Appeal Ref: APP/F0114/C/25/3364346, APP/F0114/C/25/3364347, APP/F0114/C/25/3364348, APP/F0114/C/25/3364349

BETWEEN

MR STEPHEN WILCOX

APPELLANT

-And-

BATH AND NORTH EAST SOMERSET COUNCIL

RESPONDENT

AGREED AUTHORITIES BUNDLE

Belmont Farm, Ltd. v. Minister of Housing and Local Government and Another

QUEEN'S BENCH DIVISION—DIVISIONAL COURT

LORD PARKER C.J., WINN AND BRABIN JJ.

May 30, 1962

Development—Change of use—"Agriculture"—Breeding and training horses for show-jumping—Whether "agriculture"—Whether horses "livestock"—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *ss.* 12 (2), 119 (1).

Development—Building operations—Erection of large aircraft hangar for farm purposes—Whether structure "designed for" agricultural purposes—Town and Country Planning General Development Order, 1950 (*S.I.* 1950 *No.* 728), *Sched. I, Class VI*, 1.

The owners of a farm decided to use it in part as a horse-breeding centre, and to exercise and train horses for show-jumping there. Partly for those purposes and partly for the other purposes of farming, they erected a large aircraft hangar on the farm. They then applied to the local planning authority, under section 17 of the Town and Country Planning Act, 1947, for a determination whether their activities in breeding and training horses amounted to a change of use. The authority held that they did, and also issued an enforcement notice under section 23 of the Act requiring the removal of the hangar. The owners' appeals to the Minister against the determination and the notice were dismissed, and the owners appealed to the court against these dismissals. It was contended on the owners' behalf that breeding and training horses was a use of the land for the purposes of agriculture within the meaning of section 119 (1) of the Act, so as to be deemed not to be development by virtue of the provisions of section 12 (2) [1]; as to the hangar, it was contended that its erection was development for which permission was granted by the provisions of the Town and Country Planning General Development Order, 1950,[2] being the carrying out on agricultural land of a building operation requisite for the use of that land for the purposes of agriculture.

Held, dismissing both appeals, (1) that in its context in section 119 (1) "the breeding and keeping of livestock" did not extend to the breeding

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[1] Town and Country Planning Act, 1947, s. 12: ". . . (2) . . . the following operations or uses of land shall not be deemed . . . to involve development . . . (*c*) the use of any land for the purposes of agriculture . . ."

S. 119: "(1) In this Act, . . . 'agriculture' includes . . . dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), . . ."

[2] Town and Country Planning General Development Order, 1950, art. 3: "(1) . . . development of any class specified in the First Schedule to this Order is permitted by this Order . . ."

Sched. I: "Part I. The following development is permitted under article 3 . . . Class VI . . . 1. The carrying out on agricultural land having an area of more than one acre and comprised in an agricultural unit of building or engineering operations requisite for the use of that land for the purposes of agriculture, other than the placing on land of structures not designed for those purposes . . ."

and keeping of horses, except for their use in the farming of land, so that the owners had effected a change of use.

Peterborough Royal Foxhound Show Society v. *Commissioners of Inland Revenue* [1936] 2 K.B. 497 distinguished.

(2) That the hangar was not "designed" for the purposes of agriculture within the meaning of the exception to the permission granted by the Order, since "designed" in that context meant so designed in the sense of physical appearance and layout; by that test the hangar would not ordinarily be described as a farm building, so that no permission for its erection was granted by the Order.

APPEALS from two decisions of the Minister of Housing and Local Government.

The facts are stated in the judgment of Lord Parker C.J.

C. Lewis Hawser, Q.C. and *Bernard Marder* for the appellant landowners.

J. R Cumming-Bruce for the Minister of Housing and Local Government.

Monique Viner for the local planning authority, the Hendon Borough Council.

Lord Parker C.J. These are two appeals from decisions dated November 28, 1961, by the Minister of Housing and Local Government.[2a] In the first instance there is an appeal from a determination of the Minister under section 17 of the Town and Country Planning Act, 1947, as to whether a certain proposed user constitutes a material change in use under the Act. The second is from a decision of the Minister as to the validity of an enforcement notice issued by the Hendon Borough Council under delegated powers from the Middlesex County Council, that decision having been made under section 33 of the Caravan Sites and Control of Development Act, 1960. Both appeals, needless to say, are only on points of law.

The short facts giving rise to these proceedings are as follows: There is a farm of some forty-eight acres in the green belt near Totteridge known as Belmont Farm, which is owned by a company, Belmont Farm, Ltd., the appellants. That farm was acquired in 1958 when it was derelict and there were no farm buildings. Their intention was to run it as a mixed farm. No doubt because it was a somewhat uneconomic unit, they desired to have horses on the farm, and their intention was to exercise and train horses for international show-jumping and allied purposes, together with the establishment of a horse-breeding centre. Partly for that purpose and partly for the purpose of the farm it was decided, instead of having a number of small farm buildings, to have one large building,

[2a] [1962] J.P.L. 121, 133.

and they acquired what had undoubtedly been an aircraft hangar, a building some 175 feet long by ninety-five feet deep and some twenty-five feet high. Byelaw permission was obtained, and this structure was erected on the farm in 1959. It was used as to about two-thirds for the storage of fodder and farm implements and also to house cattle, and later it was decided to use about one-third of it for the exercise and training of these horses.

On September 11, 1959, an application was made under section 17 of the Act of 1947 to the local planning authority for the determination of the question whether the breeding of horses and their training and exercise for international show purposes was a material change of use. The local planning authority held that it was, and the appellants then appealed to the Minister. On November 28, 1961, the Minister issued his decision after causing an inquiry to be held by one of his inspectors, and he said:

> The inspector in his report, a copy of which is enclosed, said that he was advised that in defining the word "agriculture," and within that context "livestock," section 119 (1) of the Act of 1947 implied a common denominator, in the definition, of the use of land for the production of food, raw materials for clothing and certain other things normally produced in the countryside for the material wants of man. The breeding, keeping and training of horses for show-jumping could not be included; they were for a specialised form of sport. The inspector concluded that the institution of a use of the land and buildings for the training and breeding of such horses would constitute development for which planning permission is required.

The Minister further went on to say that the proposed use of the land would involve a "material change" of use.

Meanwhile, as I have already said, this large building had been erected, and on October 12, 1960, the Hendon Borough Council issued an enforcement notice calling upon the appellants to remove the structure. On October 14, 1960, the appellants appealed to the Minister asking, in the alternative, as they were entitled to do, that permission should be granted for the retention of that structure on the land. On November 28, 1961, the Minister issued his written decision, in which he said that he was satisfied "that the building in question was not designed for agricultural use within the meaning of Class VI of the First Schedule to the Town and Country Planning General Development Order, 1950, being designed to house aircraft; planning permission was not therefore granted by that Order." Secondly, "that its erection constituted development for the purposes of Part III of the Town and Country Planning Act, 1947, requiring the grant of planning permission"; thirdly, "that no such permission has been granted"; and fourthly, that the structure, in its entirety, having been erected without planning permission, the requirements of the enforcement notice do not

exceed what is necessary for restoring the land to its condition before the said development took place." He accordingly dismissed the appeal against the validity of the enforcement notice, and went on to refuse permission for the retention of the structure on the land.

It is convenient to deal first with the appeal in regard to the matter that came before the Minister under section 17 of the Town and Country Planning Act, 1947. By section 12 (2) it is provided as follows:

> . . . the following operations or uses of land shall not be deemed for the purposes of this Act to involve development of the land, that is to say . . . (*e*) the use of any land for the purposes of agriculture or forestry (including afforestation), and the use for any of those purposes of any building occupied together with land so used.

The contention of the appellants is that the purposes for which they proposed to use the land were for the purposes of agriculture. "Agriculture" is defined by section 119 (1) as including

> horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and "agricultural" shall be construed accordingly.

It is agreed that if what was proposed to be done was not for the purposes of agriculture within that definition it is impossible to contend that there was not a material change of use. Accordingly, the matter in issue—and it is not an easy matter—depends upon the true construction of the definition in section 119 (1).

For myself, I would like to approach this matter, at any rate in the first instance, apart from authority. I do that the more readily because this definition appeared on the Statute Book for the first time in 1947, and the authorities relate to other definitions. On the same day in 1947, the Royal Assent was given to the Agriculture Act, 1947, and the Town and Country Planning Act, 1947. In passing, it should be mentioned that while the definition in those two Acts is broadly the same, the layout is different. In the Agriculture Act, 1947, "agriculture" is defined in section 109 (3) as meaning a number of matters including "livestock breeding and keeping," and then "livestock" is defined as including "any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land." In the Town and Country Planning Act, 1947, the draftsman did not adopt that layout, but provided in the definition of "agriculture" itself a further definition of the breeding and keeping of livestock by taking the words which defined "livestock" in the Agriculture Act, 1947,

and putting them in a parenthesis after "livestock" in the definition. The important point, perhaps, is that in these two Acts this definition appeared for the first time.

The argument for the appellants is, broadly, that the word "including" wherever it is used in the definition section here is being used in an extensive sense. The definition begins: "'Agriculture' includes horticulture," and a number of other matters, and that the word there is used in the extensive sense really admits of no doubt because the growing of crops which, one would think, is one of the most important activities of agriculture, is not stated expressly in the definition itself. The argument then proceeds that the words "the breeding and keeping of livestock" have, prima facie, a very wide meaning and at any rate include the breeding and keeping of animals under the control of man, and that those words are perfectly apt to include the breeding of horses and keeping of horses for whatever purpose. Going on then to the words in parenthesis, it is said that the word "including" is again used in an extensive and illustrative sense, and moreover that there is nothing in the words in parenthesis which would in any way cut down the wide meaning given to the word "livestock."

It may be that this is rather a matter of first impression, but I confess that I approach it in this way: Of course, on one view "livestock" can be said to be used in contradiction to dead stock, and to include any animal whatsoever. In some contexts that might be so, but it seems to me that in the context of agriculture, as here, it has some less extensive meaning. What exact meaning should be given to it if it stood alone in this agricultural context, I do not propose to determine. I think that it is sufficient to say that there must be a limitation in that context on what I may call the wide dictionary meaning. I find it unnecessary to decide what it would mean if it stood alone because it does not stand alone, and the words in brackets that follow assist in determining what is meant by "livestock." The words are "including any creature kept for the production of food, wool, skins or fur." Pausing there, that is clearly an extension to cover, no doubt, an argument that, for instance, bees, possibly pheasants and fish are not livestock. It covers any creature kept for this purpose, and it then goes on to say "including any creature kept for the purpose of its use in the farming of land." Granting that the word "including" has been used in an extensive sense, it seems to me nonsense for the draftsman to use those words "any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of "land," if the word "livestock" was intended to cover the keeping of any creature whether for its use in farming land or not.

It seems to me that those words show a clear intention that "livestock," however it is interpreted, does not extend to the breeding and keeping of horses unless it is for the purpose of their use in the farming of land. Perhaps one can make the point by assuming that in some Act there was a definition of farm buildings which included bungalows with a particular type of roof. It would, I think, be idle to say then that bungalows with a different type of roof were included in the definition of farm buildings. The very fact that the bungalows which are to be treated as farm buildings are limited to those with a particular roof points to the fact that "farm buildings" was not intended to cover bungalows generally. So here, it seems to me, approached in that manner, it is reasonably clear that Parliament did not intend the breeding and keeping of horses to be considered as agriculture, unless for the purpose of their use in the farming of land. Accordingly, in my judgment, the Minister came to a correct decision in law.

I should, however, before leaving that point, mention one of the cases to which the court has been referred. It is *Peterborough Royal Foxhound Show Society* v. *Commissioners of Inland Revenue*.[3] The passage that has been very much relied upon is a passage in the judgment of Lawrence J. He begins by saying[4]:

> The words "live stock" are ordinarily and properly used in contrast with dead stock and include all live animals and birds the breeding of which is regulated by man.

The appellants rely on that passage as showing what the word "livestock" means quite apart from the words in parenthesis. Then, later on, after referring to an argument by the Crown that the words ought to be construed as referring only to animals whose use is an integral part of agriculture, Lawrence J. said[5]:

> But such an interpretation would exclude many animals which are bred in the ordinary course of agriculture and shown throughout the country; for example, town and van horses, hackneys, hunters, racehorses, most breeds of dogs, and fur-bearing animals. I see no reason why the words should receive this limited interpretation, particularly as it was the will of the legislature that such societies should be exempted from entertainments duty.

Those are very strong words used by a very eminent judge with a considerable knowledge of the subject, but it is to be observed that what he there had to consider was whether a particular society could claim relief from entertainments duty on payments for admission to entertainments provided by that society, and the Act in question, the Finance Act, 1924, by section 23, gave relief

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[3] [1936] 2 K.B. 497.
[4] *Ibid.* 500.
[5] *Ibid.* 500.

to such societies as were established "for the purpose of promoting the interests of agriculture, horticulture, livestock breeding or forestry." Bearing in mind the definition which had to be applied in that case, it becomes perfectly clear that Lawrence J. was really saying—and this was the *ratio decidendi* of his decision—that there was no reason to give the words "livestock breeding" as opposed to "agriculture" a meaning other than one which included all live animals the breeding of which is regulated by man, in contradistinction to dead stock. It is true that in the further passage he refers to hunters, hackneys, racehorses, dogs and the like as being bred in the ordinary course of agriculture. That, however, was no part of his decision in the case. Accordingly, on the quite different definition in the present case, I have come to the conclusion that a much more limited meaning has to be given to the word "livestock," and that, as I have said, the words do not cover the proposed activities of these appellants.

The second appeal depends upon whether the appellants can bring themselves within the terms of the Town and Country Planning General Development Order, 1950, which provides that certain things can be done without permission. Article 3 of that Order provides:

> Subject to the subsequent provisions of this Order, development of any class specified in the First Schedule to this Order is permitted by this Order and may be undertaken upon land to which this Order applies, without the permission of the local planning authority or the Minister.

Class VI in Schedule I, which is headed "Agricultural buildings, works and uses," provides in paragraph (1):

> The carrying out on agricultural land having an area of more than one acre and comprised in an agricultural unit of building or engineering operations requisite for the use of that land for the purposes of agriculture, other than the placing on land of structures not designed for those purposes or the provision and alteration of dwellings.

Accordingly, there are three prerequisites; first, there must be agricultural land; secondly, the development by way of building or engineering operations must be such as is requisite for the use of that land for the purposes of agriculture; and thirdly it must not involve the placing on the land of structures not designed for those purposes. There is no doubt in the present case that the land is agricultural land. As to whether the development was requisite may depend on the answer on the first appeal. If, as I think, the Minister was right on the first appeal, then it may be that this structure was not requisite for the use of the land for the purposes of agriculture in the sense that it was far bigger than required. There may well be two views about that, and I desire myself to express no opinion on it.

The third prerequisite, however, is that the proposal does not involve the placing on the land of a structure not designed for the purposes of agriculture. There are three views, as it seems to me, as to what the word "designed" there means. The appellants, through Mr. Hawser, to whom the court is indebted for his argument, say that "designed" there really means no more than "intended for," in other words, that when the structure is placed on the land it must be intended for the purposes of agriculture. The other extreme view is that it all depends upon the original design of the architect who designed it or the manufacturer who made it, and it depends upon what he intended it for. The third and intermediate view, and the one which I think is right, is that you look at the structure at the time of its erection and ask: Is this designed for the purposes of agriculture in the sense of its physical appearance and layout? I am influenced by that because we are dealing here with a Town and Country Planning Act. Moreover, Mr. Cumming-Bruce has referred us to several sections of the Act itself where the word "designed" is used which clearly suggests the interpretation which I think is correct. In particular, he has referred us to section 18 (3), which provides:

> Where permission is granted under this Part of this Act for the erection of a building, the grant of permission may specify the purposes for which the building may be used; and if no purpose is so specified, the permission shall be construed as including permission to use the building for the purpose for which it is designed.

There, I think, undoubtedly it cannot merely mean for the purpose for which it is intended by the proposed erector. I confess that having seen a large-scale photograph of this building it does assist me in coming to my own conclusion on the matter. It seems to me that nobody looking at the photograph of that building would say: "Oh, that is a large farm building." It is much more likely that they would say: "Here is a man who must have his own private aeroplane." In any ordinary sense of the word it seems to me that this building could not be said to be designed for the purposes of agriculture. Accordingly, for those reasons, which I have endeavoured to state shortly, I think both these appeals ought to be dismissed.

Winn J. I agree.

Brabin J. I agree.

Appeals dismissed.

Solicitors—Garber, Vowles & Co.; Solicitor, Ministry of Housing and Local Government; R. H. Williams.

[*Reported by Grove Hull, Esq., Barrister-at-Law.*]

A arbitrator or quasi-arbitrator ought to exercise care. I prefer to say that, short of fraud, he cannot be sued if he fails to perform that part of his duty.

