Neutral Citation Number: [2022] EWHC 2621 (Admin)

Case No: CO/408/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 October 2022

Before :

MRS JUSTICE LANG DBE

- -

Between :

LONDON BOROUGH OF HACKNEY	**Appellant**
- and -	
JCDECAUX (UK) LIMITED	**Respondent**

- -
- -

Charles Streeten (instructed by **Legal and Governance Services**) for the **Appellant**
Charles Merrett (instructed by **RLS Law**) for the **Respondent**

Hearing date: 6 October 2022

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Approved Judgment

This judgment was handed down remotely at 11 am on 19 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mrs Justice Lang :

1. This is a civil appeal by way of case stated against the decision of Deputy District Judge Warner ("the Judge"), in the Stratford Magistrates Court, dated 7 September 2021, in which she allowed the Respondent's appeal under section 225B of the Town and Country Planning Act 1990 ("TCPA 1990") against a removal notice issued by the Appellant ("the Council"), requiring removal of an advertising panel on land at 133 Homerton High Street, London E9 6AS ("the Site").

2. The display of advertisements requires consent under the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 ("the 2007 Regulations"). The Judge upheld the Respondent's contention that the advertisement benefited from deemed consent under Class 13 Part 1 of Schedule 3 to the 2007 Regulations as it came within the description in Class 13, namely:

> "An advertisement displayed on a site that has been used continually for the preceding ten years for the display of advertisements without express consent."

3. It was common ground that, in the circumstances of this case, the "preceding ten years" were the ten years preceding the date of issue of the removal notice on 14 February 2020, i.e. the period between 14 February 2010 and 14 February 2020. In the Case Stated, the Judge recorded the dates as 17 February 2010 to 17 February 2020, but the parties agreed that this was a slip on her part.

4. The Council contends that there were two periods of time during the preceding ten years when the Site was not in use for the display of advertisements, and so the requirement of continual use was not met.

5. The first period was between 14 February 2010 (when the Site was vacant, as evidenced by a photograph taken in October 2009), and either June 2010 (when the Respondent first installed the display panel), or July 2010 (when the panel was first activated and advertisements displayed), pursuant to a contract it made with the owner of the Site on 14 April 2010.

6. The second period was between 17 February 2019 and 26 May 2019, when the Respondent removed the mechanical display panel and replaced it with a digital display panel. The works were expected to take about 4 weeks, but the host wall unexpectedly required significant repairs, the supporting brackets had to be designed and fabricated, and there were traffic management restrictions on working hours at the Site.

7. The Judge found that neither of these two periods amounted to a cessation of use for the display of advertisements and so the requirements of Class 13 were met. Therefore, the Respondent had deemed consent for the display of advertisements at the Site, and the removal notice should not have been issued.

8. The Judge also rejected the Council's contention that the digital display did not fall within Class 13 because it amounted to a material alteration from the previous mechanical display. The Council has not appealed this part of the Judge's decision, accepting that it was an evaluative judgment, rather than an error of law, on the part of the Judge.

Legal framework

(1) Statutory scheme

9. The term "advertisement'" is defined in section 336(1) TCPA 1990 as:

> "any word, letter, model, sign, placard, board, notice, awning, blind, device or representation, whether illuminated or not, in the nature of, and employed wholly or partly for the purposes of, advertisement, announcement or direction, and (without prejudice to the previous provisions of this definition) includes any hoarding or similar structure used or designed, or adapted for use and anything else principally used, or designed or adapted principally for use, for the display of advertisements."

10. The statutory scheme for control of advertisements is set out in Part VIII of the TCPA 1990 and the 2007 Regulations. Responsibility for control and enforcement is vested in local planning authorities.

11. There are 3 categories of advertisement consent:

    i) Those permitted without requiring either deemed or express consent from the local planning authority;

    ii) Those which have deemed consent;

    iii) Those which require the express consent of the local planning authority.

12. By section 225A(1) TCPA 1990, a local authority may remove, and then dispose of, any display structure "which, in the local planning authority's opinion, is used for the display of advertisements in contravention of regulations under section 220". Before taking any action, the local planning authority must serve a removal notice on the person responsible for the erection and maintenance of the structure, provided they can be identified. If not, the local planning authority must fix the removal notice to the structure or display it in the vicinity, and serve a copy on the occupier of the land, if one is known, or if one can be identified.

13. If the removal notice is not complied with, the authority may remove the structure, and recover expenses reasonably incurred in doing so, from anyone served with the removal notice.

