



Neutral Citation Number: [2021] EWHC 112 (Admin)

Case No: CO/886/2019

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**DIVISIONAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 26/01/2021

**Before:**

**LORD JUSTICE COULSON**  
**MR JUSTICE HOLGATE**

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**Marjolein Russnak-Johnston**

**Claimant**

- v -

**Reading Magistrates' Court**

**Defendant**

- and -

**Royal Borough of Windsor and Maidenhead**

**Interested Party**

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**Mr W Robert Griffiths QC and Ms Nicola Strachan**  
(instructed by **ABV Solicitors**) for the **Claimant**  
The **Defendant and Interested Party** were not represented

Hearing date: 15/12/2020  
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**Approved Judgment**

COVID-19 Protocol: This judgment has been handed down by the judge's clerk remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand down is deemed to be 2pm on 26<sup>th</sup> January 2021.

**Mr Justice Holgate:**

**Introduction**

1. The Claimant, Marjolein Russnak-Johnston, challenges by way of judicial review the preliminary decision of the Reading Magistrates' Court on 10 December 2018 that it had jurisdiction to hear an information in respect of four alleged offences under s. 171D (1) and (5) of the Town and Country Planning Act 1990 ("TCPA 1990") relating to non-compliance with two planning contravention notices served by the Royal Borough of Windsor and Maidenhead ("the Council") under s. 171C on 30 March 2016 and 14 July 2016 (referred to as "PCN1" and "PCN2" respectively).
2. The single offence alleged under s.171D(1) is that the Claimant failed to provide copies of certain documents required by PCN2. The three offences alleged under s.171D(5) are that the Claimant made statements purporting to comply with PCN1 and PCN2, but which were knowingly or recklessly false or misleading.
3. The claim raises two issues: -
  - (i) Whether a requirement to provide a document is *ultra vires* the power under s.171C TCPA 1990 to serve a planning contravention notice;
  - (ii) Whether the prosecution of the four alleged offences was time-barred by s.127 of the Magistrates' Courts Act 1980 ("MCA 1980").
4. The Defendant filed an acknowledgment of service, but, following the normal practice for a court added as a defendant in proceedings of this kind, indicated that it would not be contesting the claim. Instead, the Defendant filed "submissions" which explain how it reached its decision that it had jurisdiction to try all four offences, because (i) the term "information" includes documents and (ii) the prosecution of all four offences complied with the time limit laid down by s.127. The Council, which had been served as an interested party, did not file an acknowledgment of service.
5. On 8 July 2019 Mostyn J granted the Claimant permission to apply for judicial review. On 9 September 2019 the Council sent an email to this Court stating that it supported the Defendant's position. However, the Council did not file detailed grounds of defence and did not appear at the substantive hearing.

**Statutory framework**

6. Section 171C of TCPA 1990 is entitled "Power to require information about activities on land" and provides: -

“(1) Where it appears to the local planning authority that there may have been a breach of planning control in respect of any land, they may serve notice to that effect (referred to in this Act as a “*planning contravention notice*”) on any person who—

  - (a) is the owner or occupier of the land or has any other interest in it; or
  - (b) is carrying out operations on the land or is using it for any purpose.

- (2) A planning contravention notice may require the person on whom it is served to give such information as to—
- (a) any operations being carried out on the land, any use of the land and any other activities being carried out on the land; and
  - (b) any matter relating to the conditions or limitations subject to which any planning permission in respect of the land has been granted,
- as may be specified in the notice.
- (3) Without prejudice to the generality of subsection (2), the notice may require the person on whom it is served, so far as he is able—
- (a) to state whether or not the land is being used for any purpose specified in the notice or any operations or activities specified in the notice are being or have been carried out on the land;
  - (b) to state when any use, operations or activities began;
  - (c) to give the name and [ postal] address of any person known to him to use or have used the land for any purpose or to be carrying out, or have carried out, any operations or activities on the land;
  - (d) to give any information he holds as to any planning permission for any use or operations or any reason for planning permission not being required for any use or operations;
  - (e) to state the nature of his interest (if any) in the land and the name and [ postal] address of any other person known to him to have an interest in the land.
- (4) A planning contravention notice may give notice of a time and place at which—
- (a) any offer which the person on whom the notice is served may wish to make to apply for planning permission, to refrain from carrying out any operations or activities or to undertake remedial works; and
  - (b) any representations which he may wish to make about the notice,
- will be considered by the authority, and the authority shall give him an opportunity to make in person any such offer or representations at that time and place.
- (5) A planning contravention notice must inform the person on whom it is served—
- (a) of the likely consequences of his failing to respond to the notice and, in particular, that enforcement action may be taken; and
  - (b) of the effect of section 186(5)(b).
- (6) Any requirement of a planning contravention notice shall be complied with by giving information in writing to the local planning authority.
- (7) The service of a planning contravention notice does not affect any other power exercisable in respect of any breach of planning control.
- (8) In this section references to operations or activities on land include operations or activities in, under or over the land.”

7. Section 171D entitled “Penalties for non-compliance with planning contravention notice” provides: -

“(1) If, at any time after the end of the period of twenty-one days beginning with the day on which a planning contravention notice has been served on any person, he has not complied with any requirement of the notice, he shall be guilty of an offence.

- (2) An offence under subsection (1) may be charged by reference to any day or longer period of time and a person may be convicted of a second or subsequent offence under that subsection by reference to any period of time following the preceding conviction for such an offence.
- (3) It shall be a defence for a person charged with an offence under subsection (1) to prove that he had a reasonable excuse for failing to comply with the requirement.
- (4) A person guilty of an offence under subsection (1) shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale.
- (5) If any person—
  - (a) makes any statements purporting to comply with a requirement of a planning contravention notice which he knows to be false or misleading in a material particular; or
  - (b) recklessly makes such a statement which is false or misleading in a material particular,he shall be guilty of an offence.
- (6) A person guilty of an offence under subsection (5) shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.”

