Neutral Citation Number: [2016] EWCA Civ 784

Case No: C1/2015/2160

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE HOLGATE
[2015] EWHC 1654 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 July 2016

Before:

Lord Justice McFarlane
and
Lord Justice Lindblom

- -

Between:

Kestrel Hydro	**Appellant**
- and -	
(1) Secretary of State for Communities and Local Government **(2) Spelthorne Borough Council**	**Respondents**

- -
- -

Ms Saira Kabir Sheikh Q.C. and Mr Ned Westaway (instructed by **Fortune Green Legal Practice**) for the **Appellant**
Mr Gwion Lewis (instructed by **the Government Legal Department**) for the **First Respondent**
Mr Scott Stemp and Ms Leanne Buckley-Thomson (instructed by **Spelthorne Borough Council**) for the **Second Respondent**

Hearing date: 29 June 2016

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Judgment Approved by the court for handing down

Lord Justice Lindblom:

Introduction

1. In what circumstances may an enforcement notice issued by a local planning authority against an unlawful change of use require the removal of structures connected with that unlawful use? That question lies at the heart of this appeal.

2. With permission granted by Sales L.J. on 12 October 2015, the appellant, Kestrel Hydro, appeals against the order of Holgate J., dated 17 April 2015, dismissing its appeal against the decision of an inspector appointed by the first respondent, the Secretary of State for Communities and Local Government, by which he dismissed its appeal against an enforcement notice issued by the second respondent, Spelthorne Borough Council.

3. The enforcement notice was issued by the council on 28 August 2013. It alleged a breach of planning control by the making of a material change of use in premises known as "Kestrel", in Horton Road, Stanwell Moor, Staines from residential use to mixed use for residential purposes and as an "Adults Private Members' Club", and the erection of various structures on the site and the laying of hardstanding to create a car park. The site is in the Green Belt. As described in the statement of common ground prepared on behalf of Kestrel Hydro and the council for the inquiry into the appeal against the notice, it is "a relatively large plot of land comprising a bungalow fronting onto Horton Road in Stanwell Moor", whose "lawful use … is a single family dwellinghouse" (section 3).

4. The notice required that the unauthorized use be ceased, the site reverted to its lawful residential use, and the structures and hardstanding removed. Kestrel Hydro appealed against the enforcement notice on grounds (a), (d), (f) and (g) in section 174(2) of the Town and Country Planning Act 1990. The inspector held an inquiry on 10 June and 12 September 2014, making his site visit on 11 June 2014. His decision letter is dated 14 October 2014. He dismissed the appeal on grounds (a) and (d). On the ground (f) appeal he varied the notice only to remove the requirement that the lawful residential use of the site be resumed. The appeal on ground (g) succeeded, in that the time for complying with the requirements of the notice was extended from six to 12 months. Kestrel Hydro appealed against the notice under section 289 of the 1990 Act. Holgate J. rejected that appeal on all grounds.

The issues in the appeal

5. As refined in written and oral argument before us, the appeal raises two main issues: first, whether the council's enforcement action was ultra vires because it sought to attack operational development that had been on the site for more than four years; and secondly, whether the inspector fell into error in his consideration of Kestrel Hydro's appeal under ground (f) of section 174(2). In their skeleton argument for the appeal Ms Saira Kabir Sheikh Q.C. and Mr Ned Westaway, who appeared for Kestrel Hydro, described the substance of the appeal in this way (at paragraph 4):

> "In short, [Kestrel Hydro] contends that the juridical basis for extending the scope of [enforcement notices] beyond the breach of planning control enforced against either (i) derives from ground (f) and is associated with appeals brought on that basis or (ii)

> goes to the *vires* of enforcement action in Part VII of the [1990 Act] … Whether (i) or (ii) is correct, it is submitted that the Inspector's decision was flawed, the appeal should be allowed and the matter be remitted to the [Secretary of State] for re-hearing and redetermination … ."

In addressing those questions we must consider the relevant provisions of the statutory scheme and the relevant case law, including the decision of the Divisional Court in *Murfitt v Secretary of State for the Environment* (1980) 40 P. & C.R. 254 and the first instance decisions in *Somak Travel Ltd. v Secretary of State for the Environment* (1988) 55 P. & C.R. 250 and *Bowring v Secretary of State for Communities and Local Government* [2013] J.P.L. 1417.

The statutory provisions

6. Section 55(1) of the 1990 Act defines two distinct types of "development": the "carrying out of building, engineering, mining or other operations in, on, over or under land" and "the making of any material change in the use of any buildings or other land". Section 336(1) provides that "except in so far as the context otherwise requires … "use", in relation to land, does not include the use of land for the carrying out of any building or other operations on it".

7. In Part VII of the 1990 Act, which contains the provisions for enforcement, section 171A(1)(a) provides that "carrying out development without the required planning permission" constitutes a breach of planning control. Section 171B, "Time limits", provides:

> "(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.
>
> (2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.
>
> (3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.
>
> (4) The preceding subsections do not prevent –
> (a) the service of a breach of condition notice in respect of any breach of planning control if an enforcement notice is in effect; or
> (b) taking further enforcement action in respect of planning control if, during the period of four years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach."

8. Section 172(1) provides that a local planning authority may issue an enforcement notice where it appears "(a) that there has been a breach of planning control"; and "(b) that it is

expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations".

9. Section 173 contains provisions for the content and effect of an enforcement notice. Section 173(1) requires an enforcement notice to 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". Section 173(3) and (4) provides:

> "(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.
>
> (4) Those purposes are –
> (a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or
> (b) remedying any injury to amenity which has been caused by the breach."

Section 173(5) states that an enforcement notice "may, for example, require … (a) the alteration or removal of any buildings or works".

10. An appeal against an enforcement notice may be made under section 174. Section 174(2) provides:

> "An appeal may be brought on any of the following grounds:
>
> (a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;
> …
> (d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;
> …
> (f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;
> (g) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed."

