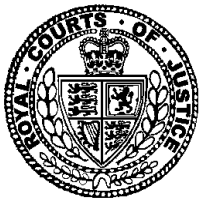

Neutral Citation Number: [2021] EWCA Civ 1101

Case No: C1/2020/1320

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
Mr David Elvin QC (sitting as a deputy High Court judge)
[2020] EWHC 3105 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2021

Before :

LORD JUSTICE SINGH
LORD JUSTICE DINGEMANS
and
SIR NIGEL DAVIS

- -

Between :

ROYALE PARKS LIMITED	**Appellant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**First Respondent**
- and -	
(2) BOURNEMOUTH, CHRISTCHURCH AND POOLE COUNCIL	**Second Respondent**

- -
- -

Mr Paul G Tucker QC and Mr Michael Rudd (instructed by **Stephens Scown LLP**) for the **Appellant**
Mr George Mackenzie (instructed by the **Treasury Solicitor**) for the **First Respondent**
Mr Gary A Grant (instructed by **Tanya Coulter Senior Solicitor, Bournemouth, Christchurch and Poole Council**) for the **Second Respondent**

Hearing date: 16 June 2021

- -

Approved Judgment

Lord Justice Singh:

Introduction

1. This case comes to this Court as an application under section 288(1) of the Town and Country Planning Act 1990 ("the 1990 Act"). By that application the Appellant challenges the decision of the Inspector appointed by the Secretary of State, dated 1 April 2020, to dismiss an appeal against the refusal by a local planning authority of a lawful development certificate ("LDC"), certifying the lawfulness of "the stationing of caravans for the purpose of human habitation as a person's sole or main place of residence" on land ("the appeal site") forming part of a caravan site known as Tall Trees Park, Matchams Lane, Hurn, Christchurch ("the caravan site").

2. I would like to thank the parties' legal representatives for their written and oral submissions. At the hearing we heard from Mr Paul Tucker QC for the Appellant; from Mr George Mackenzie for the Secretary of State; and from Mr Gary A Grant for Bournemouth, Christchurch and Poole Council, the local planning authority ("the LPA").

Factual background

3. The caravan site was established at some point before the mid-1970s. The original planning permission, which was granted in the 1960s, has not been found but there is in the documents before the Court a minute which refers to the approval (on 5 November 1963) of an application for the siting of three chalets and 11 caravans between 1 March and 31 October each year. This was subject to planning conditions.

4. As is clear from various maps that were shown to us at the hearing, the caravan site comprises two areas: Area A and Area B. It is Area B which is the appeal site in the present case.

5. On 29 June 1987, planning permission 8/87/0213 was granted for the "Extension and modification of existing caravan site to provide 59 additional static caravans in lieu of 41 touring units & 4 chalets previously approved". This related to Area A.

6. On 4 July 2006, planning permission 8/06/0261 varied condition 2 of planning permission RFR C239. This permission related to the appeal site.

7. On 20 November 2006, an LDC was issued by the LPA. This related to Area A.

8. On 13 April 2007, planning permission 8/07/0112 varied condition 2 of 8/87/0213. This related to Area A.

9. On the same date planning permission 8/07/0111 was also granted for relief of condition 2 and variation of conditions 3 and 4 of planning permission 8/06/0261. This related to the appeal site.

10. So far as is material for present purposes, planning permission 8/07/0111 was subject to the following conditions. Condition 2 was that: "The caravans and chalets shall be occupied for holiday purposes only except for 1 caravan or chalet which may be

occupied by a resident site warden." Condition 3 was that: "The caravans and chalets shall not be occupied as a person's sole or main residence except for 1 caravan or chalet which may be occupied by a resident site warden."

11. It is common ground that, by the material date, those conditions had been breached, in the case of at least some of the units, for longer than 10 years.

12. In December 2016 and January 2017, the LPA issued a series of enforcement and breach of condition notices in respect of residential occupation of caravans at the site across both the appeal site and Area A. The notices were appealed but the appeal did not proceed, as we shall see later. The caravan site was purchased by a new owner (Royale Parks Limited) shortly afterwards. It is common ground that the caravan site is in single ownership.

13. Although the planning permissions do not specify any particular number of caravans or set out individual plots on accompanying plans, the practice on the ground has been to give a number to each unit. On 20 March 2017 an LDC was issued in respect of unit 18. This is located on part of the appeal site. On 21 March 2017, an LDC was issued in respect of unit 2 and a separate LDC was issued in respect of unit 6. These are both located on parts of the appeal site. On 23 March 2017, an LDC was issued in respect of unit 7. This is also located on part of the appeal site.

