Developments In Enforcement Including POCA.

Financial assistance with the cost of injunctions

1. The Government has recently announced (January 2015) the creation of a Planning Enforcement Fund of £1m intended to help local councils combat unauthorised development – welcome assistance in times of financial hardship.

2. Councils can now apply for up to £10,000 to help towards the cost of obtaining injunctions against those who act in breach of planning control. According to Government figures, the average cost of an injunction during 2011 to 2013 was around £13,000. The £1 million fund, with a maximum contribution of £10,000 to each case/council, could pay towards more than 90 court injunctions up to March 2016.

3. Injunctions are a remedy that are, for the most part, underused by local authorities. Indeed, the PPG warns that

   a local planning authority should generally only apply for an injunction as a last resort and only if there have been persistent breaches of planning control over long period and/or other enforcement options have been, or would be, ineffective. The Court is likely to expect the local planning authority to explain its reasons on this issue. (emphasis added).

4. Many authorities feel more comfortable using traditional enforcement powers, but where these have failed, or are likely to fail, injunctions can certainly be a swift and effective way of achieving compliance.

5. The fund that will be administered by DCLG made £200K available until 31 March this year (applications now closed), and the remaining £800K will be available until 31 March 2016, but there are a number of conditions:
(i) The fund is solely for use by LPAs in England, towards the cost of securing a Court injunction (High or County Court), under Section 187B of the Town and Country Planning Act 1990, against actual or apprehended breaches of planning control to be restrained.

(ii) The maximum grant for any one case is limited to not more than half the council’s estimated costs, and in any event, a maximum payment of £10K - whichever is lesser.

(iii) The authority is required to provide a costs estimate setting out details of anticipated legal costs likely to be incurred in preparing and issuing legal proceedings and attending court, but this estimate is not to include non-legal specialist officer time.

(iv) The LPA must take responsibility for any legal costs incurred in excess of £10K or in excess of any lesser sum that may be granted.

(v) Funding is only available where other enforcement options have been, or would be, ineffective, or where there have been persistent breaches of planning control over a long period.

(vi) Funding will not be available for court proceedings which have already been started, or where an appellant lodges an appeal under section 174 against an enforcement notice that the LPA has issued “within 28 days of receiving the notice”, but as a notice may come into effect after the minimum 28-day period and appeals can be made to the Secretary of State until it does (see s.174(3) TCPA), that distinction seems a little peculiar.

6. The Eligibility Criteria published at:  
   http://www.planningenforcementfund.co.uk/eligibility-criteria/4587273851  
demonstrates just how tough it will be for LPAs to get the funding they are seeking.

7. Each application for funding should address the following criteria in approximately 1,000 words in total (with a final word count)

   a) Confirmation that the commencement of injunction proceedings is
authorised; the source of that authority (e.g. planning committee/named delegated officer) and the date obtained

b) Confirmation your authority has taken legal advice on the proposed injunction (internal or external) from whom and on what date

c) Demonstrate why the action is in the general interest;

d) Explain the degree and flagrancy of the breach of planning control;

e) Set out the enforcement history for the site e.g. what other measures have failed over a long period of time;

f) Explain any urgency needed to remedy the breach;

g) Set out the planning history of the site;

h) Provide details of previous planning decisions in relation to the site; Set out consideration of the Public Sector Equality Duty (section 149 of the Equality Act 2010) and Human Rights Act 1998;

i) Demonstrate a planning enforcement injunction is a proportionate remedy in the circumstances of the individual case; and

j) Amount of funding requested, including a breakdown of estimated spend on legal costs in 2014-15 and 2015-16 (grant is only available for spend in these financial years).

8. That's rather a lot to fit into 1000 words. However, that is not the end of it! To qualify for consideration, the authority is required to confirm that it has adopted the enforcement best practice recommended in paragraph 207 of the National Planning Policy Framework and published its plan to manage enforcement of breaches proactively. The authority’s enforcement plan must have been published at least three months prior to applying for grant and
the authority is required to confirm adherence to the recommendations of the National Planning Policy Framework with regard to the way in which the authority monitors the implementation of planning permissions, investigates alleged breaches of planning control; and takes enforcement action whenever it is expedient to do so.

9. So really, the fund is an award for the grade A enforcement authorities who are coming top of the class - it stands to reason that they may not be the ones who need the funding most.

