UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 0238 (LC)
Case No: LCA/48/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

Compensation – Stop Notice – claim under section 186 of Town and Country Planning Act 1990 – stop notice prohibited an activity for which conditional planning permission had been granted – conditions required approval of details by planning authority before development carried out – further development under the planning permission without that approval would be in breach of planning control – whether compensation not payable because of section 186(5)

BETWEEN :

KEITH HUDDLESTONE — Claimant

- and -

BASSETLAW DISTRICT COUNCIL — Compensating Authority

**Re: Land to the South West of Lound Hall,
Colliery Access Road, Bothamsall, Nottingham, DN22 8DF**

Hearing date: 16th June 2017

The Hon. Sir David Holgate, President

Royal Courts of Justice, London WC2A 2LL

- -

Jonathan Wills instructed by OCL Solicitors for the **Claimant**
Jonathan Mitchell instructed by Bassetlaw District Council for the **Compensating Authority**

The following cases are referred to in this decision:

Hart Aggregates Ltd (2005) 2 P & CR 31
R (Lisle-Mainwaring) v Royal Borough of Kensington and Chelsea [2017] EWHC 904 (Admin)
Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners [1927] AC 343
Hartnell v Minister of Housing and Local Government [1965] AC 1134
Greyfort Properties Limited v Secretary of State for Communities and Local Government [2011] EWCA Civ 908
Trocette Property Co. Ltd. v Greater London Council (1974) 28 P&CR 408
Inland Revenue Commissioners v Gray [1994] S.T.C 360
Ryde International plc v London Regional Transport [2004] EWCA Civ 232
Hoare v National Trust (1999) 77 P&CR 366
Land and Property Limited v Restormel Borough Council [2004] RVR 303; LCA/47 2002
Portland Stone Firms Limited v Dorset County Council [2014] UKUT 0527 (LC)
R v Secretary of State for the Environment ex parte Hillingdon LBC (1992) 64 P&CR 105

DECISION

Introduction

1. This reference relates to a claim for compensation under section 186 of the Town and Country Planning Act 1990 ("TCPA 1990") for loss and damage said to be directly attributable to the prohibition in a stop notice dated 19 November 2009 ("the stop notice") served on the Claimant, Mr Keith Huddlestone, by the local planning authority and Compensating Authority, Bassetlaw District Council ("BDC"), in relation to land at Lound Hall Estate, Bothamsall, Retford, Nottinghamshire ("the Property").

2. The parties agreed that a preliminary issue should be determined. On 5 April 2017 the Tribunal made an order for the hearing of the following preliminary issue:-

> "Whether having regard to the matters recorded in the Inspectors' decision letters of 8th June 2010 and 11th May 2012 concerning breaches of planning control on the part of Mr Huddlestone, he is not entitled to make the claim for compensation by virtue of s. 186(5)(a) of the Town and Country Planning Act 1990".

3. Section 186(5)(a) provides that compensation is not payable "in respect of the prohibition in a stop notice of any activity which, at any time when the [stop] notice is in force, constitutes or contributes to a breach of planning control."

4. A claim for compensation under section 186 may only be made by a person who, when the notice was first served, had an interest in or occupied the land to which the notice relates (subsection (2)). The papers before the Tribunal do not disclose how Mr Huddlestone satisfies that provision, but BDC did not raise this as an objection to the Tribunal deciding the preliminary issue. The Claimant's status for the purposes of section 186(2) could therefore be addressed subsequently if appropriate.

Planning history

5. The parties have agreed the planning history in an Agreed Statement of Facts supplemented by an agreed bundle of documents.

6. On 22 May 2006, planning permission 09/03/00007 was granted to LCH Property Developments Limited ("the planning permission") for development at the Property described as the "change of use of land for siting holiday lodges." Condition 1 required the permission to "be begun not later than the expiration of five years beginning with the date of this permission."

7. The planning permission contained a total of 24 conditions. The legal argument in this case focused on conditions 4, 8 and 19, which provide as follows:-

> "4. The development hereby permitted shall be carried out only in accordance with the details and specifications shown on amended drawing number 04 submitted with the applicant's agent's letter of 15 September 2004."

"8. The lodges hereby permitted shall be used as holiday accommodation only and no holiday lodge shall be occupied in excess of nine months continually in any twelve month period."

