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Mrs D Aylmore
Adur District Council
Planning & Development Services
Department
Civic Centre
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West Sussex
BN4 6PR

Your Ref: ADC/0465/08

Our Ref: APP/Y3805/C/10/2125360
Further appeal references at foot of letter

- 1 APR 2010

Date: 31 March 2010

Dear Mrs Aylmore

Town and Country Planning Act 1990
Appeals by Mr Paul Haggqvist, Mr John Clark and Mr Michael Johnstone
Site at Church House Dental Practice, 4-8 Church Street, Shoreham-by-sea, BN43 5DQ

I refer to your enforcement notice dated 9 February 2010 alleging the installation of a roller shutter door in replacement of hinged timber doors.

In the case of Kaur v SSE and Greenwich London Borough Council [1990] JPL 814, it was held that a requirement of an enforcement notice which provided for the subsequent submission and approval of a scheme introduced an unacceptable degree of uncertainty. The subsequent case of Payne v NAW and Caerphilly CBC (QBD 5/1/06) held that such a notice is a nullity because it fails to comply with section 173(3) of the 1990 Act. (attached for your information)

Your notice states: at Section 5: to permanently remove the roller shutter door and re-install hinged timber doors of the same design as the original doors ***(or such other design as approved in writing by the local planning authority).***

Our initial view is that the notice may therefore be a nullity because it fails to meet the requirements of the Act. As such there would be nothing to correct and no further action could be taken on the appeals against it.

We fully accept that it is for your council to decide on the format of the notice; however, we consider that this error may be beyond the First Secretary of State's powers of correction. In the circumstances you may wish to consider withdrawing this notice and re-issuing.

INVESTOR IN PEOPLE

Please may we have your comments by **16 April 2010?** If no reply is received within this period, it will be assumed you accept that the notice is a nullity. We will therefore close our file and no further action will be taken on the appeal.

A copy of this letter has been sent to the appellant.

Yours sincerely

Fran Littler

SCHEMES

Further appeal references:- APP/Y3805/C/10/2125361 and APP/Y3805/C/10/2125362

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IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

NO.CO/6451/2004

BETWEEN

CLIVE PAYNE

CLAIMANT

PINS CPT&C
10 JAN 2006
QUALITY
HIGH COURT

AND

THE NATIONAL ASSEMBLY FOR WALES

FIRST DEFENDANT

AND

CAERPHILLY COUNTY BOROUGH COUNCIL

SECOND DEFENDANT

JUDGMENT

1 On the 12th May 2004 the Second Respondent issued Enforcement Notices against the Claimant, Mr. Gareth Evans and two limited companies in respect of alleged breaches of planning control at an area of land at Graig Yr Hufen, off Nelson Road, Senghenydd, near Caerphilly. The Claimant, Mr. Evans and the companies exercised their right of appeal to the First Respondent In their respective notices of appeal each specified that the ground of appeal to be relied upon was that the activities carried on upon the land did not constitute the breaches of planning control alleged.

2 The First Respondent appointed an Inspector to conduct and determine the appeals. The Inspector convened a public local inquiry on the 5th October 2004 at which he heard representations from the relevant parties. On the same day he visited the land in question.

3 By letter dated the 23rd November 2004 the Inspector upheld the Enforcement Notices and dismissed the appeals. In so doing, however, he did not uphold the notices in the form in which they had been issued and served. Rather he exercised the power conferred upon him by section 176(1) Town and Country Planning Act to vary the terms of each notice.

4 On the 17th December 2004 the Claimant issued a Notice of Appeal under section 289 of the 1990 Act in which he challenged the decision of the First Respondent's Inspector on a variety of bases. As I understand it he was acting on behalf of himself and the companies. Mr. Evans also issued such a Notice on similar grounds.

5 On the 23rd May 2005 I granted permission to the Claimant and Mr. Evans to appeal on one specific point.

6 At the hearing of the appeal the Claimant appeared as did the First Respondent. The Second Respondent did not appear; nor did Mr. Evans. As I understand it, there is a dispute about whether Mr. Evans has paid a necessary fee to the Court but, in any event, he suffers from ill – health. It was not suggested that I should adjourn the hearing so as to enable Mr. Evans to attend. The reality is that my decision upon the appeal launched by Mr. Evans would be identical to my decision in this appeal.

