[2020] EWHC 3425 (Admin)

Case no. CO/2063/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Date: 18 November 2020

Before :

Lord Justice Stuart-Smith
Mrs Justice Jefford DBE

sitting remotely at Cardiff Civil Justice Centre

- -

Between :

CEREDIGION COUNTY COUNCIL	**Appellant**
- and –	
MELANIE ROBINSON **IAN CRITCHLEY** **TRACEY STYLES** **JEFFREY CLARKE**	**Respondents**

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Annabel Graham Paul (instructed by **Ceredigion CC Legal Department**) for the Claimant
Scott Stemp (instructed by **Mary Monson Solicitors**) for the First Respondent
Alexander Pritchard Jones (instructed by **Jonas Roy Bloom Solicitors**) for the Fourth Respondent

Hearing date: 18 November 2020

Lord Justice Stuart-Smith :

Introduction

1. This is the judgment of the Court.

2. The Appellant, Ceredigion County Council, appeals by way of case stated against the decision of the Crown Court Sitting at Swansea on 15 November 2019 by which it held that the charges laid against the Respondents were defective, with the result that their appeals against conviction by the magistrates were allowed.

3. In briefest outline, the Respondents had been charged with offences under s. 179 of the Town and Country Planning Act 1990 ["the Act"], which makes it an offence for an owner or a person having control of or an interest in land to carry on any activity which they are required to cease by an enforcement notice. The informations that were laid did not identify expressly the date by and from which the relevant enforcement notices required compliance. Relying upon the authority of *Maltedge and Frost v Wokingham District Council* [1992] 64 P & CR 487, the Crown Court held that this omission was a fatal defect.

4. The issue for this court whether the informations that were laid in the present case were defective such that the Court below was right to quash the convictions.

The Case Stated

5. The Case Stated included the following:

> 2. The Defendants were all charged as either being owners of, or having an interest in, forestry land at 'Cornerwood', Llangoedmor (sometimes referred to as Llechryd), Ceredigion within the local planning authority area of Ceredigion County Council ('the Council'). The owners of the land are D1 and D2. It is alleged by the prosecution that all defendants had failed to comply with three planning enforcement notices issued under s.172 of the Town and Country Planning Act 1990 relating to unlawful buildings and structures on the forestry land and their residential occupation of them.
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> 3. All defendants were prosecuted under s.179 of the Town and Country Planning Act 1990 whereby it is an offence for an owner (subsections (1) and (2)) to fail to take any steps required by a notice or carry out any activity required by the notice to cease after the end of the period for compliance, and it is an offence for another who has control of or an interest in the land (subsections (4) and (5)) to carry on any activity required by the notice to cease.
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> 4. There were three charges against the owners, Ms Robinson and Mr Critchley, to reflect failure to comply with three separate enforcement notices. The relevant parts of the charges for the purposes of this application to state a case are identical

> for each charge and read as follows (for Melanie Robinson): "Between 11/02/2012 and 15/08/2016 at Cardigan in the County of Ceredigion, that you (being Melanie Robinson) together with Ian Critchley, Tracey Styles and Jeffrey Clarke being persons with an interest in the land known as Corner Wood, Coedmor, Llechryd, have, since the 11 February 2012 at Cardigan, carried on activities in contravention of an Enforcement Notice dated the 23 June 2011 in that you failed to…. Contrary to section 179(1) and (2) of the Town and Country Planning Act 1990" (emphasis added).
>
> 5. There was one charge remaining against the other two defendants which contained the same form of wording: D3 and D4 having been acquitted before the Magistrates' Court of charge 1 and the prosecution, on the day of trial, deciding not to resist the appeal of D3 and D4 against charge 3. For Tracey Styles: "Between 11/02/2012 and 15/08/2016 at Cardigan in the County of Ceredigion, that you (being Tracey Styles) together with Melanie Robinson, Ian Critchley and Jeffrey Clarke being persons with an interest in the land known as Corner Wood, Coedmor, Llechryd, have, since the 11 February 2012 at Cardigan, carried on activities in contravention of an Enforcement Notice dated the 23 June 2011 in that you failed to…. Contrary to section 179(4) and (5) of the Town and Country Planning Act 1990" (emphasis added).
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> 6. The history of the prosecutions is that the Defendants had initially been acquitted by the Magistrates' Court on the basis that the prosecution was an abuse of process. An appeal by way of case stated against the decision was allowed by the Divisional Court. The Defendants were then convicted by the Magistrates' Court and the Crown Court was hearing appeals against those convictions. The issue of the legality of the charges was first raised in the Crown Court appeal."

