

CO/14759/2013

Neutral Citation Number: [2015] EWHC 1197 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 1 April 2015

B e f o r e:

MR JUSTICE DOVE

Between:
ARNOLD_

Claimant

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT_
Defendant

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(Official Shorthand Writers to the Court)

Mr R Turney (instructed by Mishcon de Reya) appeared on behalf of the **Claimant**
Mr R Kohli and **Ms S Bell** (judgment only) (instructed by Government Legal Department)
appeared on behalf of the **Defendant**

J U D G M E N T

1. **MR JUSTICE DOVE:** In 2006 the Appellants commenced residing in Blackheath Cottage in the village of Blackheath in Surrey. Guildford Borough Council are the Local Planning Authority for the area in which that property resides. The property is in the Green Belt and the Area of Outstanding Natural Beauty, but is not listed or in a conservation area.
2. The Appellants perceived shortcomings in their property and wished to remodel and improve it. In 2011, Lawful Development Certificates were obtained in relation to, firstly, a rear extension to the north of the property and secondly, a long front extension to the south of the property. Following obtaining of these Lawful Development Certificates, a building project commenced.
3. At the inquiry into subsequent enforcement proceedings, the history of project was found to have occurred by the Inspector as follows:

"7. I have been presented with a whole raft of different plans and drawings. They demonstrate that the design of house the Arnolds were seeking to create evolved over time with numerous changes. Having said that although there were different stages of construction the main builder (Mr Brooks) explained that there was only one short break (around the end of December 2011 to early January 2012) in the building work. I therefore agree with the Council's submission that the stages were all part of one single building project that was being implemented with no significant gaps between the stages.

8. The Mr Arnold's (sic) evidence explains why they did not wish to pursue the development as shown on the plans that accompanied the LDCs or to completely demolish the house and start from scratch. A particular concern was that the width of the front extension shown on the LDC plans, following that of the existing front projection, which was felt to be too narrow and "would not achieve the goal of improving the flow of the home". Consequently consideration was given to widening this element. An informal view of whether this could be achieved by demolishing the side (west-facing wall) of the existing front projection was sought by the appellant's agent at that time (Jayne Wunderlich). The Council's response in an e-mail from Katie Williams dated 17 February 2011 was that if the side wall was first demolished it would not be treated as an original wall in any LDC application. I will come back to this point below but it is clear that this was only an informal view and not one which had the backing of a LDC.

9. The drawings that emerged as a consequence of these deliberations appear to be those of architect Ilse Kerr. She did not give evidence but states in a letter dated 2 August 2013 that she is a South African who knows the Arnolds personally and was involved in the Blackheath Cottage project from July 2011 until March 2012 when she went to join her family who were relocating to Australia. The plans, dated 26 September 2011, show a single storey rear extension of 4m deep and a 3

storey front extension of 6.85m wide projecting some considerable distance from the existing front wall. These plans differ materially from what was shown on those that supported the LDC. As well as the increase in width from 4.85m the length of the projection differs at basement and first floor levels.

10. There is some uncertainty as to which plans were being followed when the groundworks and foundation construction commenced on 19 September 2011 or the building works were started by Mr Brooks on 26 September 2011. Mr Brooks' oral evidence was vague on this matter. He said he did not check whether planning permission had been obtained for the building works he undertook – his normal practice. He said at one point that he only had footprint drawings to work to which show the majority of the existing walls retained but no elevations. However later in cross-examination he referred to seeing elevations before he started the project but could not recall when he was given these. This seems odd as it is apparent that Ms Kerr's Sketches 1 and 3 (26/09/11) show only floor plans and sections and no elevations. I therefore consider his evidence is unreliable in this respect as he could not stipulate what drawings (floor plans and/or elevations) he was building to.

11. Notwithstanding the lack of clarity in Mr Brooks' evidence, I have noted the comments in the statement of Mr Walker a structural engineer and director of AND Designs Ltd. This company was commissioned to provide the engineering solutions for the development that has taken place – the quotation letter being dated 1 August 2011. At paragraphs 6 and 7 of his statement he says "We received drawings for the sub-structure and refurbishment of the existing building from Ilse Kerr Architects". "We performed the calculations and structural designs based on the IK Arch drawings and in conjunction with Mr Arnold's conversations". These calculations and floor plan extracts have been provided and show the majority of the walls of the existing house retained but with new foundations to support the long front projection, which is partly cut into the ground.

12. What is curious is that where there are dates on the calculation sheets they are from October 2011 and that on the main basement plan is "Nov 11". So when the groundworks and foundation construction began in late September 2011 these plans and calculations would not have been in existence. Nevertheless, it seems likely that once the front extension had been demolished and the excavations for the new extensions had been undertaken that the engineering solution based on Ms Kerr's plans was the scheme being followed at least at the initial stages of construction. The Council do not demur from this conclusion but rightly point out that this scheme differed materially from what was lawful by virtue of the LDC for the front extension. The submission for the appellants is that this was the case but that the alternative scheme being pursued was also PD by virtue of the terms of the GPDO. This is a matter to address under ground

(c).

13. I now set out the various stages of engineering works and construction that occurred based on the evidence before me and the timeline provided:

- Excavation of the front and rear extensions commenced on 26/09/11;
- The Arnolds move out into rented accommodation on 27/09/11 having already packed house contents into a storage container brought to the site;
- Stripping out of all internal fixtures and fittings (plumbing and electrics) within the house and demolition of the conservatory attached to east elevation on 28/09/11 and 10/10/11. Mr Arnold confirmed that everything went bar the walls, floors and ceilings;
- Scaffolding erected between 30/09/11 and 05/10/11 with the stripping of roof envelope (tiles, felt, battens) occurring from 03/10/11 to 12/10/11;
- Removal of the roof trusses over the eastern part of the house from 13-18/10/11; Mr Arnold said originally only the southern element was intended for removal but as this was providing a counter-balance for the northern (rear) element in terms of loading this needed to be removed as well;
- Demolition of the front extension walls in their entirety commencing on 21/10/11;
- Removal of the roof trusses over the western wing between 31/10/11 and 04/11/11 – the Arnolds decided this was necessary having received advice from the engineer concerning the structural failings and weaknesses in the existing roof frame;
- Discovery by bricklayer (Mr Edgington) (date not specified) that the first floor brickwork is constructed of inferior 'rat trap' bond with the recommendation that this be repaired or rebuilt. Also deficiencies in the length of the lintels to the ground floor openings;
- The Arnolds take the decision to demolish all the walls internal floors and ceilings save for the walls that remained which were underpinned by 11/11/11. This took place through November and early December with steel girders installed on between 23 and 25 November to support the retained walls and provide a frame for the new building work;
- By 14/12/11 all that remained of the original fabric was that shown in Mr Payne's photographs of that date;
- Subsequently any remains of the original floor slabs were removed and new concrete slabs laid. The new walls, roof frame, dormers and

fenestration were installed thereafter."

4. It is evident from what I have set out above that it is common ground that the works which were undertaken did not directly implement the proposed works described in the LDCs.
5. As a result of the work, in paragraph 3 of the Inspector's decision letter, he notes as follows:

"It is common ground based on the evidence of witnesses from the main parties that the only elements of the original extended dwelling that remain are parts of the walls of the western wing. These can be generally described, based on the photographs supplied, as part of the south facing wall (to the top of ground floor windows), the two storey west facing gable (partly tile-hung) and a small section of supporting 'return' wall on the northern elevation. The rest of the existing dwelling, including all the slabs, footings and foundations other than those remaining beneath the walls of 'original' building, are new building works that have taken place since work commenced in September 2011."

6. Essentially, after the works were complete and following warnings which had been given by Guildford Borough Council during the course of those works that they were at risk, the Council served an enforcement notice in relation to what had happened. Within the enforcement notice, the description of the development was as follows:

"Without planning permission operational development comprising of the erection of a building to be used as a dwellinghouse in the (sic) as shown hatched in black on the attached plan."

7. There was a plan attached to the enforcement notice which, as described, showed the as built dwelling entirely hatched in black.
8. The steps which the enforcement notice required were the removal of the building and all demolition materials arising and the reinstatement of the land. This approach in the enforcement notice arose from the Council's conclusion that what had happened was the demolition of the dwelling which had been on site and the provision of a replacement dwelling.
9. By contrast, it was contended on behalf of the Appellants that what had in fact occurred was the enlargement, improvement, alteration and repair of the existing building. These rival contentions formed the basis of the Appellants' appeal on ground (b), namely that the development alleged in the notice had not occurred as a matter of fact. I shall set out the relevant statutory framework and the various grounds of appeal to which I propose to refer during the course of the analysis of the facts a little later when I turn to the question of the relevant applicable law. The ground (b) appeal had an interrelationship with the Appellants' appeal under ground (c). Ground (c) is the contention that the matters which were described in the notice did not constitute a breach of planning permission. In this respect, the Appellants relied upon a

combination of works which were said to be simply repair and therefore not development by virtue of section 55(2)(a) of the Town and Country Planning Act 1990 and works which were development permitted by operation of the Town and Country Planning (General Permitted Development) Order 1995, here after the GPDO.

10. The Inspector's conclusions in relation to these grounds of appeal were as follows:

"14. The submission for the appellants is that although very little of the original fabric remained by 14/12/11 that is not the critical point as regard has to be had to the staged nature of the development – which it is claimed proceeded on a lawful basis as it was either not development, having regard to s55(2)(a) of the Act, or PD by virtue of the rights conveyed by the GPDO – and to the intentions of the appellants.

15. Dealing with the latter point I do not accept that the intentions of the Arnolds is a critical determining factor when considering a matter of law. They may well have intended a whole range of things and indeed it is manifestly clear from their own evidence that these intentions changed and were modified as the development progressed. Be that as it may the important point is the outcome which as the Council submits is that to all intents and purposes the original dwelling had been demolished – barring a few walls or parts of walls – before the new works of construction on the new walls and roof structure commenced.

