All England Official Transcripts

First Secretary of State v Arun District Council and another

Town and country planning - Enforcement notice - Time limit - Change of use to single dwelling - Condition in planning permission prohibiting change of use to single dwelling - Whether time limit for enforcement action ten years or four years - Town and Country Planning Act 1990, ss 55(1), 171(B)(2), 171B(3)

[**2006] EWCA Civ 1172,** (Transcript: Smith Bernal Wordwave)

COURT OF APPEAL (CIVIL DIVISION)

AULD, SEDLEY, CARNWATH LJJ

10 AUGUST 2006

10 AUGUST 2006

P Brown & J Auburn for the Appellant

A Williams and E Lambert for the Respondents

Treasury Solicitor; Delwyn Jones, Littlehampton

AULD LJ:

[1] This appeal raises a narrow but important point of construction as to the applicable time-limit in the Town and Country Planning Act 1990 ("the 1990 Act") governing enforcement action for breach of planning control in the form of failure to comply with a condition of planning permission restricting change of use to use as a single dwelling-house, namely whether it is four years from the date of the breach, pursuant to s 171B(2), or ten years, pursuant to s 171B(3), of the Act.

[2] The starting point in the 1990 Act for consideration of this issue is s 55(1), which identifies two forms of development subject to control by the Act, operational and change of use. It provides so far as material:

> ". . . in this Act, except where the context otherwise requires, 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

As to "material change of use", s 55(3)(a) provides that:

> ". . . the use as two or more separate dwelling-houses of any building previously used as a single dwelling-house involves a material change in the use of the building and of each part of it which is so used."

[3] Section 171A(1) of the 1990 Act, under the side heading "Expressions used in connection with enforcement", identifies two categories of breach of "planning control", the first of which, development without required permission, embraces both forms of controllable development identified in s 55(1), and the second of which may or may not result in such development, failure to comply with a condition to or limitation on permitted development:

> "For the purposes of this Act -
>
> (a) carrying out development without the required planning permission; or
>
> (b) failing to comply with a condition or limitation subject to which planning permission has been granted;
>
> constitutes a breach of planning control."

[4] Section 171B provides two different time-bars for enforcement action for "breach of planning control" according to different forms of breach whether in the form of impermissible development or for failure to comply with a condition to or limitation on permitted development. In summary, it provides: a time-bar of four years from substantial completion of works for breach by way of operational development; four years from breach for one particular category only of change of use, namely "of any building to use as a single dwelling house"; and ten years from breach for "any other breach of planning control". The section reads as follows:

> "(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.
>
> (2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house, no enforcement action may be taken after the end of four years beginning with the date of the breach.
>
> (3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.
>
> (4) . . ."

[5] The rationale for the different periods of limitation according to the nature of the breach of planning control was to impose a shorter period, four years, where it was considered that a longer period could cause serious loss and/or hardship in the event of enforcement proceedings long after the event, including in the case of homeowners loss of their homes, and ten years for any other breach of planning control.

[6] As I have said, the critical question of construction for the court is whether a breach of condition resulting in a change of use of a building to use as single dwelling house is governed by the four-year time bar in s 171B(2) or the ten year time-bar in s 171B(3). The First Secretary of State, whose appeal this is, argues for the four-year bar on the basis that the scheme of s 171B is to provide a ten year time-bar for breaches of planning control in the form of material change of use, save only for the single exception of change, whether material or not, of use to a single dwelling house. Arun District Council ("Arun"), whose decision as local planning authority seeking to enforce a planning condition against such change outside the four year period is under challenge, argues for the ten year period in s 171B(3), on the basis that s 171B(1) and (2) are concerned only with breaches of planning control in the form of development without permission (s 171A(1)(a)), and the only place for breach of condition (s 171A(1)(b)) is as an "other breach of planning control" in s 171B(3).

[7] The matter comes before the court from a decision of His Hon Judge Mole QC, sitting as a Deputy High Court Judge, upholding Arun's entitlement to take enforcement action against Mrs Karen Felicity Brown more than four years after her breach of condition against change of use of an extension to her home to use as a single dwelling-house.

