

Deliberate concealment Abstract

Purpose *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government*¹ (*Beesley* hereafter) and *Fidler v Secretary of State for Communities and Local Government*² (*Fidler* hereafter) are two recent cases concerning deliberately concealed breaches of planning control. The defendants engaged in dishonest and misleading conduct, in an attempt to rely on a loophole within section 171B of the Town and Country Planning Act 1990 (T&CPA).³ This article critically analyses two solutions which were created to close the loophole, in addition, the article analyses various alternative remedies that have been suggested, and lastly, whether the present law has been sufficient to remedy the situation.

Approach The T&CPA is a key piece of legislation regulating planning controls; section 171A-C provides the time limits for taking enforcement action against a breach of planning control. In order to achieve the above purpose, an evaluation of those provisions will be undertaken in detail. Subsequently, this article will analyse two solutions which were created to close the loophole; firstly, the Supreme Court (SC) decision,³ and secondly, Parliament's decision to amend the T&CPA without awaiting the SC's decision.⁴

Findings This research concludes that Parliament should have awaited the SC's decision before amending statute to prohibit reliance upon the expiration of time where there is an element of deliberate concealment. Additionally, this article suggests that the statutory amendments were not required in light of the SC's solution in *Beesley*. As a result of Parliament's ill-considered decision, uncertainty has permeated through the conveyancing process, causing ambiguity, delays and additional expense in transactions at a time when a precarious property market needs anything but uncertainty.

Research Limitations The scope of this research is limited to deliberate concealment of breaches of planning control and the four-year enforcement period; whilst considering the consequences of the solutions proposed it does not provide a detailed overview of the planning system, but rather assumes prior knowledge.

Originality This article offers a unique assessment of the law relating to the deliberate concealment of planning breaches and offers a thorough criticism of the law with recommendations for reform. Additionally, a variety of alternative solutions are considered. Both legal academics, planning professionals and those interested in planning law will find the paper a thought-provoking digest.

Keywords Planning Law, Deliberate Concealment, Planning Law Breaches, Environment, Development, Private Property.

¹ [2009] EWHC 966 (Admin); [2010] EWCA Civ 26; [2011] UKSC 15

² [2010] EWHC 143 (Admin); [2011] EWCA Civ 1159

³ *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government* [2011] UKSC 15

⁴ Section 124 of the Localism Act 2011

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Paper type Research article

1) Introduction to *Beesley & Fidler*

Planning cases rarely hit the headlines;⁵ ‘enforcement is perhaps the Cinderella of planning, ignored by most, for most of the time’.⁶ Recently however, Welwyn Hatfield Council, were faced with the case of *Beesley*.⁷ In 2000, the Local Planning Authority (LPA hereafter) granted *Beesley* planning permission to build a barn on green belt land, with the condition it would be used as agricultural storage. *Beesley* built what resembled the exterior of a barn; the interior however, was a three bedroom house.⁸ In 2002 *Beesley* and his family moved into the barn, they lived there for four continuous years and in 2006 applied for a certificate of lawfulness of existing use or development (CLEUD hereafter).⁹ In his application *Beesley* ingeniously relied on s.171B(2),¹⁰ stating there had been a material change of use; a storage barn to a residential dwelling, which took place four years prior.

~~Subsequently, an application for a CLEUD was made to certify the building as lawful and immune from enforcement action. Consequently, the barn ought to be immune from enforcement action and therefore, he made an application for a CLEUD to certify the building as lawful.~~

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⁵ Martin Edwards "Planning Case update" [2012] J.P.L. Issue 4, 374-395, 374 Martin Edwards (n 25) 379

⁶ Neil Cameron QC "Enforcement of Planning Law – some Recent Issues" [2010] J.P.L., 11, 1397 -1405, 1397 Neil Cameron (n 10) 1397

⁷ *Beesley* (n 1)

⁸ -- "Couple lose four year battle over £500,000 home they hid inside this barn" (2011) <http://www.dailymail.co.uk/news/article-1374193/Couple-lose-battle-500-000-home-hid-inside-barn.html> - accessed 5th November 2015

⁹ S.191 of T&CPA 1990

¹⁰ S.171B(2) of the T&CPA 1990

Around the same time, Reigate and Banstead Borough Council alongside the public were left stunned when what had previously been bales of straw covered by plastic tarpaulin, was now a castle complete with ramparts.¹¹ Fidler¹² commenced building work in 2002, but concealed the development for four continuous years; working only at night-time and via the disguise mentioned in the evidence to be considered by the Tribunal, he worked in the building in the night, the LPA did not know of his plans and failed to notice the castle, but inadvertently took photos of the straw bales.¹³ Four years after completing the building work Fidler could not have been aware of the fact that the castle was being built in the night and therefore could not have been granted retrospective immunity. Planning permission could not have been granted retrospectively, because the development was on green belt land and therefore would be contrary to the National Planning Policy Framework (NPPF hereafter).¹⁴ Subsequently, the LPA therefore served an enforcement notice, requiring demolition.¹⁵ ~~Planning permission could not have been granted~~ substantially complete for four years and therefore ought to be immune from enforcement action under s.171B(1).¹⁷

In both cases, the LPA's appeared to be cornered by the unequivocal wording of s.171B.¹⁸ Additionally, the Court of Appeal (CA hereafter) had previously ruled, in the case of *Arun District Council v First Secretary of State*,¹⁹ that the intentions of the person applying for a CLEUD, are irrelevant, even if the application is dishonest.²⁰ The fact 'dishonesty' did not stop the four-year rule from operating, would undoubtedly encourage the

¹¹ --"Timeline: Farmer's 'hidden castle' battle" (November, 2015) <http://www.bbc.co.uk/news/uk-england-surrey-394585555> - accessed 21st December 2015

¹² *Fidler (n 2)*

¹³ -- "Timeline: Farmer's 'hidden castle' battle" (n 11)

¹⁴ Department for Communities and Local Government "National Planning Policy Framework" (2012) Ministerial foreword 11 part 9

¹⁵ Reigate and Banstead Borough Council served Fidler 6 enforcement notices – requiring various parts of the development to be demolished

¹⁶ Department for Communities and Local Government "National Planning Policy Framework" (2012) Ministerial foreword 11 part 9

¹⁷ Robert Fidler of Honeycrook Farm, Axes Lane, Salford, Surrey, RH1 5QL - Inspectorate Decision (7th May 2008) APP/3625/C/07/2036100; 171B(1) of the T&CPA 1990

¹⁸ S.171B of the T&CPA 1990

¹⁹ *Arun District Council v First Secretary of State* [2006] EWCA Civ 1172 para 35-36

unscrupulous developer to try his luck;²¹ as demonstrated by *Beesley* and *Fidler*.²² Clearly Evidently, a substantial loophole existed, which if ignored, would be detrimental to the public's confidence in the system; the floodgates would ~~be~~ open, allowing individuals to exploit the law.²³ Additionally, authorities would need to look carefully at every development;²⁴ external inspections alone would be fruitless, because as demonstrated external appearances can be highly misleading.²⁴ LPA's would need to be alert to the possibility of deception in almost every development.²⁵

The four-year rule originated from the Carnwath report²⁶, which argued that a breach of planning control could not have caused harm if the LPA failed to take enforcement action within a timely manner.²⁷ For the majority of cases, the time limits provide ample time to discover breaches of planning control.²⁸ However, it would be unrealistic to say no harm had been caused simply because the LPA omitted to take enforcement action. ~~as it~~ there are various reasons why LPA's remain unaware of a breach until time has expired:²⁹ neighbours may resist complaining, onlookers may be unaware the development is unlawful; the development may be in a remote locations with no overlooking properties; and lastly, the focus of this article, ~~when~~ the developer may have sets out with the intention to conceal the development. Ideally, LPA's would carry out routine inspections of every development they

²⁰ Martin Goodall "Mr Fidler's Castle" (November, 2015) <<http://planninglawblog.blogspot.co.uk/2015/11/mr-fidlers-castle.html>> accessed 17th December 2015

²¹ Christopher Barclay, Chris Sear, Wendy Wilson 'Localism Bill: Committee Stage Report' (Research Paper 11/32, House of Commons Library, 12 April 2011) 40 from PBC Deb 1 March 2011 c672 c726 (Jack Dromey) <<http://researchbriefings.files.parliament.uk/documents/RP11-32/RP11-32.pdf>> accessed 20th October 2015

²² *Beesley* (n 1) and *Fidler* (n 2)

²³ Martin Edwards (n 5) 379

²⁴ *Beesley* CA (n 1) 53 (Richard LJ)

²⁵ *Ibid* 35

²⁶ Robert Carnwath report to Secretary of State on "Enforcing Planning Control" (HMSO, February 1989) para 3.2 (as cited in Richard Humphreys QC "20 years of the 10 year period for enforcement: time for reform?" [2011] J.P.L., 5, 522-526, 522) it is not possible to access a copy of the original report; Planning and Compensation Act 1991 (now subsumed within the T&CPA); section 4 of the 1991 Act introduced s.171B into T&CPA 1990

²⁷ Humphreys (Ibid) 522

²⁸ Claire Fellows "Establishing Lawfulness by Deception" [2010] J.P.L., 8, 965-969, 968

²⁹ For more on this see: Humphreys "20 years..." (n 26) 523

grant permission ~~for to~~ (although notably that would not help in cases similar to Fidler³⁰, where no application for planning was made). However, few, if any LPA's carry out systematic checks of their area, mostly due to lack of resources and recent government cuts.³¹ Accordingly, both LPA's endeavoured to challenge the cases to close the loophole and prevent the floodgates opening.

2a) Judicial Reaction to Beesley³²...