This however is not quite the end of the matter. The plaintiff may succeed as against the first defendant in setting aside the existing valuation. If so, there might have to be a fresh valuation. Accordingly, the plaintiff seeks an order against Cassons, in that event, directing them to revalue the shares. Mr. Muir Hunter, for the plaintiff, agreed that Cassons could B only be called upon to make the fresh valuation if they were in fact the current auditors of the company at the time when the new valuation came to be made. Otherwise they would not be the correct persons to carry out the valuation according to the agreement between the parties, nor would they have the necessary access to the company's books of account. They might also, for perfectly proper reasons, relinquish their C office as auditors before any such order had been complied with. However, leaving aside these difficulties, it appears to me that such an order would, in effect, be an order for specific performance of a contract for services and therefore an order which the court does not normally make. Mr. Muir Hunter did not refer me to any authority to support his submission that it would be possible or proper for the court to make a mandatory order of this sort in the present case; I do not think that it would be. D In my judgment this is a clear and obvious case in which the statement of claim discloses no cause of action against the second defendants. I shall therefore direct that the statement of claim be struck out as against the second defendants and that the action be dismissed as against them.

Order that statement of claim be struck out and action dismissed as against second defendants.
Leave to appeal refused.

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Solicitors: *Malcolm Slowe & Co.; Reynolds, Porter & Co.*

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T. C. C. B.

[QUEEN'S BENCH DIVISION]

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* BURDLE AND ANOTHER *v.* SECRETARY OF STATE FOR THE ENVIRONMENT AND ANOTHER

1972 June 20; 22 Lord Widgery C.J., Willis and Bridge JJ.

Town Planning—Development, meaning—Material change of use— H *Land used as car breaker's yard and sale of salvaged vehicle parts—Building on land adapted for sale of new car parts and camping equipment—Enforcement notice served requiring discontinuance of use of land as shop—Secretary of State varying notice to refer only to building—Whether building separate planning unit—Tests to be appplied to determine planning unit*

[Reported by KUTTAN MENON ESQ., Barrister-at-Law]

In 1963, land, on which there were a number of buildings including a lean-to annexe attached to a house, was used as a scrap metal and car breaker's yard and salvaged vehicle parts were sold from the site. There was also a limited sale of car parts obtained from other sources. In 1965, the present occupiers purchased the land and, although continuing the use of the land, substantially reconstructed the annexe and changed its use from an office to a place where they displayed and sold new vehicle parts and camping equipment. The local authority, acting as agents of the local planning authority, served on the occupiers an enforcement notice alleging the use of the premises as a shop and requiring the restoration of the premises to their condition before the development took place. The occupiers appealed to the Secretary of State and, at the inquiry, the occupiers and the local authority presented their case on the basis that all the land was affected by the enforcement notice. The inspector in his conclusions expressed the view that, whether the appropriate planning unit was the whole site or the annexe, there had been a material change of use. The Secretary of State took the view that the site could not be considered as a shop for the purposes of the Town Planning legislation and, accordingly, amended the enforcement notice to refer only to the annexe.

On appeal by the occupiers:—

Held, that, although parts of a single unit of occupation could be considered as separate planning units, the test to be applied was whether there were two or more physically separated and distinct areas which were used for substantially different and unrelated purposes and, since the Secretary of State had not applied that test in deciding that the annexe was the appropriate planning unit, the case would be remitted for the Secretary of State to appply the correct test to determine what was the appropriate planning unit to be considered as a matter of fact and degree.

Observations on the appropriate criteria to determine the planning unit to be considered when deciding whether there had been a material change of use (post, p. 1212c–G).

The following case is referred to in the judgment:

Trentham (G. Percy) Ltd. v. *Gloucestershire County Council* [1966] 1 W.L.R. 506; [1966] 1 All E.R. 701, C.A.

The following additional cases were cited in argument:

Bendles Motors Ltd. v. *Bristol Corporation* [1963] 1 W.L.R. 247; [1963] 1 All E.R. 578, D.C.

Hawkey v. *Secretary of State for the Environment* (unreported) March 26, 1971, D.C.

APPEAL

On February 3, 1971, the New Forest Rural District Council, as agents for the local planning authority, Hampshire County Council, served on the occupiers, Derek Stanley Burdle and Dennis Williams, an enforcement notice alleging that there had been a breach of planning control at their premises, New Forest Scrap Metals, Ringwood Road, Netley Marsh, Hampshire. The breach of planning control was stated to be the use of the " premises . . . as a shop for the purpose of the sale inter alia of motor car accessories and spare parts " and the notice required the discontinuance of the use of the premises as a shop.

The occupiers appealed to the Secretary of State for the Environment against the enforcement notices. At an inquiry, the occupiers and the local council agreed that the enforcement notice referred to the whole site, which

had an existing use as a scrap metal and car breaker's yard and from which salvaged parts of cars had been sold, but the occupiers contended that there had been no material change of use although they had altered a lean-to annexe to a house known as "Fern Bank" and, thereafter they had displayed and sold car accessories, new car spare parts and camping equipment in the annexe. The Secretary of State allowed the appeal to the extent of amending the enforcement notice by deleting the word "premises" and inserting "the annexe adjoining the west side of the dwelling known as 'Fern Bank.'"

The occupiers appealed to the court on the ground, inter alia, that on the findings of fact in the inquiry there was shown to be an established use in accordance with section 17 of the Town and Country Planning Act 1968 and that the Secretary of State was wrong in law to uphold the enforcement notice.

The facts are stated in the judgment of Bridge J.

Roland Roddis for the occupiers.
Gordon Slynn for the Secretary of State.
Alan Fletcher for the local authority.

Cur. adv. vult.

LORD WIDGERY C.J. I will ask Bridge J. to give the first judgment.

BRIDGE J. This is an appeal under section 180 of the Town and Country Planning Act 1962 from a decision of the Secretary of State for the Environment given in a letter dated January 7, 1972, upholding, subject to variation, an enforcement notice which had been served by the New Forest Rural District Council as delegate of the local planning authority on the occupiers. They occupy a site at Ringwood Road, Netley Marsh in the New Forest area, which has a frontage of 75 feet and a depth of 190 feet, and upon which there stand a dwelling house to which is attached a lean-to annexe and a number of other buildings which it is not necessary to describe.

The relevant history of the matter is that before the end of 1963, which of course in relation to changes of use is the critical date under the Town and Country Planning Act 1968, the occupiers' predecessor in title, a Mr. Andrews, carried on, on the site, within the open curtilage, the business of a scrap yard and a car breaker's yard. As an incident of that business he effected from time to time on the site retail sales of car parts arising from the cars broken up on the site. There was some evidence at the inquiry at which this history emerged of a very limited scale of retail sales of car parts arising from sources other than the break-up of vehicles in the course of the breaker's yard business.

The lean-to annexe adjoining the dwelling house was used by Mr. Andrews as an office in connection with the scrap yard business. In 1965 the occupiers purchased the property; whereas Mr. Andrews had carried on business under the modest title of "New Forest Scrap Metals," the occupiers promptly changed the title to the more grandiose "New Forest Autos." They found the lean-to annexe in a somewhat decrepit state, and effected a substantial reconstruction and alteration of it which clearly materially altered its appearance. Inter alia, they provided it with two external display windows. They started to use that building for retail sales on a substantial scale for vehicle spare parts not arising from the break-up of vehicles as part of the scrap yard business, but new spares of which the occupiers had themselves been appointed stockists by the manufacturers.

They also embarked on retail sale of camping equipment and the goods to be sold by retail from the annexe lean-to were displayed both in the new shop windows, if one could so call them, and on shelves within the buildings. Finally it is to be observed that as well as advertising themselves as stockists of spare parts for all makes of motor cars, they included in the advertising material the phrase "New accessories and spares shop now open."

Those activities prompted the local planning authority to serve on February 3, 1971, the enforcement notice which is the subject of the appeal to this court. That notice recites:

> "... That it appears to the council: that a breach of planning control has taken place namely the use of premises at New Forest Scrap Metals, Ringwood Road, Netley Marsh, as a shop for the purpose of the sale inter alia of motor car accessories and spare parts without the grant of planning permission required in that behalf in accordance with Part III of the Town and Country Planning Act 1962."

The steps required to be taken by the enforcement notice are the discontinuance of the use of the premises as a shop and the restoration of the premises to their condition before the development took place. Concurrently with that enforcement notice with which the court is concerned, it is to be observed merely as a matter of history that there was also served an enforcement notice directed at the building alterations which had been effected to the lean-to annexe, but as the Secretary of State allowed an appeal against that enforcement notice, it is unnecessary for us to consider it.

The enforcement notice alleging a change of use, be it observed, uses the perhaps ambiguous expression "premises" to indicate the unit of land to which it was intended to apply. We were told in the course of argument by Mr. Alan Fletcher, who appeared for the local authority, that the authority's intention was to direct that notice at the whole of the occupiers' site; it alleged a material change of use of the whole site. It seems to have been so understood by the occupiers, and when the matter came before an inspector of the department, following the appeal to the Secretary of State by the occupiers against the notice, both parties presented their cases on the footing that the whole site was the planning unit with which the inquiry was concerned.

The local authority's case was that the change in the character and degree of retail sales from the site, as a matter of fact and degree, effected a material change of use of the whole site which had taken place since the beginning of 1964. Indeed, in these proceedings, Mr. Fletcher has submitted before us that that is still the proper approach which the Secretary of State should adopt if the matter goes back to him. On that view, so Mr. Fletcher said, the enforcement notice as applied to the whole site should be upheld subject to any necessary reservation to preserve to the occupiers their right to effect retail sales in the manner and to the extent that such sales were effected by their predecessor before the beginning of 1964.

The occupiers' case at the inquiry was in essence that as a matter of fact and degree, looking at the site as a whole, the intensification of retail sales had not been sufficient to amount to a material change of use.

The inspector, after indicating his findings of primary fact, expressed his conclusions thus:

"The legal implications of the above facts are matters for the

A consideration of the Secretary of State and his legal advisers but it appears to me, from the almost complete absence of reference to wholesale deliveries, that the original business was based on the scrap yard, grew out of the then proprietor's specialisation in the Austin 7, an obsolete vehicle, and would not have survived as a mainly retail business. In contrast, while sales of salvaged spares survived, the combination of advertising with improved facilities for display, and B the emphasis on new items in that display, all now support the [occupiers'] claim that the annexe is a shop. But in becoming a shop a material change has taken place, without planning permission and later than January 1, 1964. Whether or not notice A "—which is the use notice—" is properly directed to the whole property or to the annexe, the appeal should therefore fail on ground (d)."

C I read that conclusion as indicating first that the inspector was aware, although it does not appear from the report that it was raised by the parties, that there was an issue for consideration as to what was the appropriate planning unit to be considered, either the whole site on the one hand, or on the other hand the lean-to annexe, but he took the view that whichever unit one considered, there had been a material change of use, and accor- D dingly he thought the enforcement notice could be upheld on that footing. Speaking for myself, if the Secretary of State had adopted and endorsed that view, I do not see that such a conclusion could have been faulted in this court as being erroneous in point of law.

But the Secretary of State did not simply endorse his inspector's conclusion; he said in the decision letter:

E " Both enforcement notices allege development associated with a shop. It is clear that enforcement notice B "—that is the notice relating to the building operations—" relates to the building called variously the annexe or learn-to. Enforcement notice A refers to the use of premises as a shop and at the inquiry it was argued for your clients that the whole site was used for sales and should be regarded as a long established shop. This is not an argument that can be accepted F in the light of the clearly established definition of a shop for the purposes of the Town and Country Planning Acts as a building used for the carrying on of any retail trade etc. The view is taken that enforcement notice A as worded can relate only to the lean-to or annexe. It is proposed to amend the notice to make this clear. The appeal against enforcement notice A has been considered on that limited basis."

G The Secretary of State then went on to ask himself the question, has there been a material change of use of the lean-to annexe, and on the facts, as it seems to me inevitably, he answered that question in the affirmative. Given that the lean-to annexe was the appropriate planning unit for consideration, the decision of the Secretary of State that there had been a material change of use of it was, as I think, clearly right, and, in spite of the H argument of Mr. Roddis for the occupiers, I cannot accept that the Secretary of State in any way exceeded his jurisdiction in ordering that the scope of the enforcement notice be cut down if it was originally intended to apply to the whole site, so as to limit the ambit of its operation to the lean-to annexe. As such, that was a variation of the enforcement notice in favour of the occupiers.

But the real complaint and grievance of these occupiers is that the Secretary of State has for insufficient or incorrect reasons directed his mind

to the wrong planning unit and thereby deprived them of a consideration and decision by the Secretary of State, as opposed to the inspector, of the real question which the occupiers say should have been considered, namely, has the change of activities on the whole site effected a change of use of the whole site which is the appropriate planning unit to be considered?

For my part I am unable to accept that the reasons as expressed by the Secretary of State in his decision letter were good reasons for concluding that the lean-to annexe was the appropriate planning unit for consideration. I accept at once that whether one uses the definition of " shop " in the Town and Country Planning (Use Classes) Order 1963 or the ordinary dictionary meaning of " shop," it is really an absurdity to describe the whole of this site as a shop, but what I cannot accept is that the accident of language which the local planning authority choose to use in framing their enforcement notice can determine conclusively what is the appropriate planning unit to which attention should be directed.

What, then, are the appropriate criteria to determine the planning unit which should be considered in deciding whether there has been a material change of use? Without presuming to propound exhaustive tests apt to cover every situation, it may be helpful to sketch out some broad categories of distinction.

First, whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered. That proposition emerges clearly from *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, where Diplock L.J. said, at p. 513:

> " What is the unit which the local authority are entitled to look at and deal with in an enforcement notice for the purpose of determining whether or not there has been a ' material change in the use of any buildings or other land '? As I suggested in the course of the argument, I think for that purpose what the local authority are entitled to look at is the whole of the area which was used for a particular purpose, including any part of that area whose use was incidental to or ancillary to the achievement of that purpose."

But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separate and physically distinct areas of land.

Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit.

To decide which of these three categories apply to the circumstances of any particular case at any given time may be difficult. Like the question of material change of use, it must be a question of fact and degree. There may indeed be an almost imperceptible change from one category to another. Thus, for example, activities initially incidental to the main use of an area of land may grow in scale to a point where they convert the single use to a composite use and produce a material change of use of the whole. Again, activities once properly regarded as incidental to another

use or as part of a composite use may be so intensified in scale and physically concentrated in a recognisably separate area that they produce a new planning unit the use of which is materially changed. It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally.

It may well be that if the Secretary of State had applied those criteria to the question, what was the proper planning unit which fell for consideration in the instant case, he would have concluded on the material before him that the use of the lean-to annexe for purposes appropriate to a shop had become so predominant and the connection between that use and the scrap yard business carried on from the open parts of the curtilage had become so tenuous that the lean-to annexe ought to be regarded as a separate planning unit.

But for myself I do not think it is possible on the factual and evidential material which is before this court for us to say that that was by any means an inevitable conclusion at which the Secretary of State was bound to arrive, and that being so I do not think it would be appropriate for us to usurp his function of deciding the question, what is the appropriate planning unit here to be considered as a matter of fact and degree? Accordingly I reach the conclusion that the appeal should be allowed and that we should send the case back to the Secretary of State with a direction to reconsider his decision in the light of the judgment of this court.

WILLIS J. I agree.

LORD WIDGERY C.J. I entirely agree for the reasons so fully and clearly given by Bridge J.

Appeal allowed.
Secretary of State to pay occupiers' costs.

