Neutral Citation Number: [2015] EWHC 1931 (Admin)

Case No. CO/5670/2014

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

Royal Courts of Justice
Strand
London WC2A 2LL

12 June 2015

B e f o r e :

ROBIN PURCHAS QC
(Sitting as a Deputy High Court Judge)

Between:

THE QUEEN (ON THE APPLICATION OF KEVIN PITT)	**Appellant**
v	
SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT	**First Respondent**
EPPING FOREST DISTRICT COUNCIL	**Second Respondent**

Miss M Thomas (instructed by Sharpe Pritchard) appeared on behalf of the Appellant
Mr R Williams (instructed by Government Legal Department) appeared on behalf of the First Respondent
The Second Respondent was not represented, did not attend

DEPUTY JUDGE:

Introduction

1. This is an appeal under Section 289 of the Town & Country Planning Act 1990 (the 1990 Act) against the decision of an inspector appointed by the first respondent dismissing the appeal of the claimant against an enforcement notice in respect of the erection of an extension to a garage block at Hastingwood Farm, Hastingwood, Essex.

2. Permission was granted by His Honour Judge Jarman QC on 13 January 2015. The judge granted permission limited to ground 4 subject to amendment to reflect the basis on which the judge granted permission. As amended, the ground challenges the finding by the Inspector that the extension comprised an independent dwelling unit contrary to what was common ground between the appellant and the second respondent (the council) that it was accommodation ancillary to the established residential use of the land. In the circumstances Miss Megan Thomas, who appears for the appellant, submits that the appellant was not given any fair opportunity to deal with the point so that the decision was in breach of natural justice.

3. As originally amended, the ground referred only to ground A of the appeal against the enforcement notice. At the hearing I gave permission further to amend the ground to include ground G. My reasons for giving permission include that the consideration by the judge at the permission stage did not seem to me to have been limited to ground A but could also apply directly to the decision on ground G and that there would be no particular prejudice to the appellant as a result of the amendment, which, in the circumstances, would enable fair and just disposal of the appeal.

Background

4. Hastingwood Farm is a substantial dwelling standing in grounds which contain a number of outbuildings. Those included a garage block which was extended in about 2010/2011 to form the extension, the subject of the present appeal. As described by the appellant, the extension was later converted to contain two bedrooms with bathrooms and a living room/kitchen. The site is in the Green Belt.

5. According to the appellant, the original garage block (which also contained storage) was constructed in 2006 because the property had no garaging. As a collector of classic cars, the appellant had a need for extensive garaging. That was a hobby and not a commercial venture. The garage block constituted permitted development under Part 1, Class E of Schedule 2 to the Town & Country Planning (General Permitted Development) Order 1995 (GPDO), which, at the time, was not restricted by reference to not being in front of the principal elevation of the dwelling, which was introduced by amendment in 2008.

6. The appellant was not aware of the 2008 amendment but accepted that as a result when the extension was constructed in 2010/2011 to provide further garaging it was in breach of the restriction and, as such, not permitted under class E.

7. During the course of the subsequent conversion to a residential annex officers from the council made investigations which led to enforcement action in respect of the whole garage block. That was subsequently withdrawn on the basis that the original block was permitted development within the curtilage of the main dwelling. That then led to an application by the appellant for a lawful development certificate, which was granted on 25 July 2013. The certificate certified that a development for a new garage block to the south west of the original garage block (but behind the principal elevation of the main dwelling house) and the provision of a two-bedroom residential annex within part of the original garage block to be used ancillary to the main dwelling house would be lawful. The certificate incorporated plans which showed accommodation for the residential annex similar to that in the extension, the subject of the present appeal.

8. Thereafter the appeal enforcement notice was issued by the council on 3 November 2014, requiring removal of the extension which had been constructed unlawfully in 2010/2011. The notice alleged a breach of planning control, comprising the erection without planning permission of a building for use as a residential annex forward of the principal elevation of the main dwelling house. The time for compliance was three months. The reason for issuing the

notice included that it was inappropriate development in the Green Belt and did not constitute permitted development.

9. The appellant appealed on a number of grounds, including that planning permission ought to have been granted for the development the subject of the notice (ground A) and that the period of three months allowed for compliance fell short of what should reasonably be allowed (ground G). I should note at this point that at the invitation or suggestion of the parties the Inspector amended the notice to delete the words "for use as a residential annex" from the description of the breach of planning control in the enforcement notice for the reasons he explained in paragraph 10 of the Decision Letter. As a result, as confirmed, the notice referred solely to the erection of a building in breach of planning control. The judge refused permission to appeal in respect of that amendment.

10. The appellant's grounds of appeal for the enforcement appeal in support of ground A noted:

"1.3 The council officers accepted that the area around the garage historically formed part of the curtilage of the property and that the first garage block was erected as 'permitted development' fully within the terms of the then GPDO and immune from enforcement action."

The grounds then made reference to the lawful development certificate and continued:

"1.6 This certificate confirms that the council have now accepted that this part of the appellant's landholding falls within the curtilage of the dwelling for the purposes of erecting outbuildings ancillary to the domestic use of the main dwelling, Hastingwood Farm. This illustrates an important, logical and viable fall-back situation in the event planning permission is not granted for the retention of use for the building the subject of this appeal.

