

Neutral Citation Number: [2016] EWHC 427 (Admin)

Case No: CO/3400/2015 & CO/3401/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

8 March 2016

B e f o r e :

MRS JUSTICE LANG DBE

Between:

PATRICK KEENAN

Appellant

- and -

**(1) WOKING BOROUGH COUNCIL
(2) SECRETARY OF STATE FOR
COMMUNITIES AND LOCAL
GOVERNMENT**

Respondents

**Jonathan Wills (instructed by Coyle White Devine) for the Appellant
Estelle Dehon (instructed by the Government Legal Department) for the Second
Respondent**

**The First Respondent did not appear and was not represented
Hearing dates: 3 and 24 February 2016**

Mrs Justice Lang:

1. The Appellant appeals, pursuant to section 289 of the Town and Country Planning Act ("TCPA 1990") against a decision of the First Respondent, by his appointed Inspector (Bridget M. Campbell), dated 22 June 2015, dismissing his appeals against two enforcement notices issued by Woking Borough Council ("the Council") on 20 March 2014 in respect of Blanket Mill Pig Farm, Goose Rye Road, Worplesdon, Surrey GU3 3RQ ("the Site").

History

2. The Site is about 5.6 hectares in size, and is situated partly within the Borough of Woking and partly within the Borough of Guildford. It is within the Green Belt and within a Site of Nature Conservation Importance.

3. The Site has an extensive planning and enforcement history. In 2002, the Council granted planning permission for change of use from agricultural to use for “the keeping of horses for private recreational purposes”. In 2004, an Inspector found that the permission had been implemented and two horses were being kept on the Site.
4. In 2011, another Inspector also found that the use was not agricultural, and that the only livestock on the land was a single horse. He viewed the touring caravan, which he found was being “used as an office, for shelter, for making a cup of tea and to have access to a toilet” (paragraph 27). The Inspector addressed the “suggestion that either the caravan or mobile home had been used for residential purposes by the Appellant’s son”, but found that “nothing I saw at the time of my site visit would lead me to find that such a use is subsisting now” (ibid).
5. The Appellant had previously kept pigs on the Site, but was banned from doing so for four years, ending in September 2012. During the time the Appellant kept pigs, he applied to Guildford Borough Council for prior approval for a concrete track on the part of the Site that falls within the Borough of Guildford. Approval was granted in September 2007.
6. On 29 March 2012, the Appellant made an application for prior approval for agricultural or forestry development for a 260m track and 10m turning area. The application form asked if the proposed development was reasonably required for the purposes of agriculture and, if so, why. The Appellant stated:

“To allow transport of harvested trees during the winter from site of growth to market.
Agricultural use of unit to move materials required for movement of stock pens and stock.
Prevent transmission of diseases to stock of sheep and pigs.”
7. At the inquiry, a different justification was given, because the Appellant admitted that, at the time of the application, no pigs were allowed to be kept on the farm. The Appellant’s advocate stated that, in November 2011, 600 Christmas trees had been planted on the Site, and two sheep and some chickens were being kept (Decision Letter (“DL”) 12).
8. The Council did not respond to the application for prior approval, which the Appellant took to mean that he could proceed with the works, and duly did so. The Council’s case was that it had invalidated the application, as both a site location plan and a block plan were missing.
9. On 25 October 2013, the Council granted retrospective planning permission for, amongst other things, an access track to the north of the Site (DL 18). This was part of the track for which prior approval had been applied, and was found to be required to serve a store building (DL 18 footnote 4).

The enforcement notices

10. On 20 March 2014, the Council issued the two enforcement notices to which this appeal relates. In her decision letter, the Inspector referred to the two Notices as “Notice A” and “Notice B” respectively.
11. Notice A alleged an unlawful change of use to a mixed use of agricultural and residential use. It required the cessation of the mixed use, the removal of a number of items, including an Elan touring caravan, tents, two lorries and garden furniture said to facilitate the unlawful mixed use.
12. The stated reasons for issuing Notice A were that it appeared to the Council that the breach had occurred in the last ten years; the unauthorised use was not reasonably related to agriculture nor any of the other purposes considered to be appropriate within the Green Belt; the unauthorised residential unit was within 5km of the Thames Basin Heaths Special Protection Area; there had been a failure to provide for affordable housing despite the creation of a new residential unit;

and planning permission should not be granted because planning conditions could not overcome those objections.

13. Notice B alleged the construction of a hard core track, and required the removal of the track and the restoration of the land to its former condition. It specified the parts of the track extending south-west and north-east from the permitted section of track.
14. The stated reasons for issuing Notice B were that it appeared to the Council that the development had occurred within the last four years; the track was not reasonably related to agriculture or any of the other purposes appropriate in the Green Belt and the track undermined the openness of the Green Belt and had a material detrimental effect on visual amenity.

The appeals

15. The Appellant appealed against the notices. Section 174(2) TCPA 1990 permits an appeal to be made on grounds including the following:
 - “(a) 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 or, as the case may be, the condition or limitation concerned ought to be discharged;
 - ...
 - (c) that those matters (if they occurred) do not constitute a breach of planning control;
 - (d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;
 - ...
 - (f) that the steps required by the notice to be taken, or the activities required by the notice to cease, 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;”
16. The Inspector held an Inquiry and conducted a site visit. She dismissed the appeals by a decision letter dated 22 June 2015.

Notice A

17. **Ground (a):** the Inspector declined to grant planning permission, giving substantial weight to the harm to the Green Belt.
18. **Ground (d):** the Appellant argued that the change of use had become immune to enforcement action. The Inspector dismissed this appeal.
19. **Ground (f):** the Inspector allowed the Elan touring caravan to remain on Site, but otherwise dismissed the appeal. The basis for this was that the removal of the other items at the site was necessary in order to achieve what she considered to be the purpose of the notice under s. 173(4)(a), namely to remedy the breach of planning control.

