Hilary Term
[2011] UKSC 15
On appeal from: [2010] EWCA Civ 26

JUDGMENT

Secretary of State for Communities and Local Government and another (Respondents) *v* Welwyn Hatfield Borough Council (Appellant)

before

Lord Phillips, President
Lord Rodger
Lord Walker
Lady Hale
Lord Brown
Lord Mance
Lord Clarke

JUDGMENT GIVEN ON

6 April 2011

Heard on 7 and 8 February 2011

Appellant

James Findlay QC
Wayne Beglan
(Instructed by Sharpe Pritchard)

1st Respondent (Secretary of State for Communities and Local Government)
James Maurici QC
Sarah-Jane Davies
(Instructed by Treasury Solicitors)

2nd Respondent (Alan Beesley)
Alexander Booth
(Instructed by Sherrards)

LORD MANCE (with whom Lord Phillips, Lord Walker, Lady Hale and Lord Clarke agree)

Introduction

1. In July 1999 Mr Beesley, the second respondent, bought 22 acres of open land in the Green Belt on the outskirts of Northaw, Potters Bar. In October 1999 he applied for and in March 2000 obtained planning permission to construct a hay barn for grazing and haymaking. Upon a further application made in January 2001, this was in October 2001 revoked and in December 2001 replaced by a second planning permission for the same barn, re-sited differently. Each planning permission was subject to the condition that "The building hereby permitted shall be used only for the storage of hay, straw or other agricultural products and shall not be used for any commercial or non agricultural storage purposes".

2. Between January and July 2002, with the assistance of his builder father-in-law, Mr Beesley constructed a building which was to all external appearances the permitted barn, with walls in profiled metal sheeting, a roller-shutter door, two smaller doors and eight roof lights. Internally it was a dwelling house with full facilities, including garage, entrance hall, study, lounge, living room, toilet, storeroom, gym and three bedrooms, two of them with en suite bathrooms, and connected to mains electricity, water and drainage and a telephone line. On 9 August 2002 Mr Beesley and his wife moved in and there they lived continuously for four years. Welwyn Hatfield Borough Council, the appellant, in whose area the property lies, remained unaware throughout that the building was or was being used as a dwelling house.

3. Mr Beesley was, on the other hand, well aware of the scheme of the Town and Country Planning Act 1990, section 171B of which provides:

> "(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.
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> (2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse,

no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.

(3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach."

Section 171A defines "a breach of planning control" as (a) carrying out development without the required planning permission, or (b) failing to comply with any condition or limitation subject to which planning permission is granted.

4. The significance of the expiry of the periods mentioned in section 171B appears from section 191(3), which provides that for the purposes of the Act:

"any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if—

(a) the time for taking enforcement action in respect of the failure has then expired; and

(b) it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force".

Section 191(1) provides:

"If any person wishes to ascertain whether—

(a) any existing use of buildings or other land is lawful;

(b) any operations which have been carried out in, on, over or under land are lawful; or

(c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,

> he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.
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> (2) For the purposes of this Act uses and operations are lawful at any time if—
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> (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and
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> (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force."

5. On 15 August 2006, Mr Beesley submitted an application under section 191(1)(a) for a certificate of lawfulness for use of the building as a dwelling house, attaching three statutory declarations and thirteen items of documentation to establish his completion of four years of continuous occupation. The application led to a dispute notable for the turns taken by each side's case.

6. The council denied that the building constructed was a dwelling house, maintained that a ten year period for enforcement applied under section 171B(3) and on 30 August 2007 refused a certificate. Mr Beesley appealed and the matter came before Mr K L Williams, a planning inspector appointed by the second respondent, the Secretary of State. The council, in addition to relying on section 171B(3), challenged Mr Beesley's credibility regarding the length and continuity of his occupation. In so doing, it relied on the fact that, on his own account, he had from the outset, and specifically when he applied for planning permission for a barn, deliberately deceived the council. The inspector noted this, but found nevertheless that use as a dwelling house probably did commence more than four years before the date of the application for a certificate. He observed that, since the intention from the outset was to establish immunity from enforcement under section 171, Mr Beesley would have been unlikely to apply for a certificate until four years had expired. He held that, however the building was classified, it had been in "use as a single dwelling house", and he treated this as sufficient to bring section 171B(2) into operation. Under section 195(2) of the Act, he therefore granted a certificate.

7. The council appealed to the High Court, where Collins J on 7 April 2009 over-turned the inspector's decision: [2009] EWHC 966 (Admin). He viewed the

building as the permitted barn (paras 34-35), but went on to hold that there had never been any intention to use the building other than as a dwelling house, and that this meant that there had not been a change of use within section 171B(2). On further appeal by the Secretary of State and Mr Beesley, the Court of Appeal (Pill, Mummery and Richards LJJ) on 29 January 2010 reversed Collins J: [2010] EWCA Civ 26; [2010] PTSR 1296. It held section 171B(2) to apply on the basis that use as a dwelling house as from 9 August 2002 was a change of use either from the use permitted by the planning permission or from a period of "no use" which the court identified as occurring between completion of the building and its residential occupation: para 29 per Richards LJ, with whose reasoning the other two members of the court agreed. However, Mummery LJ expressed puzzlement at

> "the total absence of argument from the council, or the Secretary of State, about the effect of Mr Beesley's reprehensible conduct in obtaining planning permission by deception and in failing to implement it" (para 43).

He added (para 45) that

> "it is very difficult to believe that Parliament could have intended that the certificate procedure in section 191 should be available to someone who has dishonestly undermined the legislation by obtaining a planning permission which would never have been granted if the council had been told the truth".

8. The council now appeals to the Supreme Court. It challenges the Court of Appeal's decision that there was a change of use, but it also seeks to raise a new point, picking up Mummery LJ's remarks in terms of a principle of public policy. Neither Mr Beesley nor the Secretary of State has objected to this new second point being argued. However, both dispute that public policy can have any role in the relevant statutory scheme, and Mr Beesley seeks to adduce fresh evidence which would, if accepted, qualify the inspector's finding that his intention was from the outset to establish immunity from enforcement. This could, he submits, affect the application of any principle of public policy which may be relevant. The fresh evidence would be to the effect that his intention to construct the barn to live in as a dwelling house was only formed in June 2001, and so after he had submitted both the original and the revised planning application, although before the former was revoked and the latter actually obtained.

The first issue – section 171B(2)

9. The first issue depends upon an analysis of the scheme of section 171B. The only directly relevant part is subsection (2), because, for whatever reason, Mr Beesley only applied for (and was only given by the inspector) a certificate of lawfulness of existing use under section 191(1)(a). He has not sought to address the possibility that the operation of constructing the building might itself also (and independently) be regarded as having been in breach of planning control within section 171B(1) and section 191(1)(b). This is perhaps not as surprising as might appear, since the council itself treated the building as a barn when refusing a certificate in August 2007, and argued forcefully before the inspector to this effect with a view to establishing a ten year period for enforcement under section 171B(3)). If it was the permitted barn (as Collins J thought), then section 171B(1) would not apply and the only breach was in its use as a dwelling house, contrary to its stated purpose as well as contrary to the planning permission condition (para 1 above).

10. Before the Court of Appeal, the Secretary of State and Mr Beesley challenged the proposition that the building constructed was the permitted barn, relying on the House of Lords' reasoning in *Sage v Secretary of State for the Environment, Transport and the Regions* [2003] UKHL 22; [2003] 1 WLR 983. The Court of Appeal upheld the challenge, concluding that the physical and design features, and the character, purpose and proper classification for planning purposes of the building built were those of a dwelling house, not a barn.

11. Looking at the matter overall, this part of the Court of Appeal's analysis appears incontestable. It rests on the approach established as correct by Lord Hobhouse's opinion in *Sage*, para 14, with which all other members of the House agreed. It is unusual to find a house which looks externally like a barn, but appearances can be and were here intended to be deceptive. Tromp l'oeil can of course also have legitimate purposes, as for example in an eco-house constructed with permission to look like a fold in the ground. Aside from its appearance, the present building was in every respect designed and built as a house. This is a case where it would, taking Lord Hope's words in *Sage*, para 7, "be wrong to treat it as having a character which the person who erected it never intended it to have".

12. In another of the many turns in each side's arguments, Mr Booth for Mr Beesley now submits that there is another way in which the first basis of the Court of Appeal's decision under section 171B(2) can be upheld. He notes that under section 56 of the 1990 Act:

> "(1) …. for the purposes of this Act development of land shall be taken to be initiated-
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> (a) if the development consists of the carrying out of operations, at the time when those operations are begun;
> (b) if the development consists of a change in use, at the time when the new use is instituted; ….
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> (2) For the purposes of the provisions of this Part mentioned in subsection (3) development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out.
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> (3)The provisions referred to in subsection (2) are sections 85(2), 86(6), 87(4), 89, 91, 92 and 94.
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> (4)In subsection (2) "material operation" means—
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> (a)any work of construction in the course of the erection of a building;
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> (aa)any work of demolition of a building;
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> (b)the digging of a trench which is to contain the foundations, or part of the foundations, of a building;
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> (c)the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b); …."

