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Ref: **WEAC5024**

Judgment: approved by the Court for handing down

(subject to editorial corrections)

Delivered: **07/09/2004**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY THE DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND FOR JUDICIAL REVIEW

WEATHERUP J

The application

[1] This is an application by the Department of the Environment for Northern Ireland in its capacity as the Planning Authority for Northern Ireland. By this application the Applicant seeks Judicial Review of a decision of the Planning Appeals Commission ("the PAC") dated 4 May 2001 whereby the PAC determined that it had jurisdiction to hear an appeal by Clarke Moses ("the Appellant") under Article 24 of the Planning (Northern Ireland) Order 1991. Mr McCloskey QC and Mr Coll appeared for the applicant and Mr Larkin QC and Mr Torrans appeared for the respondent, the PAC.

[2] On 24 June 2000 the Applicant issued a "Submission Notice" to the Appellant under Article 23 of the 1991 Order. The notice provided –

> "(1) THIS IS A FORMAL NOTICE which is issued by the Department because it appears to it that development has been carried out without the grant of planning permission required in that behalf in accordance with Part IV of the above Order, at the land described below.
>
> (2) THE LAND AFFECTED
>
> Land adjoining 43 Aughnagar Road, Sixmilecross, Omagh shown edged red on the attached plan.

(3) THE MATTERS ALLEGED TO CONSTITUTE THE DEVELOPMENT TO WHICH THIS NOTICE RELATE

The erection of a cattle shed and slurry tank without the grant of planning permission which is required in that behalf in accordance with Part IV of the above Order.

(4) WHAT ARE YOU REQUIRED TO DO?

The Department in exercise of the powers conferred on it by Article 23 of the Planning (Northern Ireland) Order 1991 requires you to make an application for planning permission for the said development within 28 days from the service of this Notice. The application should be made to the Divisional Planning Manager.

The application must be accompanied by the prescribed fee of £975.

(5) Your attention is drawn to the right conferred on you by Article 24 of the above Order in relation to an appeal against this Notice".

[3] By letter dated 2 August 2000 on behalf of the Appellant a notice of appeal was given to the PAC against the Submission Notice, which included the point that -

> "The issue in question in this case is whether Mr Moses in fact requires planning permission and appears to hinge on the interpretation of Part 6A(1)(d)(ii) of the Planning General Development (NI) Order 1993".

On the Appellant's interpretation of the provision referred to it was contended that the Appellant did not require planning permission for the development.

[4] On 12 January 2001 the PAC conducted an oral hearing of the appeal at which it was contended on behalf of the Applicant that the PAC had no jurisdiction to entertain the appeal as it had not been brought under any of the grounds specified in Article 24(2) of the 1991 Order. The Commissioner reserved a decision on the issue of jurisdiction and on 6 April 2001 conducted an oral hearing on the substance of the Appellant's appeal.

[5] By its decision dated 4 May 2001 the PAC determined in the first place that it had jurisdiction to entertain the appeal and secondly that the Appellant's development required planning permission. Accordingly the appeal was dismissed and the Applicant's Submission Notice was upheld.

[6] The Applicant does not accept the PAC finding that it had jurisdiction to entertain the appeal in the circumstances of the Appellant's case. This being an issue that has arisen from time to time the Applicant seeks by this application for Judicial Review to challenge the PAC finding that it has jurisdiction to entertain appeals in the circumstances of the Appellant's case, namely where there is a challenge to the lawfulness of a Submission Notice that is not based on one of the specified grounds of appeal in Article 24 of the 1991 Order..

The Planning (Northern Ireland Order 1991.

[7] The Applicant's Submission Notice was issued under Article 23 of the 1991 Order which provides as follows:

> (1) Where it appears to the Department that development has been carried out-
>
> > (a) without the grant of the planning permission required in that behalf in accordance with this Part; or
> >
> > (b) without the grant of any approval of the Department required in that behalf under a development order;
>
> the Department may issue a notice under this Article requiring the making of an application for such planning permission or approval to the Department within 28 days from the service of the notice.
>
> (2) A notice under this Article may be issued only within the period of four years from the date on which the development to which it relates was begun; and the provisions of Article 36(1) apply in determining for the purpose of this Article when development shall be taken to be begun.
>
> (3) A notice under this Article shall specify the matters alleged to constitute the development to which the notice relates.
>
> (4) A copy of a notice under this Article shall be served on the owner and on the occupier of the land to which it relates.
>
> (5) Where a copy of a notice under this Article has been served on any person referred to in paragraph (4), then if the application referred to in the notice is not made to the Department within the

period allowed for compliance with the notice, that person shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(6) If a person against whom proceedings are brought under paragraph (5)-

(a) was, at the time when the copy of the notice under this Article was served on him, the owner of the land to which the notice relates; but

(b) has, at some time before the end of the period allowed for compliance with the notice, ceased to be the owner of that land, he shall, upon a complaint duly made by him and on giving to the prosecution not less than three days' notice of his intention, be entitled to have the person who then became the owner of the land (in paragraph (7) referred to as the "subsequent owner") brought before the court in the proceedings.