Relevant case law

11. In *Murfitt* the Divisional Court – Waller L.J. and Stephen Brown J. – had to consider an enforcement notice in which the local planning authority had alleged a material change of

use of a farmyard to use for a plant hire and haulage business. The notice required that the use of the site for the parking of heavy goods vehicles be ceased and the land restored to its condition before the change of use took place. The steps specified in the notice included the removal of hardcore placed on the land in association with the enforced against use. The appellant contended that the enforcement notice had not been directed to the carrying out of operational development, that if such a breach of planning control had been alleged, enforcement action could only have been taken against development carried out within a period of four years preceding the service of the notice. Thus the hardcore laid on the site more than four years before the service of the enforcement notice would be exempt from any requirement for its removal. For the Secretary of State it was submitted that the placing of the hardcore on the land was, as Stephen Brown J. put it (at pp.258 and 259), "so much an integral part of the use of the site for the parking of heavy goods vehicles that it [could not], and should not, be considered separately …". In dealing with those rival submissions, Stephen Brown J. said this (at p.259):

> "Section 87(6)(b) of the Act of 1971 requires that an enforcement notice shall specify, first, the matters alleged to constitute a breach of planning control, and, secondly, the steps required by the authority to be taken in order to remedy the breach – that is to say, steps for restoring the land to its condition before the development took place. This is, of course, a mandatory duty that is placed on a local authority, and it would make a nonsense of planning control, in my judgment, if it were to be considered in the instant case that an enforcement notice requiring discontinuance of the use of the site in question for the parking of heavy goods vehicles should not also require the restoration of the land, as a physical matter, to its previous condition, that requirement, of necessity, being the removal of the hardcore.
>
> I do not accept the criticism made by the appellant that the requirement to restore the land to its condition before the development took place by the removal of the hardcore is one that is *ultra vires*. … ."

Waller L.J. agreed. He observed (at p.260) that section 87(6) gave "specific authority for a notice in matters of this sort to specify the steps required to be taken in order to remedy the breach, that is to say, steps for the purpose of restoring the land to its condition before the development took place", and he saw "no reason to retract [I think the intended verb was "restrict"] that meaning". He went on to say this:

> "If one wishes to see some logic in the distinction between the two types of breach – that is, a breach where the variation has existed for four years or more and a breach where that which is described as a variation is something ancillary to the use – as it seems to me, the former case is one where something is done that, on the whole, would be obvious – that, on the whole, would be permanent by the mere fact that it is done and, therefore, something that should be dealt with within a period of four years, whereas in the second case, where it is [a question of] an ancillary purpose, the planning matter [*sic*] might leave land, as in this case, in a useless condition for any purpose, and, therefore, it is logical that, when the use that has no planning permission is enforced against, the land should be restored to the condition in which it was before that use started."

12. In *Somak Travel Ltd.* the enforcement notice required the cessation of office use in a maisonette above a ground floor shop and the removal of a spiral staircase between the

ground floor and the first. The staircase was not "development" within section 22 of the Town and Country Planning Act 1971. But the inspector had decided that its removal was necessary to restore the maisonette to residential use. Rejecting the appeal against the inspector's decision, Stuart-Smith J. (as he then was) relied on the Divisional Court's decision in *Murfitt*. He said (at p.256):

> "The test laid down in that case by Stephen Brown [J.], that the operational activity should be part and parcel of the material change of use or integral to it, is one which seems to me to be satisfied in this case. It must, of course, be a question of fact in each case, but there seems to me to be plainly material upon which the inspector could come to the conclusion, as he clearly did, that [the staircase] was integral to [the change of use]. …
>
> It seems to me that if one adopts the test, whether or not it was integral to or part and parcel of the change of use from residential to office accommodation, the test is satisfied. … ."

In those circumstances Stuart-Smith J. did not find it necessary to go on to consider whether the scope of section 87(9) was wider still. But he found support for the view that it was in the judgment of Glidewell J. (as he then was) in *Perkins v Secretary of State for the Environment* [1981] J.P.L. 755. The report of Glidewell J.'s judgment in that case states (at p.756):

> "On Mr Brown's first question, he accepted that *Murfitt* … was binding authority for the proposition that section 87(6) of the Act permitted an enforcement notice to be served where the operational development was an integral part of the change of use. Having answered the second question in favour of the Secretary of State it was unnecessary for him to decide whether the meaning of section 87(6) was sufficiently wide to cover the situation where operational development was caught by the requirements of the change of use enforcement notice, even though the operational development was not an integral part of the change of use. The judgment … of Waller L.J. in *Murfitt* suggested that section 87(6) was wide enough to cover that situation and he was inclined to agree, although he stressed that his view was strictly obiter."

Stuart-Smith J. said (at p.257) that he too was "inclined to agree" with that last proposition. The scope of the relevant statutory provision was "widely phrased". But it was not necessary to decide that point. Adopting the "integral and part and parcel test" in *Murfitt*, he saw "abundant material on which the inspector could come to the conclusion" that the spiral staircase was "part and parcel" of the change of use and "integral" to it.

13. In *Bowring* the court (Clive Lewis Q.C., sitting as a deputy judge of the High Court) was concerned with an enforcement notice alleging a material change of use from use as a single dwelling-house to use as three self-contained flats. The notice required the cessation of the use, the restoration of the building to its authorized use as a single dwelling-house and the removal of all structures and fixtures and fittings associated with its use as three flats, including any kitchen fittings. The deputy judge found (in paragraph 16 of his judgment) that Stuart-Smith J.'s decision in *Somak Travel Ltd.* "supports the view that where an enforcement notice is served alleging the making of a material change of use of land, and the notice requires that certain works be removed, those works must have been integral to or

part and parcel of the making of the material change of use". However, as he went on to say (in the same paragraph), "it will not be sufficient if the works are integral to or part and parcel of the present unauthorised use of land if the works had been undertaken for a different, and lawful, use and could be used for that other, lawful use even if the unauthorised use ceased". He found this proposition consistent with the Divisional Court's decision in *Murfitt* (see also the judgment of Stewart J. in *Makanjuola v Secretary of State for Communities and Local Government* [2013] EWHC 3528 (Admin), to similar effect on this point, at paragraph 26).