Here, he says, the planning permission for a hay barn was initiated as soon as the first trench was dug; and this was as capable of being referable to the permitted hay barn as it was to the intended dwelling house; so he submits that the first basis upon which Richards LJ held that there can be a change of use (see para 7 above) can be supported by this route. Although Mr Booth put his submission in terms of "initiation" under subsection (1), that subsection, once relevant to compensation, appears to have been long obsolete (Encyclopaedia of Planning Law and Practice, Sweet & Maxwell, para P56.04). But a parallel submission may be made under subsection (2), which defines when development is to be taken to have begun, for the purpose of deciding whether it has been begun within the time required by statute or the permission itself.

13. It is impossible to accept this submission, on whichever subsection it is based. As a preliminary observation, it must be open to doubt whether even the first material operations related to the permitted hay barn. The dwelling house which Mr Beesley was intent on building must from the outset have required construction works for sewage and drainage. But I can leave that aspect aside (which would if relevant have required further factual investigation), as well as

any potential issue of law as to whether Mr Beesley's admitted intention from the outset to build a dwelling house is relevant to the question whether he could, in any event, be said to have "begun" to build the permitted hay barn (compare the authorities discussed in the Encyclopaedia of Planning Law, para P56.10, on which the Supreme Court heard no submissions). Even assuming that it could be shown that the development of a hay barn was "begun" within section 56(2), this cannot assist on the essential question whether the building as constructed and completed was a barn, so that the only breach was in its use as a dwelling house contrary to its stated purpose and contrary to the planning permission condition (para 1 above). Even if the planning permission were to be treated as having been initiated or begun, it was not implemented in any further or substantial respect; so the building constructed was not a building which could be regarded as having any permitted use. Accordingly, the first basis on which the Court of Appeal held that there may have been a change of use within section 171B(2) is unsustainable.

14. This makes it unnecessary at this point to decide whether change of use under section 171B(2) can consist in a simple departure from permitted use, without any actual prior use. I doubt this, since the word "use", in each place where it appears in that subsection is on its face used in a real or material sense, rather than in the legal sense of "permitted use". This is also supported by authorities on the concept of development by "the making of any material change in the use of any buildings or other land" which has appeared in successive Town and Country Planning Acts (section 12 of the 1962 Act, section 22 of the 1971 Act and now section 55 of the 1990 Act). Under these sections it is clear that this form of development focuses on actual use: Hill's Town and Country Planning Acts (5th ed) (1967), p. 55; *Hartley v Minister of Housing and Local Government* [1970] 1 QB 413, discussed in Lord Scarman's leading speech in *Pioneer Aggregates (U.K.) Ltd v Secretary of State for the Environment* [1985] AC 132, 143B-E and *White v Secretary of State for the Environment* (1989) 58 P & CR 281. In Hill's work, it is also expressly stated that a use permitted by a planning permission but never implemented is irrelevant. It was only in section 15(3)(c) of the Town and Country Planning Act 1968 that the predecessor to section 171B(2) first appeared, adopting "change of use …. to use as a single dwelling house" as a specific trigger to the start of a four year period. (Under the Town and Country Planning Act 1947, all development without planning permission attracted a four year period, within which any enforcement notice had to be served.) The natural assumption is that the concept introduced into section 15(3)(a) in 1968 was borrowed in the same sense as that in which it was used in section 12. The express qualification "material" was probably omitted because of the existence of what is now section 171A(1)(b).

15. I turn to the alternative basis on which the Court of Appeal concluded - and the sole basis on which the Secretary of State now argues - that there was a change of use. This is that in the short period between completion of the building in July 2002 and its residential occupation on 9 August 2002 the building had no use, so

that there was a change of use from no use to use as a dwelling house on and after 9 August 2002. The Court of Appeal did not base this analysis on any authority, and none appears to have been cited to it on this aspect, but cases have been produced before the Supreme Court which are said to assist it.

16. The scheme of section 171B is on its face straightforward. Subsection (1) deals with unauthorised building operations. For reasons already given, subsection (1) applied to the present building. Subsection (2) deals with change of use of a building to use as a single dwelling house. Both subsections involve four year periods, from the date of substantial completion of the operations under subsection (1) and the date of the breach (meaning clearly the date when the change of use first occurred and the four year period began to run) under subsection (2). There is a basic distinction between the types of development dealt with under these two subsections, and it is buttressed by section 336(1) where use in relation to land is defined as *not* including the use of land for the carrying out of any building or other operations on it. Subsection (2) does not however on its face cover all breaches relating to the use of a building, but only one important category: "change of use" to use as a dwelling house. Subsection (3), applying "in the case of any other breach of planning control", involves, in contrast, a ten year period from the date of breach.

17. Protection from enforcement in respect of a building and its use are thus potentially very different matters. Mr Beesley could have applied for a certificate under subsection (1) in respect of the building as soon as July 2006 was over, but he has not done so. He has focused on the use of the building for four years, in respect of which, he submits, he must now be entitled to protection by reference to roughly, though not precisely, the same four year period. If the right analysis were that there has been no change of use within subsection (2), the only alternative analysis must, he points out, be that use of the building as a dwelling house, which is either impermissible or positively prohibited under the relevant planning permission, can be the subject of an enforcement notice at any time within a ten year period under subsection (3). I agree that that would, on its face, seem surprising. However, it becomes less so, once one appreciates that an exactly parallel situation involving different time periods applies to the construction without permission and the use of a factory or any building other than a single dwelling house. The building attracts a four year period for enforcement under subsection (1), while its use attracts, at any rate in theory, a ten year period for enforcement under subsection (3). I say in theory because there is a potential answer to this apparent anomaly, one which would apply as much to a dwelling house as to any other building. It is that, once a planning authority has allowed the four year period for enforcement against the building to pass, principles of fairness and good governance could, in appropriate circumstances, preclude it from subsequently taking enforcement steps to render the building useless.

18. The Secretary of State and Mr Beesley rely heavily upon what they submit is the purpose behind subsection (2). The Supreme Court was not provided with material shedding direct light on the mischief to which the subsection was directed. However, the normal expectation would be that unauthorised building operations within subsection (1) would be easy to spot and quite often onerous to undo. A shorter period for enforcement steps is understandable. As to subsection (2), single dwelling houses were clearly seen as falling into a category meriting a degree of special treatment. They are after all people's homes, and a longer period than four years might well "cause serious loss and/or hardship in the event of enforcement proceedings long after the event": *Arun District Council v First Secretary of State* [2006] EWCA Civ 1172; [2007] 1 WLR 523, para 5, per Auld LJ. It is also not difficult to view change of use of an existing building to a single dwelling house as less likely to be harmful to the public interest than other development. In considering the predecessor provisions of the 1968 Act (section 15), Robert Carnwath QC suggested in his February 1989 report *Enforcing Planning Control* that the logic behind them was not entirely clear, but that special protection was no doubt thought desirable for peoples' homes. He went on to say that in the case of operations, now dealt with in subsection (1), "the governing considerations presumably were the relative ease of detection, the potential costs involved in reinstating the land, and the need to provide certainty for potential purchasers" (Chap 7, para 3.2). The periods of four years retained in respect of both building operations and change of use to use as a dwelling house clearly reflect the legislator's view that this would give adequate opportunity for enforcement steps, after the expiry of which the infringer would be entitled to repose and to arrange his affairs on the basis of the status quo. The speculation that a need to provide certainty for purchasers can have motivated the legislator is less obviously sure. At any rate in a case like the present, no purchaser would presumably look at Mr Beesley's house unless and until he is able to produce a certificate of lawfulness.

19. Not surprisingly, subsection (2) has received a generous interpretation. In *Arun District Council v First Secretary of State*, the Court of Appeal held that, bearing in mind that "a breach of planning control" covers under section 171A(1) both (a) carrying out development without the required planning permission and (b) failing to comply with any condition or limitation subject to which planning permission is granted, section 171B(2) should be read as providing for a four year period in respect of both types of breach of planning control, for example both unauthorised development in the form of material change of use contrary to section 55(1) and any consequent breach of an express condition in a planning permission. However, as Carnwath LJ noted at para 49, although the type of breach does not in this respect matter, the protection under subsection (2) depends upon there having been a "change of use". In *Van Dyck v Secretary of State for the Environment* [1993] 1 PLR 124, the Court of Appeal concluded that subsection (2) covered the case of a single dwelling house the use of which was changed by its conversion into two separate units or dwelling houses. It is unnecessary to express any view

on the decision, but it is relied upon for the Court's general statements to the effect that "the broad policy" underlying the then equivalent of section 171B(2) (section 172(4)(c) of the Town and Country Planning Act 1990) meant that it was "capable of being construed and applied so as to benefit all new separate residences after four years" (p.137). But in that case the change of use was undeniable.

