Neutral Citation Number: [2021] EWHC 1509 (Admin)

Case No: CO/4316/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7th June 2021

Before :

THE HON. MR JUSTICE HOLGATE

Between :

The Queen on the application of OCADO RETAIL LIMITED	**Claimant**
- and –	
LONDON BOROUGH OF ISLINGTON	**Defendant**
-and-	
(1) TELEREAL TRILLIUM LIMITED **(2) CONCERNED RESIDENTS OF TUFNELL PARK**	**Interested Parties**

- -

Paul Brown QC (instructed by **Mishcon De Reya LLP**) for the **Claimant**
David Forsdick QC (instructed by **London Borough of Islington Legal Services**) for the **Defendant**
Richard Wald QC (instructed by **Walton & Co**) for the **2nd Interested Party**
The 1st Interested Party was not represented and did not appear

Hearing dates: **05/05/2021 and 06/05/2021**

Approved Judgment

Mr Justice Holgate :

Introduction

1. This claim for judicial review raises some important issues of planning law. How does the 10-year time limit in s.171B(3) of the Town and Country Planning Act 1990 ("TCPA 1990") for the taking of enforcement action apply to a breach of condition in a planning permission? What is the legal nature of the right which accrues when a breach of condition becomes immune from enforcement and lawful under s.191(3)? Does the subsistence of such a right depend upon it continuing to be exercised? What is the scope of the power in s.193(7) of TCPA 1990 to revoke a certificate of lawfulness of an existing use or development (a "CLEUD") granted under s.191?

2. This case has raised some difficult points and at the outset I would like to express my gratitude for the considerable assistance I have received from Mr. Paul Brown QC for the claimant, Ocado Retail Limited ("Ocado"), Mr. David Forsdick QC for the defendant, the London Borough of Islington ("Islington") and Mr. Richard Wald QC for the second interested party, Concerned Residents of Tufnell Park, ("CRTP"), along with their respective teams.

3. The claim relates to 4 units A-D on the Bush Industrial Estate, Station Road, London, N.19. This terrace was built pursuant to a full planning permission dated 17 May 1984, which granted consent for an "industrial building to house British Telecom Power Workshops and ancillary buildings for storage, diesel repair and engine-testing, with associated vehicle parking." Condition 3 stated:-

> "The Industrial accommodation shall be used as light or general industrial buildings only, as defined in Classes (3) and (4) of the Schedule to the Town and Country Planning (Use Classes) Order 1972 and General Development Order 1977, and shall not be used without planning permission for any other purpose, including warehousing (Class 10)."[1]

4. The planning application indicated that the premises would provide 5000 sqm of accommodation, including some ancillary office and storage areas. It is unclear whether the permission also authorised the construction of Unit E, lying immediately to the south of Units A to D. This appears to have been used for vehicle maintenance. It was demolished by 5 January 2019 and it is not suggested that it has any significance for the issues now to be determined.

5. Units A-D lie at the north-eastern end of the Bush Industrial Estate. To the south west lies another range of units 1-10, several of which were occupied by BT for a number of years, and units 11-13 in a separate range, occupied for several years by Royal Mail for storage and distribution purposes (class B8 in the Town and Country Planning) (Use Classes) Order 1987 – SI 1987 No. 764) ("UCO 1987").

6. The Industrial Estate occupies a long site oriented from south west to north east. A railway line runs along its long north-western boundary. Employment development and residential properties lie on the other side of that line. To the north east of units A to D

[1] Referred to in the 1972 Order as use classes III, IV and X.

there are some three-storey block of flats. To the south east is the Yerbury Primary School, which is attended by about 450 children.

7. It is said that BT was in occupation of Units A-D from the time they were constructed until late 2013. In 2002 the first interested party, Telereal Trillium Limited ("Telereal") acquired much of BT's property estate, including units A to D, which were then leased back to BT.

8. On 27 January 2014 Telereal arranged for the grant of a 10-year lease of units A-D to Royal Mail for use, it is said, as a Parcel Force distribution warehouse. The small extract provided from the lease suggests that there were rights to break the term on *inter alia* 27 January 2017. At all events, Royal Mail did terminate the lease in the early part of 2017. Telereal then marketed the premises for B8 purposes and carried out refurbishment work.

9. In 2018 Telereal entered into negotiations with Ocado for a lease of units A-D. Paragraphs 3 to 5 of the claimant's Statement of Facts and Grounds explain that Ocado was seeking a distribution centre in the Islington area where it could store food at chilled temperatures, process customer orders and organise scheduled deliveries. It was important to the company to be able to find suitable B8 premises from which it could operate 24 hours a day. It was a condition of the negotiations that the premises would have a suitable planning consent allowing for a use, which included B8, a "click and collect" facility and 24 hour use. Telereal said that it would obtain a CLEUD for that purpose.

10. On 15 January 2019 Telereal applied to Islington for a CLEUD certifying that the lawful use of units A to D was for B8, storage and distribution purposes. The application form stated that the use had begun more than 10 years before the date of the application in breach of condition 3 of the 1984 planning permission and said that the use had started in 1992. The application relied upon a statutory declaration dated 12 February 2019 by Mr. Damian Molony, a chartered surveyor, who had some responsibility for the site, first as an employee of BT and then from 2002 as an employee of Telereal. The application also relied upon a covering letter from Telereal's planning consultants, Union 4 Planning, which enclosed some supporting documents. They included a site boundary plan showing the application area edged in red. The area was said to be 1.9ha.[2]

11. The legislation does not require any public consultation on an application for a CLEUD and none was carried out on this particular application.

12. In summary, the case put on behalf of Telereal to Islington was that BT had used units A-D for B8 purposes from 1992 to 2013, although not to full capacity in the latter part of that period. Between early 2014 and early 2017 Royal Mail leased the premises for warehousing and since then they had been marketed for that same purpose. The application was presented on the basis that units A-D had constituted a single planning unit throughout that entire period and that once the premises had been used for B8 purposes for a 10-year period in breach of condition, the use right thereby obtained had not subsequently been abandoned. On that basis it was contended that it did not matter

[2] Strangely, Mr. Molony stated that the area of the application site was shown on a different plan he produced which restricted that area to the footprint of the units A-D. It does not appear that this discrepancy was noticed before the CLEUD was granted and, although it was raised during the hearing, it has not been resolved. No party suggests that any of the issues the court is being asked to determine are affected by it.

whether B8 activities had continued to take place physically up until the date on which the application for the CLEUD was made.

13. The application was determined by an officer acting under delegated powers. On 26 April 2019 Islington granted a CLEUD in respect of Units A-D for a B8 use. The accompanying Delegated Report essentially accepted the information and approach presented in Telereal's application.

14. On 4 November 2019 Ocado entered into an agreement for the lease of units A-D relying upon the CLEUD which had been obtained (paragraph 6 of the Statement of Facts and Grounds).

15. On 11 November 2019 Ocado submitted a planning application to Islington for the carrying out of various improvements to the premises. Unlike the application for the CLEUD, this was the subject of consultation with landowners and occupiers in the vicinity. It attracted objections from CRTP. The group comprises a number of members of the public living in the vicinity of the Industrial Estate who are opposed to Ocado's use of units A-D. They became aware of the grant of the CLEUD and took advice on whether it could be challenged.

16. On 23 April 2020 CRTP sent a letter to Islington enclosing a bundle of documents mainly relating to the planning history of the Estate. They asked the local authority to exercise its powers under s.193(7) of the TCPA to revoke the CLEUD on the grounds that Telereal's application had contained statements which had been "false in a material particular" or that "material information" had been "withheld." The letter carefully explained the particular respects in which the group maintained that those conditions were satisfied.

17. On 1 June 2020 Islington wrote to Ocado and Telereal enclosing the material received from CRTP, stating that there appeared to be grounds for revocation of the CLEUD and giving the recipients an opportunity to make representations on the matter pursuant to article 39(15) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015 No. 595) ("DMPO 2015").

18. Telereal responded on 25 June 2020 by a letter from its planning consultants enclosing a second statutory declaration by Mr Molony (dated 25 June 2020). That declaration revealed that he had not visited the premises during Royal Mail's lease. Ocado's solicitors also sent a response on the same day, enclosing a Note from the claimant's planning consultants, Gerald Eve. Telereal and Ocado contended that there were no grounds for revocation. Paragraph 1.8 of a Note by Telereal's consultants stated that, in reliance upon the CLEUD, refurbishment and fit out works costing over £2.3m had been carried out, but without any more detail or clarifying who had borne those costs.

19. On 7 August 2020 Islington wrote to Telereal and Gerald Eve responding to points which had been made, stating that the conditions for exercising the power of revocation appeared to be met, but giving one further opportunity for representations to be made. Telereal and Ocado's solicitors sent separate replies on 20 August 2020. No complaint has been made about the procedure followed by Islington.

20. On 13 October 2020 Islington revoked the CLEUD pursuant to s.193(7) of TCPA 1990. That decision was accompanied by a Delegated Report authorised by the Council's

Director of Planning and Development. Relying on decisions in the High Court, *Nicholson v Secretary of State for the Environment* (1998) 76 P&CR 191 and *Ellis v Secretary of State for Communities and Local Government* [2010] 1 P&CR 21, Islington decided that the law required a breach of condition to have continued for at least 10 years up to and including the date of the application for the CLEUD. Even if there had been a continuing use for B8 purposes for a 10-year period ending at some earlier date, any lawful right then acquired had been lost because the occupier did not *continue* thereafter to use the application site for that purpose. Telereal's contention that the lawful use right for B8 purposes had not been *abandoned* was irrelevant to satisfying a legal requirement that the use should *continue* in order for that use right to subsist. As we shall see, the Delegated Report also approached the revocation issue on the alternative basis that Telereal's legal analysis had been correct.

21. On 20 November 2020 Ocado issued its claim for judicial review. Lane J granted permission to apply.

22. If this claim succeeds Ocado will be able to rely on the CLEUD which does not itself contain any conditions restricting the operation of the premises for B8 purposes. There might be an issue as to whether any of the conditions of the 1984 permission other than condition 3 (e.g. the noise level restrictions in condition 7) govern that B8 use accommodated in the building erected under that consent (see e.g. *Lambeth London Borough Council v Secretary of State for Housing Communities and Local Government* [2019] 1 WLR 4317 at [38]). This issue has not been the subject of argument in these proceedings and is not a matter for decision in this judgment. Leaving that point to one side, it would be open to Islington to consider exercising its powers under s.193(7) again, subject to overcoming or avoiding any legal errors identified in this judgment. A reconsideration might involve an examination of additional material. It would not be confined to the information considered so far.

23. If the claim fails, it may be open to Ocado or Telereal to consider making a further application for a CLEUD relying upon more detailed material and addressing criticisms made in the revocation process. If that application were to be refused, an appeal to the Secretary of State could be made under s.195. However, any entitlement to a CLEUD would have to be considered by Islington as at the date of any fresh application, not 15 January 2019.

24. It is appropriate to deal with the issues in this case in the following order:-

Headings	Paragraph Numbers
The Statutory Framework	25 - 42
Immunity from enforcement action and lawful planning rights *The position before the Planning and Compensation Act 1991*	43-49

Ground 6 was not pursued, but it is convenient to retain the original numbering.

The Statutory Framework.

25. The key provisions are to be found in Part VII of TCPA 1990 as amended by the Planning and Compensation Act 1991 ("PCA 1991"). The PCA 1991 amended the law on planning control in the light of the report by Robert Carnwath QC (as he then was) "Enforcing Planning Control" (February 1989).

26. Section 171A(1) of TCPA 1990 defines two types of breach of planning control:-

> "(a) carrying out development without the required planning permission; or
>
> (b) failing to comply with any condition or limitation subject to which planning permission has been granted."

"Development" without planning permission may involve either a "material change of use" or the carrying out of building, engineering, mining, or other operations ("operational development") (s.55(1)).

27. Section 171A(2) defines the "taking of enforcement action" as including the issuing of an enforcement notice and the service of a breach of condition notice. An enforcement notice may deal with both types of breach of planning control (s.172(1)). It may give rise to an appeal in which planning permission may be granted for the development enforced against or the relevant condition discharged (ss.174(2) and 177(1)). A breach of condition notice under s.187(A) simply secures compliance with conditions which are being breached and does not give rise to any right of appeal.

28. Section 171(B) lays down the time limits for the taking of enforcement action against a breach of planning control, after which no such action may be taken in respect of that breach:-

> "(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building engineering mining or other operations in on over or under land no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.
>
> (2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.
>
> (3) In the case of any other breach of planning control no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.
>
> (4)……"

29. The time limits for the taking of enforcement action govern challenges to both enforcement and breach of condition notices and the determination of whether a breach of planning control has become lawful for the purposes of a CLEUD under s.191. The test is the same in both contexts (see Sullivan J as he then was in *R (North Devon District Council) v First Secretary of State* [2004] JPL 1396).

30. Thus, if an appeal is brought against an enforcement notice, the appellant may rely upon the ground of appeal in s.172(4)(d) to obtain a decision on whether enforcement action against the breach of planning control alleged is time barred under s.171B (but not otherwise – see s.285(1)). In a prosecution for non-compliance with a breach of

condition notice, the notice may be challenged on the grounds that it was time-barred by s.171B (*Dilieto v Ealing London Borough Council* [2000] QB 381).

31. Upon the expiry of a time limit in s.171B for taking enforcement action against either development without planning permission or a breach of condition, the breach of planning control is treated as being lawful at any time, so long as it does not contravene any enforcement notice (or breach of condition notice) then in force. That is the effect of s.191(2) and (3). Although those provisions appear in a section dealing with applications for a CLEUD, they apply equally when determining whether a breach of planning control has become lawful in an appeal against an enforcement notice or in defending a prosecution on a breach of condition notice.