8. So far as is material, section 127 of the MCA 1980 provides: -

- “(1) Except as otherwise expressly provided by any enactment and subject to subsection (2) below, a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within 6 months from the time when the offence was committed, or the matter of complaint arose.
- (2) Nothing in—
  - (a) subsection (1) above; or
  - (b) .....shall apply in relation to any indictable offence.”

The offences created by s.171C are summary only offences.

### **Factual background**

- 9. The PCNs related to Fairview Stables. This site lies on the western side of Darlings Lane, Maidenhead. It is in the Green Belt and to the west lies open countryside.
- 10. The site has the benefit of a planning permission for a ménage and stable building, subject to conditions restricting the number of stables to six and prohibiting any commercial activity.
- 11. PCN1 was issued by the Council on 30 March 2016. In accordance with s.171C(1) the notice identified the breach of planning control which the Council thought may have occurred, namely “the use of buildings on the land for residential purposes and the erection of new buildings without planning permission.” The notice was served on the claimant as an owner or occupier of, or with an interest in, the land or as a person carrying out operations on the land or using it for any purpose (see s.171C(1)). The notice required the Claimant to provide within 21 days of receipt information in response to a list of questions. It stated: -

“If you wish to make an offer to apply for planning permission, or to refrain from carrying out any operations or activities, or to undertake remedial work; or any representations about this Notice, contact [the relevant planning officer] on ..... or write to arrange a meeting.”

This reflected the provisions of s.171C(4). The notice also warned the Claimant about the offences which may be committed under s.171D(1) and (5) and that a failure to respond to the notice could also result in the Council taking enforcement action. In that context the notice drew the Claimant's attention to implications for compensation under s.186(5)(b) of TCPA 1990.

12. The notice asked questions *inter alia* about who was the owner of the land, for copies of any lease or tenancy agreement to which the Defendant was a party, and the current use of the land. Specific questions were also asked to identify any residential use of the land and whether any buildings had been erected while the Claimant had been in occupation.
13. The Claimant's planning consultant responded on 16 April 2016. The Claimant stated that Fairview Stables were owned by Mr Russnak-Johnston, her husband, and not herself. She was not a party to any lease or tenancy of the land. The site had been used as a “stud farm and livery stables” since 2009. The Claimant stated that she was currently staying on-site to provide 24-hour supervision for horses but neither she, nor any other person, was using any building for accommodation. In response to a specific question, the Claimant stated that council tax was not being paid.
14. In the light of this information, the Council issued PCN2 on 14 July 2016. It stated that the breach of planning control which may have occurred was “the use of a caravan on the land for residential purposes, the erection of new buildings and the introduction of a commercial use without planning permission.” The notice required a series of questions to be answered within 21 days of receipt. It provided the same opportunity for representations to be made or a meeting to be held about the planning issues surrounding the notice. It also gave the same warnings in relation to non-compliance.
15. The questions were about *inter alia* the possibility of the land being used as a commercial stud farm and livery and the use of the land before 2009. Question (h), which is the only question to which the Claimant has objected as being outwith the powers conferred by s.171C, was as follows: -

“Please provide copies of all documents relating to the commercial Stud and Livery use, copy livery records, copy agreements with tenants, copies of all tax documents relating to the business and any other documentation that may assist the Council in understanding the current use.”

The notice clearly identified the condition prohibiting commercial activity as giving rise to a possible breach of planning control.

16. The Claimant responded through her planning consultant on 2 August 2016. She did not provide any of the documents requested in question (h), but said that the current

use of the land was as stated in her previous response, “stud farm and livery stables.” The response also stated that the Claimant was a director of Fairview Stables and that the property had been “acquired as stables with on-going livery agreements”. However, she did not produce those agreements. The letter concluded by saying that livery stables and horse breeding of horses had been carried on at the property for more than 10 years, a reference to the relevant period conferring immunity from enforcement action (ss.171B(3) and 191(2) of TCPA 1990).

17. By letter dated 8 December 2016 the Council warned the Claimant that they considered some of the information she had supplied to be misleading and that a prosecution might follow. The Council also stated that the enforcement team had formed the opinion that a breach of planning control had occurred by making a material change in the use of the land from the keeping of horses for recreational use to a “commercial stud farm and livery with residential”.
18. On 18 January 2017 the Council resolved to take enforcement action in respect of that change of use. An enforcement notice was issued on 1 February 2017. An appeal against the notice was made to the Secretary of State. A public inquiry was fixed to begin on 17 January 2018. On 16 January 2018 the Claimant served a bundle of documents as late evidence in breach of the relevant procedure rules. That material included livery agreements entered into by the Claimant as proprietor during the period December 2009 to December 2016.
19. At the public inquiry on 17 January 2018 the Council decided to withdraw the enforcement notice. On the same date the Council sent a letter stating that it was investigating offences that may have been committed under s.171D(1) and (5) of the TCPA 1990. The letter said that the Claimant had provided evidence for the appeal which contradicted certain answers given to the PCNs and that the Claimant had failed to provide the livery agreements in response to question (h) of PCN2.
20. On 22 March 2018 the Council wrote to the Claimant to say that it considered it had sufficient evidence to allege four offences and that, once authorised, a prosecution would be brought.
21. On 8 June 2018 the Council laid an information in the Magistrates' Court alleging the following four offences: -