(7) If after it has been proved, in a case to which paragraph (6) applies, that the application referred to in the notice under this Article has not been made within the period allowed for compliance with the notice, the original defendant proves that the failure to make that application was attributable, in whole or in part, to the default of the subsequent owner-

(a) the subsequent owner may be convicted of the offence; and

(b) the original defendant, if he further proves that he took all reasonable steps to secure compliance with the notice, shall be acquitted of the offence.

(8) If, after a person has been convicted under paragraphs (5) to (7), the application referred to in the notice under this Article is not made to the Department, he shall be guilty of a further offence and liable on summary conviction to a fine not exceeding one-tenth of level 3 on the standard scale for each day following his first conviction on which the offence continues.

(9) The Department may, at any time before the end of the period allowed for compliance with a notice under this Article, withdraw the notice.

(10) If it does so the Department shall forthwith give notice of the withdrawal to every person who was served with a copy of the notice.

(11) Any reference in this Article and Article 24 to the period allowed for compliance with a notice under this Article is a reference to the period mentioned in paragraph (1) or such extended period as may be allowed by the Department for compliance with the notice.

(12) For the purposes of this Article an application to the Department for any planning permission or approval shall not be taken to be made unless it is accompanied by the fee prescribed under Article 127 in relation to that application.

[8] Article 24 of the 1991 Order provides for appeal against a notice under Article 23 as follows.

24. - (1) A person on whom a copy of a notice has been served under Article 23 may, at any time before the end of the period allowed for compliance with that notice, appeal to the planning appeals commission against the notice.

(2) An appeal may be brought on any of the following grounds-

(a) that the matters alleged in the notice do not constitute development;

(b) that the development alleged in the notice has not taken place;

(c) that the period of four years referred to in Article 23(2) had elapsed at the date when the notice was issued.

(3) An appeal under this Article shall be made by notice in writing to the planning appeals commission and such notice shall indicate the grounds of the appeal and state the facts on which it is based.

(4) Before determining an appeal under this Article, the planning appeals commission shall, if either the appellant or the Department so desires, afford to each of them an opportunity of appearing before and being heard by the commission.

(5) Where an appeal is brought under this Article the notice shall be of no effect pending the final determination or the withdrawal of the appeal.

(6) On an appeal under this Article the planning appeals commission-

(a) shall quash the notice, vary the terms of the notice or uphold the notice;

(b) may correct any informality, defect or error in the notice, or vary its terms, if it is satisfied that the correction or variation can be made without injustice to the appellant or to the Department.

(7) The validity of a notice under Article 23 shall not, except by way of an appeal under this Article, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought.

Planning Policy Statement 9.

[9] The Applicant has issued Planning Policy Statement 9 on "The Enforcement of Planning Control" which sets out the general policy approach that the Applicant will follow in taking enforcement action against unauthorised development. PPS 9 includes consideration of four situations.

First, where acceptable but unauthorised development has been carried out (paragraph 4). Where an initial assessment by the Applicant indicates that it is likely that unconditional planning permission would be granted for the development which has already taken place the Applicant will advise a retrospective application for planning permission without delay. An enforcement notice will not be issued solely to regularise development which is acceptable on planning grounds but for which permission has not been sought. Where an application is not made the Applicant will issue a Submission Notice under Article 23 and where a person fails to comply with such notice the Applicant will normally pursue court action.

Second, where unauthorised development can be made acceptable through the imposition of conditions (paragraph 5). The reaction is the same as the first situation but the Applicant would be justified in issuing an enforcement notice if it considered the unauthorised development had resulted in injury to public amenity or damage to a statutorily designated site which required the imposition of conditions on the grant of planning permission.

Third, where unauthorised development is unacceptable (paragraph 6). The Applicant will issue a warning letter indicating the measures considered necessary to

remedy the breach of planning control. If ignored the Applicant would issue an enforcement notice and in default would normally pursue court action.

