Neutral Citation Number: [2014] EWHC 2729 (Admin)

Case No: CO/1623/2014
& CO/1626/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 August 2014

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

- -

Between :

LOUIS SILVER	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT	**Defendants**
(2) THE LONDON BOROUGH OF CAMDEN	
- and -	
BARRIE TANKEL	**Interested Party**

- -
- -

Andrew Fraser-Urquhart for the **Claimant**
Estelle Dehon (instructed by **Treasury Solicitor**) for the **First Defendant**
The Second Defendant was not represented and did not participate
Jonathan Wills (instructed by **Messrs Jaffe Porter Crossick LLP**) for the **Interested Party**

Hearing date: 16 July 2014

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Approved Judgment

Mr Justice Supperstone :

Introduction

1. The Claimant, Mr Silver, seeks an order quashing two decisions of an Inspector appointed by the First Defendant, the Secretary of State for Communities and Local Government, in relation to the development of a property situated at 45 Lancaster Grove, London, NW3 4HB ("the Property"). Both decisions are contained in a single decision letter dated 3 March 2014.

2. By the first decision the Inspector dismissed the Claimant's appeal under s.78 of the Town & Country Planning Act 1990 ("the 1990 Act") and refused to grant retrospective planning permission for the construction of a two-storey extension at basement and ground floor level at the Property ("the Planning Appeal"). This decision is challenged by way of an application under s.288(1) of the 1990 Act.

3. By the second decision the Inspector dismissed the Claimant's appeal under s.174 of the 1990 Act ("the Enforcement Appeal") and upheld an enforcement notice issued by the Second Defendant, the London Borough of Camden ("the Council"), in respect of the construction of a two-storey extension at basement and ground floor level at the Property. This decision is challenged by way of an appeal under s.289(1) of the 1990 Act.

4. These challenges are heard together, by way of a hearing of the s.288 application and a "rolled-up" hearing of the s.289 appeal.

Factual Background

5. The Claimant is the owner of the Property which contains three self-contained flats in a two-storey red brick detached building, with a rear garden containing a number of established trees. The Property lies within the Belsize Conservation Area ("the BCA") which, in turn, is within the administrative area for which the Council is the Local Planning Authority.

6. By a decision notice dated 15 January 2008 the Council granted planning permission ("the 2008 Permission") for the following development of the Property:

> "Excavation of basement level with front light well enclosed by railings and with bridge over to front entrance door all in connection with additional accommodation for the ground floor level flat; as revision to planning permission granted 21/08/07… which allowed for demolition of existing single storey rear extension and erection of a new two storey rear extension at basement and ground floor level for the existing flat." ("The 2008 Scheme").

7. A condition of the permission required development to begin no later than 15 January 2011 (Condition 1). Conditions 3 and 4 provided as follows:

> "3. All trees on the site, or parts of trees growing from adjoining sites, unless shown on the permitted drawings as

> being removed shall be retained and protected from damage to the satisfaction of the Council. Details shall be submitted to and approved by the Council before works commence on site to demonstrate how trees to be retained shall be protected during construction work: such details shall follow guidelines and standards set out in BS5837:2005 'Trees in Relation to Construction'. The protection measures shall not be carried out otherwise than in accordance with the details thus approved.
>
> …
>
> 4. No development shall take place until full details of hard and soft landscaping and means of enclosure of all un-built, open areas have been submitted to and approved by the Council. The relevant part of the works shall not be carried out otherwise than in accordance with the details thus approved."

8. The 2008 Scheme was a revision to an earlier planning permission, granted in August 2007, for a two-storey rear extension. The 2007 permission was itself based on a previous permission, granted in 2005. The plans used for both the 2005 and 2007 permissions stated that they were drawn at a scale of 1:50, but some were actually scaled at 1:100. This error in the scale of the floor plans was not noticed by the Council. It is now acknowledged by the Council, as was noted by the Inspector (see decision letter at para 10), that the 2008 permission was for 1:100 scale development as opposed to 1:50 scale development.

