Neutral Citation Number: [2019] EWHC 160 (Admin)

Case Nos: CO/3915/2018 & CO/2505/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 February 2019

Before :

Justine Thornton QC, sitting as a Deputy High Court Judge

- -

Between :

Mr Robert Johnson and Mrs Marjolein Russnak-Johnson	**Claimant**
- and -	
Royal Borough of Windsor and Maidenhead	**Defendant**
-and-	
Royal Borough of Windsor and Maidenhead	**Appellant**
- and -	
Secretary of State for Housing Communities and Local Government	**Respondent**

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- -

Mr W. Robert Griffiths QC and Ms Nicola Strachan (instructed by Sharpe Pritchard) for **Mr and Mrs Johnston**
Ms Frances Lawson instructed by **Royal Borough of Windsor and Maidenhead**
Ms Estelle Dehon (instructed by Treasury Solicitor) for the **Secretary of State**

Hearing dates: 9 October; 17, 18 December 2018

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Approved Judgment

Justine Thornton QC, sitting as a Deputy High Court Judge :

Introduction

1. This is the judgment in two consolidated claims arising from protracted and ongoing enforcement proceedings in relation to land in Maidenhead.

2. The land subject to the enforcement proceedings is Fairview Stables, Darlings Lane, Maidenhead SL6 6PB. It is owned by Mr Johnston and houses stables. Mr Johnston's wife, Mrs Russnak-Johnston runs the stables and operates a livery service. Mr Johnston and Mrs Russnak-Johnston are together referred to as Mr and Mrs Johnston in this Judgment. The planning authority in whose area the land is situated is the Royal Borough of Windsor and Maidenhead ('the Council').

3. In an application for judicial review, Mr and Mrs Johnston seek to challenge the service of an enforcement notice by the Council, dated 16 May 2018, alleging material change in the use of the land from private equestrian use to a mixed private and commercial equestrian/livery use, as well as six notices alleging breach of planning conditions in a 1991 planning permission.

4. In the statutory appeal, under section 289 Town and Country Planning Act (TCPA), the Council seeks to challenge a costs decision made by a specialist costs decision maker on behalf of the Secretary of State for Housing, Communities and Local Government ('the Secretary of State') arising out of events at an aborted hearing in January 2018 in an appeal by Mr Johnston against an enforcement notice served previously by the Council. The Secretary of State awarded Mr and Mrs Johnston their costs of the appeal proceedings on grounds of the Council's unreasonable behaviour resulting in unnecessary or wasted expense.

Chronology

5. The land in question has been used for the grazing of horses for a number of years. It is subject to planning permission granted in 1991 containing 13 conditions.

6. It is common ground that, between 2006 and 2009, during previous ownership, the use of the land was equestrian use with "*DIY livery*". '*DIY livery'* is defined in Government Guidance on keeping horses on farms as where "*the care and management of the horse is the responsibility of the horse owner*". DIY livery is to be contrasted with "*full livery*" where the care of the horse is the responsibility of the provider of the livery or yard manager and "*part livery*" where the management and care of the horse is shared between the owner and livery provider.

7. In late 2009 / early 2010, the land was sold to Mr Johnston. Mr and Mrs Johnston undertook refurbishment work and applied unsuccessfully for planning permission, in 2011 and 2016, to restore, enlarge and modernise the stables.

8. In March 2016, the Council served a notice requesting information about a suspected breach of planning control on site (a Planning Contravention Notice under Section 171C TCPA). A further notice was served in July of that year.

9. On 1 February 2017, the Council served an enforcement notice in relation to the land ('the First Enforcement Notice'). The notice alleged a breach of planning control arising from:

> *"a material change of use of the land from the keeping of horses for recreational use, including stabling and grazing of horses and training and exercising of horses in the approved menage to a commercial stud farm and livery with residential occupation"*

10. Mr and Mrs Johnston appealed against the service of the First Enforcement Notice. On 17th January 2018, the inquiry into the appeal against the First Enforcement Notice opened. The Council decided to withdraw the enforcement notice shortly after the inquiry opened, following its unsuccessful application for an adjournment on the basis of a very late change in circumstances. There was some debate between the parties at the hearing before me as to the basis of the application for adjournment, but it emerged as common ground that the Council's application was based on three factors:

    a. Further planning breaches had been detected on site and required investigation;

    b. Seventy-one pages of late evidence (livery agreements and relevant guidance) were served on behalf of Mr and Mrs Johnston at 1pm the day before the inquiry opened;

    c. The Council wished to investigate whether a criminal offence had been committed with the provision of misleading information in the response to the Planning Contravention Notices.

11. The Inspector ('the Appeal Inspector') refused the Council's application to adjourn, whereupon the Council withdrew the Enforcement Notice. Both sides applied for costs in relation to the aborted inquiry.

12. On 16th May 2018, the Council served a second enforcement notice ("the Second Enforcement Notice") and six Breach of Condition Notices. Three of the notices were served on Mr Johnston and three were served on Mrs Johnston. The Second Enforcement Notice refers to the breach of planning control as:

> *"the material change in the use of the land from the keeping of horses for private recreational purpose comprising non commercial DIY livery, functioning with a maximum of six horses and six stables, to a mixed use comprising of private stabling and commercial livery with ancillary activities including 'assisted' DIY livery, part livery, full livery, schooling, hacking, lessons, massage, grooming, clipping and the formation of hardstanding, the erection of buildings and the siting of a metal container to facilitate the material change in the use of the land"*

13. The Breach of Condition Notices each relate to breaches of conditions 7, 9 and 10 of the 1991 planning permission.

14. Mr and Mrs Johnston appealed against the service of the Second Enforcement Notice and issued judicial review proceedings challenging the issue of the Second Enforcement Notice and the Breach of Condition Notices ("BCN"s). The grounds of claim were as follows:

    a. The Council could not rely on conditions 7, 9 and 10 of the 1991 planning permission as the time for taking any enforcement action in relation to those conditions had expired;

    b. As a matter of construction, the conditions did not have the effect of limiting any development of the Claimant's land other than the land in respect of which the permission had been granted – namely, the retention of internal access road and replacement of lean-to to existing stables;

    c. The Second Enforcement Notice was of considerably wider ambit than the First Enforcement Notice and was therefore an unlawful second bite at enforcement contrary to section 171B(4)(b) of the TCPA 90.