Fourth, where unauthorised development is unacceptable and urgent remedial action is required (paragraph 7). The Applicant would take vigorous enforcement action including a stop notice with or on foot of an enforcement notice or where circumstances permit an injunction or other court action.

The PAC Decision.

[10] By its decision of 4 May 2001 confirming jurisdiction the PAC acknowledged that the Appellant's claim of permitted development under the Planning (General Development) Order (Northern Ireland) 1993 was not one of the grounds for appeal set out in Article 24(2) of the 1991 Order. It was stated to be incumbent on the Applicant before concluding that unauthorised development had taken place to consider whether it was a case of permitted development and if such permission had in fact been granted it was stated that any Submission Notice would be invalid. Reference was made to the scheme of enforcement notices under Articles 68 and 69 of the 1991 Order and to the inclusion in Article 69 of a ground of appeal that enabled an Appellant to argue the case for permitted development. This led the PAC to the conclusion that narrower grounds of appeal in Article 24(2) were illogical and that the legislation was badly drafted. Further, the PAC considered that it was competent to consider the Appellant's argument that the Submission Notice was invalid and that it would be unreasonable to refuse to entertain the appeal. The Commissioner's report set out a more detailed consideration of the preliminary point on jurisdiction.

The Statutory Grounds of Appeal to the PAC.

[11] On a plain reading of Article 24(2) an Appellant's grounds of appeal are limited to the three specified issues, namely that the matters alleged do not constitute development, that the development alleged has not taken place, or that four years had elapsed prior to the issue of the notice. Accordingly, a plain reading leads to the conclusion that an argument by the Appellant that he was not required to make an application for planning permission because the development constituted permitted development under the 1993 Order, is not one of the grounds of appeal that an Appellant can bring before the PAC under Article 24(2).

[12] The PAC compared the statutory scheme for enforcement notices. Part VI of the 1991 Order deals with enforcement and Article 68 provides for enforcement notices to be issued by the Applicant for breach of planning control. Article 69 provides for appeal against an enforcement notice and the grounds of appeal are stated in Article 69(3) as follows –

> (3) An appeal may be brought on any of the following grounds-

(a) that planning permission ought to be granted for the development to which the notice relates or, as the case may be, that a condition or limitation alleged in the enforcement notice not to have been complied with ought to be discharged;

(b) that the matters alleged in the notice do not constitute a breach of planning control;

(c) that the breach of planning control alleged in the notice has not taken place;

(d) in the case of a notice which, by virtue of Article 68(4), may be issued only within the period of four years specified in that paragraph, that that period had elapsed at the date when the notice was issued;

(e) in the case of a notice not falling within sub-paragraph (d), that the breach of planning control alleged by the notice occurred before 26th August 1974;

(f) that copies of the enforcement notice were not served as required by Article 68(5);

(g) that the steps required by the notice to be taken exceed what is necessary to remedy any breach of planning control or to achieve a purpose specified in Article 68(10);

(h) that the period specified in the notice as the period within which any step is to be taken falls short of what should reasonably be allowed.

[13] A comparison between Article 69(3) and Article 24(2) indicates that Parliament has elected to specify a wider range of grounds of appeal in respect of enforcement notices than that which applies to Submission Notices. In particular it will be noted that section 69(3)(b) allows for appeal on the ground that the matters alleged in the notice do not constitute a breach of planning control. That ground of appeal is absent from Article 24(2). It is a ground of appeal that would permit an appellant to contend that the development to which objection is taken amounts to permitted development under the 1993 Order. It cannot be concluded that these differences between Article 69(3) and Article 24(2) are other than deliberate. Parliament could have elected to apply any or all of the grounds of appeal against enforcement notices as grounds of appeal against Submission Notices upon the drafting of the 1991 Order, but that was not done.

Statutory Interpretation.

[14] The Court of Appeal addressed the issue of statutory interpretation in *Criminal Cases Review Commission's Reference under section 14(3) of the Criminal Appeal Act 1995* [1998] NI 275. The Criminal Appeal Act 1995 set out those cases that the Criminal Cases Review Commission might refer to the Court of Appeal and they included those cases where defendants had been found not guilty on the ground of insanity. However the Applicant had been convicted in 1953 and at that time the form of verdict was guilty but insane. No provision was made in the 1995 Act for the cases of defendants found guilty but insane to be referred to the Court of Appeal. The Applicant contended that Parliament in enacting the words in the 1995 Act "not guilty by reason of insanity" intended to include the phrase "guilty but insane", but the Court of Appeal rejected that contention and held that the Criminal Cases Review Commission did not have power to refer the Applicant's case to the Court of Appeal.