1.7 It should be stressed from the outset that the appellant did not intend to contravene planning legislation by commissioning what turned out to be unauthorised development on his landholding. The initial extension to the original garage/car store building was to meet a known need for further garage accommodation. The appellant has a large collection of vehicles, mainly classic cars. The subsequent conversion of this building arose from a further need for ancillary residential accommodation for the appellant's adult son and daughter."

11. In paragraph 2.1 it was submitted that the use of an existing domestic outbuilding for ancillary residential accommodation was not inappropriate development in the Green Belt. At paragraph 2.2 the ground stated:

" No planning purpose is served by demolishing the extension on the existing outbuilding (the original garage block) when almost the exact same form of development can be undertaken under permitted development rights within close proximity of the unauthorised extension."

It continued at paragraphs 2.7:

"2.7 Whilst it could be argued that the removal of this extension will facilitate in some way in assisting to safeguard the countryside from encroachment (the third purpose), this has little weight given that a similar-sized building or even larger, subject to being within the appropriate limitations of the GPDO, can be erected a few metres from the site.

2.8 It also must be borne in mind that we are dealing with a cluster of ancillary domestic buildings of appropriate scale and character to this rural area. Such a cluster can be replicated or constructed as individual buildings as many times as the appellant considers appropriate provided they are sited to the side of the appeal building and behind the front of the main dwelling subject of course to having a purpose associated with the domestic use of the site and within the permitted development limits regarding height etc, and also not exceeding fifty per cent of the curtilage. It is considered only a significant amount of new build will have any impact on public views or the rural character of this area so further buildings in the same location behind the foremost part of the main dwelling is all permitted development as proved by the certificate."

12. In other words, what the appellant was saying was that there would be no net effect on openness of the Green Belt because he could otherwise convert the existing garage block, in part, as a residential annex and provide replacement garaging and storage in a new building pursuant to class E a little to the south where it would be behind the principal elevation of the main dwelling house.

13. In support of ground G, paragraph 6.1 stated:

" Insufficient time has been given to enable the appellant to convert the other garage to provide this essential ancillary dwelling facility. It is considered that at least nine months would be an appropriate period in which to plan, organise and execute the conversion works. Given the modest impact of this extension on the amenity of the area, its continued presence for a few more months above that suggested by the council would not cause material harm to any interest of acknowledged importance."

The Planning Inspectorate directed that the appeal should proceed by written representations.

14. In the appellant's statement of case at paragraph 2.6 it was stated:

" It may be noted that the application covering letter specifically raised the issue of what planning purpose would now be served by removal of the unauthorised development given that it could be replicated a few metres away ..... It is pertinent to note that nowhere in the officer's analysis is the matter of the material and feasible fall-back situation considered. This, in my opinion, was a very special circumstance which should have been given significant weight but according to the report was not even considered."

15. The statement then referred to the lawful development certificate and continued at paragraph 2.9:

"It is submitted that the aims and purposes of the Green Belt and any harm to the nature and character of the Green Belt must be considered against this fall-back position which proves, firstly, that this area falls within the curtilage of the dwelling for the purposes of 'PD' rights under the GPDO with the logical assumption that further outbuildings can be erected in the immediate area subject to compliance with the limitations regarding such buildings in the GPDO and, secondly, the existing garage building can be converted into an ancillary dwelling."

Paragraph 2.11 of the statement pointed out that "the now established fall-back position" was not considered in the report recommending enforcement action. At paragraph 2.12 the statement of case continued:

" As the new garage building, the subject of the certificate application, was likely to be either under construction or recently completed by the time the inspector has his/her inspection of the appeal site, this is because there remains a requirement for additional garages to serve the appellant's personal needs and some of his extensive collect[ion] of vehicles are kept elsewhere. But the bundle of vehicle logbooks at appendix E illustrates his current daily fleet."

That referred to the lawful development certificate new building and suggested that that was needed even with the retention of the unauthorised extension, the subject of the enforcement appeal.

16. In my judgement, the reference to the fall-back position was therefore not limited to the lawful development certificate building but was concerned with additional building under class E which would be required if the existing garage space was lost because of its conversion as a residential annex.

17. In its appeal statement exchanged at the same time as the appellant's statement of case on ground A, the council noted at paragraph 5.5:

" No explanation is given of why the existing ancillary accommodation on the site could not be used or why space in the main dwelling was not available. These grounds do not meet the criteria for very special circumstances."

It then referred to the fall-back argument:

"5.6 He further asserts that there is no harm caused to the Green Belt by the scheme and there is no purpose served by demolishing the building when something similar can be erected close by under the permitted development rights."

The statement returned to that at paragraph 5.9:

"5.9 It is accepted that the appellant can erect a similar building in the curtilage of the dwelling under the current Permitted Development Regulations. However this would not cover a residential use of such a building. It would need to be subject to a planning application and could then be assessed by the NPPF and Local Plan Policies. Therefore, the fall-back position as argued by the appellant is not as clear-cut as he asserts. It is his case that the authority has no control over what can be erected under the Permitted Development rights. It does have control of those developments not so covered. It has that control for a reason. In this case the scheme as built causes unacceptable harm to the Green Belt, and it is clearly in the public interest to act in this case."

