JUDICIARY OF
ENGLAND AND WALES

Judge Jabbitt

In the Willesden Magistrates' Court

BETWEEN:

London Borough of Brent

Applicant Local Authority

V

1. Tark Rashti
2. Ava Rashti
3. Badih Rashti
4. Silia Rashti

5. Free Trade Import/Export Limited
6. Tenants and Occupiers and Persons having an interest in Flats 3A, 3B, 4A, 4B, 11B, 12A, 13A, 13B, 14A, 14B. 21A, 21B, 22A,22B, 23A, 23B, 24A, 24B, 31A, 32B, 33A, 33B, 34A, 34B, Freetrade House, Lowther Road, Stanmore, HA7 1EP

Respondents

Hearing: 3 and 4 March 2022
Decision: 12 April 2022

The Application.

1. This is an application for a Planning Enforcement Order (PEO) by the London Borough of Brent (LA), made pursuant to S171BA of the Town and Country Planning Act 1990.

2. The application is dated 6 July 2021 (Bundle A 2-4) and the alleged breach of planning control is the material change of use of the premises from offices to 28 flats.

3. The LA were represented by Mr Robb.
The Rashti family, respondents 1 to 4, by Mr Turney.
None of the other respondents attended the hearing.

4. The substantive hearing was heard over two days, 3 and 4 March 2022.
Written submissions were directed and served.
My decision to be given on 12 April 2022.

5. I read the five bundles of evidence and exhibits, containing over 600 pages, and the bundle of authorities. Unlike counsel, I had no specialist knowledge of enforcement of alleged breaches of planning control, nor am I self-evidently an expert Planning Inspector. After the substantive hearing I looked at the government website to attempt to improve my understanding of the subject. It is authoritative open source material, an overview from HM GOV.UK, that I found helpful. I have therefore set out the information, in part, as an annexe A to this decision

Legal Background and Case Summary.

6. I now set out below the opening case summary, and skeleton argument served by Mr Robb on behalf of the LA.

7. The LA summary sets out a helpful case summary, but plainly from the perspective of the LA. I have reproduced the full initial skeleton submissions of the respondents at Annexe B and summarised the overall submissions in the course of this decision.

The LB of Brent Skeleton Argument.

1. *This Skeleton Argument is submitted in support of the Council's application for a Planning Enforcement Order ("PEO") which is made under the provisions of S. 171BA of the Town and Country Planning Act 1990 ("the 1990 Act"). The Council's application for a PEO can be found at A.2-4.*
2. *The alleged breach of planning control for the purposes of the application is the material change of use of premises at Freetrade House, Lowther Road, Stanmore, HA7 1EP ("the Property") from office use to use as 28 residential flats.*

Legal Background

3. *S. 124 of the Localism Act 2011 inserted S. 171BA to S. 171BC into the 1990 Act.*
4. *The additional sections, which set out provisions dealing with PEOs, were intended to increase the powers of local planning authorities to clamp down on breaches of planning control which had been deliberately concealed, and which might otherwise benefit from the time limits (contained in S. 171B of the 1990 Act) by which planning breaches may obtain immunity from enforcement action.*
5. *S. 171BA sets out time limits for local planning authorities to take enforcement action in cases involving concealment when a PEO has been granted by the Courts:*

"(2) If a magistrates' court makes a planning enforcement order in relation to an apparent breach of planning control, the local planning authority may take enforcement action in respect of -
(a) the apparent breach, or
(b) any of the matters constituting the apparent breach, at any time in the enforcement year."

6. *S. 171BB sets out the procedure for making PEO applications. This includes the requirement at (1) that any application for a PEO must be accompanied by a certificate.*
7. *Further, S. 171BB makes clear that:*

"(2) For the purposes of subsection (1), a certificate –
(a) signed on behalf of the local planning authority, and
(b) stating the date on which evidence sufficient in the authority's opinion to justify the application came to the authority's knowledge ***is conclusive evidence of that fact****." (emphasis added)*

8. *S. 171BC sets out a two-stage test to be applied by the Courts in deciding on whether to grant an application for a PEO:*

"171BC Making a planning enforcement order:
(1) A magistrates' court may make a planning enforcement order in relation to an apparent breach of planning control only if –
*(a) the court is satisfied, on the balance of probabilities, that the apparent breach, or any matters constituting the apparent breach, has (****to any extent****) been deliberately concealed by any person or persons, and*
(b) the court considers it just to make the order ***having regard to all the circumstances****." (emphasis added)*

9. *In Jackson v Secretary of State for Communities and Local Government [2015] EWHC 20 (Admin), Holgate J made clear the High Court's view (at para. 67-68) (S.39) that the introduction of rules for PEOs to deal with deliberate concealments of planning breaches were intended to sit alongside, rather than to replace, the principle contained in the leading authority of Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government [2011] 2 AC 304.*
10. *In Welwyn, the Supreme Court had identified a four-stage test through which deliberate concealments of planning breaches could lead to the loss of immunity from enforcement action by the passage of time. Holgate J set out this four-stage test at para. 34 of his judgment in Jackson.*
11. *Holgate J's conclusions in Jackson were supported by the Court of Appeal (see [2015] EWCA Civ. 1246). Richards LJ confirmed the Court's view (at para. 45), that whereas there is "an overlap" between the Welwyn principle and the provisions relating to PEOs, the two sets of rules dealing with concealment of planning breaches were intended to sit alongside each other.*
12. *Richards LJ also made clear (at para. 48) the circumstances in which local planning authorities may wish to rely on the PEO provisions:*

"For example, the extent of concealment may be insufficient, or arguably insufficient, to engage the Welwyn principle, but sufficient to justify the making of a PEO so as to enable enforcement action to be taken outside the normal time limit in section 171B."

13. *In summary, the introduction of PEOs provides local planning authorities with a new, and potentially very effective, tool to clamp down on breaches of planning control. The test to be applied by the Courts to the question of whether concealment has occurred has been deliberately framed in broader terms than set out in Welwyn: does the Court consider, on the balance of probabilities, that there has been a "deliberate concealment" of planning breaches "to any extent"?*
14. *As Holgate J made clear in Jackson (at para. 44 (i)):*

"…the legislation employs a relatively simple and broad definition of deception which embraces and goes beyond the Welwyn type of case. But the broad scope of that definition is balanced by a requirement that the court should be persuaded that the making of a PEO is just in all the circumstances."

Factual Background

15. *On 7th February 2014, the Council received a prior approval application to convert the Property from an office use to use of 14 residential flats. This prior approval was granted by the Council on 16th April 2014 (A.24).*
16. *On 5th June 2014, a further prior approval application was submitted to the Council, this time for "the subdivision of the space into 28 studio flats" (A.43). The new prior approval application made it clear (A.45) that the "previous prior notification has not been implemented".*
17. *On 18th July 2014, the 28-unit prior approval application was withdrawn (A.54).*
18. *On 22nd August 2019, the Council issued an enforcement notice alleging as the breach of planning control:*

"Without planning permission, the material change of use from offices (Use Class B1) use to 28 flats."

19. *Following a Public Inquiry in front of a Planning Inspector, a Decision Letter was issued (A.12) in which the appeal against the Enforcement Notice was dismissed and the Enforcement Notice was upheld with various corrections and variations.*
20. *Specifically, the Planning Inspector found that:*
    - *(i) "As a matter of fact and degree, the prior approval scheme was not implemented and the change of use that occurred was from offices to 28 studio flats." (para. 15);*
    - *(ii) "The appellants' have been less than honest in their dealings with matters relating to Council Tax, street naming and*

numbering, securing EPC and filing of building control certificates." (para. 35); but that

(iii) *"Overall, in my judgment the appellants' conduct did not amount to the degree of deception necessary to engage the principles set out in Welwyn" (para. 38).*

21. *The Planning Inspector therefore concluded (at para. 50),*

"…on the balance of probabilities, that the material change of use of 16 flats…took place more than 4 years prior to the issue of the enforcement notice and so, at the date the enforcement notice was issued, the time for taking enforcement action as set out in s.171B (2) of the 1990 Act as amended had expired. The appeals succeed on ground (d) to that extent only."

The S.171BC (1) (a) Test

22. *As above, the Court needs to decide whether it:*

*"is satisfied, on the balance of probabilities, that the apparent breach, or any matters constituting the apparent breach, has (**to any extent**) been deliberately concealed by any person or persons." (emphasis added)*

23. *The evidence of the various measures which were taken after the first prior approval application in 2014 to achieve this concealment are set out within the first Witness Statement of Nigel Wicks (A.10-12).*
24. *The Building Control applications which were submitted to the Council on 15th May 2014 were made in respect of 14 flats (A.57-65).*
25. *Further, no amendment notice was served as required under the provisions of S. 51A of the Building Act 1984 (S.21), which would have made it clear to the Building Inspector prior to the issuing of Completion Certificates on 12th April 2016, that 28 not 14 units had been constructed at the Property.*
26. *The Energy Performance Certificates which were submitted to the Council and dated and entered into the public register in March 2016 were in respect of 14 flats (A.66-121).*
27. *The Valuation Office entries which were submitted for Council Tax to be assessed on the flats at the Property between 1st April and 31st December 2015, were in respect of 14 flats (A.122-135).*
28. *The Street Numbering application was submitted to the Council in respect of 14 flats (A.136-149).*
29. *It was only when evidence was received by the Council on 24th March 2021 in relation to the appeal against the Enforcement Notice that the Council first became aware that use of the Property as 28 flats first began on 13th February 2015 – and it is for this reason that the Council has specified 24th*

March 2021 as the relevant date on which they had received sufficient evidence justifying the application for a PEO.

30. *As Mr Wicks states in his third Witness Statement at para. 24 (A.290):*

"If the respondents had:

(a) placed 28 numbered letter boxes at the entrance to the flats instead of 14;

(b) created 28 numbered doors to the flats instead of 14;

(c) Registered 28 flats with the Valuation Office instead of 14;

(d) Registered 28 Energy Performance Certificates instead of 14; and

(e) issued 28 completion Certificates instead of 14,

the Council would have taken enforcement action earlier."

31. *In light of the above, the Planning Inspector was correct to identify (at para. 35 of her Decision Letter) that the respondents had been "less than honest in their dealings" with the Council relating to the development of the Property in a number of respects.*
32. *It is therefore, in the Council's view, beyond sensible argument that the conversion of the Property from offices to 28 residential units was indeed deliberately concealed from the Council.*

The S. 171 BC (1) (b) Test

33. *As above, in the event the Court is satisfied that there was indeed deliberate concealment such that the threshold set out within the first limb of S. 171BC is met, it must go on consider whether it would be:*

"…just to make the order having regard to all the circumstances."

34. *The Council wishes to underline 7 key issues for the Court's consideration, as set out below.*

1. ***The Article 4 Direction***

35. *The original prior approval application was made under the provisions of Class J of the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 1995.*
36. *Class J of Part 3 to Schedule 2 introduced in 2013 permitted development rights for the:*

"Change of use of a building….to a use falling within Class C3 (dwellinghouse) of the Schedule to the Use Class Order from a use falling within Class B1 (a) of that Schedule (office)"

37. *On 4th August 2017 (confirmed on 3rd July 2018), the Council secured an Article 4 Direction (S.65) which removed Class J from various different areas of the Council's administrative area, including the area in which the Property is situated (S.85).*

38. *The purpose for which the Article 4 Direction was sought by the Council was the need to protect strategically important areas of office, light industrial and storage uses from conversion by developers to residential use.*
39. *The Council's concern is reflected in its designation of the areas covered by the Article 4 Direction as Locally Significant Industrial Sites ("LSIS"), and this approach is set out in Policy DMP 14 from the 2016 Local Plan (S.96) and Policy BE2 from the 2021-22 Draft Local Plan (S.99).*
40. *The Council's Local Plan policies which aim to protect the status of LSIS within the Borough also reflect Policies E4 and E6 of the 2021 London Plan (S.107).*
41. *The respondents would not now, in other words, be able to take advantage of the permitted development rights under which prior approval was first granted in 2014, and indeed, the Article 4 Direction makes clear the Council's priority need is to protect its limited and valued stock of non-residential buildings from conversion in several different parts of the Borough.*

2. <u>*Amendment of Class J*</u>

42. *The Government acted in 2020 to remove Class J permitted development rights where these would lead to the creation of dwellings below a minimum of 37 Sqm floor area. Under S.I. 1243 2020 (S.87):*

"Amendment in relation to space standard

3. In article 3, after paragraph (9) insert—

"(9A) Schedule 2 does not grant permission for, or authorise any development of, any new dwellinghouse—

(a) where the gross internal floor area is less than 37 square metres in size; or

(b) that does not comply with the nationally described space standard issued by the Department for Communities and Local Government on 27th March 2015.

(9B) The reference in paragraph (9A) to the nationally described space standard is to that standard read together with the notes dated 19th May 2016 which apply to it."

43. *The 14 units which were granted prior approval in 2014 were supposed to provide 40 sqm of accommodation. In fact, however, the 28 units that were constructed provided only 20 sqm of accommodation for each unit, almost half the 37 sqm minimum standard referred to in S.I. 1243 2020 and the 2015 Nationally Described Space Standards (S.89) which the S.I. refers to.*

3. <u>*The Council's Development Plan Policies*</u>

44. *The residential units at the Property also breach the standards set out within various policies from the Council's Local Plan (2016) and the London Plan (2021).*
45. *These policies seek to ensure that high general standards are adhered to by developers in the design of residential accommodation, so as to protect the amenity and living conditions of future occupiers (e.g. see DMP1 at S.95).*
46. *The Policies specifically provide for the provision of minimum sizes of different kinds of residential accommodation. Policy DMP18 (S.97) refers to the minimum spatial standards set out in the London Plan Policy i.e. 37 sqm (see D6 and Table 3.1 at S.101). Again, the size of the units being provided at the Property is almost half this minimum standard.*

4. ***The Current Status of the Property***

47. *The Planning Inspector made it quite clear in her Decision Letter (A.12) that, contrary to the argument submitted on behalf of the respondents, the 14-unit scheme which had obtained prior approval in 2014 was never implemented. She stated (at para. 15):*

"The Appellants' closing submissions suggest that the prior approval was being carried out in stages: from offices to 1-bed flats; and then from 1-bed flats to pairs of studios. However, when the works commenced in October 2014 on units 33 and 34, they were laid out and fitted in such a way that no further works, other than a lock on the bedroom door, was needed to facilitate creation of the 20m Sqm studio flats. These units were then occupied as 20 sqm studio flats and not 40 sqm flats as granted in the prior approval scheme. Indeed, none of the 14 units which were granted consent for conversion to 40 sqm flats were ever occupied as such. As a matter of fact and degree, the prior approval scheme was not implemented and the change of use that occurred was from offices to 28 studio flats."