"19. Precise details of the lodges hereby permitted shall be submitted to and agreed in writing by the District Planning Authority before development commences. The development shall be carried out only in accordance with the agreed details."

In fact, the permission contained 14 conditions (in addition to condition 19) which required various details to be submitted to and approved by BDC before development commenced. It also contained a further 3 conditions requiring other details to be submitted to and approved by BDC before the first occupation of any of the approved lodges. The conditions required the development to be carried out in accordance with the details when they were approved.

8. On 27 October 2009 BDC issued an enforcement notice ("the first enforcement notice") in respect of an alleged breach of planning control at the Property, namely:

"Without planning permission, the material change of use of land for the siting of residential accommodation units at Cupola House and Bridge House, Lound Hall Estate, Bothamsall, DN22 8DF"

9. The first enforcement notice required that within 6 months from the date when it took effect the following steps should be taken:-

"i) Cease using the land... for the siting of residential accommodation units;
ii) Remove all the accommodation units from the land...;
iii) Remove all the footings/hard surfaces used for the siting of the units;
iv) Remove from the land all the material, rubble and waste arising from the removal of all the items identified in (i), (ii), (iii) above."

10. The first enforcement notice stated that it would take effect on 7 December 2009, unless in the meantime an appeal was made to the Secretary of State. Such an appeal was made and so, by virtue of section 175(4) of TCPA 1990, the notice was of no effect pending the determination of that appeal.

11. However, on 19 November 2009 BDC served the stop notice under section 183 of TCPA 1990 to take effect that day. This notice required that on 19 November 2009 the following "activity" should cease:

"Cease the introduction and siting of any further accommodation units, caravans, chalets and other structures onto the land."

The stop notice stated that BDC considered it expedient that that activity should cease before the expiry of the time allowed by the first enforcement notice for compliance with its requirements. The stop notice related to the same land as had been the subject of that enforcement notice.

12. The Claimant appealed against the first enforcement notice under s. 174(2) TCPA 1990, relying upon grounds (a), (c), (f) and (g). Ground (c) enables an appellant to raise the contention that if the matters alleged in the enforcement notice occurred, they "do not constitute a breach of planning control." If that fails, under ground (a) the appellant can argue that planning permission ought to be granted for the development enforced against (or the discharge of the condition being enforced).

13. The appeal was determined by a Planning Inspector who issued his decision letter on 8 June 2010 ("the 2010 decision letter"). He allowed the appeal under ground (c) and therefore the other grounds did not fall to be considered. The Inspector quashed the first enforcement notice and therefore by virtue of section 184(4)(a) the stop notice immediately ceased to have effect, ie. on the date of the Inspector's decision.

14. BDC did not appeal against the Inspector's decision under section 289 of TCPA 1990. The parties agree that in these proceedings they are bound by the findings of the Inspector in his decision letter. In summary he decided that:-

> (i) None of the conditions in the planning permission relied upon by BDC amounted to conditions precedent to the implementation of the permission or went to the heart of the permission (applying Hart Aggregates (2005) 2 P & CR 31);
>
> (ii) Therefore, the Claimant's failures to apply for and obtain approval of details under those conditions did not prevent the activities and works which had been carried out from being treated as a commencement of development, with the consequence that the planning permission had been lawfully implemented;
>
> (iii) Although those failures were breaches of condition which amounted to breaches of planning control, the first enforcement notice had incorrectly specified a different breach of planning control which had not taken place, namely the making of a material change of use of the land without planning permission;
>
> (iv) Likewise, the fact that the positioning of the lodges did not accord with drawing number 04 and that some of the lodges had been used as permanent rather than as holiday accommodation constituted breaches of condition;
>
> (v) Although BDC could take enforcement action for the breaches of condition, it would be inappropriate to use section 176(1) of TCPA 1990 to correct the failure in the first enforcement notice to identify the correct breaches of planning control;
>
> (vi) The appeal succeeded under ground (c) and the first enforcement notice was quashed.

15. For completeness, the parties mentioned that BDC issued a second enforcement notice on 13 July 2011, which was withdrawn by the authority by letter dated 28 October 2011. The parties agree that the resolution of the preliminary issue is not affected by this notice.