14. On 16 March 2018, the LPA withdrew the enforcement notices which it had issued in 2016 and confirmed in writing that no further action would be taken on the breach of condition notices. The appeal against the enforcement notices had not yet proceeded because of the unavailability of a suitable Inspector/venue. I will return to this letter in more detail later.

15. On 30 April 2018, the LPA issued an LDC in respect of Area A, described as "use of land for the stationing of caravans for holiday or residential use".

16. On 22 November 2018, Royale Parks Ltd (the Appellant before this Court) applied for an LDC in respect of the appeal site. This application was rejected by the LPA on 21 December 2018.

17. On 10 January 2019, the LPA wrote a further letter to residents in respect of their intention not to take planning enforcement action on the site. I will return to this letter also in more detail later.

18. On 23 January 2019 the Appellant applied for a further LDC in respect of the appeal site. This application was rejected by the LPA on 26 March 2019 and an appeal was lodged.

19. A public inquiry was held by the Inspector on 10 December 2019 and 9 January 2020. He conducted a site visit on 9 January 2020.

20. On 1 April 2020, the appeal was dismissed by the Inspector in a written decision.

21. On 14 April 2020, an application was made to the High Court to quash that decision by the Appellant under section 288 of the 1990 Act.

22. On 1 July 2020 permission to proceed was refused on the papers by Mr Neil Cameron QC (sitting as a deputy High Court judge).

23. On 30 July 2020, a hearing of the renewed application for permission took place before Mr David Elvin QC (sitting as a deputy High Court judge). Permission to proceed was refused by an order sealed on 4 August 2020.

24. On the application for permission to appeal to this Court, it was ordered by Stuart-Smith LJ on 30 March 2021 that permission to make the underlying section 288 application should be granted; and that the substantive application should be retained in this Court rather than remitted to the High Court. Accordingly, this Court has considered that application for itself rather than on an appeal from the High Court as such.

The decision of the Inspector

25. At paras. 2-4, the Inspector set out some preliminary matters. He noted that it was common ground that all the units fell within the definition of caravans. He said that there were about 15 units on the appeal site, with about two units appearing to straddle the site boundary. There was no argument that the relevant planning conditions had been breached for some of the units, and that at least two units continued to be occupied in accordance with the planning permission and conditions.

26. At paras. 5-20, the Inspector set out his reasoning on the main appeal issue before him under the heading "Planning Unit".

27. At para. 10, the Inspector concluded that the relevant planning unit was the whole of the caravan site, including the appeal site. He noted that during the inquiry the LPA had acknowledged this to be the case.

28. At para. 11, the Inspector then identified the question before him as follows: whether the use of one or more of the caravans on the site for more than 10 years in breach of the conditions meant that other caravans on the site were not covered by the relevant conditions. In this respect he considered that the decision of Sullivan J in *R (St Anselm Development Co Ltd) v First Secretary of State* [2003] EWHC 1592 (Admin); [2004] 1 P & CR 24 (to which I will return below in detail) was relevant. He then proceeded to analyse that decision at paras. 11-14. The Inspector was of the view that the present case was "a similar situation".

29. At para. 15, the Inspector said the following:

> "In this case the Council has clearly identified the specific parts of the land that have been used in breach of the conditions for more than 10 years, when issuing the lawful development certificates. I accept that in the original planning permission the number of caravans is not controlled and the positions are not identified on a plan so plot positions could change. However, the units over most of the site are in relatively fixed positions, being accessed from defined hard surfaced drives, and a substantial portion of the units on masonry basis [*sic*: that should

> be "bases"]. Some have some form of physical enclosure around a 'garden' area, which is the case in part with some of the four units on the appeal land that have been granted the LDC. While I acknowledge that the units could move and numbers change the physical evidence is that this has not occurred for a long time and there is no evidence that it is going to occur in the future, other than the hypothetical argument raised. The units identified in the LDC are clearly distinguishable on the ground."

30. At para. 16, he noted the Appellant's hypothetical case in the following way:

> "I note the hypothetical case put that someone could live on one part of the site for a few years, then move to another part of the site for a few years and again another achieving 10 years occupation in breach of a condition. However, a similar argument could be used with car parking where either the same person or different persons used different car parking spaces for different periods amounting to a 10 years continuous period overall. If that was the case it would have to be made out for the LDC and perhaps different areas would have to be identified depending on the facts. There is no actual case being made on these grounds to be considered in this case."