48. *The current status of the property is therefore that is does not benefit from any planning permission for conversion from office to residential use. The building therefore currently has a lawful office use.*

5. ***Availability of Appeal Against Further Enforcement***

49. *As set out above, if the Court grants the application for a PEO, under the provisions of S.171BA, the Council would have a period of 1 year to issue a new Enforcement Notice.*
50. *In turn, the respondents would be entitled to issue a statutory appeal against this new Enforcement Notice under the grounds set out at S. 174 (2) (a) – (g) of the 1990 Act. Such an appeal could include arguments (at ground (a)) that planning permission should be granted for the development.*

6. ***Availability of Planning Application***

51. *Further to point 5 above, the Council has repeatedly reminded the respondents that it is open to them to issue a planning application in order to seek regularize the use of the Property. Any such application would be tested against the Council's Development Plan policies, and other material considerations. No planning application has been received by the Council.*
52. *If any application for planning permission were refused by the Council, a statutory right of appeal would exist under the provisions of S. 78 of the 1990 Act, and any such appeal would be determined by an independent Planning Inspector.*
53. *The Council believes that bearing in mind the Article 4 Direction, the withdrawal of permitted development rights under Class J, the very poor amenity standards which the accommodation provides for occupiers of the Property in breach of the Council's planning policies and national guidance, the current lawful use of the Property for office and not residential purposes, an opportunity now exists for the respondents to undertake a conscientious planning process through the submission and determination of a proper planning application.*

7. ***Minimal Impact on Current Occupiers***

54. *The Council is mindful of the importance of protecting the rights of any occupiers of the Property, and it has therefore indicated to the respondents that in the event the application for a PEO is granted:*
    - *No existing tenant will be forced to leave any of the units;*
    - *Tenants may be permitted to use the double units wherever possible (i.e. taking available space in each unit from 20 sqm to 40 sqm); and*
    - *Any PEO which is granted will rely on natural wastage of tenants as they leave the Property, whilst ensuring that no new tenancy agreements are granted.*
55. *The Council's approach is intended to minimize the inconvenience caused to any resident who is currently living at the Property.*

The Issues for the Court to determine.

8. a**.** That the application has been brought in time (i.e. within the deadline set out in s.171BB (1).
b. That there has been "deliberate concealment" of the sub-division; and
c. That it is just to make the PEO having regard to all of the circumstances

Preliminary Issues re: Jurisdiction.

Issue Estoppel and Abuse of Process.

9. At the outset of the substantive hearing, Mr Turney raised as preliminary matters, issue estoppel and abuse of process. Mr Turney submitted that this was an issue where the guidance of the Divisional Court may be sought. Mr Robb opened the case for the LA, and I then heard submissions from both counsel on the two issues. My decision was that issue estoppel and abuse of process do not apply in these proceedings, but in my decision, I would give more detailed reasons.

10. I have now, of course heard the oral evidence as well as reading the material provided in advance of the hearing.

11. I have considered the submissions, written and oral, on behalf of the parties.

12. Plainly LA's have a discretion to take enforcement action, taking into account national and local development plans, and any other material considerations. LA's have a range of enforcement powers. There is clearly a public interest in the enforcement of planning control, which should be exercised in a proportionate manner.

13. Issue estoppel arises as a legal principal, when there is an issue or issues involved in proceedings between parties, which has been litigated and decided in a first set of proceedings between the parties, and in subsequent proceedings between the same parties, one of the parties seeks to reopen the same issue or issues. The justification for preventing relitigating such issues is principally to bring finality to the matter.

14. On behalf of the respondents, in summary, it is submitted that the Planning Inspector's findings at para 38 of her decision letter are binding upon this court, that finding was that there was no deliberate concealment, this was a final decision on its

merits, after an examination of written and oral evidence at the Appeal (held remotely) on 20 April 2021, the decision handed down on 24 May 2021.

15. The principal decision cited in support of the respondent's case is *Thrasyvoulou v Secretary of State for the Environment [1990] 2 AC 273 (1989)*. In that case A building owner appealed against enforcement notices which alleged that there had been a material change of use of his buildings in 1982. This notice was issued by a planning authority. As a result of the appeal an inspector determined that the buildings were in hotel use. The use of the buildings did not change between 1982 and 1985. Nevertheless, in the latter year the planning authority issued further enforcement notices alleging that there had been a change of use from hotel to hostel. The Court of Appeal accepted a plea of action estoppel.
Held: The House of Lords confirmed the decision.
Lord Bridge said: 'In *relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions.' And*
'The doctrine of res judicata rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims 'interest reipublicae ut sit finis litium' and 'nemo debet bis vexari pro una et eadem causa'. These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in the criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the statutory provisions.'
and 'the local planning authority were . . . estopped from asserting that there had been a material change of use between certain dates, which expressly contradicted the finding made by the first planning inspector, which was not merely incidental or ancillary to his decision but was an essential foundation for his conclusion that no

breach of planning control was involved in the use being made of the structure which was the subject of the first notice.'

16. The LA were seeking to establish at the Planning Appeal that the *Welwyn* criteria applied, namely:
a. there was a positive deception in matters integral to the planning process.
b. that deception was directly intended to undermine the planning process.
c. it did undermine the planning process; and
d. the wrong doer would profit directly from the deception, if the normal limitation period were to enable them to resist enforcement.

17. The Planning Inspector's decision that there was no deliberate concealment is therefore binding on this court.

18. These are submissions that I have carefully considered, however, as I stated in brief summary at the substantive hearing, I accept the submissions of Mr Robb that this is an application for a PEO to a court, under a different statutory provision, requiring the application of a different test of whether, deliberate concealment to any extent had taken place, and whether it is just to make the order in all the circumstances

19. In *Thrasyvoulou* there were two enforcement notices, the first in 1982, and a further notice in 1985, the LA sought to revisit the findings of the first Planning Inspector, in the second application. That is plainly different from the position in this hearing.

20. Mr Robb submitted, and I accept that the PEO scheme is a relatively new and effective method of enforcement of planning control, which deliberately provides a broader test than that set out in the *Welwyn* case. It is for the LA able to prove on the balance of probabilities that there has been deliberate concealment of planning breaches to any extent.

21. Thus, I am unable to find that issue estoppel is operative in this case, but even if I had done so, I consider that the assertion that there was no finding of deliberate concealment of the development to any extent, is an over simplification of the findings of fact made by the Planning Inspector.

22. It is instructive to set out in full the findings of fact made by the Planning Inspector at para 38 of her decision:
"*The appellants' conduct has been shown to be misleading. In particular, there was no specific attempt to bring the material change of use of the building and the existence of 28 flats to the attention of the local planning authority. However, the evidence does not demonstrate the development was deliberately concealed or that there was a planned course of deception designed to circumvent planning control and escape enforcement. Overall, in my judgement the appellants conduct did not amount to the degree of deception to engage the principals in Welwyn. The appellants appear to have mostly pursued deliberate inaction, so as to achieve concealment, rather than taking sustained or actively deceptive steps (My emphasis). I conclude therefore on balance, that there was no concealment of the change of use of the property to 28 flats by positive deception in matters integral to the planning process. The Welwyn principal is not engaged, and the appellants are not deprived of the benefit of the four-year limitation period in S171B (2).*

23. Those detailed findings are relevant to the issue of whether there has been deliberate concealment "*to any extent*".

24. In conclusion, I consider that I am able to take note of and give weight to the findings of fact of the Planning Inspector, but also to make my own findings of fact, when applying the statutory test in S171BC(1)(a).

25. I will also, in the alternative, make a decision based entirely upon the findings of the Planning Inspector. It follows that I do not consider that her findings, even if binding on this court, preclude further application of the statutory test in S171BC(1)(a).

26. In relation to the submission that these proceedings are an abuse of process, I propose to take this issue shortly.

27. I have considered the submissions, I accept, in common with the Planning Inspector that it was open to the LA to have served earlier, either a planning contravention notice to elicit further information from the respondents, and then take enforcement action. I have also not heard any explanation for the delay, and I also accept that the respondents have been prejudiced to a degree as a consequence.

28. These issues are a consideration as to whether the application for a PEO is in time and whether it is just to make the order in all the circumstances.

29. However, I am unable to find on the evidence I have now heard that the LA has acted in bad faith, or have sought unfairly to manipulate proceedings, nor that this application is a collateral attack on another tribunal's decision.

30. I am sure that the LA were disappointed by the decision of the Planning Inspector, but I consider it is within the LA's discretion to bring an application before the court for a PEO, with a different test, if the LA consider that there has been a substantial and continuing breach of planning control. There is nothing in the legislation to prevent such an application.

The evidence heard at the Substantive Hearing.

31. At the hearing I heard oral evidence from three witnesses, Mr Nigel Wicks on behalf of the LA.

32. Mr Tarik Rashti on behalf of the first to forth respondents.

33. Mr Ian Coward, called on behalf of the above respondents.

34. The notes below do not purport to be a verbatim account of the evidence, but a record of the evidence I consider to be significant.

Mr Nigel Wicks. Town Planner.

35. Mr Wicks is the director of Enforcement Services Ltd, which is engaged by the LB of Brent to remedy alleged breaches of planning control in the Borough.

36. He adopted his statements:
Bundle A.
a. Statement dated 27 October 2021. Page 283-285.
b. Statement dated 7 December 20-21. Page 286-290
c. Statement dated 6 July 2021. Page 10 -11.

37. He said in additional questions that the issue by the LB, of a Planning Enforcement Notice (PEN), was different from an application to the Court for a Planning Enforcement Order (PEO). They were two different regimes and could be used in the alternative. If an Enforcement Notice was in effect, but there was later evidence of a breach of planning control, the LB could apply to the court for an Enforcement Order. There was a different evidential basis for the two means of enforcement.

38. An application for an PEO was fairly new method of enforcement, to address the acquisition of "Immunity Rights", as a consequence of the Welwyn/Hatfield decision. It was recognised that individuals should not benefit from "Immunity Rights" if there had been deliberate concealment or deception.

39. The LB would not always resort to a PEO, on behalf of the LB of Brent, he had served approximately 200 PEN's, it would be unworkable to serve that many PEO's.

40. (This is not oral evidence, but at page 287, paras 12 of his statement dated 7 December 2021, he recorded:

1. *The appellants' statement of case of 25 August 2020 informed the Council of the evidence the appellants intended to produce of the use of the Premises. It did not contain such evidence. Evidence was not produced to the Council until 23 March 2021. That evidence did not contain the stream of records of rent receipts and deposits supported by bank statements or the electricity charges supported by utility invoices that were referred to in the statement of case.*

41. At pages 289 and 290, paras 23,24, 25, 26 and 27, he stated:

   a. *The Council was aware of unauthorised development on 7 January 2018, but it did not have sufficient evidence of the extent or nature of the unauthorised development to inform a decision on the expediency of enforcement action;*
   b. *The Welwyn test applied by the Inspector sets a higher bar than that set by s171BC;*
   c. *The respondents' own evidence is that the unauthorised 28 flat development has generated nearly twice the rental income they could have expected from the permitted 14 flat development. They have received an income around £25,000 per month since January 2016 and will continue to receive such income until the compliance period expires 24 February 2022. Thereafter they will receive the income*

from 16 flats, unless and until further enforcement action is taken. The financial consequences of a PEO for the respondents will be that they return to the income generated by the office building they held before the unauthorised development began, having benefitted from an income of around £1.8million in the meantime. Those consequences are not severe;

d.

i. Tenants are living in flats around half the minimum national space standard for single person dwellings;

ii. Many of those dwellings are occupied by 2 persons;

iii. The respondents conceded to the public inquiry that planning permission should not be granted for those flats because they fall far short of development plan standards of accommodation;

iv. It has remained the respondents' prerogative to apply for planning permission for development of the premises, including rearrangement to accord with policy compliant space standards;

v. Of the 16 flats the respondents provided evidence for to the public inquiry, only 2 tenants moved in before the issue of the Enforcement notice, and the average stay of the tenants who had been in occupation since 2015 was less than 12 months;

vi. Any new enforcement notice arising from a PEO would be subject to a further right of appeal and would have a minimum 6 month period for compliance;

vii. The Council as housing authority would not force eviction of any tenants. It would expect to secure compliance through natural wastage;

viii. During any compliance period harm could be mitigated by the letting of 2 flats as 1 to overcome space standard deficiencies; and.

ix. The respondents have put no alternative development proposals to the Council since the unauthorised development begun.

2. *If the respondents had:*
    a. *Placed 28 numbered letter boxes at the entrance to the flats instead of 14;*
    b. *Created 28 numbered doors to the flats instead of 14;*
    c. *Registered 28 flats with the Valuation Office instead of 14;*
    d. *Registered 28 Energy performance certificates instead of 14; and*
    e. *Issued 28 completion Certificates instead of 14*

   The Council would have taken enforcement action earlier

3. *If the Council had been provided with evidence, before 23 March 2021, of the letting of those 28 flats beginning on 13 February 2015, the Council would have applied for a PEO earlier.*

4. *The respondents concealed the unauthorised development of 28 flats for as long as they could, and did not produce evidence of that concealment before their evidence to the public inquiry of 23 March 2021.*

5. *A PEO is just in the circumstances.)*

42. In his first statement, he stated that the door numbering, the Energy performance certificates, and the completion certificates did not provide any evidence of 28 units at the site. The only evidence was one complaint, otherwise all the evidence suggested 14 flats.

43. The fire escape plans would have not been conclusive but only referred to 14 flats.

44. His state of knowledge changed on 24 March 2021, the planning appeal against the PEN showed the LB the respondent's evidence of the subdivision of the 14 flats into 28 studio units. The LB received 3 ring binders of evidence, including tenancy agreements, and at this point there was overwhelming evidence of a breach of planning control, and that was the date the LB certified it had the requisite knowledge.

45. Mr Wicks was referred to Bundle A, page 12, the Appeal decision of the Planning Inspector, against the PEN, made on 24 May 2021.

46. The appeal found that there had been a breach of planning control, in that without planning permission, there had been a material change of use from office use to 28 flats, it upheld the requirements of the PEN, subject to amendments.

47. In relation to appeal ground D, the inspector found that in accordance with the Welwyn/Hatfield case, there was insufficient evidence of deliberate concealment or deception. Therefore, the appellants were not deprived of the benefit of the 4-year limitation period in S171B (2) T& CPA 1990. Thus 16 flats gained immunity from enforcement action.