9. It appears that in late 2010 the Claimant decided that he wished to make alterations to some elements of the design of the rear extension comprised in the 2008 Scheme. Accordingly he engaged a builder, Mr Ansalem. As to what happened next the Inspector records the following in the decision letter at paragraph 31:

> "… Mr Ansalem immediately advised the [Claimant] that the planning permission for the 2008 Scheme must be begun no later than 15 January 2011 (which was then little more than a month away), and so he needed to undertake work to ensure that permission did not expire. To this end the services to a rear extension were disconnected and that extension was duly demolished. By mid-January 2011 the only other work undertaken were basement excavations."

10. Subsequently when the Claimant decided on the precise extent and nature of alterations which he wished to make to the 2008 Scheme he instructed an architect to submit an application for planning permission so that they could be effected. The application that was submitted later came to be withdrawn. Officers considered that no works of implementation had taken place before 15 January 2011 and, accordingly, that a fresh application for permission ought to be submitted as opposed to an application seeking amendments to an extant permission.

11. Council Officers subsequently visited the Property and advised the Claimant that the works he had carried out on the Property did not benefit from planning permission

and were therefore unlawful. By an application dated 6 March 2012 the Claimant sought permission for

> "Excavation of basement extension to rear and erection of rear ground floor level extension above all in connection with existing flat (Class C3)(Retrospective)." ("The 2012 Scheme").

12. By a decision letter dated 13 May 2012, the Council refused to grant retrospective planning permission for this development. Instead the Council decided to take enforcement action in respect of the development comprised in the application for retrospective planning permission.

13. On 6 August 2012 an enforcement notice was served on the Property ("the Notice"). The Notice alleged that without planning permission the following breach of planning control had occurred at the Property within the last four years:

> "Excavation of basement extension to rear and erection of rear ground floor level extension above all in connection with existing flat."

The Notice required, within a period of nine months of its effective date of 17 September 2012, the complete removal of the rear ground and basement floor level extension and the return of the building to the condition shown on the plans of the Property as submitted in connection with the retrospective application for the 2012 Scheme.

14. Before 17 September 2012 the Claimant brought the Planning Appeal and the Enforcement Appeal.

15. Having initially proceeded by way of the written representations procedure the combined Planning Appeal and Enforcement Appeal were converted into conjoined inquiries. The Inspector held a public inquiry from 7-9 January 2014 and undertook a site visit on 9 January 2014. A Rule 6 Party, the Interested Party, Mr Tankel, took part in the public inquiry as an objector.

16. The Inspector issued the decision letter on 3 March 2014. He dismissed the Planning Appeal and refused to grant planning permission for the existing Development on the basis that it: (1) would cause unjustified harm to the character and appearance of the BCA, (2) would cause harm to the living amenity of properties neighbouring the Property, and (3) may adversely affect underground drainage and the structure of adjacent buildings. He dismissed the Enforcement Appeal on the basis that it would not be appropriate to require compliance with the 2008 Permission.

The Decision Letter

17. The Inspector identified at paragraph 14 the main issues in relation to the Planning Appeal ("Appeal A") and at paragraph 62 the main issues in relation to the Enforcement Appeal ("Appeal B"). No criticism is made of the way in which the Inspector set out the main issues in relation to each appeal. They were:

> "**Appeal A** …

> 14.(i) whether the scheme would preserve or enhance the character or appearance of the Belsize Conservation Area;
>
> (ii) the effect on the living conditions of residents at 43a and 47 Lancaster Grove;
>
> (iii) whether harm results from the lack of a Basement Impact Assessment (BIA) and
>
> (iv) if any harm would be caused to the conservation area whether there are public benefits or other material considerations that outweigh the harm.
>
> …
>
> **Appeal B**…
>
> 62. The main issue with this appeal is whether the steps required to comply with the notice are excessive."