31. At paras. 17-19, the Inspector set out the core of his reasoning as follows:

> "17. The Council has clearly identified the parts of the land to which the conditions do and do not apply through the LDCs. I therefore conclude that because some identified parts of the site have been used contrary to the conditions, does not mean that the other parts of the site do not remain controlled by them.
>
> 18. The appellant also argues that a unit and its occupier could move to another part of the site that is outside the area identified by an LDC or another unit could be moved onto the area of land deemed lawful. I accept that is the case. It is the use of the land that is controlled and the individual area is identified. If an occupier moved off the land with the LDC and placed the unit on land without the LDC then their use would become unauthorised. Similarly, if someone else moved onto the LDC land with a new unit for use not in compliance with the conditions that would not be an unlawful use, if the non-complying use directly followed the previous one with no intervening compliant use.
>
> 19. I acknowledge that users of the site areas with the LDCs also use the communal areas. The appellant suggests that means that their use not in compliance with the conditions is of the

> whole of the communal areas. I do not accept that. As with a car park there are communal parts that are used outside of a particular space, that does not mean that the rest of the car parking spaces would then cease to be controlled by the conditions."

32. At para. 20, the Inspector considered another appeal decision to which he had been referred, in which a different view had been taken, but said that he would give greater weight to the decision of the High Court in *St Anselm*.

33. At paras. 21-33, the Inspector turned to the second issue before him, under the heading: "Whether enforcement action may be taken, estoppel and legitimate expectation".

34. At para. 30, he concluded that no legitimate expectation could be inferred directly or indirectly in relation to the LPA's future actions in relation to the appeal site from the two letters relied upon: as I have said, I will return to those letters later. At para. 31 he set out his reasoning as follows:

> "31. I have also considered the Council's decision not to pursue enforcement action. Section 172(1)(b) indicates that an LPA may issue a notice where it appears to them that there has been a breach of planning control and that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations. Clearly the Council in withdrawing the notices did not consider that it was expedient to proceed with them, or to issue further notices at the present time, but again that does not bring the situation into the ambit of 'for any other reason' of Section 191. The Council's approach to the site and enforcement action is clearly set out in the two letters considered above. The Council has a concern relating to permanent residential use in terms of impact on nearby heathlands. Any planning permission would require mitigation, so while not taking action, there is the potential that some of the units will remain in holiday use, as some are at present, limiting their impact. It is appropriate not to take action in the circumstances."

Grounds of Appeal

35. There are two grounds of appeal, which are now in effect grounds for the application under section 288 of the 1990 Act:

(1) In determining whether the LDC should be granted the Inspector erred in his approach to the relevance and application of the previously acknowledged breach of condition on the extant 2007 planning permission.

(2) The Inspector erred in his interpretation and application of sections 172 and 191(2)(a) of the 1990 Act in respect of the formal position adopted by the LPA prior to and at the public inquiry as to the expediency of enforcement action and how that should be considered in the context of those provisions.

Material legislation

36. The material legislation is contained in the 1990 Act, as amended by the Planning and Compensation Act 1991.

37. Section 191 of the 1990 Act governs certificates of lawfulness of existing use or development. It provides:

> "(1) If any person wishes to ascertain whether –
>
> (a) any existing use of buildings or other land is lawful;
>
> …
>
> (c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,
>
> he may make an application for the purpose to the local planning authority specifying the land and describing the use, … or other matter.
>
> (2) For the purposes of this Act uses … are lawful at any time if –
>
> (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and
>
> (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
>
> (3) For the purposes of this Act any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if
>
> (a) the time for taking enforcement action in respect of the failure has then expired; and

> (b) it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.
>
> (4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, … or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application."

38. Subsection (5) sets out the details which a certificate must include. Subsection (6) provides that the lawfulness of any use, operations or other matter for which a certificate is in force shall be conclusively presumed. Subsection (7) provides that a certificate also has the effect, for the purposes of certain statutes, including section 3(3) of the Caravan Sites and Control of Development Act 1960, as if it were a grant of planning permission.

39. Where an application is made to a local planning authority for a certificate under section 191 and is refused, the applicant may appeal to the Secretary of State under section 195. That is what occurred in the present case. If a person is aggrieved by the outcome of that appeal, they may make an application to the High Court to quash the decision of the Secretary of State under section 288. As I have mentioned, in the present case, that application has been considered by this Court.

