Case No: C1/2006/0982

Neutral Citation Number: [2006] EWCA Civ 1744
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Mr Justice Burton
CO/4652/2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 21st December 2006

Before :

LORD JUSTICE CARNWATH
LORD JUSTICE WILSON
and
LORD JUSTICE HUGHES

- -

Between :

TAPECROWN LIMITED	**Respondent**
- and -	
THE FIRST SECRETARY OF STATE & ANR	**Appellant**

- -

(Transcript of the Handed Down Judgment of
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- -

Robert Fookes (instructed by **Jones Day, Solicitors**) for the **Respondent**
Lisa Busch (instructed by **Treasury Solicitor**) for the **Appellant**

- -

Judgment

Lord Justice Carnwath :

Background

1. This appeal concerns an enforcement notice under the Town and Country Planning Act 1990 ("the Act"), issued by the Vale of White Horse District Council in respect of a building on land near Faringdon in Oxfordshire.

2. The building was erected by Tapecrown Ltd ("the company"), on their agricultural holding, which extends to some 11.6 ha. They claimed that it was permitted development under the Town and Country Planning (General Permitted Development) Order 1995 Schedule 2 Part 6 Class A. That permits certain forms of development which are "reasonably necessary for the purposes of agriculture" within an agricultural unit of at least 5 hectares. Under paragraph A.1, development is not permitted if:

> "(c) it would involve the provision of a building, structure or works not
>
> designed for agricultural purposes;
>
> (d) the ground area which would be covered by –
>
> i) …
>
> ii) any building erected or extended or altered by virtue of Class A, would exceed 465 square metres…"

The ground area is calculated so as to include both the area covered by the proposed development, and the ground area of any works within the same unit "which are being provided or have been provided within the preceding two years and which would be within 90 metres of the proposed development" (D.2).

3. Before beginning such work, the developer is required to apply to the authority for a determination as to whether their prior approval will be required to the siting, design, external appearance or various other matters. If no notice of determination is received from them within 28 days, the developer may begin work (A.2(2)(iii)(cc)), provided he does so within five years of his notice to the authority (A.2(2)(vi)(bb)).

4. Also relevant under the GPDO is Part 4 Class A, which grants permission for temporary works required in connection with development operations, but only for the duration of the operations.

5. In this case, an application was duly made by the company for a determination under Part 6 Class A, but the authority's notice requiring further details was sent to the wrong address. The company started work, and the building was largely complete by the time the enforcement notice was served. In a letter dated 17th November 2003 (during the course of the works), the authority's enforcement officer confirmed that the site had been visited and that the building was within the dimensions allowed by Class A. However, he questioned whether it was reasonably needed for agriculture within the unit or designed for agricultural purposes, as

required by Class A. Following further exchanges on those and other issues, the enforcement notice was served on 11th October 2004.

6. The building is a rectangular steel framed building, clad to a height of 2 metres in concrete blocks, and above in timber boarding. The roof is corrugated metal cladding. The floor area of the building is 460 square metres. Adjacent to it is a substantial area of hardstanding "only a little less in total area than the building".

7. The enforcement notice alleged the erection of a building and construction of hardstanding without permission. It required the removal of the building and hardstanding, the removal of all building materials and rubble, and the restoration of the site to its original condition. The company appealed to the Secretary of State. The appeal was dealt with by written representations. The planning inspector upheld the notice in a decision dated 15th June 2005. He declined to grant retrospective permission, or to vary the terms of the notice, other than to extend the time for compliance.

8. Burton J allowed an appeal and quashed the decision. The Secretary of State appeals to this court with permission granted by Pill LJ.

The Inspector's decision

9. The company's appeal was made under section 174 (2) of the Act, relying on grounds (c) (no breach of planning control), (f) (steps required excessive), and (g) (period for compliance too short). The appeal automatically triggered a deemed application for retrospective planning permission in respect of the matters alleged in the notice to be in breach of planning control (s 177(5)).

10. In his decision the inspector dealt in turn with the ground (c) appeal, then the deemed planning application, and then grounds (f) and (g).

11. *Ground (c)* He noted that the authority relied on two factors as taking the development outside the GPDO:

    i) The total development including the hardstanding exceeded the permitted limit of 465m;

    ii) The building was not "designed for agricultural purposes".

    The inspector agreed with the authority on both points. I note that the authority had also taken issue with the contention that the building was "reasonably needed for agricultural purposes" within the unit under Class A; but the inspector made no reference to that issue and made no finding on it. Although there is no live issue before us as to the inspector's reasoning on ground (c), it provides necessary background to his treatment of the other grounds.