18. The reference to not covering residential use appears to be a reference to the restriction on class E development, excluding a building that "relates to a dwelling".

19. On ground G the statement stated:

"9 The authority is of the opinion that three months is a realistic timescale to remove the fittings from the building and demolish it."

20. The appellant responded in a letter dated 7 May 2014, saying at paragraph 5.2:

" The term 'substantial increase in the amount of built form on the site' is meaningless having regard to the fall-back position and also taking into account the amount of additional development that may legally be erected behind the main building line of the main dwelling in this part of the site. Indeed, it could be the whole of this area as it would not be seen fit to build in the curtilage of the Hastingwood Farm dwelling. The existing building, as extended, would have no more impact on the openness of the Green Belt than that alternative fall-back possibility."

It continued at paragraph 5.9:

“5.9 The council seems to be mixing up the concept of ancillary accommodation as opposed to developing an independent separate dwelling. The appeal proposal is for ancillary accommodation by way of conversion which, as a fall-back, can be provided in the adjoining garage building as per the fall-back certificate determination. The unacceptable harm has not yet been qualified to any material degree as compared to a fall-back situation. In cases such as this a commonsense approach is required.”

In the conclusion it is said:

> “Indeed, they have failed to have any regard to a feasible fall-back situation which was illustrated in the certificate approval.”

21. The council did not make any representations in response to the appellant’s statement of case.

22. The Inspector thereafter carried out a site inspection. By that time the new building, subject to the lawful development certificate, had also been completed, but the conversion to a residential annex had not been carried out.

The Decision Letter

23. In his Decision Letter dated 7 November 2014 the Inspector described the site and surroundings in paragraphs 3 and 4. Having dealt with other grounds, he turned to ground A at paragraph 11, saying:

“11 Under this ground, planning permission is sought for the development enforced against. The main matter of dispute is whether the unauthorised development harms the rural character of the area or conflicts with relevant planning policies having regard to the location of the site within the Metropolitan Green Belt.

12 Allowing for the correction to the allegation, the permission being sought is, in effect, for the retention of the building. The building is designed and used as a dwelling. Part of the appellant’s case relates to a claimed requirement for the dwelling and for the alternative option of creating another dwelling. So it is sensible to treat ground A and the related deemed application for seeking permission for the retention of the building as it stands, that is to say as a dwelling.

13 At this point I think it is necessary to clarify one matter. The appellant, through his agent, refers in his statement to what he calls an ancillary dwelling. This expression is a contradiction in terms. The relationship between Mr Pitt and the current occupiers does not affect the fact that what has been created here is a two-bedroom dwelling with a full kitchen facility, fittings, a living area and two bathrooms. The building is made up of all the facilities as an independent self-contained dwelling. The available evidence indicates that the building is used as such.”

There is a footnote at that point which says:

> “This is apparently not the only dwelling within the complex of buildings known as Hastingwood Farm in addition to the original farmhouse. The appeal only relates to the building shown on the enforcement notice plan.”

Returning to paragraph 13, it continued:

> “Indeed, the independent nature of the occupation of this dwelling is shown by the claim made in support of ground E that copies of the enforcement notice should have been

served on the occupiers of the dwelling which indicates to me the day-to-day living pattern is not part of the same household as occupies the original farmhouse."

24. At paragraphs 14 and 15 the Inspector dealt with Green Belt policy and concluded that the extension was inappropriate development and caused actual harm to the Green Belt.

25. At paragraphs 17 and 18 the Inspector turned to the fall-back argument:

"17 Part of the appellant's case relates to what might be called the fall-back position. The council granted a certificate of lawfulness in July 2013 for a new outbuilding and to provide a two-bedroom residential annex within part of the existing L-shaped outbuilding for use ancillary to the main dwelling house. The appellant has argued that this proves several matters, that all this area was within the curtilage of the main house, that the original garage block can be converted into ancillary space and that a further garage block could be constructed just south of the unauthorised building. This further garage block has in fact been built. An area around it has been recently surfaced with shingle.

18 The thrust of the appellant's contention here is that no useful purpose would be served by requiring the demolition of the unauthorised building. The appellant has argued such a step would have no material impact on public view or perception of the owner's character and that whether the unauthorised development remains or whether – what the appellant has called – the transfer of the ancillary residential use is implemented would have no impact on the purposes of Green Belt policy."

26. In paragraph 17 the Inspector only referred to the new building subject to the lawful development certificate which had been built by the time of his inspection. He did not refer to the part of the fall-back argument which concerned accommodating the displaced garage and storage uses in a new building constructed pursuant to class E.

27. The Inspector continued at paragraph 19:

"19 In my judgement the fall-back argument is weak for three reasons. First, the certificate of lawfulness for a proposal only certifies that on the date of the application the development specified would have been lawful. Circumstances can change and various changes in the layout and use of the land at Hastingwood Farm appear to have occurred recently.