[8] The Judge defined the issue of construction, as he saw it, in the following way in para 22 of his judgment:

> ". . . Does s 171B(2) mean that if there has in fact been a breach of planning control consisting in the change of use of a building to use as a single dwelling-house, no enforcement action may be taken at all after four years, even though the breach of planning control that the local authority actually enforce against is not the change of use but a breach of condition? Or does s 171B(2) mean instead that where there has been a breach of planning control consisting in the change of use any building to use as a single dwelling-house, no enforcement action in respect of *that* breach of planning control, namely the change of use, may be taken after four years, but that does not prevent enforcement action in respect of a different breach of planning control, namely the breach of condition? . . ."

[9] The Judge resolved the issue, so described, by holding that the enforcement action in respect of the breach of condition fell within the residual provision of s 171B(3) providing for a ten year time bar for "any other breach of planning control", and was, therefore, still enforceable. This is how he put it in paras 38 and 39 of his judgment:

> "38 . . . it is clear in s 171B(1) that the words 'no enforcement action may be taken' mean in respect of *that* breach of planning control. It is so clear, reading the section as a whole, that it does not need to be spelt out by adding those extra words in. Exactly the same approach, it seems to me, is true for s 171B(2). The words 'no enforcement action may be taken' mean in respect of *that* breach of planning control, namely the change of use to use a single dwelling-house. The provision does not mean 'or in respect of any other breach of planning control that may have some connection with that breach of planning control'.
>
> 39 I have not found it an easy point and it is surprising that it never seems to have been decided before. But, in my judgment, s 171B(2) means, on the facts of this case, that the use of the extension as a separate dwelling involved a material change of use without planning permission. Certainly enforcement notice proceedings in respect *that* breach of planning control would have had to be brought within four years. But given an enforceable valid condition prohibiting use as a single dwelling-house, the breach of such a condition was not caught by s 171B(2), but fell within s 171B(3). It follows that enforcement action could be brought within ten years. It was, and was brought lawfully . . . ."

[10] Mr Paul Brown, on behalf of the First Secretary of State, in submitting that the Judge wrongly applied the ten year period, relied upon what he maintained were the plain words of s 171B, the wider context of the Act, its legislative history and settled views as its application. He submitted that, on its correct construction, the time limit for taking enforcement action against any breach of planning control resulting in the change of use of any building to use as a single dwelling house is four years, as provided by s 171B(2), irrespective of whether the particular breach complained of is the carrying out of development without permission, a breach of condition, or some combination of the two.

[11] Mr Brown's analysis of s 171B as a whole was that: sub-s (1) provides for a breach of planning control by all operational development without permission; sub-s (2) makes specific provision for breach of planning control in respect of one particular category of change of use, "change of use of any building to use as a single dwelling house", whether or not the change was *material,* that is, whether or not amounting to development without permission, and whether or not the change resulted from a breach of condition; and sub-s (3) is a residual "catch-all" provision, which applies only to breaches of planning control, whether or not amounting to development without permission, which are not within sub-ss (1) or (2).

[12] As to s 171B(2), Mr Brown maintained that the criteria for the four year bar were met on the facts of the case and that, accordingly, whether or not, but for s 171B(2), it might fall within the residual catch-all

provision of s 171B(3), the latter is irrelevant.

[13] Mr Brown elaborated his argument by reference to the wider context of the 1990 Act, in particular, ss 55(1), 171A and 171B, First, he invited comparison of the words "change of use" in s 171B(2) with the definition of "development" in s 55(1) of the Act, noting that, while s 171B(1) repeats the definition of operational development in s 55(1), s 171B(2) does not repeat the definition of development in s 55(1)of "any *material* change of use", omitting the word "material" before the words "change of use". Such omission, he argued, allows s 171B(2) to include changes of use that are not sufficiently "material" to amount to "a breach of planning control" by way of "development" without the required planning permission under s 171A(1)(a), but do amount to such a breach by way of failure to comply with a condition or limitation subject to which planning permission was granted under s 171A(1)(b).

[14] Miss Anne Williams, on behalf of Arun, submitted that s 171B(2), in failing specifically to refer to a breach of condition or limitation, clearly intended to exclude them from it and to leave them to the residual provision for a ten year bar in s 171B(3), for "any other breach of planning control". She submitted that a condition limiting the scope of permission, whether for operational development or development by material change of use, or a condition, breach of which would not amount to development in either sense, is wholly different from a grant of permission.