14. Section 225B TCPA 1990 provides a right to appeal to the Magistrates' Court against a removal notice, which the Respondent exercised in this case.

15. In addition to these powers of removal, anyone who displays an advertisement in contravention of the 2007 Regulations commits an offence. The local planning authority may bring a prosecution in the Magistrates' Court for an offence: see section 224 TCPA 1990.

16. Section 220 TCPA 1990 empowers the Secretary of State to make regulations providing for restricting or regulating the display of advertisements. In England, those are the 2007 Regulations.

17. Regulation 4 of the 2007 Regulations states that no advertisement may be displayed unless consent for its display has been granted by the local planning authority or Secretary of State, or by operation of regulation 6 (referred to as "deemed consent").

18. Regulation 6 of the 2007 Regulations grants consent for the display of an advertisement of any class specified in Part 1 of Schedule 3 to the 2007 Regulations.

19. Class 13 of Part 1 of Schedule 3 to the 2007 Regulations provides:

Class 13	**Advertisements on sites used for preceding ten years for display of advertisements without express consent**
Description	**13.** An advertisement displayed on a site that has been used continually for the preceding ten years for the display of advertisements without express consent.
Conditions and Limitations	**13.** —(1) An advertisement does not fall within this description if, during the relevant 10-year period, there has been either a material increase in the extent to which the site has been used for the display of advertisements or a material alteration in the manner in which it has been so used. (2) If any building or structure on which such an advertisement is displayed – (a) is removed in compliance with a requirement of, or under, any enactment, (b) is removed in any other circumstances, or (c) is destroyed by any means the erection of any building or structure to continue the display is not permitted. (3) Illumination is not permitted unless— (a) the advertisement is displayed with illumination on 6th April 2007; or (b) the advertisement is first displayed after that date, and the advertisement most recently displayed was illuminated. (4) An advertisement that— (a) comprises sequential displays; or

	(b) otherwise includes moving parts or features; or (c) features intermittent lighting in a manner designed to give the appearance of movement, is not permitted unless— (i) it is displayed on 6th April 2007 and falls within the description specified in any of sub-paragraphs (a) to (c); or (ii) it is first displayed after that date, and the advertisement most recently displayed fell within any such description.

(2) Authorities

20. The predecessor to Class 13 under the 2007 Regulations was Class 13 under the Town and Country Planning (Control of Advertisements) Regulations 1992 ("the 1992 Regulations"). It granted deemed consent for the display of an advertisement on a site which was used for the display of advertisements without express consent on 1 April 1974, and which had been so used continually since that date. Thus, it protected existing rights which had been accrued as at a specific date (1974), in contrast to Class 13 in the 2007 Regulations which permit rights to be acquired at any time through a ten year period of continual use.

21. The earlier provision in the 1992 Regulations was considered by the Divisional Court in *Westminster City Council v Moran* (1997) 77 P & CR 294, in which the respondent licensee regularly placed advertisement boards on a yellow line outside his public house to deter unauthorised parking by vehicles. The Magistrate found that there was deemed consent for the advertisement boards because the respondent had been putting them out regularly over a period since 1974 without objection.

22. On appeal, Westminster City Council submitted that the term "continual" required that the use had to be uninterrupted or unbroken. So the licensee's regular use of the advertising boards when he was expecting a delivery was not sufficient to amount to a continual use.

23. The Divisional Court dismissed the appeal. Simon Brown LJ said at 298-299:

> "I see no good reason for supposing that Parliament was ignorant of the difference in meaning between "continuous" and "continual" or intended to overlook them. On the contrary, it seems to me plain that the word "continually" was precisely chosen and that Class 13 was intended to encompass advertising which was "regularly occurring" (another meaning given to 'continual' by the Shorter Oxford Dictionary) irrespective of whether it was uninterrupted, provided only and always that it had existed since April 1, 1974.

> Assume a site which has been regularly used to display advertisements over the 24 year period in question, but that from time to time within that period, for whatever reason, there has been an occasional period, perhaps of some months, when the site has not been used for that purpose. It would to my mind be surprising if a deemed consent were denied to such a site because of such interruption in the use."

24. In *Winfield v Secretary of State for Communities and Local Government* [2012] EWHC 469 (Admin); [2012] EWCA Civ 1415, the appellant applied for statutory review of a decision of a planning inspector to dismiss his appeal against a refusal by the local planning authority of his application for a Certificate of Lawful Use of Development for the use of the land for the display of advertisements.

