Neutral Citation Number: [2017] EWHC 2716 (Admin)

Claim No: CO/3092 and 3093/2017

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

Date: 3 November 2017

B e f o r e :

HIS HONOUR JUDGE WAKSMAN QC
(sitting as a Judge of the High Court)

GRAHAM OATES

Claimant

- and -

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) CANTERBURY CITY COUNCIL **Defendants**

Timothy Straker QC and Jonathan Powell(instructed by Russell-Cooke LLP Solicitors) for the Claimant
Leon Glenister (instructed by Government Legal Department) for the First Defendant
The Second Defendant did not appear and was not represented

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Hearing date: 11 October 2017

INTRODUCTION

1. This is my judgment following a "rolled-up" hearing to determine (a) permission to appeal pursuant to s 289 of the Town and Country Planning Act 1990 ("the Act"), a decision of the Inspector dated 2 June 2017 whereby she upheld an enforcement notice, and (b) permission for a statutory review pursuant to s 288 of the Act, of her refusal of planning permission which formed part of the same decision. If permission was granted in either case, I should then determine the substantive appeal and/or review. Having had the benefit of full arguments on the points, I consider that permission in both respects should be granted and accordingly I deal with the matter substantively.

2. The Claimant, Mr Oates, owns three former chicken sheds on his site at Hoath Farm, Bekesbourne Lane, Canterbury, Kent. The sheds had permission to be used for Class B1 and B8 office use and on 27 November 2013 Mr Oates received confirmation from the Interested Party, Canterbury City Council ("the Council") that no prior approval was needed for a change of use to residential use.

The Notice

3. By May 2015 a significant amount (to put it neutrally) of further building work had been done in relation to the sheds. The Council took the view that this was unauthorised development and a breach of planning control which led to the issue of an enforcement notice pursuant to s 172 of the Act dated 22 August 2016 ("the Notice"). In paragraph 3, the matters appearing to constitute the breach of planning control were stated to be "Without planning permission, the erection of 3 new buildings in the open countryside for residential use." Paragraph 5 then set out three requirements to be complied with by Mr Oates, as follows:

> " i. Demolish 3 buildings marked A, B and C on the attached plan.
> ii. Remove all resultant material from the land.
> iii. Make good the land underneath the 3 former buildings."

4. Mr Oates appealed to the Inspector in respect of the Notice and also sought planning permission for further works on the site with the aim of creating 8 residential units with associated parking, landscaping etc. Put shortly, the grounds of appeal were that there was no breach of planning control because it was incorrect to say that there were "3 new buildings" as opposed to alterations to existing buildings which themselves had the benefit of a permitted change of use to residential.

The Decision Letter

5. The Inspector's decisions on these matters are contained in the Decision Letter dated 2 June 2007 ("the DL"). It is convenient at this point to refer to all the relevant passages from the DL.

6. In paragraphs 24-26, the Inspector noted Mr Oates' contention that although the Notice did not state that the original buildings had been demolished, this was in fact the Council's view and the basis for the Notice which was wrong because there had been no demolition. Further, what had been done was not to erect three new buildings but rather to erect an external structure around the original building. In this context, the Inspector referred to the decision of Green J in *Hibbitt v SSCLG and Rushcliffe BC* [2016] EWHC 2853 and in particular paragraph 27 of his judgment that:

> "[whilst] a development following a demolition is a rebuild… the test is one of substance not form based upon a supposed but ultimately artificial clear bright line drawn at the point of demolition [and] it is a matter of legitimate planning judgment as to where the line is drawn… There will be numerous instances where the starting point might be so skeletal and minimalist that the works needed to alter the use to a dwelling would be of such magnitude that in practical reality what is being undertaken is a rebuild."

7. The Inspector took the view that on the basis of *Hibbitt* an original building need not be demolished for it to become a new building. I deal further with that case below.

8. The Inspector then determined this aspect of Mr Oates' appeal as follows:

> "27. From the evidence, both written and oral, including the photographs and reports and from what I saw on my visit there can be no dispute that as a matter of fact a substantial amount of operational development has taken place in respect of Buildings A, B and C. Put simply this operational development includes: the erection of a metal framed exo-skeleton around the original building which provides a structure for the slate roof and blockwork walls; this exo-skeleton has been erected some 0.3m from the original building and has its own foundations; the walls of the original building have largely been removed save for the short blockwork elements and replaced with plasterboard which now forms the interior walls; there are new concrete floors; the original internal wooden structure remains, although it has been extensively repaired and parts re-placed.
>
> 28. Whilst elements of the original buildings remain and in particular I note that the proposal in the s.78 appeal does not include retention of parts of the currently existing internal wooden structure, taking all the above matters into account together with the judgement in *Hibbitt* there is no question in my mind that Buildings A, B and C are new buildings as a matter of fact as alleged on the notice.
>
> 29. In the circumstances I consider that the description of the breach as stated on the notice is correct and there is no need for it to be corrected."