16. Stepping back from the finer detail the question to ask as matter of fact and degree is what took place from December 2011 onwards. Was it simply some staged extensions to an existing dwelling that were arguably not development or permitted development or alternatively in essence the construction of a new dwelling with the integration of a few remaining walls? I consider that the only logical conclusion to draw given the scale and amount of demolition that took place is that what has been built is a new dwelling and not one that has been repaired and extended by alteration and enlargement. Reaching any other conclusion based on the facts would be contrary and send out a message that it is possible to build a new dwelling of a fundamentally different design by employing an argument of staged removal and replacement under PD rights.

17. The appellants place great reliance on the argument that some works of excavation commenced before the house was vacated and the demolition of the walls and roof took place. The assertion is that these foundation works were lawful but as they were not in accordance with any LDC granted I have no way of knowing that this so. It is true that they may still have been PD even though the LDC scheme was not being followed (the wider front extension point) but even if this were so I do not consider it assists as what has resulted is not some extensions to the front and rear of the house with the majority of the original walls retained but effectively a new dwelling.

18. Notwithstanding this conclusion I turn to the case law cited to see whether this would lead to an alternative conclusion. There is no definition of a dwellinghouse in the GPDO but the case of *Gravesham BC v SSE [1984] 47 P&CR 142* is still good authority for what it constitutes; that is something which has the ability to afford to those who use it the facilities required for day-to-day domestic existence. This judgment makes clear that this could apply to a holiday home occupied on a seasonal basis or a dwelling vacated to undergo extensive repairs or for sale. Thus the stripping out of kitchens and bathrooms or the addition of substantial extensions that render it uninhabitable for a period of time would not mean that it ceased to be a dwellinghouse.

19. The extent of intervention therefore could be considerable and occupation is not necessary whilst building works are undertaken. However, there must be something significant by way of a structure that remains. In the instant case there were just a few bits of wall and no roof whatsoever. Given the cumulative degree of intervention and demolition that had occurred there is no way that what remained could provide facilities required for day-to-day existence and it follows that by December 2011 the dwellinghouse no longer existed. Support for this view is drawn from an LDC appeal decision submitted for the appellants which found that the current remnants of a cottage could not reasonably be regarded as a dwellinghouse. To quote from paragraph 8 of this decision, "One wall and a portion of another scarcely provide the facilities for domestic day to day living". Hence I find that the allegation is correct in that what has taken place as a matter of fact is the erection of a building used as a dwelling...

26. Having reached this conclusion on ground (b) that what has taken place is the construction of a replacement dwelling it is not necessary to go on to consider whether the PD rights relied on apply as they are only applicable where a dwellinghouse was in existence when they were being undertaken. Even if these rights could be relied on the extent of demolition undertaken meant that they had been lost and could not some how be restored by the claims of a phased rebuilding project.

27. Notwithstanding this finding I will for the sake of completeness address the principal arguments advanced under ground (c) in case they should become relevant.

28. I have taken account of the finding in *Riordan Communications Ltd v South Bucks DC [2001] 81 P&CR 8* that the subjective intentions of individuals will not override the objective test of whether what has taken place requires planning permission. I am also mindful of the findings in *R (oao Watts) v SSETR [2002] EWHC 993 (Admin)* that it is not enough to simply commence development permitted under GPDO rights but it must be substantially completed in accordance with those rights. If there is some change during the building process which takes the development

outside the GPDO rights then the fact that it started in accordance with these rights will not provide a sound defence as to lawfulness. I accept that that case concerned the exceeding of the volume limit under previous limitations but it is the principle that is important not the detail. So as submitted for the Council, even if the development in this case commenced under PD rights, which in any case has not been proven, the effective demolition of the majority of the building meant that there was no dwellinghouse of substance left to enlarge, improve or alter.

29. In this respect, I consider that the appellants' reference to the findings in *Cole v Somerset CC* [1956] 1 QB 23 does not assist their case as it deals with a situation where a change of use occurred before such a change was precluded by the making of an Article 4 Direction. The court held that this change of use was still lawful. However in the present case the Council have not sought to retrospectively impose limitations on PD rights. They simply contend that what has taken place is not PD for the reasons already explained. Similarly the case of *R (Orange PCS) v Islington LBC* [2006] EWCA Civ 157 concerns the retrospective designation of a conservation area which could not undermine the lawfulness of development already carried out under the GPDO. Again this is not comparable on its facts.

30. There is then the case of *Sainty v MHLG* [1964] 15 P&CR 432. I accept the submission for the appellants that this concerned the demolition of 2 houses in their entirety and the erection of replacements of different design on slightly different foundations which is not comparable in terms of circumstances. However a comment Lord Parker CJ is of bearing. This is set out in the Council's closing submissions and makes clear that it was correct in law to find that a dwellinghouse must be in existence when the operations claimed to be PD are being carried out, that is throughout the course of construction. If the dwellinghouse is demolished it is no longer capable of being enlarged improved or altered under the relevant Order. He went on to consider the prospect of a new erection in stages but found that this would very rarely occur. Although the facts in *C W Larkin v SSE & Basildon DC* [1980] JPL 407 and *Hewlett v SSE* [1985] JPL 404 are distinguishable from the present case they reinforce the principle that PD rights cannot be relied on if the original building is effectively replaced with a new building.

31. In *Hewlett* Lord Donaldson MR commented "it is very difficult to think how you could rebuild by stages in such a way as to produce what is in effect a new building and still be able to maintain that it was merely the old building in an improved form unless, as was pointed out in argument, there was a very substantial separation between the stages – a century or so was suggested". In the present case no such separation has occurred but a single project carried out in consecutive stages has led to the dwelling that has been created...

33. With these findings in mind I do not consider that it is possible for the appellants to rely on the GPDO rights as a basis for lawfulness of what they have constructed. However, I will for completeness address these arguments. The relevant parts of the GPDO cited are Classes A, B and C of Part 1 of the Schedule contained in the GPDO (2008 amendment).

34. In terms of Class A the Council contend that some of the limitations set out in the sub-paragraphs are exceeded...

36. In terms of A.1(d) it was agreed that because the limitations are conjoined ('and' rather than 'or') that this does not apply to the addition to the principal elevation as this faces southwards and does not front a highway. There is however an area of dispute concerning the extension of the front projection beyond the line of the original side elevation which does face towards the highway. As this projection exceeds 4m in height and is more than one storey in height it would be caught by the limitations in A.1(h). The appellants' position is that demolition means that there is no remaining original side elevation and so it was therefore possible to widen the extension towards the highway by about 2m – a point with which a Council officer concurred.

37. I find no substance in this argument and agree with the views expressed by the Council's witnesses and in submissions on their behalf. I accept they run counter to the previous officer's interpretation but this was an informal opinion and not a legally binding decision. I reach this conclusion for two reasons. Firstly there is no caveat in the GPDO which indicates that if original walls are demolished then the limitations within it no longer apply. Secondly, if this argument were to apply it would mean that any amount of increase in width could occur, so long as other limitations, such as not being within 2m of the boundary of the curtilage (A.1(g)) were satisfied. On a large plot such as this it could lead to huge additions being added beyond the line of an original side wall simply because it had first been demolished. I cannot accept that this was the intention of the Government in the rights conveyed and, as I have already pointed out, I am reassured in this finding as this is not what the wording of the GPDO actually states. Consequently, I find that the increase in the width of the front projection is not PD and required planning permission."

11. The original wall concerned in this argument is identified on the plan which I have attached to this judgment as Annex 1 as "A". This wall had been demolished as part of constructing a new and existing limb of the building which extended much further south and, critically, was wider than the 4.8 metre width of the original element of the house in this location.

12. The Appellants promoted a further ground of appeal under ground (a). This ground is that if development had occurred in breach of planning control, then consent for it or part of it ought to have been granted.
13. They produced three alternative proposals which they argued could properly be approved even if the Inspector was not prepared to approve the whole of that which had in fact been built. Option 2.1 showed the removal of two rooms at the basement level of the property in its southern extension and a reduction and reordering of both internal walls and external elevations in the northern extension. Option 2.2 showed the same removal of two rooms at basement level in the south extension and also involved the removal of the garage. Option 2.3 was a combined option in which the southern extension was reduced as set out above and the northern extension was also reduced and redesigned as per option 2.1. In addition as part of this option, the garage was also removed.
14. The Inspector reached a preliminary view about those alternatives as follows:

"44. Before considering the main issues it is worth focusing on what the proposal is that flows from the deemed planning application and ground (a). S174(a) concerns breaches of planning control which may be constituted by the matters stated in the notice for which planning permission ought to be granted. So essentially, unless the breach of planning control is wrong (which I do not consider it is), the deemed application in this case is for the dwelling as built on the date the notice was issued. I accept that by virtue of s177(1)(a) it is possible to grant permission for the whole or any part of the development constituting the breach of planning control. However what is not possible is to grant planning permission for some alternative form of development that differs from the alleged breach. The authority for this is *Richmond-upon Thames LBC v SSE* [192] 224 EG 1555. Planning permission may only be granted in respect of the matters stated in the notice as constituting a breach of planning control and there is no power to go beyond the notice. With this proviso in mind it is not a question of considering alternative proposals which fall outside the scope of the notice if they materially differ from what is alleged and has been built. I appreciate that I did request alternative schemes which the appellants might pursue instead but they need be viewed in the context of this legal principle.

45. There is also the matter of whether it would be possible to grant a split decision (allowing the deemed application in part, but refusing the other part) having regard to the practicalities of whether the parts are functionally and physically severable. This is a necessary prerequisite if the requirements of the notice which would bite on the elements that are refused permission, are to be understood and achievable. If this were not the case then such an approach would be inappropriate as it would leave the parties guessing as to how the building was to be modified to comply with the terms of the notice. The option in such circumstances would be to make a planning application for a modified form of building. Should

permission be granted, having regard to the powers conveyed by s180 of the Act, it would result in any notice ceasing to have effect in so far as it was inconsistent with that permission."

