approach it had taken in its letter of 24 October 2019. But the lockdown began, and no letter was sent to the claimant. The witness statement of Mr. Matthew Smith states that "this inspection was subsequently postponed." An email sent on 26 March 2020 states that the inspection should be rescheduled after April 2020 as it did not fall into the "emergency/urgent" category for the purposes of lockdown restrictions. It plainly did not, given the inaction on BCC's part between mid-December 2019 and mid-March 2020. At all events, the evidence shows that even in the Spring of 2020, BCC (a) was still prepared to allow the claimant time to make the property habitable and to secure its proper occupation and (b) still

required access to the property to inspect its condition. But in fact no further internal inspection was made before the GVD was executed.

66. The note of the discussion between officers on 24 June 2020 reads as follows:-

> "**133 Wyatt Road**
>
> 3 Possible options to take:
>
> 1. Vest the property immediately
> 2. Carry out an Internal inspection
> 3. Ask for Documentary Evidence from Ms Dawes to demonstrate that the property is in occupation.
>
> Allyson suggests that an inspection should be carried out as upon passing visits she has seen the light on in the property during the day. Therefore, Ms Dawes could challenge BCC by stating that she is currently living in the property. However, Matthew pointed out that having the lights on during the day suggests that the property is not in occupation.
>
> Due to the COVID-19 restrictions an internal inspection cannot be carried out. However, Matt has explained that guidelines have been given that the windows and doors should be open to prevent touching means there is a possibility that the inspection can go ahead. Problems may arise if the owner states that she has coronavirus.
>
> It would have been helpful to check the current position of 133 Wyatt Road by looking over the fence in the garden of 135. However, as the property is boarded up this may not be viable.
>
> Asking for Documentary Evidence could create problems due to the difficulty of being able to check documents without seeing the original copies.
>
> Service of notice can take place as the notices will be hand delivered by Matts team.
>
> No correspondence has been received from the Dawes Family despite the seriousness of the warning that the works should be carried out immediately which was made to them months ago.
>
> The owner was previously given additional time to carry out the necessary works in the property however this has not yet been carried out. Therefore, MS is clear that the property should now be vested. In doing so, we must consider whether this is reasonable. Having considered the previous facts of the case and chances given to comply with BCC's request it would be reasonable to vest immediately.

> BCC to inform MP's, Councillors, Chief Officers, Chief Executive and Press Officer about the current position of 133 and 135 Wyatt Road. The warning letter must detail what we are doing, in addition to the previous issues encountered in the past.
>
> Once the above parties are notified the property will then be vested.
>
> Deposit locations – As it only one property, the documents will be sent directly to Ms Dawes to all addresses on file via email, post and, hand delivery at 133 Wyatt Road.
>
> Allyson will check whether the property still has scaffolding up. This may give an indication of whether any works have been continued.
>
> In accordance with clear instructions from Matthew, the GVD is in the process of being prepared. Dates will follow in due course."

67. An external inspection was carried out later that day during daylight hours. That revealed that there was no scaffolding on the property and there were lights on by the front door and first floor bedroom. A brief comment merely said that it did not "appear" as though anyone was there; there was a "stack of paint by the back patio doors."

68. From the note of the discussion on 24 June 2020 I draw the following conclusions:-

> (i) No good reason was given as to why an inspection had not been carried out before mid-March 2020, or subsequently as lockdown restrictions were eased. BCC had no reason to believe that the claimant had coronavirus. They had had no contact with her since 20 February 2020;
>
> (ii) In the conversation on 20 February 2020 the claimant had referred to works she had been carrying out, despite personal difficulties. The external inspection on 24 June 2020 revealed that scaffolding was no longer present which, according to BCC could indicate that works had been carried out;
>
> (iii) BCC had relied upon the lack of correspondence from the claimant or her father. But on 20 February 2020 the claimant contacted one of the persons participating in the meeting on 24 June and said that she had been unable to obtain a response from officers. Thereafter, BCC made no attempt to get in touch with the claimant;
>
> (iv) Indeed, BCC ignored the fact that in March 2020 (and after the first lockdown had begun) it had intended to send a further letter following the same approach as in the letter dated 24 October 2019;