18. In relation to Appeal A the Inspector reached five conclusions that are not challenged:

    i) The extension would adversely affect the contribution the building and its garden made to the BCA (paras 23-25);

    ii) The Scheme would have an unduly dominant and overbearing effect on the rear garden of No.43a and the rear garden and main rear room of the ground floor flat at No.47 thereby detracting unreasonably from the living conditions enjoyed by those residents in conflict with CCS Policy CS5 and CDP Policy DP26 (para 52);

    iii) That it has not been shown that the Scheme would not adversely affect underground drainage or the structure of adjacent buildings, and so is in conflict with CDP Policy DP27 and CPG4 (para 56);

    iv) There were no public benefits adhering in the Appeal Scheme that could outweigh the harm to the BCA (paras 58-60);

    v) If it were to be a fall back option the 2008 Scheme would not be as harmful as the Appeal A Scheme (para 28).

19. However the Inspector concluded that the 2008 Scheme was not a fall back option because it had not been commenced before permission for it expired in mid-January 2011. The Inspector accepted (at para 35)

> "that demolition was permitted in the development comprising the 2008 Scheme and so the removal of the extension could, on its face, be the first step in the construction of that proposal."

However he continued:

> "36. … having regard to *Commercial Land Limited v Secretary of State for Transport, Local Government and the Regions and the Royal Borough of Kensington & Chelsea* [2002] EWHC 1264 (Admin) it is necessary to look at what has been done as a whole rather than seeing if a modicum of works complied with another permission. To my mind there are material differences between the 'as built' scheme and the 2008 scheme. These are numerous, but relate to such matters as the roof form, the ground floor footprint, the proximity to the boundary with No. 43a, the window arrangement and the relationship to the existing building. I note too that the [Claimant] did not challenge the view that there was a material difference between these two extensions as no ground (c) appeal has been lodged, and indeed an application for planning permission had been submitted that purported to be to retain the 'as built' scheme. Consequently, what is now on site is unlawful in its entirety and so I cannot accept that the 2008 scheme has been implemented or that it could be built without the need for further planning permission."

20. The Inspector then moved to consideration of the conditions precedent to the 2008 Scheme. He considered at paragraph 39:

> "… that Condition 4 is not fundamental to the proposal, as it concerns a domestic garden. Moreover, if it was that important there would be timeframe given for the implementation of the landscaping. However, to my mind Condition 3 goes to the heart of that permission. This is because some of the trees are close to the basement works and, given the character of the rear gardens, the Council could well have resisted the development had it been expressly stated that they would be felled. I accept that condition relates to 'works' rather than 'development', but given the scale of the extension to my mind there is no ambiguity as to what it concerns or that the works were the same as the development in question. It is plain that condition prohibits the development commencing or taking place before certain details are submitted and approved. Therefore, having regard to *Greyfort Properties Ltd v SSCLG and Torbay Council* [2011] EWCA Civ 908 I see no reason why it should not be treated as a condition precedent, and so I am of the view that a failure to comply with its terms means the planning permission for the 2008 scheme has not been lawfully implemented."

21. Turning to Appeal B, the Inspector assessed the Appellant's case that the Notice should require the works to be modified to accord with the 2008 Scheme. Even though he concluded that the 2008 Scheme had not been implemented, he considered in detail whether the Notice could be modified to accord with the 2008 Scheme, despite the permission having expired, having regard to the decision in *Mahfooz Ahmed v SSCLG and LB Hackney* [2013] EWHC 2084 (Admin). However he concluded that there were two reasons why he considered such a course of action

would not be appropriate (se paras 67-68). In his opinion the inconsistencies highlighted in relation to the plans accompanying the 2008 Scheme

> "… when taken together, mean the precise scale and form of the 2008 scheme is uncertain. As such, if I varied the notice to require the 'as built' scheme to be modified to accord with that approved in 2008 the recipient of the notice would not know what he or she was required to do to comply with its terms. Therefore, I conclude that varying the notice to require compliance with the 2008 scheme would not be appropriate in this instance." (para 69).

The Inspector's assessment in this regard is not challenged.

