

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2012

Before :

LORD JUSTICE RICHARDS

And

MR JUSTICE MADDISON

Between :

The Queen (on the application of Resul Altunkaynak)	<u>Claimant</u>
- and -	
Northamptonshire Magistrates' Court	<u>Defendant</u>
- and -	
Kettering Borough Council	<u>Interested</u> <u>Party</u>

Richard Kimblin (instructed by Wilson Browne LLP) for the Claimant
Simon D Butler (instructed by Kettering Borough Council Legal Department) for the
Interested Party
The Defendant did not appear and was not represented

Hearing date: 25 January 2012

J udgment

Lord Justice Richards :

1. This is an application for judicial review of a decision of the Northamptonshire Magistrates' Court in proceedings brought by the interested party, Kettering Borough Council, against the claimant, Mr Altunkaynak, for failure to comply with enforcement notices under the Town and Country Planning Act 1990 (the 1990 Act). As originally formulated, the target of the judicial review was the refusal of the justices to state a case; but as the matter has progressed it has become a challenge to the justices' substantive decision.
2. The essential issue is whether this is one of those rare cases contemplated in *Staffordshire County Council v Challinor* [2007] EWCA Civ 864, [2008] 1 P&CR 10, at [76]-[78], where a prosecution for failure to comply with an enforcement notice should be stayed as an abuse of the process of the court. The justices dismissed the claimant's application for a stay. The claimant's case on the judicial review is that they erred in law in so doing.

The factual background

3. The claimant formerly carried on a restaurant and hot food takeaway business in premises in which he had a leasehold interest at no.15 Silver Street, Kettering. The operation of the business at no.15 was covered by planning permission. In 2005 he acquired a leasehold interest in additional premises, at no.15B. Nos.15 and 15B are separated by separate premises at no.15C, in which the claimant had no interest; but he had the benefit of access between nos.15 and 15B by a connecting passage at first floor level through no.15C.
4. In 2005 an application for planning permission for change of use of no.15B from an existing class A1 retail use to a hot food takeaway use within class A5 was refused: the 'classes' to which I refer are as set out in the Town and Country Planning (Use Classes) Order 1987.
5. A further application was made in July 2006. This time it was successful. The terms of the planning permission, granted on 23 October 2006, are central to the issue before the court. The development for which permission was granted was described as:

'Conversion of shop to restaurant kitchen and hot food takeaway as an extension to the present premises at number 15.'

The location of the development was described as no.15, but it is common ground that the permission covered 15B, the address named in the application. The only conditions of the grant related to (1) the time within which the development was to be begun and (2) implementation of a specified ventilation system before commencement of the permitted use.

6. At some point thereafter the landlord refused to renew the lease of no.15, leaving the claimant in a position where he could only operate his business from no.15B.
7. In June 2007 the claimant applied for a certificate of lawful use in respect of the use of no.15B for class A3 (restaurant) purposes; but the application was withdrawn in August 2007.
8. In December 2007 he applied for planning permission for 'conversion of 15B Silver Street to an A5 takeaway independent of other properties in [the October 2006 permission]'. The council refused permission in February 2008. An appeal was dismissed by an inspector in November 2008. Nevertheless the claimant continued to carry on his hot food takeaway business from no.15B.
9. On 28 November 2008 the council served two enforcement notices on the claimant in respect of no.15B. Only one of them is material to this case. The breach of planning control alleged in it was:

'Without planning permission the change of use of the property from retail shop to a use for the preparation and sale of hot food for consumption on or off the premises and the carrying out of works as part of the unauthorised change of use, namely the

installation of an extraction system and flue through the rear slope of the property. _

The reasons for issuing the notice included that adequate provision could not be made at the premises for the proper storage and disposal of waste, and that the extraction system facilitated the use of the premises as a hot food outlet and would constitute unnecessary clutter on the roofscape in the event of the cessation of use. The steps required to remedy the breach were (1) to cease to use the premises for the preparation and sale of hot food and (2) to remove the external flue and make good the roof. In each case the time for compliance was 6 months from the date the notice took effect.