40. Section 171A defines certain expressions which are used in connection with enforcement. Subsection (1) provides, that for the purposes of the 1990 Act, (a) carrying out development without the required planning permission; or (b) failing to comply with any condition or limitation subject to which planning permission has been granted, constitutes a breach of planning control. Subsection (2) provides that (a) the issue of an enforcement notice (defined in section 172) or (b) the service of a breach of condition notice (defined in section 187A) constitutes taking enforcement action.

41. Section 172 provides that:

> "(1) The local planning authority may issue a notice (in this Act referred to as an 'enforcement notice') where it appears to them –
>
> (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."

42. Section 187A provides, in subsection (1), that the section applies where planning permission for carrying out any development of land has been granted subject to conditions. Subsection (2) provides:

> "The local planning authority may, if any of the conditions is not complied with, serve a notice (in this Act referred to as a 'breach of condition notice') on –
>
> (a) any person who is carrying out or has carried out the development; or
>
> (b) any person having control of the land,
>
> requiring him to secure compliance with such of the conditions as are specified in the notice."

43. Section 171B governs time limits for the taking of enforcement action. The only relevant provision in this case is subsection (3), which provides:

> "In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach."

Ground 1

44. Under Ground 1 Mr Tucker submits that the Inspector erred, having made a finding (at para. 10 of his decision) that the entire caravan site comprised one single planning unit, by then going on to conclude that the breach of condition only occurred within some smaller sub-area within the wider planning unit. The two conclusions are contradictory. He submits that, if a condition relates to the whole planning unit (or in this case the appeal site as part of a single planning unit), and it is breached, and there is no obvious delineation as to where the breach has or can be geographically confined, then the breach necessarily relates to the whole of the appeal site.

45. It is common ground that four units within Area B each have an LDC. Some caravans bisect the boundaries of Area B but Mr Tucker accepted at the hearing that nothing turns on this fact.

46. At the hearing before us Mr Tucker submitted, and it became clear that this is common ground, that the planning unit is not the same as an area of land in respect of which an application is made for an LDC. Indeed, the concept of a planning unit is not as such found in the planning legislation itself. It is the product of judicial interpretation of the legislation and has been developed in order to identify whether there has been a material change of use (and therefore "development"): see *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207, at 1212-1213 (Bridge J).

47. As became clear at the hearing before this Court, nothing in the present case turns on the concept of the planning unit. To the extent therefore that the Inspector set out his

reasoning under the heading "Planning Unit", in my view, it has become clear that that was not the crucial issue in this case. That said, however, the Inspector himself noted this point in his decision letter, at para. 5.

48. On behalf of the Appellant Mr Tucker emphasises, first, that the planning permission in this case does not impose any restriction on either the number or the location of particular caravan units. If that were to be done, it would have to be done by a condition and there is no such condition.

49. Secondly, he submits, the breach of condition is not confined to a particular plot, because the occupant of that plot also has access to the communal areas of amenity. In this context, he submits that occupants of caravan units located in the appeal site, Area B, nevertheless have access to communal facilities such as a pond and a play area for children, which are located in Area A. He submits therefore that their breach of condition is not confined to the particular plot where their own caravan is located. He also notes, as the Inspector found, that there are no demarcated plots as such on the ground.

50. Thirdly, he emphasises that the caravan units are in principle mobile and indeed have to be mobile to qualify as caravans at all.

51. Fourthly, he submits that as a matter of fact the LPA did seek to take enforcement action against the whole of the site. The enforcement notice, which was withdrawn in 2018, was not issued on a plot by plot basis.

52. Mr Tucker further submits that the Inspector erred in applying the decision of Sullivan J in *St Anselm* to the case before him, as it is clearly distinguishable and does not apply.

53. In *St Anselm* the local planning authority, Westminster City Council, had in 1964 granted planning permission for the erection of a new building for use as offices and for residential purposes. The new building included a basement car park containing 19 car parking spaces. The planning permission was subject to a number of conditions, including condition 2, which stated:

> "The whole of the car-parking accommodation shown on the drawings shall be provided and retained permanently for the accommodation of vehicles of the occupiers and users of the remainder of the building provided that nothing in this condition shall prevent the use of such car-parking accommodation or any part thereof, by persons or bodies for such periods and at such times as the Council may from time to time approve in writing."

54. Fourteen of the 19 spaces had been leased to, and used continuously by, non-occupiers and non-users of the building for more than 10 years. There was no dispute that those spaces were immune from enforcement action. The remaining five spaces had not been used continuously for 10 years by such persons. In respect of each of those spaces the council issued an enforcement notice. The Inspector dismissed the appeal. On appeal to the High Court under section 289 of the 1990 Act the main argument was that the condition was a single condition, which applied to the whole area comprising the car

parking spaces, and enforcement action could not be taken in respect of the five individual spaces because immunity from enforcement action had already been acquired in respect of the whole area. Sullivan J rejected that argument.

