

FOR EDUCATIONAL USE ONLY

The Conveyancer and Property Lawyer

2013

"A sledge hammer to crack a small nut": an analysis of section 124 of the Localism Act 2011

Emma Hatfield

Subject: Planning. **Other related subjects:** Administration of justice

Keywords: Concealment; Deception; Enforcement notices; Immunities; Magistrates' courts; Planning control; Ten year immunity rule

Legislation: [Localism Act 2011 \(c.20\)](#) s.124

Cases: [Welwyn Hatfield Council v Secretary of State for Communities and Local Government \[2011\] UKSC 15](#); [\[2011\] 2 A.C. 304 \(SC\)](#)

[R. \(on the application of Fidler\) v Secretary of State for Communities and Local Government \[2011\] EWCA Civ 1159 \(CA \(Civ Div\)\)](#)

***Conv. 48** On April 6, 2012, [Pt 6 Ch.5 of the Localism Act 2011](#) ("the Localism Act") came into force. [Section 124](#) gave Local Planning Authorities ("LPAs") the power to apply to the magistrates' court to take planning enforcement action outside of the normal four- and ten-year time limits in situations where there may have been a breach of planning control involving concealment.¹ Providing an LPA applies within six months from the date of knowledge of evidence of the apparent breach,² and the court is satisfied, on the balance of probabilities, that the apparent breach has been deliberately concealed and that it is just to do so,³ a planning enforcement order ("PEO") will be made.

This effectively eliminates immunity from enforcement action and the ability to obtain a certificate for lawful status under the [Town and Country Planning Act 1990](#)⁴ ("the 1990 Act ") for a number of individuals who have breached planning controls and have concealed the breach.

Why introduce s.124?

[Section 124](#) is a direct response to two high-profile cases, [Fidler v Secretary of State for Communities and Local Government](#) (" *Fidler* ") and [Welwyn Hatfield Council v Secretary of State for Communities and Local Government](#) (" *Beesley* "). Both cases involved the deliberate concealment of unauthorised building.

In [Fidler](#), Mr Fidler unsuccessfully claimed the LPA was time barred from taking enforcement action after constructing a mock tudor castle without planning permission and concealing it for more than four years behind a 40-foot high straw bale wall covered in blue plastic sheeting. The court held the LPA's enforcement notice had been validly served and was within the four-year window for taking enforcement action. In reaching its conclusion the court ruled that the erection and removal of this wall and sheeting were relevant to the issue of when operations ***Conv. 49** were substantively completed, forming part of Fidler's original contemplation and intention. It ruled that operations under [s.55 of the 1990 Act](#) were not substantially completed until these items were removed.

By contrast, Mr Beesley obtained planning permission to erect a hay barn. Whilst erecting an agricultural barn in external appearance, internally the building comprised a residential property. Beesley applied for a certificate of lawful use under [s.191\(1\)\(a\) of the 1990 Act](#), claiming immunity from enforcement action under the four-year rule. Beesley unsuccessfully argued his actions amounted to a breach of planning control due to a change of use of the property from a hay barn to a single dwelling house. The Supreme

Court ruled no change of use had occurred and as such no benefit of immunity from enforcement action could be sought. Beesley was dealt a second blow when the Supreme Court held the council could not only seek enforcement action against the continued use of the building as a single dwelling but also against its construction itself, which it ruled unlawful.⁵

Whilst both Fidler and Beesley ultimately failed in their attempts to manipulate the planning system, what became abundantly clear were gaping holes within s.171B, which had now been exposed for others to exploit.

The 1990 Act had been drafted in such a way that individuals only need to demonstrate the requisite time period has passed from the date of the breach of planning control. Dishonesty and an intention to deceive is irrelevant in obtaining immunity. Both the inspector and Sir Thayne Forbes in *Fidler* observed that "hiding something does not take away lawful rights that may accrue due to the passage of time."⁶ Mummery L.J. in *Beesley* also commented that he had not

"been referred to anything in the planning legislation that expressly precluded Mr Beesley from relying on the time limits by reason of his false representations, so assume that there is no such provision."⁷

Nothing stops or affects the clock once started.

