Neutral Citation Number: [2021] EWHC 1428 (Admin)

Case No: CO/2142/2020

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

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street, Birmingham

Date: 27/05/2021

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

- -

Between :

THE QUEEN

on the application of

(1) LYNDON THOMAS
(2) SAMANTHA THOMAS
(3) LYNDON THOMAS LIMITED **Claimants**

- and -
NORTH NORTHAMPTONSHIRE COUNCIL
(formerly KETTERING BOROUGH COUNCIL) **Defendant**

- -
- -

Christian Hawley (instructed by **Thrings LLP**) for the **Claimant**
Killian Garvey (instructed by **North Northamptonshire Council**) for the **Defendant**

Hearing date: 10 May 2021

- -

Approved Judgment

Mrs Justice Steyn :

Introduction

1. This is a claim for judicial review by which the claimants challenge the decision of the defendant of 1 May 2020 to issue an Enforcement Notice alleging unauthorised development on land at Birchfield Springs, Rushton Road, in Desborough, a town in Northamptonshire ("the Site").

2. The first and second claimants, Mr and Mrs Thomas, are the registered owners of the Site, and the third claimant is the occupier. The Enforcement Notice was issued by Kettering Borough Council ("KBC"), and when the claim was issued on 12 June 2020, KBC was the named defendant. Since then, structural changes have taken place with the effect that KBC has ceased to exist, and a new unitary authority, North Northamptonshire Council ("NNC"), has been established, which has subsumed the functions and responsibilities of KBC, including in respect of enforcement notices. Accordingly, since 1 April 2021, the defendant to this claim has been NNC.

3. Permission was granted by HHJ David Cooke, by an order sealed on 6 July 2020, limited to one ground of challenge by which the claimants allege that KBC did not have the power to issue the Enforcement Notice.

4. This claim gives rise to the following issues:

   i) Is the claim academic? Or, more accurately, does Regulation 6(3) of the Local Government (Boundary Changes) Regulations 2018, together with the structural changes that have taken place, cure the alleged illegality? (***Issue (1): The effect of the restructuring of local government***)

   ii) Was KBC, as a district planning authority, precluded by paragraph 11(4) of Schedule 1 to the Town and Country Planning Act 1990 ("the 1990 Act") from issuing an enforcement notice that included components such as winning, working, storage and sale of minerals (which the claimants contend were reserved to the county planning authority)? (***Issue (2) The ultra vires issue***)

   iii) If it is established that KBC had no power to issue the Enforcement Notice, given that the Enforcement Notice persists in the name of NNC, which indisputably has the requisite power to re-issue it, does section 31(2A) of the Senior Courts Act 1981 apply and, in any event, should relief be refused? (***Issue (3) Relief***)

Issue (1): The effect of the restructuring of local government

The statutory provisions

5. The Northamptonshire (Structural Changes) Order 2020 ("the 2020 Order") came into effect on 14 February 2020 (article 1). Article 3 of the 2020 Order provides:

> "(1) A new non-metropolitan county and a new non-metropolitan district, each to be known as North Northamptonshire, are constituted comprising (in each case) the area of the North Northamptonshire districts.

> (2) A new district council, to be known as North Northamptonshire Council, is established as the sole principal authority for the non-metropolitan district of North Northamptonshire.
>
> (3) Except for the purposes of Part 4 of this Order (electoral matters), until 1st April 2021 –
>
> > (a) North Northamptonshire Council is not a local authority for the purposes of the 1972 Act or for any other enactment relating to local government; and
> >
> > (b) subsection (2) of section 2 of the 1972 Act (constitution of principal councils in England) has effect in relation to that council, as if the words form "and the council" to the end of that subsection were omitted.
>
> (4) In relation to the county of North Northamptonshire, section 2(1) of the 1972 Act (which provides that every county shall have a council) does not apply.
>
> (5) On 1st April 2021 –
>
> > (a) the North Northamptonshire districts are abolished as local government areas; and
> >
> > (b) the North Northamptonshire councils are wound up and dissolved." (emphasis added)

6. Article 5(1) provides:

> "On 1st April 2021 –
>
> > (a) the County of Northamptonshire is abolished as a local government area; and
> >
> > (b) the county council is wound up and dissolved."

7. The definitions are contained in Article 2 which provides so far as material:

> "In this Order –
>
> "the 1972 Act" means the Local Government Act 1972;
>
> …
>
> "the county council" means the council of the county of Northamptonshire
>
> …

> "the North Northamptonshire districts" means the districts of Corby, East Northamptonshire, Kettering and Wellingborough
>
> "the North Northamptonshire councils" means Corby Borough Council, East Northamptonshire District Council, Kettering Borough Council and Wellingborough Borough Council." (emphasis added)

8. It is common ground that the 2020 Order provided for the establishment, on 1 April 2021, of a single tier of local government in Northamptonshire. As the explanatory note accurately states:

> "Two new councils are created; the North Northamptonshire Council, for the same area as the existing districts of Corby, East Northamptonshire, Kettering and Wellingborough, and the West Northamptonshire Council, for the same area as the existing districts of Daventry, Northampton and South Northamptonshire.
>
> The County of Northamptonshire and the districts of Corby, East Northamptonshire, Kettering, Wellingborough, Daventry, Northampton and South Northamptonshire are abolished as local government areas with effect from 1st April 2021. The county council and district councils in the county are wound up." (emphasis added)

9. When the Enforcement Notice was issued on 1 May 2020, KBC was the district planning authority, and Northamptonshire County Council ("the County Council") was the county planning authority, for the area within which the Site is located. Both those authorities were abolished on 1 April 2021 and, simultaneously, NNC was constituted as the new unitary authority for the area in which the Site is located (having operated prior to 1 April 2021 as a "*shadow authority*", for electoral purposes only).