20. The Secretary of State and Mr Beesley invite a broad approach to change of use. They submit that there is no real reason why the legislator should have wanted subsection (2) to apply to a case like *Van Dyck*, but not have wanted to apply it in the present case. The words "change of" use cannot however be ignored. If the legislator had wanted subsection (2) to cover all situations of unauthorised use, these words could and presumably would have been omitted, and the subsection would have read: "Where there has been a breach of planning control consisting in the use of any building as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach". A likely explanation of the general scheme of section 171B is in these circumstances that, in the legislator's mind, new building developments like the present would be dealt with under subsection (1), while changes of use of an existing building to use as a single dwelling house would be dealt with under subsection (2). All other breaches of planning control, including on any view unauthorised use of an authorised new building other than as a dwelling house, would fall within subsection (3).

21. The Court of Appeal, rightly and inevitably, accepted that a change of use to use as a single dwelling house was required before subsection (2) could apply, but found this, on its alternative analysis, in the existence of a period of no use between the end of July 2002 and 9 August 2002, followed by a change to use as a single dwelling house on that date. This analysis is to my mind counter-intuitive. It is not, I think, natural to talk of a house built to live in as undergoing, especially in so short a period, two different uses or non-use and then use. Second, it raises the question what would be the position if Mr Beesley had moved in as substantial completion of the building occurred. Third, should a dwelling house into which its builder-owner intends to move almost immediately be regarded as having or being of "no use" as a dwelling house?

22. On the second point, no satisfactory answer was to my mind given by the Secretary of State or Mr Beesley. It was suggested that there might during the building operations still be a period of no use, which changed to residential use as and when the building was completed. But subsection (2) is only concerned with change of use "of any building", not with the change of use of land and of something which is not yet a building which may occur when the building is completed. It follows that subsection (2) cannot on any view cover all cases of new building. There will be cases where completion of the building and

commencement of occupation are simultaneous. House-owners sometimes even start to move in before building works are complete.

23. Turning to the third point, it is necessary at the outset to distinguish cases concerned with the different question whether existing use rights have been extinguished. As explained by Lord Scarman in *Pioneer Aggregates (U.K.) Ltd v Secretary of State for the Environment* [1985] 1 AC 132, 143F-144D, a new development sanctioned by a planning permission may extinguish the existing use rights which the land or a previous building on the land possessed: see e.g. *Prosser v Minister of Housing and Local Government* (1968) 67 LGR 109; *Petticoat Lane Rentals Ltd v Secretary of State for the Environment* [1971] 1 WLR 1112, discussed in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, pp 598-599 per Viscount Dilhorne, pp 606E-H per Lord Fraser, pp 616-617 per Lord Scarman and pp 625A-626F per Lord Lane. The straightforward explanation is that the planning permission, once taken up and implemented, gives rise to a new situation in which the building owner has the advantage of, but is also bound by the limitations of, the rights of use permitted by the planning permission, and no longer has the benefit of any other rights of use which may have existed prior to the new development. This is highlighted in an instructive article, *New Planning Units, New Chapters in Planning History and Inconsistent Permissions* [2009] 2 JPL 161 by Satnam Choongh and Jeremy Cahill QC.

24. It is true that at one point in the *Petticoat Lane* case (p 1117D), Widgery LJ said of the new building that it started "with a nil use, that is to say, immediately after it was completed it was used for nothing, and thereafter any use to which it is put is a change of use, and if that use is not authorised by the planning permission, it is a use which can be restrained by planning control". But the opinions of Lords Fraser, Scarman and Lane in *Newbury* and the analysis of Lord Scarman in *Pioneer Aggregates* show that reasoning based on change of use was not necessary even in the context which Widgery LJ was addressing. It was sufficient that the owner was bound by the terms of the planning permission which he had chosen to implement. By parallel reasoning the implementation of one of two co-existent planning permissions can supersede the other inconsistent planning permission: see *Pioneer Aggregates*, pp 144B-145C per Lord Scarman. Thus, in the present case, the council, while understandably prudent to do so, may not have had to insist on revoking the first planning permission obtained by Mr Beesley before granting the second.

25. Whether existing use rights had been lost was also in issue in *Jennings Motors Ltd v Secretary of State for the Environment* [1982] QB 541, but there the argument was that the replacement of one building by another new building without planning permission gave rise to a new situation paralleling that which arose in *Prosser*, *Petticoat Lane* and *Newbury* as a result of the implementation of a planning permission. The Court of Appeal proceeded on the basis that the

parallel was generally sound, and cited Widgery LJ's judgment, including the passage referring to a new building starting with a nil use (see p 553F per Parker LJ, with whom Watkins LJ agreed at p 557H), but it held that the erection of the replacement building had no impact on existing rights of user. The enforcement steps were based on development in the form of an alleged "material change in the use of buildings", and the decision itself appears readily explicable on the basis that there had been no such change of use, merely an unauthorised re-building which the planning authority was not as such challenging.

26. These cases, although prominent in counsel's submissions, concern a very different problem, and in my view offer no real assistance in the present context. In each case the essential question was whether prior rights of user had been lost, not whether the land or building could still be said to be in or of use for any purpose. More to the point are cases on abandonment, which is possible in relation to prior use (*Hartley v Minister of Housing and Local Government* [1970] 1 WLR 413; *Secretary of State for the Environment v Hughes* (2000) 80 P & CR 397), though not in relation to rights acquired under a planning permission still capable of being implemented according to its terms (*Pioneer Aggregates (U.K.) Ltd v Secretary of State for the Environment* [1985] 1 AC 132, 143B-E). Even in this context caution is necessary in considering the terminology used in the cases, because references to "non-use" may mean, as in *Hartley*, no more than non-use as a site for selling cars (the token sales of five cars being held *de minimis*), and not that the site had no use – in *Hartley* it continued throughout to be used as a petrol station. But, as was accepted by the site owner in argument in *Hartley* (p 417G-H), a single use may, if abandoned, mean that a site has nil or no use. In *Hughes* it was held that residential use of a cottage which had been uninhabited for nearly 30 years and had fallen into a ruinous state had in all the circumstances been abandoned (despite the owner's subjective intention to resume residential user). It is difficult to think in such a case of any other use which the cottage could be said to have continued to have. But caution could be necessary even before describing a ruinous cottage or waste land as having or being of no use at all. One might have to consider whether it could be regarded as having a use to the owner as a place to walk or walk to or for its aspect or its value to flora and fauna.

27. The cases on abandonment show that use as a dwelling house should not be judged on a day by day basis, but on a broader and longer-term basis. Dwelling houses are frequently left empty for long periods without any question of abandonment or of their not being in or of use. A holiday home visited only yearly remains of and in residential use. Of course, such cases usually fall to be viewed against the background of previous active use. In the present case, the question is whether it is right to describe a dwelling house as having or being of no use as a dwelling house, when it has just been completed and its owner intends to occupy it within days. This too is not a question which can sensibly be answered on a day by day basis. It calls for a broader and longer-term view. Support for this is found in

Impey v Secretary of State for the Environment (1984) 47 P & CR 157. The question before the Divisional Court there was whether development had occurred in the form of a material change of use of a building from the breeding of dogs to residential use. Donaldson LJ said at pp 160-161:

> "Change of use to residential development can take place before the premises are used in the ordinary and accepted sense of the word, and [counsel] gives by way of example cases where operations are undertaken to convert premises for residential use and they are then put on the market as being available for letting. Nobody is using those premises in the ordinary connotation of the term, because they are empty, but there has plainly, on those facts, been a change of use.
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> The question arises as to how much earlier there can be a change of use. Before the operations have been begun to convert to residential accommodation plainly there has been no change of use, assuming that the premises are not in the ordinary sense of the word being used for residential purposes. It may well be that during the course of the operations the premises will be wholly unusable for residential purposes. It may be that the test is whether they are usable, but it is a question of fact and degree."

