Neutral Citation Number: [2020] EWHC 3249 (Admin)

Case No: CO/1533/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MANCHESTER DISTRICT REGISTRY

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester, M60 9DJ

Date: 02/12/2020

Before :

LADY JUSTICE MACUR DBE

MR JUSTICE JULIAN KNOWLES

- -

Between :

ANEEL ZAFAR	**Appellant**
- and -	
STOKE – ON – TRENT CITY COUNCIL	**Respondent**

- -
- -

Christopher McNall (instructed by **A F Brooks & Company**) for the **Appellant**
Freddie Humphreys (instructed by **Council Solicitor**) for the **Respondent**

Hearing dates: 23 November 2020
- -

Approved Judgment

Mr Justice Julian Knowles:

Introduction

1. This is an appeal by way of case stated by the Appellant, Aneel Zafar, against his conviction by Staffordshire Justices on 20 January 2020 for the offence contrary to s 179 of the Town and Country Planning Act 1990 (the 1990 Act). Section 179 makes it an offence to fail to comply with an enforcement notice served by a local planning authority under Part VII of the 1990 Act.

2. The Information laid by the Respondent Council against the Appellant alleged that he had:

> " … failed to comply with a planning enforcement notice which became effective on 5 December 2018 and required compliance on or before 5 June 2019 in that he failed to undertake the steps required in that notice contrary to s 179 of the Town and Country Planning Act 1990."

3. The Enforcement Notice (the Notice) in question was issued by the Council on 31 October 2018. It alleged that it appeared to the Council that there had been a breach of planning control within s 171A(1)(a) of the 1990 Act. I will return to the statutory provisions later. Specifically, the Notice alleged that the Appellant, at a property he owned in Victoria Park Road, Tunstall, Stoke-on-Trent, had done the following:

> "Without planning permission, the installation of upvc double glazed windows/door to all openings on the front elevation and the re-painting of the render on the front elevation in a dark grey colour (within Victoria Park Conservations Area and Article 4 Direction in place removing permitted develop rights).

4. The various conservation policies said to have been breached by the work were set out [4(2)] and [4(3)] of the Notice.

5. Section 5 of the Notice set out what the Appellant was required to do to comply with it which was, in essence, to restore the house to its previous state by reinstating the wooden window frames and repainting the front of the house in exterior grade white paint.

6. The Appellant failed to carry out this work and so he was prosecuted by the Council for the s 179 offence.

Statutory framework

7. In order to understand the issues arising on this appeal it is necessary first to set out the relevant statutory framework.

8. Part VII of the 1990 Act is headed 'Enforcement'. Section 172 provides that a local planning authority may issue an enforcement notice where it appears to them that

there has been a breach of planning control and that it is expedient to issue the notice, having regard to the various specified matters in that section,

9. Breaches of planning control are defined in s 171A(1). That section provides that carrying out development without the required planning permission and failing to comply with any condition or limitation subject to which planning permission has been granted, constitutes a breach of planning control.

10. Section 173(1) requires the enforcement notice to state (*inter alia*) the matters which appear to the local planning authority to constitute the breach of planning control; and the paragraph of s 171A(1) within which, in the opinion of the authority, the breach falls.

11. Section 173(3) requires an enforcement notice to specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the purposes in s 173(4), which include remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or) remedying any injury to amenity which has been caused by the breach. Section 173(5) provides that an enforcement notice may, for example, require the alteration or removal of any buildings or works.

12. Section 174 provides for a right of appeal to the Secretary of State against an enforcement notice:

> **"174 Appeal against enforcement notice.**
>
> (1) A person having an interest in the land to which an enforcement notice relates or a relevant occupier may appeal to the Secretary of State against the notice, whether or not a copy of it has been served on him.
>
> (2) An appeal may be brought on any of the following grounds—
>
> (a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;
>
> (b) that those matters have not occurred;
>
> (c) that those matters (if they occurred) do not constitute a breach of planning control;
> (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;
>
> (e) that copies of the enforcement notice were not served as required by section 172;

> (f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;
>
> (g) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed.".