[15] As Carnwath LJ details in his helpful judgment, from early on in the legislative history of time-bars on enforcement action in respect of breaches of planning control, material change of use to use as a single dwelling-house has been treated in the same way as operational development, and, by 1981, irrespective of whether the development was without permission or simply in breach of condition. All such breaches were then subject to a four year time-bar for enforcement, whilst any other change of use was subject to no time-bar; see Town and Country Planning Act 1968, s 15(3); Town and Country Planning Act 1971 ("the 1971 Act"), s 87(3); and the 1971 Act, s 87(4), as amended by the Local Government and Planning (Amendment) Act 1981 ("the 1981 Act"), s 1, Schedule, para 1(4).

[16] The only relevant change to the wording of the 1971 Act made by the 1981 amendment was the express mention in the categories of breach of planning control subject to the four year bar of a failure to comply with a condition against change of use to use as a single dwelling-house. This was a change, of which this court in *London Borough of Camden v Backer and Aird* (1982) 262 EG 549, [1982] JPL 516 became aware, but before it became law. In the light of the court's decision - to which I now turn - it must have considered the change unnecessary as adding nothing to the law already provided in the 1971 Act.

[17] The breach of planning control in *Camden v Backer* was the use of a second storey of a house as a single dwelling-house where the planning permission for the second storey was subject to a condition requiring it to be used only as storage ancillary to residential use of the remainder of the premises. The question before the court was whether the breach of that condition fell within what was then s 87(3)(c) of the 1971 Act, namely whether it relate[d] to a breach of planning control consisting in . . . "the making without planning permission of a change of use of any building to use as a single dwelling house", a similar provision, save for the words "without planning permission", to s 171B(2) of the 1990 Act. Waller LJ, with whom Donaldson LJ (as he then was) and Sir David Cairns agreed, held that the breach was covered by the words of s 87(3)(c) and the fact that the change of use was also a failure to comply with a condition did not override that.

[18] Some seven years later, in February 1989, Robert Carnwath QC (as he then was) in his report on a review commissioned by the Government in 1989 of enforcement provisions, "Enforcing Planning Control" (HMSO 1989), summarised the effect of the law as it stood following the 1981 amendment:

> "3.2 In four specific cases, there is immunity four years after the breach (all operations; breaches of conditions 'relating

> to the carrying out of operations'; changes of use to single dwelling; and breaches of a condition prohibiting such change). . . . The logic behind these exclusions is not entirely clear. Special protection was no doubt thought desirable for people's homes. In the case of operations, the governing considerations presumably were the relative ease of detection, the potential costs involved in reinstating the land, and the need to provide certainty for potential purchasers."

[19] In his report, Robert Carnwath recommended (para 3.17) that "the general period of immunity be ten years", with no change to the four year rule categories other than to revoke an express provision in s 87(4)(b) of the amended 1971 Act providing for a four year period for breach of conditions relating to operations. His recommendation of removal of operations conditions (para 3.12), but not change of use to single dwelling house conditions, from the four year time-bar appears to have been prompted by complications in the application of the four year period to breaches of conditions exemplified in *Peacock Homes Ltd v Secretary of State* (1984) 83 LGR 686, 48 P & CR 20, [1984] JPL 729 (CA), leading him observe in para 3.12 of his report:

> "I would not make any change to the 4 year categories, other than to revoke the paragraph [section 87(4)(b) of the 1971 Act] dealing with conditions relating to operations . . . ."

[20] In so recommending, he appears to have accepted that breaches of conditions relating to changes, whether material or otherwise, of use to single dwellings should continue to be governed by the four year regime, whereas breaches of conditions as to operational development and other changes of use should become subject to the "general" new ten year time-bar that he recommended.

[21] Robert Carnwath's recommendation was implemented by the Planning and Compensation Act 1991 ("the 1991 Act"), resulting in the new provisions, ss 171A and 171B in an amended 1990 Act. Those new provisions effected in simpler form (but for breaches of condition on operational development) the 1971 Act, as amended, which had, as I have said, expressly articulated the application of the four year rule to failure to comply with a condition preventing a change of use to use as a single dwelling house. This appears to have been the view of the Government in para 9(2) of Circular 17/92, explaining the changes in enforcement provisions made by the 1991 Act, and again in Circular 19/97 "Enforcing Planning Control", Annex 2, para 2.4, stating that s 171B(2):

> ". . . applies either where the change of use as a single dwelling house involves development without planning permission, or where it involves failure to comply with a condition or limitation subject to which planning permission has been granted"

and that the ten year bar in 171B(3) in practice:

> "applies to breaches of planning control involving any material change of use in the land (other than a change of use as a single dwelling house) and to any breach of condition or limitation (including one where the breach is of an occupancy condition imposed on permission for the erection of a dwelling house, but not including one where the breach consists in using a building as a single dwelling house)."

