

PLANNING ENFORCEMENT CASE LAW UPDATE

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Overview of topics

- A. Appeals (s.174 TCPA 1990); prosecutions (s. 179 TCPA 1990)
- B. Injunctions and direct action
- C. Section 70C TCPA 1990
- D. Proceeds of Crime Act 2002

Legislative framework

Legislative framework

- Part VII of the Town and Country Planning Act 1990
 - Carnwath Report (1989)
 - Planning and Compensation Act 1991
 - Key provisions (for today's purposes):
 - s. 172 – enforcement notices (“EN”)
 - s. 174 – appeal to Secretary of State
 - s. 179 – offence where EN not complied with
- Section 70C TCPA 1990
 - Power to decline to determine retrospective application
 - Localism Act 2011

(A) Appeals and prosecutions

(1) Binning Property Corp Ltd v SSHCLG [2019] EWCA Civ 250

- Scope of section 289(6) TCPA 1990
- Issue: whether CA had jurisdiction to hear an appeal against HC refusal of leave to appeal pursuant to section 289 TCPA 1990.
- Held – no jurisdiction:
 - “*well established jurisprudence*” – **Wendy Fair Markets; Prashar, Walsall.**
 - Basic principle still prevails: “*whenever a power is given to a court ... by legislation to grant or refuse leave to appeal, the decision ... is, from the very nature of the thing, final and conclusive*”
 - Unaffected by amendments to CPR Pt. 45 or s. 288 TCPA 1990.

(2) Mirza v Newham LBC [2017] EWCA Crim 924

- Scope of section 179(3) TCPA 1990 – statutory defence – “*he did everything he could be expected to do to secure compliance with the notice*”
- At trial, M claimed that she had left the management of the property to her husband (H), an experienced landlord, and that she had a defence under s.179(3). H stated that he had actioned all the steps in the notice and had rented the property as a single dwelling, but that the tenant had, unbeknown to him, sub-let it. The judge concluded that H's evidence was not relevant to the issue of the s.179(3) defence and directed the jury to focus on what M knew and did.
- M argued that the judge had erred in directing the jury that it could not consider H's evidence in relation to the defence.

(2) Mirza v Newham LBC [2017] EWCA Crim 924

- Held: no misdirection.
- S.179(3) defence had two stages:
 - (1) whether it was within the owner's power to comply with the notice without the assistance of others. If "yes", no defence under s.179(3) applied. If the answer was "no" –
 - (2) whether the owner had shown on a balance of probabilities that he did everything he could be expected to do to secure compliance with the notice.
- Therefore an inability or incapacity of the owner to comply with the notice unaided was not the end of the defence, but the gateway to it.

(3) Camden LBC v Galway-Cooper (2018)

- Also scope of section 179(3) TCPA 1990
- A local authority appealed by way of case stated against a district judge's decision to acquit the respondent homeowners of breaching a planning enforcement notice (unauthorised extension).
- LPA issued an enforcement notice requiring the extension's removal and the reinstatement of the rear wall to its previous condition
- Homeowners relied on a structural engineer's expert report to the effect that the house, built on London clay and sand, had a visible lean, and that the removal of the original rear wall had caused the ground to heave. The original rear wall could not be re-erected over the steel frame. The judge accepted that evidence. Defence made out.

(3) Camden LBC v Galway-Cooper (2018)

- **Did the steps taken to secure compliance constitute a valid statutory defence?** Yes. The judge had accepted the expert evidence, and elaborated on it in his conclusions. He found that the construction of such a wall would make it exceedingly difficult to satisfy the enforcement notice's requirements, and that it was more likely than not that it could not. He was entitled to make all of those findings on the evidence, and to use the words "*not feasible*".
- **Did the matters raised by the respondents amount to questioning the validity of the enforcement notice?** No. It was not necessary to decide whether a contention that an enforcement notice could not be complied with amounted to a challenge to its validity. The judge had not implied a challenge to the notice on the grounds in s.174(2)(f). The question was whether the breach could be remedied.



BEFORE

AFTER

(4) Oates v SSCLG [2017] EWHC 2716 (Admin)

- Issue: whether Inspector correct to hold EN not a nullity.
- Appellant owned three former chicken sheds on his farm. A significant amount of building work was carried out, including the erection of metal framed exo-skeletons around the existing buildings. LPA served EN - stated the breach to be the erection of three new buildings and required that the appellant demolish the buildings, remove the resultant material and make good the land.
- The appellant argued that it was incorrect to say that there were three new buildings.
- The inspector found that an original building did not need to be demolished for it to become a new building.

(4) Oates v SSCLG [2017] EWHC 2716 (Admin)

- Following *Hibbett*, it was possible to conclude that there was a "new building" even where parts of the original building remained. Whether the works extended beyond an alteration to the original building was a question of fact and degree that was pre-eminently a question of the decision-maker's planning judgment.
- An inspector's decision as to whether a defect rendered a notice a nullity should be accorded considerable weight, it was a matter of planning judgment.
- Open to an inspector to conclude that while one section of a notice was too uncertain and could not stand, taken as a whole the notice did comply with the statutory requirements. Inspector had been entitled to conclude that the third requirement in the notice to make good the land was unnecessary and did not render the requirements section of the notice to be non-compliant with the statutory requirements and thus a nullity.