Notice B

20. **Ground (a):** the Inspector declined to grant planning permission, finding that the track was inappropriate development in the Green Belt, despite previous Inspectors having found that tracks were not an inappropriate form of development.
21. **Ground (c):** the Appellant argued under ground (c) that the track was lawful as permitted development under the Town and Country Planning (General Permitted Development) Order 1995 (“GPDO”), as he had made the application for prior approval under Part 6 of Schedule 2 of the GPDO and the Council had not responded to his application within the requisite 28 day period. The Inspector dismissed this ground, finding that no such planning permission arose in respect of the development described in the application notwithstanding the expiry of the 28 day period, as the track was not reasonably necessary for the purposes of agriculture.

Grounds of appeal

22. The Appellant was acting in person initially, and pleaded some 11 grounds in two separate notices of appeal. Both appeals have been consolidated. At an oral hearing, on 11 August 2015, Singh J. granted permission to appeal on three grounds only, namely:
 - i) **Ground 1.** The Inspector erred in her handling of the ground (f) appeal in relation to Notice A by failing to consider whether allowing more items to remain on the land was acceptable in planning and amenity terms, despite having the power to do so.
 - ii) **Ground 2.** The Inspector made a material error of fact in respect of the date on which Mrs Keenan left the country to live in Italy, and that this error gave rise to unfairness in respect of the ground (d) appeal against Notice A.
 - iii) **Ground 3.** The Inspector erred in rejecting the ground (c) appeal in relation to Notice B on the basis that the Appellant did not have planning permission to lay the track, as such permission was deemed to be granted by virtue of the Council’s failure to respond to the application for prior approval within the 28 day time period.

Scope of appeals under section 289 TCPA 1990

23. An appeal under section 289 TCPA 1990 is on a point of law only. The exercise of planning judgement and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties v Secretary of State for the Environment* (1978) 42 P & CR 26; *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74.
24. An Inspector’s decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

Ground 1: The appeal under ground (f)

Statutory framework

25. The provisions relating to enforcement notices are contained in Part VII of the TCPA 1990. Section 172(1) provides that:
- “(1) The local planning authority may issue a notice (in this Act referred to as an ‘enforcement notice’) where it appears to them —
- (a) that there has been a breach of planning control; and
 - (b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.”
26. Section 173 sets out the matters that must be included in the contents of an enforcement notice, including, so far as is material:
- “(1) An enforcement notice shall state —
- (a) the matters which appear to the local planning authority to constitute the breach of planning control;
- ...
- (3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.
 - (4) Those purposes are —
- (a) remedying the breach ...; or
 - (b) remedying any injury to amenity which has been caused by the breach.”
27. By providing in section 173(3) that steps may be specified “to achieve wholly or partly” the purposes set out in subsection (4), the legislation envisages that a local planning authority may decide to “under-enforce” by only seeking to remedy part of any breach of planning control and/or injury to amenity caused thereby. Where a planning authority under-enforces, section 173(11) may operate so as to give deemed planning permission for development which has not been enforced against, but only in respect of matters which were in existence when the enforcement notice was issued and which formed part of the matters which were the subject of the enforcement notice. See *Secretary of State for Communities and Local Government v Ioannou* [2014] EWCA Civ 1432, [2015] 1 P & CR 10, at [30]-[32].
28. As stated above, an appeal against an enforcement notice may be brought on the grounds set out in section 174(2). This provides, so far as is material:
- “An appeal may be brought on any of the following grounds—
- (a) 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 or, as the case may be, the condition or limitation concerned ought to be discharged;
 - (b) ...;
 - (c) that those matters (if they occurred) do not constitute a breach of planning control;
 - (d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;

- (e) ...;
 - (f) that the steps required by the notice to be taken, or the activities required by the notice to cease, 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.”
29. 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 if the land to which the notice relates.”

The Inspector’s decision

30. The Inspector’s conclusions on the ground (f) appeal were as follows:

- “54. The ground of appeal is that the steps required to be taken are excessive. The steps in a notice are intended to achieve the purpose of either remedying the breach of control that has occurred or remedying any injury to amenity (s173(3) and (4) of the Act). In this case requiring cessation of the use; removal of all items brought on to the land to facilitate the use; and restoration of the land to its former condition; the notice is clearly aimed at the former. At the inquiry, the Council accepted that it would be excessive to require a return to a permitted use or to require the removal of the Elan caravan which had been on site prior to the breach occurring and to this limited extent the appeal on ground (f) succeeds.
- 55. In seeking to remedy the breach it is not excessive to require all items brought on to the land to facilitate the use to be removed. That would include the two lorries, any residential tents, and associated paraphernalia. There was some suggestion that only one lorry should be removed, the other having been previously used to move livestock, but that case was not made out by the Appellants and historic photographs show that the number plate on the vehicle has been changed. Whilst much was made of the using the garden furniture for agricultural activities, no evidence was presented to demonstrate that they has been brought onto the site for this purpose and not in connection with the residential use. With the exception of the caravan the requirement to remove all items associated with the residential use is not excessive.
- 56. One of the lorries (a DAF) currently accommodates some non-domestic storage and it was argued that it would still be needed for that purpose even if the residential use was to cease. In my view this modest enterprise has a considerable number of structures available for storage although I was unable to look in them as they were locked and the keys were unavailable.
- 57. These include a third white lorry at the entrance to the site which I was told is used for moving livestock, a loose box and large green container on the Guildford side, a timber shed and a recently erected large timber building. However, on my finding that the small shed was not locked as claimed, I was able to look inside and found, contrary to what I had been told a moment earlier, that it was not used for storage but rather contained additional living accommodation. That being the case, it leaves open a question what the other structures on the site might be used for. It does not, in any event, support an argument that the DAF lorry is needed for additional storage.
- 58. Other than in relation to the retention of the caravan, the appeal on ground (f) fails.”