16. BDC issued a third enforcement notice relating to the Property on 17 November 2011 ("the third enforcement notice"). The notice specified as breaches of planning control "non-compliance with conditions 4, 8 and 19 of planning permission reference 09/03/07." The

notice required that, within 9 months of the notice taking effect, the Property should cease to be used for the siting of residential accommodation units (save for two specified buildings) and those units together with associated footings, hardstandings and materials should be removed. The notice was to take effect on 5 January 2012 unless in the meantime an appeal was made to the Secretary of State.

17. The Claimant appealed against the third enforcement notice. A hearing was held on 1 May 2012 at which the Claimant withdrew his ground (b) appeal, namely that the matters specified in the enforcement notice had not occurred. The appeal then proceeded solely on the basis of grounds (a), (c) and (f).

18. The Planning Inspector determined the appeal by a decision letter dated 11 May 2012 ("the 2012 decision letter"). No appeal was brought under section 289 of TCPA 1990 against the Inspector's decision. The parties agree that in these proceedings they are bound by the findings of the Inspector in the 2012 decision letter.

19. The Claimant accepted that as at the date when the third enforcement notice was issued he had not complied with conditions 4 and 19 in relation to the 8 lodges sited on the Property. They were not sited in accordance with drawing 04 and BDC's approval of the details required by condition 19 had not been sought and obtained (see also paragraph 7 of the decision letter). Therefore, the appeal on ground (c) related solely to the breach of condition 8. That was dismissed.

20. The appeal on ground (a), which related solely to conditions 4 and 19, was also dismissed. The Inspector's key reasoning appears in paragraphs 16 and 17 of the decision letter. The lodges which had been brought onto the Property were much smaller than had been approved and the development appeared cramped and incongruously sited. This incongruity was exacerbated by the form and appearance of the lodges:-

> "Their square plan form and pyramidal roofs look like a regimented series of domestic double garages with glazed panels substituted for garage doors and converted for residential use. In this regard the lodges are urban in character and are significantly out of place in their countryside location. The eight lodges on the enforcement land are incongruous in siting, form and appearance and have an adverse effect on the character and appearance of the countryside."

He added that the development conflicted with a policy in BDC's adopted Core Strategy.

21. The appeal on ground (f) succeeded to the limited extent that the Inspector varied the notice by deleting the requirement to remove the concrete bases on which units 5 to 8 were situated. Subject to that small variation the enforcement notice was upheld.

22. Paragraph 21 of the decision letter records that the effect of the third enforcement notice was to require the removal of the 8 lodges which had been erected on the Property, but not accommodation units that could in future be sited on the Property in compliance with planning permission 09/03/00007 granted on 22 May 2006 and its conditions.

Statutory framework

23. Section 172 of TCPA 1990 enables a local planning authority to serve an enforcement notice in respect of a breach of planning control:-

> "(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.
>
> (2) A copy of an enforcement notice shall be served—
> (a) on the owner and on the occupier of the land to which it relates; and
> (b) on any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice.
>
> (3) The service of the notice shall take place—
> (a) not more than twenty-eight days after its date of issue; and
> (b) not less than twenty-eight days before the date specified in it as the date on which it is to take effect."

24. Section 171A(1) defines what amounts to a "breach of planning control":-

> " (1) For the purposes of this 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."

25. Section 174 gives persons interested in, and "relevant occupiers" of, the land the subject of an enforcement notice, a right of appeal to the Secretary of State on any of the seven grounds set out in subsection (2).

26. Where an enforcement notice is served but before it comes into effect, section 183 gives a power to a local planning authority to serve in addition a stop notice which may require an activity specified in the enforcement notice to cease before the time for compliance specified in the enforcement notice. By section 187 it is a criminal offence to contravene a stop notice and the legislation does not provide for any right of appeal against such a notice. But an illegality in the use of the stop notice procedure may be the subject of an application for judicial review.

27. Section 183 provides:-

> "(1) Where the local planning authority consider it expedient that any relevant activity should cease before the expiry of the period for compliance with an enforcement notice, they may, when they serve the copy of the enforcement notice or afterwards, serve a notice (in this Act referred to as a "stop notice") prohibiting the carrying out of that activity on the land to which the enforcement notice relates, or any part of that land specified in the stop notice.

