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Judgment: approved by the Court for handing down | *Delivered:* **12/06/2013**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF A CASE STATED FROM THE COUNTY COURT FOR THE DIVISION OF ARDS

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BETWEEN:

THE PLANNING SERVICE OF NORTHERN IRELAND

Respondent/Prosecutor;

-and-

WILLIAM YOUNG AND ROBERTA YOUNG

Appellants/Defendants.

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Before: Morgan LCJ, Girvan LJ and Sir John Sheil

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MORGAN LCJ

[1] This is an appeal by way of case stated from a decision by Her Honour Judge Kennedy who dismissed an appeal from the appellants' conviction by District Judge White for failing, on 23 February 2005 and continuing daily thereafter, to take the steps required by an Enforcement Notice dated 9 January 2004 for land to the west of 39 Carrowdore Road, Greyabbey contrary to Article 72 (1) of the Planning (Northern Ireland) Order 1991 as amended (the 1991 Order). The learned trial judge sought the opinion of the Court of Appeal on three questions: –

> "1. Was I correct in law, on the basis of the evidence before me, in finding that the Enforcement Notice, served on the appellants and dated 9 January 2004, was a formally valid Enforcement Notice?
>
> 2. Was I correct in law, on the basis of the evidence before me, in finding that the challenge by

> the appellants to the Enforcement Notice was one which was not properly brought in a criminal proceeding?
>
> 3. Was I correct in law, on the basis of the evidence before me, in finding that the defendants/appellants were guilty of the offence of failing to take the steps required of them by the Enforcement Notice dated 9 January 2004, contrary to Article 72 (1) of the Planning (Northern Ireland) Order 1991, as amended by Article 9 of the Planning Amendment (Northern Ireland) Order 2003, following a conviction for the same offence on 22 February 2005 at Newtownards courthouse?"

Mr Hutton appeared for the appellant. Mr Shaw QC and Mr Jonathan Dunlop appeared for the respondent. We are grateful to counsel for their helpful written and oral submissions.

Background

[2] On 8 March 2002, planning permission was granted by the Planning Appeals Commission for the construction of a dwelling on lands to the west of 39 Carrowdore Road, Greyabbey, Co Down. Construction of a dwelling commenced on behalf of the appellants who were subsequently warned by the Planning Service that the development was not being carried out in accordance with the approved plans and therefore was in breach of planning control. The Planning Service was of the view that the dwelling was being constructed some 20 metres further up a slope on the site than had been approved and as a result the finished floor levels appeared to be approximately 2 metres higher than had been approved. Additionally, a hedgerow had been removed and the splays had not been fully implemented. On 9 January 2004, the appellants were issued with an enforcement notice stating that there appeared to have been a breach of planning control under Article 67A(1)(a) of the 1991 Order. The alleged breach was unauthorised construction of a dwelling on lands to the west of 39 Carrowdore Road, Greyabbey without the requisite grant of planning permission. On 22 February 2005, the appellants were convicted of failing to comply with the enforcement notice. The appellants appealed that decision but then withdrew the appeal.

[3] In December 2004 the appellants had lodged a retrospective planning application for retention of the building without complying with the conditions imposed on the original permission. In the absence of any decision from the Planning Service on that application the matter was referred to the Planning Appeals Commission. Although there were certain procedural difficulties in hearing the

deemed refusal, the Planning Appeals Commission dismissed the appellants' application for retention on 10 July 2006.

[4] On 3 October 2006, the complaint the subject of the present proceedings was laid. Judicial review proceedings in relation to the dismissal of the retention application were launched and on 30 March 2007 Weatherup J quashed the decision of 10 July 2006. That decision was reversed by the Court of Appeal on 6 September 2007. The hearing of the complaint made on 3 October 2006 eventually took place on 9 June 2008 when the appellants were convicted in their absence. They successfully argued that they had been unaware of the hearing and a rehearing was ordered before another judge. In a reserved judgement delivered on 5 October 2010 District Judge White convicted the appellants. Her Honour Judge Kennedy dismissed the appeal on 13 April 2011.

The statutory scheme

[5] The relevant statutory provisions in relation to enforcement of planning obligations are contained in the 1991 Order. Article 67A defines certain expressions.