7 The one point in this appeal relates to the Inspector's decision to uphold the Enforcement Notice but in a form different from that which was issued and served upon the Claimant. The First Respondent contends that that the Inspector was entitled to vary the terms of the Notice by virtue of section 176(1) (b) of the 1990 Act. It is submitted that in varying the terms of this Notice, the Inspector was doing no more than lawfully exercising the power conferred upon him by the section. The Claimant contends that this course was not open to the Inspector because the Enforcement Notice was null and void. He submits that the power conferred by section 176 of the Act cannot be invoked to "cure" a Notice which is a nullity. The Claimant argues that the Inspector should have declared the notice to be a nullity as opposed to changing its terms and upholding it.

8 In order to understand the rival contentions, it is first necessary to set out parts of the Notice and the Inspector's Decision Letter.

9 The Enforcement Notice was issued by the Second Respondent in a form which was standard. It identified the person to be served, the land to which the notice related, the alleged breaches of planning control, the steps which the Second Respondent required the Claimant to take to remedy the alleged breaches and various times by which those steps were to be taken. It also contained a section which explained why the Notice had been issued.

10 The section of the Notice which is the focus of this appeal is that headed "What you are required to do" and numbered paragraph 5. It contains six sub – paragraphs. The first four sub – paragraphs require the Claimant to "cease" various activities upon the land in question. Sub – paragraph (e) requires the Claimant to remove plant and machinery from the land. Sub – paragraph (f) is in the following terms:

> "(f) Submit details of a scheme of levelling and planting of the land to the Local Planning Authority, for written approval, which shall include proposals to *Level and plant the areas of the land affected by the activities described in* Part 3 of this Notice."

Sub – paragraph (g) requires the Claimant to "implement the approved scheme as set out in (f) above."

11 As I indicated above, the Claimant appealed against the Notice on the ground that his activities on the land did not amount to a breach or breaches of planning control. That is one of the specified grounds of appeal open to a person served with an Enforcement Notice.[1] The Claimant did not appeal (as was open to him) on the grounds that the steps required by the Notice to be taken exceeded what was necessary to remedy the alleged breaches. Nor did he take any point to the effect that the Notice was a nullity either prior to or at the hearing of the appeal before the Inspector.

12 Nonetheless at the appeal the Inspector raised an issue about sub – paragraph (f) in the form in which it appeared in the notice. He considered that sub – paragraph (f) was "*unacceptable because of the uncertainty it introduces.*"[2] The Second Respondent put suggestions to the Inspector about amending the wording of the sub – paragraph but the Inspector did not accept those suggestions. In the event, the Inspector devised his own solution. He decided to delete sub – paragraphs (f) and (g) as drafted in the Notice and substitute paragraphs (f), (g) and (h) as drafted by him.[3]

13 The Decision Letter records that the Claimant did not agree with the requirements of the Notice as served upon him nor with the modifications put forward by Second Respondent. It also records, however, that the Claimant did not indicate how he would suffer injustice if the Notice was varied. (see paragraph 19).

14 The Claimant accepted before me that he had not suggested to the Inspector that the Notice was a nullity by virtue of the uncertainty inherent in sub – paragraph (f). He explained that by saying that none of the grounds of appeal specified in section 174 of the Act were apposite to take a point that the Notice was a nullity. That may be so, but that does really explain why the Claimant did not submit to

[1] Section 174(2)(c of the Act
[2] Decision Letter paragraph 18
[3] Decision Letter paragraph 25

the Inspector that he had no power to vary the terms of the Notice once the Inspector made it clear that he was contemplating such a course.

15 Notwithstanding that the Claimant did not take the point before the Inspector that the Notice was a nullity, I do not think that prevents him from taking the point before me. If this Notice was a nullity it cannot be made operative by the Claimant's failure to allege that the Notice was a nullity until he launched an appeal under section 289 of the 1990 Act. I should record that Counsel for the First Respondent did not submit that it was not open to the Claimant to argue before me that the Notice was a nullity.

The relevant statutory provisions

16 Section 173(3) and (4) of the Act provide as follows:

"(3) An enforcement notice shall specify the steps which the authority require to be taken .....in order to achieve, wholly or partly, any of the following purposes.

(4) Those purpose are –.
(a) remedying the breach by making any development comply with the terms..... of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or
(b) remedying any injury to amenity which has been caused by the breach.

17 Section 174 provides a right of appeal against an enforcement notice and specifies grounds upon which the appeal can be brought. As I indicated earlier there is no ground of appeal along the lines that the notice in question is a nullity. However, section 174(2)(f) provides a ground of appeal

"that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach."