12. On the first point (the hardstanding), the main issue was whether the hard-standing was, as the company claimed, covered by the Part 4 permission for temporary building works. The inspector rejected that argument:

> "3. The appellant contends, however, that the hard-standing is temporary and was to serve only as a platform for storage and

> building operations. It has not been removed because building works were not completed following service of the Notice. I accept that some form of hard-standing may be required during building operations. However, the hardcore of which it is comprised is similar in nature and appearance to that laid on the ground within the building. It is also much more extensive than would be required for construction, especially since the area within the building was surfaced and could have accommodated some plant and materials. Furthermore, the Council contend that the hard standing was laid after the major part of the construction works had taken place…"

The inspector also rejected the alternative that the hard-standing was to be moved into the building to complete the floor in due course, and therefore covered by the Part 6 permission:

> "… the floor in its current form seems adequate for the purpose to which the building is being put and no indication was given or has now been given about the floor construction proposed.
>
> The building structure appears to be complete with the exception of some further works required at the north-western end and according to the Appellant, the floor. These works would not require extensive hard-standing. In addition, the Appellant refers to the building as being substantially complete and it is, in any event, now in use for the storage of hay…."

He concluded that the hard-standing formed part of the development, which accordingly exceeded the prescribed area limit of 465 m^2 set out in the GPDO.

13. Mr Fookes accepts that on both points the inspector disbelieved the company's case, and that he cannot now challenge that conclusion.

14. On the second issue (the design of the building), the inspector described the building as having attributes which he found "somewhat surprising in a barn":

> "6… In addition to the gable door there are three further large door apertures along the longer north-east elevation. These are currently blocked up but have, nevertheless, been created. The Appellant contends these have been formed to make the building adaptable to possible future needs, but is not specific as to what these may be. In any event, steel portal framed buildings of this kind lend themselves to later adaptation due to the clear spans and non-loadbearing walls.
>
> 7. Also along the north-east elevation there are six windows, one either side of each door aperture. Although boarded up at present, these apertures contain window frames which are glazed. There are similar windows along the south west elevation and two in the south east elevation. Given that there are twelve translucent panels in the roof which currently

> provide light levels which are more than adequate for the storage use taking place, I consider the addition of windows in this arrangement to be unusual and unnecessary unless internal sub-division is contemplated".

15. In paragraph 8 he said that, in spite of the "slightly rustic effect imparted to the building by the use of vertical timber cladding", it did not have the appearance of a typical modern barn. Rather it possessed "many of the attributes" of a building for Class B1 or B2 business use. The differences from a typical barn were not minimal, as claimed by the company:

> "In their blocked up state [the windows] currently have an impact upon the overall appearance of the building and, were all the openings to be revealed, this effect would be even greater. Since the openings exist they could probably be opened up without reference to the Council."

He concluded that the building exceeded the size limit for Class A and "constitutes a building not designed for agricultural purposes." Again Mr Fookes accepts that this was a finding of fact which he cannot now challenge.

16. *Deemed application* The inspector next considered the applicable planning policies for buildings in an area of open countryside, and one designated as of high landscape value. He observed that the building had "an industrial and commercial character of a kind not normally found in the countryside" and was "incongruous in its rural setting". He concluded that the development was contrary to the objectives of national and local planning policies, and would not be permitted, in the absence of some material circumstances sufficient to outweigh the objection.

17. *Ground (f)* This part of the inspector's reasoning is central to the issues before us. It is important to have in mind the relevant statutory provision (s174(2)(f)), which permits an appeal on the ground:

> "(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;"

18. The notice in this case required the complete removal of both the building and the hard-standing. In paragraph 15, the inspector rejected the company's contention that it would be sufficient to require the removal of all the hardcore outside the building, in order to bring the development within the limit set by Part 6:

> "That stance would be correct if I had not also concluded that the building constitutes one not designed for agricultural purposes. In these circumstances mere removal of the hardcore would not regularise matters in the manner suggested."

19. He then considered the possibility of alterations to the building:

> "16. Simply blocking up the openings formed in the building in a temporary manner would not remedy the situation either because it is probable that the coverings could be removed at any later time without any permission being needed. This would result in a non-agricultural type of building remaining in an area where it would not normally be permitted.
>
> 17. I have also considered whether permanent blocking of door and window openings and reinstatement of external cladding to match that elsewhere on the building would be acceptable in transforming the building to one of a design suitable for agriculture. However, I am not satisfied that some form of hard standing for means of access and turning of vehicles within the site would not be required in any event for the kind of use to which the building is currently being put. That being so, then the development would again be larger than the limit prescribed in the GPDO and so would require planning permission which I have concluded should not be granted."