25. The appellant displayed advertising banners at the site; removed them when requested to do so by the local planning authority; but then erected a replacement within a few days or weeks. The Inspector held that the removal of the advertisements in these circumstances represented a material break in the use of the land. When a replacement banner was erected, the ten year clock would start afresh.

26. The Inspector decided the appeal by reference to the time limits for enforcement action in planning cases under section 171B TCPA 1990, but it was held that the application had to satisfy the conditions for deemed consent under Class 13 in the 2007 Regulations.

27. The Court of Appeal and the High Court upheld the decision of the Inspector. Maurice Kay LJ set out the relevant passages from the judgment in *Moran* at [8] and said:

> "8. ……Does this reasoning avail the applicant in the present case?
>
> 9. Supperstone J thought not. He said [2012] EWHC 469 (Admin) at [14]:
>
> > "In contrast with the type of situation under consideration in Moran, (occasional non-use by the landowner), where the local planning authority requires an advertising activity to cease with a threat of enforcement action, and the landowner complies contrary to his will, the use is not merely interrupted, it ceases. Subsequent resumption of the same activity constitutes . . . a new chapter in the planning history."
>
> He later added, at para 15:
>
> > "There would be a lacuna in the statutory system of planning control if compliance with threatened enforcement action, with resumption constituting a fresh breach of planning control, was sufficient to break the ten-year immunity period for the purposes of section 171B of the 1990Act, but not necessarily sufficient to prevent deemed consent arising under class 13."

And, at para 16:

> "That finding as to a material breach applies necessarily, in my view, whether one is considering section 171B or class 13 because of its character, namely that of cessation because of a local authority threat of action. The consequence is a new chapter in planning history. In my view, whether one is considering continual use or continuous use, the result must necessarily be the same. The use in question has ceased, and the resumption is a new breach of planning control."

10. I entirely agree. The inspector's finding of a material break or breaks in the face of threatened enforcement action, albeit in the context of a section 171B analysis, negates continual use for ten years as required in relation to class 13.

11. I do not consider that, in the circumstances of this case, anything turns on the use of the word "continually" as opposed to "continuously" in class 13. The two words often cause confusion. My resort to the Concise Oxford Dictionary yields a definition of "continual" as meaning "always happening; very frequent and without cessation", whereas "continuous" is defined as "connected, unbroken; uninterrupted in time or sequence". Here, the applicant had undoubtedly brought about cessations in the advertising. He had done so specifically as a result of threatened enforcement action…

There is a real difference between an interruption caused by (say) the taking down of an advertisement pending the anticipated arrival of another one and a cessation. I have read the judgment of Elias LJ in draft and I agree with it …"

28. Elias LJ held:

> "21. I, too, would dismiss the appeal. At the heart of the applicant's case lie two connected propositions. The first is that a break in the display of the advertisements does not necessarily involve the conclusion that there was no continual use during the preceding ten years. It will only do so if the interruption is material: see the observations of Simon Brown LJ in *Westminster City Council v Moran* (1998) 77 P & CR 294, to which Maurice Kay LJ has referred.
>
> 22. The second proposition is that it is irrelevant why the break occurs. The fact that it may have been brought about under threat of enforcement or other legal sanction is wholly immaterial. The only question is whether, as a matter of fact and degree, the interruption is sufficiently material to break the period of uninterrupted user so that the ten year period has to start afresh. The inspector did not engage with that question and the matter would have to be remitted for the relevant findings to be made.

> 23. I reject the second proposition. As Lord Mance JSC observed in *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government* [2011] 2AC 304, para 54, statutory periods of this kind:
>
> > "must have been conceived as periods during which a planning authority would normally be expected to discover an unlawful building operation or use and after which the general interest in proper planning control should yield and the status quo prevail."
>
> 24. The applicant's position is that it is not enough to discover and threaten enforcement and thereby cause the land owner to change his or her conduct; some positive enforcement sanction must be taken within the ten-year period in order to bring an end to the period of user.
>
> 25. I do not accept that this should be required. In my judgment, the interruption in user which results from the threat of some form of legal sanction is qualitatively different from interruptions which flow from the fact that there are periods when the landowner has no specific advertisement which he wishes to display. In the former case he is positively accepting that his unlawful use has been discovered and should be stopped; in the latter there is no such acceptance, and the interruption occurs simply for his own convenience…."