Welwyn Hatfield Council sparked the start of their battle when they refused to grant Beesley a CLEUD.³³ However, in light of *Arun*,³⁴ it was not surprising leave to appeal was granted. On appeal to the High Court (HC hereafter), the council contested the case on the grounds ~~that~~ deceit should invalidate the reliance on the four-year rule.³⁵ Collins J, likened Beesley's action to fraud, as he had concealed the full extent of the development from the outset; had he been honest, planning permission would never have been granted. For that reason, the HC agreed with the council and quashed the appeal.³⁶

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The technical reasoning behind the judgement is rather puzzling;³⁷ it was based on the argument there had been no change in use, meaning s.171B(2) did not apply.³⁸ ~~Collins J argued the barn went from a nil use to a residential use and therefore no change had occurred.~~³⁹ ~~Beesley on the other hand,~~ argued the material change of use was ~~from~~ a storage barn to a residential dwelling. ~~Collins J however, argued the barn went from a nil use to a~~ the requirements of s.171B(2). ~~The HC however, were not convinced, nevertheless it did not~~

³⁰ ~~Fidler (n 2)~~

³¹ Christopher Barclay, Wendy Wilson 'Localism Bill: Planning and Housing Bill 126 2010/11' (Research Paper 11/03, House of Commons Library, 11 January 2011) 29 from HC Deb 19 June 2007 cc375-9WH <<http://www.parliament.uk/briefing-papers/RP11-02.pdf>> accessed 20th October 2015

³² ~~Beesley (n 1)~~

³³ Alan Beesley of Northaw Brook Meadow, Coopers Land Road, Northaw, Potters Bar, Hertfordshire, EN6 4FB – Inspectorate Decision (3rd June 2008) APP/C1950/X/07/2054801

³⁴ ~~Arun (n 18)~~

³⁵ ~~Beesley HC (n 1)~~

³⁶ ~~Ibid 36 (Collins J)~~

³⁷ -- Current Topics "Established Use by Deception" [2010] J.P.L. 1, 2-4, 3

³⁸ ~~Beesley HC (n 1) 25 (Collins J)~~

technical ~~concept, which is and~~ arguably 'grasping at straws'.⁴² Counsel for Beesley warned Collins J about twisting the law in favour of the LPA.⁴³ Collins J defended his judgement stating, fraud should only ever succeed if the statute specifically provides for such a conclusion,⁴⁴ which in this case it did not.

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Although ~~it is,~~ perhaps difficult to understand the logic underpinning his judgement, namely the nil change in use, only a purist would criticise the decision.⁴⁵ Collins J continued, suggesting obtaining planning permission by deception could amount to a criminal offence and any financial gain could be clawed back under the Proceeds of Crime Act 2002 (POCA hereafter).⁴⁶ These comments were however ~~The HC's judgement was~~ "a straw in the wind";⁴⁷ highlighting the potential precedent for future cases.

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Nevertheless, leave was granted to the CA⁴⁸ where, surprisingly, the council failed to advance any legal argument precluding Beesley from relying on the time limits. They failed to direct the Court to fundamental principles of public policy which courts must apply when interpreting legislation.⁴⁹ Principles such as; statutory provision cannot be used as "an engine to fraud" and the law should serve the public interest.⁵⁰ These principles are widely

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³⁹ Ibid

⁴⁰ Ibid

⁴¹ *Beesley* (n 3)

⁴² -- "Established Use by Deception" (n 36) 3

⁴³ Ibid 4

⁴⁴ *Beesley* HC (n 1) 37 (Collins J)

⁴⁵ Martin Edwards "Commentary: R (on the application of Welwyn Hatfield Council) v Secretary of State for Communities and Local Government and *Beesley* [2009] EWHC 966 (Admin)" [2010] J.P.L. 3 352- 361, 361

⁴⁶ *Beesley* HC (n 1) 39

⁴⁷ Harry Spurr "A Straw in the Wind" (2009) *Estates Gazette*, 934, 78, 78

⁴⁸ *Beesley* CA (n 1)

⁴⁹ Ibid 44-47 (Mummery LJ)

⁵⁰ Ibid 46 (Mummery LJ)– Halsbury's Law of England 'Statute and Legislative process' (Volume 96, 2012) see part 5(2)(iv)(D) 1152 – Law should serve the public interest

applied in various areas of law. There was certainly no compelling reason why they should not be applicable in planning.⁵¹

Due to the Council's omission to raise these arguments, the judges granted leave to appeal to the SC.⁵² Mummery LJ made it clear the outcome would have been different had such argument been put forward. On the contrary, Phil LJ saw "no place for the analysis of the morality" reinstating *Arun*.⁵³ He believed s.171B should be objective.⁵⁴ Additionally he asserted that any exception to the time limits ought to be created through a statutory scheme.⁵⁵

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The council successfully relied upon the 'Connor principle' in the SC; it states "no one shall be allowed to profit from his own wrong".⁵⁶ Although Beesley's conduct was not identifiably criminal nor unlawful, it was a case of positive deception which should not be profited from; which ought not to be profited from.⁵⁷

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Thus, to allow Beesley to rely on the unqualified statutory language would frustrate the policy; indeed, the *raison d'être* of the provision.⁵⁸ It would be unthinkable that parliament would have intended the time limits to apply in such circumstances.⁵⁹ Someone who builds without planning permission and deliberately flouts the law cannot be put in the same position as if he had been honest.⁶⁰ The SC distinguished *Beesley* from

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⁵¹ Lord Denning in *Lazarous Estates Ltd v Beesley* [1956] 1 Q.B. 702 713; *R v South Ribble BC Housing Benefit Review Board Ex p Hamilton* (2001) 33 H.L.R 9 26– "legislation should not be construed as to enable a man to profit from his own fraud"

⁵² *Beesley* CA (n 1) 37, 47 (Mummery LJ) 36 (Richard LJ)

⁵³ *Arun* (n 18)

⁵⁴ *Beesley* CA (n 1) 50 (Phil LJ)

⁵⁵ *Ibid* 52 (Phil LJ)

⁵⁶ derived from *R v Chief National Insurance Commissioner ex p Connor* [1981] QB 758

⁵⁷ *Beesley* SC (n 1) 56 (Lord Mance)

⁵⁸ *Ibid* 63 (Lord Rodger)

⁵⁹ *Ibid*

⁶⁰ *Sumner v Secretary of State for Communities and Local Government* [2010] EWHC 37, 29 (Collins J)

*Arun*⁶¹ based on the facts; the applicant (in *Arun*) had not deceived the LPA, she simply omitted to comply with a condition of the planning permission.⁶² In contrast, *Beesley* had an elaborate and sustained plan to deceive the council from the outset; therefore his conduct was in a category of its own.⁶³

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Consequently, *Beesley* could not obtain a CLEUD and the LPA were entitled to take enforcement action against the unlawful development. The ultimate principle derived from *Beesley* is that 'where a person makes a representation, which amounts to positive deception, in matters integral to the planning process, enforcement action is permitted outside of the time limits'.⁶⁴

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2) Judicial Reaction to *Fidler*⁶⁵

Whether *Fidler's* ruse was ingenious or not is a matter of personal opinion,⁶⁶ but it is unequivocal that ~~both~~ the council, planning inspectorate and HC favoured the LPA,⁶⁷ concluding it was not ingenious enough to circumvent the T&CPA.⁶⁸ The HC believed the development was not "substantially complete", finding that the enforcement clock had not started until the disguise had been removed.⁶⁹ The judiciary applied *Sage v Secretary of State*⁷⁰ where their Lordships favoured a holistic approach to the meaning of "substantially complete", having regard to the totality of the operations which the person originally

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⁶¹ *Arun* (n 18)

⁶² *Arun* (n 18) discussed in *Beesley* SC (n 1) 79 (Lord Brown)– In *Arun* planning permission had been granted, subject to the condition that the extension be used as an additional part to her house and not a separate accommodation, she later rented it out to students and failed to inform the council

⁶³ *Beesley* SC (n 1) 80 (Lord Brown)

⁶⁴ *Fidler* CA (n 2) 13 (Lord Justice Sullivan) summarised by Michael Purdue "Local Government Ombudsman Reports – West Dorset DC 09 000 635 and 09 012 752" [2012] J.P.L., 1, 94 – 98, 94

⁶⁵ *Fidler* (n 2)

⁶⁶ Martin Edwards (n 5) 379

⁶⁷ Council Enforcement Notices (n 14), Inspectorate Decision (n 16) and *Fidler* HC (n 2)

⁶⁸ Martin Edwards (n 5) 379

⁶⁹ *Fidler* HC (n 2) 26 (Sir Thayne Forbes)

⁷⁰ *Sage v Secretary of State for Environment Transport and the Regions* [2003] UKHL 22

contemplated and intended to carry out.⁷¹ Although the HC accepted “hiding something does not take away lawful rights that may accrue due to the passage of time”,⁷² when applying *Sage*,⁷³ four years could not have passed because Fidler had always intended to remove the straw. Thus it formed an integral part of the development meaning it was not “substantially complete” until the disguise had been removed.⁷⁴ Accordingly, the enforcement notice was valid as the four-year time limit had not expired prior to it being served.⁷⁵

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This reasoning was said to be “too clever by half”;⁷⁶ because arguably the building was complete when the building works finished.⁷⁷ The only use and purpose of the straw bales was to hide the castle. They provided no benefit to the building operations. Having said that, a building would not be considered complete if it was still surrounded by scaffolding and hoardings; so perhaps a logical conclusion?⁷⁸ Nevertheless, it was presumed the CA would overturn the decision⁷⁹ following *Arun*.⁸⁰ At the time *Fidler* reached the CA, the SC had not concluded *Beesley*,⁸¹ consequently the case was temporarily held in abeyance.

⁷¹ *Ibid* 6 (Lord Hope)

⁷² *Fidler* HC (n 2) 163 (Sir Thayne Forbes)

⁷³ *Sage* (n 68)

⁷⁴ *Fidler* HC (n 2) 26 (Sir Thayne Forbes)

⁷⁵ *Fidler* HC (n 2) 26 (Sir Thayne Forbes)

⁷⁶ Goodall “Fidler’s castle...” (n 19)

⁷⁷ -- Current Topics “The concealment of Breaches of Planning Control and the Enforcement Time Limits” [2012] J.P.L., 2, 99 – 101, 99

⁷⁸ Richard Harwood “Commentary: Robert Fidler v Secretary of State for Communities and Local Government, Reigate and Banstead BC [2010] EWHC 143 (Admin)” [2010] J.P.L., 7 915 – 925, 925

⁷⁹ Goodall “Fidler’s castle...” (n 19)

⁸⁰ *Arun* (n 18)

⁸¹ *Beesley* SC (n 1)

In the SC's judgement of *Beesley*, Lord Brown stated, *obiter dictum*, it was plain the 'Connor principle' could be applied to ~~prohibit Fidler to prohibit him~~ from benefitting from his dishonest conduct.⁸²