55. At para. 20 of his judgment, he said:

> "… Absurdity may well be putting it too high, but there can be no doubt that the consequence of accepting the appellant's arguments would be, to say the least, most undesirable in planning terms. If a local planning authority, for perfectly good planning reasons, wishes the whole of a particular area/building, or floor in a building, to be retained (or not used) for a particular purpose, it would be most unfortunate if its right to take enforcement action in relation to any use of that area, however extensive, would be curtailed after ten years merely because a part, perhaps only a small part, of the building or area had been used (or not used) in breach of condition. The planning consequences of using the whole of the area or building otherwise than in accordance with a condition, as opposed to the consequences of using only a small part of the building or area in breach of condition, might be very significant. The legislative intention underlying s.171B is that if a local planning authority has failed to take enforcement action to stop a particular activity for a period of ten years, then it is far too late for it to begin to complain about the activity in question."

56. At paras. 23-26, he continued:

> "23. Like the Inspector, I would strive to avoid such an undesirable planning consequence if at all possible. I am not persuaded that her re-interpretation of the condition, as set out in para.10 of the decision letter, is appropriate or, indeed, an answer to the underlying problem. If the condition does apply to the whole of the car parking accommodation and to its constituent parts, the breach still occurred over 10 years ago, when the whole of the car parking ceased to be used in accordance with the terms of condition 2.
>
> 24. Mr Litton's re-interpretation of the condition so as to apply it, in effect, to each and every one of the car parking spaces individually, thus giving each space the benefit of its own condition is, in my judgment, a step, if not 19 steps, too far. In my view, the court should not strive to rewrite the condition, which would be impermissible, but to consider whether the provisions in the Act relating to the 10-year time limit can be construed so as to produce a sensible planning outcome.
>
> 25. There can be no doubt what the sensible planning outcome would be. On the planning merits, the Inspector

considered that condition 2 should be retained. It still served a planning purpose even though it applied to only five spaces.

26. Miss Lieven submits that I should not rewrite the Act. I agree. But I do not think it necessary to do so. I think it is merely necessary to construe s.171B(3) within the overall framework for enforcement action that is laid down by the Act. When considering the 10-year limit on taking enforcement action, it is important to bear in mind that it is not sufficient for an enforcement notice to allege that the breach of planning control is a breach of condition in s.173(1)(b). A notice must also specify the matters which are said to constitute the breach: see subss.173(1)(a) and (2). In addition, the notice must specify the steps which it requires to be taken. Although under-enforcement is permissible, those steps may not be more than is necessary to make any development comply with the conditions which are alleged to have been breached: see subss.173(3) and (4). Thus, if space number 1 is being used by non-occupiers/users of the building, but the remaining 18 spaces are being retained for use by the occupiers/users of the building, any steps required to be taken would be limited to space number 1."

57. At para. 27, he concluded:

"Applying this statutory framework to the facts of the present case, if condition 2 is breached because one car parking space ceases to be retained for use as parking accommodation by users/occupiers of the building, the enforcement notice must make it plain that the breach of condition is by reason of the use of that space, must identify the space with sufficient clarity, and require no more than that the use of that space, in breach of condition, shall cease. If the notice requires more it can be cut down in response to an appeal under ground (f) in section 174(2). … Section171B has to be construed against this statutory background, which requires an enforcement notice where there has been a breach of planning control by a reason of noncompliance with a condition to explain the nature and the extent of the breach, and what must be done to remedy the breach. For the purpose of applying the 10-year time limit in s.171B the focus should be upon the terms of the enforcement notice which has been issued. The question is not: could *an* enforcement notice alleging a failure to comply with this condition have been issued 10 years ago, but could *this* enforcement notice alleging this failure to comply with the condition and requiring this failure to be remedied by taking *these* steps, have been issued 10 years ago? If the answer to the latter question is 'Yes', then it is readily understandable that the local planning authority should have lost its right to take enforcement action. In respect of those spaces where the local

> planning authority could not have required any remedial steps to be taken—because they were being retained for the use of occupiers/users of the building—there is no sensible reason why it should have lost its right to take enforcement action. In my judgment, it does not involve a rewriting of section 171B to construe it as though it prohibits a local planning authority from issuing an enforcement notice after the end of ten years from when the particular matters alleged by the enforcement notice to constitute a breach of condition began." (Emphasis in original)

58. We were informed by counsel that the judgment in *St Anselm* has not previously been considered at an appellate level but that it has been followed as a matter of practice ever since. It was not submitted before us that *St Anselm* was wrongly decided on its facts. In my view, it was correctly decided. I would respectfully endorse the approach taken by Sullivan J in *St Anselm* but would add this.