10. Part 2 of the Local Government (Boundary Changes) Regulations 2018 (SI 1128/2018) ("the 2018 Regulations") contains regulations 4 to 8. Regulation 4 provides:

> "On the reorganisation date, the functions of the predecessor councils shall become the functions of the successor council."

11. Regulation 6 provides, so far as material:

> "**Continuity: successor council**
>
> (3) Anything done by, or in relation to, a predecessor council or a shadow authority in the exercise of, or in connection with, a function that is to be exercised on and after the reorganisation date by the successor council shall have effect as if done by, or in relation to, that council.
>
> (4) Paragraph (3) applies in particular to –
>
> …

> (d) any certificate, direction or notice given by or to such a council or authority;…"

12. Regulation 2 (interpretation) provides so far as material:

> "In these Regulations –
>
> …
>
> "predecessor council", in relation to a section 10 order, means a district council for whose winding up and dissolution the order provides;
>
> "the reorganisation date" means the date specified in the section 10 order as that on which the predecessor council is to be wound up and dissolved;
>
> …
>
> "successor council" in relation to a predecessor council whose entire area becomes part of the area of a new council on the reorganisation date, means that new council".

13. It was common ground that regulation 6 applies and that for the purposes of the 2018 Regulations KBC is a "predecessor council", NNC is a "successor council", and the "reorganisation date" was 1 April 2021.

14. The explanatory notes to the 2018 Regulations state:

> "Part 2 provides for the transfer of all functions of the predecessor councils to the successor council (regulation 4) and ensures continuity as a result of the transfer (regulations 5 to 7)." (emphasis added)

The parties' submissions

15. This preliminary issue was raised by the defendant following the reorganisation on 1 April 2021. Counsel for the NNC, Mr Garvey, contends that because of the structural change that has recently occurred, the claim has been rendered academic. He submits that I should dismiss the claim on that basis alone. It is well established that the court should not determine academic issues, save in exceptional circumstances. In support of this proposition in the planning context, Mr Garvey relies on *R (Tewkesbury Borough Council) v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1775 (Admin), in which Dove J held:

> "22. …it was accepted on all sides that the court does have jurisdiction to consider a claim and grant relief in a claim which is or has become academic or hypothetical. The difficulties with this kind of case were alluded to by Lord Goff in his speech in *R v Secretary of State for the Home Department ex parte Wynne* [1993] 1 WLR 115 in which he observed that it was well established that the House of Lords did not decide hypothetical

situations, and if they were to do so any conclusions could constitute no more than obiter dicta "expressed without the assistance of a concrete factual situation, and would not constitute a binding precedent for the future."

…

24. This line of authority was considered by Silber J in *R (Zoo Life International Limited) v Secretary of State for Environment, Food and Rural Affairs and others* [2000] EWHC 2995 (Admin) in which, having observed the approach of the authorities in the House of Lords, Silber J concluded that there was no reason why those principles should not apply to other courts. In particular in relation to the Administrative Court he observed as follows:

> '…
>
> 36. In my view these statements show clearly that academic issues cannot and should not be determined by courts unless there are exceptional circumstances such as where two conditions are satisfied in the type of application now before the court. The first condition is in the words of Lord Slynn in *Salem* (supra) that "a large number of similar cases exist or are anticipated" or at least other similar cases exist or are anticipated and the second condition is that the decision in the academic case will not be fact-sensitive. If the courts entertained academic disputes in the type of application now before the court but which did not satisfy each of these two conditions, the consequence would be a regrettable waste of valuable court time and incurring by one or more parties of unnecessary costs.
>
> …'

34. I recognise that there is force in the submission made by Mr Pereira that when the court faces a question of the interpretation of national planning policy it could be contended that the two conditions set out in paragraph 36 of *Zoo Life* might be satisfied. Interpretation of national planning policy is a question of law and not fact, and given its national coverage it is possible to contemplate that the point of interpretation will arise in a number of other similar cases. However, it is important, in my view, to recognise that in paragraph 36 of *Zoo Life* Silber J was not laying down an exhaustive or comprehensive list of conditions giving rise to when exceptional circumstances might exist. The two conditions are identified as examples of when exceptional circumstances might exist rather than as a test of exceptionality itself. His use of the language "such as" reinforces this. …" (emphasis added)

16. The foundation for NNC's contention that the claim is academic is regulation 6(3) of the 2018 Regulations (quoted in §10 above). The NNC relies on this provision, and particularly the words "*shall have effect as if done by*", as meaning that pursuant to regulation 6(3) the Enforcement Notice persists in the name of NNC and must be treated as if it were issued by NNC. The Enforcement Notice is deemed to have been issued by NNC, rather than KBC. The claimants' substantive argument is that KBC, as a *district* planning authority, did not have power to issue the Enforcement Notice. That substantive argument does not run against NNC which is a unitary authority, having the powers of both a district and a county planning authority. If the Enforcement Notice is deemed to have been issued by NNC, the claim must fail and it is neither here nor there whether a district planning authority's powers are limited in the way the claimants contend.