9. She then dealt with a further related ground of appeal which relied upon the permitted change of use to residential. However the answer to this as found by the Inspector was that the permitted change of use did not include any permission for operational development which is what the Notice was all about in the context of what she had found to be three new buildings. The permitted change of use had applied only to the buildings which had existed before the operational development took place but which no longer existed. The prior approval was therefore not capable of implementation. See paragraph 33 of the DL.

10. It is also material to note paragraph 34 of the DL which stated that the use of the buildings for residential purposes had occurred after the operational development had taken place, that is, in the new buildings and there had been no actual change of use in the buildings that had been the subject of the prior approval.

11. Mr Oates' third and final ground of appeal against the Notice was that even if there had been a breach of planning control, the appropriate remedial action was not the demolition of all of the buildings as they now were, but rather works to reinstate the buildings as they had previously been i.e. the chicken sheds, albeit with office layouts within. A draft schedule of works to achieve this had been submitted by Mr Oates but it was incomplete and lacked precision and specificity. She then said as follows:

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

12. However the Inspector then took a different point (not one previously advanced by Mr Oates) and added this in paragraph 87:

> "87. However, the third requirement is to 'Make good the land underneath the three former buildings'. It has been established that 'The recipient of an enforcement notice is entitled to say that he must find out from within the four corners of the document what he is required to do or abstain from doing'. The Appellant did not make any submissions in respect of the third requirement but in my opinion, it is vague and subjective and offends the rule in *Miller-Mead.* I have powers to correct or vary the terms of a notice if I am satisfied that no injustice will be caused to either party. As the requirements would be reduced there can be no injustice to the Appellant or to the Council as the breach would be remedied by requirements 1 and 2. I will delete the third requirement accordingly."

13. As for the application for planning permission, this was considered by the Inspector in considerable detail and with regard to all the relevant factors. In paragraph 37-79 of the DL. she concluded that planning permission should not be granted. The only paragraph which is material for present purposes is paragraph 45 which reads thus:

> "45. I accept that the Appellant's case is that that erection of the exo-skeleton was purely an enhancement to the buildings' external appearance which would in turn enhance the setting and improve the efficiency of the fabric and it is on this basis that he seeks permission. However, I have found above that Buildings A, B and C as they now exist are new buildings and therefore the Appellant is seeking permission for the erection of the three new buildings and their use for residential purposes. In the ground (c) appeal I also found that 'these three new buildings cannot benefit from any consent for a change of use because that consent applies to buildings which had existed before the operational development took place but which no longer exist. On this basis the three new buildings have no lawful use. There is therefore no fallback position for Buildings A, B and C as they currently exist."

THE GROUNDS OF CHALLENGE TO THE INSPECTORS DECISION

14. The three grounds of challenge before me are as follows:

Ground 1: no breach of planning control

(1) The essential complaint is that the Inspector was wrong in law to conclude that following the further works done prior to the issue of the Notice, there were three new buildings as opposed to the original buildings albeit supplemented and altered by those further works. Because of that error, the Inspector was wrong to conclude that there had been a breach of planning control in respect of the existence of the buildings as they now were. Had she held that the original buildings were still extant she could and should then have concluded that they could have had the benefit of the change of use to residential even if not implemented prior to the new works. On that basis, the Notice could not have validly required the removal of all of the buildings but only (for example) the "Exo-skeleton" structure subject to it gaining planning permission in its own right.

Ground 2: wrongful refusal of planning permission

(2) It is then said that the Inspector could and should have found that Mr Oates had a valid fallback position i.e. the original chicken sheds and their permitted development rights including a change of use to residential. Her refusal for so finding was because there were now "new buildings" on the site, as she previously concluded. See paragraph 45 of the DL cited above. Had she considered that there was a valid fallback then, where the decision as to planning permission was otherwise finely balanced, the outcome could well have been the grant of such permission. Here, both parties agree that Grounds 1 and 2 are interlinked. Mr Oates accepts that if he loses on Ground 1 he must lose on Ground 2 as well. Conversely, if he wins on Ground 1, the Inspector's findings as to a fallback position cannot be sustained and the appeal on this ground must be allowed also.

Ground 3: the Nullity Point

(3) Shortly prior to the hearing of an oral application for permission on 15 August 2017, Mr Oates took a new point. This led to the adjournment of the permission hearing until 11 October, which I directed should then be on a rolled-up basis. The new point had not been raised before the Inspector or in the original grounds but only in Mr Powell's skeleton argument. It was to the effect that requirement (iii) of the Notice had been found by the Inspector in paragraph 87 to be too vague and that accordingly, in the light of the decision of the Court of Appeal in *Miller-Mead v MHLG* [1963] 2 QB 196, that finding should have led inevitably to her concluding that the Notice as a whole was a nullity. In error, however, the Inspector did not so find but instead simply deleted the requirement in purported pursuance of her corrective powers under s176 (1) of the Act while otherwise maintaining the validity of the Notice. If Ground 3 succeeds, then either this court should declare the Notice to be a nullity or the matter should be remitted to the Inspector to deal with this point in accordance with my judgment. It is common ground that if the Notice as a whole was a nullity then it would be for the Council to issue a fresh notice. In that regard, Mr Oates accepts that there is here no applicable time-bar which would prevent the Council from doing this. If it did so, then how it chose to frame any such Notice would be a matter for it to determine in the light of any relevant points made in this judgment.