32. Section 191 provides (so far as material):-

> "(1) If any person wishes to ascertain whether—
>
> (a) any existing use of buildings or other land is lawful;
>
> (b) any operations which have been carried out in, on, over or under land are lawful;
>
> (c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,
>
> he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.
>
> (2) For the purposes of this Act uses and operations are lawful at any time if—
>
> (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and
>
> (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
>
> (3) For the purposes of this Act any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if—
>
> (a) the time for taking enforcement action in respect of the failure has then expired; and
>
> (b) it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.
>
> (3A)…….

> (4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.
>
> (5) A certificate under this section shall—
>
> (a) specify the land to which it relates;
>
> (b) describe the use, operations or other matter in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);
>
> (c) give the reasons for determining the use, operations or other matter to be lawful; and
>
> (d) specify the date of the application for the certificate.
>
> (6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed.
>
> (7) ……..”

33. Section 191(7) provides that a CLEUD shall be treated as if it were a planning permission for the purpose of *inter alia* the licensing requirements for caravan sited (s.3(3) of the Caravan Sites and Control of Development Act 1960) and for waste management licences (under ss.35-6 of the Environmental Protection Act 1990).

34. Section 192 is a parallel provision enabling a person to apply to a local planning authority for a certificate that a proposed use or operation on land would be lawful (a “CLOPUD”).

35. Section 193 of TCPA 1990 provides:-

> “(1) An application for a certificate under section 191 or 192 shall be made in such manner as may be prescribed by a development order and shall include such particulars, and be verified by such evidence, as may be required by such an order or by any directions given under such an order or by the local planning authority.
>
> (2) Provision may be made by a development order for regulating the manner in which applications for certificates under those sections are to be dealt with by local planning authorities.

(3) In particular, such an order may provide for requiring the authority—

(a) to give to any applicant within such time as may be prescribed by the order such notice as may be so prescribed as to the manner in which his application has been dealt with; and

(b) to give to the Secretary of State and to such other persons as may be prescribed by or under the order, such information as may be so prescribed with respect to such applications made to the authority, including information as to the manner in which any application has been dealt with.

(4) A certificate under either of those sections may be issued—

(a) for the whole or part of the land specified in the application; and

(b) where the application specifies two or more uses, operations or other matters, for all of them or some one or more of them;

and shall be in such form as may be prescribed by a development order.

(5) A certificate under section 191 or 192 shall not affect any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted unless that matter is described in the certificate.

(6) In section 69 references to applications for planning permission shall include references to applications for certificates under section 191 or 192.

(7) A local planning authority may revoke a certificate under either of those sections if, on the application for the certificate—

(a) a statement was made or document used which was false in a material particular; or

(b) any material information was withheld.

(8) Provision may be made by a development order for regulating the manner in which certificates may be revoked and the notice to be given of such revocation."

36. Section 194 of TCPA 1990 provides:-

"(1) If any person, for the purpose of procuring a particular decision on an application (whether by himself or another) for the issue of a certificate under section 191 or 192—

> (a) knowingly or recklessly makes a statement which is false or misleading in a material particular;
>
> (b) with intent to deceive, uses any document which is false or misleading in a material particular; or
>
> (c) with intent to deceive, withholds any material information,
>
> he shall be guilty of an offence.
>
> (2) A person guilty of an offence under subsection (1) shall be liable—
>
> (a) on summary conviction, to a fine not exceeding the statutory maximum; or
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding two years, or a fine, or both.
>
> (3) Notwithstanding section 127 of the Magistrates' Courts Act 1980, a magistrates' court may try an information in respect of an offence under subsection (1) whenever laid."

37. Section 195 gives an applicant a right of appeal to the Secretary of State against a refusal of an application for a certificate under s.191 (or s.192).

38. In so far as is material, article 39 of the DMPO 2015 provides:-

> "(1) An application for a certificate under section 191(1) or 192(1) of the 1990 Act (certificates of lawfulness of existing or proposed use or development)(1) must be made on a form published by the Secretary of State (or on a form substantially to the same effect) and must, in addition to specifying the land and describing the use, operations or other matter in question in accordance with those sections, include the particulars specified or referred to in the form.
>
> (2) An application to which paragraph (1) applies must be accompanied by—
>
> (a) a plan identifying the land to which the application relates drawn to an identified scale and showing the direction of North;
>
> (b) such evidence verifying the information included in the application as the applicant can provide; and
>
> (c) a statement setting out the applicant's interest in the land, the name and address of any other person known to the applicant to have an interest in the land and whether any such other person has been notified of the application.

> ……
>
> (9) The local planning authority may by notice in writing require the applicant to provide such further information as may be specified to enable them to deal with the application.
>
> …….
>
> (15) Where a local planning authority propose to revoke a certificate issued under section 191 or 192 of the 1990 Act in accordance with section 193(7) of the 1990 Act (certificates under sections 191 and 192: supplementary provisions)(4), they must, before they revoke the certificate, give notice of that proposal to—
>
> (a) the owner of the land affected;
>
> (b) the occupier of the land affected;
>
> (c) any other person who will in their opinion be affected by the revocation; and
>
> (d) in the case of a certificate issued by the Secretary of State under section 195 of the 1990 Act, the Secretary of State.
>
> (16) A notice issued under paragraph (15) must invite the person on whom the notice is served to make representations on the proposal to the authority within 14 days of service of the notice and the authority must not revoke the certificate until all such periods allowed for making representations have expired.
>
> (17) An authority must give written notice of any revocation under section 193(7) of the 1990 Act to every person on whom notice of the proposed revocation was served under paragraph (15)."

39. By s.193(6) of TCPA 1990 an application for a certificate under s.191 (or s. 192) is treated as an application for planning permission for the purposes of the planning register kept by each local planning authority under s.69. Accordingly a copy of each application, the decision on the application and the information required under article 40 of the DMPO 2015 (including that specifically required by article 40(7)) must be contained in the register. The register must be open to public inspection (s.69(8)).

40. However, the legislation does not require a local planning authority to carry out any public consultation on an application under s.191 of the TCPA 1990 (or under s.192). Strangely, that contrasts with the position where the authority refuses to grant a certificate and the applicant appeals to the Secretary of State under s.195. It is common ground that the procedure rules for such appeals, whether dealt with at a public inquiry or hearing, or by written representations, provide for public participation in the process.

41. It is beneficial to the quality of decision-making on s.191 applications, which deal with past events, that persons or bodies with relevant information on the grounds for seeking

a CLEUD should be able to be involved, whether supporting or opposing an application. If they are not, there is potentially an increased risk of any certificate granted becoming the subject of an application for judicial review, or revocation under s.193(7), with consequential delays for a landowner wishing to rely upon that decision. If, on the other hand public participation results in the refusal of a CLEUD, the applicant is entitled to pursue the matter on appeal, where the evidence can be examined and tested.

42. It could be said to be unsatisfactory that whether consultation takes place should depend upon the exercise of discretion by individual planning officers, rather than there being a uniform national procedure. Similar concerns were raised by Collins J in *Sumption v London Borough of Greenwich* [2008] 1 P&CR 20 at [8]. The point is illustrated by paragraph 008 of the relevant part of the National Planning Practice Guidance, which states that "it may be reasonable for a local planning authority to seek evidence from other sources e.g., parish councils or neighbours, if there is good reason to believe they may possess relevant information about the content of a specific application". The difficulty is that an authority is unlikely to be able to identify all situations in which members of the public have something material to contribute, either on the decision whether to grant a certificate or the precise scope of any certificate.

Immunity from enforcement action and lawful planning rights.

The position before the Planning and Compensation Act 1991.

43. In order to understand better the current legislation, it is necessary to refer to parts of the previous statutory scheme before it was amended by PCA 1991 This was contained in TCPA 1990 as originally enacted and was something of a hotchpotch.

44. Under s.172(1) a local planning authority could not serve an enforcement notice unless they considered a breach of planning control had occurred after the end of 1963. Section 172(4) reduced that time limit to 4 years from the date of the breach for 4 types of breach of planning control:-

> "(4) An enforcement notice which relates to a breach of planning control consisting in—
>
> (a) the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land; or
>
> (b) the failure to comply with any condition or limitation which relates to the carrying out of such operations and subject to which planning permission was granted for the development of that land; or
>
> (c) the making without planning permission of a change of use of any building to use as a single dwellinghouse; or
>
> (d) the failure to comply with a condition which prohibits or has the effect of preventing a change of use of a building to use as a single dwellinghouse,

> may be issued only within the period of four years from the date of the breach."

45. Accordingly, breaches of conditions relating to the carrying out of operational development were subject to a 4-year time limit (s.172(4)(b)), whereas those relating to a material change of use were not (unless they fell within the single dwelling category in s.172(4)(d)). Immunity from enforcement could not be obtained for any breach of planning control falling outside s.172(4) unless it was shown that it had continued since the beginning of 1964 down to the date of the enforcement notice. These two alternative time limits were reflected in two of the grounds upon which an appeal against an enforcement notice could be brought under s.174(2)(d) and (e).

46. Section 192 enabled an application to be made for an "established use certificate". Section 191 defined an "established use" as follows:-

> " For the purposes of this Part, a use of land is established if—
>
> (a) it was begun before the beginning of 1964 without planning permission and has continued since the end of 1963;
>
> (b) it was begun before the beginning of 1964 under a planning permission granted subject to conditions or limitations, which either have never been complied with or have not been complied with since the end of 1963 ; or
>
> (c) it was begun after the end of 1963 as the result of a change of use not requiring planning permission and there has been, since the end of 1963, no change of use requiring planning permission."

Thus, s.192 certificates could only relate to an existing use of land and not operational development carried out in the past (or breaches of conditions relating to operational development).

47. Furthermore, a use which was shown to have become "established" was only treated as immune from enforcement. It was not treated as a *lawful* use. One consequence of that distinction, was that in the event of an enforcement notice being served the landowner had no right under s.57(4) of TCPA 1990 to revert to the lawful use immediately preceding the use enforced against if it was merely an "established use" (*LTSS Print and Supply Services Limited v Hackney London Borough Council* [1976] QB 663).

48. The Carnwath Report made the following points:-

> (i) Prior to the Town and Country Planning Act 1968 there had been a 4-year time limit for enforcement against any breach of planning control. The 1968 Act had introduced a requirement for a landowner to prove that certain breaches of planning control (including a material change of use) had continued since the beginning of 1964. By the end of the 1980s, that period had become far too long to be a sensible basis for immunity. Leaving aside those cases where the 4-year rule should continue to apply, the 1964 rule should be replaced by a "rolling limitation period after which immunity would be conferred" of 10 years (paras. 3.4 to 3.11);

(ii) A breach of control which becomes immune from enforcement should also be treated as lawful (paras. 3.4);

(iii) The procedures for established use certificates and to determine under s.64 TCPA 1990 whether planning permission was required for prospective development, should be replaced by a new, unified procedure. The onus would be on the applicant to make good his case. The authority could refuse to grant a certificate if he failed to do so. The applicant could pursue the matter on appeal to the Secretary of State or in response to any enforcement action (paras. 7.4 to 7.5).

49. PCA 1991 gave effect to those recommendations by inserting s.171B into TCPA 1990 and by substituting new ss.191-196. There are two important points to be noted about the reforms following the Carnwath Report. First, the Report's recommendation of a "rolling period" of 10 years was to replace the more onerous requirement that a breach of control must have subsisted since 1964, which meant a period already in excess of 25 years and still rising. The "rolling" nature of the time limit simply meant that the landowner would not have to do any more than show that a breach of planning control has existed for a *minimum* period of 10 years prior to the date on which the issue of immunity falls to be determined. It did not mean, as has sometimes been said, that the *only* way of demonstrating immunity was by looking solely at the 10-year period immediately prior to the date of an application for CLEUD or the issuing of an enforcement notice. The 10-year rule might have been satisfied at some point prior to that date. Second, once the 10-year rule is satisfied, the breach of planning control becomes lawful. In other words, a legal right in respect of what had previously amounted to a breach of planning control would accrue. The 10-year time limit for taking enforcement action might have expired at some point in the past, but the Carnwath Report did not suggest that any right which accrued in this manner would be lost merely because it did not continue to be exercised or exercised actively.

The application of the immunity periods after the 1991 Act

50. Section 191(1) enables an application to be made for a CLEUD to determine whether (a) an existing use or (b) an operation which has been carried out (e.g. a building) or (c) a breach of condition, is lawful. Section 191(2) and (3) defines lawfulness in terms of firstly, the time for taking enforcement action having expired under s.171B (or planning permission not being required for an existing use or operations previously carried out), and secondly, there being no contravention of any enforcement notice then in force. If the local planning authority is provided with information satisfying them of the lawfulness of (a), (b), or (c) at the time of the application, then it shall issue a certificate and must describe the use, operation or breach of condition certified as being lawful (s.191(4) and (5)). As we have seen, the same approach to immunity and lawfulness applies where a planning authority serves an enforcement notice ([29] and [31] above).

51. It is well established, and common ground in this case, that in order to be able to show that a use is lawful upon the expiration of a time limit in s.171B(3) it is necessary to show that the use has *continued* for 10 years since it began. The same applies to a breach of planning control in the form of a breach of condition. It is sometimes said that the use must be "continuous", although, as we shall see, care must be taken in the use of that word. The legislation itself does not stipulate that the breach must be a continuing one (see e.g. *North Devon* at [30]). What then, is the legal basis for that requirement and what does it mean?

52. In *Thurrock Borough Council v Secretary of State for the Environment* [2002] J.P.L 1278 the Court of Appeal was concerned with whether the use of land as an airfield had become immune from enforcement. The inspector had said that there was no need for the landowner to demonstrate that the use had been in continuous existence for 10 years. The use had survived throughout that period unless there had been a clear change in circumstances, such as the introduction of another use or the airfield use had been abandoned ([14]).

53. At first instance Newman J held that the rationale for s.171B is that throughout the relevant period of unlawful use the planning authority had had the opportunity to take enforcement action but had failed to do so. If at any time the authority would not have been able to take enforcement action, for example, because no breach was taking place, that period would not count towards the rolling period of 10 years ([15]). The Court of Appeal endorsed that explanation. It is for that reason that the breach of planning control must have *continued* during the immunity period ([25]).

