Planning Enforcement

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Introduction

Planning enforcement is sometimes seen as the poor, and slightly dirty and disreputable cousin of the planning family. Plan making has the aspirational place making, society shaping and special protection roles. Development management is about creating the best places, building consensus (or winning arguments) and hard decisions. But enforcement is a crucial third pillar without which the other limbs would be a pointless exercise.

Enforcement can be quite nerve-racking, for both local authority officers and owners/developers even for those well-versed in the process, let alone the many for whom it may be their one and only encounter with the planning system.

Overview

While this paper aims to give a brief overview of the planning enforcement regime its main aim is a discussion of some of the practical effects and considerations arising from enforcement matters. It is not intended to be a substantive guide to procedure at all steps.[1]

The main focus will be on enforcement against breaches of planning control arising under Part VII of the Town and Country Planning Act 1990 (the "1990 Act"). This paper will also note some ways in which the same principles apply, or materially different results occur under related regimes such as listed buildings or under devolved legislation for other parts of the UK, but this review is not exhaustive.

The paper is presented roughly chronologically in the life of an enforcement action from the initial breach, though investigation to the decision to take enforcement action and the consequences of that action.

All views expressed are, of course, my own and not those of Mishcon de Reya LLP.

Breaches of Planning Control

Fundamentally a breach of planning control falls into two types: failure to have permission at all and failure to comply with a permission you do have. Failure to have permission could relate to a change of use or physical works or both.

In many cases the breach will be clear. A residential dwelling is now used as a dentist surgery or a restaurant repeatedly remains open after the 11pm closing required by conditions. In other cases, especially relating to use, there may be arguments as to whether a breach has occurred. Such assessment is beyond the scope of this paper, but examples include cases on intensification and the amalgamation of residential units (*Richmond upon Thames LBC v Secretary of State for the Environment, Transport and the Regions* [2001] J.P.L. 84 and a swathe of recent cases in Kensington and Chelsea). It might also include the materiality of a change of use e.g. a hairdresser (in use class A1) becomes a nail bar (outside A1) but the owner argues no material change of use has occurred, or the dividing line between mixed uses (e.g. a pub might be A4 or it might have become a full-on A3 "Gastropub" restaurant or a genuine sui-generis mix between the two).

A number of cases have revolved around the extent of enforceability of the description of development in a planning application. The well-known case of *I'm Your Man Ltd v Secretary of State for the*

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[1] Law is stated as at August 2019

Environment [1998] 4 P.L.R. 107 is authority for apparent limitations in the description of development being directly enforceable. The use of the word "limitation" in the definition of breach of planning control in s.171A of the 1990 Act did not mean words such as "temporary" or "for agricultural workers" in the description of development. Limitation is limited to the restrictions of a permitted development right. If, say, an agricultural workers restriction is to be enforced there would have to be a condition imposing such restriction.

That doesn't mean that the description of development has no meaning. That was particularly important in the recent case of *Lambeth LBC v Secretary of State for Communities and Local Government* [2019] UKSC 33 where the Supreme Court were satisfied that a description of development in a s.73 application which recited that the council was approving a variation of a specified condition clearly and naturally had to mean that the condition was varied, despite it not being set out in the subsequent conditions. The description sets the scope of the permission and works or activities outside that scope can still be subject to enforcement. A planning permission to erect a building described as a barn does not prevent that building from being enforced against if used as a home because that is outside the permission. Materiality of any change of use still applies of course. An agricultural worker's dwelling in my example above falls within use class C3 meaning that a change to any other kind of occupation within C3 is, by definition, not a material change of use.

The physical equivalent of the materiality test of change of use is, of course, a minor change from approved plans. Even without conditions, approved plans can be incorporated into the grant of planning permission by reference. Deviation from the plans can be a breach of planning control.

However, does any deviation, no matter how small, constitute a breach of planning control? Are we reliant on the council's decision to take action to regulate whether a breach matters? Or is there a limit below which, not only would it not be appropriate to take action but below which the council *cannot* take action? In practice, whilst there must logically be a de-minimis rule, the extent of it is determined by fact and degree in each case and it is difficult to see how enforcement is expedient where the change is likely to meet any reasonable de-minimis threshold anyway.

An example at the other end of the scale in which I had some personal involvement featured a householder who thought that at worst, they had gone beyond their permitted development rights when implementing multiple extensions and a roof repair at the same time, but the inspector was persuaded that the works were so extensive as to constitute a demolition and rebuild of the house and agreed that the appropriate remedy was therefore complete demolition of the "new" house. Had the inspector been convinced that the works were in fact PD or mostly PD, that the complete demolition requirement in the enforcement notice may well have been seen as excessive.

Time limits

The time limits for enforcement in planning cases will be familiar to most readers. Operational development and the special case of change of use to a single private dwellinghouse are subject to a 4-year time limit with any other breaches including other changes of use and breaches of condition being subject to the 10-year limit. This limit runs from practical completion of the development even if the breach arose at an early stage of a long build (long established; see particularly *Sage v Secretary of State for the Environment, Transport and the Regions* [2003] 1 W.L.R. 983—but a point still being discussed as recently as May 2019 by the inspector in a roof terrace enforcement in Sunderland DCS reference: 400-021-972) or the institution of the change of use.

Aside from demonstrating the date of practical completion or institution of a new use, the other most commonly argued factual matter as regards time limits is whether there has been a material interruption and what effect that has.

Thurrock BC v Secretary of State for the Environment, Transport and the Regions [2002] EWCA Civ 226 is often quoted authority for the need to look back 10 or 4 years from the date of issue of an enforcement notice and requiring that the use be continuous since that date. Care must be taken however not to place more emphasis on Thurrock than it actually bears. That continuity does not require that a use be used every single day, a point made in Thurrock itself. When looking at residential occupations for let properties councils will often accept three-month void periods as within the normal letting process and not consider it fatal to time running. Some even accept a six-month window, but this is less common. Certainly, in *Miles v National Assembly for Wales* [2007] EWHC 10 (Admin), an 18-month gap in motorcycle racing due to foot and mouth disease restrictions was fatal to the case and acted to restart the clock. In *Swale BC v First Secretary of State* [2005] EWCA Civ 1568 a patchy use was considered, and the inspector was found to have erred by not being clear in how he had assessed the key periods of use and being distracted by discussion of abandonment.

When a building is unlawfully split into say six flats, I would assert that continuity gaps in one flat can be compensated for by occupation of other flats at the same time. It would be perverse and nonsensical to say that five of the six flats are immune from enforcement but that somehow the 6th flat of a conversion remains open to enforcement. Taking a purposive approach, the aim of the continuity test applied by Thurrock is to ensure that the council is not penalised for not taking enforcement action during a period when in practice it would be odd or even impossible for them to do so. In the flat conversion example, any enforcement would always have been against the building as a whole and there is realistically no period lost to the council and a certificate should be granted or enforcement should be found to be out of time.

It is also critically important that *Thurrock* is not authority for the point that a use which is not currently taking place at the point of a certificate application or enforcement consideration is automatically unlawful. There is no justification for suggesting, as some councils have done to me on certificate applications, that where a use can unequivocally demonstrate the requisite 4 or 10 years prior to a cessation of use later gaps can be fatal to the application. It is clear from *Thurrock* itself and from *Panton v Secretary of State for the Environment, Transport and the Regions* [1999] J.P.L. 461 that a full requisite period is enough as long as there is not a later different use or actual abandonment (as opposed to lack of active use).

Whilst *M&M (Land) Ltd v Secretary of State for Communities and Local Government* [2007] EWHC 489 (Admin) made the point that a certificate of lawfulness does not make a use immune from being abandoned, it said nothing more than that use certified as lawful by a certificate is no different from one which has the express grant of planning permission. It would be quite odd, frankly, if a use started unlawfully but which became lawful though effluxion of time was somehow magically more robust than one granted express approval.

Concealment

No discussion on enforcement would be complete without a short note on concealment. Section 171BA-BC of the 1990 Act were added by the Localism Act 2011 because of the famous cases of *Welwyn Hatfield Council v Secretary of State for Communities and Local Government* [2011] J.P.L. 1183 and *Fidler v Secretary of State for Communities and Local Government and Reigate and Banstead BC* [2010] EWHC 143 (Admin). At the time of the Localism Act it was clear that the courts were quite concerned about clear and flagrant intentional deceits in order to obtain a lawful house which would otherwise not have been granted permission but also uncertain whether those deceptions could nonetheless succeed. The public attention received combined with fear surrounding the final decision, led the government to create what it hoped would be a clear framework for dealing with deception namely, Planning Enforcement Orders (see below).

It is worth however a quick moment to take stock of where this leaves us.