59. There will be some planning conditions which apply to the entirety of the relevant land and cannot sensibly be regarded as being the subject of a "partial breach" only. Others will be like the one in *St Anselm*. The issue whether a case falls on one side of that line or the other is one of fact and degree and, like so many questions in planning law, calls for the exercise of judgement, having regard to the particular facts before the relevant decision-maker (in this case the Inspector). The exercise of that judgement will not readily be amenable to challenge in the courts, which will only interfere with it on well-established grounds of law, for example if the Inspector has erred in principle or has reached a conclusion which was not reasonably open on the evidence.

60. In *St Anselm* both the Inspector and counsel for each of the parties treated the question as one of the true interpretation of the relevant condition. Sullivan J did not consider that that was the right approach. This is why he rejected the submission made on behalf of the Secretary of State, as summarised at para. 24, that the condition should be interpreted so as to apply, in effect, to each and every one of the car parking spaces individually.

61. It can be seen therefore that the approach which Sullivan J took, with which I agree, is that the question in cases such as this turns not so much on the interpretation of the relevant condition but on the proper application of the legislation on enforcement notices. The question is what is the particular breach and what could properly be enforced against?

62. Furthermore, as Sullivan J rightly observed, this gives effect to sound planning principle and common sense. In my view, it properly balances the rights of all concerned, including the important public interest at stake. The alternative would, in my view, have the unfortunate consequence that a local planning authority would be compelled to take enforcement action even against those occupiers of units where there is no pressing public interest reason to take action. Alternatively, if it did not take action because there was only one unit which was being used in breach of the condition, it would then be precluded from taking action in the case of any other units at a later stage, because immunity would have been acquired in respect of the entire site. In my view, Parliament cannot have intended those unfortunate consequences.

63. As I have mentioned, *St Anselm* was an appeal against enforcement notices. It did not directly concern an LDC. Nevertheless, as Sullivan J acknowledged at para. 13, the two sets of provisions are "interrelated". This was acknowledged by all parties at the hearing before us.

64. This point was noted by Sullivan J himself, in *North Devon DC v First Secretary of State* [2004] EWHC 578 (Admin); [2004] 3 PLR 62, at paras. 28-29. I will now turn to that decision, as Mr Tucker placed some reliance on it.

65. The facts of that case were that, in 1971, planning permission was granted for the erection of five holiday bungalows. The permission was subject to a condition that the holiday bungalows should only be occupied during the period from 15 March to 15 November in each year. An application was made for the grant of an LDC in respect of one of the bungalows. The property had been occupied continuously throughout the year, both winter and summer, since October 1992. This was just over 10 years before the application for the LDC was made on 22 November 2002. However, the local planning authority refused to grant the LDC on the basis that, while there had been a breach of the planning condition each winter, that breach had ceased on 15 March each year, when occupation was again permitted for the spring, summer and autumn months. It contended therefore that each winter period represented a separate breach of condition, so that a 10-year period of continuous non-compliance could not accrue for the purposes of section 171B(3) of the 1990 Act. The Inspector rejected that contention and allowed the appeal. The local planning authority then applied under section 288 of the 1990 Act to the High Court to quash the decision of the Inspector.

66. Sullivan J rejected that application. He said that it was plain that, in enacting section 171B(3), Parliament intended that all breaches of planning control other than those mentioned in subsections (1) and (2) should become immune from enforcement action after they had continued for 10 years. Many conditions, such as agricultural occupancy conditions, are capable of being breached continuously throughout each year of the 10-year period but that is not true of all conditions. He said that a useful way of testing the position in relation to an LDC is to ask: what would be the outcome if an enforcement notice was issued in relation to the use which is applied for and an appeal was made against that enforcement notice on ground (d) in section 174(1), that is 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.? He said that the outcome should be the same in both cases. If the ground (d) appeal against the enforcement notice would succeed, so should the application for an LDC.

67. Sullivan J said that, on the facts before him, the matters constituting the breach would have been the occupation of the property between 16 November and 14 March each year. The steps required to be taken to remedy that breach would have been to cease using the property between those dates each year. An enforcement notice could have been served alleging such a breach and containing such a requirement in each one of the 10 years prior to the application of the LDC. In those circumstances it would subvert the underlying purpose of section 171B(3) to construe it in such a way as to conclude that there could be no immunity from enforcement action. In that context he referred, at paras. 28-29, to his earlier decision in *St Anselm*.