“1. failed to comply with a requirement of the Planning Contravention Notice of 14<sup>th</sup> July 2016, in that you failed to provide copies of all documents relating to commercial stud and livery use, copy livery records and copy agreements with tenants *at any time after the end of the period of 21 days when the notice was served, namely from 5<sup>th</sup> August 2016 up to and including 15<sup>th</sup> January 2018*, contrary to section 171D(1) of the Town & Country Planning Act 1990;

2. made a statement purporting to comply with a requirement of the Planning Contravention Notice of 30<sup>th</sup> March 2016 which you knew to be misleading in a material particular, namely that you stated that the use of the land at the time of asking was that

of stud farm and livery stables, contrary to section 171D(5)(a) of the Town & Country Planning Act 1990

3. recklessly made a statement in response to the Planning Contravention Notice of 14<sup>th</sup> July 2016 which was false or misleading in a material particular, namely that you stated that breeding of horses has been undertaken over a period in excess of 10 years, contrary to section 171D(5)(b) of the Town & Country Planning Act 1990

4. made a statement purporting to comply with a requirement of the Planning Contravention Notice of 14<sup>th</sup> July 2016 which you knew to be misleading in a material particular, namely that you stated that council tax was not paid for a residential occupancy at Fairview Stables, contrary to section 171D(5)(a) of the Town & Country Planning Act 1990” (emphasis added)

22. It will be seen that offence 1 related to the failure to provide the livery agreements in response to question (h) of PCN2 in breach of s.171D(1) during the period running the expiry of the 21 days allowed for compliance until the day before the documents were eventually provided, that is from 5 August 2016 to 15 January 2018. Offences 2, 3 and 4 raised allegations under s.171D(5) in relation to information which was in fact supplied by the Claimant, but is said to have been false or misleading

#### **The Magistrates' decision**

23. On 10 December 2018 the Magistrates' Court was asked to determine the two preliminary issues set out in [3] above.

24. In relation to the first issue the Magistrates have helpfully set out in their acknowledgment of service their reasons for rejecting the Claimant's submissions: -

“We note that 171C(2) requires a person to give such information as specified in the planning contravention notice. We note that such information must relate to paragraphs (a) or (b) which deal with the use of the land. It is reasonable to expect that information might include documents to enable the council to understand the situation and make a decision on how to proceed. We find that the term information does not preclude documentation.”

25. On the second issue the Magistrates have summarised the parties' submissions to them as follows: -

“The defence set out the timeline starting with the first PCN issued on 30/03/16 with 21 days to respond and the second PCN issued on 14/07/16 with 21 days to respond. They submitted that the end of the 21 day period set out in s.171D Town and Country Planning Act 1990 was 05/08/16 and that pursuant to s.127(1) Magistrates' Courts Act 1980 the six month limitation period would have expired on 05/02/17.

The response from the prosecutor referred the Magistrates to s.171D(1) Town and Country Planning Act 1990 "If at any time..." and submitted that on 16/01/18, the day before an appeal hearing relating to the council's planning notice, the defendant had provided documents which alerted the council that the offences may have been committed. The prosecution submitted that criminal liability occurs because the documents only became apparent in January 2018 and not in the original submission in August 2016. The court was directed to s.171D(1) Town and Country planning Act 1990 "...he has not complied with any requirement of the notice." "

26. The Magistrates decided that none of the four alleged offences were time-barred under s.127 of the MCA 1980 for the following reasons: -

"We have heard much evidence on the matter of timeliness with regard to these matters. On all matters we find that these are within time and the elements of these offences were only made out on 16 January 2018. On that date the council became aware that there were grounds for charges to be laid and therefore laying the charges on 8 June was within time."

#### **A summary of the Claimant's submissions**

27. In relation to the first issue, Mr Robert Griffiths QC and Ms Nicola Strachan submitted on behalf of the Claimant that under s.171D the recipient of a planning contravention notice can only ever be required to provide "information" about the matters specified and that term does not allow a local planning authority to require any document to be disclosed. In the same vein, s.171D(3) enables an authority to require a person to "state" certain matters or to "give" information.

28. The word "information" is not defined in the TCPA 1990 and should therefore be given its ordinary, natural meaning. Thus, "information" is said to refer to:-

"The imparting of knowledge in general"  
"knowledge communicated concerning some particular fact, subject, or event; that of which one is appraised or told; intelligence, news." (Oxford English Dictionary)

29. The Claimant did not cite any authority from this jurisdiction, but relied instead on some Australian authorities mentioned in "Words and Phrases Legally Defined". For example, in *VAF v Minister for Immigration* (2004) 206 ALR 471 at [24] the Federal Court of Australia stated that the word "information" refers to "knowledge of relevant facts or circumstances communicated or received...". In *SZLPO and others v Minister for Immigration and Citizenship* (2009) 255 ALR 407, the Federal Court stated at [110] to [114] that a document was not "information" for the purposes of certain provisions in the Migration Act 1958, albeit that a document may convey information.

30. The Claimant also referred to Australian case law for the proposition that interrogatories are generally not permitted as a substitute for the discovery of



documents or to ascertain the contents of documents as a “fishing exercise” (see *Austal Ships Pty Ltd. v Incat Australia Pty Ltd.* (2010) FCA 795).