28. In a later case, *Backer v Secretary of State for the Environment* (1984) 47 P & CR 149, Mr David Widdicombe QC, sitting as a deputy judge, expressed doubt about the decision in *Impey*. He said (p 154) that, but for it, he would have had no hesitation in accepting an argument that "physical works of conversion, that is, say building operations, cannot by themselves give rise to a material change of use: some actual use is required". *Backer* is on any view an odd case, and the deputy judge's doubt as to whether any change of use had occurred is understandable, even on the approach in *Impey* - indeed, although he remitted the matter for further consideration, his expressed view was that there had been none. The issue was whether development had taken place before 7 July 1976, in circumstances where all that appears is that the works of conversion were "completed, or substantially completed, by July 1976" (p 151). The owner's brother was sleeping in the building at nights on a mattress which he moved to and from his van every day, since workmen were working during the day (p 15l). Yet the argument was that it was not necessary to consider his activity, and that the result of the physical works of conversion to a residential unit alone sufficed to constitute a material change of use. On any view, the present case involves an altogether simpler and (apart from the deceit underlying it) more conventional scenario.

29. As a matter of law, I consider that the approach taken by Donaldson LJ was correct and is to be preferred to the doubt expressed in *Backer*. Too much stress

has, I think, been placed on the need for "actual use", with its connotations of familiar domestic activities carried on daily. In dealing with a subsection which speaks of "change of use of any building to use as a single dwelling house", it is more appropriate to look at the matter in the round and to ask what use the building has or of what use it is. As I have said, I consider it artificial to say that a building has or is of no use at all, or that its use is as anything other than a dwelling house, when its owner has just built it to live in and is about to move in within a few days' time (having, one might speculate, probably also spent a good deal of that time planning the move).

30. So far as the impetus to adopt so artificial an analysis derives from the thought that otherwise section 171B(2) will not apply, I consider that result to be, on the contrary, consistent with a proper understanding of the scheme of the section. In summary: unauthorised building operations, like the present, are likely to have been seen as falling to be addressed under subsection (1), rather than subsection (2); the suggested anomaly that enforcement action based on use might then be taken under subsection (3) within as long as ten years is one which the draftsmen failed in any event to address in relation to the use of all buildings other than single dwelling houses, so there is no reason to think that he thought of subsection (2) as covering it in respect of single dwelling houses; any unfairness in either case may, in an appropriate case, be covered by more general public law controls on administrative action by way of planning enforcement; the focus on the established concept of "change of use", rather than simply on "use", can only have been deliberate; and the Secretary of State's and Mr Beesley's analysis either ignores this or, by artificial extension of the concept of change of use to cover the present case, opens an anomalous distinction between cases where an owner moves in before or as his unauthorised dwelling house is completed and cases like the present where a period of days elapses before he actually moves in.

The second issue – the facts as found by the inspector

31. I would therefore allow the council's appeal on the first issue. This makes it strictly unnecessary to address the second issue, but it is one of general importance and I shall do so. It is necessary to set out in greater detail the factual background as it can be derived from the inspector's findings. First, Mr Beesley intended to deceive the council from the outset, that is (at least) when he made each of his successive planning applications in March 2000 and January 2001; in each application he described the proposed building as a hay barn, said that the application involved no change of use of land, and, in relation to sewage disposal, answered not applicable. Secondly, when building his house, he deliberately refrained from giving the notice under the building regulations, applicable to a house but not an agricultural barn, so committing an offence triable summarily and punishable by a fine. Thirdly, he did not register for council tax or on the electoral register at the building. Fourthly, he gave the council as his address his office,

whereas all other correspondence was to and from the house. Fifthly, he lived a low key existence, the house being at the end of a lane or track apparently accessible from the road only by a locked gate.

32. The aim of this conduct was, firstly, to obtain a planning permission which would not have been granted had the application been for a dwelling house, secondly, to conceal the fact that what was being built was and was to be a dwelling house and, thirdly to live in the house without being detected or therefore having enforcement steps taken for the four year periods stated in section 171B(1) and (2), after which a certificate would be sought under section 191. The council now submits that Mr Beesley's deceit should preclude Mr Beesley from obtaining a certificate under section 171B(2), even if (contrary to my view) that subsection were otherwise applicable.

Mr Beesley's application to adduce fresh evidence on the new point

33. It is in response to this new submission that Mr Beesley applies to adduce fresh evidence, with a view to showing that he intended to build a genuine hay barn up until June 2001. That is, until after both planning applications and after the Council had written to him on 15 March 2001 informing him that its planning control board had resolved to grant the second planning permission subject to revocation of the first planning permission, and asked for his written consent to that effect. It is unclear when such consent was granted and why there was further delay, since it was only on 16 October 2001 that the first permission was revoked and only on 7 December 2001 that the second permission was granted. Be that as it may, Mr Beesley submits that any argument based on his conduct would look different if both planning permissions were honestly sought.

34. The inspector's report states the factual position as follows:

> "7 The appellant, Mr Beesley, says that he deliberately deceived the council when he applied for planning permission for a barn. He always intended that the building should be a dwelling. ….
>
> 22. ….. he admits that he has carried out a planned and deliberate deceit over an extended period. I consider this to reduce his credibility as a witness. ….."

35. These passages were solidly based. The pre-inquiry statement lodged on Mr Beesley's behalf had stated unequivocally:

> "The appellant has confirmed that the building was never intended or designed for any other use than a dwellinghouse. The appellant and his wife … may also give evidence at the inquiry."

Mr Beesley's proof of evidence had been to like effect:

> "2.2 On 7 December 2001 I obtained planning permission for the erection of a hay barn. …
>
> 2.3 Between January and July 2002, the building was erected. The building was never intended for any use other than as a dwelling house."

These statements were in support of Mr Beesley's case that what he had built was a dwelling house, within section 171B(2).

36. Mr Beesley came up to proof. In opposition to his present application, the Council has produced notes of his evidence taken at the inquiry by the Council's principal development control officer (Lisa Hughes) and by a planning consultant called by the Council (Alison Hutchinson). They show that in cross-examination Mr Beesley accepted that he knew (a) that, if he had applied for planning permission for a house, he would not have got it, (b) that his applications for a barn were a "ruse to mislead [the] local planning authority" and, later, (c) that his sole purpose in seeking the planning permissions for a barn and in not paying council tax was to obtain after four years a certificate of lawfulness for his house.

37. The application filed on Mr Beesley's behalf for permission to adduce fresh evidence states:

> "20. [Mr Beesley] acknowledges that in the course of the planning enquiry he must have intimated to the inspector that, when seeking planning permission from the council, he had already determined to erect a dwelling. So much is evident from the statement of the planning inspector at paragraph 7 of his report.

> 21. However, it is contended that such indication was given by [him] in error and that when providing his answer to the inspector's question [he] misunderstood what it was that was being asked of him. ….."

38. In a witness statement supporting the present application Mr Beesley states that the land was bought in August 1999 because his future wife was a keen equestrian, and "because the horses were our priority we decided that we should build stables, a manège and a barn" to which purpose he applied for planning permission on 7 October 1999 for all three and an access track. The application for a barn being agricultural, it had to be re-submitted separately on 26 October 1999. The stables and access track were completed by 29 November 2000. Thefts then occurred of a generator and other items on 16 December 2000 and of horse rugs in March 2001. The application for re-siting of the barn was made because the original site chosen for the manège was prone to flooding. Mr and Mrs Beesley married in June 2001, and, on their honeymoon, were very concerned about "the spate" of thefts which left them feeling very vulnerable:

> "12. …. It was approximately at this point that we made a decision to build the Barn as a dwelling and to move into it. We spent so much time there as it was and we felt protective of our smallholding (even more so in view of the thefts) and so moving in to it seemed the most sensible thing to do.
>
> 13. ….. I knew that, if I asked the council for permission to build a house on the land in lieu of the barn, my application would be refused, and so I said nothing about our decision to build a dwelling and move into it. Planning permission for the (re-situated) Barn was granted on 7th December 2001 …… I was aware that in planning law there is as a 'catch-all' rule that provides that, where the local authority does not commence enforcement proceedings within 4 years ….. , immunity from such enforcement action arises. I freely admit that I knew what I was doing and that I kept deliberately silent about the true use of the premises. ….."

39. In a second witness statement Mr Beesley says that, since the inspector granted him a certificate of lawfulness, "there was no need for me, at that time, to correct the assumption that I had deceived the council", that, when the matter came to the High Court, the council:

> "did not there raise any legal argument concerning my alleged deceit. Accordingly, it did not appear to me to be necessary to seek

> to correct the inaccurate impression I must have given to the Planning Inspector regarding my intention when submitting the planning applications in respect of the Barn. It was simply not an issue that was relevant to the issues at the time, and I took a decision, principally with a view to saving costs, that I would not seek to address the issue of the supposed deceit by way of witness statement and would not participate in the proceedings. That was not a position that I was altogether happy with at the time, but I took a pragmatic approach having regard to the way in which the [council's] case was put."