> "67A. - (1) For the purposes of this Order-
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> (a) carrying out development without the planning permission required; or
>
> (b) failing to comply with any condition or limitation subject to which planning permission has been granted,
>
> constitutes a breach of planning control.
>
> (2) For the purposes of this Order-
>
> (a) the issue of an enforcement notice…
>
> constitutes taking enforcement action."

[6] Article 68 deals with the issue of enforcement notices and Article 68A sets out the required content of such a notice.

> "68. – (1) The Department may issue a notice (in this Order referred to as an "enforcement notice") where it appears to it-
>
> (a) that there has been a breach of planning control; and

(b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.

(2) A copy of an enforcement notice shall be served-

(a) on the owner and on the occupier of the land to which it relates; and

(b) on any other person having an estate in the land, being an estate which, in the opinion of the Department, is materially affected by the notice…

68A. – (1) An enforcement notice shall state-

(a) the matters which appear to the Department to constitute the breach of planning control; and

(b) the sub-paragraph of Article 67A(1) within which, in the opinion of the Department, the breach falls.

(2) A notice complies with paragraph (1)(a) if it enables any person on whom a copy of it is served to know what those matters are…"

[7] Appeals against enforcement notices lie to the Planning Appeals Commission and the grounds are set out in Article 69(3).

"(a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;

(b) that those matters have not occurred;

(c) that those matters (if they occurred) do not constitute a breach of planning control;

(d) that, at the date when the notice was issued, no enforcement action could be taken in respect of

any breach of planning control which may be constituted by those matters;

(e) that copies of the enforcement notice were not served as required by Article 68;

(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;

(g) that any period specified in the notice in accordance with Article 68A(9) falls short of what should reasonably be allowed."

Article 69 also contains restrictions on the right to challenge the validity of an enforcement notice.

"(9) Subject to paragraph (10), the validity of an enforcement notice shall not, except by way of an appeal under this Article, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought.

(10) Paragraph (9) shall not apply to proceedings brought under Article 72 against a person who-

(a) has held an estate in the land since before the enforcement notice was issued;

(b) did not have a copy of the enforcement notice served on him; and

(c) satisfies the court that-

(i) he did not know and could not reasonably have been expected to know that the enforcement notice had been issued; and

(ii) his interests have been substantially prejudiced by the failure to serve him with a copy of it."

On an appeal against an enforcement notice the Planning Appeals Commission has the powers contained in Article 70.

> "70. - (1) On an appeal under Article 69 the planning appeals commission shall quash the enforcement notice, vary the terms of the notice or uphold the notice.
>
> (2) On such an appeal the planning appeals commission may correct any misdescription, defect or error in the enforcement notice, or vary its terms, if it is satisfied that the correction or variation can be made without injustice to the appellant or to the Department."

[8] Article 72 creates an offence where there has been a failure to comply with an enforcement notice.

> "72. - (1) Where, at any time after the end of the period for compliance with an enforcement notice, any step required by the notice to be taken has not been taken or any activity required by the notice to cease is being carried on, the person who is then the owner of the land is in breach of the notice.
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> (2) Where the owner of the land is in breach of an enforcement notice he shall be guilty of an offence….
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> (8) A person guilty of an offence under this Article shall be liable-
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> (a) on summary conviction, to a fine not exceeding £30,000;
>
> (b) on conviction on indictment, to a fine."

The previous hearings

[9] District Judge White heard evidence from Mr Tumelty of the Planning Service who proved the enforcement notice which was served and described in general terms the breach of planning control. He was cross examined on the basis that the

breach was a failure to comply with a condition of a planning permission. He stated that the Department's opinion was that this was an unauthorized development.

[10] The appellants called Ms Jobling, a planning expert employed by Elevate Planning. She stated that the dwelling was not located at the position indicated in the relevant drawings and was not at the correct elevation. She disagreed with the Planning Service as to where the correct location was but that disagreement is not relevant to this appeal. She contended, in part as a result of her determination of which portion of the site had been approved, that the breach of planning control was a failure to comply with the conditions subject to which the permission of 2002 was given. District Judge White noted that this evidence was introduced in order to question the validity of the enforcement notice but decided to hear it and then deal with its admissibility.