29. Following on from Elias LJ's observations at [23], the Council referred me to authorities decided under section 171B TCPA 1990 which hold that the test to be applied is whether, throughout the period during which immunity from enforcement accrues, the planning authority could at any time have taken enforcement action: see *Swale BC v Secretary of State for the Environment* [2005] EWCA Civ 1568, per Keene LJ at [25]; *Thurrock BC v Secretary of State for the Environment* [2002] EWCA Civ 226, per Schiemann LJ at [30(iv),(v)], [25], [28]. I applied that test in *LB Islington v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 2691 (Admin) at [35], [36].

Case stated

30. The Judge gave an extempore judgment at the end of the hearing on 7 September 2021 and shortly afterwards provided a written judgment in similar terms. The Judge then issued the Case Stated on 25 January 2022. There were differences between the written judgment and the Case Stated, but I have proceeded on the basis that the Judge's reasons are as set out in the Case Stated.

31. The Judge's findings were as follows, so far as is material to this appeal:

> "**E. Findings**

1. In cross examination of Mr Stevens there was an inconsistency as to an annotation made on page 77 which suggests the photograph was dated 13 February 2002. However, a silver motor vehicle depicted within the said photograph, has an index number of LB05CLX which denotes that the car was first registered in 2005, therefore 3 years after the suggested date of February 2002.

2. I did not find to be satisfied to the required standard that the photographic evidence presented in this case by either party carried sufficient weight to assist. There are too many variables most notably angle of the shots and weather conditions which impacts on how the advertisement displays and its impact on the local community.

3. In reaching my judgement, I was assisted by the exact wording of Class 13 and the significance of the term "preceding 10 years". I was asked to take a wide [narrow (sic)] view as to how those 10 years are calculated. I found it would be wrong of me to read, infer or interpret any greater meaning in the calculation namely whether it should apply to one advertiser or more and that the 10-year period must be consecutive. I do not agree with such a wide approach. From a factual perspective, I am satisfied that the use of the site has for a number of years, and indeed way beyond the 10 years preceding the Removal Notice, being used by various companies for advertising purposes and there was nothing before me to suggest the Local Authority raised any objection to that usage.

4. I did not find in favour of the suggestion that for 8 months from October 2009 – June 2010, when no advertisement was displayed on the site amounted to a cessation. This is based on the weight I have given to the photographic evidence and the contract signed by the Appellant in April 2010.

5. The fact that the Appellant's adverts did not go live until June/July 2010 is not a relevant factor for my consideration given that JCDECAUX (UK) Limited is an industry leader in the realms of outdoor advertising and therefore when the contract was signed in April 2010, the use of the site as an advertising platform was a forgone conclusion. In addition, the interpretation of the law in my view as to 'continual use' for advertising purposes; goes as far back to 1980s, if not further and I gave regard to the photograph from the NATIONAL SOLUS Site Record Sheet at page 52 of the trial bundle as to the issue of longevity.

6. I wish to clarify in stating this Case that reference in my Written Judgement to the photograph from the NATIONAL SOLUS Site Record Sheet of "settle the issue of longevity", was

> stated obiter and not that it was part of my findings and/or reasoning for my judgement.
>
> …..
>
> 10. For the above reasons I found in favour of the Appellant and allowed the appeal."

32. In its application for a case stated, the Council asked the Judge to state the following questions for the High Court:

> "Whether DDJ Warner erred in law in the interpretation and application of Class 13 of Part 1 of Schedule 3 to the Town and Country Planning (Control of advertisements) (England) Regulations 2007 (**Regulations**), specifically:
>
> 1) Whether the requirement that the site be used continually for the display of advertisements for the preceding ten years in Class 13, Part 1, Schedule 3 to the Regulations requires active use involving the display of an advertisement throughout that 10 year period.
>
> 2) Whether DDJ Warner should have considered the 14 week gap where no advertisement was displayed at the site as being **capable** of breaking the continual use
>
> 3) Whether DDJ Warner was wrong to take into account the historic use of the site for advertising dating back to the 1980s and to regard this as sufficient to establish the continual use of the site for advertising purposes (or in the words of DDJ Warner "to settle the issue of longevity") in circumstances where Class 13 of Part 1 of Schedule 3 to the Regulations refers to use "for the preceding ten years"
>
> 4) Whether DDJ Warner had regard to an immaterial consideration; namely the intention to use the Site for advertising, and failed to have regard to a relevant material consideration namely the date the advertisements 'went live' which she said was "not a relevant factor for my consideration"."