15. The main issues in the ground (a) appeal were whether the development was inappropriate development for the purposes of Green Belt policy, the impact on the openness or visual amenity of the Green Belt, the design of the building and the impact of it on the AONB.
16. Finally, the Inspector raised the issue as to whether in relation to any harm which might be established from the examination of the issues I have just set out there were other considerations which outweighed that harm and could if necessary amount to very special circumstances to justify inappropriate development in the Green Belt.
17. Having undertaken his analysis, the Inspector was satisfied that there was no material compromise to either the landscape or the scenic beauty of the AONB.
18. In relation to the Green Belt, the Inspector accepted the Appellants' analysis that the increase in floorspace arising from the building on site as compared to that which had been there originally was a 70 per cent increase and also accepted the Council's analysis that the increase in three dimensional volume was almost 100 per cent. This led to the Inspector to the conclusion that the replacement dwelling was materially larger than that which had been there originally and therefore amounted to inappropriate development in the Green Belt which also harmed the Green Belt's openness. The Inspector concluded that there would not be material harm to the visual amenity of the Green Belt. Overall, the conflict with Green Belt policy and harm to the Green Belt was a matter to which the Inspector, in accordance with the National Planning Policy Framework, afforded substantial weight.
19. The Inspector also formed conclusions in relation to the design of the dwelling as follows:

"66. Be that [arguments about arts and crafts heritage in the area] as it may, the 2nd and 4th criteria in Policy H6 of the LP require replacement dwellings to be in scale and character with the area and to respect their context and immediate surroundings. Policy G5 of the LP provides a design code for new development which covers a number of factors, including context, scale/proportion/form, roofscape and materials/architectural detailing. I have considered Mr Piper's analysis of the context and the design of houses in the immediate surrounding area. I accept that there are a range of ages and styles of dwelling in Blackheath and no consistency in the materials used. Nevertheless some coherence is provided by the modest scale of most properties and although there are examples of rendered walls, buff brickwork and timber cladding (an example being Silvercombe immediately to the south) the red brick walls, often with tile hanging, and clay tiled roofs are still the predominant facing materials that characterise houses in the area. Moreover although properties have been extended, from the information provided and my

own observations, I am not aware of anything in the vicinity which is directly comparable in scale to what has been built on the appeal site or in terms of its striking modernistic appearance.

67. What I consider to be particularly incongruous and out-of-keeping with anything I could see locally is the huge expanses of glazing which seem to be randomly distributed in order to suit the internal configuration and outlook across the rear garden that was sought. The central glazed opening of 2 storeys in height is, as some objectors have commented, more akin to an office building than a dwelling. Whilst this might be an appropriate design approach in an urban location or one where there are no design parameters to follow this is not the case in Blackheath given its inherent character and rural setting. In terms of the roof design this is odd and unsettling to the eye as it includes two areas of truncated roof comprising a mainly flat deck with sloping edges. This contrived design, rather than the use of full pitched roof slopes meeting at a ridge, adds to the incongruity in appearance especially in terms of the two storey front projection. Added to this there is the use of slates on the large roof envelope which is not the predominant roofing material found in the locality.

68. These are not just my own conclusions but seem to be shared to a significant degree by Mr Piper. He refers to "the design needing to be resolved by the employed tradesmen on the 'hoof' and in an ad hoc manner in order to achieve the result visible today". He comments that the original design intended a flat roof on the two storey extension but this could not be readily constructed as visualised and the compromise was the "slightly peculiar truncated roof pitch". He acknowledges that in terms of fenestration he was constrained by the fact that the openings had already been formed in order to create the desired internal environment and "there was and still is little consistency in the size and distribution of the windows". The slate roof he agrees "might initially appear to be an odd choice but when seen on site it feels completely appropriate and not at all out of context with the site". It is not just the site but the surroundings that are important and I doubt whether this wide expanse of slate accords with the context of the typical red clay tiles found in the vicinity.

69. What I find most telling from his evidence is what is said at paragraphs 12.18 to 12.20. He comments that the south and west elevations are less successful in design terms given the substantial and shear (sic) elevation with little relief through stepping or layering. He says that this was due to being constrained by PD requirements but I find this argument to be without foundation. The appellants were not bound to follow PD rights and indeed I have found that they have not in any case. The eastern elevation could have been designed in a manner which better accorded with the advice of an architect in terms of its appearance. Whether this resulted in the need for planning permission to be sought by

application is irrelevant to the consideration of what is good design.

70. He then goes on to describe the single two storey high opening which corresponds with the entrance hall and glass staircase as being a 'tour de force'. Having reached this view he then comments:

"However the shear (sic) brick and glass elevation rising through three full floors is in some respects uncomfortable and lop-sided. The imbalance is emphasised by a subtly changing solid to void proportion along the elevation from north to south along with the slightly clumsy treatment of the roof at the north edge and the scale of the central glass screen."

71. The defence against these seeming inadequacies or weaknesses in the finished design is to again plead the restrictions imposed by PD limitations and also that this elevation is seen as private one which will soften with the growth of landscaping. I agree that the impact is striking and dramatic and possibly even beguiling. However given the criticisms of Mr Piper, the only architect called to give evidence, I remain unconvinced concerning the overall design credentials of the finished development and must question his conclusion that, on balance what has resulted is an acceptable solution...

73. Given the above analysis I consider that the failings in the design of the dwelling go beyond matters of detail and include some fundamental flaws. I consider it is probable that the building that has arisen results from a contrived approach which has been more concerned with the internal arrangement, range of domestic facilities provided and outlook from within than the external appearance of the building. I find that the finished form has a jarring appearance, especially on the eastern side and that this together with the expanse of glazing, odd truncated roofs and slate finish is out-of-keeping with the immediate context and the character of the area. This runs counter to the thrust of the advice from the Framework set out above, the 2nd and 4th criteria of Policy H6 and the terms of Policy G5 of the LP."

20. The Inspector went on to consider the weight to be attached to a variety of matters relied upon by the Appellants as being benefits of the proposal. Those included, firstly, the extent of construction which might have been achieved through the use of permitted development; secondly, the Appellants' personal circumstances; thirdly, the contention that the layout and design of the dwelling had minimised its visual impact; fourthly, that the form of the construction was energy saving and sustainable; and finally, reliance was placed by the Appellants upon ambiguity over permitted development rights and their application which were unique to the facts of the case before the Inspector.

21. Having analysed those matters, the Inspector was unimpressed by them and did not afford them any significant weight. He reached his overall conclusions on the planning merits of the ground (a) appeal in the following terms:

"85. I have found that the development that has taken place is inappropriate development in the GB and has caused harm to its openness, contrary to the relevant local and national policies that apply. This harm has to be afforded substantial weight. Set against this combined harm I consider that the other considerations relied upon either carry no or little weight. Consequently, I conclude that these other considerations, whether taken individually or cumulatively do not clearly outweigh the harm identified and that there are no very special circumstances which justify the granting of planning permission. I have given consideration to whether conditions could be imposed to render the development acceptable but given the scale of the development and the fundamental flaws in its design I do not consider that this is possible.

86. I have had regard to the 3 modified forms of development that have been supplied on the appellants' behalf by Mr Piper. These show various levels of intervention and reduction in the extent of the front and rear extensions and the removal of the garage with the second and third options. Whilst these options would reduce the floor area and volume of the dwelling they are materially different forms of development to what constitutes the deemed application before me and having regard s174(2)(a) of the Act and *Richmond-upon-Thames* I consider that it is, at the very least, questionable in law whether I am in a position to substitute these schemes for consideration under ground (a).

87. Even if I were there is also the question of functional and physical severability and whether it is even possible to grant permission for some parts of the dwelling that might be acceptable, subject to conditions. Given the integrated nature of the development I do not consider that this is possible. This is not a case where there is clear divide between parts which are acceptable and parts which are not. I therefore consider that issuing a split decision is not a realistic proposition in this case. The appellants are at liberty to submit planning applications and the 2nd option (2.2) would appear to accord with Scheme C which is already the subject of a planning application under consideration by the Council. By virtue of the powers conveyed by s180 of the Act, should permission be granted for any of these schemes, any extant enforcement notice will cease to have effect in so far as it is inconsistent with that permission.

88. I therefore conclude that the ground (a) appeal should not succeed and deemed planning permission for the development as constructed or any modified form of dwelling as described and detailed should not be granted."

22. These conclusions led into the Inspector's consideration of the Appellants' case which was in effect related to these matters under ground (f). The appeal under ground (f) was a contention that the steps required by the enforcement notice exceeded what was required to remedy the breach of planning control or alternatively the injury to amenity arising.
23. The Inspector's primary response to this was to accept the Council's submission that the enforcement notice had been issued in order to remedy a breach of control and not because of the impact on amenity. As a result of that conclusion, requiring lesser steps was not, in the Inspector's view, appropriate.
24. He nonetheless went on to consider the position if he were wrong about that contention and that lesser steps could be considered. He set out his conclusions in respect of that issue as follows:

"94. However even if I am wrong in this finding, and the authorities of *Tapecrow* and *Ahmed* are found to indicate otherwise, then I do not consider that this assists the appellants. Even if it were held that where the purpose of the notice was to remedy the breach of planning control, lesser steps which were less costly or disruptive should be considered, these steps still need to amount to a realistic and obvious alternative which is acceptable. From what is before me by way of alternatives suggested I am not in a position to conclude that they are realistically achievable or obvious solutions which would overcome the harm that has been identified. So following that thread from *Tapecrow* this does not assist the appellant. I would add that there is also no obvious lawful 'fallback' to resort to as can be the situation in enforcement cases. An example might be where a fence in excess of 2m on a garden boundary has been erected; the legitimate fallback, assuming PD rights have not been removed would be to reduce the height to 2m as an alternative to complete removal. No such fallback scenario exists in this case.