[11] District Judge White was referred to R v Wicks [1997] 2 All ER 801. On the basis of that authority he concluded that an "enforcement notice" meant a notice which had been issued by the planning authority and had not been set aside on appeal or quashed on judicial review. He concluded that the appellants were seeking to attack the enforcement notice in the criminal proceedings in a manner which was not permitted by Wicks. He concluded that the enforcement notice was formally valid and the court could not go behind it. In light of the continuing breach of the enforcement notice since the appellants' first conviction on 22 February 2005 he convicted them of the continuing offence.

[12] On appeal the same witnesses were called on the same issues. Mr Hutton also relied on two pieces of correspondence. The first was a report made by a case officer on 2 July 2003 which stated: –

> "This most serious breach perhaps relates back to condition number one as the positioning of the dwelling has been moved back approximately 22 m more than indicated on plan. There are some concerns regarding this matter as there is an outline approval for a dwelling within this area which could be activated allowing for an additional house on the site."

In our view this does not assist the appellants. The planning officer's concern is that the development on the site is not the implementation of the 2002 permission as a result of which that permission might be separately implemented on the site. The implication is, therefore, that the development on the site is development without permission which is consistent with the enforcement notice.

[13] The second piece of correspondence is a letter sent by Downpatrick Divisional Planning Office to Arthur Cox Solicitors dated 5 March 2007. The portion of the letter on which the appellants rely states:

> "I can confirm that planning permission for a dwelling in these lands was granted on appeal by the Planning Appeals Commission on the 8th March 2002 subject to a number of conditions including a condition restricting the siting and floor level of the dwelling in question. The development as constructed on the site does not comply with this condition and consequently an enforcement notice was served on 9 January 2004 in respect of the construction of an unauthorised dwelling."

This again is of no assistance to the appellants. The passage recognises that there is an extant permission on the site but concludes that what has been developed is not the implementation of that permission. That again is consistent with the position adopted by the Planning Service.

[14] In any event Her Honour Judge Kennedy concluded that the enforcement notice was formally valid and that the only way to challenge it was either by an appeal to the Planning Appeals Commission or by way of judicial review. On 13 April 2011, she dismissed the appeals and affirmed the convictions.

The contentions of the parties

[15] The respondent contended that R v Wicks [1998] AC 92 was authority for the proposition that where an enforcement notice was valid on its face it was not open to the recipient of the notice to challenge the validity of that notice in criminal proceedings. Any challenge to the enforcement notice must be made by way of appeal to the Planning Appeals Commission or alternatively by way of judicial review.

[16] Mr Hutton submitted that Wicks was a case in which the appellant did not dispute that the planning enforcement notice was properly served or that it was formally valid or that he had failed to comply with its terms. At his trial he sought to argue that the service of the notice was vitiated by bad faith and the taking into account of immaterial considerations by the local planning authority. He accepted that the latter issue had to be decided in judicial review proceedings but submitted that the issue of the nature of the breach of planning control went to the formal validity of the notice and was justiciable in the criminal courts. He submitted that there was support for this approach from the decision of the Divisional Court in Palacegate Properties Ltd v London Borough of Camden [2000] EWHC Admin 373.

[17] It was also submitted that there was assistance to be gained from earlier cases even though there have been some change in the legislative regime now in force. In East Riding CC v Park Estate Ltd [1956] 2 All ER 669 the enforcement notice did not indicate whether it was alleged that there had been unauthorised development or failure to comply with conditions. The House of Lords decided that the notice did not specify whether the development alleged was unauthorized or in breach of condition as required by Section 23(2) of the Town and Country Planning Act 1947. Accordingly it was invalid and therefore not effective. Francis v Yiewsley and West Drayton [1957] 3 All ER 529 was a case in which the enforcement notice alleged breach by way of unauthorised development whereas the court found that the breach was a failure to comply with conditions. Because the notice had proceeded on a wholly false basis of fact it was ineffective. The appellants relied on both of these cases to support the argument that any error in identifying the nature of the breach of planning control would render the notice invalid and that the issue was capable of being considered in the criminal courts.