Welwyn Hatfield was finally determined before the Localism Act received Royal Assent. It however was not superseded by the Act and remains good law. Whilst in Welwyn Hatfield the question of public policy was addressed strictly obiter, it is clear that all three Lords considered that the so-called Connor Principle[2] could be applied to allow public policy to negate a right to which someone was otherwise entitled under statute. Lord Brown however stressed that, given that the government had felt it necessary to introduce provisions in the Localism Act that "only truly egregious cases such as this very one (and perhaps Fidler too) should be regarded as subject to the Connor principle" and "I do recognise, however, that, as matters presently stand, it should only be invoked in highly exceptional circumstances".

This is crucial given the transitional provisions in the Localism Act. The Planning Enforcement Order provisions only apply to breaches whose time limit for enforcement expires after 6 April 2012. Historic breaches where there has been concealment which only now comes to light, more than seven years after the expiry of the time limit, could not be subject to an application for an order and a council would have to demonstrate gross concealment of the type seen in *Fidler* and *Welwyn Hatfield*. As the 2012 date moves further into the past, that test will be harder and harder to make out and many cases of milder concealment would reasonably have to be weeded out in any event as not expedient to enforce.

It is not however as simple as Welwyn Hatfield applying before 2012 and the new provisions after. *Jackson v Secretary of State for Communities and Local Government* [2015] EWCA Civ 1246 confirmed that an authority can still rely on the Welwyn Hatfield principles. It went further to suggest at first instance that the inspector in that case had not been obliged to go further by applying an "exceptionality" test or considering whether the conduct had been "truly egregious". In the Court of Appeal, Lord Justice Richards, whilst not expressly disagreeing with that statement, confirmed however that the *Welwyn* principles are limited to "particularly serious cases".

Jackson presents some challenges as it seems to suggest that a council can ignore ss.171BA–BC and issue a notice anyway in reliance on *Welwyn Hatfield* if they thought it applied. That creates real issues for certainty, especially if *Welwyn Hatfield* can be relied on when the council has been aware of a breach and concealment for more than six months. Conversely and as pointed out in *Jackson* itself, notices could be issued and a ground (d) appeal[3] only be raised at that stage. It would be perverse in a situation where the ground (d) was upheld but there was concealment if the council had to withdraw the notice at that stage and seek an order before reissuing a notice. An ability for the inspector to consider *Welwyn Hatfield* arguments during the appeal makes more sense.

The provisions for seeking a planning enforcement order in s.171BA–BC allows a council to apply to the magistrates' court for an order to open a planning enforcement window of one year in which to serve an enforcement notice, where it has learned of concealment in the last six months. An order is limited to a specified breach but can be used to allow service of an enforcement notice or a breach of condition notice (or an enforcement warning notice in Wales).

The council issues a certificate confirming when it became sufficiently aware of a breach. This is deemed conclusive evidence of the fact even if, for example, the applicant may consider that registration for council tax nine months ago ought to have been sufficient information to let the council know a change to residential use had taken place. In some ways that makes sense as the council is better able to assess how that information is handled in the authority. In *Tanna v Richmond LBC* [2016] EWHC 1268 (Admin), the high court did at least consider that the question could still be asked as to whether the certificate is clearly wrong. Separately, it must also be amenable to judicial review. Some may find the specific decision in *Tanna* surprising; in that case the council considered they did not have sufficient information to decide if

[2] A reference to the case of *R. v Chief National Insurance Commissioner, ex p Connor* [1981] QB 758 in which the normal statutory entitlement to a widow's allowance was refused for a woman who had been convicted of the manslaughter of her husband which widowed her in the first place, an application of the general principle of not allowing someone to profit from their own wrongdoing.

[3] Ground (d) is one of the grounds on which an enforcement notice can be appealed and requires the appellant to demonstrate that at the date of the enforcement notice, the time limit for bringing action had expired.

there was a breach when they inspected the site and found a residential tenant and considered that they had sufficient information only when the owner later applied for a certificate of lawfulness claiming four years' residential use. However, the test is that the authority has sufficient information to "justify the application" for the enforcement order. Just being aware of a breach but thinking it was newly commenced, as in *Tanna*, may not have been sufficient to give rise to a need for an order.

Concealment has been interpreted widely. In addition to applications like Welwyn Hatfield itself for permission for something different or which fails to disclose a breach, there have been examples of:

- failure to register to vote;
- not having the property assessed for council tax;
- ambiguous PCN replies; and
- lies to the planning officer on a site visit denying a use.

Concealment may involve several of the above as well as others such as physical concealment or failure to obtain building regulations approval.

Concealment does however, after lobbying from many directions including a Law Society delegation of which I had the honour of forming part, have to be deliberate (the initial draft bill having merely referred to a breach being concealed). This does introduce some subjective element. The same omission may be accidental if done by a private individual but far more likely to be deliberate if by a professional developer. It also means that breaches which can't be seen easily by simple reason of geography cannot be said to have been deliberately concealed without other evidence to suggest some further intentional action or inaction.

Investigation

Before any decision can be made regarding enforcement, the local planning authority has to first become aware of a potential breach and undertake some investigation to establish whether or not a breach has in fact taken place, and what the specifics of that breach might be.

Many years ago, I said to a client who was concerned about a historic breach of planning control in properties they were purchasing that "Planning enforcement usually is only triggered either by a complaint or the enforcement officer driving past the sight on their way home". While that advice was intentionally slightly tongue-in-cheek, there is some truth to this statement, although today I would probably add that an application for planning permission for something new would also be a real risk factor.

In reality authorities use methods somewhat more sophisticated than officers varying their route home to pick out possible breaches or verify allegations which come to them from other departments or the wider public. Westminster CC, for instance, has had a dedicated team devoted to breaches of the "90-day rule" within Greater London who have checked small ads and Airbnb listings to identify possible breaches. With the pressure on local authority funding, not all authorities can afford this kind of pro-active investigation or have scaled it back in recent years.

The 90-day rule is a particular difficulty for identifying breaches, which is common to many intermittent uses such as holiday lets with seasonal conditions or the permitted development right for temporary activities on open land for 28 or 14 days per annum under Part 4 of Sch.2 of the General Permitted Development Order 2015. For cumulative annual limits it can be quite possible that the council may have to monitor a property for most of a year before a breach can be established with the allowance refreshing in the new calendar year.

Where the council has identified a breach and wishes to obtain more information, officers usually then approach those involved. This may involve a site visit, with officers introducing themselves to people at the property and seeking names and addresses. Particularly in residential circumstances, the person in occupation need not even have a registrable interest in the land, and so simply talking to an occupier

should not be the end of an investigation. Unless the council is certain of its position, they will usually wish to identify individuals involved and may, indeed, require further information, particularly about uses. The original power to seek information in s.330 of the 1990 Act is relatively limited in that it is addressed to occupiers and any person receiving rent and relates generally to interests in land and the current use (or activities) and when they started. It has the advantage that there is no need to have formed a view that there is a breach of planning control taking place. Failure to respond is an offence, although one rarely charged for mere delay in returning the form, especially if a holding response is given. It is also an offence to knowingly or recklessly make false or misleading statements.

A planning contravention notice ("PCN"), however, is much wider. It can be served on occupiers, anyone with an interest in the land and anyone who appears to be carrying out operations or use. Specifically, it allows questions about operations carried out as well as uses. Failure to respond or knowingly or recklessly making false or misleading statements is also an offence.

It is of particular use in questions of changes of use and intensification/alteration of ancillary uses into significant additional activities. A PCN can include questions not only about the people involved and with an interest in the property. I have seen PCNs request information on activities that take place, the balance of different uses, and even detailed information relating to the balance of uses; for example: floor space splits, proportion of customers who take food away, or proportions of income derived from certain activities. Whilst wide, the power is not a complete free reign for a fishing expedition. It has to appear to the council that a breach of planning control has taken place and it is possible that at the extreme end, some requests go beyond what is reasonably within the power.

Councils must of course be conscious that the person who replies to a PCN may not take legal advice and often cannot give information which they simply don't know. It is particularly unwise to base the service of an enforcement notice solely on information and contact details provided by a person returning a PCN. One client of mine had two of their group companies served with an enforcement notice which related to property which neither company owned but which a further group company had a tangential interest by being a shareholder of the freehold management company. Although the cause of the error was never determined and the matter was resolved amicably, the overwhelming likelihood is that the person who caused the breach to which the PCN related simply guessed at my client's full company name.

From the point of view of somebody served with a PCN, one part of my advice to clients is that whilst it has to be taken seriously, and certainly cannot be ignored, a PCN does not indicate that enforcement action is going to happen. Indeed, many PCNs are an excellent opportunity for an owner to clarify any misconceptions and to confirm that the use and physical condition at the property is legal.

A correct response to a PCN where the client has not breached planning control or has done so only in a very minor fashion, will frequently result in an enforcement file being closed. That said, data from MHCLG released in August 2019[4] shows a strong correspondence between the number of PCNs and the number of enforcement notices issued. Correlation does not, of course, equal causation, and the figures may simply be tracking the ebb and flow of council resources devoted to enforcement over the years.