(5) Sarodia v Redbridge LBC [2017] EWHC 2347 (Admin)

- Building work to house without planning permission. LPA issued an EN alleging "the erection of an unauthorised two storey and single storey rear extension, single storey side extension" and other works. It removal of "two storey side extension and single storey rear extension" and other additions. No appeal and EN took effect.
- S. 179 prosecution some three years later. DJ rejected argument that EN a nullity.
- The appellant submitted that two fundamental errors made the notice ambiguous and hence a nullity: first, it required the removal of a two storey side extension which did not exist and, second, there was no mention of the single storey side extension in its requirements.

(5) Sarodia v Redbridge LBC [2017] EWHC 2347 (Admin)

- EN did not enable the appellant to know what he was required to do. It asked him to remove a two storey side extension that did not exist. It created further confusion in relation to the rear extension. It was hopelessly unclear such that it was a nullity. Appeal allowed.
- The DJ erred in asking whether there could have been a successful appeal to the secretary of state. The notice could not have been saved by s.176 as the amendments it required were too extensive and could not have been made without injustice to the appellant. It was not a case of under-enforcement. No reason why the appellant should appeal against a notice that was defective on its face. It was incumbent on the local authority to formulate the notice correctly. If there were minor mistakes, that was one thing, but the mistakes in the instant notice were fundamental. The appellant's conviction was quashed.

(6) Procedure on s.174 appeals

- ***Akhtar v SSCLG*** [2017] EWHC 1840 (Admin)
- Inspector had been entitled to refuse to entertain a landlord's representations during his appeal against an enforcement notice from his local planning authority where they were made out of time without very good reason. A failure to abide by the timetable for submission of appeal documents caused prejudice to the proper administration of the system, and ultimately to other parties.
- ***Benson v SSCLG*** [2018] EWHC 1354 (Admin)
- Inspector had not failed to exercise his discretion correctly in refusing to admit extra documents as evidence when considering whether to allow an appeal against an enforcement notice issued by a local authority. Appellant had already breached procedural rules by failing to provide evidence when she brought her appeal. The inspector had considered the extra material; there was no proper basis for saying that his treatment of it would have been materially different if it had been formally in evidence.

(B) Injunctions and direct action

Recent examples

- Common area for first instance cases – mostly s.187B TCPA 1990 injunctions.
- Recent examples:
 - ***Forest of Dean DC v Wildin*** [2018] EWHC 2811 (QB)
 - ***Ashford BC v Stevens*** [2018] EWHC 2101 (QB)
 - ***Ali v Newham LBC*** (2018)
 - ***South Cambridgeshire DC v Taylor*** (2018)
 - ***Wealden DC v Mitchell*** [2017] EWHC 2328 (QB)
 - ***Wealden DC v McCreadie*** [2017] EWHC 1120 (QB)
- Little development of principles, but consistent application: on the whole success for LPAs.

Forest of Dean DC v Wildin [2018] EWHC 2811 (QB)

- When is a building single storey?
- A “*huge man cave*”; a “leisure centre”.



(C) Section 70C TCPA 1990

Section 70C TCPA 1990

- (1) A local planning authority may decline to determine an application for planning permission or permission in principle for the development of any land if granting planning permission for the development would involve granting, whether in relation to the whole or any part of the land to which a pre-existing enforcement notice relates, planning permission in respect of the whole or any part of the matters specified in the enforcement notice as constituting a breach of planning control.

- (2) For the purposes of the operation of this section in relation to any particular application for planning permission or permission in principle, a “*pre-existing enforcement notice*” is an enforcement notice issued before the application was received by the local planning authority.

In 2015/16, see: ***O’Brien***; ***Seventeen De Vere Gdns***; ***Wingrove***

(1) R. (Chesterton Commercial Ltd) v Wokingham BC [2018] EWHC 1795

- Whether LPA entitled to exercise power where substantive and real differences between proposed development and breach specified in notice.
- In determining whether s.70C engaged, only relevant part of the EN was the description of breach. S. 70C invited a comparison on that basis.
- S.70C engaged if there is any overlap between the whole or any part of the land concerned.
- S.70C applied to all cases involving an application for planning permission for any part of matters specified in EN, including matters of substantive difference, and was not confined to cases involving only a very minor change from breach described in EN.

(2) R. (Banghard) v Bedford BC [2017] EWHC 2391 (Admin)

- PP granted for storage building. Erected on correct footprint. Used as dwellinghouse. EN issued. Appeal dismissed, no consideration of planning merit of building for storage because EN alleged construction as dwellinghouse. Application for retrospective PP to retain some parts of building for storage which EN had required to be demolished. LPA exercised s.70C power.
- S.70C designed to ensure there were not two separate considerations of planning merits by having an appeal against refusal of PP and EN on same grounds. However, individual was entitled to one consideration.
- Here, retrospective application did not form part of breach as described on EN: storage building, not dwellinghouse. Challenge allowed.