95. Taking these points together I do not consider that it would be acceptable or appropriate to substitute lesser steps or requirements to those set out in the notice. It is not my role to try and devise alternative steps from the schemes before me not least because it is well accepted and understood principle that an enforcement notice needs to be clear on its face from the four corners of the document so that all (appellants, Council, 3rd parties) are certain as to what is necessary to achieve compliance. I do not consider, even if alternatives were permissible, they could be described with the necessary level of precision to achieve this. For all these reasons there is no success on ground (f)."

25. The Inspector allowed the Appellants' appeal under ground (g) whereby they sought more time to comply with the notice. He extended the time for compliance from 6 to 9 months. He concluded in relation to this:

"This would strike an appropriate balance providing sufficient time for

attempts to be made to reach an amicable solution over an alternative form of development."

26. His overall conclusions on the entire appeal incorporated an assessment of the contentions raised by the Appellants in relation to the impact on their human rights. He expressed himself as follows:

"101. In coming to my conclusions and decision I have taken account of the human rights implications that flow from Article 8(1) European Convention on Human Rights and Article 1 of the First Protocol of the Human Rights Act 1998. These are the rights to respect for private and family life, homes and possessions. They are not absolute rights and interference with these rights is permissible in the public interest or in the interests of the economic well-being of the country which has been found to include environmental considerations.

102. The upholding of the notice and the refusal of the deemed planning application could lead to the demolition of the house in its entirety if no suitable alternative scheme is permitted by the Council before the notice takes effect. This would infringe the Arnolds' human rights under the above Articles and would leave them in a position where they would need to find another home or at least alternative accommodation for a significant period of time. The Arnolds argue that they may lack the finances to demolish the house and build something that is acceptable to the Council whilst in the meantime paying rent for other residential accommodation over this period. I was not presented with details of their assets nor did I request them but this outcome would be likely to have a considerable impact on their financial resources.

103. Notwithstanding this finding, on the basis of my reasoning on ground (g) there do appear to be reasonable prospects of a mutually agreeable solution being found and this is not a situation where the appellants will be dispossessed of their land or where they are unlikely to be able to modify the house that exists or build an alternative on the land. As I have said above they could consider bringing a mobile home to the site which would cater at least temporarily for their accommodation needs.

104. In all these circumstances, I am satisfied that upholding the notice with the extended period for compliance would be a proportionate measure having regard to the harm that has resulted to the environment and the public interest and one which would not violate the appellants' human rights."

Grounds of challenge in brief

27. It would be helpful at this stage for me to set out the Appellants' grounds in brief. Under ground 1 they contend that the Inspector ought to have allowed the appeal under

ground (b). The allegation in the enforcement notice of "erection of a building to be used as a dwelling-house" was not, in their submission, made out. The Inspector should have concluded that what occurred, and indeed the extent of demolition shown in the photographs from December 2011 described in the extracts of the decision letter I have set out above, was necessary as part of the single project of extending and altering the house. The Appellants contend that these photographs were merely a snapshot in time and the Inspector failed to properly consider whether this was simply an isolated stage in the overall process of the project.

28. Under ground 2, the Appellants contend that the Inspector erred in his construction of Schedule 2 Part 1 Class A of the GPDO and in particular the application of the restriction which is set out at Class A.1(h) which he dealt with in paragraphs 36 and 37 which I have set out above.
29. Turning to ground 3, it is contended on the part of the Appellants that the Inspector erred in not considering the alternative schemes which were put to him as part of the ground (a) appeal. They were, it is contended, schemes which the Inspector could properly have granted and which should have been properly and more fully evaluated.
30. Finally, in respect of ground 4 it is submitted on behalf the Appellants that the Inspector erred in his consideration of human rights in this case. It was, it was contended, a disproportionate interference with the both the rights under Article 8 and also those under Article 1 of the First Protocol to require the complete demolition of the Appellants' family home when alternative and smaller schemes were available to be approved. Furthermore, it is submitted that it was disproportionate to assume that an acceptable solution would be reached within 9 months. The Appellants rely in particular on the fact that as matters have turned out, they still are not in possession of a planning permission notwithstanding the submission of other alternative solutions which the Council have either declined to consider or alternatively not approved.

The law

31. In relation to ground 1, the "enlargement, improvement or alteration of a dwelling-house" is permitted development as part of the GPDO Schedule 2 Part 1 permitted development identified within the curtilage of a dwelling-house. It is set out as Class A and is subject to restrictions to which I shall turn shortly.
32. Pursuant to section 58 of the 1990 Act, the GPDO grants planning permission as part of the statutory framework. Perhaps unsurprisingly, to have the advantage of this right to a planning permission there must a dwelling-house to be enlarged, altered or improved.
33. In the case of Sainty v Minister of Housing and Local Government 15 P & CR 432, the developer owned two aged and unsatisfactorily cottages which could not be made fit for purpose. He proposed to demolish and rebuild them, albeit not on the same foundations. The developer maintained that he was entitled to do this, exercising the then comparable permitted development right to that which is in play in the present case.

34. The conclusion of the court in relation to that contention was set out in the judgment of Lord Parker CJ as follows:

"The Minister in his letter of decision, after referring to the appellant's contention said that:

"In his [i.e. the Minister's] opinion however Class I, 1, of that Order must refer to a dwelling-house which is in existence when the operations mentioned in that Class are being carried out. After a dwelling-house is demolished that building is no longer capable of being enlarged, improved or altered and is therefore unable to benefit from the general permission contained in the Order. In any event, the Minister takes the view that the complete replacement of one building by another does not constitute enlargement, improvement or alteration of the original building. Furthermore, in his view the reference to "original" building in Class I, 1, when read with the definition of "original" in article 2(1) of the Order seemed to be only a means of establishing a point in time for the calculation of the cubic capacity of a building. He is satisfied that your client's proposals involve development for which planning permission is required."

For my part, I find it unnecessary -- without discourtesy, I hope, to Mr Kerrigan -- to deal with the details of his arguments. I entirely accept as correct in law what the Minister says and for the reasons given by him. I would only mention one point which is urged on behalf of the appellant, namely, that that cannot be the true meaning of the words "enlargement, improvement or alteration" because it would be perfectly possible, as in the case, for instance, of an old cottage, to take down one wall, put in a dampcourse and re-erect the wall. That would certainly be an improvement or alteration. He would then be entitled to deal with another wall and by stages through different walls, in the course of time maybe, would enlarge the permitted capacity.

In my judgment, it may well be that it is possible to arrive at what in effect is a new erection by stages, each stage of which can be said to be an improvement. That certainly is not this case and I should imagine that it would be a case which could very rarely occur. It would be difficult to think how it could be done economically or over a period long enough to be able to say that each stage was merely an improvement, and that the whole thing was not just a rebuilding."

35. A similar case came before the Divisional Court in CW Larkin v Basildon District Council [1980] JPL 407. The Appellant rebuilt all four of the external walls of his dwelling-house. He did it in two stages, two walls each time. Lord Widgery CJ analysed the effect of the decision of the Divisional Court in Sainty as follows:

"It meant that, if the arrangements were so made that the house remained a dwelling-house at all times and for all purposes, the fact that bits of it

were pulled down and rebuilt did not necessarily involve planning permission because it could be argued that was a mere improvement and no more. But whether or not a particular activity was justified on that basis or not was entirely a question of fact and degree. It was not possible to observe from the result without knowing a great deal of detail about the circumstances in which the work was done. But the principle was clear enough."

36. In relation to the case which was before the court, the judge concluded as follows:

"Turning back to the case before the court today and applying those principles as best one can, the real question, as May J pointed out in the course of argument, was whether the activities with which they were concerned did amount to improvement or did they amount to rebuilding. Whether or not they followed either of those categories depended, almost entirely on matters of fact and degree.

The Secretary of State had made his decision upon this work, and he must conclude the judgment by referring to what he had said on the operations in this case. He had said, quoting the inspector: "None of the external walls of the original building remain and new walls have been constructed as part of one operation and are unlike the walls of the original building; the construction of those walls, as distinct from the replacement of one or two of them, are not works of maintenance, improvement or other alteration of a building within the meaning of section 22 of the 1971 Act since the original building has virtually ceased to exist; the construction of the new walls consequently involves development. The building operation of the new external forms part amount to the construction of a new dwelling; the construction of the new external walls is, therefore, not development within the curtilage of a dwelling-house and, consequently, is not permitted under Class I. 1 of Schedule 1..."

All that now remained, according to the Secretary of State, of the original building on the site were some internal supporting walls and the roof and part of the floor. Speaking for himself, he had no doubt that, those being the facts of the case, it was fully open to the Secretary of State to say upon those facts that that which was done was not the improvement of the dwelling-house but something else, something else which did not qualify for exemption under the exception. He would therefore dismiss the appeal."

37. A further case engaging these principles is the Hewlett v Secretary of State [1985] JPL 404. The facts of that decision and the conclusions on those facts of the Court of Appeal can be set out as follows:

"An enforcement notice dated June 30, 1977, related to a very small building in the "green belt" at Coxie Green Road, Brentwood, Essex. Not only was the building small, but it had the unusual feature that it only

had three walls, the remaining space being used apparently as a means of access for various lorries which were repaired under its shelter. There was an existing use certificate relating to the site, which permitted the owner, Mr Hewlett, to carry on business as a scrap metal merchant and breaker, and no objection had yet been taken to his running a haulage business. The objection taken was to works which he did to this building. They apparently involved jacking up the roof, then undertaking certain operations to the walls in turn, and then at a later stage probably working on the roof itself.

Mr Hewlett maintained that none of these operations, either individually or collectively, constituted development for the purposes of the Town and Country Planning Act 1971 because of the beneficial provisions of section 22(2)(a). His case was that these operations, however extensive, did not materially affect the external appearance of the building and were merely improvements; in particular, they did not amount to the creation of a new building...

The third ground of appeal concerned whether this building could be a new building. It was submitted on behalf of the appellant that if it could be shown that each stage of the work was an improvement of the old building, the fully improved building had to, as a matter of law, be the same building albeit in an improved form. Therefore, unless the old building had been knocked down in the course of the works, the Secretary of State could not hold that this was a new building.