6. We do not have a transcript of the judgment of the Court below, though the case stated includes a detailed note which is agreed for present purposes to be accurate. It appears from that note that the short point underpinning the Court's decision was that, although the informations alleged that the enforcement notice had been contravened since 11 February 2012, they do not tell the Defendant or the Court the date on and from which the enforcement notice required compliance. In reliance upon *Maltedge* the Court below held that "there could … be no more relevant date of averment than the date that entitles proceedings to begin." It concluded that the date on which criminal proceedings became possible "goes to the very heart of the question of the power to use criminal sanctions in pursuance of a planning dispute"; and, in reliance upon *Maltedge* it held that the date on which criminal proceedings could be brought (which would on the facts of this case be the date by and from which compliance with the enforcement notice was required) was a necessary and vital averment. The appeal was therefore allowed.

7. The Case Stated identifies two grounds of appeal and the contentions of the parties in support of their respective positions. Ground 1 is that the Court below was wrong to find that the facts in this case were similar if not identical to *Maltedge* and that it was bound by *Maltedge*. Ground 2 is that *Maltedge* is in any event no longer good law since it concerns entirely different statutory wording. In light of *Sanger v Newham LBC* [2015] 1 WLR 332, it is said that the date for compliance with an enforcement notice is not a material averment.

8. The Case Stated identifies the questions for the Court as being:

> 1. Was the learned Judge wrong to find that the facts in this case were similar, if not identical, to *Maltedge and Frost v Wokingham District Council* [1992] 64 P & CR 487 and that he was bound by that case?
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> 2. If that case was distinguishable, did the informations under consideration correctly aver the date of compliance with the enforcement notice by way of the use of the words "since the 11 February 2012" (that being the date of the compliance)?
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> 3. In the alternative, is *Maltedge* no longer good law that the date of compliance with an enforcement notice is a material averment that must be pleaded because the wording of section 179 of the Town and Country Planning Act 1990 has changed?
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> 4. If so, did the charges adequately aver the date when criminality commenced, in accordance with the current wording of section 179 of the Town and Country Planning Act 1990 and the case of *Sanger v Newham London Borough Council* [2015] 1 WLR 332?
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> 5. Was the learned Judge wrong to find the charges defective for this reason?

The Legal Framework

The earlier framework

9. When *Matledge* was decided, the relevant statutory provisions were s. 179(1) and (6) of the 1990 Act as then in force, which we will call "the 1991 Provisions". They provided:

> "(1) Where—
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> (a) a copy of an enforcement notice has been served on the person who at the time when the copy was served was the owner of the land to which the notice relates, and
>
> (b) any steps required by the notice to be taken (other than the discontinuance of a use of land) have not been taken within the compliance period,

> then … that person shall be guilty of an offence.
>
> …
>
> (6) Where, by virtue of an enforcement notice
>
> (a) a use of land is required to be discontinued, or
>
> (b) any conditions or limitations are required to be complied with in respect of a use of land or in respect of the carrying out of operations on it,
>
> then, if any person uses the land or causes or permits it to be used, or carries out those operations or causes or permits them to be carried out, in contravention of the notice, he shall be guilty of an offence."

10. *Maltedge* arose out of the issuing of enforcement notices against Maltedge and Frost alleging breaches of planning control. The notices required the breaches to be remedied. The original date for compliance was stated to be 6 months of 26 May 1987 (i.e. 26 November 1987). On appeal to the Secretary of State the period for compliance was subsequently extended from 6 to 12 months, but the date from which the period should run is not stated in the report and is therefore unknown. The dispute in *Maltedge* concerned the validity under the 1991 Provisions of two informations which are described but not set out in full in the judgment as follows:

    i) The information against Maltedge (as amended) alleged that on and since 22 June 1989, Maltedge had failed to take steps required by the notice within the period allowed for compliance contrary to section 179(1) of the 1990 Act;

    ii) The information against Frost (as amended) alleged use of the land in contravention of the enforcement notice between 22 June 1989 and 28 September 1991, contrary to s. 179(6) of the 1990 Act.

