



Neutral Citation Number: [2017] EWHC 904 (Admin)

Case No: CO/4846/2016

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 24/04/2017

**Before:**

**MR JUSTICE GILBART**

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**Between :**

**THE QUEEN**  
**on the application of**  
**ZIPPORAH LISLE-MAINWARING**  
**- and -**  
**ISLEWORTH CROWN COURT**  
**-and-**  
**ROYAL BOROUGH OF KENSINGTON AND**  
**CHELSEA**

**Claimant**

**First**  
**Defendant**

**Second**  
**Defendant**

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**Paul Brown QC** (instructed by **Richard Max and Co, London**) for the **Claimant**  
The First Defendant did not appear and was not represented  
**Andrew Parkinson** (instructed by **Michael Carson, Directorate of Legal Services of Second**  
**Defendant**) for the **Second Defendant**

Hearing dates: 14<sup>th</sup> March 2017  
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**Approved Judgment**

**GILBART J :**

ACRONYMS USED IN JUDGMENT

<i>TCPA 1990</i>	Town and Country Planning Act 1990
<i>LBCAA 1990</i>	Planning (Listed Buildings and Conservation Areas) Act 1990
<i>GPDO</i>	Town and Country Planning (General Permitted Development) ((England) Order 2015
<i>UCO</i>	Town and Country Planning (Use Classes) Order (now 2015-formerly 1995)
RBKC	Royal Borough of Kensington and Chelsea
LPA	Local Planning Authority
CA	Conservation Area
BPG	Best Practice Guidance of the Office of the Deputy Prime Minister, issued in 2005

1. This is an application for permission to seek judicial review of decisions of the Isleworth Crown Court
  - i) dated 12<sup>th</sup> July 2016, to dismiss the Claimant’s appeal from the District Judge’s dismissal in part of the Claimant’s appeal against a notice served under s 215 of the *TCPA 1990*;
  - ii) dated 11<sup>th</sup> August 2016, to refuse the Claimant’s application to state a case in respect of its dismissal of her appeal.
2. On 2<sup>nd</sup> November 2016 Dove J ordered a “rolled up hearing.”
3. In short terms, the Claimant owns a building in a Conservation Area in the Royal Borough of Kensington and Chelsea. She has painted its façade in a scheme of red and white stripes, which is, on the findings of fact made by the Crown Court, harmful to amenity. The painting was entirely lawful, having been carried out by the *GPDO* Class C2. No complaint is made of any want of repair. There are two issues:
  - i) whether a s 215 notice may be used when the complaint is that the planning authority considers that the choice of painting scheme harms amenity;
  - ii) if so, whether the condition of the building as painted was one which results in the ordinary course of events from the carrying on of operations which are not in contravention of Part III of *TCPA 1990*.
4. I shall say more of the facts presently.
5. I shall consider the matter as follows

- (a) *Section 215 of the TCPA 1990*
- (b) *The Facts, including the findings of the Crown Court*
- (c) *Submissions of the parties*
- (d) *The Planning Code*
- (e) *Discussion and Conclusions*

(a) *Section 215 of the TCPA 1990*

6. Part VIII of the Act contains what are described as “Special Controls.” One such is dealt with in Chapter II, headed “Land Adversely Affecting Amenity of Neighbourhood,” and contains ss 215-9.

“215 Power to require proper maintenance of land.

- (1) If it appears to the local planning authority that the amenity of a part of their area, or of an adjoining area, is adversely affected by the condition of land in their area, they may serve on the owner and occupier of the land a notice under this section.
- (2) The notice shall require such steps for remedying the condition of the land as may be specified in the notice to be taken within such period as may be so specified.
- (3) Subject to the following provisions of this Chapter, the notice shall take effect at the end of such period as may be specified in the notice.
- (4) That period shall not be less than 28 days after the service of the notice.

216 Penalty for non-compliance with s. 215 notice.

- (1) The provisions of this section shall have effect where a notice has been served under section 215.
- (2) If any owner or occupier of the land on whom the notice was served fails to take steps required by the notice within the period specified in it for compliance with it, he shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.
- (3) – (6).....

217 Appeal to magistrates’ court against s. 215 notice.

(1) A person on whom a notice under section 215 is served, or any other person having an interest in the land to which the notice relates, may, at any time within the period specified in the notice as the period at the end of which it is to take effect, appeal against the notice on any of the following grounds—

- (a) that the condition of the land to which the notice relates does not adversely affect the amenity of any part of the area of the local planning authority who served the notice, or of any adjoining area;
- (b) that the condition of the land to which the notice relates is attributable to, and such as results in the ordinary course of events from, the carrying on of operations or a use of land which is not in contravention of Part III;
- (c) that the requirements of the notice exceed what is necessary for preventing the condition of the land from adversely affecting the amenity of any part of the area of the local planning authority who served the notice, or of any adjoining area;

(d) .....

(2) – (8) .....

218 Further appeal to the Crown Court.

Where an appeal has been brought under section 217, an appeal against the decision of the magistrates’ court on that appeal may be brought to the Crown Court by the appellant or by the local planning authority who served the notice in question under section 215.

219 Execution and cost of works required by s. 215 notice.

(1) If, within the period specified in a notice under section 215 in accordance with subsection (2) of that section, or within such extended period as the local planning authority who served the notice may allow, any steps required by the notice to be taken have not been taken, the local planning authority who served the notice may—

- (a) enter the land and take those steps, and
- (b) recover from the person who is then the owner of the land any expenses reasonably incurred by them in doing so.

(2) – (5) .....

7. I shall set out other aspects of the *TCPA 1990* when I deal with the Planning Code in section (d) of this judgment. For the purposes of the next section, I draw attention to the fact that permitted development rights exist under *GPDO 1995*, including the

grant of planning permission for painting the exterior of a property, which is given by Schedule 2 part 2 Class C of the *GPDO 1995*. “Painting” includes any application of colour (see paragraph C2). Painting the exterior of a building is a building operation within the meaning of ss 55 and 336 (1) *TCPA 1990*, but is permitted by this provision (see *Windsor and Maidenhead Royal BC v Secretary of State for the Environment* [1988] 2 PLR 17 @20B per Mann J).

(b) ***The Facts, including the findings of the Crown Court***

8. As noted already, this matter arises out of the Claimant’s choice of colour scheme for a building she owns at 19 South End London W8 5BU. She acquired the premises in August 2012, intending to convert it in due course into a dwelling for her own use. At that time the building was in use as offices. In August 2013, she changed the use to storage. That change of use to storage was permitted by the *GPDO 1995* Sch 2 part 3.
9. On 7<sup>th</sup> March 2015, the Claimant had the premises painted. She chose to effect a colour scheme of red and white stripes. She has been seeking planning permission for conversion of the building to residential use. The grant to her of permission has been the subject of an application for judicial review by objectors. One is a Ward Councillor, and feelings have run high.
10. On 5<sup>th</sup> May 2015, RBKC served a notice under s 215 *TCPA 1990*. It replaced an earlier defective notice of 24<sup>th</sup> April 2015. The notice of 5<sup>th</sup> May 2015 included the following

“3 This Notice is served by the Council under section 215.....because it appears to the Council that the amenity of a part of their area is adversely affected by the condition of the Land.

THE REASON FOR ISSUING THIS NOTICE

The property is located in a prominent location in the Kensington Square Conservation Area. The condition and appearance of the property, particularly the red and white painted stripes on the front elevation, is incongruous with the streetscape of South End and the local area. The resulting condition and appearance of the land is considered detrimental to the character and appearance of this part of the Kensington Square Conservation Area, does not achieve a high level of amenity or protect views within the conservation area to the detriment of the amenities of neighbouring residents. In the circumstances, the appearance of the property is not considered to comply with CS policies, particularly the aims of Policies CL3, CL11 and the Kensington Square Conservation Area proposal Statement.”

It will be noted that it referred to “the *condition and appearance*” and took issue in the final sentence with “the *appearance of the property*”

11. It then set out the steps which were required to be taken within 28 days
- “ (i) prior to repainting clean and repair all external joinery, removing in the process any flaking paint, replacing any rotten or perished timbers with

replacement woodwork which is an accurate replica of the original design in terms of pattern detail and profile, so as to ensure all external timbers are in appropriate condition for repainting;

(ii) Repaint all external brickwork, located on the front elevation white, to match the finish and colour of the property in accordance with (an attached photograph showing the property when painted white);

(iii) On completion of steps (i) and (ii) above, repaint all external joinery with external wood primer, exterior undercoat, and external wood gloss, the finished colour to be white.”