Solicitors: *Heppenstall, Rustom & Rowbotham, Lymington; Solicitor, Department of the Environment; Sharpe, Pritchard & Co. for F. R. Appleby, Lyndhurst.*

[CHANCERY DIVISION]

* PICKWICK INTERNATIONAL INC. (G.B.) LTD. *v.* MULTIPLE SOUND DISTRIBUTORS LTD. AND ANOTHER

PRACTICE NOTE

1972 June 8, 12, 13, 14; 27 Megarry J.

Practice—Chancery Division—Motion ex parte—Appearance of counsel for party moved against—Order for costs

MOTION

The plaintiffs, Pickwick International Inc. (G.B.) Ltd., who published and sold gramophone records under the brand name of "Top of the Pops," gave notice of motion in this action, seeking an interim injunction

McKay and another v Secretary of State for the Environment and another [1989] 1 PLR 7

QUEEN'S BENCH DIVISION

His Honour Judge Marder QC (sitting as a High Court judge)

September 30 1988

Enforcement notice — Agricultural building — General Development Order — Whether permitted development within class VI — Whether prior agricultural use — Whether agricultural trade or business — Whether profitability proper test — Whether building reasonably necessary or required — Whether building designed for agricultural purposes

Between 1984 and 1985 the appellants, the owners of a holding of three acres of land, erected a barn and lean-to. The second respondents, the South Cambridgeshire District Council, issued an enforcement notice in January 1987 alleging a breach of planning control and requiring the barn and lean-to to be removed. The respondents appealed to the Secretary of State for the Environment on ground (*b*) of section 88(2) of the Town and Country Planning Act 1971, that there was no breach of planning control, and on ground (*a*), that planning permission ought to be granted. The Secretary of State, by his inspector's decision, dismissed the appeal on the grounds that the development did not have the benefit of planning permission conferred by article 3 and class VI.1 of Schedule 1 to the Town and Country Planning General Development Order 1977 as contended for by the appellants. The inspector concluded that the scale of agricultural activity at the appeal site, at the time the development enforced against was commenced, fell far short of an agricultural use by way of a trade or business as defined in section 109(1) of the Agriculture Act 1947. The inspector had taken the expression “agricultural trade or business” as meaning an occupation by which a person earns his or her living to some significant degree or extent. The inspector held, on the evidence, that the building was not requisite for agricultural purposes because the physical characteristics were such that it could not be regarded as reasonably necessary for any agricultural purpose. The inspector also considered the building was not “designed” for the purposes of agriculture, as it was a general purpose one and not peculiarly agricultural in appearance or design.

The appellants appealed that decision under section 245 of the Town and Country Planning Act 1971 on the grounds that the inspector was in error in the tests he applied in deciding that the building did not have the benefit of planning permission under the General Development Order 1977.

Held The appeal was dismissed.

1. At the time the development commenced, the land was used for grazing horses and a few cattle and poultry, and these uses constituted an agricultural use of the land. The definition of “agricultural land” in

section 109(1) of the Agriculture Act 1947, that requires the land to be in agricultural use by way of trade or business, does not involve looking at profitability as the test of whether the agricultural use be a trade or business. The inspector had applied the wrong test: he was required to determine whether, when the barn was erected, the holding was agricultural land; that is to say land used for agricultural purposes and so used by way of trade or business. On the evidence, there was nothing to suggest that the agricultural use was other than by way of trade or business as there was nothing to suggest that the grazing and keeping of poultry was done as a hobby: see p 10C-F.

---------- ***[1989] 1 PLR 7 at 8***

2. The barn, when erected, was not requisite for the use of the holding for the purposes of agriculture. Although the inspector was in error in taking account of the size of the building in the way that he did, he was entitled to hold, on the evidence, that this particular building was not requisite for agricultural purposes because the physical characteristics to which he referred were such that it could not be regarded as reasonably necessary for any agricultural purposes. The building lacked ventilation, was lined with plasterboard and had no proper drainage and so was incompatible with the keeping of livestock: see pp 10G-11G.

3. The building was not "designed" for the purposes of agriculture, as it was a general purpose one and not peculiarly agricultural in appearance or design, having windows and insulation features designed for some purpose other than agriculture. On the evidence before the inspector, he had dealt with this issue correctly and was entitled to reach the conclusion he did: see p 12A.

4. The inspector had made no error of law, nor was guilty of faulty reasoning in arriving at the conclusion that he did that the building was not an agricultural building within class VI and that on the merits planning permission should not in any event be granted for it because of the local policies: see p 13.

Cases referred to in the judgment

Belmont Farm v Minister of Housing and Local Government (1962) 13 P&CR 417; 60 LGR 319; [1963] JPL 256, DC

Harding v Secretary of State for the Environment [1984] JPL 503

Jones v Stockport Metropolitan Borough Council (1983) 50 P&CR 299; [1984] EGD 1037; 269 EG 40, [1984] 1 EGLR 1028; [1984] JPL 274, CA

Wilson v West Sussex County Council [1963] 2 QB 764; [1963] 2 WLR 669; [1963] 1 All ER 751; (1963) 61 LGR 287; 14 P&CR 301; [1963] EGD 565; 185 EG 683, CA

Appeal under section 246 of the Town and Country Planning Act 1971

This was an appeal under section 246 of the Town and Country Planning Act 1971 against a decision of the Secretary of State for the Environment, by his inspector, to dismiss an appeal against an enforcement notice issued by the second respondents, the South Cambridgeshire District Council.

Matthew Horton (instructed by Robbins Olivey & Blake Lapthorn, for Bendall and Sons, of Mildenhall) appeared for the applicants.

Roger Ter Haar (instructed by the Treasury Solicitor) appeared for the first respondent, the Secretary of State for the Environment.

John Steel (instructed by Nabarro Nathanson) appeared for the second respondent, the South Cambridgeshire District Council.

The following judgment was delivered.

HIS HONOUR JUDGE MARDER QC: This is a motion by way of appeal under section 246 of the Town and Country Planning Act 1971 to remit to the Secretary of State for the Environment, with the opinion of the court, the decision of an inspector appointed by the Secretary of State to determine an appeal, that decision being set out in a letter dated January 29 1988 whereby the inspector upheld an enforcement notice and refused to grant planning permission for the development to which it related. The enforcement notice had been served in January 1987.

The description of the development of which it complained was the erection of a building with an adjacent lean-to structure. The enforcement notice required the removal of the building and the structure. The owner's appeal from that enforcement notice proceeded principally on ground (*b*) in section 88(2), that is to say that there was no breach of planning control involved, and on ground (*a*), which was in any event that planning permission ought to be granted for the retention of the building.

---------- ***[1989] 1 PLR 7 at 9***

The appeal was concerned with a farm holding called Lomas Farm in South Cambridgeshire. That was a holding of about three acres of land. The appellant, who is the applicant here, Mrs McKay, had purchased the farm in July 1983 and had erected the building between May and October 1984 and the lean-to some time in 1985. For the sake of convenience the building can be called a “barn”, as it was so called indiscriminately in the course of the inspector's decision letter and in the course of argument in this court. The case, as it was argued on Mrs McKay's behalf at the inquiry, was that the barn had been erected with the benefit of planning permission conferred by article 3 and class VI.1 of the Schedule to the General Development Order 1977. My primary concern is to see whether the inspector has gone wrong in law in deciding that the barn was not erected with the benefit of that planning permission.

The inspector set out in his decision letter, at para 26, four criteria, all of which require to be satisfied in order to obtain the benefit of planning permission. Para 26 reads:

> In order to bring the development enforced against within Class VI of the GDO (and thus for the ground (*b*) appeal to succeed) it is necessary in my view to show that at the time the development was commenced:
>
> 1. The development took place on “agricultural land” as defined in section 109(1) Agriculture Act 1947 — a definition which requires the land to be in agricultural use by way of trade or business
>
> 2. The agricultural land as so defined exceeded an acre in area.
>
> 3. The development undertaken was reasonably necessary for the use of the land for agriculture — applying the interpretation of “requisite” adopted in *Jones v Stockport MBC* [1984] JPL 274.
>
> 4. The building was designed (in the sense of its physical appearance and layout) for the purposes of agriculture.

Those four criteria, or requirements, are derived directly from the definition in class VI.1 of the Schedule to the General Development Order.

It has not been contended by Mr Horton, on behalf of the applicant, that that paragraph is in any way inaccurate. It is clear that the inspector has correctly set himself the questions that he is required to answer. He has directed himself correctly, in my judgment, in the first instance. As to the second of those requirements — the need for the agricultural land to exceed an acre in area — the agricultural land there referred to is the land comprised in an agricultural unit. If Mrs McKay's land was an agricultural unit then that criterion was satisfied and the inspector so held.

As to the first of those requirements, however, the inspector dealt with that in para 28 of his decision letter in which he said:

> … it is my understanding (derived also from the *Jones* decision) that for permitted development rights to be attached to a building the use of the land … has to be — before the building is commenced — an agricultural use for the purpose of a trade or business; … The relevant date is 1984 in respect of the barn … There was a letter produced from the first appellant's vendor saying that cattle had “always been grazed” on the appeal site but there was no claim at the inquiry of the unit being acquired as a going concern; indeed the clear impression I have is of a run-down farmhouse, derelict buildings and land in poor heart fit for little but grazing horses. Once purchased in 1983 any agricultural activity on the land was confined initially to grazing a few horses and one or two cattle and the keeping of a few poultry — none of which activities were on a scale which I consider could reasonably be regarded as being by way of an agricultural trade or business — an expression I take to mean an occupation by which a person earns his or her living to some significant degree or extent.

---------- ***[1989] 1 PLR 7 at 10***

He then went on to consider accounts produced by the appellant showing a very small net profit attributable to sales and cropping at the site. He then concluded that paragraph by saying:

> The scale of activity at the appeal site when the development enforced against was commenced falls far short, I conclude as a matter of fact and degree, of satisfying the trade or business test.

Mr Horton has submitted on behalf of the applicant that the inspector is clearly wrong in that paragraph in that he has looked at the profitability as the test of whether it be a trade or business, or at any rate has looked to the scale and profitability of the occupier's activities in order to determine whether or not the land was agricultural land at the time this building was erected.

Both Mr Ter Haar, on behalf of the Secretary of State, and Mr Steel, on behalf of the local planning authority, say that that is a legitimate way of approaching the question of trade or business and all the inspector is saying, in that paragraph, is that looking at the scale and profitability of the activities of the occupier, they were such that the element of trade or business can be dismissed by application of the *de minimis* principle.

In my judgment, Mr Horton is correct and the inspector has applied the wrong test. He was required to determine whether, when the barn was erected, the holding was agricultural land; that is to say land used for agricultural purposes and so used by way of trade or business. That inquiry ought logically to have started by considering for what purpose was the land used. In this case it is plain on the evidence recited by the inspector that the applicant had taken over farmland, which he described as “land in poor heart”, and had then used it for “grazing a few horses and one or two cattle and keeping a few poultry”. Those uses, in my view, constituted an agricultural use of the land and could not be said to be anything else.

The next question, then, is whether that agricultural use was by way of trade or business. Here, too, the evidence that the inspector had and has cited was clear. There was nothing at all to suggest that this lady grazed cattle and kept poultry as a hobby or that she was doing so as an eccentricity. She did so because — this is recited by the inspector — she was at all times seeking to establish a farming enterprise. If the inspector did not believe her evidence about that, he has certainly not said so. It seems to me that only one conclusion can follow from the inquiry thus far, namely that the land was used for agriculture by way of trade or business. The fact that the trade or business had by that stage resulted in very little profit to the occupier is, in my view, not to the point.

The next requirement, which the applicant had to prove, was that the barn, when erected was requisite for the use of the holding (including the land on which it was erected) for the purposes of agriculture. The word “requisite” has been in the General Development Order and its predecessors, I think, since the first such order in 1950. In the case of *Jones v Stockport Metropolitan Borough Council* (1983) 269 EG 40, [1984] 1 EGLR 1028, referred to by the inspector, the Court of Appeal, and Lawton LJ in particular, drew attention to the perennial difficulties that the word had caused and suggested revision of the order so as to exclude it, but the order has not yet been revised. In that connection Lawton LJ drew support for the suggestion that the word be avoided from sources as far apart as Sir Thomas More, Martin Luther, Zwingli and Calvin. Notwithstanding that weight of authority the legislature has not yet got around to making the revision.*

---------- ***[1989] 1 PLR 7 at 11***

However, all counsel in this case accept that the test can be formulated as whether the building is “reasonably necessary or reasonably required” for the use of the holding for purposes of agriculture. The inspector dealt with that matter in para 29 of his letter. He says, as to that:

> … so far as the barn is concerned it has domestic style windows, insulated walls and a plasterboard lining none of which contribute to the use of the building for agricultural purposes. Indeed, on the evidence, a building lacking ventilation and lined with plasterboard and with no proper drainage is incompatible with the keeping of livestock and this state of affairs is likely to prevail also in my view if any significant form of agricultural storage were to be contemplated. The building also exceeds in size anything which might reasonably in my view be required in connection with the limited agricultural use to which a land holding of this nature and size might be put.

He then goes on to consider the lean-to in these terms:

> The lean-to which depends on the barn for its support but is otherwise a substantial structure in its own right functions in my view primarily as protection for the “stables” erected beneath it and although some of the surplus covered space is available to house plant or equipment a structure of this kind and size with provision for glazing its open side is, to put the matter at its lowest, an unusual feature on a holding of this type and size. I remain unconvinced that either the building or the lean-to it supports was reasonably necessary for any agricultural use to which the land might in the foreseeable future be put.

As it seems to me, the inspector's reference in that paragraph to the size of the barn is erroneous. The General Development Order permission itself by class VI imposes a limit as to size, and it cannot be right that a building which is erected within that limit of size and is required or necessary for agricultural use — for example by way of intensifying the poultry-keeping operation — should fail to benefit from the planning permission because it is a large building in relation to the size of the agricultural unit on which it has been erected.

However, I do not consider the inspector's error in taking account of the size of the building in the way that he did was decisive in his finding on this issue or indeed necessary to that finding. In my judgment, the inspector was entitled to hold on the evidence that this building was not requisite for agricultural purposes because the physical characteristics to which he referred were such that it could not be regarded as reasonably necessary for any agricultural purpose. That is to say, it could not be reasonably required because it was not reasonably capable, in the form in which it was erected, of being used for agricultural purposes. In so far as that formulation involves an overlap with the fourth criterion — that is the criterion as to what the building was designed for — that to my mind is a further illustration of the difficulties caused by the use of the word “requisite” to which the Court of Appeal drew attention in the *Jones* case.

Mr Horton then submitted that if the inspector was holding that the building was not “requisite” because of its features, ie the windows, insulating panels, flat floor, or undrained floor, I think I should say, he ought to have considered whether or not to grant planning permission on terms requiring modifications or perhaps a limitation of use to agricultural use or a combination of both. It is sufficient to say that I do not consider that the inspector was under any such obligation.

I turn, then, to the final requirement that the building is “designed” for purposes of agriculture. That word has caused almost as much debate as the word “requisite”. The inspector dealt with that in para 30, quite shortly. He said:

---------- ***[1989] 1 PLR 7 at 12***

> As I have said in paragraph 8 the building is a general purpose one and not peculiarly agricultural in appearance or design. The windows and insulation features incorporated in the structure point clearly in my view to a design for some purpose other than agriculture and it is, I consider, unarguable that the lean-to was designed to facilitate any agricultural use of the land.

He referred there to para 8. Para 8 was a detailed description of the building that I called the “barn”. In that detailed description he refers to it as “a steel frame asbestos clad building” and elsewhere in the paragraph as “merely a general purpose building of a type often to be seen in industrial or commercial use as well as on farms”.

Mr Horton has subjected those passages from the inspector's report to sophisticated and ingenious analysis. He submits that the effective meaning of para 30 is that the building *is* agricultural in appearance and design, though not peculiarly so, and that the later reference to the windows and insulation refer to the purpose for which the building is intended rather than its external appearance. Mr Horton submits that it is external appearance alone that matters in this context. He cited passages from three cases: *Belmont Farm v Minister of Housing and Local Government* (1962) 13 P & CR 417; *Wilson v West Sussex County Council* [1963] 2 QB 764 and *Harding v Secretary of State for the Environment* [1984] JPL 503. I do not propose to refer specifically to those cases. I believe the true test derived from them is whether the building can be said to be “designed” for the purposes of agriculture having regard to its external appearance and layout.

In para 30 the inspector has, in my judgment, tackled the issue correctly and answered it simply and straightforwardly. One hesitates to put the matter in words other than his own, but the effect of para 30 is that there is nothing in this building's appearance and design that makes it an agricultural building as opposed to a general purpose building. It is a general purpose building and certain features of its appearance and its layout indicate that it was not designed for agricultural purposes. I do not accept, therefore, that the inspector erred in law in that respect.

It will be recalled that in order to acquire the benefit of the planning permission under class VI, the owner must at the time the building is erected satisfy all of the four requirements. If there is a failure to satisfy any one of them, then no planning permission will result under class VI. Hence, no planning permission can have been conferred when this building was erected because, in my judgment, only two of the four requirements can be said to have been satisfied.

Mr Horton's argument, on behalf of the applicant, proceeds further. He submits that if there is an accumulation of faulty reasoning in arriving at the conclusion that this is not an agricultural building within class VI, even though that conclusion is ultimately held to be a correct one, the faulty reasoning vitiates the inspector's treatment of the appeal on the planning merits under ground (*a*). In particular he refers to the passage in para 32 in which the inspector dealing with the appeal on ground (*a*) includes this passage:

> Nor can the barn be regarded as development for the purposes of agriculture (and thus a possible exception to the Green Belt Policy) because there is at present no viable agricultural enterprise whose purposes it serves. I regard the building as one which has been erected without regard to the viability of the agricultural unit but in the expectation that some agricultural use for it, or for part of it, will emerge.

Mr Horton draws attention to that as showing that one of the principal reasons why the inspector held he ought not to grant planning permission for the retention of the building was because of his finding that it was not an

agricultural building upon which class VI has conferred the benefit of planning permission.