54. The concept of abandonment is applicable to the issue whether a use right which has already accrued continues to exist or has been lost, but cannot apply to the prior issue of *whether* such a right has accrued in the first place. It cannot be used to address any gap in the carrying on of a use during the time period set by s.171B, in effect to supply an assumption that the use *continued* during that period ([26]-[27] and [57]).

55. In *Swale Borough Council v First Secretary of* State [2006] JPL 886 the issue was whether the 4-year immunity period in s.171B(2) was satisfied in relation to a change of use of an agricultural barn to a dwelling. The Court reaffirmed the principle laid down in *Thurrock* that time runs for the purposes of the time limits in s.171B only when the local planning authority is able to take enforcement action, and not when it is unable to do so, notably during periods when a breach has ceased. Just as in *Thurrock* the inspector in this case had erred by relying upon the absence of evidence to show that the residential use had been abandoned during the period before any use right could have accrued, in order to fill a gap in the continuation of that use (see [8]-[11], [25]-[26], [29]-[30] and [35]-[37]).

56. The *North Devon* case was concerned with a breach of condition. Planning permission had been granted for the erection of five holiday bungalows subject to a condition that they should only be occupied for a defined period of 8 months in any calendar year. There was no dispute that one of the bungalows had been occupied continuously for a period of just over 10 years. The Inspector granted a CLEUD on appeal rejecting the local authority's argument that there had only been a breach of condition during the 8-month period in each year and that each such portion of the year when the condition was breached amounted to a separate breach of planning control setting the clock for a 10-year period of immunity running again.

57. Sullivan J upheld the Inspector's decision. He referred to the rationale of s.171B(3) as explained in *Thurrock* and the implicit requirement that the breach of condition should continue for a period of 10 years. Some conditions are capable of being breached continuously. Others are not, such as conditions which do not prohibit or restrict an activity throughout the year but only during certain months, or on certain days (e.g. Sundays and bank holidays) (see [18] to [23]). A "seasonal" or a "time-limited" condition does not give rise to a fresh breach for the purposes of the immunity period each time it is broken. Instead, immunity from enforcement is attained if, throughout a

period of 10 years, the condition was breached whenever it was capable of being complied with (disregarding exceptional compliance as a matter of fact and degree). The breach of planning control imposed by the condition would have continued throughout that 10-year period. The practical test in this situation is whether it would have been possible in any year of the 10-year period for the local planning authority to have taken enforcement action in respect of the non-compliance, to which the obvious answer is "yes" ([24]-[25] and [30]).

58. It is plain from *Thurrock, Swale* and *North Devon* that the test of whether the local authority would have been able or entitled to take enforcement action during the immunity period is central to a decision on whether a lawful right has accrued, both in relation to a determination under s.191 or an appeal against an enforcement notice. This principle will help to resolve a major issue between the parties under ground 3 below.

59. *North Devon* also establishes another principle of general importance where a breach of condition becomes lawful under s.191(3). At [26] Sullivan J approved the analysis given in paragraph 8.36 of Circular 10/97. The fact that the circular has since been revoked does not alter the soundness of that analysis. It is based upon s.193(5) which provides that a CLEUD does not affect any failure to comply with a condition subject to which a planning permission has been granted, unless that matter is specified in the certificate. So where a CLEUD is granted because the 10-year immunity period is satisfied in relation to breaches of one of the conditions in a planning permission, it is the legitimation of *that breach* which should be stated in the CLEUD. The certificate does not legitimise any breaches of other conditions in the permission which are not specified. Those conditions will continue in force unless and until, for example, immunity from enforcement is acquired or a different planning permission (without those conditions) is granted and implemented. Moreover, it may be possible to breach a particular condition in different ways. It is the extent to which a condition is shown to have been breached for 10 years which defines the scope of the accrued right and which should be specified in the certificate, no less and no more. I understand these principles to have become common ground between the parties.

60. The practical importance of these principles is illustrated by an example given by Mr. Brown QC. Suppose permission has been granted for a caravan site subject to a condition restricting the number of pitches to 50. If the landowner can show that there has continued to be 55 pitches on the site for a 10-year period, he is entitled to a CLEUD legitimising the breach of *that condition* to the extent of allowing up to 55 pitches. The immunity from enforcement, and the additional right which accrues, relate to the increase in the total number of pitches on site. The condition cannot be treated as expunged altogether, because that would not correspond to the continuing breach which has been demonstrated and would unjustifiably remove any limit on the number of pitches permitted. In effect, the condition restricting the number of pitches continues in force, but with a revised ceiling on the total number of pitches allowed. There may also be other conditions controlling the pitches on a caravan site, for example their location within the site, which remain unaffected. As s.193(5) plainly states, it is necessary to apply the 10-year time limit to each relevant condition individually.

The procedure for obtaining a CLEUD

61. It is common ground between the parties that the burden lies on an applicant to demonstrate that a breach of planning control has become lawful applying the civil

standard (*Gabbitas v Secretary of State for the Environment* [1985] J.P.L 630). This aligns with the principle that in an enforcement notice appeal the burden lies on the appellant to establish to the same standard a ground of appeal falling within, for example, s.174(2)(d) (*Nelsovil Limited v Minister of Housing and Local Government* [1962] 1 WLR 404).

62. Not only must the applicant complete an application in the form published by the Secretary of State, giving the particulars specified, he must also provide "such evidence verifying the information included in the application as the applicant can provide" (article 39(1) and (2) of DMPO 2015).

63. It is only if the applicant provides a local authority with information which satisfies them of the lawfulness of the matter specified in the application that the authority should grant a certificate.

64. If an authority is not satisfied that the information provided to them by an applicant is adequate for that purpose it may refuse the application. The applicant may then appeal against that refusal or may submit a fresh application with more information. Alternatively, the authority may require the applicant to provide further information to enable them to deal with the application (article 39(9) of DMPO 2015). If the authority considers that there may have been a breach of planning control, it may also serve a planning contravention notice under s.171C of TCPA 1990 requiring specified information, including documents, to be provided, which, in the event of non-compliance can give rise to criminal sanctions (*R (Russnak-Johnston) v Reading Magistrates' Court* [2021] 1 WLR 2444).

65. I accept the submission of Mr. Forsdick QC that a local authority is not obliged to exercise its powers to require more information to be provided in order to try and remedy deficiencies in the material submitted by an applicant. The exercise of those powers is a matter of judgment for the authority. Nonetheless, their availability is important, given that the grant of a CLEUD will constrain the future ability of a planning authority to exercise planning controls, including the taking of enforcement action, and the consequent need to be satisfied with the adequacy of the information presented by an applicant.

66. If an authority should grant a certificate on sparse or materially inadequate information there is a risk of aggrieved citizens applying to challenge that decision by judicial review. This risk is increased by the absence of a statutory requirement for consultation before an application for a CLEUD is determined. It might be argued, for example, that an authority has failed to comply with a *Tameside* obligation to take reasonable steps, in the circumstances of the case, to obtain further information. However, the manner and intensity of any such inquiry may only be challenged on the grounds of irrationality (*R (Khatun) v Newham London Borough Council* [2005] QB 37 at [35] and *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647 at [70]).

67. Care needs to be taken in the drafting of any statutory declaration in support of an application for a certificate under s.191 (or s.192). Such a document is intended to have a formal and solemn status in a non-judicial process where oaths are not administered. It is an offence for a person knowingly and wilfully to make a statutory declaration containing a statement which is false in a material particular (s.5 of the Perjury Act 1911). This offence is "triable either way" and so there is no specific time limit on the

bringing of a prosecution. Whether or not a statutory declaration is used to provide evidence to a local planning authority, s.194 makes it an offence for a person, for the purposes of obtaining a decision on an application under s.191 or s.192, to make a statement knowingly or recklessly which is false or misleading in a material particular or, with an intent to deceive, to use any document which is materially false or misleading or to withhold material information. In s.194(3) Parliament has expressly disapplied the normal 6-month time limit in s.127 of the Magistrates' Courts Act 1980 for the bringing of a prosecution in respect of a summary only offence. Section 194(3) is all of a piece with the power of revocation in s.193(7), which is exercisable at any time after the grant of a CLEUD.

68. To enable an authority to assess the weight to be placed upon a statutory declaration or witness statement, it is good practice for the author to make plain which matters are within his own personal knowledge and, unless it is obvious, how that knowledge was obtained. For each matter outside his own knowledge, he should identify the specific source relied upon. These are essentially the principles applied to witness statements in civil litigation (CPR PD32 para.18.2) and it is difficult to see why the approach should be any less rigorous in the context of s.171B where a declaration may be dealing with continuity over a long period of time.

69. An application under s.191 of TCPA 1990 is asking for a certificate to be granted which is intended to provide immunity from subsequent enforcement action inconsistent with the right certified. It would therefore be appropriate in many cases for the applicant to have in mind the type and level of information which would be needed to advance a successful appeal against an enforcement notice under grounds (c) or (d) in s.174(2).

70. At one point Mr. Forsdick QC submitted that the grant of a CLEUD is predicated on the applicant not making any false statement or using any false document or withholding information falling within s.193(7). But he went on to make it clear that he was not contending that this is a condition for the exercise of the power to grant a CLEUD. Otherwise a line of legal challenge to the grant of certificates would arise which could not have been intended by the legislature.

71. Instead, the impact of s.193(7) on the CLEUD process is that an applicant assumes a risk (which passes to or affects successors in title) that any certificate he obtains may be revoked if it turns out that materially inadequate or false information was provided on the application. That risk is likely to be greater if he takes a minimalist approach to the provision of information. In practical terms, an applicant takes on responsibility for supplying information to verify his application that will not give rise to action under s.193(7).

72. Because s.193(7) deals with a material withholding of information, it follows that an applicant takes a risk of his certificate being revoked if he withholds material which is adverse to his case. As Mr. Wald QC put it, the legislation implicitly assumes that an applicant seeking a CLEUD is candid with the local planning authority in the information he supplies to verify his application. Where, for example, an applicant has adverse material, he would need to consider carefully whether he could properly justify withholding it. If, for example, it is fatal to the application the obvious answer is "no". Indeed, the application ought not to be made, bearing in mind the criminal sanctions which might apply as well as the risk of revocation. For other adverse information, the appropriate course may well be to disclose the material with an explanation (and any

verifying evidence) explaining why it is considered to be non-material to the merits of the application. That after all, is the course which would have to be followed if grounds for revocation arose subsequently. One advantage of disclosure up-front is that the local authority is then able to consider whether it is appropriate to pursue any other lines of enquiry before deciding whether to grant a certificate. Where such steps are taken, it is more likely that any subsequent suggestion of revocation could be resisted more effectively.

73. In many cases the ambit of any certificate and its degree of particularity are likely to be important considerations, because, for example, such matters affect the scope of any enforcement action that may subsequently be taken. Section 193(5) underscores the importance of this issue for breach of condition cases. Ultimately, it is for the local authority to consider the content and degree of particularity in a CLEUD (*R (KP JR Management Company Limited) v Richmond-Upon-Thames London Borough Council* [2018] J.P.L 838). Plainly, this can affect the nature and level of detail which an applicant can be expected to provide in support of an application. A lack of precision in a certificate may sometimes give rise to a successful legal challenge (*Broxbourne Borough Council v Secretary of State for the Environment* [1980] QB 1; *Main v Secretary of State for the Environment, Transport and the Regions* (1999) 79 P&CR 300).

Abandonment of a planning use right

74. In *Hartley v Minister of Housing and Local Government* [1970] 1 QB 413 the Court of Appeal held that the use of a site, for example an established use, could be abandoned, so that its resumption would require planning consent. The Court distinguished a temporary cessation or suspension of a use.

75. By contrast, a planning permission which remains capable of being implemented cannot as a matter of law be abandoned (*Pioneer Aggregates (UK) Limited v Secretary of State for the Environment* [1985] AC 132; *Camden London Borough Council v McDonald's Restaurant*) (1993) 65 P&CR 423. Instead, whether a planning permission lapses altogether is generally controlled by conditions in the permission imposing time limits for the commencement of development (ss.91-93 of the TCPA 1990).

76. In *Secretary of State for the Environment, Transport and the Regions v Hughes* (2000) 80 P&CR 397 the Court of Appeal accepted that abandonment can be assessed by reference to the four criteria applied in *Castell-y-Mynach Estate v Secretary of State for Wales* [1985] JPL 40:-

(i) the physical condition of the property;

(ii) the length of time for which (and extent to which) the property has not been used;

(iii) whether it has been used for any other purposes; and

(iv) the owner's intentions with regard to the use of the property.

Nonetheless, in the final analysis the test is an objective one, based upon the view that would be taken by a reasonable person with knowledge of all the relevant circumstances. The subjective intentions of the actual owner are not determinative.

77. Whereas an established use certificate was conclusive as to the matters it stated in an appeal against an enforcement notice (s.192(4) of TCPA 1990 as originally enacted), the use certified was not treated as lawful. By contrast, under the current version of s.191 a use or breach of planning control found to be immune from enforcement is lawful.

78. Although s.191(6) provides that that lawfulness "shall be conclusively presumed", the Court of Appeal has held that that presumption only applies to the lawfulness certified as at the date of the application for a CLEUD. Consequently, a certified lawful use right is capable of being abandoned subsequently. Such a right may also be lost if an enforcement notice is later served and no appeal is brought against that notice relying upon the CLEUD (*Staffordshire County Council v Challinor* [2008] 1 P&CR 10 at [47]-[48] and [54]-[56]).

79. In the *Swale* case Keene LJ remarked at [30] that the concept of abandonment is best confined to the topic of "established use rights." However, it is plain from [7], [9] and [15] that he was using the expressions "established use rights" and "lawful use rights" interchangeably. That was because the real point in that case was that the concept of abandonment is relevant to whether an accrued use right has been lost, but not to whether it has accrued in the first place (see [54]-[55] above). At all events *Swale* was cited in *Challinor* where the leading judgment was also given by Keene LJ.