The Government's response

These cases troubled the Coalition Government by exposing such weaknesses within the planning system. There was also great concern that the cases had undermined the importance of obtaining planning permission and eroding public confidence in the enforcement process.⁸

On December 13, 2010, before Mr Beesley's appeal to the Supreme Court had been heard, the Localism Bill ("the Bill") was introduced in the House of Commons. Whilst the main thrust of the Bill related to a package of democratic reforms, tucked away within Ch.5 were four clauses relating to enforcement of planning control. Designed to amend the 1990 Act, it proposed to give LPAs power to apply to the magistrates' court to take enforcement action outside of the normal time limits, specifically where it appeared a breach of planning control involving concealment had occurred.⁹ Its aim was to stop profiteering by ***Conv. 50**

"people who deliberately deceive the LPA about the nature of their intended development or who conceal it until the window for enforcement action has expired."¹⁰

Richard Humphreys argued that these reforms went a long way to restoring confidence in the enforcement regime.¹¹ The changes have been heavily criticised from the outset by the legal profession as "entirely disproportionate",¹² however. In its parliamentary brief on the Bill the Law Society recommended the deletion of cl.104 (as it then was). Their Planning and Environmental Law Committee pointed out they were unaware of any similar cases in the planning system's 60-year history and therefore it would be highly inappropriate to make such a fundamental change to the planning rules. The Royal Town Planning Institute described the changes as a "sledge hammer to crack a relatively small nut."¹³

Criticism surrounding s.124 falls into three areas. First, the section's definitions are not clear thereby causing difficulty in ascertaining who is liable and how they become liable. Secondly, it eliminates a clear limitation period and as such removes certainty for those involved in the planning and conveyancing process. Finally, the use of the magistrates' court is seen as highly problematic.

A clear definition

The Coalition Government's objective in its impact assessment accompanying the Bill was

"to ensure that people who deliberately deceive or who conceal [the breach] until the window for

enforcement action has expired, [were] no longer able to profit from this practice."¹⁴

Whilst designed to deal with the likes of Fidler and Beesley, there are concerns that s.124 goes beyond its original scope. The rationale for this is on the basis that "concealment" has not been clearly defined. Consequently s.124 casts its net too wide and catches a far larger group of people than intended. Establishing concealment may not be straightforward, however.

In its original form, the [Localism Act](#) proposed that liability would be based on a person's actions that had resulted in or contributed to full or partial concealment of the apparent breach. The Law Society had major difficulties with this, particularly as proposed liability was based on concealment, rather than fraud or dishonesty.¹⁵ As such, liability would not be limited to the likes of Beesley and Fidler who had actively deceived.

The term "actions" was originally defined to include representations and inactions. Although it was understandable that "representations" be included to ensure those who are proactive and directly deceive are culpable, the inclusion of the word "inaction" was not. The Law Society believed the inclusion of the term **Conv. 51* "inaction" would result in property owners becoming liable for all concealed breaches including any deliberate actions of past owners. Such an interpretation could also result in liability for any individuals aware of or who suspected a past breach of planning but who had failed to act and report the breach to the LPA; effectively, liability through silence. Other examples put forward included situations where breaches had been concealed to subsequent property owners by their vendor¹⁶ and commercial transactions involving the purchase of a company owning properties rather than the properties themselves.¹⁷ This approach was criticised for "being too wide and encompass[ing] conduct far removed from the antics of Mr Beesley and Mr Fidler."¹⁸

Humphreys, in the minority, welcomed the inclusion of "inaction", believing that those concealing breach by failing to notify the council tax department would be liable.¹⁹ The Coalition Government defended its position, stating that the amendments gave scope for LPAs to take action where none previously existed.²⁰ The House of Lords, however, took onboard the concerns, tightening the definition and clarifying that concealment must be deliberate. "Inaction", too, was removed from the examples of concealment in a bid to show that s.124 was "aimed only at the worst cases of concealment."²¹

In its final form, s.124 allows an order to be made where the apparent breach has been *deliberately concealed*.²² Whilst these amendments have been welcomed, there are still concerns. Some argue that s.124 will still not deal with those it was intended to.

What constitutes deliberate concealment?

The literal definition is a conscious or intentional²³ action of hiding something or preventing it from being known.²⁴ Note that it is the concealment of the breach rather than the breach itself that is relevant. Commonsense suggests that when considering the term "deliberate concealment" it "ought to require more than mere oversight"²⁵ to inform the LPA that a breach had occurred. A concerted effort to prevent the LPA from finding out about the breach is therefore required to trigger liability. If this approach is correct then s.124 may not effectively deal with those the Coalition Government intended it to deal with.

Four weeks before s.124 came into force the case of Mr and Mrs Brown, who had constructed and occupied a wooden-clad building in wooded land in Surrey²⁶ without planning permission, was reported. As with Fidler and Beesley, the property **Conv. 52* was built in a designated greenbelt area where planning permission would have almost certainly been refused if legitimately applied for. Like Fidler and Beesley, the Browns were aware of the four-year rule relating to immunity from enforcement action. They, too, failed to notify the Local Authority for the purposes of council tax, electoral roll and building regulation consent, and,

like Fidler, planning permission was never sought. The distinguishing factor here was that the property had not been deliberately camouflaged nor had there been any clandestine or night-time construction of the property, as in Fidler. The property had been built in a dip within wooded land, shielded by trees.