10. Contractors engaged by DCLG (Ivy Legal) will assess applications for funding against the eligibility criteria in January, April, July and October, and applications for the grant must be received no later than the last working day of the relevant application month.

11. The last date for applying for grant is Monday, 11th January 2016.

12. On the face of it then, the fund seems like a helpful new addition to the enforcement armory, but in practice, the take up is likely to be small, particularly given the requirement that the local authority have an enforcement plan in place as a pre-requisite. In addition, if an injunction is sought on the basis of legal advice and the Council are content there are good prospects of success, and the injunction is awarded, the Council will (usually) be entitled to recover its costs in any event. It is worth pausing there to look at para 207 of the NPPF in a little more detail:

**Enforcement**

207. **Effective enforcement is important as a means of maintaining public confidence in the planning system. Enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control. Local planning authorities should consider publishing a local enforcement plan to manage enforcement proactively, in a way that is appropriate to**
their area. **This should set out how they will monitor the implementation of planning permissions, investigate alleged cases of unauthorised development and take action where it is appropriate to do so.**

13. It can be seen that there is no absolute requirement for such a plan to be in place in contrast to the language of para 153 that each local planning authority should produce a Local Plan for its area. As such, at a time when LPA’s have been busily getting the evidence together to produce local plans, including addressing the much vexed question of housing land supply, it is likely that enforcement plans (as useful as they might be) have been pushed to that back of the plan making queue which in turn, will prevent many authorities from contemplating an application for funding.

14. The page on DCLG’s website that advertises the fund also advertises other measures the government has taken to deal with unlawful developments include:

   a) five new powers in the Localism Act 2011 including scrapping the rule allowing an appeal against an enforcement notice and a retrospective planning application being submitted at the same time to delay a decision; and allowing councils to extend the amount of time they have to deal with unauthorised development when it has been concealed

   b) temporary stop notices extended to cases of caravans used as a main residence placed without planning permission

   c) publishing an updated summary of powers available to councils and other agencies to deal with unauthorised sites and encampments, and updated and simplified guidance on enforcement

   d) reforms to judicial review to address its impact on economic recovery and growth and reduce the delays and costs associated with it - in July 2013 the time for bringing a judicial review was reduced from 3 months to 6 weeks in certain planning cases.

15. Eric Pickles has been keen to emphasise that the motivation behind these
changes is the need to be fair – “…law abiding residents follow the rules and obtain planning permission so they find it galling to see others who don’t.”

Concealment of unauthorised development

16. In normal circumstances, where a beach of planning permission has persisted for 4 years in the case of operational development, or the change of use of any building to use as a single dwelling house or 10 years for other breaches, then section 171B ‘Time Limits’ of the TCPA steps in to prevent enforcement action being taken against a patient landowner. After that time, the development achieves immunity from enforcement action and becomes lawful. However, where the landowner has deliberately sought to conceal the breach, the protection offered by s. 171B may fall away.

17. Two high profile cases in 2010 and 2011 brought the issue of concealment of planning breaches into sharp focus; R (on the application of Fidler) v Secretary of State for Communities and Local Government [2010] EWHC 143 Admin, and Welwyn Hatfield Borough Council v (1) Secretary of State for Communities and Local Government and (2) Beesley [2011] UKSC 15.

18. In the first case the court found that when building his house, Robert Fidler intended to deceive local planners by using ”a shield of straw bales around it and tarpaulins or plastic sheeting over the top in order to hide its presence during construction” so that he could get around his expectation that the council ”would not grant planning permission for its construction”. The second case concerned an application for planning permission to build a hay barn, which was in fact going to be used as a dwelling. The Supreme Court found that the applicant intended to deceive the council from the outset and should be denied the benefit of the time limit provision in the TCPA - in furtherance of the principle that the law should serve the public interest, the courts have evolved techniques of construction in bonam partem, or in good faith, the first element of which is that a person should not benefit from his own wrong. These are described as principles of “public policy”.

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19. Before the supreme court decision in *Welwyn Hatfield* however, the government had devised its own solution to the problem because the Localism Act 2011 introduced new ss171BA-171BC into the TCPA 1990 to allow local authorities to apply to the magistrates’ court for a planning enforcement order to allow enforcement action to be taken which would otherwise be out of time where concealment of the breach has taken place.