(2) In this section and sections 184 and 186 "relevant activity" means any activity specified in the enforcement notice as an activity which the local planning authority require to cease and any activity carried out as part of that activity or associated with that activity.

(3) A stop notice may not be served where the enforcement notice has taken effect.

(4) .... (5) .... (5A) ....

(6) A stop notice may be served by the local planning authority on any person who appears to them to have an interest in the land or to be engaged in any activity prohibited by the notice.

(7) The local planning authority may at any time withdraw a stop notice (without prejudice to their power to serve another) by serving notice to that effect on persons served with the stop notice."

28. Section 184 contains some supplementary provisions dealing with the contents of a stop notice and the circumstances in which it ceases to have effect:-

"(1) A stop notice must refer to the enforcement notice to which it relates and have a copy of that notice annexed to it.

(2) A stop notice must specify the date on which it will take effect (and it cannot be contravened until that date).

(3) That date—

(a) must not be earlier than three days after the date when the notice is served, unless the local planning authority consider that there are special reasons for specifying an earlier date and a statement of those reasons is served with the stop notice; and

(b) must not be later than twenty-eight days from the date when the notice is first served on any person.

(4) A stop notice shall cease to have effect when—
(a) the enforcement notice to which it relates is withdrawn or quashed; or
(b) the period for compliance with the enforcement notice expires; or
(c) notice of the withdrawal of the stop notice is first served under section 183(7).

(5) A stop notice shall also cease to have effect if or to the extent that the activities prohibited by it cease, on a variation of the enforcement notice, to be relevant activities.

(6) .... (7) .... (8) ...."

29. As regards claims for compensation arising from the service of a stop notice, section 186 provides:-

> "(1) Where a stop notice is served under section 183 compensation may be payable under this section in respect of a prohibition contained in the notice only if—
>
> (a) the enforcement notice is quashed on grounds other than those mentioned in paragraph (a) of section 174(2);
>
> (b) the enforcement notice is varied (otherwise than on the grounds mentioned in that paragraph) so that any activity the carrying out of which is prohibited by the stop notice ceases to be a relevant activity;
>
> (c) the enforcement notice is withdrawn by the local planning authority otherwise than in consequence of the grant by them of planning permission for the development to which the notice relates [...] ; or
>
> (d) the stop notice is withdrawn.
>
> (2) A person who, when the stop notice is first served, has an interest in or occupies the land to which the notice relates shall be entitled to be compensated by the local planning authority in respect of any loss or damage directly attributable to the prohibition contained in the notice or, in a case within subsection (1)(b), the prohibition of such of the activities prohibited by the stop notice as cease to be relevant activities.
>
> (3) A claim for compensation under this section shall be made to the local planning authority within the prescribed time and in the prescribed manner.
>
> (4) The loss or damage in respect of which compensation is payable under this section in respect of a prohibition shall include any sum payable in respect of a breach of contract caused by the taking of action necessary to comply with the prohibition.
>
> (5) No compensation is payable under this section—
>
> (a) in respect of the prohibition in a stop notice of any activity which, at any time when the notice is in force, constitutes or contributes to a breach of planning control; or
>
> (b) in the case of a claimant who was required to provide information under section 171C or 330 or section 16 of the Local Government (Miscellaneous Provisions) Act 1976, 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.
>
> (6) .... (7) ....

30. Thus, section 186(1)(a) provides for a right to compensation where, as in the present case, a stop notice ceases to have effect because the enforcement notice to which it relates is quashed on any ground other than that contained in section 174(2)(a) of TCPA 1990. In the decision letter dated 8 June 2010 the Inspector did not get as far as considering the ground (a) appeal, and whether planning permission should be granted for the use enforced against, because he decided to allow the ground (c) appeal, which involved a prior question. He quashed the enforcement notice on that basis.

31. Accordingly, a party who falls within section 186(2) is entitled to be compensated by BDC for "any loss or damage directly attributable to the prohibition contained in the [stop] notice." But that is subject to the exclusion in section 186(5)(a) which applies to "any activity which, at the time when the [stop] notice is in force, constitutes or contributes to a breach of planning control." It is also to be noted that Parliament has not conferred a right to compensation where a stop notice, rather than the related enforcement notice, is quashed by the High Court in proceedings for judicial review.