I am unable to accept that submission. The inspector has decided that this building was erected without the benefit of planning permission, and however he arrived at that conclusion, it was, in my judgment, a correct conclusion. He has gone on to consider, and does so in detail in para 32, whether or not that building — a quite substantial building and in an area to which green belt policies were applied — ought on its merits to be retained or be required to be removed.

In para 32, it appears to me clear that he took into account all the relevant matters that he ought to have taken into account and arrived at the conclusion on it wholly as a matter of planning judgment within the scope of his competence and expertise. I can detect no error of law in the way in which he has dealt with that issue. In the result the application must be dismissed.

Appeal dismissed with costs to the Secretary of State for the Environment; leave to appeal granted.

Neutral Citation Number: [2018] EWCA Civ 2229

Case Nos: C1/2017/3197 and C1/2017/3198

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
HIS HONOUR JUDGE WAKSMAN Q.C. (sitting as a deputy judge of the High Court)
[2017] EWHC 2716 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 October 2018

Before:

Lord Kitchin
Lord Justice McCombe
and
Lord Justice Lindblom

- -

Between:

Graham Oates	**Appellant**
- and -	
Secretary of State for Communities and Local Government	**Respondent**
- and -	
Canterbury City Council	**Interested Party**

Mr Timothy Straker Q.C. and Mr Jonathan Powell (instructed by **Russell-Cooke Solicitors**) for the **Appellant**
Mr Leon Glenister (instructed by **the Government Legal Department**) for the **Respondent**
The Interested Party did not appear and was not represented.

- -

Hearing date: 11 July 2018

Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. Was it wrong in law for an inspector deciding an appeal under section 174(2) of the Town and Country Planning Act 1990 to uphold an enforcement notice that required the complete demolition of three "new buildings" whose construction had incorporated parts of the buildings previously on the site? That is the basic question in these two appeals. It raises no legal issues that are new.

2. With permission granted by Lewison L.J. on 8 January 2018, the appellant, Mr Graham Oates, appeals against the order dated 4 November 2017 of H.H.J. Waksman Q.C., sitting as a deputy judge of the High Court, by which he dismissed an application under section 288 of the 1990 Act and an appeal under section 289, challenging the decisions of an inspector appointed by the respondent, the Secretary of State for Communities and Local Government, to dismiss appeals against an enforcement notice issued by the interested party, Canterbury City Council, and the council's refusal of planning permission for development on the same site.

3. The enforcement notice was issued on 22 August 2016. It alleged a breach of planning control by the erection of three "new buildings", without planning permission, on the site of three former chicken sheds at Hoath Farm, Bekesbourne Lane, in Canterbury, and required the total demolition of those three "new buildings". Planning permission for the development of eight residential units had been refused by the council on 22 April 2016. Mr Oates' subsequent appeals, under section 174 and section 78 of the 1990 Act, were heard by the inspector at an inquiry held over four days in April 2017. Her decision letter is dated 2 June 2017.

4. The challenge to the inspector's decisions was brought on several grounds, all of which the judge rejected.

The issue in these appeals

5. Although there are five grounds of appeal, it is agreed that they all go to the same principal issue, which is whether the inspector went wrong in her approach to Mr Oates' contention that the surviving parts of the original, lawfully erected buildings on the site could not properly be enforced against, and that the enforcement notice, if upheld, should therefore have been varied.

The statutory provisions

6. Section 172(1) of the 1990 Act gives a local planning authority the power to issue an enforcement notice where it appears to it that there has been a breach of planning control and that it is expedient to issue the notice. Under section 171A(1), "carrying out development without the required planning permission" constitutes a breach of planning control. Section 173(1) requires an enforcement notice to state "(a) the matters which appear to the local planning authority to constitute the breach of planning control …". Section

173(3) provides that the steps required by the enforcement notice must be directed to achieving "wholly or partly" any of the purposes referred to in subsection (4), which are "(a) remedying the breach" of planning control and "(b) remedying any injury to amenity which has been caused by the breach". Where the enforcement notice requires less than a full remedy of the alleged breach of planning control, section 173(11) provides for deemed planning permission for such development as remains after the notice has been complied with (see paragraph 31 of the judgment of Carnwath L.J., as he then was, in *Tapecrown Ltd. v First Secretary of State* [2006] EWCA Civ 1744, with which Wilson and Hughes L.JJ., as they then were, agreed).

7. Section 174(2) provides that an appeal may be brought against an enforcement notice on any of eight specified grounds. The relevant grounds here are grounds (a), (b), (c), (f) and (g). Ground (a) is "that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted …". Ground (b) is "that those matters have not occurred". Ground (c) is "that those matters (if they occurred) do not constitute a breach of planning control". Ground (f) is "that the steps required by the notice to be taken … exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach". And ground (g) is "that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed".

8. Section 176(1) provides a power for the Secretary of State to vary an enforcement notice "if he is satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority".

9. Section 177(1) provides that, on the determination of an appeal under section 174, the Secretary of State may "(a) grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates …". Section 177(5) provides that, where an appeal is brought under section 174(2)(a), "the appellant shall be deemed to have made an application for planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control".

The enforcement notice

10. The site has a long planning history, which need not be fully narrated here. The three former chicken sheds had been divided into six units. The council had granted planning permission for the change of use of those six units from agricultural use to use in Class B1 and B8. As the inspector noted (in paragraph 7 of her report), there was "no dispute that this change of use was implemented and also that prior approval was not needed for a change of use from offices to residential". She reminded herself, however, that "[the] development permitted by Class J [of Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995, as amended] was for 'development consisting of a change of use of a building and any land within its curtilage to a use falling [within] Class C3 (dwellinghouses) … from a use falling within Class B1(a) (offices)', that is, for a change of use only with no permission for any operational development" (paragraph 8).

11. By May 2015, extensive building work had taken place on the site, without planning permission. On 11 January 2016 Mr Oates made an application for planning permission for "[external] alterations and extensions to 5 existing buildings including retro-fitting insulation and new external cladding/roof materials in connection with the formation of 8 no. residential [dwellings] (comprising 7 x 3 bedroom and 1 x 4 bedroom units) …". It was the council's refusal of this application that was the subject of the section 78 appeal before the inspector.

12. The council issued the enforcement notice on 22 August 2016. In paragraph 3 of the notice the alleged breach of planning control was stated to be:

> "Without planning permission, the erection of three new buildings in the open countryside for residential use."

The requirements of the notice, stated in paragraph 5, were these:

> "i. Demolish three buildings marked A, B and C on the attached plan.
> ii. Remove all resultant material from the land.
> iii. Make good the land underneath the three former buildings."

13. Mr Oates appealed against the notice on the grounds in section 174(2)(a), (b), (c), (f) and (g).

The inspector's findings and conclusions

14. In her decision letter (in paragraphs 10 to 13), under the heading "The works (Buildings A, B and C; Units 1-6)", the inspector set out these findings about the works that had been carried out on the appeal site:

> "10. In or around May 2015 the Council was made aware of works taking place to the three buildings. No document or list of the works undertaken has been provided but Mr Harper produced a schedule of works in the ground (f) appeal which he suggested comprised the lesser steps necessary to remedy the breach. From this schedule it is apparent that the works undertaken included the erection of an exo-skeleton shell around each of the three buildings; drystone walling to the corners of each building; blockwork between the steel posts; the installation of 24000 natural roof slates; the installation of Tyvek roofing battens; 200mm Cellotex Insulation between the rafters; the provision of Gluelam rafters; welding to the steel sections; the addition of scarfed sections of the timber rafters; and bolts to the steel posts.
>
> 11. Photographs also show that the floors of the buildings were removed and re-laid with concrete. In addition, as I saw on my visit, interior works have included the erection of a block wall to separate the two halves of each building; the creation of rooms by studwork and plasterboards; and plaster boarding around what were the original exterior walls and the remaining parts of the original wooden frame to create walls and ceilings.

> 12. In order to re-instate the buildings as they were before it would be necessary to refit the timber ridge; refit the timber scarfed rafters; re-felt and batten; fit corrugated roof panels; remove ply panels; and refit shiplap boarding. In addition the schedule listed works not being as before which included the barn doors being removed; new windows and glazed doors being inserted; the asbestos roofing being replaced with zinc replacements; the ventilation units on the roof being removed; and the internal concrete dividing wall being built to divide each building into two units.
>
> 13. The Council's list of the works that have been done include the erection of new steel frames partially clad; the removal of existing structures' walling; removal of existing structures' frames; retention of some existing structures' fenestration; the erection of new internal layout, timber frames/partitions; and the erection of a new roof on each structure.
>
> 14. There was and still is considerable dispute between the Parties about who said what to whom about the works and their respective interpretations of what those works entailed. These interpretations included whether the original buildings had been demolished or not; whether the original buildings had been retained or not; whether the re-cladding of the walls and the replacement of the roofs amounted to a conversion of the original buildings or the erection of new buildings."

15. She then summarized "The reports submitted by the Appellant", including a "structural appraisal by Mr Stocker, a chartered structural engineer" (paragraphs 15 to 19), a "letter from Mr Edwards, a consultant civil engineer" (paragraph 20), a "report from Mr Webborn, a building surveyor …" (paragraph 21), and a "drawing showing the existing and proposed structural arrangements" submitted by Mr Oates' planning consultant, Mr Harper (paragraph 22).

16. She noted (in paragraph 24) the council's view that the original buildings on the site had been demolished. In the light of the judgment of Green J. in *Hibbitt v Secretary of State for Communities and Local Government and Rushcliffe Borough Council* [2016] EWHC 2853 (Admin), she observed (in paragraph 25) that, "depending on the works undertaken, an original building need not be demolished for it to become a new building". And she recorded the counter-assertion made on behalf of Mr Oates that "given the Council's misdirection of itself that there had been demolition, the breach of planning control was incorrectly described because what had occurred was not the erection of three new buildings but the erection of an external structure around the original building" (paragraph 26).

17. She went on to determine the ground (b) appeal in this way (in paragraphs 27 to 30):

> "27. From the evidence, both written and oral, including the photographs and reports and from what I saw on my visit there can be no dispute that as a matter of fact a substantial amount of operational development has taken place in respect of Buildings A, B and C. Put simply this operational development includes: the erection of a metal framed exo-skeleton around the original building which provides a structure for the slate roof and blockwork walls; this exo-skeleton has been erected some 0.3m from the original building and has its own foundations; the walls of the original building have largely been removed save for the short blockwork elements and replaced with plasterboard which now forms the interior

walls; there are new concrete floors; the original internal wooden structure remains, although it has been extensively repaired and parts re-placed.

28. Whilst elements of the original buildings remain, and in particular I note that the proposal in the s.78 appeal does not include retention of parts of the currently existing internal wooden structure, taking all the above matters into account together with the judgement in *Hibbitt* there is no question in my mind that Buildings A, B and C are new buildings as a matter of fact as alleged on the notice.

29. In the circumstances I consider that the description of the breach as stated on the notice is correct and there is no need for it to be corrected.

30. The appeal on ground (b) fails."

18. On the ground (c) appeal she concluded (in paragraphs 32 to 35):

"32. The prior notification to convert the existing offices in Units 1, 2 and 3 … into residential use related to a change of use only and related to the buildings present at that time. This is clear from the notice dated 27 November 2013 which, among other things, cites the submitted drawings. No permission or deemed permission was granted for operational development.

33. The allegation is 'the erection of three new buildings in the open countryside for residential use' and is in respect of operational development. I have found that the operational development that has taken place amounted to the erection of three new buildings and these three new buildings cannot benefit from any consent for a change of use because that consent applies to buildings which had existed before the operational development took place but which no longer exist. The prior approval is therefore not capable of implementation.

34. In this respect it is also pertinent to note that the use of the buildings for residential purposes took place after the operational development had taken place, that is, in the new buildings and there was no actual change of use of the buildings that had been the subject of the prior approval.

35. The erection of three new buildings for residential use requires planning permission and none has been granted. The matters alleged in the notice constitute a breach of planning control; three new buildings have been erected; and the ground (c) appeal fails."

19. In her conclusions on the appeal on ground (a), the deemed application for planning permission and the section 78 appeal – all of which failed – she said this (in paragraph 45):

"45. I accept that the Appellant's case is that that erection of the exo-skeleton was purely an enhancement to the buildings' external appearance which would in turn enhance the setting and improve the efficiency of the fabric and it is on this basis that he seeks permission. However, I have found above that Buildings A, B and C as they now exist are new buildings and therefore the Appellant is seeking permission for the erection of the three new buildings and their use for residential

purposes. In the ground (c) appeal I also found that 'these three new buildings cannot benefit from any consent for a change of use because that consent applies to buildings which had existed before the operational development took place but which no longer exist'. On this basis the three new buildings have no lawful use and there is therefore no fallback position for Buildings A, B and C as they currently exist."

20. When she came to the ground (f) appeal, the inspector dealt with the argument that even if there had been a breach of planning control, the appropriate remedial action was not the demolition of all the buildings as they now were, but works to reinstate the buildings as they had previously been, with office layouts, in accordance with a draft schedule of works provided on behalf of Mr Oates. She said (in paragraphs 81 to 86):

> "81. In determining this ground of appeal I have to consider whether there are any obvious alternatives to the stated requirements that would remedy the breach. The obvious alternative in this appeal is the schedule of works that the Appellant has prepared as an alternative to the requirement to demolish the three buildings. The schedule is marked as a 'draft' and is in three parts, A/'Removal of the exo-skeleton shell'; B/'Work to be carried out to re-instate commercial buildings as before'; and C/'Works we would like the Inspector to accept, not being as before'. Mr Harper, who prepared the schedule, is not an architect or an engineer but he has a great deal of experience of all types of buildings and matters pertaining to them. Nevertheless part A of the schedule is merely an outline list of works and it lacks the precision and specificity required in the drafting of requirements; in addition it is incomplete with regard to the totality of the works undertaken because it concerns only the exo-skeleton and there is no mention of other works, such as the relaying of the floors and the foundations that have been provided for the exo-skeleton.
>
> 82. With regard to the other parts of the schedule, I have no powers to order re-instatement as set out in part B or to permit the matters set out in part C.
>
> 83. Given the terms of the schedule of works I have considered whether it would be appropriate to vary the requirements to provide for a scheme of the works to be submitted which would overcome the lack of detail as submitted by the Appellant. A variation of a requirement to restore the land to its former state to a requirement that the land be restored to a scheme to be agreed with the local planning authority was upheld in [*Murfitt v Secretary of State for the Environment* (1980) 40 P. & C.R. 254]. But in a later case the notice required the submission of a scheme of levelling and planting … to the local planning authority for approval; the Inspector found that the notice did not comply with s.173(3) in that it did not specify the steps which the authority required to be taken and he substituted precise requirements. It was held that having found that the notice did not comply with s.173, the Inspector had erred in varying its terms and he had no power to do so because the notice was a nullity.
>
> 84. It seems to me therefore that to vary the notice as submitted by the Appellant could render it a nullity.

> 85. The Appellant submits that there are pre-existing lawful use rights and the requirements to return the site of Buildings A, B and C to an empty space go beyond the breach of planning control which arises from the erection of the exo-skeleton and do not comply with the [*Mansi v Elstree Rural District Council* (1965) 16 P. & C.R. 153] principle which established that the requirements must not purport to prevent an appellant from doing something he or she is entitled to do without planning permission, relying on lawful use rights or rights of reverter, GPDO or UCO rights, or any of the exceptions from the definitions of development. However, in this appeal I have found that as the three buildings are new buildings as alleged in the notice, they have no pre-existing lawful use rights.
>
> 86. The purpose of the requirements [of the enforcement notice] is to remedy the breach by restoring the land to its condition before the breach took place. The alternative solution offered by the Appellant in the schedule of works does not describe the works to the necessary level of precision and I do not consider it appropriate to vary the requirements to provide for a scheme to be submitted. There are therefore no obvious solutions which would remedy the breach and overcome the harm identified. I consider that the requirement to remove the three buildings, together with the requirement to remove the resulting materials, does not appear to me excessive in that it accords with the statutory purpose so far as the allegation is concerned."

Although she varied the notice by deleting the third requirement (paragraph 87), the ground (f) appeal failed (paragraph 88).

21. On the ground (g) appeal, the inspector varied the notice, extending the time for compliance from six months to nine. Subject to those two variations, she upheld the notice.

The judgment of H.H.J. Waksman Q.C.

22. Before the judge there were three grounds of challenge. The third ground, in which it was asserted that, in the light of the decision of the Court of Appeal in *Miller-Mead v Minister of Housing and Local Government* [1963] 2 W.L.R. 225, the enforcement notice was a "nullity" is not pursued before us – permission having been refused on the ground of appeal in which that argument was advanced. In the first and second grounds it was contended that the inspector erred in law in concluding that the works undertaken on the site had created three "new buildings", and that she was therefore also wrong to find there had been a breach of planning control as alleged in the enforcement notice, and to refuse planning permission on the basis that Mr Oates had no valid "fall-back" position.

