Enforcement notice served in respect of lean-to building—owner appealed to inspector submitting inter alia that the roof of the building had been constructed separately more than four years before the service of the notice and constituted repair work—inspector upheld enforcement notice—on appeal to High Court held the inspector's decision was wholly ambiguous on the question whether or not there were two or one operations of building work and therefore the reasoning did not reach the required standard—appeal allowed.

Worthy Fuel Injection Limited v. Secretary of State and Southampton City Council (Queen's Bench Division, Woolf J., July 23, 1982)*

An enforcement notice was served in respect of a lean-to building owned by the appellant. The appellant appealed against the notice and the appeal was heard by an inspector by way of written submissions. As part of his submission the appellant wrote: "The structure in question was originally an open fronted store with a lean-to roof and facing the inner yard area. The outer wall of the workshop adjoining the open fronted store contained a window which also looked on to the yard in question.

Some five years ago the roof of the adjoining single storey extension (which was also of a lean-to design) was removed and a new shallow pitched felt roof was substituted in lieu and this roof was extended to replace the lean-to roof over the open fronted door area. These operations were regarded as repair items and no planning consent was sought and indeed the operations were never challenged by the Authority. . . .

Later operations involved the removal of a window to form a door, the erection of a wall along the face of the lean-to to a height defined by the re-roofed area and the inclusion of two windows in that wall to provide daylight to the existing internal industrial area . . . in any event, part of the alleged works have been on site in excess of four years and are merely items of repair."

The inspector upheld the enforcement notice and said in his decision: "I will deal first with your claim that the roof of the present structure was put there as a result of repairing the former lean-to five years ago. The present appearance of the roof is that it is an integral part of the overall construction of the extension including its front wall. It is not suggested that the front wall was erected outside the four-year period and the whole structure must therefore be regarded, as a question of fact and degree, as having been finished within the four year period."

The appellant appealed to the High Court.

WOOLF J. said if the roof and the wall to which the inspector referred were completed within the four-year period in the course of a single operation, then it was not contested that the inspector would be entitled to uphold the enforcement notice. If, however, the inspector were to come to the conclusion that what had happened here was what was alleged by the appellant, that there were two operations, then the inspector would not have been entitled to come to that conclusion.

On behalf of the appellant, Mr. Purchas made two submissions with regard to the inspector's decision. First of all, he said the proper meaning of what the inspector was saying was that he had not considered the question as to whether or not there was one operation here or two operations. Alternatively, he submitted that the reasoning of the inspector was defective because it failed to disclose whether or not he considered that question, which was of fundamental importance to his case, and he submitted he was entitled to have reasons which would indicate that the matter was properly considered.

On behalf of the Council, Mr. Ash strenuously submitted that, it was implicit that the inspector was indicating that the conclusion to which he came was there was one single operation, and that the single operation was completed within the four-year period. He accepted that all the inspector referred to was the present appearance of the building.

However, he accepted that in deciding whether or not there has been one operation or two operations, it was the appearance of the building which was normally critical. If there had been two separate activities, first of all, the repairing of the roof, and later

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the construction of the wall, one would expect, that the building when viewed by an experienced inspector would indicate that situation. Therefore, the inspector's reference to the present appearance of the building was indicating that he, the inspector, deduced from that appearance that there had only been one operation. Frequently, that would undoubtedly be the case, that the appearance of the building was decisive, especially if the appearance indicated two separate operations. However, it was possible in the case of a structure of the sort under consideration here to first of all construct a roof and later to fill in that roof with walls so that as a result the whole looked like one integral building.

The inspector was required to come to a conclusion on that matter. Bearing in mind the material which was put before him, the inspector had a very difficult task if he wished to make a finding that this was one single operation without having had the opportunity of testing the evidence of the appellant. Be that as it may, he (Woolf J.) did not go as far as to say it would not be possible to determine that issue by the appearance of the building alone. However, he took into account the difficulty of performing that function in considering whether the reasoning of the inspector was adequate in this case.

He came to the conclusion that the reasoning did not come up to the required standard because the paragraph, which he had read, was wholly ambiguous as to whether or not the inspector, in fact, decided the important question as to whether there was one operation or two operations. The paragraph was capable of being read as indicating the inspector took the view that, because the walls were completed within the four-year period, the whole building had to be regarded as being one which was capable of being subject to enforcement, irrespective of the fact that the result which was now to be observed was the consequence of two operations.

This appeal had to be allowed and the matter had to go back to the Secretary of State for reconsideration by him.

Comment. In the Court of Appeal decision of *Thomas David (Porthcawl) Ltd.* v. *Penybont R.D.C.* [1972] 1 W.L.R. 1526, it was held that, where mining operations had commenced more than four years ago, it was still possible to take enforcement action. However all their Lordships made clear that it would be too late to take action against those specific mining operations which had taken place more than four years ago as they had gained protection under the four-year rule. Lord Denning stated "It is true that the developers go free in respect of the extractions which took place more than four years before the enforcement notice. No complaint can be made of them and no order for restoration could be made to put the earth back into them." Lord Denning then went on to state that mining operations were *sui generis* and that what he said related only to mining operations. Edmund Davies L.J. did not make this qualification specifically and Stephenson L.J. went out of his way to include building or engineering operations in his conclusion that the initiation of operations cannot be regarded as the date of the carrying out of the operations. This decision therefore leaves open the question of whether enforcement action can be taken against those parts of building or engineering operations which took place more than four years before the service of an enforcement notice even though the rest of the operations took place within the four-year period. However, in an enforcement notice appeal decision, the Secretary of State appeared to indicate that he regarded the crucial date with regard to building operations as the date when the building had become a viable building, see [1972] J.P.L. 385. This approach received judicial confirmation by the Divisional Court in *Ewens Developments Ltd.* v. *Secretary of State for the Environment* [1980] J.P.L. 404. There, Lord Widgery C.J. held that enforcement action could be taken against the whole of an embankment even though the work of building the embankment had commenced but not been completed more than four years ago. Unfortunately Lord Widgery was not referred to the earlier Court of Appeal decision and so the decision could be challenged as *per incuriam*. However it does seem to have become settled law, as in the present case it seems to have been assumed that the operations which had taken place outside the four-year period could only be immune if they amounted to two separate series of operations.