Consequently, the CA found *Fidler's* case to be a "paradigm case of deception, which disentitled him from relying on the time limits".⁸³ Although *Fidler*⁸⁴ had stretched the meaning of "substantial completion" to breaking point, the "mental gymnastics" of such reasoning was now obsolete,⁸⁵ ~~as the the~~ case would have failed ~~irrespectively~~ due to *Beesley*.⁸⁶ It could not be said that the council should have spotted the building earlier; to do so would frustrate the purpose of the statute.⁸⁷ Additionally, it would be a disservice to the parties and the paying public to permit further time and money to be spent appealing the case.⁸⁸ Having said that, *Fidler* spent a further four years battling the enforcement decision by applying for planning permission and CLEUDS; he proposed several arguments⁸⁹ however all "to no avail".⁹⁰ In November 2015, *Fidler* was sentenced to a three month suspended prison sentence for contempt of court; requiring compliance by 6th June 2016.⁹¹

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⁸² *Beesley* SC (n 1) 81/82 (Lord Brown)

⁸³ *Fidler* CA (n 2) 13 (Sullivan J)

⁸⁴ *Fidler* (n 2)

⁸⁵ Ashley Bowes "Summaries of Cases: R (on the application of *Fidler*) v Secretary of State for Communities and Local Government [2011] EWCA Civ 1159 [2012] JPL, Issue 4, 490-49, 490

⁸⁶ *Ibid*

⁸⁷ Goodall "Fidler's castle..." (n 19)

⁸⁸ *Fidler* CA (n 2) 16 (Longmore J)

⁸⁹ He had sold the property, he needed to retain the property for agricultural use and lastly the presence of bats and newts prevented him from demolishing the building

⁹⁰ Goodall "Fidler's castle..." (n 19) and *South Hams DC v Halsey* [1996] J.P.L 761 where the CA decided that requiring a licence or consent order, in order to comply with an enforcement notice is not an excuse for non-compliance, unless the licence is denied

⁹¹ *Reigate and Banstead Borough Council v Fidler* [2015] EWHC 3863 (QB) - The LPA obtained an injunction against *Fidler* under s.187B of the T&CPA, due to his failure and refusal to comply with the court order to demolish the unlawful development

Finally, in April 2016 Fidler began demolition of the castle,⁹² demonstrating the power of criminal sanctions.

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3) The United Kingdom Government's response

Despite the courts successfully closing the loophole, the government felt compelled to amend the legislation to ensure that dishonesty was not more profitable than honesty.⁹³ The government enacted the Localism Act 2011 (LA'11 hereafter) which provided for stronger enforcement provisions,⁹⁴ with the objective of restoring the public's confidence by providing LPA's additional powers to tackle abuse of the planning system.⁹⁵ Section 124 inserted s.171BA-C into the T&CPA.⁹⁶ These provisions revised the time limits for deliberately concealed breaches of planning control, precluding those from benefitting from the enforcement window expiring.⁹⁷ The government's reaction is said to be a "quick fix"⁹⁸ solution. They did not await the SC to conclude *Beesley*⁹⁹, had they done so, it would be evident an adequate remedy had been adopted.

3.1) How the new provisions, s.171BA-C, will operate

Section 171BA states LPA's may apply to a magistrate's court for a planning enforcement order (PEO hereafter) where they believe the apparent breaches of planning

⁹² Martin Goodall "Mr Fidler's castle comes down" (April 2016) <<http://planninglawblog.blogspot.co.uk/search?updated-min=2016-01-01T00:00:00Z&updated-max=2017-01-01T00:00:00Z&max-results=17>> accessed 10th April 2016

⁹³ Scott Stemp "Why Plato is Wrong" (2011) <<http://planningblog.org/2011/02/13/why-plato-is-wrong/>> accessed 30/10/2015

⁹⁴ These were set out in Conservative Party 'Open Source Planning Green Paper No.14' (2010, Conservative party) as referred to in Harriet Townsend "In control" (2011) <http://www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=6009%3Ain-control&catid=63%3Aplanning-articles&Itemid=1> accessed 30th March 2016 and Localism Bill HL (Session 2010-12) [90] Part 5

⁹⁵ Department for Communities and Local Government "A plain English guide to the Localism Act" (2011) 13

⁹⁶ Section 124 of the Localism Act 2011 inserted Section 171BA-C into the T&CPA 1990

⁹⁷ Department for Communities and Local Governments 'Localism Bill: enforcement package, impact assessment' (January 31, 2011)12

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6028/1829785.pdf> accessed 7th November 2015

⁹⁸ Emma Hatfield "A sledge hammer to crack a small nut": An analysis of section 124 of the Localism Act 2011" (2013) C&PL, 1, 48-60, 59/60 at 59/60

⁹⁹ Beesley (n 1)

control has been deliberately concealed.¹⁰⁰ A PEO allows a LPA an additional year¹⁰¹ to seek enforcement, despite the fact the enforcement window, namely four or ten years, has expired.¹⁰² A LPA has six months to apply for a PEO¹⁰³ from the date sufficient evidence comes to light.¹⁰⁴ The court may grant a PEO, if satisfied on the balance of probabilities, the apparent breach or any matter constituting to the breach, has (to an extent) been deliberately concealed, and having considered all circumstances the court considers it 'just'.¹⁰⁵

Effectively, the provision allows LPAs to take enforcement action beyond the limitation period provided they obtain a PEO from the magistrates. Consequently, the incentive to conceal a breach is removed, as no amount of time that passes can be regarded as 'safe'.¹⁰⁶

Arguably, developers could attempt to conceal breaches forever, rather than await four years before applying for a CLEUD, as demonstrated by Beesley¹⁰⁷. In reality, this would be impracticable; the property would be unsaleable because planning permission would be absent and a CLEUD could not be obtained without notifying the LPA.¹⁰⁸ Nevertheless, if the developer was happy to own the development forever, that would not be a problem and perhaps a small price to pay.

¹⁰⁰ S.171BA(1) of the T&CPA 1990

¹⁰¹ The enforcement year begins 22 days from the date the court's decision to make the order (s.171BA(3)), unless an application is made to the HC for a statement of case for opinion in respect of the PEO (s.111(1) Magistrates Courts Act 1980) then the enforcement year begins with the day the proceedings arising from that application are finally determined or withdrawn (s.171BA(4)) of the T&CPA 1990

¹⁰² S.171BA(2) T&CPA 1990

¹⁰³ S.171BB(1) T&CPA 1990

¹⁰⁴ The LPA must sign a certificate stating the date that sufficient evidence came to light and that certificate is conclusive evidence of that fact (s.171BB(2)); unless the contrary is proven (s.171BB(3))

¹⁰⁵ S.171BC(1) T&CPA 1990

¹⁰⁶ Optima Legal "Concealing Breaches – Uncertainty in Planning Enforcement" (2013)

<<https://360.optimalegal.co.uk/news-insights/insights/concealing-breaches-uncertainty-planning-enforcement>> accessed 5th May 2015

¹⁰⁷ Beesley (n 1)

¹⁰⁸ David Merson "Concealment, Enforcement and the Localism Act 2011" (2012)

<<http://davidmerson.blogspot.co.uk/2012/05/concealment-enforcement-and-localism.html>> accessed 10th January 2016

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The next section will discuss the main criticisms of the new legislation. So what are the main criticisms?

3.2) What constitutes 'deliberate concealment'?

At present, there is no definition or guidance as to what constitutes 'deliberate concealment'.¹⁰⁹ Theoretically, 'deliberate concealment' could be any breach of planning that the landowner knew, or could upon reasonable enquiry, have known to be a breach, which they then omitted to remedy.¹¹⁰ Consequently, there is fear the net has been cast too wide.¹¹¹ It has been suggested the provision would be clearer had it been based on "dishonesty or fraud"¹¹² and focused on the mental state of the person at the time of the breach.¹¹³

The literal definition of the term is a "conscious or intentional action of hiding something or preventing it from being known".¹¹⁴ Arguably, Fidler would certainly fall within the literal definition; his positive actions were disguising the development with straw bales and tarpaulin and carrying out building works at night time to avoid detection.¹¹⁵

Beesley on the other hand, however, it is arguable Beesley would not fall under the literal definition as he made no positive act to conceal the breach, he merely deceived the council as to the development's extent.¹¹⁶ Conversely, it is unlikely Beesley would have

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¹⁰⁹ S.171BC of the T&CPA 1990

¹¹⁰ Christine de Ferrars Green "Briefing 2012: Concealment of breaches of planning control" (2012, Mills & Reeve) 1 <<http://www.mills-reeve.com/files/Publication/e5bf71fd-4953-4a47-b31e-6aaa178c9c97/Presentation/PublicationAttachment/c97f5c6e-b9f5-4f3b-9a75-487873d32f80/Concealment%20of%20breaches%20of%20planning%20control%20-%20February%202012.pdf>> accessed 13th September 2015

¹¹¹ Hatfield "sledge hammer..." (n 96) 51

¹¹² Ibid

¹¹³ Scott Stemp "To Infinity and Beyond" (2011) <<http://planningblog.org/2011/02/21/to-infinity-and-beyond/>> accessed 30th October 2015

¹¹⁴ "Deliberate" -- Oxford Dictionary (undated)

<<http://oxforddictionaries.com/definition/deliberately?q=deliberately>> and "Concealment" -- Oxford Dictionary (undated) <<http://oxforddictionaries.com/definition/concealment?q=concealment>> both accessed 20th October 2015

¹¹⁵ Fidler Inspectorate (n 16) 12

¹¹⁶ Beesley HC (n 1) 5-- Beesley admitted that he set out with the intention of building a residential dwelling

chosen the external appearance of a storage barn, had he not needed to conceal the use, ~~that evidence alone may be; therefore it could potentially be~~ considered sufficient.¹¹⁷

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~~Accordingly~~Evidently, if the literal definition was adopted the application would be controversial and would not lead to definitive answers. The purpose of the provision would be defeated as conduct affiliated to Beesley's, such as omissions, would debatably not be sufficient.¹¹⁸ Whether omissions ~~are amount to 'deliberate concealment' sufficient~~ is a debated topic ~~which is yet~~ to be settled.¹¹⁹

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3.3) Does the threat of enforcement action now last forever?