[15] In dismissing the application, Carswell LCJ relied upon Lord Scarman in *Stock -v- Frank Jones (Tipton) Limited* (1978) 1 All ER 948 and 955 –

> "If the words used by Parliament are plain, there is no room for the `anomalies' test, unless the consequences are so absurd that, without going outside the statute, one can see that Parliament must have made a drafting mistake. If the words `have been inadvertently used', it is legitimate for the court to substitute what is apt to avoid the intention of the legislature being defeated – per Mackinnon LJ in *Sutherland Publishing Company Limited -v- Caxton Publishing Company Limited (No.2)* (1937) 4 All ER 405 and 421. This is an acceptable exception to the general rule that plain language excludes a consideration of `anomalies', ie mischievous or absurd consequences. If a study of the statute as a whole leads inextricably to the conclusion that Parliament has erred in its choice of words, eg used `and' when `or' was clearly intended, the courts can, and must, eliminate the error by interpretation. But mere `manifest absurdity' is not enough – it must be an error (of commission or omission) which in its context defeats the intention of the Act".

Further Lord Simon at page 954 stated that –

> "A court would only be justified in departing from the plain words of the statute were it is satisfied that –

(1) There is clear and gross balance of anomalies;

(2) Parliament, the legislative promoters and the draftsman, could not have envisaged such anomaly and could not have been prepared to accept it in the interests of a supervening legislative objective;

(3) The anomaly can be obviated without detriment to such legislative objective;

(4) The language of the statute is susceptible of the modification required to obviate the anomaly. "

[16] The present case is far removed from circumstances where the courts have power to alter the words of legislation. On plain language Parliament has introduced not only wider grounds of appeal against enforcement notices, but different persons entitled to appeal against an enforcement notice and a different operation of the 4 year rule. There are two distinct regimes in place.

Challenges to the lawfulness of Statutory Notices.

[17] The Respondent's skeleton argument commences by stating that the fundamental question raised by this application is whether the PAC is required to refrain from enquiring into the lawfulness of a Submission Notice. The Respondent contends that where a Submission Notice is issued in respect of permitted development (which in the event was not the present case) then the Submission Notice is ultra vires and should be quashed by the PAC. On the other hand the Applicant contends that the PAC is limited to the grounds of appeal set out in Article 24(2) of the 1995 Order and that any challenge to the validity of the Submission Notice must therefore be undertaken by way of an application for Judicial Review of the decision to issue the Submission Notice or alternatively must await the service of an enforcement notice where the grounds of appeal under Article 69(3)(b) include the ground that the matters alleged in the notice do not constitute a breach of planning control. To this might be added the further alternative of raising the lawfulness of the Submission Notice as a defence in any criminal proceedings, as Article 23(5) makes it an offence not to apply for planning permission after a Submission Notice has been served.

[18] Accordingly this application resolves to determining the proper forum for the raising of issues as to the "lawfulness" of a Submission Notice. The options include all or any of the following, namely the PAC by way of appeal from the Submission Notice, the High Court by way of Judicial Review of the decision to issue the Submission Notice, the Magistrates Court by way of a defence in the event of criminal proceedings for failing to apply for planning permission and the PAC by way of appeal from a later enforcement notice. A determination of the appropriate

forum for the different types of challenge that might be made to a statutory notice depends on a consideration of the statutory context.

Challenges to the lawfulness of Enforcement Notices.

[19] This issue of the proper forum to challenge a statutory planning notice that is alleged to be unlawful has been considered recently by the House of Lords. In *R -v- Wicks* (1997) 2 All ER 801 an enforcement notice had been served under the English legislation where the appellant had carried out rebuilding work on an existing building without planning permission. The provisions of English legislation dealing with enforcement notices are similar to the Northern Ireland legislation and include extensive grounds of appeal to the Secretary of State against an enforcement notice. The appellant claimed he did not require planning permission and a criminal prosecution followed. The appellant wished to challenge the decision to serve the enforcement notice on the grounds that the planning authority had acted in bad faith and had been motivated by immaterial considerations. These were not statutory grounds that could have been raised on appeal to the Secretary of State. At the hearing of the criminal prosecution the Court refused to hear the appellant's objections to the enforcement notice and the appellant pleaded guilty. The House of Lords dismissed the appeal and held that the appellant was not entitled to contend in the criminal proceedings that the planning authority's decision to issue the enforcement notice was influenced by bias and improper motives.