Conclusions

31. The Appellant's ground of challenge to the Inspector's decision on ground (f) was that she erred in not considering whether the removal of all mobile structures was excessive under the second limb of ground (f), "to remedy any injury to amenity". She only considered the need for removal of all mobile structures under the first limb of ground (f), "to remedy any breach of planning control".
32. On the Appellant's analysis of the scope of section 174(1)(f), an appellant may elect to bring an appeal on the ground that the steps required by the enforcement notice exceed what is necessary to remedy any injury to amenity, regardless of the purpose identified in the enforcement notice, citing the High Court judgement in *Miaris v Secretary of State for Communities and Local Government* [2015] EWHC 1564 (Admin), upheld in the Court of Appeal [2016] EWCA Civ 75.
33. Furthermore, the Appellant contended that, since both grounds (a) and (f) were in play, the Inspector could and should have considered any obvious alternative which would make the development acceptable in terms of both planning policy and amenity, having at her disposal the powers to grant planning permission under section 177(1) and the possibility of a grant of deemed planning permission under section 173(11).
34. In support of his submissions, the Appellant relied, in particular, upon the case of *Tapecrow Ltd v First Secretary of State* [2007] 2 P&CR 7. It concerned a building erected and hardstanding laid on an agricultural holding which, in the local authority's view, was not reasonably required for the purposes of agriculture and was not designed for agricultural purposes. There was a deemed planning application for which the requisite fee had been paid, which the inspector refused, on the basis that the building was of an industrial and commercial character and was incongruous in a rural setting. Under ground (f), the Inspector rejected Tapecrow's contention that the removal of the hardstanding and the alteration of the building were sufficient, rather than demolition.
35. The Court of Appeal accepted the High Court's criticism of the Inspector's reasoning under ground (f), and found that the Inspector had failed to consider whether the "building could be made acceptable in planning terms" if appropriate modifications were made or if all or part of the hardstanding were removed (at [35]). Furthermore, the Inspector failed to give a clear answer to whether the building was needed for the purposes of agriculture, and as a result failed to consider the potentially relevant planning policies dealing with agricultural buildings.
36. In considering the Secretary of State's powers on appeal, Carnwath LJ said:

"32 ...Repairing the damage to *amenity* may be only part of what is needed. Even a physically unobtrusive development may be objectionable in planning terms, but it may be made more acceptable by steps short of total demolition. That is the province of ground (a), which needs to be read with s.177. The latter makes clear that, on an enforcement appeal, planning permission may be granted in respect of the matters alleged in the notice "in relation to the whole or any part of those matters" (s.177(1)(a); that for this purpose ordinary planning considerations (including the development plan) must be taken into account (s.172(2)); and that the permission is to be treated as though granted on an application (s.177(3)(6))....
33. In short, the inspector has wide powers to decide whether there is any solution short of a complete remedy of the breach, which is acceptable in planning terms and amenity terms. If there is, he should be prepared to modify the requirements of the notice, and grant permission subject to conditions ...I emphasise, however, that his primary task is to

consider the proposals that have been put before him. Although he is free to suggest alternatives, it is not his duty to search around for solutions....

The ground (f) appeal in this case

34. To return to the present case, having rejected the ground (c) appeal, and so identified a breach requiring remedy, the inspector's task was to decide what was the appropriate solution. This required him to consider, not simply what would be necessary to bring the building into compliance with class A, but more generally whether the building could be made acceptable in terms of both planning policy and amenity by any proposed modifications, supported if necessary by planning conditions.
35. On that approach, the inspector's reasoning is open to criticism.... What he never does is to consider whether, if appropriate modifications were made to the building, and if all or part of the hardstanding were removed, the building could be made acceptable in planning terms.

[36-45]

46. ...I would accept that as a general proposition, given the limitations of the written representations procedure, an appellant would be well advised to put forward any possible fall-back position as part of his substantive case. It is not the duty of the inspector to make his case for him. On the other hand, the inspector should bear in mind that the enforcement procedure is intended to be remedial rather than punitive. If on his consideration of the submissions and in the light of the site view, it appears to him that there is an obvious alternative which would overcome the planning difficulties, at less cost and disruption than total removal, he should feel free to consider it...."
37. The Appellant also relied on *Ahmed v Secretary of State for Communities and Local Government* [2014] EWCA Civ 566 and *Moore v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1202 which applied *Tapecrown*.
38. In my judgement, the meaning in these cases of an "obvious alternative" open to the Inspector when considering a ground (f) appeal has to be understood in the light of the Court of Appeal's guidance in *Ioannou*, which rejected the notion of a "freestanding 'obvious alternative' test". Sullivan LJ said, at [35]-[37]:
 - "35. The passages relied upon by Mr Wills in the judgements in these three cases must be understood in the context of the factual and legal issues that were in dispute in these cases. The judgements are a response to those issues, they are not to be applied as though they were enactments of universal application. In *Ahmed* the question was whether the "obvious alternative", the 2005 scheme, could be regarded as "part" of the matters stated in the enforcement notice as constituting a breach of planning control. Richards LJ said in paragraph 32 of *Ahmed* that:

"The question of a grant of permission going beyond the terms of the notice does not arise."
 36. In paragraph 40 of *Moore* the point being made by the Court was that if there was an "obvious alternative" which the Inspector should have considered it did not matter that the appellant had put her case under ground (b) rather than ground (f). The Court concluded that there was, in fact, no "obvious alternative" (paragraph 41).
 37. In *Tapecrown* the matter was remitted for reconsideration by the Secretary of State because the Inspector's reasoning was inadequate in that he failed to consider whether

the building and hardstanding which were the subject of the enforcement notice could be made acceptable in planning terms by (i) reducing the extent of the hardstanding, and (ii) blocking up the windows in the building. It appears to have been common ground that modifying the notice so as to require both of these steps to be taken would have been within the scope of the Inspector's powers under ground (f), and the principal issue was the adequacy of his reasoning on this topic. Carnwath LJ was not establishing a free-standing 'obvious alternative' test as a replacement for to the express statutory limitations imposed by subsections 177(1) and 173(11) upon the nature and extent of the planning permissions that may be, or be treated as having been, granted in response to appeals under section 174. The 'obvious alternatives' which he had in mind were those 'obvious alternatives' which (it was agreed in that case) would fall within the scope of a ground (f) appeal."

