

ENGLAND AND WALES / JUDGMENT

Tony Leigh v Secretary of State for Housing, Communities and Local Government & Anor

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Neutral Citation Number: [2026] EWHC 537 (Admin) IN THE HIGH COURT OF JUSTICE KING'S BENCH DIVISION PLANNING COURT Case No: AC-2025-LON-004156 Royal Courts of Justice Strand, London, WC2A 2LL Date: 13 March 2026 Before: TIM SMITH (sitting as a Deputy High Court Judge)

- ----- Between: TONY LEIGH
- and – Claimant SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT (1) CHICHESTER DISTRICT COUNCIL (2) Defendants
- ----- Mr Stephen Whale (instructed under Public Access) for the Claimant Mr Jonathan Welch (instructed by Government Legal Department) for the First Defendant The Second Defendant did not appear and was not represented Hearing date: 27th February 2026
- ----- Approved Judgment This judgment was handed down remotely at 10.00am on 13 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives. MR JUSTICE LINDEN MR TIM SMITH (sitting as a Deputy High Court Judge): 1) 2) 3) 4) 5) 6) 7) 8) 9) This is my judgment following the oral permission hearing in the above case. I heard oral argument from the parties on the afternoon of 27th February 2026. At the conclusion of their submissions I indicated that I would reserve judgment on the question of whether permission should be granted. The mere fact that I wished to take time to marshal my thoughts after the hearing does not signal that the grounds must inevitably therefore be arguable. Indeed – as will be seen from the discussion below - having reflected on the parties' submissions I have concluded that the claim is not arguable and that permission should be refused on all grounds. The claim relates to a challenge by the Claimant, Mr Leigh, against a decision of one of the First Defendant Secretary of State's Planning Inspectors. That decision concerned the Claimant's appeal against a refusal by the local planning authority, Chichester District Council ("the Council"), of his application for a Lawful Development Certificate. The relevant background facts are as follows. The Claimant owns a site known as Long Acres, at Drift Lane, Chidham, West Sussex ("the Site"). He acknowledges that he carried out certain activities at the Site, in

the form of laying hardstanding and creating an earth bund, without planning permission. His evidence is that these activities were carried out in the summer of 2018. On 18 August 2022 the Council served an enforcement notice on the Claimant (“the Notice”) alleging a breach of planning control as follows: “Without planning permission, the siting of storage container buildings, the construction of hardstanding and creation of earth bunds all in the approximate positions shown on the attached plan” The Notice stated that it would take effect on 29th September 2022 unless an appeal was made against it beforehand. No appeal was made. Accordingly the Notice took effect on 29th September 2022. It appears that its terms have never been complied with. Subsequently, on 8 September 2023, the Claimant submitted an application (“the Application”) for a Lawful Development Certificate to the Council pursuant to section 191 of the Town & Country Planning Act 1990 (“the 1990 Act”). The Application was accompanied by evidence (including a sworn statutory declaration) and sought the grant of a certificate from the Council in the following terms: “The development for which an LDC is sought is hardstanding and earth bund on the land for in excess of 4 years prior to service of Enforcement Notice on 18 th August 2022” 10) 11) 12) 13) This, it is said by Mr Stephen Whale, who appears on behalf of the Claimant, should have led to the grant of a Certificate if the evidence of the Claimant were accepted. The Council refused the Application on 30 October 2023 on the grounds that it was not satisfied from the evidence that “... on the balance of probabilities, the building operations ... has taken place for a continuous period of four years prior to the service of the Enforcement Notice”. The Claimant appealed against the refusal. The appeal was determined by Mr Mark Harbottle, an Inspector appointed by the Secretary of State to determine the appeal (“the Inspector”). This he did based on the written representations of the parties. By his decision letter (“DL”) dated 13 October 2025 the Inspector dismissed the appeal. The salient parts of the DL are as follows:

- a) On the principal factual ground raised by the Claimant, and dismissed by the Council, the Inspector agreed with the Claimant. He concluded that the works in question were substantially completed before 8 September 2019. He described that date as the “Relevant Date” on the basis that this was four years before the date of the Application; but
- b) He nevertheless concluded that the appeal should fail because at the time the Application was made there was in force an enforcement notice applying to the works. He stated (at DL16-17): “16. Section 191(4) of the Act specifies that a decision to issue or refuse to issue an LDC must be made based on the lawfulness of the matter “at the time of the application”.
17. The enforcement notice requiring the hardstanding and earth bund to be broken up and removed from the land had taken effect on 29 September 2022 and was still in force on the date the application was made. Accordingly, the hardstanding and earth bund contravened the requirements of an enforcement notice then in force, so they were not lawful by reason of section 191(2)(b) of the Act”