GROUND 1: NO BREACH OF PLANNING CONTROL

15. As refined in argument there were three related contentions:

    (1) The Inspector found in paragraphs 28 and 33 that there were now "new buildings" but this could not be justified from the facts concerning the nature and description of the original buildings and that of the further works;

    (2) The Inspector further erred in so finding because she ignored the point that in law whatever remained from the original buildings still consisted of "buildings" as defined by s336 of the Act which included for these purposes parts of buildings. This was not a point put to the Inspector. Nor was it included in either the original or amended grounds of appeal before me, nor was it adequately presaged in the skeleton argument of Mr Straker QC filed shortly before this hearing. Although there is an issue between the parties as to whether it can now be raised on this appeal from the Inspector I have decided to deal with it. While Mr Glenister for the Secretary of State dealt with the matter as best he could in his oral submissions I permitted him as a matter of fairness to supplement these by written submissions. This was done and Mr Straker QC availed himself of a right of written reply;

    (3) Yet further, the Inspector failed to apply a principle said to derive from the decision of the Divisional Court in *Mansi v Elstree Rural District Council* [1964] 16 P&CR 153 to the effect that the Notice could not apply to, or require anything to be done in respect of those parts of the present building which had been there before and which Mr Oates had been entitled to use for residential purposes.

16. The finding that there were new buildings was important because it drove the Inspector's conclusions that subject to the Nullity Point, the Notice had described the breach of planning control correctly and had prescribed the proper remedy, namely demolition.

17. Like the Inspector, I consider that the correct approach to deciding this question was that set out by Green J in *Hibbitt*. In that case the s288 appellant argued that the making of a pre-existing barn into a dwelling did not require planning permission because it was no more than a "conversion". The Inspector dismissed the appeal in part on the basis that for there to be no more than a conversion, the nature and extent of the further works had to fall short of a "rebuild". See paragraph 27 of the DL cited in paragraph 8 above.

18. While I accept that the immediate context of *Hibbitt* was different from this case, I can see no reason in principle why the observations of Green J should not apply here. That is to say, it is possible to conclude that there is a "new building" even where parts of the "old" building remain as opposed to being demolished. Whether what has happened, or is contemplated, extends beyond a mere conversion of or addition to the original building or means that in substance there is a new building is obviously a question of fact and degree. Moreover, as it seems to me, it is pre-eminently a question of planning judgment for the decision-maker. Accordingly, unless the Inspector's conclusion that there were "new" buildings can be successfully challenged on *Wednesbury* grounds it must stand. It follows from this that I reject the contention made by Mr Straker QC that the reasoning in *Hibbitt* does not apply here so that the Inspector was wrong to proceed as if it did.

19. It is plain from the paragraphs of the DL cited above that the Inspector undertook a very careful analysis of the works done to date and noted correctly that some of the original

elements remained. She then summarised the effect of all of this in paragraph 28 (cited in paragraph 8 above) and found that in substance what had emerged were "new buildings". I cannot see how it can be said that this decision-making process went wrong in any relevant sense and the same applies to the similar conclusion in paragraph 33. Accordingly, the suggestion that the Notice was defective and the Inspector subsequently erred, because it could not be said that there were new buildings when parts of the original buildings remained, must be rejected. That disposes of the first element of Ground 1.

20. I then turn to the second element which is that the Inspector should have found that what remained of the original buildings amounted to "buildings" within the meaning of s336. This provides that in the Act except so far as the context otherwise requires, " "building" includes any structure or erection, and any part of a building, as so defined.." Had she so found, and taken into account the fact that there was a permitted change of use applicable to the original buildings, then she could not have concluded that what were now on site were, in law, "new buildings".

21. As to whether the statutory definition was relevant here at all, Mr Straker QC relies upon the decision of the House of Lords in *Wyre Forest DC v SSE* [1990] 2 AC 357. The issue there was the scope of a planning permission which gave the owners of a caravan site consent for 205 caravans. The owners successor's in title subsequently erected a chalet. Though lacking wheels, it fell within the definition of "caravan" in s29 (1) of the Town and Country Planning Act 1960 ("the 1960 Act") because, strictly, it could be moved. If that definition applied for the purposes of the planning permission, then the enforcement notice, served on the basis that the chalet was not a caravan, would have to be quashed. The House of Lords held that the correct definition for these purposes was the statutory one. In the leading judgment of Lord Lowry he rejected the argument that the "ordinary and popular" definition of caravan (which would have excluded a chalet) was the correct one. At page 365E he said:

> ".. If Parliament in a statutory enactment defines its terms (whether by enlarging or by restricting the ordinary meaning of a word or expression), it must intend that, in the absence of a clear indication to the contrary, those terms as defined shall govern what is proposed, authorised or done under or by reference to that enactment"