80. Accordingly, it is plain that if a lawful right to use units A-D for B8 purposes did accrue in about 2002, through that use having continued in breach of planning control for 10 years, that right was capable of being abandoned thereafter.

The power in s.193(7) to revoke a certificate under s.191 or s.192

81. A CLEUD or a CLOPUD may only be revoked by a local planning authority on the grounds set out in s.193(7). The power of revocation may not be used, for example, because the authority wishes to revisit the merits of the application, or has changed its mind about the findings of fact it has made or the inferences or conclusions it has drawn from the material submitted.

82. The power in s 193(7) may be exercised at any time. It does not give rise to any right to compensation, unlike the making of a revocation order or a discontinuance order under s.97 or s.102 of TCPA 1990 (see ss.107 and 115). A decision to revoke a CLEUD under s.193(7) is not subject to confirmation by the Secretary of State, unlike an order made under s.97 or s.102.

83. It is reasonable to assume that a certificate under s.191 or s.192 is a "possession" for the purposes of Article 1 of the First Protocol to the ECHR. However, Mr. Brown QC confirmed that the grounds of challenge in this case do not rely upon that provision. He accepts that the grant of a CLEUD or a CLOPUD is precarious in the sense that it is liable to be revoked without compensation if the applicant relied upon a statement or document which was materially false, or material information was witheld. The absence of a right to compensation is justified by the nature of the grounds upon which the

power in s.193(7) may be exercised. That power of revocation is then subject to judicial review.

84. The first ground upon which a CLEUD may be revoked is that the application relied upon a statement or a document which was false in a material particular. It is common ground that this ground does not additionally require that the party who made or relied upon the statement or document knew that it was false, or was reckless on that issue. There is no requirement that the making of a statement was deliberately false or dishonest. I agree that section 193(7)(a) lays down a straightforward, objective test that the material in question was false, in the sense of incorrect. Collins J reached the same conclusion in *R (Russman) v London Borough of Hounslow* [2011] EWHC 931 (Admin) at [11].

85. However, there is disagreement on the interpretation of s.193(7)(b). This is the issue raised by ground 1 of the challenge. It is convenient to deal with it now. The claimant submits that the word "withhold" connotes a deliberate decision to hold back information from the local planning authority. Islington and CRTP submit that a withholding does not have to be deliberate.

86. I am in no doubt that the claimant's contention, and ground 1, should be rejected for a number of reasons.

87. According to the Oxford English Dictionary the word "withhold" has a range of meanings. It may indicate a deliberate decision. But it may also describe a situation in which a person keeps something in their possession, such as information. "Keeping" need not be a deliberate act or decision. As a matter of language, it may properly be said that a person withholds information which he or she has in their possession, and therefore is able to provide, but does not provide. Such a withholding may be accidental or inadvertent. It may be mistaken, careless or reckless. For example, the information may be contained in a file which an applicant does not take the trouble to look for. A range of situations may properly be said to fall within the notion of withholding information.

88. The width of the meaning to be given to "withheld" in s.193(7)(b) must depend upon its context. A CLEUD confers an important and valuable right which impacts upon the future exercise of planning control. The local planning authority is entitled to be satisfied with the adequacy of the information provided by the applicant to justify the grant of a certificate. The power to revoke a certificate is an important safeguard for dealing with false information or non-disclosure. It makes no sense for ground (a) in s.193(7) to be an objective test, but for ground (b) to be dependent upon the subjective intention of the applicant. There is no sharp distinction between grounds (a) and (b). They are both concerned to promote reliable decision-making under ss.191 and 192. The positive falsity of a statement may go hand in glove with the non-provision of information. They may relate to the same subject-matter.

89. The objective approach to the meaning of "withheld" in s.193(7) aligns with the onus which the statutory scheme places on the applicant to justify the grant of a certificate by providing adequate evidence to the decision-maker verifying the information included in the application. The subjective approach would undermine the applicant's obligation to verify. It would provide an inappropriate "let out" for an applicant, where

it could not be shown that he had withheld information deliberately, but who may have acted carelessly.

90. The procedure applicable under s.193 does not involve any hearing in which the issue of whether an applicant had acted deliberately could be examined by live evidence and tested through cross-examination. This stands in marked contrast to the offence in s.194(1)(c), withholding information with intent to deceive, where the applicant's state of mind can be examined in a hearing before the magistrates' court. Furthermore, a failure to provide information which had a material impact upon the decision to grant a certificate may not be discovered until much later. At that stage it might no longer be practicable to consider the intention or mental state of the applicant when considering the possible use of the power of revocation.

91. I do not accept Mr. Brown's submission that the words with "intent to deceive" in s.194(1)(c) demonstrate that Parliament understood knowledge of the relevant information to be inherent in the use of the word "withheld" in that provision and in s.193(7)(b). Instead, the objective meaning of "withheld," which does not require information to be withheld deliberately, is entirely consistent with the specific form of *mens rea* required by Parliament for s.194(1)(c). This is demonstrated by s.194(1)(b), which criminalises the use of a document which is false in a material particular provided that there is an "intent to deceive." That specific intent is consistent with the test in s.193(7)(a) for the use of a false document being entirely objective. In other words, Parliament's decision to make criminality in s.194(1) dependent upon specific forms of intent does not help in deciding whether the tests in s.193(7)(a) and (b) are either objective or subjective.

92. For all these reasons, ground 1 must be rejected. The withholding of information referred to in s.193(7)(b) need not be deliberate. Islington made no error of law in this respect.

93. Next, I turn to consider the phrases "in a material particular" and "material. This language appears both in s.193(7) and in the offences defined by s.194(1). It also appears in s.5 of the Perjury Act 1911 in relation to false statutory declarations.

94. I accept Mr. Forsdick' s submission that a local planning authority is entitled to consider the materiality of matters falling within s.193(7)(a) and (b) cumulatively as well as individually.

95. To be "material" the information in question must at least be relevant. Relevance is for the court to decide (*Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759, 780F). But "materiality" here refers to not only relevance but also significance. As Mr Brown QC rightly accepted, it refers to information the falsity or withholding of which *could*, and not necessarily *would*, have resulted in the application for a CLEUD being refused, or being granted in different terms. It is common ground that Islington applied the "could" test. In my judgment they were correct to do so.

96. I also accept the submission of Mr. Forsdick QC that the materiality test may be satisfied because the relevant information could have resulted in the authority making a different factual finding (or drawing a different inference) to one made previously, or a line of inquiry leading to that outcome, and that could have resulted in the application under s. 191 or s. 192 being determined differently.

97. The words "in a material particular" have frequently been used by Parliament in legislation dealing with false statements and non-disclosure. Relevant case law is helpfully summarised in Archbold 2021 at paras. 28-144 and 28-157, Blackstone Criminal Practice 2021 at para. B14.10, and Halsbury's Laws Vol 26 para. 984. The principles I have set out above are in line with that case law.

98. For example, in *R v Millward* [1985] QB 519 the Court of Appeal endorsed the "could" test and rejected the "would" test. Furthermore, the "materiality" test is to be applied to the *information* which was falsely given or withheld. So it follows that a statement may be materially false because it discourages a relevant line of questioning or inquiry (p.525G).

99. In summary, a local planning authority considering whether to exercise the power of revocation under s.193(7) does not have to be satisfied that if false statements had not been made or information withheld, it would have refused to grant the certificate applied for. One possible basis for the exercise of the power is that the matters in question are "material" because the authority considers that the certificate could have been refused if a line of inquiry had been followed.

100. When a local planning authority determines an application for a CLEUD or a CLOPUD it must act on a correct understanding of relevant legal principles. In other words, it must not misdirect itself as to the law. But beyond that, the application of the law to the circumstances of the case is a matter for the authority. It will involve assessing the evidence submitted in support of an application for a CLEUD, weighing the material supplied along with any weaknesses or gaps in it, and making findings of fact and drawing inferences from that material. These are matters of judgment for the decision-maker in an evaluative process. The authority's evaluation may only be challenged on *Wednesbury* principles.

101. The same analysis applies to the evaluation by the authority under s.193(7) of false statements or withheld information and their materiality. So, where an authority identifies a false statement or withheld information, the essential legal question is whether its reasoning on why that matter was "material" was rationally incapable of supporting that judgment. In other words, was that reasoning irrational? For this reason, several of Mr Brown's criticisms were expressed in that way.

102. Mr. Brown QC submitted that where an area of doubt or a potential line of inquiry was apparent from the material submitted with the application for a CLEUD, the power in s.193(7) cannot apply where further information becomes available after the grant of a certificate which simply raises the same point or doubt. I do not accept that broad and absolute proposition. At the application stage the applicant only has to satisfy the local authority of the matter to be certified on the balance of probabilities. The local authority may consider, for example, that there is uncertainty on one issue but not to such an extent that further information should be required, or the application refused on the grounds that the applicant had failed to satisfy the civil standard of proof. But if the authority should subsequently discover that information provided with the application was false or other information was withheld, that may increase the uncertainty or doubt on that very same issue to the extent that it is judged that a certificate would not or might not have been issued, for example, without certain questions being raised and investigated. The revocation power in s.193(7) enables that course to be followed if the authority judges that to be appropriate.

103. It is common ground between the parties that s.193(7) cannot be relied upon simply to correct an error of law, for example, an error which was made in the application and was not corrected by the authority before it decided to grant a CLEUD. Instead, that should be dealt with by judicial review, possibly by a self-challenge (*R v Bassetlaw District Council ex parte Oxby* [1998] PCLR 283) subject to CPR 54.5(6). In view of the conclusions I have reached on the grounds of challenge in this case, there is no need for me to decide whether I agree with this point. It should be left to a case where it needs to be determined. Different circumstances and considerations may arise. For example, an error of law by an applicant may lead to the making of a false statement or the withholding of material information without the same error being committed by the decision-maker. It may be arguable that in some circumstances a decision under s.193(7) does not have to adhere to or replicate, in effect, a legal error made in the decision to grant a CLEUD. These may not be straightforward issues.

104. Nevertheless, the grounds on which the power in s.193(7) to revoke is engaged are limited to those set out in paragraphs (a) and (b). Like the initial decision whether to grant a certificate under s.191, the planning merits of the matter in question are not relevant to the decision whether paragraphs (a) or (b) are satisfied.

105. If either paragraph (a) or (b) is met, s.193(7) confers a discretion on the local authority as to whether to revoke a certificate under s.191 or s.192. The authority is not under an obligation to revoke. It "may" do so. The statute does not expressly indicate any factors which must be taken into account in the exercise of that discretion. Nor did the parties contend that the legislation impliedly identified any factors which must be taken into account, at least not in the circumstances of the present case.

106. Accordingly, the position in law is that the local planning authority may have regard to other relevant factors in so far as it considers it appropriate to do so. Where it is shown that an authority did not take a particular consideration into account, that will not give rise to an error of law unless the consideration was "so obviously material" that it was irrational in the *Wednesbury* sense not to have taken it into account. The mere fact that a decision-maker did not advert to a particular consideration does not render its decision unlawful, unless it was irrational not to have taken it into account in the circumstances of the case:-

> "There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion."

(see the decision of the Supreme Court in *R (Friends of the Earth Limited) v Secretary of State for Transport* [2021] PTSR 190 at [116] – [121]).

107. By way of example, the local planning authority might take into account the effect of revoking the certificate on affected landowners, particularly if time has elapsed and successors in title demonstrate the harm they would suffer. In that event, it could also be relevant to consider whether a successor in title was involved in, or aware of, the application for a certificate, particularly if it intended to rely upon any certificate granted. Where a local authority has reason to conclude that material information was *deliberately* withheld at the application stage, or that there has been material

concealment of information after the certificate was issued, those matters could be taken into account as weighing in favour of revocation. Although the planning merits of a development or a legitimised breach of condition are irrelevant to whether sub-paragraphs (a) or (b) of s.193(7) are satisfied, a local authority may have regard to that aspect when exercising its discretion whether to revoke a certificate. But it is entirely a matter for the authority whether to consider planning benefits or harm at all and, if so, to what extent, subject only to review on the grounds of irrationality.

108. There is no statutory requirement for reasons to be given for a decision to revoke a certificate under s.191 or s.192. However, it is common ground between the parties, and I agree, that a local planning authority has a common law obligation to give reasons for such a decision. Ocado does not contend that Islington failed to satisfy that requirement in this case.

The application for the CLEUD

109. Telereal's application form seeking a CLEUD stated that it related to an existing use in breach of condition falling within Use Class B8. It stated that the use began on 1 January 1992 and had not been interrupted since then, and that there had been no material change in the use of the property. The application form relied upon a covering letter from Telereal's consultants, Union4Planning. That letter submitted a brief analysis of the planning history of the Industrial Estate and commented on certain documents (including a short extract from Royal Mail's lease in 2014, a marketing brochure in 2017, and extracts from the 2010 and 2017 Valuation Lists maintained by the Valuation Office Agency).

110. The planning consultants did not purport to give any evidence about the way in which units A-D had been used over the years. They did not claim to have any knowledge of that subject. Instead, they commented on the documents presented. The consultants said that Appendix 1 to their letter contained "the full planning history" for the estate as far as could be ascertained from Islington's planning register. They stated that most of the planning history concerned units 1 to 13 and was not relevant to units A-D, save that some of the planning applications had described the use of those units. The letter referred to permissions in 1997 and 2000 for B8 use in units 9 to 13 and a permission in 1985 for an open storage use to the rear of units 3 to 10. Whilst those permissions did not relate to units A-D, they did indicate "the prevalence of B8 uses within the estate." The letter also mentioned two applications, one in 2010 and the other in 2011, which proposed an increase in the area used for open storage and the erection of an indoor tennis court. The consultants said that the Design and Access Statement for the 2010 application had referred to "the underused nature of the surrounding B8 units. In relation to the 2011 application they said that "the applicant importantly confirmed that the major warehousing building on the site is units A to D, but that these are not being used to capacity." The letter did not give any further detail on these matters.

