

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

Royal Courts of Justice
Strand, London, WC2A 2LL

13/01/2015

B e f o r e :

MR. JUSTICE HOLGATE

Between:

NIGEL KEITH JACKSON

Claimant

- and -

**SECRETARY OF STATE FOR
COMMUNITIES AND LOCAL
GOVERNMENT**

Defendant

**PAUL BROWN QC and ALEXANDER BOOTH (instructed by KEYSTONE LAW) for
the CLAIMANT**

**NATHALIE LIEVEN QC (instructed by TREASURY SOLICITORS) for the
DEFENDANT**

Hearing dates: 27th AND 28th NOVEMBER 2014

MR. JUSTICE HOLGATE:

Introduction

1. The enforcement of breaches of planning control under the Town and County Planning Act 1990 is subject to time limits in section 171B, upon the expiration of which development is treated as lawful and no enforcement action may be taken. For example, the time limit in relation to buildings operations or the change of use of a building to a single dwelling house without planning permission is 4 years. The protection afforded by these limitation periods has been open to abuse by unscrupulous individuals, well aware of the rules, who deliberately conceal a breach of control until 4 years have passed and then "triumphantly reveal" (per Lord

Rodger at [2011] 2 AC 331C) their development when making an application to the local authority under section 191 of the Act for a certificate of lawfulness of existing use or development ("CLEUD").

2. However, in *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government* [2011] 2 AC 304 the Supreme Court held that the limitation periods in section 171B should be construed so as not to apply to someone who positively deceives the local planning authority in order to avoid enforcement action being taken. Shortly after *Welwyn* was decided, Parliament enacted section 124(1) of the Localism Act 2011 so as to insert sections 171BA to 171BC into the 1990 Act. These provisions expressly deal with the problem of deliberate concealment by giving the local planning authority a power to apply to the magistrates' court for a planning enforcement order ("PEO").
3. The main question in this case is whether Parliament enacted sections 171BA to 171BC so as to replace the law laid down by the Supreme Court in relation to deliberate concealment of breaches of planning control. The Appellant contends that the answer is yes, because the PEO code "covers the field". The Secretary of State submits that the answer is no, because the new legislation simply widens the powers available to authorities. The point is plainly of general importance and I note that in *Bonsall v Secretary of State* (C1/2014/1402) Sullivan LJ granted permission to appeal on 10 November 2014 on this very issue. In that case the point had not been raised at first instance before Stuart-Smith J ([2014] EWHC 2022 (Admin)).
4. At the outset I would like to express my gratitude for the helpful submissions from all Counsel.

Background

5. Mr. Jackson is the owner of a trout farm at Sutton Springs, Bullington Lane, Sutton Scotney, near Winchester. At the northern end of the site there are two buildings, the main dwelling and a building referred to as "the barn" which is the subject of these proceedings.
6. The barn was erected in 2004 pursuant to a planning permission granted on 25 March 2004. However, it was not built in accordance with the approved plans and so a retrospective planning permission had to be sought for the barn as built, which was granted on 21 July 2005.
7. According to Mr. Jackson, dormer windows and roof lights were inserted on the roof slopes in late 2007 to early 2008. Thereafter, the Appellant's son Mr. James Jackson, began to use the first floor of the barn as a dwelling on some date between 6 February 2009 and 26 June 2009.
8. The local planning authority, Winchester City Council ("WCC") received a complaint or query concerning residential use of the barn and an enforcement officer, Mr. Hobson, was sent to the premises to investigate on 15 April 2009. On that date works were being carried out and Mr. Hobson did not enter the barn because he was advised by Mr. Jackson or someone working with him at the time, not to do so.
9. Because the dormer windows and roof lights had been installed without the necessary planning permission, WCC wrote to the Claimant inviting him to legalise the position by making a planning application. He did so and a site visit was carried out on 31 July 2009 by the case officer, Mrs. Jill Lee. Subsequently permission was granted on 10 August 2009.
10. On 2 April 2013 Mr. Jackson submitted to WCC an application under section 191 for a CLEUD confirming the lawfulness of the use of the first floor of the barn as a dwelling on the basis that it had been used as such for a continuous period of 4 years. On 29 May 2013 WCC refused that application because it was not satisfied that the first floor of the barn had been converted to a dwelling at least 4 years before the date of Mr. Jackson's application.