The enforcement notice

14. The enforcement notice stated that it appeared to the council "that there has been a breach of planning control within the last ten years on the land or premises ("the Land") described in Schedule 1 hereto" (paragraph (1)); that the breach "consists in the carrying out of development by the making of a material change in the use of the land together with associated engineering works as described in Schedule 2 hereto, without the grant of planning permission required for that development", and that it appeared to the council "that the breach of planning control falls within section [171A(1)(a)] of the [1990] Act" (paragraph (2)). Schedule 1 described the site to which the enforcement notice related as:

> "Land and premises known as Kestrel, Horton Road, Stanwell Moor, Staines … as shown edged red on the Attached Plan (the "Land")."

Schedule 2 to the notice described the alleged breach of planning control in this way:

> "The making of an unauthorised change of use of the Land, namely unauthorised change of use from residential to a mixed use of residential and an Adults Private Members' Club together with the installation of various outbuildings, covered walkway, marquee-style structure and shed within it, and laying of hardstanding to create car park."

Schedule 3 stated the council's reasons for issuing the notice:

> "The development represents inappropriate development in the Green Belt for which no very special circumstances have been demonstrated. It results in the site having a more urban character, diminishes the openness of the Green Belt and conflicts with the purposes of including land within it. It is therefore contrary to Policy GB1 of the Spelthorne Borough Local Plan 2001 and Section 9 (Protecting Green Belt Land) of the Government's National Planning Policy Framework 2012."

The steps required to be taken, in Schedule 4, were these:

> "
>
> - Cease the use of the site as a mixed use of part Adults Private Members' Club and part residential, and revert it back to its lawful use as a single family dwellinghouse.
> - Remove the hardstanding in the car park from the site and reinstate the land to grass
> - Remove the outbuildings, and shed in car park, from the site

- Remove the covered walkway, and marquee-style structure and shed within it, from the site.
  (All as shown on attached plan)".

Schedule 4 required compliance with those requirements within six months of the notice coming into effect.

The inspector's findings and conclusions on the ground (d) appeal

15. On its ground (d) appeal, Kestrel Hydro did not contend before the inspector that the change of use was immune from enforcement action. Its proprietor, Mr Tattersall, acknowledged that the use began in January 2005. The appeal on ground (d) was limited to the structures on the site and the hardstanding. The inspector therefore concluded that there was "no basis on which the notice could be quashed under ground (d), but there is scope for argument over whether the notice can require removal of all items 1-10 on the inquiry plan" (paragraph 2 of the decision letter). It was agreed that, apart from the shed shown numbered 2 on the inquiry plan and the group of four timber cabins shown numbered 4, all of these structures had been substantially completed by 28 August 2009 – more than four years before the enforcement notice was issued (paragraph 3). The council's case was "that the installation of each of the items numbered 1, 3 and 5-10 was integral to and part and parcel of the unauthorised change of use", and, "[having] regard to *Murfitt* … and *Somak Travel* [*Ltd.*], … that the notice can require the removal of these items, along with items 2 and 4, notwithstanding that their installation would otherwise be immune from enforcement action". Kestrel Hydro had drawn the inspector's attention to the decision in *Bowring* (paragraph 4).

16. At the inquiry evidence was taken on oath. Mr Tattersall, though present, did not give evidence. The evidence about the installation of the various structures on the site was provided mainly in statutory declarations that had been submitted with an application for a certificate of lawfulness. These, said the inspector, indicated that "all of the relevant works were undertaken after the unauthorised use commenced and much of the work was done by [Kestrel Hydro's] "Facilities Manager"" (paragraph 5). This, as I understand it, was not in dispute. Indeed, as Ms Sheikh confirmed, none of the inspector's findings of fact in paragraphs 4 to 21 of his letter is said to be wrong.

17. The inspector first considered "the hardstanding/car park area … numbered 3 on the inquiry plan" (paragraphs 6 to 9). He was "satisfied on the balance of probability that the extensive hardstanding … was not laid until 2006" (paragraph 8). There was, he said, "no evidence to indicate that [it] was required or intended for any purpose other than to serve as a car park in connection with the current unauthorised club use" (paragraph 9). He went on to consider the structures shown numbered 1 and 5 to 10 on the plan (paragraphs 10 to 20). He took into account the content of an e-mail sent by Mr Tattersall to the council on 29 October 2013 concerning the application for a certificate of lawfulness, and evidence given to the inquiry by Kestrel Hydro's planning consultant, Mr Lancaster.

18. The "3 GRP sheds" shown numbered 6 on the inquiry plan and the "timber shed" within the "marquee-style structure" shown numbered 1 were, the inspector found, "… part and parcel of and integral to the change of use and they were not provided for a different, lawful use" (paragraph 12). He found that "but for the unauthorised change of use" the wooden building shown numbered 7 on the plan, which was used as an office, "probably would not have been

provided; its provision was part and parcel of and integral to that change of use and not for a different, lawful use" (paragraph 13). The covered walkway shown numbered 5 on the plan, which extended from the dwelling-house to the club house in the stable building, had been erected after the unauthorised use began. Again, he was "satisfied that, but for the unauthorised change of use, [it] … probably would not have been provided; its provision was part and parcel of and integral to that change of use and not for a different, lawful use" (paragraph 16). He made a similar finding about the "marquee-style structure". This, he found, had been "erected at the same time as the covered walkway" (paragraph 17). Mr Lancaster had said in his evidence that it "was erected in connection with the cinema in the converted garage and that this was for residential use, though it is now also used by the club". But "[given] the timing of [its] erection … , the fact that it was erected by the club's Facilities Manager and is available for use by club members", the inspector was "satisfied that, but for the unauthorised change of use, it probably would not have been provided", and, again, that "its provision was part and parcel of and integral to that change of use and not for a different, lawful use" (paragraph 18). According to Mr Lancaster, the "2 GRP sheds" shown numbered 8 on the plan and the "summerhouse type structure" shown numbered 9, which were used as "relaxing rooms", and the "timber building" shown numbered 10, which served as "a tea room for the club", were capable of having a "dual use". Once again, however, "without further explanation from Mr Tattersall", the inspector found that, "but for unauthorised change of use", these structures "probably would not have been provided and their provision was part and parcel of and integral to that change of use and not for a different, lawful use" (paragraph 19).