13. Section 175 contains supplementary provisions relating to such appeals.

14. Part XII of the 1990 Act is headed 'Validity'. Section 285(1) provides:

> **"Validity of enforcement notices and similar notices.**
>
> (1) The validity of an enforcement notice shall not, except by way of an appeal under Part VII, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought."

15. Of importance to this appeal is the Town and Country Planning (General Permitted Development) Order 1995 (SI 1995/419) (the 1995 Order), as amended. This has since been repealed and replaced but it was common ground before us that it was the legislation in force at the relevant time. Its provisions are detailed and technical, but in general terms the relevant ones can be described as follows.

16. Subject to the exceptions specified, Article 3 of the 1995 Order granted general planning permission for the classes of development specified in Sch 2. Class A in Part 1 of Sch 2 referred to 'the enlargement, improvement or other alteration of a dwellinghouse'. Class C of Part 2 permitted, 'The painting of the exterior of any building or work.' Thus, in general terms, such work was permitted and no planning permission was needed.

17. However, Article 4(2) of the 1995 Order provided that:

> "(2) If the appropriate local planning authority is satisfied that it is expedient that any particular development described in paragraph (5) below should not be carried out within the whole or any part of a conservation area unless permission is granted for it on an application, they may give a direction under this paragraph that the permission granted by article 3 shall not apply to all or any particular development of the Class in question within the whole or any part of the conservation area, and the direction shall specify the development and conservation area or part of that area to which it relates and that it is made under this paragraph."

18. Article 4(5)(a) referred to the enlargement, improvement or other alteration of a dwelling-house, where any part of the enlargement, improvement or alteration would front a relevant location, and Article 4(5)(i) referred to the painting of the exterior of

any part, which fronts a relevant location, of dwelling house; or any building or enclosure within the curtilage of a dwellinghouse.

19. It is common ground that the Appellant's property is within a conservation area. We have in our papers the entry from the London Gazette from 9 January 2002 announcing that on 4 October 2001 the Council had designated (*inter alia*) Victoria Park Road as a conservation area pursuant s 69 of the Planning (Listed Buildings and Conservation Areas) Act 1990.

20. Thus, although the alteration, etc, of a dwelling-house was generally permitted by Class A of Part 1 in Sch 2 to the 1995 Order without permission, as was exterior painting to the front of a house by virtue of Class C of Part 2, Article 4(2) of the 1995 Order gave the local planning authority the power to require permission for such alterations in conservation areas. In other words, Article 4(2) gave the authority the right to remove these development rights and to require planning permission to be obtained before such work could be lawfully carried out on a property within a conservation area.

21. The procedure for confirming a direction under Article 4(2) (which we will call 'an Article 4 Direction') removing development rights was contained in Article 6 of the 1995 Order. It provided that after the Article 4 direction had been made by the appropriate local planning authority, there had to be 'local advertisement', and the authority also had to give notice directly to local property owners affected by the Article 4 Direction.

22. Article 1(2) defined 'local advertisement' as meaning publication of the notice in at least one newspaper circulating in the locality in which the area or, as the case may be, the whole or relevant part of the conservation area to which the direction relates was situated.

23. Article 6(7) provided that an Article 4 Direction expired at the end of six months from the date on which it was made unless it was confirmed by the appropriate local planning authority in accordance with Articles 6(8) and 6(9) before the end of that six month period. These provided:

> "(8) In deciding whether to confirm a direction made under article 4(2), the local planning authority shall take into account any representations received during the period specified in the notice referred to in paragraph (2)(d).
>
> (9) The local planning authority shall not confirm the direction until a period of at least 28 days has elapsed following the latest date on which any notice relating to the direction was served or published."

The issues before the justices

24. The matters that were in issue before the justices are set out in their statement of case dated 8 April 2020.

25. At [3] the justices summarised the prosecution's case that the Appellant had breached the Notice by not carrying out the required works within the time specified. The

matter had come to the Council's attention following complaints from members of the public about the work he had done to the house in question.

