



RTPI Cymru Seminar - 7th July 2010
ENFORCEMENT – REVIEW OF RECENT
CASE LAW

Morag Ellis QC



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GRAY'S INN
SQUARE

Can the Discretion to take Enforcement Action ever become a Duty?

s.172 Town and Country Planning Act 1990

“LPA may serve an enforcement notice ... If it appears ... that it is expedient...”

R (Ardagh Glass) v Chester City Council [2010]

EWCA Civ 172

- Quinn constructed largest glass container factory in Europe without gaining planning permission: EIA development



continued/...

- construction began October 2003
- retrospective application July 2004 called in
- production started May 2005
- planning permission refused January 2007
- JR of decision not to enforce
- HHJ Mole QC:
 - (i) ordered LPA to issue enforcement notice
 - (ii) held that retrospective planning permission could be granted so long as LPA paid careful attention to need to protect objectives of EIA directive

continued/...

(iii) said that failure to take action to prevent immunity would be breach of UK obligations under Directive

- Court of Appeal affirmed decision

PRACTICAL IMPLICATIONS

- LPA likely to be acting unlawfully if allows immunity to be achieved for unlawful EIA development



continued/...

- Can grant retrospective planning permission
- EIA dimension important element of discretion/expediency under s.172
- Might also logically apply to Habitats Directive/Appropriate Assessment

DISCONTINUANCE

- S.102 TCPA –

“(1) If, having regard to the development plan and to any other material considerations, it appears to a local planning authority that it is expedient in the interests of the proper planning of their area (including the interests of amenity) –

(a) that any use of land should be discontinued, or that any conditions should be imposed on the continuance of a use of land; or

(b) that any buildings or works should be altered or removed, they may by order –

(i) require the discontinuance of that use, or

(ii) impose such conditions as may be specified in the order on the continuance of it, or

(iii) require such steps as may be so specified to be taken for the alteration or removal of the buildings or works, as the case may be.

(2) An order under this section may grant planning permission for any development of the land to which the order relates, subject to such conditions as may be specified in the order.

s.102 continued

- (3) Section 97 shall apply in relation to any planning permission granted by an order under this section as it applies in relation to planning permission granted by the local planning authority on an application made under this Part.*
- (4) The planning permission which may be granted by an order under this section includes planning permission, subject to such conditions as may be specified in the order, for the development carried out before the date on which the order was submitted to the Secretary of State under section 103.*
- (5) Planning permission for such development may be granted so as to have effect from –
 - (a) the date on which the development was carried out; or*
 - (b) if it was carried out in accordance with planning permission granted for a limited period, the end of that period.**
- (6) Where the requirements of an order under this section will involve the displacement of persons residing in any premises, it shall be the duty of the local planning authority in so far as there is no other residential accommodation suitable to the reasonable requirements of those persons available on reasonable terms, to secure the provision of such accommodation in advance of the displacement.*

s.102 continued

- (7) Subject to section 103(8), in the case of planning permission granted by an order under this section, the authority referred to in sections 91(1)(b) and 92(4) is the local planning authority making the order.*
- (8) The previous provisions of this section do not apply to the use of any land for development [consisting of the winning and working of minerals or involving the depositing of refuse or waste materials] except as provided in Schedule 9, and that Schedule shall have effect for the purpose of making provision as respects land which is or has been so used.*

USK VALLEY CONSERVATION GROUP v BRECON BEACONS NATIONAL PARK AUTHORITY and THOMAS

JR of Planning Permission and Resolutions concerning
Discontinuance

THE PLANNING PERMISSION

- PP granted, June 2005 by NPA for *“Relocation of existing camping facility out of flood zone”* at Gilestone Farm, Talybont-on-Usk, with conditions limiting numbers of tents and caravans
- JR claim form issued February 2009; permission granted (Wyn Williams J), June 2009



DISCONTINUANCE – s.102 TCPA 1990

- NPA resolved not to make a discontinuance order in late 2009, and had regard to financial consequences of statutory compensation if it were to do so
- JR'd on basis:
 - (a) that it was unlawful to have regard to financial consequences; and/or
 - (b) that it was unlawful to have regard to the specific valuations of the District Valuer; and/or
 - (c) perception of bias

ISSUE: What considerations are “material”?