20. The recent case of *Jackson v SSCLG* [2015] EWHC 20 (Admin) outlined the operation of the statutory regimes (per Holgate J) at [41]:

i) The magistrates' court may only grant a PEO under section 171BA(1) if satisfied on the balance of probabilities that the breach which appears to have occurred, or any of the matters constituting the apparent breach, has to any extent been deliberately concealed by any person, and the court thinks it “just to make the order having regard to all the circumstances” (section 171BC(1)). Thus, the legislation employs a relatively simple and broad definition of deception which embraces and goes beyond the Welwyn type of case. But the broad scope of that definition is balanced by a requirement that the court should be persuaded that the making of the PEO is just in all the circumstances.

ii) Section 171BB(1) imposes a time limit for applying for a PEO of 6 months beginning with “the date on which evidence of the apparent breach of planning control sufficient in the opinion of the local planning authority to justify the application came to the authority's knowledge”, but the authority is able to issue a “conclusive” certificate on that factual matter, or to self-certify (section 171BB (1) and (2));

iii) Once a PEO is granted the authority has a period of up to one year plus 22 days from the date on which the court's decision is given, within which to take enforcement action (section 171BA (2)) (“the enforcement year”);

iv) “The enforcement year” may expire after the time limits in section 171B (e.g. in a case where deception is not discovered until after the limits in section 171B expire). But the authority may still take enforcement action within the section 171B time limits if they would expire later than the
“enforcement year” (section 171BA(5));

v) Where a PEO is obtained and an enforcement notice is issued within the “enforcement year”, then even if the breach occurred more than 4 years before that action was taken, the Inspector dealing with an appeal against that notice will not have to consider evidence or legal submissions on deception and its effect upon the application of section 171B. The same applies to an appeal against the refusal of a CLEUD (see section 191(3A) below).

21. The PPG also gives the following advice on the statutory provisions:

What are the requirements for obtaining a planning enforcement order?

A local planning authority must have sufficient evidence of the apparent breach of planning control to justify applying for a planning enforcement order (Sections 171BA, 171BB and 171BC of the Town and Country Planning Act 1990).

The application may be made within 6 months, starting with the date on which sufficient evidence of the apparent breach came to the local planning authority’s knowledge. The appropriate officer must sign a certificate on behalf of the authority which states the date on which that evidence came to the local planning authority’s knowledge, and the certificate will be conclusive of that fact.

The application must be made to a magistrates’ court and a copy must be served on the owner and occupier of the land, and on anyone else with an interest in the land which, in the local planning authority’s opinion, would be materially affected by the taking of enforcement action in respect of the breach. The applicant, any person who has been served with the application, and any other person the court thinks has an interest in the land
that would be materially affected by the enforcement action have a right to appear before, and be heard by, the court hearing the application.

**What evidence is needed to obtain a planning enforcement order?**

A magistrates’ court may only make a planning enforcement order if it is satisfied on the balance of probabilities that the apparent breach of planning control (or any of the matters constituting that breach) has (to any extent) been deliberately concealed and that it is just to make the order having regard to all the circumstances.

Planning enforcement orders can only be made where the developer has deliberately concealed the unauthorised development. In these circumstances, evidence that the developer has taken positive steps to conceal the unauthorised development, rather than merely refraining from informing the local planning authority about it, will be required.

It is expected that planning enforcement orders will be **focused on the worst cases** of concealment.

22. Pausing there, there is no definition of what “worst cases” refers to, and whether it means the conduct of the landowner or the scale of the breach or both. It would certainly be helpful if the matter were clarified. Furthermore, what is “just in all the circumstances” is not defined either, but may operate to exclude from the regime those whose conduct is not so morally reprehensible.

23. The PPG goes on:

**What is the effect of a planning enforcement order?**
The effect of a planning enforcement order is that the local planning authority will be able to take enforcement action against the apparent breach of planning control or any of the matters constituting the apparent breach during the “enforcement year”. This means that once the “enforcement year” has begun, the local planning authority can at any time during that year, take enforcement action in respect of the apparent breach of planning control or any of the matters constituting that breach.

The “enforcement year” does not begin until the end of 22 days starting with the day on which the court’s decision to make the order is given, or when any appeal against the order has been finally dismissed.

A local planning authority may make an application even if the normal time limit for enforcement action has not expired. This is to allow for the possibility that evidence may come to light very close to the end of the normal time limits for taking enforcement action, when there may be insufficient time to draft and issue an enforcement notice, or where there may be doubt as to when the time limits actually expire. For example, where the date of substantial completion is not certain. The local planning authority is not prevented from taking enforcement action once the enforcement year has ended provided that the normal time limits for enforcement action have not expired (Section 171BA of the Town and Country Planning Act 1990).