He says that, in the course of preparing for the Court of Appeal proceedings, he specifically raised with his legal team the question whether to put in a "statement to correct the inaccurate impression I must have given the Planning Inspector", but "I was advised that the question of my intention when submitting the applications were [sic] not relevant to the point at issue". Now, however, that the case against him in the Supreme Court does directly put in issue his conduct, he says, he has no choice but to take steps to correct the inaccurate impression, and is "in a sense, relieved to now have the opportunity to explain my side of the story in effect forced upon me".

40. The admission of new evidence on appeal normally depends upon satisfying three conditions identified in the well-known case of *Ladd v Marshall* [1954] 1 WLR 1489, viz: (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and (3) the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible. In the present case, Mr Booth submits that the first condition is either inapplicable or needs to be relaxed, bearing in mind that we are concerned with a finding regarding Mr Beesley's state of mind which went only to credibility before the inspector, and did not influence the outcome before him or in either of the courts below. There is force in this submission, although I note that it is not quite correct to say that Mr Beesley's state of mind can have been regarded as entirely irrelevant by him or his legal team below, since the skeleton argument submitted on his behalf to the Court of Appeal records that Collins J had been concerned in argument about a certificate having been granted "in circumstances where he [Mr Beesley] had misled the [council] (in its capacity as a local planning authority" and went on to submit "that important principles and statutory provisions ….. should not be stretched in their application simply to ensure a particular outcome in a case where a claimant/appellant is deemed to be less than sympathetic". If Mr Beesley did not mislead the council from the outset in making the planning applications, and there was some unexplained misapprehension to that effect in the inspector's report, this was one occasion on

which at least to put that on the record. However, I will proceed on the basis that the first condition is either satisfied or, in this case, inapplicable.

41. I turn to the second condition. At the core of the council's case on public policy is the obtaining of the planning permissions as a result of the deceptive planning applications. If the applications when made were genuine, that could well put a different complexion on Mr Beesley's conduct. Mr Beesley's conduct, though still disgraceful, could then be said to consist predominantly of sins of omission and concealment, rather than of positive deception. This of course could depend upon what if any communications there were between Mr Beesley and the council between June 2001 and 7 December 2001. Further, even if there were none, Mr Beesley's current account could well support a conclusion that he knew full well both that after June 2001 the council would still be relying on his continuing but now inaccurate statements in his second application about the nature and purpose of the proposed building, and that he owed a duty to correct this, but deliberately determined not to do this. Whether and how far Mr Beesley's current account could, therefore, significantly influence a court's evaluation of any issue of public policy is therefore best left open. Unless the third condition is satisfied, it is unnecessary to consider it further.

42. The third condition is that the proposed evidence is apparently credible. To this, I consider that the only answer is a categorical no. First, there is no basis or credibility at all in Mr Beesley's suggestion that he (not the inspector) made some unexplained "misunderstanding" in his answers in cross-examination. The notes show clear and repeated answers, directly in point on the issue of his state of mind and intentions when making the planning applications. Second, precisely the same account was given in the pre-inquiry statement put in on Mr Beesley's behalf and in his own witness statement. Mr Beesley has not volunteered any explanation as to how these statements could also be mistaken. Third, it is difficult to believe that, if the inspector's report had, due to some unexplained mistake by Mr Beesley, given a factual account which Mr Beesley (as he says) knew and thought was less favourable to him than the reality, Mr Beesley would have said nothing at any point to record this, even if it was not directly in issue. Fourth, the account now advanced regarding Mr Beesley's state of mind has the ring of implausibility. The land was bought in August 1999. Applications were made in October 1999 to build stables, which were clearly required and in due course built for the horses, but also for a large hay barn. If a large hay barn was intended, there must have been some need or use for such a barn, and, since the application was actively pursued over the next 21 months, this need or use must have continued to exist. The present application was not accompanied by any explanation as to how or why it disappeared in and after June 2002, and none was given after the point arose during oral submissions. I would therefore refuse Mr Beesley's application to adduce the proposed evidence.

The second issue – merits

43. It follows from the above that the issue whether Mr Beesley's conduct disentitles him on public policy grounds from relying on section 171B or 191(1), assuming it would otherwise apply, falls to be determined on the facts as stated by the inspector. The real gravamen of the council's case is to be found in the deception involved in the obtaining of false planning permissions which Mr Beesley never intended to implement, but which were designed to and did mislead the council into thinking that the building was a genuine hay barn and so into taking no enforcement step for over four years. This was deception in the planning process and directly intended to undermine its regular operation.

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

45. The council relies upon a principle stated in Halsbury's Laws of England's title Statutes (vol 44(1)), para 1450 in these terms:

> "1450. **Law should serve the public interest.** It is the basic principle of legal policy that the law should serve the public interest ….
> Where a literal construction would seriously damage the public interest, and no deserving person would be prejudiced by a strained construction to avoid this, the court will apply such a construction.
> In pursuance of the principle that the law should serve the public interest, the courts have evolved the important technique known as construction *in bonam partem* (in good faith). If a statutory benefit is given only if a specified condition is satisfied, it is presumed that Parliament intended the benefit to operate only where the required act is performed in a lawful manner. ….
>
> 1453. **Illegality.** ….. Unless the contrary intention appears, an enactment by implication …. imports the principle of legal policy embodied in the maxim *nullus commodum capere potest de injuria sua propria* (no one should be allowed to profit from his own wrong). The most obvious application of this principle against wrongful self-benefit relates to murder and other unlawful homicide".

46. Bennion on Statutory Interpretation (5th ed) (2007) section 264, also discusses the principle that law should serve the public interest. It comments that "all enactments are presumed to be for the public benefit" and that "[t]his means that the court must always assume that it is in the public interest to give effect to the intention of the legislator, once this is ascertained"; and, later, that "Construction *in bonam partem* is related to three specific legal principles. The first is that a person should not benefit from his own wrong". The second principle precludes a person from succeeding if he has to prove an unlawful act to claim the statutory benefit, and the third is that "where a grant is in general terms there is always an implied provision that it shall not include anything which is unlawful or immoral".

47. In *R v Chief National Insurance Commissioner, Ex p Connor* [1981] QB 758, a widow's claim for a widow's allowance failed, despite her apparently absolute statutory entitlement, because her widowhood derived from the manslaughter of her husband of which she had been convicted. Another famous older example of the obvious application of the same principles is *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147. After her conviction – still controversial - for poisoning her husband, Florence Maybrick assigned to Mr Cleaver as her administrator an insurance policy taken out by her husband in her favour on his life. Cleaver's claim on the policy failed, Fry LJ saying (p 156) that:

> "The principle of public policy invoked is in my opinion rightly asserted. …. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour. …. This principle of public policy, like all such principles, must be applied to all cases to which it can be applied without reference to the particular character of the right asserted or the form of its assertion".

48. In *R v South Ribble Borough Council, Ex p Hamilton* [2000] EWCA Civ 518; (2001) 33 HLR 9, a statutory provision entitled a person to housing benefit if he had no income above a specified amount, and it had been previously decided that receipt of income support under the separate social security scheme, with its inbuilt rights of adjudication and appeal, bound those administering the housing benefit scheme to treat a person as having income below the specified amount. Mr Hamilton had however obtained income support by false statements. The Court of Appeal held that income support obtained by fraud did not count for the purposes of entitlement to housing benefit. One reason was an express provision in the relevant regulations defining "a person on income support as a person lawfully in receipt of income support", but another was the principle that "legislation should not be so construed as to enable a man to profit from his own wrong": paras 8 and 26. The cases cited included *Lazarus Estates Ltd v Beesley* [1956] 1 QB 702, where Lord Denning MR delivered his dictum that "Fraud unravels all" and *R v Barnet London Borough Council, Ex p Shah* [1983] 2 AC 309, where Lord

Scarman said at p 344A that "it was wrong in principle that a man could rely on his own unlawful act to secure an advantage which could have been obtained if he had acted lawfully". This was said in the context of the entitlement to a student award of anyone ordinarily resident for three years in this country, to support Lord Scarman's view that ordinary residence would not include unlawful residence.