Legal Background

Statutory Framework

Commencement of development

22. Section 56 of the 1990 Act provides, so far as is material:

> "(2) For the purposes of the provisions of this Part mentioned in sub-section (3) development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out.
>
> (4) in sub-section (2) 'material operation' means—
>
> (a) any work of construction in the course of the erection of a building;
>
> (aa) any work of demolition of a building;"

Validity of Enforcement Notices

23. Section 173 of the 1990 Act provides, in so far as is material:

> "(1) An enforcement notice shall state—
>
> (a) the matters which appear to the local planning authority to constitute the breach of planning control; and
>
> (b) the paragraph of section 171A(1) within which, in the opinion of the authority, the breach falls.
>
> (2) A notice complies with sub-section (1)(a) if it enables any person on whom a copy of it is served to know what those matters are
>
> …

> (10) An enforcement notice shall specify such additional matters as may be prescribed…"

24. The relevant regulations are the Town and Country Planning (Enforcement Notices and Appeals)(England) Regulations 2002 ("the 2002 Regulations"), which provide in Regulation 4:

> "An enforcement notice issued under section 172 of the Planning Act shall specify—
>
> (a) the reasons why the local planning authority consider it expedient to issue the notice;
>
> (b) all policies and proposals in the development plan which are relevant to the decision to issue an enforcement notice; and
>
> (c) the precise boundaries of the land to which the notice relates, whether by reference to a plan or otherwise."

General Principles

25. An application under s.288 or s.289 of the 1990 Act is not to be a vehicle for a challenge to the Inspector's decision on the underlying planning merits of the scheme. It is necessary to identify an error of law in the Inspector's approach to the decision (*R (Newsmith Stainless Ltd) v Secretary of State for the Environment* [2001] EWHC 74 (Admin) at paras 6-8, per Sullivan J).

26. Matters of planning judgment are within the exclusive province of the Inspector (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at 780, per Lord Hoffmann). Similarly the weighting of the various issues are matters for the decision maker and not for the court (*Seddon Properties v Secretary of State for the Environment* [1981] 42 P&CR 26 at para 28).

27. The importance of a condition is a matter for the Inspector (see *Greyfort* at para 41 per Richards LJ).

28. Decision letters should be read in a straight-forward way, without excessive legalism. (See *Clark Homes v Secretary of State for the Environment* [1993] 66 P&CR 263 at 271-272, per Sir Thomas Bingham MR).

29. The decision maker must have regard to any fall back position. In *Coln Park LLP v SSCLG* [2011] EWHC 2282 (Admin) at para 38, Collins J set out the test to be applied when considering a fall-back argument:

> "It is … whether there is a reasonable possibility that if planning permission were to be refused, use of land, or a development which has been permitted, would take place, and such use or development would be less desirable than that for which planning permission is sought."

30. The correct approach to construing enforcement notices is as stated by the Court of Appeal in *Miller-Mead v Ministry of Housing and Local Government* [1963] 2 QB 196 at 224, per Upjohn LJ:

> "It was at one stage submitted by counsel for the Appellant that we must look at some application for a site licence in order to construe the enforcement notice. But I must protest in strong terms against looking at any document except the enforcement notice. This is a most important document, and the subject, who is being told he is doing something contrary to planning permission and that he must remedy it, is entitled to say that he must find out from within the four corners of the document exactly what he is required to do or abstain from doing. For this is the prelude to a possible penal procedure. It is comparable to the grant of an injunction and it is perfectly plain that someone against whom an injunction is granted is entitled to look only to the precise words of the injunction to interpret his duty. The order cannot be construed by reference to the earlier proceedings unless expressly incorporated in the order."