Decision to enforce

So, having satisfied itself that a breach of planning control has taken place, what does a council do? The answer is *not* that it proceeds to enforcement action.

Enforcement is a discretionary power not an automatic duty and for good reason. Not all breaches need to be dealt with. Some can be a positive improvement, e.g. an alteration to windows during construction to a frame which better reflects the predominant style in a conservation area. Some can simply not matter. Some may be objectionable but other reasons may weigh in the balance.

[4] *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/812459/Table_P127.xlsx*.

This is not a new principle, nor a hidden or surprising one. Paragraph 58 of the NPPF expressly states that "Enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control" and the PPG supports this, adding reference to some factors to be taken into account. But the principle of a proper assessment was already contained in the old PPG18, and in greater detail than the current PPG.

My first exploration when I used to act for local authorities was to understand whether I was being instructed to take action or merely to advise on the process for deciding. If the decision was already taken, I would examine the basis of that decision and where necessary suggest a review. When a private client is threatened with enforcement or action is brought, one of my first questions to the authority is the basis of their decision. This is not always released, especially not in full but there should, usually, be some explanation and if certain facts were unknown, councils can be invited to reconsider. Given the long history of this process, it is therefore always surprising that I still sometimes receive the answer from enforcement officers or even lawyers that "We have ascertained that there is a breach of planning control and *therefore* are taking action". At least two have actually told me that they *have* to or have a duty to take action. Thankfully this does seem to be the exception rather than the rule and, with publicity given to recent decisions, hopefully a declining trend.

My next request is normally then for a copy of the council's local enforcement plan. These are not always easily available online or are sometimes merely summarised. The NPPF in para.58 encourages councils to "consider publishing a local enforcement plan to manage enforcement proactively, in a way that is appropriate to their area". Such a document is essential in my view. Local enforcement plans help an authority to set out how it will approach the decision whether and how to enforce as well as providing details of its approach to investigations and monitoring of permission and works. It allows policies to be formulated and applied in a consistent fashion.

The content of the plan is a factor that the council is expected to take into account when deciding what, if any, action to take. It cannot of course act as a straitjacket to decision making and all cases must be considered on their own merits. Equally, owners may also have a legitimate expectation that certain approaches will be taken in certain circumstances unless there are clear reasons for the council to depart from the plan. The plan can identify types of breach (especially, say, listed building breaches) which the council considers higher priority and more likely to require action. The plan could also put a high priority on preventing (or stopping further) irreversible harm. Other factors to be considered, to the extent they are not already set out in the local enforcement plan include:

- the development plan;
- national policy and guidance;
- the wider importance of ensuring that planning controls are upheld (closely connected with deterrent factors);
- proportionality;
- public interest test where prosecution is considered (see below);
- Equalities Act;
- personal circumstances where appropriate;
- the welfare of those enforced against and of those suffering adverse effects from any breach;
- human rights, especially in living accommodation cases, and in particular, article 8 (right to respect for private and family life), art.14 (prohibition of discrimination) and art.1 of protocol 1 (protection of property) of the European Convention; and
- other material considerations.

Council resources may not be an official reason, but as can be seen from historic trends in enforcement action and the current reports of enforcement being at its lowest since records began in 1996, it is only

natural that the threshold for both investigation and taking of action will in practice be resource dependent. This flows to a large extent from the differences between public duties and powers. If duties still have to be complied with (valid applications processed for instance) they will always have first call on scarce resources. It is unlikely that many decisions not to enforce will simply say that the council cannot afford to enforce, but what is enforced against could and should be prioritised in times of forced austerity. As noted in the section on proceeds of crime below, the cases of *R. v The Knightland Foundation & Friedman* [2018] EWCA Crim 1860 and *Wokingham BC v Scott* [2019] EWCA Crim 205. however, make explicit that potential receipts from any confiscation order under the Proceeds of Crime Act will *not* be a valid consideration. Any hint of such consideration will risk opening the decision to take enforcement action to judicial challenge or claims of an abuse of process during prosecution proceedings. I would personally add another similar risk factor, that of targets for enforcement. Whilst monitoring enforcement action is sensible, setting actual targets for numbers of enforcement actions commenced or proportion of cases which lead to enforcement would clearly be inappropriate and risk distorting the proper decision-making process.

It should be pointed out that the decision to take action can in some circumstances be taken differently in respect of different individuals or groups of individuals. This is especially true of a decision to prosecute where each prosecution is a separate enforcement decision, but also where notices or injunctive proceedings can be served on some individuals and not others. This was a further point in *Wokingham*, where the council was criticised for bringing prosecution proceedings against a wide range of individuals without adequate assessment of who is the priority for prosecution.

The crucial point to remember is that the decision to enforce is not once-and done. It must be kept under review and revisited where necessary. This point also arose in poor Wokingham's case, though the fault there was, I suspect, a failure to document it rather than never reviewing at all. A point well worth making on its own.

Such decisions are amenable to judicial review, especially where there is no appeal, such as a decision to issue a breach of condition notice, and the prospect of running detailed arguments as to the decision to serve in front of the magistrates during a prosecution is unappetising.

So, if the council simply does nothing, is that OK? Maybe, but only if they have chosen to do nothing. A council should not accidentally let a known breach pass the time limit for enforcement. Any council choosing to do nothing should make a conscious decision to do so and should take that in a timely fashion and clearly document the reasons for it. This point cropped up in *R. (on the application of Samuel Smith Old Brewery Tadcaster) v Selby DC* [2008] EWHC 902 (Admin), one of the long running series of court cases brought by the Brewery relating to an equestrian centre in the green belt. The court ordered Selby council to properly consider proceedings rather than simply let the time limit elapse but stopped short of actually ordering that enforcement action *had* to take place.

The decision to take action sometimes gets caught up with expediency. However, the test of expediency strictly applies only to enforcement notices, stop notices and injunctions. Irrespective of this a formal balancing act still must be undertaken. It would be wrong to suggest a BCN can always be served in a case of breach of condition because there is no expediency requirement in the section. Expediency is however a prerequisite for action in those specified examples. Expediency considerations seem to be limited to the development plan and material considerations. No amount of political pressure, local objection or local enforcement plan content allows an enforcement notice to be served in a case where it is not expedient.

Remedies

Where a change of use has taken place, a council's first step would often be to ask the owner to cease the use voluntarily, backed with either a threat that formal enforcement will take place if not corrected or at

the very least, outlining the council's powers to take action. This may even be requested temporarily pending an investigation. The same approach can be taken to operational development as well.

The most commonly thought of next action would be an enforcement notice. This can be directed at remedying either the breach or just at removing impacts of the breach on local amenity. It need not cover the whole breach and, when complied with, deemed permission is given for the remainder of the unlawful works or use not enforced against. It nonetheless remains binding the land and can be used against future repetitions of the same breach.

The notice is made and must specify the breach and what steps must be taken. A copy must be served within 28 days and cannot take effect for at least a further 28 days after that. Once it has taken effect, it can allow a certain time period for compliance, or different time periods in the case of different steps. It can of course be appealed, and any appeal must be lodged before the notice takes effect which then suspends that effect until determined.

However, the enforcement notice is not the only option. It should not even necessarily be the default. Other possibilities are discussed in turn below.

Invitations to apply for permission

If the development is potentially acceptable or could be so if properly regulated, an owner may be invited to submit a regularisation application. Such application could involve sacrificing some of a set of unlawful works or activities. Councils may be cautious about this option if it appears that the breach has existed for some time as the application process can take time and it would be embarrassing to miss the enforcement deadline.

This process is formalised in Wales with the enforcement warning notice ("EWN") under s.173ZA. This invites an application and gives a deadline for submitting one but has no direct enforceability. It neither prevents service of an Enforcement Notice before the stated deadline expires nor requires a further notice to be served immediately on expiry or at all.

The Welsh Government's Development Management Manuel includes guidance stating that an EWN should not be used where the development is potentially EIA development. This is not express in the legislation but must follow from the requirement that there should be a reasonable prospect of grant of planning permission. The council can form no such view on EIA development without the benefit of an Environmental Statement. The same must follow for development which is having impacts on a European Site. This does not, of course, prevent the council inviting a retrospective application anyway.

Crucially the service of an EWN counts as enforcement action for the purpose of the 4-year and 10-year time limits. As such it engages s.171B(4)(b) of the 1990 Act which allows further actions (including another EWN) within four years. This drastically reduces the risk of the council accidentally allowing development to become lawful while an application is considered.

The Law Commission has reviewed this latter provision in its Planning Law in Wales Final Report HC 1788 and noted that it risks an indefinite series of EWN. Consultees generally agreed that the best solution was for the period for additional enforcement action to be triggered from the date the EWN is served but be expressly unable to be further extended by additional EWN.