> (v) Although an external inspection was carried out on 24 June 2020 to see whether there were any signs of occupation, it does not appear that BCC attempted to make contact at the front door;
>
> (vi) BCC considered that asking for documentary evidence to demonstrate that the property was being occupied "could create problems" because of the difficulty of seeking originals. There was no reason why BCC could not have contacted the claimant to require her to produce originals if that was the only way of checking the veracity of any material;
>
> (vii) The note of the meeting states that a GVD should be made because "necessary works" (still undefined) had not yet been carried out and so the property should be vested in the authority "immediately." But this comment on necessary works was mere assertion. The authority had not been inside the property for nearly 9 months. The claimant had said to them in the meantime that various works had been carried out. Without inspecting the premises BCC could not reasonably judge whether the condition of the property was suitable for habitation. If necessary works had in fact been carried out, no doubt at some cost, that inevitably raised the question why would the property not be occupied, either already or soon thereafter? BCC recognised that some inspection was required, but they limited this to an external inspection, and made no attempt to contact the claimant at all prior to executing the GVD;
>
> (viii) Mr. Smith himself states that if the inspection on 24 June had indicated that the property was in residential use "the decision may well have been different."

69. Having decided on 24 June 2020 to execute the GVD, that step was not in fact taken for nearly 2 months. In the meantime still no attempt was made to contact the claimant or to inspect the premises, so that by the time the GVD was executed, the authority had not been inside the property for nearly 11 months.

70. On 13 July 2020 Elaine King, a CPO Regeneration Team Leader at BCC, sent an email to Mr. Smith suggesting an external inspection, without appreciating that it had already taken place. The email included a note of the meeting on 24 June 2020 but with different text. Ms. King had prepared the original file note of that meeting (see para.9 of Mr. Smith's witness statement) and no explanation has been given in the evidence as to how the additional text came to be inserted. Now it was suspected that because of "constant difficulties" the authority had had when trying to inspect the premises, the claimant would use Covid as a delaying tactic and would further resist inspection. It was also now claimed that the possibility of getting into the property was very remote. But I do not consider that any of the additional points materially alter the analysis in [68] above.

71. It is most surprising that this text should appear in the email of 13 July 2020 without any proper explanation, given that it is so different from the file note. It is inconsistent with the email exchange in March 2020, after the pandemic was well under way, when the authority said that a further inspection would be arranged after 20 April 2020. No

one said at that stage that there was no point in following that course because of previous "constant difficulties" and any concern that Covid would be used by the claimant as a delaying tactic. However frustrating the claimant's behaviour and delay may have been at times for BCC, the fact remains that they knew of her personal circumstances, works had been undertaken, inspections had been carried out in August and September 2019, and the claimant had offered an inspection in January 2020, which the authority did not take up once the December 2019 inspection had failed to take place. There was simply no evidence before BCC upon which it could be concluded that the claimant would seek to prevent or delay an inspection in June 2020, whether on account of Covid or for any other reason.

72. Having regard to the chronology summarised above and the plainly material considerations I have set out, I am left in no doubt that it was irrational for BCC to decide on 24 June 2020 to execute the GVD, and then to execute that declaration on 13 August 2020, without having carried out an internal inspection of the property to check on the condition, use and occupation of the property and to require the production of documents on the issue of occupation. On the material before the authority, I am satisfied that no rational authority could have supposed that the information it had in its possession, or the enquiries it had made, were sufficient for making the decision to exercise its powers of compulsory purchase in relation to Number 133. The approach previously taken by the authority, at the time when the CPO was confirmed and subsequently (even down to March 2020), was that the purposes of the CPO would be fulfilled, and so the powers of acquisition would not be used, if the owner satisfied the terms of her undertakings, or subsequently the conditions set by the authority in its correspondence. On any rational view, that did not cease to be the position by the time BCC decided on 24 June 2020 that a GVD should be executed, or indeed by the date when it was in fact executed. Accordingly, I conclude that ground 5 must succeed.

Grounds 4 and 6

73. It is common ground between the parties that these grounds are dependent upon (i) whether the claimant went into occupation of the property and (ii) the claimant succeeding in showing under ground 5 that BCC acted irrationally by failing to make inquiries about the condition of the property and whether it was being or about to be occupied.