19. The inspector therefore concluded (in paragraph 20):

> "… [Items] 1, 3 and 5-10 were completed before 28 August 2009 and would normally be immune from enforcement action. However, for the reasons given, and having regard to the judgments in *Murfitt*, *Somak Travel Ltd* and *Bowring* the notice can nevertheless require their removal. Items 2 and 4 on the inquiry plan were completed after 28 August 2009 and are not immune anyway. The notice does not therefore require variation under ground (d)."

Was the council's enforcement action ultra vires?

20. Ms Sheikh's submissions here concerned only the council's enforcement against the "installation of the various outbuildings, covered walkway, marquee-style structure and shed within it, and [the] laying of hardstanding to create [a] car park". She submitted that the council had no power to enforce against this operational development, which had been in place for more than four years when the enforcement notice was issued. The distinction between material changes of use and operational development is very clear in the statutory scheme. In this case the several structures and the hardstanding attacked by the enforcement action – which, as the reasons for issuing the notice showed, were the council's real concern – were operational development immune from enforcement under section 171B(1), not a material change of use within the scope of section 171B(3). These provisions belong to a "comprehensive code of planning control" (see the speech of Lord Scarman in *Pioneer Aggregates (U.K.) Ltd. v Secretary of State for the Environment* [1985] A.C. 132, at p.141C-D). Where Parliament intended there to be an exception to the three distinct provisions for time limits in section 171B(1), (2) and (3), it had provided for that exception in section 171B(4). The provisions in section 173(3) and (4)(a) for specifying in an enforcement notice

the steps required to remedy the breach of planning control must be read together with the rest of this part of the statutory scheme. They do not override the time limits in section 171B.

21. Ms Sheikh submitted that the concept of operational development being "part and parcel" of an unauthorized change of use, which informed the decisions in *Murfitt* and *Somak Travel Ltd.*, was alien to the statutory scheme, and that we should not hesitate to hold that those cases, and others at first instance in which the same approach has been adopted, were wrongly decided. She relied on the decision of the Supreme Court in *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government* [2011] UKSC 15, in which, in the context of the enforcement of planning control, the basic distinction between operational development and material change of use was emphasized (see, in particular, the judgment of Lord Mance, at paragraphs 16 to 18). It was significant, she said, that the report of Robert Carnwath Q.C., as he then was, "Enforcing Planning Control" (February 1989) had accepted the idea of "useless" buildings, themselves immune from enforcement, surviving successful enforcement action against unauthorized changes of use.

22. Ms Sheikh added that any legitimate concern about the survival of "useless" buildings was met by the provisions for discontinuance orders in section 102 of the 1990 Act, and the power of a local planning authority "to require [the] proper maintenance of land" under section 215, which has sometimes been used, she said, to secure the removal of buildings.

23. I cannot accept those submissions. The straightforward answer to them, in my view, is that the decisions in *Murfitt* and *Somak Travel Ltd.* are good law and support the course adopted by the council in this case. As I read those decisions, they do not purport in any way to modify the statutory scheme. They do not ignore the distinction between operational development and material changes of use, now in section 55(1) of the 1990 Act, or sanction any disregard of the time limits for enforcement now in section 171B, or enlarge the remedial provisions now in section 173(3) and (4). They represent the statutory scheme being lawfully applied, as in every case of planning enforcement it must be, to the particular facts and circumstances of the case in hand – which is what happened here.

24. As Mr Gwion Lewis submitted for the Secretary of State, it is necessary in every case to focus on the true nature of the breach of planning control against which the local planning authority has enforced. It is the nature of the breach that dictates the applicable time limit under section 171B. Under section 173(1) the enforcement notice must state the matters that appear to the local planning authority to "constitute the breach …". The nature of the alleged "breach" will also be evident in the requirements of the notice, and in any appeal against it. The provisions of section 173(3) and (4)(a) are directed to "remedying the breach", and include, as one means of achieving that purpose, "restoring the land to its condition before the breach took place". And the provisions for grounds of appeal in section 174 are framed in terms of the "breach" that is "constituted" by the matters stated in the notice. Central to all of these provisions is the concept of the matters that constitute the "breach".

25. In this case the council alleged a breach of planning control by the making of an unauthorized change of use, namely the change of use of the site from residential use to a mixed residential and "Adults Private Members' Club" use, together with the installation on the land of various structures in association with that mixed use, and the laying of the hardstanding for the car park that serves it. The allegation of the breach of planning control

in Schedule 2 of the enforcement notice was fully borne out in the inspector's undisputed findings of fact, and I see no reason to doubt its accuracy as a description of the development against which the council found it expedient to enforce. The council was in my view entitled to regard the breach of planning control here as not falling within the category of breach "consisting in" the carrying out of unauthorized operational development, to which a four-year time limit for enforcement under section 171B(1) applied, but within the category of "any other breach of planning control" subject to the ten-year time limit in section 171B(3). And the inspector was therefore entitled to endorse that approach in determining the appeal.

26. This was one of those cases in which the change of use offending lawful planning control entailed the carrying out of physical works to enable and facilitate the unauthorized use of the land. Though some or all of those works comprised engineering or building operations, this in itself did not, as a matter of fact and degree, take the breach of planning control out of the ambit of section 171B(3) and into the scope of section 171B(1). In such a case, as one might expect, the remedy for the breach provided for under section 173(4)(a) can involve the removal of the works carried out in association with the unlawful change of use.

27. The principle at work here is, I think, unsurprising. And, contrary to Ms Sheikh's submission, the "juridical basis" for it is not obscure. It has been recognized in jurisprudence extending back at least to the Divisional Court's decision in *Murfitt*, and has been consistently applied by the courts since that decision. It corresponds to the provision in section 173(4)(a) of the 1990 Act – previously section 87(6)(b) of the 1971 Act – which enables a local planning authority to issue an enforcement notice specifying steps to be taken to remedy the breach of planning control by "restoring the land to its condition before the breach took place". It does not, and cannot, distort the operation of the time limits in section 171B, or widen the reach of the requirements provided for in section 173(3) and (4) beyond the bounds set for them in those provisions. Of course, its breadth must not be over-stated. It operates within the statutory scheme, not as an extension of it. This, as Holgate J. acknowledged (in paragraph 37 of his judgment), is the effect of the relevant case law.