As proposed to be changed by the Law Commission, this notice is a welcome addition to the enforcement stable and other jurisdictions could do worse than to copy it. The main risk I see is that it becomes the default action, issued to stop the clock but with a perceived lower threshold for deciding to take action than as full-blown enforcement notice.

It should be recalled however that if the development in breach of planning control is truly acceptable and needs no conditions to regulate its use, no enforcement action should be threatened by the council merely to tidy up the paperwork. Conversely, a council may be willing to close its file but an owner,

perhaps with an eye on a future sale may want to make a retrospective application to satisfy a future purchaser or to avoid delay to the transaction.

Breach of Condition

Breach of condition notices ("BCN") are an alternative to an Enforcement Notice when (obviously) there is a breach of condition involved. They are ideally an alternative to an enforcement notice rather than intended to be used in tandem, but such use is not strictly prevented.

A key element to a BCN is that the offence of failure to comply can only be charged against a person on whom the notice was served. Effectively, unlike an Enforcement Notice, it does not run with the land. A notice can be served on the person who is carrying or has carried out the development or on a person having control of the land.

Unlike and enforcement notice or injunction, a BCN does not require the council to consider expediency before issue however that still does not exempt the council from its duty to properly consider whether and how action ought to be taken. It also does not mean that prosecution must automatically follow from a breach of the notice.

Because there is no appeal available, it might be tempting to think that BCN is a preferred route for a swift resolution (albeit that there is still a minimum of 28 days compliance period which may seem like a long time to neighbours suffering from disturbance from a breached condition). However, many authorities will issue an enforcement notice in preference even where a breach of condition is involved. In practice the fact that there is no appeal can sometimes lead to a Judicial Review of the decision to take enforcement action or to matters which would have been raised at appeal instead being raised as a defence or procedural objection in the magistrates' court. In general, if such matters are likely to be raised, an appeal decided by an inspector is a better forum than a local magistrates' court who may see only a few planning cases a year at best.

In my experience BCNs are more likely to be used and be successful where:

- there is no reasonable prospect of time limits being argued (easy to determine if the permission is less than 10 years old);
- the fact of a breach is indisputable (e.g. something is required to be done or to be retained and its presence or absence is demonstrable by photographs); and/or
- the remedy is likely to be uncontroversial and measurable.

One particularly useful approach is to use a BCN in relation to conditions likely to give rise to occasional or episodic breaches, e.g. construction noise (though this is often better dealt with through environmental health controls), sheeting or wheel washing of lorries or opening hours. A persistent offender in such a case who believes the constraint is too tight is more likely to seek a relaxation though a s.73 application than the uncertain and difficult approach of trying to fight the validity of the condition in a magistrates' court whilst being prosecuted. The threat that later recurrences of the breach could each be prosecuted focuses the mind. It also has the advantage that a future owner/tenant cannot be prosecuted without a new notice being served reducing any harm to the desirability of the property which a permanently effective enforcement notice may have (while making clear that the council takes compliance seriously).

Injunction

An injunction can be sought where the council thinks it expedient or necessary. Crucially and in contrast to the other powers it can be used prospectively against an apprehended breach of planning control. It is not technically an enforcement action so not strictly prohibited by the time limits for enforcement, however

injunctions are an equitable remedy and are not granted as-of-right. In a case without concealment it seems unlikely that the court would be persuaded to grant an injunction relating to long established breaches.

An injunction is not parasitic on other powers, the council need not have already taken other action or propose to do so. The council must however have considered whether to do so (*Hackney LBC v Manorgate Ltd* [2015] EWCH 2025 (QB)).

The ability of an injunction to be brought against persons unknown is also helpful. Whilst this ability is expressed in the legislation it took the case of *South Cambridgeshire DC v Persons Unknown* [2004] EWCA Civ 1280 to establish that this could be used for a wide-ranging blanket injunction against any people who intend to enter the land to breach planning control. That seems extraordinary but, in the context, a field adjacent to and forming a natural potential extension of an already controversial existing gypsy/traveller site on which unusual activity had started and in relation to which inquiries were being made about purchase, it is reasonable that the council was entitled to an order even though the identity of those looking to move on were not and could not be fully ascertained. This approach has been repeated in recent years in Enfield and Waltham Forest.

In practice injunctions are most common in cases where pre-emptive action is being taken or where an enforcement notice has been served and breaches remain ongoing despite threat of or actual prosecution. The appeal in the latter situation is the potential for imprisonment for contempt which is often seen as a more serious threat than fines for breach of an enforcement notice or a BCN. It was this threat for instance, that finally convinced Mr Fidler to remove his mock-Tudor castle, although the council had to go so far as initiating proceedings for contempt and obtaining a suspended order before action was finally taken (*Reigate and Banstead BC v Fidler* [2015] EWHC 3863 (QB)).

One possible effect of the rise in use of Proceeds of Crime legislation (see below) may be a reduction in the need for injunctions in the latter case, perhaps limiting them to cases where no or limited monetary benefit of a breach can easily be identified.

Stop Notices

A stop notice is, of course parasitic on an enforcement notice and is potentially short-lived. The aim is to prevent damaging activities continuing in the period before an enforcement notice can take effect and, if appealed, this includes the period of suspension for the appeal.

Historically these have been underused by authority because of the potential for compensation payments under s.186. Such compensation payments have always only been claimable if either notice is withdrawn or if the enforcement notice is successfully appealed on a ground other than ground (a)[5] or varied so as to remove the requirement to which the stop notice relates.

It therefore has always been the case that compensation claims can be minimised by being satisfied as to the factual existence of the breach (and being satisfied it doesn't have permission!) and the enforcement time limits. If those elements are fairly unambiguous, there should be little concern for compensation. The time limit point may explain why in my experience such notices are proportionally more common in minerals and waste cases where each new deposit or extraction is a new breach.

Amazingly, or perhaps because of this fear, the statutory exclusions from the compensation provisions were tested for what appears to be the first time in *Huddlestone v Bassetlaw DC* [2019] EWCA Civ 21. In that case, all sides accepted that the activity prohibited by the stop notice was a breach of planning control despite the fact that the enforcement notice was quashed because the basis of the breach was wrongly identified (and later correctly enforced against). It is clear from *Huddlestone* that the intention behind the section, that compensation should not be payable for loss of an ability to breach planning

[5] Ground (a) is one of the specified grounds of appeal against an enforcement notice and argues that the breach of planning control should be granted express planning permission. There is therefore no risk of compensation simply because the inspector decides to grant retrospective consent for the breach.

control, has been successfully captured by the section. Councils may well be more confident of their use of Stop Notices in the future.

The Rogues' Gallery: Who is responsible and who is actually liable?

Up to this point I have generally referred to enforcement against an "owner", but many sites have far more complicated interests than a simple freehold. Enforcement is generally aimed at all of those with an interest.

There are many people however who may be involved with a property without being involved in a planning breach or indeed, being able to rectify it. Even a single office building could have multiple tenants, a head landlord and a freeholder with mortgagees holding interests in the freehold and headlease. Across a complex development site, some of which may be completed and some of which may still be in the original use, the issue becomes far more complex.

An enforcement notice needs to identify the land to which it relates. This need not be the whole of a single registered title. Indeed, in a multiple occupancy building I would argue that it should not be. If a notice can be limited to the fourth-floor office suite or flat 2B or the rooftop then there is every reason to do so. Where a notice is limited, innocent parties do not receive notices on which they have to take advice and the risk of appeals delaying the enforcement are reduced.

Where someone has to be served with a notice but is not the council's focus of attention, a council can provide an assurance pursuant to s.172A of the 1990 Act.

A s.172A assurance is however no guarantee for the person receiving the assurance. In my personal experience councils can be resistant to giving such assurances. In some ways this is good as it gives comfort that those which are given are limited to cases where there is no realistic prospect of the assurance being revoked. However, the ability to revoke a notice does also mean that even freeholders and banks could be given assurances in respect of tenant breaches without compromising a council's ability to secure compliance. Such assurance could be accompanied by advice as to the situations in which the assurance could be revoked (e.g. the end of the tenancy or a bank entering possession).

The situation under s.172A is notably different from that of a person potentially liable for CIL under the Community Infrastructure Levy Regulations 2010 (as amended) where someone else has issued an assumption of liability notice. In that case, the council cannot pursue other people for unpaid CIL unless and until it has used "all reasonable effort" to pursue the person who has assumed liability. That may not be the same as the well-known phrase "all reasonable endeavours" and I am not aware of any case on this question yet. The regulation goes on to refer to using one or more of the enforcement measures available to the council. Despite the uncertainty, the assumption of liability notice does offer more confidence to other owners that they will not be first port of call or pursued as mere leverage against the main offender. This is stronger than the s.172A assurance and in my personal opinion would form a good model for giving more confidence and purpose to s.172A.