11. Neither information alleged the date by which the notices had to be complied with whether originally or after extension of the period for compliance after the appeal. Nor did the magistrates receive evidence (whether in the form of presentation of the enforcement notices themselves or otherwise) about the date when the compliance period had expired. The appellants were convicted by the magistrates. On their appeal by way of case stated, their convictions were quashed.

12. The leading judgement was given by Laws J, with whom Beldam LJ agreed. There are four essential strands to his reasoning, which are to be found at pages 488-489:

    i) "Neither information alleged the date by which the enforcement notice had to be complied with, whether originally or by extension on appeal to the Secretary of State. More than that … the magistrates did not receive evidence as to the date when the compliance period expired. Each case asserts that the decision letter, that is to say, the Secretary of State's inspector's decision letter on the appeal, was not put before the magistrates who received no evidence as

to the date of the letter. It is implicit … that the magistrates had no evidence as to what was in fact the date of the expiry of the period for compliance."

ii) "[T]he date by which an enforcement notice falls to be complied with is a defining factor in the offence created by section 179(1) because that section is drafted by reference to the compliance period. Implicitly the same is true of the offence created by section 179(6)."

iii) "[I]t is inherent implicitly in the terms in which the offence in section 179(6) is created that the compliance period must be alleged and proved so that the court can see whether the facts alleged to constitute a breach have occurred at the time and the only time with which the statute is concerned." And

iv) "There being no averment as to the date when the period for compliance expired, nor yet proof of it, these informations and the convictions which flowed from them were … defective."

The present framework

13. The 1990 Act has been subject to amendments, as a result of which s. 179 now provides what we shall call "the Current Provisions" as follows:

> "(1) Where, at any time after the end of the period for compliance with an enforcement notice, any step required by the notice to be taken has not been taken or any activity required by the notice to cease is being carried on, the person who is then the owner of the land is in breach of the notice.
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> (2) Where the owner of the land is in breach of an enforcement notice he shall be guilty of an offence.
>
> (3) In proceedings against any person for an offence under subsection (2), it shall be a defence for him to show that he did everything he could be expected to do to secure compliance with the notice.
>
> (4) A person who has control of or an interest in the land to which an enforcement notice relates (other than the owner) must not carry on any activity which is required by the notice to cease or cause or permit such an activity to be carried on.
>
> (5) A person who, at any time after the end of the period for compliance with the notice, contravenes subsection (4) shall be guilty of an offence.
>
> (6) An offence under subsection (2) or (5) may be charged by reference to any day or longer period of time and a person may be convicted of a second or subsequent offence under the subsection in question by reference to any period of time following the preceding conviction for such an offence.
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> (7) Where—

> (a)a person charged with an offence under this section has not been served with a copy of the enforcement notice; and
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> (b)the notice is not contained in the appropriate register kept under section 188,
>
> it shall be a defence for him to show that he was not aware of the existence of the notice."

14. A different constitution of this Court considered the Current Provisions and the continued applicability of *Maltedge* in *Sanger v Newham LBC* [2015] 1 WLR 332. The judgment of the Court was given by Singh J, with whom Sir Brian Leveson P agreed. One of the questions raised was whether an offence under s. 179(2) of the Current Provisions was only capable of being committed on the day that an enforcement notice expired. Reliance was placed on *Maltedge* in support of this submission. Having identified the ratio of Laws J's judgment by reference to the passage set out at [12 (iii)] above, Singh J rejected the submission at [43], giving two reasons:

> "First, the ratio of the case is that the informations in that case were defective because they did not aver, nor was it ever proved before the magistrates' court, that there had been a failure to comply with the requirements of the enforcement notice by the date specified in it. That was an essential element of the offence charged, yet it had not been averred or proved, as it should have been. Secondly, and fundamentally, the case was concerned with a different version of section 179. In particular, it should be recalled that the words of subsection (1) now apply to "any time" after the end of the period for compliance with an enforcement notice. The reasoning of Laws J, that the only time with which the statute was concerned was the end of the period for compliance, is simply not applicable to the current wording of section 179 ."