23. The judge rejected that argument. He concluded (in paragraph 17 of his judgment) that the approach indicated by Green J. in *Hibbitt* was correct. It was possible to conclude that there was a "new building" even where parts of the "old" building remained, rather than being demolished. Whether what had happened, or was contemplated, had gone beyond a conversion of, or addition to, an original building, and whether there was now a new building, was "obviously a question of fact and degree" and "pre-eminently a question of planning judgment for the decision-maker". Unless the inspector's conclusion that there were "new" buildings could be successfully challenged on "Wednesbury" grounds, it must stand (paragraph 18). There was no such error here (paragraph 19).

24. The judge also rejected the submission that the inspector ought to have found that what remained of each of the original buildings amounted to a "building" within the definition in section 336 of the 1990 Act, which includes "… any part of a building …"; and the submission that if she had done so and had taken into account the permitted change of use for the original buildings, she could not have concluded that the buildings now present were, in law, "new buildings". In his view the inclusion of parts of a building in the statutory definition did not bear on the correctness of the allegation in the enforcement notice, which was, he said, "not about the nature of the building but whether it is "new"". The question here was "whether as a matter of law or fact it was correct to say that what was on site now were new buildings rather than the original buildings for the purpose of establishing a breach of planning control as a result of operational development" (paragraph 23).

25. In the judge's view, the exercise the inspector had conducted was "directed to the extent to which in substance and by reference to the facts on the ground … , the original buildings had really survived at all or whether in reality new buildings had emerged". The statutory definition had "no relevant application to that exercise". If the argument were right, it would never be possible for an inspector to find that new buildings had emerged where "remnants" of previous buildings survived. This would not accord with the reasoning of Green J. in *Hibbitt*, or with common sense (paragraph 24).

26. The judge did not accept an argument based on the principle in *Mansi* – which is, essentially, that established rights should be safeguarded in enforcement action where this is still possible. It was submitted to the judge that this principle applied by analogy here. Because the original buildings had the benefit of a lawful change of use to residential use, this should be protected from any remedial steps required by the enforcement notice. The judge saw no force in that argument. In the first place, there was, he said, "no reason in principle or by reference to any decided case to extend the reasoning in *Mansi* which was all about a change of use, to an enforcement notice issued where the breach of planning control was operational development" (paragraph 29). Secondly, there was "clear authority to the effect that the reasoning in *Mansi* does not have any application outside the change of use context so as to apply to buildings" – namely the judgment of Gilbart J. in *Mohamed v Secretary of State for Communities and Local Government and Brent London Borough Council* [2014] EWHC 4045 (Admin), at paragraphs 22 and 23 (paragraphs 30 to 32). Thirdly, even if the *Mansi* principle was potentially relevant here, it "would not make any difference", because if the inspector found that the buildings on the site were new buildings – as she did in paragraph 85 of her decision letter – "it would make no sense to say that there were any original buildings which now required to be "protected"" (paragraph 33). There was an extant planning permission for a change of use to residential use. But there was "no evidence of any change to residential use actually having been implemented prior to the further works being undertaken", and the inspector had expressly found to the contrary in paragraph 34 of her decision letter. It "would be wrong to say that there were buildings with a pre-existing use which required protection". And "[the] fact that any residential use after the operational development was in whole or in part in those sections of the new buildings" was, said the judge, "not relevant … given the Inspector's characterisation of what is there now as new buildings" (paragraph 34).

27. Finally, the judge endorsed as lawful the inspector's rejection of Mr Oates' "draft schedule of works designed to remove all the offending parts of the new operational development in

order to effect a reinstatement". The inspector was, he said, "entitled to reject that for the reasons given in paragraphs 81-83 of the [decision letter]" (paragraph 37).

Did the inspector err in law in her approach and conclusions?

28. For Mr Oates, Mr Timothy Straker Q.C. presented to us an argument largely replicating the submissions that failed before the judge. On the first and second of the five grounds of appeal, which go together, he submitted that the requirements of the enforcement notice went beyond what was necessary to correct the breach of planning control. They interfered with Mr Oates' established rights to retain and use those parts of the original buildings that remained on the site. They constituted "over-enforcement". The inspector had simply focused on the question of whether or not the buildings were "new buildings". She had not identified, as she ought to have done, the precise extent of the breach of planning control, and so had failed to consider what had to be done to correct that breach. She had found, in effect, that lawful structures were still present on the site – as one can see, for example, in her reference in paragraph 27 of her decision letter to the "exo-skeleton" having been erected "some 0.3m from the original building …", and in paragraph 28 to the "elements of the original buildings" that "remain". The new buildings incorporated parts of what was there before – and what was there before was lawful and should be protected from enforcement. The inspector could and should have used the power she had under section 176(1) to vary the notice, to prevent "over-enforcement". The original buildings had not been completely demolished. Lawful buildings within the extended definition of a "building" in section 336 of the 1990 Act remained on the site. Mr Straker acknowledged that *Mansi* concerned a lawful use of land rather than operational development (cf., for example, *Worthy Fuel Injection Ltd. v Secretary of State for the Environment* [1983] J.P.L. 173). But, he submitted, the principle – that a landowner is not to be deprived of existing lawful development by subsequent unlawful development – was equally applicable to operational development, and in so far as the first instance judgment in *Mohamed* suggested otherwise, it was incorrect.

29. On the third ground, Mr Straker submitted that the judge had failed to consider the effect of section 57(4) of the 1990 Act which provides that "[where] an enforcement notice has been issued in respect of any development of land [including development comprising "building operations", as defined in section 55 (1) and (1A)], planning permission is not required for its use for the purpose for which (in accordance with the provisions of this Part of this Act) it could lawfully have been used if that development had not been carried out". The lawful use of the site was either a Class B1 use or residential use within Class C3. Whichever it was, the total demolition of the buildings required by the enforcement notice would make it impossible to carry out. And much of the operational development to which the inspector referred in paragraphs 10, 11 and 27 of the decision letter was within the scope of relevant permitted development rights.

30. On the fourth ground, Mr Straker submitted that, in finding that the buildings on the site were "new buildings", the inspector had failed to have regard to structural elements of the original buildings that were still in place, but also took account of works not yet undertaken.

31. On the fifth ground, Mr Straker contended that the inspector's decision was "over-enforcement", and unlawful. Her finding that the buildings on the site were "new buildings", as the enforcement notice alleged, was mistaken. She had not recognized that the description

of unlawful development in the enforcement notice was an overstatement of the breach for the sake of stating the remediation required, which involved the demolition of lawful development. The principle stated by Green J. in *Hibbitt* had no place here – because that case did not involve the overriding of lawful rights.

32. I cannot accept those submissions, forcefully as they were put to us by Mr Straker. As the judge held in the court below, and as Mr Leon Glenister submitted to us on behalf of the Secretary of State, they are based on a misconception: that the inspector accepted, or at least ought to have accepted, that "lawful" parts of the original buildings remained on the site and could properly be distinguished from the new works of construction following the partial demolition of those original buildings. This seems to me to be a misreading the inspector's decision letter. On a true understanding of her findings and conclusions, she was clearly satisfied that the buildings now on the site were, as she described them, "new buildings" – not new buildings and original buildings, but simply "new buildings" – which were not, in whole or in part, lawful. And in my view, as the judge concluded, she did not err in law.

33. The decision letter must be read fairly, and as a whole. As was emphasized in this court in *Arnold v Secretary of State for Communities and Local Government* [2017] EWCA Civ 231 (at paragraph 20):

> "20. It is necessary, as always, to read the inspector's relevant conclusions fully, in their proper context, and bearing in mind that the decision letter was written principally for the parties to the appeals, who were of course familiar with the evidence and submissions presented on either side at the inquiry. One should not isolate particular passages in the inspector's conclusions from others which are also relevant to the specific point being considered in the passage in question. The inspector's conclusions on the ground (a) and ground (f) appeals are not wholly discrete. They relate to each other, and, to an extent, depend upon each other. They must be considered together."

34. In this case it is necessary to take the inspector's findings and conclusions on the ground (b) appeal together with her findings and conclusions on the appeals on grounds (a), (c) and (f). When this is done, it is, I think, quite clear that she was alive to the possible mischief of "over-enforcement", and that she took care to satisfy herself that the council's enforcement action was soundly based in fact and justified in law.

35. In paragraphs 10, 11, 27, 28 and 29 of the decision letter the inspector described how the "original buildings" had been largely demolished and the remaining elements of them intimately incorporated into the fabric of the "new buildings". On the evidence before her and with the benefit of her site visit, she was entirely clear in her finding, as a matter of fact and degree, that there were three "new buildings" on the site, and that the "original buildings" no longer existed as recognizable, independent structures. Such parts of the "original buildings" as had not been destroyed or removed had now been integrated fully into the structure of the "new buildings". This question was squarely before the inspector as a contested issue between the parties. She was plainly well aware of its significance for her decision on the enforcement notice appeal. She faithfully recorded the rival assertions in paragraphs 24 to 26. She set out a thorough summary of the evidence of the works of demolition and construction that had been carried out on the site, and the documentary evidence submitted on behalf of Mr Oates. In finding as she did, she was explicitly and unequivocally rejecting the assertion made on Mr Oates' behalf, which she had recorded in

paragraph 26, that the breach of planning control alleged in the enforcement notice had been inaccurately described, and that "what had occurred was not the erection of three new buildings but the erection of an external structure around the original building". This was classically a matter of fact and evaluative judgment for her as decision-maker. It is not for the court to consider and determine afresh in an appeal under section 289.

36. The content of the passages in the decision letter to which I have referred is, in my view, unimpeachable. There can be no suggestion that the inspector made incomplete or erroneous findings of fact, that she ignored any relevant considerations or took into account considerations that were irrelevant, or that her exercise of judgment was unreasonable in the "Wednesbury" sense, or otherwise unlawful. She did not misdirect herself on the relevant law.

37. She was entitled to find as she did – that the buildings on the site were "new buildings" – even though they were partly composed of what was left of the buildings that had stood there before. As she said in paragraph 25, "depending on the works undertaken, an original building need not be demolished for it to become a new building". Here, when she said "demolished", she was clearly referring to total or near-total demolition. Her reference to, and reliance upon, the first instance judgment of Green J. in *Hibbitt* was appropriate. As Green J. said (in paragraph 27 of his judgment):

> "27. … In my view whilst I accept that a development following a demolition is a rebuild, I do not accept that this is where the divide lies. In my view it is a matter of legitimate planning judgment as to where the line is drawn. The test is one of substance, and not form based upon a supposed but ultimately artificial clear bright line drawn at the point of demolition. And nor is it inherent in "*agricultural building*". There will be numerous instances where the starting point (the "*agricultural building*") might be so skeletal and minimalist that the works needed to alter the use to a dwelling would be of such magnitude that in practical reality what is being undertaken is a rebuild. …".

38. Put simply, the principle here is unsurprising: that a building constructed partly of new materials and partly of usable elements of previous structures on the site, after other elements of those previous structures have been removed through demolition, may in fact be a "new" building; or it may not. The facts and circumstances of every case will be different. But, in principle, the retention of some of the fabric of an original building or buildings within the building that has been, or is being erected, does not preclude a finding by the decision-maker, as a matter of fact and degree, that the resulting building is, physically, a "new" building, and that the original building has ceased to exist. This, in effect, is what the inspector found here. In doing so she made no error of law. She was not compelled to find that because some elements of the original buildings had survived in the construction of the buildings now on the site, the buildings were not and could not be, as a matter of fact, "new buildings". That suggestion is untenable.

39. On the ground (b) appeal the inspector's crucial finding is in paragraph 28 of the decision letter. She acknowledged there that "elements of the original buildings remain". She found, however, "taking all the above matters into account together with the judgement in *Hibbitt*" that "Buildings A, B and C are new buildings as a matter of fact as alleged on the notice". This led to her conclusions in paragraphs 29 and 30: that the breach of planning control was

correctly stated in the enforcement notice (paragraph 29), and that the ground (b) appeal must fail (paragraph 30).

40. As one would expect, the inspector's findings and conclusions on the ground (c), ground (a) and ground (f) appeals were consistent with her findings and conclusions on ground (b). She considered the appeal on each of these three grounds separately, reaching the relevant findings and conclusions for the determination of each. The outcome of each is based on the same, and ultimately decisive, finding of fact: that the buildings now on the site, against which the council had enforced, were indeed, and only, "new buildings", not original buildings encased by new buildings, but simply "new buildings", for which planning permission had not been granted.

41. As on the ground (b) appeal, the inspector's conclusions on all three of these grounds are, in my view, impeccable.

42. On the ground (c) appeal, in paragraph 33, she confirmed and relied upon her finding on the ground (b) appeal that "the operational development that has taken place amounted to the erection of three new buildings". In the light of that finding, she reached three conclusions, all of which are legally faultless: first, in paragraph 33, that in the circumstances the three "new buildings" on the site could not benefit from any "consent" for change of use because such "consent" had applied only to "buildings which had existed before the operational development took place but which no longer exist", with the result that the "prior approval is therefore not capable of implementation"; second, in paragraph 34, that the residential use had taken place in the "new buildings" and there was "no actual change of use of the buildings that had been the subject of the prior approval"; and third, in paragraph 35, that the erection of the three "new buildings" for residential use was development that "requires planning permission and none has been granted". In summary, the "new buildings" were not lawful development; they had been constructed unlawfully, in breach of planning control.

43. The inspector's corresponding conclusions on the ground (a) appeal, in paragraph 45, were consistent with those previous conclusions. She rejected the contention on behalf of Mr Oates that the "erection of the exo-skeleton was purely an enhancement to the buildings' external appearance …". She referred again to the finding she had made for the purposes of the appeals on grounds (b) and (c) that the buildings "as they now exist are new buildings". She concluded therefore that what Mr Oates was now seeking was "permission for the erection of three new buildings and their use for residential purposes". She reiterated her finding on the ground (c) appeal, in paragraph 33, that "these three new buildings cannot benefit from any consent for a change of use because that consent applies to buildings which had existed before the operational development took place but which no longer exist". All of this, it seems to me, is beyond criticism in proceedings such as these.

44. The same findings and conclusions also informed the inspector's consideration of the ground (f) appeal. In paragraph 85 she confronted the argument put forward on the basis of "the *Mansi* principle". She stated the principle accurately. But she concluded, in effect, that there could be no application of it in a case such as this, where the three buildings were "new buildings" and had "no pre-existing lawful use rights". This conclusion matched her relevant findings of fact on the previous grounds, and it was correct in law. She also found, in paragraph 86, that, despite the "alternative solution" put forward on behalf of Mr Oates in the "schedule of works", which she considered insufficiently precise, there were no "obvious solutions which would remedy the breach and overcome the harm identified" – a

conclusion that is not said to be irrational. In the circumstances she could only conclude that the requirement in the enforcement notice to remove the three buildings was not excessive. These, again, were issues of fact and judgment for the inspector. They are not matters for the court.

45. In summary, in my view, the inspector correctly applied the relevant provisions of the statutory scheme to her determination of each ground of appeal against the enforcement notice, and her conclusions were entirely consistent with relevant authority, including *Mansi*.

46. On that analysis, the appeals cannot succeed on the first two grounds, or on the fifth. Mr Straker's attack on the inspector's approach and conclusions fails in its main thrust. It does not, and cannot, dislodge her finding, contrary to the evidence and argument presented to her on behalf of Mr Oates, that the buildings against which the council had enforced were, in fact, "new buildings", in whose structure the remaining fabric of the original buildings had been fully integrated, so that they no longer existed as buildings, even in part. Having made that finding on the ground (b) appeal, and having reached the conclusion she did on that ground, she was entitled to find and conclude as she did on the others.

47. As the judge held, it is also wrong to suggest that the inspector was at fault in failing to consider the definition of "building" in section 336 of the 1990 Act, which includes a "part" of a building. The situation here is quite different from that considered by the court in *Wyre Forest District Council v Secretary of State for the Environment* [1990] 2 A.C. 357, on which Mr Straker relied. In that case the validity of the enforcement notice depended on whether there was a "caravan" or not, within the relevant statutory definition. This was a question with only one possible answer, applying the statutory definition. In this case, by contrast, there is no dispute that there were "buildings" on the site, within the definition in section 336. The inspector was not considering whether there was or was not "part" of a building on the site, such as to be, in itself, a "building" within the statutory definition, but rather whether, as a matter of fact, the buildings that had now been erected on the site were or were not "new buildings" – even though parts of the original buildings left in place after the works of demolition had been incorporated into those now constructed. She dealt with the right question, not the wrong one. Her finding that there were now, in fact, three "new buildings" on the site is not upset by the submission that parts of those "new buildings" were not, in themselves, new fabric but old. And, as Mr Glenister submitted, for a structure or piece of structure to be "part of a building" there must in the first place be a building of which it can be a part. If the buildings now on the site were, as the inspector found, "new buildings", it follows that the remaining fabric of the original buildings was no longer part of those original buildings, but was now part of the "new buildings" themselves.