39. I cannot accept the Appellant's submission that the Inspector was required to consider whether to allow the ground (f) appeal on the basis that the notice exceeded what was necessary to remedy any injury to amenity, despite the fact that she found that the purpose of the steps required by the enforcement notice was to remedy the breach of planning control, not injury to amenity caused thereby. In my judgement, that submission was not supported by the terms of section 174(1)(f), nor by the judgement of the High Court and Court of Appeal in *Miaris*.
40. In *Miaris*, the Appellant, appealed under ground (f) against an enforcement notice alleging a breach of planning control by the making of a material change in the use of a restaurant to a mixed use of restaurant, drinking establishment and nightclub. There was no ground (a) appeal and is distinguishable from this case in that respect.
41. In the High Court in *Miaris*, at [27], John Howell QC, sitting as a Deputy High Court Judge, set out Mr Wills' submission that the phrase "as the case may be" in section 174(1)(f) referred to whichever basis an appellant chooses to rely on, and that if an appeal is brought on the basis that a step specified in an enforcement notice exceeded what was required to remedy an injury to amenity, the Secretary of State had to consider its merits, even if there was no appeal on ground (a).
42. It is significant that, at [38], the Judge rejected Mr Wills' construction, holding:

"In my judgement, Mr Wills' primary submission is inconsistent in particular with the judgement of the Court of Appeal in *Wyatt Bros*. In that case the Court took the phrase "as the case may be" (in section 174(1)(f)) to refer to the purpose for which the relevant requirements had been specified by the local planning authority under section 173(3) and (4), the structure of which paragraph (f) mirrors...."
43. In *Secretary of State for the Environment, Transport and the Regions v Wyatt Brothers (Oxford) Ltd* [2001] EWCA Civ 1560, there was no ground (a) appeal and the inspector found that the enforcement notices were only directed at breach of planning control, not injury to amenity. The Court of Appeal (per Kennedy LJ at [22]) accepted the proposition, agreed by the parties, that:

".... The word "or" at the end of section 173(4)(a) is not fully disjunctive. When specifying in an enforcement notice the steps which it requires to be taken a local planning authority can specify steps under subsection (4)(a) i.e. require compliance with an existing planning permission or restoration of the status quo, and/or specify under subsection 4(b) steps intended to remedy any injury to amenity which has been caused by the breach.... Bearing in mind that the words "wholly or partly" in section 183(3) expressly enabled the local planning authority to "under enforce" it is not difficult to envisage circumstances in which a local planning authority might want to require in one enforcement notice a partial restoration of the status quo coupled with other work designed to remedy the injury to amenity caused by the breach, and in my

judgement there is no reason why the word “or” should be so construed as to prevent that course. This is consonant with the phrase “any of the following purposes” at the end of subsection (3).”

44. Applying *Wyatt*, the Judge in *Miaris* said, at [46]:

“46. An enforcement notice may relate to more than one breach of planning control and it may contain more than one step in respect of any breach of planning control. Some of the steps in an enforcement notice may be directed at remedying a breach of planning control; others maybe directed at remedying any injury to amenity another breach may have caused. Similarly it is possible for one step to be directed at remedying a breach and for another to be directed at remedying any injury to amenity that that same breach may also have caused. Given the decision in *Wyatt Bros*, Mr Wills accepted, in my judgement correctly, that an appeal on the ground that a step exceeds what is necessary to remedy any injury to amenity could not considered on its merits if that was no part of the purpose for which that step was specified by the authority.....Whereas here, so he contends, the relevant steps were each specified wholly, or at least in part, to remedy the injury to amenity caused by the breach of planning control, the contention that either exceeds what is necessary for that purpose has to be considered on its merits. “

45. Mr Wills’ concession, recorded at [46], is significant, in my view.

46. At [48], the Judge rejected Mr Wills’ submission on the grounds that the consequence would be that planning objections based on matters other than amenity would then never be addressed. He concluded:

“68. For the reasons given above, an appeal against an enforcement notice made under ground (f), on the basis that any step specified in an enforcement notice exceeds what is necessary to remedy any injury to amenity caused by the relevant breach of planning control, cannot be entertained when (i) there is no appeal under ground (a) that planning permission should be granted and (ii) the planning objections which the step addresses are not limited to any injury to amenity. An appeal on that basis when there is no appeal under ground (a) may be considered on its merits, however, if the step in issue is one solely to remedy any injury to amenity caused by the breach of planning control. Whether an appeal lies on this basis under ground (f), therefore, is not determined by the particular paragraph in section 173(4) on which the local planning authority may have relied to specify the step in issue. It depends upon the nature of the planning objection that the steps seek to remedy.”

47. The Court of Appeal in *Miaris* held that the deputy judge’s analysis at [68] of his judgement was correct (per Lindblom LJ at [22]-[35]). Lindblom LJ made it clear that the statutory purpose still had to be ascertained, saying at [35]:

“35 ...The deputy judge was not, as I understand him, seeking to add any novel proposition of law to those applied in previous cases – or, as Mr Wills submitted, to create a new “test”. He was not seeking to exclude consideration of the statutory purpose for which requirements in the enforcement notice were specified. In any event the dichotomy between planning objections and statutory purposes implicit in Mr Wills’ submissions is, I think, false. The planning objections to the development against which the enforcement action is being taken will usually be clear from the notice itself, read as a whole. They are likely to be apparent both in the requirements that must be specified for one or both of the purposes in section 173(4) and in the reasons given for the enforcement notice being issued.”