26. At [4] the justices summarised the defence's contentions. These were that the Council had to prove removal of permitted development rights by producing the relevant Article 4 Direction, but they had failed to do so. The Council had admitted that it had lost the Direction which should have been available for inspection, probably when it moved to electronic from paper records. The Council agreed that in the absence of an appropriate Article 4 Direction, the works carried out by the Appellant would not have required planning permission. The Council's Planning Enforcement Officer (Kerry Mee), who gave evidence before the justices, said she was not familiar with the process for designating conservation areas or the process of making Article 4 Directions. However, she said that she had investigated the matter and was satisfied that a relevant Article 4 Direction had been made removing development rights in relation to the Appellant's property.

27. At [5] the justices directed themselves that it was for the Council to prove beyond reasonable doubt that the Appellant had not complied with the Enforcement Notice.

28. At [6] the justices recited evidence given by Ms Mee that there was an Article 4 Direction removing development rights for the Appellant's property and that she had worked for the Council since 2008 and was aware upon her employment commencing that there was an Article 4 Direction in existence. The justices heard evidence that there had been 14 planning applications for replacement windows, indicating that local residents were aware of the Article 4 Direction. Further checks had revealed that there had been 13 cases on the Defendant's road, three of which had resulted in enforcement notices being issued and one appeal, and in none of these cases had any doubt been raised about the Article 4 Direction.

29. Among the exhibits produced by Ms Mee were:

    a. KM3, a Council document dated 21 December 2006 listing the development rights which were removed by the Article 4 Direction;

    b. KM6, a letter dated 20 June 2018 sent to the Appellant informing him the work he had carried out was in breach of the Article 4 Direction;

    c. KM11, the Enforcement Notice; KM21, a generic letter dated 21 December 2006 generated by the Council's Planning Team and Heritage Team sent to residents notifying them about the Article 4 Direction which had come into force on 20 December 2008;

    d. KM22, a Notice of Confirmation of Direction Under Article 4(2) dated 22 June 2007. This stated, pursuant to Article 6(7) of the 1995 Order, that the Council had confirmed the Article 4(2) Direction;

    e. KM23, the Council's Register of Documents Sealed, containing an entry for 19 June 2008 showing Victoria Park as a conservation area;

    f. KM24, a letter dated 22 June 2008 sent to the Occupier of 157 Victoria Park Road stating,

> "You may recall that on 21 December 2006 the Council introduced extra controls for a provisional period over certain works which previously had not required planning permission.
>
> This letter and the attached Notice now confirm these controls as a permanent measure. Planning permission is now required to carry out any of the following works ..
>
> …
>
> - enlargement, improvement or alteration to elevations fronting the street, including alterations to external doors, windows, and porches
>
> …
>
> - painting the exterior of dwelling houses and curtilage of building fronting the street
>
> The new controls were approved by the Council on 27 March 2007, under Article 4 of the Town and Country Planning (General Permitted Development) Order. They apply to all those parts of the building which front the highway.
>
> …"

I infer that the Notice which was enclosed with this letter was the Notice exhibited by Ms Mee as KM22;

g. KM25, an extract from the Land Registry records showing that the Victoria Park Conservation Area and the Article 4 Direction are registered as local land charges.

The justices' decision and the issues on this appeal

30. At [8] the justices concluded that the original Article 4 Direction could not be found and that only KM22 could be located. At [9] they concluded that, having considered the exhibits before the court:

> " … the Article 4 Direction was more likely in place than not. We were satisfied that exhibit KM22 details the development works not to be carried out under the Article 4 Direction without permission and that this is the information which would have been contained in the missing signed Article 4 Direction. We were therefore satisfied on the balance of probabilities that the Article 4 Direction has been properly made and was therefore in effect, thus removing the Permitted Development Rights at the Defendant's property. Accordingly, we convicted the defendant."

31. The justices then said that their attention had been drawn to s 133 of the Criminal Justice Act 2003, which provides:

> **"133 Proof of statements in documents**
>
> Where a statement in a document is admissible as evidence in criminal proceedings, the statement may be proved by producing either—
>
> (a) the document, or
>
> (b) (whether or not the document exists) a copy of the document or of the material part of it,
>
> authenticated in whatever way the court may approve."