111. Turning to the history of units A to D, the letter from the consultants relied upon the first statutory declaration of Mr. Molony. On the basis of that document the consultants asserted that units A-D had been in use for B8 purposes "since at least 1992":-

> "During the period from 1992 to 2013, during which the building was controlled by BT and then by Telereal Trillium, the building was *fully operational* as a warehousing/storage depot with

> ancillary offices (class B8). The building was primarily used as stores for field engineers with ancillary office areas." (emphasis added).

The letter relied upon the photographs of the interior of units A-D "from February 2006". The letter then referred to the grant of the Royal Mail lease in January 2014 and the termination of that lease in Spring 2017. Nothing was said about the extent to which, if at all, Royal Mail physically used units A-D.

112. The consultants submitted that the building had been occupied as a whole and treated as a single planning unit. They claimed that a class B8 use of the building had been acquired "as a result of continuous and uninterrupted occupation of the building for storage and distribution use for a period exceeding 10 years." They contended that that use right had not subsequently been lost by abandonment, replacement by a different use, or extinguishment following the formation of a new planning unit. In this context, Telereal relied upon the decision of the High Court in *Panton and Farmer v Secretary of State for the Environment, Transport and the Regions* (1999) 78 P&CR 186.

113. Thus, there is no dispute that Mr. Molony's declaration was the key document relied upon to "verify" the claim that a B8 use right had accrued by 10 years' continuous and uninterrupted use in breach of planning control and had not subsequently been abandoned. But although he was addressing the occupation of 5000m^2 of floorspace during a period of just over 37 years, the document amounted essentially to no more than one page of text.

114. Mr. Brown QC confirmed that the claim to a continuing use for B8 purposes began on 1 January 1992 because that was when Mr. Molony first became "responsible" for the site and "familiar" with it (paras. 5 and 7 of the declaration). He explained that he had been employed by BT as a chartered surveyor between 1991 and 2002 and then when in 2002 Telereal acquired the majority of BT's estate, including the site, his employment was transferred to Telereal. He said that he continued to be "responsible" for the site from 2002 to the date of the declaration, 12 February 2019. But he gave no details on the nature and extent of his involvement with the site over that 37 year period.

115. Mr. Molony's statutory declaration made the following additional points:-

> (i) The declaration was made from his own knowledge and the information provided was complete and accurate (para.1);
>
> (ii) Units A-D comprise "four interlinked warehouse units with ancillary offices" (para.4);
>
> (iii) Between 1992 and 2002 Mr. Molony had "direct responsibility" for the rationalisation and consolidation of BT's operations in units A-D and was involved in relocating operations from the adjoining leasehold units occupied by BT (para.7);
>
> (iv) In 1992 units A-D were "already fully operational as a warehousing storage depot" (para.7);

> (v) Since at least 1992 "the whole of [units A-D] was in use as a warehousing/storage (class B8) depot with ancillary offices and, as far as I am aware, this use has been continuous throughout. The site was primarily used for stores for field engineers with ancillary office areas." He produced photographs taken in 2006 "which are typical of the uses which were" (sic) (para.8);
>
> (vi) In December 2013 BT vacated the site and a new 10-year lease was granted to Royal Mail in January 2014 for a distribution warehouse. The lease was terminated in 2017, since when units A-D have been marketed as "an industrial warehouse" and were being refurbished (para.9);
>
> (vii) "I dispose (sic) of the above information from my own knowledge of the use of the buildings and the site generally" (para.10).

116. Thus, the key information provided by Mr. Molony was said to be based solely upon his own personal knowledge and without relying on other sources. The declaration gave the clear impression that he was able to speak to the entire period between 1992 and February 2019. It also gave the clear impression that the premises had been used physically for B8 purposes continuously throughout the whole period from 1992 to 2017. I also note that the covering letter said that during the period 1992 to 2013 the building "was fully operational as a warehousing/storage depot with ancillary offices." The declaration did not address the subject of whether the whole or any part of units A-D was vacant at any time. It did not suggest that any B8 use right continued to subsist because there had been no abandonment of that right. No evidence was provided in the declaration addressing any of the four criteria on abandonment set out in [76] above. Instead, the covering letter from the planning consultants asserted that there had been no abandonment of B8 use rights, but without any supporting evidence.

117. The approach taken in this case to the provision of verifying evidence in support of the application for a CLEUD can only be described as minimalist. Even if that application were to be approved, there was plainly a substantial risk of revocation in the event of information coming to light which engaged s.193(7).

118. Mr. Molony's second statutory declaration dated 25 June 2020 stated that:-

> (i) Units C and D were marketed for subletting from 2006 whilst units A and B were being used for storage;
>
> (ii) In response to a suggestion by local residents that Royal Mail did not use units A-D during the period 2014 to 2017, Mr. Molony said that he had not inspected the premises during that period;
>
> (iii) No evidence was given, for example information obtained from Royal Mail, about the extent to which they actually used units A-D.

119. Given the nature of the grounds of challenge, it is unnecessary in this judgment to summarise at this stage the representations sent to Islington by Ocado and Telereal in 2020. The challenge relates essentially to the approach taken in the Delegated Report dated 13 October 2020.

120. The Report correctly stated that s.193(7)(b) does not require material information to have been withheld deliberately (para.4).

121. The Report identified what Islington considered to have been material false statements and withholding of information, which may be summarised as follows:-

> (i) Telereal's application had relied on units A-D as "four interlinked units" forming a single planning unit, without mentioning a lack of interconnection between units B and C (paras. 11, 13 and 19);
>
> (ii) Telereal had not referred to a statement in the 2011 planning application that units C-D were unused at that time and, being surplus to requirements, had been marketed since 2006 as a separate unit. Telereal had not produced photographs taken in 2011 showing the empty units. This information contrasted with the false statement in the application that between 1992 and 2013 units A-D had been fully operational as a warehouse and also with the reliance placed upon photographs taken in 2006 produced by Mr. Molony. This was not a case where units had simply not been used to capacity (paras. 11, 17 and 18);
>
> (iii) The statutory declaration had been false in stating that since 1992 the whole site had been in use as a warehousing/storage depot, that the use had been continuous throughout, and that the photographs submitted were "typical of the uses" (para. 18);
>
> (iv) The statutory declaration had withheld the fact that Mr. Molony, who was professing to give first-hand evidence, had not visited the site during Royal Mail's lease[3] and so could not attest to its use during that period (para.18);
>
> (v) The application had failed to refer to Royal Mail ceasing to use the premises by, at the latest, 2015 (paras. 11 and 17);
>
> (vi) The application and the decision in 2019 had proceeded on the incorrect legal basis that the issue was whether there had been a 10-year period of continuous use in breach of condition at any time in the past, without that lawful use being subsequently abandoned or suspended. Instead, the law had been correctly stated in *Ellis* (para.22). In any event, even applying "the wrong legal tests" relied upon by Telereal, the applicant had been required to provide an accurate factual account of the use over

[3] The reference to "BT's occupation" is an obvious typographical error.

> time. The false statements and withholding of information were still material to that issue (para.23);
>
> (vii) The false assertion about the interlinked nature of units A-D, as well as the lack of use and the separate marketing of units C and D, were relevant to the identification of the correct planning unit (para.28);
>
> (viii) On the exercise of the discretion to revoke the CLEUD, the legislation assumes the provision of "correct and complete material information." Had the false statements not been made and/or material information withheld, Islington "would have been alerted to the need to carry out further investigations in particular as to the planning unit" and "could have come to a different decision" (para.8).

122. It was common ground between the parties that the officer's report should be read with "reasonable benevolence" and not with "undue rigour" (*R (Mansell) v Tonbridge and Malling Borough Council* [2019] PTSR 1452 at [42], [62] and [64]).

Summary of the grounds of challenge

123. In summary, Ocado advances the following grounds of challenge:-

> 1. Islington erred in law by deciding that s.193(7)(b) of TCPA 1990 does not require a withholding of material information to have been deliberate;
>
> 3. Islington erred in law by proceeding on the basis that an accrued right relating to a breach of planning condition legitimised by s.191(3) is lost if that right does not continue to be exercised;
>
> 2. Islington's conclusion that false statements had been made, or material information withheld, was inconsistent with its acceptance that those statements (or omissions) had been made on the legal basis set out in the application. Viewed in that way it could not be said that any such statements were false or that any material information had been withheld;
>
> 4. Islington erred in law in concluding that the false statements and withheld information they identified were material to the correct identification of the planning unit for the site to which the s.191 application related;
>
> 5. Islington erred in law in concluding that the false statements and withheld information they identified were material to whether the B8 use had been abandoned;

> 7. In exercising its discretion as to whether to make the revocation order Islington failed to take into account material considerations.

Ground 1

124. For the reasons given in [84]-[92] above, ground 1 must be rejected. Section 193(7)(b) does not require the withholding of material information to have been deliberate.

Ground 3

125. Islington reached its decision to revoke the CLEUD on the basis that where a breach of planning condition becomes lawful after 10 years by virtue of s.191(3), the right which thereby accrues is lost if it does not continue to be exercised. Ocado submits that the mere fact that such a right is not exercised for a time does not result in it ceasing to subsist. Something more than that would be required for the right to be lost, such as abandonment.

126. It is necessary to put the parties' submissions into context. Three scenarios should be considered where a breach of planning control becomes lawful, and so a right accrues by virtue of section 191(2) or (3): (1) development without planning permission (i.e. a material change of use or operational development) which does not also constitute a breach of condition; (2) a breach of condition which does *not* also constitute development without planning permission; and (3) a breach of condition which *does* also constitute development without planning permission.

127. As to these three scenarios, Islington, supported by IP2, submits that:-

> (1) In scenario (1) once the relevant immunity period in s.171B for development without permission is satisfied at any time before enforcement action is taken or a s.191 application is made, that development becomes lawful. The right which then accrues is not lost thereafter merely if it ceases to be exercised for a time. Cessation of use would not result in the right being lost unless there was sufficient evidence to show that it had also been abandoned;
>
> (2) In scenario (2) the breach of condition must continue for at least 10 years and thereafter must continue until the date when enforcement action is taken or a s.191 application is made. Once a breach of condition becomes lawful by satisfying s.191(3), the right which then accrues only exists for so long as it continues to be exercised, or, in other words, for so long as that former breach continues. It follows that such a right may be lost through mere cessation not amounting to abandonment;
>
> (3) In scenario (3), either the rules in scenario (1) or the rules in scenario (2) apply according to whether a s.191 application made by a landowner or an enforcement notice served by a local authority is directed at development without planning permission or alternatively a breach of condition. Accordingly,

> Mr. Forsdick QC had to accept that even if a landowner obtains a CLEUD expressed as a change of use, where that use also involves a breach of condition, the use right conferred by the certificate can be defeated by the subsequent service of an enforcement notice alleging a breach of that condition, merely because the use has ceased for a period even though the right certified has not been abandoned.

Ocado agrees with scenario (1) but says in relation to scenarios (2) and (3) that an accrued right based upon a breach of condition does not come to an end merely because that right is not exercised for a time.

128. It should be noted that the parties have proceeded on the basis that the s.191 application and the CLEUD granted by Islington related to a use in breach of condition.

129. It can be seen straightaway that, according to Islington's analysis, the right which accrues in scenario (2) by virtue of s.191(3) is of a very different nature to the right which accrues in scenario (1) by virtue of s.191(2). A "use it or lose it" principle is said to apply in scenario (2), but not in scenario (1). The distinction in Islington's analysis is illogical, not least because an accrued right would be stronger and more durable where it derives from a failure to obtain any planning permission at all, as compared with a situation where a planning permission was obtained but the only breach of planning control is a breach of condition. Islington's analysis of scenario (3) is even more odd. Mr. Forsdick QC was unable to provide any rationale for the illogical consequences that would result from Islington's analysis of the law. He said that that they were just the inevitable result of the distinction which Islington says the law requires to be drawn between scenarios (1) and (2).

130. It is helpful to begin by returning to *Thurrock* where Schiemann LJ explained at [25] that the rationale for the time limits in s.171B is that once they have expired the local planning authority has lost the chance to take enforcement action in respect of that breach. Section 171B expressly prohibits the taking of enforcement action. Subsection (3) does so in relation to cases involving either a material change of use or a breach of condition without distinction. Schiemann LJ also drew an analogy with a landowner who has allowed the public to walk regularly along a path over his land and after a time loses the right to object. Similarly, in private law an easement such as a right of way may be acquired by prescription. But once such a right has accrued, it is not lost by mere non-user. It must be shown that the right has been abandoned (see *Megarry & Wade: The Law of Real Property* (*9th edition*) paras. 28-009 to 28-010).

131. Mr. Forsdick QC rightly accepted that the correctness of Islington's analysis depends on whether it is justified by the nature of the right which accrues under s.191(3) or by the wording of the legislation. In fact his submission on the nature of the right depends on the way in which that right is acquired. In addition, Mr. Forsdick QC relied upon the decisions in *Nicholson* and *Ellis*. It is common ground that these are the only authorities deciding the issue under ground (3). Although they are not binding on me, I should only depart from them if satisfied that there is a powerful reason to do so or that they are clearly wrong (*Willers v Joyce* (No.2) [2018] AC 843 at [9]).

132. I turn to the nature of the right which accrues under s.191 and with the breach of planning control from which it derives. The key principle upon which the decisions in

Thurrock, *Swale* and *North Devon* are based is that time does not run for the purposes of s.171B during periods when the local planning authority would be unable to take enforcement action because the breach of planning control has ceased. It is for that reason that a breach of planning control must continue throughout the immunity period. If, for example, a breach of condition ceases the clock stops. If the condition is breached again a fresh breach of planning control occurs and the clock starts all over again (*Nicholson*). This requirement of continuity is not explicitly stated in the legislation; it is a judicial principle (see [51]-[58] above).