24. What is interesting about planning enforcement orders however is the fact that few Local Planning Authorities are seeking them before using, what they believe to be an act of deliberate concealment, as a basis for taking enforcement action even where the relevant 4 or 10 year immunity period has
expired. Instead the Council then argue the *Welwyn Hatfield* principle in front of a planning Inspector without the need to step into the Magistrates’ Court. It might be considered that the statutory regime shouldn’t be discarded so easily, but the message to LPAs for the time being at least, is carry on.

25. Last year a case was reported involving enforcement action by Winchester City Council against an unauthorised material change of use of an agricultural barn to a mixed use as an agricultural storage barn and a self-contained unit of residential accommodation.

26. At the appeal against the enforcement notice, the issue of PEOs arose because the Council had not sought one. Having heard representations from both parties under the ground (d) appeal the Inspector took the view that:-

> “In the event, the appellant’s argument, that he cannot be accused of deception judged by his intentions at the time, rather than his actions, is contradicted by the evidence before me. The Connor principle should therefore apply. Accordingly, I conclude that there is nothing in the arguments put to me by the appellant, legally or as regards applying the authority of Welwyn Hatfield to this case, that persuades me that he should, in spite of the evidence, nevertheless benefit from the protection provided by s171B(2) of the 1990 Act. For these reasons, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections, as set out in the formal decision below.”

27. It is not the only example of an Inspector finding concealment where an Order has not first been obtained, and so it is useful that the High Court has now had an opportunity to comment on the matter and did so in January of this year in *Jackson v SSCLG* [2015] EWHC 20 (Admin).

28. Mr Nigel Jackson, the disgruntled Claimant in the Winchester case, sought to challenge the Inspector’s findings on the basis that the TCPA provided a
comprehensive code for dealing with matters of concealment that replaced
the law laid down by the Supreme Court in Welwyn Hatfield. The Secretary of
State argued that the new legislation simply widens the powers available to
authorities and did not replace the principles earlier enunciated by the
Supreme Court.

29. The Court determined that

64… it is necessary to construe the PEO code as a
supplementary procedure available to local authorities and not as
an exhaustive replacement for the Welwyn principle. If not,
ironically the effect would be to allow wrongdoers to continue to
use concealment in order to legitimise breaches of planning
control. In any balance struck between the advantages and
disadvantages of the competing arguments, this consideration
has to be decisive, quite apart from the other matters to which I
have already referred.

30. In essence, the Court found that the language used by Parliament was not
clear enough to conclude that the Welwyn Principle could no longer be relied
on, stating that there was no express amendment of s.171B to disapply the
effect of the Supreme Court decision in Welwyn Hatfield.

31. However, the appeal was dismissed primarily because of the decision making
process in relation to applications for certificates of lawful use. In such
applications the time limits in section 171B are disapplied where:

(a) the time for applying for an order under section 171BA(1) (a “planning
enforcement order”) in relation to the matter has not expired,

(b) an application has been made for a planning enforcement order in
relation to the matter and the application has neither been decided nor
been withdrawn, or

c) a planning enforcement order has been made in relation to the matter, the order has not been rescinded and the enforcement year for the order (whether or not it has begun) has not expired.¹

32. However, Holgate J observed the following

“62… Plainly a local planning authority cannot rely upon section 191(3A)(a) before that time limit starts to run. That would be incompatible with the proper operation of the standard time limits in section 171B.

63 The problem arises because of the criterion used to determine the start of the 6 months’ time limit. That depends upon the local planning authority obtaining sufficient information to justify making an application for a PEO, i.e. when the authority ceases to be deceived. But in the Beesley type of situation that is likely to be after the limitation period in section 171B has already expired and the landowner has applied for a CLEUD. The problem in concealment cases is that, by definition, it is most unlikely that on the date when a CLEUD application is registered, the local planning authority will be aware of the deception. Accordingly, the authority will not be in a position to rely upon section 171BB(1) or (2) and set the 6 months’ time limit for a PEO application running and so it will be unable to refuse the application by relying upon section 191(3A)(a). Consequently if in such circumstances the authority (or an Inspector on appeal) was obliged to grant the CLEUD on the evidence produced by the applicant, enforcement action could not be initiated (sections 171B, 174(2)(d), and 191(2)).