This submission would in fact involve overruling two decisions of the Divisional Court: *Sainty v Minister of Housing and Local Government* and *CW Larkin v Basildon District Council*. The submission was none the worse for that, but Lord Parker CJ in *Sainty's* case, on which *Larkin's* case was to some extent founded, said this at page 434:

"In my judgment, it may well be that it is possible to arrive at what in effect is a new erection by stages, each stage of which can be said to be an improvement. That is certainly not this case and I should imagine that it would be a case which could very rarely occur. It would be difficult to think how it could be done economically or over a period long enough to be able to say that each stage was merely an improvement, and that the whole thing was not just a rebuilding."

It was quite clear that Lord Parker was contemplating precisely the problem which had arisen here. For his part he (the Master of the Rolls) entirely agreed with the learned Chief Justice that it was very difficult to think how you could rebuild by stages in such a way as to produce what was in effect a new building and still be able to maintain that it was merely the old building in an improved form unless, as was pointed out in argument, there was a very substantial separation between the stages - a century or so was suggested. In such a case it might indeed be possible to

say that it remained the same building. But it was essentially a question of fact and degree -- not a question of law -- and the Secretary of State had decided it as a matter of fact and degree."

38. Thus, the question of what has occurred and whether or not it has been an exercise of permitted development rights or the removal of the original dwelling-house and its replacement by rebuilding with a new dwelling-house is a question of fact and degree and inevitably fact sensitive.
39. In connection with this issue, it will be recalled that the Inspector referred to the case of Gravesham Borough Council v Secretary of State for the Environment [1984] 47 P & CR 142 which concerned a building erected pursuant to planning permission for a "weekend and holiday chalet". In response to an enforcement notice served in relation to an extension to it, the Appellant submitted that the extension was permitted development because the building was in truth a dwelling-house.
40. McCullough J concluded that whether it was or was not a dwelling-house was a question of fact. He offered the following observations:

"In using a simple word in common usage and leaving it undefined, Parliament realistically expected that, in the overwhelming majority of cases, there would be no difficulty at all in deciding whether a particular building was or was not a dwelling-house. The use in a statute of almost any word in common usage may give rise to difficulties of interpretation in a very small number of cases, but the problems are both fewer and less troublesome than those that are apt to result when the statute defines the word. The good sense of this is such that I do not intend to resolve the issue that arises in this appeal by attempting to define what Parliament left undefined.

The more helpful approach, in my opinion, is to consider a number of buildings that quite clearly are dwelling-houses and others that equally clearly are not and to see whether this throws up any indication of what ought and what ought not to be taken into account.

Consider a building that anyone would acknowledge was a dwelling-house. If it is not being lived in because, for example, the occupants are on holiday or because they have two houses and spend half the year in each, it remains a dwelling-house. Take a common situation where a family has a second house in the country that is only visited at weekends, in the summer months and for a summer holiday. That is clearly a dwelling-house. So the intention to use one's house, or the practice of using it throughout the year, is not essential.

If a house is empty pending its sale or because its owner cannot, or does not want, to let it, it is still a dwelling-house. So emptiness is not fatal.

If it cannot be occupied because it is flooded, or is undergoing extensive

repair, it is still a dwelling-house. So, too, a second home in a remote mountainous district, cut off by snow every winter. So an ability to use it whenever one wants is not an essential either.

Suppose that there is a national emergency and an order is made prohibiting the use of houses in a particular area for the duration of the emergency: they would nevertheless remain dwelling-houses. So even an inability to use a house lawfully does not necessarily prevent it from being a dwelling-house.

Leaving aside extraordinary events like floods and national emergencies and repairs so extensive that the occupant has to move out, is it a characteristic of every dwelling-house that the owner or occupier could live in it permanently if he wanted to? I think not...

Mr Aitchison has emphasised the "dwelling" in "dwelling-house" and has stressed that to dwell is to remain or reside. Comparatively few of those living in the buildings last mentioned ordinarily stay for long enough to be regarded as residing there. He submits, therefore, that a capacity to provide permanent accommodation is the essential character of a dwelling-house.

In my judgment, however, its more distinctive characteristic is its ability to afford to those who use it the facilities required for day-to-day private domestic existence.

Whether a building is or is not a dwelling-house is a question of fact. In *Scurlock v Secretary of State for Wales*, the Secretary of State had to decide whether a building that was used partly for residential purposes and partly for business purposes was a "dwelling-house" within the meaning of the Town and Country Planning General Development Order 1973. He adopted a factual approach, and the Divisional Court held that that was right."

41. In the case of the Gravesham, the judge concluded that the Secretary of State had reached the correct conclusion in that case on the facts and that the building concerned was a dwelling-house.
42. There is an additional point in the present case. It will be recalled that at a time when the Appellants were still in occupation in September 2011 they undertook initial works which it is accepted on behalf the Respondent were capable of amounting to the implementation of a planning permission. It is contended that this implementation of the permitted development rights meant that they crystallised and could not thereafter be lost. It will be remembered that the Inspector rejected this argument at paragraphs 28 and 29 of his decision which I have set out above.
43. The relevant case law bearing on this issue is as follows. Firstly, one needs to have regard to the case of R (oao Watts) v Secretary of State for Environment, Transport and

the Regions [2002] EWHC 993. In that case the Appellant applied for permission for an extension to the side and rear of a dwelling-house and intended at the same time, if planning permission were granted, to take advantage of rights under the GPDO in Schedule 2 Class B Part 1 to undertake a roof extension. That permitted development right is restricted to not enlarging the original building when measured, having taken account of other extensions, by more than an aggregate of 50 cubic metres. The issue in that case was that the permitted side and rear extension to which the Council had consented together with the roof extension exceeded the limits set out in the GPDO. The Inspector had resolved that issue by applying a test of whether what in fact had occurred was a single building operation.

44. Ouseley J concluded that that analysis was incorrect. He set out his analysis of the approach to the legal instrument and its application as follows:

"34. (1) I accept, as did Mr Harwood, that the GPDO Class B most readily applies when examining the position before development in reliance upon it is started. But a development which would otherwise require express planning permission continues to need the permission afforded by the GPDO until it is "substantially completed" i.e. until it has reached the stage at which no further planning permission would be required for any of the works being done to it. If between the start of such works and their conclusion the building which is being altered pursuant to the GPDO is otherwise enlarged, improved or altered so that the cubic content of the "resulting building" together with the GPDO works would now exceed 50 cubic metres, those GPDO works cease to be protected by the GPDO and can be enforced against.

35. In other words, in examining whether in Class B1(d) the cubic content of the resulting building "would exceed" the cubic content of the original dwelling-house by more than 50 cubic metres, the prospectivity inherent in "would" continues to apply until the GPDO permission no longer needs to be relied on for the carrying out of any works. The availability of the GPDO is not set in stone by the mere start of works...

41. (5) It is, accordingly, my judgment that the inspector had to ask himself as at the time when the GPDO works, namely the roof extension, were substantially complete and thus at the time when the claimant last ceased to do any works for which any planning permission, express or pursuant to the GPDO, was necessary: did the cubic content of the dwelling-house, as at that time, including any actual cubic content already created by other works of enlargement, improvement or alteration ("the resulting building") exceed by more than 50 cubic metres, the cubic content of the original dwelling house? The side and rear extensions may or may not have any cubic content, but there were no findings of fact in relation to that matter...

45. (8) Instead clarity in the legal position is, in my judgment, important for these operations. That is provided by the application of the statutory

provisions, however fine the distinction to which that leads, rather than by the creation of non-statutory tests. The GPDO is not well cast so as to deal with simultaneous works, or what might be seen as single building operations, but best sense is made of it if it is recognised that one should measure the roof extension against the existing cubic content whether that cubic content had recently been acquired, whether it existed at the start of the building works, or whether that cubic content had been created shortly before the conclusion of the roof extension works. One ignores prospective cubic content during that examination, however imminent that prospective cubic content might be. One ignores it because once prospective cubic content is relevant one is driven to accept as relevant that which does not, and may never, exist as cubic content.

46. (9) In view of the fact that it is inherent in the GPDO that the precise sequencing of doing works can affect the availability of the permission which the GPDO provides, I see nothing contrary to the purpose of the legislation, or to planning policy, in applying that sequencing potential to this situation. The sequence of events, and the state of affairs at the completion of works, matters for widely separated works, and also matters for those closely following upon each other's heels. There is no legal justification for switching to a non-statutory single building project approach at some stage at which detecting the separation involves a careful factual analysis and a perhaps quixotic outcome in extreme cases."

45. The foundation for these conclusions in paragraphs 34 and 35 are, in my view, of particular importance to the argument in the present case. Ouseley J concluded that works needing permission derived from the GPDO continued to need that derived permission until substantially complete and were not "set in stone by the mere start of works".
46. The Appellants relied upon the decision of the Court of Appeal in Orange PCS, R (on the application of) v Islington Borough Council [2006] EWCA Civ 157. Using the notification procedure under the GPDO the Claimants in that case had the benefit of permitted development in order to erect telecoms equipment and infrastructure. They erected it and completed the works. Subsequently, a conservation area was designated in the area covering where the equipment had been installed. The Council contended that as a result the permitted development rights that they had acquired did not apply and that therefore the installation was unlawful. This was because land which is in a conservation area is covered by Article 1(5) of the GPDO which excludes the permitted development rights for telecoms equipment.
47. The question which was before the Court of Appeal was formulated by counsel who appeared on behalf of Orange as follows:

"Was the judge correct that the first respondent had an accrued right to develop the site in accordance with the details submitted in the application at least from the date of issue of the Prior Approval Notice, so that the right to develop was unaffected by the subsequent designation of

the Highbury New Park Conservation Area?"