31. Accordingly, the Claimant submitted that question (h) in PCN2 was *ultra vires* s.171C and the Claimant was entitled to rely upon that point as a defence to the prosecution under s.171D(1) for a failure to comply with the requirement to provide documents.
32. Where s. 127 of the MCA 1980 applies, the Magistrates' Court has no jurisdiction to try an information which is not laid within the 6 months' time limit (*R v Wimbledon Justices ex parte Derwent* [1953] QB 380, 385).
33. The offences under s.171D(1) and (5) are summary only offences and the time limit in s.127 of the MCA 1980 applied, namely 6 months running from the commission of each alleged offence. Accordingly, because of the time that elapsed between April/August 2016 and 8 June 2018, the only way in which the time limit could have been satisfied was if the offences were of a continuing nature and were therefore still being committed inside the 6 months' period immediately prior to the date when the information was laid.
34. The Claimant submitted that a failure to comply with a “do” notice under s.171C requiring information to be supplied was a once and for all offence committed when the 21-day period allowed by s.171D(1) expired. Assuming that PCN2 was served on 15 July 2016, the offence would have occurred 21 days later on 5 August 2016, and the time limit for laying an information expired on 5 February 2017. In relation to the three alleged offences under s.171D(5), the Claimant submitted that the making of statements which are said to have been false or misleading was a once and for all offence which was committed when her planning consultant sent his letter on 18 April 2016 in relation to PCN1 and on 2 August 2016 in relation to PCN2. Accordingly, the time limits for bringing any prosecution had expired on 18 October 2016 and 2 February 2017 respectively.
35. There is no authority directly in point. In addition to *Derwent*, the Claimant relied upon *Hodgetts v Chiltern District Council* [1983] 2 AC 120; *Hertsmere Borough Council v Alan Dunn Building Contractors Limited* (1985) 84 LGR 214; *Torrige District Council v Turner* (1991) 90 LGR 173; *British Telecommunications Plc v Nottinghamshire County Council* [1999] Crim. L.R. 217).

## **Issue 1**

### *Overseas case law*

36. The Claimant placed a great deal of emphasis upon extracts from certain Australian authorities taken from a legal dictionary. But they are of no real assistance on the construction of s.171C of TCPA 1990. They were decided in the context of a statutory regime for dealing with refugee protection claims and the specific issues which fell to be decided. *VAF* was concerned with a provision which required the Refugee Review Tribunal to give an applicant claiming protection particulars of “information” it had obtained, and which would be a reason for affirming the decision under review, so that the applicant could comment on it. The majority decided that in the circumstances of the case, the Tribunal had not acted in breach of this obligation because, although it had taken into account in its decision “information” which was adverse to the

applicant, but which had not been particularised for him to comment on, that information did not form part of its reason for upholding the decision under review. There was no issue in that case as to whether the material in question fell outside the meaning of “information”, and certainly no discussion of whether a document could or could not be treated as information.

37. The decision in *SZLPO* is of no assistance at all. The passage cited by Mr Griffiths QC related to one small issue in one of three appeals before the Court, that of *SZLPP*. There, the Tribunal had asked the relevant Government Department to provide the results of the applicant’s health examination but had not complied with a statutory obligation to specify the way in which “additional information” was to be given by the Department, “being the way the Tribunal considers is appropriate in the circumstances” ([19], [53], [55] and [59]). The Court held that this obligation was not engaged for a variety of reasons ([154] to [161]), including that the Tribunal’s power to request “additional information” did not cover a request for an existing document. But that conclusion was based upon (i) the explicit distinction drawn between “document” and “information” in various parts of the legislation ([112]) and (ii) the Tribunal’s obligation to *specify the way* in which information was to be given, which made no sense if applied to an existing “document” ([113]). TCPA 1990 does not contain any provisions of that nature.
38. The Claimant’s citation of extracts from these authorities demonstrates that it is inadvisable to rely upon material of that kind taken from a legal dictionary without going on to analyse the legislative context and the issue which was decided in order to see whether it has any relevance to the problem in hand.
39. It turns out, however, that there are other authorities referred to in “Words and Phrases Legally Defined” which are more in point and which tend to undermine the Claimant’s argument. An important Australian authority referred to in the passage in *VAF* at [24] upon which Mr Griffiths QC had relied, did have to consider whether material fell within the meaning of information: *Win v Minister for Immigration and Multicultural Affairs* (2001) 105 FCR 212. There, an applicant for a protection visa contended that a confidential informant’s letter, which was adverse to his credibility, was *not* “information” within the meaning of the legislation and so the Tribunal had not been entitled to take it into account. The Court rejected his contention ([19]). Having referred to several dictionary definitions of “information” the Court said that this term is capable of different shades of meaning, depending on the context ([18]).
40. This sensitivity of the meaning of “information” to context is illustrated by another part of the Migration Act 1958 dealing with the exemption of confidential “information” from access to documents under “Freedom of Information” legislation. In *Kwok v Minister for Immigration and Multicultural Affairs* (2001) FCA 1444 the Federal Court, not surprisingly, proceeded on the basis that a request for access to documents could fall within the scope of “information” relying upon the passage in *Win* referred to in [39] above (see [15], [17] and [20]).
41. Similarly, the Official Information Act 1982 in New Zealand provided for access to “information” so as not be limited to written records or documents but to embrace the “knowledge” of the relevant bodies (*Commissioner of Police v Ombudsman* (1985) 1 NZLR 578, 586).

*Domestic legislation and dictionary definitions*

42. Section 1 of the Freedom of Information Act 2000 provides a general right for a person to have “information” held by a public authority communicated to him. Section 84 provides that “information” means “information recorded in any form.” In the context of this legislation, information includes records and data sets kept by public bodies. Accordingly, s.11 provides for information to be communicated to the person making a request by the provision of a copy or a reasonable opportunity to inspect a record. Plainly, the word “information” is capable of including documents.
43. The same approach is to be found in the Environmental Information Regulations 2004 (SI 2004 No. 3391). Regulation 5 imposes a general duty on a public authority to make available the “environmental information” it holds on request. “Environmental information” is defined by regulation 2(1) to mean “any information in written, visual, aural, electronic or any other material form” on a number of defined subjects, which includes “reports on the implementation of environmental legislation.” In this context the term “information” plainly includes information in the form of a document.
44. The word “information” in these two examples is not a term of art or special usage dependent upon the interpretation provisions in the 2000 Act or the 2004 Regulations. The definitions in the Oxford English Dictionary referred to above do not exclude the communication of information in written form, for example where information exists in the form of a document, or a book. Indeed, the Dictionary also provides other meanings of “information” which include material which is capable of being stored in, transmitted by, and communicated to inanimate things and material which is obtained by the processing of data. The word “information” may have a broad range of meanings depending on context.
45. The Claimant’s submission that “information” and “document” have separate meanings such that, as a matter of ordinary language, the former cannot include the latter, is unsound.