32. At [11] they concluded:

> "The Council contend, in our opinion correctly, that the provisions of section 133 Criminal Justice Act 2003 were not a bar to the consideration of other forms of evidence before the court. We considered that evidence to determine on a balance of probabilities (a standard accepted as appropriate by the defence) whether or not the Article 4 Direction covering the development in question had been properly made and applied at the relevant time."

33. The justices then posed two questions for the High Court's opinion:

> "a. Was it open to us to consider forms of evidence out-with the terms of section 133 [of the Criminal Justice Act 2003] in determining the existence of the Article 4 Direction ?
>
> b. Were we correct in applying the civil standard of proof to this discreet (sic) aspect of the case?

34. There is a Respondent's Notice which argues that the Appellant is (and was) precluded from arguing the Article 4 Direction point because, in reality, it is an argument that there has no breach of planning control and so is precluded by s 285(1) because such a point can only be taken on an appeal to the Secretary of State against the enforcement notice.

35. Hence, the case before us ranged more widely than the questions presented in the case stated. If my Lady agrees, I do not feel it necessary to send the case back to the justices for amendment pursuant to s 28A(2) of the Senior Courts Act 1981. I am satisfied that both sides had a full opportunity to address us on all of the relevant issues which in large part are logically anterior to the questions presented and implicit within them.

The parties' submissions on the appeal

36. Neither Mr McNall for the Appellant nor Mr Humphreys for the Council appeared below.

37. On behalf of the Appellant, Mr McNall took the two questions in the case stated in reverse order. He said, first, that the justices had applied the wrong standard of proof and should have asked themselves whether they were satisfied beyond reasonable doubt that an Article 4 Direction had been made.

38. Secondly, he said that the justices could not, on the material before them and in the absence of at least a certified copy of the original Article 4 Direction confirmed by the Council in June 2008, be satisfied to the criminal standard that such a document was in existence. He relied on s 133 as being the only permissible mode of proof of the Article 4 Direction and that in the absence of the original (and hence the impossibility of producing even a copy), it could not be proved in the required manner.

39. In his oral submissions, although not in his Skeleton Argument, Mr McNall took an additional point that there was no evidence (and had been none before the justices) that the 2007/08 Article 4 Direction had been locally advertised in a newspaper as required by Article 6(2) read with Article 1(2) of the 1995 Order.

40. He said the absence of proof of the Article 4 Direction was fatal to the Appellant's conviction because without proof of it, there was no evidence and so the Council could not prove that the Appellant had breached planning control.

41. On behalf of the Council, Mr Humphreys submitted that s 285(1) of the 1990 Act was a complete answer to the Appellant's submissions. His argument had the following steps. He said the Appellant's submission was that:

    a. there was no evidence of a valid Article 4 Direction;

    b. hence there was no proof that generally permitted development rights (including replacement of windows and exterior painting) had been removed for the Appellant's property;

    c. hence the work carried out by the Appellant did not require planning permission;

    d. and hence the Appellant had not breached planning controls and not breached the enforcement notice.

42. But, said Mr Humphreys, that was a ground on which the Enforcement Notice could have been appealed, by virtue of s 174(2)(c) of the 1990 Act. But that in turn meant the validity of the Enforcement Notice could not be challenged in criminal proceedings by reason of s 285(1), which is what the Appellant was and is, in effect, seeking to do. He referred us to *Badcock v Hertfordshire County Council* [2002] EWCA Civ 1941, [38].

43. Dealing with this submission, Mr McNall referred us to *Davy v Spelthorne Borough Council* [1984] AC 262, 272, which dealt with the statutory predecessors to s 174 and s 285 of the 1990 Act (namely, s 88 and s 243 respectively of the Town and Country Planning Act 1971). He also referred us to *Square Meals Frozen Food Limited v Dunstable Corporation* [1974] 1 WLR 59, 64 and *South Hams District Council v Halsey* [1996] Lexis Citation 1858, p8. I will return to these decisions later, but Mr

McNall attempted, on the back of them, to mount an argument that the absence of a valid Article 4 Direction was not something which affected the validity of the Enforcement Notice in a way which could have been challenged before the Secretary of State on an appeal under s 174(2)(c) and hence could be raised in these criminal proceedings. He said the Enforcement Notice in this case was a nullity, which *is* something which can be questioned in proceedings other than an appeal under Part VII.