Another area of criticism surrounds the uncertainty the provision brings. The ability to take enforcement action outside the time limits leads to the question, when does the enforcement period now end, or does it last forever? ~~Disputably~~Debatably, the time limits have been removed entirely, something that is certainly not desirable,¹²⁰ particularly as enforcement action poses a significant threat to developers and notably prospective purchasers. Time limits are imposed to provide certainty to both the conveyancing and planning system; the justification is that they provide LPA's ample time to take action.¹²¹ Yet, the only time limit mentioned is regarding a PEO; namely that it needs to be sought within six months from the date the LPA discovered the breach,¹²² irrespective of whether that is five, ten ~~or~~ twenty ~~or five~~ years later. As some now say, the time limit for enforcement is ~~to~~ infinity and beyond!¹²³

¹¹⁷ *Beesley* (n 1) and *Fidler* (n 2)

¹¹⁸ Hatfield "Sledge hammer..." (n 96) 51

¹¹⁹ See the case of Carol Jones of Land at Woodend, Crown East Lane, Lower Broadheath, Worcester, WR2 6RH – Inspectorate Decision (6th September 2012) APP/J1860/C/12/2174258

¹²⁰ HL Deb 19 July 2011 Vol. 729, col. 1304 per Baroness Gardner of Parker at [1305] – made it clear that she did not feel the time limits should be removed entirely

¹²¹ R. Card, J. R. Murdoch and S. Murdoch "Real Estate Management Law" (2nd edn, OUP, 2011) 715

¹²² s.171BB(1) of the T&CPA 1990

¹²³ Stemp "To Infinity..." (n 111)

The Law Society disagreed with the provisions entirely. Their objections stemmed from the argument that limitation periods are necessary to provide certainty.¹²⁴ Their three main arguments were: a) memories fade the longer time passes, b) certainty is vital for prospective purchasers and c) rights ought to be lost if not asserted promptly.¹²⁵

3.3a) Memories fade

The Law Society's first argument is as time passes, memories fade and consequently, evidence is lost. This is particularly problematic Especially today, as we move towards a system of e-conveyancing¹²⁶ where paperless transactions mean physical evidence is absent.¹²⁷ Thus, proving a breach of planning control had been deliberately concealed years previously would become progressively more harder. difficult. P Various problems may be faced, such as: properties may have changed hands, the individual responsible may be untraceable and evidence may have been destroyed due to council's retention periods expiring. There is also the argument that developers would simply not apply for a CLEUD and therefore remain undetected for longer, which will be discussed later.¹²⁸

3.3b) Prospective purchasers

Certainty is a key part of planning control¹²⁹ and precise time limits are vital to provide a clear understanding of when potential liability ceases.¹³⁰ The removal threatens the clarity and certainty they provide the conveyancing process.¹³¹ as LPA's must now consider whether a breach has been deliberately concealed, not just whether the relevant

¹²⁴ The Law Society, Localism Bill Parliamentary Brief (June 7, 2011) Pt 5, cl.109.

¹²⁵ Ibid

¹²⁶ -- "The implementation of e-conveyancing in England and Wales" (2015)

<<http://www.fridaysmove.com/implementation-e-conveyancing-england-and-wales/126>> - accessed 30th March 2016 – also – "E-conveyancing portal to begin rollout today" (2015) <<http://www.lawgazette.co.uk/practice/e-conveyancing-portal-to-begin-rollout-today/5049004.fullarticle>> accessed 30th March 2016

¹²⁷ Law Society Brief (n 247) cl.109 (as cited in Hatfield "Sledge Hammer..." (n 96) 55)

¹²⁸ Merson "Concealment..." (n 106)

¹²⁹ A. Bowes, "Potential restrictions on a legal right to development" (2011) 8 J.P.L. 994-1004, 994

¹³⁰ Hatfield "Sledge hammer..." (n 96) 55

¹³¹ Planning and Compensation Act 1991 (now subsumed within the T&CPA); section 4 of the 1991 Act

introduced s.171B into Town &Country Planning Act 1990

limitation period expired.¹³² Inviting such uncertainty could have a chilling effect on the property market,¹³³ resulting in further costs and time for solicitors and lenders, as more vigorous checks would need to be carried out to ascertain the full planning history.¹³⁴

The government were asked to clarify how far liability would spread, but so far they have failed to do so.¹³⁵ Planning permission runs with the land rather than the owner, therefore, following that reasoning, liability for a breach of planning control would also run with the land.¹³⁶ An enforcement notice may be served on any person who has an interest in the land, irrespective of whether they were responsible for the breach of planning control.¹³⁷ Accordingly, prospective purchasers could be held liable for a planning breach they were not a party to.¹³⁸ The general consensus however, is that the power to take enforcement action outside of the time limits will only be exercised in the worst cases of concealment.¹³⁹ There is hope therefore, that the breach would become apparent prior to selling.

A safety-net for *bona fide* purchasers for value of a legal estate without notice,¹⁴⁰ would be the standard of care solicitors and conveyancers owe to their clients.¹⁴¹ A solicitor

¹³² Frank Smith "Planning enforcement changes – deliberate concealment" (2012) <http://www.willans.co.uk/news/article/planning_enforcement_changes_deliberate_concealment/> - accessed 5th May 2015

¹³³ The Law Society "Government amends planning enforcement regime in response to Law Society warning - but doesn't go far enough" (August, 2011, Law Society Press Release) (as cited in Hatfield "Sledge Hammer..." (n 27) 55)

¹³⁴ *Ibid*

¹³⁵ HL Deb (n 118) 1304 (Lord Taylor)

¹³⁶ Department for Communities and Local Government 'Circular 11/95: Use of Conditions in Planning Permission' (2006) 4.2

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7715/324923.pdf> accessed 15th October 2015

¹³⁷ Section 172 of the T&CPA 1990

¹³⁸ Department for Communities and Local Government (n 134)

¹³⁹ HL Deb (n 118) 1304 (Lord Taylor)

¹⁴⁰ The bona fide purchaser for value of the legal estate without notice, otherwise known as "equity's darling" – John McGhee and Edmund Snell "Snell's Equity" (33rd edn, Sweet & Maxwell, 2014) Part 1, Chapter 4, Section 4-018] – argued by Bowes "Potential restriction..." (n 127) 997

¹⁴¹ Negligence - Duty of Care – *Donoghue v Stevenson* [1932] UKHL 100 – professionals owe a higher standard of care - *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118- "reasonable skill and care" (McNair J)

or conveyer would have a duty to investigate the planning history⁷ in the absence of the required permission, a solicitor ought to check whether a CLEUD exists, if absent the client or mortgagee must be advised as to the possibility of it being unauthorised. Failure to do so could allow the client to sue the solicitor for professional negligence.¹⁴² However, that does nothing to reinstate any degree of certainty.¹⁴³ The prudent purchaser should still remain cautious,¹⁴⁴ as even with the recourse of suing the solicitor, compensation would arguably not suffice if the PEO required demolition of the dwelling.¹⁴⁵

The only real comfort is the fact magistrates may only grant a PEO when it is “just”, in regard to all circumstances.¹⁴⁶ Thus, logic suggests it would not be fair to take enforcement action against the *bona fide* purchaser who was not party to the breach of planning control.¹⁴⁷ Having said that, However, the planning regime is a codified system designed to operate in the public interest.¹⁴⁸ Presumably therefore, if the unauthorised development caused harm, it would inevitably be in the public interest to take enforcement action, irrespective of who was responsible for the breach. Consequently, it remains to be seen what would happen if the property changed hands.

~~The government are yet to clarify this issue, possibly because of the problems they could face.~~ Notably however, if enforcement action could only be taken against the owner, shrewd developers would simply transfer the property in order to bypass liability. As demonstrated by Fidler,¹⁴⁹ he claimed he had transferred the property to a third party and

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¹⁴² Solicitors Act 1947 see Schedule 1A and Solicitors Regulations Act Code of Conduct 2011 – example *Turner v Eversheds* [2007] All ER (D) 108 (Feb)

¹⁴³ Stemp “To Infinity...” (n 111)

¹⁴⁴ Hatfield “Sledge hammer...” (n 96) 53

¹⁴⁵ Stemp “To Infinity...” (n 111)

¹⁴⁶ S.171BC(1)(b) of the T&CPA 1990

¹⁴⁷ *Bona fide purchaser* (n 138)

¹⁴⁸ NPPF (n 15) 47, para 207

¹⁴⁹ *Fidler* (2015) (n 89)

therefore could not comply with the notice. The judge however, was unsatisfied that the transfer had any legal effect but, in any event, it would not suffice as a reason for non-compliance.¹⁵⁰ Having said that, Although noticeably, Fidler's¹⁵¹ enforcement notice had been served several years before he claimed to he had transferred the property, it remains to be seen what would happen if the property had changed hands before the LPA became aware of the breach.

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3.3c) Should rights be lost if not exercised?

The Law Society's third argument was those that do not enforce their rights should lose them;¹⁵² developing on the suggestion, harm could not have been caused if enforcement action had not been exercised within the time limits.¹⁵³ While there is some truth in the "use it or lose it" rationale, it is possibly the weakest of the three arguments. The public are at the heart of the planning system,¹⁵⁴ if expiration of time rewarded dishonest and fraudulent acts, the public's confidence would be lost.¹⁵⁵ Often these cases are in remote locations or, as with Fidler,¹⁵⁶ hidden until the relevant limitation period expires. Therefore it cannot be just to say the LPA should lose their rights.¹⁵⁷

An incidental issue is the concern regarding compliance with the European Convention on Human Rights.¹⁵⁸ However, many believe this not to be an issue.¹⁵⁹ Currently, there have been zero challenges and limited discussion regarding this. Conversely, extending limitation

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¹⁵⁰ Ibid at para [17] where Fidler tried to claim he no longer owned the property, he failed to convince the judge that the property had been legally transferred to a third party but even if it had, it would not be a reason for non-compliance 31 (Dove J)

¹⁵¹ Fidler (n 2)

¹⁵² Law Society Brief (n 122) at cl.109 (as cited in Hatfield "Sledge Hammer..." (n 96) 55)

¹⁵³ Humphreys "20 years..." (n 26) 522

¹⁵⁴ Plain english guide??- Para 49 page 14

¹⁵⁵ Hatfield "Sledge hammer..." (n 96) 58

¹⁵⁶ Fidler (n 2)

periods is not a new concept, it is tried and tested in various areas;¹⁶⁰ often in criminal matters. Therefore it would seem unlikely to become an issue.

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An incidental issue is one regarding compliance with the European Convention on Human Rights.¹⁶¹ There is a threat that one's Article 8, right to a private life,¹⁶² could be interfered with. There may be cases where a family have occupied a property for years, completely unaware that a breach of planning had occurred prior to them acquiring the property. In those cases, if a PEO was served on the property, it is likely that they would have a strong article 8 claim, albeit, a court would be unlikely to grant a PEO in those circumstances. Consequently, many believe this not to be an issue.¹⁶³ Currently, there have been zero challenges and limited discussion regarding this. Conversely, extending limitation periods is not a new concept, it is tried and tested in various areas;¹⁶⁴ often in criminal matters. Therefore it would seem unlikely to become an issue.