10. The claimant did not exercise his right under section 174 of the 1990 Act to appeal against the enforcement notices. It is said on his behalf that he was advised by his planning agent and architect, Mr Paul Ansell, to make further applications for planning permission (to which I refer below) rather than to appeal the notices. According to his solicitor's note of the proceedings before the magistrates, the claimant's evidence in chief on this was as follows:

“ He said that he went to see Mr Ansell with the enforcement notice. Mr Ansell said that he would sort this out for him. Mr Altunkaynak was then asked whether he made further applications, to which he replied that he told Mr Ansell who said that he would deal with this.

Mr Altunkaynak was then asked about appealing the enforcement notice. He informed the Court that he did not know how to go about appealing the notice “ . _

In cross-examination as to his knowledge of the right to appeal, his attention was drawn to a section in the annex to the enforcement notice which explained the right of appeal, and he was asked if he had read it. The note records his reply as follows:

“Mr Altunkaynak stated that he hadn't, and in fact he did not remember seeing this entire document. _

11. A further application for planning permission in respect of no.15B was made by the claimant but was refused by the council in July 2010; and an appeal to an inspector was subsequently dismissed.
12. The claimant's continued use of no.15B for his hot food takeaway business led to the council laying informations before the Northampton justices on 23 March 2010 pursuant to section 179 of the 1990 Act, alleging breach of the enforcement notices. The two relevant informations related respectively to (1) the carrying on of the sale of hot food at the premises, and (2) the failure to remove the external flue.
13. The claimant's evidence was that on 31 July 2010, on legal advice, he stopped the prohibited use of the premises; but that did not affect the extant proceedings either in respect of breach prior to that date or, on the face of it, in respect of a continuing failure to remove the flue.

14. The case was heard on 17 January 2011. The central issue at the hearing was a submission on behalf of the claimant, the basis of which I will come to in a moment, that the prosecution was an abuse of process. The justices rejected the submission, following which the claimant changed his plea to guilty. He was fined and ordered to pay costs. There is an appeal to the Crown Court, currently stayed, in respect of the level of the fine.
15. On 22 February 2011 the justices refused the claimant's application that they state a case. The ground of refusal was that the application was frivolous. That led to the proceedings for judicial review. Permission to apply was granted by the Divisional Court on 5 October 2011. Laws LJ indicated on that occasion that pursuant to the guidance given in *Sunworld Ltd v Hammersmith & Fulham London Borough Council* [2000] 1 WLR 2102, the appropriate course following the grant of permission might be to focus on the justices' substantive decision rather than on the refusal to state a case. That is the way the matter was presented before us at the substantive hearing by Mr Kimblin on behalf of the claimant, and for that purpose we granted him permission to amend the relief sought in the claim form.
16. The magistrates' court has played no active part in the judicial review proceedings. The council, represented by Mr Butler, has appeared as an interested party to oppose the claim.

The legal framework

17. The relevant enforcement notice was issued under section 172 of the 1990 Act in respect of an alleged breach of planning control as defined in section 171A(1)(a), namely 'carrying out development without the required planning permission'. I have referred already to the right of appeal under section 174. The statutory grounds of appeal include, in section 174(1)(c), that the matters alleged in the enforcement notice 'do not constitute a breach of planning control'. It is submitted on the claimant's behalf that if he had appealed the enforcement notice the appeal would inevitably have succeeded, because the October 2006 planning permission in respect of no.15B meant that his use of the premises for a hot food takeaway business within class A5, together with the related installation of the flue, was not in breach of planning control.
18. The claimant faces the difficulty that, by section 285 of the 1990 Act, the validity of an enforcement notice cannot be questioned otherwise than by way of an appeal. It was therefore not open to him to question the validity of the enforcement notice as a defence to the prosecution for its breach.
19. He relies, however, on the judgment of Hughes LJ, with whom Rix LJ agreed, in *Staffordshire CC v Challinor*. That case involved both civil and criminal proceedings in respect of breaches of an enforcement notice. One of the matters relied on by the defendant was an earlier certificate of lawful use. Hughes LJ said at [75] that if reliance was sought to be placed on a certificate of lawful use as a ground of challenge to an enforcement notice, it had to be raised by way of an appeal under section 285. But he continued:

