

Enforcement: breach, immunity and enforcement notices

Stephen Whale
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Mr Beesley

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- Welwyn Hatfield BC v SSCLG [2011] 2 AC 304
- Planning permission to construct hay barn
- Fitted out internally as single dwelling house
- Lived in undetected for four years
- Application for certificate of lawfulness
- Certificate granted by Inspector on appeal
- Decision quashed by High Court
- Appeal allowed by Court of Appeal

Enter the Supreme Court...



- Local planning authority's appeal allowed
 - No change of use from permitted barn to dwelling house
 - Therefore no section 171B(2) change of use
 - Local planning authority entitled to enforce
 - Positive deception on the part of Mr Beesley in matters integral to the planning process; direct intention to undermine, and had undermined, that process
 - Had section 171B(2) applied and the four years elapsed, local planning authority still entitled to take enforcement action
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Mr Fidler



- Fidler v SSCLG [2011] EWCA Civ 1159
 - Construction of new dwelling house in clandestine fashion, using shield of straw bales and a tarpaulin to conceal
 - Lived in undetected for four years
 - Dwelling revealed
 - Enforcement notice served
 - Ground (d) appeal
 - Finding that four-year period began when straw bales removed; appeal dismissed
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Enter the Court of Appeal...



- Inspector's decision upheld by High Court
 - Permission to appeal granted by Court of Appeal
 - 1 September 2011: permission to appeal set aside by Court of Appeal
 - "...this is a paradigm case of deception which disentitles an appellant from relying upon the four-year rule."
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Postscript



- 13 June 2014: High Court section 187B injunction order requiring permanent compliance within 90 days with the requirements of identified enforcement orders, including the requirement to demolish the dwelling house
 - Suspended pending outcome of Mr Fidler's section 78 appeal seeking planning permission for the dwelling as an agricultural worker's dwelling
 - Functional need conceded
 - Inspector's decision imminent....
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Enter Parliament...



- Sections 171BA, 171BB and 171BC
 - Entitlement of local planning authority to apply to the magistrates' court for a "planning enforcement order"
 - Entitles enforcement action at any time in "the enforcement year"
 - Applies whether or not the section 171B time limits have expired and does not prevent the taking of enforcement action after the end of the enforcement year but within those time limits
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Section 171BB: procedure



- Application relating to apparent breach of planning control within 6 months beginning with date on which evidence of the apparent breach sufficient in the local planning authority's opinion to justify the application came to its knowledge
 - Certificate conclusive evidence
 - Service and entitlement to appear before the court and be heard
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Section 171BC: making the order



- Standard of proof is balance of probabilities
 - Court needs to be satisfied that the apparent breach or any of the matters constituting it has (to any extent) been deliberately concealed; and
 - It is just to make the order having regard to all the circumstances
 - The order must identify the apparent breach and the date of the court's decision
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The Empire Strikes Back...



- Bonsall case
 - Reliance upon concealment to defeat application, but no planning enforcement order
 - Can one now rely upon concealment if no planning enforcement order? Is this a permissible side-stepping of the Act?
 - Permission to appeal granted by Lord Justice Sullivan on the point
 - Jackson v SSCLG case last week in High Court: same point; Judgment reserved...
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SSCLG v Ahmed [2014] EWCA Civ 566



- Planning permission for 3-storey building
 - 4-storey building built
 - Enforcement notice
 - Appeal, including grounds (a) and (f)
 - No application for permission for 3-storey building under ground (a)
 - Appeal dismissed by Inspector
 - Appeal upheld by High Court
 - SSCLG's appeal dismissed by Court of Appeal
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The upshot



- Section 177(1) power to grant planning permission on appeal linked to ground (a) appeal rather than ground (f)
 - Planning permission could have been granted for 3-storey scheme
 - If there is an “obvious alternative which would overcome the planning difficulties, at less cost and disruption” than the requirements of the enforcement notice, the Inspector should consider it *even if not invited to do so*
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The tests



- Is there an “obvious alternative”?
- Is it in relation to “the whole or any part” of the matters stated in the enforcement notice as constituting a breach of planning control, or is it in relation to “the whole or any part of the land to which the notice relates”?
- Would it overcome the “planning difficulties”?
- Would it be less costly and less disruptive than complying with the requirements of the enforcement notice?
- Would the granting of planning permission under ground (a) (and a consequential variation of the requirements of the enforcement notice under ground (f)) “cause injustice” to the local planning authority or others?



SSCLG v Ioannou [2014] EWCA Civ 1432



- Unauthorised conversion of single family dwelling house into five self-contained flats
- Enforcement notice
- Appeal on grounds (a), (d), (f) and (g)
- Submission that Inspector could invoke ground (f) to enable an alternative 3-flat scheme to be implemented
- Ground (g) appeal allowed by Inspector: compliance time extended
- High Court accepted submission that Inspector had power to enable a 3-unit scheme to be implemented (combination of section 173(4)(b), ground (f) and section 173(11))



The upshot



- SSCLG's appeal allowed by the Court of Appeal
 - Only buildings, works or activities in existence when the enforcement notice was issued can benefit from section 173(11)
 - The Inspector's conclusion that he did not have power under ground (f) to consider the 3-flat scheme was correct
 - If an alternative scheme is put forward, but which is not part of the matters stated in the notice as being in breach of planning control, the Inspector can allow the ground (g) appeal and extend the compliance period so that the merits of the alternative can be properly explored with the local planning authority
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The reach of enforcement notices



- Unauthorised material change of use
 - Enforcement notice can require removal of operational development even if ordinarily immune from enforcement action (passage of time) or outside planning control
 - The operational development must be "integral to" or "part and parcel of" the unauthorised material change of use
 - See Murfitt v SSE (1980) 40 P&CR 254 and Somak Travel Ltd v SSE [1987] JPL 630
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Bowring and Makanjuola

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- Bowring v SSCLG [2013] JPL 1417
 - Makanjuola v SSCLG [2014] JPL 439

 - Not sufficient that the operational development is integral to or part and parcel of the unauthorised use
 - Was the operational development undertaken for a lawful use?
 - Is that lawful use different from the unauthorised use?
 - Could the operational development be used for that lawful use even if the unauthorised use ceased?
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