Who the main target of enforcement should be can vary. In a change of use case, it will generally be the tenant (if there is one) who is breaching planning control and the person who will need to cease an activity. A bakery which has started to allow more than just ancillary hot food takeaway or eat in is likely to be the party who will have to change their behaviour and business model. The landlord may or may not be aware of the shift of emphasis in sales and even when they are, cannot directly change the tenant's use except though pressure exerted though the lease.

The focus on tenants is not universal for all uses, however. Councils who look to enforce against a change of use from C3 to C4 for student use (in an area with an appropriate art.4 direction[6]) will often

[6] Change from a C3 dwellinghouse to a C4 small house in multiple occupation is normally permitted development unless that right is removed by the council with a direction under art.4 of the general permitted development order.

(rightly in my view) not require the students themselves to cease occupation until the end of the academic year and will focus enforcement action against the landlord.

It can be more difficult to tell who the key target in cases of operational development in leasehold property should be. Often works will be specifically authorised by a licence for alterations. A landlord who is authorising unlawful works may be thought of as more culpable than one who is not. Similarly, however, it remains the case that works performed during the tenancy are likely in practice to have been the Tenant's action, whether authorised or not.

Whilst a lease may well have a user clause which the tenant may be breaching, the enforcement mechanism requires formal notice giving a deadline for compliance and ultimately in most cases an order for possession from the court. This process can be long, possibly costly and ultimately can be abortive work if the tenant then complies or undertakes to the court to do so. It is not unusual for Landlords therefore to rely on the council's threats as the main enforcement mechanism unless and until the risk of prosecution arises.

It is often forgotten however that the primary offence of breach of an enforcement notice under s.179(2) for failure to comply with the requirements of a notice, and in particular a requirement to remove unlawful works can only be brought against an "owner". This includes people entitled to a rack rent (*Pollway Nominees Ltd v Croydon LBC* [1987] A.C. 79; [1986] 7 WLUK 184) so the landlord will usually be the person in the frame for any future prosecution for failure to remove works. The tenant might not be at all for not undoing works unless they had a long leasehold interest, though a failure to cooperate and refusal of entry may assist in giving the landlord a defence. Short term tenants and mere occupiers are only liable under s.179(5) which relates only to continuing to carry out or permit activities which are banned by the notice.

The council is likely therefore to take the view that this very threat of forfeiture from the landlord is the only real incentive against some tenants and insist on keeping the landlord on the hook as the main driver for delivering the required steps even if ultimately, they are delivered via this pressure on the tenant.

A similar argument applies to a lesser extent to mortgagees. Whilst they will very rarely have sufficient control to rectify a breach of planning control unless they exercise some security over the property, councils may still seek to apply pressure to the person who can via their mortgagees. Breaches of planning control are usually events of default under loan documents and the prospect of the loan being called in can certainly focus minds.

A mortgagee is not an owner for the purposes of s.179(2) and their offence is limited to that in s.179(5) which relates solely to not carrying on or causing or permitting activities to be carried on which are required to be ceased. Leverage by the council over a mortgagee for physical works therefore is more limited.

It is worth noting at this point that the service requirements and targets of other enforcement powers can differ.

Stop notices are served on "any person who appears to them to have an interest on the land *or to be engaged in any activity prohibited by the notice"* (emphasis added). This allows it to be extended to, say, contractors delivering waste to a site, builders, or tree surgeons. This is wider than the service requirement of an enforcement notice and reflects the urgency of this remedy. Temporary stop notices are similar but expressly include occupiers as well.

Breach of condition notices are served on those carrying out the development and any person having control of the land who are together called the "person responsible". Again, this can include a party who may have no interest in the land such as a developer. Only these persons can be prosecuted, again meaning that mortgagees are generally not affected by a Breach of Condition Notice.

Injunctions can be sought against various persons including those without interest in the land. This can be justified where someone is actively engaged in a breach or potential breach. However, the court is unlikely to be convinced to grant an injunction against a party who cannot legally or practically comply.

Whilst listed building enforcement notices are served on owners, occupiers and those with an interest in the same way as a planning enforcement notice, the offence can be charged only against the owner (equivalent to only having s.179(2) which is sensible given that s.179(5) relates to activities rather than works). However, this does not alter the general offence of executing or causing to be executed controlled works to the listed building without, or not in accordance with, listed building consent. That formulation is wider and has been used against architects and contractors and tenants as well as owners.

Effect on Property Transactions

The existence of a formal notice on the land charges on the local search can be a cause of concern when someone is buying or renting property. This immediately indicates to the purchaser that not only has a breach of planning control taken place at the property, but it is a breach which the authority considered to be important enough to bring enforcement proceedings against.

A purchaser's priority when seeing enforcement action will be immediately to identify whether or not the enforcement notice was complied with in whole or in part. If it has not been complied with, or only complied with in part, then the outstanding obligations must be identified and/or any subsequent grant of planning permission which authorises an alternative solution to the steps outlined in the enforcement notice has to be identified and, again, full compliance with that permission ascertained.

With no formal arrangements for signing off compliance with an enforcement notice, informal confirmations often have to be relied upon. This is especially true where an enforcement notice is older, or record keeping has been poor, or simply the person selling does not have the direct knowledge e.g. where an enforcement notice was served prior to their ownership, or where a receiver is selling a property. Whilst one might expect that in the case of a property having been sold since the enforcement notice was served the first purchaser would have made their own checks and be able to provide any new incoming purchaser with the details they obtained on their own acquisition to explain the enforcement notice, in practice this can be somewhat less clear. "Rely on your own searches/inspection" is an all too common response and even a "The seller believes so but gives no warranty" is of limited comfort if further proceedings are brought against the new owner.

A mortgagee may behave slightly differently. Some banks have reputations for being very risk adverse, though that can change dependent on the economic climate and other entities which provide lending services can be more commercially minded. A high street bank giving a standard mortgage on an ordinary residential property is likely to treat live enforcement as a stop sign.

On more complex residential deals or commercial transactions, where a breach is not fundamental, a live enforcement may not be a disaster for a sophisticated lender. The value loss and cost of complying with, say, a requirement to replace unlawfully installed UPVC windows or even removing an extension could be much less than the equity in the property. The real risk for the lender in that scenario is a loss of liquidity. Where an owner defaults and the mortgagee has to exercise, say, their powers of sale, they may find a much more limited pool of buyers willing to take on a property with problems. The mortgagee's certainty for giving their loan is tied to the ability to recoup the value in the event of default in a reasonable period and liquidity can be just as important as value.

It should be noted that an assurance under s.172A is personal to the individual or entity to which it was given. On a strict reading it is also limited to being given to a person on whom the Enforcement Notice was served. There is an argument therefore that it is not possible to reissue an assurance to an incoming tenant or purchaser. In my view this is a flaw in the drafting as there seems no reason for the use of assurances to be limited in this way.

In practice however, the existence of a s.172A assurance to the seller will be a strong consideration when the council is considering any action against the buyer. Good reasons should exist (in my view reasons which would have justified revoking the earlier assurance) before the buyer is treated differently

than the seller. This is some comfort to a buyer but relies on trust in the reasonableness of the council or confidence that if the council behave differently without good reason, the legal system can be used to put it right with minimal cost and hassle. As such the comfort is more limited than it could be if incoming purchasers inherited or were given their own assurances.

Even if it is clear to a buyer or tenant that the notice has been complied in a full, an enforcement or breach of condition notice will remain on the local search and indeed remain capable of enforcement for any subsequent reinstatement of works or resumption of use unless such action has the benefit of a subsequent planning permission. Such actions would be immediately open to prosecution without any new notice being served, subject to the usual considerations before action is taken.

Whether a complied-with notice represents a risk for a new purchaser will depend greatly on the nature of the breach. One which relates to a long demolished unlawful structure, is hard to breach by accident. One which dealt with more-than-merely-ancillary consumption of food on the premises in an A1 coffee shop or breach of a noise condition at a nightclub presents a much greater risk for a similar tenant in the future accidentally engaging in criminal behaviour.

Breaches which clearly exist but have not been enforced against present a real problem in transactions. A buyer or tenant will want to establish the length of time the breach has been established and what evidence is available to prove this should the breach subsequently be challenged. A normal reply to enquiry which might be satisfactory in a pure property matter will not normally be enough to obtain a certificate of lawfulness or successfully appeal an enforcement notice on ground (d).

In those circumstances, a range of options are available including insurance, taking of a Statutory Declarations from the seller or others with knowledge or even making the deal conditional on remedial action or retrospective planning permission.

This problem was further complicated by s.171BA relating to concealment. An innocent purchaser who takes a property satisfied on the facts that a change took place more than 10 years previously would have been comfortable that this carried no planning risk. Now such a purchaser needs to satisfy themselves that no deliberate act or omission of concealment has taken place or face enforcement against part of the property or use to which they may have ascribed real value.