 '76. It is certainly possible to envisage rare cases in which this law may work some injustice. They will be confined to those in which both: (a) there is a defect in the enforcement notice

which can irrefutably be established; and (b) the landowner had an understandable reason for omitting to pursue a s.174 appeal. The coincidence of those factors will, I think, be rare. But it is not entirely unknown for administrative errors to lead to the issue of an enforcement notice when there is an existing planning permission, or Certificate of Lawful Use, and the chance of such error is no doubt increased if there are two different authorities concerned in the case. It is no doubt possible that a landowner might be absent abroad, ill, illiterate or simply may wrongly think that his CLU provides an answer and he need take no advice and do nothing. There is, we are told, no power even in an exceptional case to extend time for bringing a s.174 appeal. So in such a case, rare as it may be, the landowner could perhaps find himself with a cast iron defence to a prosecution under an enforcement notice, which he is prevented by s.285 from advancing. _

20. He gave reasons why the case before the court was not such a case, but went on to say:

'78. ũ If such a case were to arise, then the courts do, as it seems to me, have limited capacity to address it. First, so long as the court retains the rarely exercised but important power to stay a prosecution on the grounds that it is an abuse of the process of the court, under the second limb of the law as explained by the House of Lords in *R v Horseferry Road Magistrates' Court, Ex p. Bennett* (No.1) [1994] 1 AC 42, the criminal court has available the means of preventing the gross injustice of a conviction. Secondly, the civil court plainly retains a discretion whether or not to grant an injunction if one is sought ũ . _

21. The claimant seeks to apply that reasoning to the facts of the present case, submitting that (1) a section 174 appeal against the enforcement notice would inevitably have succeeded (this is to apply the spirit of what Hughes LJ said, rather than his precise wording that there is a defect in the enforcement notice which can irrefutably be established); and (2) the claimant had an understandable reason for omitting to pursue an appeal, having relied completely on a qualified architect.

The claimant's case

22. The claimant's case on the first point is that no.15B has a permitted class A5 use as a hot food takeaway business by virtue of the October 2006 planning permission and that this is not limited to use of no.15B as an extension of no.15; it applies equally to use of no.15B on a stand-alone basis.
23. The October 2006 planning permission falls to be construed in accordance with the principles summarised in *R v Ashford Borough Council, ex p. Shepway District Council* [1999] 1 PLCR 12, 19C-20B. In summary, so far as relevant, the general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself. This excludes

reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. If, however, there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity.

24. Mr Kimblin submits that there is no basis for looking at extrinsic evidence in construing the October 2006 planning permission, save to the extent of looking at the application for confirmation that (as is common ground) the location in respect of which the permission was granted was no.15B. The permission is otherwise clear and unambiguous. It was plainly effective (as is also common ground) to permit a change of use of no.15B to use as a hot food takeaway. It also plainly permitted the installation of the extraction system and flue, which were encompassed within the condition requiring implementation of a specified ventilation system before commencement of the permitted use. As for the words 'as an extension to the present premises at number 15', Mr Kimblin submits that they were not effective in law to impose a limitation that no.15B could be used for the permitted purpose only as an extension of no.15 and not on a stand-alone basis. Any limitation of that kind could only be imposed by condition, yet the council imposed no such condition.
25. As to that last point, Mr Kimblin relies on the judgment of Mr Robin Purchas QC, sitting as a deputy High Court Judge, in *I'm Your Man Limited v Secretary of State for the Environment* (1999) 77 P&CR 251. In that case planning permission had been granted for use of premises 'for a temporary period of seven years'. No condition was imposed requiring cessation of the use at the end of the seven-year period. It was subsequently argued that the permission was a permanent permission. The deputy judge held that there is no express or implied power under the 1990 Act for a local planning authority or the Secretary of State to impose limitations on a planning permission granted pursuant to an application (as distinct from a permission granted by a development order). In the absence of a relevant condition imposed pursuant to section 72(2) of the 1990 Act the planning permission granted was a permanent permission.
26. Applying the reasoning in *I'm Your Man Limited*, Mr Kimblin contends that the words of apparent limitation in the October 2006 planning permission did not have the effect in law of limiting the permission granted. Any such limitation could only have been achieved by the imposition of an appropriate condition, i.e. a condition to the effect that no.15B was to be used as a hot food takeaway only as an extension of no.15 and not on a stand-alone basis.
27. It is further submitted that the planning permission granted by the October 2006 planning permission has not been abandoned and cannot be abandoned: see *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132.
28. It follows, submits Mr Kimblin, that no.15B has a permitted A5 use which is not tied in any way to the use of no.15 and which would have been a complete answer to the enforcement notice if the notice had been appealed. There was no breach of planning control because the relevant use had planning permission.
29. As to the second point drawn from *Challinor*, Mr Kimblin submits that there was plainly an 'understandable reason' why the claimant did not appeal under section 174 against the enforcement notice. He relied completely upon Mr Ansell, a qualified

