



Neutral Citation Number: [2022] EWHC 3172 (Admin)

Case No: CO/2204/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Bristol Civil Justice Centre
2 Redcliffe Street
Bristol BS1 6GR

Date: 12/12/2022

Before:

MR JUSTICE CHAMBERLAIN

Between:

(1) PAUL BATEMAN
(2) SAMANTHA BATEMAN

Appellant

– and –

NORTH SOMERSET COUNCIL

Respondent

Jonathan Ward (instructed **directly by Mr & Mrs Bateman**) for the **Appellants**
Harry Spurr (instructed by **Legal Services - North Somerset Council**) for the **Respondent**

Hearing dates: 4 October 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 December by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

- 1 This is an appeal by case stated from a decision of District Judge Layton (“the judge”), sitting at North Somerset Magistrates’ Court, on 24 January 2022. On the application of the local planning authority, North Somerset Council (“the Council”), the judge made a planning enforcement order (“PEO”) under s. 171BC(1) of the Town and Country Planning Act 1990 (“the 1990 Act”) in relation to land at West Hay Farm, Banwell, Somerset. This followed earlier proceedings before lay justices.

Extension of time for the appellant’s notice

- 2 The appellant’s notice and grounds of appeal were both late, due to errors by the appellant’s representatives. However, the circumstances have been explained and, despite the Council’s objection, they have been aware of the appellant’s intention to appeal since very shortly after the challenged decision and are not significantly prejudiced by the subsequent errors. I therefore consider it appropriate to extend time.

The legal framework

- 3 A PEO allows the Council to take enforcement action in respect of a breach of planning control even though the usual time for such action has expired. Section 171BB provides as follows:

“(1) An application for a planning enforcement order in relation to an apparent breach of planning control may be made within the 6 months beginning with the date on which evidence of the apparent breach of planning control sufficient in the opinion of the local planning authority to justify the application came to the authority's knowledge.

(2) For the purposes of subsection (1), a certificate—

(a) signed on behalf of the local planning authority, and

(b) stating the date on which evidence sufficient in the authority's opinion to justify the application came to the authority's knowledge,

is conclusive evidence of that fact.”

- 4 By s. 171BC(1), a court may make a PEO only if:

“(a) the court is satisfied, on the balance of probabilities, that the apparent breach, or any of the matters constituting the apparent breach, has (to any extent) been deliberately concealed by any person or persons and

(b) the court considers it just to make the order having regard to all the circumstances”.

The background

- 5 The background is fully set out in the case stated. Essentially, the application for a PEO first came before lay justices, who on 2 December 2019 made a preliminary ruling that the proceedings were not time-barred. The judge explains:

“I could not find any further written reasons supporting this determination recorded in the court register so cannot provide any more information regarding this finding.”

- 6 The matter subsequently came before the judge. He rejected two preliminary objections by the appellant on 10 December 2020. There was then a contested substantive hearing on 12-14 July 2021. The Council called its principal planning officer, Ms Bartlett. The first appellant, Mr Bateman, gave evidence on behalf of himself and Mrs Bateman. Mr Bateman also called evidence from Trevor Savage, Paul Clark, Mark Heppenstall and Amanda Sutherland.

- 7 In the case stated, the judge posed three questions:

“(i) whether the decision of the lay justices sitting on 2 December 2019 in ruling that the proceedings were not time-barred was unlawful;

(ii) did I err in determining that the respondent’s failure to register for council tax was a matter properly falling to be considered for the purposes of deliberate concealment under s. 171BC(1)(a) TCPA 1990;

(iii) whether I was entitled to take into account, as a matter constituting the apparent breach, within the terms of section 171BA(2)(b), the caravan in building C notwithstanding my finding that it was at some point removed and replaced by another caravan nearby.”

Question (i)

The authorities

- 8 In *Tanna v London Borough of Richmond* [2016] EWHC 1268 (Admin), the local planning authority applied for a PEO in respect of a single storey building erected at the bottom of a garden. The breach of planning control was using it as a separate dwelling. There had been several visits to the property over the years, and several lies told about its use, but the council’s officers did not find evidence sufficient to show it was being used as a separate dwelling until a certificate of lawful use was applied for. The certificate under s. 171BB(2) of the 1990 Act specified the date of this application as the relevant date for the purposes of s. 171BB(1). The judge held that the certificate was not “plainly wrong” and dismissed the appeal.
- 9 In *Coles v Lichfield District Council* [2016] EWHC 305, Elisabeth Laing J noted at [49] that time runs “not from when the LPA knows about the apparent breach but from the date on which ‘evidence of the apparent breach of planning control sufficient in the opinion of the [LPA] to justify the application comes to the LPA’s knowledge’”. She

observed that a certificate under s. 171BB(2) was conclusive but, relying on *Tanna*, observed that it could be challenged before the magistrates. Since it had not been, that was the end of the knowledge issue: [50].

Submissions

- 10 For the Batemans, Jonathan Ward submitted that, despite s. 171BB(2), a certificate which was plainly wrong is not conclusive: *Coles v Lichfield District Council* [2016] EWHC 305, [51]. The 6 month period referred to in s. 171BB(1) starts to run from the point where the local planning authority has “evidence of the apparent breach of planning control sufficient in the opinion of the local planning authority to justify the application”. In this case, that was the point when it had evidence that there had been a breach of planning control, not when it had evidence of concealment. Mr Ward argued that the point of the 6 month time limit was to give local authorities a reasonable but not unlimited time in which to investigate a breach of planning control which has come to its attention. If the time limit ran only from the date on which it had evidence of concealment, it could delay investigating for many months or even years and then make an application for a PEO. This would be contrary to legal certainty.
- 11 For the Council, Harry Spurr argued that the 6 month period starts to run not from the moment when the local planning authority becomes aware of the breach of planning control, but only when it has sufficient evidence to justify the application. Given that the application requires evidence of concealment, it can only be when the Council has this evidence that the 6 month period begins to run. This is the effect of *Coles*, at [49]. In any event, s. 171BB(2) provides a mechanism for the Council to determine when the period starts. This is conclusive save where it is “plainly wrong”. There was no argument before the justices that the certificate was plainly wrong and that cannot sensibly be argued now.