22. He later observed at p368F that the planning permission was itself a formal document given under the Planning Acts.

23. Mr Straker QC argued that the principle enunciated by Lord Lowry applied with equal force here. In other words where the term "building" is used in the Notice, being itself a document issued pursuant to the Act, it should be understood by reference to the statutory definition. I do not accept this because the context is very different. In *Wyre* it was important to ascertain what the precise scope of the underlying planning permission was because on that depended the validity of the enforcement notice. But if the "target" of the statutory definition here is to be the Notice - it would be very unclear what was being said about the alleged breach of planning control. To say that the term would include, for example, parts of a building would not help in dealing with the correctness or otherwise of the Notice which is not about the nature of the building but whether it is "new". The exercise here is not to determine the scope of the Notice (for example the extent of any remedial requirement) but rather whether as a matter of law or fact it was correct to say that what was on site now were new buildings rather than the original buildings for the

purpose of establishing a breach of planning control as a result of operational development. The proposed analogy from *Wyre* is simply inapposite.

24. However Mr Straker QC also argued that the Inspector should have paid regard to the statutory definition of building for the purpose of her decision and if she had, she would have been obliged to conclude that even the parts of the original building which survived were themselves "buildings" which would then have ruled out any finding that what were there now were "new" buildings. This is an ingenious argument but it is wrong, in my view. Again, the exercise being conducted by the Inspector was directed to the extent to which in substance and by reference to the facts on the ground as it were, the original buildings had really survived at all or whether in reality new buildings had emerged. The statutory definition of a building has no relevant application to that exercise. So the fact that the Inspector made no reference to s336 (nor was she asked to at the time by Mr Oates on the appeal) goes nowhere. Moreover, if this argument was right, it would mean that it would never be possible to conclude that as a matter of substance new buildings had emerged where there were some remnants of the old buildings. But that goes against the reasoning of Green J in *Hibbitt* and, I would respectfully add, common sense.

25. In his post-hearing written submissions, Mr Glenister also submits that the remains of the original buildings still present could not be described as parts of a building for the purpose of the statutory definition where the building of which they formed a part is no longer there. In other words what would be a part of a building, if standing alone, could not fall within the statutory definition, for example a single wall or pile of bricks. I would tend to agree with this analysis but it is not necessary for my decision here which is based on the reasons given in the paragraphs above.

26. The final strand of Ground 1 was to submit that the Inspector should have applied what was said to be an applicable principle from the case of *Mansi v Elstree RDC* (1965) P & CR 153 and fell into error by not doing so.

27. In that case, the land owned by the appellant had been used as a plant nursery and from 1922 a subsidiary part of it was used for retail sales of nursery and other produce. This was a permitted use. In 1959 the appellant intensified the retail use so that the glasshouse became primarily a shop. The local authority issued an enforcement notice alleging a change of use from agricultural to retail and required the discontinuance of all retail use including the limited retail use which had existed before without objection. One of the arguments was that the requirement of complete discontinuance went further than it legitimately could since it now removed even the prior limited retail use. Widgery J stated at page 161 that this argument was "unanswerable". He said that the Minister should have recognised that a notice requiring discontinuance of all sales went too far and it should have been amended under the powers given to the Minister to make it perfectly clear that the notice did not prevent the appellant from using the premises for the sale of goods by retail in such a manner and scale as had previously existed. Although that use was a subsidiary one it should be protected and the purpose of binding the notice was to safeguard the appellant's established rights.

28. It is argued here that this approach applies by way of analogy and as Mr Oates had established rights in relation to the original buildings, they should be protected from any remedial order in the Notice, the need for which arose as a result of the further works. It is

said here that the original buildings had the benefit of the change of use to residential. Accordingly, the Inspector should have quashed the Notice on these grounds.

29. I disagree. First, there is no reason in principle or by reference to any decided case to extend the reasoning in *Mansi* which was all about a change of use, to an enforcement notice issued where the breach of planning control was operational development. If otherwise, the working out of whether there was some pre-existing building and use which deserve protection could be a complex exercise.

30. Second, there is clear authority to the effect that the reasoning in *Mansi* does not have any application outside the change of use context so as to apply to buildings. In *Mohamed v SSCLG and Brent* [2014] EWHC 4045 (Admin), an enforcement notice was served because the occupier had changed a dilapidated garage in the rear garden into a fully-functioning residential unit. Gilbart J allowed the appeal from the Inspector on one particular ground, namely her failure to address the issue of whether the building fell outside of the operable GPDO and he ordered that the matter be remitted to the Inspector for reconsideration. But he then went on to consider a second ground of appeal which if successful would have required a reconsideration by the Inspector. Accordingly, the second ground of appeal was not an academic point. Before him it was argued that the enforcement notice was defective because it required demolition rather than taking some steps falling short of that and in any event the Inspector should have considered whether more modest steps would have been sufficient. As to the main argument on this ground of the appeal Gilbart J rejected it in terms which have a parallel to this case - see paragraph 22.

31. However, in paragraph 23 he dealt with a further point in support of the second ground of appeal:

> "There was some suggestion before me that the Inspector was required to let what had existed before remain, as per *Mansi*. But the so-called *Mansi* doctrine applies to the retention of use rights, not the retention of buildings erected or altered in breach of planning control."