¹ Section 191(3A)
33. The problem arises because as explained at para 26 of the Judgment,

“A person who wishes to ascertain whether (inter alia) any existing use of a building is lawful may apply to the local planning authority for that purpose (section 191(1) ). If that authority is provided with information satisfying them of the lawfulness of that use at the time of the application, they shall issue a certificate to that effect; and if not they shall refuse that application (section 191(4) ). The lawfulness of (inter alia) any use for which a certificate is in force shall be conclusively presumed (section 191 (6) ).”

34. Accordingly, at the time of the application which is the point for determining the lawfulness of the use, if the local authority were not aware of the concealment (and it is likely they would not be), they could not be said to have the requisite knowledge for any of the circumstances in 191(3A) to have arisen and so would have no choice but to grant the certificate unless the Welwyn Hatfield principle could operate.

35. The case is interesting, because it would appear the decision as to whether to trouble the Magistrates in respect of a PEO is a matter for the local authority in each case. Although the decision focused on the difficulties that might arise in a certificate of lawfulness context, it didn’t exclude the application of the Welwyn Hatfield principle from broader enforcement issues. In practice, when the principle arises, those involved might consider it expedient to simply have the argument in front of a planning Inspector rather than obtain a PEO first.

A note on Fidler

36. Enforcement Powers have been strengthened and refined over a number of years in an attempt to expedite the enforcement process and strip away the complexities that have plagued this particular area of planning law. We said above that injunctions can be a swift and effective way of dealing with
planning control, but the case of Robert Fidler and his Surrey Castle demonstrate just how convoluted the enforcement process can be.

37. The timeline of events reveals that Robert Fidler built the castle at Honeycrock Farm in Salfords, Surrey, in 2002. He unveiled the house in 2006 and the Council enforced against it shortly after. An appeal against the enforcement notices was dismissed and Mr Fidler appealed to the High Court. Again, the appeal was dismissed in 2010. Mr Fidler, not content to slip away quietly and demolish his home sought to appeal to the Court of Appeal.

38. In the meantime however, the Supreme Court had heard the case of Welwyn Hatfield, and so the Court of Appeal refused permission for the matter to be taken further.

39. That however is not the end of the story – fast forward to summer 2014 and the long suffering Council obtained an injunction to compel Mr Fidler to comply with the enforcement notices and demolish the unlawful building which by that time, had been standing for 12 years. However, the injunction will not take effect until the outcome of Mr Fidler’s present appeal (against the refusal of the Council to grant permission for the property with and agricultural condition attached) is decided. The decision is awaited.

40. One has to admire the tenacity of Mr Fidler.

POCA

41. The CPS guidance on proceeds of crime announces that:

Confiscation is an essential tool in the prosecutor’s toolkit to deprive offenders of the proceeds of their criminal conduct; to deter the commission of further offences; and to reduce the
profits available to fund further criminal enterprises. **Prosecutors should consider asset recovery in every case in which a defendant has benefited from criminal conduct and should instigate confiscation proceedings in appropriate cases.** When confiscation is not appropriate and/or cost effective, consideration should be given to alternative asset recovery outcomes.

... By taking away the profits that fund crime, we can help to disrupt the cycle that sustains these organisations and fraudsters. By prioritising the assets of organised and economic crime, the strategy aims to improve further on our asset recovery performance, and to disrupt, deter and reduce organised crime and economic crime. This will help to protect the public from the harm it causes.

42. The legislation was originally devised to seize proceeds from "big ticket" crime such as drug trafficking or money laundering, but is increasingly (and correctly) being used by councils in planning enforcement cases. It should be obvious that in some cases, the availability of a confiscation order should provide a significant deterrent to those who with the benefit from a breach of planning control. Offenders also risk a prison sentence if they do not comply with a confiscation order, which makes this a powerful tool of enforcement for the LPA.