12. The Claimant appealed to the Magistrates’ Court under s 217 *TCPA 1990*. She argued that

- i) the condition of the land did not adversely affect the amenity of any part of the area of the local planning authority, or of any adjoining area;
- ii) that the condition of the land to which the notice related was attributable to, and such as results from, the carrying out of operations or a user of land which is not in contravention of Part III of *TCPA 1990*;
- iii) the requirements of the notice exceeded what was required to prevent the condition of the land having an adverse effect on the amenity of any part of the area of the local planning authority, or of any adjoining area;
- iv) the time for compliance was too short.

13. Those grounds followed those set out in s 217(1) *TCPA 1990*. The appeal was heard by District Judge Bayne on 8<sup>th</sup> January 2016. She allowed the appeal insofar as it related to the joinery. She upheld the Notice insofar as it related to the requirement that the building be painted white. An appeal was then made to the Crown Court by the Claimant. It was heard by HH Judge Johnson, sitting with magistrates, at Isleworth Crown Court. The appeal was dismissed on 22<sup>nd</sup> June 2016. A written ruling was issued on 12<sup>th</sup> July 2016.

14. The Court, in a judgement given by HH Judge Johnson, dealt with the appeal as follows. Having referred to the Claimant’s acquisition of the property in 2012 with a view to its redevelopment, he recorded that the Claimant had obtained planning permission to rebuild the property as a house, which was the subject of a challenge in the High Court by an objector.

15. He also recorded that the use had been changed from offices to storage. It was the only building in South End not in residential use. The Judge continued:

“3 This Court has been told that currently the Appellant has permission to rebuild the property which will in effect remove every vestige of the current structure. This permission is being challenged in the High Court, the action being set down in September 2016. We have not seen what has been proposed in the new build, nor is it relevant to the issues that this Court needs to decide.

4 The Appellant bought the property in August 2012 with a view to redeveloping. The plan was, and we have been told is, to build a modern house in keeping with its neighbourhood. In recent years, it had been used as offices. The Appellant became involved in entrenched disputes concerning planning permission and these continue. While these were continuing she, in order to mitigate her outgoings, elected to change its use from offices to storage. It is the only non-residential property in South End.

5 On 2 March the front elevation of the Property was painted in red and white stripes. While the District Judge made observations as to the quality of the painting we simply note that the entire operation took a number of hours and has the appearance of being incomplete.”

16. He went on to deal with the facts

10 “The Property is a 3 storey terraced building on the North side of South End, a cobbled cui-de-sac off Andsell Street. It lies within the Kensington Square Conservation Area (KSCA).The Appellant, by the 2 March 2015 had been engaged in a protracted dispute with her neighbours regarding planning permission.

11 In her statement the Appellant said that while the planning process was dragging on she thought of doing something to "cheer up" the building and herself, before she returned to Switzerland. She instructed a builder to repaint the front elevation in red and white stripes. We note that DJ Bayne found that "her reasons for doing so remain a matter of conjecture". We disagree with that conclusion. We are satisfied that the instruction to paint the Property in that way was made out of a sense of pique. Having made this finding it is clear that not only was it lawful for the Appellant to do this but that, other things being equal, every householder may paint his property in any way he wishes.

12 Between 3 March and 13 April 2015 the Council's enforcement team received complaints regarding the Property's appearance. There was correspondence which failed to resolve the matter. The Notice that followed was appealed and that appeal was dismissed on 8 January 2016.....”

17. The Judge then recited the terms of ss 215 and 217 *TCPA 1990*. He continued at [16]:

16 “The words "condition" and "amenity" are not defined in the statute and submissions have been made as to what meaning should attach to both words.

17 We accept the submission that in order to succeed on (ground (a) ) the Appellant must show that the condition of the land to which the notice relates does not adversely affect the amenity of any part of the RBKC.”

18. The Judge then stated at [18] that

18 “Both parties accepted that the correct definition of amenity was that given in *Berg v Salford City Council* [2013] EWHC 2599 per Supperstone J, who cited the definition of amenity in the (BPG) whereby

“Amenity’ is a broad concept and not formally defined in the legislation or procedural guidance, ie it is a matter of fact and degree and, certainly commonsense. Each case will be different and what would not be considered amenity in one part of an LPA’s area might well be considered so in another. LPAs will therefore need to consider the condition of the site, the impact on the surrounding area and the scope of their powers in tackling the problem before they decide to issue a notice.””

19. He then set out the parties’ submissions on the meaning of section 215 and the Court’s conclusions:

19 The Appellant has taken various points under this heading. First, that a s215 Notice can only be used to bring in to repair a property that is in disrepair, in other words it is argued by the Appellant that "condition of land" can only adversely affect amenity when there is a current maintenance issue. The Appellant's argument is that, as a matter of law, the fresh application of paint is not a matter which affects “the condition of the land.” The Appellant further submits that as a matter of fact the painting of the property has not adversely affected amenity.

20 We accept the submissions made on behalf of RBKC on these matters. The word condition should be interpreted broadly-and in a common-sense manner. The "condition of land" refers to the current state of the land and here there is a property painted in red and white stripes.

21 The submission made by the Appellant on this point has been answered by the case of Berg when this question was posed: “Can a .....s 215 ...Notice...be used in whole or in part to effect “improvements” or alterations of land or property that go beyond “Literal maintenance”, such as .....requiring repainting, where it appeared that there was no ongoing maintenance issue?” the court gave an informative answer. It was thus accepted that land may have an adverse effect upon the area without there being a current maintenance issue.”

22 We further accept the submission made by the Respondent that s 215 can be used to regulate the appearance of land. The s 215 (BPG) .....states: "S215 and associated powers provide an effective mechanism for dealing with unsightly land ... ". *Allsop v Derbyshire Dales District Council* [2012] EWHC 3562 (Admin) concerned a case where a 'lurid face' had been painted on to a trailer and then faced into a conservation area. In that case it was accepted that the LPA would have been entitled to serve a s 215 Notice requiring the removal of the face ... because it harmed the amenity of the neighbouring land. *Berg* lends further support to this proposition when an application was made to replace an existing hoarding with another. The LPA accepted that "the amenity value (of the hoarding), or lack of it, lay to some extent with its colour and general appearance rather than any problem with the condition of the hoarding at the present time". That approach was not faulted during the judgment. At para 24 Supperstone J stated: "In my judgment, it is sufficient for visual disamenity to be established in order for a section 215 notice to be issued.”

20. The Judge then turned to what he called the factual merits. He set out what the Court found



- i) that, having regard to the BPG on the topic of “amenity”, the painting of the front elevation in red and white stripes did have an adverse effect on amenity. It harmed the uniformity of the buildings in South End and in the Conservation Area, referring in particular to the integrity of the area, with buildings painted in a limited range of neutral colours ([24]-[25];
  - ii) The Judge referred to the Conservation Area Proposal Statement, which bore out that comment, where it said that much of the charm and character of buildings in the Conservation Area comes from the visual integrity of the buildings and from the limited palette of colours, and that the majority of the exterior painting is white and should continue to be so, with the buildings benefiting from this relative uniformity;
  - iii) The Judge said that “ painting the house in garish stripes undermines this uniformity and is at odds with all other buildings in the (CA).” [27]. The Court also found the painting of the property to be disruptive of the townscape, with the eye being drawn to it when entering or being on the street. [28]. The Court considered that it made the building disproportionately tall and narrow [29]. The painting was “unsightly” and the court noted the use of that term in the BPG [30].
21. RBKC had also chosen to argue a case based on its duty under s 72 *LBCAA 1990*. That reads, insofar as is relevant
- “(1) In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.  
(2) The provisions referred to in subsection (1) are the Planning Acts and.....”
22. RBKC also referred the Judge to *E Northants DC v SSCLG* [2014] EWCA 137 at [29] about the considerable weight and attention being given to any harm caused to the Conservation Area. It also referred him to s 66 of the Act, which relates to the effect of development on Listed Buildings.
23. The Court stated that
- “ We accept therefore that this Notice is a manifestation of RBKC carrying out its statutory duty rather than imposing its personal taste.”
24. At [38] – [39] the Court stated that it rejected the Appellant’s submissions on this issue, and found that
- “as a matter of law the painting of the property is a matter that affects the condition of the land, and further that as a matter of fact, and in our judgment, the painting of the property in this way has adversely affected amenity. Bearing these matters in mind the appeal under s 217(1)(a) fails ”