20. He concluded for these reasons that the requirements were not excessive.

The judgment below

21. Burton J allowed Tapecrown's appeal. Although his criticism was directed principally to the inspector's reasoning under ground (f), I should mention one matter under ground (c). The judge had noted the inspector's comment that even in their blocked-up state the windows had an impact on the appearance of the building, and that "since the windows exist, they could probably be opened up without reference to the Council". The judge observed:

> "8. In those circumstances, he concluded, **simpliciter**, as there set out, although I shall return to why that should only have been a starting point, that he was not satisfied that the building was *intended* for agricultural purposes." (my italics)

22. I would make two points. So far as ground (c) was concerned, the inspector's view of the effect of the windows was not just "the starting point" but was an essential part of his reasons for holding that the building was not "designed for agricultural purposes". It was helpful in my view to treat that as a discrete issue, before turning to the different (albeit related) issues under the deemed application and ground (f). They would only arise if he found a breach of planning control. Secondly, his use of the word "intended" may be open to misunderstanding. "Design" in this context refers, not to the intention of the developer, but to how the building is designed "in its physical appearance and layout" (*Belmont Farm Ltd v MHLG* (1962) 13 P&CR 417; *Clarke v Secretary of State* [1992] 3 PLR 146).

23. Turning to the inspector's treatment of the deemed application, Burton J noted that this "unusually" had been dealt with before ground (f). The consequence, in Mr Fookes' submission, was that the inspector had considered the relevant policies as applying to what he had found to be an industrial building, without considering how it might be modified by an appropriate condition:

> "Had the Inspector turned his mind to the question as to whether it could be put beyond doubt that the building was for agricultural purposes, then the criticisms and critique by the Inspector of a non-agricultural building being built in an agricultural area would have fallen away." (para 14)

24. The main focus of Mr Fookes' attack before Burton J, as before us, was in relation to his treatment of ground (f), particularly in paragraph 17, which I have set out above. Burton J agreed with this criticism. He found the reasoning "totally impossible to follow":

> "If, as in paragraph 15, the hard standing problem could be resolved but the problem is the agricultural purposes, then when one comes to paragraph 17, by which he suggests that the agricultural purposes could be solved were it not for the hard standing, the conclusion would appear to follow that both are soluble. In any event, reading the whole set of paragraphs as best I can, it appears to me that the Inspector concluded, on balance, that the agricultural purposes problem could be solved but that the hard standing problem could not. The basis upon which he resolved, notwithstanding paragraph 15, in paragraph 17 that the hard standing could not be resolved is a conclusion which he formed, without having heard argument on the point, that "some form of hard standing" might be needed and he puts that in a sentence which is rendered uncertain by the presence of double negatives: "I am not satisfied that some form of hard standing would not be required."" (para 24)

Miss Busch (for the Secretary of State) had attempted to support the reasoning in paragraph 17, on the basis that, by rejecting the suggestion that the hard-standing was temporary, the Inspector by implication had concluded that it was not only permanent, but also necessary in order to provide access to the barn.

25. Burton J had two answers to this argument. The first was that such an approach was "*Wednesbury* unreasonable":

> "I see no basis on which it can be concluded, without more, that some form of hard standing over and above five square metres was necessary for access to vehicles, not least when I look at the photographs which show a very large entrance which would mean that, at any rate, most vehicles would be able to enter inside this large barn and do any turning within the barn."

Alternatively, there had been a breach of the requirements of fairness because the point had never been put to the company:

> "Alternatively, this is a proposition arrived at by the Inspector without putting to the Appellant what would plainly be a very material matter, as it naturally must follow that it was determinative, as I have concluded, against the appellant, and that would be a breach of natural justice if indeed it was the

> case, as Miss Busch has conceded. I am satisfied it was the case."

26. On the fairness point (although this was not mentioned by Burton J) I note that there was before the court a written statement by the company's surveyor prepared for the purposes of the appeal from the inspector. He asserted that there had been no evidence before the inspector that a hard standing or other turning area was required by this building; on the contrary, for the proposed agricultural use there would have been "ample turning room within the building". He added, that if the point had been raised -

> "… I would have been able to point out that the land outside the building is hard clay and would not have required an access track to be made up. Furthermore, since the use of the building is for hay storage, it would be accessed mainly by tractors and trailers."