17. The NNC accepts this claim is not fact sensitive, but Mr Garvey submits that I should not determine the substantive issue because, *first*, any determination I make on that issue would be obiter; *secondly*, it would involve making findings against an authority which no longer exists: *thirdly*, the answer to the substantive issue can make no difference to the claimants, whose Site is located in the area of a unitary authority; and, *fourthly*, the fact that there appears to have been only one previous case addressing the issue since the provision was enacted more than 30 years ago, suggests that it does not commonly arise.

18. During the hearing I suggested to Mr Garvey that his argument goes further than contending the claim is academic: his true contention is that any unlawfulness has been cured. He accepted that his submission is that regulation 6(3) has retrospective effect. As he put it, the words of the regulation are clear and the effect is to "*rewrite history*".

19. The second aspect of Mr Garvey's contention that the claim is academic was that relief should be refused pursuant to section 31(2A) of the Senior Courts Act 1981. I consider that relief is more appropriately addressed separately, as the final issue.

20. Counsel for the claimants, Mr Hawley, submits that the 2018 Regulations do not have the effect of rendering *intra vires* an action which was *ultra vires* when taken, just because the successor authority would now have the power to take the action, if it were to choose to do so. He contends it cannot be right that the effect of regulation 6 is that by *adopting* KBC's unlawful act, NNC has *cured* the unlawfulness, rendering the Enforcement Notice lawful.

21. The claimants submit that in a two-tier authority area, consideration and control of minerals development is a *function* which is the sole preserve of the county planning authority. If that is right, KBC had no *function* to seek to enforce against minerals development, and so it had no relevant *function* in respect of minerals development that it could pass to NNC. The claimants submit that the purpose of regulation 6(3) is to ensure that lawfully made decisions, agreements, approvals, byelaws etc do not fall away simply because of a local authority reorganisation. Its purpose is not to render lawful, retrospectively, decisions, agreements, byelaws etc of the predecessor authority which were unlawful. It is not *"a carte blanche pardoning the unlawful actions of predecessor authorities*".

22. If the court does regard the substantive issue as academic, the claimants contend that the court should, nevertheless determine it because it is predicated on a straightforward

set of facts, as the defendant accepts the issue is not fact-sensitive, and it raises a question of statutory interpretation which is of wider relevance than this case alone.

Analysis and decision

23. In my view, the claim is not academic. This is not a case where, for example, a decision has been withdrawn or overtaken by a fresh decision, rendering any argument as to whether it was lawful academic. The Enforcement Notice issued on 1 May 2020 remains in effect and continues to affect the claimants. NNC has the power to remake the Enforcement Notice, but it has not done so yet. NNC's power to do so, and the likelihood of that power being exercised, do not render the question whether the existing Enforcement Notice is unlawful academic, but those factors fall to be considered if and when determining whether relief should be granted.

24. The defendant's argument as to the effect of regulation 6(3) is more fundamental. On analysis, it is not a plea to the court to refuse to exercise its jurisdiction to determine an academic claim. Rather, it is said that the court must treat the Enforcement Notice as having been made in May 2020 by a unitary authority (NNC), having the powers of both the district and county planning authorities. Even if, had this claim been determined in March 2021, before KBC was abolished, the court would have found the decision to issue the Enforcement Notice was *ultra vires*, the court can no longer make such a finding (the defendant contends) because the effect of regulation 6(3) is to rewrite the history of which authority issued the Enforcement Notice, and what powers and functions the authority had at the time.

25. There is a well established, rebuttable presumption that legislation is not intended to have retrospective effect (other than in relation to procedural matters, where special considerations apply). This presumption applies as much to secondary legislation as it does to primary legislation.

26. *Bennion, Bailey and Norbury on Statutory Interpretation*, (8th ed., 2020) ("*Bennion*") states at §7.13 (footnotes omitted):

> "(1) It is a principle of legal policy that, except in relation to procedural matters, changes in the law should not take effect retrospectively.
>
> (2) Legislation is retrospective if it alters the legal consequences of things that happened before it came into force."

27. The applicable principles are identified in *Bennion* at §7.14 in these terms (footnotes omitted):

> "(1) Unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation.
>
> (2) The strength of the presumption varies from case to case, depending on the degree of unfairness that would result from giving the enactment retrospective effect.

> (3) The greater the unfairness the clearer the language required to rebut the presumption.
>
> (4) Special considerations apply to procedural changes…"

28. The commentary at §7.14 of *Bennion* notes that the principles to be applied in determining whether legislative is retrospective were considered by the House of Lords in *L'Office Cherifien des Phosphates v Yamashita-Shinnibon Steamship Co Ltd* [1994] 1 AC 486.

> "Lord Mustill, with whom all the other members of the appellate committee agreed, explained that the basis of the presumption is 'no more than simple fairness'. Having cautioned against undue or mechanistic reliance on generalised presumptions he applied the following statement from Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712, 714:
>
> > 'In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.'"

29. Similarly, the presumption is identified in *Craies on Legislation* ed. Daniel Greenberg (12th ed., 2020) ("*Craies*") at §§10.3.2-10.3.3. The commentary in *Craies* states at §10.3.3 (footnotes omitted):

> "Not only is it a principle applied by the courts in construing legislation that retrospective application is to be rebuttably presumed not to be intended, but it is also a principle accepted by successive governments that retrospectivity should be avoided except where necessary.
>
> The seriousness with which the notion of retrospective legislation is approached is such that it is generally thought right to bring the retrospectivity to the attention of Parliament and other readers in a prominent way. For example, the long title of a Bill has on occasion been used to draw attention to retrospective effect."

30. NNC's interpretation of regulation 6(3) would give it, together with the 2020 Order, retrospective effect in the sense that it would alter the legal consequences of things that happened before the reorganisation date. So the presumption applies and it is necessary to consider whether it has been rebutted.