architect, who advised him not to appeal but to apply for planning permission. That reliance was appropriate for a Turkish man with an incomplete understanding of English and who needed professional help to deal with complex planning issues.

The justices' decision

30. The claimant's case as summarised above is broadly the same as that advanced before the justices, with some additional detail to cover matters raised by the council on the appeal. Mr Kimblin presented it to the justices as a straightforward case and concluded his written submissions with the proposition that 'a prosecutor which is also the responsible body with powers to grant permission to develop land cannot at the same time prosecute as unlawful that which it has used its own statutory powers to grant', and that the council's conduct was self-evidently oppressive and unconscionable.
31. According to the note of the hearing, the solicitor then appearing for the council submitted that the council had not taken unfair advantage of a technicality. He referred to the claimant's evidence that he had not read the section in the document concerning the right of appeal against the enforcement notice. He argued that the council had acted reasonably in making the claimant aware of his right of appeal, and that the claimant should have appealed: the claimant was not illiterate and he had a perfectly reasonable command of the English language. It was fair to bring a prosecution.
32. In his reply before the justices, Mr Kimblin dealt both with the effect of *I'm Your Man Limited* and with the question whether it had been reasonable for the claimant not to appeal against the enforcement notice.
33. The note goes on to record the justices' findings as follows:

'It was accepted that the facts are not in dispute. The comments of Lord Justice Hughes in *Staffordshire CC* [were] also accepted by all parties. The Justices advised that they were of the opinion that Kettering Borough Council had observed all procedures and had not taken an unfair advantage of a technicality. An appeal to the enforcement notice by Mr Altunkaynak was by no means certain to be successful in any event. Whilst the Justices did not wish to be critical of Mr Altunkaynak [they] believed that the correct course of action should have been to appeal the enforcement notice.'
34. It is clear from those findings that the justices rejected the claimant's case that an appeal against the enforcement notice would inevitably have succeeded. That point is also covered in robust terms in the reasons subsequently given for the refusal to state a case, which were these:

'There is no defect in the enforcement notice that can irrefutably be established. Mr Altunkaynak made two applications for Permission to use the premises as a takeaway and both were refused. There can be no abuse of process as a result of failing to comply with the Enforcement Notice.'

35. There was some debate before us as to whether the justices had also rejected the claimant's case that there was an understandable reason why he had not appealed against the enforcement notice. I was originally doubtful whether the reasons given at the hearing were sufficiently clear to disclose a finding on that point; and that aspect of the matter is not illuminated by the reasons for the refusal to state a case. On further consideration, however, I have come to the conclusion that the justices did indeed make a finding against the claimant on the point. In expressing the belief that the correct course of action should have been to appeal the enforcement notice, they were accepting the council's submissions to that effect and were rejecting the contrary submissions for the claimant that he had acted reasonably in not appealing – submissions that were all plainly addressed to the issue of understandable reason. Nor can it be said that this finding was inextricably bound up with the finding that an appeal against the enforcement notice was by no means certain to be successful. The justices were giving reasons why neither of the conditions expressed by Hughes LJ in *Challinor* was met.
36. The question for us is whether the justices' findings in respect of the two conditions are sustainable. In order to succeed in the judicial review, Mr Kimblin has to show that the justices fell into legal error in relation to both of them.