Discussion

- 12 The absence of any written reasons from the justices for their decision on 2 December 2019 is unfortunate. However, the presumption of regularity applies and the Batemans therefore bear the burden of showing that that decision was made in error of law. In this case, there was a certificate under s. 171BB(2). The authorities show that such a certificate is conclusive unless it can be shown to be plainly wrong.
- 13 Mr Ward relied on *Tanna* for the proposition that the certificate was plainly wrong, but in my judgment the decision does not show that. In *Tanna*, the order in which the evidence was obtained was quite different. There had been inspections prior to the application for the certificate and the inspectors had been told that the flat was not being used as a separate dwelling. It was open to the council to certify that it was only once the application for the certificate of lawful use was made that it became obvious both that there had been a breach of planning control and that what had been said to the inspectors were lies.
- 14 *Tanna* is not, therefore, authority for the proposition that evidence of breach of planning control on its own is always enough to trigger the running of the 6 months period. *Coles* makes the point that what is required is not just evidence of an apparent breach of planning control, but “evidence of the apparent breach of planning control sufficient in the opinion of the [LPA] to justify the application comes to the LPA’s knowledge”. Because s. 171BC(1) makes concealment a precondition of the grant of a PEO, evidence

can only be “sufficient... to justify” an application for a PEO if it includes evidence of concealment.

- 15 It is true that, on this construction, s. 171BB(1) would not preclude a local planning authority from applying for a PEO long after the date on which it had evidence of the apparent breach. If it did so, however, the delay could be taken into account under s. 171BC(1)(b) in considering whether it was just to make the order. No doubt a court considering that question would want to consider whether there was a good reason for the delay and to what extent the delay had prejudiced the respondent.
- 16 Collins J in *Tanna* did not hold, therefore, that in every case time starts to run from the date on which a certificate of lawful use or development is applied for. In the present case, that was the date on which the Council were put on notice of an apparent breach. But they had to investigate further to discover whether there was evidence of concealment sufficient to justify the application. If the law did not fix the date on which time began to run as the date of the application for the certificate of lawful development, there was no other reason for concluding that the certificate under s. 171BB(2) was plainly wrong, so the answer to Question (i) is “No” and this ground of appeal fails.

Question (ii)

The authorities

- 17 In *Coles*, Elisabeth Laing J concluded at [54] that the district judge in that case had been entitled to conclude that the appellants were guilty of deliberate concealment. The basis for that conclusion was a series of “contextual features” described earlier in the judgment. The appellants had “set about creating the impression” that they still lived at another property, so as not to draw attention to the cottage the subject of the PEO application. For the same reasons, they did not register the cottage as a separate address, delayed going on the electoral register and did not register for council tax.

Submissions

- 18 Mr Ward submitted that National Planning Policy Guidance provides that PEOs should be reserved for the worst cases of concealment, where some positive step has been taken to conceal matters from the attention of the local planning authority. Moreover, the statute itself requires a deliberate act of concealment. A mere omission, such as the failure to register for council tax, is not enough.
- 19 Mr Spurr argued that the judge here relied on deliberate attempts by the Batemans to lead the Council away from residential use by indicating that it was owned by them (when they were clearly not occupying it), rather than by its actual owner (who was). Against this background, the omission to register the property for council tax was a matter that could be taken into account as part of the mix.

Discussion

- 20 In my judgment, this ground of appeal has no merit. The case stated makes clear that the judge made “a finding that the respondents had provided information in statutory declarations and correspondence with the council’s planning department which was markedly different to information given to the housing benefit section of the council and which I found amounted to a deliberate attempt to create a false impression”. There was

no proper basis for impugning this finding, made after hearing relevant evidence. Against the background of a finding that positive steps such as these had been taken, *Coles* shows that the judge was entitled to take into account the omission to register for council tax as part of the evidence leading to the conclusion that there had been concealment. There was no error of approach or law. The answer to Question (ii) is “No” and this ground of appeal fails.

Question (iii)

Submissions

- 21 Mr Ward submitted that the judge erred in taking into account the use of a caravan in building C, given that that use had come to an end by the time the application was made.
- 22 Mr Spurr’s answer was that this ground had no merit because the breach of planning control in respect of which the PEO had been sought was a change of use on a larger planning unit, so it did not matter that the caravan had at some point been moved.

Discussion

- 23 In my judgment, Mr Spurr’s submissions on this point were correct. The question for the judge under s. 171BC(1)(a) was whether “the apparent breach, or any of the matters constituting the apparent breach, has (to any extent) been deliberately concealed”. Here, there were two caravans whose use constituted the breach. Both were situated within the same planning unit. The finding of the judge, as recorded in the case stated, was that “an occupied caravan on the site had been replaced by another caravan at the same location by the time the PEO application was made”. It would be contrary to the purpose of the scheme if fluctuations in the intensity or character or location of the breach over time required the local planning authority to recommence its application for a PEO. There was no error here. The answer to Question (iii) is “Yes” and this ground of appeal fails.

Conclusion

- 24 For these reasons, the appeal is dismissed.