48. Earlier in the judgement, Lindblom LJ expressly rejected Mr Wills' submission that the scope of the ground (f) appeal did not depend upon which of the two purposes in section 173(4) the requirements in the enforcement notice were intended to achieve and confirmed the analysis of section 174(2)(f) in *Wyatt* (per Lindblom LJ at [17], [23-26]).
49. On the authorities, therefore, Ms Dehon was correct to submit that, under section 174(2)(f), an inspector has to ascertain the purpose of the steps required by the enforcement notice. Where the purpose does not include the second limb of remedying any injury to amenity, then the inspector ought not to consider the appeal on that basis. In my judgement, this approach accords with the natural meaning of the statutory language.
50. In this case, the Inspector, in DL 54, considered the two limbs and concluded that the steps required in this notice were clearly aimed at achieving the purpose of remedying the breach of planning control, not remedying any injury to amenity. Her finding on that point has not been challenged. The Inspector then went on to give careful consideration to the evidence, applying the correct legal tests.
51. In my judgement, this is not a case in which the Inspector failed to consider an obvious alternative solution.
52. There was a ground (a) appeal, in which the Inspector considered whether or not planning permission ought to be granted for the change of use to mixed agriculture and residential, which if granted, would have authorised the presence of the vehicles, tents etc. on the land for residential purposes. The Inspector found:

“37. Paragraph 88 of the NPPF says substantial weight is to be given to any harm to the Green Belt. In this case additional harm to the Green Belt arises from the introduction of the residential use. The agglomeration of structures facilitating the residential use, which includes two white lorries, results in an encroachment into the countryside (protection from which is one of the purposes of including land in Green Belts) and a loss of openness and visual intrusion which are exacerbated by the elevated and exposed position on the property (notwithstanding that it might be the least visible position from neighbouring properties). The residential use and associated structures, together with a degree of domestic paraphernalia which I consider would be highly likely were the site to be allowed, would undermine the undeveloped rural nature of the site introducing an urbanising influence. The development conflicts with the provision of the NPPF and with policy CS6 of the Council's Core Strategy.”
53. It is apparent from these findings that, after having the benefit of a site visit, the Inspector considered that the presence of the structures on the land was harmful in planning terms. Her conclusion was an exercise of planning judgement, which has not been challenged.
54. The Appellant's ground (f) appeal was argued on the premise that, if the ground (a) appeal failed, and only agricultural use was permitted on the land, it was nonetheless excessive to require the vehicles and other structures to be removed from the site, in particular since they were used for agricultural purposes. The Inspector gave proper consideration to this ground of appeal.
55. Although there are cases where an appellant relies on both ground (a) and ground (f) together to obtain permission for an alternative scheme (see per Lindblom LJ in *Miaris* at [27], citing Carnwath LJ in *Tapecrown* at [32]), that was not the position before the Inspector at this appeal. The Appellant was not arguing for any alternative scheme beyond the change of use which was under consideration in the ground (a) appeal. The ground (f) appeal was confined to the question whether the steps in the enforcement notice were excessive. Therefore the Inspector is not open to criticism for failing to address proposal for an alternative scheme under ground (f).

56. For these reasons, the Appellant's appeal fails on this ground.

Ground 2: Material mistake of fact in respect of Mrs Keenan's residence in Italy

Legal principles

57. Despite the general principle that questions of fact are primarily for the decision-maker, not the courts, to resolve, a mistake of fact may amount to an error of law in certain circumstances.
58. Since the seminal case of *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, it has been established that, where a public body makes a finding of fact which is unsupported by any evidence, or which is based upon a view of the evidence which could not reasonably be held, it will have erred in law. Generally such an error is categorised as irrationality or a failure to take into account relevant considerations. The application of this principle in challenges to planning decisions was confirmed by Lord Nolan in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295.
59. The doctrine of mistake of fact giving rise to unfairness is conceptually distinct from these cases because the legal flaw is the unfairness that results from the mistake. In *E v Secretary of State for the Home Department* [2004] QB 1044, the Court of Appeal held that mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law "at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result": per Carnwath LJ at [66].
60. The Court set out four requirements which will usually have to be met before a mistake of fact can give rise to the necessary unfairness:
- i) A mistake as to an existing fact, including a mistake as to the availability of evidence.
 - ii) The fact must be uncontentious and objectively verifiable.
 - iii) The party relying upon the mistake must not have been responsible for it.
 - iv) The mistake must have played a material (but not necessarily decisive) part in the public body's reasoning.
61. These principles were applied to a planning context by the Court of Appeal in *Connolly v Havering LBC* [2009] EWCA Civ 1059, [2010] 2 P&CR 1, per Rix LJ at [34] to [37].

Conclusions

62. The Appellant's case was that he was residing at the Site from 2001 onwards, so at the time the enforcement notice was issued (2014), the ten year period during which enforcement action could be taken in respect of unauthorised residential use had expired [DL 22]. The Council disputed the Appellant's length of residence at the Site.
63. The evidence of the Appellant and Mrs Keenan was that they were separated and living apart. Mrs Keenan said that from 1999 she had been living at 22 Wimbledon Road, Camberley with their children. In 2010 she had moved to Italy and returned in 2011, whereupon she went to live at the Site with the Appellant. The Council did not dispute the periods during which Mrs Keenan had lived in Camberley and Italy.
64. The Inspector therefore made a mistake when she stated at DL 22:

“Mrs Keenan was living with the children in Camberley in the property that the couple jointly owned but she went to Italy in 1999 and on her return in August 2011 moved onto the appeal site.”

It was common ground that instead of “1999” she should have stated “2010”.