18 Section 176 is entitled "General Provisions relating to determination of appeals."

It is in the following terms:

"(1) On an appeal under section 174 the Secretary of State may –
(a) correct any defect, error or misdescription in the enforcement notice, or
(b) vary the terms of the enforcement notice,
if he is satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority."

The wording of what is now section 176 was first introduced in 1981.

Discussion

19 There can be no doubt that the Inspector varied the terms of the Enforcement Notice in the instant case. He reached the conclusion that it would cause no injustice either to the Claimant or the Second Respondent if he did so. The Claimant does not contend and has never contended that the variation would cause injustice.

20 At first blush, therefore, the Inspector was acting squarely within the power conferred upon him by section 176.

21 The Claimant submits, however, that the section does not empower an Inspector to vary the terms of an Enforcement Notice if the Notice was a nullity as and from the time it was served. He argues that the Notice was a nullity since it did not comply with the mandatory requirement of section 173(3) of the 1990 Act in that sub – paragraph (f) did not specify the steps which the Claimant was required to take to restore the land to the condition in which it was before the breach of planning control took place. Rather, sub – paragraph (f) was uncertain, vague or ambiguous. In making that submission the Claimant is apparently upon strong ground since that was the conclusion of the Inspector. I have quoted above that the Inspector found that sub – paragraph (f) was "unacceptable because of the uncertainty it introduces." In the next sentence he said this:

"The notice as it stands fails to meet the requirements of section 173 that it shall specify the steps required to be taken to remedy the breach of planning control or any injury to amenity."[4]

In the body of the decision letter the Inspector does not explain why he considers that sub – paragraph (f) introduces uncertainty. By way of a footnote, however, he refers to the decision in Kaur v SSE and Greenwich LBC [1989] EGCS 142. This decision was not cited to me in argument but I felt it necessary to read it so as to enable me to understand better the reasoning of the Inspector. I return to this decision below.

22 At the heart of the Claimant's submission before me is the decision of the Court of Appeal in Miller – Mead v Minister of Housing and Local Government [1963] 2 Q.B. 196. In this case the local planning authority had issued two enforcement notices in respect of two distinct areas of land. On appeal against the notices the Inspector appointed to report to the Secretary of State had recommended upholding the notices but the Minister decided to uphold the Notices subject to variations in their terms. On appeal to the Divisional Court the Court held that one of the two Notices as varied was valid but allowed the Appellant's appeal in respect of the second notice. The Court of Appeal upheld the decision of the

[4] Decision Letter paragraph 18.

Divisional Court in respect of the notice it had declared valid but allowed the appeal of the Local Planning Authority in respect of the second notice.

23 The facts upon which this decision is based bear no relation to the facts in the present case; accordingly I do not set them out. Further the statutory provisions with which the Court was concerned were not identical to the current statutory provisions. Nonetheless the decision in Miller – Mead has never been doubted so far as I am aware and the judgment of Upjohn LJ has been followed on many occasions in relation to his analysis of the difference between an enforcement notice which is a nullity and one which is invalid or defective but capable of correction or variation. The relevant passages in his judgment are as follows:

"Then the notice may require such steps as may be specified in the notice to be taken within such period as may be specified for restoring the land to its earlier condition or for securing compliance with conditions. To be operative, therefore, the notice must specify these things and if for example, it does not specify what is to be done, it will fail to have effect as an enforcement notice and the owner or occupier need not comply with it....."

"Now, what happens if a notice does not comply exactly with these sections [section 23(2) and (3) 1947 Act]? As a matter of common sense, if it does not specify the steps to be taken to remedy the alleged breach of planning permission or the alleged failure to comply with conditions with proper and sufficient particularity, the notice will not be operative.....Now I think is the time to draw the distinction between invalidity and nullity. For example, supposing development without permission is alleged and it is found no permission is required.....then the notice may be quashed.....The notice is invalid: it is not a nullity because on the face of it it appears to be good and it is only on proof of facts aliunde that the notice is shown to be bad: the notice is invalid and, therefore, it may be quashed. But supposing that the notice on the face of it fails to specify some period required by sub – sections (2) or (3). On the face of it the notice does not comply with the section: it is a nullity and is so much waste paper.....Supposing then upon its true construction the notice was hopelessly ambiguous and uncertain, so that the owner or occupier could not tell in what respect it was alleged that he had developed the land without permission.....or again, that he could not tell with reasonable certainty what steps he had to take to remedy alleged breaches. The notice would be bad on its face and a nullity....."