43. Proceedings under the Proceeds of Crime Act 2002 for breaches of planning control arise following conviction of a criminal offence (such as non-compliance with an enforcement notice). The LPA can request that the court makes a confiscation order against the offender to enable the LPA to recover any proceeds of the crime.
Steps involved

44. The following summary of the position under POCA is derived from the decision of the Supreme Court in *Waya* [2012] UKSC 51, reported at [2013] 1 AC 294, and that of the Court of Appeal in *Gavin and Tasie* [2010] EWCA Crim 2727, reported at [2011] 1 Cr App R (S) 126:-

a. Under section 6(2) of POCA, it is mandatory to proceed with a view to a confiscation order being considered once two conditions are satisfied, namely that the defendant is convicted of an offence **before the Crown Court** and that the prosecution applies for the order to be made.

b. A central feature of Part 2 of POCA is the distinction between cases in which the defendant is, or is not, to be treated as having a criminal lifestyle (as prescribed by section 75).

c. In cases where a defendant has benefited from a criminal lifestyle, the court must determine how much he has benefited from his general criminal conduct. If he does not have a criminal lifestyle, the court must determine whether he has benefited from the particular criminal conduct. In both cases, the first stage is to identify the benefit: see sections 6(4), 8 and 76. Section 8(2) requires the court to “take account of conduct occurring up to the time it makes its decision” in the confiscation proceedings.

d. In cases where a defendant has a criminal lifestyle, when deciding whether he has benefited from his general criminal conduct and deciding what his benefit is from the conduct, the courts must, in accordance with section, make the assumptions contained in section 10. Broadly stated, the effect of these assumptions is that property in the possession of a defendant in the six years ending with the day when proceedings for the offence concerned were started against the
defendant is assumed to be the product of his criminal activities unless he can show otherwise on the balance of probabilities. In other words, in such a case the burden of proof is reversed since the defendant has to show how he came by his assets.

e. The second stage is the valuation of the benefit. It may fall to be valued (see sections 79 and 80) either at the time when it is obtained, or at the date of the confiscation order.

f. The third stage is the valuation as at the confiscation date of all the defendant’s realisable assets, described in section 9 as “the available amount”. The “available amount” operates as a cap on the amount of the confiscation order, termed “the recoverable amount” in section 7.

g. POCA laid down a procedure to enable the court to obtain the information necessary to make findings as to benefit and assets. The prosecution serves a statement of information pursuant to section 16 (“a section 16 statement”), outlining what it considers to be matters potentially relevant to the inquiry. The defendant may be ordered to indicate to what extent he accepts the matters in the statement, and to particularise those matters which he does not accept in a response: see section 17. A defendant may also be required to provide information to help the court carry out its functions: see section 18.

45. The provisions of POCA 2002 apply only to offences committed on or after 24 March 2003. If the offence occurred before this date, earlier confiscation regimes apply.

46. A confiscation order will require the defendant to pay the ‘recoverable amount’, which reflects the benefit received from the conduct having regard to the available amount, for example, if the defendant has insufficient resources.
Examples where POCA has been used

47. In *R v del Basso* [2010] EWCA Crim 119, land was being used to provide a park and ride facility for passengers using Stanstead Airport in breach of an enforcement notice. The recoverable amount was assessed at the total income received, before payment of staff costs, rent and tax and was over £1.8 million.

48. More recently,

(i) a confiscation order of nearly £225,000 was made to recover the proceeds of selling and storing vehicles in breach of an enforcement notice served by Kirklees Council;

(ii) a confiscation order of £75,636 was made against a landlord who divided two houses into flats without planning permission and failed to comply with enforcement notices issued by Barnet Council; (and see more recently *R v Hussain* [2014] EWCA Crim 2344);

(iii) a London Borough were successful in obtaining an order that a man who operated a nightclub without planning permission and in breach of an enforcement notice pay £171,000 following his conviction.

(iv) The Court of Appeal reviewed a confiscation order in *R v Ali (Saleh)* [2014] EWCA Crim 1658 and varied the order from £1.44 million to approx. £0.5m on the basis that The Town and Country Planning Act 1990 s.179(1) and (2) expressly provided that it was the failure to comply with the enforcement notice that rendered the unauthorised use criminal. Unless and until that moment arrived, Mr Ali could not be said to have been engaged in general or particular criminal conduct within the meaning of s.6(4) of the 2002 Act. Accordingly, in respect of properties for which no enforcement notices were issued but which were being let in breach of planning control, the confiscation order was set aside.
49. Those examples demonstrate the efficacy of the regime in all manner of enforcement proceedings.

50. In addition to using POCA for breaches of valid effective enforcement notices, LPAs could consider using POCA

a. to deprive advertisers of the benefit gained from unlawfully displaying advertisements contrary to the Control of Advertisement Regulations 2007.

b. in heritage enforcement cases where, for example, a Listed Building is demolished unlawfully and the owner’s land increases in development value as a result of the demolition.