3.4) Jurisdiction in the magistrates' court

There are various concerns relating to the involvement of magistrate's courts. It has been expressed the magistrates' court is "not a suitable forum in which to argue the technicalities of planning legislation".¹⁶⁵ Accordingly, there is apprehension as to whether

¹⁵⁷ Humphreys "20 years..." (n 26) 522

¹⁵⁸ [European Convention of Human Rights – implemented into United Kingdom's legislation through the Human Rights Act 1998](#)

¹⁵⁹ Stemp "To Infinity..." (n 111)

¹⁶⁰ [Ibid](#)

¹⁶¹ [European Convention of Human Rights – implemented into United Kingdom's legislation through the Human Rights Act 1998](#)

¹⁶² [Article 8 of the European Convention on Human Rights – Right to respect for private and family life](#)

¹⁶³ Stemp "To Infinity..." (n 111)

¹⁶⁴ [Ibid](#)

¹⁶⁵ Carnwath (n 25) (as cited in Hatfield "Sledge Hammer..." (n 96) 59)

magistrates and their advisers are equipped to make such decisions, especially in contrast to LPA's and inspectorates.¹⁶⁶

It has been suggested the planning industry has taken a step back by reverting to using magistrates in this area; especially given that there are now even more grey areas in planning than ever before.¹⁶⁷ There is a risk of decisions being tainted by personal opinions and concern that a consistent approach will not be provided, which ultimately effects the overriding test of fairness.¹⁶⁸ Requiring a magistrate to consider whether a decision is just is arguably an implicit recognition of the potential risk for an injustice to occur.¹⁶⁹ Many questions why— LPA's and planning inspectorates, those specifically equipped with the knowledge and expertise, could not continue to deal with enforcement, especially given that PEO's involve technical questions and complex scenarios.¹⁷⁰ Additionally, they would provide a more homogeneous approach, as they are supported by a body of reported decisions and circulars.¹⁷¹

4) The *Beesley Principle v s.171BA-C of the T&CPA*

The new provisions seem powerless at curbing unlawful developments. Had the government awaited the SC to conclude *Beesley*,¹⁷² they would have seen the fundamental

¹⁶⁶ Royal Town Planning Institute 'The Localism Bill: RTPI Issue Briefing Enforcement' (June 29, 2011)16 <<http://www.rtpi.org.uk/media/8262/RTPI-Issue-Briefing-Enforcement-v2-29-06-11.pdf>> accessed 18th December 2015 4 para16

¹⁶⁷ Ibid

¹⁶⁸ Nicholas Dobson "Localism Bill does not rule out bias" (November 2015) Law Society Gazette - <<http://www.lawgazette.co.uk/law/legal-updates/localism-bill-does-not-rule-out-bias/5051848.article>> accessed 10th January 2016

¹⁶⁹ National Association for Planning Enforcement - Memorandum submitted by NAPE (L116) (February 2011) (NAPE Memo) as referred to in Simon Pickles "Localism Act 2011: Enforcement" (2011, Landmark Chambers) 23 <http://www.landmarkchambers.co.uk/userfiles/documents/resources/Enforcement_-_Simon_Pickles.pdf> accessed 15th October 2015

¹⁷⁰ Carnwath (n 25) (as cited in Hatfield "Sledge Hammer..." (n 96) 59)

¹⁷¹ There is ample guidance issued by the Department for Communities and Local Government, Planning Inspectorate Decisions, Journal of Planning & Environment Law and newsletter to LPA

¹⁷² *Beesley* (n 1) -LA'11 s.171BA-C came into force on the 15th November 2011 but the bill was put to parliament on the 13th December 2010— SC concluded *Beesley* on the 6th April 2011

principles of law and justice were perfectly apt to close the loophole.¹⁷³ The SC relied on two principles: firstly, law must be applied in the public interest¹⁷⁴ and secondly, no person should be permitted to profit from their own wrongdoing; known as the 'Connor principle'.¹⁷⁵ Both public policy (the *Beesley* principle) and s.171BA-C address the same problem. Thus it is questionable, why the unnecessarily complicated process of applying for a PEO was required;¹⁷⁶ hence the question, which solution is preferred and how will they operate together?

4.1) Conflict or compatibility?

To answer such questions, it is necessary to determine whether the statutory amendments overrode the *Beesley* principle. The case of *Jackson v Secretary of State*,¹⁷⁷ factually similar to *Beesley*, considered the relationship between the two solutions.¹⁷⁸

Jackson deceived the LPA by changing the use of an agricultural building to one of a residential use, omitting to obtain planning permission.¹⁷⁹ The LPA refused Jackson's application for a CLEUD upon expiration of the four-year time limit, by relying on the *Beesley* principle. Jackson appealed, arguing that the *Beesley* principle had been supplanted by the PEO procedure.¹⁸⁰

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¹⁷³ Emma Hatfield "Under wraps: enforcing concealed planning breaches after the Localism Act" [2013] Solicitors Journal -

<<http://www.solicitorsjournal.com.libezproxy.bournemouth.ac.uk/property/land/under-wraps-enforcing-concealed-planning-breaches-after-localism-act>> - accessed 2nd November 2015

¹⁷⁴ Halsbury's Laws (n 48)

¹⁷⁵ Ibid and *Beesley* SC (n 1) (Lord Mance) cited various cases; *Connor* (n 54); *Cleaver v Mutual Reserve Fun Life Assoc* [1892] 1 Q.B. 147

¹⁷⁶ Martin Goodall "Concealed development and the Connor principle" [2012] -

<<http://planninglawblog.blogspot.co.uk/2012/06/concealed-development-and-connor.htm>> accessed 5th May 2015

¹⁷⁷ *Jackson v Secretary of State for Communities and Local Government* [2015] EWCA Civ 1246 also known as *Bonsall v Secretary of State for Communities and Local Government* [2015] EWCA Civ 1246

¹⁷⁸ *Jackson v Secretary of State for Communities and Local Government* [2015] EWHC 20 (Admin)

¹⁷⁹ Ibid 72/77 (Holgate J)

¹⁸⁰ Ibid 52 (Holgate J)

When determining the relationship, the court gave attention to the differences between the two approaches.¹⁸¹ Parliament legislated only with regards to “deliberate concealment”; the Beesley principle however, is of much wider application, such as “bribery, coercion or menaces”.¹⁸² The LA’11 was being deliberated when the SC concluded *Beesley*, consequently parliament could have amended s.171BA-C so the provision would replace the *Beesley* principle, however they neglected to do so.¹⁸³ Perhaps due to the gap this would have left.¹⁸⁴ Accordingly, both the HC¹⁸⁵ and the CA¹⁸⁶ concluded the PEO procedure simply gave LPA’s additional enforcement powers; a result consistent with the legislative object of strengthening their powers.¹⁸⁷

In addition, *Jackson* questioned the legal adequacy of the tests *Beesley* established.¹⁸⁸ *Jackson* accepted he had satisfied the *Beesley* criteria; positive deception in matters integral to planning, which were directly intended to and did undermine the operation of that process.¹⁸⁹ However, he argued his conduct was “less obviously shocking”¹⁹⁰ than *Beesley*’s, thus he did not meet the “exceptionality test” referred to by Lord Brown.¹⁹¹ *Holgate J* however, stated the only test to satisfy was the criteria, there was not an “exceptionality test”.¹⁹² Consequently, *Jackson* is extremely valuable clarifying the application of *Beesley* and clearly stating LPA’s may decide which route to adopt.¹⁹³

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¹⁸¹ Ibid

¹⁸² *Beesley* SC (n 1) 55

¹⁸³ *Jackson* CA (n 170) - the case was conjoined with the *Bonsall v Secretary of State for Communities and Local Government* [2014] EWHC 2022 (Admin) 52 (Richards LJ)

¹⁸⁴ *Jackson* HC (n 171) 52 (Holgate J)

¹⁸⁵ Ibid

¹⁸⁶ *Jackson* CA (n 170)

¹⁸⁷ *ibid* 52 (Richards LJ)

¹⁸⁸ *Jackson* HC (n 171) 66 (Holgate J)

¹⁸⁹ *Beesley* SC (n 1) 56 (Lord Mance)

¹⁹⁰ *Jackson* HC (n 171) 67 quoting the case of Nigel Jackson of Sutton Springs, Bullington Lane, Scotney, Hampshire, S021 3RA - Inspectorate Decision (2nd May 2014) APP/L1765/C/13/2201138 para 62

¹⁹¹ *Ibid* 84 (Lord Brown)

¹⁹² *Jackson* HC (n 171) 68

¹⁹³ -- “Case Comment: *Jackson v Secretary of State for Communities and Local Government* [2015] EWHC 20 (Admin) (2015)” J.P.L., 7, 830-846, 846

4.2) A comparison of the two approaches

Upon concluding PEOs are an additional remedy;¹⁹⁴ it prompts the question, which will be preferred.

Some argue that the *Beesley* principle is an exception to the statutory time limit, ~~however~~ others however, advocate it was merely interpreting the law in harmony with principles of public policy.¹⁹⁵ Had the SC adopted the literal interpretation, the public's confidence would have been seriously damaged;¹⁹⁶ arguably leaving their Lordships no choice but to fill the gap in the law.¹⁹⁷

It has however, been argued any changes to legislation should be expressly authorised by parliament and that applying principles merely to achieve a fairer result, was an impermissible exercise of the judicial function.¹⁹⁸ The SC however, made reference to the fact statutes have been "subject to implied limitations based upon principles of public policy"¹⁹⁹ for years, therefore planning legislation is not immune from such interpretation.²⁰⁰

The criticism of 'judge made law', is that it creates uncertainty and capriciousness, as the parameters are established on a case by case basis.²⁰¹ The criticism is however equally applicable to s.171BA-C,²⁰² especially given the lack of definition and ambiguity of "deliberate concealment". Arguably, making s.171BA-C no more effective than the *Beesley*

¹⁹⁴ *Beesley* SC (n 1)

¹⁹⁵ *Jackson* CA (n 170) 42 (Richards LJ) elaborating on *Jackson* HC (n 171) 53 (Holgate J)

¹⁹⁶ "all enactments are presumed to be for the public benefit" – Oliver Jones "Bennion on Statutory Interpretation" (6th edn, Lexis Nexis, 2007) section 264

¹⁹⁷ Clive Moys "Has the Town and Country Planning Act 1990 stood the test of time?" [2016] J.P.L, 5, 447-456, 455

¹⁹⁸ *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] A.C. 132, 141

¹⁹⁹ *R v Secretary of State for the Home Department Ex p Puttick* [1981] Q.B. 767, 773

²⁰⁰ *Beesley* SC (n 1) 50

²⁰¹ Current Topics "Established use..." (n 36) 100

²⁰² S.171BA-C of the T&CPA 1990

principle.²⁰³ Additionally, there are strict safeguards and stringent guidelines that courts must adhere to when applying public policy principles.²⁰⁴ Conversely, s.171BA-C²⁰⁵ is new, thus lacking sufficient guidance. Furthermore, there is the concern regarding its application in the magistrates' court; a body ill-equipped to deal with such complexities.²⁰⁶ Subsequently, the *Beesley* principle ensures certainty remains,²⁰⁷ whilst the criticism regarding s.171BA-C concerns the lack of certainty.²⁰⁸

The *Beesley* principle may also be preferred for an additional reason based on, namely money and time. Interpreting the law in accordance with public policy is expedient and arguably much easier than obtaining a PEO from the magistrates' court.²⁰⁹ Refusing an application for a CLEUD or issuing an enforcement notice outside of the time limits, in reliance on the *Beesley* principle, incurs no additional costs. Applying to the magistrates' court however, incurs costs and requires valuable time from council officers.