48. Mr Wicks said this was an issue for the LB, but a different test was to be applied for an application for a PEO.

49. In the appeal decision by the planning inspector, at page 19, para 38, she recorded that the appellant had been "less than honest" but had not exhibited the degree of deception to meet the test in the Welwyn/Hatfield case. The concealment was to a lesser extent.

50. The nature of the evidence presented to this court was different to the evidence presented to the planning inspector. In particular, there was the valuation report, commissioned by the respondent in 2016, where the valuer was under the impression that the building had 14 residential units. This evidence was received from the respondent in these proceedings. The valuer had received 14 tenancy agreements not 28. Mr Wicks said there was clear evidence of deliberate concealment, to the planning inspector, 28 studio flats and to the valuer, 14 flats.

51. There had been an amendment in 2020 by the government to Class J permitted dwelling development rights if the proposed development had a gross internal floor area of less than 37 square metres. This addressed a short-term measure to alleviate the then housing crisis and regulate dwellings that were too small. This was part of the London Plan. The studio flats would have a square footage of approximately 20 square metres.

52. Mr Wicks said the 14-unit scheme was never implemented and had lost the benefit of prior approval. There is no current approval at the site for residential use. The LA would not evict the remaining current tenants, they were innocent victims, and the LA would secure vacation of the premises by natural wastage.

53. He said that 16 flats had become lawful because of the respondent's deception, those 16 flats have a floor area of approximately 20 square metres, this was not acceptable to the LA. It has been open to the respondents to apply for planning permission for flats at the site in accordance with national standards, they have not done so. However, the LA considers the site is a locally significant industrial site, and the LA does not accept the long-term use of the site for flats. If the 16 flats are permitted to remain, they will remain as substandard flats.

54. In cross examination, Mr Wicks said he speaks on behalf of the LA, but he is not a decision maker. He provides advice to Mr Wroth, who is the decision maker. He was not involved in the site visits in 2018 and 2019 and was not involved in the decision to issue the PEN. He was involved in the process but does not recall when his involvement began. There had been an apparent breach of planning control, which was referred to in the PEN.

55. The application for a PEO requires different evidence and a different process. Bundle B, page 124 is the PEO appeal form, filed in September 2019, at Ground D,

the advisors for Mr Rashti admitted the 14 original units had been subdivided into 28 units. Mr Wicks said that was an admission of a breach of planning control, but Mr Rashti said that he did not know if he was in breach. It was not enough to go to court, it was an ambiguous admission, and not enough to found a PEO breach.

56. Ground B was a submission on behalf of Mr Rashti that at the time the PEN was issued, it was too late to take enforcement. Mr Wicks said that documents that would have provided evidence to the LA were not served until the appeal process began.

57. Bundle B, page 134 was an admission in the appellants statement of case, that of the total 28 flats, 16 are immune from enforcement action. Put to Mr Wicks that this admission, together with other documents, the EPC certificates was sufficient for the LA to acquire knowledge of the breach, he said that a PEN was appropriate at that stage, the breach had been concealed.

58. Counsels advice at Bundle A, page 296 showed the breach of planning control, but Mr Wicks said Mr Rashti's counsel had been misled by his client. The subdivision of the flats took place in 2015, but there were never 14 flats, the development was for 28 flats. Mr Wicks said that the LA did not see the 28 tenancy agreements.

59. Mr Wicks did not accept that before the exchange of documents for the appeal there was sufficient evidence to put the LA on notice, of a planning breach.

60. There had been consultation with the tenants. They will not be at risk, and will not be required to leave, the LA will allow for natural wastage of the clients. The PEO will requires the owners to cease residential occupation. He would expect a reasonable landlord to offer alternative accommodation.

61. Mr Wicks said that he was not questioning the decision of the Planning Inspector, nor seeking to go behind her decision. A different test was now being applied.

62. In re-examination, Mr Wicks confirmed that the LA would not harm the welfare of the tenants and would mitigate their position.

63. He agreed that Mr Rashti's counsel's opinion cannot be reconciled with the valuation report from Cluttons.

64. The EPC certificates generated in 2016 refer to 14 units, so clearly the provider of the EPC certificates was misled.

Mr Tarik Rashti. First Respondent.

65. Mr Rashti adopted his statement at Bundle B, pages 13-22 dated 20 January 2022.

66. By way of background, he was born in Iraq, came to the UK in 1977. He studied civil engineering in Iraq.

67. Ava Rashti is his wife, Badih is his brother, and Silia is his brother's wife. He speaks on behalf of the family.

68. Freetrade House was purchased by the family in June 1993, it was developed into offices. Units 1 and 2 on the ground floor were sold as offices, the remaining 14 units are the subject of these proceedings.

69. In April 2014, they obtained "prior approval" to change the 14 units to residential units. This was permitted development. They did this because they struggled to sell the remaining units as offices. The intent was to create 14 flats. The Planning Inspector found that there were only ever 28 studio flats, Mr Rashti said they rented each flat to 2 people, with 2 tenancy agreements. They would not have achieved a decent rental yield otherwise.

70. The Inspector found, and he accepted that there was a breach of planning control, but he had not been certain that there had been a breach, he did not realize at the time that there was a breach.

71. He registered 14 flats for council tax because he thought there were 14 flats, this also applied to the EPC certificates, and the door numbering. In respect of building control, he did not think the units could be characterised as 28 flats. He only became aware of the LA's concerns after the service of the PEN in August 2019. If he had been informed before, he would have corrected the breach.

72. In relation to obtaining a loan on the flats in 2016, Cluttons were appointed to prepare a valuation in January 2016. The Cluttons report (B5, P 55), refers to 14 flats.

73. Mr Rashti said he thought there were 14 flats. There was no subsequent mention of 2 tenancies per unit, but he did correct the document later.

74. In June 2014, they did seek prior approval for a change of use to 28 flats, but this was subsequently withdrawn. He said he was advised to withdraw the application and he did so.

75. In August 2019, they received the PEN, and they were advised to appeal the decision. He accepted, based on the notice that there was a breach of planning control. He does not accept that he concealed the breach, he informed the lender and his lawyers. He was never told that he needed planning consent for 28 flats. He was upset when the Planning Inspector said he was "less than honest", as a family they have principals, but it was her opinion and he respected it.

76. It was her finding that he knew that the Building Control Certificate were wrong, that was her finding, he did not agree. He was not asked to provide the tenancy agreements.

77. They complied with the PEN. If a PEO is granted, enforcement must take place within 12 months, they would have to consider the tenants. The enforcement proceedings have been very stressful for him and his family.

78. After the appeal, he did not think there would be any further proceedings, and they were given 9 months by the Inspector to comply with the notice, and they have done so.

79. Their rental receipts have dropped by 40% because of the alterations that were ordered. He has tenants that have stayed for 3 to 4 years. The 12 tenants that left had said that they had been happy there.

80. The test for the grant of a PEO is that the breach was concealed, and it is just to make the order. He does not consider that he or anyone else concealed the breach, he is hurt by this allegation, he does accept that there was a breach of planning control.

81. He thought that everything was decided by the decision of the Planning Inspector.

82. In cross examination, he agreed that he had been a businessman and company director for many years, a civil engineer here and abroad. He has owned properties in the UK. He rents out other properties, and he converted Freetrade House originally into offices. He is familiar with the responsibilities of a landlord to a tenant, familiar with lawyers and planning consultants.

83. He has taken planning advice over several years from Mr Ian Coward. He had taken his advice in respect of the applications in respect of 14 and 28 flats. He has always said that he considered that he had 14 1 bed flats. The Planning Inspector found that the 14-unit scheme was never implemented, and 28 studio flats were constructed, with 2 tenancy agreements for each unit. Mr Rashti maintained that he believed there were 14 flats, which had been subdivided.

84. In 2016, he sought a loan, by way of a remortgage on the building. In the Cluttons report, at page 55, it refers to 14 flats and the gross rent. He said that he tried to correct this.

85. Mr Rashti stood by his statement at page 19, para 33, that he thought there were 14 flats, the only difference was they were rented to 2 different people, with separate tenancy agreements.

86. Put to him that his actions in relation to council tax, EPC certificates, and street numbering were evidence of concealment, Mr Rashti maintained his position. In relation to Building Control, he took advice from his lenders.

87. Mr Coward in his statement (Bundle B, page 152), made for the appeal proceedings, said due to problems letting the 1-bedroom flats, each of the 14 flats were subdivided into 28 studio flats. At page 19 of Mr Rashti's statement he said he did not think there was any need to request 28 EPC certificates. Mr Rashti said he did not take advice from Mr Coward, he made the decision and the EPC specialists came to the building.

88. He did not consider that he needed to register the 28 studio flats for council tax, and he did not seek advice form his lawyer or planning consultant. He did not ask the LA, because he did not think it was an issue.

89. He did apply for 14 street numbers and did not take any advice.

90. Put to him that the Planning Inspector had decided that he was less than honest in his dealings with the LA, and he had sought to mislead the LA, he said he must accept her decision.

91. He agreed that he had access to professional planning advice from 2014. He did instruct Mr Coward to apply for planning permission for 28 units in 2014, he was advised to withdraw the application. Put to Mr Rashti that was because the average floor space for the studio flats would only be 20 square metres, he said he was advised that the application would be rejected because there were not enough parking spaces.

92. Put to him that after the withdrawal of the application he delivered 28 units when he knew that he only had permission for 14 units, Mr Rashti said he had permission for 14 flats, and he had 2 tenancies per flat.

93. He did not agree that his actions concerning council tax, EPC certificates, numbering and building control amounted to deliberate concealment.

94. With regard to whether it is just to make the PEN, it was put to Mr Rashti that the LA will not evict the tenants. Mr Rashti said the PEO requires removal of all residential elements.

95. Put to him that the LA cannot countenance 16 units with less than 20 square metres of floor space, he said that the Planning Inspector gave him 9 months to redistribute the 16 units. Put that his tenants live in flats with half the minimum required space standard, he said that 3 to 4 people can live in a 1 bedroom flat. Mr Rashti said the LA do not want any residential elements in the building in the future.

96. In re-examination he maintained that he always considered that there were 14 flats, after service of the PEN he accepted that it was 28 flats, based on what he was told.

Mr Ian Coward. Planning Consultant.

97. Mr Coward adopted his statement, at Bundle B, pages 105 -120, dated 20 January 2022.

98. He is familiar with planning enforcement actions, he has 3 to 4 current cases. He is familiar with the planning concepts of immunity and concealment.

99. He has been involved with the Rushti family since 2014. With regard to the 28-unit application in 2014, at that time, minimum room size was not an issue, this is a more recent restriction. The London Plan and Local Plans introduced a 30 square metre minimum, this is planning policy but not a legal requirement. The LA concern was lack of parking.

100. His involvement after 2014 was limited to advising there could only be more than one tenant if they lived in the same household. He prepared the appeal submissions. Grounds B and D of the appeal were not inconsistent, ground D was a separate immunity case. Our case was the breach of planning control was the change from 14 to 28 flats. At the time of service of the PEN, we were clear that was the issue, our statement of case was not denying the existence of 28 flats, and we provided more information about our case. It was difficult to gather all the evidence in time. The tenancy agreements were filed in March 2021. The LA would know from the statement of case that there had been a breach of planning control.

101. The original plans are at page 107 of his statement, and the subdivision at page 108. He said that the subdivided units could only be let to members of the same household.

102. At page 112, para 40 relating to the ground D immunity point, the LA would have known that the breach was accepted. At page 114, para 47, the LA address and allege either concealment or misrepresentation. Our ground B submission failed, because we said there had been 2 separate acts of development, which the Planning Inspector rejected. Our ground D “immunity” submission was partially upheld for half of the units.

103. The units could have returned to part office and part residential, with adequate floor space, but the LA would not endorse this approach.

104. In cross examination, he said he provided advice from time to time but not at every step. He agreed that 28 units had been constructed and accepted the appeal decision.

105. The 2014 application for 28 units, he advised Mr Rashti that the application would be refused on the grounds of inadequate parking and he withdrew the application. Mr Rashti knew he had no prior approval for 28 flats. Each of the studio flats has one main door into a lobby and then an individual entrance door.

106. Some might regard appeal grounds B and C as contradictory.

107. At page 141, para 36, Mr Coward states that the appellants will serve a schedule of evidence, he agreed that it was an evolving process. The schedule of evidence was served on 24 March 2021.

108. Mr Rashti was wrong in thinking he could subdivide the 14 flats without planning consent. He misunderstood the law.

109. Mr Rashti did not consult him about Building Control, Council Tax or EPC certificates, he would not expect him to do so. If he had been asked, he would have advised Mr Rashti to make it clear that there were 28 units.

110. He does not read the decision of the Planning Inspector as saying that Mr Rashti attempted to mislead the LA. Put to him that at Para 38 of the appeal decision, it states that the appellants conduct has been shown to be misleading. Mr Coward said the conduct found did not amount to the level of deception to engage the principal in the Welwyn/Hatfield case. He agreed that the test for a PEO was different.

111. Mr Rashti has made no further planning applications, the 16 flats have immunity unless the PEO is granted.

112. In re-examination he confirmed he was not asked to advise on Council tax, EPC certificates or street numbering. Council Tax registration is not normally an issue in these types of cases.

Has the application has been brought in time (i.e. within the deadline set out in s.171BB (1)).

Summary of submissions on behalf of respondents 1-4

113. a. The LA has not appreciated the correct test to be applied with regard to timing, relevant to the LA's purported certification pursuant to S177BB TCPA1990. There are two issues:
i. The threshold for applying for a PEO is that it "*appears to the local planning authority that there has been a breach of planning control*" (S171BA (1) not that it appears that there may have been deliberate.
ii. The test for when time runs is when evidence of the apparent breach "*comes to the authorities knowledge*" (S171BB (2) (b) not when it was concluded that the evidence in the authority's possession was sufficient.

114. On the first point, the same threshold is applied to an application under S171BA as is applied to a decision to serve an PEN under S172(1): does it appear that there has been a breach of planning control. In August 2019, a PEN was served which stated in terms that it appeared to the LA that this breach of planning control had taken place.

115. On the second point, it is asserted that the LA have misunderstood the test. Reference is made to the *Chesterfield Poultry* case, and the principal derived from is that the LA is wrong to suggest that a conclusion as to the "sufficiency" of evidence was required but rather the question was whether the evidence was available to the LA and had been reviewed and considered. Thus, the evidence was available to Mr Wicks, and considered by the LA before the PEN was served, referred to and dealt with in the LA's Statement of Case and proof of evidence for the PEN appeal.