15. In July 2018, Robin Purchas QC, sitting as a Deputy High Court Judge, granted permission in relation to the challenge to the decision to issue the Breach of Condition Notices on grounds of the scope of the conditions and the effect of any change of use. He refused permission on the basis that the decision to issue the Second Enforcement Notice was perverse or contrary to article 6 of the European Convention on Human Rights. Any arguments to this effect could and should be properly addressed as part of the statutory appeals. The argument that the BCNs were served out of time was wholly misconceived on the basis that Section 171B(4)(b) TCPA provides for an extension of time and the Council contended that the breaches arose within the ten year period. He refused the application for a stay in respect of criminal proceedings for breach of the earlier planning contravention notices.

16. On 13 September 2018, the Secretary of State issued his decision on costs arising from the aborted appeal hearing on 17 January 2018. He awarded Mr and Mrs Johnston their costs of the appeal proceedings on grounds of 'unreasonable' behaviour by the Council resulting in unnecessary or wasted expense. He declined to award the Council partial costs, in respect of the expense incurred in preparation for the inquiry on 17 January 2018, on the basis that the Council was not put to unnecessary or wasted expense as a result of the appellant's unreasonable behaviour in submitting late evidence.

17. In response, the Council challenged the costs decision on grounds of Wednesbury unreasonableness; mistake of fact and error of law under s.288 of the Town & Country Planning Act. The challenge proceeded as an appeal under s.289 TCPA.

18. On 9 October 2018, the substantive hearing into the judicial review application opened before me in the High Court. It was adjourned part heard at the request of the Council, on grounds that the Council had been taken by surprise at propositions of law relied on by Counsel for Mr and Mrs Johnson. The hearing was adjourned and the parties were ordered to produce addendum skeleton arguments on the point of law arising.

19. By order dated 15 November 2018, the judicial review claim and statutory appeal were consolidated, to be heard on 17th and 18th December 2018. The statutory appeal was to

proceed by way of a rolled up permission hearing with any substantive hearing to follow immediately if permission was granted.

20. On 10th December 2018, the trial into the Planning Contravention Notices served in 2016 was heard at Reading Magistrates Court. After hearing legal arguments, the trial was adjourned to 19 March 2019.

21. The substantive hearing of the judicial review and the rolled up hearing of the statutory appeal were heard before me on the 17 and 18th December 2018. Counsel for Mr and Mrs Johnston (Mr Griffiths) and Counsel for the Council (Ms Lawson) made submissions in relation to the judicial review challenge. Ms Lawson and Counsel for the Secretary of State (Ms Dehon) made submissions in relation to the statutory appeal.

22. The inquiry into the appeal against the second Enforcement Notice is listed for 24th April 2019.

The 1991 Planning Permission

23. The Notice of Permission is dated 4 December 1991. It opens with a series of short headings which include the application date; the type of permission; the proposal; location; parish; application and agent. The proposal is specified as "*retention of internal access road and replacement of lean-to to existing stables*", at land west of Darlings Lane, Maidenhead.

24. Below the headings, the permission states:

> *"The Council of the Royal Borough of Windsor and Maidenhead hereby PERMIT the above development to be carried out in accordance with the application submitted by you on the above date, subject to compliance with the conditions specified hereunder:"*

13 conditions are specified followed by an Informative.

25. Condition 2 provides that 'This permission shall relate only to drawing numbered WM/91/69/1/A'. The reason given is "to avoid ambiguity, to ensure a satisfactory development and to accord with the terms of the application".

26. Conditions 7, 9 and 10 provide as follows:

> *"7 The development hereby approved shall be used only for the keeping of horses for private recreational purposes and for no other use whatsoever, including any commercial use.*
>
> *Reason: In order to accord with the Local Planning Authority guidelines for the keeping of horses outside of residential curtilages and to avoid an inappropriate form of development at this Green Belt site."*
>
> *"9 The haystore shall be used only for the storage of hay for purposes ancillary to the keeping of horses at the site for*

> *recreational use. It shall not be used for any other use whatsoever, including any commercial or separate use.*
>
> *Reason: In order to accord with the Local Planning Authority guidelines for the keeping of horses outside of residential curtilages and to avoid an inappropriate form of development at this Green Belt site.*
>
> *10 The surfaced 'open' areas comprising the yard and parking areas shall be used for the purposes of access, manoeuvring, parking and loading in connection with the approved development. No storage shall take place other than inside the buildings.*
>
> *Reason: In the interests of amenity."*

27. The other conditions make provision for:

    a. Materials for the new building; access road and vehicle hardstanding (conditions 3 and 4)

    b. The width of the access road (condition 5)

    c. The provision of gates at the boundary of the site with the highway (condition 6)

    d. A maximum of 6 stables (condition 8)

    e. The removal of earth bunds (condition 11)

    f. Provision for a landscaping scheme (condition 12)

    g. Restrictions on planting, seeding or turfing (condition13)

28. The Informative provides that:

> *"The applicant is advised that any commercial use would require planning permission. An application for any such use (including Riding School, livery, farrier or other commercial use) would be unlikely to receive favourable consideration."*

The Secretary of State's cost decision

29. The Secretary of State's decision was made on his behalf by a specialist costs decision maker at the Planning Inspectorate (referred to in this Judgment as the Costs Inspector to distinguish him from the Inspector at the appeal hearing referred to as 'the Appeal Inspector'). The formal decision is that the Secretary of State orders the Council to pay to Mr Johnson his costs of the appeal proceedings before the Secretary of State, such costs to be assessed (paragraph 20).