133. Some conditions require only intermittent, rather than continuous, compliance. But the same principle applies. During periods when the control imposed by such a condition does not apply, it would be incorrect to say that any previous breach of condition has ceased, or that there is compliance with the condition. For the purposes of gaining immunity from enforcement action, it suffices that the breach occurs throughout the part (or parts) of the year when the control applies. The local authority "continues" to be able to take enforcement action throughout the year in respect of periods when an intermittent control does bite and is breached; the clock carries on running.

134. It is plain that the application of this requirement of continuity does not differ between a breach of planning control based upon a material change of use and one based upon breach of a condition prohibiting that use. If in either case the use ceases or is interrupted during the immunity period, time ceases to run and if the use recommences a fresh breach of planning control occurs (see e.g. *Thurrock* and *Swale*). So, contrary to Islington's case, there is no difference in the way in which the continuity requirement applies to these types of planning control so as to justify the difference in the nature of the accrued right for which they contend.

135. More fundamentally, Islington's argument involves flawed logic. The continuity requirement simply determines whether time is running for the purposes of s.171B and the requisite period for immunity is achieved. It is based upon the notion that time only runs when the planning authority is able to take enforcement action. But once the relevant time limit in s.171B expires the question of whether the authority would be able to take enforcement action is completely irrelevant. The taking of enforcement action is prohibited by the legislation itself and not by any principle that such action cannot be taken when a breach has ceased. The continuity principle is defunct so far as that former breach of planning control is concerned. There is therefore no reason why this judicial principle should govern the entitlement to enjoy the right which has accrued. Once the immunity period for a breach of planning control is satisfied, it is the time bar in s.171B which prevents any enforcement action being taken thereafter, irrespective of whether what was formerly a breach of planning control continues.

136. As we have seen, *Thurrock* established that the concept of abandonment is irrelevant to whether a use right has accrued under s.191(2). But the Court also endorsed the view that abandonment, and not mere cessation of use, is relevant to determining whether an accrued right is lost ([26] and [56]). There is nothing in the principles by which breaches of planning control *become lawful* which could justify drawing a distinction between breaches of condition and development without permission when it comes to considering how such accrued rights may be *lost*.

137. Mr. Forsdick QC sought to justify Islington's stance by pointing to differences of language in the legislation in the treatment of development without permission as

compared with breaches of condition. In summary, he points to the fact that changes of use and operations are dealt with in s.191(2), whereas breaches of condition are dealt with separately in s.191(3). The former are referred to by language using the plural, whereas the language dealing with the latter is in the singular. As I understood the argument, the use of the singular for a breach of condition is said to reflect the separate breach which occurs each time there is an interruption in the activity prohibited.

138. In my judgment, this submission adds nothing to the arguments already considered above. First, changes of use and operations are dealt with separately in s.191(2) because there are two grounds upon which such development may be lawful in addition to the expiration of a time limit in s.171B, namely they do not involve development or if they do, they do not require planning permission (s.191(2)(a)). Those grounds cannot apply to breaches of condition. Second, because the same criteria apply to uses and operations the draftsman has dealt with them in one subsection rather than two, to avoid unnecessary repetition. Consequently, the plural had to be used in s.191(2). Moreover, s.191(2) is a classic example of a statutory provision where the plural must be read as including the singular. Section 191(3) only deals with one type of breach of development control and so there the singular had to be used. In any event, the singular is used in s.191(1)(a), when dealing with a use of land, just as in s.191(1)(c) when dealing with a breach of condition. There is no material difference.

139. Initially, Islington submitted that a breach of condition is not lawful unless it is shown that the breach has continued during the 10-year period expiring on the date when an enforcement notice is issued or the date when an application for a CLEUD is made, and not during any earlier 10-year period. During argument Islington modified that stance by accepting that the 10-year requirement could be satisfied during an earlier period, but the right which would have then accrued must continue to be exercised down to the date of an enforcement notice or application for a CLEUD. In my judgment neither version of Islington's submission is consistent with the statutory language.

140. Section 191(4) applies to the certification of all types of lawfulness falling within s.191, whether a use, an operation or a breach of condition. It requires the authority to be satisfied of *the lawfulness* of the matter in question at the date of the application for a CLEUD, and not that that matter *became lawful* on that date. Sections 191(2) and (3) declare that any use, operation or breach of condition is lawful *at any time* if the time for enforcement action had *then* expired. That language makes it plain that the time limit for enforcement may have expired at some point prior to the application date or the issuing of an enforcement notice. That approach aligns with the language in s.171B that "no enforcement action may be taken *after* the end of" the relevant time limit. What the legislation does not do is to define the nature of any of the rights which may accrue under s.191(2) or (3) by the expiration of a time limit in s.171B by reference to the manner in which those time limits are satisfied.

141. Lastly, I turn to the case law to which the parties have referred. *Nicholson* was concerned with a refusal of a CLEUD relating to non-compliance with an agricultural occupancy condition in a permission for a dwelling. For 15 years the property was occupied in compliance with the condition. Then it was unoccupied for 7 years before being occupied in breach of the condition for the next 7 years. For the following 4 years leading up to the date of the application for the CLEUD the house was unoccupied while extensive works were carried out. Mr. Robin Purchas QC (sitting as a Deputy High Court Judge) rejected the claimant's argument that it sufficed for her merely to

show that the breach had occurred more than 10 years before the date of the application. It is highly pertinent that because the breach of condition had ceased after 7 years, the 10-year time limit had never been satisfied. That in itself was fatal to the claim. The breach had not continued for at least 10 years (p197). The judge accepted that straightforward point at p.200 (see Sullivan J in *North Devon* at [16]).

142. The judge also held that the concept of whether a planning use is or is not abandoned was irrelevant to deciding whether a breach of condition had continued for the requisite period (p. 198). No doubt that point had arisen in relation to the 4-year refurbishment period (see p.193). The judge's observation is consistent with the subsequent decisions in *Thurrock* and *Swale* that it is irrelevant to whether a use has continued throughout the appropriate immunity period to say that it was not abandoned during that time (see [54]-[55] above). It was unnecessary for the Court to go any further in *Nicholson*.

143. However, the judge did go on to hold that the relevant breach of condition had to subsist not only during the 10-year immunity period but also at the date of the application for a CLEUD. He equated the issue under s. 191(1)(c) as to whether any matter relating to a failure to comply with a condition is lawful to the provisions in s.191(a) and (b) which are also expressed in the present tense. But s.191(1) does not define lawfulness. That is left to s.191(2) and (3) where it is crucial to note that a use, operation or breach is declared to be lawful "at any time" and not simply by reference to the date when an application for a CLEUD happens to be made. The problem is that the judgment in *Nicolson* did not consider the nature of the rights which accrue and continue once a time limit in s.171B has expired. That issue did not arise in *Nicholson* and so it was not argued before the judge, as it has been very fully in the present case.

144. This difficulty can also be seen at p.199 where the judge said that the effect of s.191(1)(a) is that "the *use* must exist at the time of the application" (emphasis added). In my judgment that statement is only accurate if the word "use" is understood as referring to a "use right", whether or not any physical use pursuant to that right is taking place at the time. In this context it is preferable to use the term "use right" rather than the shorthand "use" to avoid confusion. As Keene LJ said in *Swale* at [7], where the necessary period of user can be shown under s.171B the land in question enjoys "lawful use rights". It is those rights, in other words "lawfulness", which must presently subsist at the date of the application, not a breach of planning control. The two concepts should not be elided. On this important point the legislation does not distinguish between a use, an operation or a breach of condition.

145. The judge then suggested that s.191(2)(b) and s.191(3)(b) pre-suppose that there must continue to be something capable of amounting to a breach of planning control at the date when lawfulness is being considered if there was in fact a relevant enforcement notice then in force.

146. With respect, I am unable to agree with this analysis of the legislation. First, the approach taken in *Nicholson* to s.191(2)(b) is inconsistent with the established principle that an accrued lawful use right subsists during periods when the land is not being actively used unless it is abandoned. Second, section 191(2)(b) and s.191(3)(b) apply equally to uses, operations and breaches of conditions without drawing any material distinction between them. Third, they operate by making it clear that a lawful right does *not accrue* upon the expiration of a time limit in s.171B for taking enforcement action if the use, operation, or breach of condition in question contravenes *the requirements*

of an enforcement notice then *in force*. In other words, Parliament did not wish an *extant* enforcement notice (or breach of condition notice) to be negated by the subsequent application of a time limit in s.171B to something which contravened the requirements of that notice. The position would be different if at the time the relevant period in s.171B expired the notice had ceased to be in force, e.g. because it had been withdrawn (s.173A of TCPA 1990) or quashed. Fourth, if both limbs (a) and (b) in s.191(3) are satisfied, then the "matter constituting a failure to comply" with a condition is declared to be lawful "at any time". That matter is not lawful simply at the point when the time limit in s171B expires. Accordingly, contrary to the suggestion in *Nicholson*, these provisions do not imply that there must be a continuing breach of planning control *after* the expiry of the time limit in s.171B for taking further enforcement action.

147. For these reasons, I do not consider *Nicholson* to be an authority which assists on the issue to be decided under ground 3.

148. *Panton* decided that a lawful use right which has accrued for the purposes of s.191 may only be lost by operation of law, whether by abandonment, the formation of a new planning unit or by a material change of use, or by a discontinuance order (p.193). Unlike *Nicholson, Panton* was not concerned with the legal requirements for a breach of planning control to *become* immune from enforcement and lawful. Instead, *Panton* was concerned with whether an *accrued* lawful use right still subsisted. The decision supports the analysis in scenario (1) (see [127(1)] above). But it did not consider the nature of an accrued right arising from a breach of condition and on what basis it may continue to exist. *Panton* does not assist on the issue I have to decide under ground 3.

149. *Ellis*, like *Nicholson*, was also concerned with an agricultural occupancy condition in a planning permission for the erection of a dwelling. Unlike *Nicholson*, the condition had been breached for well over 10 years, in fact for 39 years between 1961 and 2000. An application for a CLEUD was made in March 2007. Between 2000 and 2007 the cottage was occupied for two periods amounting to nearly 5 years in total, but was otherwise unoccupied. At the time the application was made the dwelling was also unoccupied ([3]-[4]).

150. Mr. Rabinder Singh QC sitting as a Deputy High Court Judge (as he then was), accepted that immunity from enforcement had been acquired on four different bases prior to the application for a CLEUD ([27], [32], [35], and [38]). Plainly a right to occupy the dwelling without complying with the agricultural occupancy condition had accrued by 2000.

151. The judge accepted that the facts of *Nicholson* were distinguishable because in that case there had not been a breach of the relevant condition for at least 10 years ([50]). In *Ellis* the condition had been breached for substantially more than 10 years and so it was necessary to decide whether, in addition, lawfulness depended upon the breach of condition continuing down to the date of the application for a CLEUD. The judge held that the court had decided in *Nicholson* that it did ([52]) and he went on to agree with that conclusion. Accordingly, *Ellis* is undoubtedly authority for that particular proposition.

152. The judge in *Ellis* stated at [54] that *Nicholson* had been approved in *Swale* [2006] J.P.L 886 at [6]. But in my judgment it is important to note that all that Keene LJ said in that passage was that the issue of whether enforcement action can be taken against a breach

of planning control, in that case a change of use, is to be judged as at the date of the application for the CLEUD. In other words, the question of lawfulness is to be judged as at that date (see s.191(2) to (4)). The Court of Appeal did not endorse the conclusion in *Nicholson* that a breach of condition which has continued for 10 years must thereafter continue in order to remain lawful.

153. The judge acknowledged that *Panton* was authority for the proposition that a lawful use right which had accrued by virtue of s.171B(3) would not be lost merely by an interruption in that use, but could only be lost by abandonment, or the other methods referred to. But he concluded that changes of use were to be treated in a different way from a breach of condition, a distinction said to have been recognised in *Panton* (see [56]).

154. In *Ellis* the judge relied at [57] upon the acceptance in *Panton* at p.194 that *Nicholson* had correctly stated that if a period of compliance with a condition followed a period of non-compliance that breach would be at an end, and any later breach would constitute a fresh breach. It was said that a CLEUD could therefore only be granted in relation to a breach of condition which had continued down to the date of the application.

155. At [58] of *Ellis* the judge said that *Panton* and *Nicholson* were consistent with each other. I accept that conclusion as far as it goes. But in my judgment the flaw in the analysis summarised in [154] above is that what *Nicholson* was dealing with was a requirement for continuity during the 10-year period for achieving immunity from enforcement and lawfulness. Neither *Nicholson* nor *Panton* analysed the nature of the right which accrues and subsists after a breach of condition has continued for 10 years. Ultimately, *Nicholson* and *Ellis* depend upon an unstated assumption that the legal test for determining whether a breach of condition had become lawful over a period of time also governs the nature of the right which accrues and its continued existence.

156. At [60] of *Ellis* the judge stated that *Thurrock* did not assist the claimant's argument. I agree that *Thurrock* was concerned with whether the absence of abandonment could be relied upon to support the *acquisition* of immunity from enforcement, and did not address the issue in *Ellis* about the *retention* of use rights which have already accrued.

157. I also agree with the judge that the issue which had to be determined in *Ellis* did not arise in the authorities addressed in [61] to [64] of his judgment. Likewise, those authorities did not address the related point in *Nicholson* which he decided to follow.

158. At [66] of *Ellis* the judge returned to the central point in his reasoning, namely that because a breach of condition can cease and a fresh breach commence later, it follows that that type of breach must continue to subsist down to the date of the application for a CLEUD in order to be treated as lawful at that date. That was the same point as had been made in *Nicholson* and *Panton* (see [154] above).