Although not in force at this point, [s.124](#) was considered. [Section 124](#) states that it is the concealment of the breach that triggers liability. Was it therefore possible for the LPA to argue a deliberate *administrative* concealment of the breach by failing to notify the various council departments? Or did there have to be a physical concealment of the breach?

Following legal advice, Mold Valley District Council's LPA took the view that the Browns's actions did not amount to deliberate concealment. As such, a PEO would not be successfully obtained outside the four-year period. In a move that may have turned Beesley and Fidler green with envy, the LPA issued the Browns with a Certificate of Lawful Use under [s.191 of the 1990 Act](#).

Enforcement proceedings under the [1990 Act](#) and applications for PEOs under [s.124](#) are, after all, discretionary. It is possible that the LPA, being fully aware of the time and expense involved in *Fidler* and *Beesley*, did not have the stomach to test its position, particularly given the current finances of Local Authorities.

This case provides an interesting insight into how "deliberate concealment" may be interpreted. Whilst an intriguing starting point, it is clear that more cases are required before we will be in a position to ascertain exactly what deliberate concealment entails, and what triggers liability. It is ironic that in its first test [s.124](#) has failed to do what it was intended to do, given the Coalition Government's objective.

Whilst it may be the case that [s.124](#) has proven itself ineffective before it has even begun, there is also the question of how it will impact upon subsequent owners. This concern still remains even with the removal of the term "inaction" as to how such owners are protected against liability under [s.124](#).

The Coalition Government and supporters of [s.124](#) argue that PEOs will only be applied for in rare cases,²⁷ with magistrates only granting them where there has been deliberate concealment and where it is just to make the order, having regard to all the circumstances. Logic suggests it would not be just to make a PEO against a subsequent purchaser if they can demonstrate they were a bona fide purchaser. One would hope if no breach or no deliberate concealment of a breach is revealed following searches and investigations this would be sufficient to discharge any liability.

A prudent purchaser should still remain cautious, protecting their position by ensuring that all necessary paperwork is produced beyond the four- and ten-year limitation periods. This is particularly important given that purchasers and their legal advisers are on notice of the potential liability under [s.124](#). ***Conv. 53**

There had been anxiety as to how historic breaches would be treated under [s.124](#). With immunity effectively removed, it was feared that LPAs would be able to make PEO applications regarding any breach of planning, including historic breaches. Many owners, having purchased their property aware of a historic breach but relying upon the immunity previously granted under the [1990 Act](#), were nervous. They could not rely on the bona fide purchaser argument, as they did have notice of the breach. It was hoped that if immunity had previously been obtained then it would now be difficult if not impossible to undo the effects of a reliance on the [1990 Act](#) years after the event.²⁸ To do so would be unjust and would have the potential to throw the conveyancing system into complete disarray. Thankfully, the Coalition Government saw sense and confirmed that [s.124](#) would not apply to breaches prior to April 6, 2012 where the requisite four- or ten-year period had also been completed before this date.²⁹ This was clearly a relief to property owners and their solicitors alike.

The need for limitation

Whilst [s.124](#) has not been allowed to wreak the havoc many had feared, at the heart of the criticism is still the removal of a limitation period for enforcement action for breaches after April 6, 2012. Lord Taylor of Holbeach reassured the House of Lords that [s.124](#) is aimed only at the worst cases of concealment, and the Coalition Government had no appetite to abolish the limitation for enforcement action.³⁰ Many are still fearful of this, however.

The [Localism Act](#) takes away a definitive cut-off point whereby property owners cease to be liable from enforcement action by the LPAs. Such clarity is important not only for the planning system but also for the conveyancing process, as uncertainty brings detrimental effects to future purchasers and the property market.

When Robert Carnwath QC reviewed the planning system³¹ prior to the [1990 Act](#), he recognised that the enforcement time limits under the Town and Country Planning Act 1968 ("the 1968 Act") were failing. Why? The 1968 Act altered the position on immunity, changing it from a rolling four-year time limit to that of a fixed date. Under [s.15](#),³² whilst the four-year rolling time limit remained in force in three situations³³ : operations³⁴ ; failure to comply with any condition or limitations relating to such operations³⁵ ; and change of use of any building to use as a single dwelling-house,³⁶ the LPA were now able to take enforcement action for a breach of *any* material change of use occurring after the end of 1963. Any breaches prior to that date were immune from enforcement action. As such, individuals faced a constant threat of enforcement action on any breaches of planning post 1963. This **Conv. 54* lack of certainty proved problematic, especially in relation to the conveyancing process.

[Section 124](#) has again removed a definite legal test³⁷ that Carnwath believed crucial. It is interesting that criticisms now being put forward against [s.124](#) are the same arguments expressed 25 years ago in the Carnwath Report.