15. The Court held that, although the offence under s. 179(2) could not be committed before the period for compliance has expired, thereafter the offence is a continuing one, as is shown by the fact that the offence is committed "at any time" after the end of the period for compliance with an enforcement notice: see [35]-[36].

16. It is also material to note that, at [31], the Court formulated the factual ingredients that the prosecution would have to prove in order to secure a conviction in a case under s. 179 as then (and now) in force:

> " (1) that an enforcement notice was issued by the council relating to the relevant land and which on its face complied with the requirements of the 1990 Act, had not been quashed and required some steps to be taken within a certain time; (2) *that the time for complying with the enforcement notice had expired;* (3) that the appellants owned the land during the period covered by the charge and that period was after the period for complying with the enforcement notice had expired;

> and (4) that on the dates covered by the summons the appellants had not complied with the requirements of the enforcement notice." (Emphasis added)

17. One further strand needs to be borne in mind. The formal requirements for the laying of an information are set out in the Criminal Procedure Rules 2015 at rules 7.2 and 7.3, which at the relevant time provided:

> "7.2.—(1) A prosecutor who wants the court to issue a summons must—
>
> (a) serve an information in writing on the court officer; or
>
> (b) unless other legislation prohibits this, present an information orally to the court, with a written record of the allegation that it contains.
>
> 7.3.—(1) An allegation of an offence in an information or charge must contain—
>
> (a) a statement of the offence that—
>
> (i) describes the offence in ordinary language, and
>
> (ii) identifies any legislation that creates it; and
>
> (b) such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant."

18. The Court's approach to these requirements has been set out frequently, not always in the same words but to the same effect: the critical question is whether the defendant is prejudiced by the way in which the information is worded. An example of this approach is to be found in *Lycamobile UK v LB Waltham Forest* [2014] EWHC 1829 (Admin) which, by coincidence, was decided by the same constitution of the Divisional Court and heard on the same day as *Sanger*. One issue was whether the informations had sufficiently identified the "Advertisement Regulations" that the Defendant was alleged to have contravened. The information did not specify the year in which the regulations were made; but it was argued for the prosecution that there was only one set of "Advertisement Regulations" and that there could be no confusion or prejudice to the defendant.

19. The facts of *Lycamobile* are evidently distinguishable from the facts of the present case. However, the approach of the Court is relevant and is demonstrated at [30]-[32] where, having set out the terms of the rule that was current at the time (which were the same as Rule 7.3 as set out above) Sir Brian Leveson P, with whom Singh J agreed, said:

> "30. I, for my part, would entirely accept the proposition that there are some defects in an information which cannot be remedied. Hunter v Coombs, where the statute pleaded had been repealed, is an obvious example. In this case, there is no

> doubt whatsoever that this information accurately identifies the legislation that created the offence.
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> 31. Furthermore, in ordinary language it describes the offence, namely the display of the advertisements. Does it give sufficient particulars of the conduct constituting the offence as to make clear what the prosecutor alleges against the defendant? Although we recognise, and Mr Mullin concedes, that it would have been far better had the information contained more by way of particularity in the form of an identification of the regulation and the breach, in our judgment the failure in its drafting falls within that group of failures that do not undermine the safety of a conviction based upon them.
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> 32. These are rules with which prosecutors must comply and, in our judgment, the requirement for ordinary language and particularity is sufficiently satisfied by the language used in this information, although by no means an exemplar of its type."

The Parties' Submissions

20. The parties submissions were clearly and concisely expressed by Ms Graham Paul on behalf of the appellant and by Mr Stemp and Mr Pritchard-Jones on behalf of the first and fourth respondents respectively. The second and third respondents were not separately represented and did not make separate submissions; but they adopted the submissions made on behalf of the first and fourth respondents.