31. The presumption is rooted in fairness. It may, perhaps, be seen as a particular instance of the more general presumption that the legislature does not intend to achieve a result

that is manifestly unfair, unreasonable or arbitrary, and so the court will prefer a reasonable interpretation where there is any choice (see *Craies,* §19.1.15). What degree of unfairness (if any) might be thought to be suffered if the provision were applied with retrospective effect? The greater the unfairness, the stronger the presumption that Parliament would not have intended it, and therefore the greater the degree of clarity in the language required to rebut it.

32. In my view, the clear purpose of regulation 6(3), as indicated by its terms and as described in the explanatory notes, is to ensure continuity, so that the legal effect of something done by a predecessor authority is not extinguished by the transfer to a successor authority. The purpose of such a continuity provision is not to make valid, retrospectively, an act that was invalid when done.

33. The presumption against retrospectivity applies with particular force in this context. An enforcement notice affects property rights. A person who fails to undertake the specified steps required by an enforcement notice may potentially face criminal proceedings. A retrospective legislative provision which had the effect of requiring the court to treat an unlawfully issued enforcement notice as if it had been made lawfully would be arbitrary and manifestly unfair. The unfairness, and breach of the rule of law, would be all the more pronounced in circumstances where NNC's interpretation would potentially alter the outcome of ongoing litigation, depending on whether the case was heard before or after 1 April 2021.

34. I reject NNC's contention that regulation 6(3) should be interpreted as having such a profound effect. For the presumption to be rebutted, there would have to be clear language to show that by providing for things to be treated "*as if done by*" the successor council, the provision is intended not just to ensure continuity going forwards, but also to alter the legal consequences of past acts. The regulation does not expressly or clearly say so. In my view, the effect of regulation 6(3) is that the Enforcement Notice subsists in NNC's name, but in considering whether it was lawfully issued, the court must focus on the functions and powers that have been passed to NNC by the predecessor authority that made the Enforcement Notice (i.e. KBC, a district planning authority). Additional functions and powers that NNC has acquired from other predecessor authorities, none of which issued the Enforcement Notice, are irrelevant.

35. I also bear in mind that if regulation 6(3) were to be interpreted in the way for which NNC contends, its retrospective operation would potentially apply to the extensive and wide-ranging list of acts that may have been taken by a predecessor authority, as set out in regulation 6(4)(a) to (i).

36. Where a provision which is said to operate with retrospective effect is contained in secondary legislation, the presumption against retrospectivity is also relevant to the question of *vires*. Just as it may be presumed, unless the contrary intention appears, that Parliament did not intend an enactment to operate with retrospective effect, it may also be presumed that Parliament did not intend to permit subordinate legislation to be made which has the same effect. The parties have not addressed the question whether the primary legislation pursuant to which the 2018 Regulations were made, the Local Government and Public Involvement in Health Act 2007, permitted the Secretary of State to make subordinate legislation which has retrospective effect in the way NNC contends. In these circumstances, and given that I have in any event rejected NNC's

interpretation of regulation 6(3), I have not addressed the terms of the regulation making power.

Issue (2) The ultra vires issue

The Enforcement Notice

37. The Enforcement Notice was issued under section 171A(1)(a) of the 1990 Act and it recited that:

> "THIS IS A FORMAL NOTICE which is issued by the Council because it appears to them that there has been a breach of planning control, under Section 171A(1)(a) of the above Act, at the land described below. They consider that it is expedient to issue this Notice, having regard to the provisions of the Development Plan and to other material planning considerations."

38. The Enforcement Notice alleged the following breach of planning control:

> "Without planning permission the material change of use of the land to a mixed *sui generis* use comprising of:
>
> A) the use of the land for the winning, working, storage and sale of minerals;
>
> B) the use of the land for the unauthorised importation, storing, processing, sorting, transferring and depositing of waste materials;
>
> C) the use of the land for the storage of plant, machinery and vehicles associated with uses A and B above (processors/crushers);
>
> D) the use of the land for the storage of plant hire machinery and storage of parts for the purpose of hire;
>
> E) the residential use of the land, through the stationing of a timber lodge marked A on the Plan with decking, a shed and a caravan;
>
> F) the use of the land for a fishing lake business;
>
> G) the erection of a building, patio and boundary walls hatched in yellow on the Plan, which is part and parcel to the mixed use.
>
> H) the use of the land for mechanical repairs, vehicle maintenance, plant maintenance and the storage of mechanical tools;
>
> I) the erection of a building hatched in blue on the Plan, which part and parcel to use (H);

> J) the unauthorised formation of a pond and two lakes, laying down of hardstanding and access roads, pillars and toppings, perimeter walls and gates above 1m adjacent to the high road part and parcel with use (F) above;
>
> K) the creation of a haul road that is shown on the Plan hatched in orange, that is part and parcel of the mixed use; and
>
> L) the siting and stationing of a portacabin on the land marked B on the Plan for the purpose of an office that is part and parcel of the mixed use."

39. The parties agree that the Site comprises a single planning unit and the unauthorised development alleged by the defendant is a mixed use.