In a bold move, the Law Society called for the removal of [s.124](#) and is still opposed to it now. Its main objection is based on the fundamental principle that limitation periods are necessary. This is based on three main arguments:

1. asserting rights needs evidence: and evidence and memories fade over time;
2. certainty is vital; and
3. a person who does not promptly enforce their rights should lose them.³⁸

Memories fade

Fixed time limits have always been problematic: Carnwath acknowledged this. Critics of the 1968 Act argued that whilst it was easy to provide evidence and prove non-compliance with planning rules immediately following the 1968 Act, as time passed the task became harder. The 1968 Act 's fixed date watershed was seen as "far too long ago to be a sensible or useful date for immunity of uses."³⁹ As memories become hazy and information and records lost, it became harder to establish that a pre-1963 breach had occurred. The [Localism Act](#) has again returned to a similar situation by removing limitation for any deliberately concealed breach where the immunity has not been reached by April 6, 2012.

Today this task is hampered further, as we move towards a system of e-conveyancing. A move to paperless transactions means the physical evidence is simply absent. Mortgage lenders, too, are less willing to retain paperwork at the end of conveyancing transactions. The result is that property owners may not have knowledge of breaches of planning nor be aware of the significance of information given to them. The result is that vital evidence is lost forever.

Property professionals now find themselves in a catch-22 situation, required to provide absolute certainty

regarding a property's legal and planning status for buyers and their mortgage providers but without the means to obtain the necessary evidence. This is further complicated by the current economic climate and mortgage lenders' increased caution and risk aversion.

Many in the legal profession consulted prior to the [1990 Act](#) favoured the return of a rolling limitation period to provide a "definite legal test".⁴⁰ The rolling time limit not only offered certainty but was also practical. That is not to say the [1990 Act](#) is without issue, but the implementation of [s.124](#) is a backward step. ***Conv. 55**

The need for certainty

Well-defined time limits are vital to provide a clear understanding of when potential liability ceases. Many areas within the law have limitation periods, and with that comes certainty for all involved. Ashley Bowes observed that "if the passive standardisation dynamic is one pillar of the planning system, legal certainty must surely be the other."⁴¹ The need for certainty has been the main argument put forward by the Law Society against [s.124](#).

The planning system and, in turn, the conveyancing process need clear rules to advise prospective purchasers of their potential liability, enabling them to make an informed decision as to whether to proceed. The changes under [s.124](#) make it impossible for solicitors to advise with confidence on planning liability and enforcement issues.

Prior to the [Localism Act](#), solicitors could work within the parameters of the four- and ten-year time limits, ensuring requisitions and investigations were tailored to potential breaches within these time periods. Such a system makes the conveyancing process clear and not unduly burdensome. The conveyancing process generally does not require an investigation of the property's entire legal history in order to advise the clients or satisfy the lender's requirement of a good and marketable title. In unregistered land, for example, a period of at least 15 years must be investigated in order to prove good root of title.⁴² Solicitors have come to rely upon these cut-off periods to provide certainty whilst ensuring efficiency and speed of service, essential when buyers', sellers' and increasingly lenders' expectations are of low costs and quick completions.

Some highlight Listed Building Control as a system offering no immunity from breaches but able to function with relative ease and clarity within the conveyancing process. Listed Building Control is by comparison a different beast. First, far fewer buildings are affected by Listed Building Control compared to general planning controls, with approximately 374,081 listed building entries currently registered in England.⁴³ Secondly, consent for works, be they demolition, alteration or extension, are mandatory, thereby removing the excuse of "I didn't think I needed consent." Thirdly, it is easier to detect breaches of Listed Building Control when they occur. Despite these differences, from personal experience the lack of immunity in Listing Building Control does affect the conveyancing transaction. The potential risk of liability makes the process longer and more onerous, with many more requisitions and checks required compared with other transactions.

Changes under [s.124](#), even with the watershed date, will similarly make the conveyancing process more complex for solicitors. Every change of use and building works will need thorough investigation, enquiries will become more extensive, and supporting evidence will be required. Such a rigorous approach will have to be taken in order that solicitors are not negligent. It is this change of approach that the Law Society believes could have a "chilling effect on some parts of the property market".⁴⁴ For example, in commercial transactions where a client ***Conv. 56** may not be buying one property but a portfolio of properties, the additional time and work required to ascertain the planning status of each property will increase costs considerably, cause huge delays and could result in deals collapsing. Even with residential property

transactions there is an increased risk of chains collapsing, as solicitors struggle to ensure they can thoroughly investigate such planning issues within the tight deadlines now demanded.