Discussion

[18] The system of planning enforcement introduced by the Town and Country Planning Act 1947 was progressively developed in different statutory guises in England and Wales until 1991. It was regularly criticized as being overly technical and productive of delays. In Britt v Bucks County Council [1964] 1 QB 77 Harman LJ said:

> "Hard indeed are the paths of local authorities in striving to administer the town and country planning legislation of recent years. It is a sorry comment on the law and those who administer it that between the years 1947 and 1960 they had succeeded in so bedevilling the whole administration of that legislation that Parliament was compelled to come to the rescue and remove a great portion of it from the purview of the courts. Not for nothing was I offered a book yesterday called Encyclopaedia of Planning. It is a subject which stinks in the noses of the public, and not without reason.
>
> Local authorities, until they have been recently rescued, have had practically to employ conveyancing counsel to settle these notices which they serve in the interests of planning the countryside or the towns which they control. Instead of trying to make this thing simpler, lawyers succeeded day by day in making it more difficult and less comprehensible until it has reached a stage where it is very much like the

> state of the land which this plaintiff has brought about by his operations - an eye-sore, a wilderness, and a scandal."

[19] The requirement to specify the matters alleged to constitute the breach of planning control was re-enacted in the later consolidating statutes prior to 1991. In many cases the courts took the view that this required the notice to correctly identify the facts alleged to constitute the breach of control and the nature of the breach. It remained the position, therefore, that if the planning authority chose the wrong breach of planning control, the enforcement notice could be challenged on the basis that it did not specify the correct breach.

[20] In 1989 the government commissioned the Carnwath review to examine the scope and effectiveness of the enforcement provisions. The conclusions are set out in Enforcing Planning Control (HMSO 1989). The recommendations were broadly accepted and implemented in the Planning and Compensation Act 1991. Particular difficulty had been caused by the requirement to "specify" the breach alleged which included the nature of the breach of planning control. This wording was altered so that the notice had to "state" the matters which appeared to constitute the breach and to state the opinion of the planning authority as to the nature of the breach of planning control. A sub-paragraph identical to Article 68A(2) of the 1991 Order was introduced to deal with the argument about the particularity of the factual breach and the Minister was given power to amend an enforcement notice for misdescription, defect or error where the wrong breach of planning control was alleged if that could be done without injustice. That was a matter to be pursued by appeal. Those provisions are found in Article 70(2) of the 1991 Order. We consider, therefore, that the cases referred to at paragraph 17 above are of no assistance in light of the changed legislative regime.

[21] The leading case on the issues in this appeal is R v Wicks. In that case the appellant had carried out development on an existing building without planning permission. He did not dispute that an enforcement notice had been properly served and was formally valid and that he had failed to comply. He wished to defend the case on the basis that the authority had acted in bad faith and been motivated by immaterial considerations. The issue was whether such a defence could be raised in the criminal courts. Both Lord Nicholls and Lord Hoffmann, who gave the substantive speeches, recognised that there was a boundary between cases where a challenge to the *vires* of the impugned order can be undertaken in criminal proceedings and those where different procedures, including judicial review, must be used.

[22] The substantive consideration of the position in the context of an enforcement notice was undertaken by Lord Hoffmann. He concluded that one is driven to the conclusion that "enforcement notice" means a notice issued by the planning authority which is formally valid and has not been quashed. His reasoning for that

decision informs what is meant in this context by "formal validity". He noted that the 1947 legislation provided a right of appeal to the local justices and from them to quarter sessions. In 1960 the right of appeal to the justices was abolished and a right of appeal to the Minister on wider grounds was substituted. At the same time the 1960 legislation provided that the validity of an enforcement notice could not be questioned in any proceedings on certain of the grounds on which an appeal could be brought. This was further consolidated in later legislation.

[23] He then set out how this history was material to the determination of the issue.