159. I have reached the clear and certain conclusion that, with great respect, I should not follow the decisions in *Ellis* and in *Nicholson*, that a breach of condition which has become lawful after continuing for 10 years does not remain lawful unless that breach continues thereafter. I do not consider that those decisions can be reconciled with the following key points, along with the earlier analysis in this judgment:-

(i) The requirement that a breach should continue during the immunity period is not contained in the legislation (Sullivan J in *North Devon* at [30]);

(ii) That requirement is based solely on the rationale for the time limits in s.171B, namely that throughout the relevant period the local planning authority had the opportunity to take enforcement action but failed to do so. The continuity requirement is only concerned with whether the time period for satisfying an immunity period is running. Time only runs while a breach of planning control, whether a change of use or a breach of condition, is liable to enforcement action. Time does not run when a use or breach of condition has ceased;

(iii) Once an immunity period is satisfied, the legislation prohibits the taking of enforcement action *thereafter* (s.171B). It follows that from then on, any question about whether there is an ongoing breach of planning control against which a local planning authority would be able to take enforcement action would be completely irrelevant. The raison d'être for the continuity requirement disappears upon the expiration of an immunity period. There is no need to consider whether time is running for the purposes of s.171B;

(iv) Once an immunity period expires, what was formerly a breach of planning control becomes "lawful at any time", save only that that planning right does not accrue if it would contravene the requirements of an enforcement notice then in force;

(v) There is nothing in the legislation to indicate that the requirement for continuity to satisfy an immunity period also characterises the nature of the legal right which accrues upon the expiration of a time limit in s.171B, or conditions the basis upon which that right may continue to exist thereafter, or that a right which accrues under s.191(2) or (3) ceases to exist when it ceases to be exercised;

(vi) The legislation does not treat a use, operation or breach of condition differently in these respects.

160. For completeness, I should mention the decision of the Court of Appeal in *Bilboe v Secretary of State for the Environment* (1980) P&CR 495, which was decided under the enforcement regime in the Town and Country Planning Act 1971. The Court of Appeal held (pp 512-4) that tipping of waste involves a material change of use and not operational development and so the then 4-year time limit in s.87(3)(b) for enforcement action against a breach of condition relating to operational development authorised by a planning permission (which ceased to apply as from PCA 1991) should not have been applied. Instead, the issue was whether the breach of planning control had begun before 1964. The Court held that it had. However, they did not address the continuity principle, although that was an explicit requirement in s.94 of TCPA 1971 dealing with the

conditions for the grant of an established use certificate for pre-1964 uses. Moreover, the focus of the Court's reasoning was on the issue of whether there had been a change of use, and if so when, rather than on the legal nature of any rights arising from a breach of condition. TCPA 1971 did not confer lawful planning rights on matters immune from enforcement, unlike the present TCPA 1990. Not surprisingly, the Court in *Bilboe* did not address the principles applying to the current statutory regime, as later set out in *Thurrock* and *Swale.* Accordingly, *Bilboe* does not provide any assistance on the nature of a lawful right which accrues under the present legislation when the time limit for taking enforcement action against a breach of condition has expired.

161. For all these reasons, I conclude that Islington's submissions under scenario (2) are incorrect. It follows that its analysis in scenario (3) collapses.

162. The correct legal position is that a lawful planning right which has accrued upon the expiry of a time limit in s.171B is not lost merely because subsequently that right is not exercised for a period of time. That conclusion applies just as much to a right legitimising a breach of condition which prohibited a use as to a use right derived from a material change of use. The law does not require that such a right be exercised on the date when an application for a CLEUD is made (or an enforcement notice is issued), or that it has been exercised throughout the intervening period from the time when it accrued. Instead, the law requires that the right remains in existence at the date when the lawfulness of what it authorises is in issue. So an accrued planning right must not have been lost in the meantime because of a supervening event, such as abandonment. The legal arguments in this case did not address in detail what other events might suffice to terminate a planning right arising from a breach of condition. It may well be that events of the kind recognised as terminating a use right would also suffice here, but any further discussion of that point should await a case in which it arises for decision by the court and is therefore addressed more fully in argument.

163. Before leaving ground 3, I think it would be helpful to clarify some further points. This case has had to focus on the breach of a negative condition restricting the use of land. But the range of conditions which may be imposed on a planning permission is very wide and varied and the nature of the breaches to which they can give rise may also vary considerably. For example, a condition may be mandatory in nature by requiring something positively to be done, e.g. a requirement to provide landscaping, noise attenuation or some other form of mitigation, parking spaces, or just obscure glazing to prevent overlooking through a window. Where such a condition is breached during the 10-year immunity period the accrued right will entitle the landowner not to comply with the condition thereafter. The continued existence of that right will not depend upon the landowner having to take any positive action to assert his right, let alone to continue taking that action. In my judgment there is no legal reason why the continued existence of a right which arises from breach of a negative condition should be any different in this respect.

164. The breach of a condition may be of a continuing nature, or it may be once and for all. For example, a condition may require an approval to be obtained before a specified activity may take place (as in *Bilboe*). The failure to obtain such an approval may well be treated as a once and for all breach of that particular control. But some conditions contain a negative and ongoing prohibition of an activity or on carrying on an activity outside a specified parameter (e.g. number of caravan pitches, or limits on emissions of noise or light or pollutants). Differences in the nature of the control imposed by a

condition may affect the way in which an immunity period in s.171B falls to be applied, for example, the date from which times runs. As we have seen, the extent of any lawful planning right which accrues will be determined by the nature and extent of the breach which has continued during the relevant immunity period. But I do not presently see why, once that accrued legal right has been defined, its continued existence is affected by whether the past breach was of a once and for all or a continuing nature. It does not seem to me that the position is any different from the situation where a breach of planning control relates to development without planning permission. Such a breach may be once and for all (e.g. the erection of a building) or continuing (e.g. a material change of use). There is no suggestion that the legal basis for the continued existence of an accrued right relating to development without planning permission is different according to whether the former breach of planning control was once and for all or a continuing breach.

165. Although Ocado has succeeded under ground 3, the question remains whether, and if so to what extent, that error vitiates Islington's findings that materially false statements were made and material information withheld on the application for the CLEUD? That issue will be considered under grounds 4 and 5 below.

Ground 2

166. The arguments on both sides under this ground became somewhat convoluted. But it is not necessary for the court to disentangle all of them in view of the conclusion I have reached under ground 3 above.

167. In summary, Ocado says that the application for a CLEUD was made on the basis that a lawful right to use units A-D for B8 purposes in breach of condition had accrued by 2002 and thereafter had not been abandoned. The approach taken in *Panton* to a use right was said to be applicable. Here Ocado submits that, irrespective of the outcome of ground 3, Islington acted illogically or irrationally in that the statements and withheld information upon which they relied could not properly be described as false and/or material according to the legal approach on which the CLEUD application had been founded. Those matters could *only* have been treated as false and/or material according to the *Nicholson/Ellis* approach which did not form the basis for the application. The matters relied upon by the authority relate to the period postdating the accrual of the lawful B8 use right in 2002 and therefore could only have engaged s.193(7) if it had been necessary for Telereal to show that the breach of condition had continued after 2002 down to the date of the application for the CLEUD. Because the officer who decided to grant the CLEUD had proceeded on the same understanding of the law as Telereal, Islington's true complaint was not that false statements had been made and/or material information withheld, but that the officer's legal approach had been incorrect. Islington was not entitled to rely upon s.193(7) to address that complaint instead of applying for judicial review to quash the CLEUD (para.39 of Ocado's skeleton).

168. It will be seen, and Mr. Brown QC accepted, that Ocado's argument under ground 2 could only arise if (a) the legal approach taken in the decision to grant the certificate had been wrong and (b) the matters said by Islington to engage the power of revocation in s.193(7) were irrelevant to that approach.

169. But the effect of my decision under ground 3 is that the legal approach advanced by Telereal in its s.191 application, and accepted by the officer in his decision to grant the CLEUD, was essentially correct. On that basis ground 2 adds nothing.

170. The issue left over from ground 3 is whether the legal error relating to Islington's reliance upon *Nicholson* and *Ellis* vitiated its conclusions that materially false statements were made and material information withheld on the application for the CLEUD. A related issue is whether, in any event, Islington relied upon those conclusions in relation to the correct legal basis for considering how an accrued planning right may be lost. These issues should be considered under ground 4 and 5 where Ocado argues that Islington's legal error under ground 3 tainted its treatment of the planning unit (ground 4) and the continued subsistence of the accrued right (ground 5).

171. For these reasons, I do not consider that there is any legal basis for quashing the revocation of the CLEUD under ground 2.

172. However, before leaving this subject I should add that I do not accept the broad proposition put forward by Ocado, namely that the falsity and/or materiality of statements made or information withheld may only be judged in the context of the legal approach upon which an application for a CLEUD is based. For example, a decision-maker may accept the information put forward by the applicant but grant a certificate adopting a rather different legal approach to that relied upon in the application. Subsequently, the local authority may decide to revoke the certificate relying on false statements or information withheld which are material to the legal approach upon which the decision was based, even if they are immaterial to the legal approach in the application.

Ground 4

173. In paragraph 28 of the Delegated Report on revocation Islington stated that the identification of the correct planning unit was a key factor in determining the existence of a lawful use right and the area to which it applied. This is not in dispute. Islington's statement is correct in relation to the legal approach adopted in Telereal's application for, and the officer's decision to grant, the CLEUD.

174. In the covering letter accompanying the application for the CLEUD, the planning consultants stated that units A-D had been occupied as a whole and as a single planning unit. They added that the lawful B8 use right which had been acquired through "continuous and uninterrupted occupation of the building" for that purpose over 10 years had "not been lost by abandonment, replacement by a different use, or extinguishment following the formation of a new planning unit." Thus, the applicant rightly accepted that any B8 use right which had accrued by 2002 could have been lost if thereafter a new planning unit had been formed.

175. The planning unit is a long-established tool for defining an area of land (or building) in order to determine the use to which that area is put and whether a material change of use has occurred requiring planning permission.

176. In *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207 Bridge J (as he then was) identified some broad criteria, without purporting to propound exhaustive

tests covering every situation (pp. 1212D-1213A) which may be summarised as follows:-

> (i) A useful working rule is to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be identified;
>
> (ii) Where the whole unit of occupation is used by the occupier for a single main purpose to which secondary activities are incidental or ancillary, that should be treated as the planning unit;
>
> (iii) When a single unit of occupation is used for a mixture of activities and it is not possible to say that one is incidental or ancillary to another (a mixed or composite use), that whole area is a single planning unit. In such a case the component activities may fluctuate in their intensity from time to time, but the different activities are not confined to separate and physically distinct areas of land;
>
> (iv) Where within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes, each area used for a different main purpose (together with its incidental and ancillary activities) is a separate planning unit;
>
> (v) The application of these criteria, like the question of material change of use, is a matter of fact and degree;
>
> (vi) Activities which were once incidental to another use or formed part of a composite use, may be so intensified in scale and physically concentrated in a recognisably separate area that they produce a new planning unit, the use of which is materially changed.

177. In *Johnston v Secretary of State for the Environment* (1975) P&CR 424 the Divisional Court re-emphasised that the identification of a planning unit is a question of fact and degree and only open to challenge on *Wednesbury* principles. *Prima facie* the planning unit is the area occupied as a single holding by a single occupier (p.427). Occupation is significant because it signifies control of an area of land by the occupier (p.428). In that case three lock-up garages capable of separate occupation were in fact in single occupation. There was no error of law in treating those three garages as a single planning unit to determine whether a material change of use had taken place (p.428). In *Church Commissioners for England v Secretary of State for the Environment* (1996) 71 P&CR 73 the Court confirmed that "control" had been a relevant factor for determining that a retail unit within a shopping mall was the appropriate planning unit rather than the single building comprising the shopping centre.

178. Although the covering letter from the planning consultants asserted that units A-D had constituted a single planning unit throughout, there having been no formation of a new planning unit, they did not produce any evidence themselves to support that contention. The annexed planning history did not deal with the issue. In other respects, the covering

letter relied upon the statutory declaration of Mr. Molony and the lease to Royal Mail. But the statutory declaration did not address the *Burdle* criteria or whether the planning unit changed at any point. At most it indicated that BT, then Royal Mail, held a single property interest in the 4 units.

179. There was much discussion during the hearing as to whether it had been false for Mr. Molony to state that the four units A-D were interlinked, given that there was no physical interconnection through the wall separating units B and C. Instead, access between the two could only be obtained by going outside one of these units into a shared loading area under a canopy (see the agreed statement between the parties). Likewise, because of this lack of internal connection between units B and C the same also applied to communication between units A and D. The only internal connections were between units A and B and between C and D. In view of decisions such as *Johnston* Mr. Forsdick QC did not claim that this could be sufficient to show, for example, that there were two planning units comprising (1) units A and B and (2) units C and D, rather than a single overall unit. But he said that this point fell to be considered with the misstatements and withholding of information which had not revealed that (i) units C and D had not been occupied by BT since 2006, (ii) they had been marketed for separate subletting since that year and (iii) Mr. Molony could not speak to the use made by Royal Mail of the site and hence there was no evidence about that subject.

180. It is apparent from paragraph 28 of the Delegated Report that Islington's concern about the planning unit related not just to the interconnection point, but was also based upon these other issues, as summarised at [121] (ii) to (v) and (vii) above. Mr. Forsdick QC pointed out that while these matters could be consistent with Ocado's case that there continued to be a single planning unit with usage reduced to, say, units A and B, they were also consistent with the possibility of the overall planning unit having being subdivided into two units. An important part of Islington's reasoning was that if the authority had been aware of the false statements and/or information withheld "it would have been alerted to the need to carry out further investigation in particular as to the planning unit" (para.8 of Delegated Report). Accordingly, Islington had not reached a concluded view on that issue and had not been required to do so (para.28).

181. Applying the principles set out in [93] to [102] above, Islington was legally entitled to rely upon those considerations to support its decision to revoke the CLEUD unless that line of inquiry could not rationally have led to any different conclusion being reached on the planning unit issue or was otherwise irrational. One of the problems faced by Ocado here is the exiguous amount of information and lack of detail in the material supplied to verify the application. By contrast, where an application is robustly supported by evidence, the authority may judge that its decision to grant a CLEUD was not materially affected by false statements or withheld formation at the application stage, and would not have been affected even if further inquiries had been made. But given the minimalist approach taken to the s.191 application in this case, I find it impossible to say that Islington's conclusion that inquiries needed to be made which could have resulted in a different decision on the planning unit and on the grant of the CLEUD could possibly be impugned as irrational. Likewise, there is nothing irrational or illogical about Islington deciding to revoke the certificate without having yet been able to form a concluded view on the planning unit issue.