Subsequently, it is fair to predict LPAs will rely upon the *Beesley* principle, and sidestep the application for a PEO,²¹⁰ opting for the cheapest, quicker and more predictable option.

4.3) Alternative solutions / remedies to s.171BA-C

Subsequent to the discussion above, the amended provisions provide no additional assistance to the *Beesley* principle.²¹¹ Hence the next question, was s.171BA-C the answer to

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²⁰³ *Ibid* and *Beesley* (n 1)

²⁰⁴ As shown by the case above; *Pioneer* (n 191), *Puttick* (n 192), *Connor* (n 54) and *Lazoutes* (n 49)

²⁰⁵ S.171BA-C of the T&CPA 1990

²⁰⁶ RTPI Briefing (n 159) 4 para16

²⁰⁷ Hatfield "Under wraps..." (n 166)

²⁰⁸ s.171BA-C of the T&CPA 1990 and *Beesley* (n 1) - Emma Hatfield "Concealed Development: Did we really need Section 124" [2013] J.P.L Issue 1, 19 – 28, 27

²⁰⁹ *Ibid*

²¹⁰ Martin Goodall "Concealed developments: transitional provisions" (2012)

<<http://planninglawblog.blogspot.co.uk/2012/05/concealed-development-transitional.html>> - date accessed 5th May 2015

²¹¹ *Beesley* (n 1)

close the loophole in the law? Some academics and practitioners have argued alternative solutions may have been better.²¹²

Firstly, the Royal Town Planning Institute (RTPI hereafter) suggested an alternative position was to calculate the time limits from the actual date the LPA became aware of the breach.²¹³ The advantages would be that jurisdiction would remain in the appropriate forum, namely the LPA and planning inspectorates, there would be no need to grapple with the definition of deliberate concealment and consequently, certainty would remain.²¹⁴ Nonetheless, the government did not take the RTPI's advice on board, perhaps regrettably, in light of the wide criticism of s.171BA-C.²¹⁵

A similar alternative would have been for the time limits to stop running during any period of concealment, the development, if concealed, would therefore never become immune.²¹⁶ This solution would not rely on the magistrates' court, nor the PEO procedure. Albeit, the question 'what constitutes deliberate concealment' would remain. Perhaps the only problem this approach eradicates, is the involvement of the magistrates' court.²¹⁷

A further suggestion would be to make enforcement action mandatory, in practice however, this would be too rigid.²¹⁸ Providing LPA's discretion, allows LPAs to take action when it is expedient to do so, having regard to their Development Plan and any other material considerations.²¹⁹ If the public feel an LPA has failed in their duty to take

²¹² Hatfield "Section 124..." (n 201) 20

²¹³ RTPI Brief (n 159) para 17

²¹⁴ Ibid

²¹⁵ S.171BA-C of the T&CPA 1990

²¹⁶ David Brock and Phillip Kratz "The ten year period for enforcement: is it really time for reform?" [2011] J.P.L Issue 8, 1005 -1008, 1005 1005

²¹⁷ Ibid

²¹⁸ Michael Purdue "Reform of the Enforcement of Planning Control – Where are We Now?" [2012] J.P.L, 7, 795 – 804, 797803

²¹⁹ NPPF (n 15) para 207

enforcement action, they would be able to challenge the decision via judicial review²²⁰ or make a complaint to the ombudsmen, as they can make recommendations which can be extremely influential on LPA's²²¹.

Alternatively, Parliament could have strengthened the powers within the T&CPA. LPA's are currently overstretched, due to the lack of funding and manpower.²²² At present the system of detection relies heavily upon the public,²²³ it is said to be no more than a game of 'Russian roulette',²²⁴ simply a matter of time and chance.²²⁵ Accordingly, a prevention mechanism would be for LPA's to carry out systematic checks upon completion and ensure full compliance with planning permission conditions,²²⁶ and adopting a proactive approach to breaches of planning.²²⁷ Additionally, as such, it is surprising the LPA in *Beesley*, did not learn of the connections to mains services.²²⁸ There should be a cohesive system to allow LPA's to check, investigate and cross reference information with service providers.²²⁹ Consequently, developers are taking advantage and abusing the system.

A further option, would be to require those applying for planning permission to sign a declaration, stating the information they have provided is the truth. It is surprising this is not a requirement for planning permission ~~when considering~~ it is required for obtaining a

²²⁰ Civil Rules Procedure 1998 SI 1998/3132 Part 54 Judicial Review

²²¹ Louise Smith "Enforcement of Planning Law" House of Commons Standard Note SN/SC/1579 (26 August 2014, HC Library) 1 1

²²² Christopher Barclay, Chris Sear, Wendy Wilson 'Localism Bill: Committee Stage Report' (Research Paper 11/32, House of Commons Library, 12 April 2011) 40 from PBC Deb 1 March 2011 c672 c726 (Jack Dromey) <<http://researchbriefings.files.parliament.uk/documents/RP11-32/RP11-32.pdf>> accessed 20th October 2015 (Jack Dromey c726)

²²³ Hatfield "Section 124..." (n 201) 20

²²⁴ Ibid

²²⁵ *Arun* (n 18) 36 (Sedley LJ)

²²⁶ *Fellows* (n 27) 968

²²⁷ -- "Case Comment certificate of existing use – planning permission for barn" [2010] J.P.L, 9, 1095-1106, 1106 para 5.4

²²⁸ *Beesley* SC (n 1) 55

²²⁹ Current Topics "The legal consequence of keeping breaches of planning control hidden" [2010] J.P.L, 5, 537 – 540, 539

CLEUD.²³⁰ It would seem peculiar to have such inconsistencies.²³¹ Logic would suggest that if a declaration were to be inserted into the T&CPA, LPA's would be in a stronger position to deal with cases like *Beesley*.²³² Firstly, it would make applicants think twice about their actions and secondly, it would give rise to the possibility of prosecutions for fraud, as discussed below.²³³

Jersey's planning law²³⁴ criminalises breaches of planning; 'if a person knowingly or recklessly makes a false statement, the applicant shall be guilty of an offence and liable for imprisonment of up to two years and/or a fine'.²³⁵ There is no reason why the T&CPA could not have a similar provision (as discussed below); the very existence of criminal sanctions would deter devious ~~developer's~~ developers.²³⁶

4.3c) Prosecuting breaches of planning control

Previously, judges and Parliament have been firmly against the idea of criminalising breaches of planning control.²³⁷ However, it would appear judges may be returning to the idea. Collins J acknowledged the legislation could contain a provision regarding fraud. He continued by expressing 'it ought to be carefully considered by those responsible for legislation'.²³⁸

Irrespective of whether the T&CPA is amended to deal with fraudulent acts, there is no reason why criminal liability under the Fraud Act 2002 (FA hereafter) could not be

²³⁰ S.194 of the T&CPA

²³¹ *Fellows* (n 27) 969

²³² *Beesley* HC (n 1) 32 (Collins J)

²³³ If the applicant signed the declaration of truth, which was in fact false or misleading – it could trigger liability under the Fraud Act 2006 – Section 2 fraud by false representation or Section 3 fraud by failing to disclose information – this is discussed next - Noticeably, this would not assist in cases like *Fidler* where developers sidestep the planning application stage altogether.

²³⁴ Article 10 of Planning and Building Regulations (Jersey) Law 2002 (as amended)

²³⁵ *Ibid*

²³⁶ Richard Humphreys QC "Integrity in the Planning System in England: Lacunas But Lessons From a British Isle?" [2015] J.P.L., 2 128 – 132, 132; Moys (n 190) 455

²³⁷ Most noticeably Baroness Blatch - HL Deb 17 July 1991 vol 524 col.1301

²³⁸ *Beesley* HC (n 1) 32 (Collins J)

triggered. Section 2 states a person is liable, if they dishonestly make a false representation and intend to make a gain, for themselves or another, or cause loss to another, by making that representation.²³⁹ Prosecuting Beesley would appear unequivocal.²⁴⁰ The LPA granted Beesley planning permission on the basis of the false and misleading representation that the barn would be used for storage.²⁴¹ Beesley intended to make a gain for himself, that being the increase in value to the land, consequently satisfying the criteria for prosecution. The LPA however omitted to bring a criminal prosecution, thus the judges' comments were merely *obiter dictum*.²⁴² albeit insightful ~~nonetheless~~.²⁴³

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In the event of a criminal conviction, the LPA could have recourse to the POCA, recovering the profits made.²⁴⁴ It was confirmed by *R v Del Basso (Luigi)*,²⁴⁵ that it is possible to seek a confiscation order in planning prosecutions. Previously, it had been suggested it was an abuse of process to allow the POCA to be used for planning breaches, this argument was however rejected by the CA.²⁴⁶ The judges endorsed the view 'those that flout the law are in the same position as thieves, fraudsters and drug dealers' irrespective of the area of law.²⁴⁷ Recovering profits from breaches could eradicate the possibility of landowners taking calculated risks,²⁴⁸ reminding unscrupulous developers that crime does not pay.²⁴⁹

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²³⁹ Section 2 of the Fraud Act - A representation is false if it is untrue or misleading and the persons knows it to be; a representation can be fact or law and could be express or implied

²⁴⁰ Stemp "Why Plato..." (n 91)

²⁴¹ *Beesley* (n 1)

²⁴² *Beesley* SC (n 1) 56 (Lord Mance)