[20] Lord Nicholls referred to two different types of challenge to the lawfulness of an order. The first defence arose where a defendant wished to contend that the order was ultra vires as having been made in terms not authorised by the statute. The second defence arose where the order was not validly made because the public body was motivated by immaterial considerations and had made the order for an unauthorised purpose (page 803(j)). It was said to be well established that where the criminal offence lies in failure to comply with an order made under statutory powers it is open to the defendant to challenge the lawfulness of the order on certain grounds by way of defence in the criminal proceedings, among the most well established grounds being lack of vires which is apparent merely from a reading of the order in conjunction with the enabling Act (page 804(d)). However, not all challenges to the lawfulness of an impugned order can be raised by way of defence in criminal proceedings and some must be decided in judicial review proceedings, including some, but not all, challenges to the procedure which led to the making of the order (page 804(e)).

[21] The proper starting point is that prima facie in criminal proceedings an accused should be able to challenge on any ground the lawfulness of an order, the breach of which constitutes an alleged criminal offence (page 805f). This starting point must always take effect subject to any contrary indication in the relevant legislation (page 808(d)). The criminal offence of not taking steps required by an enforcement notice is embedded in an elaborate statutory code with detailed provisions regarding appeals. Lord Nicholls concluded that as a matter of statutory interpretation an "enforcement notice" is a notice issued by the authority which is

formally valid and has not been set aside (page 808(e)). Accordingly the first defence (order invalid on its face) could be raised in the criminal proceedings, but the second defence (immaterial considerations or unauthorised purposes) was a matter for Judicial Review.

[22] Lord Hoffman considered the point at which a defendant was entitled to challenge the vires of a notice issued under statutory authority by way of a defence to criminal proceedings.

> "The question must depend entirely upon the construction of the statute under which the prosecution is brought. The statute may require the prosecution to prove that the act in question is not open to challenge on any ground available in public law, or it may be a defence to show that it is. In such a case, the justices will have to rule upon the validity of the act. On the other hand, the statute may upon its true construction merely require an act which appears formally valid and has not been quashed by judicial review. In such a case, nothing but the formal validity of the act will be relevant to an issue before the justices. It is, in my view, impossible to conduct a general theory of the ultra vires defence which applies to every statutory power, whatever the terms and policy of the statute". (Page 815(h)-(j)).

[23] Lord Hoffman examined the terms of the legislative scheme of enforcement of planning control and the history of the provisions. The history of the provisions illustrated a consistent policy of progressively restricting the kinds of issues which a person served with an enforcement notice could raise when he was prosecuted for failing to comply (page 818(a)). The reasons for progressive restriction related first to the unsuitability of the subject-matter for a decision by the criminal courts; secondly, to the need for the validity of the notice to be conclusively determined quickly enough to enable planning control to be effective and to allow the timetable for service of such notices in the Act to be operated; and thirdly, to the fact that the criminal proceedings are part of the mechanism for securing the enforcement of planning control in the public interest (page 818(b)).

[24] As to the first matter, the suitability of the subject-matter for the criminal courts, it was recognised that the planning merits of the enforcement notice were unsuitable for a decision by a Magistrates' Court. The right of appeal was transferred to the Secretary of State and challenges on most such grounds were excluded in any other proceedings. Grounds of challenge outside the statutory grounds, such as bias or other procedural impropriety, were described as "the residual grounds". Such residual grounds are not included in the appeal procedure because they are quite

unsuitable for a decision by a planning inspector. The question was stated to be whether Parliament regarded them as suitable for decision by a criminal court (818(e)-(f)). Regard must be had to the complexity and sophistication of the law relating to the residual grounds and the difficulty that Justices may experience compared to the High Court where the issues were said to be familiar ground.

As to the second matter, the question of timing, exclusion of the residual grounds from the appeal procedure would harmonise better with the scheme of the legislation if they had to be raised by Judicial Review within the time limits prescribed for that procedure rather than if they could be relied upon in a criminal prosecution (page 819(f)).

As to the third matter, the purpose of the provisions for enforcement, the criminal proceedings, with recurring criminal liability for non compliance, form part of the general scheme of enforcement and should be interpreted to give effect to the overall policy of the enforcement procedures (page 219(g)).