25. The Court then turned to the appeal under s 217(1)(b). the Court accepted that the condition of the land had resulted from the carrying on of operations which were not in contravention of Part III of the *TCPA 1990*. It did so because, as noted above, the painting of a building by any application of colour is lawful development, being permitted under Class C2 of *GPDO* (although the Judge referred to its successor 2015/596)
26. The Court rejected the appeal on this ground. It accepted the RBKC submission that, if the Appellant were right, any appeal would always be successful where the condition of the land is the consequence of lawful operations. The Court agreed with the submission that if that were correct, the words “such that results in the ordinary course of events” would be otiose [43]. It accepted the RBKC argument based on the BPG.
27. The Court accepted the argument that the purpose of s 217 (1) (b) was to protect activities, such as pig farming, where a lawful use harmed amenity, and that use would ordinarily give rise to harm to amenity. This however was the painting of an exterior of a building which, in the vast majority of cases did not cause harm to amenity. {44}- [50].
28. The Court went on:
- 51 ”We accept that this is the correctly propounded test. The answer to the question" does the external painting of a building ordinarily result in amenity harm?" is 'NO'.
- 52 Accordingly we reject the arguments on this ground that have been advanced on behalf of the Appellant.
- 53 It follows that the appeal under (b) fails. Grounds (c) and (d) are no longer pursued under s 217(1). Accordingly this appeal fails on all grounds.
- 54 The Appellant has submitted that these proceedings could have been avoided by RBKC and that this issue ought to have been addressed by an article 4 direction. We accept the submissions made by Mr Parkinson in his Closing Notes. In the near half century that is the life of the KSCA no other property owner has seen fit to paint their property in a manner even approaching the vulgarity of these stripes. It was not therefore something that could be foreseen.
- 55 We accept the evidence given by Mr Wright on this topic. There was no basis for the issuing of an article 4 notice.
- 56 The requirement to paint the Property white will be with effect from 28 days of this judgment.”

(c ) ***Submissions of the parties***

29. After the submissions had been made, I invited Counsel’s written submissions on authority not cited to me, namely *Britt v. Buckinghamshire County Council* [1964] 1 QB 77 (CA). I shall include those further submissions in the appropriate context. I must observe at this stage that *Britt* may have a significant effect on the issue of the meaning of the term “*condition of the land*” in s 215.
30. Mr Paul Brown QC for the Claimant submitted as follows. He argued 3 Grounds:

### Ground 1

31. S 215 must be seen in context. *TCPA 1990* permits extensive permitted development rights without the need for prior application and approval. Had the Claimant applied for a Certificate of proposed lawful development under s 192 before painting the exterior, RBKC would have been obliged to grant it.. The effect of the RBKC approach is to prevent landowners from exercising those rights, and in a way which avoids the payment of compensation.
32. The effect of the Crown Court’s application of the law is to enable LPAs to use s 215 to require the removal of works which may involve considerable expenditure. GPDO rights include altering or extending dwellinghouses (Part 1 Class A), the construction of ancillary buildings, enclosures and swimming pools (part 1 Class E), the erection of gates or walls (Part 2 Class A), change of use to a school or nursery (part 3, Classes S and T) use of land for motor racing for 14 days (Part 4, Class B).
33. The *TCPA* contains a range of powers enabling LPAs to alter existing planning permissions, to remove or alter buildings or cause uses to cease. All carry with them the duty of the LPA to pay compensation for the loss of the rights thereby removed or altered, if done retrospectively (e.g. under s 102 *TCPA 1990*). The powers under Art 4 *GPDO 1995*, and s 97 *TCPA 1990* (revocation or modification if an extant permission) are prospective. The duty to compensate for loss of rights relating to existing buildings and uses is consistent with Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Freedoms, which is a Convention Right under s 11(1)(b) of the *Human Rights Act 1998*. The effect of the RBKC approach to s 215 is to allow an LPA to intervene after the exercise of permitted development rights on the basis of the LPA’s own assessment of whether it likes the result. It is inconsistent with the regime of *TCPA 1990* to construe s 215 in a manner which enables an LPA to sidestep the compensation provisions. That approach to s 215 was supported by Leggatt J in *R (Allsop) v Derbyshire Dales DC* [2012] EWHC 3562 (Admin) at [27]- [28].
34. It follows that the Court’s interpretation of s 215 (and acceptance of the RBKC position) is to interpret and apply s 215 in a way which is not consistent with the principles of the Planning Code. The section is not intended to be a substitute for the powers of enforcement or discontinuance, nor to act as a retrospective form of Article 4 direction or s 97 notice.

### Ground 2

35. In s 215 “the condition of the land” should be taken as referring to the state of maintenance of the land. The section is headed “Power to require proper maintenance of the land”. In normal parlance one would talk of the condition of the building as relating to the state of repair, and not as relating to the choice of colour scheme, nor whether that scheme was attractive or unattractive. One might use the word “condition” in the context of paintwork to describe its state (e.g. whether new and pristine or old and flaking), but “condition” whether “good” or “bad” would never be applied to the subjective response to the choice of colour or colours. RICS guidance is to the same effect. The BPG of 2005 is to the same effect. It is directed to buildings in disrepair or neglected land; see page 59 and the case studies at pages 65-71.

36. Views may differ, and be held strongly, about the attractiveness of buildings (such as some prominent new buildings on the London skyline). That is a different question from their condition, and it would be absurd to imagine using s 215 where the dispute is about the choice of colour scheme or their appearance rather than the condition of the fabric.
37. The Crown Court's (and RBKC's) reliance on *Berg v Salford City Council* [2013] EWHC 2599 is misplaced. That concerned the issue of whether the requirements of a s 215 notice could be directed to achieving alterations or improvements which went beyond mere maintenance. Supperstone J there pointed out ([21]) that it can be impossible to differentiate between repair and improvement, and that repair inevitably leads to improvement. In any event the evidence in *Berg* showed that it related to a building which was dilapidated, in poor repair and needed maintenance. In any event *Berg* is not a reasoned decision for the proposition that a building in good repair, where the works in issue have planning permission, can be the subject of a s 215 Notice.
38. So far as *Britt v. Buckinghamshire County Council* [1964] 1 QB 77 is concerned, Mr Brown submits that
- i) *Britt* does not fundamentally alter the arguments already advanced in the Claimant's skeleton argument;
  - ii) The main issue in *Britt* was whether section 33 of the *TCPA 1947* (now section 215 of the 1990 Act) "only applies to a case where the injury to amenity results from the condition of the land as opposed to the use to which land is put", and whether it was correct that "regard could only be had to what one counsel described as the inactive condition and not to the active condition brought about by use": see Sellers LJ at p. 85.
  - iii) The Court of Appeal concluded that section 33 was not so limited. The central conclusion in the case is that "a use, as well as a non-use, can be prohibited under section [33]": see Harman LJ @ p. 88, Pearson LJ @ 91.
  - iv) This is a fundamentally different point from that which arises in the present case. The Claimant accepts that section 215 could be relied upon in cases where there has been activity as well as inactivity – e.g. harm to amenity which arises from positive activity (e.g. bringing scrap vehicles on to land). The deposition of demolition material on land which is shown in the case study in the BPG at [183] may be another. However, that is quite different from the questions
    - a) whether section 215 can be used where planning permission exists for the very thing against which complaint is made. Neither in *Britt*, nor in the case of a rusting car in a front garden, nor in the case study in the BPG could it be said that planning permission had been granted for the activity which was the subject of the notice;
    - b) whether the "condition" of land includes purely aesthetic matters such as the colour of a building. The decision in *Britt* does not deal with this at all.