116. b. It is asserted that the evidence relied upon by the LA in respect of its application for a PEO was in the possession of the LA well before its purported certification under S171BB (2).

117. Mr Wicks said in evidence that there was a record of a 14-flat scheme in the LA's possession. The LA served a PCN in 2019, plainly knowing that the premises were in use as 28 flats, because that was the allegation on the face of the PCN. When the then appellants appealed the LA knew that it was accepted that there were indeed 28 flats. Therefore, Mr Wicks assertion that the LA had to wait for better quality evidence, than a clear admission is untenable. The quality of evidence required by a Magistrates Court is the same as required in an appeal before a Planning Inspector.

118. c. Therefore the application for a PEO is out of time. The certification is not conclusive because it does not refer to evidence of the "*apparent breach of planning control*" and it shows that the LA considered that time ran from the date when a conclusion on sufficiency was met.

Summary of submissions on behalf of the LA.

119. a. The submission that the LA should have acted to issue an application for a PEO at the point that an "*apparent*" breach of planning control came to its attention, and this "*apparent*" breach came to the LA's attention several years before the exchange of evidence for the PCN appeal in March 2021, is wrong.

120. The submission fails to take proper account of the actual test set out at S171BB (1). The test is not when the "*apparent*" breach came to the LA's attention or even when the "apparent" breach ought to have been understood to have occurred.

121. The test for the 6-month period in which an application for a PEO can be made is: *the date on which evidence of the apparent breach of planning control sufficient in the opinion of the local planning authority to justify the application came to the authority's knowledge*

122. The LA signed a certificate, pursuant to S171BB (2) (a)-(b) which identified 24 March 2021 as the date when evidence sufficient to justify the application came to its attention.

123. b. Whilst the LA had some information relating to breaches of planning control before 24 March 2021, it was by no means complete, it was inconsistent and ambiguous. This was compounded by the steps taken by the respondents to conceal the 28-studio flat scheme.

124. In addition, the respondents only served evidence that firmly established the existence of the 28-studio flat scheme on 24 March 2021.

125. c. The LA when it issued a PEN apprehended that a breach of planning control had taken place, it did not consider that it had sufficient evidence of a breach, nor that there had been deliberate concealment, sufficient to justify an application to a court for a PEO.

126. The burden of proving any grounds of appeal against a PCN would be upon the appellants, pursuant to S174(2) (a)-(g), whereas with an application for a PEO, the burden is upon the LA to show on the evidence that the application should be granted.
Therefore, the LA cannot be criticised for applying for a PEO when prior to 24 March 2021, it did not possess the requisite knowledge.

127. d. In accordance with S171BB (2) (b) the date of 24 March 2021 should be taken as conclusive evidence of the date upon which the LA obtained sufficient evidence to justify the application for a PEO. This is not a case where the test for Wednesbury unreasonableness is close to being met, in relation to the certification by the LA.

128. e. There is in addition no error on the face of the certificate, and the court should consider the finding of Males LJ on this issue at para 61 of the *Chesterfield Poultry* case:
"…a prosecutor's certificate is not merely conclusive evidence of the date when particular pieces of evidence came to the prosecutor's knowledge. A certificate in proper form is conclusive evidence of the relevant date from which the six-month period begins to run."

129. f. The submission that the LA had a choice when it became aware of an "apparent " breach of planning control to issue a PEN pursuant to S171B, or apply for a PEO, pursuant to S171BA, but it could not issue a PEN and the subsequently apply for a PEO, is wrong.
There is no statutory provision that obliges this choice, and they are different instruments of planning enforcement, and the PEO is only justified when there the LA concludes that there is sufficient evidence of a breach of planning control that has been deliberately concealed.

Decision.

130. My conclusion after considering the submissions and authorities is that Mr Robb is correct and the application for a PEN is underpinned by different statutory criteria, to the application for a PEO. Both procedures are recognized as two distinct methods of planning control (See *Bonsall*), although they may overlap.

131. I take the following from the HM GOV website:

An enforcement notice should only be issued where the local planning authority is satisfied that it appears to them that there has been a breach of planning control and it is expedient to issue a notice.

In most cases, development becomes immune from enforcement if no action is taken:

- *within 4 years of substantial completion for a breach of planning control consisting of operational development;*
- *within 4 years for an unauthorised change of use to a single dwelling house;*
- *within 10 years for any other breach of planning control (essentially other changes of use).*

Where a person deliberately conceals unauthorised development, the deception may not come to light until after the time limits for taking enforcement action (section 171B of the Town and Country Planning Act 1990) have expired. A planning enforcement order enables an authority to take action in relation to an apparent breach of planning control notwithstanding that the time limits may have expired.

132. Mr Robb set out the test for the 6-month period in which an application for a PEO can be made, which is:
"the date on which evidence of the apparent breach of planning control sufficient in the opinion of the local planning authority to justify the application came to the authority's knowledge, pursuant to S171BB (2)(a)"

133. The words are plain, it is not enough for the apparent breach to have merely come to the attention of the LA, or when the LA ought to have understood the breach had occurred.

134. There must be sufficient evidence of the apparent breach in the opinion of the LA to justify the application. If the LA become aware of an apparent breach of planning control, it is not restricted in choosing either an application for a PEN or a PEO.

135. I have no doubt that the cost of preparing a case for an application for a PEO to a Magistrate's Court is a significant factor.

136. The LA are required to certify the date when the LA acquired the relevant evidence, and a to certify that fact as conclusive evidence.

137. In the *Chesterfield Poultry* case where the prosecutors certificate related to animal welfare offences, Males LJ said at para 26:
There are powerful policy considerations in favour of upholding the conclusive nature of such a certificate. To do so promoted certainty which is in the interests of all parties, avoids the court having to second guess prosecutorial judgements whish are properly the province of the CPS, and avoids satellite litigation about whether proceedings have commenced in time which causes additional expense while determination of the real issue, whether an offence has been committed is delayed well beyond the time within which it ought to be determined.

138. Further after reviewing the relevant authorities, he concluded, inter alia, that unless a prosecutor's certificate is plainly wrong on its face, it is conclusive evidence of that date.

139. It is not appropriate in my view to go behind the certification, unless it is plainly wrong, by suggesting that the Mr Wicks who advises the decision maker, should have reached the decision on the information available to him earlier, when he disputes that assertion. In any event, I accept his evidence that although there was some evidence of a breach of planning control, it was not sufficient to meet the statutory test. In fact, and ironically, it was only when the respondents, in furtherance of their claim for "immunity" in respect of all 28 flats provided the evidence, that enabled the statutory test to be met.

Has there has been "deliberate concealment" of the sub-division.

Summary of submissions on behalf of respondents 1-4.
140. a. There was no deliberate concealment of the subdivision to any extent. The deliberate nature of the breach of planning control was not put to Mr Rashti in cross examination, and according to established principal, the failure to challenge any material part of his evidence, or to put the LA's case to him, precludes the LA from pursing this point in final submissions.

141. b. Mr Rashti's case is clear that the breach of planning control was not concealed and could not be deliberately concealed, because Mr Rashti was not aware that he

had breached planning consent, until he received the PEN on 22 August 2019. He was not challenged on this point.

142. c. S171BC(1)(a) requires the LA to prove on the balance of probabilities that breach of planning control was deliberately concealed. It follows that a PEO cannot be granted if the respondent is unaware of the breach. This has always been the case for the respondent.
i. Mr Rashti said in evidence that none of the respondents have any expertise in planning law. When they thought that they needed such expertise, for example, when they sought prior approval, when they sought to remortage, and when served with the PEN, they consulted Mr Coward, who gave evidence in support of them.
ii. The relevant breach of planning control was technical, Mr Coward explained that the 14 flats were built in such a way that was consistent with prior approval, and all the respondents did was put a lock on an internal door and let the flats under 2 separate tenancy agreements to people who were not living together as a single household. Mr Coward went on to explain that had the flats been let to persons living as a single household there would have been no breach of planning control.

143. d. It is not surprising that therefore the respondents were not aware they had breached planning control. Mr Wicks said in cross examination he did not doubt that Mr Rashti was confused about whether he needed planning permission. Mr Rashti said in evidence that at the time, he submitted the building control certificates, EPC certificates and council tax applications, and at all times before the issue of the PEN in August 2019, he and the respondents considered that the building contained 14 flats, notwithstanding that each flat was let under 2 separate tenancy agreements.

144. i. The suggestion that the respondents, had they taken professional advice, before submitting the above documents (which the LA rely on as evidence of concealment) would have been aware of the breach of planning control is irrelevant. The respondents were under no obligation to seek advice and Mr Coward said in evidence, the matters were separate from planning control.

145. ii. Mr Rashti's evidence that he would have provided the LA with an explanation of the use of the flats was not challenged in cross examination. This is corroborated by the fact that when in 2016, Mr Rashti was provided with a report from Cluttons, in respect of a remortgage, which did not show that the flats were let under 28 tenancy agreements, he asked that the position was checked, by providing copies of the 28

tenancy agreements to the lender, and paying for a further inspection. This did not result in any amendments to the valuation report, or the description of the building as containing 14 flats.

146. e. There was in fact no concealment, and the purpose of a PEO is to allow the LA to take action against an apparent breach of planning control, that has been deliberately concealed, and therefore denied the LA the opportunity to take enforcement action within the statutory time limit (the immunity period).

147. Mr Wicks said in evidence that a site visit was conducted in January 2019, because of a complaint from a former tenant, received in September/October 2018. The note of the site visit recorded that several of the flats had been subdivided, and this was evidence to demonstrate a breach of planning control. Mr Wicks said that this was confirmed by a second site visit in March 2019, and thus there was sufficient evidence to issue the PCN within the immunity period. If the LA had done so, the respondents would have not ben able to claim immunity at all, and the issue if concealment would never have arisen.

148. f. It remains unclear why the LA failed to serve the PCN until August 2019, 5 months later, or why the LA did not give Mr Rashti any prior warning, because Mr Rashti in his unchallenged evidence said that if he had been told he was in breach of planning control, he would have sought to remedy the breach.

149. g. The evidence that the LA rely on as showing concealment in fact had no bearing on the date upon which the LA established that the breach of planning control occurred. Mr Wicks accepted in cross examination that the applications for building control, the EPC certificates and valuation office entries were in the LA's possession at all material times, and certainly before the first site visit in January 2019. Mr Wicks said that the LA's enforcement officer would have had access to this material before the first site visit. He said that none of these documents concealed the fact of the breach.

Summary of submissions on behalf of the LA.

150. a. Further to the opening skeleton submissions, it is clear that the 2 stage test in the 1990 Act for PEO's envisages a lower threshold than the *Welwyn c*riteria, in which the LA can seek to prove "deliberate concealment" of a breach of planning

control, and at the same time introducing a requirement that the LA take a rounded and balanced view of all the surrounding circumstances.

151. It is clear from the statutory scheme, and the authorities, that PEO's are an additional planning enforcement tool for use by local planning authorities.

152. b. The LA submit that there is clear evidence that there was deliberate concealment to any extent in this case.
i. Mr Rashti said in his witness statement, and in chief and cross examination that the 14-unit residential scheme, for which prior approval was granted in 2014, was completed as such.
That claim was dismissed by the Planning Inspector, who found at para. 15 of her decision letter:
"As a matter of fact and degree the prior approval scheme was not implemented and the change of use that occurred was from offices to 28 studio flats".
ii. On 5 June 2014, a further application was made to the LA for a 28-unit scheme. The application contained detailed plans for the new scheme. The scheme was withdrawn on 18 July 2014 by Mr Coward, the LA had refused permission on highway grounds.
Without the knowledge of Mr Coward, Mr Rashti then went ahead and completed the 28-unit scheme, even though he had been informed by the LA that planning permission would be refused for such a development scheme. In addition, Mr Coward explained the difference to Mr Rashti of 14 flats and 28 flats occupied by the same household.
iii. The reason given by the respondents, once the PCN was issued, for the creation of the 28-studio flat scheme was the financial lack of viability of the 14-flat scheme. Importantly, this explanation was provided on the basis that the 14 flat scheme had been implemented which as the Planning Inspector found was never the case.
iv. Mr Coward at para 3.8 of his proof of evidence for the Appeal said:
"As explained in the evidence of Mr. Rashti, due to problems with letting the one-bedroom flats, including feed-back from prospective tenants and letting agents, each of the 14 flats was sub-divided so as to create two studio flats"
The LA submit this explanation provided 6 years after the unlawful development of the 28 studio flats does not address the steps the respondents took to conceal the unlawful development from the LA.

153. c. The steps taken were:

(i) *the Building Control applications which were submitted to the Council on 15th May 2014, in respect of 14 flats (A.57-65);*

(ii) *the Energy Performance Certificates ("EPC") which were submitted to the Council and dated and entered into the public register in March 2016, in respect of 14 flats, all of which were said to be 46 sqm in size (A.66-121);*

(iii) *the Valuation Office entries which were submitted for Council Tax to be assessed on the flats at the Property between 1st April and 31st December 2015, in respect of 14 flats (A.122-135); and*

(iv) *the Street Numbering application was submitted to the Council in 2020, in respect of 14 flats (A.136-149).*

(v) *No Amendment Notice was served by the Respondents as required under the provisions of S. 51A of the Building Act 1984 (S.21), which would have made it clear to the Building Inspector prior to the issuing of Completion Certificates on 12th April 2016, that 28 rather than 14 units had been constructed at the Property.*

154. d. The Cluttons valuation report, dated 29 January 2016 was based on instructions from the respondents that the property comprised of 14, not 28 residential units. A tenancy schedule prepared by the respondents showed 14 2 person tenancies.

155. e. The Planning Inspector in her decision (para 38) stated:
"Overall, in my judgment the appellants' conduct did not amount to the degree of deception necessary to engage the principles set out in Welwyn." (A.19).
Therefore the 4-stage test set out in the judgement of Holgate J in the *Welwyn* case had not been met.

156. However, the Planning Inspector did find:
"…have been less than honest in their dealing with matters relating to Council Tax, street naming and numbering, securing EPC and filing of Final Building Control Certificates." (para. 35, A.18)
And:
"…conduct has been shown to be misleading" (para. 38, A. 19)
And the Inspector noted at para. 33 that Tarek Rashti:
"…also acknowledged when questioned, that he had previous experience of renting out property."

157. The LA submit therefore that the assertion by the respondents, specifically by Mr Tarek Rashti that there was no need for him to inform the LA that the building Control certificates, the EPC certificates, Council Tax and numbering applications related to 28 not 14 flats is not sustainable.