Grounds of Challenge

31. Mr Andrew Fraser-Urquhart, for the Claimant, advances two grounds of challenge:

i) The Inspector's decision to dismiss the Planning Appeal and the Enforcement Appeal was unlawful because in doing so he misdirected himself as to the law on fall-back positions and, as a result, failed to have regard to a material consideration, namely the fact that the 2008 Permission was in law a good fall back position because it had been lawfully implemented and there was no impediment to its being fully built out in the future (**ground 1**).

ii) The Inspector's decision to dismissed the Enforcement Appeal was unlawful because in doing so he decided that the Notice was valid and was not a nullity. That determination amounted to a misdirection in law because the Notice was invalid and was a nullity (**ground 2**).

The Parties' Submissions and Discussion

Ground 1: the 2008 Permission was a good fall-back position because it had been lawfully implemented.

32. The Inspector reached his conclusion for two reasons: first, he took the view that in order to decide whether a permission has been implemented it was "*necessary to look at what has been done as a whole rather than seeing if a modicum of works complied with another permission*" and that, in applying that approach, the differences between the 2008 Scheme and the Development were material so that the building out of the latter could not have amounted to an implementation of the permission authorising the former (see para 36 of the decision letter at para 19 above); and second, he decided that the demolition of the former rear extension in January 2011 took place in breach of Condition 3 (see para 7 above), and that because Condition 3 went to the heart of

the 2008 Permission those works could not have implemented it (see para 39 of the decision letter at para 20 above).

33. I shall consider each in turn.

The works undertaken

34. Mr Fraser-Urquhart submits that the Inspector was wrong to have approached the question whether the 2008 Permission had been implemented by asking whether the totality of the Development, in the form that it was built out to as at the date of the decision letter, was materially similar or materially different to the 2008 Scheme as contemplated by the 2008 Permission. The question to which he should have directed his mind was simply whether before 15 January 2011 the Claimant carried out any material operations which were comprised in the development for which planning permission was granted by the 2008 Permission. By that date the former rear extension had been demolished. That was, as the Inspector accepted at para 35 of the decision letter (see para 19 above), a matter which was comprised in the 2008 Permission.

35. Mr Fraser-Urquhart submits that the passage of the judgment of Ouseley J in *Commercial Land Ltd* set out at para 35 of the decision letter on which the Inspector relied is obiter, and that the judge is making the simple point that where there has, as a matter of fact and degree, been a single composite set of operations, it is necessary to consider whether that set of operations in totality amounts to a material operation comprised in the development.

36. Mr Fraser-Urquhart submits that it is inappropriate to isolate a discrete "modicum" or element of works that in reality comprised part of a unified set of operations and point to that element of works as having implemented a permission. He suggests that it is material that throughout the judgment in *Commercial Land* Ouseley J refers to the "operations relied on" as opposed to operations "existing at the date of the determination", for example. Mr Fraser-Urquhart submits that it is the first set of operations within section 56(2) that determine whether or not development has begun. This is clear, he submits, from the language of s.56(2) itself, which expressly refers to the "earliest date" on which material operations take place. There is nothing, he submits, in *Commercial Land* that requires a decision maker faced with a s.56(2) issue to treat whatever development that happens to exist at the date of his decision as a material operation. The approach adopted by the Inspector would mean that a permission validly begun by operations within s.56(2) could subsequently be "unimplemented" in the event that developer changed his mind and decided to build out something different in some way to the permission, even if this occurred after the statutory s.91 date. There is no room in the scheme of planning legislation for a doctrine of de-implementation of planning permissions (*Pioneer Aggregates v Secretary of State for the Environment* [1985] 1 AC 132). On a straight-forward application of s.56(2) of the 1990 Act the Inspector should have held that the "first step of the construction of the proposal", namely "the removal of the extension" (see para 35 of the decision letter) amounted to a material operation comprised in the 2008 Scheme.