This is a far more subjective investigation. It is clear that this is the intention however as s.171BC is clear that the concealment can be carried out by any person, not just the owner for the time being. There is no consideration of the innocence or otherwise of the current owner in the assessment made by the Magistrates' court for the making of a Planning Enforcement Order. To the extent that an innocent purchaser can receive any protection at all this will be either at the council's decision-making stage as to whether enforcement is appropriate or, potentially in rare cases, as a personal circumstances argument in the decision whether to grant planning permission in any ground (a) appeal against an enforcement notice.

This risk assessment is made even harder in a listed building case where no amount of time can make a breach immune from enforcement. It is rare for a seller to be keen to advertise a breach by making an application for retrospective listed building consent, especially with no guarantee that a sale will take place. They are at risk of being left with no sale and a threat of enforcement which may take many months or in some cases years to resolve.

The listed building problem is compounded by the difficulty of identifying the absence of features which may have been present at some time since the original listing but been lost along the way. A Georgian house converted into bedsits in the 60s, listed for group value in the 70s and then refurbished in the 80s and converted to self-contained flats in 2012 illustrates this nicely. If there are no cornices in any of the rooms, is there a breach of listed building control? Were they long gone by the date of listing, or maybe taken out in the 80s because an officer informally said the only value in the property was the group or even ripped out unlawfully in 2012? Add to that the fireplaces, modern doors, floorboards etc and the matter becomes hugely complex.

Sophisticated investors may be able to get comfortable but a private purchaser of a flat may find that uncertainty hard to swallow, especially if they wanted to do works which would involve inviting the heritage officer around to look at the building. The inability to check that the existing layout is lawful though a certificate of lawfulness under listed building law is unhelpful. The decision not to allow existing development certificates when certificates for proposed changes were introduced was, as I understand it, on the basis of the inability for works to become lawful through time and possibly to discourage owners from acting first and seeking a certificate later. I consider however that this kind of situation is a perfect candidate for a new form of certificate which can confirm the lawfulness of the existing layout, works and features of a listed building.

When a breach is already one to which criminal sanctions attach, even one which has not been prosecuted or even been identified by the relevant authority, an additional issue can arise from the fact that the owner may have assets which constitute proceeds of crime. Solicitors and certain other regulated professionals have duties imposed on them under the Proceeds of Crime Act ("POCA") when they suspect that a client is making arrangements concerning the acquisition, possession or control of the proceeds of criminal activity. This is quite separate from the confiscation order risk under POCA described below.

Within the planning and related regimes, there are many offences which could leave a person better off, save them money or increase the value of their property. For advertisements, listed building, trees and Development Consent Order matters for example, these can be criminal without a notice even being served. Any activity a lawyer might be involved in for a client could involve such proceeds even potentially where they do not relate to the property involved. The exact extent of the duties on lawyers are beyond the scope of this paper but can involve reporting to the National Crime Agency and being unable to act without authorisation and strict rules about tipping off the criminal and can apply to criminal proceeds belonging to the other party in a transaction.

Appeals and Legal Challenges

For someone facing enforcement action, a swift response is necessary. Whether it is initial enquires from an officer, a formal PCN, an invitation to make a retrospective application, warning letter or full-blown enforcement, steps can usually be taken, or at least tried, to prevent matters from getting worse.

A common cause for any enforcement moving to the next stage is silence or the impression that warnings have not been taken seriously. Whilst it might seem that I have a vested interest to say so, the early appointment of a solicitor or other appropriate professional is a crucial step to assess what has been done, what can be done and to open or keep open lines of communication.

An owner or other target of enforcement should perform their own assessment of whether a breach really has taken place and the time limits. The quality of the council's own information or advice should also be assessed.

Where enforcement seems likely it is rarely, in my view, sensible to keep powder dry on matters which may have to be raised on appeal, as a defence or in a Judicial Review later down the line. The ongoing requirement to keep the decision to enforce under review means that a council cannot safely ignore facts or suggestions that call the basis of enforcement into question. The council must have reason to believe that a breach has taken place. At that stage the burden of proof lies with the council to satisfy themselves on this point. After a notice is served, that burden shifts to the owners to demonstrate on the balance of probabilities that a breach has not taken place. Early openness therefore can sometimes avoid the position of having to fight from the back-foot on appeal.

An enforcement notice (or listed building enforcement notice for that matter) can of course be appealed to PINS on various grounds. The effect of the notice is suspended, so owners are frequently advised to appeal merely to buy time even if ultimately, they are likely to comply. That approach is understandable

but can put the owner to significant costs, especially if the appeal has no merit and there is a risk of a costs order.

That said, the effects of the powers to decline to determine duplicate applications together with the strong negotiating starting point which an unchallenged enforcement notice creates, means that where a real compromise is proposed, an appeal may be needed to avoid setting an uncomfortable baseline.

There may be other drivers to whether a party appeals or not. Contractual or funding requirements may oblige an owner to or tenant to do so. If a buyer insured a property against risk of enforcement, the insurer will want a say in whether appeals and challenges are brought, and their conduct, with a view to mitigating any loss.

Even after an enforcement notice is served, the legislation allows for withdrawal of a notice. That withdrawal does not prevent future notices and indeed, the ability to serve such a notice is protected for four years irrespective of the time limits. Councils can be reluctant to take a notice off the table even where real issues have arisen, there is an alleged mistake in the notice or there is a real potential for a solution. Sometimes this is because of political realities involved, the risk of creating further delay and sometimes simple lack of trust in someone who the council has already satisfied themselves is willing to breach planning law.

On appeal against enforcement notice the Planning Inspectorate is not as willing as it once may have been to leave an enforcement notice appeal on their books whilst parties talk. Withdrawing and reserving the right to re-serve deserves consideration where there is a good opportunity to be explored rather than forcing an owner to start the appeal process in order to protect their position.

As noted above an appeal needs to be lodged before the notice takes effect. This means there is often a short window in which to put a case together and decide on which of the various grounds in s.174[7] are legitimately arguable. In particular the choice whether there is a sufficiently arguable case to be worth paying the application fee for ground (a) will require considered advice.

As to how an appeal is conducted, it is outside the scope of this paper to dwell too much on an appeal on ground (a) (other than a reminder that CIL is payable on a permission granted under ground (a)) and time limits are already discussed above. The more procedural grounds relating to service or errors in descriptions to plans, whilst important, rarely ultimately affect the overall enforcement. An appeal on the ground that insufficient time has been allowed (ground (g)) will normally only be a case of delaying the inevitable, though is frequently thrown in as an additional ground when others are also being used. Sometimes it might be legitimate if the notice specifies works within a time scale which is physically impossible, or which has a practical effect e.g.: if it would require evicting students from rented accommodation prior to the end of the academic year.

Recent case law has looked in more detail at the extent of the power of an inspector to vary the requirements in the notice under ground (f), sometimes combined with the extent of power under ground (a) to grant partial permission so as to achieve a compromise position. It is often the case that it becomes clear by the time of an inquiry that some of the injury to amenity, or some of the objections to a breach of planning control, could be mitigated e.g. by making modifications to an unlawfully erected building.

The issue and the interplay between the powers was explored at length by the Court of Appeal in *Secretary of State for Communities and Local Government v Ioannou* [2015] 1 P. & C.R. 10. In a case where a conversion to five flats was enforced against and the steps required resumption of single dwelling house use, Ioannou had suggested that a compromise may be found by reducing the number of flats in the building to three. The inspector did not feel that his powers extended so far as to grant permission for the three-flat scheme, as it was not the breach which was enforced against nor any part of it. He also considered that an enforcement notice which required the conversion of a five-flat building into a three-flat building

[7] Section 174 of the 1990 Act provides the right to appeal and identifies the seven grounds on which an appeal may be brought (plus one further ground in relation to demolition of unsafe structures).

which had never previously existed would not have been appropriate for the local authority to issue in the first place and could not be an amendment he should make to the enforcement notice.

Although in the first instance a wider interpretation of ground (f) was explored, the Court of Appeal was not convinced. For the three-flat scheme to be lawful it would have to become so through the deemed consent under s.173(11) when the under enforcement of any amended requirements of the notice had been fully undertaken. It therefore follows that if the 3-flat scheme could not lawfully be approved under ground (a) it did not exist, equally it could not be created through ground (f). A similar approach was subsequently followed in *Arnold v Secretary of State for Communities and Local Government* [2015] EWHC 1197 (Admin) where the Secretary of State successfully argued that the inspector did not have the power to somehow push together grounds (a) and (f) to create a planning permission for a house with a reduced extension than that which had been built.