74. The claimant has succeeded on ground 5. Mr. Bell, who appeared on behalf of the claimant, was unable to identify how grounds 4 and 6 added anything of significance to ground 5. In the present circumstances, they are both to do with whether in substance an adequate assessment was made for the purposes of the PSED and Article 8, not with the breach of an absolute right.

75. I have already expressed my reservations about reliance upon the PSED or Article 8 as a basis for challenging a GVD in relation to points which could and should have been pursued as an objection to the CPO and thereafter as a potential legal ground of challenge to that order. In so far, as grounds 4 and 6 relate to matters arising after the confirmation of the CPO they have been adequately addressed under ground 5. The arguments deployed by Mr. Bell in his written and oral submissions confirm that this is the correct approach. For these reasons, I decline to quash the GVD under grounds 4 or 6.

Section 31(2A) of the Senior Courts Act 1981

76. BCC submit that in the event of the claimant establishing a ground of challenge, the court should nonetheless refuse to grant any relief because it is highly likely that the outcome for the claimant would not have been substantially different "if the conduct complained of had not occurred."

77. Mr. Habteslasie accepts that the issue posed by s.31(2A) is whether the carrying out of further inquiries would have made a difference to the decision to execute the GVD. He submits that the answer is no because the claimant says she only moved into the property on 1 July 2020 whereas the decision had already been taken on 24 June 2020.

78. With respect, the submission that relief should be withheld under s.31(2A) on that basis is untenable. If an inspection had been made it would have revealed to BCC the condition of the property and whether it was suitable for habitation. Actual occupation was not the sole issue. If the property had been physically suitable for habitation that would have led to the inevitable question when would it be occupied. It is reasonable to suppose that if she had been asked on 24 June 2020, the claimant would have said that she was about to move in. The fact that she had not done so by 24 June 2020 would not have been determinative in the circumstances. In any event, the matter was revisited on 13 July 2020 and the GVD was not executed until 13 August 2020.

79. A further problem with BCC's submissions is that the court does not know what would have been discovered if the authority had complied with its obligation to make further inquiries at the relevant time. Instead, BCC's officers have devoted many pages of witness statements to making claims as to why, in the light of subsequent material, they do not accept that the claimant moved into the property on 1 July 2020. By definition, this is not evidence which was available to the authority at the time of the decision impugned. It is all "fresh evidence" which is not admissible under any of the recognised categories (*R (Law Society v Land Chancellor* [2019] 1 WLR 1649 at [37-29]).

80. Furthermore, it is strongly contested by the claimant. In order to resolve the differences between the parties on the occupation issue the court would have to take on a fact-finding role, which is inappropriate for judicial review proceedings. In ordinary civil proceedings live evidence would need to be heard and tested in cross-examination. But the issue raised by BCC is not an issue of jurisdictional fact. Instead, BCC is seeking to entice the court into forbidden territory which belongs to the decision-maker, reaching decisions on the basis of material before it *at the time of the decision under challenge*, and not additional evidence after the event when a challenge is brought. If the court were to accede to the authority's suggestion, that approach could be replicated in many other claims for judicial review, using s.31(2A) in a way which was never intended by Parliament.

81. In any event, it has not been suggested that live evidence should be called at the hearing. The time estimate did not allow for that and no arrangements had been made for witnesses on both sides to be called. The court could not in fairness to the parties make proper factual findings simply by reviewing the witness statements. BCC's reliance upon *R (Safeer) v Secretary of State for the Home Department* [2018] EWCA Civ 2518 at [16]-[19] to suggest that the claimant must fail on this issue is misconceived. The claimant has borne the burden of proof in relation to the grounds of challenge. She has discharged that burden in relation to ground 5. At this stage of the case, it is the

defendant which is seeking to rely upon s.31(2A) by adducing new evidence. On that issue the defendant bears any burden of proof (see e.g. *R (Bokrosova) v Lambeth London Borough Council* [2016] PTSR 355 at [88]), certainly in relation to new evidence, even assuming, contrary to the view I have expressed, that that material is admissible.

82. For these reasons, the defendant's reliance upon s.31(2A) is misconceived.

Conclusion

83. For all these reasons the claim must be upheld on ground 5 and the GVD executed on 13 August 2020 must be quashed. However, the court's decision very much rests on the unusual circumstances of this case and the unusual events which occurred. The claimant's success on ground 5 does not undermine the observations in [38]-[44] above.