11. On 13 June 2013 the Claimant made a second application to WCC for a CLEUD. That was refused by WCC on 17 September 2013 on the same grounds as the first, but also relying upon the *Welwyn* principle (i.e. that deliberate concealment of the breach of the planning control prevented reliance upon the 4 year limitation period).
12. In the meantime, on 27 June 2013 WCC issued an enforcement notice under section 172 of the 1990 Act alleging a material change of use of the barn (as I understand the position, the whole barn) from "an agricultural barn to a mixed use as an agricultural storage barn and a self-contained unit of residential accommodation"¹. The appeal which then followed proceeded on the basis of that description. The notice required the permanent cessation of the residential use, the removal of residential items and the restoration of the building to the layout shown on a previously approved plan.
13. Mr. Jackson appealed against the notice to the Secretary of State under section 174 of the 1990 Act. The only ground of appeal advanced was under section 174(2) (d), namely at the date when the enforcement notice was issued, no enforcement action could be taken in respect of the breach alleged in the notice. In other words, Mr. Jackson sought to rely on the 4 year limitation period. Ground (a) and the "deemed application" for planning permission to validate the breach of planning control (section 177) did not arise because Mr. Jackson did not pay the appropriate fees.
14. The appeal was conducted by an Inspector appointed to act on behalf of the Respondent. He held a public inquiry on 4 to 5 March 2014, carried out a site inspection and issued his decision letter on 2 May 2014.
15. Paragraphs 4 to 13 of the decision letter summarised the factual background to the appeal. Paragraphs 14 to 17 set out the burden and standard of proof and the approach taken by the Inspector to assessing the evidence in a case of this kind, as to which no complaint is made. In paragraphs 18 to 25 the Inspector dealt with the evidence relating to 4 years' continuous use as a dwelling and accepted the agreed position at the inquiry that *factually* the Appellant had established his case.
16. At paragraphs 26 to 27 of his decision the Inspector set out his understanding of the "Connor principle" (from *R v Chief National Insurance Commissioner ex parte Connor* [1981] QB 578) as applied in *Welwyn*. I would prefer to call this the *Welwyn* principle (because the application of the *bonam partem* principle in planning enforcement cases was articulated in the decision of the Supreme Court).
17. At paragraphs 55 to 63 of the decision letter the inspector dealt with the arguments as to whether the *Welwyn* principle survives the enactment of sections 171BA to 171BC of the 1990 Act and decided that it does. That conclusion gives rise to the first issue in this appeal, the main issue identified in paragraph 3 above.
18. Paragraphs 28 to 53 of the decision letter set out the Inspector's findings on the application of the Welwyn principle to the facts of this case. He concluded that the Appellant's conduct had amounted to a positive deception of WCC so as to engage the *Welwyn* principle and deprive him of the benefit of the 4 year limitation period in section 171B(2). If, contrary to ground 1 the Welwyn principle still forms part of the law, ground 2 seeks to challenge the legality of the Inspector's conclusion on that part of the case. I will deal with the issues in that order.
19. This appeal has been brought under section 289 of the 1990 Act with the permission of Patterson J, granted on 26 June 2014.

Ground 1

20. I will deal with matters in the following order:

- i) Enforcement provisions in the 1990 Act;
- ii) The *Welwyn* principle;
- iii) The amendments made by the Localism Act 2011 (and the Impact Assessment of the Bill);
- iv) Planning as a comprehensive code (the Pioneer Aggregates decision);
- v) Authorities on "covering the field";
- vi) Analysis of the competing arguments.

(i) Enforcement provisions in the 1990 Act

- 21. Planning permission is required for the carrying out of any development of land (section 57(1)), which includes the making of any material change in the use of a building or other land (section 55(1)).
- 22. In Part VII of the 1990 Act a breach of planning control includes the carrying out of development without planning permission (section 171A(1)). A local planning authority has a discretion to issue an enforcement notice where it appears to them (a) that there has been a breach of planning control and (b) that it is expedient to do so having regard to the development plan and other material considerations (section 172(1)). The notice must state the matters appearing to constitute a breach of planning control, the steps required to remedy the breach, and the period for compliance (section 173).
- 23. An appeal against an enforcement notice may be made to the Secretary of State on any of the grounds set out in section 174(2).
- 24. "Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house no enforcement action [which includes the issuing of an enforcement notice – see section 171A(2)(a)] may be taken after the end of a period of four years beginning with the date of the breach." (section 171B(2))
- 25. "For the purposes of this Act uses and operations are lawful at any time if –
 - a) no enforcement action may then be taken in respect of them (..... because the time for enforcement action has expired...)"(section 191(2)(a)).
- 26. A person who wishes to ascertain whether (inter alia) any existing use of a building is lawful may apply to the local planning authority for that purpose (section 191(1)). If that authority is provided with information satisfying them of the lawfulness of that use *at the time of the application*, they *shall* issue a certificate to that effect; and if not they *shall* refuse that application (section 191(4)). The lawfulness of (inter alia) any use for which a certificate is in force shall be conclusively presumed (section 191 (6)).
- 27. The grounds upon which an appeal against an enforcement notice may be brought include "(d) that, at the date when the notice was issued, no enforcement action could be taken in respect of

any breach of planning control which may be constituted by" the matters stated in the notice (section 174 (2)).

(ii) The *Welwyn* principle

28. In *Welwyn* [2011] 2 AC 304 Mr. Beesley obtained planning permission to construct a hay barn, subject to a condition restricting the use to storage of hay, straw or other agricultural products (paragraph 2). As originally built the structure had the external appearance of a barn, but an interior with the layout and facilities of a dwelling. Upon completion Mr. Beesley and his wife moved into the property and lived there continuously for 4 years, whereupon he applied for a CLEUD to confirm the lawfulness of the residential use. His strategy had been to erect a building for use as his home in circumstances where planning permission for a dwelling would not have been granted, to conceal from the planning authority that the property built was in fact a dwelling, and then to live in the house without being detected for 4 years so as to legitimise his deliberate breach of planning control (paragraphs 31-32 and 43 to 44).
29. Mr. Beesley's appeal against the refusal of a CLEUD was allowed by an Inspector on the basis that he had satisfied the 4 year rule. It is relevant to note the course taken in the subsequent appeals. The High Court quashed that decision on the basis that no change of use *to* a dwelling-house had taken place so as to engage section 171B(2). The Court of Appeal reversed that decision and restored the Inspector's decision. However, Mummery LJ expressed surprise that the point had not been taken that Mr. Beesley should not be able to rely upon his own deception of the planning authority in order to bring himself within section 171B(2) (paragraph 7). That was the stage reached in the Beesley litigation when the Localism Bill was introduced into Parliament in December 2010 containing provisions which eventually became enacted as section 171BA to 171BC of the 1990 Act.
30. The Supreme Court then allowed the local planning authority's appeal and restored the order of the High Court quashing the Inspector's decision. Firstly, it was held that there had been no change of use *to* a dwelling within section 171B(2), and so the 4 year limitation period did not apply. Secondly, the Court decided that in any event Mr. Beesley would not have been entitled to rely upon that limitation period because of his deception (the "*Welwyn* principle").
31. The leading judgment was given by Lord Mance JSC, with whom Lord Phillips, Lord Walker, Baroness Hale and Lord Clarke JJSC agreed. The *Welwyn* principle is firmly based upon the principles of statutory construction summarised in paragraphs 45 to 50 of the judgment, now to be found in paragraphs 1152 and 1155 of Halsbury's Laws of England (5th Edition – 2012) Vol. 96 and section 264 of Bennion on Statutory Interpretation (6th Edition). In furtherance of the principle that the law should serve the public interest, the courts have evolved techniques of construction in *bonam partem*, or in good faith, the first element of which is that a person should not benefit from his own wrong. These are described as principles of "public policy".
32. Not only Mr. Beesley but also the Secretary of State relied upon *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132 to argue that planning law is a comprehensive statutory code, into which the courts should not import principles derived from private law unless expressly authorised by Parliament or it is necessary to do so in order to give effect to the legislative purpose. But that argument was rejected by the Supreme Court because the *bonam partem* principle it applied is a principle of statutory construction, and not a matter of private law (paragraph 50).
33. The scope of the public policy principle is not confined to wrong-doing amounting to a crime (paragraph 53). Whether conduct will disentitle a person from relying upon an unqualified statutory provision on public policy grounds must be considered in context, taking into account any nexus between that conduct and the statutory provision. In enforcement situations the 4 year limitation period had been conceived as a timespace within which a planning authority