37. Mr Fraser-Urquhart submits that the Inspector asked himself the wrong question. What happened after 15 January 2011 is wholly irrelevant. However, even if the

Inspector was entitled to look forward and consider the works that were done, he still erred. The Inspector confined himself (at para 36) to a comparison of the permitted scheme and what was built. In *Commercial Land* at paragraph 33 Ouseley J said:

> "It is, in my judgment, necessary for an Inspector dealing with this sort of problem to consider not just the existence of differences between the plans and the operations relied on, but also to consider the significance of those differences. It is insufficient just to mark and measure the existence of differences. … Consideration of the similarities, or degree of compliance of the operations relied upon, with the approved plans is also relevant, together with the substantial usability of those works in the permitted development, and the degree of alteration required to them in order for them to be effective to that end. …"

Mr Fraser-Urquhart submits that the Inspector failed to have proper regard to the matters the Claimant put before him relating to considerations of similarity and degree of alteration and substantial suitability (see Claimant's list of some of the similarities in the document "Appellant's response to queries raised by the Inspector prior to the opening of the Inquiry").

38. The first point that Ms Estelle Dehon makes, on behalf of the Secretary of State, is that the Inspector correctly identified the issues in relation to the fall-back position, and reached conclusions, as a matter of fact and degree, which he was entitled to reach. In any event in both appeals he conducted the comparative analysis sought by the Claimant despite his conclusions about the implementation of the 2008 Scheme. He found as a matter of planning judgment that the 2008 Scheme would not be as harmful as the Appeal A scheme, and that it was not appropriate or practicable to vary the terms of the Enforcement Notice to require compliance with the 2008 Scheme (see paras 18 and 21 above). This, she submits, is a complete answer to the Claimant's challenge on the fall-back position.

39. Turning to the issue of whether the Inspector was correct to adopt the approach of Ouseley J in *Commercial Land*, Ms Dehon submits that he was correct to consider the whole of the works. The Inspector then exercised his planning judgment to determine, as a matter of fact and degree, whether the works undertaken were so different from the permitted development that they did not constitute the commencement of the 2008 Scheme.

40. Ms Dehon submits that it depends on the circumstances whether demolition is a material operation "comprised in the development" (s.56(2)). What was done in the present case at the point of expiration of the permission was ambiguous, and therefore it was necessary to consider what happened next and to what extent it was capable of being comprised in the development. On the facts in *Staffordshire County Council v Riley* [2001] EWCA Civ 257 Pill LJ said at paragraph 30(5) that "the removal [of the topsoil] was in accordance with the planning permission, and there could be no mining unless it occurred but it cannot be seen as an unequivocal act pursuant to the planning permission".

41. In *Commercial Land* Ouseley J considered the decision in *Riley*. He held that a wall, which only partially complied with the approved plans, "would be potentially equivalent to the ambivalent earth stripping discussed in *Staffordshire County Council v Riley* and would lack the quality of being distinctly referable to the approved development" (para 29). However Ouseley J went on to consider the position where the works in question were not functionally different from the planning permission and were not ambivalent in nature, but nevertheless deviated from what was permitted. He concluded that it was not permissible to ignore part of the works that had been done and focus only on those works which complied with the planning permission. He said:

> "I consider that the question of whether the operations done were comprised within the development involves looking at what has been done as a whole and reaching a judgment as a matter of fact and degree upon that whole. It does not entail any artificial process of ignoring part of what has been done. I reach that view even where it is not contended that the works are different functionally from the planning permission which has been granted, or are ambivalent in nature and so not unequivocally referable to the planning permission in question" (para 35).

42. In *Green v Secretary of State for Communities and Local Government* [2013] EWHC 3980 (Admin) Cranston J accepted that was how an inspector should proceed in circumstances where there had been demolition followed by deviation at an early stage from the approved plans. The judge followed the approach adopted by Ouseley J in *Commercial Land* in upholding the decision of the inspector that the works carried out did not constitute lawful commencement of the planning permission. Cranston J stated at paragraph 30:

> "[The Inspector] considered the appellant's contention that the implementation of planning permission was achieved through the demolition of the existing structure on the site, the removal of the tanks and equipment, and the evacuation of trenches and that all this amounted to the commencement of the development. However, assessing the matter objectively, in accordance with *Commercial Land*, he concluded, at paragraph 25 of the decision letter, that the works undertaken were so different from the permitted development that they did not constitute the commencement of the 2006 permission. That, in my judgment, was a perfectly permissible exercise of planning judgment."