32. Nor can it be said that these observations were *obiter* because (a) the second ground of appeal had to be dealt with in any event as explained above and (b) had the point dismissed in paragraph 23 been a good one, the appeal would have succeeded. I appreciate that this argument could hardly be said to be at the centre of the case before Gilbart J but I still ought to give considerable weight to the view expressed in *Mohamed* by him and I do.

33. However, even if *Mansi* <u>was</u> relevant here, it would not make any difference. That is because if it is to apply at all, it could only do so, subject to the ability of the LPA or Inspector to form the view that in substance there were new buildings. If so, it would make no sense to say that there were any original buildings which now required to be "protected". That is effectively what the Inspector did (legitimately) here in paragraph 85:

> "The Appellant submits that there are pre-existing lawful use rights and the requirements to return the site of Buildings A, B and C to an empty space go beyond the breach of planning control which arises from the erection of the exo-skeleton and do not comply with the *Mansi* principle which established that the requirements must not purport to prevent an appellant from doing something he or she is entitled to do without planning permission, relying on lawful use rights or rights of reverter, GPDO on UCO rights, or any of the exceptions from the definitions of development. However, in this appeal I have found that as the three buildings are new buildings as alleged in the notice, they have no pre-existing lawful use rights."

34. An attempt was made to bolster this argument by reference to the fact that there was an extant change of use permission for residential use and of course internal alterations could be made without requiring planning permission. I agree with both of those points, but in fact there is no evidence of any change to residential use actually having been implemented prior to the further works being undertaken. Indeed the Inspector expressly found to the contrary in paragraph 34 of the DL. So it is not as if it can be said that the original buildings had already changed to residential use. To that extent it would be wrong to say that there were buildings with a pre-existing use which required protection. The fact that any residential use after the operational development was in whole or in part in those sections of the new buildings that had been there before is not relevant in my view given the Inspector's characterisation of what is there now as new buildings.

35. Accordingly, in my view, this final strand of Ground 1 must fail.

36. It therefore follows that there is no basis for saying that the Inspector had erred in finding that there were new buildings, consistent with the description and requirements of the Notice.

37. It is right to say that at the hearing before the Inspector, Mr Oates had somewhat belatedly put together the draft schedule of works designed to remove all the offending parts of the new operational development in order to effect a reinstatement. However, the Inspector was entitled to reject that for the reasons given in paragraph 81 -83 of the DL. There is not and could not be any challenge to that conclusion. It had always been open to Mr Oates to have delivered a complete and detailed alternative to demolition that might have satisfied the Inspector so that the requirements of the Notice could be changed, but what was done was too little and too late.

GROUND 2 - WRONGFUL REFUSAL OF PLANNING PERMISSION

38. For the reasons given above, if Ground 1 fails as it does, then Ground 2 must fail as well.

GROUND 3-THE NULLITY POINT

39. Albeit belatedly, Mr Oates finally contends as follows:

    (1) in paragraph 87 the Inspector clearly concluded that requirement (iii), though not objected to previously by Mr Oates, was vague and subjective and offended the "rule" in *Miller-Mead*; but

    (2) if so, she had no option, on the law, but to declare the Notice as a whole to be a nullity;

    (3) accordingly, it was not open to her to exercise her corrective powers to delete requirement (iii) and thereby "save" the Notice.

40. The starting point is the issue, much debated before me, as to what the so-called rule in *Miller Mead* actually is. This requires a careful analysis of the judgments. The issue in that case was whether the enforcement notice in question was a nullity or whether it could be corrected and the Court of Appeal unanimously found that it was not a nullity. The short

point on the notice there was that it had said that the breach of planning control was the parking of caravans on the appellants' site. The notice then directed the removal of all caravans. But in fact, and as all parties knew, the occupier was entitled to park storage caravans there; what he could not put there were residential caravans. So the notice should be corrected to reflect this. It was not a case of the relevant part of the notice being unclear or subjective rather its ambit was too wide.

41. By s 23 (2) of the Town and Country Planning Act 1947 ("the 1947 Act") an enforcement notice had to state what the breach of planning control was and what steps were required of the recipient to remedy it. This corresponds with s173 (1) and (3) of the Act. Section 33 (5) of the 1947 Act then provided that "On an appeal under this section the Minister may correct any informality, defect or error in the enforcement notice, if he is satisfied that the informality defect or error would not be a material one."

42. In his judgment, Lord Denning MR at page 221 stated that the defect etc would not be a material one unless it was such as to produce injustice. In the case of a recital he said that if the mis-recital did not go to the substance of the matter and could be amended without injustice, then it should be amended as opposed to quashing the notice.

43. The availability of this corrective procedure was seen by him as a way of mitigating an unduly technical or formalistic approach to the contents of enforcement notices which had previously prevailed. His overall approach was clearly to say that if the defect was not material and its proposed correction would not cause any injustice, then the curative powers available should be used. And if so, the defect would not render the notice a nullity. By implication, if the defect was material it would.