would normally be expected to discern an unlawful building operation or use, following which the public interest in proper planning control should prevail. Thus, "positive and deliberately misleading false statements" by an owner so as to prevent discovery of a breach of planning control take the circumstances outside that rationale (paragraph 54).

34. The Supreme Court identified (in paragraph 56) four features in Mr. Beesley's case which in combination took his case outside the true scope of section 171B(2):
 - i) positive deception in matters integral to the planning process;
 - ii) that deception was directly intended to undermine the planning process;
 - iii) it did undermine that process and;
 - iv) the wrong-doer would profit directly from the deception if the normal limitation period were to enable him to resist enforcement.
35. In his concluding paragraph 58 Lord Mance JSC referred to "the exceptional facts of this case", but I do not read his statement as imposing any additional "exceptionality" test. Instead Lord Mance described those exceptional circumstances by reference to the same criteria as he had already set out in paragraph 56. In my judgment, the four criteria set out in that paragraph provide a sufficient basis for defining deception which disentitles a landowner from relying upon the time limits in section 171B, pursuant to the public policy principle of statutory construction.
36. Mr. Brown QC, who appeared on behalf of the Appellant, relied upon paragraph 84 of the judgment of Lord Brown JSC which stated that "only truly egregious cases" of deception should fall outside section 171B. However, I accept the submission of Ms. Lieven QC, on behalf of the Respondent, that Lord Brown's dictum formed no part of the ratio of the case. The leading judgment of Lord Mance JSC, with whom four other members of the court agreed, did not use any such expression. Moreover, Lord Rodger JSC adopted essentially the same criteria in paragraphs 62 to 63 as Lord Mance JSC laid down in paragraph 56, without suggesting that any additional test should be applied, such as whether the conduct is egregious. In my judgment there is no justification for treating Lord Brown's phrase as a test which must also be applied in addition to those set out in paragraph 56 of Lord Mance's judgment.
37. Nevertheless, Lord Brown pointed out at paragraph 73 that situations potentially falling within section 171B may involve a spectrum of wrongdoing. At one end there may be cases where the landowner is unaware of the need for planning permission and thus no deception is involved. But the four features present in Mr. Beesley's case were at the other end of the spectrum and plainly *sufficient* to take that case outside the scope of section 171B. But in my judgment it does not follow that all of the features present in that case should be treated as *necessary* requirements for that purpose. For example, the circumstances in *Fidler v Secretary of State* [2011] EWCA Civ 1159 did not involve any false representations during the process of obtaining a planning consent. There the positive deception concerned the concealment behind straw bales of a building erected without planning permission. Mr Fidler had not engaged with the process of making a planning application at all. Nonetheless it was held by the Court of Appeal that the Welwyn principle applied. There had been positive conduct intended to deceive the local authority so that it would not appreciate that a breach of control had taken place until after the limitation period had expired. The decisions of the courts to date have been fact-sensitive and there is some uncertainty as to the overall range of circumstances in which the public policy principle may be applied.
38. Furthermore, in both *Welwyn* and *Fidler* the issue of the lawfulness of the concealed development had to be determined relatively soon after the deception had ceased. But in a

situation where the Welwyn principle applies, should it follow that the landowner can never rely upon section 171B subsequently? For example, what if the deception ceased and the local planning authority either chose not to take, or did not take, enforcement action for the next 4 years? Would public policy continue to require that those circumstances be treated as falling outside the scope of section 171B, bearing in mind the statutory purpose as explained in paragraph 54 of the judgment of Lord Mance JSC? These issues have yet to be argued and decided.

39. I return to these uncertainties in the scope and effect of the Welwyn principle in my conclusions on the first issue.