28. What then is the principle? It is that an enforcement notice directed at a breach of planning control by the making of an unauthorized material change of use may lawfully require the land or building in question to be restored to its condition before that change of use took place, by the removal of associated works as well as the cessation of the use itself – provided that the works concerned are integral to or part and parcel of the unauthorized use. It does not apply to works previously undertaken for some other, lawful use of the land in question, and capable of being employed for that or some other lawful use once the unlawful use has ceased. But it can extend to unauthorized changes of use where the associated works, if viewed on their own, would have become immune from enforcement under the four-year rule in section 171B(1) (as in *Murfitt*) or would be outside the scope of planning control (as in *Somak Travel Ltd.*). In every case in which it may potentially apply, therefore, it will generate questions of fact and degree for the decision-maker. Whether it does apply in a particular case will depend on the particular circumstances of that case.

29. This was recognized by Stuart-Smith J. in *Somak Travel Ltd.*, in his observation (at p.256) that the application of the principle – or "test" – in *Murfitt* "must, of course, be a question of fact in each case". The cases show the principle being applied in a variety of circumstances. So, for example, in *Shephard and Love v Secretary of State for the Environment* [1992] J.P.L. 827 Sir Graham Eyre Q.C., sitting as a deputy judge of the High Court, upheld an

inspector's decision to reject an appeal against an enforcement notice under ground (d), in which the appellant challenged a requirement in the notice to remove a hut or huts erected in association with a material change of use of land to a "leisure plot". In *Newbury District Council v Secretary of State for the Environment and Mallaburn* [1995] J.P.L. 329 Mr Roy Vandermeer Q.C., sitting as a deputy judge of the High Court, held that an inspector had been entitled to find on the material before him that the construction of a tennis court had involved development consisting of "engineering and building operations of substantial scale", which was not merely incidental to a material change of use of land from agriculture to mixed use for agriculture and residential purposes and was therefore protected from enforcement by the four-year rule (see the deputy judge's analysis at pp.333 to 337, and also *Ball v Secretary of State for the Environment, Transport and the Regions* [2000] P.L.C.R. 299, at p.312). In *Cash v Secretary of State for Communities and Local Government* [2012] EWHC 2908 (Admin) Ms Belinda Bucknall Q.C., sitting as a deputy judge of the High Court, rejected a challenge to an inspector's decision upholding a requirement in an enforcement notice for the removal of fencing around a site whose unauthorized use for the stationing of caravans was the target of the enforcement action.

30. The cases demonstrate that the principle acknowledged and applied in *Murfitt* does not embrace operational development of a nature and scale exceeding that which is truly integral to a material change of use as the alleged breach of planning control. It seems clear that this is what Waller L.J. had in mind when he used the word "ancillary" in the passage I have cited from his judgment in *Murfitt* (at p.260). This is not to refine the principle, or to recast it. It is to recognize two things about it: first, that it is, in truth, a reflection of the remedial power, in section 173(4)(a), to require the restoration of the land to its condition before the breach of planning control took place; and secondly, that it does not – indeed, cannot – override the regime of different time limits for different types of development in section 171B(1), (2) and (3).

31. We were taken to several paragraphs of the Carnwath report. None of the passages we were shown, however, appears to have doubted the soundness of the approach taken by the court in *Murfitt*, or suggested the need for any amendment of the statutory scheme to exclude that approach. The discussion of "Immunities" in chapter 7 of the report, "Specific Conclusions and Recommendations" (in particular at paragraphs 3.2, 3.4, 3.5, 3.8, 3.10, 3.12 and 3.13), recognized that the "interaction of the two forms of immunity creates anomalies" (paragraph 3.4(iv)) – among them, as Ms Sheikh put it, the concept of a "useless building". But it did not advocate any change to the statutory provisions for time limits to exclude the *Murfitt* approach. Nor was this suggested in the discussion of the provisions of section 87 of the 1971 Act, including the recommendation in paragraph 4.2(iii) that "[there] should be a general statement of the scope of the steps that can be required, to show that it is a broad discretionary power to deal with the effects of a breach" (see Carnwath L.J.'s judgment in *Fidler v First Secretary of State* [2005] 1 P. & C.R. 12, at paragraphs 41 and 42, and, to similar effect, his observations in *Tapecrown Ltd. v First Secretary of State* [2007] 2 P. & C.R. 7, at paragraphs 30 to 33 of his judgment in that case).

32. The reach of the principle was considered in this court in *Welwyn Hatfield Council v Secretary of State for Communities and Local Government* [2010] EWCA Civ 26. In that case the appellant, Mr Beesley, having obtained planning permission for the erection of a hay barn, always intending to build and occupy a dwelling-house, had constructed the building and lived in it for more than four years. Richards L.J. concluded that section 171B(2) provided immunity from enforcement for the use of the building (paragraph 26 of

his judgment). Relying on the Divisional Court's decision in *Murfitt*, the local planning authority had argued that an enforcement notice directed to a material change of use of the land could require not only the cessation of the residential use of the building but also the removal of the building itself, even though the building was immune from direct enforcement action under section 171B(1). Richards L.J. was not attracted by that argument. He said (at paragraph 32):

> "I am very doubtful about that elaboration of the council's argument. *Murfitt* was a very different case … . In rejecting a submission that the placing of the hardcore was operational development immune from enforcement action by reason of the four year time limit, the [court] plainly accepted that the hardcore was so integral to the use of the site for the parking of vehicles that it could not be considered separately from the use, or that it was properly to be regarded as ancillary to the use being enforced against. I do not think that similar reasoning can be applied to the building in question here, and I would be reluctant in any event to accept that an enforcement notice directed against use of the land could properly require removal of a building that enjoys an immunity from enforcement by virtue of section 171B(1). But it is unnecessary for me to say anything more on the point, both because of my finding that the council's basic case under section 171B(3) must fail and because [counsel] made clear that the council would wish to enforce against the residential use of the building even if it could not secure removal of the building itself."