[25] In conclusion it was stated by Lord Hoffmann at page 820c–

> "I do not think that in practice hardship will be caused by requiring the residual grounds to be raised in judicial review proceedings. The statutory grounds of appeal are so wide that they include every aspect of the merits of the decision to serve an enforcement notice. The residual grounds will in practice be needed only for the rare case in which enforcement is objectively justifiable but the decision that service of the notice is "expedient" is vitiated by some impropriety. As Keene J said in the Court of Appeal, the owner has been served with the notice and knows that he has to challenge it or comply with it. His position is quite different from that of a person who has contravened a by-law, who may not have heard of the by-law until he contravened it.
>
> All these reasons lead me to conclude that "enforcement notice" in section 179(i) means a notice issued by a planning authority which on its face complies with the requirements of the Act and has not been quashed on appeal or by judicial review. There was no dispute that Mr Wicks had failed to comply with such an enforcement notice and he was therefore guilty of the offence. The matters which he proposed to raise at his trial were irrelevant".

Challenges to the lawfulness of by-laws.

[26] The issue was revisited by the House of Lords in the context of the validity of a by-law in *Boddington -v- British Transport Police* (1998) 2 All ER 203. The defendant had been convicted of an offence of smoking a cigarette in a railway carriage when

smoking was prohibited by British Railways Board by-laws made under legislation. It was held that a defendant in criminal proceedings was entitled to challenge the lawfulness of subordinate legislation, or an administrative decision made thereunder, where his prosecution was premised on its validity, unless there was a clear parliamentary intention to the contrary. The defendant's challenge was on the basis that the power to regulate the use of the railway in respect of smoking in carriages did not extend to the complete prohibition of smoking in all carriages by the posting of no smoking notices.

[27] Lord Irvine stated that whether a public law defence may be mounted to a criminal charge requires scrutiny of the particular statutory context in which the criminal offence is defined and of any other relevant statutory provisions (page 208(e)).
In considering *R -v- Wicks* it was stated that an important feature of the case was concerned with administrative acts specifically directed at the defendant where there had been clear and ample opportunity provided by the scheme of the relevant legislation for the defendant to challenge the legality of the acts before being charged with the offence. By contrast where subordinate legislation was promulgated which is of a general character the first time an individual may be affected by the legislation is when he is charged with an offence under it. Such a defendant would have had no sensible opportunity to challenge the validity of the Act until he was charged. In such a case a strong presumption must be that Parliament did not intend to deprive the defendant of an opportunity to defend himself in the criminal proceedings by asserting the alleged unlawfulness of the decision (page 216(f)-(j)).
Only the clear language of the statute could take away the right of a defendant in criminal proceedings to challenge the lawfulness of a by-law or administrative decision where his prosecution is premised on its validity (page 217(g)).

Challenges to the lawfulness of Breach of Condition Notices.

[28] On the same day that judgment was delivered in *Boddington* a Divisional Court gave judgment in *Dilieto -v- Ealing London Borough Council* (1998) 2 All ER 885. The local planning authority had served a notice on the Appellant requiring him to comply with a condition imposed upon the grant of planning permission (a breach of condition notice) and criminal proceedings were undertaken for his failure to comply with the notice. The appellant sought to challenge the validity of the notice first of all on the ground that it was out of time, having been issued outside the statutory 10 year limit (and this was not a specified statutory ground of appeal) and secondly, that the planning condition was so vague and imprecise as to be a nullity. The Justices held that the appellant was not entitled to challenge the validity of the notice. On appeal it was held that a defendant charged with breaching such a notice was entitled by way of defence in criminal proceedings to challenge the validity of the notice on the ground that it was out of time and also to challenge the lawfulness of the planning condition on the ground of lack of certainty.

[29] Sullivan J, having reviewed the decision in *R -v- Wicks*, stated that that case was decided against the background of the elaborate provisions made for appellants

who wished to challenge enforcement notices to appeal to the Secretary of State, and that no such provision was made in the case of breach of condition notices (page 893(g)).
It could not have been intended by Parliament that a defendant who wished to allege that he had been served with a breach of condition notice after the expiration of the 10 year period should have no avenue of appeal whatsoever. Deciding whether or not premises had been used in breach of condition for 10 years or more would usually involve a detailed examination of oral and written evidence and Magistrates were much better equipped to perform that fact finding task than the High Court in Judicial Review proceedings (page 893(j) to 894(b)).
Almost every aspect of the merits of a decision to serve an enforcement notice can now be raised before the Secretary of State and only before the Secretary of State, and by way of contrast, breach of condition notices are much more limited (page 894(d)).