21. The point may be shortly stated. Ms Graham Paul submitted that the changed wording of s. 179 renders the date of expiry of the period of compliance less critical than it was under the operative wording in *Maltedge*. She accepts that the prosecution would have to prove at trial that the period for compliance with the enforcement notice had expired by the date of the conduct which is alleged to be criminal contravention of the notice, but not the specific date on which it had expired. That, she submits is entirely clear from the wording of these informations, which identify the Enforcement Notices, the conduct alleged to have contravened it, and the period of the allegedly criminal offending. Since there cannot have been a contravention before expiry of the period for compliance, she submits that it is a necessary inference to be drawn from the informations as they stand. The date of expiry of the compliance period need not be the same as the date on and from which contravention is alleged. She submitted that under the Current Provisions what needs to be shown is not the date on which the period expired (as in *Maltedge)* but that it had expired before the conduct alleged to be criminal contravention. The respondents had all the information they needed to enable them to understand what was charged against them, including that the provisions of the enforcement notice were in force and that they had contravened them. There could accordingly be no confusion about what was being alleged and no prejudice to the respondents.

22. For the respondents, Mr Stemp and Mr Pritchard-Jones submitted that, despite the changed wording of s. 179, the date of expiry of the period for compliance is critical because it opens the door to allegations of criminality and should therefore be specified in the information. Mr Stemp submitted that the critical importance of the

actual date is that it may also be essential to consideration of potential statutory defences under s. 179(3) or s. 179(7). Both counsel submitted that the informations in the present case do not merely state the date on which the period for compliance had expired, they do not state expressly that the period had in fact expired at all.

Discussion

23. It is convenient to set out again the form of the charges under challenge in these proceedings. They were in two forms:

    i) "Between 11/02/2012 and 15/08/2016 at Cardigan in the County of Ceredigion, that you (being Melanie Robinson) together with Ian Critchley, Tracey Styles and Jeffrey Clarke being persons with an interest in the land known as Corner Wood, Coedmor, Llechryd, have, since the 11 February 2012 at Cardigan, carried on activities in contravention of an Enforcement Notice dated the 23 June 2011 in that you failed to…. Contrary to section 179(1) and (2) of the Town and Country Planning Act 1990"; and

    ii) "Between 11/02/2012 and 15/08/2016 at Cardigan in the County of Ceredigion, that you (being Tracey Styles) together with Melanie Robinson, Ian Critchley and Jeffrey Clarke being persons with an interest in the land known as Corner Wood, Coedmor, Llechryd, have, since the 11 February 2012 at Cardigan, carried on activities in contravention of an Enforcement Notice dated the 23 June 2011 in that you failed to…. Contrary to section 179(4) and (5) of the Town and Country Planning Act 1990"

24. These informations have in common that they:

    i) Identify the defendants;

    ii) Identify the offence with which the Defendant's are charged ("carried on activities in contravention of an Enforcement Notice…);

    iii) Identify the relevant legislation that creates the offence that is charged;

    iv) Identify the particular enforcement notice by date and by reference to the land that is the subject of the enforcement notice in question, thereby locating the defendants' activities on that land;

    v) Identify the date on or since which and the period during which the offence is alleged to have been committed;

    vi) Identify the failures that are alleged to constitute contravention of the enforcement notice;

    vii) Do not identify the date on which the period for compliance set by the enforcement notice expired or state expressly that it has done so.

25. It can therefore be seen that the informations comply with CPR Rule 7.3(1)(a). The only question under the provisions of Rule 7 is whether they "provide such particulars of the conduct constituting the commissions of the offence as to make clear what the prosecutor alleges against the defendant."

26. We approach this issue taking as our touchstone whether the informations as laid in this case could have caused any reasonable confusion or prejudice to the Defendants.

27. In our judgment the change in the wording of s. 179 is important. The wording at the time of *Maltedge* focused on the ending of the period of compliance with an intensity that is absent from the current wording. The offence under the *Maltedge* wording was committed if steps required by a notice to be taken were not taken "within the compliance period". Therefore there was a binary question which had to be answered by reference to the expiry of the compliance period: at that moment had steps that were required by the notice to have been taken by then not been taken? In order to assess and answer that question it would be imperative for the defendant and the Court to know precisely when the compliance period ended. Without that information the Defendant could not assess his position at all and would be prejudiced in his defence of the charge; and the Court would not know the moment at which it had to assess whether the Defendant had failed to take the required steps. That explains why the Court in *Maltedge* said that the date by which an enforcement notice fell to be complied with was "a defining factor" in the offence created by the 1991 Provisions "because that section is drafted by reference to the compliance period." It also explains the need for the Court to see whether the facts alleged to constitute a breach have occurred "at the time *and the only time* with which the statute is concerned." (Emphasis added)