33. The Judge made significant amendments to the questions, and set them out in the Case Stated as follows:

> "Whether I erred in law in the interpretation and application of Class 13 of Part 1 of Schedule 3 to the Town and Country Planning (Control of Advertisements) (England) Regulations 2007, specifically;
>
> 1. Whether the requirement that the site be used continually for the display of advertisements for the preceding 10 years in Class 13 requires active use.

> 2. Whether I should have considered the 14-week gap between 17 February 2019 and 26 May 2019 when the works were being conducted and no advertisement was displayed at the site as amounting to a cessation.
>
> 3. Whether external factors such as in this case, those imposed by the Respondent of restrictive access to the site of only 3 hours on Sundays to undertake the works; should be taken into consideration as exceptional circumstances and therefore negate the submission of cessation.
>
> 4. Whether I was wrong to take into account the historic use of the site as an advertising display.
>
> 5. Whether I was wrong in not taking into account the date the advertisements went live when considering continual use."

The Council's submissions

34. The Council's submissions may be summarised as follows.

35. **Questions 1 and 2**. The Judge failed to apply the correct legal test to the evidence, which is set out in *Winfield*, not *Moran*. Further, she did not ask herself whether the Site had been continually used throughout the whole of the relevant ten year period, so that the planning authority could at any time during that period have taken enforcement action. Nor did she recognise that the burden of proof was on the Respondent establish that the test was satisfied.

36. **Question 3**. The Judge erred in treating the external factors surrounding the updating works as "exceptional circumstances". The Judge should have applied the correct legal test, as set out above.

37. **Question 4**. The Judge misconstrued the relevant period under Class 13 which concerns only the ten year period preceding issue of the removal notice.

38. **Question 5**. The Judge erred in not taking into account the date at which the advertisement "went live" as that was an obviously material consideration to which she was bound to have regard: see *Friends of the Earth Limited v Heathrow Airport Ltd* [2020] UKSC 52 at [116] – [121]. The Judge also erred in substituting the date of the contract for the date upon which the advertisement was actually displayed, contrary to the wording of Class 13, and the guidance in *Winfield* at [19].

The Respondent's submissions

39. The Respondent's submissions may be summarised as follows.

40. **Question 1**. The word "continual" in Class 13 is intended to encompass advertising which was "regularly occurring" (another meaning given to "continual" by the Shorter Oxford Dictionary and applied in *Moran*), irrespective of whether it was uninterrupted. It follows that "active use" for advertising throughout the ten year period is not required

for a finding that use is continual. The Judge asked herself the correct question, namely, whether the Respondent had demonstrated that throughout the relevant ten year period there was "regularly occurring" use of the Site for advertising. She stated that use did not need to be "consecutive" to be continual. Her findings of fact were open to her on that basis.

41. **Question 2**. Continual use is use which is "regularly occurring". Unless a break in use is the result of threatened enforcement action it does not automatically prevent use being continual. It is a question of fact for the judge to determine whether a gap in "active use" prevents that use being continual. The Judge's conclusion that a 14 week gap did not amount to a cessation in the use being continual was plainly a conclusion open to her, having correctly directed herself as to the interpretation of Class 13.

42. **Question 3.** There is nothing in the 2007 Regulations or the reported cases to circumscribe what factors a judge can have regard to in determining whether use is continual when considering gaps in "active use." The intention behind a cessation in the use of a site for the display of advertisement is relevant to determining whether there has been a material break in the use of that site. Reference to external factors may be of relevance to ascertaining the intention behind a break in the active use of a site. It follows that there was no error in the Judge's consideration of external factors in determining whether the 14 week gap in 2019 amounted to a cessation in the use of the site or did not prevent the use being continual.

43. **Question 4**. There may be circumstances in which the use of a site beyond the relevant 10 year period is relevant to the determination of the key question – namely whether a site has been used continually for advertising for the preceding 10 years. There is nothing in either the 2007 Regulations or the reported case law to indicate that a judge is obliged to close their mind to any longer period. The Judge's conclusions were properly informed by the historic use of the Site.

44. **Question 5**. Given the Site was not in active use for advertising during the start of the Respondent's contract, it was clearly correct for the Judge to have regard to the intention of the Respondent, evidenced by the contract, to use the Site for advertising, as being relevant to the question of whether the Site was in "continual use" for advertising. It follows that the date at which the advertisements "went live" was not material in determining the issue, given this question had been addressed by reference to the Respondent's contract.