[30] Reference was made to the three particular matters relied on by Lord Hoffman in relation to the progressive restriction which a person served with an enforcement notice can raise when he is prosecuted for failing to comply, namely the unsuitability of the subject-matter for a decision by the criminal court and the question of timing and the question of the purpose of the provisions for the enforcement by criminal proceedings.
Sullivan J applied those considerations to breach of condition notices where they had been served out of time. First, in the case of breach of condition notices there had been no progressive transfer of rights of appeal away from Magistrates to the Secretary of State.
Second, there was no comprehensive avenue of appeal against a breach of condition notice leaving only residual grounds for challenge by way of Judicial Review.
Third, what Lord Hoffman described as a residual ground that is more appropriate for challenge by way of Judicial Review, is not true of an allegation that a breach of condition notice is out of time.
Fourth, in relation to timing, as there is no right of appeal to the Secretary of State there is no reason why a prosecution for a breach of condition notice should be delayed, and interposing a challenge by way of Judicial Review before any prosecution takes place may well lead to delay.
Fifth, while Lord Hoffman referred to residual grounds that would be needed for the rare case, *Dilieto* was concerned with basic defences. It was concluded that a breach of condition notice means a breach of condition notice that has been served within the prescribed time limits, and the issue of validity on that ground can be raised in criminal proceedings. Nevertheless Sullivan J recognised that an appellant who wished to challenge the decision to serve the breach of condition notice on the basis that it was made in bad faith or for improper motives or based on irrelevant considerations should make the challenge by way of Judicial Review. (page 897(e)-898(b)).

[31] In relation to the other ground of challenge that the condition was so vague and imprecise as to be a nullity, Sullivan J stated that if a defendant was charged with failing to comply with a notice alleging a breach of condition it would require

very clear words of exclusion to prevent the issue being raised in defence to criminal proceedings. Such an argument can be advanced by simply looking at the face of the planning permission and construing the condition. It is wholly different from an allegation that service of a notice which is valid on its face was motivated by bad faith or improper purposes. It is also different from an allegation that a condition is undesirable on planning merits, which is plainly not a matter for Magistrates (page 898(g)-(h)).

Challenges to the lawfulness of Submission Notices.

[32] The result is that a different forum may determine different types of challenge to the same notice. The identity of the relevant forum depends on a consideration of the requirements of the statutory provisions, the wider statutory context and the appropriateness of a particular forum to deal with the particular type of challenge. The statutory provisions may provide for appeal against the notice on the basis of statutory grounds that are wide ranging (as in the case of enforcement notices) or are limited (as in the case of Submission Notices). In some cases the statutory grounds of appeal may allow the defence of permitted development to be raised (as is the case with enforcement notices). The statutory provisions may also specify defences available in the event of criminal proceedings for non compliance with the notice and in any event a defence is available on the ground that the notice is invalid on its face. Residual grounds of challenge on public law issues are matters for Judicial Review.

[33] In relation to a Submission Notice the PAC will deal with challenges on the statutory grounds of appeal. In the event of a prosecution for non-compliance with the Submission Notice a defendant may raise as a defence the invalidity of the notice on its face when read in conjunction with the enabling legislation (per Lord Nicholls in *R -v- Wicks* at page 804(d)) and where the material part of the notice fails for uncertainty (per Sullivan J in *Dilieto -v- Ealing London Borough Council* at page 898(h)). For the purposes of criminal proceedings the relevant notice may be defined as a notice that does not fail in these respects, as occurred in *Wicks* and *Dilieto*. A "Submission Notice" should be similarly defined in criminal proceedings. It would seem that the same definition might apply to a "Submission Notice" appealed to the PAC on the statutory grounds of appeal, where the burden would be on the Department to prove that the notice amounted to a "Submission Notice". However I express no conclusion on that issue as it was not argued before the Court. Challenges on residual grounds such as bad faith or irrelevant considerations may be made in the High Court by way of Judicial Review.

[34] The first ground of challenge in *Dilieto -v- Ealing London Borough Council* concerning the 10 year period can be compared with the statutory limit of 4 years on Submission Notices, but the 4 year period is one of the statutory grounds of appeal to the PAC under Article 24(2)(c) of the 1991 Order.

[35] In the present case the ground of challenge was whether the admitted development was permitted development that did not require planning permission.

That is not a specified statutory ground of appeal and the PAC does not have power to consider the issue on an appeal under Article 24. If the Applicant were to proceed to an enforcement notice an appeal to the PAC could be made under Article 69(3)(b) that the matter alleged in the notice did not constitute a breach of planning control. When a party's objection to a Submission Notice is on the grounds that it is permitted development, the Applicant might consider it appropriate to issue an enforcement notice so that the issue can be determined by the PAC.