33. The Supreme Court allowed the local planning authority's appeal in that case, holding that there had been not been a "change of use" within the meaning of section 171B(2), and that the authority had been entitled to take the enforcement action it did (see the judgment of Lord Mance, with which Lord Phillips, Lord Walker, Baroness Hale and Lord Clarke agreed, at paragraph 58, and the judgment of Lord Brown at paragraph 68). In reaching that decision, the Supreme Court did not find it necessary to consider the potential relevance of the *Murfitt* principle to the breach of planning control with which the case was concerned. Indeed, it seems that *Murfitt* and the related authorities did not feature in argument at all. Nevertheless, as I have said, Ms Sheikh sought to draw support for her argument from observations made by Lord Mance in paragraphs 16 to 18 of his judgment in that case. Lord Mance emphasized (in paragraph 16) the "basic distinction between the types of development dealt with under these two subsections [section 171B(1) and (2)], … buttressed by section 336(1) where use in relation to land is defined as *not* including the use of land for the carrying out of building or other operations on it". He went on to say (in paragraph 17):

> "Protection from enforcement in respect of a building and its use are thus potentially very different matters. Mr Beesley could have applied for a certificate under subsection (1) in respect of the building as soon as July 2006 was over, but he has not done so. He has focused on the use of the building for four years, in respect of which, he submits, he must now be entitled to protection by reference to roughly, though not precisely, the same four-year period. If the right analysis were that there has been no change of use within subsection (2), the only alternative analysis must, he points out, be that use of the building as a dwelling house, which is either impermissible or positively prohibited under the relevant planning permission, can be the subject of an enforcement notice at any time within a ten-year period under subsection (3). I agree that that would, on its face, seem surprising. However, it becomes less so, once one appreciates that an exactly parallel situation involving

> different time periods applies to the construction without permission and the use of a factory or any building other than a single dwelling house. The building attracts a four-year period for enforcement under subsection (1), while its use attracts, at any rate in theory, a ten-year period for enforcement under subsection (3). I say in theory because there is a potential answer to this apparent anomaly, one which would apply as much to a dwelling house as to any other building. It is that, once a planning authority has allowed the four-year period for enforcement against the building to pass, principles of fairness and good governance could, in appropriate circumstances, preclude it from subsequently taking enforcement steps to render the building useless."

Lord Mance referred (in paragraph 18) to the comment made in the Carnwath report (at paragraph 3.2 in chapter 7) that the "governing considerations" in the differential time limits for enforcement, with the provision for a shorter time limit relating to changes of use to use as a single dwelling-house, "were the relative ease of detection, the potential costs involved in reinstating the land, and the need to provide certainty for potential purchasers" (see also paragraph 68 of Lord Brown's judgment).

34. I do not think any of that reasoning can be said to displace the principle applied by the Divisional Court in *Murfitt*, and subsequently recognized in the cases to which I have referred. It does not, in my view, cast doubt on the proposition that when a local planning authority is properly enforcing against a material change of use of premises where that change of use has entailed subsequent physical works to facilitate and support it, and those works are thus integral to the unauthorized use, the statutory scheme allows the enforcement notice to require the removal of such works as well as the cessation of the use itself. That is what was done in this case. The circumstances here were quite different from those in *Welwyn Hatfield Borough Council*. In that case the appellant had constructed a substantial building on his land and, having done so, proceeded to use it as a dwelling-house, contrary to a condition on the planning permission precluding such use. In this case, by contrast, a material change of use of the premises from its lawful residential use to an unlawful mixed use resulted in the erection of several structures to serve that unlawful use.

35. Thus, as Holgate J. said (in paragraph 36 of his judgment), the issue with which the inspector had to grapple on the ground (d) appeal in this case was "whether items 1, 3 and 5 to 10 had been included wrongly in the notice's identification of the breach of planning control", and this issue "turned upon the application of the principle laid down in [*Murfitt*, *Somak Travel Ltd.* and *Bowring*]". At the inquiry the parties had, in fact, asked the inspector to apply the approach indicated in *Murfitt* (paragraph 38). As the judge said, the "critical issue" the inspector was invited to determine was "whether items 1, 3 and 5 to 10 had been installed in connection with the lawful residential use of the property predating the inception of the unauthorised mixed residential and private members' club use, or whether instead they were installed during and as part and parcel of that mixed use" (paragraph 39). It was accepted before the judge that the inspector "did apply that agreed test, and in effect the test in paragraph 16 of the judgment … in [*Bowring*], and that no challenge can be made to the Inspector's factual findings or reasoning between paragraphs 4 and 21 of the decision letter, which [led] to his dismissal of the appeal under ground (d)" (also paragraph 39), and that there was "nothing improper" about the "but for test" applied by the inspector "because it simply addressed the question whether, on the balance of probabilities, it was likely that the structures would have been introduced at a time when the premises were in lawful use solely

for residential purposes, that is to say before the unauthorised mixed use began" (paragraph 45). With all of that I agree.

36. In my view, therefore, the approach indicated in *Murfitt* was properly available to the council in this case, was properly applied by it, and was properly supported by the inspector in the light of his undisputed findings of fact. The requirement in the enforcement notice that the hardstanding and various structures erected to serve the unauthorized use of the land be removed was a requirement the council could properly impose under section 173(4)(a). The inspector, for his part, explicitly applied the approach in *Murfitt*, *Somak Travel Ltd.* and *Bowring*. In doing so, he was entitled to find that the hardstanding, sheds, covered walkway and "marquee-style structure" were all integral to the unauthorized use and ancillary to it. These were the physical manifestation of the unauthorized change of use. As Mr Lewis submitted, the council cannot in the circumstances be faulted for enforcing against them, and requiring their removal together with the cessation of the unauthorized use.

37. It follows that there is no need to consider whether the council could also have availed itself of its powers in sections 102 and 215 of the 1990 Act to secure the removal of some or all of the works included in the enforcement notice, as Ms Sheikh suggested.

38. I conclude that the council's enforcement notice was not issued ultra vires, and that the inspector did not fall into error in rejecting the ground (d) appeal.

The ground (f) appeal

39. The ground (f) appeal succeeded only to the extent that the inspector varied Schedule 4 in the enforcement notice to remove the requirement that the lawful residential use be resumed (paragraph 38). His conclusion on this ground is in paragraph 37 of his decision letter:

> "I have found that the hardstanding and other structures referred to in the notice were part and parcel of and integral to the unauthorised use and it is not clear that they could be provided as [permitted development]. It is therefore appropriate for the notice to require their removal in order to remedy the breach and restore the land to its condition prior to that breach. The change of use brought with it the requirement for an extensive car parking area and the other structures and the change of use is inappropriate development in the [Green Belt] in its own right. It is not therefore excessive to require the unauthorised use to cease."