30. The Costs Inspector set out his understanding of events at the inquiry as follows:

> *"……The Council considered that they had been prejudiced by the service of the late evidence and that inquiry could not fairly proceed. They took the decision to apply for an adjournment at the start of the inquiry but the appellant was opposed to the request. It appears that the Planning Inspector did not give a ruling on whether the submission of the late evidence would be accepted for consideration but indicated that it might warrant an adjournment. As regards the request to adjourn to allow further investigation by the Council (and for criminal proceedings to run their course) the Inspector declined to adjourn but, it seems, indicated that the Council might wish to consider their position. After an initial brief adjournment the Council announced that the enforcement notice would have to be withdrawn. They were not satisfied that, in the light of the appellant's late evidence (on 16 January) the inquiry could fairly proceed (paragraph 8)…"*

31. Having set out the basis of both applications for costs, the Inspector set out his conclusions as follows:

> ***Conclusions on a) the Council's costs application:***
>
> "*11 All the available evidence has been carefully considered. The costs application is for a partial award of costs – in respect of the expense incurred in preparation for the inquiry on 17 January 2018. It has not been alleged that the appeal was unreasonably made at the outset. The decisive issue is whether or not the appellant acted unreasonably, resulting in unnecessary or wasted expense being incurred, by the late submission of evidence. Paragraphs 50 & 51 of the costs policy guidance are particularly relevant. Paragraph 51 refers to examples of unreasonable behaviour arising from the introduction of fresh substantial evidence at a late stage.*
>
> *12 The Council have argued that the late submission of evidence by the appellant on 16 January 2018 caused them to decide to withdraw the enforcement notice. They claim the alternative would have been to proceed at the inquiry with their case being substantially prejudiced. While the appellant has apologised for the late submission the Secretary of State agrees that the submission of evidence on the day before the date of the inquiry amounts to unreasonable behaviour. In particular, the livery agreements date from 2009 and it is not understood, notwithstanding Mrs Johnston's accident during the Christmas period, why this information could not have been submitted much earlier. Whether or not the need for enforcement action could have been avoided if the information had been made available in response to PCNs is considered a matter of conjecture but, in this regard, it appears the Council did not see*

cause to withdraw the enforcement notice in response to the submission of the appellant's proofs of evidence which included statutory declarations that gave support to the appellant's argument that the livery had been in existence for over 10 years. The appellant has argued that the tenancy agreements helped to clarify his position and did not add anything new.

13 While the Council have stated that the late submission "goes to the heart of the reason why the enforcement notice was withdrawn" it is not clear to the Secretary of State why the late evidence could not have been considered during the course of the inquiry (which had already opened) with the benefit, if necessary, of an adjournment for this specific purpose. Any application for an award of costs, as arising from an adjournment, could have been considered by the Planning Inspector. In the event there was no such request for an adjournment because the Council decided to withdraw the enforcement notice. And, as can be seen from the Secretary of State's conclusions on the appellant's costs application (below), it is concluded that the late submission of evidence was not sufficient reason for the Council to decide to withdraw the enforcement notice – the inquiry could have proceeded without any injustice being caused and the Inspector could have determined the appeal. In the particular circumstances the conclusion drawn is that the Council were not put to unnecessary or wasted expense as a result of the appellant's unreasonable behaviour in submitting late evidence.

Conclusions on (b) the appellant's costs application

14 All the available evidence has been carefully considered. The decisive issue is whether or not the Council acted unreasonably, resulting in unnecessary or wasted expense being incurred, by withdrawing the enforcement notice. Paragraphs 42, 47 and 48 of the costs policy guidance are particularly relevant. Paragraph 47 states that, for enforcement action, local planning authorities must carry out adequate investigation. They are at risk of an award of costs if it is concluded that an appeal could have been avoided by more diligent investigation that would have either avoided the need to serve the notice in the first place or ensure that it was accurate.

15 Although the timing of the livery agreements submission is puzzling, as it would appear to have been in the appellant's interest to submit this as soon as possible, the view is taken that the agreements served to add to the evidence previously put forward by the appellant in support of the contention that the livery had been in existence for over 10 years. The evidence in question came at a very late stage, however, it is not clearly understood why the Council could not have allowed the enforcement notice to remain in place thus allowing the

> *Inspector to hear the parties' respective cases and to proceed to a determination on the appeal. Although the Council have stated that the submission of the late evidence on the day before the inquiry date had prejudiced their case on appeal, they have not clearly stated that this had rendered their case untenable. The Council would have had the option of making a costs application, if considered appropriate, in respect of the late service of evidence by the appellant. As regards the possibility of there being further breaches of planning control, and a further enforcement notice, this is a matter which could have been raised during the inquiry proceedings for the Inspector to note, however, the view is taken that this should not have prevented him from considering the merits of the appeal on the basis made. If the Council wished to carry out further investigations, with a view to possibly issuing a further enforcement notice, then this could have been the subject of further proceedings at a later date.*
>
> *16 For these reasons the Secretary of State does not agree with the Council that the late evidence amounted to good reason for the withdrawal of the enforcement notice. In the particular circumstances the Council's decision not to proceed with their case on appeal, by withdrawing the enforcement notice at such a late stage, is considered to amount to unreasonable behaviour. As a result the appellant was put to wasted expense in the appeal proceedings. A full award of costs is therefore being made.*"

The Legal Framework

32. Planning permission is required for the carrying out of development of land (s57(1) TCPA). The making of a material change in the use of land is development (s.55(1) TCPA). The term "*material change of use*" is not defined in the 1990 Act. Carrying out development without the required planning permission or failing to comply with any condition or limitation pursuant to which the planning permission has been granted constitutes a breach of planning control, under s.171A (1) TCPA.

Planning Contravention Notice (PCN)

33. A planning contravention notice may be issued under section 171C of the TCPA to allow the local planning authority to request information required for enforcement purposes. It is a criminal offence to fail to comply with a requirement of a PCN or to make false or misleading statements in response to the notice (s171D TCPA).