182. There is no merit in the criticism that the Delegated Report failed to apply the *Burdle* criteria. Those criteria would have been applied after a more detailed inquiry into the

facts relating to the planning unit issue, involving the provision of more detailed information by the landowner. The *Burdle* criteria provide no basis for concluding that Islington's reasoning was irrational.

183. Ocado's argument focused on the issue regarding interlinking of the 4 units (skeleton para.54). But that criticism goes nowhere, because Islington relied upon the interlinking in combination with the other points referred to above, and not in isolation.

184. I wholly reject the contention that the officer who took the decision to grant the CLEUD ought to have discovered for himself the marketing exercise carried out on units C-D over a 5-year period by examining the "2011 tennis court application" (paragraph 54d of Ocado's skeleton). Islington had no obligation to go through each of the applications mentioned in the planning history or in the covering letter to see whether, on the off-chance, they might have contained any relevant information not disclosed by the applicant. That does not accord with the statutory framework as analysed above and the expectation that an applicant will be candid in the provision of information relevant to his application.

185. For all these reasons, ground 4 must be rejected.

Ground 5

186. I have held under ground 3 that once a lawful use right accrues its continued existence does not depend upon that right continuing to be exercised. Instead, the true question is whether that use right was thereafter abandoned or whether it was lost because of some other supervening event.

187. In the present case, Islington decided to revoke the certificate partly because they considered that the false statements and/or information withheld went to the issue of whether the B8 use had "continued" after 2002. If the authority's reasoning had stopped there, it would have been tainted by the legal error identified under ground 3. But it is clear that success under ground 5 cannot justify the quashing of Islington's decision to revoke the certificate, because the authority's approach to the planning unit issue cannot be impugned (see ground 4 above) and that was a freestanding and sufficient basis to found the decision. Islington's decision would inevitably have been the same. Telereal's covering letter accompanying the application rightly accepted, in line with *Panton*, that the creation of a new planning unit was one of three alternative routes (including abandonment) by which any lawful B8 use right could have been lost. Ocado did not argue otherwise in this case.

188. In any event, the Delegated Report plainly stated that Islington considered that the false statements and withheld information it identified went to Telereal's additional assertion that the B8 lawful use rights had not been abandoned as well as to Islington's contention that the use had not continued (para.23). Accordingly, the real issue now under ground 5 is whether Islington erred in law in reaching that conclusion on the subject of abandonment. As Mr. Forsdick QC rightly pointed out, the need for Islington to carry out further investigations applied to both the abandonment and the planning unit issues (para.8 of the Report). Plainly, the two topics were related.

189. Here also, it is relevant to have in mind the absence of any evidence to support the assertion by Telereal's planning consultants that the B8 use which had accrued by 2002

had not been abandoned, albeit that Telereal knew that half of the floorspace (units C and D) had been vacant from 2006 and marketed at least until 2011 as a separate letting. Mr. Molony's statutory declaration did not address those matters nor did he address the four criteria for assessing whether a planning right had been abandoned (see [76] above). Telereal's application for the CLEUD did not provide any other information to support its contention that there had been no abandonment of a B8 use right. This is not a case where the landowner can say that there was other significant information before the authority when it granted the CLEUD which has not subsequently been criticised in the decision to revoke.

190. Accordingly, there is no merit in the faint criticism made by Mr Brown QC during oral argument that the reasoning given by Islington on this aspect was insufficient. Read in context, it is not arguable that the authority's legal reasoning was inadequate as a matter of law. Indeed, Ocado accepted that the point had not previously been raised. Ocado's criticism is not improved by referring to Islington's letter dated 7 August 2020. There the authority did say that abandonment was not in issue. But that was solely for the express reason given that, applying *Thurrock*, abandonment could not be relevant to whether a lawful use right had been created during the relevant 10-year period which, applying *Ellis*, had to run up to the date of the s.191 application. There was no justification for Telereal's planning consultants to misread that letter as stating that Islington had accepted that there had been no abandonment *as a matter of fact*, as they purported to do in their response dated 20 August 2020. There was no legal obligation on Islington to correct that blatant error. Ultimately, as we have seen, the Delegated Report considered the materiality issue on the alternative legal basis that its reliance upon *Ellis* might be incorrect.

191. Ocado's first real criticism under ground 5 is that if units A-D formed a single planning unit then the mere fact that units C and D were vacant for a period of time would be irrelevant to satisfying the implicit requirement in s.171B(3) that the use be "continuous" (para.55 of skeleton). There are two separate answers to this. First, the argument assumes that units A-D remained a single planning unit, which begs the question already addressed under ground 4. Second, we are now dealing with abandonment and not the continuity principle. Here, what is relevant is not merely whether an activity was interrupted or not, but the substantial period of time for which the property was not in active use together with the other factors listed in [76] above. The test is an objective one as to what would be the view of a reasonable person with knowledge of all the relevant circumstances. Accordingly, there is nothing in Ocado's first criticism. This is not a case where, on the information available, the issue of abandonment could not rationally have arisen.

192. Ocado's second criticism is that the vacant status of units C and D for 6 or more years could not have involved the withholding of material information because the covering letter sent with the application for the CLEUD stated that units A-D were not being used to capacity and referred to "the underused nature of the surrounding B8 units". I reject this submission. "Not being used to capacity" is consistent with all four of units A-D being used. It does not indicate that BT had moved altogether out of units C and D and had concentrated its storage use entirely within units A and B, and moreover, had done so since 2006, and not merely in 2010 or 2011 when the tennis court applications were made. The statement that "surrounding units" "were underused" was no more explicit. Moreover, the context for this remark was "the B8 warehousing on

the wider estate", which did not indicate which of BT's B8 units was being referred to. In any event, these statements must be read alongside both Mr. Molony's statutory declaration that the whole of units A-D was in use as a B8 storage depot and the statement in the covering letter that "the building was fully operational as a warehousing/storage depot" during the period 1992 to 2013, that is to say from 2006 to 2011 and beyond.

193. The assessment of falsity, withholding and materiality are, subject to any issue about relevance, matters of fact and degree, and therefore judgment, for the decision-maker, subject to challenge on the ground of irrationality. I have already dealt with the argument raised on relevance. I see no basis for contending that Islington's judgment was irrational. Rather, it seems to me to have been entirely reasonable, *a fortiori* given that the matters identified plainly required further investigation.

194. I regard as wholly untenable the suggestion in paragraph 57 of Ocado's skeleton that an applicant cannot be treated as withholding information in an application for a CLEUD if that information is already in the possession of the local planning authority. An applicant withholds material information if he has it and does not provide it to the authority. That remains the case even if the authority has that information in its records. Ocado's contention is completely at odds with the statutory scheme, which puts the onus on the applicant to justify the grant of a CLEUD with adequate verifying information. The legislation places a clear risk upon an applicant and his successors in title that a CLEUD may be revoked in the future if the conditions in s.193(7) are met. It is a deeply unattractive submission that what would otherwise amount to a material withholding of information justifying the revocation of a CLEUD, should be treated differently simply because the local planning authority did not search through its register of planning applications looking for anything which might undermine the application. Ocado's submission transforms the statutory expectation that an applicant will make an adequate and candid disclosure of relevant information into an implicit obligation on the local authority to search through its own records and files before granting a CLEUD.

195. Likewise, I reject the submission that material was not withheld because Telereal adequately "signposted" or summarised the content of the "tennis court application." I have already referred to the "*actualité*" that units C and D were empty and unused for at least 5 years from 2006 as opposed to the "economical", indeed misleading, statements that units A-D were fully operational between 1992 and 2013 but were simply not being used to capacity at the time of the application in 2011. Again, it is very unattractive to suggest that a landowner can avoid action being taken under s.193(7) to address a withholding of material information on the actual use of premises, which it plainly would have been aware of and which could have undermined its application, by making a cursory observation which would not be expected to raise any significant doubts in the mind of the reader about the merits of the application. The submission advanced by Ocado would simply encourage bad practice of this kind and undermine the transparency and soundness of, and even public confidence in, the certification regime. An unjustifiable burden would be placed on local authorities to check the material relied upon by an applicant to support a s.191 application against their records for information which is available to the applicant and should plainly be disclosed.

196. Finally, Ocado complains that the failure to mention in the application that Royal Mail had ceased to use the premises in 2015 could not have involved the making of any false statement or withholding of material information at the application stage. This is because the statutory declaration and the other material submitted to Islington said nothing about the nature or extent of Royal Mail's active use of the site, nor could Telereal have been expected to have had knowledge of such matters.

197. There is no merit at all in this complaint. Mr Molony's statutory declaration stated that as an employee of Telereal he had "responsibility" for units A-D down to the date of the application for a CLEUD (para.6). He stated that he was able to make the declaration from his own knowledge and that the information was complete and accurate (para.1). His declaration was expressly made for the purpose of "confirming the existing use" of the site and "in support of the application for a certificate of existing lawful use in respect of the site" (para.3). He confirmed that since at least 1992 the whole site was in use as a B8 warehousing/storage depot and "as far as I am aware, this has been continuous throughout." On the basis of those statements Islington had been entitled to proceed on the basis that Mr. Molony knew what he was talking about. It was only in his second statutory declaration produced in response to the indication by Islington that revocation was being considered, that he revealed that he had not inspected the premises during Royal Mail's lease. On any view that was plainly a material withholding of information, which would justifiably lead Islington to question the sources and extent of the knowledge which Mr. Molony claimed to have for the period before and after 2014. Furthermore, beyond the revelation that Mr. Molony had not visited units A-D during Royal Mail's lease of the premises, Telereal's representations to Islington in 2020 did not state that neither he nor Telereal had no knowledge at all of the extent to which physical activity took place during that period, nor that they could not have been expected to have had such knowledge.

198. For all these reasons, there was nothing irrational or otherwise unlawful in Islington's identification of false statements or information withheld as being material to the abandonment issue. Accordingly, ground 5 must be rejected.

Ground 7

199. I have reached the conclusion that the challenge to Islington's decision that the conditions for exercising the power to revoke under s.193(7) must fail. Ground 7 only arises in that event. At this stage Ocado challenges Islington's exercise of its discretion as to whether to revoke the CLEUD. It does so on the basis that the authority failed to take into account certain relevant considerations. The principles in [105] to [107] above are relevant. In particular, Mr. Brown QC accepted that Ocado has to show irrationality.

200. First, Ocado submits that Islington failed to consider whether the false statements and information withheld would, as opposed to could, have led to a different outcome. This complaint is untenable. Islington stated in its decision *inter alia* that further investigation would have been necessary. That is sufficient to dispose of the suggestion that the absence of any conclusion about what the outcome would have been was irrational. Indeed, had Islington attempted to conclude that the CLEUD would still have been granted, that decision would have been liable to be quashed on an application by IP2.

201. Second, Ocado contends that Islington failed to consider the importance of (a) public confidence in the issuing of certificates of lawfulness and (b) the fact that Ocado had relied upon the CLEUD in this case before entering into an agreement for a lease of the premises. It is also submitted that it was Telereal, not Ocado, that made the application and Ocado "may…… not be in possession of the 'full and correct information'" needed for a fresh application under s.191.

202. Public confidence in CLEUDs must extend to the reliability of the information put forward by an applicant to support the grant of a certificate. That was a matter which Islington plainly had in mind in paragraph 8 of the Delegated Report. Telereal obtained a certificate to which it was not entitled on the basis of the information it provided and withheld.

203. Very little was said about harm to either Telereal or Ocado in the representations made to Islington in the event of revocation (see [9] and [18] above). Plainly, the progressing of the s.191 application would have been a key aspect of the negotiations for an agreement for a lease and Ocado would have had the opportunity to ask to see and consider the application in draft. Certainly, there is no evidence that they did not have any involvement at all. Substantial expenditure has been incurred in refurbishing units A-D, but the nature of the works was not explained to Islington in any detail, nor when and how the costs were borne, in particular as between Telereal and Ocado. Nothing was said about any remedies which Ocado might have against Telereal. The letter from Ocado's solicitors dated 25 June 2020 simply said that Ocado would be prejudiced by the revocation of the certificate "by at the very least the uncertainty of applying for a fresh certificate or making a planning application." It was not suggested that there would be any particular difficulty in obtaining appropriate information to support a fresh application. The solicitor's letter dated 20 August 2020 added that Ocado had "been put to considerable cost and inconvenience as a result of the Council's mishandling of the issue" without any further details.

204. In these circumstances, I do not accept that it was improper for Islington not to have given explicit consideration to Ocado's position in the Delegated Report. There is nothing to suggest positively that Islington disregarded the submissions relating to Ocado's position. In any event, even if Islington did fail to consider the non-specific representations made on Ocado's position, that could not be described as irrational. It would be difficult to give any significant weight to submissions of the kind which were put forward.

205. Next, Ocado complains that Islington had failed to consider the extent to which the *incorrect* legal approach adopted by the officer who had granted the CLEUD "contributed to any mistakes in the grant of the certificate." There is nothing in this point. It falls away because, as I have decided under ground 3, that approach was not incorrect. Moreover, as I have already explained, Islington decided that the false statements and information withheld were material in relation to that correct legal approach taken by both Telereal and the officer.

206. Lastly, Ocado complains that Islington paid no regard to the planning merits of a B8 use on the site, as opposed to a light industrial or a general industrial use. This contention had not been developed in any detail in the representations to Islington before revocation. In these circumstances, this was not a case in which it was irrational for the authority not to make an assessment of the planning merits.

Conclusion

207. For all these reasons, Ocado's claim for judicial review of Islington's revocation of the CLEUD dated 26 April 2019 in respect of units A-D on the Bush Industrial Estate must be dismissed.