65. Whatever the explanation for the mistake, I consider that it amounted to a mistake of fact in relation to an uncontentious and verifiable issue, and so the first two requirements which I have set out above are met. The mistake was not the fault of the Appellant or Mrs Keenan, and so the third requirement is met too.
66. However, the Appellant has failed to establish that the mistake was material to the Inspector’s reasoning, and so the fourth requirement is not met. I consider that the reference to 1999 was a mere slip, and that the Inspector made her decision upon the correct basis, namely, that Mrs Keenan was in Camberley between 1999 and 2010. Therefore there was no unfairness.
67. First, the Inspector correctly recorded the evidence in her notes. This suggests to me that she correctly understood the evidence at the time.
68. I have had the benefit of comparing the Inspector’s handwritten notes of the material parts of Mrs Keenan’s evidence with the relevant part of a transcript of the audio recording.
69. The Inspector’s handwritten note of Mrs Keenan’s cross examination records that Mrs Keenan was living at number 22 [the address in Camberley] from 1999 to a year which is either 2010 or 2011, and then there is an arrow from that year to “went to Italy – moved back straight to the site”. Above that comment is “moved on site Aug. 2011”. Her note is consistent with the transcript which shows that Mrs Keenan’s unchallenged evidence was that she lived at the Camberley address from 1999; she left in August 2010 to move to Italy; and on her return moved to the Site.
70. Further on in the Inspector’s notes of evidence she records the Council’s representative putting to Mrs Keenan:

“So 2010-2011 – you can’t help with as you were in Italy.”

It was apparent from this question that the dates upon which Mrs Keenan was in Italy were not disputed by the Council.

71. One of the issues in dispute was whether or not the Appellant was living at the Camberley property with Mrs Keenan. Mrs Keenan’s evidence was that the Appellant was not living with her and that was why she was eligible for a single person’s council tax discount between 1999 and August 2010. A letter from the Council was produced which confirmed the discount between those dates. The Inspector also accurately recorded in her notes Mrs Keenan’s oral evidence on this issue:

“Single persons discount No 22 – Nov 99 – Aug 2010.

Yes but don’t think continuous – when daughter + sons turned 18.

So lived at that address then? ... Mr K wasn’t resident with you? No.

Came to stay sometimes at weekends – visit children. Sometimes a week or 2 when brother took over – sometimes stayed with me or he travelled.”

72. Second, even though many months elapsed between the inquiry and the writing of the decision, the Inspector would have been able to refresh her memory on this point from her notes, which were of good quality. She also had the benefit of documentary evidence from the local council tax office, confirming that Mrs Keenan was residing at the property in Camberley between 1999 and 2010. In my view, these factors make it unlikely that she would have misremembered the date when writing her decision.
73. Third, despite the error in DL 22, it is apparent from other parts of the decision letter that the Inspector was not labouring under the misapprehension that Mrs Keenan was absent in Italy between 1999 and 2011. For example in DL 28, the Inspector said:
- “Mrs Keenan made clear in her evidence that questions about the way the site had been occupied prior to her occupation in 2011 should be addressed to her husband. [FN 9: For example in cross examination when asked if there had been any living facilities available on the site.] Her evidence was that although Mr Keenan had not lived at the Camberley address, he had sometimes come to stay at weekends to see the children or when his brother took over the farm for a week or two if he was not travelling. He also might have stayed during a period of some 3-5 weeks when she had been ill. It was suggested that the existing residential use simply became more apparent when Mrs Keenan moved onto the site.”
74. At DL 29, she correctly recorded that:
- “Mrs Keenan was unable or unwilling to answer detailed questions about the historic use of the site, instead deferring to her husband, so her evidence is of limited assistance.”
75. In my view, the Inspector was here recording and evaluating Mrs Keenan’s evidence as to the Appellant’s residence during the period prior to 2010. Mr Wills submitted that the Inspector did not evaluate it fairly because she considered that Mrs Keenan was in Italy at that time, and so her evidence could not be relied upon. In my view, this submission is not supported when one reads the decision letter. The Inspector clearly found Mrs Keenan’s evidence of “limited assistance” for quite different reasons. Moreover, if the Inspector was of the view that Mrs Keenan was living in Italy during this period, she would surely have said so, since this would have been an important factor to take into account in her assessment of the reliability and value of Mrs Keenan’s evidence.
76. Fourth, the primary issue in the appeal was the Appellant’s length of residence at the Site. The dates of Mrs Keenan’s residence in Camberley was a secondary issue. There was sufficient evidence from other sources to support the Inspector’s conclusion that the Appellant had failed to demonstrate a continuous residential use of the Site over a period of 10 years:
- i) At DL 25-26, the Inspector found that Mr Keenan’s evidence lacked credibility, given documentary evidence concerning his Firearm Certificate and his Shotgun Certificate, which showed his address as the Camberley property for the period January 2007 – January 2012.
 - ii) At DL 27, the Inspector found that, in a 2010 Planning Contravention Notice, Mr Keenan gave his address as 22 Wimbledon Road, listed “ALL uses” at the Site as “agricultural” and returned a plan of the site that made no mention of anything in residential use.
 - iii) At DL 31-32, the Inspector found that the evidence from neighbours did not support the Appellant’s assertion that he had been living on the Site continuously since 2001.
77. For these reasons, the Appellant’s appeal fails on this ground.

Ground 3: planning permission to lay the track

Statutory framework

78. By s. 57(1) TCPA 1990, planning permission is required for the carrying out of development. By s. 58(1)(a), planning permission may be granted by a development order. The GPDO 1995 was in force at the material time.

79. Article 3 of the GPDO provided that planning permission was granted for the classes of development described as permitted development in Schedule 2.

80. Part 6 of Schedule 2 related to agricultural operations.

81. Class A granted permission for the following development:

“A Permitted development.

The carrying out on agricultural land comprised in an agricultural unit of 5 hectares or more in area of—

(a) works for the erection, extension or alteration of a building; or

(b) any excavation or engineering operations,

which are reasonably necessary for the purposes of agriculture within that unit.”

82. Paragraph D1 of Part 6 defined “agricultural land” as follows:

“‘*agricultural land*’ means land which, before development permitted by this Part is carried out, is land in use for agriculture and which is so used for the purposes of a trade or business, and excludes any dwellinghouse or garden”

83. Paragraph A2 of Class A provided, so far as material:

“...(2) Subject to paragraph (3), development consisting of—

...