A summary of the parties' submissions

32. It is common ground between the parties that the period during which the stop notice was in force was 19 November 2009 to 8 June 2010.

33. Mr Wills on behalf of the Claimant submits that the stop notice prevented his client during that period from introducing onto the property and siting any further "accommodation units", including any such units as he was entitled to install under the 2006 planning permission, subject to complying with the conditions in that permission. He suggests that BDC served both the first enforcement notice and the stop notice in the erroneous belief that the planning permission could not be relied upon because it had not been lawfully implemented. They were disabused of that notion by the Inspector in his decision letter dated 8 June 2010, who held that the permission had been lawfully implemented and therefore could still be relied upon.

34. Of course, the thinking which lay behind BDC's decision to serve the two notices in the autumn of 2009 is irrelevant to the interpretation of section 186(5)(a) of TCPA 1990. But for my part, I find it difficult to understand how, on the case presented to the Inspector in 2010, it could have been thought that by 19 November 2009 the 2006 planning permission, which authorised a change of use and not operational development, had already lapsed because development had been carried out without obtaining the prior approvals required by a number of conditions. Quite apart from the Inspector's conclusion that these breaches of planning control involved breaches of condition and not the carrying out of development without permission (section 171A(1)), the stop notice was targeted at the future introduction of additional lodges onto the Property, but condition 1 of the 2006 planning permission allowed it to be implemented at any time during the 5 year period expiring on 21 May 2011.

35. At all events, Mr Wills submitted that when the stop notice was served, the Claimant was still entitled to rely upon the 2006 planning permission so long as any additional lodges were sited in accordance with drawing 04 (condition 4) and used only as holding accommodation (condition 8), and so long as approvals of the various details required under other conditions were obtained before any such development was carried out, or before first occupation of the lodges, as the case may be. He accepted that the stop notice did not

prevent the Claimant from applying for and obtaining the approvals required by those conditions. He also accepted that a failure to obtain such approvals before carrying out further development would involve breaches of condition, and thus breaches of planning control under section 171A(1). This therefore raised the question whether section 186(5)(a) applied.

36. But Mr Wills submitted that it was sufficient to prevent section 186(5)(a) from applying in this case that his client *could* rely on the 2006 planning permission during the currency of the stop notice because during that period he *could* comply with the conditions of that permission (inter alia) by being able to apply for and obtain the outstanding approvals required. Mr Wills added that if, following the service of the stop notice, the Claimant had obtained these approvals pursuant to the conditions of the permission, the notice would have had the effect of preventing the introduction of any further accommodation units on to the Property, even if they were to be used solely for holiday accommodation in accordance with condition 8, sited in accordance with condition 4, and otherwise in accordance with the permission.

37. An expert report has been prepared on behalf of the Claimant alleging that the effect of the stop notice was to cause him to suffer a loss of £629,691 through being prohibited from achieving rental income on 11 additional units, the sale of 19 units, increased costs through being unable to repay a bridging loan on the due date, and losses in relation to pitch fees. Mr Wills accepted that this claim had been formulated as if all approvals required under the conditions of the 2006 permission had been obtained by 19 November 2009, the beginning of the claim period, although that was not in fact the case, and that any claim would have to be amended so as to take into account the requirement to comply with those planning controls.

38. When asked to state how section 186(5)(a) should be interpreted so that it does not bite upon the claim in this case, Mr Wills submitted that this provision does not apply where the landowner *could* have carried out the prohibited activity without it *necessarily* constituting (or contributing to) a breach of planning control. The corollary of this submission is that section 186(5)(a) *only* applies where the carrying out of the prohibited activity would *necessarily* constitute (or contribute to) a breach of planning control.

39. Plainly, this formulation involves reading language into the statute. But Mr Wills said that this was justified in order to avoid section 186(5)(a) having the effect of removing, or interfering with, rights conferred by a planning permission without payment of compensation. He cited the observations of Gilbart J in R (Lisle-Mainwaring) v Royal Borough of Kensington and Chelsea [2017] EWHC 904 (Admin) at paragraphs 78 to 79. Although those comments were not directed to the scope of section 186(5)(a), they reflect the principle stated in the well-known line of authority which includes Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners [1927] AC 343, 359 and Hartnell v Minister of Housing and Local Government [1965] AC 1134: a statute should not be held to have taken away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms.