Conclusions

The legal test

45. The legal test that the Court should apply is set out in the 2007 Regulations, namely, whether there is deemed consent for the advertisement, within the meaning of regulation 6, because it comes within the description set out in Class 13 of Part 1 of Schedule 3:

> "An advertisement displayed on a site that has been used continually for the preceding ten years for the display of advertisements without express consent."

46. The purpose of this provision is to allow for the regularisation of unauthorised advertisements, by effluxion of time and the acquiescence of the local planning authority.

47. In *Winfield*, the Court of Appeal considered the distinction drawn between "continuous" and "continual" by the Divisional Court in *Moran*, and Simon Brown LJ's adoption of the synonym "regularly occurring", and rejected that analysis. Maurice Kay LJ held:

> "11. I do not consider that, in the circumstances of this case, anything turns on the use of the word "continually" as opposed to "continuously" in class 13. The two words often cause confusion. My resort to the Concise Oxford Dictionary yields a definition of "continual" as meaning "always happening; very frequent and without cessation", whereas "continuous" is defined as "connected, unbroken; uninterrupted in time or sequence"."

48. I consider that the reasoning of the Court of Appeal is binding; alternatively, I consider it is to be preferred. In my view, Maurice Kay LJ's judgment reflects more accurately than *Moran* the true meaning of the word "continual". The Shorter Oxford English Dictionary gives the following three relevant definitions of "continual": (1) "Always happening; very frequent and without cessation; *arch* regularly occurring"; (2) "perpetually existing or acting; unchanging in position"; (3) "forming a connected whole or continuous series; unbroken in expanse". The Divisional Court in *Moran* appears to be referring to the archaic ("arch") secondary definition in (1) above. By contrast, Maurice Kay LJ relied on the primary definitions which demonstrate the similarity between the words "continuous" and "continual". Both require continuity.

49. In applying the test in Class 13, the Court should have regard to the guidance given in *Winfield*, as cited above. The key question is whether any break in the display of advertisements is sufficient to amount to a material interruption which brings one period of use to an end, in other words, a cessation of use. If so, a new period of use will commence if and when there is any resumption of display of advertisements thereafter. In answering that question, relevant factors are likely to be the length of the period of use, the length of the interruption, the reason for the interruption and the circumstances in which it has arisen.

50. The deemed consent of the local planning authority to an unauthorised advertisement arises because of its failure to take enforcement action within the prescribed period. Therefore, a further relevant factor in determining whether or not there has been a material interruption amounting to a cessation of use will be whether, during any break in the display of advertisements, the local planning authority would not have been able to take enforcement proceedings, for example, because no breach of the 2007 Regulations was taking place: see *Thurrock*, per Schiemann LJ at [15]; *Swale*, per Keene LJ at [25]. In *Winfield* the Court of Appeal (at [23]) and the High Court (at [12]) explained the rationale behind the ten year period in Class 13 as analogous to the rationale behind the time limits for taking enforcement action against breaches of planning control (section 171B TCPA 1990). The local planning authority is given a reasonable opportunity to take action against any unlawful operation or use, and if it fails to do so within the prescribed period, it would be unfair and/or could be regarded

as unnecessary to permit enforcement. It follows that the local planning authority must have been able to take enforcement action at any time during the prescribed period.

51. In *Winfield*, the Court contrasted the interruptions of use in that case which arose from the threat of legal sanction, and so brought the use to an end, with interruptions which were not likely to be material such as taking down one advertisement pending the anticipated arrival of another one (at [11]).

The Judge's decision

52. The Judge correctly set out the description of Class 13 at page 2 of the Case Stated, paragraph 3 ("CS/2 paragraph 3"). However, in my judgment, she failed to apply it fully and correctly to the facts of this particular case.

53. At CS/4 paragraph 3, the Judge wrongly characterised the Council's submission to her as being that the ten year period must be "consecutive" when in fact the Council's submission to her was that there had been material interruptions in use, which amounted to a cessation of use, which meant that the requirement of continual use in the ten years preceding the issue of the removal notice was not met. Therefore she misunderstood the question she had to consider.

54. The Judge rejected the "consecutive" test and held:

> "3. …..I do not agree with such a wide approach. From a factual perspective, I am satisfied that the use of the site has for a number of years, and indeed way beyond the ten years preceding the Removal Notice, being used by various companies for advertising purposes and there was nothing before me to suggest the Local Authority raised any objection to that usage."