²⁴³ *Fellows* (n 27) 968

²⁴⁴ This point was considered by Collins J in *Beesley* HC (n 1) 39 (Collins J)

²⁴⁵ *R v Del Basso (Luigi)* [2010] EWCA Crim 1119

²⁴⁶ Helen Boniface and Jessica Hickson "A new direction?" (2014) P.L.J 323, 26-28, 27

²⁴⁷ *Del Basso* (n 238) 46

²⁴⁸ Cameron "Enforcement..." (n 6)1401

²⁴⁹ *Ibid* 1405

Recognisable however, ~~are~~ is the time and costs involved with obtaining a conviction and subsequent confiscation orders. This is likely to dissuade many overstretched authorities from pursuing such an approach.²⁵⁰ Nevertheless, in cases where proceeds of the crime are likely to be substantial, a LPA may find the money attractive.²⁵¹ In *Garland Development v Hackney Council*²⁵², the court ordered a payment of £700,000 for the non-compliance of an enforcement order. This was a record breaking amount of money awarded, of which the LPA were entitled to a third ~~of such sum~~.²⁵³ Arguably, this could be a lucrative option.²⁵⁴ Utilising the POCA allows the money obtained to be used to repair any harm the development caused, either to the environment or the local community.²⁵⁵ It is clear the very existence of criminal sanctions would deter deceitful developers.²⁵⁶

4.4) The effect on CLEUDs

Another area of uncertainty following s.171BA-C²⁵⁷ is the effect this could have on CLEUDs,²⁵⁸ considering most concealment cases come to light when the landowner applies for a certificate upon expiration of four years.²⁵⁹ The critical distinction between enforcement action and a CLEUD application is the timing; enforcement action is initiated by

²⁵⁰ Fellows (n 27) 969

²⁵¹ Hatfield "Section 124..." (n 201) 23

²⁵² Yusuf Sarodia, *Garland Development v Hackney Council* (Sharesbrook Magistrates Court, 30 November 2015) Case No. S20141016/21 – although it is said the property is yet to be demolished see report by William Eichler "Record breaking £700,000 seized from rogue developer in Hackney" (2015) <<http://www.localgov.co.uk/Record-breaking-700000-seized-from-rogue-developer-in-Hackney/40021>> accessed 17th December 2015

²⁵³ See also *Danny Beach v Runnymede Borough Council* (30 October 2011, Guilford Crown Court) Case No: T20110543 wherein Runnymede Borough Council were entitled to a third of the sum of £250,000.

²⁵⁴ Rebecca Carriage "When enforcement isn't enough" (2010) <http://www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=3827:when-enforcement-isnt-enough&catid=63:planning-articles> – accessed 20th February 2016

²⁵⁵ Stemp "Why Plato..." (n 91)

²⁵⁶ Humphrey "Integrity..." (n 229) 132; Moys (n 190) 455

²⁵⁷ S.171BA-C of the T&CPA 1990

²⁵⁸ S.191 of the T&CPA

²⁵⁹ As seen with *Beesley* (n 1), *Jackson and Bonsall* (n 170) and various cases discussed further below

the LPA, whereas, a CLEUD application is initiated by the landowner. It is this feature which allows the planning system to be abused.²⁶⁰

The LA'11 also inserted s.191(3A) into the T&CPA to prevent CLEUD applications being successful in three situations; firstly, when the time for applying for a PEO has not expired,²⁶¹ secondly, when a PEO has been applied for but is awaiting a decision,²⁶² and thirdly, when the enforcement year is yet to expire.²⁶³ In those situations, the LPA have grounds to refuse a CLEUD in deliberate concealment cases. These however, are “pending”²⁶⁴ situations, what if the application itself was the coming to light of evidence, could that be sufficient to refuse the application?²⁶⁵

This question arose in *Jackson*,²⁶⁶ at the time he made a CLEUD application, the LPA were unaware of any deception, so on what grounds could they refuse to grant the certificate? The LPA could not rely on s.171BB(1) and (2)²⁶⁷ and set the six month time limit for a PEO application running, because at the time they received the application for a CLEUD they did not have ‘sufficient evidence’.²⁶⁸ Consequently, the LPA could not rely on any of the “pending” grounds for refusal as the six month period had not started to run.²⁶⁹ Accordingly, if the PEO procedure were to be treated as exhaustive, wrongdoers would be allowed to continue to use concealment in order to legitimise breaches of planning

²⁶⁰ *Jackson* HC (n 171) 63

²⁶¹ Section 171BA(1) – the 6 months from the date that the LPA came to light of sufficient evidence has not expired – as stated in section 191(3A)(a) of the T&CPA 1990

²⁶² section 191(3A)(b) of the T&CPA 1990

²⁶³ section 191(3A)(c) of the T&CPA 1990

²⁶⁴ *Jackson* HC (n 171) at para [46]

²⁶⁵ *Ferrars Green* (n 108) 1

²⁶⁶ *Jackson* HC (n 171)

²⁶⁷ S.171BB(1) and (2) of the T&CPA 1990

²⁶⁸ *Jackson* HC (n 171) 63 (*Holgate J*)

²⁶⁹ *Ibid* 62

control.²⁷⁰ Subsequently, the court concluded the *Beesley* principle was a supplementary solution, required to fill this gap in the law.²⁷¹

Consequently, developers are unlikely to make CLEUD applications if the breach of planning control was deliberately concealed.²⁷² Does that therefore render applications for CLEUDS redundant?²⁷³ It is suggested CLEUD's will become an equitable remedy;²⁷⁴ only being granted when the applicant "comes with clean hands".²⁷⁵ Such an approach however, would be fraught with difficulty, as it would depend on the degree of culpability; where would the line be drawn.²⁷⁶ There would be varying levels of wrongdoing, it would be difficult to differentiate between someone with "grubby hands" as opposed to someone with "unclean hands".²⁷⁷ With such an extensive range of wrongdoing, it is possible, mere ignorance of the law could be compared with conduct akin to *Beesley* or *Fidler*.²⁷⁸ Without guidance it would be impossible to predict. Whilst consideration of "good faith" in theory acts as a solution, upon closer scrutiny it is problematic.²⁷⁹

A further area of uncertainty is the LPAs power ~~LPAs have to revoke a CLEUD's upon discovering if they discover~~ a statement or document ~~the applicant provided by the applicant,~~ was false or ~~withheld~~ material information ~~was withheld~~.²⁸⁰ The concern arises with regards to innocent parties who bought the property on the basis of the certificate.

²⁷⁰ Ibid 64

²⁷¹ David Bird "Good faith and planning enforcement" (2015) <http://localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=22608%3Agood-faith-and-planning-enforcement&catid=56&Itemid=24> date accessed 4th November 2015

²⁷² Merson "Concealment..." (n 106)

²⁷³ Hatfield "Sledge hammer..." (n 96) 48 - Perhaps they will only be used in cases that do not involve deliberate concealment, for example certifying the use of land that has occurred for years

²⁷⁴ Fellows (n 27) 967

²⁷⁵ McGhee and Snell (n 138) Part 2, Chapter 5, Section 6, 5-010; *Portsea Island Building Society v Barclay* [1895] 2 Ch 298, CA - a court of equity refuses relief to a claimant whose conduct in regard to the subject matter of the litigation has been improper

²⁷⁶ Hatfield "Section 124..." (n 201) 22

²⁷⁷ Fellows (n 27) 967

²⁷⁸ Ibid; *Beesley* (n 1) and *Fidler* (n 2)

²⁷⁹ Hatfield "Section 124..." (n 201) 22

²⁸⁰ Section 193(7)(a) and (b) of the T&CPA 1990

Several safety-nets have been suggested; firstly there is hope the magistrates' would not consider it just to make an order.²⁸¹ Secondly, insurance could provide the necessary security and protection for innocent purchasers, although that is a quick fix solution and could be unnecessarily expensive.²⁸² There is also concern insurance would not be sufficient to cover the risks posed and the only winners are the insurance companies.²⁸³ Alternatively, it is expected buyers could seek indemnity from the seller, for any future liability for enforcement action.²⁸⁴ Or, there is the potential for a new type of insurance, specifically created to cover the risk of CLEUDS's being revoked.²⁸⁵ That said, until there is guidance on the interpretation of the provisions, those involved in buying, selling and lending in the property market should tread carefully for the foreseeable future.²⁸⁶

5. Which is applied in practice, the *Beesley* principle or s.171BA-C?

In recent years there have been various cases relating to 'deliberate concealment', this section will analyse how the LPA's have dealt with the issue, identifying whether they favour s.171BA-C or the *Beesley* principle.

5.1 Malvern Hills District Council

Shortly after the implementation of s.171BA-C,²⁸⁷ Malvern Hills DC ~~were~~ faced with the case of *Jones*,²⁸⁸ wherein planning permission had been granted for a garage. Jones ~~however, in fact~~ built a two bedroom house which he disguised by the external façade of a

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²⁸¹ Merson "Concealment..." (n 106)

²⁸² Not the first time insurance is used as a solution as seen in *Cottingham v Attey Bower & Jones* [2000] P.N.L.R. 557 (Ch D)

²⁸³ Brock and Kratz "The ten year..." (n 209) 1005

²⁸⁴ Ferrars Green (n 108) 2

²⁸⁵ Ibid

²⁸⁶ Optima Legal (n 104)

²⁸⁷ T&CPA 1990

²⁸⁸ Malvern Hills District Council: *Mrs Jones* (n 216)

garage.²⁸⁹ Upon discovering the dwelling, the LPA served an enforcement notice on the grounds of *Beesley*,²⁹⁰ despite *Jones* claiming the four-year rule s had expiredpassed.²⁹¹ On appeal, the enforcement notice was upheld as the planning inspectorate had no doubt that “as a matter of public policy, people are expected to behave lawfully and a person should not benefit from their own wrongs”²⁹², thus relying on the *Beesley* principle.