49. The Court of Appeal in the *South Ribble* case also cited *R v Secretary of State for the Home Department, Ex p Puttick* [1981] QB 767. Astrid Proll, a member of the Baader-Meinhof gang and unmarried, absconded while awaiting trial in Germany. She then entered the United Kingdom using a passport which she had bought in the name of Senta Sauerbier, and married Robin Puttick under that name. The German authorities discovered her true identity and location, and applied to extradite her. She responded by an application under section 6 of the British Nationality Act 1948. Section 6 gave an apparently unqualified right to any woman married to a United Kingdom citizen to be registered as a citizen of the United Kingdom. The Divisional Court refused her application. Donaldson LJ said that "statutory duties which are in terms absolute may nevertheless be subject to implied limitations based upon principles of public policy accepted by the courts at the time when the Act is passed" (p 773G-H). Ms Proll's marriage was valid and in itself legal, but "the commission of the crime of perjury and forgery" formed the foundation of her marriage … and … disentitled her to rely upon the right which she would otherwise have had to claim registration …." (pp 775H-776A, per Donaldson LJ). Forbes J said that "the registrar who performed the ceremony was fraudulently misled into believing that he was marrying … someone called Sauerbier, a divorced person of whose capacity to contract a second marriage he had satisfied himself, and whose father was called Eric Schulz, a machine engineer" (p 777E), and, further, that, when applying to the Home Secretary to be registered as a citizen, Ms Proll (or Mrs Puttick as she was in law) produced, as she had to, the marriage certificate, with its fraudulent entries and forged signature, and had to explain in a covering letter the extent of her criminal activities. Forbes J said that he had therefore "no doubt that it was her fraud and forgery which directly obtained for her the entitlement she now seeks to enforce and that she cannot claim that entitlement without relying on her own criminality" (p 777F-G).

50. In considering whether the above principles and cases can have any present application, the Secretary of State and Mr Booth for Mr Beesley point to Lord Scarman's warning to courts in the *Pioneer Aggregates* case at pp 140H-141A-C that planning control, though based on land law, is the creature of statute, and that planning law is a comprehensive code imposed in the public interest, into which the courts should not import principles or rules derived from private law unless expressly authorised by Parliament or necessary in order to give effect to the legislative purpose. That is a salutary reminder, and it links to Bennion's first message quoted in para 46 above. But since the principles discussed in Halsbury and Bennion and in cases already discussed (notably *South Ribble* and *Puttick*)

involve statutory interpretation, I do not think that the planning legislation can be treated as axiomatically immune from their application.

51. The decision in *Puttick* was that, although Ms Proll was Mrs Puttick, and satisfied the literal language of section 6, her criminal conduct in the course of the marriage ceremony alone (Donaldson LJ's judgment), or at all events that conduct coupled with her inevitable reliance on it when seeking registration (Forbes J's judgment), disentitled her from such registration. In the present case, if (as I am assuming, for the purposes of considering the second issue) Mr Beesley satisfies the literal language of the relevant statutory provisions, sections 171B(2) and 191(1)(a), he only does so because he successfully deceived the council into giving him planning permission to build a hay barn, into thinking that he intended to build and was building such a barn, and into thinking for more than four years that he had done so. When he applied for a certificate of lawfulness under section 191(1)(a), he attached carefully accumulated documentation to substantiate his four year occupation, including a plan showing the location and shape of his house (still marked "barn"). He thus necessarily disclosed and indeed expressly asserted that the hay barn for which he had obtained planning permission and in which he had been living for over four years was in reality a dwelling house. He did not expressly disclose or have to disclose that he had intended from the outset, when seeking planning permission, to build a dwelling house. In that respect the present case may be said to differ from *Puttick*, although the over-whelming probability that the planning permissions had been deceptive from the outset could not have failed to be apparent.

52. The other respect in which the present case differs from *Puttick* is that Mr Beesley's conduct in obtaining the planning permissions by deception, perhaps surprisingly, did not involve any identifiable and provable criminal offence under the law as it then stood. It could now do under section 2 of the Fraud Act 2006. One may speculate that Mr Beesley cannot have acted alone in relation to the planning applications, but must have had at least a co-conspirator in forming and executing the plan to deceive the council, but the factual basis for a conclusion in this area is certainly outside the scope of the present proceedings.

53. Since the ultimate question is whether it can have been the intention of the legislator that a person conducting himself like Mr Beesley can invoke the benefits of sections 171B and 191(1), I do not consider that there can be any absolute principle that public policy can only bear on the legislator's intention in a context where there has been the commission of a crime. The principle described in the passages cited from Halsbury and Bennion is one of public policy. The principle is capable of extending more widely, subject to the caution that is always necessary in dealing with public policy. Some confirmation that the need for an actual crime is not absolute can also be found in another case, *R v Registrar General, Ex p Smith* [1991] 2 QB 393, where the Court of Appeal held it sufficient to disentitle a

prisoner from exercising his on its face absolute right to inspect his birth certificate that there was a current and justified apprehension of a significant *risk* that he might in the future use the information thereby obtained to commit a serious crime.

54. Whether conduct will on public policy grounds disentitle a person from relying upon an apparently unqualified statutory provision must be considered in context and with regard to any nexus existing between the conduct and the statutory provision. Here, the four-year statutory periods must have been conceived as periods during which a planning authority would normally be expected to discover an unlawful building operation or use and after which the general interest in proper planning control should yield and the status quo prevail. Positive and deliberately misleading false statements by an owner successfully preventing discovery take the case outside that rationale. Although the principle was not mentioned in counsel's submissions and my conclusions have been reached independently of it, it is not uninteresting also to recall the way in which, before the enactment of section 26 of the Limitation Act 1939 (the predecessor of section 32 of the Limitation Act 1980), the courts held that the apparently general wording of the limitation statutes could not be relied upon in cases where the cause of action had been fraudulently concealed or, later also, was itself based on fraud: *Booth v Warrington* (1714) 2 ER 111, *Gibbs v Gould* (1881-82) LR 9 QBD 59, *Bulli Coal Mining Co v Osborne* [1899] AC 351 and *Lynn v Bamber* [1930] 2 KB 72.

55. If the owner of an unauthorised house were to bribe or by menaces coerce a planning authority officer into turning a blind eye to unlawful development for four years, it is inconceivable that the building owner could then rely on the four year period, even though the owner would not have to (and surely would not) mention anything but his four year period of occupation in his attempt to bring himself within the literal language of the sections. It is true that the council would then be able to show that a criminal offence had been committed (in the case of a bribe under the Public Bodies Corrupt Practices Act 1889, section 1 and in the case of menaces probably under the Theft Act 1968, section 21, since the purpose of "gain" includes under section 34(2)(a) "keeping what one has"). However, if a planning authority were to discover an unauthorised development or use, and the property owner were, in order to avoid enforcement action within the four years, falsely to assure the planning authority that the four years had not expired, and that he intended to remove or cease the development or use before they did, and so succeed in avoiding enforcement action during the four years, I very much doubt whether the owner could thereafter rely upon sections 171B and 191(A), merely because no criminal offence had been committed.

56. Here, Mr Beesley's conduct, although not identifiably criminal, consisted of positive deception in matters integral to the planning process (applying for and obtaining planning permission) and was directly intended to and did undermine the

regular operation of that process. Mr Beesley would be profiting directly from this deception if the passing of the normal four-year period for enforcement which he brought about by the deception were to entitle him to resist enforcement. The apparently unqualified statutory language cannot in my opinion contemplate or extend to such a case.

57. In seeking to counter such a conclusion, the Secretary of State and Mr Beesley draw attention to *Epping Forest District Council v Philcox* [2002] Env LR 2, where the grant of a certificate under section 191 was challenged on the grounds that the relevant user (the breaking of motorised road vehicles and storage of parts) had taken place during the relevant period without a waste management licence required under the Environmental Protection Act 1990 and so involved a criminal offence. The Court of Appeal cited inter alia *Connor* and *Puttick*, but held that there was no "principle that the plain words of a statute which define what is lawful were to be read subject to a proviso that what is criminal cannot be lawful" (para 15, per Pill LJ). However, both Chadwick LJ and Buxton LJ stressed that enforcement under the planning legislation and under the legislation regulating waste management were different matters: paras 35 and 46. No benefit would accrue to the operator by granting planning permission, which might be granted or refused for reasons which had nothing to do with waste management; those responsible for regulating waste management would remain free to take whatever enforcement action they decided: para 46. The case did not involve any fraudulent conduct in the planning process, and the failures to procure an environmental licence and obtain planning permission were independent, rather than one causing the other. I do not regard the case as assisting the Secretary of State or Mr Beesley's case.

Conclusion

58. For the reasons I have given, I do not consider that sections 171B(2) and 191(1)(a) are applicable to the facts of this case. Had I considered otherwise, I would have concluded that their language could not have been intended to cover the exceptional facts of this case, where there was positive deception in the making and obtaining of fraudulent planning applications, which was directly designed to avoid enforcement action within any relevant four year period and succeeded in doing so. This is a conclusion which would still be relevant, were any application to be made for a certificate under section 191(1)(b) or any reliance sought to be placed upon section 171B(1) to preclude enforcement action in respect of the building itself. In the present case, I would allow the Council's appeal, and set aside the grant of the certificate under section 191(1)(a).