- v) The Claimant notes the observations of Sellers and Pearson LJ about the relevance of the sidenote (now the heading of s. 215) “power to require proper maintenance of land”. Those comments must now be read in the light of the decision of the House of Lords in *R v. Montila* [2004] UKHL 50, paras 31-37, where their Lordships observed that many of the older authorities on the relevance of headnotes were “out of keeping with the modern approach to the interpretation of statutes and statutory instruments” (para 33); that headings and side notes are “part of the contextual scene”; and that there is no logical reason why they should be treated any differently to the explanatory note in identifying the mischief which the legislation is attempting to remedy (paras 35-36).
- vi) The Claimant accepts that the heading cannot be used to override the words used in s 215, but that is not what is suggested in this case. Rather, the Claimant submits that the headnote is relevant when the Court comes to consider what is meant by the word “condition”. Even if s 215 is not restricted to cases of pure maintenance, the heading is a useful indicator of the kind of mischief which section 215 is intended to cover.
- vii) The Court of Appeal in *Britt* clearly did not consider the case before them was one involving the “maintenance” of land. Similarly, a building which has been defaced with graffiti is not consequently in disrepair. To that extent, the Claimant accepts that the scope of s. 215 may be broader than cases of pure “maintenance” or “repair”. However, *Britt* is very different from a case where section 215 is used in respect of buildings or land which are generally in good order, where the effect of the notice is to reverse or subvert development which has been carried out pursuant to an express grant of planning permission, and where the only justification advanced for the notice is a purely aesthetic judgment about a matter such as colour.
- viii) The distinction drawn above is supported by the penultimate paragraph of the judgment of Sellers LJ where, at p. 86, he said (emphasis added):

“If there had been on the facts of this case a use established for which permission had been granted under this Part of the Act, then that would have been an answer to the notice which was given, but without that – and it was not contended that there was such a permission granted – I think this case must fail.”

- 39. The present case is one in which permission has been granted, and where the development which is the subject of the s. 215 notice results directly from the implementation of that permission. That is a complete answer to the notice which was given.

### Ground 3

- 40. The test is not whether the amenity harm arises in the ordinary course of events from lawful operations or user, but whether the condition of the land does so. RBKC argue that some uses (e.g. pig farming) or operations automatically and inevitably cause harm to amenity. That is not so. The *GPDO* Part 6 Class A requires a 400

metre gap between buildings for livestock and dwellings. It follows that harm to amenity is not automatic in such cases.

41. Most *GPDO* permitted developments have the potential to cause harm to amenity, whether visually, aurally or otherwise. The RBKC approach to s 215 gives it a power to remove the exercise of such permitted rights without compensation.
42. S 217(1)(b) applies not just to permitted development, but also to the full range of permissions granted under *TCPA 1990* and to existing buildings (unless erected unlawfully) and uses (unless unlawful). The test that the condition “results in the ordinary course of events” must be read together with the nature of the permission granted. Many permissions will be one off or bespoke, and thus an “ordinary” exercise of the permission will be difficult to identify. For example Class 2 part 2 permits painting in “any colour.” The *GPDO* could have, but did not, restrict the execution of that permission. It could have required the matching of neighbouring properties, or one which did not materially alter the appearance of the building, but it had chosen not to do so.
43. If one grants householders the right to paint the building in any colour, then it could ordinarily be anticipated that some might choose to do so in a distinctive way. That does not render s 215 redundant, contrary to the Crown Court’s conclusion ([43]) but simply limits the section to its proper purpose, which is the maintenance of derelict, dilapidated or neglected premises.
44. Mr Andrew Parkinson for RBKC submitted as follows. He started with Ground 2.

Ground 2

45. “Condition” is not defined in *TCPA 1990*. It must therefore be given its ordinary meaning. The dictionary definition (OED) is “the state of something with regard to its appearance, quality, or working order” so that the phrase “condition of the land” simply means “the state of the land,” which includes its appearance. There is no basis for restricting it to mean the “state of maintenance of the land.”
46. The heading of the section should be given little weight- see *Bennion on Statutory Interpretation* 6<sup>th</sup> Edition p 694 at [255]. He also referred to *Britt* at p 85-6 per Sellers LJ and p 93-4 per Pearson LJ, for a submission that the sidenote to the section was unreliable and inconsistent with the precise wording of the section itself, and was of no assistance in interpreting the section. Attention is drawn to the heading of the Chapter in which s 215 appears “Land adversely affecting amenity of neighbourhood.”
47. The correct interpretation of s 215 was resolved by *Berg* where the court rejected exactly the argument being advanced by the Claimant. The Court there was dealing with a case stated which asked the question whether s 215 could be used in whole or in part to effect improvements or alterations which go beyond “literal maintenance”, such as repainting, *where there was no ongoing or current maintenance issue*. (His emphasis). The LPA argued that land may have an adverse effect on the area without there necessarily being a current maintenance issue, which Supperstone J accepted ([23]-[27])

48. In *Berg*, the notice sought the replacement of a hoarding in three sections by a hoarding of one section. The LPA there accepted that the effect on amenity arose from its colour and general appearance rather than any problem with its condition. *Berg* shows that a state of disrepair is not required for a notice to be upheld.
49. The Claimant's interpretation would have the bizarre consequence that s 215 could not be used to deal with graffiti if the paint beneath the graffiti was in good repair.
50. In *Allsop* it was accepted that a "lurid face" painted on a trailer facing a conservation area could be removed because it harmed the amenity of the neighbouring land ([21]). There is no difference between that and the painting of stripes. In *Berg* Supperstone J held at [24] that it was "sufficient for disamenity to be established in order for a s 215 Notice to be served." ([24]). That approach is consistent with the BPG, which describes s 215 Notices as providing an effective mechanism for tackling unsightly land.
51. *Britt* supports the LPA position. There, land was being used for the buying and selling of old motor vehicles, without planning permission. The Notice was directed to the removal of the vehicles and components. It was argued by the owner that the predecessor of s 215 (s 33(1) *TCPA 1947*) could only be used where the injury to amenity resulted from the condition of the land, and not from its use. S 33(1) allowed service where the amenity of the area was affected by the condition of the land (albeit that under the then legislation "serious injury" to amenity had to be shown, and it applied only to gardens, vacant sites, or other open land). A defence equivalent to that in s 217 (1) (b) *TCPA 1990* was provided, albeit in Regulations rather than in the Act. *Britt* is binding authority that that a section 215 notice can be used in situations where the condition of the land is not the result of poor maintenance or disrepair, including situations where (as here) the condition of the land is the consequence of a particular use or operation (subject, of course, to the potential defence under section 217(1)(b)).
52. Many of the Claimant's arguments here were those made in *Britt* and rejected- for example those relating to other provisions which entitle an LPA to bring a use to an end but pay compensation, and the heading of the section.
53. *Britt* establishes that what matters is the condition, now how it came about, and whether through activity or inactivity (per Sellers LJ at 85, Harman LJ at 88, Pearson LJ at 90). One could not depart from the words of the section because the landowner would be required to cease uses which had acquired immunity from enforcement (per Harman LJ at 88)
54. Applying that reasoning to section 215, it is plain that, contrary to the Claimant's submissions, a notice can be served even where the condition of the land is not the consequence of neglect or poor maintenance. It can also be served where the condition of the land is the consequence of uses and operations, or – put simply – the consequence of positive action by the landowner. As set out in *Britt*, that is the consequence of the ordinary meaning of the words used in the section; it is reinforced by the ground of appeal (now in section 217(1)(b)), which makes clear that in certain circumstances a section 215 notice can be used where the condition of the land is attributable to uses and operations; and it does not harm the overall

statutory scheme – as Pearson LJ put it, it is “most astonishing” to argue that “the man who is told to abate an eye-sore ought to be compensated for it”.

55. There is no difference in law between the eyesore in *Britt* and what the Crown Court found as a matter of fact was the eye sore created by the red and white stripes in this case. S 215 is not limited to cases of neglect and disrepair.
56. It is accepted that at page 86 Sellers LJ noted that “If there had been on the facts of this case a use established for which permission had been granted under this Part of the Act, then that would have been an answer to the notice which was given” but he gave no explanation for that.