> "The history shows that over the years there has been a consistent policy of progressively restricting the kind of issues which a person served with an enforcement notice can raise when he is prosecuted for failing to comply. The reasons for this policy of restriction are clear: they relate, first, to the unsuitability of the subject matter for decision by the criminal court; secondly, to the need for the validity of the notice to be conclusively determined quickly enough to enable planning control to be effective and to allow the timetable for service of such notices in the Act to be operated; and thirdly, to the fact that the criminal proceedings are part of the mechanism for securing the enforcement of planning control in the public interest.
>
> First, then, the suitability of the subject matter. The Act of 1960 recognised that the planning merits of the enforcement notice were unsuitable for decision by a magistrates' court. It not only transferred the right of appeal to the Minister (now the Secretary of State) but excluded challenge on most such grounds in any other proceedings. The present position is that no challenge is possible on any ground which can form the subject matter of an appeal.
>
> On the other hand, there remain residual grounds of challenge lying outside the grounds of appeal in section 174(2) of the Act of 1990, such as *mala fides*, bias or other procedural impropriety in the decision to issue the notice. I shall call these 'the residual grounds.' Mr Speaight says that the fact that the residual grounds were not swept up in the appeal procedure supports his argument. If section 285(1)

> says that the notice cannot be questioned on certain grounds, it follows that it *can* be questioned on any other grounds. But the fact that the residual grounds are not altogether excluded does not necessarily mean that they can be raised as a defence to a prosecution. They may be available only by some other means. One has to ask why they were not included in the appeal procedure. The reason, as it seems to me, is obvious. Questions of whether the planning authority was motivated by *mala fides* or bias or whether the decision to issue the notice was based upon irrelevant or improper grounds are quite unsuitable for decision by a planning inspector….
>
> Then there is the question of timing. The enforcement of planning control obviously does not have the same urgency as the measures to prevent the spread of infectious diseases considered in *Reg. v. Davey [1899] 2 Q.B. 301*. But one is entitled to say that the institution and extension of the appeal procedure shows a policy of having challenges to enforcement notices decided as soon as possible after they have been served. It is not only a question of avoiding undue delay. The policy must be seen against the background of the timetables laid down by the Act...
>
> Thirdly, there is the purpose of the provisions for enforcement by criminal proceedings. The provisions of Section 179(5), by which failure to comply after a first conviction gives rise to a fresh offence punishable by a daily fine, show that the criminal law is being used not merely to punish for a past act but as an instrument of coercion to encourage compliance in the future. The criminal proceedings thus form part of the general scheme of enforcement of planning control contained in Part VII of the Act and should in my view be interpreted to give effect to the overall policy of the enforcement procedures."

Lord Nicholls agreed with Lord Hoffmann

[24] The issue as to whether or not the matters alleged constitute a breach of planning control is a matter which is made the subject of appeal rights under Article 69 of the 1991 Order and is subject to the amendment powers of the Planning Appeals Commission under Article 70(2). Article 69 also provides that the validity of

the enforcement notice should not be questioned in any proceedings on any ground on which an appeal could be pursued under that Article. The fact that the opinion of the planning authority as to the nature of the breach of planning may be erroneous could not of itself invalidate the enforcement notice. There is no longer a requirement to specify. All that is required by the 1991 Order is that the planning authority should indicate its opinion. It has done so in this case. If there is any public law challenge to that opinion, it must be pursued by way of judicial review.

[25] We do not consider that Palacegate Properties Ltd v London Borough of Camden is of any assistance to the appellants. In that case the issues were:

(i) whether the enforcement notice was lawfully authorised by a resolution of the planning authority,
(ii) whether a necessary statutory consent had been received,
(iii) whether there was a discrepancy between the breach of planning control alleged and the remedy required and
(iv) whether the remedy required was uncertain.

The court recognised that Wicks was critical to the determination of the case stated before them and in relation to the third and fourth matters concluded that, since these could properly be dealt with within the appeal procedure, they could not be raised in the criminal proceedings. They accepted that the first two matters could properly be raised on the issue of formal validity but that does not in any way undermine the reasoning that a dispute over the nature of the breach of planning control in this case could not affect the formal validity of the enforcement notice and that any challenge would have to be pursued by way of appeal under Article 69 of the 1991 Order or by way of judicial review.

Conclusion

[26] For the reasons given we consider that the first two questions should be answered yes. The appellants suggested that there remained outstanding issues in the case which had yet to be determined and that we should not, therefore, answer the third question. Since we are unaware of whether there are outstanding matters and the answer to the first 2 questions deals with the legal issues before us we will take that course.