Enforcement Notice

34. Where it appears to a Local Planning Authority that there has been a breach of planning control and that it is expedient to issue an Enforcement Notice, the authority may do so: (s.172(1)). The notice must set out the matters which appear to the Planning Authority to constitute the breach of planning control, so as to enable the person on whom it is served to know what those matters are. It must also specify the activities

which the authority require to cease in order to achieve, wholly or partly, the remedying of the breach: (s.173 (3) and (4)).

35. A person served with a notice may appeal to the Secretary of State on a wide ranging number of grounds set out in s.174(2) TCPA, including that: planning permission ought to be granted (ground a); the matters alleged have not occurred (ground b); the matters in question do not constitute a breach of planning control (ground c) or; 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).

36. If the Secretary of State errs in law in reaching a decision on the appeal, the appellant may, with leave, appeal to the High Court under section 289 of the TCPA. If there is no appeal to the Secretary of State, or if the Secretary of State upholds the Enforcement Notice on appeal, any breach of its requirements is a criminal offence by virtue of section 179 of the Act.

Breach of Condition Notice

37. Under the TCPA, a Breach of Condition Notice may be served where planning permission has been granted subject to conditions and any of the conditions is not complied with (section 187A(2) TCPA). The notice may be served on the person carrying out the development or the person having control of the land ("the person responsible"). It must specify the steps to be taken, or activities required to cease, in order to comply with the conditions. If the notice is not complied with in the time allowed, the person responsible is guilty of an offence (s 187A(9) TCPA).

38. Unlike section 174, there is no right of appeal to the Secretary of State or any other body against the service of a Breach of Condition Notice. The validity of a notice may be challenged by way of an application for judicial review, or by way of defence to a prosecution (*Dilieto v Ealing LBC* [2000] QB 381). Alternatively, an application may be made to the planning authority for permission to retain the development without complying with the condition (s73).

39. The service of a Breach of Condition Notice is a purely public law act. There is strong public interest in its validity, if in issue, being established promptly, both because of its significance to the planning of the area, and because it turns what was merely unlawful into criminal conduct (Carnwath in *Trim v North Dorset District Council of Nordon* [2010] EWCA Civ 1446).

Time limits for enforcement

40. The general time limit for enforcement action is the end of ten years "*beginning with the date of the breach*" ("the 10-year rule") (s171B(3)). This period may, in effect, be extended by a further four years to enable an authority which has "*taken or purported to take*" enforcement action to take further enforcement action in respect of the same breach (s 171B(4)(b)). One effect is that, if the first enforcement action is set aside on appeal or by the court because of some legal defect, the authority may have a second chance to get it right. In addition, the time limits do not prevent the service of a breach of condition notice in respect of any breach of planning control if an enforcement notice in respect of the breach is in effect (s171B(4)(b)).

Costs jurisdiction and guidance

41. Pursuant to section 250(5) Local Government Act 1972, the Secretary of State may make orders as to the costs of the parties at an inquiry and as to the parties by whom the costs are to be paid. Pursuant to section 320 of the Town and Country Planning Act 1990, section 250(5) applies to a local inquiry held under the provisions of section 320 of the 1990 Act for the purpose of the exercise of any functions under the 1990 Act. Those functions include an appeal against an Enforcement Notice under section 174 of the Act.

42. Government guidance on costs provides that:

> Why do we have an award of costs?
>
> > "*Parties in planning appeals and other planning proceedings normally meet their own expenses. All parties are expected to behave reasonably to support an efficient and timely process, for example in providing all the required evidence and ensuring that timetables are met. Where a party has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs.* (paragraph 28)
>
> In what circumstances may costs be awarded?
>
> > *Costs may be awarded where:*
> >
> > - *a party has behaved unreasonably; and*
> > - *the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.* (paragraph 30)
>
> What does "unreasonable" mean?
>
> > *The word "unreasonable" is used in its ordinary meaning, as established by the courts in Manchester City Council v SSE & Mercury Communications Limited [1988] JPL 774* (Paragraph 31)
>
> What type of behaviour may give rise to a procedural award against a local planning authority?
>
> > *Local planning authorities are required to behave reasonably in relation to procedural matters at the appeal, for example by complying with the requirements and deadlines of the process. Examples of unreasonable behaviour which may result in an award of costs include:*
> >
> > …

- *withdrawing an Enforcement Notice without good reason* (Paragraph 47)

What type of behaviour may give rise to a procedural award against an appellant?

> *Appellants are required to behave reasonably in relation to procedural matters on the appeal, for example by complying with the requirements and deadlines of the appeals process. Examples of unreasonable behaviour which may result in an award of costs include:*
>
> …
>
> - *delay in providing information or other failure to adhere to deadlines*
>
> - *only supplying relevant information at appeal when it was requested, but not provided, at application stage*
>
> - *introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen*" (Paragraph 52)

The judicial review claim by Mr and Mrs Johnson

Submissions on behalf of Mr and Mrs Johnston

43. On behalf of Mr and Mrs Johnston, Mr Griffiths QC submitted that the 1991 planning permission could no longer be relied on by the Council as the basis for enforcement action because there had been a lawful change of use of the site which had resulted in a new planning chapter. It was common ground that 'DIY livery' took place on the site from 2006 – 2009. A change of use from one category of livery to another category of livery cannot amount to a material change of use. It is simply an intensification of use which of itself cannot lead to a material change of use without a change in the character of the land. The Council's distinction between DIY livery (which it regarded as lawful) and commercial livery (which it regarded as unlawful) was based on a contractual distinction as to the payment of rent, which was not a distinction of relevance in planning terms.

44. Alternatively, as a matter of construction, the 1991 permission was limited specifically to the retention of an internal access road and replacement of a lean-to, to the existing stables. Accordingly, the planning conditions could only delimit or circumscribe the use of those areas and could not be relied on by the Council to enforce against the whole site.