- 13) Mr Whale mounts four grounds of challenge against the DL, which may briefly be summarised as follows:
 - a) Ground 1: wrong determination regarding the ability to take enforcement action against the works
 - b) Ground 2: failure to determine whether the works were substantially completed before the Notice was served
 - c) Ground 3: wrong conclusion that “lawfulness” for the purposes of s191(4) has to be judged at the date of the Application
 - d) Ground 4: wrong conclusion that s191(2)(b)’s reference to an enforcement notice “then in force” refers to notices in force at the Application date 14) In my judgement the key parts of the legislative framework are sections 191(2) and 191(4) of the 1990 Act. S191(2) provides as follows: “(2) 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 (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
 - (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force” 15) S191(4) provides as follows: “(4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application” 16) At first blush the statutory provisions are not a promising start for the Claimant. I indicated to Mr Whale at the outset of the hearing that I was in difficulties with understanding how - in the light of section 191(2)(b) in particular - the challenge could get off the ground in circumstances where:
 - a) Section 191(2) includes two criteria – paragraphs (a) and (b) – both of which need to be satisfied (a point the Inspector noted expressly at DL6),
 - b) Having regard to the criteria in paragraph (b) there was undeniably an enforcement notice which bore directly on the activities which were the subject of the Application, c) d) In those circumstances it was difficult to see how paragraph (b) could ever be satisfied, and If the above were correct then the appeal before the Inspector was doomed to fail from the outset, and hence none of the four grounds of challenge now advanced could bring about a different outcome even if they were accepted 17) 18) 19) In introducing his oral submissions to me, Mr Whale’s short answer was that, when section 191(2)(b) referred to development contravening the requirements of any enforcement notice “then in force”, the “then” meant the point in time at which immunity from enforcement action became available (per section 191(2)(a)) and not the point in time at which the Application were submitted. In testing this proposition with Mr Whale, he accepted that the challenge would stand or fall by whether

his interpretation of “then in force” were correct. Both Counsel referred me to the case of R (Ocado Retail Limited) v Islington London Borough Council [2021] PTSR 1833, a judgment of Holgate J (as he then was). Both of them claimed that the decision supported their case. 20) Ocado concerned a challenge to the decision of Islington Council to revoke a Lawful Development Certificate that had been granted to the retailer. Much of the case therefore considered the provisions of section 193 of the 1990 Act, which do not arise here, but there was also consideration of section 191(2) in the context of when immunity from enforcement action arose. 21) For the Claimant, Mr Whale relied in part on [143] of the judgment which includes the following passage: “s.191(1) does not define lawfulness. That is left to s.191(2) and (3) where it is crucial to note that a use, operation or breach is declared to be lawful “at any time” and not simply by reference to the date when an application for a CLEUD happens to be made” 22) In relation to the question of when lawfulness has to be judged, for the Secretary of State Mr Jonathan Welch referred me to the following passage in [152] of Ocado, emphasising in particular the extract that I have underlined: “The judge in Ellis stated at [54] that Nicholson had been approved in Swale

[2006] J. P. L 886 at [6]. But in my judgment it is important to note that all that Keene LJ said in that passage was that the issue of whether enforcement action can be taken against a breach of planning control, in that case a change of use, is to be judged as at the date of the application for the CLEUD. In other words, the question of lawfulness is to be judged as at that date (see s.191(2) to (4)).” 23) That reference to Swale is to the decision of the Court of Appeal in Swale Borough Council v First Secretary of State [2006] JPL 886. At [6] of Swale, Keene LJ (who gave the leading judgment) said as follows: “6. Section 191(2) tells one what is meant by a lawful use. It provides: “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 (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
- (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.” There is no suggestion in the present case that paragraph (b) has any application. Consequently, the issue that the Inspector had to determine was whether enforcement action could be taken against the residential use of the building, that issue to be judged as at the date of the application for the certificate: see Nicholson v Secretary of State for the Environment [1998] 76 PCR 191.” 24) 25) 26) 27) 28) 29) 30) 31) I draw attention in particular to the sentence “There is no suggestion in the present case that paragraph (b) has any application”. That is because in Swale – unlike in the present case – there was no extant enforcement notice. Put at its highest for the Claimant, therefore, Swale is neutral on the argument now advanced by Mr Whale regarding s191(2)(b). The extract from Ocado from which I have drawn most assistance, following Mr Welch’s submissions, is [146]. There, in considering the words of sections 191(2)(b) and 191(3)(b), Holgate J observed: “... they operate by making it clear that a lawful right does not accrue upon the expiration of a time