48. Having found that the buildings were "new buildings", constructed without planning permission, the inspector was not compelled to conclude that the remedy for the breach of planning control was anything less than complete demolition. Indeed, in the circumstances it is hard to see how any other conclusion could have been justified.

49. Mr Straker was, of course, right to submit that the enforcement of planning control should not be used to deprive landowners of lawful rights. That, however, is not what happened in this case. Here, as the inspector concluded, the landowner had no lawful rights in the three "new buildings" he had constructed on the site without having first sought and obtained the necessary planning permission for them. Such lawful use rights as had attached to the

original buildings were lost when those buildings ceased to exist as buildings and "new buildings" had replaced them. That is the effect of the inspector's relevant findings and conclusions. So the requirement in the enforcement notice to demolish the buildings entirely did not deprive Mr Oates of any established lawful rights. No such rights subsisted. There was, therefore, no breach of the "*Mansi* principle". On the facts as found by the inspector, that principle was simply not engaged.

50. Whatever force there might be in Mr Straker's argument that the *Mansi* doctrine could, in principle, be extended to apply not only to lawful use rights but also to operational development, I cannot see how, at least in a case such as this, it could offer any greater protection against "over-enforcement" than is already inherent in the express provisions of the statutory scheme. But that point can remain moot in these appeals, because on the inspector's findings of fact it does not arise. The operational development here, as found by the inspector, was the construction of three "new buildings", which had not been lawfully erected and which had no lawful use rights of their own. The buildings to which lawful use rights had attached were no longer in existence. There was nothing, either by way of lawful use or by way of lawful operational development, for the "*Mansi* principle" to bite upon.

51. For essentially the same reasons, the argument in the third ground of appeal must also be rejected. As Mr Glenister submitted, a lawful use right attaching to a building can only be exercised while that building survives so as to be physically capable of being used for the relevant purpose. In this instance, on the inspector's findings of fact, that was not so. The identifiable remains of the original buildings no longer had any independent existence as buildings capable of being lawfully used as such. They had been metamorphosed into "new buildings". The "pre-existing lawful use rights", as the inspector described them in paragraph 85 of the decision letter, did not subsist after the buildings to which they had attached were replaced by "new buildings" with no lawful use of their own. As the inspector effectively concluded, on the facts of this case, section 57(4) did not produce that result.

52. The fourth ground of appeal is also unsustainable. There is nothing in the decision letter to indicate that the inspector left out of account any relevant matter of fact, or that she reached her conclusions on any of the statutory grounds of appeal on the basis of her anticipation of further works of construction on the site, and not merely the works already carried out. If she did not refer to every piece of evidence, or give to any of the evidence as much weight as she was invited to do by counsel for Mr Oates at the inquiry, that does not amount to an error of law. She referred to the salient parts of the evidence as to what had been done on the site. She did not base her findings and conclusions on work not yet undertaken. Her reference to the drawings of the proposed development, which had been presented to her in evidence on behalf of Mr Oates, did not pre-empt her consideration of the development already in place. This is plain from paragraph 27 of the decision letter.

53. Lastly, I should acknowledge a point made on behalf of the Secretary of State in his respondent's notice – that in an appeal under section 289 the court should refuse to entertain arguments not put to the inspector in the appeal under section 174 (see, for example, the judgment of Mr George Bartlett Q.C., sitting as a deputy judge of the High Court, in *South Oxfordshire District Council v Secretary of State for the Environment, Transport and the Regions* [2000] P.L.C.R. 315, at p.329). In many cases, however, it will not be easy to disentangle from each other arguments with a common thread. The arguments put to us here do have a common thread, which is the complaint of "over-enforcement". I have therefore

dealt with them all, without attempting to distinguish those that were firmly before the inspector from those that were not.

Conclusion

54. For the reasons I have given, I would dismiss these appeals.

Lord Justice McCombe

55. I agree.

Lord Kitchin

56. I also agree.

House of Lords

*Sage *v* Secretary of State for the Environment, Transport and the Regions and another

[2003] UKHL 22

2003 Jan 30; April 10

Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Hobhouse of Woodborough, Lord Scott of Foscote and Lord Rodger of Earlsferry

Planning — Enforcement notice — Validity — Erection of uncompleted dwelling house in breach of planning control — No further building work in four years before notice served — Uncompleted work only affecting interior of building and not external appearance — Whether completion amounting to "development" requiring planning consent — Whether dwelling house "substantially completed" — Whether enforcement notice served in time — Town and Country Planning Act 1990 (c 8), ss 55(2)(a), 171(B)(1) (as inserted by Planning and Compensation Act 1991 (c 34), s 4)

The local planning authority served an enforcement notice on a landowner informing him that he was in breach of planning control in partially erecting a dwelling house, and requiring its removal. No building work was carried out on the structure during the four years preceding service of the notice, and the building was unfit for habitation since the ground floor consisted of rubble, there were no service fittings or staircase, the interior walls were not plastered and the windows were unglazed. The landowner appealed against the enforcement notice on the ground that the building was an agricultural building for which planning permission was not required, or alternatively, that the notice had not been served within the time limit of four years after "the operations were substantially completed" as specified by section 171(B)(1) of the Town and Country Planning Act 1990[1]. An inspector appointed by the Secretary of State rejected the appeal and held that, having regard to the layout and appearance of the building, it was not an agricultural building but a dwelling house, that the time limit of four years did not begin to run until the whole operation of creating the dwelling house was substantially completed and that, as a question of fact and degree, the house was a building in the course of construction and was not "substantially completed". The landowner appealed to the High Court on the ground that since all the work remaining to be done on the dwelling house was either internal work or work which did not materially affect the external appearance of the building it was, pursuant to section 55(2)(a) of the Act, work which did not amount to the development of land for which planning permission was required so that there were no further building operations to which an enforcement notice could apply, and that therefore the operations referred to in section 171B(1) must have been completed. The judge allowed the appeal on those grounds and the Court of Appeal upheld that decision.

On appeal by the planning authority—

Held, allowing the appeal, that the exception to "development" in section 55(2)(a) applied only to operations carried out on a completed building for its "maintenance, improvement or other alteration", and did not apply to work carried out by way of completing an incomplete building; that the work needed to complete the dwelling house was not within the exception so that it still required planning permission and involved breaches of planning control to which an enforcement notice could apply; that a holistic approach was implicit in planning control and if a

[1] Town and Country Planning Act 1990, s 55(2)(a): see post, para 18.
S 171(B)(1), as inserted: see post, para 10.

building operation was not carried out, both externally and internally, fully in accordance with planning permission, the whole operation was unlawful; and that, accordingly, the building operation was not "substantially completed" for the purposes of section 171(B)(1) and the enforcement notice was not served out of time (post, paras 1, 2, 6, 8, 19–29, 42–44).

Decision of the Court of Appeal [2001] EWCA Civ 1100 reversed.

The following cases are referred to in the opinion of Lord Hobhouse of Woodborough:

Belmont Farm Ltd v Minister of Housing and Local Government (1962) 13 P & CR 417, DC

Ewen Developments Ltd v Secretary of State for the Environment [1980] JPL 404, DC

Howes v Secretary of State for the Environment [1984] JPL 439

McKay v Secretary of State for the Environment [1989] JPL 590

Somak Travel Ltd v Secretary of State for the Environment [1987] JPL 630

The following additional case was cited in argument:

R v Secretary of State for the Environment, Ex p Baber [1996] JPL 1034, CA

APPEAL from the Court of Appeal

By leave of the House of Lords (Lord Bingham of Cornhill, Lord Mackay of Clashfern and Lord Hobhouse of Woodborough) granted on 24 April 2002, Maidstone Borough Council, in its capacity as local planning authority, appealed from a dismissal by the Court of Appeal (Schiemann, and Keene LJJ and Sir Murray Stuart-Smith) on 28 June 2001, of the planning authority's appeal from a decision of Mr Duncan Ousley QC sitting as a deputy judge of the Queen's Bench Division on 11 October 2000, allowing an appeal by the landowner, Alan Frank Sage, from a decision dated 16 December 1999 of an inspector appointed by the Secretary of State for the Environment, Transport and the Regions, upholding an enforcement notice served on 19 March 1999 by the planning authority on the landowner, informing him that the planning authority considered he was in breach of planning control in partially erecting a dwelling house at Holly Farm, Otham, Maidstone, Kent.

The facts are stated in the opinion of Lord Hobhouse of Woodborough.

Stephen Hockman QC and *Richard Barraclough* for the planning authority.

Alice Robinson for the landowner.

Their Lordships took time for consideration.

10 April. **LORD NICHOLLS OF BIRKENHEAD**

1 My Lords, I have had the opportunity of reading a draft of the speech of my noble and learned friend, Lord Hobhouse of Woodborough. I agree that, for the reasons he gives, this appeal should be allowed.

LORD HOPE OF CRAIGHEAD

2 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hobhouse of Woodborough. I agree with it, and for the reasons which he has given I too would allow the appeal.

A **3** As my noble and learned friend has explained, Mr Sage's primary argument at first instance was that the building was an agricultural building for which he did not need planning permission. This was a pure question of fact, and it was resolved against him conclusively by the inspector's finding that the building was not an agricultural building but was best described as a dwelling house that was in the course of construction.

B **4** This led to the alternative argument that the notice was out of time because the operations that must be substantially completed for the purpose of section 171B(1) of the Town and Country Planning Act 1990 comprise the operations which constituted a breach of planning control, or (as it was put) the operational development, and not the whole operation of completing the dwelling house. The inspector's view was that the four-year period did not begin until the whole operation of creating the dwelling house was C substantially completed. He then held, treating the question as one of fact and degree, that the building in this case was not a substantially completed dwelling house. Here again the inspector's decision on the facts went against Mr Sage and the contrary is not longer arguable. The question which remains is whether the inspector was right when he said that the four-year period did not begin until the whole operation of creating the dwelling house D was substantially completed.

5 Mr Sage's argument is that the reference in section 171B(1) to the date "on which the operations were substantially completed" has to be read in the light of the wording of the other relevant sections in the 1990 Act, and that by tracing the language of that subsection back through section 171A(1)(a) the reader is required to bring into account the definition of "development" in section 55(1) of the Act, those operations which section 55(2)(a) says are E not to be taken to involve development and the definition of the word "building" in section 336(1). If this approach is right the position is, as Keene LJ explained in paragraphs 27–31 of his judgment, capable of being resolved quite simply by saying that what have to be substantially completed are those operations which amount to a breach of planning control and that operations and works which do not amount to development because they F fall within section 55(2)(a) are not to be taken into account. On this approach, it does not matter that the inspector did not think that the building was a dwelling house. All one needs to find is that there is a building which has been erected in breach of planning control.

6 I was initially attracted to this approach, as it seemed to me to be consistent with the language of the statute and to be unlikely, as Keene LJ said G in paragraph 32 of the judgment, to give rise to practical difficulties. But I have in the end been persuaded, with respect, that the language of the statute is open to a different interpretation and that it makes better sense of the legislation as a whole to adopt the holistic approach which my noble and learned friend has described. What this means, in short, is that regard should be had to the totality of the operations which the person originally contemplated and intended to carry out. That will be an easy task if the H developer has applied for and obtained planning permission. It will be less easy where, as here, planning permission was not applied for at all. In such a case evidence as to what was intended may have to be gathered from various sources, having regard especially to the building's physical features and its design.

7 If it is shown that all the developer intended to do was to erect a folly, such as a building which looks from a distance like a complete building—a mock temple or a make-believe fort, for example—but was always meant to be incomplete, then one must take the building when he has finished with it as it stands. It would be wrong to treat it as having a character which the person who erected it never intended it to have. But if it is shown that he has stopped short of what he contemplated and intended when he began the development, the building as it stands can properly be treated as an uncompleted building against which the four-year period has not yet begun to run.

8 It must be emphasised that it is not for the inspector to substitute his own view as to what a building is intended to be for that which was intended by the developer. But that was not what the inspector did in this case. It was not just that the building looked to him like a dwelling house that was in course of construction. His conclusion was supported, in his view, by an application which Mr Sage had made in 1994 to use the building for tourist accommodation and by his finding that that remained Mr Sage's stated intention. These matters were relevant to the question which he had to decide, and in my opinion he was entitled on the facts which he found to reach the conclusion which he did.

LORD HOBHOUSE OF WOODBOROUGH

9 My Lords, on 19 March 1999, the Maidstone Borough Council (the council) as the relevant planning authority issued and served on Mr Sage an enforcement notice (the notice) under Part VII of the Town and Country Planning Act 1990. The notice informed him that the council considered that he was in breach of planning control in erecting (or, as later amended, partially erecting) a dwelling house and requiring its removal. Mr Sage appealed raising various grounds under section 174(2). Besides applying for planning permission ex post facto, the two main grounds of his appeal were firstly that the building was an agricultural building and did not require planning permission and, secondly, that the notice had been served outside the four-year time limit permitted by section 171B(1), a section inserted into the Act by the Planning and Compensation Act 1991.

10 Section 171B(1) provides:

> "Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed."

This provision followed the lead given by Robert Carnwarth QC in his report to the Secretary of State for the Environment entitled Enforcing Planning Control (HMSO February 1989) which called for greater simplicity and clarity in the law and procedures of enforcement which had become excessively technical and complex and open to evasion and abuse. There can be no doubt that the underlying purpose behind section 171B(1) was to introduce a single easily applied limitation period for operations. Section 171B(2) and (3) adopted in respect of change of use and other breaches four- and ten-year periods respectively, running in either case from the date of the breach.

A **11** The point raised by this appeal by the council to your Lordships' House concerns the construction of section 171B(1) and the starting point of the four-year period—i e "the date on which the operations were substantially completed". Mr Sage contends that it means the date after which the building work remaining to be done would no longer itself involve a breach of planning control, because, if taken on its own, it would not require planning permission. The judge, Duncan Ouseley QC, sitting as a B deputy High Court judge, and the Court of Appeal summarised the point in a brief sentence: "The building operations are complete when those activities which require planning permission are complete." The council on the other hand argue for a holistic construction, asking: has the building been substantially completed and, if so, when? The council, like the inspector, adopt the passage in the Ministry Circular No 10/97, para 280.

C

> "in the case of a single operation, such as the building of a house, the four-year period does not begin until the whole operation is substantially complete. What is substantially complete must always be decided as a matter of fact and degree . . . All the relevant circumstances must be considered in every case."

D The inspector, deciding in favour of the council and upholding the notice, applied the latter approach; the judge and the Court of Appeal (Schiemann LJ, Keene LJ and Sir Murray Stuart-Smith), deciding in favour of Mr Sage, preferred the former.

12 The inspector heard Mr Sage's appeal (together with two other appeals concerning the same parties) over the space of two days including a view of the relevant premises. Both parties were legally represented and E adduced oral and written evidence. It was accepted by the council that Mr Sage had not done any further building work on the relevant structure during the last four years before the notice was served. It was also common ground that it was an "operation" case falling within section 171B(1) not a change of use case under subsection (2).

13 The inspector started by considering Mr Sage's contention that it F was an agricultural structure and therefore he had never needed any planning permission to erect it. He considered how it was constructed and concluded that it was constructed with domestic not agricultural features, as a dwelling not as a building to be used for agricultural purposes. It was constructed with cavity block walls. Three elevations were clad with tiles and the fourth with timber boarding (but the cladding was incomplete). The entrance door and the fenestration were typical of a dwelling designed and G constructed for human habitation not agricultural use. The external tile hung walls in his view supported the same conclusion. The building had an upper floor with further fenestration though no stairway had been installed. He applied the test of physical layout and appearance derived from *Belmont Farm Ltd v Minister of Housing and Local Government* (1962) 13 P & CR 417 and *Mckay v Secretary of State for the Environment* [1989] JPL 590.

H **14** The inspector rightly did not investigate the intentions of Mr Sage at various stages in the history nor the uses he had made of the structure from time to time. The character and purpose of a structure falls to be assessed by examining its physical and design features. The relevance of the assessment is to determine whether or not the building operation is one requiring planning permission. The actual use made of the building does not alter the

answer to be given. Keeping a pig in the sitting-room or hens in the kitchen does not turn a dwelling house into an agricultural building even if the humans move out. Permission for a change of use may have to be applied for but that would be a separate question. The starting point for considering the permitted use of a new structure is the character of the building for which permission has been given or does not require to be given (section 75(3)): "the permission shall be construed as including permission to use the building for the purpose for which it is designed."