### Ground 3

57. The Claimant has accepted that a s215 Notice can be served even if there is no breach of planning control. It follows that a s 215 Notice can be served in relation to lawful operational development, unless the second part of s 217(1) (b) is satisfied- i.e that the condition of the land results in the ordinary course of events from (in a case such as this) operations permitted under Part III of *TCPA 1990*. That provision has been deliberately and carefully drafted. It cannot be enough to show that the development was lawful.
58. If a s215 Notice could not extend to cases where there was no breach of planning control, it would be redundant given the existence of ss 172(1) and 173 which enable an enforcement notice to be served so as to address issues of amenity. It follows that Parliament envisaged the use of s 215 Notices being directed in some cases to lawful development, without payment of compensation.
59. Addressing the issue of “ *such that results in the ordinary course of events*” it is submitted that the Crown Court asked itself “ *does the external painting of a property ordinarily result in amenity harm ?*” It approached it as per [45]-[52] of the judgment.
  - a) Ground (b) only applies where the condition of the land adversely affects amenity;
  - b) Some lawful operations and uses will ordinarily result in harm to amenity- e.g agricultural uses can smell offensive or scaffolding can be unsightly ;
  - c) Such harm is a function of the use or operation, which results “in the ordinary course of events” from the lawful use;
  - d) the purpose of the ground of appeal is to protect landowners in those circumstances from being required to clean up and tidy their land under s 215 notice where amenity harm is the ordinary consequence of the lawful operation;
60. The test of what results in the ordinary course of events is not the condition of the land, but the harm to amenity, contrary to the Claimant’s arguments. A s 215 Notice can only be served if there is harm to amenity. That being so, the Crown Court’s reasoning is unimpeachable.



61. The Crown Court's finding that the harm to amenity caused by the painting in stripes did not result in the ordinary course of events and that there is no connection between the harm caused here and the exercise of the permitted development right are findings of fact which have not been challenged.
62. There was thus no error of law.
63. The Claimant's suggested test of what could be "anticipated" is misconceived
  - i) It has no discernible justification in policy;
  - ii) It is hard, if not impossible, to conceive of a situation where the particular exercise of rights could not be anticipated;

It is arbitrary to ask whether something could be "anticipated." It is a vague and subjective question.

#### Ground 1

64. Parliament has decided that, the application of a s 215 Notice should not attract compensation. It is understandable that that is so when harm to amenity is caused and it is not the ordinary consequence of development being permitted.
65. In the case of many permitted developments, some harm to amenity can be expected to occur (e.g the erection of a fence in a way which affects daylight). The purpose of this development was to cause harm to amenity.
66. Rights under A1PI are protected, because the effect of s 217(1)(c) is to apply proportionality.
67. Other examples exist in *TCPA 1990* of steps which may be taken to limit a landowner's rights- e.g. completion notices.
68. There is nothing unusual with having an overlap of powers in the *TCPA 1990* – e.g. whether to issue an enforcement notice under s 172, or a breach of condition notice under s 187A.

#### **(d) *The Planning Code, including Control over Development and Special Controls***

69. The *TCPA 1990* and related Acts (e.g. the *LBCAA 1990*) constitute the "Planning Acts" (*TCPA 1990* s 336(1)). *TCPA 1990* is the "principal Act"- see *LBCAA1990* s 91(1). They constitute the Planning Code, as described by Lord Scarman in *Pioneer Aggregates (UK) Ltd v The Secretary of State for the Environment* [1985] 1 AC 132 HL As he made clear, it is a comprehensive code. The issue before the House of Lords was whether it was possible for a planning permission to be abandoned by conduct. Lord Scarman (with whom the other members of the Appellate Committee agreed) held that there was no such general principle of abandonment in planning law, but in doing so he addressed the wider question of how one treats issues dealt with by the Planning Code. At page 140 Lord Scarman said this:

"Planning control is the creature of statute. It is an imposition in the public interest of restrictions upon private rights of ownership of land. The public

character of the law relating to planning control has been recognised by the House in *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578. It is a field of law in which the courts should not introduce principles or rules derived from private law unless it be expressly authorised by Parliament or necessary in order to give effect to the purpose of the legislation. The planning law, though a comprehensive code imposed in the public interest, is, of course, based on the land law. Where the code is silent or ambiguous, resort to the principles of the private law (especially property and contract law) may be necessary so that the courts may resolve difficulties by application of common law or equitable principles. But such cases will be exceptional. And, if the statute law covers the situation, it will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely because they may appear to achieve a fairer solution to the problem being considered. As ever in the field of statute law it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute, or statutory code, considered as a whole.

70. The second starting point is borne out by that passage as well. Subject to the restrictions imposed by the planning code (and any other relevant legislation or legal principle), the citizen is able to do anything, unless specifically restrained by law from doing so, whereas the state and its organs (such as RBKC) are only permitted to do something, including the restraint of activities of citizens, if expressly permitted to do so.
71. It is necessary to understand something about the operation of development control under Part III of *TCPA 1990*. Under s 55 *TCPA 1990*, planning permission is required for “development”- i.e. the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. While planning permission is required for acts of development, including material changes of use and building operations (ss 55 and 57 *TCPA 1990*), some planning permissions are granted by General Development Order for various types of development: see ss 59-61 *TCPA 1990*. They are specified in the *GPDO 1995* (since 15<sup>th</sup> April 2015 *GPDO 2015*).
72. The painting in question here occurred while the *GPDO 1995* was still in force.
73. If a local planning authority wish to restrict the availability of permitted development rights (such as repainting), it may make a direction under Article 4 of the *GPDO*. The making of an Order carries a right to compensation (s 107-8 *TCPA 1990*). The making of such an order affects the carrying out of development after its coming into force. It does not affect development that has already occurred. It is quite common for LPAs to make an Article 4 direction restricting the colours used for repainting. Plainly, a provision in an Article 4 direction directed to the colour of paint or the type of painting scheme is unlikely to generate any, or at any rate any significant claim for compensation.
74. Unlike the permitted development right in Schedule 2 part 2 Class C (the permitted development of painting), where no restrictions are imposed by the *GPDO*, in the case of some of the other rights, restrictions are placed upon them so that certain materials are excluded, or the appearance of the building in question must be similar

to its neighbours, or the design or external appearance must be submitted to and approved by the LPA. They include:

- i) Schedule 2 Part 1 Class A rights to enlarge, improve or alter a dwellinghouse:
    - a) in the case of Article 1(5) land, permitted development does not include cladding in stone, artificial stone, pebbledash, render, timber, plastic or tiles: see A.2(a)
    - b) Class A rights are subject to the condition that materials used in exterior work must be of a similar appearance to those used in the construction of the existing dwellinghouse: see A.3
  - ii) Schedule 2 Part 1 Class B rights to make an addition to or alter the roof of a dwelling are subject to the condition that materials used in exterior work must be of a similar appearance to those used in the construction of the existing dwellinghouse: B.2(a)
  - iii) Schedule 2 Part 6 Class A rights for the erection, extension or alteration of an agricultural building are subject to application to the LPA for a determination whether prior approval is required, inter alia for the design and external appearance of the building: see A.2(2)d(i) (and see B.6 for similar requirements under Class B).
  - iv) Schedule 2, Part 8 Class A rights for the erection, extension or alteration of an industrial building are subject to Condition A.2(d), which requires the materials to have a similar external appearance to those used for the existing industrial building or warehouse.
  - v) Schedule 2, Part 32 Class A rights for the erection, extension or alteration of a school, college, university or hospital building are subject to conditions A.2(c) and (d), which require any new building/extension to be constructed using materials which have a “similar external appearance” to those used for the original buildings/the building being extended.
  - vi) Schedule 2, Part 42 Class A rights for the extension or alteration of a shop are, in the case of article 1(5) land, subject to condition A.2(b), which requires the materials to have a similar external appearance to those used for the building being extended.
75. Some uses may change without that constituting development (i.e. as permitted under the *Town and Country Planning (Use Classes) Order 1987* whereas some other changes of use, while potentially material and thus constituting development, are permitted under *GPDO 1995*.
76. Under s 97 *TCPA 1990* an LPA can issue a notice revoking or modifying a planning permission. However it cannot be used to remove works already carried out, or to revoke permission for a change of use which has already taken place. Compensation is payable under s 115 *TCPA 1990* for depreciation in the value of an interest, disturbance and expenses incurred in carrying out works in compliance with the notice.