45. Whilst permission to challenge the issue of the Second Enforcement Notice had been refused by the Deputy High Court Judge, the subsequent costs decision by the Secretary of State provided evidential support for the argument that the Claimant's decision to issue the second Enforcement Notice in May 2018 was unreasonable.

Submissions on behalf of the Council

46. On behalf of the Council, Ms Lawson submitted that the question of a material change of use on site was a matter of fact and degree, suitable for determination by the Planning Inspector at the forthcoming appeal hearing and not a matter for the Court. The distinction between 'DIY' and commercial livery is highly fact specific and depends on the circumstances in question. In this case, the relevant evidence relied on by the Council included an increase in stables; the placing of a water tank in open storage areas on the land; the introduction of new buildings as well as the employment of staff on site. In the circumstances the Court's role was limited to considering whether the Council had acted Wednesbury unreasonably in deciding to issue the BCNs. On the evidence available to the Council when it took its decision to enforce, it could not be said that the Council had acted unreasonably.

47. As to the Claimant's alternative argument, the 1991 planning permission expressly incorporated the site drawing which displays the whole of the site. It was apparent from the wording of the conditions that they extended beyond the access road and replacement shed.

48. As regards the Council's decision to issue a Second Enforcement Notice, the Secretary of State's cost decision was narrowly focussed on events at and shortly before the opening of the inquiry in January 2018 and could provide no support to re-open the Deputy Judge's decision on permission in this respect.

Discussion

Material change of use

49. It was common ground between Mr Griffiths and Ms Lawson that the DIY livery use established by 2009 was a lawful use of the land. The issue in dispute was whether the change from DIY to commercial livery use was a question of fact or degree, or whether, as a matter of law, a change from one category of livery use to another was incapable of constituting a material change.

50. Both Counsel accepted that the relevant principles for considering a material change in the use of land were summarised by the Court of Appeal in *Fidler v First Secretary of State* [2005] 1 P&CR 12:

> "*a. The orthodox approach is for the decision maker to identify the appropriate 'planning unit' to be considered for the purpose of deciding whether or not there has been a material change in the use of land*
>
> *b. The appropriate planning unit may embrace an area of occupation within which a variety of activities are carried on and comprise a composite or mixed use, where the individual components may fluctuate in their intensity from time to time, but are not confined within separate and physically distinct areas of land;*

> *c. Whether or not there has been a material change in the use of land is to be considered by reference to the character or uses to which the land is put. A material change in the character of the use of land is capable of resulting wholly or in part from changes in the intensity of the use or uses of or activities carried out on land. Such changes may be material for planning purposes even though the generic use or uses of the land in question have not changed.*
>
> *d. Whether the use of land has changed in any manner that is material for planning purposes is a question of fact and degree for the decision maker to determine in the light of all the circumstances of the case.*"

51. It seemed to me that proposition d) presented Mr Griffiths with considerable difficulties in his argument, particularly given he could not point the Court to a case establishing the legal proposition that there can be no material change of use between different forms of livery. To support his case, Mr Griffiths relied on the underlined parts of the following analysis by Lord Bridge in *Westminster Council v British Waterways Board* [1985] AC 676 at 683 that:

> *"to determine the scope for planning purposes of an existing use of land established by de facto user for a sufficient period to put it beyond the reach of enforcement procedures ..it is necessary to answer two question which are primarily questions of fact. First what is the precise character of the established use? Secondly what is the range of uses sufficiently similar in character to the established use to be capable of replacing the established use without involving a material change? Behind this second question lies a potential question of law in that there may be some uses of such a character that a reasonable tribunal of fact directing itself correct in in law must necessarily conclude that they lie within that range or beyond it as the case may be"*

52. Mr Griffiths also relied on the decision of Ouseley J in *Hertfordshire County Council and The Secretary of State for Communities and Local Government* [2012] EWCA Civ 1473. In that case, the lawful use of the site was a commercial scrap yard. The company running the yard replaced an old fragmentiser dealing with scrap metal with a new one, around which time the throughput of the scrap yard increased notably. Lorries arrived at unsociable hours and dust was created. The Court upheld the Inspector's assessment that there had not been a material change of use. There had to be a change in the character of the use of the land. Significant environmental effects on or off site could not, of themselves, constitute a material change in the use of the land.

53. In the Westminster Council case, Lord Bridge posed the question whether the range of the replacement use is sufficiently similar in character to the established use to be capable of replacing the established use without involving a material change. This was, he said, primarily a question of fact. I am not satisfied, on the evidence before me, that DIY and commercial livery can be said to be sufficiently similar in character as to give rise to a legal proposition that a change from one to the other cannot constitute a material change in the use of the land.

54. The Government guidance cited to me defines DIY livery as where "*the care and management of the horse is the responsibility of the horse owner*". This is in contrast with "*full livery*" where the care of the horse is the responsibility of the provider of the livery or yard manager and "*part livery*" where the management and care of the horse is shared between the owner and livery provider. The 1991 planning permission envisages a clear distinction between commercial and recreational equestrian use of the land. Condition 7 provides that:

> *"7 The development hereby approved shall be used only for the keeping of horses for private recreational purposes and for no other use whatsoever, including any commercial use."*

55. The informative states that:

> *"The applicant is advised that any commercial use would require planning permission. An application for any such use (including Riding School, livery, farrier or other commercial use) would be unlikely to receive favourable consideration."*

56. The Council is not simply relying on off site impacts, as was the case in ***Hertfordshire County Council***. Ms Lawson set out the evidence which the Council relies on to establish that the change from DIY livery to commercial livery has produced a change in the character of the land, including an increase in stabling, new buildings, the provision of a water tank and the employment of staff. In ***Fidler***, the Court of Appeal accepted that intensification could result in a material change in the character of the land. The Court of Appeal's decision on appeal in ***Hertfordshire County Council v Secretary of State for Communities and Local Government*** [2012] EWCA Civ 1473 cited Sullivan J (as he then was in ***R v Thanet District Council*** [2001] 81 P&CR 37 that:

> *"…It is easy to state the principle that intensification may be of such a degree or on such a scale as to make a material change in the character of a use; it is far more difficult to apply it in practice. There are very few cases of 'mere intensification'. Usually the increase in activity will have led to some other change: from hobby to business, from part to full time employment or an increase in one use at the expense of other uses in a previously mixed use".*

57. In this case the Council contends that the change from DIY livery to commercial livery marks a change from private recreational use to a business use, evidenced, in part, by the employment of staff.

