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Planning Enforcement Orders: Law & Practice

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Topic Overview



- Background
- Requirements
- Self-certifying the date for time limits purposes
- *Tanna v Richmond LBC*, and what it means
- *Welwyn Hatfield* and the two routes
- Practical tips for LPA investigators



The Background

Background: 1 of 4



- Localism Act 2011:
 - Amends TCPA 1990
 - Introduces new provisions, ss 171BB-BC
 - In force since April 2012
 - LPAs may apply for PEO in cases involving concealment
 - Aims to prevent enforcement time limits being exploited

Background: 2 of 4



- Enforcement time limits (s 171B TCPA):
 - 4 years:
 - Building, engineering, mining or other operations in or over land
 - Change of use of any building to use as a single dwelling house
 - 10 years:
 - Any other breach of planning control




Background: 3 of 4



- What happens if LPA is prevented from discovering the breach in time to take enforcement action?

Background: 3 of 4



I still think that you're hiding something

Background: 3 of 4



- What happens if LPA is prevented from discovering the breach in time to take enforcement action?
 - LPA may apply to Magistrates' Court for PEO
 - PEO allows enforcement action at any time in the **enforcement year** (s 171BA(2))
 - Enforcement year – the year beginning 22 days after order is made (s 171BA(3))

Background: 4a of 4



- If a PEO is made, LPA can enforce in respect of (s 171BA(2)):
 - the apparent breach, or
 - **any** of the matters constituting the apparent breach

Background: 4b of 4



- NB:
 - PEO doesn't prevent LPA taking enforcement action under the normal time limits
 - LPA can apply (and PEO can be made) even if normal time limits haven't yet expired: (s.171BA(5))



What are the requirements?

Requirements: 1 of 3



- There may have been a breach of planning control (s 171BA)
 - Note – no need for certainty



Requirements: 2 of 3



- Must apply within 6 months of receiving **sufficient evidence** of the breach to justify the application - (s.171BB(1))

Requirements: 3 of 3



- Serve copies of the application (s 171BB(4)):
 - on the owner and the occupier of the land
 - on any other person having a material interest in the land





What is the court's approach?

The Court's Approach



- 2-stage test (s 171BC):
 - **Deliberate concealment**, to any extent, by any person(s):
 - of the apparent breach, or
 - of any matters constituting it
 - **AND:**
 - **Just** to make the order
- Balance of probabilities, not criminal standard

The Court's Approach



- The Order itself **must** (s.171BC(2)):
 - Identify the apparent breach of planning control; and
 - State the date of MC's decision to make order



Self-Certifying the date

Self-Certifying the Date: 1 of 3



- 6 months to make application
- Section 171BB(1) T CPA:
 - *“An application for a [PEO]... may be made within the 6 months beginning with the date on which evidence of the apparent breach of planning control sufficient in the opinion of the... [LPA] to justify the application came to [its]... knowledge.”*

Self-Certifying the Date: 2 of 3



- Section 171BB(2) TCPA:
 - *“For the purposes of subsection (1), a certificate –*
 - (a) signed on behalf of the [LPA]... and*
 - (b) stating the date on which evidence sufficient in the [LPA’s]... opinion to justify the application came to [its]... knowledge, is conclusive evidence of that fact.”*

Self-Certifying the Date: 3 of 3



- Key points:
 - When the LPA had sufficient evidence, not when it knew of the breach
 - Whether evidence sufficient to justify the PEO application, not whether sufficient to suggest a breach of planning control
 - Whether LPA regarded the evidence as sufficient, not whether a court would
 - Conclusive evidence, if signed and dated

Tanna and its True Meaning: 1 of 11



- *Tanna v Richmond LBC* [2016] EWHC 1268 (Admin)
- D erects single-storey garden extension
- LPA suspects use as self-contained dwelling
- LPA investigates over a number of years; D denies the use
- On 4 July 2014 D applies for lawful use cert; admits extension had been occupied for at least 4 years

***Tanna* and its True Meaning: 2 of 11**



- LPA therefore certifies 4 Jul 2014 as the date
- D argues certificate invalid, saying correct date 19 May 2014
- On this date D said he intended to apply for a lawful use certificate
- D says PEO application therefore time-barred as made on 15 December 2014
- Collins J rejects D's argument

Tanna and its True Meaning: 3 of 11



- Collins J:
 - Certificate can be challenged by way of JR, and therefore in the MC on the same grounds
 - But challengeable only on two grounds:
 - Fraud
 - Decision clearly or plainly wrong
 - MC can look behind certificate if it “could not meet the test of being a reasonable decision” in JR terms

***Tanna* and its True Meaning: 4 of 11**



- Collins J (cont.):
 - Certificate should normally be determinative
 - Incompetence does not mean clearly wrong
 - LPA entitled to a degree of judgment
 - Whether evidence sufficient to justify application, considering cost/strength of case
 - LPA entitled to want a cast-iron case

Tanna and its True Meaning: 5 of 11



- Collins J (cont.):
 - Certificate not clearly/plainly wrong here (and D didn't allege fraud)
 - However:
 - Borderline situation
 - LPA officers incredibly gullible – e.g. had seen a sign saying “garden flat” with an arrow pointing to the extension (2011); extension was registered for council tax (2013); and LPA had found a tenant in occupation (May 2014)