(iii) *The Localism Act 2011*

40. Section 124 inserted section 171BA to 171 BC into the 1990 Act so as to follow on immediately after section 171B.

41. "171BA Time limits in cases involving concealment"

- (1) Where it appears to the local planning authority that there may have been a breach of planning control in respect of any land in England, the authority may apply to a magistrates' court for an order under this subsection (a "planning enforcement order") in relation to that apparent breach of planning control.
- (2) If a magistrates' court makes a planning enforcement order in relation to an apparent breach of planning control, the local planning authority may take enforcement action in respect of—
 - (a) the apparent breach, or
 - (b) any of the matters constituting the apparent breach, at any time in the enforcement year.
- (3) "The enforcement year" for a planning enforcement order is the year that begins at the end of 22 days beginning with the day on which the court's decision to make the order is given, but this is subject to subsection (4).
- (4) If an application under section 111(1) of the Magistrates' Courts Act 1980 (statement of case for opinion of High Court) is made in respect of a planning enforcement order, the enforcement year for the order is the year beginning with the day on which the proceedings arising from that application are finally determined or withdrawn.
- (5) Subsection (2)—
 - (a) applies whether or not the time limits under section 171B have expired, and
 - (b) does not prevent the taking of enforcement action after the end of the enforcement year but within those time limits."

42. "171BB Planning enforcement orders: procedure"

- (1) An application for a planning enforcement order in relation to an apparent breach of planning control may be made within the 6 months beginning with the date on which evidence of the apparent breach of planning control sufficient in the opinion of the local planning authority to justify the application came to the authority's knowledge.

- (2) For the purposes of subsection (1), a certificate—
 - (a) signed on behalf of the local planning authority, and
 - (b) stating the date on which evidence sufficient in the authority's opinion to justify the application came to the authority's knowledge, is conclusive evidence of that fact.
- (3) A certificate stating that matter and purporting to be so signed is to be deemed to be so signed unless the contrary is proved.
- (4) Where the local planning authority apply to a magistrates' court for a planning enforcement order in relation to an apparent breach of planning control in respect of any land, the authority must serve a copy of the application—
 - (a) on the owner and on the occupier of the land, and
 - (b) on any other person having an interest in the land that is an interest which, in the opinion of the authority, would be materially affected by the taking of enforcement action in respect of the apparent breach.
- (5) The persons entitled to appear before, and be heard by, the court hearing an application for a planning enforcement order in relation to an apparent breach of planning control in respect of any land include—
 - (a) the applicant,
 - (b) any person on whom a copy of the application was served under subsection (4), and
 - (c) any other person having an interest in the land that is an interest which, in the opinion of the court, would be materially affected by the taking of enforcement action in respect of the apparent breach.
- (6) In this section "planning enforcement order" means an order under section 171BA(1)."

43. **"171BC Making a planning enforcement order"**

- (1) A magistrates' court may make a planning enforcement order in relation to an apparent breach of planning control only if—
 - (a) the court is satisfied, on the balance of probabilities, that the apparent breach, or any of the matters constituting the apparent breach, has (to any extent) been deliberately concealed by any person or persons, and
 - (b) the court considers it just to make the order having regard to all the circumstances.
- (2) A planning enforcement order must—
 - (a) identify the apparent breach of planning control to which it relates, and
 - (b) state the date on which the court's decision to make the order was given.
- (3) In this section "planning enforcement order" means an order under section 171BA(1)."

44. Key features of the new provisions include the following:-

- i) The magistrates' court may only grant a PEO under section 171BA(1) if satisfied on the balance of probabilities that the breach which appears to have occurred, or *any* of the matters constituting the apparent breach, has to *any extent* been deliberately concealed by *any* person, and the court thinks it "just to make the order having regard to all the circumstances" (section 171BC(1)). Thus, the legislation employs a relatively simple and broad definition of deception which embraces and goes beyond the Welwyn type of case. But the broad scope of that definition is balanced by a requirement that the court should be persuaded that the making of the PEO is just in all the circumstances.
 - ii) Section 171BB(1) imposes a time limit for applying for a PEO of 6 months beginning with "the date on which evidence of the apparent breach of planning control sufficient in the opinion of the local planning authority to justify the application came to the authority's knowledge", but the authority is able to issue a "conclusive" certificate on that factual matter, or to self-certify (section 171BB (1) and (2));
 - iii) Once a PEO is granted the authority has a period of up to one year plus 22 days from the date on which the court's decision is given, within which to take enforcement action (section 171BA (2)) ("the enforcement year");
 - iv) "The enforcement year" may expire after the time limits in section 171B (e.g. in a case where deception is not discovered until after the limits in section 171B expire). But the authority may still take enforcement action within the section 171B time limits if they would expire later than the "enforcement year" (section 171BA(5));
 - v) Where a PEO is obtained and an enforcement notice is issued within the "enforcement year", then even if the breach occurred more than 4 years before that action was taken, the Inspector dealing with an appeal against that notice will not have to consider evidence or legal submissions on deception and its effect upon the application of section 171B. The same applies to an appeal against the refusal of a CLEUD (see section 191(3A) below).
45. Section 124 of the 2011 Act also inserted subsection (3A) into section 191 of the 1990 Act in the following terms:
- "(3A) In determining for the purposes of this section whether the time for taking enforcement action in respect of a matter has expired, that time is to be taken not to have expired if –
- (a) the time for applying for an order under section 171BA(1) (a "planning enforcement order") in relation to the matter has not expired,
 - (b) an application has been made for a planning enforcement order in relation to the matter and the application has neither been decided or has been withdrawn, or
 - (c) a planning enforcement order has been made in relation to the matter, the order has not been rescinded and the enforcement year for the order (whether or not it has begun) has not expired."
46. During argument I raised the question whether section 191(3A) indicated Parliament's intention as to the fate of the Welwyn principle. The effect of this provision is to prevent an application for a CLEUD from succeeding in reliance upon the time limits in section 171B in three "pending" situations defined by limbs (a), (b) and (c). Limb (a) covers the case where an authority has self-certified the date on which it became sufficiently aware of an "apparent breach" and the 6 months time limit for seeking a PEO has started to run. Limbs (b) and (c) deal with cases where either an application for a PEO is outstanding or an order has been made but the "enforcement year" has not yet expired. Because section 191(3A) only deals with those

three "pending" situations under the PEO code, it is not incompatible with the continued application of the *Welwyn* principle to section 171B. I return to section 191(3A) below in the analysis of the competing arguments.