20 Secondly, the unauthorised building is a significant addition to the size of the previously existing L-shaped structure and it affects the openness of the Green Belt. It is inappropriate development in the Green Belt so, by definition, under long established national and local policies, if harm is caused, it is necessary to find very special circumstances to justify granting planning permission. The fact that the council have accepted the lawfulness of other development at Hastingwood Farm may be unusual but does not amount to very special circumstances since this is the sort of argument which could be repeated not only at this site but other locations in the Green Belt. In any event, even assuming the existing garage were to be converted into a dwelling, in line with the past certificate of lawfulness, the overall effect on the openness of the Green Belt would be less than leaving the unauthorised building in place."

28. I interject there to note that, while the Inspector dealt here with the conversion of the outbuilding "into a dwelling", concluding that in itself that would have less effect on the openness of the Green Belt, again he did not address what the appellant said would be the consequence of a further building required to replace that space pursuant to the class E permitted development rights just to the south of the extension enforced against.

29. The Inspector continued at paragraph 21:

> " Thirdly, there appears to be a repeating sequence of development at Hastingwood Farm involving the construction of buildings or conversion of buildings into dwellings for what, in my judgement, is doubtful justification relating to the extent of the curtilage of the original farmhouse and to the use of the buildings ..... "

There is a footnote referring to the Inspector's definition of curtilage. The paragraph continues:

> "In this Green Belt location where a strict control over development is appropriate, a failure to apply the very special circumstances test would be liable to encourage continuation of this sequence.
>
> 22 On the subject of repeated development, it is suggested for the appellant that 'within the cluster of ancillary domestic buildings ..... such a cluster can be replicated or constructed as individual buildings as many times as the appellant considers appropriate'. That belief is flawed in several ways and should be apparent from my comments about points of law relating to the GPDO."

In a footnote at that point he sets out the requirements of class E of the GPDO, commenting that there is a limit to the extent to which the vehicle storage could be regarded as incidental within the meaning of class E before the use of the planning unit as a whole becomes a mixed use. Returning to the main text of the paragraph:

> " Moreover, as the council have pointed out, and setting aside issues relating to terms such as 'ancillary' and 'curtilage', permitted development rights to the erection of curtilage buildings would not cover a residential use."

30. I note that the Inspector has omitted to include the proviso to the quoted sentence from the grounds of appeal which is set out above and makes the same point as the Inspector that this was of course subject to the restrictions on class E. It was not the case of the appellant that the new building itself would be constructed for use related to a dwelling. That was to be accommodated by converting the existing outbuilding in accordance with the lawful development certificate.

31. The Inspector went on to reject ground A at paragraph 27 of the decision letter.

32. The Inspector dealt with ground G at paragraph 30:

> "30 The essence of the appellant's case on this ground is that three months' compliance period is insufficient time to convert the other garage to provide this 'essential ancillary facility' and at least nine months would be an appropriate period.
>
> 31 I have used quotation marks in the previous paragraph since, as I have previously explained, in my judgement, the dwelling is neither essential nor ancillary. Moreover the suggestion that the garage will be converted into a dwelling reinforces the impression that at least some of the garaging was erected more because of a desire than a requirement within the meaning of class E of the GPDO.
>
> 32 The purpose of a compliance period is to enable the requirements of the enforcement notice to be carried out. A three-month period allows sufficient time for the steps specified to be undertaken. I conclude that ground G fails."

Legal Framework and Authorities.

33. Under the Town & Country Planning Act 1990, Section 55, the extension of a building would comprise a building operation and, as such, development requiring planning permission. By the GPDO 1995 (which then applied) Class E of Part I to Schedule 2 provides that –

"The provision within the curtilage of a dwelling house of –

(a) any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwelling house as such .....

is permitted development."

But, by E1 –

"Development is not permitted by class E if –

(a) the total area of ground covered by buildings, enclosures and containers within the curtilage (other than the original dwelling house) would exceed fifty per cent of the total area of the curtilage (excluding the ground area of the original dwelling house);

(b) any part of the building, enclosure, pool or container would be situated on land forward of a wall forming the principal elevation of the original dwelling house;

...

(h) it relates to a dwelling …;"

34. Part VII of the Town & Country Planning Act provides for enforcement. Section 174 provides for appeal against an enforcement notice, including grounds A and G, to which I have referred. Section 192 provides for a certificate of lawful development to be obtained in respect of proposed use or operations. Section 192 (4) provides:

" The lawfulness of any use or operations for which a certificate is in force under this section shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness."

35. I was referred to the Planning Inspectorate's Practice Guide on ancillary residential use, which provides:

"253 The use of land for full residential purposes will not normally be ancillary or incidental to some other main use of the land. There may be some exceptions where an element of residential use can be regarded as ancillary without constituting a separate main use. It is most likely to arise that primary use is itself a form of residential use, like a pub providing accommodation for guests, a hotel or a hostel where staff or management would ordinarily be expected to live in. Alternatively, it could be argued in such cases that the residential use by staff is actually part and parcel of the main use of a hotel etc rather than simply ancillary or incidental to it.

254 Where a self-contained or virtually self-contained area in a planning unit provides all the facilities necessary for independent day-to-day living, for cooking, eating and sleeping, whether within a building, part of a building, caravan or other structure or combination of these, and is used for that purpose, its use for someone's home and dwelling house would not normally be incidental or ancillary to some other main use of the land.

...