40. As presented to us at the hearing, Ms Sheikh's argument on this part of the appeal was essentially quite simple. She submitted that in any event the inspector had failed to understand and discharge the task for decision-makers implicit in section 174(2)(f): to consider what was strictly necessary to remedy the breach of planning control alleged in the enforcement notice, and nothing more than a proportionate interference with the landowner's right under, article 1 of the First Protocol of the European Convention on Human Rights, to "the peaceful enjoyment of his possessions …". In his evidence at the inquiry Kestrel Hydro's planning consultant, Mr Lancaster, had said that some or all of the structures against which the council had enforced were being "used both for business and for residential purposes" (paragraph 11 of the inspector's decision letter). In the light of that evidence, Ms Sheikh submitted, the inspector ought to have considered, in the case of each individual structure, whether its removal should be required if it could be employed for the

lawful residential use. The structures had a "dual use". And the lawful residential use was inherent in that "dual use". Even if the structures were "integral" to the unlawful mixed use, they could nevertheless potentially be used for the lawful residential use. The comprehensive approach he took in paragraph 37 of his letter was insufficient and unlawful. But even in that comprehensive assessment he did not apply the tests of necessity and proportionality.

41. Ms Sheikh relied on the deputy judge's judgment in *Bowring*, where he had, she said, applied a "gloss" to the principle in *Murfitt*. In paragraph 16 of his judgment in that case the deputy judge, having referred to that principle, said this:

> "… On the facts of cases such as the present, it will not be sufficient if the works are integral to or part and parcel of the present unauthorised use of land if the works had been undertaken for a different, and lawful, use and could be used for that other, lawful use even if the unauthorised use ceased."

The deputy judge went on to say (at paragraph 20) that the inspector in that case "did not address the question of whether or not the installation of the kitchens was in fact undertaken for a different, lawful use or whether the works were, in reality, done as part of the making of a material change of use of the land from use as a dwelling house to use as three self-contained flats". He concluded (at paragraph 22) that it would not necessarily be irrational to have required the removal of one additional kitchen rather than two, and that it "would be open to the inspector to form the view that he would impose the least excessive or onerous requirements to prevent the use of the property as three self-contained flats".

42. Ms Sheikh's argument, persuasively presented as it was, is not in my view correct.

43. In the first place, I do not think the deputy judge in *Bowring* applied a "gloss" to the principle in *Murfitt*. There was no need for him to do so. As I have said, the principle operates within the statutory scheme, not outside it. The crucial point here, I think, is that under section 173(3) and (4) of the 1990 Act the steps required by an enforcement notice can only be for the purposes of remedying the breach or any injury to amenity arising from that breach (see the recent decision of this court in *Miaris v Secretary of State for Communities and Local Government* [2016] EWCA Civ 75). They cannot act against works pre-dating the breach, which are therefore no part of it. This is nothing more than to recognize the parameters in this part of the statutory scheme. The judgment in *Bowring*, properly understood, does not warrant an approach in which works carried out after the breach of planning control and integral to the unauthorized use of the land must be considered as potentially available for a resumption of the previous lawful use, or for some other use that is lawful. The error made by the inspector in *Bowring* was that he did not consider whether the added kitchens were integral to the material change of use against which the local planning authority had enforced or had in fact been carried out for a different lawful use. The inspector in this case did not err in that way.

44. Secondly, I do not think that the inspector failed to confront the question of necessity as he should. He did not have to repeat the detailed findings of fact on which he had based his analysis on the ground (d) appeal, or the assessment that led him to dismiss the appeal on ground (a).

45. In dealing with the ground (d) appeal he had made the requisite findings of fact on each of the structures attacked by the notice (in paragraphs 5 to 20). In dealing with the appeal on ground (a) he had found that, as the structures were "part and parcel of the change of use", they had "not therefore been re-used in this material change of use", and were "therefore inappropriate development in the [Green Belt]" (paragraph 23), and that "the hardstanding and the numerous other structures installed as part of the change of use substantially reduce openness on the site" (paragraph 24). He was not satisfied that, if lawful use of the premises as a dwelling-house were resumed, these structures could be provided as permitted development. Under the Town and Country Planning (General Permitted Development) Order 1995, any buildings or enclosures would need to be required for purposes reasonably incidental to the enjoyment of the dwelling-house. In view of "the extent of buildings already lawfully on the site", he said "there must be some doubt as to how many more would be reasonably required". And he had had "no indication of whether there would be a reasonable prospect of anything like the existing contentious structures being installed …" (paragraph 28). He went on to conclude that "very special circumstances do not exist to justify the development" (paragraph 35).

46. The inspector was now able to draw upon those earlier findings and conclusions in dealing with the appeal on ground (f). In the light of them, he confirmed his conclusion that "the hardstanding and other structures referred to in the notice were part and parcel of and integral to the unauthorised use", and that it "[was] not clear that they could be provided as [permitted development]" (paragraph 37). In my view nothing more was required. When one reads the decision letter fairly as a whole, as one must, it is perfectly clear how and why the inspector reached the conclusion he did on the ground (f) appeal.

47. This was not a case in which the local planning authority's enforcement action was concerned merely with a breach of planning control by the making of an unauthorized change of use without associated works – the kind of breach that could be remedied by a requirement that the use be discontinued. In this case the change of use had, said the inspector, "brought with it the requirement for an extensive car parking area and the other structures …", and the change of use itself was "inappropriate development in the [Green Belt] …". In these circumstances, he concluded, it was not "excessive" to require the unauthorized use to cease. But that was not all. As he had said at the beginning of paragraph 37, the hardstanding and other structures were "… integral to the unauthorised use", and he was not satisfied that they could have been provided as permitted development – without planning permission being sought and granted for them. He concluded, therefore, that it was appropriate for the notice to require all of them to be removed "in order to remedy the breach and restore the land to its condition prior to that breach". This conclusion echoes the relevant language in section 173(4)(a). And in my view it was, in the circumstances of this case, an entirely reasonable and sound conclusion for the inspector to reach, consistent with the basic principle that the enforcement of planning control is "intended to be remedial rather than punitive" (see paragraph 46 of Carnwath L.J.'s judgment in *Tapecrown*). It does not offend the principle of necessity in section 174(2)(f), or, therefore, in the context of enforcing lawful planning control, the principle of proportionality in the restriction of the right to peaceful enjoyment of possessions under article 1 of the First Protocol (see the judgment of Pill L.J. in *Lough v First Secretary of State* [2004] EWCA Civ 905, at paragraphs 49 and 50, and the deputy judge's judgment in *Bowring*, at paragraphs 23 to 25).