[22] For the reasons advanced by Mr Brown and, to an extent, anticipated by my summary earlier in this judgment of the effect of the relevant statutory provisions, I am of the view that s 175B(2), on its plain words, read with s 171A(1) and the remainder of s 171B, applies the four year bar to a breach of a condition as to or limitation on a change of use, whether *material* or not, to a single dwelling house. I say "read with s 171A" because the identification in it of a failure to comply with a condition or limitation as one of the two forms of "breach of planning control" is carried into s 171B(2) in the use of that omnibus term without unnecessary express repetition or exclusion of either of the two s 171A(1) forms.

[23] Moreover, s 171A(1), read in particular with s 55(1) of the Act, supports the application of the s 171B(2) four year bar to breaches of conditions or limitations, whether or not amounting to a *material* change of use. Whilst s 55(1), in its definition of development, speaks of "*material* change of use", s 171A(1), in its definition of "a breach of planning control" is not just concerned with development without the required permission, but also with breach of conditions on or limitations to a permitted development. In this respect it is to be contrasted in two respects with s 171B(1), governing breach of planning control by operational development. First, s 171B(1) specifically limits the operational development constituting the breach of planning control to development carried on "without planning permission". Secondly, the omission in s 172B(2) of the word "material" before the words "change of use" is significant and cannot have been accidental. Thus, a breach of a condition or limitation, even though not resulting in a *material* change of use and hence impermissible development, may yet constitute a breach of planning control liable to enforcement action. Such an outcome is logical in that, whichever form of breach of planning control the change of use takes, it should be subject to the same time limit for enforcement action. As will appear, on the facts of this case, it is common ground that the breach of the planning condition in question constituted a *material* change of use to use as a single dwelling-house.

[24] As noted by the Judge, there is no binding authority on the construction of s 171(B)(2). However, there is authoritative support for the long and widely held view, which I have adopted, in an obiter observation of Mr David Keene QC, (as he then was), sitting as a Deputy High Court Judge, in the only other reported case in which the provision was expressly considered. In *King's Lynn and West Norfolk BC b SSE* [1995] JPL 730 at 737-738, he said at p 9 of his judgment:

> ". . . I note that whereas s 171B(1) is confined to cases where the breach consists of the carrying out of operations without planning permission, that is to say one form of development, s 171B(2) seems to apply to any breach of planning control consisting in the change of use of a building to a single dwelling house. Unlike subsection (1), subsection (2) does not seem to be limited to cases where the breach arises because there is no planning permission. On the face of it, therefore, subsection (2) would seem to be wide enough to embrace breaches of planning control arising by way of breach of condition as well as wholly unpermitted changes to a single dwelling house. That would also be consistent with a legislative intention to protect occupiers of such dwellings after four years of breach, whatever the nature of the breach."

[25] It follows that, in my view, the Judge erred in not appreciating that a breach of planning control consisting of the "change of use of any building to use as a single dwelling house" in s 171B(2) can occur as a result of a failure to comply with a condition attached to a planning permission and whether or not that failure results in a *material* change of use constituting development. To be fair to the Judge, he did not have the benefit given to this court of citation of its decision in *Camden v Backer,* a decision which, if drawn to his attention, might have inclined him to a different decision.

[26] Accordingly, what I regard as the true construction of s 171B(2) is of a piece with the pattern established by its statutory predecessors and such interpretation as they have been given by the courts. It is also reflected in a long-established understanding of that section, as illustrated in governmental guidance for at least 13 years in the Circulars to which I have referred, and also in the Encyclopaedia of Planning Law and Practice, Vol 2, at para P171B.17. This happy synthesis of legislative construction, legislative history, governmental understanding and authorities has as its outcome an expression of a clear legislative intent that, unlike other changes of use, householders who change the use of a building to that of a single dwelling-house should only be vulnerable to enforcement action if it is instituted within four years from the change. The present provisions merely re-state in more concise form the position reached in 1981 in the amendment that year of the 1971 Act, subject only to removal from the four year rule of breach of planning control through failure to comply with conditions of operational development.