44. In the speech of Upjohn LJ, often quoted in later cases, he made the following observations.

> "..[The enforcement notice].. is a most important document, and the subject, who was 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 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…(p224);

> "A notice has to specify certain matters. If it does not so specify, the notice is plainly inoperative as a notice under the Act. It must start by specifying one of two matters: the development alleged to have been carried out without the grant of planning permission… Then the notice may require such steps as may be specified… To be operative, therefore, the notice must specify these things and if for example it does not specify what is to be done or within what period it is to be done, it will fail to have effect as an enforcement notice and the owner or occupier need not comply with it..(p225-226);

> "Now, what happens if a notice does not comply exactly with those sections? As a matter of common sense, if it does not specify the steps to be taken to remedy the alleged breach of planning permission… the notice will not be operative.… Now, I think, is the time to draw the distinction between invalidity and nullity. For example, supposing development without permission is alleged and it is found that no permission is required… then the notice may be quashed under section 23 (4) (a). The notice is invalid: it is not a nullity because on the face of it appears to be good and it is only unproven facts *aliunde* that the notice is shown to be bad: the notice is invalid and therefore it may be quashed. But supposing that the notice on the face of it fails to specify some period required by subsection (2) or (3). On the face of it the notice does not comply with the section; it is a nullity and so much waste paper.… The notice on its face is bad. Supposing then upon it's true construction the notice was hopelessly ambiguous and uncertain so that the owner or occupier could not tell in what

> respect it was alleged that he had developed the land without permission … Or, again, that he could not tell with reasonable certainty what steps he had to take to remedy the alleged breaches. The notice would be bad on its face and a nullity… That to my mind is the distinction between invalidity and nullity (p226-227)
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> ".. Each case must depend upon its own facts. The whole question is whether section 23 is complied with in the requirements it lays down… Some mistake in the notice would not, I would think, amounts to a failure to comply. Of course the failure to comply… Maybe so fundamental that the notice is bad on its face and a nullity… It seems to me that [this] must depend on the facts of each case. (p227-228)
>
> "The whole question therefore, is whether the notice complies with section 23.… The court must insist on a strict and rigid adherence to formalities for the rights of owners and occupiers are being subjected to interference. This interference, however, on the other hand, is for the common good and the powers are entrusted to responsible public bodies of great experience. The requirements of the section must be interpreted with reasonableness in all the circumstances of the case.… In my judgment the test must be: does the notice tell him fairly what he has done wrong and what he must do to remedy it? (p230-231);

45. In the case before him, Upjohn LJ found as with the other members of the Court that the notice was not a nullity. The Minister was entitled to come to the view that the notice had simply gone too far and could be varied down, as it were. There was then a concurring judgment from Diplock LJ.

46. Much has been made before me about the observations of Upjohn LJ . But looked at fairly and objectively and not as if they were the words of the statute, what he was saying is that if it be found that there was a breach of section 23 (2) then nullity must result. But if the defect was not such as to entail such a breach, then it was open to the Minister to ex ercise his corrective powers. So it is a binary position.

47. The question then was what would render a defect sufficiently serious to amount to a non-compliance with the statute. As to the example of vagueness, while Upjohn LJ used the words "hopelessly ambiguous and uncertain" at one point he later refers to the position where the recipient "could not tell with reasonable certainty what steps he had to take". That seems to me to be a preferable way of putting it not least because it is phrased in language familiar to lawyers; the expression "reasonable certainty" is to be distinguished from absolute certainty. Provided that the essential steps to be taken were clear enough that would suffice even if there was some uncertainty at the margins.

48. It is of course correct to say that strictly, all of these observations were *obiter* since the Court held that there was no nullity in the notice before it anyway. But given the extensive statements made about this issue and the subsequent approval of them by later appellate courts, they cannot be disregarded simply because they were *obiter*, at least not by me.

49. The potential for undue technicality still remains, however, because if an enforcement notice did not comply with the statute because for example a part of it did not set out with reasonable certainty the steps to be taken, there was no curative power available to substitute requirements which would have been reasonably certain even if that could be done on appeal without injustice and even when the underlying breach of planning control had itself been described perfectly adequately.

50. I therefore turn to subsequent case-law.

51. *Metallic v SSE* 11 November 1975 is of limited importance since the role of the Court of Appeal there was simply to approve a consent order remitting the enforcement notice back to the Inspector with an intimation that in the Court's view, it was a nullity and so should be disregarded. This was because of the specified remedy for the breach of planning control - causing a nuisance by noise and smoke etc - namely that the occupier should install "satisfactory soundproofing" of a compressor and "take all possible action" to minimise the effect of using acrylic paint. One can see why the Secretary of State ultimately accepted that these requirements were far too vague. Nonetheless the commentary to this report did point out that it would be much more satisfactory administratively if the Minister had the power to amend any defect if this could be done without causing injustice and it made reference to current legislative proposals.