LORD RODGER

59. I agree with Lord Mance and Lord Brown that the appeal should be allowed.

60. I agree with what Lord Mance says on the first point. But, even assuming that section 171B (2) of the Town and Country Planning Act 1990 ("the 1990 Act") did apply and that more than four years have elapsed since the structure was first used as a single dwellinghouse, in agreement with Lord Brown and Lord Mance, I am satisfied that the council would still be entitled to take enforcement action.

61. Section 171B (2) of the 1990 Act allows respite from enforcement action four years after the time when a breach of planning control consisting in the change of use of a structure to a single dwellinghouse occurred. This provision must be based on the general idea that the change of use has been there for all to see for four years. If in that period the breach has not come to the notice of the council or the council has not seen fit to take enforcement action, then the better policy is to allow the change of use to stand and, so, to exclude enforcement action.

62. In this case, however, Mr Beesley took effective steps to conceal the true nature of the development over the four-year period since the change of use occurred. In particular, he deliberately concealed the fact that the structure was being used, and was intended to be used, as a single dwellinghouse on greenbelt land. The concealment worked and the true position came to light only when Mr Beesley triumphantly revealed his dwellinghouse immediately after the four years had expired. He does not suggest – and it would not lie in his mouth to suggest – that, despite his efforts, the council should have spotted the true position before the four years expired.

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

follows that, having regard to section 191(2)(a) of the 1990 Act, the use of the subjects as a dwellinghouse is not lawful for the purposes of section 191(1)(a).

64. I would therefore allow the appeal and set aside the grant of the certificate of lawful use under section 191(1)(a) of the 1990 Act.

LORD BROWN

65. Is Mr Beesley entitled to continue living in the three-bedroomed house, masquerading as a modern barn, which in 2002 he built on metropolitan green belt land in Hertfordshire? The Secretary of State's Planning Inspector held that he is. Collins J decided the contrary. The Court of Appeal restored the inspector's decision.

66. One of the more surprising features of the litigation has seemed to me the Secretary of State's strong support throughout for Mr Beesley's case. Reluctantly allowing the Secretary of State's and Mr Beesley's joint appeal to the court below, Mummery LJ observed [2010] PTSR 1296, para 38:

> "It is a surprising outcome which decent law-abiding citizens will find incomprehensible: a public authority deceived into granting planning permission by a dishonest planning application can be required by law to issue an official certificate to the culprit consolidating the fruits of the fraud."

The Lord Justice went on to note with regret that no public policy argument had been addressed to the court to the effect that statutory provisions should where possible be construed so as to prevent their use as "an engine of fraud".

67. Prompted by that judgment, the public policy argument is now for the first time in these proceedings before the Court – in addition to the argument that, on the proper construction of section 171B(2) of the Town and Country Planning Act 1990 (as amended) (the 1990 Act), the particular breach of planning control committed here did not fall within its scope. Before us the Secretary of State resisted both arguments with equal vigour and whilst, of course, I recognise his general interest in supporting his inspectors' decisions, I confess to some difficulty in understanding the damage he suggests the acceptance of either would occasion to the overall operation of the 1990 Act. On the contrary, what to my mind *would* be damaging, at least to the public's confidence in our planning law, would be a

conclusion that the Court has no option but to permit Mr Beesley to profit from his dishonest scheme.

68. With regard to the first issue – the true construction and application of section 171B(2) – there is nothing of substance I want to add to Lord Mance's detailed judgment on the point. I find his reasoning entirely convincing. Parliament appears to have contemplated that a dwelling house built by way of unpermitted operational development would be enforced against, if at all, within the requisite four-year period provided for by section 171B(1) – failing which the authority probably would not seek ordinarily to enforce against its continued use as a house. That no doubt explains why the protection of a four- year (as opposed to a ten-year) limitation period for enforcement in respect of single dwelling-houses was not extended to use as such but only to a "change of use of any building [inferentially, some building other than a newly built house] as a single dwelling house". Either way, as Lord Mance demonstrates, section 171B(2) is simply not apt to encompass the use of a newly built house as a dwelling house and the nil use concept provides no coherent escape from this conclusion.

69. It is upon the second issue in the case – the issue of public policy to which Mr Beesley's deceitfulness gives rise – that I wish to add a few thoughts of my own. Is it, one must ask, appropriate to import into this apparently self-contained legislative planning scheme the principle of public policy that no one should be allowed to profit from his own wrong? That, critically, is the question arising on this part of the appeal and, it is important to note, it is a question that affects enforcement time limits no less under section 171B(1) (and, indeed, section 171B(3)) than under section 171B(2).

70. At first blush, there might be thought two difficulties in the path of this public policy argument. The first is this. Although Mr Beesley's appeal to the inspector was ostensibly against the council's refusal of a section 191 application for a certificate of lawful existing use, in law his entitlement to such a certificate depended in turn (see section 191(2)(a)) upon whether the existing use could be enforced against i.e. whether the time for enforcement action had expired. Assuming – as for the purposes of this part of the appeal one should – that Mr Beesley's use of the dwelling-house would otherwise fall within the terms of section 171B(2), the 1990 Act appears on its face to preclude the taking of enforcement action. It might be thought one thing to construe the Act in the light of the public policy principle so as to deny Mr Beesley the certificate that he was seeking (the grant of which would no doubt enhance his house's value and saleability) – a certificate, as we have seen Mummery LJ describe it, "consolidating the fruits of the fraud"; quite another thing to construe it as enabling the council, section 171B(2) notwithstanding, to enforce against the use (by now apparently protected and thus lawful) beyond the expiry of the four-year limitation period.

71. On true analysis, however, there is nothing in this point. If, as was held in *R v Chief National Insurance Commissioner, Ex p Connor* [1981] QB 758, monetary payments, or, as decided in *R v Secretary of State for the Home Department Ex p Puttick* [1981] QB 767, registration as a United Kingdom citizen, could lawfully be withheld on public policy grounds – respectively from a widow who had manslaughtered her husband, and from a German woman whose qualifying marriage to a United Kingdom citizen she had procured by fraud – despite in each case their having acquired an ostensibly absolute statutory right to these respective benefits, so too a statutory bar on enforcement action can in my judgment be disapplied on similar public policy grounds. Logically a statutory prohibition on enforcement action is simply the other side of the coin from a statutory requirement to make a payment or to register citizenship: the one prevents a public authority from terminating a benefit; the other requires a public authority to confer a benefit. Public policy may operate to negate both.

72. The second problem said to confront the importation into the 1990 Act of the public policy principle (the Connor principle as I shall now call it) is that it would run counter to the plain intention of a legislative scheme as a whole. The very premise of section 171 (and, in turn, of section 191) is that unlawful development – development in breach of planning control – has taken place and, having been persisted in for more than four years (or, as the case may be, ten years) has become expressly legitimised by Parliament. The whole object of the scheme, essentially in the interests of clarity and certainty, is to recognise and declare that after a certain time unpermitted development, if not already enforced against, has become immune from enforcement and thus lawful. To import the Connor principle into this scheme, submits the Secretary of State, would be inconsistent with that intention and would compromise the very public interest which the scheme is designed to serve.

73. The argument is a serious one and I confess initially to have been troubled by it. Clearly it would be impossible to superimpose upon the statutory scheme any sort of broad principle to the effect that no one guilty of wrongdoing can be allowed to benefit from the limitation provisions of the 1990 Act. That, indeed, would be inconsistent with the plain intention of this legislation. Inevitably the breaches of planning control statutorily said to become immune from enforcement under section 171B involve a spectrum of wrongdoing. These range from cases at one end where the developer is simply unaware of the need for development permission to, at the other extreme, those intent on unpermitted development who plot a whole course of deception designed to circumvent planning control and escape enforcement. The point is illustrated by two cases in particular, *Epping Forest District Council v Philcox* [2002] Env LR 2 (*Philcox)* and *Arun District Council v First Secretary of State* [2007] 1 WLR 523 (*Arun*), both touched on in Lord Mance's judgment.