43. In the present case the Inspector made clear (at para 36) that in his judgment there were numerous material differences between the "as built" scheme and the 2008 scheme such that he could not accept that the 2008 scheme has been implemented. Ms Dehon submits, and I accept, that the Inspector's conclusion that there was a sufficiently substantial difference cannot be characterised as irrational, and was a permissible exercise of his planning judgment.

44. In my judgment the Inspector, following *Commercial Land*, adopted the correct approach and his decision discloses no error of law. Accordingly the Claimant's contention that the 2008 permission was lawfully implemented fails. That being so it is not strictly necessary to consider the Condition 3 issue (see para 32 above), but out of respect for the careful submissions made by counsel I shall do so.

Condition 3

45. Mr Fraser-Urquhart submits that it was irrational for the Inspector to have decided that Condition 4 did not go to the heart of the 2008 Permission but to have decided that the second sentence of Condition 3 did.

46. Mr Fraser-Urquhart accepts that the second sentence of Condition 3 was not complied with prior to the demolition works being carried out in early January 2011. Accordingly if that sentence was a condition precedent which went to the heart of the 2008 Permission then material operations carried out in breach of it could not have been effective to have begun the 2008 Scheme. However it was irrational, Mr Fraser-Urquhart submits, for the Inspector to have taken the view that the second sentence of Condition 3 did go to the heart of the 2008 Permission. He contends that the principle of the retention and protection of trees on the Property is established by the first sentence of Condition 3.

47. Mr Fraser-Urquhart submits that the second sentence of Condition 3 purely relates to the provision of information to the Council in order to indicate how this retention and protection of trees will be secured. That requirement is therefore of a subsidiary nature in the context of the first sentence of Condition 3 establishing the principle of the matter, and as such does not go to the heart of the 2008 Permission as a whole.

48. However, as Ms Dehon points out it is not suggested on behalf of the Claimant that the Inspector adopted an incorrect approach or failed to apply the relevant principles. The challenge to the Inspector's conclusion in relation to Condition 3 is on irrationality grounds alone and depends on reading the second sentence of Condition 3 as being subsidiary to the first.

49. Ms Dehon observes that the Claimant seeks to separate the first sentence of Condition 3 from the remainder. However, Condition 3 is a single condition aimed at the protection of trees, which makes it clear that the manner in which such protection is effected must be approved prior to any work starting. It is clear, she submits, from Condition 3, read as a whole, that the mechanism by which the Council sought to ensure that the protected trees were in fact retained and protected was to require the Claimant to submit details of how those trees would be protected during construction work, which details were required to be approved by the Council.

50. Mr Jonathan Wills, for the Interested Party, Mr Tankel, supports Ms Dehon in her submission that the Inspector's judgment that Condition 3 went to the heart of the permission can only be interfered with on *Wednesbury* grounds (see *R on the application of Hart Aggregates Ltd v Hartlepool Borough Council* [2005] EWHC 840 (Admin), per Sullivan J at para 67). The Inspector gave his reasons for concluding as he did which cannot, Ms Dehon and Mr Wills submit, be categorised as irrational. Even if, as Mr Fraser-Urquhart submits, the court is not constrained by the

Wednesbury test, the court should be "very cautious" about interfering with the Inspector's planning judgment on such a matter (see *Greyfort* at para 41).

51. I do not accept, as Mr Fraser-Urquhart suggests, that the decision in *Greyfort* is limited to its facts. At paragraph 41 Richards LJ stated:

> "… The fact is… that the Inspector was plainly in a better position than the court to assess the matter, not only because of his greater expertise in interpretation and assessment of plans of this sort but also because he is bound to have had a better feel for the overall context and the site itself, which he had visited. The court should therefore be very cautious about acceding to an invitation to conclude, on the basis of its own examination of the plans, that the Inspector fell into error in making the finding he did as to the importance of condition 4."