58. Mr Griffiths suggested that the only distinction drawn by the Council between DIY livery and commercial livery related to contractual payments which cannot amount to a relevant distinction in planning terms of any payments cannot affect the character of the use of the land. Ms Lawson denied that this was the Council's rationale and argued that Mr Griffiths was over-simplifying the Council's position.

59. In my judgment, the alleged breach of planning control gives rise to a classic question of matter of fact and degree for the planning decision maker, subject only to challenge in this Court on public law grounds In this case, the local planning authority has

examined the evidence available to it and reached the view that there has been a material change in the use of the land. Whether that view is correct will be tested in due course before a Planning Inspector. Mr Griffiths does not contend that the Council has taken an irrational view of the evidence currently before it. In my view, he was right to do so. Ms Lawson took me through the evidence, including witness statements of the planning enforcement officer, aerial photographs and a statutory declaration by a neighbour. There is, it seems to me, nothing unreasonable about the Council's conduct at this stage of proceedings.

60. I accept that the issue arises in the context of a judicial review challenge to the Breach of Condition notices. They cannot form part of the appeal to the Inspector in April 2019 because the statutory framework does not provide for an appeal against their service. Nonetheless, it is well established that the jurisdiction of this Court does not extend to matters of planning judgment and the Court's ability to decide evidential matters is limited. In this case neither party applied to call or cross-examine witnesses. In any event, the same issue about change of use arises in relation to the Enforcement Notice so will, I understand, be considered by the Inspector in the appeal. Moreover, the Council has not to date instituted criminal proceedings against Mr and Mrs Johnston in relation to the failure to the breaches of condition notices. This may be because the Council is awaiting the outcome of the appeal against the enforcement notice. If the Council does decide to prosecute, matters of fact and degree relevant to material change can be considered, if necessary, as part of any defence to prosecution.

The Scope of the 1991 Planning Permission

61. The legal principles applicable to construing a planning permission were not in dispute between the parties. They were laid down by Kenne J in *R v Ashford Borough Council ex parte Shepway Distinction Council* [1999] PLCR 12 at 19:

a. The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions

b. This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. The reason for normally not having regard to the application is that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application

c. For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are needed, such as "… in accordance with the plans and application …" or "… on the terms of the application …" and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission

is granted. These words need to govern the description of the development permitted

d. If there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity.

62. The Notice of Permission is dated 4 December 1991. It opens with a series of short headings which include reference to the 'proposal', specified as the "*retention of internal access road and replacement of lean-to to existing stables*". It is this wording which Mr Griffiths relies on to submit that the planning permission is to be construed as relating only to the access road and replacement of the lean to. This is however to construe the permission by narrow reference to its frontpiece and not by reference to the permission as a whole.

63. Condition 2 provides that '*This permission shall relate only to drawing numbered WM/91/69/1/A'.* Whilst the available copy of the drawing is poor quality, the parties were agreed that it shows the whole site in question and not just the access road and lean to shed specified in the title piece.

64. Other conditions support the broader construction of the planning permission by encompassing matters and structures outwith the access road and replacement shed building. Condition 6 relates to the provision of gates at the boundary of the site with the highway. Condition 10 makes reference to open areas, parking areas and 'buildings'. It would appear to be a nonsensical interpretation of Condition 7 if the stipulation as to the keeping of horses for private recreational use applies only to activity on the access road and replacement building, rather than activity on the whole site.

65. Applying the 'Ashford' principles to the permission, it is to my mind clear that the scope of the 1991 permission is not to be construed as limited to the area occupied by the internal access road and the lean-to. Nor do the conditions attached to that planning permission delimit or circumscribe the use of those areas only.

Issue of the Second Enforcement Notice

66. I reject the submission by Mr Griffiths that the Secretary of State's cost decision lends any support to the argument that the Council acted unreasonably in issuing the Second Enforcement Notice. The costs decision focusses narrowly on events at the opening of the appeal hearing into the service of the First Enforcement Notice on 17th January 2018. Moreover, it makes express reference to the Council's ability to serve a further enforcement notice ("If the Council wishes to carry out further investigations, with a view to possibly issuing a further enforcement notice…" (paragraph 15)). In any event, I reject the submission that the Council acted perversely in serving the Second Enforcement Notice. Ms Lawson took the Court through the evidence relied on by the Council which includes a statutory declaration from a neighbour resident throughout the relevant period, stating that the use of the land was for DIY livery from 2006 – 2009. Ms Lawson also pointed to a statement on behalf of Mr and Mrs Johnston appearing in the design and access statement for the 2011 planning application indicating that that the established private equestrian use had not changed since the 1990s. I accept Ms Lawson's submission that the evidence in this regard is neither

flimsy nor non-existent. Whether it proves to be correct will be for the Planning Inspector to determine at the forthcoming public inquiry in April 2019.