47. Both parties sought to rely upon DCLG's Impact Assessment on the Localism Bill published in January 2011, in order to identify the mischief of the PEO code. But in this case I derive no great assistance from the Assessment. At the time the document was issued, the Secretary of State was intending to argue in the Supreme Court that section 171B(2) should not be interpreted so as to exclude development concealed by positive deception. Therefore, the Secretary of State was not considering whether the new legislation should *replace existing law*.
48. The Court was informed that there is no *Pepper v Hart* material which would assist on the point at issue.

(iv) Planning as a comprehensive code

49. In his oral submissions Mr. Brown QC placed some emphasis upon the statement by Lord Scarman in *Pioneer Aggregates (UK) Limited v Secretary of State for the Environment* [1985] AC 132, 140-141 to the effect that planning is a comprehensive statutory code into which private law concepts should not be introduced unless expressly authorised by Parliament or necessary. He acknowledged that that submission had been made unsuccessfully in the *Welwyn* case [2011] 2 AC (at paragraph 50), but he argued that the position was different now because Parliament has enacted a code specifically to deal with concealment by deliberate deception. Whereas in *Welwyn* it had been necessary for the Supreme Court to rely upon the *bonam partem* principle that a person should not benefit from their own wrongdoing, the amendments introduced by section 124 of the Localism Act 2011 had made that unnecessary.
50. However, I agree with Ms Lieven QC that the reasoning in *Pioneer Aggregates* is not in point here. The rejection by the Supreme Court in *Welwyn* of that line of argument did not involve any reliance upon a principle of private law. Instead, the court invoked the *bonam partem* principle of statutory construction in order to interpret section 171B(2) and to determine the extent of its reach. Therefore, the true question remains how, as a matter of statutory construction, do sections 171BA to 171BC interact with section 171B(2) as interpreted in *Welwyn*.
51. Ms Lieven adds that when future amendments to the Localism Bill were introduced in the House of Lords on 19 July 2011, the Supreme Court's decision was expressly referred to (paragraph 41 of the Respondent's skeleton). I have not been shown that material, but it is only relied upon by the Secretary of State as an application of the *Barras* principle ([1933] A.C. 402). Parliament should be taken to have been aware of the width of the principle laid down in *Welwyn*, as well as the broader ambit of the PEO code contained in the Localism Bill.
52. It is also plain that Parliament did not make any express amendment of section 171B and did not use any such express language, as is sometimes the case, to disapply or overcome the effect of a judicial decision, for example an authority interpreting existing legislation.
53. To my mind, therefore, the issue is whether, as a matter of statutory construction, it should be inferred that Parliament intended that the PEO code should wholly replace the application in *Welwyn* of the *bonam partem* principle to read down the scope of section 171B, when dealing with the concealment of breaches of planning control by deliberate deception.

(v) Authorities on "covering the field"

54. Mr. Brown relied upon four authorities in which it had been held that legislation enacted by Parliament had been treated as "covering the field", or stating the law exhaustively on a particular subject, so as to replace earlier law:

Attorney General v De Keyser's Royal Hotel [1920] AC 508

R (Hooper) v Secretary of State for Work and Pensions [2003] 1 WLR 2623

Marcic v Thames Water Utilities Limited [2004] 2 AC 42

R v Forsey [1988] SLT 572

55. Plainly, Parliament could not have intended in the 2011 Act to replace all aspects of wrongdoing which, according to *Welwyn*, would take a case outside the scope of section 171B of the 1990 Act. Whereas Parliament has legislated on deliberate concealment, it has not dealt with other forms of wrongdoing such as bribery, coercion or menaces (see paragraph 55 of *Welwyn*). So the Claimant's argument has to be that Parliament intended to replace the *whole* of *that part* of the *Welwyn* principle which relates to concealment by deliberate deception.
56. I agree with Ms Lieven QC that the authorities cited on "covering the field" do not assist on this issue. They were all decisions in which it was held that a legislative code or provision had replaced a prerogative power, or a common law power, or a cause of action at common law. By contrast, the *Welwyn* principle did not create an extra-statutory or common law power for a local planning authority to take enforcement action. Instead, it merely construed a statutory provision for determining the boundary between activities which are susceptible to enforcement action and those which, by virtue of limitation periods, have become lawful. In effect *Welwyn* was concerned with the scope of statutory powers to take enforcement action subject to those time limits. Plainly, *Welwyn* had nothing to do with the survival of a common law cause of action in the face of a comprehensive statutory code (e.g. the regulatory regime considered in *Marcic*).
57. Researches have not revealed any authorities on the approach which the Court should take to interpreting a new code enacted by Parliament to deal with a subject already covered by judicial construction of existing legislation, particularly where that legislation remains in force without express amendment. I remain of the view that the question for the Court is as set out in paragraph 53 above and that I should address this by seeking to identify any indications in the legislation pointing either way, along with advantages and disadvantages of the competing arguments, in order to determine which is more reasonable and help identify Parliament's intention (see e.g. Bennion on Statutory Interpretation (6th edition) section 268).

