

A notice to rectify requiring the demolition of a retaining wall on an access strip

1 INTRODUCTION

- 1.1 There is a dispute between two neighbours who are co-owners of an allotment which was created to provide an access strip serving their residential properties. The dispute is currently before the District Court, and several of the documents submitted to the Authority were prepared for the Court. For that reason the co-owners will be referred to as “the plaintiff” and “the defendant”.
- 1.2 In the course of that larger dispute, the defendant applied to the Authority for a determination as to the validity of a notice to rectify issued by the territorial authority and requiring the dismantling of a timber retaining wall on the access strip and the restoration of the land to the ground levels before the wall was constructed. The notice is in Form 8 of the Building Regulations 1992 and was issued under section 42 of the Building Act 1991 (references below are to that Act unless otherwise stated).

2 THE BUILDING WORK AND THE NOTICE TO RECTIFY

- 2.1 The building work consists of a timber retaining wall and associated earthwork. It is not disputed that the building work was done without either a building consent under the Building Act or a building permit under the previous bylaws. There is conflicting evidence as to whether the building work was done before or after the Building Act came into force. The Authority therefore approaches the matter on the assumption that the building work was done after the Act came into force, but makes no decision as to whether that was in fact the case.
- 2.2 The parties have not disputed whether the building work complies with the building code (the First Schedule to the Building Regulations). The Authority therefore approaches the matter on the assumption that the building work does comply with the building code, but makes no decision as to whether in fact it complies or not.
- 2.3 The “particulars of contravention” attached to the notice to rectify allege that, contrary to section 32(1) of the Building Act, the building work concerned was carried out without building consent, and say:

You are required to dismantle the timber retaining wall and remove sufficient spoil to achieve the ground levels prior to building the wall.

- 2.4 The plaintiff wishes to comply with the notice to rectify and demolish the retaining wall and built-up turning area. The defendant disputes the notice to rectify by way of the application for this determination. The effect of that application is to suspend the notice to rectify under section 17(4).

3 THE PARTIES AND THEIR SUBMISSIONS

- 3.1 The defendant applied for a determination and the other parties are the plaintiff and the territorial authority concerned.
- 3.2 The defendant undertook the building work so as to provide a built-up turning area for the defendant's property. The plaintiff complains that the turning area on the access strip adversely affects the plaintiff's use of the strip to gain access to the plaintiff's undeveloped property.
- 3.3 The plaintiff drew the building work to the attention of the territorial authority, which initially took no action but later, after time had run out for bringing a prosecution, issued the notice to rectify.
- 3.4 The territorial authority issued the notice to rectify in the belief that the building work had been done "well into 1993", when the Building Act had come into full force so that the work required a building consent. The territorial authority's only reason for issuing the notice was that the building work had been done without a building consent.
- 3.5 All three parties made extensive submissions. A formal hearing was held at which all three parties were present, with the defendant and the territorial authority being represented by legal counsel. Further extensive submissions were made at the hearing.
- 3.6 The parties' submissions and the Authority's consideration of them are not set out in detail but essentially consisted of:

- (a) Historical material, some of which was disputed.

On the view taken by the Authority, that material was not relevant to the Authority's decision.

- (b) Explanations of the disadvantages which the existence of the retaining wall impose on the plaintiff, and which the demolition of the wall would impose on the defendant.

On the view taken by the Authority, those are matters to be considered by the Courts not by the Authority.

- (c) Competing legal argument about:

- (i) Whether the territorial authority had the power to issue a notice to rectify requiring the demolition of a building solely because it had been constructed without building consent;
- (ii) Whether the Authority had jurisdiction to determine the dispute; and
- (ii) If the Authority took the view that it did not have jurisdiction, whether it could properly state what it would have determined if it did have jurisdiction.

The Authority took full account of those legal arguments in arriving at its decision.