77. By section 102 *TCPA 1990*, the LPA can require the discontinuance of a use, or the application of conditions to it, or the alteration or removal of buildings, or apply conditions to the use of them. That power may be exercised if the LPA, having regard to the development plan and to any other material considerations, consider that it is expedient in the interests of the proper planning of the area (including the interests of amenity). Compensation is payable: s 115 *TCPA 1990*.
78. The carrying out of development in breach of planning control (including breach of a conditions attached to a planning permission) is addressed in Part VII. It is to be observed that if an LPA has served an enforcement notice requiring an activity to cease, it may also seek by Stop Notice to prevent the carrying on of that activity before the time for compliance with the notice has expired (which includes the time for any appeal to be determined) – see s 183 *TCPA 1990*. If it does so, and the Enforcement Notice is then quashed on the basis (among others) that the use was lawful, then compensation is payable- see s 186 *TCPA 1990*.
79. It will be observed from the above that if a lawful use subsists, or a building exists, or if a planning permission is granted for development (whether expressly or by the exercise of *GPDO* rights) then removal of the building or discontinuance of the use can only be effected by the LPA if it accepts a liability to compensate. Permissions or existing use rights can only be revoked or modified if compensation is paid. Existing buildings which were not erected unlawfully can only be removed or altered if compensation is paid. Uses or operations whose lawfulness is in issue can only be prevented from occurring under a Stop Notice which carries a concomitant duty to compensate if the related enforcement notice fails. Similarly, rights given by the *GPDO* can only be removed by a direction which also involves the right to compensation. That is the price which Parliament has decided should be paid for the deprivation of rights otherwise extended to an occupier of land.
80. Given the emphasis placed on the Conservation Area (CA) aspect of the matter by RBKC and by the Crown Court, it is necessary to refer to controls which apply there. By s 69 *LBCAA 1990*
- “(1) Every local planning authority—
- a) shall from time to time determine which parts of their area are areas of special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance, and
- b) shall designate those areas as conservation areas.”
- c)
81. The effect of designation is to apply some further controls:
- i) the felling, lopping etc of trees requires consent; (*TCPA 1990* S 211-214;
- ii) restrictions are placed on the exercise of some permitted development rights, by its designation as article 2(3) land under the *GPDO*.; No restrictions are placed thus on the permitted development right of painting under Schedule 2 part 2 Class C. It is to be noted that many rights remain;

- iii) if, but only if, an Article 4(1) direction is made, one or more permitted development rights can be withdrawn (see above).

*(e) Discussion and Conclusions*

82. In my view the starting point for this case is to recognise that we are here dealing with a comprehensive code addressing development control. I have referred above to the seminal words of Lord Scarman in *Pioneer Aggregates*, and especially the last part of the passage cited above

“ And, if the statute law covers the situation, it will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely because they may appear to achieve a fairer solution to the problem being considered. As ever in the field of statute law it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute, or statutory code, considered as a whole.”

83. In the planning code, subject to some special cases, no distinction is drawn between the aesthetics of one kind of development over another. Aesthetics and value judgements are properly brought into play as in the case of Listed Buildings and Conservation Areas, but only in particular contexts. In the case of the former, the effect of proposed development on the setting of a listed building is always important when a decision is being made about development, or in some other case where a planning function is being exercised (see s 66 *LBCAA 1990*). In the case of Conservation Areas, s 72 enjoins local planning authorities, when exercising their planning functions, to pay special attention to the desirability of preserving or enhancing the character or appearance of that area. It is to be noted again that that duty is limited in this context to its planning functions. The grant of permission by Class C2 of the GPDO is not such a function.

84. Of course, a decision may be made to grant or refuse a planning application under s 70 *TCPA 1990* on the grounds of the effect of the development on the amenities of the area. But that is a different matter from the terms or application of the Code.

85. I turn now to the terms of Section 215. It applies generally. Its *interpretation* is not referable to, or affected by, the fact that a building in issue falls within a Conservation Area. However, the nature of the surrounding area may be relevant to its *application*, as consideration of the effects of amenity inevitably involves considering the effect of the condition of the land on its surroundings (land includes a building- see s 336(1) *TCPA 1990*) . However in that context, in my judgment it is impermissible for a Magistrates’ or Crown Court sitting on an appeal to take account of the terms of planning policies or of the reason for the designation of the Conservation Area. It could receive evidence of the fact that a building was listed (and the reasons for listing in the register) or the fact that a building was in a Conservation Area. But the task for the Crown Court here was to form its view, not to investigate or consider the interpretation or application of policies. A Magistrates’ Court or a Crown Court is not the appropriate forum to determine such issues. Had such planning merits been relevant, one would have expected the appellate route in the legislation to have been to the Secretary of State or his Inspectors, as it is in (for example) the case of refusal of planning permission. Their concern is to look at the facts.

86. The origin of s 215 lay in s 65 of the *TCPA 1971*, and before that the *TCPA 1947*, which was limited to cases where the amenity of their or an adjoining area, was seriously injured by the condition of any garden, vacant site, or other open land in their area.” The definition is now more broadly drawn, but is still limited to cases where the condition of the land (or therefore building) adversely affects the character of the area.
87. What is meant by “condition of the land?” In my judgment, one must be careful to avoid a catch all definition that exceeds the proper bounds of the power. The context of s 215 is to deal with land or buildings whose condition, in the usual sense of that word, is such as to cause an adverse effect on amenity. Given the terms of the Planning Code, one would expect that is that it is not designed to deal with questions of aesthetics or taste, nor to exercise a control over development which affects the choice of exterior finish in a way which should be dealt with under Article 4 of the GPDO with the corresponding right to compensation. *Berg v Salford City Council* [2013] EWHC 2599, relied on in the Crown Court, does not concern such a principle. Supperstone J was asked to consider a property, where he accepted the evidence of the Council that it was “dilapidated”- see [24]- [27]. I do not read his judgement as supporting the argument that a local planning authority has the right to use s 215 to deal with a choice of finish which it dislikes.
88. More significant is the Court of Appeal authority of *Britt*. Before turning to what the Court said there, it is right to observe that it was decided within 8 years of the *TCPA 1947* coming into force. Uses had immunity from enforcement if carried on before the appointed day of 1<sup>st</sup> July 1948 (s 23 (1)) or for more than four years (before the date of the Notice). While the period for the immunity of development consisting of an unlawful change of use was extended to 10 years by later legislation, development which was immune from enforcement was none the less unlawful (see *LTSS Print and Supply Services Ltd v Hackney London Borough Council* [1976] QB 663). That is no longer the law, as a result of the extensive review conducted by Lord Carnwath (as he now is) whose 1989 Report led to the changes to the enforcement provisions in the *TCPA 1990*, for now a landowner may obtain a certificate of lawful use or development if it is now immune from enforcement- see s 191 *TCPA 1990*.
89. *Britt* concerned land used for the storage of vehicles. The headnote reads:
- In 1946 the plaintiff, a general dealer, bought a piece of agricultural land situated in a rural area and brought on to it his stock which consisted at that time of six motor vehicles, some tons of vehicle parts and other articles, all of which he deposited on the land. He carried on farming activities for some time but by 1957 his main activity had become the buying and selling of old motor vehicles and his business expanded to such an extent that at the time of this action the land was covered with hundreds of closely packed vehicles and their components. No planning permission for that development was ever sought. In 1958 the defendants, as planning authority, served a notice under section 33 (1) of the Town and Country Planning Act, 1947, [11] declaring that the amenity of part of their area was seriously injured by the unsightly disorderly condition of the land and requiring the plaintiff to remove the old motor vehicles and components with which it was covered. In an action for a declaration that the notice was void and of no effect, the plaintiff contended that the planning authority was entitled to

proceed under section 33 only where the injury to amenity resulted from the condition of the land as opposed to the use to which it was put, and that steps to determine a use must be taken under the appropriate sections of the Act:

90. One may observe at once that the facts of the case reveal some particular features;
- i) the complaint was of the use of the land, not by reason of anything to do with the state of the land as such, but to do with its use;
  - ii) the use for vehicle storage had been carried on since before the appointed day, but there had been at the least a mixed use until 1957;
  - iii) given the fact that there was a material change of use by 1957, an enforcement notice could have been issued.
91. The Court (Sellers, Harman and Pearson LJJ) dismissed an appeal against the refusal of Widgery J to quash the Notice. At 85-6 Sellers LJ said

“The contention which was advanced before us was that .....section 33 only applies “to a case where the injury to amenity results from the condition of the land as opposed to the use to which land is put, and that where the injury is a necessary result of the particular use to which the land is put the planning authority must take steps to determine that use under the earlier provisions of the Act (paying compensation in appropriate cases) and cannot proceed under section 33.”