48. Laws LJ who gave the leading judgment in the Court of Appeal set out his conclusions and also his observations in relation to the application of the case of Watts as follows:

"18. The question then arises - what middle way can be found consistent with principle and the statutory language? Plainly the Development Order has to be read as a whole. Certainly Part 24 has to be read as a whole. Thus the grant of planning permission for class A development and its withholding by paragraph A.1(h) have to make sense in the light of each other. It seems to me therefore that if we contemplate the notional case of a prospective developer who has not yet taken any steps to carry forward his development - whether by seeking prior approval, commencing works or otherwise - and who, on a particular date, asks the question "Does he have an approved right to install telecommunications apparatus on a particular site?" the answer will be "Yes, unless on the facts then prevailing any of the exceptions including paragraph A.1 (h) apply." So much is consistent with the concession made by Mr Katkowski that in a "non-prior approval" case no right to develop accrued until work had begun. I note in passing that this concession is incorrectly recorded by the judge at the start of paragraph 41 as going to the time when the work had been substantially completed.

19. It seems to me that in a non-prior approval case once the work has been done the advent of conservation area status cannot condemn the development as unlawful. The planning permission has been implemented; work has been done and expense incurred on the faith of it.

20. It is true, as Mr Taylor submitted this morning, that in such a case the developer - perhaps a home owner - will have incurred expense before starting the work and that expense would not be compensatable if then the conservation area is designated before the works are commenced. The matter is, no doubt, inevitably rough and ready, but a point has to be fixed somewhere for the crystallisation of the benefits given by the planning permission; and it seems to me that the start of the works provides at least a desirable degree of certainty.

21. So much for a non-prior approval case. What about a case where prior approval has to be sought, as here? The judge thought this instance was not at all straightforward. I am bound to say that I have some sympathy with that. It seems to me, as Mr Katkowski submits, that in a prior approval case the analogue to the commencement of work in a non-prior approval case is the application for prior approval and receipt of and reliance on the planning authority's response. In making the application the developer must have committed resources to assembling the required materials.

22. In a case where, in response, the planning authority grants prior

approval, unlike this case where the response was that approval was not required, it would surely be unjust if the developers' inevitable reliance on the grant could be defeated by the adventitious fact of a conservation area designation. Cases like the present where no approval is required cannot be in a different category.

23. I would not fix the date at which the planning permission crystallises or its benefits accrue in a non-prior approval case at the moment of commencement of the work but at the time when the favourable response of the local planning authority is received...

27. There is also Mr Justice Ouseley's decision in Watts to which I have made passing reference. With respect, I do not propose to go into it. Although there is certainly some similarity between Mr Justice Ouseley's reasoning and one of Mr Taylor's formulations of his argument, it dealt with a different provision in the development order and it does not seem to me that there is any potential read across that would assist Mr Taylor."

49. Turning away from ground 1 to ground 2, the relevant provisions of the GPDO which pertain to the argument under ground 1 are as follows.

50. As I have set out above, under Schedule 2 Part 1 Class A, development involving the "enlargement, improvement or other alteration of a dwelling house" is permitted, but it is subject to the restrictions which are set out in, amongst other places, section A.1. The particular restriction which is concerned in the present case is set out at A.1(h) as follows:

"(h) the enlarged part of the dwellinghouse would extend beyond a wall forming a side elevation of the original dwellinghouse, and would -

(i) exceed 4 metres in height

(ii) have more than one storey, or

(iii) have a width greater than half the width of the original dwellinghouse."

51. So far as ground 3 is concerned, the legal analysis must start with the relevant provisions in relation to enforcement contained within the legislative framework, in particular of the 1990 Act.

52. Section 171A(1)(a) of the 1990 Act identifies that the carrying out of development without planning permission constitutes a breach of planning control. Under section 172, the Local Planning Authority can then, if they consider it expedient to do so, enforce against that breach of planning control.

53. Section 173 provides as follows in relation to the contents of a notice:

"173. Contents and effect of notice.

(1) An enforcement notice shall state -

(a) the matters which appear to the local planning authority to constitute the breach of planning control;

(b) the paragraph of section 171A(1) within which, in the opinion of the authority, the breach falls.

(2) A notice complies with subsection (1)(a) if it enables any person on whom a copy of it is served to know what those matters are.

(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 by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or

(b) remedying any injury to amenity which has been caused by the breach...

(11) Where - _

(a) an enforcement notice in respect of any breach of planning control could have required any buildings or works to be removed or any activity to cease, but does not do so; and

(b) all the requirements of the notice have been complied with, then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of section 73A in respect of development consisting of the construction of the buildings or works or, as the case may be, the carrying out of the activities." _

54. Section 174 addresses the grounds of appeal that may be launched in respect of an enforcement notice. Section 174(2) specifies them as follows:

"174. Appeal against enforcement notice.

(2) 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) that those matters have not occurred;

(c) that those matters (if they occurred) do not constitute a breach of planning control...

(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;_

(g) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed."_

55. These provisions are enlarged upon so far as the ground (a) appeal is concerned by section 177 of the 1990 Act as follows:

"177. Grant or modification of planning permission on appeals against enforcement notices.

(1) On the determination of an appeal under section 174, the Secretary of State may -

(a) grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates."_

56. The effect of alternative proposals and the approach to them under the statutory framework has been analysed in a number of cases. The first is Ahmed v Secretary of State for Communities and Local Government [2014] EWCA Civ 566. Planning permission had been granted in 2005 on appeal for a three storey building on the site concerned in the enforcement notice in that case. In fact, in 2007 the Appellant built a four storey building. The Council enforced against that building and the Appellant appealed. The case before the Court of Appeal concerned particularly ground (f) and the Inspector's rejection of the alternative of amending the notice to require a version to the scheme permitted in 2005, albeit that by the time of the appeal that permission had lapsed.
57. The jurisprudence relevant to this issue was summarised by Richards LJ. His conclusions as to their applicability are set out in the following paragraphs from his judgment, which was the leading judgment in the Court of Appeal:

"22. In *Taylor & Sons (Farms) v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 1254, it was said that appellants should contemplate the possibility that their primary contentions might fail, and if there was a fall-back position on which they intended to rely they should make this clear in their submissions. It was not reasonable to come to court and ask for the case to be remitted to the

inspector so that he or she might ask for further submissions which could and should have been made in the first place if the landowner wished to advance them.

23. *Taylor* was considered in *Tapecrow*. Carnwath LJ, with whom the other members of the court agreed, observed at para 33 of his judgment that 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. The inspector's primary task, however, is to consider the proposals that have been put before him, and although he is free to suggest alternatives it is not his duty to search around for solutions. Carnwath LJ came back to this later in his judgment:

"46. As I have said, I would not wish to lay down any general rules. 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. In such circumstances fairness may require him to give notice to the parties to enable them to comment on it..."

24. The judgment of the court in *Moore* was given by Sullivan LJ. He referred to *Taylor* and *Tapecrow* as establishing the proposition that an appellant under ground (f) should state his "fall-back" position because the inspector's primary duty is to consider the proposals which have been put before him, and he is not under any duty to search around for solutions. He continued:

"40. We readily accept that it is not the duty of an Inspector to make an appellant's case for him (see [46] of *Tapecrow* per Carnwath LJ, as he then was), but in the present case the appellant had made her case, albeit that she made it under ground (b) rather than ground (f), that the alleged use in breach of planning control, which the notice required her to cease, was too wide. As Carnwath LJ observed in *Tapecrow* 'the enforcement procedure is intended to be remedial rather than punitive' ([46]). We accept [counsel's] submission that the mere fact that this issue was raised under ground (b) rather than ground (f) is not fatal to this ground of appeal. If there was an 'obvious alternative which would overcome the planning difficulties, at less cost and disruption than total [cessation]' the inspector should have considered it: *Tapecrow*."

The court in that case held on the particular facts that there was no "obvious alternative" on the material before the inspector.

25. Whilst Carnwath LJ's observations in *Tapecrow* were obiter, as Mr Whale emphasised in his submissions, the same cannot in my view be said for para 40 of the court's judgment in *Moore*. I note too that in *Tapecrow* the point was expressed in terms of discretion (if there appears to the inspector to be an obvious alternative, he should feel free to consider it), whereas in *Moore* it was expressed in terms of duty (if there is an obvious alternative, the inspector should consider it). In my judgment, the deputy judge was correct to direct himself in accordance with *Moore*. He was also correct that the principle in *Moore* is not limited to consideration under ground (f) of a point raised under another ground but is equally capable of applying to consideration under ground (a) of a point raised under ground (f).

26. That brings me to the deputy judge's finding that the inspector erred in law by overlooking an obvious alternative by way of granting planning permission for the 2005 scheme and varying the enforcement notice accordingly. It is clear that the inspector did not consider the possibility of that alternative. I do not accept Mr Whale's submission that even if the inspector had considered it he would have had no power to grant permission for the 2005 scheme. Whether it would have been open to him to grant such permission depended, as explained below, on an exercise of planning judgment which he did not undertake. It cannot be said, either as a matter of law or on the basis that the facts were capable of leading to only one reasonable answer, that it would have been outside his powers to grant permission for the 2005 scheme.

27. I agree with Mr Whale that the power under section 177(1) to grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control is linked to an appeal under ground (a) rather than under ground (f). But Mr Ahmed's appeal included express reliance on ground (a) and he would have been deemed in any event to have made an application for planning permission by virtue of section 177(5) as it existed at the material time. Although his ground (a) appeal sought planning permission only in respect of the development as built, which constituted the whole of the matters stated in the notice as constituting a breach of planning control, the power under section 177(1) was to grant planning permission "in relation to the whole or any part of those matters". In principle, therefore, planning permission could have been granted for the 2005 scheme if the differences between it and the development as built (i.e. the differences identified in the notice as "unauthorised additions, alterations and variations to the approved scheme") were such that a development in accordance with the 2005 scheme could be regarded as a "part" of the development as built. This was a matter of planning judgment for the inspector. It was a judgment he did not make because of his failure to give any consideration to the

possibility of granting planning permission for the 2005 scheme. This court is not in a position to decide what conclusion he would have reached if he had considered that possibility. In particular, we cannot exclude the possibility that he might reasonably have concluded that the 2005 scheme was to be regarded as "part" of the development as built, on which basis he would have had power under section 177(1) to grant planning permission in relation to it.