[27] Given such intent, it would be illogical for there to be a different period for enforcement, depending on whether the breach of planning control within the meaning of s 171A(1) involving a change of use involves a failure to comply with a condition as well as or instead of "development without the required planning

permission". Similarly, it would be illogical for the time bar to depend, in such circumstance, according to whether the local planning authority formulates its enforcement notices on the basis of a breach of planning control constituted by development without the required permission or as a breach of condition.

[28] Now, I should apply my construction of the legislation to the facts of the case.

[29] The appeal concerns an extension of Mrs Brown's house in Bognor Regis. On 14 March 1988 Arun granted planning permission to her for the extension subject to a number of conditions, one of which was that it should be occupied only by her dependent relative, Mrs J Brown. A further condition provided that, upon vacation of the extension by Mrs J Brown, it should at all times be used for purposes incidental to the house as a single dwelling house and not be occupied or disposed of as separate residential accommodation. The extension was built shortly after the grant of the permission, but was not, in the event, occupied by Mrs Brown's relative. Mrs Brown used it as part of the house until 1996, when she let it to students who occupied it independently as separate living accommodation.

[30] In April 2004 Arun issued an enforcement notice, alleging that -

> "without planning permission the . . . planning condition ha[d] been breached in that the annex authorized under [the] planning permission . . . ha[d] been occupied as a separate unit of residential accommodation."

[31] Following an inquiry into Mrs Brown's appeal against the notice, an inspector decided that the condition was invalid, and that, in any event, the time limit for enforcement was four, not ten, years, and so the enforcement proceedings would be barred. He, therefore, allowed her appeal.

[32] On Arun's appeal to the High Court, the Judge found for it on both issues and allowed the appeal. He held that the condition was valid and enforceable and, for the reasons he had given (see paras 8 and 9 above), the period for enforcement was ten, not four, years. He, therefore, held that the enforcement notice was not time-barred. The First Secretary's sole ground of appeal to this court relates to the time bar.

[33] In my view, the breach of planning control by Mrs Brown falls squarely within the words of s 171B(2), and is, therefore, enforceable for a period of four years only after the breach. Prior to 1996 the extension was used for a purpose ancillary to the house. From 1996 its use changed to independent use as student accommodation. By virtue of s 55(3)(a) of the 1990 Act (see para 2 above) that change constituted a material change of use, and was therefore development without planning permission within the meaning of s 171A(1)(a) and/or it was a breach of condition of the permission within the meaning of s 171A(1)(b). Either way, it was clearly a "breach of planning control" consisting in "the change of the use" of the extension from a residential use which was ancillary to and part of the main dwelling, to use as a separate single dwelling house within the meaning of s 171B(2).

[34] Accordingly, I would allow the Secretary of State's appeal so as to quash the decision of the Judge and to uphold the inspector's decision.

SEDLEY LJ:

[35] I agree that this appeal succeeds. The legislation is unambiguous in first defining a failure to comply with any condition attached to a planning consent as a breach of planning control (s 171A(1)(b)) and in then providing (s 171B(2)) that where such a breach consists in change of use to a single dwelling house, which

was the case here, any enforcement action has to be taken within four years.

[36] I can entirely understand the local planning authority's sense of frustration about this. Their planning department is not a police station, and the discovery that a person such as Ms Brown has - not to put too fine a point on it - cheated on a conditional grant of permission, to detriment of her neighbours and of planning control, may well be a matter of time and of chance. The ordinary ten-year period might well have been thought reasonable for such cases, but - in circumstances which Carnwath's LJ judgment illuminates - it is not what Parliament decided to provide.

CARNWATH LJ:

[37] I agree that the appeal should be allowed for the reasons given by Auld LJ. Since reliance has been placed on a report of my own, it may be helpful if I add a few words by way of explanation of the history of these provisions.