The inability of an inspector to find a solution which is not already contained within the boundaries of the enforcement notice originally drafted by the local planning authority or within the constraints of the unauthorised works actually performed, is understandable but can be very frustrating for owners. A case where I advised one council on an enforcement appeal for an unlawful travellers' site, included a throw-away line by the inspector that a "much reduced" site might be acceptable. Whilst understanding the desire to be helpful and reasonable, those words, without further clarification, were in fact very unhelpful as they gave no clarity as to what a "much reduced" site might have meant. As the site was in disparate ownership, no-one was willing to sacrifice their plots in the hope that others may be successfully described as a smaller site; and the owners, who had largely known each other before arriving on site, were reluctant to start breaking into smaller groups competing for a notional permission which might be available. Had the inspector been able to consider what sort of small development might be appropriate at the enforcement stage, then many years of distress for both the occupiers and their neighbours could have been avoided.

Approached from the other side, in the appeal which led to *Arnold* four alternative drawings were presented to the inspector who, despite upholding an enforcement notice requiring complete demolition of the building, expressed the view that a significantly reduced house would likely be acceptable, but did not feel empowered to consider the schemes proposed to him, nor even to opine on whether any of them were in an appropriate ball park. As a result, the Arnolds spent several years trying to establish what an appropriate revised scheme might be which could be acceptable to the local planning authority.

Statutory challenges can of course be brought to the upholding of an enforcement notice on appeal. Judicial Review of the decision to serve an enforcement notice is less likely to be entertained given the enforcement notice appeal procedure, though expediency challenges have occasionally been successful.

Judicial Review of the decision to bring injunction proceedings is also possible but probably impractical in most cases. Any of the points likely to be aired in a judicial review will also be available at the hearing for any injunction but the case at the hearing need not be limited to only public law matters.

Remaining enforcement decisions and steps are more likely to be considered by the court on application for Judicial Review. Several potential areas for challenge have been mentioned in this paper in the relevant places.

Prosecution and direct action

The ability to prosecute can arise automatically in some areas of the planning regime, most notably for listed building breaches, but often only comes into play after a notice has fallen due. As noted above, the decision whether to prosecute is a new and separate one. Any council moving straight to prosecution without a reassessment and documenting that process risks procedural challenge to that that prosecution.

The question of who to prosecute also arises at this stage. As noted above, the decision to prosecute should be taken in respect of each individual or company separately. In part this is a legal question—who is actually committing a chargeable offence? It is also a public policy question. A council must apply a

public interest test before bringing or continuing any proceedings. In this way the local authority is no different from the CPS. The CPS's own public interest test guidance[8] is helpful for authorities and which the Private Prosecutors Association also recommends adopting for any prosecutor.

The question of who should be pursued has already been considered to some extent above. However, it is worth comparing the non-planning case of *R v Leonardo Viscomi* (unreported). Mr Viscomi was a landlord of a retail unit. The unit was well known to trading standards for selling illegal cigarettes with numerous prosecutions but illegal sales were still taking place. Mr Viscomi was repeatedly notified of the problem and indeed asked to evict the tenants. Eventually, and after suitable warning, the council prosecuted Mr Viscomi and sought a confiscation order for his rent receipts over the many years he had known that the rent payments were proceeds of crime. In planning terms, a landlord in a similar position who did not seek to evict tenants who were refusing to cease activities prohibited by an enforcement notice, would be equally vulnerable to a prosecution and confiscation of rent proceeds. The defence under s.179(3) that the owner has done everything he could reasonably be expected to do to secure compliance would be unlikely to be of use if no steps had been taken to enforce the lease provisions.

No prosecution can be brought against a party on whom an assurance under s.172A has been served without revoking that assurance and giving an appropriate window to ensure that the person has a reasonable opportunity to take any steps necessary to comply. Withdrawal of the assurance does not allow prosecution for failure to comply during the period when the assurance was in place.

It is also possible that an undertaking not to prosecute, given outside that section may also act to make any prosecution that was subsequently brought and abuse of process. *Robinson v Ceredigion* [2018] EWHC 2121 (Admin)[9] looked at an allegation of precisely such an undertaking. In that case the statement was found not to be an unequivocal undertaking, even though allegedly as a result of something said by the officer, the owners chose not to appeal an enforcement notice, clearly to their detriment. The finding of an abuse of process was quashed and the owners were subsequently convicted though at the item of writing an appeal against that conviction is understood to be pending.

Conversely, on a matter for one of my clients, a local planning authority withdrew a prosecution, accepting that an undertaking had been given. The authority and my client discussed my client's preparation of a significant amended planning proposal instead of compliance with an enforcement notice which had fallen due. The authority assured him that no action would be taken against him whilst this was prepared, and my client busily went about having the case put together and plans drawn up. Yet a summons arrived a couple of months later with no further warning or discussion. The client was still put to significant distress, time commitment and expense (to which the authority contributed) before the prosecution was withdrawn.

Sometimes not prosecuting can have a greater effect than doing so. This is particularly the case where a negotiated set of actions not contained in a formal notice have been agreed as a way of resolving the problem, perhaps via a new application. Allowing the question of prosecutions to "lie on the file" while such matters are resolved can help prevent the application and any subsequent works from dragging on. This is frequently used in listed building cases where a level of cooperation can be secured by simply leaving the decision as to whether the original offence should be charged until after the works are done.

If a prosecution is brought, the planning offences are strict liability meaning that the state of mind of the person who has committed the breach is usually irrelevant, even their state of knowledge in respect of the existence of an enforcement notice can only be a defence if the notices was not served on them and is not held in the council's register of notices. In all cases it can have significant effects on sentencing, however.

[8] The Code for Crown Prosecutors published by the DPP, the current version of which is dated October 2018.
[9] Which is currently unreported, and I am grateful to Ms Annabel Graham Paul who appeared in that case for a copy of the judgment.

In relation to an enforcement notice, there is another means of securing compliance, namely the council's power to enter land and taking the prescribed steps themselves and charge the cost against the land, often called direct action. This approach is not common and tends to hit the news when used. The most common usage in my experience has been with Gypsy or Traveller sites erected on land purchased by the occupiers where they were not at risk of private law evictions and long histories of planning enforcement, applications, prosecutions, injunctions and/or appeals. Given the residential nature of the sites, those actions I advised on in the 2000s included detailed assessments before taking action. In one case, an earlier injunction application had expressly included a declaration that the council would be able to use such powers in the absence of any change in personal circumstances, a question which was carefully revisited before letters threatening final removal of caravans, hardstanding etc were sent. That site was largely peaceful, but some direct action has required heavy police presence and resulted in violence or threats of the same and long-term protest occupation. The initial cost outlay, potential for difficulties and even danger to officers means that such action will always be carefully considered and usually a very last resort.

Future Trends

One of the biggest trends in planning enforcement in the immediate future is the increasing use of Proceeds of crime. I will close this paper with a full discussion of that but before I do, it is worth looking at other changes in the way enforcement is carried out.

As a trainee solicitor my first ever involvement with enforcement related to a scrap yard which was under investigation but which the owners said had been in use for years. The whole team were astonished when the owner managed to track down aerial photography of the site from 15 years previously clearly showing cars stacked on top of one another. Today Google, Bing, and other sites shows us aerial and satellite photographs and street level views.

This information is only useful if the dates are known, which is not always the case, though some of these have timelines allowing one to look back to see the same or similar view in, say, 2012. I have an app on my desktop with a subscription to both land registry data and up to 10 years of satellite imagery overlayable on the same OS map. I frequently use this when advising clients on property transactions to check differences in property over time. This kind of technology and the body of recorded data will continue to grow and will form an increasing part of the toolkit for enforcing authorities and those advising landowners.

In the same vein, some councils are already using drones to take photographs and inspect properties from entirely new angles. This can help verify complaints but could in theory allow for pro-active investigations as well (subject to compliance with other legislation). At least 20 councils had applied for CAA licences by the beginning of 2019 and that number is likely to have grown since. It should however be remembered that being able to be seen by a drone does not necessarily mean there is a visual impact. The recorder in the non-enforcement appeal decision LBA-230-2169 was unimpressed by Edinburgh Council's assertion that the fact a glass infill of a roof valley would be visible in aerial photographs would have an adverse impact on the conservation area, though he ultimately refused the appeal on other grounds.

Big Data also offers opportunities for councils to be more proactive. Council departments, including council tax/Business rates, environmental health and planning already often share data but systems can sometimes be ad-hoc, patchy or just plain fail to flag possible breaches to the right people. Properly processed in accordance with GDPR,[10] data from a range of services as diverse as bin collection and building regs has the potential to allow for far more proactive enforcement than has been possible in the past.

[10] The General Data Protection Regulation (EU) 2016/679 as it applies in the UK, tailored by the Data Protection Act 2018.

Proceeds of Crime Act 2002

The Proceeds of Crime Act 2002 ("POCA") did not initially seem to have anything to do with planning. The creation of an asset recovery agency, and rhetoric about seizing sports cars and second homes of drug dealers seems somewhat far removed from pre-commencement conditions and deviations from approved drawings. In recent years, however, POCA has become a significant tool in the armoury of a local authority enforcement departments.