48. The inspector's use of the word "appropriate", rather than "necessary", in the second sentence of paragraph 37 does not betray a failure to consider what was required to remedy

the breach of planning control. It is plain from the context that in using the word "appropriate" he had well in mind that the test he was applying was one of necessity. Because the hardstanding and other structures were, as he said in the first sentence of paragraph 37, "part and parcel of and integral to the unauthorised use …", it was necessary for them to be removed if the breach of planning control was to be remedied and the site restored to its condition before the breach took place.

49. Holgate J. rejected an argument based on the concept that the lawful residential use of the premises co-existed with the unlawful mixed use (see paragraph 49 of the judgment). As he said, "in the case of a single planning unit (and leaving to one side seasonal uses), it is impossible, as a matter of law, for a lawful use to co-exist with an unauthorised use", and "generally if there is a material change of use from a lawful use to a mixed or composite use which includes that former lawful use, and planning permission is not obtained, there is only one use of the single planning unit, namely the new unauthorised mixed use …". It was, said the judge, "a misconception to say that the lawful former residential use coincides with the subsequent mixed use". I agree.

50. The judge also rejected Ms Sheikh's submission that the requirements of the enforcement notice should have been amended to protect the possibility of some or all of the structures being used in connection with the lawful residential use if that use were resumed. In particular, he rejected as "completely unfounded" Ms Sheikh's criticism of the inspector's use of the "but for test" in coming to the conclusion that the requirements of the enforcement notice should be retained in full (paragraphs 53 and 54 of the judgment). As he pointed out, the inspector had used the "but for test" in assessing whether it was likely that the hardstanding and structures had in fact been introduced for the purpose of the previous lawful use of the site, before the unauthorized mixed use began in 2005. It had, he said, "nothing whatsoever to do with the merits of the "prospective" argument which [Kestrel Hydro] now seeks to advance". And it was not an argument that had been put to the inspector. Once again, I am in no doubt that the judge's conclusions were right.

51. I see nothing in the submission that the inspector erred in failing to uphold Kestrel Hydro's ground (f) appeal so as to allow the structures to remain in place because they might in the future be employed for lawful residential use of the site. It has no real force – either in the form in which it was presented to the judge, in reliance on the concept of prospective use, nor when founded on the concept of a present "dual use" of the site.

52. Holgate J. saw the argument put before him as an attempt to extend the approach accepted by the deputy judge in paragraph 16 of his judgment in *Bowring* "so as to embrace the mere possibility of the operational development being used in the future, … even on a purely hypothetical basis" (paragraph 64). He was not prepared to do that. He "[could not] see a justification for enabling the land owner to argue for the retention of works which have been found to be harmful where there is an enforcement power to require those works to be removed, simply because of the existence of an ability to use those works in connection with some former lawful use but without any consideration of the likelihood of that use being reinstated in the future" (paragraph 65). Again, I agree.

53. As Mr Lewis submitted, the real question here – as on the previous issue – goes to the nature of the breach of planning control. On the inspector's undisputed findings of fact, all of the structures enforced against as, effectively, part and parcel of the unauthorized mixed use of the premises were being employed for that unauthorized use, having been constructed for

that purpose. They were, therefore, intrinsically part of the breach of planning control. The idea that they might one day be employed for a lawful residential use was rightly described by Mr Lewis as "hypothetical". Indeed, this suggestion seems hard to reconcile with Kestrel Hydro's ground (a) appeal, which included the contention, recorded by the inspector in paragraph 29 of his decision letter, "that the area is now predominantly industrial in character and is dominated by aircraft noise from Heathrow Airport, such that the site is no longer suitable for use as a dwellinghouse". But in any event there was no legal requirement for him to consider the possibility of the works that had been carried out on the site in association with the unlawful change of use being used in the future in association with lawful use. The simple question for him under section 174(2)(f) was whether the steps required by the notice exceeded what was necessary to remedy the breach constituted by the matters stated in the enforcement notice. He found that they did not. In my view he was clearly entitled to do so.

54. Ms Sheikh's argument comes down in the end to the contention that the inspector's approach to the ground (f) appeal was in breach of article 1 of the First Protocol. I cannot accept that it was. If, as in this case, an inspector finds that particular works are so intimately connected to the unauthorized use as to engage the principle in *Murfitt*, it will be open to him to conclude that the removal of those works is appropriate, in the sense of being necessary to remedy the breach of planning control. It will not be enough simply to require the unauthorized use of the land to be discontinued. It will be necessary to require that the land be restored to its condition before the breach took place. The corollary of this is that the removal of the works associated with the unauthorized change of use will not be a disproportionate interference with the landowner's rights under article 1 of the First Protocol. Requiring the removal of such works as well as the cessation of the unauthorized use will be the minimum necessary to undo the breach of planning control. Operating in this way, the provisions of the statutory scheme – in particular, the provisions of section 173(4) and the grounds of appeal available under section 174(2), including grounds (a) and (f) – achieve a fair balance between the interests of the landowner and the public interest in effective planning control. The judgment in *Bowring* does not suggest a different conclusion. On the contrary, as the deputy judge said (in paragraph 25), "the question is what is proportionate to remedy [the] breach by discontinuing the use or restoring the land to its previous condition". In his view, if the requirement of the notice was "the minimum necessary to remedy the breach", this "would be likely to be proportionate". So it was here.

55. I therefore conclude, as did the judge, that the inspector's treatment of the ground (f) appeal, and his conclusion on that ground, were lawful.

Conclusion

56. For the reasons I have given I would dismiss the appeal.

Lord Justice McFarlane

57. I agree.