"The whole question, therefore, now is whether the notice complies with section 23. One must remember the words of Lord Simonds in the *Bridlington* case that the court must insist on a strict and rigid adherence to formalities, for the rights of owners and occupiers are being subjected to interference. The interference, on the other hand, is for the common good and the powers are entrusted to responsible public bodies of great experience. The requirements of the section must be interpreted with reasonableness in all the circumstances of the case.....I repeat,

therefore, that in my judgment the test must be: does the notice tell him fairly what he has done wrong and what he must do to remedy it?"[5]

24 It is in the light of these passages that I turn to the decision in Kaur. In that case the local planning authority issued an enforcement notice against the appellant alleging that he was in breach of planning control by erecting a mansard roof on a storage building and constructing foundations at the rear another building. The appellant appealed to an Inspector appointed by the Secretary of State. At the appeal she contended that the enforcement notice was a nullity as it required the storage building to be restored to its condition before the development took place and that was not specific. In his decision letter the Inspector had sought to correct this error. He directed that additional words be inserted into the enforcement notice requiring reinstatement of the original pitched roof by reference to a photograph of the roof taken before the development had taken place and the design of which "....be first agreed with the Local Planning Authority." The appellant appealed to the High Court. Sir Frank Layfield QC (sitting as a Deputy High Court Judge) held that the Inspector was not in error in making reference to the photograph as evidence of the prior condition of the roof or in correcting the enforcement notice to the same effect. However, in adding the requirement that the appellant must first agree with the planning authority the design of the restoration work, he had erred; the enforcement notice thereby became uncertain and failed to specify with sufficient particularity what was required of the appellant. In reaching this conclusion the learned Judge applied Miller – Mead.

25 Counsel for the First Defendant put before me extracts from the current Encyclopaedia of Planning Law. Those include extracts upon the commentary to section 173 of the 1990 Act. They make it clear that the distinction between an enforcement notice which is a nullity and one which is invalid is still recognised. They also make it clear that where the notice is a nullity it is without legal effect. There is no right of appeal in respect of such notice and if an Inspector during the course of an appeal comes to the view that the notice is a nullity the practice is that he indicates to the parties that he proposes to take further steps in relation to it.[6]

26 In the light of the foregoing the case for the Claimant is easy to formulate. He says that the Inspector correctly identified that sub – paragraph (f) was uncertain; he correctly identified that it did not comply with section 173 of the 1990 Act; however, he failed to recognise that this meant that the notice was a nullity notwithstanding his reliance upon Kaur. In line with the practice set out in the Encyclopaedia he should have indicated to the parties that he proposed to take no further action upon the notice and he should not have purported to vary its terms.

27 What is the response of the First Defendant? It seems to me that it has at its heart a decision of the Divisional Court. I refer to the decision in Bracken v East

[5] Judgment pages 225; 226 to 227 and 232
[6] Pages 2-3620 and 2-3621

Hertfordshire District Council [2000] C.O.D. 366. In that case an enforcement notice was served upon Mr. Bracken by the local planning authority which described the land affected by the alleged breach of planning control as "the land at rear of I, mount Pleasant, Hertford Heath ("the land") shown edged red on the attached plan." On the attached plan the red edging enclosed not merely the field at the rear of the appellant's house but also the house and its curtilage. The appellant was alleged to be in breach of the enforcement notice and he was summoned to appear before the justices. Before the justices he argued that the enforcement notice was a nullity because the planning unit was not clearly defined. He was convicted of the offence for which he was summoned. The justices were asked to state a case for the opinion of the High Court and one of the questions posed was whether the justices were correct to conclude that the enforcement notice was not a nullity.

28 The Divisional Court answered that question in the affirmative. That result may not be surprising. During the course of his judgment, however, Roch LJ considered Miller – Mead and subsequent cases and made comments upon which Counsel for the First Defendant relies heavily. Having quoted part of the third passage from Miller – Mead set out in paragraph 23 above Roch LJ said "The law has progressed since that time." He went on to quote from first instance decisions of Templeman J in Eldon Garages Ltd v Kingston upon Hull County Borough Council [1974] 1 W.L.R. 276 and Sir Graham Eyre QC in Oxfordshire District Council v Secretary of State For the Environment [1988] J.P.L. 324 where the learned judges had been critical of undue technicality in this field. At page 370 Roch LJ said:

"It was absurd to suggest that the misdrawing of the red line so as to include the dwelling meant that the document served on the appellant was not an enforcement notice but mere waste paper. It would defeat the clear intention of Parliament manifested in the alterations made in the planning legislation in the Acts of 1990 and 1991 to uphold the appellant's submissions. Moreover, that would depart from the whole trend of judicial decision in relation to enforcement notices which has been to see that artificial and nice distinctions only understood by lawyers no longer prevail and that the petty fogging should stop."