256 Similarly, a granny annex, even in a separate building in the curtilage of the main dwelling house, would normally be regarded as part and parcel of the main dwelling house use rather than ancillary to it. The judge in *Uttlesford District Council v Secretary of State for the Environment and White* [1992] considered that even if the accommodation provided facilities for independent day-to-day living it would not necessarily become a separate planning unit from the main dwelling. It would be a matter of fact and degree. In that case the accommodation gave the occupant facilities of a self-contained unit although it was intended to function as an annex only with the occupant sharing her living activity in company with the family in the main dwelling. There is no reason in law why such accommodation should consequently become a separate planning unit from the main dwelling. The fact and degree judgement must be made on the specific circumstances of the case. The key issue is whether a separate planning unit has been created. If an outbuilding with its living accommodation is part of the same land unit as the dwelling house and provided that the planning unit remains a single-family occupation, continues to function as a single household, no material change of use is involved."

36. That was not criticised by the parties as a proper approach to the identification of ancillary residential use.

37. On fairness and natural justice, I was referred to *Fairmount Investments Ltd v Secretary of State for the Environment* HL [1976] 1 WLR 1255, and in particular to the opinion of Lord Russell at page 1265:

"All cases in which principles of natural justice are invoked must depend on the particular circumstances of the case. I am unable my Lords in the instant case to generalise. I can only say that in my opinion in the circumstances I have outlined *Fairmount* has not had – in a phrase whose derivation neither I nor your Lordships could trace – a fair crack of the whip."

38. In *R (On Application of Ashley) v Secretary of State for Communities and Local Government* [2012] 1 WLR 2264, the Court of Appeal were considering fairness in the context of a written representation appeal. The decision was quashed because a concerned member of the public had not been given a fair opportunity to comment on a noise report submitted by the appellants on which the Inspector had relied for his decision to allow the appeal. At paragraph 20, Lord Justice Pill referred to the judgement of Mr Justice Richards (as he then was) in *Phillips v First Secretary of State* [2003] EWHC 2415 Admin, where he said:

"55 The need to invite further representations in the interests of fairness is likely to arise very infrequently. The sequence of representations provided for in the regulations will normally be sufficient to achieve fairness. But the opportunity to make additional representations can and should be given if a new point is raised which the inspector ought to take into consideration and which cannot fairly be taken into consideration without giving such an opportunity. Whether fairness requires it depends entirely on the particular facts of the case."

Submissions

39. So far as is relevant to the considerations before this court, Miss Thomas submitted that in this appeal the appellant had made clear that the building had been converted to ancillary residential use. The Inspector's rejection of that concept, which the appellant had termed "an ancillary dwelling", was wrong in law. In any event he was going against the common ground that had been reached with the council that the buildings were in the same planning unit as the main dwelling and fell within its curtilage. That was consistent with the grant of the lawful

development certificate which endorsed the use of part of the existing garage block for the provision of a residential annex and for a further building for use ancillary to the main dwelling.

40. The Inspector's conclusion at paragraph 13 of the decision letter appears to proceed from the proposition that with the provision of the facilities of an independent self-contained dwelling it necessarily ceased to be part of the existing residential use ancillary to the main dwelling and had to constitute an independent planning unit. That was wrong in law and, on the particular facts of this case, unjustified, given the express proposal that it be ancillary to the main dwelling, which could be controlled by condition. That had, in effect, been accepted by the council.

41. Furthermore, the Inspector never directly dealt with that part of the fall-back argument advanced by the appellant that with the conversion of his existing storage and garaging space to ancillary residential use he would be able to construct a third curtilage building under class E to replace that space. If necessary, with retention of the unlawful extension, a condition could be imposed to preclude other building in the curtilage for that purpose. In placing little weight on the fall-back argument as a very special circumstance the Inspector had again fallen into error. His rejection of the lawful development certificate at paragraph 19 of the decision letter was unjustified and based on unspecified changes. Moreover the council did not challenge the fact that the existing outbuilding could be used for ancillary purposes in line with the lawful development certificate.

42. There was no proper examination by the Inspector whether the appellant's use of the existing garage block would properly be a purpose incidental to the enjoyment of the dwelling house as such or that covered space was a reasonable requirement in that regard. Again, the council had not challenged that proposition. The Inspector did not address that consideration in paragraph 20 of the decision letter in his second reason for placing little weight on the fall-back argument as he only dealt with the conversion for ancillary residential use. The third reason simply cast doubt generally on the availability of the class E rights to construct new buildings as well as the use of outbuildings for "dwellings", as the Inspector put it, and relied on that as an argument for strict control over development in the Green Belt.

43. That is reinforced, she submits, by the Inspector's handling of ground G where he rejected the appellant's argument that three months would provide insufficient time to convert the existing garage block in accordance with the lawful development certificate to ancillary residential use on the basis that it was not ancillary to the main dwelling use.

44. Miss Thomas submits that the Inspector's rejection of the lawful development certificate as a basis for the provision of ancillary residential accommodation and the evident rejection of any scope for a replacement building under class E was contrary to what was common ground with the council and certainly had not been put in issue. The appellant had not had a fair opportunity to deal with those points. The decision was, accordingly, unlawful and should be remitted to the respondent for further consideration.

45. Mr Robert Williams, who appears for the first respondent, submits that the Inspector was entitled to come to the conclusion to which he did on the main issue before him and that there was no need to seek further representations on what was, at most, a peripheral issue.