(C) Proceeds of Crime Act 2002

(1) R. v Knightland Foundation [2018] EWCA Crim 1860

- Unlawful change of use (18 flats). EN issued, appeal dismissed, non-compliance. Subsequent application for PP to retain as hotel. S.179 prosecution commenced. LPA indicated that principle of hotel acceptable. Subsequent volte face – hotel use unacceptable.
- Late disclosure. Application to stay as abuse of process: decision to prosecute was reached on an unfair and partial assessment of the public interest test and that the conduct of the prosecuting authority was oppressive.
- Application succeeded: found improper interference in determination of application for PP. The intention of those who brought the influence was not that there should be a proper assessment of planning merit but that nothing should hamper the prosecution or the POCA proceedings. Accordingly, held that it offended the court's sense of justice and propriety to be asked to try the accused on the particular facts of the case.
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(1) R. v Knightland Foundation [2018] EWCA Crim 1860

- Jurisdictional point before CA – but would have refused leave in any event.

“The authority, as a prosecuting authority, is subject to the same duties as other prosecuting authorities. It is obliged to act fairly, independently and objectively. The judge's findings of fact indicate that the authority did not do so. We do not have any material from the legal department or from the person who took the decision to prosecute but we do know that their decision was based on a report from [the Enforcement Team]. The judge found that report to be flawed and that the decision to prosecute and to continue the prosecution based on it had an improper motive namely the financial advantage to the applicant of a POCA order. Those who advised the person who took the decision to prosecute failed to take into account a relevant factor, namely, the possibility that the respondents' position could be regularised and allowed an irrelevant factor, namely, the possibility of their obtaining a POCA order to the authority's financial advantage, to carry significant weight. On the judge's findings, having taken the decision to prosecute, officers of the same authority then attempted, improperly, to influence the determination of the planning application so that it would not impact adversely upon the prosecution and/or the prospects of their obtaining a POCA order. In their eyes the grant of planning permission was intrinsically linked to the prosecution and possible penalty. The judge agreed and so do we. Had planning permission been granted and the respondents' position regularised, this could have been a significant factor in mitigation and any attempt by the respondents to persuade the court that it would not be proportionate to make a sizeable POCA order.”

(2) R. v Panayi [2019] EWCA Crim 413

- The appellant had constructed a roof extension on his property which exceeded the dimensions for which planning permission had been granted. EN issued. Non-compliance. The appellant continued to let the property without modification. Application for a certificate of lawful use was rejected. An appeal was also rejected. LPA reconsidered and commenced prosecution notwithstanding eventual compliance.
- First instance confiscation order of £95,250. Reduced on appeal to £58.
 - Period of charge – “18 February 2016 or about” held to be a single day (see s.179(6) TCPA 1990)
 - Benefit limited to a single day’s rent, not whole period of non-compliance.

(3) Wokingham BC v Scott [2019] EWCA Crim 205

- EN to stop unauthorised use of land. The owner-operator appealed. After informal discussions with LPA, he took its advice to withdraw his appeal and applied for a certificate of lawfulness of existing use or development, believing that the application would be considered on its merits. However, withdrawing the appeal meant that the enforcement notice took effect. A certificate of lawfulness could not be issued where an enforcement notice already existed; consequently, the owner-operator's application was refused.
- Injunction to secure compliance, followed by committal order. LPA commenced prosecution on the basis that prosecution would support compliance of the notice and injunction, and would allow the court to punish the respondents for the breaches and make an order under POCA 2002

(3) Wokingham BC v Scott [2019] EWCA Crim 205

- Trial judge found that the local authority had induced the owner-operator to act to his detriment by withdrawing his appeal against the enforcement notice and had then taken advantage of the situation. She concluded that it would be an affront to justice to let the prosecution proceed. She was also concerned that the local authority's decision to prosecute had been influenced by the fact that, if an order was made under POCA 2002, the local authority would receive 37.5% of the fruits of the order.
- Court of Appeal affirmed *Knightland*. No basis to interfere with conclusions of trial judge.
- An undertaking not to prosecute was not necessary for an abuse of process argument to succeed.

(3) Wokingham BC v Scott [2019] EWCA Crim 205

*“It ... came as a surprise to the members of the court in **Knightland** that a body given the power to prosecute should consider the possible financial advantage to itself as a relevant factor in the decision to prosecute. As the court held in **Knightland** , this flies in the face of the clear provisions of the Code for Crown Prosecutors...*

*We endorse and repeat the observations of the court in **Knightland** . The decision to prosecute is a serious step and one that must be taken with the utmost care. ... where there is a potential conflict of interest, namely a financial interest in the outcome of the prosecution set against the objectivity required of a prosecutor, the prosecutor must be scrupulous in avoiding any perception of bias. The possibility of a POCA order being made in the prosecutor's favour should play no part in the determination of the evidential and public interest test within the Code for Crown Prosecutors. We hope that this message will be relayed to all those making charging recommendations and decisions as soon as possible.”*

Thank you.
Any questions?

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