(b) the formation or alteration of a private way;

...

is permitted by Class A subject to the following conditions—

(i) the developer shall, before beginning the development, apply to the local planning authority for a determination as to whether the prior approval of the authority will be required to ... the siting and means of construction of the private way...;

(ii) the application shall be accompanied by a written description of the proposed development and of the materials to be used and a plan indicating the site together with any fee required to be paid;

(iii) the development shall not be begun before the occurrence of one of the following—

- (aa) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;
 - (bb) where the local planning authority give the applicant notice within 28 days following the date of receiving his application of their determination that such prior approval is required, the giving of such approval; or
 - (cc) the expiry of 28 days following the date on which the application was received by the local planning authority without the local planning authority making any determination as to whether such approval is required or notifying the applicant of their determination;
- ...
- (v) the development shall, except to the extent that the local planning authority otherwise agree in writing, be carried out—
- ...
- (bb) where prior approval is not required, in accordance with the details submitted with the application; and
 - (vi) the development shall be carried out—
- (aa) where approval has been given by the local planning authority, within a period of five years from the date on which approval was given”

The Inspector’s decision

84. At the appeal, it was common ground that, where the development involved the formation of a private way, as in this case, the permission granted was subject to a condition at paragraph A.2(2)(i) that an application must be made to the local planning authority for determination as to whether prior approval would be required for the siting and means of construction.
85. It was accepted that the Appellant had made an application for prior approval. The Council said that it had invalidated the application because the development fell outside the scope of Class A of Part 6 of Schedule 2. There was no evidence that the Council had communicated its decision to the Appellant.
86. The Inspector’s conclusions were as follows:
 - “9. Taking the Council’s argument first, it is right that before considering whether the conditions relating to the requirement for prior approval were met; it is necessary to consider whether the proposal fell within the description of development that was permitted by Class A (as set out in para. 7 above) in the first place. If it did not then the development could not be permitted by the class and it would be immaterial whether the associated conditions had been met or not.
 10. In this respect para.D.1 of Part 6 (Interpretation of Part 6) says: “*agricultural land*” means land which, before development permitted by this Part is carried out, is land in use for agriculture and which is so used for the purpose of a trade or business, and excludes any dwellinghouse or garden” Thus in order for the development to be permitted by Class A the land had to be in use for the purpose of an agricultural trade or business beforehand (that is around March/April 2012) and the track had to be reasonably necessary for that agricultural purpose.

11. In appeal decisions relating to the holding dated 12 April 2011, the Inspector considered the use to which the property was being put at that time. He concluded that no agricultural use was taking place and that the land was in use for keeping of a horse for recreational purposes. That use subsequently ceased. The form for prior approval for the track submitted in March 2012 mentions trees, sheep and pigs in connection with agricultural activities taking place on the site at that time. However, it is known that there were no pigs on the land as Mr Keenan had been banned from keeping them up until September 2012.
12. Mrs Keenan said at the time of the application for prior approval there were recently planted Christmas trees ..., 2 sheep and some chicken – more than are currently on site. Assuming for the moment that the growing of Christmas trees was an agricultural activity, the two areas planted are relatively small in extent. The trees, even some three years after planting are still very small and it is not anticipated that they will be ready for harvest until 2016/2017. The two sheep, I was told, had been brought onto the land to graze between the trees and to that extent were part of the same operation.

...
20. I conclude that it has not been shown that the two sections of track attacked in the enforcement notice were reasonably necessary for the purpose of agriculture or forestry (as the case may be) at the time the application for prior approval was made thus (in addition to my conclusion reached in paragraph 14) they could not be development permitted wither by Class A of Part 6 or by Class A of Part 7 of Schedule 1 to the GPDO. The appeals on ground (c) fail.
21. I have noted the Appellants' explanation that the track was commenced because no determination or notification from the Council was received with the specified period. However, that cannot make the development permitted when it does not fall within the remit of Part 6 or Part 7 in the first place. Nonetheless it would have assisted if a timely explanation from the Council as to why the application could not be entertained could have been provided to pre-empt abortive works being undertaken. Furthermore I have no idea why the fee was not returned when the application was deemed to be invalid. However, these are matters for the parties involved and are not before me. They cannot influence my conclusion which is that the proposed works did not fall within the description of development permitted by Part 6 or Part 7."

Conclusions

87. The Appellant submitted that the Inspector erred in her interpretation of the law. In his submission, once the Council failed to respond to the application for prior approval within 28 days, the developer was entitled to proceed with the development set out in the application. This achieved the intended certainty and avoided unreasonable delay.
88. In support of this submission, the Appellant relied on the following extracts from Annex E of PPG7 (which was operative at the material time):

"E12. In certain cases, the permitted development rights for development on agricultural units of 5 hectares or more and forestry cannot be exercised unless the farmer or other developer has applied to the local planning authority for a determination as to whether their prior approval will be required for certain details ... The local planning authority have 28 days for initial consideration of the proposed development. Within this period they may decide whether or not it is necessary for them to give their prior approval to these details of development involving new agricultural and forestry buildings ...