40. By a letter dated 11 April 2019, the County Council wrote to KBC regarding the proposed enforcement action in respect of the Site (and one other site):

> "The County Council would like to support your authority in its investigations and any possible enforcement action on the two sites. As part of this we have discussed with Lucinda [Lee, Senior Planning Enforcement Officer at KBC] the need to agree that any aspects of unauthorised development which overlap with county matter responsibilities should also be covered in any enforcement action undertaken by your authority. Schedule 1, clause 11 of the Town and Country Planning Act states that enforcement can be taken by the district council (11(1)(b)) but where it appears that the function relates to a county matter they should not exercise those functions without first consulting the county planning authority (11(2)). The discussions with Lucinda have comprised this necessary consultation.
>
> Any enforcement action undertaken by the County Council as Minerals and Waste Planning Authority has to be subject to consultation with the Chairman of the Northamptonshire Development Control Committee and this would also be the case where another planning authority was undertaking enforcement action in relation to aspects of county matter development. I can confirm that this consultation has been undertaken and it has been agreed that in relation to the two cases listed at the head of this letter that it would be appropriate to agree to your authority taking enforcement action which may relate to aspects of county matters. This is subject to your authority consulting us on the final wording of any enforcement notices which relate to county matters, following which the Waste Planning Authority will confirm its agreement for the notices to be issued." (emphasis added)

41. The claimants confirm in their skeleton argument that it is no part of their claim to allege that the defendant failed to consult with the County Council as required by paragraph 11(2) of Schedule 1 to the 1990 Act.

The statutory provisions

42. Section 1 of the 1990 Act provides so far as material:

> "1.— Local planning authorities: general.
>
> (1) In a non-metropolitan county—
>
> (a) the council of a county is the county planning authority for the county, and
>
> (b) the council of a district is the district planning authority for the district,
>
> and references in the planning Acts to a local planning authority in relation to a non-metropolitan county shall be construed, subject to any express provision to the contrary, as references to both the county planning authority and the district planning authorities.
>
> …
>
> (3) In England (exclusive of the metropolitan counties, Greater London and the Isles of Scilly) all functions conferred on local planning authorities by or under the planning Acts shall be exercisable both by county planning authorities and district planning authorities.
>
> (4) In this Act "mineral planning authority" means —
>
> (a) in respect of a site in a non-metropolitan county, the county planning authority; …
>
> (5) This section has effect subject to any express provision to the contrary in the planning Acts and, in particular—
>
> …
>
> (c) subsection (3) has effect subject to Schedule 1 (which contains provisions as to the exercise of certain functions under this Act by particular authorities and liaison between them)." (emphasis added)

43. KBC was a district planning authority in a non-metropolitan county; the County Council was the county planning authority and the mineral planning authority.

44. Section 172(1) of the 1990 Act provides:

> "The local planning authority may issue a notice (in this Act referred to as an "enforcement notice") where it appears to them –

(a) that there has been a breach of planning control; and

(b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations."

45. It is common ground that s.1(3) of the 1990 Act, by which both KBC and the County Council could exercise all planning functions is qualified, in this instance, by Schedule 1 to the 1990 Act. Paragraph 1(1) of Schedule 1 provides:

"(1) In this Schedule "county matter" means in relation to any application, order or notice—

(a) the winning and working of minerals in, on or under land (whether by surface or underground working) or the erection of any building, plant or machinery—

(i) which it is proposed to use in connection with the winning and working of minerals or with their treatment or disposal in or on land adjoining the site of the working; or

(ii) which a person engaged in mining operations proposes to use in connection with the grading, washing, grinding or crushing of minerals;

(b) the use of land, or the erection of any building, plant or machinery on land, for the carrying out of any process for the preparation or adaptation for sale of any mineral or the manufacture of any article from a mineral where—

(i) the land forms part of or adjoins a site used or proposed to be used for the winning and working of minerals; or

(ii) the mineral is, or is proposed to be, brought to the land from a site used, or proposed to be used, for the winning and working of minerals by means of a pipeline, conveyor belt, aerial ropeway, or similar plant or machinery, or by private road, private waterway or private railway;

(c) the carrying out of searches and tests of mineral deposits or the erection of any building, plant or machinery which it is proposed to use in connection with them;

(d) the depositing of mineral waste;

(e) the use of land for any purpose required in connection with the transport by rail or water of aggregates (that is to say, any of the following, namely—

(i) sand and gravel;

(ii) crushed rock;

(iii) artificial materials of appearance similar to sand, gravel or crushed rock and manufactured or otherwise derived from iron or steel slags, pulverised fuel ash, clay or mineral waste),

or the erection of any building, plant or machinery which it is proposed to use in connection with them;

(f) the erection of any building, plant or machinery which it is proposed to use for the coating of roadstone or the production of concrete or of concrete products or artificial aggregates, where the building, plant or machinery is to be erected in or on land which forms part of or adjoins a site used or proposed to be used—

(i) for the winning and working of minerals; or

(ii) for any of the purposes mentioned in paragraph (e) above;

(g) the erection of any building, plant or machinery which it is proposed to use for the manufacture of cement;

(h) the carrying out of operations in, on, over or under land, or a use of land, where the land is or forms part of a site used or formerly used for the winning and working of minerals and where the operations or use would conflict with or prejudice compliance with a restoration condition or an aftercare condition;

(i) the carrying out of operations in, on, over or under land, or any use of land, which is situated partly in and partly outside a National Park;

(j) the carrying out of any operation which is, as respects the area in question, a prescribed operation or an operation of a prescribed class or any use which is, as respects that area, a prescribed use or use of a prescribed class."

46. Paragraph 11 of Schedule 1 is important to the issue here and provides:

"(1) The functions of a local planning authority of—

…

(b) issuing enforcement notices under section 172 or serving planning contravention notices under section 171C or stop

notices under section 183 or breach of condition notices under section 187A,

shall, subject to sub-paragraphs (2) to (4), be exercisable by the district planning authority.