46. The main issue was whether, as inappropriate development in the Green Belt, there were very special circumstances which would clearly outweigh the deemed and actual harm which, on the findings of the Inspector, arose from the construction of the unauthorised building for the purpose of paragraphs 87 and 88 of the National Planning Policy Framework (NPPF). In that respect, it did not matter what use was made of the unauthorised extension because it was a structure, not the use, which caused the harm to the Green Belt and was inappropriate. For the

same reason the Inspector was entitled to take the view that provision of the dwelling use in the existing garage building would cause less harm to the Green Belt for the simple reason that there would be less built coverage with the removal of the unauthorised extension.

47. On the lawful development certificate it was clear that the new building which that certified as lawful had in fact been built by the time of the site inspection and so it could not be treated as a fall-back position. Any suggestion of yet a further curtilage building was only faintly advanced as an argument and was effectively disposed of by the Inspector’s conclusion that the extent of additional building did not properly meet the conditions for class E. In those circumstances the Inspector did not reject the fall-back argument but he was fully entitled to place little weight on it, as he did for the reasons in the decision letter.

48. It was not right to say that the Inspector had differed from the parties as to the extent of the curtilage or the residential use of the site. The appellant had had a fair opportunity to address the issue of the fall-back position. The Inspector was entitled to reach his own conclusions as to the weight he attached to it.

49. On ground G the breach was the construction of the unauthorised extension, for which it was not challenged that three months was a reasonable time for demolition and removal. The additional time would only be required if it was concluded that the existing use, as the Inspector found, for a dwelling was essential and, as such, could properly be accommodated as ancillary residential use within the existing garage bock. The Inspector found, on the evidence, that there was no evidence that it was essential and, moreover, rejected the proposition that it was ancillary. Those were conclusions open to him on the evidence and there was no error of law or unfairness.

50. In any event, as a matter of discretion, the decision should not be remitted on ground G alone, first, because the appellant had now had the benefit of more than nine months to comply with the notice as a result of his appeal and the challenge to this court; and, second, in any event, the council had power to vary the terms of the enforcement notice under Section 173A of the Town & country Planning Act 1990 so that if there was any problem with compliance the appellant could apply to the council for additional time.

Consideration

51. In this case I am satisfied that on the basis of the written representations it was common ground between the parties that the new extension was within the curtilage of the existing dwelling and that the site as a whole had a residential use. It was no part of the council’s case to suggest that the extension was proposed other than as part of and ancillary to that use. It is important to be clear that use in this respect is to be distinguished from curtilage. Normally, a planning use will be determined by reference to the unit of occupation and that would seem to apply in the present case, at least independently of the creation of a new planning unit. The concept of curtilage in this context is relevant to the application of the GPDO within the curtilage of a dwelling house. The curtilage is the area that is occupied directly with and serving the principal building so as to form part and parcel of it. In every case it is a matter of fact and degree what forms the curtilage of the particular building. However, it was again common ground between the parties that the new extension lay within the curtilage of the main dwellinghouse, albeit that the extension was excluded from class E because it projected in front of the principal elevation of the original dwelling house.

52. It is apparent from the decision letter that the Inspector rejected the proposition that the extension was used as part of the established residential use and concluded that it should be regarded as an independent dwelling unit and use. At paragraph 13 the Inspector described the term “ancillary dwelling” as a contradiction in terms. He noted that the extension was laid out with all the facilities of an independent self-contained dwelling and that “the available

evidence" indicated that its use was such. There is no indication to what evidence he was referring beyond the fact of the facilities provided and his reference to ground E, that the notice was not served on the occupiers of the new extension.

53. Section 172 of the 1990 Act required the enforcement notice to be served on the occupiers of the land to which it related. It does not seem to me that appealing on the ground that the notice had not been served on the occupiers of the extension was in any way conclusive of whether or not the use was ancillary to and part of the established residential use or a separate dwelling and planning unit. It seems to me that the Inspector rejected the proposition that this was ancillary residential use largely on the fact it had facilities for use as an independent dwelling. That was contrary to the position of the appellant which had, in effect, been accepted by the council both through granting a lawful development certificate and in their representations on the appeal. There had been no indication from the Inspector that he was differing from that common view and no invitation to make further representations on the issue.

54. Mr Williams' answer to that is that it was peripheral to the main issue. In considering that submission, it is appropriate to consider the potential relevance of the point as part of the overall decision. As indicated earlier, in this case it was accepted that the extension constituted inappropriate development in the Green Belt and therefore very special circumstances would have to be shown which clearly outweighed the harm for planning permission to be granted.

55. The fall-back argument turned, in the first place, on whether the use could be accommodated in part of the original garage block in accordance with the lawful development certificate; and, second, if so, would the appellant be entitled under class E to construct an additional building to replace the lost garage and storage space? The council had effectively accepted the first proposition in its representations consistently with the issue of the lawful development certificate. On the second proposition the authority's only point was that it could not be used for residential purposes, presumably on the basis that that would relate to a dwelling. However that was not the argument of the appellant, which was to create a new building to accommodate the lost garage and storage space. There was therefore no direct challenge from the council to either central propositions in the appellant's fall-back argument.