[38] Before the Town & Country Planning Act 1968, there was a four year limitation for enforcement against any breach of planning control. The 1968 Act introduced a number of important changes to the enforcement regime. It removed the four-year limit for the generality of cases. For those, by s 15 of that Act, it was sufficient if the local authority could show that there had been a breach of planning control "after the end of 1963". As an exception to that general rule, s 15(3) enacted specific time limits for three categories of breach: (a) carrying out of operations without planning permission; (b) failure to comply with a condition which "relates to" the carrying out of such operations; and (c) the "making without planning permission of a change of use of any building to use as a single dwelling house". In those cases, the enforcement notice could only be served within four years from the date of breach.

[39] It is interesting to note that, from the Parliamentary debates at the time (referred to in *Van Dyck v Secretary of State* [1993] JPL 565, 575), it appears that the reference to "a single dwelling-house" was deliberately restrictive. The Government resisted an amendment to substitute a reference to "residential use", on the grounds that "changes to multi-occupation can have undesirable social as well as planning consequences". However, in *Van Dyck*, notwithstanding these references (which were held inadmissible under the principles of *Pepper v Hart* [1993] AC 593, [1993] 1 All ER 42, [1993] IRLR 33), the Court of Appeal held that the words were apt to cover a change from a single house to two or more separate dwellings. Accordingly, Miss Williams accepts, as she is bound to do, that what occurred here was not only a material change of use (under s 55(3)(a)), but was properly regarded as a change to a "single dwelling-house" within the meaning of s 171B.

[40] The enforcement provisions remained substantially unchanged until 1981. It is worth noting that when the stop notice provisions were extended by the Town & Country Planning (Amendment) Act 1977, so as to embrace uses as well as operations, the special status of residential use in the enforcement regime was again confirmed by the exclusion of use as a dwelling house from the ambit of those provisions.

[41] The sections relating to enforcement were substantially recast by the Local Government and Planning (Amendment) Act 1981. Most of the changes were based on recommendations in a report by George Dobry QC (as he then was) (*Review of the Development Control System* System, HMSO 1975). The implementation of those recommendations was delayed (see the introduction to the Act in the 1981 edition of Current Law Statutes Annotated). A Government Bill had been introduced in 1979, but that had run into Parliamentary difficulties. In due course the reforms were reintroduced in the form of a Private Member's Bill with Government backing, which then became the 1981 Act.

[42] The Dobry report did not make any recommendations in respect of the time limits for enforcement. However, by the time of the Bill there was a new proposal. To the three special "four-year" categories to which I have referred there was added a fourth: "(d) the failure to comply with a condition which prohibits or has the effect of preventing a change of use of a building to use as a single dwelling house."

[43] We have been shown no contemporary material which casts any direct light on when or why that change was proposed. However, it seems reasonable to assume that it may have been connected with the early stages of the case to which Auld LJ has referred: *London Borough of Camden v Backer and Aird*. That was decided by the Court of Appeal on 11 January, 1982, after the passage of the 1981 Act, but it would have been under consideration by the Department at about the time that the Bill was before Parliament.

[44] The short summary of that case in the JPEL, which is the only report before us, records that the Court of Appeal, in agreement with the Divisional Court, was reversing a decision of the Secretary of State. The planning permission had been granted for the erection of a second storey on top of a residential building for use as a loft, subject to a condition that the additional storey should not be used for any purpose other than storage connected with the residential use of the remainder of the premises. From 1 March, 1973, the additional storey had been occupied by the same tenant as a separate unit of residential accommodation. It is implicit, although it is not stated in the note, that the enforcement notice requiring discontinuance of that use was served after 1 March, 1977, and that the owner had appealed on the grounds that it was out of time under s 87(3)(c).

[45] It may be inferred that at that time the Department's legal advisers were taking the view that breach of a condition preventing separate residential use was not covered by category (c), and that it was thought desirable to include a further paragraph in the Bill to clarify the position. Even though the Divisional Court disagreed with the Department's view, the issue had not been finally resolved in the Court of Appeal by the time the Bill became law. It is understandable therefore that the paragraph was retained in the interests of certainty.

[46] At the time of my report on Enforcing Planning Control (written in February 1989), the 1981 provisions remained in force, including the four special categories subject to the four-year limit. Those provisions were carried unchanged into the 1990 consolidation. It was not until the following year that further amendments were made to give effect to my recommendations, in the Planning and Compensation Act 1991.