The Council's statutory appeal against the Secretary of State's cost decision

Submissions on behalf of the Council

67. Ms Lawson submitted that the Costs Inspector made a fundamental error of fact in his decision letter in considering that the Appeal Inspector gave the Council a second opportunity to apply for an adjournment on the basis of the late evidence served the day before by Mr and Mrs Johnston. The Council would have made a second application for an adjournment had the Appeal Inspector invited an application on the basis of the late evidence. Instead the Council was left with no option but to withdraw the enforcement notice. In the available time, the 71 pages of new evidence served the day before could not be properly digested by the Council. Nor could relevant inquiries be made. Secondly; the Secretary of State applied an unlawful test of 'untenability', instead of 'good reason' to the Council's withdrawal of the notice, as is apparent from paragraphs 13 and 15 of the decision. In the case of paragraph 15, a "*sufficient reason*" test is a higher bar than a good reason test. Furthermore, the Costs Inspector reached an irrational conclusion on the Council's ability to investigate new matters after the public inquiry, the effect of which was to penalise the Council in seeking to perform the enforcement role required of it. The decision was irrational and inadequately reasoned, given the finding that Mr Johnston acted unreasonably in serving the late evidence. The Secretary of State failed to take account of the need to conduct a criminal investigation into whether the late evidence revealed previous responses to a Planning Contravention Notice had been misleading when credibility was a key issue under the ground d) appeal before the Inspector.

Submissions on behalf of the Secretary of State

68. On behalf of the Secretary of State Ms Dehon submitted that there had been no mistake of fact. There was simply a difference of emphasis between the Council's recollection of events at the inquiry and those of the Appeal Inspector, who had provided a note relied on by the Costs Inspector. Unlike the Court, the Appeal Inspector had heard the Council's application for an adjournment and the Court should be slow to interfere. In the absence of any mistake of fact, the Council had to put its case in this regard on Wednesbury unreasonableness, which was unarguable. The Council had acted precipitously in withdrawing the enforcement notice before the Appeal Inspector had seen the late evidence or ruled on its admissibility. The Costs Inspector had not erred in his application of the guidance. He had quoted the relevant parts. The effect of the Council's submissions was to require decision makers to parrot the same wording in order to avoid the risk of legalistic challenges of this nature. There was nothing unreasonable in the Costs Inspector concluding that Mr Johnson's unreasonable conduct had not led to the Council incurring unnecessary costs. The Council would have had to prepare for the opening of the inquiry in any event. Any unnecessary costs would likely have been incurred at the point at which an adjournment to consider the late evidence became necessary, but that point was never reached because the Council withdrew the notice. There was no reason why matters relevant to credibility could not have been dealt with at the inquiry given witnesses are required to give evidence on oath in such inquiries.

Discussion

69. The principles upon which the Court may intervene to quash a decision by the Secretary of State are well established. Matters of planning judgment, are for the decision maker (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at 780). In the present context, matters of judgment include whether the Council had good grounds to withdraw the enforcement notice.

70. The Court should respect the expertise of the specialist planning inspectors and proceed on the presumption they have correctly understood the policy framework *Hopkins Homes Ltd v Secretary of State* [2017] UKSC 37, Lord Carnwath (paragraphs 25 & 26). In the present context the Costs Inspector is a specialist in cost decision making in the planning arena.

71. A Court can interfere with an inspector's decision if he has acted on no evidence; if he has come to a conclusion to which on the evidence he could not reasonably have come; if he has given a wrong interpretation to the words of the statute or if he has taken into consideration a matter which he ought not to have taken into account or vice versa (*Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320 at 1326.

72. Decision letters should be read in good faith, as a whole and not legalistically (*Clark Homes v Secretary of State* [1993] 66 P&CR 263)

73. The reasons given for a decision must be intelligible and adequate. They must enable the parties to understand why the decision was what it was and the conclusions reached on the 'principal important controversial issues' (South *Buckinghamshire District Council v Porter (No 2))* [2004] 1 WLR 1953 at paragraph 36.

Ground 1 Mistake of Fact

74. There was no dispute between the parties as to the applicable legal principles. Mistake of fact is a separate ground of review, based on the principle of fairness. To give rise to a finding of unfairness, four factors must ordinarily be present: first, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning *(E v SSHD* [2004] QB 1044 at §66).

75. Although planning inquiries are adversarial, the planning authority has a public interest, shared with the Secretary of State through his inspector, in ensuring that development control is carried out on the correct factual basis (*E v SSHD* [2004] QB 1044 at 64). An example of mistake of fact in a planning context is the case of *Connolly v Havering LBC* [2010] 2 P&CR 1 where there was a mistake as to the previous planning history of the site. The evidence was "established" in an uncontentious and objectively verifiable form because it was documented in the planning authority's decision on the planning application. The Claimants were not responsible for the mistake, which played a material part in the inspector's reasoning.

76. Ms Lawson's submissions focussed on the following underlined extracts from the decision letter:

> *"It appears that the Planning Inspector did not give a ruling on whether the submission of the late evidence would be accepted for consideration but indicated that it might warrant an adjournment" (paragraph 8)*
>
> *"While the Council have stated that the late submission [of evidence] 'goes to the heart of the reason why the enforcement notice was withdrawn" it is not clear to the Secretary of State why the late evidence could not have been considered during the course of the inquiry (which had already opened) with the benefit if necessary of an adjournment for this specific purpose….In the event there was no such request for an adjournment because the Council decided to withdraw the enforcement notice."* (paragraph 13)

77. To assist the Court, Ms Dehon produced a contemporaneous note produced by the Appeal Inspector, (who has since retired) which was relied on by the Costs Inspector. Nonetheless, Ms Dehon cautioned against the Court's reliance on it, in light of the Court of Appeal's observation in *Secretary of State for Communities and Local Government v Ioannou* [2014] EWCA Civ 1432 deprecating the use of witness statements by Inspectors. The contemporaneous note includes a statement that 'Have seen emails between the parties concerning the late evidence. But have not seen the evidence itself. That could be a matter warranting an adjournment'. In response Ms Lawson produced a contemporaneous note which was said to have formed the basis of her submissions to the Appeal Inspector and a statement from the Council's planning officer setting out his recollection of events at the inquiry. The thrust of both documents was that the Appeal Inspector had not indicated that an adjournment might be granted in relation to the late evidence.