Ouseley J did not follow Alnwick DC v SoSETR [1999] 79 P&CR 130 (s.97 TCPA) on basis of principle:

“S.102 involves a decision as to whether a DO is expedient in the interests of the proper planning of the area ... The development plan and other material considerations guide the decision on what the interests of the proper planning of the area are and the authority then has to decide whether it is expedient” to make DO.

“The expedient decision may quite lawfully be a decision that no action should be taken, and the authority is not obliged by statute to take the decision that most perfectly achieves what it has determined are the interests of the proper planning of the area”

“Advantages and disadvantages ... including the cost and effectiveness of the various possibilities”

Postscript

Successful enforcement action taken in respect of breaches of planning control

Prompt use of s.187B injunction to remove caravans after striking down of planning permission and withdrawal of s.174 appeals

Does it pay to Play the System?

Welwyn Hatfield Council v SoSE and Beesley [2010]

EWCA Civ 26

- B deliberately deceived LPA by applying for “*hay barn*” in which he intended to live
- B applied under s.191 TCPA for LDC after 4 years, which LPA refused on basis that it was not a dwelling house since its external appearance was not that of a dwelling
- Inspector granted certificate on basis of use

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- High Court overruled Inspector; building had only ever been used as dwelling; no change of use
 - Court of Appeal upheld Inspector
 - Objective test, notwithstanding consequences which were for Parliament
 - Sage v SoSE followed: looked at as a whole, physical and design features were those of a dwelling and not in accordance with planning permission

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- Permitted use was agricultural storage and use as dwelling house constituted change of use under s.171B(2) and/or between completion and occupation, no use followed by change to dwelling
 - Therefore LPA could not rely on 10 year period in s.171B(3) since s.171B(2) displaced it.

Postscript:

Westminster Government (CLG) working on details of Conservatives' *"Open Source Planning"*, including enforcement: *"new enforcement powers to tackle planning applications that, having been granted, turnout to be substantially misleading"*.



Fidler v SoSE [2010] EWHC 143

- F built dwellinghouse behind straw bales and tarpaulin
- LPA discovered and served EN
- F appealed, claiming that he had substantially completed the development more than 4 years earlier
- Inspector held, applying Sage, that as there was a very close and intimate connection between erection and removal of bales and construction of dwelling, the former was a necessary part of the overall building operations relating to the latter
- High Court upheld Inspector on the facts as found by him

R (oao Summer) v SoSE [2010] EWHC 372 (Admin)

- S submitted that use of buildings constructed more than 4 years ago was ancillary to operational development and therefore also immune, although Inspector had found use had not continued for 10 years
- Collins J disagreed: clear from s.171B that distinction is to be drawn between change of use and operational development

Ellis v SoSCCLG [2009] EWHC 634

- Planning permission granted in 1961 subject to agricultural occupancy condition
- Breach 1961-2000
- 2000 – date of application, intermittent occupation in breach/vacancy
- Unoccupied at date of application
- Therefore never occupied in accordance with condition
- E argued that 1961-2000 breach “*crystallised*” immunity/lawfulness by parity with material change of use cases and by virtue of pre 1964 start (Panton and Farmer)

Ellis continued/...

- High Court HELD (following and extending Nicholson) that breach must have continued for **at least the 10 years immediately preceding the application**

R v Del Basso [2010] EWCA Crim 1119

- Defendants operated airport parking business in breach of planning control
- S.197 TCPA prosecution successful but they continued
- On subsequent prosecution, Prosecution invoked s.6 Proceeds of Crime Act 2002 and £760,000 was confiscated

Del Basso continued/...

- CA rejected Abuse of Process submission: *“They have treated the illegality of the operation as a routine business risk with financial implications in the form of potential fines or, at worst, injunctive proceedings. This may reflect a more general public impression among those confronted by enforcement notices with the decision whether to comply with the law or to flout it. The law, however, is plain. Those who choose to run operations in disregard of planning enforcement requirements are at risk of having the gross receipts of their illegal businesses confiscated.”*



Morag Ellis QC