Discussion

44. I am satisfied that Mr Humphreys was right in the essentials of his argument, and that Mr McNall's submission about the absence of proof (as he would have it) of a valid Article 4 Direction as a defence to the accusation of a breach by the Appellant of s 179 of the 1990 Act, is and was precluded by s 285(1).

45. I did not find that the cases relied upon by Mr McNall assisted his argument and in my judgment they were, if anything, against him.

46. I begin with *Miller-Mead v The Minister of Housing and Local Government* [1963] 2 QB 196, a case not cited to us but referred to in the case which were. The constitution of the Court of Appeal which decided the case was exceptionally strong (Lord Denning MR, Upjohn LJ and Diplock LJJ). The case concerned the provisions of the Town and Country Planning Act 1947 and the Caravan Sites and Control of Development Act 1960 which were the direct predecessors of s ss174 and 285 of the 1990 Act. Upjohn LJ said at p225 (emphasis added):

> "… A[n enforcement] notice has to specify certain matters. If it does not so specify, the notice is plainly inoperative as a notice under the Act … the notice may require such steps as may be specified in the notice to be taken within such period as may be specified for restoring the land to its earlier condition or for securing compliance with conditions. To be operative, therefore, the notice must specify these things, and if, for example, it does not specify what is to be done or within what period it is to be done, it will fail to have effect as an enforcement notice and the owner or occupier need not comply with it. Subsection (3) [of s 27 of the 1947 Act] also lays down positively (and that I think is important) that the notice shall take effect at the expiration of a specified period and that period must be not less than 28 days after service. Plainly, therefore, if there is no such statement of a specified period or if it is expressed to take effect within 28 days of service, subsection (3) will not be satisfied and the notice will not operate …
>
> Now, what happens if a notice does not comply exactly with those sections? As a matter of common sense, if it does not specify the steps to be taken to remedy the alleged breach of planning permission or the alleged failure to comply with the conditions with proper and sufficient particularity, the notice will not be operative. So, too, if subsection (3) is not complied with. Now, I

> think, is the time to draw the distinction between invalidity and nullity. *For example, supposing development without permission is alleged and it is found that no permission is required or that, contrary to the allegation in the notice, it is established that in fact the conditions in the planning permission have been complied with, then the notice may be quashed under section 23(4)(a). The notice is invalid: it is not a nullity because on the face of it it appears to be good and it is only on proof of facts aliunde that the notice is shown to be bad: the notice is invalid and, therefore, it may be quashed*. But supposing the notice on the face of it fails to specify some period required by subsection (2) or (3). On the face of it the notice does not comply with the section; it is a nullity and is so much waste paper. No power was given to the justices to quash in such circumstances, for it was quite unnecessary. The notice on its face is bad. Supposing then upon its true construction the notice was hopelessly ambiguous and uncertain so that the owner or occupier could not tell in what respect it was alleged that he had developed the land without permission or in what respect it was alleged that he failed to comply with a condition or, again, that he could not tell with reasonable certainty what steps he had to take to remedy the alleged breaches. the notice would be bad on its face and a nullity, the justices had no jurisdiction to quash it, for it was unnecessary to give them that power, but this court could, upon application to it, declare that the notice was a nullity. That to my mind is the distinction between invalidity and nullity."

47. This passage, including the part I have italicised, was cited with approval by Glidewell LJ in *South Hams*, supra, at p8. Before citing it, he said:

> "So if an appeal might have been brought or has been brought and has failed on any of the grounds of appeal contained in s 174 then, at any later stage, and particularly if there be a prosecution of the defendant for failing to comply with the Enforcement Notice, he may not seek to show that the Enforcement Notice was invalid on any of those grounds. He is however still entitled to argue that the Enforcement Notice is a nullity. Section 285 is a provision that dates back to the amendments introduced into the Enforcement Notice part of the planning legislation by the Caravan Sites and Control of Development Act 1960. So it has been part of the law now for a considerable period of time."