There are two interesting aspects in this case; firstly, the inspectorate relied upon *Beesley*, not the PEO procedure, concluding the only reason for such an appearance, was to evade detection by the LPA.²⁹³ Secondly, the inference the inspectorate drew from the appellant’s omissions to seek building regulations approval, which she had previously sought for another property. He viewed this as sufficient evidence that she had intentionally concealed the breach, because she could anticipate that seeking such approval would alert the LPA. Consequently, demolition was required within six months.²⁹⁴

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5.2 Broads Authority

Here, Broads Authority served an enforcement notice upon the *Young’s* after discovering a pig-rearing barn was in fact being used as a residential dwelling.²⁹⁵ Unscrupulously, the Young’s failed to obtain building regulation approval, to register for council tax, the electoral role or an address with Royal Mail. On appeal they argued the only explicit “lie” they had told was when they denied living in the shed to a council officer.²⁹⁶

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²⁸⁹ See Neil Watts “Women loses bid to keep house ‘hidden’ in garage” (20120 “http://www.worcesternews.co.uk/news/9976298.Woman_loses_bid_to_keep_house_hidden_in_garage/” - accessed 5th February 2016
²⁹⁰ Hatfield “Under wraps...” (n 166)
²⁹¹ Malvern Hills District Council: *Mrs Jones* (n 117) para 38
²⁹² *Ibid*
²⁹³ *Ibid* para 42
²⁹⁴ *Ibid*
²⁹⁵ David and Elizabeth Young of Land adjacent to Heathacre, Hardley Road, Chedgrave, Norfolk, NR14 6BE – Inspectorate Decision (24th July 2014) Appeal A: Ref:APP/E9505/C/13/2208559 and Appeal B - Ref:APP/E9505/C/13/2208560
²⁹⁶ *Ibid* para 34

Despite explanations and excuses for their failures, the inspectorate concluded the couple had embarked upon an explicit strategy to keep the residential use of the barn a secret from the council,²⁹⁷ they had not merely let events unfold in a passive way. Consequently, their conduct had deliberately misled the LPA and therefore amounted to deliberate concealment.²⁹⁸ Interestingly, the *Beesley* principle²⁹⁹ continues to be favoured, supporting the argument that such-it is preferred over s.171B.

5.3 North Somerset Council

Thus far, the *Beesley* principle had been favoured. The first PEO was however obtained by North Somerset Council, for an agricultural storage barn disguised as a residential dwelling.³⁰⁰ The developer failed to register with both the council tax department and Royal Mail, they remained registered at their parents' address for electoral purposes.³⁰¹ These omissions, alongside the deceiving external appearance, were considered sufficient to grant a PEO.

5.4 Brent Council

Brent Council sought a PEO for an outhouse being rented out for residential use, despite planning permission being granted for a gym.³⁰² The failure to apply for residential planning permission, inform the post office, provide a separate electricity meter and the insertion of a tenancy agreement clause obliging tenants not to pay or register for council tax, was sufficient to prove deliberate concealment.⁵ Subsequently, a PEO was granted as

²⁹⁷ Ibid para 35

²⁹⁸ Ibid para 39

²⁹⁹ *Beesley* SC (n 1)

³⁰⁰ Unknown Defendant v North Somerset Council (North Somerset Magistrates Court, 15 September 2012) Case Number 521200520630

³⁰¹ Marie- Louise Gray "RTPI Network for Planning Enforcement – NAPE News" December 2012 2

³⁰² *Virendra Patel and Rashmika Patel v The Mayor and Burgesses of the London Borough of Brent* (Hendon Magistrates Court, 16 January 2014)

the developer had satisfied the criteria for deliberate concealment. The outcome was regarded as a “fantastic result”, one which unscrupulous landlords should note.³⁰³

5.5 Summary,

Evidently, both solutions are used in practice. Following the first PEO being obtained, a report was written to assist LPA's in the future. The report found that magistrates did not fully understand the reasoning for the procedure. This supports the problems that have been highlighted above. Applying the *Beesley* principle however, does not involve the magistrates' court and therefore sidesteps this issue.³⁰⁴ Having said that, it is still difficult to predict whether PEO's will continue to be used, especially given the success of the *Beesley* principle.³⁰⁵

6. Conclusion

In response to the loophole *Beesley* and *Fidler* exposed, the government responded quickly, creating a new procedure for taking enforcement action outside of the relevant time period.³⁰⁶ Although, the general concept of s.171BA-C is welcomed, it is considered to be a 'sledge hammer to crack a relatively small nut'.³⁰⁷ The amendments generate an extraordinary level of controversy, highlighting the polarised nature of debate about the planning system and the inherent conflict that arises.³⁰⁸

³⁰³ Jim Dunton "Borough wins beds in sheds 'concealment' case" (2014) <<http://www.planningresource.co.uk/article/1227931/borough-wins-beds-in-sheds-concealment-case>> - accessed 5th May 2015

³⁰⁴ *Beesley* (n 1) - Marie- Louise Gray "RTPI Network for Planning Enforcement – NAPE News" March 2013 5

³⁰⁵ Steven Bell "Cases involving concealment – where are we now?" (2014) <http://www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=20075%3Acases-involving-concealment--where-are-we-now&catid=63%3Aplanning-articles&Itemid=31> accessed 4th November 2015

³⁰⁶ Section 171BA-C of the T&CPA 1990

³⁰⁷ Royal Town Planning Institute 'The Localism Bill: RTPI Issue Briefing Enforcement' (June 29, 2011)16 <<http://www.rtpi.org.uk/media/8262/RTPI-Issue-Briefing-Enforcement-v2-29-06-11.pdf>> accessed 18th December 2015

³⁰⁸ Edwards (n 5) 374

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It is questionable whether the new provisions have created more problems than they solved,³⁰⁹ rather than close the loophole, it appears to have been 'left ajar'.³⁰⁹ The most serious casualty is the removal of unambiguous limitation periods, thereby damaging definitive tests laid down before the 1990 Act.³¹⁰ It is said to be a 'shining example of the trite observation "hard cases make bad law".³¹¹

The way the government chose to solve the problem has significant disadvantages and is has been unnecessarily complicated.³¹² The provision was ill conceived and places an extra burden on already overstretched LPA's.³¹³ It has long been said LPA's have been failing in their enforcement duties, it would appear this still stands today as more and more cases are appearing where developers have successfully deceived the LPA.³¹⁴ It is vital that LPA's ensure developers are complying with the law and make a serious in an attempt to rebuild the public's confidence in the planning system.³¹⁵

Despite concerns about importing public policy, one would predict the *Beesley* principle is the best possible way to deal with such cases, based on money, expertise and speed. Having said that, s.171BA-C³¹⁶ has also proven successful, despite the criticism,⁷ and although the magistrates are arguably not equipped to deal with such complexities, the more PEOs applications for PEO's there are, the more guidance there will be to assist in the magistrates decisions.

³⁰⁹ Hatfield "Sledge Hammer..." (n 96) 59

³¹⁰ Hatfield "Sledge Hammer..." (n 96) 59 ibid

³¹¹ Stemp "To Infinity..." (n 111)

³¹² RTPI Briefing (n 159)16

³¹³ Catherine Bowman, "The Localism Bill divides opinion"(2011, Law Society Gazette) <<http://www.lawgazette.co.uk/analysis/the-localism-bill-divides-opinion/61508.article>> accessed 4th November 2011

³¹⁴ Planning and Compensation Bill HL (Session 1991) [524] on 17 January 1991 cc1264-318 (Lord Norrie)

³¹⁵ Green paper (n 92) 5 para.2.7

³¹⁶ S.171BA-C of the T&CPA 1990

Nevertheless, had the government awaited the SC's conclusion,³¹⁷ they would have witnessed a much simpler, cheaper and quicker option; interpreting the legislation in harmony with public policy.³¹⁸ Thus, the government's reaction can undeniably be regarded as a "quick fix"³¹⁹ solution. It is also said to be entirely disproportionate,³²⁰ especially given the atypical nature of cases like *Beesley* and *Fidler*.³²¹

Nonetheless, LPA's now have two solutions to deal with deliberately concealed developments, which, despite criticisms, both have been applied successfully prohibiting reliance on the expiration of time. Deliberately concealed developments are a contemporary issue, with an influx of cases being scrutinised.³²² Those responsible are now unlikely to seek a CLEUD, so unless LPA's systematically check every development or receive complaints and 'tip offs' from the public, it is unlikely they will be discovered. Due to the very nature of these cases, it is impossible to know how many devious developers have followed in *Beesley's* and *Fidler's*³²³ footsteps. Without inspecting every agricultural barn, it is impossible to know how many are actually being used as residential dwellings. Although, as case law demonstrates *Beesley* was not alone.

7. Recommendations

Threatening unscrupulous developers with criminal sanctions, would appear the best deterrent, especially with the added threat of recovering the proceeds of the crime under the POCA. However, at present there is no sign that breaches of planning control will be

³¹⁷ *Beesley* (n 1) -LA'11 s.171BA-C came into force on the 15th November 2011 but the bill was put to parliament on the 13th December 2010– SC concluded *Beesley* on the 6th April 2011

³¹⁸ Hatfield "Under Wraps..." (n 166)

³¹⁹ Hatfield "Sledge Hammer..." (n 96) 59/60

³²⁰ Steven Dunro, of the Law Society's Planning and Environmental Law Committee, quoted in Catherine Bowman, "The Localism Bill divides opinion"(2011, Law Society Gazette) <<http://www.lawgazette.co.uk/analysis/the-localism-bill-divides-opinion/61508.article>> accessed 4th November 2011

³²¹ *Beesley* (n 1) and *Fidler* (n 2) – Ibid

³²² Martin Goodall "The 4 year rule" (2012) <http://planninglawblog.blogspot.co.uk/2012_03_01_archive.html> accessed 5th May 2015

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criminalised under the T&CPA. ~~The~~ The only option therefore, would be to bring charges under the FA, but with the absence of a statutory 'declaration of truth', the costs and time involved are likely to discourage ~~the~~ LPA's from adopting such practice. Accordingly, unless the government increase LPA's funding, enforcement action will remain subordinate until the authority is compelled to take enforcement action due to the shocking nature of the case, as with *Beesley* or *Fidler*.³²⁴ Undoubtedly, the planning system is more complicated now than ever before, but it is certainly much easier to critique the law than to suggest definitive proposals for reform.³²⁵

Over time cases will diminish, as developers will realise they will no longer benefit from deliberate concealment. Considering the *Beesley* principle survived the introduction of the PEO procedure, the effectiveness of the statute is less concerning, as it is clear *Beesley* is suitable to cover the problem. ~~Nevertheless, additional enforcement powers, such as criminalising planning breaches, ought to be reconsidered.~~

In the meantime it is suggested that procedures to criminalise planning breaches should be implemented, in a serious attempt to deter developers that intentionally plan to deceive LPAs. Whether the deception is concealing the nature or full extent of the development or deliberately failing to apply for planning permission.

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³²³ *Beesley* (n 1) and *Fidler* (n 2)

³²⁴ *Ibid*

³²⁵ Moys (n 190) 456

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