(2) In a case where it appears to the district planning authority of a district in a non-metropolitan county that the functions mentioned in sub-paragraph (1) relate to county matters, they shall not exercise those functions without first consulting the county planning authority.

(3) Subject to sub-paragraph (4), in a non-metropolitan county those functions shall also be exercisable by a county planning authority in a case where it appears to that authority that they relate to a matter which should properly be considered a county matter.

(4) In relation to a matter which is a county matter by virtue of any of the provisions of paragraph 1(1)(a) to (h) the functions of a local planning authority specified in sub-paragraph (1)(b) shall only be exercisable by the county planning authority in their capacity as mineral planning authority." (emphasis added)

47. Section 173 of the 1990 Act provides, so far as material:

"(1) An enforcement notice shall state -

(a) the matters which appear to the local planning authority to constitute the breach of planning control; and

(b) the paragraph of section 171A(1) within which, in the opinion of the authority, the breach falls.

(2) A notice complies with subsection (1)(a) if it enables a person on whom a copy of it is served to know what those matters are.

(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.

…

(11) Where -

(a) an enforcement notice in respect of any breach of planning control could have required any buildings or works to be removed or any activity to cease, but does not do so; and

(b) all the requirements of the notice have been complied with,

> then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of section 73A in respect of development consisting of the construction of the buildings or works or, as the case may be, the carrying out of the activities."

It can be seen that s.173(11) provides a deeming provision in the case of what is termed "under-enforcement".

48. Section 286 of the 1990 Act provides:

> "(1) The validity of any permission, determination or certificate granted, made or issued or purporting to have been granted, made or issued by a local planning authority in respect of –
>
> (a) an application for planning permission or permission in principle;
>
> …
>
> shall not be called in question in any legal proceedings, or in any proceedings under this Act which are not legal proceedings, on the ground that the permission, determination or certificate should have been granted, made or given by some other local planning authority.
>
> (2) The validity of any order under section 97 revoking or modifying planning permission or permission in principle, any order under section 102 or paragraph 1 of Schedule 9 requiring discontinuance of use, or imposing conditions on continuance of use, or requiring the alteration or removal of buildings or works, or any enforcement notice under section 172 or stop notice under section 183, or a breach of condition notice under section 187A being an order or notice purporting to have been made, issued or served by a local planning authority, shall not be called in question in any such proceedings on the ground –
>
> (a) in the case of an order or notice purporting to have been made, issued or served by a district planning authority, that they failed to comply with paragraph 11(2) of Schedule 1;
>
> (b) in the case of an order or notice purporting to have been made, issued or served by a county planning authority, that they had no power to make, issue or serve it because it did not relate to a county matter within the meaning of that Schedule." (emphasis added)

The parties' submissions

49. It is common ground that the starting point is that the function of issuing enforcement notices is one which lies with the district planning authority rather than the county

planning authority. Although the term 'local planning authority', with which paragraph 11(1) begins, is taken to include both district and county planning authorities (s.1(1)), paragraph 11(1) is an "*express provision to the contrary*" such as is contemplated by s.1(1) which allocates the function of issuing enforcement notices to the district planning authority.

50. However, this initial allocation is subject to the provisions of paragraph 11(2)-(4) of Schedule 1. Where the matter concerns what the county planning authority 'properly' considers to be a 'county matter' then it too, *along with the district planning authority*, has jurisdiction to initiate enforcement proceedings (para 11(3) of Schedule 1). The claimants submit that paragraph 11(3) permits of the exercise of judgment. It is for a county planning authority to assess the matters in question and ask itself whether they "*should properly be considered a county matter*".

51. Whereas the claimants contend that paragraph 11(4) of Schedule 1 does not call for 'consideration' or assessment. Nor does it enable either the district or county planning authorities to issue an enforcement notice. Paragraph 11(4) identifies, by reference to a list, a specific sub-set within the category defined as 'county matters' (i.e. those within paragraph 1(1)(a) to (h), but not (i) or (j), of Schedule 1). Enforcement proceedings in relation to this sub-set are, the claimants contend, *only* exercisable by a county planning authority (in their capacity as a mineral planning authority), and not by a district planning authority. The claimants submit the reason for this reservation is that the district planning authority is not a mineral planning authority and so cannot act in that capacity in relation to minerals matters.

52. The Enforcement Notice issued in this case includes 'mineral' matters in the alleged breach, e.g., in paragraph A (see §38 above). The claimants contend KBC, as a district planning authority, had no power to take enforcement action in respect of any matters falling within paragraph 1(a) to (h) of Schedule 1.

53. The defendant contends that the claimants' construction is wrong in principle because it misunderstands mixed uses, is inconsistent with the statutory language and the approach to the Use Classes Order, and it is unworkable.

54. Where a use is comprised of several independent components, none of which can be described as "ancillary", it becomes a mixed use: *Trio Thames Ltd v Secretary of State for the Environment and Reading Borough Council* [1983] JPL 183. The Enforcement Notice was directed to a mixed use. This mixed use included components that would, in isolation, be considered 'district matters', such as the residential use of the land, and also components that, in isolation, would constitute 'county matters', such as the winning, working, storage and sale of minerals. However, a mixed use cannot be segregated into its various components; to do so would be to disregard the use of the land: *Belmont Riding Centre v First Secretary of State and London Borough of Barnet* [2003] EWHC 1895 (Admin), Richards J at [20], citing *Beach v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC 381 (Admin), [2002] JPL 185, Ouseley J at [18]. A mixed use does not fall within any of the categories identified in paragraph 1(1)(a) to (h) of Schedule 1 to the 1990 Act, even if components of the mixed use would, if viewed in isolation, fall within those provisions.