15 He expressed his conclusion in the words:

> "As a matter of fact and degree, I consider that, having regard to its layout and appearance, [this building] is not an agricultural building and was not designed as such . . . [It] is best described as a dwelling house that is in course of construction."

Having read the evidence and considered the photographs which have been included in our papers, the inspector's conclusion on this point would seem to have been inevitable. Therefore that ground of appeal failed.

16 This led on to Mr Sage's further ground for challenging the notice, that it was out of time. The starting point is that the building is to be classified as an unfinished dwelling house. It was unfit for habitation. The floor at ground level consisted of rubble. There were no service fittings. There was no staircase. The interior walls were unfinished, without lining or plaster. None of the windows, including that on the upper floor, was glazed. One witness refers to the roof-light as being glazed. There was no guttering. Mr Sage had said in evidence that the building had originally been glazed but that the glass had been broken by vandals more than four years earlier and he had not replaced it. Mr Sage's evidence was contradicted by other evidence which was inconsistent with the windows ever having been glazed. It appears that the inspector probably did not accept Mr Sage's evidence on this point. But it was not critical to the inspector's decision nor to those of the judge and the Court of Appeal.

17 On this state of the facts, the issue of the construction of section 171B(1) became critical and was the effective subject matter of Mr Sage's recourse to the jurisdiction of the High Court. On the argument of Mr Sage, it was necessary to consider whether the work needed to complete the structure as a dwelling house was such as of itself to require planning permission, a point which Mr Sage submitted was at least arguable and had not been taken into account by the inspector in arriving at his decision and therefore (as the judge ordered) his decision should be quashed and he be directed to reconsider the appeal against the notice having regard to that factor.

18 It is convenient to examine this argument at the outset although it is not the central point raised by this appeal. Section 57(1) in Part III of the Act provides that (subject to immaterial exceptions) "planning permission is required for the carrying out of any development of land". "Development" is defined in section 55 as meaning: "the carrying out of building, engineering, mining or other operations in, on, over or under land . . ." Subsection (1A), added in 1991, amplifies this by providing that "building operations" shall include: "(a) demolition of buildings; (b) rebuilding; (c) structural alterations of or additions to buildings; and (d) other operations normally undertaken by a person carrying on business as a

builder." Subsection (1) is subject to subsection (2) which so far as material provides:

> "The following operations . . . shall not be taken for the purposes of this Act to involve development of the land—(a) the carrying out for the maintenance, improvement or other alteration of any building of works which—(i) affect only the interior of the building, or (ii) do not materially affect the external appearance of the building . . ."

Mr Sage submits that the work remaining to be done was all either internal work or work which did not materially affect the external appearance of the building.

19 It would be a question of fact whether the external work still to be done would have had a material effect on the building's appearance. But that question would only become significant if the work was work carried out "for the maintenance, improvement or other alteration" of the building. Work carried out by way of completing an incomplete structure would not come within exception (a). So, once it has to be accepted, in accordance with the inspector's finding, that the structure was a dwelling house in the course of construction, it follows that the work would be properly described as work carried out in the course of completing the construction of the building. Exception (a) clearly contemplates and involves a completed building which is to be maintained, improved or altered. It follows that an essential element in the argument of Mr Sage is missing. He cannot on the facts of this case rely upon exception (a) to say that he would not still require planning permission to complete the structure because it would not have amounted to a "development" (the premise upon which his argument under section 171B is founded). The breach of planning control would not have been exhausted; it would be continuing.

20 The Court of Appeal rejected this conclusion for two reasons. Keene LJ, in paragraph 26, said that so long as the structure had progressed to the stage where it could be said to have an interior, i e, as Mr Sage's counsel put it, say three or four walls and a roof, exception (a) could be applied and the developer could potentially take advantage of it. Schiemann LJ, in paragraph 37, thought that the council's argument introduced a subjective element: "I can see no policy reason why we should construe section 55(2)(a) as limited in its application to buildings which have been completed according to some notional plan." I do not accept either argument. It is not a question of referring to "some notional plan". Ex hypothesi, the erection is an uncompleted dwelling house; what is involved is its completion as a dwelling house by carrying out works essential for a completed dwelling house. The approach of Keene LJ not only does violence to the language used in exception (a) but also would make a mockery of planning control by inviting abuse and evasion.

21 Returning now to section 171B(1), it can be seen that the same words have been used by the draftsman to describe building operations as in section 55(1), inviting, it is said, the reader to read the two sections together. However it still does not equate the term "operation" with the term "development" as further appears from section 191. But the more important part of Mr Sage's argument is that such a cross-reference is required by the words: "Where there has been a breach of planning control consisting in the carrying out without planning permission of building . . . operations . . ."

The phrase "the date on which the operations were substantially completed" should, he submits, be answered by asking when did those operations reach the stage at which no further breach of planning control was involved. He would then answer that question by reference to exception (a) in section 55(2). Section 171A(1) provides that: "For the purposes of this Act . . . carrying out development without the required planning permission . . . constitutes a breach of planning control." He thus argued that the enforcement notice could only relate to breaches of planning control and that, once no further breach was involved in completing the development, there could be no further building operations to which an enforcement notice and section 171B could apply. Therefore the operations referred to in section 171B must have been completed.

22 Again these arguments were accepted by the Court of Appeal. Keene LJ, at paragraph 31, said:

> "I conclude that, as a matter of law, operations and other works which do not amount to development are not to be taken into account in deciding whether there has been substantial completion within the meaning of section 171B(1). As the deputy judge pointed out, where all the operations amounting to development have been carried out there is nothing remaining against which the local planning authority could take enforcement action."

Schiemann LJ added, at paragraph 38:

> "I am presently inclined to the view (without the matter having been fully argued) that substantial completion has taken place when there is enough to enable a planning authority to judge whether or not the building has sufficient adverse effects to make it expedient to issue an enforcement notice."

The section might have been drafted as Schiemann LJ prefers but it was not. The criterion he suggests would fly in the face of the simplicity and clarity that the revisions of planning control law were seeking to achieve. As regards the reason given by Keene LJ and the judge, it involves giving a limited meaning to the phrase "building operations", not its natural meaning, and does so on the basis of adopting an extended meaning to exception (a) which is open to the objections I have already referred to. But the most substantial objection to his approach is that it is contrary to the holistic approach upon which this part of planning law is based.

23 When an application for planning consent is made for permission for a single operation, it is made in respect of the whole of the building operation. There are two reasons for this. The first is the practical one that an application for permission partially to erect a building would, save in exceptional circumstances, fail. The second is that the concept of final permission requires a fully detailed building of a certain character, not a structure which is incomplete. This is one of the differences between an outline permission and a final permission: section 92 of the Act. As counsel for Mr Sage accepted, if a building operation is not carried out, both externally and internally, fully in accordance with the permission, the *whole* operation is unlawful. She contrasted that with a case where the building has been completed but is then altered or improved. This demonstrates the fallacy in Mr Sage's case. He comes into the first category not the second.

A **24** The same holistic approach is implicit in the decisions on what an enforcement notice relating to a single operation may require. Where a lesser operation might have been carried out without permission or where an operation was started outside the four-year period but not substantially completed outside that period, the notice may nevertheless require the removal of all the works including ancillary works: *Ewen Developments Ltd v Secretary of State for the Environment* [1980] JPL 404; *Howes v Secretary* B *of State for the Environment* [1984] JPL 439, Hodgson J; *Somak Travel Ltd v Secretary of State for the Environment* [1987] JPL 630, Stuart-Smith J. The first of these upheld a requirement that the whole of an embankment be removed. In the second the inspector had directed himself that the removal of a hedge and the creation of an access was "a continuous operation and each step in the work prolong[ed] the period for serving the enforcement C notice as regards every earlier step of the development": the judge upheld the notice. The third case involved an unauthorised change of use case from residential to commercial use. The notice not only required the cessation of the commercial use but also the removal of an internal staircase which had been put in to facilitate that use though in itself the staircase had not required permission.

D **25** These decisions underline the holistic structure of planning law and contradict the basis upon which the Court of Appeal reached its decision in favour of Mr Sage.

26 Finally, it was argued for Mr Sage that the inspector should have had express regard to an inspector's decision letter reported in [1972] JPL 385 where the facts bore some similarity to those of the present case and he had held the enforcement notice to be out of time. However that decision was E based upon the finding by the inspector that "the appeal building had become a viable building more than four years before [the] service of the notice and that in the form which it then took it [was] immune from enforcement action". The inspector's finding in the present case was that the structure was best described as a dwelling in the course of construction. The inspector was right to think that the 1972 decision did not help; indeed it was adverse to Mr Sage's case.

F **27** Accordingly the inspector's decision was correct. The notice had not been served after the end of the period of four years beginning with the date on which the building operations were substantially completed. Indeed they had still not been substantially completed at the date of the notice. The appeal should be allowed and Mr Sage's CPR Pt 8 proceedings dismissed and the orders of the judge and the Court of Appeal set aside, including the G costs orders made in favour of Mr Sage.

28 Leave to appeal to your Lordships' House was given "on terms that, if successful, the petitioners do not seek any order for costs against the respondent". Accordingly no order will be made in respect the costs in this House or in the courts below.

H **LORD SCOTT OF FOSCOTE**

29 My Lords, I have had the advantage of reading in advance the opinion of my noble and learned friend, Lord Hobhouse of Woodborough, and gratefully adopt his exposition of the facts and statutory provisions that have given rise to this appeal to the House. I, like your Lordships, have come to the conclusion that this appeal by Maidstone Borough Council should be

allowed and I am in general agreement with the reasons expressed by Lord Hobhouse as to why that should be so. There is, however, an aspect of this case which seems to me unsatisfactory and I think I should explain what it is.

30 The purpose of section 171B of the Town and Country Planning Act 1990 (added to the 1990 Act by amendment with effect from 2 January 1994: see section 4, Planning and Compensation Act 1991 and the Planning and Compensation Act 1991 (Commencement No 5 and Transitional Provisions) Order 1991 (SI 1991/2905)) was, as Lord Hobhouse has explained in paragraph 10 of his opinion, to introduce a straightforward, easily applied, set of time limits within which enforcement action to remedy breaches of planning control must be brought. The section divides breaches of planning control into three categories.

31 First, where the breach consists of "building, engineering, mining or other operations" over land, enforcement action cannot be taken after four years from "the date on which the operations were substantially completed" (subsection (1)). Second, where the breach consists of a change in the use of a building to use as a single dwelling house, enforcement action cannot be taken after four years "beginning with the date of the breach" (subsection (2)). And, third, in the case of any other breach of planning control, enforcement action cannot be taken after ten years beginning with the date of the breach (subsection (3)).

32 In the present case Mr Sage, without planning permission, commenced the building of a dwelling house. In 1994, however, while the dwelling house was still uncompleted he ceased his building works. The building, such as it then was, although uncompleted as a dwelling house, had reached a stage of construction in which it was capable of use for other purposes. It could, in particular, be used for agricultural purposes. Hay, straw or grain could be stored in it. Agricultural machinery of a size small enough to be manoeuvred through the single entrance door could be sheltered in it. Livestock or poultry could be kept in it.

33 The council served an enforcement notice on Mr Sage on 19 March 1999. This was more than four years after the building work had ceased. The issue before the inspector centred on the question whether or when the building operations were "substantially completed". It is, in my opinion, important to notice how the argument proceeded before the inspector and in the courts below.

34 The inspector recorded in his decision letter (paragraph 22) that the issue was whether the building was an agricultural structure, as Mr Sage contended, or an uncompleted dwelling house, as the council contended. In paragraph 26 the inspector made the important finding that "as a matter of fact and degree . . . having regard to its layout and appearance, [the building] is not an agricultural building and was not designed as such". This finding was not challenged in the courts below and was expressly accepted before your Lordships by counsel for Mr Sage.

35 Accordingly, in the courts below and before the House the argument was whether, for the purposes of section 171B(1) the building of the intended dwelling house, in the state in which the building works stood in 1994, was "substantially completed". My noble and learned friend, Lord Hobhouse, has analysed the arguments and concluded that the inspector's decision that the building operations were not substantially completed was

correct. On the premise that the inspector was faced with an uncompleted dwelling house, I respectfully agree.

36 My concern, however, is with the premise. I have no doubt at all that the inspector was right in concluding that what had been designed by Mr Sage and what he had been building was a structure intended for use as a dwelling house. But the classification of a building, for planning purposes and as a matter of common sense, is not immutable but can change if the use to which the building is put changes. It is a common feature in this country for agricultural barns to be converted into dwellings. Once the conversion is complete and use of the property as a dwelling commences, and perhaps at an earlier point of time, the classification of the building as a barn ceases to be accurate. Planning permission for any building operations involved in the conversion and for the change of use should, of course, have been obtained. But the change in the appropriate classification of the building, from agricultural barn to dwelling house, would not depend on whether planning permission had been obtained. It would be a question of fact.

37 Conversely, dwellings may become agricultural barns. There are throughout the countryside, usually well off the beaten track, innumerable examples of buildings which have been farm workers' cottages but which, with increasing agricultural mechanization, have become surplus to farming requirements and have, usually in some state of disrepair, become used for storage of hay or straw or for sheltering livestock. Planning permission is, I suspect, very rarely sought for this change of use, but here, too, classification of the building as a dwelling or as a barn is a question of fact, dependent on the permanency of the use to which it is being put and the intentions of the owner in that regard.

38 Just as change of use can change the appropriate classification of a completed building so, too, in my opinion, there can be no logical objection to the appropriate classification of a building in course of construction being changed by use, or by intentions for future use, of the uncompleted building inconsistent with its original classification. As with a completed building, the change could be either a change from an uncompleted agricultural building to an uncompleted dwelling, or a change from an uncompleted dwelling to an agricultural barn, whether completed or uncompleted.

39 For example, under the Town and Country Planning General Development Order 1988 (SI 1988/1813) planning permission is in general not necessary for the erection of a building which is reasonably necessary for the purposes of agriculture. A farmer who commenced the construction of such a building would not, by doing so, be in breach of planning control. But if, before the building operations were complete, his intentions changed and he began to install a bathroom and other features indicative of a dwelling, the operations would be in breach of planning control. Conversely, I suggest, in a case where the construction of a building as an additional dwelling has been commenced by a farmer but before the building is complete he changes his mind, decides to use the uncompleted building for agricultural purposes and actually does commence and continue that use, the classification of the structure as an uncompleted dwelling would no longer be accurate. The structure would have become an agricultural building.

40 The correct application of the section 171B time limits to a case where the building operations intended at the outset have not been

completed but the use to which the structure has been put since the building operation ceased has changed the nature of the building from one which did require planning permission to one which did not may raise difficult questions of fact and law.

41 In principle, however, there must, in my opinion, be some time limit after which it would no longer be open for enforcement action in respect of the original planning breach to be taken. The present case may be taken as an example. The building works ceased in 1994. The enforcement action was taken in 1999. Let it be assumed that at some point between those two dates Mr Sage decided he would not complete the originally intended dwelling but would instead use the structure for his agricultural purposes and that he thereafter did use the structure for those purposes. It cannot, in my opinion, be the case that for an indefinite and open-ended period the council would remain free to commence enforcement action contending that the structure still remained a substantially uncompleted dwelling house. Such a state of affairs would, in my opinion, be inconsistent with the scheme of section 171B.

42 These reflections are of no assistance to Mr Sage in the present case. There is no evidence of the use to which the uncompleted structure was put by Mr Sage in the period between 1994 and 1999. There are no facts in evidence which enable to be identified a date after which the 1994 structure could be regarded as no longer an uncompleted dwelling but as having become an agricultural building.

43 There have, naturally, been no submissions from counsel on either side as to how section 171B would have had to be applied if there had been such evidence. It seems to me, however, well arguable that it would no longer be open for enforcement action to be taken in respect of an uncompleted dwelling house if a period of more than four years had elapsed since the structure had become, de facto, an agricultural building. I think it is important to be clear that nothing in the result of the present case decides that issue. However, I agree that this appeal must be allowed and the order proposed by Lord Hobhouse should be made.

LORD RODGER OF EARLSFERRY

44 My Lords, I have had the opportunity of reading the speech of my noble and learned friend, Lord Hobhouse of Woodborough, in draft. For the reasons that he gives I too would allow the appeal and make the order which he proposes.

Appeal allowed.
No order as to costs.

Solicitors: Sharpe Pritchard; Brachers, Maidstone.