Tanna and its True Meaning: 6 of 11



- *Tanna* therefore stresses the high threshold for challenge
- But creates some room for questioning the certificate as clearly/plainly wrong according to the investigative history
- Challenge supposedly on JR grounds here
- Defendants tend to interpret *Tanna* as permitting them to argue that LPA's certification decision was unreasonable

Tanna and its True Meaning: 7 of 11



- Various problems with this interpretation:
 - Turns “*conclusive evidence*” under s 171BB(2) on its head
 - Simply applies public-law orthodoxy
 - Drags MC into factually complex satellite litigation – time-consuming and costly
 - Ignores the margin of judgment Parliament clearly intended to give the LPA
 - Incompatible with other cases

***Tanna* and its True Meaning: 8 of 11**



- *R v Haringey Magistrates' Court, ex p Amvrosiou* [1996] EWHC 14 (Admin)
- Road Traffic Offenders Act 1988, s 6(3)
- Auld LJ:
 - Fraud, or certificate *inaccurate on its face*
 - No other way of going behind certificate
 - Parliament intended certainty
 - Mindful of avoiding intolerable burden on LPA

Tanna and its True Meaning: 9 of 11



- *Burwell v DPP* [2009] EWHC 1069 (Admin)
- Computer Misuse Act 1990, s 11(4)
- Certificate failed to state the certified date – proceedings “*brought within a period of six months*”
- Certificate failed “*for that reason alone*” (para. 24, per Keene LJ)
- From *Amvrosiou*, certificate must be “*plainly wrong*” to be challengeable

Tanna and its True Meaning: 10 of 11



- *Chesterfield Poultry Ltd v Sheffield Magistrates' Court* [2019] EWHC 2953 (Admin)
- Welfare of Animals at the Time of Killing (England) Regulations 2015, reg. 41(2)
- Males LJ and Jefford J uphold certificate:
 - Review the authorities, but not *Tanna*
 - Powerful policy reasons for conclusiveness
 - Plainly wrong means wrong on its face
 - Contrary extraneous evidence inadmissible

Tanna and its True Meaning: 11 of 11



- *Tanna* – key points:
 - Remains the leading case on s 171BB TCPA
 - Don't read it in isolation from other cases
 - Various problems with allowing public-law challenge to a self-certification decision
 - *Chesterfield Poultry* should resolve the matter
 - Clearly/plainly wrong means wrong on its face
 - Extraneous evidence otherwise inadmissible



What is left of *Welwyn Hatfield*?

Welwyn Hatfield



Welwyn Hatfield & the 2 Routes: 1 of 6



- *Welwyn Hatfield BC v SSCLG* [2011] UKSC 15
- Builder receives planning permission to construct hay barn – no use for any commercial or non-agricultural purposes
- Builder then constructs what looks like a barn but is a dwelling-house inside
- Builder and wife live there undetected for 4 yrs
- Builder then applies for cert. of lawfulness
- LPA decides 10-year limitation applies

Welwyn Hatfield & the 2 Routes: 1 of 6



- *Welwyn Hatfield BC* (cont.)
- Inspector notes that builder **deliberately deceived** the LPA, but holds that 4-yr period applies and grants certificate
- Collins J overturns inspector's decision
- CA reverses Collins J
- Supreme Court decides 10-yr limitation applies, and allows LPA's appeal
- NB SC notes Inspector findings re deception

Welwyn Hatfield & the 2 Routes: 3 of 6



- *Obiter*, SC also holds:
 - Time limits exist for LPA to discover and investigate
 - Against that rationale if D can escape by deliberate deception
 - D could not be expected to profit in the case of bribery/threats etc
 - Neither could Parliament have intended for the time-limit to apply to deliberate deception
 - Had the 4-yr period been relevant, it could not have applied in such a case of deception (para 58, Lord Mance)

Welwyn Hatfield & the 2 Routes: 5 of 6



- Has the PEO regime displaced *Welwyn Hatfield*?
- *Jackson v SSCLG* [2015] EWCA Civ 1246, paras 48-49 (Richards LJ):
 - The two regimes are **alternatives**
 - Concealment may be insufficient to engage *Welwyn* but enough to secure a PEO
 - PEO procedure may avoid the need for enforcement appeal

Welwyn Hatfield & the 2 Routes: 6 of 6



- *Jackson v SSCLG* [2015] EWCA Civ 1246, paras 48-49 (Richards LJ) (cont.):
 - But *Welwyn* may still be useful
 - LPAs may face difficulty obtaining information as to site history
 - LPA may have started enforcement proceedings not realising that a deception/concealment issue would arise



Practical Tips

Practical Tips for LPAs: 1 of 2



- Apparent breach of planning control?
- Relevant time limit?
- What (precisely) is the concealment/deception?
- *Welwyn Hatfield* or PEO?
- When did LPA have evidence of concealment?

Practical Tips for LPAs: 2 of 2



- Challenges to self-cert. decisions – be robust!
- PEO application possible before time-limits expire
- Remember breadth/benefits of PEO regime
- Documentary evidence – council tax records and correspondence, electoral register, credit checks, schools, GP addresses etc

Further Information



- A. Williams, 'Planning Enforcement Orders, Time Limits and Self-Certification under the TCPA 1990 s.171BB' [2020] *Journal of Planning & Environment Law* 224-230
- Summarised in Cases section of *Cornerstone Barristers Cases & News* (16 April 2020):
<https://cornerstonebarristers.com/news/planning-enforcement-orders-time-limits-self-certification/>



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