This pressure is compounded by the involvement of buyers' mortgage lenders in the transaction. Under the *Council of Mortgage Lenders Handbook* the ("*CML handbook*") lenders now demand certainty in order to protect their position. Solicitors are currently required to ensure properties have the benefit of any necessary planning consents and that there are no breaches of planning regulations or evidence the property may be the subject of enforcement action⁴⁵ in order to discharge their duty of care. The Law Society is concerned that solicitors will not be able to clearly advise on the risk of enforcement action for past breaches and in turn will not be able to satisfy their requirement under the *CML handbook*. This means "purchasers will be less willing to buy and lenders less willing to lend."⁴⁶ At a time when the property market is sluggish and needs encouragement, these amendments do not assist nor give confidence to the financial institutes to lend to purchasers.

If solicitors are unable to provide the definite answers that lenders require, it is likely that they will again turn to defective title indemnity insurance to satisfy their *CML handbook* requirements and protect their lender client from future risk. It is not the first time insurance has been seen as a solution. Solicitors were faced with a similar situation following the decision in the case of *Cottingham v Attey Bower & Jones*.⁴⁷ Here it was held that a solicitor had been negligent in failing to obtain the necessary Building Regulation Consents, make proper investigations into this issue and advise their client of the sellers' misrepresentations to pre-contract enquiries, even though the 12-months' time limit for enforcement action by the Local Authority had passed. This case led to uncertainty and resulted in increased difficulty for solicitors to satisfy their *CML handbook* requirements. Industry specialists reported that whilst indemnity insurance policies were available for Building Regulation issues, pre- *Cottingham* few, if any, were requested. Following the case such policies became commonplace.⁴⁸

Drawing parallels with *Cottingham*, there is a risk that some sectors of conveyancing, particularly the high volume conveyancing companies, will purchase indemnity insurance as their default response rather than thoroughly investigate planning issues. As with *Cottingham*, there is a worry that this quick-fix solution to reduce delays could ultimately end up being "expensive and unnecessary".⁴⁹ Some believe insurance may be obtained in situations where it is not needed; or worse still insurance will be obtained that will not actually cover the purchaser and lenders for the specific risks and liability under s.124. This latter point was *Conv. 57* observed following *Cottingham*. Here it was noted that a massive increase in indemnity insurance for potential building regulation issues followed, but many policies obtained did not actually cover purchasers and lenders adequately for the liability that the *Cottingham* decision produced. Whilst quick and easy this automatic reaction is not helpful. It does not benefit the client and ultimately turns the planning liability issue simply into a tick-box exercise, where obtaining insurance allows a client to "pass go" quickly. Care needs to be taken to ensure such policies actually provide the necessary protection to purchasers and lenders. Insurance does not give back the certainty that s.124 has taken away nor does it provide a satisfactory solution to the problem. All it will do is provide a sticking plaster over the uncertainty, where the only winners are the insurers.⁵⁰

Those who don't enforce their rights should lose them

Finally, the Law Society argues that if a breach has not affected others for the requisite four- or ten-year period then it is not detrimental to the public at large nor is it important to them.⁵¹ Whilst there is some truth in this "use it or lose it" rationale, this is possibly the weakest of the three arguments.

Whilst it is true that large numbers of enforcement actions are instigated following information provided by the general public, Richard Humphreys contends that just because no complaint has been made to the LPA

it does not necessarily follow that there is no harm done.⁵²

Successive government's rationale for the planning system has been one of regulating

"the use and development of land *in the public interest* ... and whether the proposal would affect the locality generally and unacceptably affect amenities that ought in the public interest to be protected."⁵³

Humphreys points out that a lack of public co-operation and a failure to raise a complaint with the LPA does not necessarily signify either an absence of harm⁵⁴ or that no detriment has been caused by the breach. He offers a number of reasons for a lack of reporting by the public:

- No near neighbours, particularly in greenbelt or countryside areas.
- People wish to maintain good relations and not cause problems.
- Neighbours may not wish to draw attention to themselves and any breaches of planning law or other law they may have committed.
- A lack of knowledge of the planning system and therefore people do not know when a breach has occurred.
- Recent changes of land ownership resulting in local knowledge being lost and new neighbours believing existing developments have the necessary permissions. *Conv. 58⁵⁵

Breaches of and a disregard for the planning system affect confidence in it and people's desire to abide by it. Therefore is it not detrimental to the whole ethos of the planning system for the LPAs to lose their right to enforce the law upon individuals who have actively deceived and have not played by the rules? If it is possible to show that the planning system cannot only be circumvented but that such individuals can get away with it, then does this not cause harm in itself?

All governments have been mindful that development has a major impact on how local neighbourhoods look, feel and function economically, socially and environmentally.⁵⁶ As such they view the planning system as being at the heart of ensuring development takes place in the public interest. The planning system needs not only to be fair but *seen to be fair*, in order to ensure public confidence and ultimately to maintain the rule of law. Whilst the combination of location and concealment meant there were no complaints from the public in *Fidler* and *Beesley*, it does not follow that no harm was done. Both developments were within greenbelt areas where planning permission may not have been granted if legitimate planning applications had been submitted. It can be argued that these cases did cause harm, eroding public confidence in the planning system and weakening the perception that planning rules and policies are important and must be abided by everyone.