Discussion: (1) whether there was a cast-iron ground of appeal

37. In my judgment, Mr Kimblin is correct in his submission that, by virtue of the October 2006 planning permission, no.15B has a permitted class A5 use for a hot food takeaway business and that this would have been a cast-iron ground of appeal against the enforcement notice.
38. The submission rests on the correctness of the decision in *I'm Your Man Limited*. Mr Butler did not accept its correctness but did not put forward any convincing reason why it might be incorrect, and for my part I can see no obvious flaw in the reasoning of the deputy judge. The decision has stood for over ten years without comment one way or the other either in case-law or in commentaries, at least so far as was disclosed by the researches of counsel. In the circumstances I take the view that we ought to follow it.
39. Equally, I can see no basis for distinguishing *I'm Your Man Limited*, as Mr Butler appeared to seek to do in the course of his submissions. True it is that the case was concerned with an apparent temporal limitation on the permission granted, whereas in this case the words 'as an extension to the present premises at number 15' are relied on as imposing a substantive limitation on the permission granted. But the reasoning in *I'm Your Man Limited* contains nothing to justify confining its application to temporal limitations. The relevant principle, drawn from the wording of the statute, is a general one: if a limitation is to be imposed on a permission granted pursuant to an application, it has to be done by condition.
40. Mr Butler's written skeleton argument sought to rely on the planning history in support of a submission that the October 2006 planning permission is not to be read as permission for the use of no.15B on a stand-alone basis. It pointed out that the 2005 application for stand-alone use of no.15B was refused, as was the application made in 2007 after the claimant had lost the use of no.15, as well as the application made after service of the enforcement notice. Part of the concern, as also seen in the reasons for

issue of the enforcement notice, was that no.15B did not have adequate provision for the storage and disposal of food waste; it was no.15 which had proper storage and disposal facilities. The submission was that the October 2006 permission has to be read and understood in this light, as relating to the use of nos.15 and 15B as one set of premises, not as authorising stand-alone use of no.15B; and that this is reflected in the words 'as an extension to the present premises at number 15'. As Mr Butler acknowledged in his oral submissions, however, it is not permissible to deploy the planning history as an aid to construction of the October 2006 permission (see *R v Ashford Borough Council, ex p Shepway District Council*, cited above). And if attention is focused on the terms of the October 2006 permission, as it has to be, one simply comes back to the question whether the words of apparent limitation are effective in law to impose a limitation on the permission granted.

41. Various other points were touched on in written and oral argument, including suggestions that the effect of the October 2006 planning permission was to create an enlarged planning unit at no.15, and that there was a material change of use of no.15B when it ceased to be used as an extension to no.15 and came to be used on a stand-alone basis. None of these points was gone into in any detail. None of them appears to me to provide a sound answer to the claimant's case as to the permitted use of no.15B.
42. I should also mention that some of the council's arguments were not advanced before the justices and that the council also placed before us certain documents that were not in evidence before the justices. Mr Kimblin objected to this. It is not necessary to rule on the objection since, having considered all the council's arguments and evidence *de bene esse*, I have found nothing in them that is capable of defeating the claimant's case on this issue.
43. For the reasons I have given, I consider that an appeal against the enforcement notice would inevitably have succeeded if, as I think it right to assume, it had been properly argued and the inspector had directed himself correctly in relation to it. The justices were therefore in error in finding that an appeal was by no means certain to be successful. Although the situation does not fall neatly within the wording of the first of Hughes LJ's conditions in *Challinor*, as a 'defect in the enforcement notice which can irrefutably be established', the existence of a cast-iron ground of appeal is within the spirit of that condition.
44. It should be stressed that the existence of a cast-iron ground of appeal only emerged at a relatively late stage: Mr Kimblin appears to have been the first to identify it and take the point. It cannot have been apparent to anyone on either side at the time of the enforcement notice. Mr Butler suggested that Mr Ansell must have been aware of it because he deployed the October 2006 planning permission in support of the claimant's appeal in 2008 against the refusal of the separate application for planning permission for no.15B as a stand-alone unit. From the way the October 2006 permission was deployed by Mr Ansell, however, it is clear that the point now advanced by Mr Kimblin played no part in Mr Ansell's thinking. On the contrary, he was thinking in the same terms as the council, that the October 2006 permission was limited to use of no.15B in conjunction with no.15.
45. That takes me on to the next issue, namely whether the claimant had an understandable reason for not appealing against the enforcement notice.