55. In my judgment, the test which the Judge applied in this passage was too broad. It failed to focus with any precision on whether there had been continuity of use for the display of advertisements during the ten years preceding the issue of the removal notice, and the significance of any interruptions.

56. Furthermore, the length of use, and the periods of use prior to the ten year period, could only be relevant if and insofar as they enabled inferences to be drawn which were probative of use or absence of use during the ten year period between 2010 and 2020. For example, it was relevant that there was no display shown in a street photograph taken in October 2009 when considering the length of the interruption in use before the Respondent's use commenced in February 2010. On the other hand, the Respondent's evidence of use from photographs stretching back to the 1980's (see CS/5 paragraph 5 and 6) had no probative value in relation to the ten year period between 2010 and 2020.

57. There were two periods of interruption in use in the ten year period between 2010 and 2020. The Judge addressed the first period as follows:

> "4. I did not find in favour of the suggestion that for 8 months from October 2009 – June 2010, when no advertisement was displayed on the site amounted to a cessation. This is based on

> the weight I have given to the photographic evidence and the contract signed by the Appellant in April 2010.
>
> 5. The fact that the Appellant's adverts did not go live until June/July 2010 is not a relevant factor for my consideration given that JCDECAUX (UK) Limited is an industry leader in the realms of outdoor advertising and therefore when the contract was signed in April 2010, the use of the site as an advertising platform was a forgone conclusion. In addition, the interpretation of the law in my view as to 'continual use' for advertising purposes; goes as far back to 1980s, if not further and I gave regard to the photograph from the NATIONAL SOLUS Site Record Sheet at page 52 of the trial bundle as to the issue of longevity."

58. In my view, the Judge failed adequately to analyse the evidence and/or apply the correct legal test. In relation to the first period (14 February 2010 to June 2010), the Judge wrongly treated the period as beginning in October 2009 which preceded the commencement of the ten year period. However, I accept that the Judge was entitled to infer from the street photograph taken in October 2009, which showed a bare wall at the Site, that advertisements were not being displayed at the Site from at least October 2009 until the Respondent subsequently installed its advertising panel and supporting structure in June 2010.

59. The Judge concluded that this break in the display of advertisements was not sufficient to amount to a cessation of use. She wrongly took into account, at CS/5 paragraph 5, that the continual use for advertising went back to the 1980's, if not earlier. She considered that, as the Respondent signed a contract with the Site owner for use of the Site on 14 April 2010, the use of the Site for advertising was a foregone conclusion from that date. Therefore she found that it was irrelevant that the advertising panel was not installed at the Site until June 2010 and no advertisements were displayed until July 2010 when the panel "went live".

60. In my view, the Judge's approach was flawed. The legal test in Class 13 is whether there is "display of advertisements" at a site, not whether or not an advertiser has a contract to use a site for advertising and intends to do so. This was confirmed in *Winfield*, in the context of Maurice Kay LJ's dismissal of a submission that the wooden structure to which the banner was attached continued to be an advertisement, even when the banner had been removed. He concluded, at [19]:

> "During the period of cessation, if one were to pose the question – what product or service is being advertised by the unadorned structure? – the common sense answer would be: none. ….During the period of cessation, the unadorned structure is no longer "in the nature of, and employed wholly or partly for the purposes of advertisement" and it cannot feed the continuance required by class 13. I accept that this interpretation is at or near the limits of the permissible, but it seems to me to serve the purpose of the legislation and to chime with common sense. If it were not correct, it would mean that a landowner who erects a structure with the sole intention of eventual use for advertising,

> but who does not adorn it for ten years, would immediately obtain the benefit of class 13 if he were to commence active advertising at the commencement of the eleventh year. I do not believe that the legislation was intended to benefit advertisers (including advertising companies) in this way."

The same reasoning applies to the facts and issues in this case. The Judge erred in concluding that the existence of the contract, along with the history of prior use, was sufficient to satisfy the requirements of Class 13.

61. I agree with the Council's submission that the Judge erred in not taking into account the date at which the advertisement panel was installed (June 2010) and the date that advertisements began to be displayed (July 2010). Bearing in mind the test in Class 13 is "display of advertisements", these were obviously material considerations to which she was bound to have regard: see *Friends of the Earth Limited v Heathrow Airport Ltd* [2020] UKSC 52 at [116] – [121].