68. I do not consider that the treatment of seasonal occupancy conditions in *North Devon* has any material bearing on the issue which we have to decide in the present case. That case was concerned with a very different issue.

69. Against that background of principle I turn to the facts of the present case. For the Secretary of State Mr Mackenzie submits that there were no communal facilities in Area B itself save for an access road. He submits therefore that, on the Inspector's findings of fact, Area B in the present case is materially on all fours with the car park spaces in *St Anselm*. There were well defined plots for each caravan unit: although they were not marked out on any plans accompanying the planning permission, they were identifiable on the ground and that is sufficient. Furthermore, a person would need to obtain access to their unit by crossing other land, just as in *St Anselm*. I accept those submissions for the Secretary of State. There was, in my opinion, no requirement that the plots must be delineated on any plan which was the subject of the planning permission, provided that they were well defined and identifiable on the ground.

70. In my judgement, the Inspector did not fall into error as a matter of principle. The question was one of fact and degree, for the Inspector to decide, provided his conclusion was reasonably open to him on the evidence before him. In my view, his conclusion was reasonably open to him on the findings of fact made by him in the present case, in particular at para. 15 of the decision. In this context, I also bear in mind that the Inspector had the advantage (which this Court does not) of having conducted a site visit.

71. Accordingly, I would reject Ground 1.

Ground 2

72. Under Ground 2 Mr Tucker submits that it was not open to the LPA to take enforcement action in respect of the alleged breach of condition because it had already decided that it was not expedient to do so; and that it had created a legitimate expectation that no such action would be taken. Accordingly, he submits, that constitutes "any other reason" why enforcement action cannot be taken, within the meaning of section 191(2)(a) of the 1990 Act.

73. It is accepted on behalf of the Secretary of State that, in principle, a substantive legitimate expectation amounting to an abuse of power could amount to "any other reason" in section 191(2)(a).

74. On the question of whether legitimate expectation has any role to play in the context of planning law, we were referred to the decision of this Court in *Rastrum Ltd v Secretary of State for Communities and Local Government* [2009] EWCA Civ 1340, where the main judgment was given by Sullivan LJ. It was submitted by Mr Tucker that, at least implicitly, Sullivan LJ accepted the possibility that enforcement action might be precluded on the ground that it would be an abuse of power because it would breach a legitimate expectation: see paras. 23-25 of his judgment. For the purposes of the present case I am prepared to accept that may be so but I would stress that the issue was not contested before this Court and so we have not heard submissions about it.

75. In my view, however, the argument for the Appellant fails on the facts of this case. The two letters from the local planning authority on which reliance is placed do not amount to the unequivocal, unqualified representations which would be needed. Furthermore, insofar as the submissions by Mr Tucker placed reliance on the evidence given by witnesses on behalf of the LPA at the inquiry before the Inspector, they did not say anything materially different from what the letters had said.

76. The first letter on which reliance is placed is dated 16 March 2018. It came from Christchurch Borough Council and was addressed to the residents at Tall Trees Caravan Park. So far as material it included the following passages:

> "Therefore, the Council in accordance with Section 173A (1) (a) and 173A (3) of the Town & Country Planning Act 1990, being the Local Planning Authority, hereby give notice of the withdrawal of all Enforcement Notices served on the land at Tall Trees Caravan Park. In respect of Breach of Condition Notices also served, no further action will be taken. Please be advised that all parties on whom enforcement notices have been served will receive this notification.
>
> …
>
> Members of the Council have continuously expressed concern that enforcement action can lead to significant implications on occupiers' property and livelihood. There is much added weight to legal and planning considerations from the recent appeal decisions. The Council has acted swiftly, by the provisions of the Act 1990, the National Planning Policy Framework (NPPF), and the Planning Practice Guidance, to appropriately reconsider its decision to take enforcement action and to refuse lawful development certificate applications, as it is, by appraisal, relevant, necessary and proportionate to do so."

77. The second letter on which reliance is placed was sent by Christchurch Borough Council and was dated 10 January 2019 (it is common ground that it was incorrectly dated 2018). This was sent by email to all residents of Tall Trees "where it applies". So far as material it included the following passages:

> "In respect of an unauthorised occupation of land at the time 2016 enforcement notices were withdrawn by the Council in 2018, no further action will be taken by the Council. The Council however reserves judgment on any further unauthorised use of the land, particularly on component parts where no development or use has occurred. The risk of such action currently is low."