74. The applicant in *Philcox*, presumably a disaffected neighbour, was challenging the local authority's grant of a section 191 certificate in respect of a company's unpermitted use of land for "the breaking of motorised road vehicles and storage of parts". Basing his challenge upon the company's failure to obtain a waste management licence as required by the Environmental Protection Act 1990, Mr Philcox sought to invoke the Connor principle to deny the company the benefit of immunity from enforcement action pursuant to section 171B. In considering the Court of Appeal's judgments rejecting the challenge, it is important to have in mind three points in particular. First, section 191(7) of the 1990 Act provides in terms that a certificate under the section has effect as if it were a grant of planning permission for the purpose of section 36(2)(a) of the Environmental Protection Act 1990. Secondly, section 171B of the 1990 Act confers no immunity against prosecution by the regulatory authority under the Environmental Protection Act (ie the company could still be prosecuted for their past failure to obtain a waste management licence). Thirdly, the company still required a licence and this could be refused unless the regulatory authority was satisfied both that the applicant was a fit and proper person and that it was not necessary to refuse the licence on environmental grounds. It is in this context that the following passages in the judgments fall to be understood:

> "The court is entitled to construe a statute . . . in the light of its ability to promote its notions of public policy. The cases do not, however, in my judgment, establish a principle that the plain words of a statute which define what is lawful must be read subject to a proviso that what is criminal cannot be lawful. Section 191, in a systematic way, defines what uses and operations are lawful for the purposes of the Act and states the consequences of achieving that status with specific reference to section 36(2)(a) of the Environmental Protection Act 1990. There is no principle of public policy which requires that the intent of Parliament as expressed in section 191 should be defeated in the manner claimed." (Pill LJ at para 15)

> "Whatever might be the position in other contexts, it is to my mind clear beyond argument that activity which is illegal by reason of contravention of one or other of the regulatory statutes referred to in section 191(7) is not activity which, (for that reason alone) prevents an application being made under section 191(1); or which prevents a local authority from fulfilling the duty imposed upon it by section 191(4). To hold otherwise would be contrary to the plain intention of Parliament when enacting section 191(7) of the Town and Country Planning Act 1990." (Chadwick LJ at para 39)

> "The broad principle of not benefiting from a person's own illegal acts simply does not fit into the reality of what is being done when planning permission is granted or when a certificate of lawful existing use is granted on the basis of failure to take enforcement action over a period of 10 years; and, in particular, it does not fit, for the reasons that my Lords have given, into the particular case here, which is a case specifically addressed in section 191(7)." (Buxton LJ at para 47).

Not only, therefore, was there no relationship whatever in *Philcox* between the company's offending under the Environmental Protection Act and its breach of planning control in making unpermitted use of the land, but Parliament in section 191(7) of the 1990 Act expressly contemplated the issue of a certificate notwithstanding the requirement under different legislation for a waste management licence.

75. *Arun* was a very different case – decided, indeed, with no reference at all to the Connor principle. The point directly at issue there was whether the particular breach of planning control in question attracted a four-year or a ten-year limitation period – a point of no materiality to the present appeal. The case's present relevance, however, lies in a short passage in Sedley LJ's judgment (at para 36):

> "I can entirely understand the local planning authority's sense of frustration about this. Their planning department is not a police station, and the discovery that a person such as Mrs Brown has – not to put too fine a point on it – cheated on a conditional grant of planning permission, to detriment of her neighbours and of planning control, may well be a matter of time and of chance. The ordinary ten-year period might well have been thought reasonable for such cases, but . . . it is not what Parliament decided to provide."

76. What had happened there was that a Mrs K Brown of Bognor Regis had obtained planning permission for an extension (presumably something akin to a granny flat) subject to a number of conditions. One of these was that the extension should be occupied only by Mrs Brown's dependent relative, Mrs J Brown; another was that, upon vacation of the extension by Mrs J Brown, its use should become merely ancillary to that of the original single dwelling-house and should not be occupied or disposed of as separate residential accommodation. The extension was built shortly after planning permission was granted in 1988 but was not, in the event, occupied by Mrs J Brown. Until 1996 it was used by Mrs K Brown as part of her house and it was then let to students who occupied it independently as separate living accommodation.

77. If one starts introducing the Connor principle into this area of the law, asks the Secretary of State, where will it all end? Given that Mrs Brown, in *Arun*, "cheated" on her neighbours and planning authority, should she too have lost the benefit (after whatever was the relevant limitation period) of immunity from enforcement action?

78. In responding with a resounding "no" to that forensic question (posed, I should at once make clear, in my language rather than Mr Maurici's), it is necessary to identify what seem to me the stark differences between the facts of *Arun* and those of the present case, and so finally come to indicate just what part the Connor principle should to my mind play in the construction and application of this legislation.

79. In my opinion, the only respect in which Mrs K Brown in *Arun* can be said to have "cheated" was in 1996 when she came to let her extension to students as independent living accommodation instead of continuing to occupy it, as for the past eight years she had, as part of her own house. There was no suggestion of any deceit by her either in the obtaining or in the initial implementation of the planning permission, no suggestion that she had always intended to use the extension for independent letting, no suggestion of any positive steps taken by her to disguise her eventual breach of planning control. It is difficult to suppose that there are not many people in the same sort of position as Mrs Brown who let out part of their houses as separate accommodation. Criticise them as one may, they can hardly be thought to have forfeited the statutory protection afforded by the limitation provisions of the 1990 Act.

80. Contrast Mr Beesley's position. His was a deliberate, elaborate and sustained plan to deceive the council from first to last, initially into granting him a planning permission and then into supposing that he had lawfully implemented it and was using the building for its permitted purpose. His conduct throughout was calculated to mislead the council and to conceal his wrongdoing. As necessary features of his deceit he omitted to register any member of the household for the payment of council tax for the period 2002-2006, contrary to section 6 of the Local Government Finance Act 1992, and he failed to comply with a number of the requirements of the Building Regulations (SI 2000/2531) with regard to the construction of the dwelling. Whether this conduct (and that of his father-in-law with whom he secretly constructed the house) was or was not susceptible to prosecution under the general criminal law cannot be the determining question here. On any possible view the whole scheme was in the highest degree dishonest and any law-abiding citizen would be not merely shocked by it but astonished to suppose that, once discovered, instead of being enforced against, it would be crowned with success, with Mr Beesley entitled to a certificate of lawful use to prove it.

81. Frankly the dishonesty involved in this case is so far removed from almost anything else that I have ever encountered in this area of the law that it appears to constitute a category all its own. I say "almost", because we all now know of the no less astonishing case of *Fidler v Secretary of State for Communities and Local Government and Reigate and Banstead Borough Council* [2010] EWHC 143 (Admin), a case concerning the construction without planning permission of a mock tudor castle behind a 40 ft high shield of straw bales and tarpaulin. Mr Fidler, just like Mr Beesley, successfully concealed his dwelling-house from the local planning authority for four years. His claim to be immune from enforcement action (taken by the council there with a view to having the building demolished) was, however, defeated, initially before the inspector and then before Sir Thayne Forbes sitting on a section 289 appeal to the High Court. This was on the basis that "the overall building operations relating to the construction of the new dwelling included the erection and removal of the straw bales and tarpaulin that had been deliberately put in place to conceal the construction and existence of the new dwelling in order to take advantage of the four year rule [and] were not substantially completed until the removal of the straw bales in July 2006" (para 7). In other words, enforcement action was found to have been taken before the necessary four years had elapsed for the purposes of section 171B(1) of the 1990 Act. Mr Fidler's further appeal to the Court of Appeal is, we are told, currently stayed pending the outcome of this appeal.

82. Although, of course, we are not here deciding Mr Fidler's further appeal, it seems to me plain that, consistent with our judgment in the present case, it will be open to the council there to advance, as an alternative argument to that on which they have hitherto succeeded – as to whether for the purposes of section 171B(1) the operational development had been substantially completed four years before the enforcement action was taken – the argument based on the Connor principle.

83. It also follows from our decision here that, in this very case, the council can, if it thinks it expedient, seek to enforce not merely against the continued use of this building as a dwelling-house but additionally against its construction.

84. One other matter should be mentioned at this stage. Recognising the unattractiveness of Mr Beesley's position and the persuasive public policy arguments against his succeeding in his application for a lawful development certificate, the Secretary of State in December 2010 published the Localism Bill which, if enacted, will by section 104 amend the 1990 Act by inserting three new subsections (171BA, 171BB, and 171BC) expressly to deal with issues of concealment. Without wishing to comment on the details of these provisions, I would observe only, first, that their proposed inclusion in the legislation surely indicates that the legislative scheme as a whole can hardly be thought incompatible with some application of the Connor principle; secondly that, pending the proposed statutory amendments, only truly egregious cases such as this very one

(and perhaps *Fidler* too) should be regarded as subject to the Connor principle. I simply do not accept that amending legislation is required before this salutary principle of public policy can ever be invoked. I do recognise, however, that, as matters presently stand, it should only be invoked in highly exceptional circumstances.

85. For these reasons, together with those given by Lord Mance, I too would allow the council's appeal on both grounds and would set aside the grant of the certificate under section 191(1)(a).