Applications in the magistrates' courts

Section 124 requires an LPA to make their PEO application to the magistrates' court within six months of becoming aware of the apparent breach. The court must be satisfied, on the balance of probabilities, that the apparent breach has been deliberately concealed and that it is just to make the order having regard to all the circumstances.⁵⁷ Humphreys believes that the wording of this section will ensure that the necessary "checks and balances are properly included".⁵⁸ Others disagree.

First, in submitting their application LPAs are required to submit a signed certificate stating the date on which they became aware of the apparent breach. This date is important in establishing the LPAs are within the six months' window to commence action. The Coalition Government justify this as being "simply an alignment"⁵⁹ with other proceedings within the magistrates' courts, giving examples of traffic offences or any other summary-only procedures having the same time limits for commencement action.

The date of knowledge trigger, rather than the date of breach, is further justified on the basis of the difficulties in establishing with clarity when an offence was committed. The Coalition Government argues that they are "seeking to make the process easier, because the exact date upon which an offence was committed may not be apparent for some time."⁶⁰

Whilst the overall reasoning for the six-month time limit may be satisfactory, its inability to be challenged is not. Such certificates are self-certified and taken **Conv. 59* as conclusive proof with regards to the LPA's date of knowledge. The individual cannot challenge them. This provides cause for concern, given that this six-month window effectively gives the LPAs a second bite of the cherry to take enforcement action outside of the normal limitation period and that this certificate is taken at face value without its validity being tested.

The second concern is with the magistrates' courts administering [s.124](#). Magistrates will not only have to consider whether a deliberate concealment of a breach has occurred but also whether an actual breach of planning has occurred. This may involve consideration of issues such as whether development has taken place, what constitutes operational development and whether there has been a change of use. Such concepts are extremely technical in nature, involving complex questions of fact, law and judgment. Professional organisations such as the Royal Town and Planning Institute fear that "neither the courts nor their advisers in contrast to the LPAs are equipped to make such decisions."⁶¹ It is for this reason that matters of planning appeals were previously removed from the magistrates' courts in favour of specialist tribunals in the 1960s, as it was felt that they did not have the expertise or detailed knowledge to deal with such matters.

Carnwath, too, considered the issue, reporting strong views against the involvement of magistrates' courts in planning enforcement matters. The Association of Metropolitan Authorities at the time believed they were "not a suitable forum in which to argue the technicalities of planning legislation",⁶² particularly as there are many grey areas within the law. This argument is again applicable now.

There are fears that the argued "safeguard" of granting PEOs only when it is just to do so will not be as effective as claimed. It may not be possible to provide a consistent approach throughout the courts, with individual magistrates' decisions being tainted by their personal opinions. Such influences would ultimately have an effect on any overriding test of fairness.

When Carnwath examined uniformity in enforcement decisions he favoured the use of LPAs and inspectors. He believed them far better equipped to provide a more homogeneous approach as they are supported, in part, by a "body of reported decisions and circulars",⁶³ which is combined with their technical understanding of the planning system. This observation is just as valid in the use of magistrates for the implementation and enforcement of [s.124](#).

Concluding thoughts

The planning system has a difficult function to perform within society. It balances the needs of businesses and individuals, giving them flexibility to build, use and adapt their private land whilst ensuring a level of rigidity and regulation in the general public interest.

It is an exercise in flexibility and control. With such control there is a need for enforcement to ensure compliance from the public at large and to safeguard the rule of law. Within the planning system, as with many areas of the law, limitation **Conv. 60* periods are set for enforcement and immunity from such action. This is an opportunity for the state to enforce the planning rules whilst providing the public with an element of certainty.

The cases of *Fidler* and *Beesley* dented public confidence in the planning system by exposing weaknesses in

the [1990 Act](#). Why abide by planning rules if lawful status can also be achieved by dishonest actions? Whilst clearly an issue, the Coalition Government, in wanting to be seen to do the right thing, jumped the gun, introducing its quick-fix proposals before [Beesley](#) was heard in the Supreme Court.

Its solution under [s.124](#) has failed at every stage. Heavily criticised initially for casting the net too wide, beyond the likes of Beesley and Fidler who actively deceived, triggering liability for subsequent property owners in relation to all concealed breaches. Its final form of "deliberate concealment" does not appear any more serviceable: it is unclear, ill-defined and ineffective in dealing with those such as Mr Brown who cleverly exploit the system. Rather than close the loophole as the Coalition Government intended, it appears to have left it ajar.