78. In *Secretary of State for Communities and Local Government v Ioannou* [2014] EWCA Civ 1432, the Court of Appeal endorsed an observation by Ouseley J at first instance that:

> *"I would strongly discourage the use of witness statements from Inspectors in the way deployed here. The statutory obligation to give a decision with reasons must be fulfilled by the decision letter, which then becomes the basis of challenge. There is no provision for a second letter or for a challenge to it. A witness statement should not be a backdoor second decision letter. It may reveal further errors of law..."*

79. The rationale for the Court of Appeal's observation in Iannou is apparent from the facts of this case. This Court is simply not in a position to decide between competing recollection of events. It is not, however, necessary for the Court to attempt to resolve the actual dispute between the parties because the doctrine of mistake of fact requires that the "*mistaken*" fact be "*established*" in the sense of being uncontentious and objectively verifiable. In this case the mistaken 'fact' is contentious and cannot be objectively verified. It may be more appropriately characterised as a difference of

emphasis in the recollection of events during the inevitable cut and thrust of the opening of an inquiry. Or, it may be said to be about the Council's litigation strategy. As Ms Dehon submitted before this Court the Council appears to have behaved precipitously in jumping the gun and withdrawing the enforcement notice instead of asking for a ruling on the admissibility of the late evidence and/or an adjournment specifically for the purpose of considering the late evidence. The Costs Inspector's assessment of whether the Council had good reason to withdraw the Enforcement Notice is a matter of planning judgement and not a matter for this Court. I am satisfied that that his judgement cannot be said to be based on an established and objectively verifiable mistake of fact.

Ground 2 Error of law

80. Ms Lawson relied on the following underlined statements from the costs decision letter to support her argument that the inspector had applied the wrong test (the right test being 'good reason') in considering the Council's withdrawal of the Enforcement Notice:

> *"…it is concluded that the late submission of evidence was not sufficient reason for the Council to decide to withdraw the enforcement notice.." (paragraph 13)*
>
> *"Although the Council have stated that the submission of the late evidence on the day before the inquiry date had prejudiced their case on appeal, they have not clearly stated that this had rendered their case untenable"* (paragraph 15)

81. I am not persuaded by Ms Lawson's submissions that the statements above demonstrate that the Costs Inspector applied the wrong test. The decision maker in this case is a specialist in cost matters within the Planning Inspectorate. This Court should therefore start from the presumption that he understood the costs guidance (*Hopkins Homes Ltd v Secretary of State* [2017] UKSC 37, Lord Carnwath at paragraphs 25 and 26). This presumption is borne out by a review of the decision letter. At paragraph 6, the Inspector refers to the relevant costs guidance. At paragraph 16, he makes specific reference to the applicable test:

> *"For these reasons the Secretary of State does not agree with the Council that the late evidence amounted to good reason for the withdrawal of the enforcement notice."*

82. His reference to "*untenability*" and "*sufficient reason*", which Ms Lawson highlights, is, to my mind, simply part of his analysis leading to the conclusion that the Council had withdrawn the notice without good reason. The logic of Ms Lawson's submission in this regard is to require decision makers to parrot repetitively the legal test in order to avoid legalistic challenges.

83. Nor do I accept Ms Lawson's submission that the Secretary of State's decision maker was irrational in penalising the local planning authority from properly investigating planning breaches. Paragraph 48 of the costs decision, which Ms Lawson relied on, refers to 'adequate prior investigation (underlining is the Court's emphasis) in order to avoid "the need to serve the notice in the first place or ensured that it was accurate".

In this case the Council was asking for further time for investigations on the day the inquiry opened. Moreover, the Costs Inspector specifically referred to the ability of the Council to issue a further enforcement notice after additional investigations (paragraph 15).

Ground 3 Irrationality and inadequate reasoning

84. Ms Lawson submits that it was irrational for the Costs Inspector to conclude that the submission of the late evidence by the Johnstons was unreasonable yet deny the Council these costs. I do not accept Ms Lawson's submission in this regard. The guidance makes clear that costs may be awarded where a party has behaved unreasonably; and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process (paragraph 30).

85. The Inspector concluded that the first limb of the test was satisfied but not the second on grounds that the late evidence could have been considered during the inquiry, with an adjournment for this specific purpose if necessary. The Council would have had to prepare for the opening of the inquiry in any event. The unnecessary costs would likely have been incurred at the point at which an adjournment to consider the late evidence became necessary but that point was never reached because the Council withdrew the notice. I am of the view that the decision is sufficiently reasoned at paragraphs 13 and 15 so as to enable the parties to understand the Inspector's assessment in this regard.

Ground 4 Failure to take account of a relevant consideration

86. The Council contends that the Secretary of State failed to take account of the need to conduct a criminal investigation because the late evidence indicated responses to the previously served Planning Contravention Notice may have been misleading.

87. I am not satisfied that the need to conduct a criminal investigation amounts to a relevant consideration, which the Costs Inspector failed to take into account. He was clearly aware of the Council's submissions in this regard because he refers to the fact that the 'Council considered that these matters required 'full investigation' and that they could have a bearing on enforcement action and on the forthcoming inquiry' (paragraph 7). Paragraph 9 summarises the Council's cost application and refers to submission that 'the appellant had provided misleading information in response to PCNs and that steps were being taken to investigate this'.

88. I accept that Mrs Johnston's credibility was a key issue in relation to the ground d) appeal but I am not clear why it was necessary to adjourn the inquiry to enable criminal investigations. The parties give their evidence in enforcement proceedings on oath and it was open to the inspector to come to a decision about credibility for the purpose of the appeal hearing. As the Costs Inspector observed, it was then open to the Council to carry out further investigations with a view to possibly issuing a further enforcement notice (paragraph 15).

Conclusion

89. For the reasons given above:

a. I dismiss the application for judicial review brought by Mr and Mrs Johnston.

b. I grant permission on Ground 1 of the Council's statutory appeal against the Secretary of State's decision on costs, but dismiss the appeal.