56. Mr Williams is right to point out that the Inspector did not reject the fall-back argument, but he concluded that it was weak, which was potentially crucial as part of the necessary planning balance.

57. The Inspector did so for three reasons. First, at paragraph 19 he said that the lawful development certificate only certified lawfulness at the date of the application. That is in fact a confusion with a certificate of lawfulness for an existing use or development under Section 191 of the Town & Country Planning Act. The lawful development certificate for the proposed development under Section 192 is conclusive unless there is a material change in any of the matters relevant to determining lawfulness which occurs before the development begins. The Inspector referred to the fact that various changes in the layout and use at the site appeared to have occurred recently but there is nothing to indicate what those were or how they affected the basis on which the lawful development certificate was granted.

58. Second, at paragraph 20 the Inspector rejected reliance on the fact that the council had, "unusually", accepted the lawfulness of "other development" because that could be repeated on this site and elsewhere. The Inspector then concluded that, even assuming that there was a conversion to what he described as a dwelling in line with the lawful development certificate, there would be less damage to the Green Belt than retaining the unauthorised extension. That however still left the question of the appellant's ability to construct replacement storage or garaging space pursuant to class E.

59. Third, at paragraph 21 the Inspector dealt with what he described as the "repeating sequence" of development with what was in his judgement doubtful justification relating to the extent of the curtilage in the original dwelling and to the use of the buildings. He adopted that as a reason for concluding that a failure to apply the very special circumstances test would be liable to encourage continuation of that sequence.

60. At paragraph 22 he dealt with the suggestion in the grounds of appeal that the appellant could construct as many buildings as the appellant considered appropriate by reference to the requirements of and qualifications on the class E permitted development rights, something which the appellant had himself included as part of the same sentence from which the quotation was taken. However that did not directly address the particular point on which the appellant relied for his fall-back position, namely that in these circumstances where he had a lawful use of the existing garage block for ancillary garaging and storage he should be able to replace that space once lost to accommodate the ancillary residential use pursuant to the lawful development certificate and could do so under class E.

61. The Inspector did not, in my view, squarely grapple with this argument or, if he did, it was to place little weight on that as a fall-back position because, in his view, it would not properly come within the class as a reasonable requirement for a purpose incidental to the enjoyment of the dwelling house as such. It may be that he did not deal with it because in paragraph 17 he appears to have equated the requirement for the additional building as having been met through the building that had been constructed pursuant to the lawful development certificate. However, the appellant had made clear in paragraph 2.12 of his statement of case that that was to address his existing need for additional garages, something that had not been challenged by the council. On either basis and however the decision letter is to be understood, the problem is that the issue was not raised with the parties and the appellant was not given any specific opportunity to deal with the particular issue other than in the general sense that as an appellant the appellant had the onus of establishing the grounds of his appeal and in this case the very special circumstances.

62. The Inspector would have been aware that here the council was (incorrectly in the Inspector's view) effectively agreeing with the appellant's approach to class E. In that light, once the written representations had concluded or possibly earlier, in my judgement he could and should fairly have given the parties, and in particular the appellant, the opportunity to deal with the issue whether a replacement building for the lost garage and storage space would have been a relevant requirement for the purposes of class E. That could have included the consideration of any controls by condition or otherwise of the construction of any further buildings pursuant to class E.

63. Moving on to ground G, the Inspector was here only concerned with the appellant's representation that he needed nine months to provide the alternative facilities. While I recognise that whether or not it was essential was an issue on which the Inspector was entitled to come to his own conclusion, he also relied on the fact that the accommodation was not ancillary. That would seem to link back to his earlier consideration of ancillary use as part of ground A, including the relevance of the lawful development certificate. Thus, a similar concern arises that the appellant was not given a fair or any specific opportunity to deal with the point.

64. The Court of Appeal decision in *Ashley* makes clear that the principles affecting fairness of administrative decision making applies fully in the context of appeals by written representations, as here. In my judgement that applies no less to the parties to the appeal as to a member of the public as in *Ashley*. As Mr Justice Richards (as he then was) pointed out in *Phillips*, whether fairness requires additional opportunity to make representations depends on the particular facts of the case.

65. In that light it seems to me that in this case fairness did require that the Inspector made clear that an issue in his determination would be the question of ancillary use and the requirements of class E with regard to the fall-back position and the time for compliance, and he should have provided the opportunity for the parties to make further representations on those specific aspects. It does not seem to me that it is possible to conclude that further representations in those respects would have had no effect on the final decision or that the conclusion reached by the Inspector was inevitable in that the fall-back position was central to the case on very special circumstances to outweigh the harm to the Green Belt. Thus, further submissions on those issues would be potentially material in the conclusion to which the Inspector might have come.

66. It is not possible to say that he would necessarily have come to the same conclusion overall on those grounds if he had reached a different conclusion as to the nature of the use and the application of the GPDO as part of the fall-back position or otherwise.

67. As a matter of discretion, in the light of the above, I conclude that this appeal should succeed and the decision should be remitted to the first respondent for reconsideration in the light of the opinion of the court as set out in this judgement. I should add that if the appeal had only succeeded in respect of ground G I would still have exercised my discretion in favour of remitting the decision to the first respondent. In my judgement the appellant was not reasonably required to commence the conversion works while his challenge was extant and the appeal had not been finally disposed of. It is not an appropriate ground for the exercise of discretion that the appellant should be denied relief and reconsideration on the basis that he can apply to the council for an amendment under Section 173[A] of the 1990 Act.

