APPEAL BY MMC MINERAL PROCESSING LIMITED
SITE AT BACKDALE, HASSOP, LONGSTONE EDGE
PINS REF: APP/M9496/C/05/2000744

PRELIMINARY ISSUE:
WHETHER OR NOT THE ENFORCEMENT NOTICE IS A NULLITY

WRITTEN SUBMISSIONS ON BEHALF OF THE APPELLANT

RELEVANT STATUTORY PROVISIONS

1. Section 173 of the Town and Country Planning Act 1990 (the Act) contains provisions relating to the contents of enforcement notices and, amongst other things, states that:

> "(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.
>
> (4) Those purposes are-
> (a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or
> (b) remedying any injury to amenity which has been caused by the breach."

…

> (9) An enforcement notice shall specify the period at the end of which any steps are required to have been taken or any activities are required

to have ceased and may specify different periods for different steps or activities…”.

2. Section 174 of the Act provides a right of appeal against an enforcement notice and specifies grounds upon which an appeal may be made. Section 174(2)(f) states that it is a ground of appeal:

> “that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.”

3. Section 176 of the Act relates to the determination of appeals under Section 174 and states that on an appeal the Secretary of State (the SoS) may:

> “(a) correct any defect, error or misdescription in the enforcement notice, or
>
> (c) vary the terms of the correction or variation will not cause injustice to the appellant or the local planning authority.”

PRINCIPLES DERIVED FROM CASE LAW

4. It is well established that there is a distinction to be made between an enforcement notice that is invalid and one that is a nullity. In Miller-Mead v. Minister of Housing and Local Government [1963] 2 QB 196 Lord Justice Upjohn explained the distinction in this way:

> “Now it is time to draw the distinction between invalidity and nullity. For example, supposing development without permission is alleged and it is found no permission is required…then the notice may be quashed …The notice is invalid: it is not a nullity because on the face of it appears to be good and it is only on proof of facts aliunde that the notice is shown to be bad: the notice is invalid and, therefore, it may be

quashed. But supposing that the notice on the face of it fails to specify some period required by sub-sections (2) or (3). On the face of it the notice does not comply with the section: it is a nullity and is so much waste paper …Supposing then upon its true construction the notice was hopelessly ambiguous and uncertain, so that the owner or occupier could not tell in what respect it was alleged that he had developed the land without permission …or again, that he could not tell with reasonably certainty what steps he had to take to remedy alleged breaches. The notice would be bad on its face and a nullity …”.[1]

5. The distinction is of critical significance. An enforcement notice that is “invalid” may be challenged by way of an appeal under S174. An enforcement notice that is a “nullity” is of no legal effect and cannot be the subject of an appeal under S174.

6. An enforcement notice will be a nullity where it fails to comply with the statutory requirements set out in S173. For example, an enforcement notice that fails to specify the date on which it takes effect will be a nullity. An enforcement notice that fails to “specify” the steps which the authority requires to be taken (in accordance with S173(3)) will be a nullity.[2] Similarly, an enforcement notice that fails to specify a period at the end of which a specified step is required to have been taken (in accordance with S173(9)) will be a nullity.

7. The test for whether or not an enforcement notice is a nullity is not whether it can be amended or varied without injustice. That argument was expressly rejected in R(Lynes) v. West Berkshire District Council (2003) JPL 1137. In that case Harrison J stated that:

“Having considered the submissions of both parties and the authorities to which I have been referred, I have reached the conclusion that an

[1] Pp 226-227

[2] See generally Volume 2 of the Planning Encyclopedia at paragraphs 173.08 to 173.09.

enforcement notice which, on the face of it and without having to refer to evidence elsewhere, fails to specify a period for compliance as required by S.173(9) is a nullity and it is therefore without legal effect. That being so, it cannot be the subject of amendment by the Secretary of State under S.176. The power of amendment under S.176 cannot relate to an enforcement notice that is a nullity. The test of whether an amendment to an enforcement notice can be made without injustice can only apply to a notice which is not a nullity. Furthermore, an enforcement notice that is a nullity cannot be made the subject of an appeal under S.174(2)(g)….

…I am very conscious of the need to avoid technicalities and artificial distinctions when dealing with enforcement notices, but the failure to comply with a basic statutory provision for a valid enforcement notice, such as specification of a period for compliance, cannot be said to be a technicality. An enforcement notice which, on its face, does not comply with such a requirement, is a nullity and therefore incapable of amendment." [3]

8. The general question that arises for determination in cases where it is argued that an enforcement notice is a nullity is: "does the notice tell the recipient fairly what he has done wrong and what he must do to remedy it?"[4]

9. More particularly, S173(3) requires that the enforcement notice must "specify the steps which the authority require to be taken, or the activities which the authority require to cease…". As Upjohn LJ said in Miller-Mead: "As a matter of common sense, if it does not specify the steps to be taken to remedy the alleged breach of planning permission or the alleged failure to comply with conditions with proper and sufficient particularity, the notice will not be operative…".[5] The correct test is therefore whether or not the notice tells the recipient what he is required to do with proper and sufficient particularity. The

[3] Paras 48-49
[4] Miller-Mead p232
[5] Miller-Mead p226

need for precision and clarity is very important because criminal liability is at stake.