52. In *London Borough of Hounslow v SSE* [1981] JPL 510, the enforcement notice required the appellant, who had failed to comply with various conditions of the planning permission relating to parking, access and landscaping etc simply to "comply with" or "seek compliance with" the particular conditions. The Inspector held that this was too vague and was made worse by the addition of the words "or seek compliance with" where it was not even clear what the latter meant. The Divisional Court agreed that the requirements were so defective as to be beyond the curative powers and so the notice must be quashed. The *dicta* of Upjohn LJ were cited with approval and applied. Ackner LJ referred to the "hopelessly vague" statement while Skinner J referred to the requirement of reasonable certainty.

53. I interpose to say that s 173 (1) (a) of the Act states that the notice must state "the matters which appear to the local planning authority to constitute the breach of planning control;" and s173 (3) states that "An enforcement notice shall specify the steps which the authority requires to be taken, or the activities which the authority requires to cease in order to achieve wholly or partly, any of the following purposes" which, by s173 (4) include remedying the breach. The curative powers are now to be found in s176 (1) which states that the Secretary of State "may (a) correct any defect, error or misdescription in the enforcement notice; or (b) vary the terms of the enforcement notice, if he is satisfied that the correctional variation will not cause injustice to the appellant or the local planning authority." It will be noted that this is a change from the curative powers before the Court of Appeal in *Miller-Mead* at least as expressly stated because there is no requirement here that the defect must be not material.

54. In *Hattingh v SSE* [2002] PLCR 10, the enforcement notice stated that the breach of planning control was the unpermitted change of use of the land from mixed agricultural to residential use as part of the curtilage of the farmhouse. The recipient was then required to "cease the use of the Land as part of a residential curtilage, including removal of any boundary structures within the land". The Inspector concluded that the last part of this requirement, from the word "including" onwards, was unclear because the reference to the boundary structures was itself ambiguous. So he simply removed that latter part of the requirement. He considered that the balance of the requirement was sufficiently certain for the purposes of the recipient although he then went on to give some suggestions as to what might be done as a way of complying with it.

55. On appeal, Harrison J found that the Inspector was entitled to take this approach. His decision is of considerable importance here because what the Inspector did was to find one element of the requirement sufficiently vague that it had to be removed but it did not "infect", as it were, the rest of the requirement because that could stand by itself in any event. In paragraph 16 he said that he did not consider the requirement of the enforcement notice, as varied (my emphasis) to be "hopelessly ambiguous". The occupier had been told with reasonable certainty what had to be done. The use of the land as part of the garden had to stop. So the notice was not a nullity.

56. That is, in effect, what the Inspector did here though she did not express it in quite those terms. Context is everything. In some cases, removal of the offending part of the requirement (which might be all or most of it) would inevitably mean that there was no meaningful content left in the requirement at all, in which case it could not be saved. But that would not always be so.

57. Much reliance was placed by Mr Straker QC on *Payne v NAW and Caerphilly CBC* [2007] JPL 510. The enforcement notice there contained seven requirements. The first four were to cease various acts on the land, and the fifth was to require the removal of machinery. The sixth, however, was that the recipient should "submit details of a scheme of levelling and planting to the Local Planning Authority for written approval, which shall include proposals to Level and plant the areas of the land affected by the activities described…" And then the seventh requirement was for the recipient to "implement the approved scheme are set out… above". The Inspector considered that the sixth and seventh requirements were unacceptably uncertain and so he deleted them and then substituted new requirements as drafted by him.

58. In a detailed review of *Miller Mead*, and some later cases, Wyn Williams QC sitting as a Judge of the High Court, concluded that despite the reservations expressed in some quarters and in particular the observations of Roch LJ in *Bracken v E Herts* [2000] COD 366 at 370 as to the continued utility of the nullity/invalidity distinction, the latter remained good law by which he was bound. He concluded by saying that once the Inspector had deemed the relevant part of the requirement to be too uncertain he should then have quashed the notice as a nullity without more, as opposed to trying to rectify the offending part himself. So the appeal was allowed.

59. In paragraph 30 he dealt with one particular point, which is also pertinent here: :

> "… The First Defendant argues that even if sub- para. (f) was uncertain, nonetheless that does not have the effect of making the whole notice a nullity. He quotes no authority for that proposition. In argument he submitted that the Court or perhaps the First Defendant had the power to delete that sub- paragraph from the Notice. I do not accept either of those submissions. In all the cases on nullity of enforcement notices most of the notice complies… I know of no case where the fact that only part of the notice was uncertain has allowed the court to conclude that the notice as a whole complies with the section. Certainly no such case was cited to me. Further, I do not see how the Court or the First Respondent can have power to delete the offending uncertain part and thereby render the notice operative. In the instant case the complaint is that the notice was a nullity when it was issued. Again, no authority was cited for this proposition."