*The Carnwath Report*

46. The legislation on planning contravention notices stemmed from the report of Robert Carnwath QC (as he then was) to the Secretary of State for the Environment entitled “Enforcing Planning Control” (February 1989). The report recognised the complex nature of the law on when development takes place, and hence planning permission is required, and how this makes it more difficult for local planning authorities to investigate and take effective action (paras 1.3 to 1.12 on pp. 27-30). The report referred to the powers already available to local planning authorities to serve a notice under (i) s.284 of the Town and Country Planning Act 1971, now s.330 of TCPA 1990, (requiring information about the nature of interests held in a site, the use to which it is put and when that use began) or (ii) s.16 of the Local Government (Miscellaneous Provisions) Act 1976 (dealing with interests in land)
47. The report identified the need for an additional, broader procedure for enabling information to be obtained with a view either to taking enforcement action, or securing co-operation from the landowner by the submission of a planning application so that existing development could be regularised and controlled (paragraphs 3.5 to 3.6 on p. 42). Authorities would be able to serve a contravention notice identifying the

nature of the breach of planning control thought to have occurred, requesting information as to interests and occupation, requiring the recipient to state the nature of the activity or works being carried out on the land, when they began, "particulars of the lawful authority (if any) under which they are being carried out" and giving an opportunity for the recipient to put forward representations about the alleged contravention and any proposals for making an application for planning permission (paragraph 2.14 on p.66).

48. One of the objectives of the new procedure was to require the recipient of a notice to confirm at an early stage both the facts as to what is happening on his land and any legal justification for that activity. Planning Inspectors and local authorities had emphasised the importance of a procedure for getting basic facts clear at an early opportunity and to narrow issues where possible (paragraph 2.17 on p. 67). In addition, the procedure would enable the local authority to encourage the submission of an application for permission where the development was likely to be acceptable in principle and to discuss the form of any application (paragraph 2.18 on p.67).
49. Sometimes a local authority may consider that it is necessary to serve not only an enforcement notice but also a stop notice in order to bring a breach of planning control to an end as a matter of urgency. However, if the enforcement notice is quashed or varied, or the notices are withdrawn, the local authority may become liable to pay compensation for any loss or damage directly attributable to a prohibition in the stop notice (now set out in s.186 of TCPA 1990). To address this issue the report said (at paragraph 2.7 on p. 65):-

"A person who asserts that his activities are lawful should be able and willing to co-operate at the outset in putting the true facts before the authority. It is not unreasonable for his right to compensation on a stop notice to be taken away if he fails to do so. This should give the authority a firmer basis on which to assess the risks of a stop notice."

This resulted in the report's recommendation for a legislative amendment (paragraph 9.7 on p. 84) which is now to be found in s. 186(5)(b) of TCPA 1990.

#### *Section 171C of TCPA 1990*

50. Parliament gave effect to the substance of the report's recommendations through the Planning and Compensation Act 1991, which inserted ss.171C and 171D into TCPA 1990.
51. A planning contravention notice cannot be served unless it appears to the local planning authority that there may have been a breach of planning control (s.171C(1)). If that test is not satisfied the court may quash the notice (*R v Teignbridge District Council ex parte Teignmouth Quay Company Limited* (1995) 2 PLR 1). This is one mechanism for controlling an overly intrusive use of this power.
52. Section 171C(2) enables the authority to require information to be provided about any operations on, use of, or activities being carried out on the land and "any matter relating to the conditions or limitations" of any planning permission.

53. Without prejudice to the broad nature of subsection (2), subsection (3) lists specific matters which the recipient may be required to answer in “so far as he is able”. Thus, under sub-paragraphs (a) and (d) he may be obliged to state whether land is being used for any purpose specified in the notice, to “give any information he *holds*”, either about any planning permission for any use or operations or any reason for planning permission not being required therefor. In my judgment, the giving of such information may include the provision of a relevant document. For example, the recipient of a s.171C notice may rely upon a very old planning permission granted by an authority which has ceased to exist which may otherwise be difficult or impossible to trace. It would be absurd for that person to refer to the existence of the document, or to summarise or even transcribe its contents, rather than produce a copy of the document itself.
54. Under sub-paragraph (e) the recipient may be required to state the nature of his interest in the land, for example the details of any leasehold interests, to see whether he, or some other party, qualifies as the “owner” of the land (as defined in s.336(1) of TCPA 1990) and therefore should be served with any enforcement notice proposed (s.172(2)(a)). In my judgment, the power under s. 171C(3) to require a recipient of the notice to state the nature of his interest in a property may be exercised by a straightforward requirement to provide a copy of the relevant document. It may be necessary for the authority to understand, for example, the precise nature of the interest or the geographical extent of an interest in a complex site. It may therefore be perfectly reasonable to require that matter to be answered by the production of a document, the relevant title document and plan.
55. The broad power in s.171C(2) to require information to be given about, for example, a use of land, also needs to be interpreted in the legal and practical context in which development control falls to be exercised. Many legal issues concerned with whether a *material* change of use has taken place involve matters of degree.
56. A classic example is where activities incidental to the main use of an area of land grow in scale to a point where they convert that single use to a composite use and produce a material change in the use of that planning unit (*Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207, 1212H). So, although repairs may be carried out on a private car in a domestic garage on an incidental basis, when repairs start to be carried out on cars belonging to other persons and on a commercial basis, then a material change of use may occur (*Peake v Secretary of State for Wales* (1971) 70 LGR 98). The sale of produce grown on an area of agricultural land through a farm shop located on that land may be regarded as an incidental use of the land for agricultural purposes. Whether the importation of produce grown on land elsewhere for sale in that shop results in a material change of use is a matter of degree (*Wood v Secretary of State for the Environment* [1973] 1 WLR 707).
57. In cases of this kind the power to require information to be provided on the activities being carried out on land, where there is reason to believe that a material change of use has occurred, is directed at the nature and scale of activities which are non-incidental. In my judgment, the authority may require documents or records to be produced which go directly to that issue.
58. Likewise, in the present case, an important question raised by PCN2 was whether a commercial activity had been introduced on land authorised to be used for the