58. A similar issue arose in the case of Ioannou v Secretary of State reported as a decision of the Ouseley J at first instance at [2013] EWHC 3945 and in the Court of Appeal at [2014] EWCA Civ 1432. That case concerned the conversion without planning permission of a single dwelling into five flats. In the course of the appeal against the enforcement notice, the Appellant put forward an alternative proposal which would comprise a conversion to three flats. The Inspector accepted that this was a better solution, but neither granted planning permission for it nor adjusted the requirements of the enforcement notice to accommodate it.
59. Ouseley J's conclusions in relation to the Appellant's case brought under ground (a) were set out as follows:

"33. The Inspector obviously could not grant permission for the whole of the breach alleged in the notice and so achieve the three flat scheme; that would simply leave the five flats in place. His only other power was to grant permission for part of the breach alleged in the notice. But the three flat scheme could not be arrived at by granting permission for part only of the matters alleged to constitute the breach of planning control in the notice. Only one of the five flats, the one on the first and second floor, could be left untouched, although an entry door would have to be removed. (Despite the Inspector's conclusion that this particular flat was also substandard, he appears to have accepted that it could be part of the three flat scheme as shown on the Appellant's drawings, although they appear to show negligible change to it). The four flats on the ground floor could not go into two flats without internal alterations to walls, doors, and facilities. Works were required in order to produce three flats, which were not part of the matters alleged to constitute a breach of planning control in the notice. Granting planning permission for the larger flat without more, would not have remedied what the Inspector found to be the objectionable parts of the breach of planning control, nor would it have produced the scheme which the Inspector was prepared to see achieved.

34. For Mr Wills' submissions on ground (a) and the deemed planning permission to succeed without recourse to powers governing remedial steps under ground (f), the statutory power in s177(1)(a) has to be read as empowering the grant of permission for a development which is not, and is not part of, the matters alleged to constitute a breach of planning control, and indeed which does not exist. The wording of s177(1)(a) is too specific and clear for such an interpretation."

60. These findings of Ouseley J and his application of the relevant law to the ground (a) appeal stood and were not appealed by the Appellant. An appeal did, however, proceed in relation to Ouseley J's conclusions in respect of ground (f), namely that the Inspector in that case had erred by not considering the three flat scheme as part of ground (f).
61. The Court of Appeal's conclusions in relation to the Appellant's submissions in respect of ground (f) are to be found in the judgment of Sullivan LJ, who gave the leading judgment in the Court of Appeal, as follows:

"18. The agreed starting point in this appeal is, therefore, that the ground (a) appeal, the deemed application under subsection 177(5), and the power to grant permission under section 177(1) are of no assistance to the Respondent. The sole question is whether the Inspector erred in concluding that he did not have power to enable the implementation of the three flats scheme by allowing the appeal under ground (f), varying the steps required by the notice, and thereby enabling what remained after compliance with those requirements as varied to be treated as having been granted planning permission under section 73A by virtue of the operation of subsection 173(11)...

38. It is unnecessary to adopt a strained interpretation of subsection 173(11) in order to ensure that enforcement proceedings retain their remedial character. If, as in the present case, an alternative scheme is put forward which is not part of the matters stated in the enforcement notice as constituting a breach of planning control, but which the Inspector considers may well be acceptable in planning terms, he can follow the course which the Inspector adopted in the present case: allow the appeal under ground (g) and extend the period for compliance with the notice so that the planning merits of the alternative can be properly explored: see paragraph 7 (above). Local planning authorities usually issue enforcement notices as a last resort when persuasion and negotiation with the landowner has failed. It is open to a landowner who wishes to obtain planning permission for such an alternative scheme to apply for planning permission for that scheme at any time, whether before or after an enforcement notice has been issued. The local planning authority's power in section 70C to decline to determine applications for planning permission made after an enforcement notice has been issued applies only if granting the permission would involve granting permission "in respect of the whole or any part of the matters specified in the enforcement notice as constituting a breach of planning control."

39. I do not accept Mr Wills' submission that this approach to the ambit of ground (f) renders that ground of appeal otiose. In its earlier form, under the 1968 Act, ground (f) was clearly much narrower than ground (a): it was not concerned with the planning merits of the matters alleged to constitute a breach of planning control, a question of planning judgment, but with what was essentially a factual question – what steps were necessary to remedy that breach: see paragraph 20 (above). The

inclusion of the second limb in ground (f) – that even if they do not remedy the breach, less onerous steps will suffice because they will remedy any injury to amenity caused by the breach - means that deciding an appeal under ground (f) may well involve an element of planning judgment, which is bound to overlap to a certain extent with the Inspector's judgment as to the wider planning merits under ground (a). That there is now a degree of overlap between the two grounds, (a) and (f), is recognised in the authorities relied upon by Mr. Wills: *Tapecrowne, Moore and Ahmed*. It does not follow that ground (f) is otiose merely because there is now some overlap between the two grounds, in that injury to amenity is relevant under both grounds; nor does it follow that ground (f) is otiose because it cannot be used in conjunction with subsection 173(11) to secure for an alternative scheme a planning permission which is unobtainable under section 177(1)."

62. Turning to ground 4, the Appellants' submissions rely upon, firstly, Article 8 of the European Convention on Human Rights, which comprises the right to private and family life and in particular a person's home, and Article 1 of the First Protocol which is concerned with the entitlement to peaceful enjoyment of possessions. Both of these are qualified rights. They can be interfered with to the extent that is in accordance with the law, necessary in a democratic society and proportionate. It was the appropriate limits of proportionality which was the basis of the Appellants' contentions in this case.

Conclusions

63. The start of the Appellants' submissions under ground 1 is the contention that by focusing on the photographs of the condition of the building in December 2011, the Inspector had been distracted by what was in effect a snapshot in time and had not properly applied his mind to whether this state of affairs was correctly understood as a step on the way to the completion of works of permitted development and works by way of repair.
64. That is a submission which I am unable to accept. First and foremost, it has to be borne in mind that the question of whether what was in situ was a new building or a remodelled version of the existing dwelling was a question of fact for the Inspector. Secondly, in my view, he clearly had in mind the nature of the Appellants' case. He set it out in paragraphs 14 to 16 of the decision letter which I have quoted above. Having set it out, he provided an appropriate answer to it.
65. The Appellants complain that the Inspector did not expressly explore whether the extent of the demolition works could be explained on the basis that they involved the exercise of implementing permitted development rights and were themselves justified by the extent of repair necessary to the building.
66. In my view, that complaint is unfounded for two reasons. Firstly, as an issue it is a matter which is in effect bound up in the question which the Inspector asked himself as to whether or not as a matter of fact he was concerned with staged extensions to an existing dwelling which were arguably not development or alternatively, in truth, with

the construction of a new dwelling with the integration of a few remaining walls. He was entitled to conclude on the evidence before him that what had happened was the latter.

67. Secondly, as the authorities which I have set out above make clear, in order to benefit from the permitted development rights relied upon, the parent dwellinghouse development must be retained. The Inspector was therefore entitled to examine the extent of the demolition to assess whether or not the Appellants' argument about reliance on permitted development rights was, in fact, tenable. He concluded that it was not. Again, on the evidence before him, that was a conclusion which was clearly available to him.
68. I turn next to the contention that the digging of the foundations in September 2011 implemented permitted development rights. It is submitted on behalf of the Appellants that, in accordance with the conclusions in Orange which I have set out above, these actions crystallised those permitted development rights and therefore the Inspector should have concluded that the works which subsequently occurred were the implementation or the completion of that earlier implementation.
69. It will be recalled that the Inspector rejected these arguments at paragraph 28 of his decision letter. In my judgment, he was correct to do so. It is clear, in my view, that the case of Orange was concerned with a different issue. It was not dealing with the question of whether implemented permitted development rights could be lost if, prior to their completion, the parent development upon which they depended was itself lost. Whilst there is no authority which directly bears on this question, in my view, the case of Watts is the far closer analogy, albeit that it was concerned with the loss of the right through the exceedance of a limitation. As in that case, the language of the GPDO with which we are concerned is prospective in relation to the limitations which apply. That supports the conclusion that the availability of those permitted development rights are not "set in stone by merely starting the works".
70. The sense of the permitted development right is that it is dependent upon the existence of a parent dwellinghouse development which gives rise to it. The extent of the development permitted, as is set out in the limitations, is also to be measured against the parent original development. The language therefore assumes the continuing existence of that parent development.
71. Following the logic of Watts and the language of the GPDO, if, prior to completion of the proposed exercise of permitted development rights, the parent development is lost, then in my view the entitlement to that permitted development is lost also whether or not some works might be regarded as an implementation of permitted development rights occurred when the parent dwellinghouse existed, prior to its loss. The Inspector's conclusions were, therefore, in my judgment correct.
72. Lastly under ground 1, the Appellant complains about the Inspector's reliance upon the case of Gravesham. It is said that this authority deals with the definition of dwelling-house through consideration of whether the structure provides the facilities

required for day to day existence. It is submitted that this was not an appropriate test for the Inspector to apply.