60. With respect to the judge, there are problems with this analysis. First, there is a reported case where the Inspector excised the offending part of the requirements and otherwise upheld the notice as compliant. That is the case of *Hattingh* which it seems was not cited

to him. Second, to say that in all these cases most of the notice complies with s173 so that in reality it is always the case that the offending part nonetheless renders the whole a nullity, goes too far. If the complaint is about the required steps to be taken to remedy the breach, or part of that requirement, then of course, the other key parts of the notice, for example the statement of the alleged breach of planning control, may well be satisfactory. But that hardly answers the point as to what the Inspector can or should do with the requirements section. In fact, the cases where the Inspector has felt able simply to delete the offending part and leave the balance of the requirement intact and operative would appear to be very few apart from *Hattingh*. In *Metallic* the whole of the requirements section was too uncertain as was the case in *Hounslow*. Third, on the facts, one can well see why the judge rejected this argument in his case. That is because the offending section could not simply be excised. Something had to be put in its place and so the Inspector could not have formed the simple judgment that the notice was compliant in its attenuated form. Fourth, the logic of proceeding on the basis that if even a small part of the relevant section of the notice falls foul of the statute the result must be nullity, takes no account of the relative importance or materiality of that which is removed compared to that which is left. Take an admittedly extreme example. Suppose that the notice contains six perfectly sensible and clear required remedies but then added a seventh which was not only wholly unclear but in fact unnecessary to include in the first place. If the *Miller Mead* rule means that as a result the notice must fall that is, in my judgment, an absurd result and one which I very much doubt Upjohn LJ would have had in mind when opining as he did. For all of those reasons and to the extent that Wyn Williams QC was taking such a strict approach I would respectfully disagree with it.

61. It seems to me that even on the basis (which I accept) that the nullity/invalidity distinction continues to be good law in this area, the Court can and should avoid applying it in a way which is unduly technical and restrictive.

62. That such an approach should be taken is generally supported by a number of recent judicial pronouncements on the question. See, for example, paragraphs 34 and 35 of the judgment of Sullivan LJ in *Trott v Broadland DC* [2011] EWCA Civ 301, paragraph 72 of the judgment of Pill LJ in *Davenport v Westminster* [2011] EWCA Civ 458 and paragraph 80 of the judgment of Sullivan LJ in *Koumis v SSCLG and Enfield LBC* [2015] JPEL 1.

63. In the light of all of those cases, it may be helpful to distil what I consider to be the relevant principles applicable here:

    (1) if an enforcement notice does not comply with s173 (1) or (3) and (4) (" the Statutory Requirements"), then it is a nullity and cannot be saved by the curative powers contained in s176 (1);

    (2) in order to achieve such compliance, it is not sufficient for the notice to contain simply a section which purports to set out the breach of remedial steps. The relevant part must inform the recipient with reasonable certainty what the breach of planning control is and what must be done to remedy it;

    (3) it follows that the fact that there may be some degree of uncertainty or other defect in the relevant section does not mean that there is, without more, non-compliance with the Statutory Requirements;

(4) a decision by the Inspector as to whether a claimed defect in the notice renders it a nullity or not should be accorded very considerable weight; at least to a significant extent, it is a matter of planning judgment which should not be lightly interfered with;

(5) a consideration of whether a defect renders the notice a nullity must be viewed in context and in particular the importance or otherwise of that part of the notice which contains it, whether it is inextricably bound up with the remainder of the relevant section of the notice or not, and whether, in its absence, the enforcement notice would otherwise be valid; accordingly, it would be open to an Inspector to conclude that while one part of the relevant section of the notice was too uncertain and could not stand, it was immaterial in the sense that the notice did not require it in the first place. In such a case the inspector could conclude that taken as a whole, the notice did comply with the Statutory Requirements, and then simply delete the offending part;

(6) both the Inspector and the Court should approach the exercise above in a way which is not unduly technical or formalistic.

64. It further seems to me that there is in any event a strong case for reviewing the whole nullity/invalidity distinction at least in this context, so that the curative powers can have greater utility and be exercised even if the defect to be cured was one which would render the notice to be non-compliant with the Statutory Requirements, where no real prejudice would be caused. That, however, is not a matter for this Court.

65. I turn to what occurred here. On a fair reading of her decision and in particular paragraphs 81-83 and 85 it is impossible to conclude that the Inspector was not well aware of the *Miller Mead* decision and the nullity/invalidity distinction.

66. In my judgment, the reference by her to the "rule" in that case can only mean the rule that the recipient with reasonable certainty must be able to discern what is now required of him. Accordingly since the Inspector here found that requirement (iii) was vague and subjective, then, taken by itself, that would be non-compliance with the Statutory Requirements. Taken by itself, the effect would be nullity and the Inspector would not be able to use the corrective powers which she purported to exercise.

67. However, it is also clear that the Inspector found that all that was needed for the breach to be remedied was compliance with requirements (i) and (ii). That is why there could be no injustice if requirement (iii) was deleted.

68. On the basis of the principles set out above and in particular the case of *Hattingh*, I consider that it was well open to the Inspector to conclude that in effect the third requirement was immaterial and unnecessary in terms of remedy, and it did not therefore render the requirements section of the Notice to be non-compliant with the Statutory Requirements and thus to be a nullity. To that extent, she was entitled to exercise her corrective powers to remove that which she had found to be unnecessary.

69. In those circumstances, I do not consider that there was any error of law in the course which the Inspector took. Viewed in this way, the Notice was not a nullity.

70. Accordingly, Ground 3 of this appeal must fail and with it, the claims as a whole.