27. Finally, Burton J gave his view of how the matter should be dealt with by the inspector when the matter was remitted:

> "I am satisfied that the proper course, absent any fresh case which was not explored before the Inspector, would have been for the Inspector to have imposed conditions limiting the hard standing to the five square metres left free over and above the area of the barn and requiring the permanent blocking of the door and window openings….
>
> That could have been done either under ground (f) by limiting the enforcement notice in the way indicated, or by imposing the conditions to which I have referred under a deemed condition under ground (a)."

The Appeal to this Court

28. The Secretary of State appeals on three grounds, in summary:

    i) In holding that there was insufficient evidence in respect of the need for the hardstanding, the judge's decision reflected "an unduly onerous conception" of an inspector's duties;

    ii) The same applies to the judge's suggestion that the inspector should have first reverted to the parties for comment on that issue;

    iii) The judge wrongly entered into the planning merits.

The Inspector's task under ground (f)

29. Before dealing with those issues, I should say something about the background and scope of ground (f), and the inspector's role on such an appeal.

30. The enforcement provisions, in their present form, largely follow the recommendations of my 1989 report *Enforcing Planning Control*. They in turn took

account of amendments made in 1981, which I regarded as useful but "somewhat confused". There remained an unresolved dispute as to the extent to which the authority could (a) "under-enforce", that is, require something less than a complete remedy of the breach of planning control; or (b) impose alternative requirements to alleviate the effects of the breach. I proposed that there should be "a broad discretionary power to deal with the effects of a breach", and that the grounds of appeal should reflect that approach (*Enforcing Planning Control* HMSO 1989 pp 73-4).

31. I believe that this objective has been achieved, although the drafting might perhaps have been clearer. Section 173(3) allows the steps required by the enforcement notice to be directed to achieving "wholly or partly" any of the purposes referred to in subsection (4). Those purposes are, in summary, remedying the breach, or remedying "any injury to amenity" caused by the breach. In so far as the notice requires less than a full remedy of the alleged breach, there is provision for a deemed permission for what is left after compliance (s 173(11)).

32. There is a possible gap here. Repairing the damage to *amenity* may be only part of what is needed. Even a physically unobtrusive development may be objectionable in planning terms, but it may be made more acceptable by steps short of total demolition. That is the province of ground (a), which needs to be read with section 177. The latter makes clear that, on an enforcement appeal, planning permission may be granted in respect of the matters alleged in the notice "in relation *to the whole or any part* of those matters" (s 177(1)(a)); that for this purpose ordinary planning considerations (including the development plan) must be taken into account (s 177(2)); and that the permission is to be treated as though granted on an application (s 177(3)(6)), and so (at least by implication) may be subject to any necessary conditions.

33. In short, the inspector has wide powers to decide whether there is any solution, short of a complete remedy of the breach, which is acceptable in planning terms and amenity terms. If there is, he should be prepared to modify the requirements of the notice, and grant permission subject to conditions (or to accept a section 106 agreement, if offered). I would emphasise, however, that his primary task is to consider the proposals that have been put before him. Although he is free to suggest alternatives, it is not his duty to search around for solutions. I will return to the latter point in connection with the grounds of appeal.

The ground (f) appeal in this case

34. To return to the present case, having rejected the ground (c) appeal, and so identified a breach requiring remedy, the inspector's task was to decide what was the appropriate solution. This required him to consider, not simply what would be necessary to bring the building into compliance with class A, but more generally whether the building could be made acceptable in terms of both planning policy and amenity by any proposed modifications, supported if necessary by planning conditions.

35. On that approach, the inspector's reasoning in paragraphs 15-17 is open to criticism, because it appears to confuse the two parts of the exercise. In paragraph 15 the inspector says correctly that, having found that the building is not one "designed for

agricultural purposes", removal of the hard core would not bring it within class A. In paragraphs 16 and 17 he appears to be returning to the more general question of whether modifications, by temporary or permanent blocking of the openings and re-instatement of external cladding, would make the building acceptable in planning terms. But that question is never answered. Instead, in the second part of paragraph 17, he returns to the question of the hardstanding, which he judges by reference again to the requirements of class A. What he never does is to consider whether, if appropriate modifications were made to the building, and if all or part of the hardstanding were removed, the building could be made acceptable in planning terms.