68. MISS THOMAS: My Lord, may I formally ask for an order quashing the decision letter and remitting the appeal back to the Secretary of State for Communities and Local Government in the light of your judgement?

69. DEPUTY JUDGE: Mr Williams, I think that is right. I will remit it to the first respondent with the opinion of the court as set out in the judgement.

70. MR WILLIAMS: My Lord, yes, save that I do not think it is quashed. I think it is remitting.

71. DEPUTY JUDGE: Yes. That is right. I make that order, allowing the appeal and remitting the decision to the Secretary of State with the opinion of the court as set out in this judgement.

72. MISS THOMAS: May I also apply for the appellant’s costs of both the permission hearing and today (Wednesday’s substantive hearing and today)? A schedule has been served in accordance with the summary assessment, the guidance on the Treasury Solicitor.

73. DEPUTY JUDGE: I do not think I have seen that. I have seen the one from the respondent. (*Passed to judge*) Can we deal with the principle first? Mr Williams, do you resist that, the principle?

74. MR WILLIAMS: Not the principle of paying costs. I have submissions in relation to the quantum.

75. DEPUTY JUDGE: This case has gone over a day. I have not seen this schedule. My normal view would be to leave this to be taxed unless you can agree the assessment.

76. MR WILLIAMS: The reason that I would wish to make submissions to you in relation to it is as to a partly principle point which is that this appeal was raised with initially seven grounds. The permission hearing took virtually a whole day. His Honour Judge Jarman QC reserved costs, the issue of costs, being aware of the fact that the Secretary of State had, in effect, been put to unnecessary costs on six of the seven grounds originally raised in respect of that original

hearing and in respect of six or seven grounds which, in his view, did not have even arguable merit. In my submission it is proper to reduce the award by a relevant percentage to reflect that fact. If one looks certainly at the costs incurred by the Secretary of State in relation to the permission hearing compared to the substantive hearing, this is not a question where they are loaded on the substantive. They are quite equal because of the costs that were incurred in our case in resisting six or seven grounds. We say obviously it is not a basis on which to avoid costs – that would be inappropriate. We say it is a basis on which to reduce costs. That is my first submission.

77. My second submission in relation to relevant principle issues is simply one of quantum, that the costs sought are nigh on £17,000 which is well over double the costs of …

78. DEPUTY JUDGE: In my view the taxing Master will deal with that.

79. MR WILLIAMS: That may well be a matter of taxing.

80. MISS THOMAS: The application for permission was brought on several grounds. I would say that it was necessary to do that and would have been dealt with anyway. I do not think the costs have been unduly inflated by arguing in front of His Honour Judge Jarman. You will also be aware that some of those matters related, in any event, to the way the Inspector dealt with the curtilage which has been relevant to the ground on which we have gone forward and, secondly, in relation to the fall-back position in any event. My submission would be that the permission hearing was justified in the length of it and it has not unnecessarily been inflated. The appellant's costs also are bound to be greater than the Treasury Solicitor's.

81. DEPUTY JUDGE: I am not going to deal with taxing. I am not in a position to deal with that. I will order that it be taxed if not agreed.

82. MISS THOMAS: I am grateful.

Ruling on costs

83. DEPUTY JUDGE: I conclude in this case that the first respondent should pay the claimant's costs but that should only include seventy-five per cent of the costs of the permission hearing. I have reduced that percentage on the basis that the permission was only given on one of the seven grounds relied upon and that the costs have been inflated in respect of those other grounds.

84. MR WILLIAMS: I also have an application. (*Pause*)

85. DEPUTY JUDGE: You have an application?

86. MR WILLIAMS: I am told that I do not have the power to make an application to appeal.

87. DEPUTY JUDGE: Is that right?

88. MR WILLIAMS: If it is, it is something I am not aware of.

89. DEPUTY JUDGE: If you want to make it de bene esse ...

90. MR WILLIAMS: I do make application for permission to appeal to cover my client's interests. We say, with respect, you erred in law for these reasons. The issue on which you have remitted the matter in essence reflects the Inspector's consideration of the fall-back position and, in essence, you have concluded that he did so in error. In my submission the issue of whether the

subject building was in ancillary use or otherwise had no cause or connection with that matter. That is the first point.

91. The second point is that in my submission the judge did deal adequately with the submission that further garaging would be needed.

92. DEPUTY JUDGE: The Inspector.

93. MR WILLIAMS: The Inspector. I apologise. The Inspector dealt properly with the issue of whether further garaging would be needed in his paragraph 22 when read with his footnote 3. He did so being aware, of course, of the evidence of the log books that were put forward by the appellant.

94. For those reasons I request permission to appeal.

95. DEPUTY JUDGE: I am going to refuse permission to appeal for the reasons essentially set out in my judgement.

96. Are there any other applications?

97. MISS THOMAS: No. (*Pause*)

98. DEPUTY JUDGE: Have I said costs should be taxed if not agreed?

99. MR WILLIAMS: You did.