Decision.

158. I have considered the very detailed submissions on behalf of the respondents 1 to 4. I have not addressed every point, but I have addressed the matters I consider to be pertinent.

159. I have already stated that I consider that I am able to reach my own findings of fact, but in the alternative, if I am wrong that issue estoppel does not arise in this case, I will consider the test in S171BC (1)(a), in relation to the facts found by the Planning Inspector.

160. The test "requires the LA to prove on the balance of probabilities that breach of planning control was deliberately concealed", and this was clarified by Holgate J in *Jackson* as being deliberate deception "*to any extent*". Self evidently this is a broad test established to address the issues that occur in enforcement of planning control, as a consequence of the Welwyn criteria.

161. I am not an expert in planning law, but I am able to make my own findings of fact, after hearing the evidence and submissions in this case.

162. Mr Rashti was not a novice in respect of renting out properties, when he was granted prior approval for the development of 14 flats at Freetrade House. He agreed in his oral evidence that he was a businessman, and that he owned and rented out properties in the UK. He originally converted Freetrade House into offices, but the likely rental income was not to the level he and the other respondents had envisaged.

163. Obviously, Mr Rashti is also not an expert in planning law, but he has taken advice over the years from Mr Coward, the planning consultant, and took his advice concerning the prior approval of developing the 14 flats. It is evident to me, as it was to the Planning Inspector, that the 14 flats were constructed in such a way that they could easily be converted into 28 studio flats. Mr Coward confirmed this in his oral evidence and his plan (page 108. Respondent bundle) showed how easily this could

be achieved. Just adding a lock on a bedroom was all that was needed to make the conversion from 14 flats to 28 studio flats. I am satisfied in common with the Planning Inspector "as *a matter of fact and degree that the prior approval scheme was not implemented and the change of use that occurred was from offices to 28 studio flats*" (para 15, Appeal decision).

164. The Planning Inspector found that the appellants (in the appeal) in the prior knowledge that it was unlikely that they would be able to rent out viably the 14 flats, constructed them in a manner that they could easily be converted into studio flats. The Inspector found no evidence to suggest the two planning applications were not reasonable attempts to obtain planning permission, and there was no evidence that the developments proposed in the applications were with a view from the beginning to mislead or deceive the LA. I am prepared to accept those findings, but Mr Rashti had developed the flats from the outset to allow swift and easy conversion. I am satisfied as a fact that Mr Rashti was disappointed at the refusal of the Planning Authority to approve his application for 28 flats.

165. Mr Rashti decided, despite the refusal, to proceed with his intended plan of development. Thus, the actual change of use was, as the Inspector found, from offices to 28 flats. I have considered Mr Rashti's evidence carefully, he knew that he had no permission to develop 28 flats, irrespective of the reason for refusal, I am wholly unable to find that he genuinely believed that the subdivision of the flats was not a breach of planning control. I have considered all the submissions on behalf of respondents 1 to 4, but quite simply, planning permission was refused but Mr Rashti decided to proceed with the 28-studio flat development, because it was likely to bring in a greater rental income.

166. I do not accept the breach of planning control was technical, and I consider it is disingenuous of Mr Rashti, and not credible for him to say that he did not believe that he had breached planning control, because all that occurred was the letting of each flat, under two different tenancy agreements. Each flat was plainly capable of subdivision from the outset, into two studio flats each with a separate bathroom.

167. The knowledge of Mr Rashti of the breach, explains the steps that were followed by him subsequently. This is where I respectfully disagree with the Planning Inspector.

168. The Planning Inspector found that (para 35) the appellants had "*been less than honest in their dealings with matters relating to Council Tax, street naming and numbering, securing EPC and filing Final Building Control Control Certificates. Indeed, in cross examination the Appellant stated that he did not believe it was his place to seek to correct the documentation when it was produced, albeit he was aware that it was inaccurate.*
The Inspector continued that "a *correct description of the use of the premises on those public documents might have alerted the Council to the breaches of planning control"*

169. The Inspector (para 38) said "*the appellants conduct has been shown to be misleading"* but she concluded "*the evidence does not demonstrate the development was deliberately concealed. Or that there was a planned course of deception designed to circumvent planning control and escape enforcement*"

170. My divergence with the Inspector is not so much with the facts that she found, but the inferences that she drew from those facts. I consider that Mr Rashti's actions, in relation to Council Tax,, street numbering, obtaining EPC certificates, and Building Control Certificates, namely the original applications and/or failure to correct ,was not mere inaction but deliberate steps, in the sense that he acted consciously and intentionally to screen the true nature of the development. I do not need to consider the Cluttons valuation report, in reaching this decision, particularly as the provision of information was to a lender, not to the LA. I find as a fact that the development was deliberately concealed.

171. I add that I have no note that Mr Wicks said in evidence that Mr Rashti was confused about whether he needed planning permission, that may be my omission, but it would be inconsistent with his written evidence. In any event, it is my decision concerning Mr Rashti's state of mind at the material time.

172. If issue estoppel does apply in this case, and I am bound by the facts found by the Planning Inspector, then it is important to reflect on her finding (para 38): " *The appellants appear to have mostly pursued deliberate inaction, so as to achieve concealment, rather than taking sustained or actively deceptive steps"*
The test, in applying the statutory test in S171BC(1)(a), as interpreted by Holgate J in *Jackson* is deliberate concealment to any extent. This is a wide definition and, in my view, includes deliberate inaction, with the aim of achieving concealment. Therefore,

173. I am satisfied that even in accordance with the findings of the Inspector, the statutory test has been met.

174. Finally, I do not accept at all that the LA's case was not put to Mr Rashti, who had a full opportunity to put forward his evidence and address the pertinent issues.

Is it just to make the PEO having regard to all of the circumstances.

Submissions on behalf of respondents 1-4

175. a. If the court accepts the LA's evidence to justify the PEO application, the extent and cause of the delay in pursuing the application should be taken into account:
i. The LA became aware of the breach of planning control on 7 January 2019, before the expiry of the immunity period. However, no enforcement notice was issued until 22 August 2019. The LA were also aware that the respondents intended to claim immunity, and would support the claim with evidence from 23 September 2019, yet the LA did not make the PEO application until 4 July 2021. A delay of this magnitude is highly prejudicial to the respondents and the tenants of the flats.
ii. The LA have not given any explanation for the delay. It would not have been necessary to apply for a PEO, if the LA had acted with reasonable diligence in responding to evidence of the breach when it first arose. The LA could have sought further information by issuing a Planning Contravention Notice or issuing a timely enforcement notice. This point was noted by the Planning Inspector (A19, para 38). The LA should not benefit from its own failure to act, when it causes significant prejudice to the respondents.

176. b. Even if issue estoppel can not be established, it is relevant that the lawfulness of the sub-division and the LA's suggestion that the respondents have engaged in deliberate concealment has already been considered by an expert Planning Inspector. The LA did not appeal the decision, the respondents and the tenants are entitled to certainty and finality. The LA should not be permitted a "second bite at the cherry".

177. c. Mr Rashti has explained that a finding in favour of the LA would cause the respondents severe financial stress.

178. d. The flats, the subject of the application, are occupied currently by 20 tenants. If the PEO is granted the tenants stand to lose their homes and suffer financial hardship. The LA has stated that it will not take enforcement action against the

tenants but Mr Wicks in evidence did not rule out taking enforcement action against the first to fourth respondents, which would require them to evict the tenants.

179. e. The LA has suggested that the living conditions of the flats are inadequate, and that planning permission would not now be granted for the flats. These submissions risk the court considering the planning merits of the development, contrary to established legal principal: *Newsmith v Secretary of State [2001] EWHC 74 (Admin) para 6.*
Those matters should not be relevant to the court's discretion to grant a PEO because:
i. *The fact that an Article 4 direction is now in place is not relevant. That direction was made after the grant of prior approval, presumably on the assumption that the Building was already in residential use;*
ii. As Mr Coward confirmed in his evidence in chief, the relevant permitted development right, which was relied upon by the Respondents to carry out the development, did not impose any minimum space standards at all until 2021. It is relevant to note that the Council only proposed to refuse the Respondents' application for prior approval for 28 flats at the Building on grounds of a lack of parking, and not because of any deficiency in living standards [A/55]; and
iii. Minimum space standards in planning policy do not necessarily reflect a view that accommodation which does not provide a certain level of space will be inherently unsatisfactory. Rather, they identify the types and nature of accommodation which is presently needed. They are aspirational design standards, required to achieve planning objectives. As Mr Wicks accepted, there can be circumstances where the provision of smaller units of accommodation is entirely appropriate in planning terms. There is no suggestion that the units would fail to meet the minimum standards for overcrowding or in HMO legislation – in fact they significantly exceed these thresholds. Whilst it is recognised that new build residential schemes would be required by policy to deliver more space, it does not follow that smaller units are inherently unacceptable. The Council's case on this point has been overstated and exaggerated.

Summary of submissions on behalf of the LA.
180. The LA set out in its skeleton argument at paras 35-55 seven issues for the court to consider: See above (page 7-10)
a. Further in relation to the impact on the tenants if a PEO is granted, The LA made it clear to the respondents in am email from Tim Rolt, The LA's enforcement manager,

dated 7 January 2022, that it would not be used to cause hardship to the existing tenants, and the LA will rely on "natural wastage", waiting for the tenants to leave, but ensuring that no new tenancy agreements are granted by the respondents.
b. The LA would not take action to cause the respondents to evict the tenants.
c. The respondents have instructed a number of professional advisors and own a number of properties in London which are rented out for residential use, this is not a case of naivety on behalf of the respondents.
d. No evidence has been submitted to show that the respondents would suffer severe financial hardship.

Decision.

181. The decision of the Planning Inspector created a dilemma for both the LA and the respondents. The LA because 16 studio flats that the LA regard as substandard became lawful, by virtue of immunity, and the LA cannot compel the respondents to use the remaining 12 flats to be used to improve the immune 16 flats. The respondents because 16 lawful studio flats will not generate sufficient rental income, and they cannot do anything constructive, from their point of view, with the other 12 studio flats. It is noteworthy that there have been no further planning applications in respect of Freetrade House. Overall, the current status of the property is there is no planning permission for conversion from office to residential use, but there are 16 studio flats which have gained immunity and can continue as residential units.

182. The first point I must address, is the extent of the delay in making an application for a PEO, I accept that there has been no substantive explanation for the original delay in issuing the PEN in August 2019, when the LA, after the site visits in 2018 and 2019. Mr Wicks had not been involved in the investigation then, and I am surprised that the LA were not more curious and proactive, in issuing a planning contravention notice, at the least, to obtain an explanation from the respondents. If that approach had been adopted, there would have been no scope for the respondents to claim immunity. I have to consider whether the grant of a PEO would be just in all the circumstances, it is arguable that the respondents were lulled into a false sense of security, although I detect no real basis for such complacency, but in any event, I balance that against my finding that the respondents, after the refusal of planning permission for 28 studio flats, nevertheless deliberately carried on with their development plan and deliberately concealed that fact. I do not accept that the

respondents should benefit from the inaction and delay of the LA when the respondents continued knowingly with an unapproved development.

183. I do not accept that the application for a PEO by the LA represents a "second bite at the cherry", or that there was undue delay in the application for the PEO. I have already found that the application for a PEO requires the application of a specific and different statutory test, and that there has been deliberate concealment by the respondents. The development appears now to be in a state of limbo or paralysis, and the position unsatisfactory for both parties.

184. It is asserted that the granting of a PEO would cause the respondents financial hardship, but I agree with the LA, that no evidence has been produced to support this assertion. I know nothing of the financial resources of the Rashti family, nor the extent of the impact on those resources of such an order. In the absence of evidence, it would be wrong of the court to speculate about this issue.

185. Mr Turney submits that it is contrary to established legal principal to consider the planning merits of the development and cites *Newsmith v Secretary of State [2001] EWHC 74 (Admin) para 6*. That case was concerned with an application under Section 288 TCPA 1990 to quash the decision of a Planning Inspector, in relation to planning permission for change of use, it did not relate to the test in Section 171 BC (1) (b) which requires the application of an interests of justice test in all the circumstances. I do not accept that such a wide test precludes the court from considering the planning merits of the development.

186. In relation to the Article 4 direction in 2017, disapplying the Class J permitted development rights, it is plainly right that this direction came into force after the grant of prior approval in 2014. The purpose of the Article 4 direction was to protect office, industrial and storage use from conversion into residential use. Therefore, although it is noteworthy that now the respondents would not be able to secure permitted development of office to residential use, this fact does not play a role in my decision.

187. Although the principal of permitted approval is not relevant in these particular circumstances, the type of development is, in my view relevant. I accept the evidence of Mr Coward that the permitted development right granted to the respondents in 2014, did not impose at the time, minimum space standards, however the fact

remains that the permitted development was 14 flats not 28 studio flats. I consider that I am entitled to take into account, when deciding whether it is just to make the order having regard to all the circumstances, the fact that the studio flats do not comply with the current minimum space standards (37 sqm), set out in the Council Local Plan from 2016 and the London Plan from 2021. They may be aspirational standards, but they enable the court to take into account now, the fact that the flats by current standards are regarded as substandard, and this is why, the LA assert and I accept, there was no appeal pursuant to section 174 (2) (a) of the TCPA 1990, that planning permission should be granted for the 28 studio flats.

188. I am not dealing with the minimum standards for overcrowding, student accommodation or HMO's, I am taking into account the current policy objective of ensuring that there is compliance with minimum size requirements in the development of residential units. The studio flats have a floor area of 20 square metres, the current minimum standard is 37 square metres. This is a significant factor in considering the test in section in section 171 BC (1) (b).

189. The respondents have raised the issue of the impact of a PEO on the current residents, but I give weight to the evidence from the LA that no existing tenants will be required to leave the studio flats, and the LA will rely on the passage of time, taking into account the average stay of the previous tenants, for the building to become vacant. It does not sit well that on the one hand , the respondents submit that the grant of a PEO will cause hardship to the existing tenants because of the likely actions of the LA, and on the other that in fact, the respondents themselves may have to evict the tenants. I am satisfied that the LA as a Planning Authority and Housing Authority will ensure the welfare concerns of the tenants are met.

190. The respondents are able, and have been able, to issue a new planning application to try and remedy the impasse that currently exists, in relation to Freetrade House. It is highly unlikely that any planning permission would be granted for residential use, by virtue of the current applicable criteria. There would, however, be a right of appeal.

191. Section 171 BA, if a PEO is granted, provides the LA with an enforcement period of 1 year to issue a PEN, again there would be right of appeal.