[47] As my report made clear, the principal issue which needed to be addressed in relation to "immunities" arose from the consideration that 1963, the starting date introduced by the 1968 Act, had now become -

> ". . . far too long ago to be a sensible or useful date for immunity of uses . . . not only is evidence difficult to obtain, but the use is likely to have varied in character and intensity in the meantime. This results in narrow and arbitrary distinctions and correspondingly complicated arguments" (p 69 para 3.4(1))

There was a consensus that the present position was unsatisfactory. The choice appeared to lie between two options: (i) to abolish the immunity altogether, except where an established certificate had been issued; or (ii) to replace the 1963 date with a rolling limitation period after which immunity would be conferred. If the latter option were chosen, it would be necessary to choose an appropriate period. I adopted the latter alternative for reasons which I explained, and I proposed a period of ten years, as suggested by the Association of Metropolitan Authorities, which I described as -

> "having the merit of being long enough for any offending use of significance to have come to light, and short enough to enable evidence to be obtained without undue difficulty." (p 71 para 3.11)

As to the four-year categories, I commented:

> ". . . the logic behind these exclusions is not entirely clear, special protection was no doubt thought desirable for people's homes. In the case of operations, the governing considerations presumably were the relative ease of detection, the potential cost involved in reinstating the land, and the need to provide certainty for potential purchases." (p 68 para 3.2)

I drew attention to a particular problem in respect of the four year limit for conditions "relating" to operations (para (b)), arising from the imprecision of the word "relates" (highlighted by *Peacock Homes Ltd v Secretary of State* (1984) 83 LGR 686, 48 P & CR 20, [1984] JPL 729; and later confirmed by *Newbury DC v Secretary of State* [1994] JPL 137)). I proposed the repeal of this paragraph, because I had not been "able to devise any satisfactory line between conditions which should be subject to the rule and those which should not". Apart from this I proposed no change to the four-year categories, nor in particular did I make any comment on para (d) (p 71 para 3.12).

[48] The changes to the enforcement regime made by the 1991 Act followed generally my recommendations. However, it is important to note that, unlike a Law Commission report, my report did not contain any specific proposals for legislation. The drafting of the 1991 amendments was a matter for Parliamentary Counsel on appropriate instructions from the Department. Although it is I believe permissible to have regard to my report as indicating the mischief to which the amendments were addressed, and the general policy objectives, it cannot be regarded as in any sense a definitive guide to the meaning of the Act.

[49] However, it appears to me that, if one approaches the amended 1990 Act in accordance with ordinary principles of construction, without undue attention to the history, there is no great difficulty. Section 171A(1) defines "a breach of planning control" as meaning either (a) carrying out a development without the required planning permission or (b) failing to comply with any condition subject to which planning permission has been granted. Accordingly the reference in s 171B(2) to "a breach of planning control" is naturally read as including either type of breach. The only requirement in that section is that the breach should "consist in the change of use in any building used as a single dwelling house". As long as it involves a "change of use", it matters not which type of breach it is: whether development without planning permission or a failure to comply with a condition. This view of the matter is reinforced by the lack of reference to the need for the change of use to be "material", as in the definition of "development" in s 55; nor, unlike s 171B(1), does it require the breach to have involved something done "without planning permission". As I have said, Miss Williams accepts that, apart from the condition, the change would have involved a breach of planning control, but that it would have become immune from enforcement action under the four-year limit. Once it is accepted that sub-s (2) on a natural reading extends to either form of breach of planning control, the same time-limit must apply, and it is hard to see any policy reason why the two cases should be treated differently.

[50] The contrary argument depends on looking beyond the language of the section, to a historical comparison. If Parliament had intended to continue to apply the four-year limit to breaches of condition in relation to use of a dwelling house, why (it is argued) did it remove the specific provision to that effect? However, as I have attempted to show, that is too simplistic a view of the history. In 1981 Parliament may have seen the need to clarify the position because of uncertainty within the Department. But in 1982, the Court of Appeal held that para (c) did include breaches of condition, and in effect that (d) was unnecessary. It is understandable, therefore, that when recasting the provisions in 1991, the draftsman decided to dispense with a separate provision.

[51] Once that aspect of the history is understood, the section itself seems to me to provide a clear answer to the issue in this case. Indeed, had the judge been referred to the *Backer and Aird* case, I think it is likely that he would have reached the same view.

Judgment accordingly.