limit in s.171B for taking enforcement action if the use, operation, or breach of condition in question contravenes the requirements of an enforcement notice then in force. In other words, Parliament did not wish an extant enforcement notice (or breach of condition notice) to be negated by the subsequent application of a time limit in s.171B to something which contravened the requirements of that notice. The position would be different if at the time the relevant period in s.171B expired the notice had ceased to be in force” (italicised emphasis is from the original text; the bold emphasis is my own) Those are the facts of this case. The Notice covers the activities which the Application seeks to declare as lawful. For all Mr Whale’s enticing submissions about arguability – capably delivered though they were - it seems to me that this case is more straightforward than the arguments of the parties may necessarily suggest. The real issue seems to me to be captured succinctly by this last extract from the judgment of Holgate J in *Ocado* at [146] which I have set out above. I have quoted from s191(2) already. What is clear from this is that an applicant for a certificate must satisfy the criteria in both paragraph (a) and paragraph (b) and that a determination must be made as at the date the application was submitted, by reason of the clear words of s191(4) (a point the Inspector noted expressly at DL16). The Inspector addressed s191(2)(a), no doubt because this was the point of contention raised by the Council in its refusal (namely to consider the adequacy of the evidence in making good the substance of the Application regarding immunity from enforcement action). I observe in passing that, having done so, he made a finding in favour of the Claimant on that point. But to my mind s191(2)(a) is an unnecessary distraction for this challenge given the facts of the case. The pivotal question on the facts related instead to s191(2)(b). At the date of the Application, undeniably there was an enforcement notice in force and it bore directly upon the substance of the Application. The hardstanding and the earth bunds had been declared by the Notice to be unlawful. The Notice could have been appealed but it was not. As such, it came into force in September 2022 – almost a year before the Application was made – and, so far as I can see, it continues in force. That point, it seems to me, is a complete answer to the Application and subsequent appeal, and it is a complete answer to this claim. To be eligible for the grant of a certificate the Claimant had to satisfy both paragraphs (a) and (b) of section 191. But he could not. Paragraph (b) was not met. 32) 33) 34) 35) 36) 37) 38) That, it seems to me, is both a clear and an entirely logical conclusion. I say so for four reasons. Firstly, viewed through the lens of common sense, it would be counter-intuitive for development that has been stipulated to be unlawful in an extant enforcement notice to nevertheless be declared lawful by the grant of a certificate. Mr Whale accepted that, even if he were correct in his interpretation of s191(2), the grant of a certificate would not automatically override the Notice. There would need to be, as he put it, “a discussion” with the local planning authority in an attempt to persuade them to withdraw the Notice in light of the subsequent grant of the certificate. Any such request of the local authority to withdraw the notice would need to be considered under the aegis of *Wednesbury* rationality, but even so the fact that the Notice would survive the grant of a lawful development certificate for the same set of works (as Mr Whale conceded) underscores the artificiality of the outcome which Mr Whale advocates. Secondly, if Mr Whale’s interpretation were correct then the requirements of an extant

enforcement notice that had either not been appealed (as here), or had been appealed unsuccessfully, could be bypassed merely by the grant of a certificate application. That would lead to the undesirable outcome highlighted by Holgate J in

- [146] of Ocado to which I have referred above. Thirdly, whilst I put it to Mr Welch that I was not sure the phrase “collateral challenge” which he used is entirely apt in these unusual circumstances, certainly a conclusion contrary to that reached by Holgate J would allow a second bite of the cherry for a land owner who had previously been faced with an enforcement notice which had already taken effect, no matter how long before the application that had happened. That would be contrary to the principle of certainty which is part of the foundation of our planning system. Finally, despite Mr Whale’s submissions based upon his hypothetical development completed 70 years before an enforcement notice was served, I consider that there is nothing absurd about the result. Applicants such as the Claimant are not being deprived of a remedy by this interpretation of s191(2)(b). The very arguments which were made as part of the Application could have been mounted as a ‘ground (d)’ appeal against the Notice. And here, given the Inspector’s conclusions on the s191(2)
- (a) limb, those arguments, had they been made, may well have prevailed. But no appeal was made. Mr Whale concedes that there is no good reason why it was not, and that – as the Claimant’s evidence records – the failure to appeal the Notice was now something he deeply regretted. But the opportunity was there. The fact that it was not availed by the Claimant cannot render the consequences of that failure unfair and unlawful. The result of all the above considerations is that there was an enforcement notice in force at the time the Application was submitted; section 191(2)(b) could not therefore be satisfied; and the Application was doomed to fail. The Inspector’s conclusions on the s191(2)(b) point, at DL16-17, are in my judgement unimpeachable – let alone arguably incorrect. That the Inspector was also encouraged by the parties’ submissions to consider the criteria in s191(2)(a) do not detract from his conclusions on paragraph (b), nor does the fact that he ultimately favoured the Claimant’s case on paragraph (a). 39) 40) For these reasons the dismissal of the appeal was inevitable and none of the grounds are arguable. The claim must therefore fail. Post-judgment note: after I had circulated my judgment in draft to the parties they agreed an appropriate form of Order. The agreed form sought permission for this judgment to be referred to in future proceedings, notwithstanding that it is a judgment on an application for permission rather than a final hearing. I have no difficulties with agreeing to the request, and I therefore grant permission for this judgment to be referred to.

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