28. Under the Current Provisions, by contrast, the offence is not committed at a single point in time. As pointed out at [36] of *Sanger*, "the offence is committed "at any time" after the end of the period for compliance with an enforcement notice." After the period for compliance has expired, the offence is in that sense a continuing one. In our judgment, that explains why Singh J at [31] of *Sangar* identified that what the prosecution had to prove included that "the time for complying with the enforcement notice had expired" rather than having to prove that it had expired on a particular day. We respectfully endorse that approach. Put in other words, under the Current Provisions the focus shifts from the moment of expiry of the period for compliance to the period of alleged criminal contravention. What matters, and what the prosecution must prove, is that the period for compliance has expired so that the defendant was under obligation not to contravene the notice: the exact moment at which it expired is no longer of critical or defining importance. As Mr Stemp correctly accepted and submitted, "the compliance date and the date from which offending commences can [be] (and often are) entirely disconnected."

29. It is true that the current informations do not say expressly that the period of compliance had expired. However, since there could otherwise be no material breach of the enforcement notice, it is a necessary inference from the wording of the present informations that the period for compliance had expired at the time of the allegedly criminal contravention. In our judgment, the present informations are clear in conveying to the Defendants that their conduct between 11 February 2012 and 15 August 2016 is alleged to be a criminal contravention of the specified enforcement notice. That necessarily carries with it the assertion that the enforcement notice was effective to create obligations upon the Defendants between those dates. Any Defendant confronted by such an information could be in no doubt that the charge was based upon a failure to comply with obligations created by the enforcement notice. It would be clear to any Defendant that the prosecution was asserting (and

would have to prove) that the conduct alleged to be in criminal contravention of the identified enforcement notice occurred after any period for compliance had expired. Of equal importance, that would also be entirely clear to any Court that had to consider the charge. That would be of particular importance as a source of protection if there were a Defendant who was not represented and, despite the clarity of what was being said, did not understand that the prosecution would need and intend to prove that the period for compliance had expired. What would *not* be essential to be specified to enable the Defendant (or the Court) to understand what the prosecutor was alleging against the Defendant is the precise date on which the period for compliance came to an end.

30. For these reasons, we conclude that the informations in the present case were not defective and that the Court below was wrong to find that they were. We do not exclude the possibility that there could be exceptional cases under the new wording which might require the precise date of expiry to be specified; but we were not addressed in detail on that possibility, the submissions being suitably tailored to the facts of the present case. On the facts of the present case, which we consider to be typical, the position is clear. That is not to say that it would have been wrong for the informations to have asserted expressly the date on which the prosecutor contended that the period for compliance had expired; our decision is that these informations were not defective for want of that having been stated.

31. Adopting the touchstone that we outlined earlier, we are satisfied that the informations as laid in the present case could not have caused any reasonable confusion or prejudice to the Respondents. To the contrary, we are satisfied that they made clear what the prosecutor was alleging.

32. We answer the questions raised by the Case Stated as follows:

> 1. *Was the learned Judge wrong to find that the facts in this case were similar, if not identical, to Maltedge and Frost v Wokingham District Council [1992] 64 P & CR 487 and that he was bound by that case?* Yes
>
> 2. *If that case was distinguishable, did the informations under consideration correctly aver the date of compliance with the enforcement notice by way of the use of the words "since the 11 February 2012" (that being the date of the compliance)?* No, but it was not necessary to state the date of the end of the period for compliance.
>
> 3. *In the alternative, is Maltedge no longer good law that the date of compliance with an enforcement notice is a material averment that must be pleaded because the wording of section 179 of the Town and Country Planning Act 1990 has changed?* See the answer to question 2.
>
> 4. *If so, did the charges adequately aver the date when criminality commenced, in accordance with the current wording of section 179 of the Town and Country Planning Act 1990 and the case of Sanger v Newham London Borough*

Council [2015] 1 WLR 332? Yes. And it should be noted that the date for the commencement of criminality is not necessarily the date upon which the period for compliance expires.

5. *Was the learned Judge wrong to find the charges defective for this reason?* Yes.

33. Accordingly this appeal is allowed and the case should be remitted to the Crown Court to conduct the appeal in accordance with the principles identified in this judgment.