40. Mr Mitchell, who appeared on behalf of the Compensating Authority, submitted that the Claimant's submissions depended upon putting an unwarranted gloss on the wording of the statute.

41. He submitted that on the plain and natural meaning of section 186(5)(a) the claim is barred. The claim is dependent upon the 2006 planning permission. It is common ground that during the currency of the stop notice no details had been submitted for approval under condition 19, or approvals obtained, whether in relation to the 8 lodges the subject of the first and third enforcement notices, or any further development yet to be carried out. It is also common ground that the introduction of any additional accommodation units during that period without having complied with the requirements of condition 19 (and other conditions requiring prior approval of details) would have constituted a breach of condition and therefore a breach of planning control during the relevant period.

The background to section 186 (5)

42. Section 186(5) of TCPA 1990 in its current form was substituted by section 9(3) of the Planning and Compensation Act 1991 with effect from 2 January 1992. Section 186(5) as originally enacted in TCPA 1990 (itself a consolidating statute) contained a provision similar to what is now to be found in sub-paragraph (b), but nothing similar to sub-paragraph (a). This new provision formed part of a group of changes to Part VII of TCPA 1990 which resulted from the Government's acceptance of most of the recommendations by Robert Carnwath QC (as he then was) in his Report to the Secretary of State "Enforcing Planning Control" – February 1989. The parties agreed that the Tribunal could have regard to the relevant passages of the Report in order to identify the mischief which the amendment made by the 1991 Act was intended to address.

43. The Report discussed the predecessor provision, section 177 of the Town and Country Planning Act 1971. Paragraph 2.15 stated:-

> "It is apparent from the submissions to me that the fear of having to pay compensation is still seen as a strong disincentive to the use of the [stop notice] procedure. However, I am not satisfied that these fears are in practice justified. There seems to be a mistaken understanding as to the effect of the compensation provisions (s. 177(2)), which are designed to provide a right to be compensated only to the extent that the claimant is deprived of something to which he was lawfully entitled."

44. Paragraph 9.1 of the Report stated that the failure to use the stop notice procedure effectively was one of the main reasons for criticism of the then legislation, since it offered the planning authority the best means of taking urgent action where that is justified. The Report continued:-

> "9.2 A number of amendments could usefully be made. First, and most importantly, the position in respect of compensation needs to be clarified and improved. There is still widespread misunderstanding of the position. The effect of the provisions should be that, even where a claim to compensation arises, the assessment will exclude any use or operation which is in breach of planning control. This is not clearly spelt out at present.
>
> 9.3 The problem arises where the stop notice fails without a clear finding on appeal as to whether the use or operation was lawful or not. This may arise where it is withdrawn, or where the supporting enforcement notice fails on a technicality.

In such cases section 177 gives a prima facie right to compensation for loss attributable to the service of the stop notice. But it does not make clear to what extent the Lands Tribunal, in assessing compensation, can re-open the question of lawfulness of the use or operation.

9.4 There is no general principle in the law of compensation that unlawful uses cannot be taken into account. Section 5(4) of the Land Compensation Act 1961 contains specific provision for the exclusion of increases in value due to unlawful uses in cases to which it applies. However, although section 178 of the Town and Country Planning Act 1971 incorporates section 5 of the 1961 Act for certain purposes, it does not do so for the purpose of compensation for stop notices.

9.5 Thus the law remains at best uncertain. If the Act made clear that compensation will not *in any circumstances* be payable for a use or operation which is in breach of planning control, there would be less concern at the risks of a notice failing on a technicality, and the use of stop notices in appropriate cases would be encouraged." (emphasis added)

45. The enactment of section 186(5)(a) was plainly intended to give effect to this line of reasoning. By way of example, if a planning permission is granted for a change of use or an operation subject to a condition that the development authorised may not begin until an essential item of public infrastructure becomes available (eg the opening of a new by-pass or a waste water treatment plant), then carrying out that use or operation before the condition is satisfied would be in breach of planning control, and compensation would not be payable under section 186.