52. Mr Fraser-Urquhart points to the section in the Officer's Report headed "Trees" and observes that there is no specific reference to the need for retention and protection of trees, rather the officer's focus is on landscape details, and the need for a condition to be imposed in relation to that. That led to condition 4, which the Inspector did not consider to go to the heart of the permission, whereas the subject of Condition 3 is not referred to in the Officer's Report but the Inspector considered Condition 3 to go to the heart of the permission. However the fact is that the permission granted by the Council included both Conditions 3 and 4, and the Inspector, in my view, was entitled as a matter of planning judgment to consider that Condition 3 went to the heart of the permission, whereas Condition 4 did not.

53. In my view the Inspector was best placed to assess the importance of Condition 3 to the planning permission in the exercise of his planning judgment. The significance that the Inspector attached to the submission of details cannot, in my view, be considered irrational. In any event this is most certainly not a case where I would consider it appropriate to interfere with the Inspector's planning judgment.

Ground 2: the Inspectors decision to dismiss the Enforcement Appeal was unlawful because the Enforcement Notice was invalid and was a nullity.

54. Mr Fraser-Urquhart submits that the reasons on the Notice express the reasons why the Council considered the retrospective planning permission for the 2012 Scheme should be refused. They do not however express the reasons why the Council considered it to be expedient to issue the Notice. The Inspector acknowledged at paragraph 10 of the decision letter that the Council's case was "now … different in some way". Mr Fraser-Urquhart submits that it is highly material that the Council itself took this view and "requested its reasons in the [Notice] be varied slightly to reflect its current position" (para 13). There was accordingly an acknowledged and self-evident breach of Regulation 4(a) of the 2002 Regulations. It was not corrected by the Inspector under s.176 of the 1990 Act.

55. In the alternative Mr Fraser-Urquhart submits that the Council's decision to issue the Notice was irrational because it was based on a material error of fact.

56. Ms Dehon takes issue with the Claimant's contention that the Council's reasons for considering it expedient to issue the Notice changed subsequent to the issue of the Notice. While the Council sought to amend one of the reasons for the Notice (that concerning daylight), the Council's position before the Inspector was that the scaling error did not affect the other reasons (see proof of evidence of Mr Gary Bakall, the Council's Principal Planning Enforcement Officer for the Inquiry at para 5.3).

57. In any event Ms Dehon submits that the Claimant's reliance on a comparative analysis of the reason for refusal of planning permission for the Appeal A Scheme and the reasons on the Notice is prohibited by the decision in *Miller-Mead* (see para 30 above). The Inspector referred to that decision and pointed out that there is no reference in the Notice to any comparative analysis or any previous permissions. He looked, as *Miller-Mead* requires, within the four corners of the Notice and considered "it is not defective on its face or hopelessly ambiguous and uncertain" (para 11).

58. I accept Ms Dehon's submission that it is impermissible to look beyond the Notice where the reasons for the Notice are maintained by the Council in substance. Even with the correct scaling what was built is bigger than it should have been.

59. Paragraphs 4(b), (c) and (d) of the Notice each articulate a reason for the Notice and give reference to each part of the development plan as required by s.172(1)(b). The Inspector has not suggested other matters that should be taken into account in assessing expediency. The justification for the Notice remained the same and that justification was accepted by the Inspector.

60. As Mr Wills observes, an enforcement notice may be vulnerable to attack on appeal under a number of different grounds within s.174(2), but this does not mean that it is a nullity or fundamentally invalid in some way. The matters on which the Claimant relied were not matters which were within the four corners of the Notice.

61. Further I reject Mr Fraser-Urquhart's alternative submission. In my view, the Inspector was entitled, as a matter of planning judgment, to accept the Council's position that the majority of its reasons were unaffected by the scaling error.

Conclusion

62. For the reasons I have given the application under s.288 is refused.

63. The application for permission to appeal under s.289 dismissing the appeal against the Notice is arguable and permission to appeal against this decision is granted. However the appeal has not established any error of law on the part of the decision maker and is dismissed.