192. I have weighed all the factors that are relevant, and I am satisfied that it is just to make an order in all the circumstances.

193. I have no doubt that these proceedings are costly for both parties, it may be that the time has now arrived for a realistic approach by the respondents, in relation to the use of Freetrade House in the future.

Overall Decision.

194. a. I am satisfied that the application has been brought in time.
b. That there has been "deliberate concealment" of the sub-division; and
c. That it is just to make the PEO having regard to all of the circumstances.

195. Therefore, I do grant the application by the London Borough of Brent for a Planning Enforcement Order, in relation to Freetrade House, Lowther Road, Stanmore, HA7 1EP, in accordance with the draft order (Bundle A, page 282).

12 April 2022.

District Judge Jabbitt

Annexe A.

Planning enforcement – overview. (Taken from the website GOV.UK)

What is a breach of planning control?

A breach of planning control is defined in section 171A of the Town and Country Planning Act 1990 as:

- *the carrying out of development without the required planning permission; or*
- *failing to comply with any condition or limitation subject to which planning permission has been granted.*

Any contravention of the limitations on, or conditions belonging to, permitted development rights, under the Town and Country Planning (General Permitted Development) (England) Order 2015, constitutes a breach of planning control against which enforcement action may be taken.

Who can take enforcement action?

Local planning authorities have responsibility for taking whatever enforcement action may be necessary, in the public interest, in their administrative areas. It should be noted that local authorities have a range of enforcement powers that extend beyond planning, as do the police in certain instances. See, for example, the note on dealing with illegal encampments.

When should enforcement action be taken?

There is a range of ways of tackling alleged breaches of planning control, and local planning authorities should act in a proportionate way.
Local planning authorities have discretion to take enforcement action, when they regard it as expedient to do so having regard to the development plan and any

other material considerations. This includes a local enforcement plan, where it is not part of the development plan.
In considering any enforcement action, the local planning authority should have regard to the National Planning Policy Framework, in particular paragraph 58.
The provisions of the European Convention on Human Rights such as Article 1 of the First Protocol, Article 8 and Article 14 are relevant when considering enforcement action. There is a clear public interest in enforcing planning law and planning regulation in a proportionate way. In deciding whether enforcement action is taken, local planning authorities should, where relevant, have regard to the potential impact on the health, housing needs and welfare of those affected by the proposed action, and those who are affected by a breach of planning control.

What are the time limits for taking enforcement action?

In most cases, development becomes immune from enforcement if no action is taken:

- *within 4 years of substantial completion for a breach of planning control consisting of operational development;*
- *within 4 years for an unauthorised change of use to a single dwelling house;*
- *within 10 years for any other breach of planning control (essentially other changes of use).*

These time limits are set out in section 171B of the Town and Country Planning Act 1990.

However, the time-limits set out above do not prevent enforcement action after the relevant dates in certain circumstances. These are:

- *section 171B(4)(b) of the Town and Country Planning Act 1990, which provides for the taking of "further" enforcement action in respect of any breach of planning control within 4 years of previous enforcement action (or purported action) in respect of the same breach. This mainly deals with the situation where earlier enforcement action has been taken, within the relevant time-limit, but has later proved to be defective, so that a further notice may be issued or served, as the case may be, even though the normal time-limit for such action has since expired. This is known as the "second bite" provision*
- *where there has been deliberate concealment of a breach of planning control, local planning authorities may apply for a planning enforcement*

order to allow them to take action after the time limits in section 171B have expired

- *where a person has deliberately concealed a breach of planning control, the courts have found that in these circumstances, the time limits in section 171B do not engage until the breach has been discovered (see Secretary of State for Communities and Local Government and another v Welwyn Hatfield Borough Council and Bonsall / Jackson v Secretary of State for Communities and Local Government).*

Therefore, in cases of deliberate concealment, a local planning authority may decide to serve an enforcement notice 'out of time' or apply for a planning enforcement order. It is for the local planning authority to decide which approach is appropriate in each case.

Why is effective enforcement important?

Effective enforcement is important to:

- *tackle breaches of planning control which would otherwise have unacceptable impact on the amenity of the area;*
- *maintain the integrity of the decision-making process;*
- *help ensure that public acceptance of the decision-making process is maintained.*
-

Why are local enforcement plans important?

The preparation and adoption of a local enforcement plan is important because it:

- *allows engagement in the process of defining objectives and priorities which are tailored to local circumstances;*
- *sets out the priorities for enforcement action, which will inform decisions about when to take enforcement action;*
- *provides greater transparency and accountability about how the local planning authority will decide if it is expedient to exercise its discretionary powers;*
- *provides greater certainty for all parties engaged in the development process.*

What options are available to local planning authorities to tackle possible breaches of planning control in a proportionate way?

Enforcement notice

Deciding whether to issue an enforcement notice

The power to issue an enforcement notice is discretionary (section 172 of the Town and Country Planning Act 1990) .

An enforcement notice should only be issued where the local planning authority is satisfied that it appears to them that there has been a breach of planning control and it is expedient to issue a notice, taking into account the provisions of the development plan and any other material considerations.

Further guidance on when enforcement action should be taken.

What does an enforcement notice do?

An enforcement notice should enable every person who receives a copy to know:

- *exactly what, in the local planning authority's view, constitutes the breach of planning control; and*
- *what steps the local planning authority require to be taken, or what activities are required to cease to remedy the breach*

The local planning authority must enclose with the enforcement notice information about how to make an appeal. This information is contained in the information sheet provided by the Planning Inspectorate which local planning authorities should use. Every copy of the enforcement notice must also be accompanied by an Explanatory Note containing the information specified in regulation 5 of the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002 (as amended).

Enforcement notices are not improved by over-elaborate wording or legalistic terms: plain English is always preferable. An eventual prosecution under section 179 of the Act may fail if the Court finds the terms of the notice incomprehensible to the lay person.

Is it possible to take enforcement action against only some parts of a breach of planning consent?

A local planning authority may decide not to require action be taken to remedy the whole of a breach of planning control. This is known as "under enforcement". Where an enforcement notice identifies a breach of planning control which could have required any buildings or works to be removed, or an activity to stop, but has

stipulated some lesser requirements, and all the requirements of the notice have been complied with, then planning permission is deemed to be granted for those remaining operations or use (section 173(11) of the Town and Country Planning Act 1990).
Whether a particular notice "could have" required something is contingent upon the terms of the alleged breach of planning control set out in the notice.

Is there a right of appeal against an enforcement notice?

There is a right of appeal against an enforcement notice.

What happens if an enforcement notice is not complied with?

It is an offence not to comply with an enforcement notice, once the period for compliance has elapsed, and there is no outstanding appeal.
A person guilty of an offence is liable on conviction to an unlimited fine. In determining the amount of any fine, the Court is to have regard to any financial benefit which has been accrued or appears likely to accrue in consequence of the offence (section 179 of the Town and Country Planning Act 1990). Therefore, prosecuting authorities should always be ready to give any available details about the proceeds resulting, or likely to result, from the offence, so that the Court may take them into account.
Where a local planning authority achieves a successful conviction for failure to comply with an enforcement notice, they can apply for a Confiscation Order, under the Proceeds of Crime Act 2002, to recover the financial benefit obtained through unauthorised development.

Local authority default powers

The local planning authority has powers to enter enforcement notice land and carry out the requirements of the notice themselves (section 178 of the Town and Country Planning Act 1990). It is an offence to wilfully obstruct anyone who is exercising those powers on the local planning authority's behalf.
These default powers should be used when other methods have failed to persuade the owner or occupier of land to carry out, to the local planning authority's satisfaction, any steps required by an enforcement notice.

Further, the local planning authority can recover from the person who is then the owner of the land any expenses reasonably incurred by them in undertaking this work (regulation 14 Town and Country Planning General Regulations 1992).
A local planning authority can prosecute for a failure to comply with a notice as well as using default powers.

Planning enforcement order

What does a planning enforcement order do?

Where a person deliberately conceals unauthorised development, the deception may not come to light until after the time limits for taking enforcement action (section 171B of the Town and Country Planning Act 1990) have expired. A planning enforcement order enables an authority to take action in relation to an apparent breach of planning control notwithstanding that the time limits may have expired.

What are the requirements for obtaining a planning enforcement order?

A local planning authority must have sufficient evidence of the apparent breach of planning control to justify applying for a planning enforcement order (sections 171BA, 171BB and 171BC of the Town and Country Planning Act 1990).
The application may be made within 6 months, starting with the date on which sufficient evidence of the apparent breach came to the local planning authority's knowledge. The appropriate officer must sign a certificate on behalf of the authority which states the date on which that evidence came to the local planning authority's knowledge, and the certificate will be conclusive evidence of that fact.
The application must be made to a magistrates' court and a copy must be served on the owner and occupier of the land, and on anyone else with an interest in the land which, in the local planning authority's opinion, would be materially affected by the taking of enforcement action in respect of the breach. The applicant, any person who has been served with the application, and any other person the court thinks has an interest in the land that would be materially affected by the enforcement action. have a right to appear before, and be heard by, the court hearing the application.

What evidence is needed to obtain a planning enforcement order?

A magistrates' court may only make a planning enforcement order if it is satisfied on the balance of probabilities that the apparent breach of planning control (or any of the matters constituting that breach) has (to any extent) been deliberately concealed and that it is just to make the order having regard to all the circumstances.
Planning enforcement orders can only be made where the developer has deliberately concealed the unauthorised development. In these circumstances, evidence that the developer has taken positive steps to conceal the unauthorised development, rather than merely refraining from informing the local planning authority about it, will be required.
It is expected that planning enforcement orders will be focused on the worst cases of concealment.

What is the effect of a planning enforcement order?

The effect of a planning enforcement order is that the local planning authority will be able to take enforcement action against the apparent breach of planning control or any of the matters constituting the apparent breach during the "enforcement year". This means that once the "enforcement year" has begun, the local planning authority can at any time during that year, take enforcement action in respect of the apparent breach of planning control or any of the matters constituting that breach.
The "enforcement year" does not begin until the end of 22 days starting with the day on which the court's decision to make the order is given, or when any appeal against the order has been finally dismissed, or the appeal withdrawn.
A local planning authority may make an application even if the normal time limit for enforcement action has not expired. This is to allow for the possibility that evidence may come to light very close to the end of the normal time limits for taking enforcement action, when there may be insufficient time to draft and issue an enforcement notice, or where there may be doubt as to when the time limits actually expire. For example, where the date of substantial completion is not certain.
The local planning authority is not prevented from taking enforcement action once the enforcement year has ended provided that the normal time limits for enforcement action have not expired (section 171BA of the Town and Country Planning Act 1990).

Annexe B.

Respondents 1 to 4 Skeleton Argument.

*This skeleton argument is submitted on behalf of the First, Second, Third and Fourth Respondents ("**R1-4**") in relation to the hearing the Applicant ("**the Council**")'s application for a Planning Enforcement Order ("**PEO**") pursuant to s.171BB of the Town and Country Planning Act 1990 ("**TCPA**").*
The application is misconceived and falls to be refused on a number of legal grounds, as well as on its merits. This skeleton argument contains a summary of the arguments which will be advanced on behalf of R1-4.

background

*The full factual background to this application is set out in R1-4's Statement of Case [R/3-12] ("**the SoC**") and in the witness statement of Mr Tarik Rashti (R1) ("**WS Rashti**") [R/12-22].*
*In brief, this matter relates to a former office building, known as Freetrade House, HA7 1EP ("**the Building**") [A/272]. The Building is owned by the Respondents.[1] In 2014, R1-4 undertook works to convert 14 of the office units ("**the Units**") in the Building into residential flats ("**the Flats**") pursuant to a grant of prior approval from the Council ("**the Prior Approval**") [A/24-38].[2] This conversion commenced in October 2014.[3] The Flats were laid out in accordance with the Prior Approval and as shown in the plans and photographs contained in the witness statement of Ian Coward ("**WS Coward**") [R/108-109] and at [R/28]. It was originally intended that each of the Flats would be let under a single tenancy agreement. However, in 2015, as a result of concerns about the financial viability of this approach, and following advice from a prospective tenant, R1-4 decided to let the*

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[1] Further detail on the ownership of the Building can be found at §§2-3 SoC [R/3] and at [A/272-280]
[2] This development was undertaken pursuant to a grant of planning permission under Part 3 to Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 ("**the GPDO**"). This is often referred to as *"permitted development"*. A condition of this planning permission is that no development can take place without the prior approval of the Council on certain matters.
[3] For completeness, it should be noted that a second application for prior approval was made in June 2014 for the conversion of the Building into 28 flats ("**the Second Prior Approval**"), but this was withdrawn after the Council indicated that it would be refused: WS Coward, §15 [R/107].

*Flats under two separate tenancy agreements [R/15-16] ("**the sub-division**"). This was achieved by simply placing a lock on the door of the kitchen/living room and one on the bedroom door; it did not involve any further development: WS Rashti, §14 [R/16]; WS Coward, §§18-22 [R/109-110].*

*R1-4 were not aware that this simple act required a further planning permission from the Council. Indeed, R1 was assured by the Respondents' lender that the development was and remained 14 Flats, notwithstanding the sub-division: WS Rashti, §§17, 24-25 [R/16-18]. Because of this, they did not think that recording the sub-divisions on the various building regulations and creating two entries per Flat for council tax, Energy Performance Certificates ("**EPC**") was: WS Rashti, §§32-36 [R19-20]. These documents are referred to collectively hereafter as "**the Records**".*

*On 27.09.18, the Council received a complaint from one of the tenants of the Building (who had occupied one of the Flats from April 2016). He alleged that the Building had been converted into multiple studio flats in breach of the Prior Approval ("**the Complaint**") [A/19, §36; A/288, 19(b)]. On either 07.01.18 or 07.01.19[4] the Council's enforcement officers undertook a visit to the Building and observed (by looking through the windows, looking at the fire escape plan and by entering the Flats) that the sub-division had taken place [R/30] ("**the First Site Visit**"). On 07.03.19, the Council inspected the Building again and concluded that it was in use as 28 flats ("**the Second Site Visit**") [A/288, §19(b)].*

*On 22.08.19, the Council issued a planning enforcement notice ("**the Enforcement Notice**") against the Respondents alleging that the Respondents had undertaken unauthorised development within the last 4 years comprising: "Without planning permission, the material change of use from offices (Use Class B1) use to 28 flats".*

*On 23.09.19, the Respondents issued an appeal against the Enforcement Notice to the Secretary of State, pursuant to s.174 of the TCPA ("**the Appeal**") [R/122-128]. As part of the Appeal, R1-4 stated that 17 (subsequently amended to 16) of the Flats were immune from enforcement action pursuant to s.171B TCPA because sub-division occurred more than four years prior to the date of the Enforcement Notice (i.e. prior to 22.08.15). This four year period is referred to hereafter as "**the Immunity Period**" and is discussed in more detail below. The Respondents stated that "we will provide ASTS, receipts, affidavit evidence, live evidence to support the*

[4] The Council's formal records and its evidence state that this visit took place on 07.01.18 [R/30; A/287]. However, in its most recent statement (submitted outside the deadline for evidence from the Council in the Court's directions), the Council seeks to allege that this was an error and in fact the visit took place on 07.01.19 [A/308]. This is not admitted by R1-4 (who were not present when the visit took place) and the Council is required to prove the same.