10. S173(9) requires that the enforcement notice must specify the period at the end of which any steps are required to have been taken. The correct test here is simply whether or not the notice specifies periods at the end of which any steps are required to have been taken. If the notice does not specify such periods the notice will be defective and a nullity.

THE ENFORCEMENT NOTICE

11. The enforcement notice states that the alleged breach of planning control is:

> "Without planning permission, the winning and working of limestone other than in accordance with planning permission 1898/9/69, namely
> (i) the winning of limestone, and
> (ii) the working of limestone other than in the course of working fluorspar and barytes."

12. There are eleven reasons given for issuing the notice, one of which is at paragraph 4b):

> "The winning and working of limestone beyond the scope of the 1952 planning permission is unauthorised development."

13. Paragraph 5 of the notice is headed "What you are required to do" and states:

> "(i) Cease the winning and working of limestone other than the working of limestone where it is ancillary to the working of fluorspar and barites.
> Time for compliance: one day after this notice takes effect.
> (ii) (a) Submit to the mineral planning authority for its approval a scheme to remedy the breach of planning control caused by unlawful limestone extraction, such scheme to include proposals for

implementation of the scheme within the timescale set out in the scheme.

Time for compliance: Six months after this notice takes effect.

(b) If the scheme submitted to the mineral planning authority to remedy the breach of planning control has not been determined by it within two months of the date of submission, unless that time has been extended by agreement between the parties in writing, the applicant shall be entitled to implement the submitted scheme.

(c) In default of submission of any scheme within six months after notice takes effect, or if the scheme submitted has been refused, the mineral planning authority shall impose a scheme to remedy the breach of planning control including time for implementation of such a scheme, such scheme to be communicated within a further period of six months from the date by which the scheme was due to be submitted.

(iii) Implement the restoration scheme under 5(ii)(a) or (c) whichever is applicable."

THE FAILURE TO COMPLY WITH SECTION 173

14. The requirement in **paragraph 5(i)** of the notice that the Appellant is required to cease working "other than the working of limestone where it is ancillary to the working of fluorspar and barites" is unspecific.

15. The notice does not require that all working of limestone should stop, but something less. However, there is nothing other than the word "ancillary" to tell the Appellant what it is that the Peak District National Park Authority (PDNPA) considers he is entitled or not entitled to do by way of working limestone. Irrespective of the submissions that the Appellant will make about the interpretation of the 1952 Planning Permission in relation to its appeal under ground A, the inclusion of the word "ancillary" in the paragraph does not meet the requirement in S173(3) to "specify" the steps which are required to be taken.

16. Whilst the term “ancillary” is often employed as a tool by those practising or involved in the field of planning law, it is not “specific” in its meaning (and even experienced practitioners argue about its application to a given set of facts). Whether or not an activity is “ancillary” is very much a subjective question. It is submitted that, in the context of S173(3) reliance on a legal term of art such as this is not appropriate; it should not be assumed that recipients of enforcement notices are familiar with them. Parliament obviously did not have that intention. In any event sole use of the word “ancillary” is not enough in these circumstances to comply with the requirement to “specify” the steps required to be taken since it does not tell the Appellant precisely or clearly what it is that he is expected to do or not to do.

17. In this case, the word is not included in the terms of the 1952 Planning Permission and is not referred to in paragraph 3 of the notice, which purports to set out the alleged breach of planning control, or anywhere else in the notice. There is no indication whatsoever as to: what the PDNPA means by the use of that word in this context; how it is said that the working of limestone the subject of the enforcement notice differs from any “ancillary” working of limestone; how it is said that “ancillary” working of limestone differs from that which is said to be permitted under the 1952 Planning Permission; or what test the PDNPA would apply in any investigation into compliance with the requirements of the enforcement notice. In this respect there is no particularity in the notice and it is bereft of guidance. In short, the Appellant has not been told in clear terms what it is that the PDNPA says he is required to do in order to comply with the enforcement notice and yet be entitled to do under the 1952 Planning Permission.

18. The requirement set out in **paragraph 5(ii)(a)** to “Submit to the mineral planning authority for its approval a scheme to remedy the breach of planning control…” is vague and uncertain and does not comply with the S173(3). It is deficient in a number of respects.