62. In considering the relevant ten year period preceding the issue of the removal notice, the Judge should have taken into account all the relevant considerations, including but not limited to, the length of the period of use for display of advertisements during the ten year period; the interruptions in the display of advertisements during that period; the reasons for the interruptions and the circumstances in which they arose; and whether, during any interruption in the display of advertisements, the local planning authority would not have been able to take enforcement proceedings, for example, because no breach of the 2007 Regulations was taking place. This final factor was particularly pertinent during the gap in use which arose at the beginning of the ten year period after the previous advertiser had removed his display, and before the Respondent installed its new display, when there was arguably no unauthorised advertising at the site against which the Council could enforce.

63. Finally, I am not satisfied that the Judge properly applied the burden of proof. It was not in dispute before me that the burden of proof rested upon the appellant in the Magistrates Court. Therefore where there is insufficient information to establish continuity, the Respondent fails to discharge the burden upon him: see *Winfield* in the High Court, per Supperstone J. at [18]. However, the Judge appeared to place the burden of proof on the Council at CS/4 paragraphs 3 and 4 when she rejected its submissions.

64. The Judge erred in failing to make any specific findings in respect of the second period, which ran from 17 February 2019 to 26 May 2019. It seems that the Judge accepted the Respondent's contentions, and rejected the Council's contentions, as set out in the section headed "Contentions of Parties" below:

> "**D. Contention of Parties**
>
> 1. In the evidence of Mr Stevens, it was acknowledged that for the three months between 17 February 2019 and 26 May 2019 the site underwent maintenance and updating of technology.
>
> This length of time was extraordinary, as it was anticipated by the Appellant that the works would be completed in 4 weeks.

> 2. The Local Authority submits that the period between 17 February 2019 and 26 May 2019, amounts to a cessation in the site being used for advertising purposes and as such the requirement of continual use in the preceding 10-years failed.
>
> 3. In evidence, Mr Stevens further stated that this extended period was due to exceptional circumstances, most notably restrictive access to the site as works could only take place for 3 hours on a Sunday. Together with the major extent of damage to the site, which was only known once the display had been taken down.
>
> ….."

65. In my view, the Judge failed adequately to analyse the evidence and/or apply the correct legal test. At CS/4 paragraph 3, the Judge wrongly characterised the Council's submission to her as being that the ten year period must be "consecutive" when in fact the Council's submission to her was that there had been material interruptions amounting to cessations in use which meant that the requirement of continual use in the ten years preceding the issue of the removal notice was not met. Therefore she misunderstood the question she had to consider.

66. Although she correctly identified the reason for the interruption, she failed to consider whether the extraordinary length of time during which there was no display of advertising was a material interruption which brought a period of use to an end, amounting to a cessation of use. In applying that test, she failed to consider whether the local planning authority would have been able to take enforcement proceedings during the period when no advertisements were being displayed.

67. The Judge added question 3 to the questions posed by the Council indicating that it played a part in her reasoning. In my view, she wrongly supplemented the statutory test by applying a test of "exceptional circumstances" which "negated the submission of cessation". No such test is to be found in regulation 6 or Class 13, or the authorities.

Questions for the High Court

68. For the reasons set out above, I answer the questions for the High Court as follows.

69. The Judge erred in law in the interpretation and application of Class 13 of Part 1 of Schedule 3 to the Town and Country Planning (Control of advertisements) (England) Regulations 2007 (Regulations), specifically as follows:

    i) **Question 1**. The Judge failed to correctly interpret and apply the requirement in Class 13 that a site had to be used for the "display of advertisements", in other words, actively used for advertising.

    ii) **Question 2**. The Judge erred in failing to correctly interpret and apply the requirement in Class 13 to the 14 week period between February and May 2019 when no advertisement was displayed at the Site.

iii) **Question 3**. The Judge erred in applying a test of "exceptional circumstances" which "negated the submission of cessation".

iv) **Question 4**. The Judge erred in taking into account the historic use of the Site for advertising dating back to the 1980's for the purpose of establishing under Class 13 that the Site had been "used continually for the preceding ten years for the display of advertisements".

v) **Question 5**. The Judge erred in treating the date upon which the advertisements "went live" as irrelevant.

Final conclusions

70. For the reasons set out above, the Council's appeal against the decision is allowed. The Respondent's appeal against the removal notice must be remitted to another Judge at the Magistrates Court for re-consideration.