recreational keeping of horses, resulting in a change of use to a commercial stud farm and livery. The requests for copies of livery agreements and records went directly to that commercial activity and plainly fell within the ambit of the power conferred by s.171C(2). It was not *ultra vires*.

59. Documentary evidence may provide the best information for resolving, or alternatively narrowing, the concerns raised by a local planning authority. To exclude such material from the scope of a s.171C notice would undermine a key objective of the amendments made by the 1991 Act, namely, to identify the true facts as to how land is being used at an early stage.
60. There is no justification for giving the Claimant's narrower interpretation to "information" so as to exclude any request for a document. That could result in unnecessary litigation. Even if a local authority were to take reasonable steps to obtain information to justify the service of an enforcement notice, the landowner would thereafter be able to produce documents in his appeal against that notice resulting in it being quashed which, if they had been given to the local authority in response to a s.171C notice, could have enabled the authority to decide against taking any further action. That material could helpfully have been the subject of representations by the landowner and discussed at a meeting under s.171C(4). In other cases, the provision of such information might have resulted in the regularisation of the position by the making of a planning application so as to bring the use within planning control.
61. There will always be situations where enforcement action cannot be avoided and in some of these cases a stop notice may be served in order to deal with a serious environmental or amenity problem as a matter of urgency. Section s.186(5)(b) of TCPA 1990 provides the authority with appropriate protection in the event of a landowner potentially becoming entitled to seek compensation for losses arising from a stop notice: -

“(5) No compensation is payable under this section—

(a) ..... ; or

(b) in the case of a claimant who was required to provide information under section 171C ..... in respect of any loss or damage suffered by him which could have been avoided if he had provided the information or had otherwise co-operated with the local planning authority when responding to the notice.”

The scope of that protection would be reduced unjustifiably by construing s.171C more narrowly so that a local authority would be unable to require a person to provide relevant documentation.

62. TCPA 1990 does contain safeguards against the improper or unreasonable use of the power in s.171C by a local authority, whether in relation to a requirement to give documentation or other information. First, if a notice or requirement in a notice is *ultra vires* there is the remedy of judicial review (see the *Teignbridge* case) and the point may be raised as a defence to a prosecution under s.171D in so far as relevant. Second, a person may only be required to provide information falling within s.171C(3) in “so far as he is able”. Third, if a recipient of a notice has good reason to think that a requirement is unreasonable or excessive, he may make representations or discuss the matter at a meeting with the local authority under s.171C(4). In that way

the legitimate aims of the authority may be satisfied in some other more reasonable or proportionate manner and also avoid a prosecution. Fourth, in the event of a prosecution, it is a defence for the recipient of a notice to show that "he had a reasonable excuse for failing to comply with the requirement." That defence might involve relying upon the steps which the recipient had taken in response to the notice, including any representations made to the local authority.

### *Conclusion*

63. For these reasons, the Claimant's challenge fails under issue 1. Question (h) in PCN2 was not ultra vires s.171C and the Magistrates' conclusion on the point was correct.

### **Issue 2**

#### *The approach taken by the Magistrates' Court*

64. The Magistrates accepted the Council's case that it had not had sufficient information to be able to lay the charges on 16 January 2018 and therefore they had been brought within the time limit imposed by s.127 of the MCA 1980. Because they approached the matter in that way, the Magistrates did not make any decision about when an offence under s.171D(1) or (5) is completed, and, in particular, whether either offence is of a once and for all or a continuing nature. In effect, the Magistrates decided that the date when the 6 months' time limit under s.127 began to run was deferred until the stage when the prosecutor had sufficient information to bring the charges.
65. It is important to note that the TCPA 1990 does not contain a time limit for commencing a prosecution under s.171D. The only relevant time limit is that contained in s.127 of the MCA 1980 which is expressed to run "from the time when the offence was committed..."
66. Section 127 does not allow the commencement of the 6 months time limit to be deferred until some later date based on when the prosecuting authority obtains information sufficient for it to be able to bring proceedings. Section 127 stands in marked contrast to other provisions which have taken that different approach. For example, for offences under the Animal Welfare Act 2006, s.31 expressly disapplies s.127 of the MCA 1980 and substitutes a time limit of 6 months "beginning with the date on which evidence which the prosecutor thinks is sufficient to justify the proceedings comes to his knowledge", subject to a long stop of 3 years from the date of the commission of the offence. The principles established by the case law on provisions of that nature were helpfully distilled in *R v Woodward* (2017) EWHC 1008 (Admin) and *R (Chesterfield Poultry Limited) v Sheffield Magistrates' Court* [2020] 1 WLR 499. But none of that jurisprudence assists on the time limit in s.127 of the MCA 1980.
67. Accordingly, it follows that the reasons given by the Magistrates' Court for rejecting the Claimant's case that the prosecution of all four offences was time-barred were wrong in law and cannot be upheld.