48. These passages show that if it is possible to argue that there has been no breach of an enforcement notice on the grounds that although it alleged work was done without planning permission, and thus there had been a breach of planning control, in fact no such permission was needed, then the notice is invalid but not a nullity, and can only be challenged by way of direct appeal under s 174.

49. In *Square Meals*, supra, Lord Denning MR said at p64:

> "… I would like to say a word about the reason for section 243 of the Act of 1971. It is the successor of a similar provision which was first introduced in 1960 in section 33(8) of the Caravan Sites and Control of Development Act 1960 . Before that Act, the procedure by enforcement notices had become greatly hampered by technical objections. I explained it in *Miller-Mead v. Ministry of Housing and Local Government* [1963] 2 QB 196. The Act of 1960 was passed especially to do away with these technical objections and to abolish all the formalities which had surrounded enforcement notices. The object was to enable planning control to be enforced according to the merits of the case. For this purpose, it was enacted that the validity of an enforcement notice was not to be questioned by proceedings in the courts. It enacted that the only way to question the validity was an appeal to the Minister. This was a much better procedure, because it meant that planning merits and the law were considered by one and the same tribunal. If there was any technical defect in the enforcement notice, it could be amended. Moreover, if there was any breach of planning control — and yet there was a good case on the planning merits — the Minister could give planning permission in those very proceedings. Nevertheless, if there was a point of law, there was an appeal from the Minister to the High Court. This procedure was so greatly to be preferred that the legislature enacted that the validity of an enforcement notice should not be questioned in the courts, but only in the proceedings on appeal to the Minister."

50. This passage supports the point I made to Mr McNall in argument, that if it were open to a defendant to challenge an alleged breach of an enforcement notice on the grounds that no Article 4 direction had been made (or could not be proved to have been properly made), and so the notice was invalid, then the enforcement system would become unworkable.

51. In *Davy,* supra, p243, Lord Fraser said in relation to s 88 and 243 of the Town and Country Planning Act 1971 (the predecessors, as I have said, to ss 174 and 285 of the 1990 Act and in materially identical terms):

> "I note in passing that, although section 243(1)(a) provides that the 'validity' of an enforcement notice is not to be questioned except as therein provided, the word 'validity' is evidently not intended to be understood in its strict sense. It is used to mean merely enforceability. That appears from a consideration of the grounds on which an appeal may be brought under Part V of the Act of 1971, which are not limited to matters affecting the validity of the notice. The relevant grounds are set out in section 88(2), part of which I have already quoted, and it is apparent that paragraph (a) (at least) goes to the merits rather than to the validity (in the strict sense) of the notice. Accordingly, the fact that the respondent is not questioning the 'validity' of the notice is immaterial. In fact, of course, the respondent now accepts the notice as perfectly valid and, as at the date of instituting the

> present proceedings, unappealable; indeed, that is the essential basis of his claim for damages.
>
> But in my opinion, the respondent's claim for damages is not barred by section 243(1)(a). That paragraph provides that the validity of an enforcement notice shall not be questioned in any proceedings whatsoever 'on any of the grounds on which such an appeal may be brought.' The words 'such an appeal' are a reference back to an appeal under Part V of the Act of 1971, and they mean in effect the grounds specified in section 88(2). But section 243(1)(a) does not prohibit questioning the validity of the notice on other grounds. If, for example, the respondent had alleged that the enforcement notice had been vitiated by fraud, because one of the appellants' officers had been bribed to issue it, or had been served without the appellants' authority, he would indeed have been questioning its validity, but not on any of the grounds on which an appeal may be brought under Part V. So here, the respondent's complaint that he acquiesced in the enforcement notice because of negligent advice from the appellants is not one of the grounds specified in section 88(2), and it would not have entitled him to appeal to the Secretary of State under Part V of the Act of 1971. Accordingly, even on the assumption that the validity of the enforcement notice is being questioned in the present proceedings (an assumption which in my opinion is open to serious doubt), it is certainly not being questioned on any of the grounds referred to in section 243(1)(a) and the proceedings are not barred by that subsection. In my opinion, therefore, the appellants' first contention fails."