The phrase "hard cases make bad law" seems appropriate in relation to the implementation of [s.124](#). Rushed through and ill conceived, these amendments appear to have produced more issues than they attempted to resolve. The most serious casualty is definitive limitation periods, identified as a necessity by Carnwath. [Section 124](#) has damaged these definitive tests laid down by the [1990 Act](#), affecting the public and legal professionals alike. This uncertainty permeates through to the conveyancing process, causing ambiguity and potential delays in transactions at a time when a precarious property market needs anything but.

Emma Hatfield

Solicitor (non-practising), Senior Lecturer, University of Huddersfield

Conv. 2013, 1, 48-60

-
1. [Localism Bill 126 2010-11](#) as introduced, Vol.1, Pt 5, Ch.5, p.75, para.10.
 2. [Section 171BB\(1\) of the Town and Country Planning Act 1990](#) as amended by [s.124\(1\) Localism Act 2011](#).
 3. [Section 171BC\(1\) of the Town and Country Planning Act 1990](#) as amended by [s.124\(1\) Localism Act 2011](#).
 4. Added by the [Planning and Compensation Act 1991 Pt.I, s.4\(1\)](#) (January 2, 1992 except as it relates to breach of condition notices and subject to transitional provision specified in [Planning and Compensation Act 1991 \(Commencement No.5 and Transitional Provisions\) Order 1991 \(SI 1991/2905\)](#) ; July 27, 1992 otherwise subject to transitional provisions in [Planning and Compensation Act 1991 \(Commencement No.11 and Transitional Provisions\) Order 1992 \(SI 1992/1630\) art.3](#)).
 5. [Welwyn Hatfield Council v Secretary of State for Communities and Local Government \[2011\] UKSC 15](#) at [83].
 6. [Fidler v Secretary of State for Communities and Local Government \[2010\] EWHC 143 \(Admin\)](#) at [9].
 7. [Welwyn Hatfield Council \[2010\] EWCA Civ 26; 2010 WL308490](#) at [44].
 8. *Localism Bill: enforcement package, impact assessment, January 31, 2011, p.12.*
 9. *Localism Bill 126 2010-11*, as introduced, Vol.1, Pt 5, Ch.5, p.75, para.10.
 10. *Localism Bill: enforcement package, impact assessment, January 31, 2011, p.12, objective 3.*
 11. R. Humphreys in "20 years of the 10 year period for enforcement: time for reform?" (2011) 5 J.P.L. 522, 526.
 12. *S. Durno, of the Law Society's Planning and Environmental Law Committee, quoted in C. Bowman, "The Localism Bill divides opinion", Law Society Gazette, July 21, 2011.*
 13. *Localism Bill, RTPI Issue Briefing, June 29, 2011, para.16.*
 14. *Localism Bill: enforcement package, impact assessment, January 31, 2011, p.12, objective 3.*
 15. D. Brock and P. Kratz, "The ten year period of enforcement: is it really time for reform?" (2011) 8 J.P.L. 1005, 1005.
 16. The Law Society, "Government amends planning enforcement regime in response to Law Society warning but doesn't go far enough", Law Society Press Release, August 11, 2011 : <http://www.lawsocietymedia.org.uk/Press.aspx?ID=1488> [Accessed January 9, 2013].
 17. The Law Society, *Localism Bill Parliamentary Brief (June 7, 2011), Pt.5, cl.109.*
 18. "Current topics (February)", (2012) 2 J.P.L. 99, 100-101.
 19. Humphreys, "20 years of the 10 year period for enforcement: time for reform?" (2011) 5 J.P.L. 522, 526.
 20. *Localism Bill: enforcement package, impact assessment, January 31, 2011, p.13.*
 21. *Lord Taylor of Holbeach, Hansard, HL Vol.729, col.1304 (July 19, 2011).*
 22. [Town and Country Planning Act 1990 s.171BC\(1\)](#) as amended by [s.124\(1\) Localism Act 2011](#).
 23. <http://oxforddictionaries.com/definition/deliberately?q=deliberately> [Accessed January 10, 2013].
 24. <http://oxforddictionaries.com/definition/concealment?q=concealment> [Accessed January 10, 2013].