19. First, there is no identification of the objective of the LPA. The requirement of the submission of “a scheme to remedy the breach” is little more than a part

echo of S173(4) which sets out the statutory purposes to which the steps to be specified under S173(3) are to be directed. Notwithstanding the nod to S173(4) the sub-paragraph does not indicate that the remedying of the breach is to be done "by restoring the land to its condition before the breach took place". Thus, the recipient is not actually told what the aim of the scheme is; nor is it clear that the means by which the stated purpose of remedying the breach is to be met is within the limited terms of S173(4).

20. Secondly, and on the assumption that the PDNPA's objective is restoration, there is no identification of what is said by the PDNPA to have been the condition of the land before the breach took place, nor is there a date given upon which it is said that the alleged breach took place. In the absence of such information the Appellant cannot design a scheme to achieve the PDNPA's objective. It is incumbent on the PDNPA to state the date on which the alleged breach took place and to describe in at least some detail what in its view was the condition of the land before the alleged breach took place. Otherwise, the Appellant will be working in the dark.

21. Thirdly, there is no identification of what is said by the PDNPA to be necessary to restore the land to the condition that it was in before the breach took place. There is no plan, nor any reference to: areas to be restored, levels, quarry faces, benches, materials, stockpiles, soils or landscaping. There is no particularity at all in this respect.

22. Fourthly, the requirement gives no consideration as to how such a scheme could be implemented in the context of the rights granted pursuant to the 1952 Planning Permission.

23. This part of the notice does not specify with any particularity what it is that the PDNPA expect in terms of remedying the breach. The notice requires the Appellant to produce a scheme of unidentified works in order to restore the

land to an unidentified condition. It is woefully vague and falls well short of the test for nullity.[6]

24. **Paragraph 5(ii)(c)** of the notice serves only to exacerbate the difficulties presented by this notice. It contains the same vagueness and uncertainties that attach to paragraph 5(ii)(a). In summary: a) the aim of the scheme to be imposed is not identified; b) there is no identification of what is said to be the condition of the land before the alleged breach - nor is there even a date for the start of the alleged breach; b) there is no identification of what is said to be necessary to remedy the breach and restore the land to the condition in which it was said to have been before the alleged breach; c) there is no consideration given to how any scheme imposed by the PDNPA would be implemented in the context of the 1952 Planning Permission. The opportunity that is offered to the PDNPA to impose a scheme which conflicts with and/or takes away from the rights granted under the 1952 Planning Permission makes the paragraph even more uncertain and open-ended.

25. A further submission is made in this context. The requirement in paragraph 5(ii) is unlawful in so far as it purports to enable the LPA to impose a scheme on the Appellant. Paragraph 5(ii)(c) states that the LPA may impose a scheme on the Appellant if the Appellant fails to submit a scheme within the time period allowed or if the LPA refuse to approve a submitted scheme. That assumed power would allow the PDNPA to impose any scheme of restoration and insist upon any requirements without the right of appeal against such a decision, without the opportunity for a fair hearing by an independent tribunal and without the right to compensation if the scheme imposed by the PDNPA took away the benefit of the existing planning permission. There is no provision in the Act or at common law for a local planning authority to assume such an unfettered power. The powers of a local planning authority are circumscribed by the Act and in the context of enforcement by the provisions in Part VII. Thus, the enforcement notice contains unlawful provisions and for

---

[6] The cases of Kaur v Secretary of State for the Environment and anr 1990 JPL 814 and Clive Payne v The National Assembly for Wales and Caerphilly County Borough Council (Transcript of the Judgment) also related to steps requiring schemes to be approved and in both cases the notices were held to be nullities.

that reason also it should be regarded as a nullity. Just as the notice should be struck down because it does not include relevant matters as required by S173 of the Act, it should be struck down on the basis that it includes a matter that is not required by or provided for by S173 or any other section of the Act.

26. **Paragraph 5(iii)** is deficient because it does not specify a period by which the restoration scheme that is approved or imposed is to be implemented. That failing is a clear breach of the requirement in S173(9) and, as a result, the notice is a nullity for this reason also[7].

27. The failure to specify the time period adds yet more substance to the Appellant's argument that the requirements set out in the notice are lacking in sufficient precision.

28. In conclusion, it is submitted that the requirements of the notice do not comply with S173 of the Act. The steps which the PDNPA requires to be taken under S173(3) are not set out with proper and sufficient particularity. The steps include a matter which is outwith the scope of S173 and unlawful. Furthermore, contrary to S173(9) the notice fails to specify a time period for the steps to be taken. The notice is therefore bad on its face and a nullity.

27th February 2006

Craig Howell Williams,
2 Harcourt Buildings,
Temple,
London. EC4Y9DB

[7] This is confirmed by the case of R (Lynes) v West Berkshire District Council 2003 JPL 1137