- E14. The determination procedure provides local planning authorities with a means of regulating, where necessary, important aspects of agricultural and forestry development for which full planning permission is not required by virtue of the General Permitted Development Order. They should also use it to verify that the intended development does benefit from permitted development rights, and does not require a planning application ... There is no scope to extend the 28 day determination procedure, nor should the discretionary second stage concerning the approval of certain details be triggered for irrelevant reasons. A local planning authority will therefore need to take a view during the initial stage as to whether Part 6 rights apply.
- E15. Provided all the General Permitted Development Order requirements are met, the principle of whether the development should be permitted is not for consideration, and only in cases where the local planning authority considers that a specific proposal is likely to have a significant impact on its surroundings would the Secretary of State consider it necessary for the authority to require the formal submission of details for approval. By no means all the development proposals notified under the Order will have such an impact.
- E16. In operating these controls as they relate to genuine permitted development, local authorities should always have full regard to the operational needs of the agricultural and forestry industries; to the need to avoid imposing any unnecessary or excessively costly requirements; and to the normal considerations of reasonableness. However, they will also need to consider the effect of the development on the landscape in terms of visual amenity and the desirability of preserving ancient monuments and their settings, and sites of recognised nature conservation value. They should weigh these two sets of considerations. Long term conservation objectives will often be served best by ensuring that economic activity, including farming and forestry which are prominent in the rural landscape, is able to function successfully.
- E17. The 28 day determination period runs from the date of receipt of the written description of the proposed development by the local planning authority. If the local planning authority give notice that prior approval is required they will then have the normal 8 week period from the receipt of the submitted details to issue their decision, or such longer period as may be agreed in writing (see Article 21 of the Town and Country Planning (General Development Procedure) Order 1995) ...
- E18. The Secretary of State attaches great importance to the prompt and efficient handling of applications for determination and of any subsequent submissions of details for approval under the provisions of the General Permitted Development Order. Undue delays can have serious consequences for agricultural and forestry businesses, which are more dependent than most on seasonal and market considerations. The procedures adopted by authorities should be straightforward, simple, and easily understood ...
- E19. Authorities should prepare forms which developers can use to apply for determination, along the lines of the example in the Appendix. This will help to minimise the number of cases in which submission of details may be necessary. Authorities should acknowledge the receipt of the written description, giving the date of receipt. Where the authority do not propose to require the submission of details, it would be helpful and courteous to inform the developer as soon as possible, to avoid any unnecessary delay or uncertainty.”
89. I agree with the Respondent’s submission that these passages in PPG7 have to be read in their proper context. PPG7 made it clear at paragraph E3 that for Class A and Class B development under Part 6, that development:

- “• must be on agricultural land, which means land in use for agriculture for the purposes of a trade or business, and excludes any dwelling house or garden;
 - must be reasonably necessary for the purposes of agriculture within the unit....”
90. Paragraph E16 (quoted above) reflected this in its reference to “genuine permitted development”.
91. The *Planning Encyclopaedia* explains that there are “four principal tests” in applying Class A, the third of which is “the functional relationship between the development and the use of the land” [3B-2094.4]. This requirement is discussed in detail at 3B-2098.1:
- “To qualify for Pt 6 rights under Class A and Class B, the land must be agricultural land, which means (Class D.1) that it must, before any development permitted by this Part is carried out, be land in use for agriculture and be so used for the purposes of a trade or business ... A planning unit comprising a mixed use of agriculture and some other primary use does not benefit from Pt 6 rights: see *Lyons v Secretary of State for Communities and Local Government* [2010] EWHC 3652 (Admin).”
92. In *Lyons v SSCLG* [2010] EWHC 3652 (Admin), Frances Patterson QC endorsed the position adopted by the parties:
- “All parties are agreed that Part 6 sets out a sequential approach to be gone through, namely:
- (i) is the land agricultural land?
 - (ii) is it comprised in an agricultural unit of 5 hectares or more?
 - (iii) is the development reasonably necessary for the purposes of agriculture within that unit?”
93. In my judgement, the Inspector in this appeal was required to apply this sequential approach, which she duly did. It was only once these requirements were met that the issue of prior approval for the details of siting and construction fell to be considered.
94. This approach was adopted, after some hesitation, by Coulson J. in *Harrogate BC v Crossland* [2012] EWHC 3260 (QB), at [54]:
- “Both counsel originally told me that they believed that this issue should be dealt with before the issues concerned with the events in December 2007 and January 2008 because, if I concluded on all the evidence that this barn was not reasonably necessary for agricultural purposes, that was the end of the defendants’ planning argument. I originally disagreed with that approach, but can now see that I was wrong and that counsel were right. If this barn is not reasonably necessary, the application of 3rd December was invalid from the outset (as per *Clarke*), and no planning permission can be said to have been granted in any event.”
95. In *Clarke v SSE* (1993) 65 P&CR 85, the GPDO 1988 Schedule 2 Part 6 Class A imposed the same requirement that the works must be “reasonably necessary for the purposes of agriculture within [the] unit”. Paragraphs A2(2)(a) and (b) required the local authority to respond to an application for prior approval within 28 days of receipt and required the developer not to begin development until the 28 day period had elapsed. *Clarke* concerned the correct question to be asked in applying the test of reasonable necessity and whether an inspector’s findings in relation to reasonable necessity were perverse. It remains good law on those issues.

96. In *Murrell v SSCLG* [2010] EWCA Civ 1367, a local planning authority had wrongly required an applicant to use a particular form to make an application under Part 6 of Schedule 2 to the GPDO, in relation to a proposed cattle shelter which was said to fall under Class A. The local planning authority had responded to a subsequent application (on the required form), deciding that prior approval was required and refusing that approval on the basis that the proposed development did not comply with a number of planning policies referred to in the determination. It was not disputed that the requirements in Class A were met. Richards LJ said, at [45]:

“The question of prior approval under para.A2(2) can only arise in respect of ‘permitted development’ within Class A (i.e. development falling within the terms of Class A and not excluded by para.A1). Such development is permitted subject to the conditions in para.A2, including the condition relating to prior approval, but those conditions do not affect the principle of development. In recognition of the importance of agriculture and its operational needs, the GPDO has already taken a position on the issue of principle. Thus, as the guidance in Annex E spells out, if the GPDO requirements are met, ‘the principle of whether the development should be permitted is not for consideration’ in the prior approval procedure (para.E15).”

97. *Murrell* is clearly distinguishable from this case where the point at issue is that the proposed development was not permitted development within Class A at all. In my judgement the passage cited above is not inconsistent with the interpretation adopted by the Inspector in this appeal.
98. In conclusion, I consider that the Inspector was correct to conclude that a local planning authority’s failure to determine or respond to a request for prior approval could not have the effect of bypassing the need to fulfil the conditions upon which development may be permitted under Class A.

Conclusion

99. For the reasons I have given, the appeals are dismissed.