52. In my judgment there is nothing in this passage which assists Mr McNall's argument. It merely shows that if an enforcement notice was being challenged on some ground *other than* one of those specified in s 88 (now s 174), then such a challenge was not precluded by s 243 (now s 285). As in s 174, s 88 allowed for an appeal against an enforcement notice on the grounds that, in fact, there had been no breach of planning control (s 88(1)(b)). Lord Fraser's point is, with respect, not in issue in the present case because the Appellant's argument is precisely that the work he did was not in breach of planning control because the Council could not prove that an Article 4 Direction had been given which lawfully removed generally permitted development rights for the conservation area in question and so the work he did was lawful.

53. In *Badcock*, supra, the Court of Appeal considered an interlocutory appeal and cross-appeal by the defendants and the prosecuting Council, in relation to rulings made by the judge at a preliminary hearing under s 29 of the Criminal Procedure and Investigations Act 1996 prior to the trial of the defendants, Steve Badcock and Steve Badcock Limited on an indictment for contravention of enforcement notices and stop notices in respect of their use of a large site for importing, sorting and processing commercial waste. The notices prohibited the defendants from, inter alia, importing and processing waste at the site in question. A stop notice can be issued under ss183 and 184 of the 1990 Act. Such a notice can be served by a planning

authority where it considers that a specified activity should cease before the expiry of the period for compliance with an enforcement notice.

54. At [22] and [23] of his judgment, Potter LJ cited the passages from *Davy*, supra, and *South Hams*, supra, that I set out earlier. At [38] he said:

> "… We start from the position that the offences of failing to comply with the requirements of an Enforcement Notice and of acting in contravention of a Stop Notice are criminal offences, the ingredients of which must be proved in the same way as any other, with the burden of proof resting on the prosecution in respect of all the factual and legal ingredients of the offence, save to the extent that statute may provide to the contrary. Such contrary statutory provision has only been made in respect of challenges to the validity of Enforcement Notices. The effect of the authorities referred to at paragraphs 22 and 23 above is that in any criminal proceedings the validity, in the sense of the enforceability, of an Enforcement Notice may not be questioned on the grounds, inter alia, that at the date of issue of the notice the breach of planning control, in this case, the operation of a waste recycling and transfer facility, had not in fact occurred. Again, in this case, that means (by reason of the definition contained in the notice) it cannot be challenged that, as at the date of the notice, the land was being used for the importation of assorted waste, the storage of such waste, its sorting and processing and the distribution and exportation of unprocessed and processed material from the land. However, that is the full extent of the limitation placed on the defence. Further, it is a limitation only in respect of the counts relating to the Enforcement Notice and not in respect of the Stop Notice counts."

55. Drawing the strands together, in my judgment these authorities make clear that it was not open to the Appellant to argue by way of defence to a criminal charge contrary to s 179 that he had not breached the Enforcement Notice because the Council could not prove the existence of an Article 4 Direction for the conservation area in question. That was, in substance, an argument that the work which the Appellant had carried out was not a breach of planning control. For the reasons I have explained, that was matter which could only be challenged by way of an appeal to the Secretary of State under Part VII of the 1990 Act, a step which the Appellant did not take.

56. It follows that, I consider that the questions posed by the justices for this Court's opinion do not arise. The justices were not concerned with the existence or otherwise of an Article 4 Direction: the Enforcement Notice was valid, and the only issue for them was whether the Appellant had breached it. As to that, there was only one answer. He plainly had.

57. But in any event the evidence before the justices clearly proved the existence of the Article 4 Direction. Ms Mee's evidence could not have been more clear. The hearsay provisions of the Criminal Justice Act 2003 had nothing to do with the issues at hand. The existence or otherwise of an Article 4 Direction was not a question of

hearsay but was a question of whether the Council had taken a legislative act and was proved by the direct evidence of Ms Mee that it was in existence for the relevant conservation area at the relevant time. Thus, had they needed to, if the justices had considered whether the Council had proved the existence of Direction to the criminal standard, they would have been bound to conclude that it had.

58. For these reasons, I would dismiss the appeal.

Lady Justice Macur DBE:

59. I agree.