What was submitted was that regard could only be had to what one of the counsel described as the inactive condition and not to the active condition brought about by the use. In construing this .....the words of section 33 read in their ordinary meaning do not limit the word “condition” in any way. In its ordinary meaning the “condition” would be the state in which it was, irrespective of how it was brought about, “the condition of any garden, vacant site or other open land in their area.” If there were any doubt as to that I think that is resolved in looking at the modification brought about by the regulation, which contemplates that operations or use may seriously injure amenities

Attention was drawn to the sidenote, “Power to require proper maintenance of waste land.” This is a case, I think, which demonstrates how unreliable it would be, even if permissible, to pay attention to the sidenote. It seems to me to be inconsistent with the precise wording of the section itself, to which the word “maintenance” is inappropriate.....

.....it was said that the power under section 33 ought not to be exercised because it was in effect using section 33 to terminate the user of part of the land which had acquired rights which could not be interfered with, and to do so without compensation.

It appears that before the passing of the Act of 1947 the plaintiff had for some years (as the judgment of Widgery J. shows) used this area of otherwise peaceful and attractive agricultural land in the heart of Buckinghamshire to carry on a business of a somewhat strange character. He leaves there, apparently for a very

long time, a collection of old motor vehicles, damaged and beyond use, taking part of one to make up another, and so forth. There is no question, on the facts of this case, as the planning authority thought and as the judge also upheld, indeed as the plaintiff's counsel had to admit, that the whole of this area is rightly described as an "eye-sore." It infringes the provisions of section 33 in that it seriously injures the amenities of that locality. In those circumstances the order was rightly made. No other objection is made to this particular notice; the only objection is that it is not within the power of the authority to make it because it would interfere with an established right which was beyond the control of the other section of the Act. It seems to me that that is not a tenable argument. If there had been on the facts of this case a use established for which permission had been granted under this Part of the Act, then that would have been an answer to the notice which was given, but without that — and it was not contended that there was such a permission granted — I think this case must fail, the judge came to the right conclusion, the notice was good and full effect should be given to it."

92. Harman LJ started his judgment by delivering himself of his dislike of Planning Law in practice, expressed in colourful terms. He addressed both the state of the law and of the site in colourful terms. He went on at page 87:

"It has never seemed to me that there was any merit in the contention that in some way or other a limitation had to be put on the words of this section — which exactly fit, on the face of them, the state of things which was to be found here. Some limitation (it was said) had to be put upon them because the "Control of Development" sections, which begin with section 23, formed a kind of code, and as in the earlier ones you found a scheme for preventing various users of land and for stopping abuses which were not allowed by the planning authority and giving compensation to those whose rights were taken away, you must not, by having recourse to section 33, take a short cut and get away from all those and simply say: "This is an eye-sore: it is doing serious injury to the amenity of the countryside: abate it."

It is said that the man who is told to abate an eye-sore ought to be compensated for it. That seems to me to be a most astonishing doctrine, I must say. I can see no reason why this man, who has for years made the country hideous by his goings-on, should not be made to put his house in order, and no reason at all why he should be paid by the public for doing it....."

93. Pearson LJ said, at page 90

"Section 33 has already been read and I need not repeat it. I would entirely concur with what has already been said, that on the wording of that section, taken by itself without any extraneous aid to construction, quite plainly the words "seriously injured by the condition of any garden, vacant site or other open land in their area" must refer to the actual condition, however it may have been caused. Whether it results from inactivity or whether it results from some activity, it is nevertheless "the condition" of the land. Therefore the natural and ordinary meaning of the words is in favour of the decision which the judge has given"

He too discounted the value of the sidenote to the section.



94. One is bound to remark that *Britt* is very much a case decided in the early days of the application and interpretation of planning law. Notably, it precedes Lord Scarman's important opinion in *Pioneer Aggregates* about seeing the importance of the Planning Acts as a code. In that context, Harman LJ's distaste for the concept of a code, and for the protection it would give to those who owned or occupied land, must fall away. One must also observe that if the current Planning Code had applied, then if his use was immune, Mr Britt could and no doubt would have obtained a certificate of lawful use, and if it was not immune then the LPA could have issued an enforcement notice. No compensation would have been payable in either case.
95. I regard the views of the Court of Appeal rejecting the argument that it was wrong to serve a notice given the terms of the Planning Acts as having been overtaken by events, but there is no avoiding the fact that it held that the words "condition of the land" refer to more than the intrinsic state of the land itself.
96. For this is not a case about use, but about the fabric of the building itself. It follows that Mr Parkinson's pursuit of the "active/inactive" argument does not assist much. It must follow from s 215, and is consistent with the Court's approach in *Britt*, that "condition" includes appearance. But there is nothing surprising about that, as the section is concerned with the condition of the land affecting amenity. One such way (but not the only one) would be by reason of its appearance. A dilapidated and unkempt building (like that in *Berg*) undoubtedly falls within the purview of s 215 for that reason alone, whatever other harm its condition may do to amenity.
97. In this case the complaint of the authority is not that the use of the land is unacceptable, nor that the fabric of the building is in any way out of repair or in need of maintenance. Its case is not that the building has not been painted, or painted insufficiently to coat the plaster or brickwork properly, but that it has been painted all too well. Is it proper to use a s 215 notice where the complaint is not of lack of maintenance or repair, but of aesthetics ?
98. I was referred by counsel to what was said in the heading of the section, and what was said in BPG. I deal first with the heading or side note. Since *Britt* the House of Lords has issued definitive guidance on the use of such material in *R v Montila* [2004] UKHL 50, [2004] 1 WLR 3141 [2005] 1 All ER 113 at [31]-[37] per Lord Hope of Craighead giving the Opinion of the Appellate Committee. I refer in particular to Lord Hope at [34] and [36]

"34 The question then is whether headings and sidenotes, although unamendable, can be considered in construing a provision in an Act of Parliament. Account must, of course, be taken of the fact that these components were included in the Bill not for debate but for ease of reference. This indicates that less weight can be attached to them than to the parts of the Act that are open for consideration and debate in Parliament. But it is another matter to be required by a rule of law to disregard them altogether. One cannot ignore the fact that the headings and sidenotes are included on the face of the Bill throughout its passage through the legislature. They are there for guidance. They provide the context for an examination of those parts of the Bill that are open for debate. Subject, of course, to the fact that they are unamendable, they ought to be open to consideration as part of the enactment when it reaches the statute book.

35.....

36 The headings and sidenotes are as much part of the contextual scene as these materials, and there is no logical reason why they should be treated differently. That the law has moved in this direction should occasion no surprise. As Lord Steyn said in that case, at p 2958, the starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used.”

- 99. .I therefore consider the heading here. It cannot be doubted that “proper maintenance of land” is directed to the maintenance of the land, or in the case of a building, of its fabric. In my judgment, given that assistance, it is hard to see how one could criticise a building owner for a want of maintenance on the basis that s/he had chosen a colour scheme which was thought unattractive.
- 100. I get little assistance from the BPG. It is not appropriate to use a policy document to interpret legislation, and in any event there is nothing in it which assists on the interpretation point at issue here.
- 101. What affects the amenity of the area, and was found to do so by the Court, was the choice of colour scheme. That is, and is only, a matter of aesthetics. Parliament has not sought to prevent landowners, including those in Conservation Areas, from painting their houses in any colour or colours they wish, save and except if an Article 4 direction has been made. Parliament has determined, as part of the Planning Code, that compensation should be available if losses are caused by the making of an Article 4 direction.
- 102. In my judgement to allow a local planning authority to use s 215 to deal with questions of aesthetics, as opposed to disrepair or dilapidation (as in *Berg*) falls outside the intention and spirit of the Planning Code. An LPA has the power to limit permitted development rights or to discontinue lawful uses, but not without payment of compensation. But that is not to impose a great burden on an LPA, as can be seen from the facts of this case. Here, the RBKC had ample steps available to it under the Planning Code which would have protected amenity, and would have exposed it to minimal cost. Under section 102 it could have issued a notice requiring the repainting of the building. Were it upheld, the level of compensation would be the diminution of the interest in land (s 115 *TCPA 1990*). On the basis of its own case, that diminution in value must have been effectively nil. There would at worst be a claim for the cost of the repainting (s 115(3)).
- 103. I should refer also to the judgement of Leggatt J at first instance in *R(Allsop) v Derbyshire Dales DC* [2012] EWHC 3562 (Admin). The landowner had a farm, on which he kept a number of vehicles. On one (a silage trailer) was painted what was called a “lurid face.” The Crown Court upheld the Notice. Leggat J heard submissions on the basis of the Planning Code, and on the basis of the ground of appeal in s 217(1)(b). He did not determine the former, but upheld the ground of appeal under s 217(1)(b). I refer to paragraphs [26]-[28]