55. The defendant relies on the judgment of David Elvin QC (sitting as a Deputy High Court Judge) in *R (East Sussex County Council) v Secretary of State for Communities*

and Local Government [2009] EWHC 3841 (Admin) ("*East Sussex*"). In *East Sussex* Mr Elvin observed at [9]-[10]:

> "9. …It is important to note the following matters which were common ground between the parties. Firstly, as I have already mentioned, although two areas were shown on the plan attached to the Notice it was common ground that they formed a single planning unit. Secondly, the breach of planning control was a breach caused by the material change to a single though mixed use comprising waste and related uses. Thirdly, the mixed use comprised matters which were both 'county matters', i.e. matters within the scope of the powers and duties of the county council as planning authority and also matters within the scop of the powers of the district council as local planning authority within section 1 of the 1990 Act (which I will refer to as 'district matters' for convenience). The definition of what is a 'county matter' is found in s.1(5)(c) and Schedule 1 to the 1990 Act. It is at the heart of the issues before me that the mixed use was a single composite use although it comprised what might be termed both county and district elements. …
>
> 10. … The County Council's case was that the county and district elements of the mixed us should both be enforced against but, since the County Council only had power to enforce against county matters, it was possible to "decouple", or separate, the county and district elements of the breach of planning control and enforce only against the county matters, that is to say those relating to waste activities."

56. The county elements of the breach in *East Sussex* concerned waste planning functions which, broadly, are a county matter within paragraph 1(1)(j) of Schedule 1 to the 1990 Act. Mr Elvin held that "*unless otherwise provided by sub-paragraphs 11(2) to 11(4), enforcement notices must be served by the district planning authority*" (*East Sussex*, [39]). Having cited paragraph 11(2) to (4) he continued:

> "40. Therefore, unless the case is one where it appears to the county planning authority that the breach of planning control relates to a matter which "should properly be considered a county matter", then it is for the district planning authority to bring enforcement action.
>
> 41. The district planning authority is not prohibited from taking enforcement action if that action includes enforcing against breaches of planning control which are county matters, although it must first consult with the county planning authority before doing so. <u>If the matter, however, is wholly a county matter, then the power to take enforcement action is only exercisable by the county planning authority: see paragraph 11(4)</u>.
>
> 42. <u>This being a case where both district and county elements were intermingled, and the breach of planning control was not</u>

> considered to be solely a county matter, this was a case which fell within paragraph 11(2) of Schedule 1 to the 1990 Act — namely a case where the enforcement notice should have been served by the district council albeit in consultation with the county council as county planning authority. …" (emphasis added)

57. Although the defendant acknowledges that paragraph 11(4) was inapplicable in *East Sussex* because the 'county' elements did not fall within paragraph 1(1)(a) to (h) (irrespective of NNC's argument that it is inapplicable where the use is mixed), nevertheless the defendant contends the judge was right at [41] where he said that paragraph 11(4) has the effect that enforcement is only exercisable by the county planning authority if the matter is "*wholly a county matter*" (and, within the subset to which paragraph 11(4) applies).

58. The defendant relies on the Guidance from the PINS Inspector Training Manual for Enforcement (version 9) which addresses mixed uses and the applicability of the Use Classes Order in these terms:

> "137. In mixed use cases, the allegation should refer to all the components of the mixed use, even if it is considered expedient that only one should cease. In the case of *R (oao) East Sussex CC v SSCLG* [2009] EWHC 3841 (Admin), it was held that where there is a single mixed use it is not open to the LPA to decouple elements of it. The use of the site is the single mixed use with all its component activities.
>
> …
>
> 546. Many uses are outside any use class, i.e. "*sui generis*". Some, including car sales premises, scrapyards, launderettes and hostels are specifically referred to in Article 3(6) of the UCO. Other examples of *sui generis* uses are builders' yards, caravan sites, non-residential clubs, riding stables and vehicle hire depots.
>
> 547. All mixed, composite and dual uses are outside any use class, with the single qualified exception specified in Article 3(4) – mixed B1 and B2 use; *Belmont Riding Centre v FSS & Barnet LBC* [2003] EWHC 1895. Notices alleging a mixed use should not refer to a use class but describe the mixed use with its component parts as it existed when the notice was issued."

59. The National Association of Planning Enforcement Handbook, which is produced by the Royal Town Planning Institute (May 2020), states:

> "The *Queen oao East Sussex CC v Secretary of State for Communities and Local Government, Michael and Gary Robins* [2009] EWHC 3841 (Admin) provides that in areas where two tier authorities remain it is for the District Council to take

> enforcement action unless what appears to be the alleged breach of planning control relates solely to a County matter as defined."

60. The defendant submits the claimants' construction is unworkable because it was not open to KBC to take enforcement action and "*leave out material elements comprising an alleged single breach of planning control*": *East Sussex* at [52]. If KBC had referred only to those components that were 'district matters' in describing the breach of planning control, it would have misdescribed the breach. Equally, the County Council would have misdescribed the breach if it had sought to take enforcement action solely against the 'county matters'.

61. If KBC had correctly described the breach, but then only required the 'district matters' to cease, the effect would have been, by operation of s.173(11) of the 1990 Act, to grant planning permission for any 'county matter' referred to in the Enforcement Notice. Similarly, if the county council had correctly described the breach, but only required the 'county matters' to cease, it would constitute under-enforcement resulting in a deemed grant of planning permission for the 'district matters' in respect of which the County Council did not take enforcement action.