29 It is to be observed, however, that in his judgment Roch LJ referred to R v Wicks [1998] A.C.92. In that case the House of Lords had to decide whether a Defendant facing an allegation that he had failed to comply with an enforcement notice could raise as a defence an allegation that the issue of the notice had been motivated by bad faith, bias or other procedural impropriety. During the course of his speech (with which the other law lords agreed) Lord Hoffman said:

"The Court of Appeal dismissed the [appellant's] appeal. Keene J, who gave the judgement of the court, referred to the well – known distinction which Upjohn LJ had made in Miller- Mead v Minister of Housing and Local Government [1963] 2 Q.B. 196 between an enforcement notice which was a nullity ("waste paper") and

one which was invalid only in the sense of being liable to be quashed. A notice which could be quashed on the basis of extrinsic facts (for example, because in fact no breach of planning control had taken place) was invalid but not a complete nullity.
Miller- Mead...concerned the power of the Secretary of State to amend or vary an enforcement notice under what is now section 176(2) of the Act of 1990. The Court of Appeal decided that he could amend a notice which was otherwise invalid but not one which was upon its face a nullity.

Nowhere in his speech does Lord Hoffman criticise the reasoning of Upjohn LJ in Miller- Mead. Ads I have indicated the other law lords agreed with Lord Hoffman.

30 In my judgment the distinction between a notice which is on its face a nullity and one which is invalid until quashed is still a distinction recognised by the higher courts. I regard myself as bound by Miller – Mead. I do not believe that Roch LJ considered himself departing from Miller v Mead in relation to the distinction drawn by Upjohn LJ since Roch LJ was of the clear view that the notice in Bracken was not on its face a nullity.

31 At paragraph 31 of his Skeleton Argument Counsel for the First Defendant argues that even if sub – paragraph (f) was uncertain, nonetheless that does not have the effect of making the whole notice a nullity. He quotes no authority for that proposition. In argument he submitted that the Court or perhaps the First Defendant had the power to delete that sub – paragraph from the Notice. I do not accept either of those submissions. In all the cases on nullity of enforcement notices most of the notice complies with section 173 of the 1990 Act or its predecessor. I know of no case where the fact that only part of the notice was uncertain has allowed the court to conclude that the notice as a whole complies with the section. Certainly no such case was cited to me. Further, I do not see how the Court or the First Respondent can have power to delete the offending uncertain part and thereby render the notice operative. In the instant case the complaint is that the notice was a nullity when it was issued. Again no authority was cited for this proposition.

32 Accordingly, in my judgement the issue for my decision can be expressed thus: did the notice issued by the Second Defendant comply on its face with section 173 of the Act of 1990? If it did it was capable of being varied under the power conferred by section 176. If it did not it was a nullity.

Conclusion

33 As set out above at paragraph 21 the Inspector made an express finding that the enforcement notice did not comply with section 173 of the 1990 Act. He did so because he found that sub – paragraph (f) was uncertain on its face. In reaching that conclusion he was clearly influenced by the decision of Sir Frank Layfield in

Kaur. I am quite unable to say that the Inspector erred in law in reaching such a conclusion. Indeed Counsel for the First Respondent did not seek to argue that sub – paragraph (f) was not uncertain. One need only compare sub – paragraph (f) with the paragraphs substituted by the Inspector to realise the deficiencies in the original drafting.

34 However, having reached the conclusion that the Notice did not comply with section 173 the Inspector did fall into legal error by varying its terms. He had no power so to do because the Notice was a nullity. He should have concluded that it was, notified the parties of his view and taken no further step in relation to the Notice.

35 Accordingly, I allow this appeal. I propose to remit this case to the First Respondent in accordance with RSC Order 94 rule 13(7). The First and Second Respondents will need to consider what should happen to the Enforcement Notices served on other parties in the light of this judgement.

36 I would be grateful for a list of typographical corrections by the time this judgment is handed down.