[36] However, if the Applicant were to proceed by way of criminal proceedings for non-compliance with the Submission Notice the issue would arise as to whether the defence of permitted development could be raised in the criminal proceedings or would require an application for Judicial Review. The starting point would be that an accused should be able to challenge on any ground the lawfulness of an order, the breach of which constitutes his alleged criminal offence (per Lord Nicholls in *R -v- Wicks* at page 805(f)).

[376] In considering the terms of Part IV of the 1991 Order and the scheme of planning control and the history of its provisions, Submission Notices, having been introduced in 1991 have no history of progressive transfer of rights of appeal away from Magistrates and to that extent are akin to breach of condition notices and not to enforcement notices. Further, the Order provides a specified avenue of appeal against a Submission Notice on particular limited grounds leaving residual grounds for alternative challenge and to that extent is akin to enforcement notices and not breach of condition notices. Further, on the suitability of the subject- matter for a decision by the criminal court an issue of permitted development is unsuitable for a decision in the Magistrates' Court and to that extent is akin to the residual grounds of challenge to enforcement notices and breach of condition notices. Further, in relation to timing there is a right of appeal to the PAC which might delay a prosecution for failure to comply with a Submission Notice and to that extent is akin to an enforcement notice and not a breach of condition notice. Further, the purposes of the provisions for enforcement notices and breach of condition notices and Submission Notices by criminal proceedings are the same but there remain some challenges which are inappropriate in a criminal court and should be raised by Judicial Review. The overall scheme of the legislation indicates that as a challenge to a Submission Notice on the ground of permitted development is not a specified statutory ground of appeal and as it involves issues that are not appropriate for determination in a criminal court, the challenge should be made by way of Judicial Review. It might appear that a challenge based on permitted development would more appropriately be a matter for the PAC, as is the case with the issue of an enforcement notice, but that is a matter for Parliament.

[38] The respondent sought to secure to the PAC the power to deal with the issue of permitted development on an Article 24 appeal by reliance on section 3 of the Human Rights Act 1998 which provides that, so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect to in a way which is compatible with the Convention rights. The respondent contends that

Article 6 of the European Convention, which provides the right to a fair trial, and Article 8 of the European Convention, which provides the right to respect for private and family life and home, were engaged in the present case, so that it is unlawful for a public authority to act in a way which is incompatible with the Convention rights, as provided by section 6 of the 1998 Act. I reject the respondent's argument. An Appellant is not being precluded from raising the lawfulness of a Submission Notice but is required to do so in a manner other than by appeal to the PAC.

[39] Further the respondent contends if the Department issues a Submission Notice under Article 23 in respect of development for which planning permission is not required then such a notice is plainly ultra vires. Article 23 provides that the Applicant may issue a Submission Notice "where it appears to the Department" that development is being carried out without permission or approval. This expression also appears in Article 68 of the 1991 Order in relation to the enforcement notices. The issue arises as to whether the notice is ultra vires if there has been no actual breach of planning permission even if it appeared to the Department at the issue of the notice that there had been such a breach of planning control. In *Tidswell -v- Secretary of State for the Environment* (1977) JPL 104 an enforcement notice was upheld on the basis that it had appeared to the planning authority that there had been a breach of planning control, even though that was not the case. In *Dawn and Dawn t/as Northern Ireland Markets -v- Department of the Environment for Northern Ireland* [1981] 1 NIJB Jones LJ described *Tidswell* as debatable and found on the facts that there was insufficient justification for the issue of the enforcement notice. In *R -v- Rochester upon Midway CC ex parte Hobday* [1989] 58 P&CR 424 the issue of the enforcement notice was held to be ultra vires on the basis that it had not appeared to the planning authority that there had been a breach of planning control. The decision of the applicant to issue the Submission Notice is subject to Judicial Review and that would include consideration of whether the applicant satisfied the statutory basis for the issue of the notice. With the expanding scope of Judicial Review the modern approach to a case where it appeared to the applicant that there had been a breach of planning control might be to regard the decision to issue a notice in circumstances where there was no breach of planning control as liable to be set aside on the ground of material error of fact. The notice remains valid until set aside. The PAC does not have jurisdiction to examine the issue.

[40] In the circumstances it is proposed to make a declaration that where a "Submission Notice" is issued under Article 23 of the Planning (Northern Ireland) Order 1991, there is no right of appeal to the PAC against that notice on any grounds other than those specified in Article 24(2) of the 1991 Order. The words Submission Notice are placed in inverted commas to leave open for argument the question of the definition of what constitutes a Submission Notice under Article 23, as referred to at paragraph [33] above.