S H

SOMAK TRAVEL LTD. v. SECRETARY OF STATE FOR THE ENVIRONMENT AND ANOTHER

QUEEN'S BENCH DIVISION (Stuart-Smith J.): May 20, 1987

Town and country planning—Enforcement notice—Appellant converted two floors of residential accommodation into office space—Spiral staircase constructed to connect ground floor with new office space—Conversion was a material change of use—Enforcement notice served—Notice required removal of spiral staircase—Whether notice could require removal of staircase—Whether staircase could be erected without planning permission in any event

The appellant, Somak Travel Ltd., ran a travel agency from premises at 545 High Road, Wembley. The premises consisted of a ground floor shop and a maisonette on the first and second floor. The appellant converted the first and second floor into office space for the travel agency and installed a spiral staircase to connect the ground floor with the first floor. The second respondent, the London Borough of Brent, served an enforcement on the grounds that the conversion involved a material change of use. The enforcement notice required the appellants to discontinue the use of the two upper floors as office space and to remove the spiral staircase. At an inquiry, an inspector found that there had been a material change of use and that the second respondent was entitled to serve an enforcement notice. The inspector also decided that the removal of the staircase was necessary to restore the maisonette to residential use. The appellant contended that the construction of the staircase was something that they could have done without planning permission by virtue of section 22(2)(*a*) of the Town and Country Planning Act 1971 and that the Secretary of State had no power to require the removal of the staircase when it could be rebuilt by virtue of that section. They appealed under section 246 of the Town and Country Planning Act 1971 against the decision of the Secretary of State.

Held, dismissing the appeal, in deciding what steps should be taken to remedy a breach of planning control by a material change of use, the test was whether the activity in question constituted part and parcel of the material change of use or was integral thereto. In the present case, where there had been a material change of use by the conversion of two floors of residential accommodation into office accommodation, there was ample material for the inspector to conclude that the construction of the spiral staircase to connect the ground floor with the converted first floor was integral to the material change of use.

Cases cited:

(1) *Murfitt* v. *Secretary of State for the Environment and East Cambridgeshire District Council* (1980) 40 P. & C.R. 254, D.C.

(2) *Perkins* v. *Secretary of State for the Environment and Rother District Council* [1981] J.P.L. 755.

Appeal by Somak Travel Ltd., under section 246 of the Town and Country Planning Act 1971 against a decision of an inspector appointed by the first respondent, the Secretary of State for the Environment, upholding an enforcement notice served on the appellant by the second respondent, the London Borough of Brent, requiring the appellant to remedy a breach of planning control by discontinuing the use of the two upper floors of premises known as 545 High Road, Wembley, as office accommodation and requiring the removal of a spiral staircase connecting

the ground floor with the two upper floors. The facts are set out in the judgment of Stuart-Smith J.

P. Petchey for the appellant.
D. Holgate for the first respondent.
The second respondent did not appear and was not represented.

STUART-SMITH J. This is an appeal under section 246 of the Town and Country Planning Act 1971 against a decision by an inspector appointed by the Secretary of State, whereby he upheld an enforcement notice served by the second respondent, the London Borough of Brent, on the appellants. The enforcement notice was dated September 20, 1983.

The case relates to shop premises built in about 1925, known as 545 High Road, Wembley. It is a typical shop to be found in a small parade of shops near the Wembley Central station. It consists of four stories, a basement, a ground floor, in which the main shop is situated, and above that, on the first and second floors, a maisonette, with an internal staircase between the first and second floors. The shop is used by the appellants as a travel agency. The development which took place was the amalgamation of the first two floors together with the ground floor and conversion of those first two floors into offices for the purpose of the travel agency.

The enforcement notice required the appellants to discontinue the use of the first and second floors for office purposes and, secondly, to remove an internal spiral staircase which had been constructed by the appellants between the ground floor and the first floor.

The principal question before the inspector was whether or not there had been a material change of use and whether the appellant should be permitted to continue the use of the two upper floors as office accommodation and should be granted planning permission for that purpose.

It is now accepted by Mr. Petchey on behalf of the appellants that there was a material change of use and that the second respondents were entitled to serve an enforcement notice in respect of it. It is only in relation to the requirement, that the spiral staircase should be removed, that the appellants seek to appeal to this court. It is therefore within a very small compass that this appeal is now brought. I should add that originally the grounds of appeal extended to whether or not there had been a change of use. That is no longer pursued.

The question of the spiral staircase is dealt with in the inspector's decision letter in a number of paragraphs. It is material to set out the facts relating to it and convenient to take them from the decision letter. In paragraph 7 the inspector said this:

> The general public have access only to the former shop unit. The upper floors are given over to administrative staff but, such is the way in which a travel agency works, there must be easy and quick physical contact between the ground and upper floors. Simple telecommunications linkage will not suffice for this purpose. The present use of the former residential accommodation is therefore

> essentially ancillary to and supportive of the travel agency and the notice ought to be quashed for this reason alone.

I should add that the two paragraphs which I am now going to read are part of the case for the appellant which was made before the inspector. The inspector said in paragraph 13:

> The removal of the spiral staircase, which has been put in to ease movements between the travel agency and the ancillary offices, is not necessary to remedy the alleged breach of planning control. The upper maisonette could perfectly well be re-occupied with the staircase *in situ*.

It is said in paragraph 16, which set out the case for the local planning authority:

> Evidence exists as to the residential occupation of the maisonette until October 1980. This was the pattern of use at the time of the planning application for the rear extension. The spiral staircase had not at that time been constructed. The steps which are now required by the notice are not excessive. The unauthorised use of the upper two floors must cease and the self-containment of the maisonette must be restored. If this were not done, the residential unit would be effectively unsaleable or unlettable since the existence of access to it through the ground floor travel agency would constitute an unacceptable diminution of privacy as well as a most unwelcome security risk.

The conclusion to which the inspector came is set out at paragraph 25 of his decision letter. He said:

> As to grounds (g) and (h), I am satisfied that the required steps are necessary to remedy the breach of planning control. Whereas only the office change of use was nominated as a breach in the notice, I am satisfied that it would be necessary to remove the short spiral staircase and restore the party floor to its previous condition before the maisonette could be occupied for normal residential use. I conclude that these works are such as are envisaged in section 87(9) of the (Amendment) Act [that in fact means the 1971 Act as amended] according to the particular circumstances of the breach of planning control in question. In view of the authority's statement at the inquiry, I intend to vary the notice to extend to 6 months the period for compliance with its terms.

The relevant legislation on this question is to be found mainly in section 87 of the Act. Section 87(1) provides:

> Where it appears to the local planning authority that there has been a breach of planning control after the end of 1963, then . . . the authority . . . may issue a notice requiring the breach to be remedied . . .

Section 87(3) provides:

> There is a breach of planning control—(a) if development has been carried out . . . without the grant of planning permission . . .

Subsection (7) provides:

> An enforcement notice shall also specify—(a) any steps which are required by the authority to be taken in order to remedy the breach . . .

Subsection (9) reads as follows:

> In this section "steps to be taken in order to remedy the breach" means (according to the particular circumstances of the breach) steps for the purpose—(a) of restoring the land to its condition before the development took place . . . including—(i) the demolition or alteration of any buildings or works; (ii) the discontinuance of any use of land; and (iii) the carrying out on land of any building or other operations.

The submission which Mr. Petchey makes on behalf of the appellants is that the construction of the spiral staircase is something which was permitted under the provisions of section 22(2)(*a*) of the Town and Country Planning Act and could have been done without any planning authority or permission at all, and that it is wrong for the Secretary of State or the enforcement notice to require that spiral staircase to be demolished when, as a matter of course, it could be erected the next day. Section 22(1) of the Town and Country Planning Act provides as follows:

> In this Act, except where the context otherwise requires, "development," subject to the following provisions of this section, means 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.

Mr. Petchey says here that this is a material change of use case and that the construction of the spiral staircase although it is carrying out a building operation, is expressly excluded from the requirements of planning control by subsection (2)(*a*) which provides as follows:

> The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land, that is to say—(a) the carrying out of works for the maintenance, improvement or other alteration of any building, being works which affect only the interior of the building or which do not materially affect the external appearance of the building and (in either case) are not works for making good war damage . . .

Mr. Petchey submits that not only would it be absurd for there to be a requirement in the enforcement notice that the spiral staircase should be removed, because as a matter of right the appellants could construct it again the next day without planning permission but, as a matter of power and *vires*, the inspector had no power to order such an enforcement order.

At first sight there appears to be some attraction in that argument. But the matter has been considered by this court in the case of *Murfitt* v. *Secretary of State for the Environment and Another*. That was a case where the appellant had a farmyard. He was using the land for the purpose of a haulage business. He had extended the area of the farmyard for parking vehicles some 15 yards into the adjoining land by

laying down a quantity of hardcore. That work, which of course was operational work within the first part of section 22 of the Town and Country Planning Act, had been completed more than four years before the enforcement notice was served. A parallel argument was advanced in that case.

Stephen Brown L.J., giving the first judgment, said this[1]:

> The second point that was taken on behalf of the appellant was put forward as being of greater substance. Mr. Jones submits that in this particular case the alleged breach of planning control was that of making a material change of use of the land to use for the purpose of parking heavy goods vehicles in connection with a haulage business. The enforcement notice, he says, was not directed to the carrying out without planning permission of any building, engineering, mining or other operations in, on, over or under land. If such a breach of planning control were to be alleged, it would be one falling within section 87(3)(*a*), and in such a case enforcement proceedings could only be taken in respect of development taking place within a period of four years preceding the service of the notice.
>
> This enforcement notice was served on July 5, 1977. The appellant contends that, if there is development that should properly be considered as building, engineering, mining or other operations in, on, over or under land, there would be, as it were, a four-year limitation period that would exclude any earlier breach of planning control. He contends that the placing of the hardcore on this site is an operation that would come within the terms of section 87(3)(*a*) and would, consequently, attract the "limitation period" of four years. Therefore, hardcore placed on the site more than four years before the service of an enforcement notice would be exempt from any requirements for its removal.
>
> The appellant claims that the planning authority ought not to be able to make any requirement for the restoration of the condition of the land by the removal of the hardcore, as distinct from the removal of the vehicles, because they have not served an enforcement notice relating to the carrying out without planning permission of an operation falling within section 87(3) and the placing of the hardcore on the site in such an operation. Mr. Jones contends that it would require the service of a separate notice, or, at any rate, a notice that specified that as a distinct and separate form of development. Since that has not been done, he claims that the enforcement notice that in fact has been served in this case cannot properly require the removal of the hardcore and, therefore, it is vitiated and ought to be referred to the Secretary of State for his consideration as to what course to adopt.
>
> On behalf of the Secretary of State, it is urged that the placing of the hardcore is simply part and parcel of the use of this land for the parking of heavy goods vehicles in connection with the haulage business. The appellant agrees that the only purpose of the hardcore on the site is to enable it to be used for the purpose of parking of heavy goods vehicles. The Secretary of State submits that it is so

[1] (1980) 40 P. & C.R. 254 at p.258.

much an integral part of the use of the site for the parking of heavy goods vehicles that it cannot, and should not, be considered separately and that, when the enforcement notice makes the requirement for the discontinuance of the use complained of and requires the restoration of the land to its condition before the development took place, it ought to be understood to refer to the removal of the hardcore and properly includes that as a requirement.

Section 87(6)(*b*) of the Act of 1971 requires that an enforcement notice shall specify, first, the matters alleged to constitute a breach of planning control, and, secondly, the steps required by the authority . . . for restoring the land to its condition before the development took place. This is, of course, a mandatory duty that is placed on a local authority, and it would make a nonsense of planning control, in my judgment, if it were to be considered in the instant case that an enforcement notice requiring discontinuance of the use of the site in question for the parking of heavy goods vehicles should not also require the restoration of the land, as a physical matter, to its previous condition, that requirement, of necessity, being the removal of the hardcore.

Waller L.J. said[2]:

There is [no] direct authority on the submission made by Mr. Jones. Mr. Brown has drawn our attention to the practice of the Secretary of State where residential premises are concerned, where an order is commonly made saying that the multiplicity of tenants must be stopped and that the [house] must be restored to the condition in which it was before multiple tenancies were created. Mr. Brown knew of no authority that had said that such an order was wrong. On the other hand, he frankly admitted that there was no authority that specifically applied to a case such as the present.

The conflict is really between two different subsections of section 87. Section 87(6) gives specific authority for a notice in matters of this sort to specify the steps required to be taken in order to remedy the breach, that is to say, steps for the purpose of restoring the land to its condition before the development took place, and I see no reason to retract [I think it must mean restrict] that meaning.

There then follows a somewhat delphic passage which reads as follows:

If one wishes to see some logic in the distinction between the two types of breach—that is, a breach where the variation has existed for four years or more and a breach where that which is described as a variation is something ancillary to the use—as it seems to me, the former case is one where something is done that, on the whole, would be obvious—that, on the whole, would be permanent by the mere fact that it is done and, therefore, something that should be dealt with within a period of four years, whereas in the second case, where it is [a question of] an ancillary purpose, the planning matter [*sic*] might leave land, as in this case, in a useless condition for any purpose, and, therefore, it is logical that, when the use that has no

[2] *Ibid.* at p.260.

> planning permission is enforced against, the land should be restored to the condition in which it was before that use started.

It may be that that is not an accurate transcription of what Waller L.J. said. Certainly, it is not very easy to follow. But it seems to be saying by the last few lines that where the land would otherwise be useless if the activity, in this case the hardcore, remained on the land, then it should be removed.

Mr. Petchey sought to draw a distinction between that case and the present case on two bases. First, that the enforcement or the decision of the inspector in that case required a scheme to be drawn up to effect the restoration of the land to its original purpose. I can see no distinction between that and this case because it is clear that the scheme envisaged the removal of the hardcore in question. Secondly, Mr. Petchey says that there is a distinction, as indeed there is, between that case and the present one, because that was a case where the original operational development of placing the hardcore on the land was unlawful. But it had become immune from action because of the four year limitation period, whereas in the present case, under section 22(2)(*a*) of the Act the mere construction of the spiral staircase from the shop, the ground floor to the first floor, assuming it remained in residential use, would not be a breach of planning control. But it seems to me that that is a distinction without a difference. In practice, the two things come to the same result. The appellant in the *Murfitt* case would on that reasoning have been entitled to continue to keep the hardcore on the land.

The test laid down in that case by Stephen Brown L.J., that the operational activity should be part and parcel of the material change of use or integral to it, is one which seems to me to be satisfied in this case. It must, of course, be a question of fact in each case, but there seems to me to be plainly material upon which the inspector could come to the conclusion, as he clearly did, that it was integral to it. It is only necessary to remind oneself of the two passages which come from the appellant's own case, to which I have already referred. It seems to me that there could only have been two possible reasons why this spiral staircase should have been put in in the first place. The first is in order to use the residential accommodation on the first and second floors as a house or home for the owner or occupier or manager of the shop to facilitate movement between the two. One can see that that might be of some advantage. Quite clearly, that was not the case here. The alternative reason for putting it in was that which was explained in the reasons here, namely, to enable the staff in the travel agency business on the ground floor to communicate quickly with the office staff above, some form of telecommunication system being inadequate, and to avoid the necessity of going right outside the building, and going round the back to obtain access to the offices above.

It seems to me that if one adopts the test, whether or not it was integral to or part and parcel of the change of use from residential to office accommodation, the test is satisfied. In those circumstances, it is probably not necessary to go on to consider whether or not the scope of section 87(9) is in fact wider than that. There is some support for such a view to be found in the judgment of Glidewell J. (as he then was) in the case of *Perkins* v. *Secretary of State for the Environment and the Rother*

District Council, where he refers to the case of *Murfitt*. Glidewell J. said this[3]:

> On Mr. Brown's first question, he accepted that *Murfitt* . . . was binding authority for the proposition that section 87(6) of the Act permitted an enforcement notice to be served where the operational development was an integral part of the change of use. Having answered the second question in favour of the Secretary of State it was unnecessary for him to decide whether the meaning of section 87(6) was sufficiently wide to cover the situation where operational development was caught by the requirements of the change of use enforcement notice, even though the operational development was not an integral part of the change of use. The judgment of Waller L.J. in *Murfitt* suggested that section 87(6) was wide enough to cover that situation and he was inclined to agree, although he stressed that his view was strictly *obiter*.

Anything I say could not possibly add to the authority of an opinion from somebody such as Glidewell L.J. who is a great authority on these matters. If I may do so, I am inclined to agree also. The scope of section 87(9) is widely phrased. It is not necessary to restrict it in the way in which the appellant seeks to do. Be that as it may, in my judgment, it is not necessary to decide that point. Adopting the integral and part and parcel test, which Mr. Petchey accepts is the correct test laid down in *Murfitt*, it seems to me that there was abundant material on which the inspector could come to the conclusion that it was part and parcel of it and integral to it. Indeed, it seems to me that it would be difficult to come to any other conclusion. For those reasons this appeal must be dismissed.

Appeal dismissed.

Solicitors—Robbins Olivey & Blake Lapthorn, London WC2, agents for Leonard Gray & Co., Chelmsford, Essex; the Treasury Solicitor.

[3] [1981] J.P.L. 755 at p.756.