Council's position that there has been 4 years continuous residential use of these units" [R/124].

*The Appeal was heard by way of an inquiry ("**the Inquiry**") before a professional planning inspector appointed by the Secretary of State ("**the Inspector**") on 20.04.21. During the course of the Inquiry, the Inspector heard oral evidence from R1 and from Mr Wicks on behalf of the Council. The Council invited the Inspector to find that the Respondents had engaged in concealment and/or deception, which if proven, would disqualify them from immunity pursuant to the judgment of the Supreme Court in **Welwyn Hatfield BC v SSCLG** [2011] 2 AC 304 ("**the Welwyn principle**") – discussed further below [R/114]. The Council relied principally on the Records and the Second Prior Approval.*[5]

*The Inspector issued her judgment in a decision letter dated 24.05.21 [A/12]. The Appeal was allowed in part. In particular, the Inspector accepted R1-4's argument that 16 of the Flats were immune from enforcement action [A/16, §25]. In doing so, she found that the "the evidence does not demonstrate the development was deliberately concealed" and concluded, that the **Welwyn** principle was not engaged [A/19, §38].*

On 06.07.21, the Council applied for a PEO.

legal framework

The "Immunity Period"

The law of town and country planning is broadly contained in a single statutory code: the TCPA. It is a fundamental principle of this code that, subject to some exceptions, development[6] *cannot be carried out without planning permission: s.57(1). Planning permission can include rights granted under the Town and Country Planning (General Permitted Development) Order 2015 ("**the GDPO**"): s.59(3).*

Where development is carried out without planning permission, it will be unlawful development. It is not a criminal offence to carry out unlawful development; however, where local planning authorities (such as the Council) identify it, they have a discretion to issue an enforcement notice requiring the developer to remove or reverse it: s.172(1) TCPA. It is a criminal offence to fail to comply with an enforcement notice.[7]

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[5] However it is no longer a part of the Council's case (as set out in its Statement of Case pursuant to the Court's directions, dated 14.10.21) that the Second Prior Approval comprises evidence of deliberate concealment [R283-285].

[6] Defined in s.55 TCPA as operational development or material changes of use

[7] For completeness, it is not being suggested by the Council that R1-4 have failed to comply with the Enforcement Notice or engaged in any other criminal conduct.

The discretion of a local planning authority to issue enforcement notices is not unlimited. In particular, s.171B TCPA provides that no enforcement action may be taken after the passage of a particular period of time. In this case, the relevant period is four years from the date of the sub-division: s.171B(2). This period is defined above as the Immunity Period. The rationale for the Immunity Period was explained by the Supreme Court in ***Welwyn****, §18: dwellings are people's homes and if local planning authorities were given a longer or unlimited enforcement period it "might well cause serious loss and/or hardship in the event of enforcement proceedings long after the event". The Court went on to state:*

The periods of four years retained in respect of both building operations and change of use to use as a dwelling house clearly reflect the legislator's view that this would give adequate opportunity for enforcement steps, after the expiry of which the infringer would be entitled to repose and to arrange his affairs on the basis of the status quo.

*Where an enforcement notice is made against a person, that person has a statutory right of appeal under s.174 TCPA. Appeals must be brought under one or more of the statutory grounds set out in s.174(2). These include: "(d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters" ("****Ground D****"). This allows appellants to argue that an enforcement notice should be set aside because the immunity period has expired. Appeals are heard by the Planning Inspectorate on behalf of the Secretary of State. The Inspectorate has published procedural rules for appeals, which include a requirement for parties to exchange statements of case and, subsequently, any evidence.*[8]

*Where a person has carried out unlawful development (intentionally or otherwise), but has not been issued with an enforcement notice within the Immunity Period, he may apply to the local planning authority for a Certificate of Lawful Development ("****LDC****") under s.191 (2) TCPA. This certificate will not make the development lawful, but will rather record that the development has become lawful by virtue of s.171B.*

The relevance of concealment

[8] https://www.gov.uk/government/publications/enforcement-appeals-procedural-guide/procedural-guide-enforcement-notice-appeals-england

Following two egregious abuses[9] of the Immunity Period, the Supreme Court and Parliament moved in tandem to identify two substantially overlapping exceptions to it, which will apply in certain cases involving concealment.

The first exception – the Welwyn principle

*It is difficult to understand the **Welwyn** principle without understanding the facts in that case. It arose from the actions of a Mr Beesley, who obtained planning permission to construct a hay barn. My Beesley went on to construct a building which, whilst having the appearance of a barn, was in fact laid out internally as a dwellinghouse. It was established that this had been Mr Beesley's intention all along. Mr Beesley lived in the property for four years. Whilst living in the property Mr Beesley deliberately refrained from giving notice under the building regulations; he also did not register for council tax at the building and provided the Council with an alternative address. Mr Beesley sought an LDC from Welwyn relying on s.171B TCPA. This application was refused but granted on appeal. Before the Supreme Court it was argued that Mr Beesley's conduct disentitled him, on public policy grounds, from relying on s.171B or s.191 TCPA. Lord Mance JSC (with whom the majority of the court agreed) stated:*

43…The real gravamen of the council's case is to be found in the deception involved in the obtaining of false planning permissions which Mr Beesley never intended to implement, but which were designed to and did mislead the council into thinking that the building was a genuine hay barn and so into taking no enforcement step for over four years. This was deception in the planning process and directly intended to undermine its regular operation.

44. The other aspects of Mr Beesley's conduct identified in para 31 [including the failure to register for council tax and to give notice under the building regulations] above were ancillary to the plan of deception. By themselves, these are, I suppose, aspects of conduct not uncommon among those who build or extend houses or convert buildings into houses without planning permission; they do not bear directly on the planning process and I am prepared to assume, for the purposes of this case at all events, that they would not, at least without more, disentitle reliance upon section 171B(1) or (2) or section 191(1)(a) or (b).

Lord Rodger JSC agreed, holding, summarising the case as follows (emphasis added):

62. In this case, however, Mr Beesley took effective steps to conceal the true nature of the development over the four-year period since the change of use occurred. In

[9] The first of these is ***Welwyn,*** the facts of which are discussed below. The second is ***Fidler v SoS*** [2011] EWCA Civ 1159 (see below).

*particular, he **deliberately concealed** the fact that the structure was being used, and was intended to be used, as a single dwelling house on Green Belt land. The concealment worked and the true position came to light only when Mr Beesley triumphantly revealed his dwelling house immediately after the four years had expired. He does not suggest—and it would not lie in his mouth to suggest—that, despite his efforts, the council should have spotted the true position before the four years expired.*

*63. In that situation, where Mr Beesley **deliberately set out to conceal the true nature of the development during the whole four- year period, with the aim that the council would be prevented (as happened) from taking enforcement action within the four- year period**, there is no justification for cutting off the council's right to take enforcement action. To hold otherwise would be to frustrate the policy, indeed the raison d'être, of section 171B(2) of the 1990 Act: in short, it is unthinkable that Parliament would have intended the time limit for taking enforcement action to apply in such circumstances. In my view, therefore, in this situation section 171B(2) does not prevent the council from initiating enforcement action. It follows that, having regard to section 191(2)(a) of the 1990 Act, the use of the subjects as a dwelling house is not lawful for the purposes of section 191(1)(a) .*

*The principles which arise from **Welwyn** were summarised at §56 of the judgment. They provide that the Immunity Period will not apply to development where:*

a. *There was positive deception in matters integral to the planning process;*
b. *That deception was directly intended to undermine the planning process;*
c. *It did undermine the planning process; and*
d. *The wrongdoer would profit directly from the deception, if the normal limitation period were to enable them to resist enforcement.*

*The Supreme Court also made reference to the case of **Fidler v SoS** [2011] EWCA Civ 1159 (§§81-82) where it considered that similar considerations would have applied. In that case, Mr Fidler had constructed a mock Tudor castle without planning permission, but at all times had hidden it behind a 40ft high shield of stray bales and tarpaulin. After occupying the castle for four years, Mr Fidler removed the bales and sought an LDC.*

The second exception – the PEO procedure (ss.171BA-171BC TCPA)

*The above provisions were introduced as amendments to the TCPA by the Localism Act 2011. The background to these amendments, including references to **Fidler** and*

***Welwyn**, is summarised in the judgment of the Court of Appeal in **Bonsall v SSCLG** [2016] QB 811, §§17-23. In particular, at §22, the Richards LJ recorded the government's stated policy objective and rationale as follows:*

[T]hat development which took place without authorisation might be considered lawful if it remained in situ without enforcement action being taken within the time limits prescribed and 'this even includes cases where development has been concealed from public view until the time limit for enforcement action has passed'…The Government was said to be concerned that some applicants for planning permission were misleading planning authorities about their proposals, as for example "where … development is significantly different from the development that was granted planning permission, has been disguised as a different type of development, or has been concealed completely"

*Some further helpful commentary on the purpose of the PEO procedure was provided by Lang J in **Payne v SSHCLG** [2021] EWHC 3334 (Admin) (emphasis added):*

*18. In my judgment, the purpose of a PEO is to permit an authority to take enforcement action against an apparent breach of planning control that had been deliberately concealed, **therefore denying the authority the opportunity to take enforcement action within the statutory time limit**.*

Sections 171BA-171BC as enacted provide as follows. Section 171BA TCPA explains that the Immunity Period will be disapplied upon a successful application for a PEO:

171BA Time limits in cases involving concealment

(1) Where it appears to the local planning authority that there may have been a breach of planning control in respect of any land in England, the authority may apply to a magistrates' court for an order under this subsection (a "planning enforcement order") in relation to that apparent breach of planning control.

(2) If a magistrates' court makes a planning enforcement order in relation to an apparent breach of planning control, the local planning authority may take enforcement action in respect of—

(a) the apparent breach, or

(b) any of the matters constituting the apparent breach,

at any time in the enforcement year.

(3) "The enforcement year" for a planning enforcement order is the year that begins at the end of 22 days beginning with the day on which the court's decision to make the order is given, but this is subject to subsection (4).

(4) If an application under section 111(1) of the Magistrates' Courts Act 1980 (statement of case for opinion of High Court) is made in respect of a planning enforcement order, the enforcement year for the order is the year beginning with the day on which the proceedings arising from that application are finally determined or withdrawn.

(5) Subsection (2)—

(a) applies whether or not the time limits under section 171B have expired, and

(b) does not prevent the taking of enforcement action after the end of the enforcement year but within those time limits.

The procedure for making a PEO is set out in s.171BB TCPA:

171BB Planning enforcement orders: procedure

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

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

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

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

is conclusive evidence of that fact.

(3) A certificate stating that matter and purporting to be so signed is to be deemed to be so signed unless the contrary is proved.

(4) Where the local planning authority apply to a magistrates' court for a planning enforcement order in relation to an apparent breach of planning control in respect of any land, the authority must serve a copy of the application—

(a) on the owner and on the occupier of the land, and

(b) on any other person having an interest in the land that is an interest which, in the opinion of the authority, would be materially affected by the taking of enforcement action in respect of the apparent breach.

(5) The persons entitled to appear before, and be heard by, the court hearing an application for a planning enforcement order in relation to an apparent breach of planning control in respect of any land include—

(a) the applicant,

(b) any person on whom a copy of the application was served under subsection (4), and

(c) any other person having an interest in the land that is an interest which, in the opinion of the court, would be materially affected by the taking of enforcement action in respect of the apparent breach.
(6) In this section "planning enforcement order" means an order under section 171BA(1).
The test for making a PEO is set out in s.171BC TCPA:
171BC Making a planning enforcement order
(1) A magistrates' court may make a planning enforcement order in relation to an apparent breach of planning control only if—
(a) the court is satisfied, on the balance of probabilities, that the apparent breach, or any of the matters constituting the apparent breach, has (to any extent) been deliberately concealed by any person or persons, and
(b) the court considers it just to make the order having regard to all the circumstances.
(2) A planning enforcement order must—
(a) identify the apparent breach of planning control to which it relates, and
(b) state the date on which the court's decision to make the order was given.
(3) In this section "planning enforcement order" means an order under section 171BA(1).
Thus s.171BC imposes two tests which must be met: (a) a factual test – whether there was "deliberate concealment" and (b) a discretionary test – i.e. whether it is just to make the order.

The relationship between the two exceptions

*In **Bonsall** (above), the Court of Appeal considered the relationship between the PEO procedure and the **Welwyn** principle. Richards LJ held (§45):*
There is an overlap between the PEO procedure and the Welwyn principle but the overlap is far from complete. On the one hand, the PEO procedure is narrower than the Welwyn principle, since it applies only where an apparent breach of planning control has been deliberately concealed, whereas the Welwyn principle extends to cases of dishonesty or criminality, such as bribery or coercion, which would not necessarily amount to deliberate concealment. On the other hand, the Welwyn principle applies only to particularly serious cases, whereas the PEO procedure applies where an apparent breach of planning control has "to any extent" been deliberately concealed.

submissions

In light of the above, in order to allow the Council's application and grant a PEO, the Court will need to be satisfied of all of the following:

e. *That the application has been brought in time (i.e. within the deadline set out in s.171BB(1));*
f. *That there has been "deliberate concealment" of the sub-division; and*
g. *That it is just to make the PEO having regard to all of the circumstances.*

The Council is not able to meet any of these requirements for the reasons set out below.