Initially it used against recalcitrant offenders who had been prosecuted on a number of occasions and still would not comply with enforcement notices, perhaps because the financial rewards of continuing far outweighed the penalties given. This is understandable. In theory, courts are required to take into account the benefit to a landowner of breaching planning control when imposing a sanction. In second and subsequent offences a failure to change behaviour or to take steps previously required should also have been a factor in sentencing. In practice, fines have been notoriously low which may well be understandable given the range of horrific offences courts are exposed to. If fines alone are unable to create a dis-incentive to comply with enforcement requirements, the Proceeds of Crime Act represented an opportunity to hit those who repeatedly breach of planning control in the wallet.

Since then it has become used by many as a standard part and parcel of prosecution proceedings.

Recent cases to hit the media have included:

- A solicitor operating from a domestic dwelling in Southall (Ealing Borough) who operated for three and a half years in breach of an enforcement notice was subject to a £500,000 confiscation order.
- A landlord in Southwark who converted 3 flats into 20 studios and bedsits was fined only £11,000 (with £35,000 costs) between him and his company but was subject to a POCA confiscation order of over £1.1m, almost all of the gross rents received of £1.2m since 2011
- A private individual had the increase in value to his Poole home confiscated following the lopping of 12ft long branches off a tree in breach of a TPO. The branches blocked the sunlight to his new Juliet balcony which following the unlawful sawing was determined to be worth £21,000 more which the court considered he must forfeit.

Of the top 20 biggest enforcement cases reported in Planning Resource in the first half of 2019, only two did not include a confiscation order and only one of those that did had an order which was for a lower amount than the fine.

The tests for a confiscation order can be found in Part 2 of POCA for England and Wales, Part 3 for Scotland, and Part 4 for Northern Ireland. Each formulates the test slightly differently but in each case the defendant must be convicted of an offence (in England this must be either be by the Crown Court or by a lower court but referred to the Crown Court either for sentencing generally or specifically for consideration of a confiscation order). The prosecutor may ask the Court to make an order but except in Scotland, the Court may also make one of its own volition if it believes it appropriate to do so. The Court must also decide either that the defendant has a criminal lifestyle and has benefited from general criminal conduct or has benefited from this particular criminal conduct.

Once the tests are passed, the Court *must* then decide the recoverable amount and make an order requiring the defendant to pay that amount. The Court is required, however, to consider whether making an order would be disproportionate and the duty is turned from a duty into a power, if a victim of conduct is believed to have started or to be intending to start proceedings against the defendant for loss or, in certain circumstances, (in England and Wales only) relating to social housing fraud.

In planning cases, the criminal life-style test is clearly far less relevant, so local authorities will focus on whether the defendant has benefited from this specific breach. The defendant's benefit is calculated based on the criminal conduct up to the time the Court makes its decision, which does allow for the

potential for several confiscation orders should breaches continue after the order is made. The order will include a time scale for payment which can include periodic payments, and the defendant has an ability to seek an extension of up to six months from the date of the confiscation order if it makes an application and demonstrates all reasonable efforts to pay the amount required within the specified period. Interest is payable on late payments and the Court has further powers to add an order with such measures as it believes appropriate for the purposes of ensuring that the confiscation order is effective and complied with. The extent of such compliance orders is intentionally vague but, for example, may be able to be used to impose carefully defined travel restrictions to prevent defendants leaving the country. Such orders are likely to be rare in planning circumstances, especially when it is borne in mind that the appropriateness and nature of the compliance order must be aimed at the payment of a confiscation, and therefore cannot be used as a secondary planning enforcement mechanism. Ultimately however, failure to pay can result in a custodial sentence.

When assessing the benefit from an offence, the court will look to the overall gross benefit of an unlawful use, not the profit gained. This difference was particularly stark in *Luigi Del Basso & Bradley Goodwin v Regina* [2010] EWCA Crim 1119 in which the defendants challenged the confiscation order because the vast majority of their takings from an airport park-and-ride business was expended on VAT, operating costs and payments to the football club which the enterprise was set up to support. Whilst the Court of Appeal did exclude the turnover of a legitimate company set up to operate the scheme, the confiscation far exceeded what one defendant claimed was his personal take home profit from the venture. This is unsurprising when considered outside the regime of planning and one thinks of more traditional crimes. A burglar would not be expected to offset their costs of purchasing a new crowbar.

In a similar manner, the Court of Appeal recently confirmed in *R v Evangelou*, [2019] 7 WLUK 308 (18 July 2019) following cases in the wider criminal law, that a confiscation order is not intended to be restitutionary, i.e. that it was not solely designed to put the individual back in the position they would have been had the crime not been committed. In that instance the owner sought to argue that the order should not be for his whole rent on six bedsits but should allow a deduction for the rent which he could lawfully have achieved for the house as a single dwelling or renting a single bedsit. The court disagreed and was also swayed by the fact that the notional rent would have required compliance with part of the enforcement notice to remove partitions and some refurbishment to achieve the levels suggested.

While *Del Basco* was relatively unusual situation the principles established in it and imported from more traditional criminal cases set a reasonably consistent framework. An individual being prosecuted should not be conflated with a related company and the corporate veil should remain. But nor can defendants assume their benefit is limited to cash deposited in the bank. The Southwark landlord mentioned above was subject to an order for over 93% of his *gross* rental income.

The requirement for conviction for an offence means that in purely planning situations, criminal benefits can only begin to accrue from the date on which steps an enforcement notice or BCN have to be complied with. For listed buildings, trees (e.g. the Juliet balcony view referred to above), conservation area demolition or fly-posting offences, where prosecution can be immediate without the need for formal notice, this can be a swift and dramatic response.

While the order can date from the first carrying out of the offence, it can only be made for the period which is charged. Unfortunately for the authority in *R. v Panayi (Andrew)* [2019] EWCA Crim 413, the offence was charged regarding breach of the notice "on or about 18 February 2016", meaning that in fact the offence related to a single day and a confiscation order was permitted only for that day's rent; a total of £58.

The case of *R. v MA Kelly's Estates Ltd* [2018] EWCA Crim 2722 dealt with proceeds where the tenant paid rent to his landlord, a company of which he was also sole director. The Director had been prosecuted and subjected to a confiscation order (in *R. v Kelly (Paul Anthony)*). The court found it was not double

counting when prosecuting the landlord to impose a higher fine reflecting the benefit to the landlord of the breach as required by s.179(9).[11]

Courts have generally seemed to be comfortable with attaching confiscation orders to criminal prosecutions where appropriate. Local authorities have become increasingly keen, not just because of the deterrent effect and the removal of financial incentives to continue breaching planning control, but also because the government's Asset Recovery Incentive Scheme allows councils to keep 37.5% of the confiscated proceeds (based on 18.75% towards their investigation costs and 18.75% for prosecution).

However, there are clear warnings to authorities who might see this as a way to fill the extended holes in local authority budgets. In the cases referred to above of *Knightland* and *Wokingham* two authorities were criticised for bringing proceedings solely or mainly in order to gain the financial benefit of a proceeds of crime confiscation order. In both of these cases such a decision was found to be an abuse of power. Whilst it is important that local authorities consider the use of proceeds of crime when a decision to bring prosecution proceedings has been taken, it is completely wrong to use a confiscation order as a reason for bringing prosecutions. I expect to see more challenges to prosecutions brought on this basis unless and until local authority record-keeping of the decision to prosecute carefully and correctly records a proper decision-making process.

As a side note, following the accusations which led to the *Wokingham* case, the council appointed an external lawyer to undertake a review which in last August 2019 cleared officers of unprofessional conduct and maladministration in relation to a claim that they had convinced Mr Scott to withdraw his enforcement notice appeal against his own interests. The full report was not available at the time of writing, but it is understood not to touch on conduct surrounding the decision to prosecute.

In my view, the extended use of POCA since 2010 and the decision in *Del Basco* represents a permanent change in the landscape of planning enforcement. Still not all councils yet use the provisions and, as with anything new, there will be uncertainty and hesitancy at first. The increased frequency with which we have seen very large numbers hitting the press will continue to encourage authorities who have not yet dipped their toes in this water, but best practice and experience will continue to spread. Developers, landlords and those who advise them will also take the offences scattered through the planning regime and related disciplines more seriously.

This changing landscape was summed eloquently by HHJ Michael Baker QC in his first instance decision in *Del Basco* which was quoted in closing with approval by the Court of Appeal and now again here by me:

> "I conclude with a final observation about the mentality of the [appellants] and other similar law breakers. I have received the strong impression that neither the [appellants] nor … their accountant appreciated fully the risk that the companies and individuals involved in the park and ride operation faced from confiscation proceedings. 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. This may greatly exceed their personal profits. In this respect they are in the same position as thieves, fraudsters and drug dealers."

[11] Which states that: "In determining the amount of any fine to be imposed on a person convicted of an offence under this section, the court shall in particular have regard to any financial benefit which has accrued or appears likely to accrue to him in consequence of the offence."