(vi) Analysis of the competing arguments

58. In paragraph 55 of his report the Inspector suggested that the use of the word "may" in section 171BA(1) contradicted the Appellant's argument that the PEO code provides the only route for enforcement action in concealment cases. I do not think that the use of the phrase "may apply to a magistrates' court" can be taken that far. The word "may" is consistent with the discretionary nature of all the enforcement powers in Part VII of the 1990 Act.
59. I summarise indicators or arguments which support the Secretary of State's contention that the PEO code is not an exhaustive replacement for the *Welwyn* principle in concealment cases:

- i) On any view the PEO code could only operate at most as a partial replacement of the *Welwyn* principle, namely to deal with concealment of planning breaches by deliberate deception (see paragraph 55 above);
- ii) The *Welwyn* decision has the effect of excluding certain circumstances from the ambit of section 171B, or to read down that provision. In the Localism Act 2011 Parliament did not expressly amend section 171B or enact an express provision disapplying the *Welwyn* decision to any extent. The 1990 Act was not amended so as to make section 171B subject to sections 171BA to 171BC;
- iii) In *Welwyn* (para 54) the Supreme Court drew an analogy with judicial decisions which, prior to the enactment of section 26 of the Limitation Act 1939 (the predecessor of section 32 of the Limitation Act 1980), had held that general statutory limitation periods could not be relied upon in cases where the cause of action had been fraudulently concealed (see e.g. *Lynn v Bamber* [1930] 2 QB 72). In the present context, it is relevant to note that under the 1980 Act Parliament expressly enacted that the ordinary periods of limitation in Part I of the Act are subject to the extensions or exclusions in Part II of the Act (see sections 1 and 32(1)). Parliament did not legislate in the same manner when inserting sections 171BA to 171BC alongside section 171B.
- iv) It has not been argued, nor in my judgment could it be, that the new PEO code is *inconsistent* with the continued application of the *Welwyn* principle to section 171B in concealment cases. Thus, there is no basis for arguing that section 171B has been amended by implication (see section 80 of Bennion on Statutory Interpretation (6th edition)).
- v) Ms Lieven submits that one effect of the Appellant's argument would be to create for landowners guilty of serious wrongdoing a limitation defence against enforcement action (under section 171BA(2)) which, arguably, they do not have under the *Welwyn* principle. It is unlikely that Parliament intended to confer any such benefit on individuals who knowingly abuse the planning legislation so as to legitimise concealed breaches of planning control;
- vi) Similarly, although the PEO code does contain procedural safeguards (e.g. rights to be notified of a PEO application and to be heard in Court) they are unlikely to have been a primary objective of the new legislation. In any event, similar provisions apply to the service of enforcement notices and appeals;
- vii) Instead, one of the Government's main objectives was to make it easier for local planning authorities to enforce against concealed breaches by providing an *additional* power to take action from the date on which such breaches were discovered (section 171BB(1) and (2)) rather than the date on which they occurred (section 171B). The purpose of the legislation was not to *restrict* the power of local authorities to deal with deliberately concealed breaches to the PEO code;
- viii) Local authorities may face real difficulties in obtaining information on the history of a site, particularly when dealing with individuals who have deliberately used deception in order to conceal their activities. An authority may have taken enforcement action without having any reason to think that a concealment issue is likely to arise during an appeal against an enforcement notice and therefore without having taken steps to obtain a PEO. If concealment should subsequently become an issue at a public inquiry into the appeal, it would be disadvantageous if the authority could not ask the Inspector to deal with deception at that inquiry by applying the *Welwyn* principle, no matter how clear or serious the case, and had instead to recommence enforcement action, beginning with an

application for a PEO. The Appellant's argument has the effect of removing flexibility which is justified in the public interest.

60. I summarise indicators or arguments supporting the Appellant's contention that Parliament intended the PEO code to replace the Welwyn principle in concealment cases:-
- i) The new code contains a broad, relatively simple definition of deception, which embraces the more serious *Welwyn* type of case as well as less serious cases. Where a PEO is obtained the legislation provides a clearly defined time limit for the taking of enforcement action. The PEO code overcomes uncertainties as to (a) the type of deception which may fall within the *Welwyn* principle and (b) the effect of that principle upon the application of the limitation period in section 171B (see paras. 37 and 38 above).
 - ii) Although treating the PEO code as exhaustive would enable some wrongdoers to rely upon a limitation defence not previously available, local authorities would benefit to a greater extent. By following the PEO code they need not be concerned with the date when a breach commenced and can instead determine the start of the limitation period by self-certifying the date when they discovered an enforceable breach of planning control;
 - iii) If a local authority is entitled to choose to serve an enforcement notice relying upon the *Welwyn* principle (i.e. it is already aware of a deception at that stage) and the evidence at a subsequent inquiry results in the Inspector rejecting the *Welwyn* argument, the authority may then find that it is out of time for applying for a PEO under section 171BB(1). That risk is avoided if an authority is only able to deal with deception cases by following the PEO procedures. Whenever the deception is discovered, the authority can itself certify the date when it acquired sufficient knowledge;
 - iv) One advantage of the Appellant's argument is that where a PEO is obtained the time limit is set by section 171BA(2). The public inquiry into an enforcement notice appeal, or an appeal against a refusal of a CLEUD, would not need to be troubled with factual and legal issues as to (a) whether the circumstances of the case fall within the *Welwyn* principle or (b) when the breach occurred;
 - v) The broader concept of deception in the PEO code is balanced by a requirement that the magistrates must consider it "just in all the circumstances" for a PEO to be made (section 171BC(1)). The PEO code also contains procedural safeguards (section 171BB(4) and (5)). A local planning authority should not be able to circumvent those provisions by electing to proceed directly with the service of an enforcement notice relying upon the *Welwyn* principle rather than obtaining a PEO first.
61. Plainly, there are substantial arguments in favour of each of the competing views. However, in my judgment the balance of the arguments favours the Respondent's view. The *language* used by Parliament (including the decision to insert sections 171BA to 171BC alongside section 171B), is not sufficient to indicate an intention to alter the scope of section 171B as interpreted in *Welwyn*. In particular, I cannot detect any intention to enlarge the scope of section 171B and then to make that provision subject to the PEO code, so that concealment could only be dealt with under that code.
62. Putting to one side the linguistic approach, in my judgment a comparison between the effects of the two rival interpretations, as summarised above, also supports the view that Parliament did not intend to replace the *Welwyn* construction of section 171B with the new provisions. The balance of advantage and disadvantage supports the Respondent's case. Certainly, I do not think that the advantages supporting the Appellant's case are sufficiently strong to support the imputation of an intention by Parliament to replace *Welwyn* in concealment cases.