25. A. Riley, "Localism Act — New planning enforcement powers", *Property PSL*, January 5, 2012 : <http://propertypsl.co.uk/node/608> [Accessed January 9, 2013].
26. As reported by *BBC.co.uk*, March 16, 2012: <http://www.bbc.co.uk/news/uk-england-surrey-17398342> [Accessed January 10, 2013]; *Telegraph.co.uk*, March 15, 2012: <http://www.telegraph.co.uk/news/uknews/9143378/Family-wins-right-to-remain-in-hidden-house-in-the-woods.html> [Accessed January 10, 2013].
27. Estimated at no more than one or two at any given time. *Localism Bill: enforcement package, impact assessment*, January 31, 2011, p.12.
28. C. Fallows, "Establishing lawfulness by deception" (2010) 8 J.P.L. 965, 968.
29. [Localism Act 2011 \(Commencement No.4 and Transitional, Transitory and Saving Provisions\) Order 2012 \(SI 2012/628\) art.13\(3\)](#).
30. *Hansard*, HL Vol.729, col.1305 (July 19, 2011).
31. *Robert Carnwath QC, "Enforcing Planning Control" (HMSO, 1989)*, which heavily influenced the [Planning and Compensation Act 1991](#), which amended the [1990 Act](#).
32. Superseded by Town and Country Planning Act 1971 s.87.
33. This was later extended to include a fourth category, that of breach of any condition relating to a change of use as a single dwelling under the Local Government and Planning (Amendment) Act 1981 (c.41) s.87.
34. Building, engineering, mining or other operations: Town and Country Planning Act 1968 s.15(3)(a).
35. Town and Country Planning Act 1968 s.15(3)(b).
36. Town and Country Planning Act 1968 s.15(3)(c).
37. *Carnwath, "Enforcing Planning Control", Ch.7, para.3.7, p.70*.
38. *The Law Society, Localism Bill Parliamentary Brief (June 7, 2011), Pt 5, cl.109*.
39. *Carnwath, "Enforcing Planning Control", Ch.7, para.3.4(1), p.69*.
40. *Carnwath, "Enforcing Planning Control", Ch.7, para.3.7, p.70*.
41. A. Bowes, "Potential restrictions on a legal right to development" (2011) 8 J.P.L. 994, 994.
42. [Law of Property Act 1969 s.23](#).
43. Figure from English Heritage website: <http://www.english-heritage.org.uk/caring/listing/listed-buildings/> [Accessed January 10, 2013].
44. *The Law Society, "Government amends planning enforcement regime in response to Law Society warning — but doesn't go far enough", Law Society Press Release, August 11, 2011*.
45. *Council of Mortgage Lenders Handbook, December 2010 edn, para.5.4* : <http://www.cml.org.uk/cml/handbook> [Accessed January 10, 2013].
46. *The Law Society, "Government amends planning enforcement regime in response to Law Society warning — but doesn't go far enough", Law Society Press Release, August 11, 2011*.
47. [Cottingham v Attey Bower & Jones \[2000\] Lloyd's Rep. P.N. 591; \[2000\] P.N.L.R. 557 Ch D](#).
48. *R. Perry, "The curse of Cottingham", The Law Gazette, March 5, 2004* : <http://www.lawgazette.co.uk/news/the-curse-cottingham> [Accessed January 10, 2013].
49. Brock and Kratz, "The ten year period of enforcement: is it really time for reform?" (2011) 8 J.P.L. 1005, 1005.
50. Brock and Kratz, "The ten year period of enforcement: is it really time for reform?" (2011) 8 J.P.L. 1005, 1005.
51. *The Law Society, Localism Bill Parliamentary Brief (June 7, 2011), Pt 5, cl.109*.
52. Humphreys, "20 years of the 10 year period for enforcement: time for reform?" (2011) 5 J.P.L. 522, 523.
53. *Carnwath, "Enforcing Planning Control", Ch.4, para.3.4*.
54. Humphreys, "20 years of the 10 year period for enforcement: time for reform?" (2011) 5 J.P.L. 522, 523.
55. Humphreys, "20 years of the 10 year period for enforcement: time for reform?" (2011) 5 J.P.L. 522, 523.
56. See, for example: <http://www.communities.gov.uk/planningandbuilding/planningsystem/> [Accessed January 10, 2013].
57. [Localism Act 2011 s.124\(1\)\(a\)](#).
58. Humphreys, "20 years of the 10 year period for enforcement: time for reform?" (2011) 5 J.P.L. 522, 526.
59. *Robert Neill, House of Commons Public Bill Committee, Localism Bill eighteenth sitting (TSO, 2011), March 1, 2011, col.727*.
60. *Neill, House of Commons Public Bill Committee, Localism Bill eighteenth sitting (TSO, 2011), March 1, 2011, col.727*.
61. *The Localism Bill: RTPi Issue Briefing Enforcement, June 29, 2011, para.16, p.4* : <http://www.rtpi.org.uk/media/1117647/RTPi-Issue-Briefing-Enforcement-v2-29-06-11.pdf>
62. *Carnwath, "Enforcing Planning Control", Ch.6, para.2.7, p.54*.
63. *Carnwath, "Enforcing Planning Control", Ch.6, para.2.11, p.55*.

© 2013 Sweet & Maxwell and its Contributors

We want to hear your [feedback](#)

Sweet & Maxwell is part of Thomson Reuters. © 2013 Thomson Reuters (Professional) UK Limited