Other recent enforcement decisions

Silver v Secretary of State for Communities and Local Government [2014] EWHC 2729 (Admin)

51. Planning permission was granted for an extension to a residential dwelling and just before the permission expired, some preliminary works were undertaken to implement the permission. However, what was built thereafter was not that which was permitted, and an Inspector decided as part of an enforcement appeal that the question of whether the operations to implement the permission comprised part of a development, involved looking at what had been done as a whole and reaching a judgment as a matter of fact and degree upon that whole. In this case, the works done were not considered to have implemented the permission given what had been built thereafter, and as such, the original permission was not a fallback option.
52. The appellants in this matter appealed against their conviction for failing to comply with an enforcement notice. In 1998, the local authority had issued an enforcement notice after learning that certain flats were being let as long-term residential flats because planning consent allowed use as holiday or short lettings only. The appellants bought the property while the enforcement notice was still in force and breached the terms of the notice.

53. It was held that both the Town and Country Planning Act 1990 s.285 and the decision in *R. v Wicks (Peter Edward) [1998] A.C. 92* precluded the judge from investigating the alleged unlawful act in the context of the criminal trial. A challenge to the enforcement notice could only be brought by way of an appeal against it or by way of judicial review, *Wicks* followed.

*Ahmed v Secretary of State for Communities and Local Government [2014] EWCA Civ 566*

54. This case considered the extent to which an Inspector has a duty to consider “obvious alternatives” to demolition of an unlawful building in appeals under ground (f). In this case, the Claimant had obtained planning permission for the erection of a three storey building, but erected a four storey building instead. An EN was issued on 3 September 2010. On appeal the Claimant argued the steps required by the Council to remedy the breach were excessive because the scheme that had been approved under the now expired permission would still have been acceptable in planning terms and thus the breach could be remedied by modifying the building to that which was acceptable, not demolishing it altogether by way of ground (f).

55. The Inspector found that he did not have the power pursuant to ground (f) to do that, and the Claimant appealed to the High court.

56. The Court of Appeal held that Section 177(1) empowered an inspector to
grant permission for “a whole or any part of” the development as built. Therefore, he did have the power to grant planning permission for the six flat scheme if that scheme could be considered to be a part of the development being enforced against. The Inspector therefore erred in law by refusing to consider the possibility of granting permission under ground (a) for the six flat scheme and then amending the notice under ground (f) accordingly.

57. This case can be contrasted with Secretary of State for Communities and Local Government v Ioannou [2014] EWCA Civ 1432 where it was held that a planning Inspector hearing an appeal against an enforcement notice had not had power under the Town and Country Planning Act 1990 s.174(2)(f) to enable a scheme of development, alternative to that which was subject to the notice, to be implemented. Interestingly, Sullivan LJ commented that:

“If, as in the present case, an alternative scheme is put forward which is not part of the matters stated in the enforcement notice as constituting a breach of planning control, but which the Inspector considers may well be acceptable in planning terms, he can follow the course which the Inspector adopted in the present case: allow the appeal under ground (g) and extend the period for compliance with the notice so that the planning merits of the alternative can be properly explored: see paragraph 7 (above).” (para 38)

R (oao Matthews) v Sec of State [2014] EWHC 1299 (Admin)

58. At an enforcement appeal, the inspector accepted Matthews’ argument that the activity taking place on the site was parking and not the storage of vehicles, and amended the notice accordingly. Matthews then argued that as a result, it was not clear whether the local authority would have concluded that it was expedient to issue the notice in respect of the parking use only. The
inspector stated that the question of expediency could only be raised in judicial review proceedings and could not be challenged on appeal.

59. The Inspector’s decision on the matter were supported by the High Court, the Judge holding that considerations of expediency were not limited to planning issues, but included the advantages and disadvantages to the public interest, including the costs and effectiveness of a range of possibilities. An Inspector was not in a position to judge the implications of such issues, which were pre-eminently within the knowledge of the local authority. Even if the Inspector was not deciding whether enforcement action would be expedient, the weight given to the possibility that the local authority would decide that enforcement action was not expedient in deciding whether to quash the notice had to inevitably be based on an assessment of the likelihood of it reaching that view. If "matters relevant to the question of expediency" were within the exclusive purview of the court it would be wrong for an inspector to seek to assess the extent to which an authority might consider it expedient to take enforcement action. To do so would involve considerations which were outside the knowledge and expertise of the Inspector, outside the grounds of appeal in s.174(2) and within the court’s jurisdiction.