73. In my view, it is, however, clear that in paragraphs 18 and 19 of the decision letter what in effect the Inspector is undertaking is a crosscheck. He is asking himself whether the approach set out in the case of Gravesham might provide a different answer. He concludes, as he was entitled to on the facts before him, that it would not. That does not detract from or undermine the primary conclusion which he reached as a question of fact that the allegation in the enforcement notice is made out. I am therefore unable to accede to the submissions made by the Appellant under ground 1.
74. These conclusions under ground 1 render ground 2 academic. If the Inspector was correct to conclude that the allegation in the enforcement notice was made out and that in effect a new dwelling had been erected, the Appellant was not entitled to rely on permitted development rights. Nevertheless, in deference to the argument which I heard from both parties, I propose to deal with the point raised.
75. As I have set out above, it is illustrated on the plan of the original dwelling before the works which is attached as Annex 1 to this judgment. The argument relates to the limitation I have set out above at Schedule 2 Part 1 A.1(h). It is contended that the wall in question denoted A on Annex 1 is not engaged in that limitation. The Appellant's contentions are in effect twofold. Firstly, it is contended that the limitation does not include walls which are comprised in a projection from the main body of the dwelling-house like wall A as opposed to walls the entire or main width of the dwelling. Secondly, insofar as wall A was demolished as part of the works, it is submitted that it cannot be relied upon as part of the exercise of the limitation.
76. The Respondent contends that the language of the limitation referring to "a" and not "the" wall is clear. That is an interpretation with which I agree. Reading the limitation as it is stated, it clearly applies to wall A and the fact that the wall has as part of the works been demolished does not effect the position in terms of the imposition of the limitation. Wall A is quite clearly, in my view, a wall forming a side elevation of the original dwelling-house.
77. In the course of argument, my attention was drawn to another Inspector's decision which the Appellants say supports their interpretation and to the Respondent's guidance to the correct approach to the application of permitted development rights, which is said by the Respondent supports the Respondent's position. It is clear to me that neither of these sources are definitive. The question is one which is properly answered by examining the language of the limitation set out in the GPDO. When one does, as I have set out above, it clearly applied in this instance, as the Inspector found. I therefore am unable to accept the submissions made on behalf of the Appellant under ground 2.
78. Turning to ground 3 as set out above, that relies on the contention that the Inspector wrongly failed to consider the alternatives that had been put before him. The alternatives were put before the Inspector to deal with the principle source of objection raised by the Council, namely the effect of the development on the Green Belt and further to address whether or not the development was inappropriate. The alternatives

were put to the Inspector on the basis that they did not represent a materially larger replacement dwelling which would amount to inappropriate development.

79. The submissions made on behalf of the Appellant focused in particular on the use of the language "materially different" in paragraph 86 of the decision letter. It was contended that the Inspector had in considering this matter applied a test of material difference which had been expressly rejected, for example, by His Honour Judge Rich QC sitting as a Deputy Judge of the High Court in Exmouth Marina v Secretary of State [2006] JPL 204 at paragraph 36.
80. Furthermore, a reference in paragraph 87 to functional and physical severability was also submitted to have been misconceived and evidence of the application of an incorrect test. It was contended, and indeed it was not disputed, that the true test for the alternatives was whether, in accordance with section 177(1)(a), the alternatives comprised "part of" the matters alleged in the notice as the breach of planning control. The interrelationship between the language of section 177(1)(a) and section 70C, the power for a Local Planning Authority to refuse to consider a retrospective application for development which was in whole or in part a breach of planning control specified in an enforcement notice, was also emphasised.
81. In my view, it is important to read the conclusions of the decision letter at paragraphs 86 and 87 along with those which I have set out above which were reached at paragraphs 94 and 95. It is, in my view, unfortunate that the Inspector used the language of "materially different". I have no doubt that that is not, in truth, the test.
82. The question was whether or not the alternatives were "part of" the breach of control for which permission could be granted, it being clear, of course, that the Inspector had formed the view that the whole of the development could not be granted planning permission. That said, in my view the Respondent contended, with some justification, that the first and third options involved a redesign of the internal arrangements, footprints and elevations at ground floor which would, in accordance with the conclusions in Ioannou at first instance, have taken the alternative beyond being "part of" the dwelling constructed and enforced against. Only the second option in reality could have been properly understood as "part of" the development by simply removing, as it did, the garage and part of the south extension.
83. Be all that as it may, that was not what the Inspector's decision turned upon. In paragraph 87 he went on to consider his conclusions and provide his conclusions on the alternatives which had been promoted. It is important to note that in the first sentence of that paragraph he poses two questions, not simply the question of physical and functional severability, but also whether it would be possible to grant permission for some parts of the dwelling which might be acceptable as opposed to parts which were not. He clearly concludes that this was not a case where there were parts of the development which were acceptable and parts which were not. This is a conclusion which has to be read alongside his conclusion in paragraph 94 that the alternatives would not overcome the harm which he had identified in the course of his analysis of the ground (a) appeal. That was not just harm to the Green Belt, albeit that that was perhaps the most significant element of his planning appraisal, but also harm which

arose from the fundamental flaws in the design, which, it was accepted on behalf of the Appellant, the alternatives were incapable of curing. Reading the decision letter as a whole against the backdrop of the planning appraisal of the dwelling as built and the alternatives which were promoted, I am unable to accept that the Inspector simply failed to consider those alternatives.

84. Whilst he entertained doubts that it was legally correct for him to consider them, he did indeed provide conclusions in relation to them. In paragraph 94 he posed himself the correct question in relation to ground (f), namely whether there were obvious alternatives and concluded that they were not. Given his conclusions on the merits and reading the decision as a whole, I do not think that it was necessary for him to provide a detailed analysis of the merits in respect of each alternative, considering for instance the extent to which they might or might not represent a materially larger replacement in terms of Green Belt policy. His conclusions were that they were not obvious solutions and they did not overcome the planning harms which he had identified. Those were conclusions which are entirely comprehensible, taken from the decision read as a whole. In those circumstances, I am unable to accede to the submissions made by the Appellant under ground 3.
85. In respect of ground 4, whilst Article 8 and Article 1 of the First Protocol are undoubtedly engaged in this case, the question, as I have set out above, was one of proportionality.
86. It is beyond argument that a system of development control is a necessary and legal mechanism to provide, for instance, an appropriate balance between environmental protection and the rights of neighbouring landowners to enjoy their property in a democratic society. There is nothing, in my judgment, disproportionate about the exercise of development control, including steps to rectify breaches of that control of the kind which were undertaken in this case.
87. In analysing the question of proportionality, it is important to appreciate that the decision with which this case is concerned does not preclude the construction of a well-designed dwelling which respects the constraints of Green Belt policy in this location. The Inspector's approach, which afforded more time for such a suitable solution to be found, was a proportionate response to the decision which he had to reach. Whilst the Appellant complains that in reality finding a solution with the Council has proved problematic, I am conscious that I have heard only one side of that story. In any event and far more importantly, the Inspector's notion that a solution could realistically be identified was a suitable response which satisfied in this case the requirements of proportionality. For those reasons, I am unable to accept the Appellants' submissions under ground (a).
88. For all of the reasons which I have set out above, the Appellants' application must be dismissed.
- 89.

90. **MR TURNEY:** Your Lordship indicated that consequential matters could be dealt with in writing.
91. **MR JUSTICE DOVE:** Yes.
92. **MR TURNEY:** I understand that my learned friend is not in a position to deal with those.
93. **MR JUSTICE DOVE:** No. That is absolutely fine.
94. **MR TURNEY:** I am grateful.
95. **MR JUSTICE DOVE:** But I will obviously need to do that within timescales. What would you propose, bearing in mind we have got the holiday starting?
96. **MR TURNEY:** Well, my Lord, I suspect that the terms of the order are going to be relatively simple to agree.
97. **MR JUSTICE DOVE:** Yes.
98. **MR TURNEY:** It may be that if agreement is not reached on costs within a very short timescale, the appropriate order would simply be to ask for detailed assessment --
99. **MR JUSTICE DOVE:** Yes.
100. **MR TURNEY:** -- given that it was a one and a half day case.
101. **MR JUSTICE DOVE:** Yes.
102. **MR TURNEY:** There is likely to be an application for permission to appeal from my clients. I have not taken instructions yet --
103. **MR JUSTICE DOVE:** No.
104. **MR TURNEY:** -- but on the basis of previous discussions, I think that is a likely application to be made. I am happy to make that as soon as is convenient to your Lordship in writing and indeed --
105. **MR JUSTICE DOVE:** Well, my position is that I am finished today, but I am back, because I am doing vacation duty, next week. So if I were to give you to Friday of next week, would that be feasible?
106. **MR TURNEY:** My Lord, yes. That is more than sufficient. In fact, I would hope to have it with you some time before then.
107. **MR JUSTICE DOVE:** Very well. So I will leave it with you to do what you can.
108. What is Mr Kohli's position? Is he in foreign parts sunning himself?
109. **MS BELL:** I am actually not sure.

110. **MR JUSTICE DOVE:** Right.
111. **MS BELL:** I do not know if he is in foreign parts or otherwise engaged.
112. **MR JUSTICE DOVE:** Okay.
113. **MS BELL:** But I know he is contactable.
114. **MR JUSTICE DOVE:** Well, maybe you could try and short circuit matters by taking instructions --
115. **MS BELL:** Yes.
116. **MR JUSTICE DOVE:** -- so that at least a form of the order with alternatives within it could be agreed so that then my only task is to decide the application for permission to appeal when I have the details of it and decide whether or not I am going to grant permission or not.
117. **MR TURNEY:** I am grateful.
118. **MR JUSTICE DOVE:** I would have thought it should be pretty straightforward.
119. **MS BELL:** Yes.
120. **MR TURNEY:** My Lord, it might help if your Lordship were to indicate now on the matter of costs, if agreement is not reached in short order, would your Lordship intend to order a detailed assessment?
121. **MR JUSTICE DOVE:** Well, yes.
122. **MR TURNEY:** I am grateful.
123. **MR JUSTICE DOVE:** If you cannot agree a figure, you cannot presumably resist costs.
124. **MR TURNEY:** No.
125. **MR JUSTICE DOVE:** So the order I would expect to see would be that the Claimant pay the Defendant's cost to be subject to detailed assessment if not agreed.
126. **MR TURNEY:** I am grateful. Again, that will cut things down in terms of time.
127. **MR JUSTICE DOVE:** Thank you very much indeed.
128. Now, the drill here is that I stay here, you all leave and somebody else comes to entertain me.
129. Can I thank you both and could you thank Mr Kohli for your help with the case? I shall wait for the submissions in due course.

130. MR TURNEY: I am grateful, my Lord.

131. MR JUSTICE DOVE: Thank you.