63. I am reinforced in that view by a further issue I have noted since the conclusion of the hearing. The *Welwyn* principle is important for the resolution not just of enforcement notice appeals but also appeals against the refusal of CLEUDs. The *Welwyn* case itself was concerned with the refusal of a CLEUD. In either situation the issue of whether the relevant limitation period has expired must be determined as at the date when the relevant action is initiated. In the case of an enforcement notice the issue is whether the limitation period in section 171B has expired by the date when *the notice is issued* (sections 171A(2), 174(2) and 191(2)), whereas in the case of an application for a CLEUD the issue is whether the limitation period has expired at the date when *the application is made* (sections 171A(2), 191(2) and 191(4)). But there is a critical distinction between enforcement action and CLEUD applications. By definition enforcement action is initiated by a local authority, whereas a CLEUD application is initiated by a landowner. The timing of an application for a CLEUD lies within the control of the landowner, not the local planning authority. Of course, it is that very feature which has enabled the planning system to be abused, as the *Welwyn* case demonstrated so clearly. Once the landowner is confident that he can produce evidence that the breach of planning control has subsisted for the required period, he makes an application for a CLEUD without delay.
64. In this context, it seems to me that if the PEO code is treated as exhaustive, section 191(3A)(a) would leave a gap in the law, which only the *Welwyn* principle could fill. Otherwise the new provisions could be rendered virtually nugatory.
65. Section 191 (3A)(a) disapplies the time limits in section 171B where "the time for applying for [a PEO] in relation to the matter has not expired". That provision refers to the 6 months time limit in section 171BB(1). Plainly a local planning authority cannot rely upon section 191(3A)(a) before that time limit starts to run. That would be incompatible with the proper operation of the standard time limits in section 171B.
66. The problem arises because of the criterion used to determine the start of the 6 months time limit. That depends upon the local planning authority obtaining sufficient information to justify making an application for a PEO, i.e. when the authority *ceases to be deceived*. But in the Beesley type of situation that is likely to be *after* the limitation period in section 171B has already expired and the landowner has applied for a CLEUD. The problem in concealment cases is that, by definition, it is most unlikely that on the date when a CLEUD application is registered, the local planning authority will be aware of the deception. Accordingly, the authority will not be in a position to rely upon section 171BB(1) or (2) and set the 6 months time limit for a PEO application running and so it will be unable to refuse the application by relying upon section 191(3A)(a). Consequently if in such circumstances the authority (or an Inspector on appeal) was obliged to grant the CLEUD on the evidence produced by the applicant, enforcement action could not be initiated (sections 171B, 174(2)(d), and 191(2)).
67. Past experience shows that the situation I have described is likely to arise from time to time. The upshot is that in order to deal with unscrupulous landowners who use a strategy of deliberate concealment together with the CLEUD procedure so as to prevent enforcement action being taken, it is necessary to construe the PEO code as a supplementary procedure available to local authorities and not as an exhaustive replacement for the *Welwyn* principle. If not, ironically the effect would be to allow wrongdoers to continue to use concealment in order to legitimise breaches of planning control. In any balance struck between the advantages and disadvantages of the competing arguments, this consideration has to be decisive, quite apart from the other matters to which I have already referred.
68. For all these reasons, I conclude that the *Welwyn* principle has not been replaced by the provisions introduced by section 124 of the Localism Act 2011 and I reject ground 1.