4 DISCUSSION

- 4.1 Whether the Authority has jurisdiction in respect of any particular notice to rectify is a question of law. The Authority is not a court of law and cannot issue binding interpretations of the Building Act. However, in order to fulfil its functions under the Act the Authority is forced to take a view as to the interpretation of the relevant provisions of the Act if only to decide whether it has jurisdiction in any particular case.
- 4.2 The relevant provisions of the Act as regards the Authority's jurisdiction in respect of this particular notice to rectify are:
 - (a) Section 17(1)(b), which provides in effect that an application for determination may be made in respect of "any . . . notice to rectify",
 - (b) Section 18, which provides that an application for determination shall be "limited to whether or not or to what extent particular building work . . . complies with . . . the building code", and
 - (c) Section 42(1), which provides that the territorial authority may issue a notice to rectify "requiring any building work not done in accordance with this Act or the building code to be rectified".
- 4.3 In section 42(1), the reference to the Building Act as well as to the building code is necessary because not all building work is required to comply with the building code. Obvious examples arise under sections 38 and 46 when a building is required to comply with certain provisions of the building code "as nearly as is reasonably practicable" or "to at least the same extent as before". Therefore, in determining disputes about the application of sections 38 and 46 the Authority must decide "to what extent" building work complies with the building code, so that an application for such a determination clearly comes within section 18.
- 4.4 That is not so with this application. The disputed notice to rectify was issued solely on the basis that the building work had been done without building consent. The question is whether the application to determine its validity falls outside section 18 in that it does not necessitate any decision as to whether or not or to what extent the building work complies with the building code.

4.5 Despite legal argument to the contrary, in the absence of case law the Authority takes the view that:

- (a) The application does not come within section 18, and
- (b) The Authority has no jurisdiction to determine matters of doubt or dispute which do not come within section 18.

In other words, the Authority takes the view that section 18 is to be read as preventing the Authority from determining disputes about territorial authority decisions which are not based on or related to compliance with the building code.

4.6 Accordingly, the Authority considers that it does not have jurisdiction to determine the dispute between the parties about the validity of the notice to rectify.

4.7 However, in case the Authority is wrong about that, it records that if it did have jurisdiction it would reverse the territorial authority's decision to issue the notice.

4.8 The Authority considers that it was not appropriate to require demolition in this case for the following reasons:

- (a) Demolition of private property which is neither dangerous nor insanitary is a drastic step which should be taken only for a compelling reason and in the public interest;
- (b) The Authority does not consider that there is any such compelling reason in this case; and
- (c) Even if there appeared to be such a reason it should generally be tested in Court, as would be the case with a notice issued under section 65 in respect of a building deemed to be dangerous or insanitary under section 64.

The Authority emphasises that its remarks are made in the context of this particular case. Other cases could conceivably lead to different conclusions, although the Authority has not been able to imagine compelling reasons for demolishing work which complies with the building code but was done without a building consent.

4.9 The Authority recognises that withdrawing the notice to rectify could be seen as allowing the defendant to "get away with" doing building work without a building consent. However, that decision was effectively made by the territorial authority when, on becoming aware of the situation, it elected to take no action for more than six months, by when, as provided by section 80(4), time had run out for a prosecution to be brought under section 80(1)(a).

4.10 The Authority expresses no opinion on the plaintiff's grievances. However, the Authority notes that the Building Act is concerned with the public interest in buildings and building work, and considers it inappropriate for the co-owners to attempt to use the Act to resolve a private dispute between them.

5 CONCLUSION

5.1 The Authority concludes that:

- (a) Because there is no dispute as to whether or not or to what extent the building work concerned complies with the building code, the Authority does not have jurisdiction to determine the dispute about the validity of the notice to rectify.
- (b) If the Authority did have jurisdiction, it would reverse the territorial authority's decision and withdraw the notice to rectify.

6 THE AUTHORITY'S DECISION

6.1 The Authority hereby decides that it has no jurisdiction to determine the dispute about the validity of the notice to rectify.

Signed for and on behalf of the Building Industry Authority on this 25th day of June 1999

W A Porteous
Chief Executive