#### *Whether offences are once and for all or continuing*

68. The issue which remains for this Court is when are offences under s.171D(1) and (5) committed? Are they once and for all offences or are they of a continuing nature? Essentially, this is a matter of interpretation of the relevant provisions in the TCPA 1990.
69. In *Derwent* Croom-Johnson J stated at p. 390 (in a passage subsequently approved by Lord Bingham LCJ in the *BT* case) that a continuing offence is not created by statute without express words making it clear that that was the intention of the legislature. *Derwent* was concerned with an offence of selling or letting a house at a price or rent greater than the limit imposed in a licence for the construction of the property. The Divisional Court held that the offence was a once and for all offence committed when the transaction was entered into, whether a sale or letting. Accordingly, where the rent agreed upon exceeded the relevant limit, the word “lets” could not be construed as creating a continuing offence for the duration of the letting. The practical difficulties faced by local authorities in enforcing the legislation could not justify treating the offence as continuing in nature. Such difficulties were matters for Parliament.
70. In *Hodgetts* the House of Lords considered the offences dealing with failures to comply with enforcement notices, then contained in s.89 of the TCPA 1971. In fact, the case was not concerned with the application of s.127 of the MCA 1980 (or rather its predecessor) at all. The local authority had brought the prosecution within 6 months of when the offence under s.89(5) had first begun (p. 121E). In any event, as Lord Roskill observed at p.127A, Parliament had altered the law so as to make the offences in s.89 triable either way and so the 6 months' time limit for bringing a prosecution in respect of a summary only offence had ceased to apply.
71. Instead, the landowner had persuaded the courts below to accept that s.89(5), which related to a failure to comply with a requirement in an enforcement notice to discontinue the use of land, involved a continuing offence committed on each day of the default, and so the information was bad for duplicity because it covered a period of more than one day. The practical effect of those submissions, if correct, was that a local authority would have to lay a separate information for each day of the period for which the landowner was in default in order to prosecute the overall criminality.
72. The House of Lords allowed the local authority's appeal.
73. Lord Roskill observed that the words “continuing”, or “continuous” had given rise to difficulty because they had been used to describe the offences charged, although they did not appear in the legislation, and their precise meaning and context had not been addressed (p.127F). He pointed out that s.89 created offences for non-compliance with two types of enforcement notice. Section 89(1) to (4) dealt with notices requiring the landowner to do something (a “do notice”). Section 89 (5) dealt with notices requiring the owner to stop doing something (a “desist notice”).
74. The House of Lords held at p.128A-F that in order to create a single offence, it is unnecessary that the act prohibited (a failure to desist) or the omission (a failure to do) should take place once and for all on a single day. A single offence may take place continuously or intermittently over a period of time. The initial offence under s.89(1) for non-compliance with a “do notice” is “complete once and for all when the period for compliance with the notice expires”. That was a conclusion which the Divisional Court had previously reached in *St Albans District Council v Norman Harper Auto*



*Sales Limited* (1977) 76 LGR 300. Similarly, the initial offence of non-compliance with a “desist notice”, whether it takes place continuously or intermittently, is a single offence and not a series of separate offences committed on each day that the non-compliance continues. As a matter of practice, a single offence under s.89(5) could be charged as having been committed between two specified dates, the first being the date by which the enforcement notice required compliance, and the second being the date when the information was laid, or, if earlier, the date when the notice was complied with.

75. The House of Lords overruled the decision of the Divisional Court in *Parry v Forest of Dean District Council* (1976) 34 P & CR 209, but like *Hodgetts*, that case was only concerned with whether, for the purposes of the rule against duplicity, the continuing nature of an offence under s.89(5) meant that a separate offence was committed on each day of the period of non-compliance with the enforcement notice. The important point to note is that, contrary to the Claimant’s contention, the House of Lords did not lay down any general principle that an offence based upon non-compliance with a statutory “do notice” must always be treated as a once and for all offence. Indeed, it held that a continuing failure to comply with a “do notice” was plainly a continuing offence under s. 89(4). It all depends upon the language used by Parliament in the legislation. This can also be seen in subsequent authorities.
76. *Hertsmere Borough Council* was concerned with offences under Building Regulations arising from failures to deposit plans or to give notices to the local authority, either before carrying out certain works or in other instances at least 24 hours beforehand. The Divisional Court decided that, on the wording used in the Regulations, these were once and for all offences which were completed once the deadline specified in the Regulations for giving notice or depositing plans had passed. On a proper construction of the language used in the Regulations, the offence of non-compliance with those “do” provisions was complete once and for all when the relevant deadline had passed.
77. *Torrige District Council* was concerned with a Building Regulation which required a building to be constructed so that its combined loads were transmitted safely to the ground. The Divisional Court held that the contravention of that regulation was an offence in respect of a “do provision”, namely, to construct the building in accordance with the requirements of the legislation. Accordingly, the offence was committed and completed when the building works were concluded without having complied with the relevant regulation. The offence involved an implicit deadline for compliance with the regulation, namely, the completion of the building works.
78. In *Torrige* the Divisional Court distinguished the decision in *Penton Park Homes Limited v Chertsey Urban District Council* (1973) 72 LGR 115 but without suggesting that it was wrongly decided. In *Penton*, a site licence had been granted under the Caravan Sites and Control of Development Act 1960 subject to conditions requiring certain works to be carried out within 12 months from the date of the licence. The Court (Lord Widgery LCJ, Bridge and May JJ) rejected the site owner’s argument that the offence was a once and for all offence committed at the end of the period stipulated for compliance and any prosecution time-barred after a further 6 months had elapsed. The Court held that this was a continuing offence, although it related to non-compliance within a prescribed period with what would now be described as a “do provision”. In *Torrige* the Court accepted that the offence in s.9

of the 1960 Act had created a continuing offence where the situation was one of using the site in contravention of the conditions of the site licence. Ultimately, therefore, the issue of whether an offence is of a continuing or a once and for all nature turns on the wording and effect of the relevant legislation.