62. In response, the claimants contend that the reference in *East Sussex* to paragraph 11(4) of Schedule 1 is *obiter dicta* because no use falling within paragraph 1(1)(a) to (h) was in issue. Paragraph 11(4) does not contain the word "wholly", used in *East Sussex* at [41], and the court should not follow the judge's construction of that provision. The claimants contend that their construction is correct as a matter of ordinary interpretation and also having regard to the lack of expertise that a district planning authority has in respect of mineral matters.

63. The claimants submit that a district planning authority and county planning authority would be able to work together, either by issuing two enforcement notices at the same time which describe the same breach, but then the notice issued by the district planning authority would specify steps relating to the 'district matters' while the county planning authority would specify steps relating to the 'county matters'. Alternatively, the claimants suggested that the two authorities could issue a joint enforcement notice addressing the breach and describing all the steps required to remedy it.

Analysis and decision

64. I agree with the defendant's submissions on this issue. In my judgment, the effect of paragraph 11 of Schedule 1 to the 1990 Act is that in a two tier authority, the only circumstance in which the function of issuing an enforcement notice under s.172 may not lawfully be exercised by a district planning authority is where the alleged breach of planning control relates wholly to a county matter within the subset identified in paragraph 1(1)(a) to (h) of Schedule 1.

65. In this case, various components, if viewed in isolation, fell within that subset, but they should not be viewed in isolation. The use was a mixed use which was not a county matter falling within paragraph 1. Accordingly, paragraph 11(4) of Schedule 1 was inapplicable.

66. I accept the claimants' submissions that in *East Sussex* the judge was addressing a situation where paragraph 11(4) was inapplicable, irrespective of the dispute between

the parties to this case regarding the interpretation of the provision, because the 'county' elements were not of a type falling within the subset identified in paragraph 11(4). Nevertheless, in my judgment, Mr Elvin's interpretation of paragraph 11(4) was correct. The central point was that the mixed use, although comprised of what might be termed county and district elements, was a single composite use and the elements could not be decoupled.

67. I also agree with the defendant that the claimants' interpretation gives rise to real practical difficulties. In *Miller-Mead v Minister of Housing and Local Government* [1963] 2 QB 196, Upjohn LJ observed at 224:

> "But I must protest in strong terms against looking at any document except the enforcement notice. This is a most important document, and the subject, who is being told he is doing something contrary to planning permission and that he must remedy it, is entitled to say that he must find out from within the four corners of the document exactly what he is required to do or abstain from doing. For this is the prelude to possible penal procedure. It is comparable to the grant of an injunction and it is perfectly plain that someone against whom an injunction is granted is entitled to look only to the precise words of the injunction to interpret his duty."

68. If separate enforcement notices are issued by the district and county planning authorities addressing the same breach, and each falls to be read alone in accordance with *Miller-Mead*, each notice would potentially under-enforce the alleged breach, and so be deemed to grant planning permission, despite both authorities seeking to avoid that result. I do not accept that *Millen v Secretary of State for the Environment* [1996] JPL 735 supports the contention that two enforcement notices may be read together. In that case, a single local planning authority issued two enforcement notices in respect of the same land, in circumstances where it could have issued one notice covering all matters. Sir Graham Eyre QC, on what he described as the "very special facts" of the case, quashed and remitted the decision to the Secretary of State for redetermination, on the basis that the appropriate way in which the matter could be dealt with by the Secretary of State was by quashing the second notice and varying the first notice in such as way that the requirements of both notices would be contained within one notice.

69. In any event, if two separate enforcement notices could be read together so as to avoid s.173(11), the effect of the district and county planning authorities having to act in this way would be unsatisfactory, confusing and potentially unfair. There would be a right of appeal against each enforcement notice, with separate fees due.

70. The claimants' alternative suggestion that the district and county planning authorities could issue an enforcement notice jointly is novel. It is unnecessary to determine whether such a course would be lawful. The practical difficulties caused by an interpretation of paragraph 11 of Schedule 1 which precludes either a district or a county planning authority from taking enforcement action in respect of a mixed use on a single planning unit are manifest.

71. For the reasons I have given, I reject the claimants' contention that KBC did not have the power to issue the Enforcement Notice.

Issue (3) Relief

72. It follows from my conclusion on the sole substantive ground of judicial review that the claim is dismissed and the question of relief does not arise. In these circumstances, I will address this issue only briefly.

73. The focus of submissions was on what would happen, in the future, if I were to have quashed the Enforcement Notice. In circumstances where KBC consulted with the County Council before issuing the Enforcement Notice, and having regard to the approach taken by NNC in defending these proceedings and the appeal against the Enforcement Notice, I am satisfied that it is highly likely NNC would have re-issued it in the same terms.

74. In the circumstances of this case, that would have been an important factor weighing against quashing the Enforcement Notice, but it does not demonstrate that s.31(2A) of the Senior Courts Act 1981 would have applied so as to preclude the grant of any relief (such as a declaration). It seems to me that the focus of s.31(2A) is on what would have occurred, in the past, if the conduct complained of had not occurred. In other words, if KBC had not had the power to issue the Enforcement Notice alone, is it highly likely that KBC and the County Council would have taken the same enforcement action jointly? If the point had arisen, I would have invited further submissions on relief before determining whether s.31(2A) applied.

Conclusion

75. The claim for judicial review is dismissed.