36. Furthermore, at this stage, it might have been necessary for him to reconsider the planning issues on a different basis. It was at least arguable that, assuming appropriate modifications to the building to give it an agricultural rather than an industrial character, and assuming that he was satisfied that it was required for agriculture, a different set of policies would come into play, namely those dealing with agricultural buildings. This would of course have depended upon the inspector's rejecting the authority's case that the building was not in fact needed for agriculture. What his answer to that question would have been we do not know, because he did not find it necessary to consider it.

37. I conclude, in agreement with the judge, that on this aspect the inspector's reasoning is inadequate. This is sufficient to support his order that the matter should be remitted to the Secretary of State for reconsideration.

38. Although this is sufficient to dispose of the appeal, it may be helpful to comment on the points raised more specifically by the three grounds of appeal, since they may be of some wider relevance. The first two were directed to the inspector's conclusion that some form of hardstanding was required for access. The judge held that this conclusion was based on inadequate evidence or in any event on a point not raised with the company's representative. I would not myself attach as much weight to this point as did the judge. A professional inspector could reasonably reach a view on such an issue, on the basis of the submissions and his own view of the site, without further evidence. Furthermore, having disbelieved the appellant's representatives on two versions of their hard-standing story, he may reasonably have felt that he was unlikely to have been assisted by a third. However, that is perhaps putting words into the inspector's mouth. I note that the complaints made in Mr Jones' written statement stand uncontradicted by evidence, and there is no other evidence as to what precisely happened at the site view. Since it is unnecessary to do so, I would prefer to express no concluded view on this aspect.

39. More generally, on one side Miss Busch points to the need to avoid imposing unduly onerous obligations on the inspector whilst on the other, Mr Fookes rightly emphasises that a written representation appeal should not be seen as a second-class form of procedure in terms of fairness. I agree with both propositions. There is clearly a balance to be drawn, on which I would expect inspectors to be given Departmental guidance. It is inappropriate for this court to seek to lay down any general rules.

40. Our attention was drawn to two authorities from this court: *Dyason v Secretary of State* [1998] 2 PLR 54, and *Taylor and Sons (Farms) v Secretary of State* [2001]

EWCA Civ 1254. The first concerned an appeal conducted by an informal hearing, rather than a formal public inquiry. The issue was whether the inspector had done enough to ensure that one of the appellant's witnesses had given his evidence on the basis of full information about the appellant's business plan. Pill LJ giving the leading judgment noted the danger that the more informal atmosphere of such a hearing might lead to a "less than thorough examination of the issues". He continued:

> "A relaxed hearing is not necessarily a fair hearing. The hearing must not become so relaxed that the rigorous examination essential to the determination of difficult questions may be diluted. The absence of an accusatorial procedure places an inquisitorial burden on an inspector." (p. 61 (G-H))

Later, he recognised that the consequence of this approach was that -

> "… in leading the discussion at the hearing, the duties of the inspector may be extensive, especially when dealing with an unrepresented person….." (p 62(G))"

41. On a written representation appeal, the opportunities for an "inquisitorial" approach of this kind are reduced. The parties are not before the inspector, and it is not possible for him to "lead the discussion" in the way envisaged by Pill LJ. I note that, in that case, Thorpe LJ commented that the "round-table discussion" had only lasted two hours, but had been followed by –

> "… a two-hour site inspection during the course of which the appellant had the opportunity to make what comments and observations he wished".

That seemed to him "a sensible way of investigating the issues within an informal procedure". (p 63(B)).

42. I would treat that comment, respectfully, with some caution, except as applied to the facts of the case. The site view may provide an opportunity for clarifying points which have come up during the hearing, but it is no substitute for a fair hearing as envisaged by the rules. The dangers of extending the substantive discussion into the site view were emphasised in the *Taylor* case, in the specific context of a written representations appeal. This decision was helpfully drawn to our attention by Mr Fookes, even though it may be thought to be against his case.

43. The judgment of the court was given by Schiemann LJ who as an advocate had had considerable experience of planning procedures on the ground. It has some similarity with the present case, because it concerned an agricultural building alleged to fall within class A, and the dispute was about the inspector's duties on a ground (f) appeal. The appellant had deposited waste material and rubble on land in his farm, and had constructed a large hard-standing. The enforcement notice required him to remove it all and restore the land. It was argued that the inspector should have gone through the exercise of asking himself how much hard-standing was reasonably necessary for the purposes of agriculture within the unit, and should

have limited the notice to the removal of the excess. Not surprisingly this argument was rejected.