79. The *BT* case also illustrates this point. There the Divisional Court held that a failure by a statutory undertaking to comply with the requirement in s.71 of the New Roads and Street Works Act 1991 to reinstate to certain prescribed standards a street which they had opened up gave rise to a continuing offence. Although the offence related to non-compliance with a “do provision”, the Court explained that there was no limitation of time attached to the undertaker’s obligation, unlike the situation in *Hertsmere* and *Torrige* where the obligation was to be performed within a specific time limit. The Court drew some further support for its conclusion from s.95(2) of the 1991 Act: -

“Where a failure to comply with a duty imposed by this Part is continued after conviction, the person in default commits a further offence.”

*Section 171D of TPCA 1990*

80. Section 171C does not specify any time limit within which the information required by a planning contravention notice is to be provided, unlike the legislation considered in *Hodgetts*, *Hertsmere* and *Torrige*. Instead, s.171D(1) states that a person is guilty of an offence if he has not complied with a requirement of such a notice “at any time after” the end of the 21 day period beginning with the service of that notice. This provision is not simply concerned with whether the recipient of a notice has failed to comply with its requirements before a stated deadline. Section 171D(1) indicates that there is an ongoing obligation to comply with the planning contravention notice (as in the *BT* case). The offence is of a continuing nature until the requirements of the notice are met. It is not an offence completed at the end of that 21 day period once and for all. This approach is perfectly understandable in the context of s.171C where the local planning authority is likely to be involved in an ongoing investigation and in considering whether enforcement action should be taken, or the landowner invited to regularise a breach of planning control by submitting a planning application.
81. Accordingly, the recipient of the notice cannot simply ignore its requirements, or comply with them only partially, and then sit back to see whether a prosecution is launched within 6 months after the 21 day period has elapsed. On any view, a person who behaves in that way might simply find that the local authority serves a further planning contravention notice giving rise to a future opportunity to prosecute. The legislation does not preclude that course of action. The Claimant’s approach to s.171D(1) makes no real sense in practical terms.
82. Section 171D(2) also reinforces this analysis of subsection (1) in two ways. First, it explicitly states that an offence under s.171D(1), including an initial offence, may be charged “by reference to any day or any longer period of time.” In other words, the prosecution is not confined to charging the offence on the day when the 21 day period expired on a once and for all basis. Second, a person may be convicted of a second or subsequent offence under subsection (1) by reference to any period of time following a preceding conviction for such an offence. Thus, it is clear that the obligation to comply with the requirements of a planning contravention notice is of an ongoing

nature (as in the *BT* case) and, likewise, the offence of failing to comply with those requirements is a continuing, rather than a once and for all, offence.

83. Section 171D(5) is different. It applies where a recipient of a s.171C notice makes a statement purporting to comply with that notice but that information is false or misleading in a material particular. That part of the offence is committed when the recipient of the notice makes the statement in question. Furthermore, the offence in s.171D(5) requires *mens rea* to be established. The prosecution must show that the defendant either knew that his statement was false or misleading or that he was reckless as to whether that was the case when he made the statement. That is a further strong indication that the offence under s.171D(5) is a once and for all offence committed and completed at the time when the statement was made.
84. This analysis of s.171D(5) is not brought into question by the continuing nature of the obligation and of the offence referred to in s.171D(1). Once a recipient of a notice has responded properly to its requirements, it is possible that he may subsequently get to know of information about which he could not reasonably have been expected to be aware when he gave his response, or, alternatively circumstances may change, which in either case may render that response inaccurate. Whether such circumstances could involve criminal liability under s.171D(1) is a question which should be left to a case in which it is necessary for that to be determined.

#### *Conclusion*

85. The Magistrates' reasons for deciding that the prosecution in this case complied with the 6 months' time limit in s.127 of MCA 1980 cannot be upheld. For the reasons set out above, the prosecution in respect of the alleged offence under s.171D(1) (offence 1) did comply with that time limit, but the prosecution for offences under s.171D(5) (offences 2 to 4) did not.

#### **Conclusion**

86. Subject to the views of my Lord, the outcome of this judicial review is that the Claimant fails under issues 1 and 2 in relation to offence 1 but, succeeds under issue 2 in relation to offences 2 to 4. It follows that the prosecution may proceed in respect of offence 1 but not the other offences.

#### **Lord Justice Coulson:**

87. I agree with my Lord, Mr Justice Holgate, that the Claimant's challenge on Issue 1 must fail for the reasons he sets out at [36]-[63] above. As a matter of common sense, 'information' may well include documents; on a purposive construction of s.171C of the TCPA 1990, it plainly does so. Moreover, that is borne out by what actually happened: when in January 2018 the Claimant belatedly attempted to demonstrate that there had been no breach of planning control, she did so by providing the very documents she had been asked for and had withheld when answering PCN2.
88. I agree that, for the reasons he gives at [64]-[85], the Claimant's challenge on Issue 2 in respect of offence 1 also fails, but in respect of offences 2-4, it must be allowed. That is unfortunate, because the Council bent over backwards to give the Claimant every opportunity to provide the necessary information, whilst it appears that she had

a very different agenda. But that meant that a good deal of time went by without the matter being resolved and by the time the Council laid the information before the magistrates, it was too late for offences 2-4. Whether a statement is misleading or reckless has to be judged at the time when that statement is made. This was not a case about circumstances which changed after the statement was made. Accordingly the 6 month period for offences 2-4 ran from the provision of the reckless/misleading statement. They were not continuing offences.