Discussion: (2) whether there was an understandable reason for not appealing

46. I have referred already to the claimant's case that he had an understandable reason for not appealing, in that he relied on Mr Ansell and that such reliance was appropriate for a man with the claimant's incomplete understanding of English and need for professional help in dealing with complex planning issues.
47. Mr Butler, on the other hand, submits that the kind of understandable reason envisaged in *Challinor* did not exist in this case. There was no administrative error in relation to the issue of the enforcement notice. The claimant was not abroad, ill or illiterate. He made a deliberate decision not to appeal the enforcement notice. It is said that he relied on Mr Ansell, but the only evidence on this was the claimant's evidence that Mr Ansell said he would sort it out. There was no witness statement from Mr Ansell himself and no correspondence showing what Mr Ansell had advised. It was not shown that he actually advised against appealing or, if he did, why he gave such advice. In any event it would be wrong to allow a person a second opportunity to challenge an enforcement notice, sidestepping section 285, when a professional adviser has advised against an appeal but another professional adviser subsequently gives different advice as to the existence of good grounds of appeal. That does not amount to an understandable reason for omitting to pursue an appeal.
48. My approach to those rival submissions is conditioned by my view, expressed above, that the justices themselves made a finding that the claimant did not have an understandable reason for failing to appeal against the enforcement notice. That finding was reached after hearing the evidence of the claimant. They must have accepted that evidence (they could not otherwise have said that 'the facts are not in dispute'), but in doing so they were in a good position to assess the man himself, his understanding of English and how reasonable it was for him, on receipt of the enforcement notice, merely to leave it to Mr Ansell to 'sort this out for him'. They 'did not wish to be critical' of him but were evidently of the view that the explanation he gave was not a good reason for the failure to appeal the notice, such as to justify a finding that it was an abuse of process for the council thereafter to bring enforcement proceedings.
49. The question then is whether the finding was one that the justices were reasonably entitled to make. In my judgment it was. The power to stay criminal proceedings on the ground of abuse of process is one not lightly to be exercised. Hughes LJ in *Challinor* envisaged that it would fall to be exercised in the enforcement notice context only in rare cases where conviction would be an injustice. It does not strike me as an injustice to refuse a stay in circumstances where, as here, the local planning authority has acted reasonably and in good faith both in issuing the enforcement notice and in bringing the prosecution for breach of it, and the individual's failure to appeal the enforcement notice was not accidental (as in the cases of absence abroad, illness or illiteracy to which Hughes LJ referred) or based on a simple misunderstanding of the legal position (as in Hughes LJ's example of a landowner who thinks that his certificate of lawful use provides an answer), but was the result of a deliberate decision to act on the advice of a professional adviser in making a separate application for planning permission rather than pursuing an appeal. The fact that another professional adviser has subsequently identified a ground on which an appeal would have succeeded is not a compelling reason in those circumstances for the grant of a stay. In any event, seen in the light of those broader considerations, the

justices' finding that the claimant's explanation did not amount to an understandable reason for the failure to appeal, so as to satisfy Hughes LJ's second condition, was in my view a proper one and there is no basis for this court to interfere with it.

Conclusion

50. It follows that, despite their error in respect of the first of Hughes LJ's condition in *Challinor*, the justices were entitled to find that the second condition was not satisfied and accordingly to reject the claimant's submission that the prosecution for breach of the enforcement notice was an abuse of the process of the court.
51. I should make clear that the application for judicial review in its original form, targeting the justices' refusal to state a case, was in my view well founded. The justices were clearly wrong to treat the case stated application as frivolous; and the reasons they gave for treating it as frivolous were clearly unsound. The claimant was entitled to have the substantive issues considered in this court. But now that they have been fully considered, for the reasons given I would reject the claimant's challenge to the justices' substantive decision and would dismiss the application for judicial review.

Mr Justice Maddison :

52. I agree.