“26 I do not find it necessary to decide whether Part III of the Act is a comprehensive code for regulating the use of land such that a Section 215 notice can never be employed to require a particular use of land to cease. It may be the case that, as Mr Kimblin submitted, on a proper construction of the Act, in

circumstances where a use of land contravenes Part III of the Act, the only power which can properly be invoked is an enforcement notice rather than a Section 215 notice. It is not however necessary for me to decide that question as it is not suggested that in this case Mr Allsop was using the land in question in a way which contravened Part III. That situation therefore does not arise.

27 Mr Kimblin however also made a narrower submission as or as part of his third ground of appeal to the effect that where, as here, the land in question is not being used in a way which is said to contravene Part III, Section 215 is not to be construed as authorising the service of a notice under that section which requires the cessation of such lawful use. That conclusion does seem to me to follow from the express wording of Section 217 (1) (b). Put in terms of this case, the Section 215 notice, as varied by the Crown Court, required Mr Allsop to cease the use of the land for storage of vehicles and trailers bearing unorthodox livery. It is not however suggested that the use of the land for storage of vehicles and trailers bearing unorthodox livery is a use which contravenes Part III of the Act. On a fair reading of the notice it seems to me plain that the description of what Mr Allsop was required to do also defines the condition of the land about which complaint was made. It follows, in my view, that the condition of the land to which the notice relates is attributable to, and such as results in the ordinary course of events from, a use of land which is not in contravention of Part III.

28 I would add that Section 217 (1) (b) is also entirely consistent with the fact that the Act provides in Section 102 a different power which is applicable in circumstances where the relevant use of the land is lawful and it would, as it seems to me, cut across Section 102 - read in conjunction with Section 115 which provides for compensation where an order is made for a previously lawful use to be discontinued - if Section 215 could be construed in a way which allowed Section 215 to be used for such a purpose.”

104. While Leggatt J expressed no view on the Planning Code point, his approach to the use of s 102 *TCPA 1990* as the proper vehicle for addressing such a situation chimes with mine. At the conclusion of his judgement he quashed the Notice on the grounds that

“the Crown Court ought to have construed Section 215 as affording no power to the Secretary of State to issue a notice which required the cessation of a use of land which did not and was not said to contravene Part III of the Act” ([36])

The Notice had actually been issued by the LPA. The words “local planning authority” should, I suggest, be substituted for “Secretary of State.” I shall return to his judgement in the context of s 217 (1) (b).

105. I should two matters for completeness. Firstly, I have noted the Crown Court’s finding that the Claimant painted the house in stripes as a matter of pique. She may well have done, but s 215 does not entitle one to address the motive of a landowner. A garish (to use the judge’s phrase) colour scheme may have come about because of an owner’s eccentricity or because of his /her pique. The section does not apply any differently to the latter than it does to the former. Secondly, the effect of upholding this Notice will be to give a LPA power to cause buildings to be removed, altered or

repainted because the LPA (and Magistrates' or Crown Court on appeal) dislikes the appearance thus created, on grounds that relate only to aesthetics.

106. I am therefore of the view that it is an improper use of s 215 to use it to alter a lawful painting scheme, when there is no suggestion that there is any want of maintenance or repair in the land.
107. That would be enough to dispose of this application anyway, but there are other grounds.
108. I turn now to the ground relating to s 217(1)(b). Given the fact that painting is expressly permitted by the *GPDO*, the Defendant's argument (and the judge's approach) can only be upheld if the painting of building in a particular way can be said to fall outside the "ordinary course of events" as per s 217(1)(b).
109. Mr Parkinson interpreted 217(1)(b) as meaning that it only relates to cases where harm to amenity is the ordinary consequence of the lawful operation. That is not what the subsection says. S 217(1) permits an appeal on "*any of the following grounds.*" It may well be the case that this ground of appeal is usually taken with as an additional ground to (a), but that does not define its meaning.
110. One notes also that the question posed to the Crown Court, and answered by them at paragraph 51 of the judgment, namely

"We accept that this is the correctly propounded test. The answer to the question "does the external painting of a building ordinarily result in amenity harm?" is 'NO'.

is not a question relevant to s 217(1)(b). It is the *condition* that is the result one must consider, not whether it harms amenity.

111. I regard the discussion about what one may "expect" or "anticipate" as an unhelpful distraction. The "ordinary course of events" is not an exercise in expectation, anticipation or prediction, but simply in attribution, as the subsection makes clear. Even if this were such an exercise, given the fact that Class C2 permits painting "in any colour" the range of colours one could anticipate (or expect), and whether applied in a monochromatic manner or not, is patently very wide. It would certainly be impossible to restrict the ordinary course of events to the use of white paint, as RBKC insist on in the Notice.
112. Given the fact that Class C2 permits painting *in any colour*, it is very hard to see how a choice of colour other than white, or a colour scheme involving more than one colour, can fall outside the ordinary course of events. That is to strain the purport of s 217 (1)(b) to the ultimate. One of the reasons for that is that it is contrary to a coherent application of the Planning Acts to be able to prevent by one method that which is expressly permitted by another, save for those cases where compensation is payable. That is consistent with the approach of Leggatt J in *Allsop* at [26]-[28] as noted above.
113. Further, "course of events" is not a way of expressing legal consequence, but is a concept derived from factual causation. The former may be had regard to in

considering the latter, but its effect is not to define or confine it. Mr Parkinson's approach is to look at the former only. But the condition of land may indeed result from events. Suppose that one had a piece of land which formed part of a farm. Slurry kept by the farmer escapes its storage bund, and forms a pool of unsightly and pungent slurry in a position where its presence affects the amenity of the neighbourhood. The use of the land remains lawful, and the accidental release occurred within the exercise of that use, so there has been no breach of planning control, but the loss of containment and the pooling of the slurry are not attributable to the normal course of events. There, a s 215 Notice could be served, and s 217(1)(b) would provide no defence, because while the keeping of slurry was part of the lawful use, and therefore involved no breach of Part III, the condition was attributable to the loss of containment, which was not something which would occur in the ordinary course of events. .

114. Or to take another example, an industrialist occupies land and buildings for the purposes of his enterprise. On one part of that plot, he has chosen to store old machinery which has been used in the building but has now been replaced. It has accumulated over the years, and he has chosen to store the old machinery in a very substantial pile which towers over the adjoining road and can be seen from round about, and harms amenity. That would be a lawful use of land, but the condition of the storage area would not have occurred in the ordinary course of events.
115. Or consider, to take an unhappily more commonplace example, the situation where a farmer uses a field next to a footpath to store scrap agricultural trailers and vehicles. If it were a separate use on a separate planning unit, it would require planning permission, but if it lies within the overall planning unit, there has been no material change of use. In such cases it can be notoriously difficult to identify the point at which the use of the offending field has become a separate use. In such cases where a material change of use cannot be shown, it would certainly be arguable that the storage of scrap vehicles (which according to *Britt* affects the condition of the land) is not attributable in the ordinary course of events to the lawful agricultural use.
116. The analysis of the law set out above shows that RBKC could have used the powers it was given under the Planning Code, which protected the claimant's rights to compensation, albeit that it would be modest, without imposing a criminal liability if she fails to remove that which she had been permitted by law to apply. The problems which this s 215 Notice raises can be gauged from its requirements. It compels the landowner to have a white frontage, even though on the day after the building had been painted, the landowner could paint it in another colour pursuant to Class C2.
117. It follows that the Notice and the decision of the Crown Court should be quashed. I shall hear counsel on the question of the Order this Court should make, and on costs.