44. The judgement of the Court's comments deserved to be more widely known and I shall quote them in full:-

> "40. On behalf of the Secretary of State it is submitted that this imposes an impossible burden in the Inspector. Mr Taylor had not specified at any time which 465 square metres he would wish to retain if his appeal failed in substance; nor had he indicated that he would wish to make further submissions in this eventuality. This appeal had, at Mr Taylor's choice, not been conducted by way of public inquiry but instead was conducted by way of written representations. The purpose of this was to provide a quick and relatively cheap appeal procedure. It was not incumbent on the Inspector to conduct her own inquiries as to which area might be the most suitable for agriculture. To have done so, while giving the planning authority the right to comment, would have lengthened and complicated the process. It was arguably open to the inspector to take this course but it was well within her discretion not to do so. The judge should have asked himself whether the inspector acted outwith her discretion in not taking this course but he failed to pose the question in this form. The proper course for an appellant who appeals on ground (f) was to specify, without prejudice to his main contentions, his fall-back position and to indicate what variation to the notice he submits should be made.
>
> 41. In our judgment the broad approach of the Secretary of State is justified. Appellants should contemplate the possibility that their primary contentions may fail and that those of their opponents may succeed. The very reliance on ground (f) shows that this is the position. If there is a fallback position on which they wish to rely then they should make this clear to the Secretary of State in their submissions. It is not reasonable to come to court, as has happened here, and ask for the case to be remitted to the inspector so that she may ask for further submissions - which could and should have been made in the first place if the landowner wished to advance them. It might well be that the Inspector had the jurisdiction to explore the possibilities further with the parties. But the appellant was professionally advised. The advisers had chosen not to make any submissions in detail under ground (f). Certainly in those circumstances any failure by the Inspector to advert in her decision letter to the possibility of asking for further submissions does not amount to an error of law.
>
> 42. The judge's suggestion that the inspector should, presumably without warning and before perhaps coming to a final conclusion as to whether the appeals should be allowed on

> ground (c), have canvassed this matter at the site visit is in our judgment not appropriate; site visits are not there for the purpose of producing new submissions which might well be contentious. The person chosen to represent the other party would in all probability not be in a position to deal with such points. The weather is often foul, it can happen that the parties are out of earshot of one another and the conditions inappropriate for recording submissions. By and large conversation is rightly discouraged. The function of a site visit is to enable an inspector to make a judgment about submissions which have been made rather than to explore new possibilities. If the latter were to become commonplace it would be a fruitful breeding ground for further disputes."

I note that it does not seem to have been part of the appellant's submission in that case that partial removal was a fall-back position. His case was that the hardstandings would "soon blend in and need not be removed" and that the cost of total removal would be excessive for the farming enterprise.

45. It is not clear from the papers before us in the present case to what extent the question of permanent blocking up of the windows was put forward as an option by the company. However, it was a matter which the inspector apparently thought it right to consider, but on which he did not reach a clear conclusion. The defect in my view was one of reasoning rather than fairness.

46. As I have said, I would not wish to lay down any general rules. I would accept that as a general proposition, given the limitations of the written representations procedure, an appellant would be well advised to put forward any possible fall-back position as part of his substantive case. It is not the duty of the inspector to make his case for him. On the other hand the inspector should bear in mind that the enforcement procedure is intended to be remedial rather than punitive. If on his consideration of the submissions and in the light of the site view, it appears to him that there is an obvious alternative which would overcome the planning difficulties, at less cost and disruption than total removal, he should feel free to consider it. In such circumstances fairness may require him to give notice to the parties enabling them to comment on it. I would expect the Inspectorate to have an established practice for dealing with that situation efficiently and expeditiously.

47. Finally, in respect of the third ground of appeal, I can see some force in the submission that the judge appears to have moved from the legal to the planning merits of the case, at least at the end of his judgment. He there expressed his view that the "proper course" for the inspector would have been to grant permission for a modified building subject to conditions. I think, however, that this must be read in the context of an earlier paragraph where he had set out his interpretation of the decision, which led him to infer that the inspector had in fact reached the view that a modified building would be acceptable in planning terms. For my part I doubt whether the inspector intended to go so far. In any event, when the matter is reconsidered, the inspector should not feel constrained by any pre-judgment of the planning merits.

Conclusion

48. For these reasons, I would uphold the judgment, although on more limited grounds. The matter will be remitted to the Secretary of State for reconsideration in accordance with this judgment.

Lord Justice Hughes :

49. I agree.

Lord Justice Wilson :

50. I also agree.