78. Under Ground 2, Mr Tucker candidly accepted at the hearing before this Court that the first letter from the LPA was not sufficient by itself to create a legitimate expectation. Furthermore, he accepted that the second letter was not unequivocal taken by itself. He submitted, however, that, when taken together with the proof of evidence at the public inquiry for Mr David Lloyd, there was sufficient evidence of a legitimate expectation which had been created. Mr Lloyd is a Planning Enforcement Practitioner, who provides services to local planning authorities.

79. In his proof of evidence, at para. 15, he said:

> "On instruction of the Council's planning and legal officers, I was tasked to identify how the land was being used and to what extent that amounted to a breach of planning control."

80. At para. 22, he said:

> "The Council took enforcement action in 2016 and 2017 against the general permanent residential occupations of the caravan park; however enforcement notices were withdrawn approximately a year later by further consideration of the Council's legal position. Even though the Council would be entitled to pursue enforcement action on merits of extant permissions and quite apparent residential use of land, a balanced planning decision was reached to take no further action and realistically allow all land and plot uses to become immune and potentially lawful over the passage of time, subject to production of supporting evidence."

81. I do not accept Mr Tucker's submissions. As Mr Mackenzie reminded us at the hearing, the Inspector did not ignore the evidence of Mr Lloyd; he expressly referred to it but gave it little weight, as he was entitled to do. Para. 22, which represents the high watermark of the Appellant's submission, does not contain the unequivocal and unqualified representation as to *future* conduct which would be required for a legitimate expectation to be created. It simply records, on instructions from Mr Lloyd's client, what the LPA had done in the past. Furthermore, it expressly contemplates that, if immunity from enforcement action is to be acquired in the future, this will be as the result of operation of law (because of the passage of time) and not because of any action (or inaction) by the LPA.

82. Mr Tucker also placed some reliance upon the officers' report to the LPA dated 26 March 2019 for the purpose of its consideration of the application for an LDC. At para. 8, that report said, under the heading 'The Status of Enforcement Action':

> "At all times the LPA has been clear of its intent to take enforcement action and its reasoning. Whilst the applicant acknowledges that no enforcement action would be taken against matters considered in respect of withdrawn enforcement notices,

> the LPA must and is entitled to reserve judgment where matters go beyond what was considered in 2016. The LPA's understanding is that the site has not changed since that time.
>
> For completeness and clarity therefore, as said before, there are plots within areas green and yellow on the drawing below which do not benefit from permission to use the land for permanent residential purposes, but (and only the basis of the position in 2016) no enforcement action will be taken.
>
> …"

83. Mr Tucker submits that that was unequivocal for those residents to whom it was addressed, who were in occupation at the time in 2016. I disagree. It is a carefully worded report and, on its face, did not commit the LPA to any particular course of action for the future. It is far from the kind of unequivocal and unqualified statement which would be required to found a legitimate expectation.

84. I would therefore also reject Ground 2.

Conclusion

85. For the reasons I have given, I would refuse this application under section 288 of the 1990 Act.

Costs

86. The parties are agreed that the Appellant must pay the costs of the Secretary of State. There is also before the Court an application on behalf of the LPA for its costs. This is resisted by the Appellant.

87. It is common ground that the applicable principles in this context were set out by the House of Lords in *Bolton MDC v Secretary of State for the Environment* [1995] 1 WLR 1176, at 1178-1179 (Lord Lloyd of Berwick). Although, as Lord Lloyd said there, there are no "rules" in this context and costs are always in the discretion of the Court, the usual order is that Secretary of State will normally be entitled to the whole of his costs; and there will not normally be a second set of costs.

88. In the present case, reliance is placed by the LPA, first, on the fact that it had a separate interest to protect. We are not persuaded that that justifies an additional order of costs in its favour: in cases such as this the LPA will always have made a decision which has been upheld on appeal by the Secretary of State.

89. Secondly, the LPA submits that in the circumstances of this case there was a discrete issue which it was called upon to answer. As the Appellant has submitted, the only discrete issue, that a factual error was made by the Secretary of State in relying upon

the breach of condition notices, was very minor in the context of this case as a whole. We are not persuaded that, in the circumstances of this case, there was any sufficiently discrete issue which required separate representation before this Court on behalf of the LPA.

90. Accordingly, we order that the Appellant shall pay the costs of the Secretary of State but not those of the LPA.

Lord Justice Dingemans:

91. I agree.

Sir Nigel Davis:

92. I also agree.