Discussion

46. I begin by considering the suggestion made by Mr Wills during his submissions as to how BDC ought to have drafted both the enforcement notice and the stop notice in order to avoid any liability to pay compensation. He says that the first enforcement notice ought only to have alleged breaches of conditions. This was what the third enforcement notice did. The stop notice should simply have prohibited the use of the Property for the siting of lodges without complying with the terms and conditions of the 2006 planning permission. Mr Wills rightly says that a stop notice drafted in that way would not have involved any interference with the Claimant's rights under that permission. Equally, however, an appeal against such an enforcement notice could not have succeeded under ground (c) (or indeed ground (b)), so no entitlement to compensation would have arisen under section 186(1) and the effect of section 186(5)(a) would not even need to be addressed.

47. Nevertheless, the scenario given by Mr Wills does underline a key point, namely that the landowner's rights under the 2006 planning permission were granted subject to the 24 conditions which formed an intrinsic part of those rights. The 2006 consent did not simply authorise a change of use of the Property to a use for the siting of holiday lodges as an unconditional planning permission. When the stop notice came into effect the ambit of the rights to which the Claimant "was lawfully entitled" was restricted by (inter alia) the requirement to obtain approvals under a number of conditions before the commencement of development. The 2006 consent did not by itself grant a fully detailed planning permission for the development. The approvals which the Claimant had to obtain in order to be able to

carry out the development without being in breach of planning control, comprised not just the 2006 consent itself, but also the approvals required under the conditions in that consent.

48. Condition 1 provided that the development had to be begun by 21 May 2011, or else the permission would lapse. The 2010 decision letter has determined that the planning conditions requiring details to be approved before development commenced were not pre-conditions to the lawful implementation of the permission nor, in that particular context, did they go to the heart of the planning permission (applying the principles in Hart Aggregates Ltd subsequently approved in Greyfort Properties Limited v Secretary of State for Communities and Local Government [2011] EWCA Civ 908). Consequently, the Inspector determined that the use and related works introduced onto the site lawfully implemented the planning permission. As Mr Wills accepted, that was for the sole purpose of deciding that the time limit in condition 1 of the permission had been satisfied. The Inspector's decision went no further in the Claimant's favour than that. Indeed, Mr Wills accepted that the 2010 decision rightly contemplated that enforcement action could be taken against development which had already been carried out in breach of condition, as well as future development involving any such breach of planning control. Indeed, the third enforcement notice, upheld in the 2012 decision letter, achieved that very outcome.

49. It follows, and Mr Wills accepts, that the 2010 decision letter did not alter the simple and fundamental point that the rights granted by the 2006 consent, and upon which the landowner was entitled to rely during the currency of the stop notice, were subject to the conditions in the permission. Those rights were therefore subject to compliance with conditions 4 and 8 (restricting the location of the lodges and their use to holiday purposes) and subject to obtaining approvals of details (under condition 19 and similar conditions) before any further development could take place. The Claimant does not dispute that any failure to comply with any of these conditions would be a breach of planning control. He also accepts that the stop notice did not prevent him from obtaining all such approvals from the planning authority.

50. I am unable to accept the interpretation of section 186(5)(a) advanced by Mr. Wills. This provision simply applies where the activity prohibited by the stop notice constitutes (or contributes to) a breach of planning control. It does not refer to whether the activity *necessarily* constitutes a breach of control, or whether it *could* or *might* cease to constitute such a breach. The language of section 186(2) and (5)(a) requires the Tribunal to look at the *actual* circumstances as they were during the period the notice was in force. It does not allow the Tribunal to consider what *could* have been done in order to remedy a breach of planning control. The legislation does not contemplate any such departure from those actual circumstances. Furthermore, the language which the Claimant asks to be read into the statute is too uncertain in nature. By what criteria could the Tribunal decide whether the breach of planning control *could* be overcome or, put the other way, whether the activity would *necessarily* amount to a breach of planning control?

51. The Claimant in this case seeks to argue that if the necessary approval of details under conditions of the 2006 permission *could* have been obtained, that would be sufficient to prevent section 186(5)(a) applying. But if that construction were to be accepted, the argument could be extended to other cases where, for example, a claimant wishes to contend that a planning permission could have been applied for and obtained. The outcome would be that section 186(5)(a) does not apply merely because the claimant *could* apply for a

planning approval. It does not seem to me that this line of thinking sits well with the explicit principle in section 186(1)(a) by which a right to compensation either arises or is excluded. Compensation is *not* payable where the related enforcement notice is quashed under ground (a) in section 174(2). That ground reflects the power of the Secretary of State under section 177(1)(a) and (b) either to grant planning permission for the development enforced against, or to discharge the condition in a planning permission which is the subject of enforcement action.