Ground 2

69. On the basis that the *Welwyn* principle remains good law because it has not been replaced by the PEO code, the Appellant challenges the legality of the Inspector's application of the principle.
70. The first criticism relates to the legal adequacy of the tests which the Inspector applied. The Appellant accepts that the four criteria set out by the Inspector in paragraph 27 of his decision were correctly distilled from paragraph 56 of Lord Mance's judgment in *Welwyn* and were relevant factors for the Inspector to apply. However, Mr. Brown QC submits that those four factors did not go far enough. He criticised the Inspector for failing also to identify circumstances which were sufficiently serious or exceptional as to fall within the scope of the *Welwyn* principle. He submitted that in paragraph 62 of the decision letter the Inspector erred because he treated the facts of the present case as falling within the *Welwyn* principle albeit that they were "less obviously shocking" than in the earlier case.
71. I cannot accept this submission. The Inspector made plain his conclusion that the four criteria derived from paragraph 56 of *Welwyn* had been well satisfied in the present case (paragraphs 52 to 53, 57 to 59 and 62). For the reasons given in paragraphs 35 and 36 above, the Inspector was not required to go further and apply an "exceptionality" test or to consider whether the conduct had been "truly egregious". I reject the first criticism.
72. The second criticism concerned paragraph 61 of the decision letter in which the Inspector noted that the deception did not relate to the initial obtaining of planning permission for the building itself, as in Mr Beesley's case. Instead, it only concerned "the conversion works and the provision of windows and roof lights and the means by which planning permission was obtained for the latter." There is no merit in this argument at all. The *Welwyn* principle is not confined to cases where a building is erected without a planning permission at all, or where a planning permission is obtained but the owner intended to use the building for a purpose outwith that permission from the outset. The principle also applies to changes of use within a building already erected, whether to a dwelling house or to some other use, for which the time limits are 4 years and 10 years respectively (section 171B(2) and (3)). The starting point is to identify the relevant limitation period, so as to be able to determine whether there is sufficient evidence of a positive deception engaging the *Welwyn* principle *in relation to that period* (see paragraph 58 at [2011] 2 AC 330). The issue raised by *Welwyn* is whether the landowner has behaved in such a way as to take himself outside the scope of the relevant time limit in section 171B.
73. In the present case, the breach of planning control alleged in the enforcement notice was a change of use to a dwelling house. Therefore it was necessary for the Inspector to consider whether there had been concealment by positive deception of that change of use from around the time when the limitation period of 4 years started to run. There was no legal requirement for the Inspector to consider whether there had been deception from the time when the barn was erected in 2004. The breach of planning control alleged in this case did not raise that issue.
74. The Inspector found that the change of use to a dwelling house occurred between 6 February and 26 June 2009 (paragraph 25 of the decision letter). He then focussed upon the Appellant's conduct from around the time when the breach of planning control commenced. I cannot see any error of law in that approach.
75. I would add that although the Inspector set out his reasoning between paragraphs 28 and 51 under four headings corresponding to the four criteria in *Welwyn*, the Inspector's reasoning should be read as a whole. Some of the findings under one heading are also relevant under another. For example, paragraphs 45 to 48 under the second heading are also relevant under the first.

76. I turn to the Appellant's third criticism. In the present case, the dormer windows and roof lights were inserted initially without planning permission and so a retrospective application for planning permission had to be made in order to regularise the position (paragraph 9 of the decision letter). Mr Brown QC criticised the Inspector's statement in paragraph 18 that no reference had been made in that application to the building being used for residential purposes and that Question 18 had been answered "no". He pointed out that in cross-examination Mrs Lee, a witness for WCC, had accepted that if the question were to be taken literally as relating simply to the application to retain the works carried out to the roof, then the question had been answered correctly. This was recorded by the Inspector in paragraph 30 of the decision letter.
77. The submission is unsustainable, however, because paragraph 29 (and see also paragraph 38) refers to contemporaneous correspondence in which the Appellant had referred to the barn as an "agricultural building" and to Part 6 permitted development rights for an agricultural building (i.e. under the Town and Country Planning (General Permitted Development) Order 1995). In letters dated 2 and 7 May 2009 Mr Jackson had stated that "the agricultural building's agreed usage remains unchanged" and the dormers and roof lights are "for the introduction of light only". But as the Inspector pointed out, at the time those letters were written, Mr Jackson's evidence to the inquiry was that the change of use to residential had already occurred 3 months beforehand (paragraphs 18, 20, and 29).
78. Moreover, the Inspector did not rely upon that material in isolation from the remainder of the evidence. His overall conclusion was that the Appellant had not merely kept a low profile in the hope of remaining undetected, but had relied upon a strategy of deception "aimed at giving the Council's officers assurances that there was no intention to use the barn for residential purposes with the aim of "putting them off the scent" so that his son could continue to live in the barn undetected" (paragraphs 41 and 52).
79. The fourth criticism relied upon paragraph 52 of the decision letter in which the Inspector recorded the Appellant's contention that he had never been asked outright the question "whether the barn was being used for residential purposes" and that if he had been "he would have had to inform them [WCC] of a residential use of the barn" (see also paragraph 45). The Inspector is criticised for basing his decision on an *omission* on the part of the Appellant, rather than finding that he had committed a *positive deception*.
80. But the Inspector attached "little weight" to the Appellant's contention because "what evidence there is of his dealings with the Council indicate that he was prepared to make false statements, aimed to deceive, in the light of what he now claims was happening." The Inspector was referring to other evidence, which he accepted, in paragraphs 28, 31 and 43 to 47 to the effect that, at the relevant time, WCC's officers were informed by Mr Jackson that the building was to be used for non-residential purposes (i.e. as a mess area for employees) and there was no intention to use it as a dwelling. No criticism has been addressed to those paragraphs, nor could there be (see e.g. footnote 36 of the Appellant's skeleton).
81. Furthermore, the Inspector also relied upon his careful analysis of the layout of the flat and its fittings (see paragraphs 32 to 34), which led to his conclusion that "the evidence strongly pointed to an intention to convert the roof space to permanent living accommodation *from the start*, rather than initially as a facility for employees, for the appellant's son to occupy on a permanent, not temporary, basis" (emphasis added). No criticism has been made of that part of the decision letter.
82. When the decision letter is read fairly and as a whole, it is plain that the Inspector reached conclusions on matters of fact which were for him to determine, which cannot be faulted in law and which do not reveal any failure to apply the *Welwyn* principle correctly. Accordingly, I reject ground 2.

Conclusion

83. For all the reasons set out above, the grounds of challenge fail and the appeal is dismissed.

¹ I note that although the enforcement notice concerned a *mixed* use of the *entire* building and not simply a residential use of the first floor, the appeal before the Inspector was argued, and his decision was reached, on the basis that the time limit in section 171B(2) applied. I queried that approach during submissions and was told that the point is not being taken in this appeal to the High Court.