(a) The application has not been made in time

As explained in ***Welwyn*** *(quoted above) the reason for the Immunity Period is to provide homeowners with certainty and to prevent "serious loss and/or hardship" that would be caused by enforcement proceedings long after the event. In the same vein s.171BB(1) requires PEO applications to be made within a strict time limit of six months beginning with the date on which evidence of the apparent breach of planning control sufficient in the opinion of the local planning authority to justify the application came to the authority's knowledge.*

Section 171BB(2) provides that the local planning authority may produce a certificate specifying this date and that this certificate shall stand as conclusive evidence of that fact. However, in ***Tanna v LB Richmond upon Thames*** *[2016] EWHC 1268 (Admin), Collins J held that it is still open to respondents to challenge such certificates before the Magistrates Court on the ground that it is "clearly wrong" in that it is not "a reasonable decision" (§§34-36).*

The Council has produced a certificate in this case, which certifies the relevant date (for the purposes of s.171BB(1)) as 24.03.21 [A/281]. The Council has explained that this was the date on which it received R1-4's evidence in the Appeal [A/283], which comprised, in summary, evidence proving R1-4's assertion that the Flats had been occupied for over four years. Prior to this, the Council claims, "it had no specific evidence of the sequence or timing of completion and occupation of the unauthorised development, and it could not have proved that any deception had taken place". This conclusion is "clearly wrong" for the following reasons:

h. *The Council became aware of the sub-division between 07.01.18 (the date of the First Site Visit which was originally given) and 07.03.19 (the date of the Second Site Visit). Officers were able to enter several of the flats, observe others through a window and photograph a "fire plan" showing that all of the Flats had been subdivided [R/30; R/109].*

i. *The Council has always had access to the Records, which comprise the only evidence of concealment which it now relies upon.*[10] *These Records are either matters of public record or held by other departments of the Council [R/119-120]. The Council could therefore have proven that the "deception"*[11] *(as alleged by it but denied by R1-4) had taken place at any time after it identified the sub-division.*

j. *At that time it would not have been necessary for the Council to obtain a PEO because the Immunity Period had not expired. The need for a PEO only arose because of the inexplicable delay between obtaining evidence of the breach and issuing the Enforcement Notice, during which time the Council made no attempt to exercise its power to obtain further information from R1-4 about the development – something which the Council was expressly criticised for by the Inspector [A/19].*[12]

k. *Nothing in the test for granting a PEO (see s.171BC above) or in s.171BB(1) requires the Council to have evidence as to when the unlawful date commenced or to prove that it has taken place over any particular period of time or that the Immunity Period has expired. It was therefore not necessary for the Council to have any evidence (specific or otherwise) of the timing and completion of the sub-division.*

l. *In any event, the Council clearly had sufficient evidence of the timing and completion of the sub-division from 23.09.19 when the Respondents informed the Council in their notice of appeal*[13] *that the sub-divided Flats had been used as such since before 22.08.15 and that they held documentary evidence to prove it [R/123]. Had the Council sought a PEO at that point, it could obviously have produced this notice as evidence.*

In addressing this issue, the Court must have regard to the guidance issued by the senior courts. The only available example of such guidance can be found in ***Tanna****,*

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[10] The suggestion that the Second Prior Approval comprised evidence of concealment was rejected by the Inspector [A/18, §34] and has not been revived by the Council.

[11] As identified in the SoC, §26 [R/8], *"deception"* does not feature anywhere in the test for a PEO. The proper test is whether there has been *"deliberate concealment"*. This confusion serves to further underline the unreasonableness of the Council's approach to timing.

[12] The Inspector refers here to a *"Planning Contravention Notice"*. The power to issue these notices is contained in s.171C TCPA. The purpose of a PCN is to require a person to provide information about activity being carried out on land, including for how long. It is an offence to fail to comply with a PCN: s.171D.

[13] Attested by the signature of the Respondents' planning consultant [R/126].

where Collins J found that a delay of approximately six weeks between a local planning authority finding out about an appellant's intention to rely on the Immunity Period and the local planning authority considering that a PEO application was justified "was very much a borderline case" (§43).

The delay is significantly longer in this case: the Council found out about R1-4's intention to assert immunity on 23.09.19, just short of two years before it made the PEO application on 04.07.21 – and, as stated above, it had evidence of the breach of planning control and the alleged deception well before that. In addition, there can be no argument that the Council considered that it was appropriate to await the outcome of the Appeal before proceeding with the PEO because its own certificate states that it believed it had sufficient evidence to justify the application on 24.03.21, which was a month before the Inquiry even commenced.

Accordingly, this application falls to be dismissed as out of time.

(b) There was no deliberate concealment

There are three elements to R1-4's submissions on this issue: (i) that the Inspector's finding that there was no "deliberate concealment" is binding on the Court and the parties; (ii) that there was no concealment as a matter of fact; and/or (iii) that there was no deliberate (i.e. intentional) concealment.

(i) The Inspector's finding that there was no "deliberate concealment" is binding on the Court and the parties

The Inspector's finding, recorded at §38 of her decision letter [A/19] is binding by virtue of issue estoppel. Issue estoppel is a rule of public policy which reflects the public interest in the finality of proceedings and that citizens should not be vexed twice: ***Thrasyvoulou v SSfE*** *[1990] 2 AC 273 at 282. The relevant components of issue estoppel are summarised in Spencer, Bower & Handley Bower, Res Judicata (5th Edn), ch.1.*[14] *Each component is addressed as follows.*

(1) The decision, whether domestic or foreign, was judicial in the relevant sense

It is well established that a decision of a planning inspector hearing an enforcement appeal is judicial in this sense and can give rise to issue estoppel: ***Thrasyvoulou v SSfE*** *[1990] 2 AC 273 at 295.*

(2) The decision was in fact pronounced

The Inspector's decision was pronounced and publicised in her decision letter [A/12]. It was not appealed and remains in force.

(3) The tribunal had jurisdiction over the parties and the subject matter

[14] As approved by the Court of Appeal in ***Midland Bank Trust v Green (No 1)*** [1980] 1 Ch 590

The Inspector had a statutory jurisdiction to hear the Appeal pursuant to s.174 TCPA. This included the jurisdiction to consider questions of concealment: see ***Welwyn****.*

(4) The decision was final and on the merits

The Inspector's decision fully disposed of the Appeal and was final, subject to the right to bring a statutory review to the High Court on a point of law (s.289 TCPA), which was not exercised by the Council and which has now expired. A decision will be "on the merits" if it is made otherwise than on purely procedural grounds: Spencer, Bower & Handley Bower, Res Judicata (5th Edn), ch.6. The Inspector's decision was made after a full examination of written and oral evidence. It is relevant to note that the Council has not produced any evidence for this application which was not before the Inspector at the time of the Inquiry.

(5) The decision determined a question raised in the later litigation

In ***Virgin Atlantic Airways Limited v Zodiac Seats UK Limited*** *[2013] UKSC 46 Lord Sumption JSC cited the following explanation of this component (§20):*

Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue

The question here, then, is whether the Inspector's finding that there was no "deliberate concealment" of the sub-division was a necessary ingredient of her overall finding that the ***Welwyn*** *principle was not engaged. It plainly was for the following reasons:*

m. It is clear from both the judgment of Lord Rodger in ***Welwyn,*** *and the Supreme Court's acceptance that the* ***Fidler*** *case would also fall within* ***Welwyn*** *exception, that the presence of deliberate concealment is or can be a component of the* ***Welwyn*** *test;*

n. This is confirmed by the judgment of Richards LJ in ***Bonsall*** *(quoted above), where he accepted that both the* ***Welwyn*** *principle and the PEO procedure would apply where development was deliberately concealed, but noted (a) that the* ***Welwyn*** *principal also extended to cases of dishonesty or criminality; and (b) that the* ***Welwyn*** *principle would only apply to particularly serious cases;*

o. It follows that an Inspector considering a ***Welwyn*** *argument will have to consider:*

i. *Whether there has been deliberate concealment of any part of the development;*
ii. *Whether there has otherwise been dishonesty or fraud; and*
iii. *Whether either or both of these was sufficiently serious to amount to positive deception in matters integral to the planning process;*

p. *That is precisely what the Council invited the Inspector to do at the Inquiry [R/114] and it is precisely what she did. At §38 of her decision [A/19], she:*
i. *Considered whether there had been any deliberate concealment of the development and found that there had not been;*
ii. *Then considered whether there had been any other deception and found that there R1-4's conduct had been misleading; and*
iii. *Considered whether this conduct "amounted to the degree of deception necessary to engage the principles set out in Welwyn" and concluded that it did not.*

It follows that her conclusion that there was no deliberate concealment was a necessary ingredient in the Council's cause of action – i.e. that the ***Welwyn*** *principle should apply. The Council has not produced any evidence of "concealment" which was not presented to the Inquiry; and the arguments advanced now are identical to those which were advanced before, and rejected by, the Inspector.*

(6) The parties are the same or the decision was in rem

The parties to the Inquiry were the same as the parties to this application. In addition the decision was in rem because it related to the lawful use of the Building as opposed to the relationship between the parties.

The Inspector's conclusion that there was no deliberate concealment is therefore binding and is a complete defence to this application.

(ii) There was no concealment of the sub-division

Even if (contrary to the above) no estoppel arises, the Court should give significant weight to the findings of an expert planning inspector that there was no concealment of the development as a matter of fact. The following points are advanced on behalf of R1-4.

First, as Lang J noted in ***Payne*** *(quoted above), the purpose of the PEO procedure exists to allow local planning authorities to take enforcement action in circumstances where they could not have done so within the Immunity Period due to*

the deliberate concealment of the development. Those circumstances do not apply in this case. The Council could have taken enforcement action within the Immunity Period: it became aware of it as a result of the First Site Visit and it could have taken enforcement action at that point (or at any other point before its expiry). There was therefore no concealment for the purposes of s.171BC TCPA.

Second, there is no suggestion that R1-4 took any positive steps to physically conceal the development from the Council. Indeed, the Council's officers were able to identify that one of the flats had been sub-divided simply by looking through the window [R/30]. The "fire plan" showing the sub-division was also openly displayed in the Building and was seen by the Council's officers [R/30].

Third, the Council's case for concealment is based entirely on allegations of dishonesty arising from R1-4's failure to correct the Reports. However:

q. As Richards LJ noted in ***Bonsall*** *(quoted above), the PEO procedure does not extend to cases of dishonesty. Such cases fall within the remit of the* ***Welwyn*** *principle and the Council's specific case on this was rejected by the Inspector; and*

r. As Lord Mance noted in ***Welwyn****, Mr Beesley's failure to register for Council tax and to give notice under the building regulations did not amount to evidence of concealment or deception, and did not bear directly on the planning process, but were instead ancillary and "aspects of conduct not uncommon among those who build or extend houses or convert buildings into houses without planning permission". See also WS Coward, §62 [R/118-119].*

Accordingly, there was no concealment of the sub-division as a matter of fact.

(iii) There was no deliberate (i.e. intentional) concealment of the sub-division

Further and/or alternatively, there was no deliberate concealment of the sub-division by R1-4. It is R1's evidence that R1-4 believed at all material times that they had carried out the development in accordance with the Prior Approval and that the development could still be considered to comprise 14 Flats, notwithstanding the sub-division: WS Rashti, §17 [R/16]. Indeed R1 obtained advice from his lender to this effect: WS Rashti, §§24-25 [R/17-18]. It follows that if the Respondents were not aware that they had committed any breach of planning control, they cannot have knowingly (and therefore deliberately) concealed it from the Council.

(c) It would not be just to make the PEO having regard to all of the circumstances.

Even if, contrary to the above, the Council is able to establish that there has been deliberate concealment of the sub-division, it would still not be just to make the PEO having regard to all of the circumstances in this case for the following reasons.
<u>First</u>, even if the Court accepts the Council's evidence that it only considered itself to have sufficient evidence to justify the PEO application in March 2021, both the extent and the cause of the delay in pursuing this application are relevant to the exercise of the Court's discretion:

s. *The extent of the delay is significant. As explained, even on the most generous interpretation of its evidence, the Council became aware of the sub-division at some point between 07.01.18 and 07.01.19. This was before the expiry of the Immunity Period. Despite this, no enforcement notice was issued until 22.08.19. In addition, the Council became aware that the Respondents had evidence that indicated that the Immunity Period had expired from 23.09.19, but did not make the PEO application until 04.07.21. Given that the obvious public policy reasons for supporting a definite and short Immunity Period for residential development, a delay of this magnitude is highly prejudicial both to the Respondents and to the occupiers of the Flats (see below).*

t. *The Council has not provided any explanation for the cause of the above delays. Indeed, it would not have been necessary for the Council to seek this PEO at all had it acted with reasonable diligence in responding to the evidence of the sub-division when it arose by exercising its power to obtain further information by issuing the PCN and/or issuing an enforcement notice. This point was expressly noted by the expert Inspector [A/19, §38]. It cannot be right that the Council should now be able to benefit from its own failures so long after the events and at significant prejudice to the Respondents (see below).*

<u>Second</u>, even if no issue estoppel can be established, it is nevertheless relevant that the lawfulness of the sub-division and the Council's suggestion that the Respondents have engaged in deliberate concealment have already been considered by an expert Inspector at substantial cost both to the public and to the Respondents and at cost to the Respondents' and their tenants' wellbeing: WS Rashti, §41 [R/21]. The Council did not appeal the Inspector's decision. The Respondents and the tenants of the Flats are entitled to certainty and finality. To allow the Council a "second bite of the cherry" would be inimical to this fundamental principle. Indeed, would amount to

an abuse of the court's process, in that it would be (i) "manifestly unfair to a party to the new proceedings" (i.e. the Respondents, who are put to additional cost, stress and uncertainty: WS Rashti, §§43-45 [R/21]); and/or (ii) "would bring the administration of justice into disrepute" (in that it would significantly undermine the authority of the planning appeals structure, and particularly the ability of planning inspectors to determine allegations of concealment with any degree of confidence or finality): ***Secretary of State for Trade and Industry v Bairstow*** *[2003] EWCA Civ 321, §38.*

Third, as explained by R1, a finding in favour of the Council would place the Respondents under severe financial and emotional stress: WS Rashti, §§44-46, [R/21-22].

Fourth, the dwellings which are the subject of these proceedings are currently home to 20 tenants. Those tenants reasonably believed that the enforcement proceedings had ceased with the conclusion of the Appeal. They would stand to lose their homes and would suffer substantial hardship: WS Rashti, §§44 & 47 [R/21-22].

Fifth, and contrary to what is said at §23(ix) of Nigel Wickes' statement of 07.12.21 [A/290], the Respondents have put forward alternative proposals to the Council which would involve the cessation of the use of the Flats for residential purposes. This is precisely the outcome which the Council seeks to achieve through this application.

conclusion

For the reasons given above, the Court is respectfully requested to dismiss the application. R1-4 will seek an order that the Council pay their costs of responding to the application pursuant to s.64 of the Magistrates Court Act 1981 or otherwise