52. The Claimant's argument fails to accord with Parliament's intention that a local planning authority should not be deterred from serving a stop notice by the risk of an error in the related enforcement notice giving rise to a liability for compensation, where that compensation relates to an activity which is in breach of planning control. Indeed, the object was to encourage the greater use of the power to serve stop notices. As Mr Wills accepted, the effect of the Claimant's construction is that the exclusion in section 186(5)(a) would be disapplied throughout the whole period when a stop notice is in force, simply because a planning approval could be obtained to overcome the breach of planning control, albeit no such approval is in existence even when the notice is served. Likewise, on the Claimant's interpretation, it would not matter that the planning approval necessary to overcome a breach of planning control which actually subsists is not obtained at any point while the stop notice remains in force. It would be sufficient that such an approval *could* be obtained.

53. The Claimant's argument is also objectionable because it involves a departure from the actual circumstances which existed during the period which is relevant to the assessment of compensation under section 186. It involves a substantial departure from reality. The "reality principle" is now well-established in, for example, the carrying out of hypothetical valuations required in compensation, tax, and rating legislation. The factual matrix must be kept as close as possible to reality and no departure therefrom may be assumed unless required or authorised by a statutory provision or by case law (see eg. Trocette Property Co. Ltd. v Greater London Council (1974) 28 P & CR 408; Inland Revenue Commissioners v Gray [1994] STC 360; Ryde International plc v London Regional Transport [2004] EWCA Civ 232; Hoare v National Trust (1999) 77 P & CR 366).

54. Section 186(5)(a) excludes compensation otherwise payable under section 186 (1) and (2). The entitlement in section 186(2) is to compensation for any "loss or damage directly attributable to" the prohibition in the stop notice. That phrase is very similar to the language used in the compensation provision in section 107 which applies to the revocation or modification of a planning permission under section 97 of TCPA 1990. These provisions do not call for a hypothetical transaction or valuation to be imagined. Instead, they provide compensation for the *actual loss* suffered at the relevant date, or over the relevant period, without departing from reality or postulating hypothetical circumstances (Land and Property Limited v Restormel Borough Council [2004] RVR 303; LCA/47/2002; Portland Stone Firms Limited v Dorset County Council [2014] UKUT 0527 (LC) at paragraphs 44 and 66).

55. The rejection of the Claimant's interpretation of section 186(5)(a), and the adoption of the straightforward construction for which BDC contends, does not offend the principle in the Colonial Sugar Refining case. Mr Wills accepted that although the stop notice prohibited the siting of further accommodation units on the Property, it did not prevent the Claimant from making an application (or applications) for approval of details under condition 19 (or similar

conditions). These approvals needed to be obtained in any event even if the stop notice had not been served.

56. Mr Wills submits that if approvals of details had actually been obtained, the stop notice would still have prevented the bringing onto the Property of additional units in compliance with conditions 4 and 8 and those approved details. But the answer to that point is that if, after a stop notice has been served, a claimant obtains a planning approval necessary to overcome a breach of planning control, the exclusion in section 186(5)(a) will cease to apply. So long as one of the triggering events in section 186(1) has occurred, and a claim for compensation is brought within the 12 months' time limit in Regulation 12 of the Town and Country Planning General Regulations 1992 (see also R v Secretary of State for the Environment ex parte Hillingdon LBC (1992) 64 P & CR 105), the claim can cover losses caused by the stop notice during the period when the prohibited activity no longer constitutes (or contributes to) a breach of planning control. One of the problems with the Claimant's argument is that its effect would be to put the Claimant in a better position than he would have been in if, either he had complied with planning control (in particular the terms of the 2006 permission) or if enforcement action had been taken against him in the way in which he says it should have been (see paragraph 46 above).

Conclusion

57. On the facts presented to the Tribunal as summarised above, and for the reasons I have given, the Claimant is not entitled to pursue his claim for compensation by virtue of section 186(5)(a) of the Town and Country Planning Act 1990.

Dated: 10th July 2017

David Holgate

The Hon. Sir David Holgate, President